No. 21-13489

In the United States Court of Appeals for the Eleventh Circuit

DREAM DEFENDERS, ET AL.,

Plaintiffs-Appellees,

v.

GOVERNOR OF THE STATE OF FLORIDA, ET AL.,

Defendants-Appellants.

BRIEF OF APPELLANT GOVERNOR OF THE STATE OF FLORIDA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
CASE NO. 4:21-CV-00191-MW-MAF

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Counsel for Appellant Governor of the State of Florida certifies that the following is a complete list of interested persons as required by Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 to 26.1-3:

1. ACLU Foundation of Florida, Inc.
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5. Black Collective Inc.
6. Black Lives Matter Alliance Broward
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8. Brodeen, Karen Ann
9. Carson, Matthew Joseph
10. Chainless Change Inc.
11. City of Jacksonville, Florida, Office of the General Counsel
12. Community Justice Project, Inc.
13. DeSantis, Governor of the State of Florida Ron
14. Dore, Miranda Alyssa
15. Dream Defenders
16. Duval County, Florida

17. Evans, Anne Morril

18. Executive Office of the Governor of Florida

19. Fajana, Morenike

20. Fitzpatrick, The Honorable Martin A.

21. Florida State Conference of NAACP Branches

22. Foster, Berbeth S.

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35. McNeil, Sheriff Walt

36. Meros, Nicholas John Peter

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38. NAACP Legal Defense & Educational Fund, Inc.

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56. Tony, Sheriff Gregory

57. Tysse, James E.

58. Uthmeier, James

59. Walker, The Honorable Mark E.

60. Warren, Nicholas

61. Young, Gabriella

No publicly traded company or corporation has an interest in the outcome of this case or appeal.

ORAL ARGUMENT STATEMENT

The Court has already tentatively calendared this matter for oral argument the week of March 14, 2021. Appellant Governor of the State of Florida respectfully submits that oral argument would aid the Court in correcting the district court's several errors below.

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STATEMENT OF JURISDICTION

The district court lacked jurisdiction—and this Court, too, lacks jurisdiction—because Plaintiffs failed to establish Article III standing. The district court entered the preliminary injunction on September 9, 2021, DE 137, and the Governor filed a timely notice of appeal on October 8, 2021. DE 145. Assuming Plaintiffs have standing, this Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

1. Whether Plaintiffs have Article III standing to bring a pre-enforcement, facial challenge to Florida's riot statute against the Governor.

2. Whether Florida's riot statute is void-for-vagueness or unconstitutionally overbroad.

3. Whether Plaintiffs' delay in suing and further delay in seeking injunctive relief precludes their showing irreparable harm.

4. Whether the equities and public interest favor enjoining a duly enacted state statute.

5. To the extent there is any doubt about the meaning of the statute, whether the district court should have abstained from opining on a new, never-before-interpreted Florida law.

INTRODUCTION

Florida has long prohibited "rioting" but until recently did not define that term by statute, leaving the courts to look to the common law for guidance. At issue here is 2021 legislation that clarified the scope of criminal liability for rioting in two ways. *First*, it made explicit that prohibited conduct must be intentional. The accused must intentionally participate in a violent public disturbance and must act with a shared intent with three or more persons present at the disturbance to assist each other in violent or disorderly conduct. *Second*, the amendment made clear that peaceful protesters are outside the statute's reach.

Despite that added clarity and although the amended statute has never been construed by the Florida courts, Plaintiffs brought this pre-enforcement, facial challenge claiming that the statute is void-for-vagueness and unconstitutionally overbroad. To begin with, Plaintiffs—who if they have correctly identified themselves as peaceful protestors are at no risk of liability under the amended statute—lack standing to challenge the statute or sue the Governor. Rather than pointing to any concrete, imminent harm, Plaintiffs manufacture concern by misreading the statute to introduce uncertainty about its application and heap speculation on speculation over possible future actions by police and other protestors. Plaintiffs likewise cannot show that an injunction redresses the past or future harms they say they have suffered or may suffer at the hands of police and

other protesters under other statutes not challenged here. In any event, the statute is neither vague nor overbroad. The district court's contrary view shuns ordinary English usage and basic tools of statutory construction that make apparent the statute's strict participation and intent requirements.

For these reasons, this Court should reverse and vacate the district court's preliminary injunction.

STATEMENT OF THE CASE

For decades, Florida law has criminalized rioting: "All persons guilty of a riot, or of inciting or encouraging a riot, shall be guilty of a felony of the third degree." Fla. Stat. § 870.01 (1973). Because the statute did not define "riot," Florida courts used the common-law definition of that term: "a tumultuous disturbance of the peace by three or more persons, assembled and acting with a common intent, either in executing a lawful private enterprise in a violent and turbulent manner, to the terror of the people, or in executing an unlawful enterprise in a violent and turbulent manner." *State v. Beasley,* 317 So. 2d 750, 752 (Fla. 1975) (citing 1 Hawkins, *Pleas of the Crown* 513 (8th ed. 1824)). So construed, the statute has been upheld against constitutional challenge. *Id.*

Although the United States and the State of Florida have a rich history of positive change brought about by peaceful protest, 2020 was marred by repeated "outbreaks of violence and destruction." Staff of Fla. H.R. HB 1 Final Bill

Analysis, at 2 (May 3, 2021).[1] One such incident in May 2020 "began as a peaceful protest near the University of South Florida," but "devolved into unrest as police were forced to form barriers around businesses after several stores were broken into and looted." *Id.* "One sporting goods store and a gas station were set on fire. A crowd of people launched fireworks into officers, while others threw bottles and rocks, and the windows of multiple police cars were broken." *Id.* "Tampa's mayor issued a citywide curfew and city and county leaders reported more than 50 businesses were damaged or burglarized and more than 50 police cars were damaged. More than 40 people were arrested for charges including burglary and rioting." *Id.*

Jacksonville, Miami, and St. Petersburg, too, "experienced peaceful protests mixed with outbreaks of violence and destruction." *Id.* "[P]eaceful protests involving over 1,000 participants escalated when a group of about 200 people began confronting police, throwing water bottles, rocks, and bricks, and attempting to set police cars on fire. Some officers were injured by rocks and bricks while one officer was hospitalized after being stabbed in the neck." *Id.*

In all such incidents, peaceful protesters were "mixed with" individuals "responsible for acts of violence and property damage." *Id.* at 2. Clear lines were necessary to protect the former and hold the latter responsible. It was against that

[1] Available at: https://flsenate.gov/Session/Bill/2021/1/Analyses/h0001z.CRM.PDF.

backdrop that, in April 2021, the Florida Legislature enacted House Bill 1 (HB 1), which amended Florida's riot statute to provide that "[a] person commits a riot" only "if he or she willfully participates 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." Fla. Stat. § 870.01(2). A riot does not include "constitutionally protected activity such as a peaceful protest." *Id.* § 870.01(7).

Plaintiffs are organizations that seek, among other things, to defund the police, DE 65-4 ¶¶ 5, 20, which they emphasize is "critical" to their work, DE 65-1 ¶ 10. To accomplish this and related objectives, they organize what they describe as peaceful protests, which they allege have been chilled by the passage of HB 1. They brought this facial, pre-enforcement challenge to the legislation after it passed, claiming that the amendment is unconstitutionally overbroad and void-for-vagueness. DE 1 ¶ 145–75. In their view, it is unclear "whether a person must share a common intent with three or more persons to engage in violent or disorderly conduct," and "willfully participates" provides insufficient notice of what conduct is prohibited. DE 137, at 49 (citing DE 65, at 20–22). "In short," Plaintiffs argue "that one could plausibly read the statute to prohibit a peaceful protester from continuing to peacefully protest the moment he or she knows that

violence has broken out between several persons at a demonstration." *Id.* at 49. And because Plaintiffs cannot figure out whether that is a correct reading, they claim to fear that the statute will cause their peaceful behavior to be met with arrest by police or violence by counter-protesters, which, they apparently think, the Governor himself will ensure.

The district court agreed with this hypothetical scenario and preliminarily enjoined enforcement of the statute as amended. DE 137. The district court reasoned that "the statute can plausibly be read to criminalize continuing to protest after violence occurs, even if the protestors are not involved in, and do not support, the violence" because it "is unclear whether a person must share an intent to do violence" and "unclear what it means to participate" in a violent public disturbance. *Id.* at 76.

The State's position was that mere participation in a protest at which others engage in violent behavior, without more, does not subject a protester to liability because "constitutionally protected activity such as a peaceful protest" is outside the statute. Fla. Stat. § 870.01(7). Liability attaches only if the protester (1) "willfully participates in a violent public disturbance involving an assembly of three or more persons," (2) "acting with a common intent to assist each other in violent and disorderly conduct," (3) "resulting in" "[i]njury to another person," "[d]amage to property," or "[i]mminent danger" of either. *Id.* § 870.01(2).

The district court rejected that reading as "strain[ing] the rules of construction, grammar, and logic beyond their breaking points," "ignor[ing] the plain text of the statute," DE 137, at 66, "usurp[ing] the powers of the Florida Legislature," *id.* at 67, and requiring the court to "twist itself into a pretzel," *id.* at 75. The court also rejected the State's standing and abstention arguments. *Id.* at 6–43.

STANDARD OF REVIEW

A preliminary injunction is an "extraordinary and drastic" request that should be granted only if those asking for it "clearly establish[]" four separate requirements. *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc). Those requirements are: (1) a substantial likelihood of success on the merits; (2) that without an injunction they are likely to suffer irreparable harm; (3) that the harm from that threatened injury outweighs the harm that an injunction would cause the opposing party; and (4) that the injunction is consistent with the public interest. *See Swain v. Junior*, 961 F.3d 1276, 1284–85 (11th Cir. 2020). The last two factors "are largely the same" when the State is a party. *Scott v. Roberts*, 612 F.3d 1279, 1290 (11th Cir. 2010).

This Court reviews a district court's grant of preliminary injunctive relief for abuse of discretion. *Bank of Am. Nat. Ass'n v. Colonial Bank*, 604 F.3d 1239, 1243 (11th Cir. 2010). "[T]he legal conclusions upon which an injunction is based

are subject to more exacting de novo review." *Id.* Whether a statute is facially overbroad or vague "is a purely legal question." DE 137, at 37.

SUMMARY OF THE ARGUMENT

I.A. It is Plaintiffs' burden to establish standing to bring this pre-enforcement, facial challenge against the Governor. They must show that they were injured by the Governor's actions because he can enforce the new riot statute against them and has either done so or threatened to do so. Moreover, this injury must be certainly impending rather than just possible in the future.

Plaintiffs' purported injury relies on a flagrantly incorrect reading of the statute and a highly attenuated chain of possibilities involving the independent actions of multiple sets of third parties. And even if in the past police abused their discretion under old, still-existing criminal laws, those acts do not grant Plaintiffs perpetual standing to bring this pre-enforcement, facial challenge to a brand-new law—let alone against the Governor.

I.B. Regular English and ordinary tools of statutory construction compel a readily ascertainable meaning of the statute that is in no way vague or overbroad. Under the statute, a person who is peacefully protesting does not commit a riot. Instead, a person commits a riot only if three elements are met: (1) the person "willfully participates in a violent public disturbance involving an assembly of three or more persons," (2) those persons "act[] with a common intent to assist each other

in violent and disorderly conduct," and that participation and action (3) results in "injury to another person," "[d]amage to property," or "[i]mminent danger" of either. Fla. Stat. § 870.01(2). Under this natural construction, the statute is neither unconstitutionally overbroad nor vague. And even if an unconstitutional way to read the statute existed, this interpretation is reasonable and readily apparent and thus should be adopted by this Court.

II. Plaintiffs knew about the bill that would become the challenged statute in September 2020. But they waited one month after the bill passed in April 2021 to sue, and two more months after that (into motion-to-dismiss briefing and the start of discovery) to seek the extraordinary relief of a preliminary injunction. They cannot now be heard to claim irreparable harm, which must be imminent.

III. A state always suffers irreparable harm any time a court enjoins it from enforcing its statutes. The equities and public interest therefore counsel against issuing an injunction.

IV. The district court rushed towards opining on a new, never-before-interpreted Florida statute, rather than respecting principles of federalism and allowing Florida's state courts the first shot. If there were any doubt about the meaning of the statute, that would be a basis for abstaining from deciding the question, rather than entering a preliminary injunction.

ARGUMENT

I. PLAINTIFFS FAILED TO SHOW A LIKELIHOOD OF SUCCESS ON THE MERITS.

A. Plaintiffs lack standing.

To establish standing, Plaintiffs must show that they have suffered an "injury in fact"—"an invasion of a legally protected interest that is both (1) 'concrete and particularized' and (2) 'actual or imminent, not conjectural or hypothetical.'" *Support Working Animals, Inc. v. Governor of Fla.*, 8 F.4th 1198, 1201 (11th Cir. 2021) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). This injury must be "'fairly traceable' to the defendant's challenged actions and not the result of 'the independent action of some third party not before the court.'" *Id.* And Plaintiffs "must show that it is 'likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'" *Id.*

Because "[t]he operation of [a] statute is better grasped when viewed in light of a particular application," *Texas v. United States*, 523 U.S. 296, 301 (1998), the Supreme Court has "repeatedly" held in the context of pre-enforcement challenges that a "threatened injury must be *certainly impending* to constitute injury in fact." *Clapper v. Amnesty Int'l*, 568 U.S. 398, 409 (2013). Mere "*possible* future injury" is not enough. *Id.* Plaintiffs must show instead that they are "*immediately* in danger of sustaining some *direct injury*." *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (emphases added). The threat of harm "must be both real and immediate, not

conjectural or hypothetical." *Id.* at 102 (quotations omitted).

Plaintiffs can meet none of those requirements. Their theory of harm is that the amendment chills the exercise of their First Amendment right to protest peacefully by "heighten[ing]" the "threat of police abuse" by giving police discretion to target for "unlawful," "mass arrests" peaceful protestors, onlookers, protestors "attempting to leave the area," and "Black and Brown folks" gathering for "a barbeque at [a] house or at the park."[2] They also claim to fear that the statute "embolden[s]" police to provoke other protestors and respond to protestors "with extreme force," DE 65-1 ¶ 32, and causes other protesters (whom Plaintiffs call agitators) to "seriously injure[] or kill[]" them, DE 65, at 5.[3] Thus, Plaintiffs claim the amendment chills the exercise of their First Amendment right to protest peacefully. DE 137, at 8.

The statute does not authorize police or other protesters to do any of that. Despite Plaintiffs' "fears" and pronouncements about what they "understand[]," "view[]," "think," "believe," "fe[el] like," and "worry" that the statute "may" or "could potentially" prohibit,[4] the statute very clearly allows peaceful protesting, and

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[2] *See*, *e.g.*, DE 65-1 ¶¶ 9, 14, 15, 18, 32, 35; DE 65-2 ¶¶ 15, 16, 17, 29; DE 65-4 ¶¶ 12, 21; DE 65-5 ¶ 8; DE 65-6 ¶ 11.

[3] *See also*, *e.g.*, DE 65-2 ¶ 25; DE 65-3 ¶ 16.

[4] *See* DE 65-1 ¶¶ 9, 11, 15, 27; DE 65-2 ¶¶ 15–16, 25; DE 65-3 ¶¶ 11, 16; DE 65-4 ¶ 22; DE 65-5 ¶ 8; DE 65-6 ¶ 8; DE 65-7 ¶ 16.

that is all Plaintiffs say they want to do.[5]

A person engages in rioting only if he (1) "willfully participates in a violent public disturbance involving an assembly of three or more persons," (2) "acting with a common intent to assist each other in violent and disorderly conduct," (3) "resulting in" "[i]njury to another person," "[d]amage to property," or "[i]mminent danger" of either. Fla. Stat. § 870.01(2). The statute criminalizes an actual, "[i]mminent danger" of violence brought about by shared intent with an assembly of at least three persons to engage in violence; the statute does not apply to individuals who do nothing more than participate peacefully in a protest at which others behave violently. *See infra* 19–26. Because Plaintiffs do not seek to engage in any conduct "arguably prohibited by the statute," *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 303 (1979), they face "no credible threat of prosecution" for their activities, *Wilson v. State Bar of Ga.*, 132 F.3d 1422, 1428 (11th Cir. 1998).

It is of no moment that Plaintiffs misread the statute to arguably criminalize peaceful behavior. "Subjective fear" of future prosecution is not enough; to establish standing, the fear must be "objectively reasonable." *Id.* This Court has rejected similar claims of subjective fear when, as here, the defendants have "repeatedly and

[5] *E.g.*, DE 1 ¶ 153 ; DE 65, at 4–5; DE 65-2 ¶¶ 16–17; DE 64-4 ¶¶ 12, 21; DE 65-5 ¶ 8; DE 65-6, ¶ 11; DE 137, at 49.

consistently taken the position that the [challenged text] ha[s] no application to the types of scenarios the [plaintiffs] posed." *Id.* at 1428–29. It should do so again. Any chill Plaintiffs are experiencing is traceable, at most, to individuals who are not parties here—counter-protesters and nonparty law enforcement officials whom Plaintiffs believe may be "embolden[ed]" by the statute, perhaps (Plaintiffs suggest) because those third parties share Plaintiffs' view that the statute may be read to prohibit some peaceful activity. *See* DE 65-1 ¶¶ 9, 18, 27.

The Supreme Court held that the plaintiffs in *Clapper* lacked standing because they "merely speculate[d] and ma[d]e assumptions about whether" the government would take certain action under a surveillance statute that "at most authorize[d]" but did not "mandate or direct" the surveillance the plaintiffs claimed to fear. 568 U.S. at 411–12. Here, Plaintiffs' theory of harm requires speculation that nonparty police and counter-protesters may read the statute in the same implausible way they do, speculation that this misreading will "embolden" those people to target peaceful protesters, and speculation that Defendants will play a role in those events (despite the positions they have taken here). *See* DE 65-1 ¶¶ 18, 27. For any of this harm to occur, (1) Plaintiffs must attend a protest; (2) other protestors must choose to attend that same protest and (3) cause it to become violent; (4) non-party law enforcement officials and other protesters must choose to misread the statute; and (5) those nonparties must act on that misreading—even though counter-protestors who

engaged in violence would themselves be violating the statute. Even if such a "highly attenuated chain of possibilities" could support standing, *Clapper*, 568 U.S. at 410, "Plaintiffs cannot rely on speculation about the unfettered choices made by independent actors not before the court," *id.* at 414 n.5 (cleaned up).

In any event, Plaintiffs have presented no evidence of actual or likely harm traceable to Defendants or the new riot statute. Plaintiffs admit that they have organized several protests since the enactment of HB 1 and do not allege that any has involved abuse by law enforcement, let alone under the riot statute.[6] Plaintiffs allege instead that they "suffered past injuries," DE 137, at 7, from "discriminatory enforcement activities" by police, DE 137, at 30, police allegedly abusing them under the *pre*-HB 1 statutory scheme,[7] and other protesters attacking them, DE 65-1 ¶ 28. But allegations of past injury cannot support standing to obtain forward-looking injunctive relief. *See Lyons*, 461 U.S. at 105–10; *Corbet v. TSA*, 930 F.3d 1225, 1232–34 (11th Cir. 2019). None of those historical events supports standing

[6] *See* DE 65-1 ¶¶ 22–23; DE 65-2 ¶ 21; DE 65-7 ¶¶ 15–16; DE 65-4 ¶¶ 23, 25. Plaintiffs claim that their post-enactment events drew fewer attendees. DE 137, at 18. Even if a mere decline in attendance were a cognizable Article III injury, Plaintiffs offer no reason to think that this statute could have caused this decline. Just as likely, any decline in attendance is attributable to Plaintiffs' (incorrectly) "educating" their members on the "risks" of protesting, DE 65-1, ¶ 34, which would make the injury entirely "self-inflicted," *Clapper*, 568 U.S. at 1152.

[7] *E.g.*, DE 65-1 ¶ 33; DE 65-2 ¶¶ 26–27; DE 65-3 ¶¶ 13–14; DE 65-4 ¶ 28; DE 65-5 ¶ 4; DE 65-6 ¶ 8; DE 65-7 ¶ 10.

to challenge a new statute, much less one that *expressly protects peaceful protesters*.

Plaintiffs' theory of harm on this score is especially bizarre because their challenge would, if successful, reinstate the preexisting common-law definition of "riot" deployed by the courts when these alleged past abuses happened. What is more, Plaintiffs allege past abuses that occurred under other, still valid criminal statutes that they do not challenge here.

If, as Plaintiffs' allegations suggest, police "have numerous other methods" of targeting the same behavior, the injunction Plaintiffs seek would not redress their alleged harms. *Clapper*, 568 U.S. at 412–13. Plaintiffs have sued only the Governor and three sheriffs, and not any of the many other Florida officials empowered to enforce the many criminal laws related to riots. Plaintiffs also challenge only HB 1, not any of those other laws. The district court's injunction does not even begin to address Plaintiffs' complaints about purported police abuses.

Plaintiffs fare no better in their argument that they have standing because their subjective take on the statute has caused them to expend and divert resources. DE 137, at 8, 79. The Supreme Court rejected that theory of harm in *Clapper*, explaining that even where "present costs and burdens" like refraining from speech and spending money are a "reasonable reaction" to "fear of" future government action, plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Id.*

at 416. "If the law were otherwise," the Court explained, "an enterprising plaintiff would be able to secure a lower standard for Article III standing simply by making an expenditure based on a nonparanoid fear." *Id.*

For all these reasons, Plaintiffs' lack standing to proceed here at all. But their standing to sue the Governor is especially baseless. "[T]o establish a justiciable Article III case" against him, Plaintiffs "must establish (1) that they were injured (2) by the actions of the [Governor] (3) because []he can enforce [the statute] against them and has either done so or threatened to do so." *Support Working Animals*, 8 F. 4th at 1202. Plaintiffs must show, moreover, that the Governor "has the authority to enforce the particular provision [at issue], such that an injunction prohibiting enforcement would be effectual." *Id.* at 1201.

The district court held that Plaintiffs could sue the Governor because Florida law gives him the authority to order sheriffs to suppress riots and to take "direct command of the Florida Highway Patrol to do the same," DE 137, at 28. The district court also noted that the Florida Constitution gives the Governor power to suspend sheriffs "who decline to obey his directives to suppress riots" and that another statute gives the Governor the power to "order the Florida Department of Law Enforcement to investigate sheriffs before the Governor suspends them." *Id.*

Even so, an even more "highly attenuated chain of possibilities," *Clapper*, 568 U.S. at 410, must occur for Plaintiffs to suffer a concrete threatened injury from the

Governor's actions. On top of (1) Plaintiffs' attending a protest and (2) other protesters attending that protest and (3) causing it to become violent, *see supra* 13–14, to reach the Governor under the district court's theory, (4) sheriffs must fail or decline their independent statutory obligation to contain the violence; and either (5) the Governor must order the sheriffs to do so under threat of investigation or suspension; or (6) the Governor must take command of the Florida Highway Patrol and (7) order the Highway Patrol to suppress the violence; (8) the Highway Patrol must read the statute to allow them to arrest innocent peaceful protestors; and (9) do so. This butterfly-effect theory of potential future harm does not come close to supporting Article III standing to sue the Governor.[8]

* * *

Because Plaintiffs lack standing, they are unlikely to succeed on the merits. *See, e.g.*, *Lujan*, 504 U.S. at 561 (standing is an element of a plaintiff's case). As a result, this Court should vacate the preliminary injunction.

[8] Nor for that matter does this chain of speculation establish that the Governor is a proper party under *Ex Parte Young*, 209 U.S. 123 (1908). "Where the enforcement of a statute is the responsibility of parties other than the governor (the cabinet in this case), the governor's general executive power is insufficient to confer jurisdiction." *Women's Emergency Network v. Bush*, 323 F.3d 937, 949–50 (11th Cir. 2003). That the Governor may under certain preconditions oversee sheriffs and the Florida Highway Patrol in their efforts to keep the peace cannot be enough to make the Governor a proper party here.

B. The statute is not vague or overbroad.

Plaintiffs claim in this pre-enforcement, facial challenge that Florida's riot statute, as amended, is unconstitutionally overbroad and void-for-vagueness. "[F]acial challenge[s]" are "the most difficult challenge[s] to mount successfully." *United States v. Salerno*, 481 U.S. 739, 745 (1987). They "are disfavored" even in the First Amendment context. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008). That is because facial challenges "often rest on speculation," "run contrary to the fundamental principle of judicial restraint," and "threaten to short circuit the democratic process." *Id.* at 450–51. The Supreme Court instead prefers to review statutes "in light of a particular application," *Texas*, 523 U.S. at 301, and has "repeatedly expressed its reluctance to strike down a statute on its face where there were a substantial number of situations to which it might be validly applied," *Parker v. Levy*, 417 U.S. 733, 760 (1974).

The first step in an overbreadth/vagueness challenge is to construe the statute. *See United States v. Williams*, 553 U.S. 285, 293 (2008); *United States v. Hunt*, 526 F.3d 739, 743 (11th Cir. 2008). If necessary, the court must construe the statute "to avoid constitutional concerns." *Pine v. City of W. Palm Beach*, 762 F.3d 1262, 1276 (11th Cir. 2014). The court should then determine whether the statute, so construed, "reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail." *Vill. of Hoffman Ests. v. Flipside, Hoffman*

Ests., Inc., 455 U.S. 489, 494–95 (1982). After that, the court should "examine the facial vagueness challenge." *Id.*

1. The proper construction of Section 870.01(2).

The challenged provision states:

> A person commits a riot if he or she willfully participates 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. . . . This section does not prohibit constitutionally protected activity such as a peaceful protest.

Fla. Stat. § 870.01(2), (7).

Like countless other criminal statutes, the provision defines a crime by listing its elements in succession, each separated by a comma: "A person commits a riot if he or she" (1) "willfully participates in a violent public disturbance involving an assembly of three or more persons," (2) "acting with a common intent to assist each other in violent and disorderly conduct," (3) "resulting in" injury to another person, damage to property, or "[i]mminent danger" of either. Fla. Stat. § 870.01(2).

Because "even clear laws produce close cases," *Johnson v. United States*, 576 U.S. 591, 601 (2015), courts must "construe, not condemn" provisions like Section 870.021(2), *Skilling v. United States*, 561 U.S. 358, 403 (2010). The trial court erred in treating as constitutional infirmities run-of-the-mill interpretive questions that

courts routinely ask when construing a statute.

Plaintiffs complained below of three features of the statute, alleging that it "fails to clarify (1) whether violence among a few at a demonstration renders the entire event a 'riot,' (2) who must share a 'common intent to assist each other in violent and disorderly conduct,' and (3) whether a non-violent demonstrator can be considered as 'willfully participating' in a violent public disturbance simply because violence occurs among others who are in close proximity." DE 65, at 4–5. The trial court's ruling largely tracks those concerns, finding the statute vague as to what constitutes "participat[ion]" in a "violent public disturbance," and as to whether the accused must share intent with the "assembly of three or more persons" to "assist each other in violent and disorderly conduct." DE 137, at 52–53. In other words, the trial court found the statute vague in its application to a person who is present at an event, some part of which is a "violent public disturbance," where the person is not himself violent and does not share violent intent with those who are.

To begin with, whatever the definition of criminal riot in subsection (2) prohibits, subsection (7) expressly excludes acts of "peaceful protest" from its reach. Fla. Stat. § 870.01(7). Because "all parts of a statute must be read together in order to achieve a consistent whole," *Cadle v. GEICO Gen. Ins. Co.*, 838 F.3d 1113, 1126 n.12 (11th Cir. 2016), the language defining "riot" must be construed consistent with excluding acts of "peaceful protest." After all, "if [peacefully protesting] could be

characterized as a [riot], the statute's specific exclusion of [peacefully protesting] would not make sense." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 24 (2010).[9]

Given the peaceful-protest carveout, the first element of a criminal "riot"—"willful[] participat[ion] in a violent public disturbance involving an assembly of three or more persons"—*cannot* be read to include mere peaceful presence at "a violent public disturbance." The district court found the terms "participates" and "violent public disturbance" vague. DE 137, at 52. But there is nothing vague about the express carveout for a "peaceful protest[er]." Fla. Stat. § 870.01(7).

What it means to "participate[] in a violent public disturbance" is also readily apparent even apart from that carve-out. Courts "must" give those undefined terms their "common and ordinary meaning," *High Ol' Times, Inc. v. Busbee*, 673 F.2d 1225, 1229 (11th Cir. 1982), and "measure[]" the statute "by common understanding and practices," *United States v. Conner*, 752 F.2d 566, 574 (11th Cir. 1985). "Participate" commonly means "to take part in something (as an enterprise or activity) usu[ally] in common with others," WEBSTER'S THIRD NEW INTERNATIONAL

[9] The district court discounted the significance of subsection (7), characterizing it as merely "restat[ing] the constitutional avoidance canon" and thus treating the provision as a boiler-plate savings clause. DE 137, at 61. But to say that the statute "does not prohibit constitutionally protected activity," including acts of "peaceful protest," clarifies what the statute does not cover—it does not merely restate the constitutional-avoidance canon.

DICTIONARY 1646 (1976), "[t]o be active or involved in something," AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1285 (5th ed. 2016), or "[t]o share in something," *id*.[10] And the rest of the statute makes clear that what the person must be actively involved in is "a violent public disturbance." Fla. Stat. § 870.01(2).

Such participation does not include wholly peaceful conduct. Rather, it entails knowledge that what the person is "participating" in is violent and that the "participation" be in violence.[11] "As a matter of ordinary English grammar," the term willfully "appli[es] to all the subsequently listed elements of the crime."

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[10] Several states use the term "participate" to criminalize rioting. *E.g.*, Alaska Stat. § 11.61.100; 11 Del. C. § 1302; Haw. Rev. Stat. § 711-1103; N.J. Stat. § 2C:33-1; Ohio Rev. Code Ann. § 2917.03; Okla. Stat. tit. 21, § 1312; 18 Pa. Stat. § 5501; Tenn. Code § 39-17-302; Tex. Penal Code § 42.02. Many other states use forms of the similar term, "engage." *E.g.*, Ala. Code § 13A-11-3; Ark. Code § 5-71-201; Conn. Gen. Stat. § 53a-176; Mich. Comp. Laws § 752.541; N.D. Cent. Code § 12.1-25-03; N.Y. Penal Law § 240.06; Or. Rev. Stat. § 166.015; 720 Ill. Comp. Stat. Ann. 5/25-1; Ind. Code § 35-45-1-2; Me. Rev. Stat. tit. 17-A, § 503; Utah Code § 76-9-101. Congress also uses "Participate" for the same purpose. 18 U.S.C. §§ 2101–02. And so does the Model Penal Code. *See* Model Penal Code § 250.1.

[11] Even without that added clarity, the former Fifth Circuit rejected a constitutional challenge to a statute that used "participates." *United States v. Hawes*, 529 F.2d 472, 478–79 (5th Cir. 1976); *see Bonner v. City of Prichard,* 661 F.2d 1206, 1209–10 (11th Cir. 1981) (en banc) (adopting as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981). The Supreme Court and other federal appellate courts, too, have rejected challenges to similar statutory language, like "tak[ing] an active part," *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 571–72 (1973), "actively participates," *Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 23–24 (D.C. Cir. 2009), and "engages in," *United States v. Matthews*, 419 F.2d 1177, 1180–81 (D.C. Cir. 1969); *see also State v. McDuffie*, 2015 WL 7729793, at *2 (Ariz. Ct. App. 2015) (rejecting vagueness challenge to the term "participate" in Arizona's riot statute).

Flores-Figueroa v. United States, 556 U.S. 646, 650 (2009). "Willfully" means "intentionally and purposefully," DE 137, at 52, and involves "conscious wrong or evil purpose" by the actor. *Willful*, *Black's Law Dictionary* (11th ed. 2019). A person cannot consciously—or knowingly—participate in a *violent* public disturbance without first knowing that the public disturbance *is* violent. *See Flores-Figueroa*, 556 U.S. at 651 ("If we say that someone knowingly ate a sandwich with cheese, we normally assume that the person knew both that he was eating a sandwich and that it contained cheese."). And a person cannot "participate" in a *violent* public disturbance without acting violently—whether through an explicit act of violence or conduct or advocacy "directed to inciting or producing imminent" violence. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). The verb "participate" thus is not vague, especially considering its object: a violent public disturbance.

The district court, though, found that the term—"violent public disturbance"—was also vague. DE 137, at 52–53. But until the legislation at issue took effect, Florida had no statutory definition of "riot," and the Florida courts filled that gap with the common-law phrase "a tumultuous disturbance of the peace," *Beasley*, 317 So. 2d at 752, which the district court said it would not "hesitate" to uphold, DE 137, at 62. The difference, if anything, favors the statute. A "public disturbance" is simply a "disturbance of the peace," and "violent" is more specific

and narrower than "tumultuous." Many states use the term "public disturbance" to define riot,[12] and those statutes have been upheld. *See United States v. Matthews*, 419 F.2d 1177, 1180–82, 1187 (D.C. Cir. 1969) (rejecting vagueness challenge to D.C. rioting statute that used the term "public disturbance"). So does the federal government. *See* 18 U.S.C. § 2102 (defining "riot" as a certain kind of "public disturbance"). By requiring a "violent" public disturbance, Florida's statute is narrower and more specific, not less.

The district court also found fault with the second element of the crime—"acting with a common intent to assist each other in violent and disorderly conduct." Fla. Stat. § 870.01(2). Deploying the last-antecedent rule, under which "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows," *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003), the district court determined that the phrase "acting with a common intent" referred only to the immediately preceding "assembly of three or more persons," DE 137, at 56 (quoting *Barnhart*). Thus, in the district court's view, the person accused under the statute need not share intent with the "assembly of three or more persons." *Id.* at 53.

[12] *E.g.*, Colo. Rev. Stat. § 18-9-101; D.C. Code § 22-1322; Ky. Rev. Stat. § 525.010(5); La. Stat. § 14:329.1; N.C. Gen. Stat. § 14-288.2; N.D. Cent. Code § 12.1-25-01.

The district court reached that erroneous conclusion by misapplying the last-antecedent rule. As this Court has explained, "[w]here the modifier is set off from two or more antecedents by a comma, . . . the comma indicates the drafter's intent that the modifier relate to more than the last antecedent." *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242, 1257 (11th Cir. 2014).[13] In that circumstance, the comma "cancel[s] the last-antecedent canon." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 161 (2012). Thus, if "a comma separates a modifier . . . from multiple antecedents . . . the modifier alters both antecedents." *Glasser v. Hilton Grand Vacations Co., LLC*, 948 F.3d 1301, 1311 (11th Cir. 2020).

That is exactly the case here. The modifier ("acting with a common intent") is set off from two or more antecedents ("person" and "assembly of three or more persons") by a comma, reading in full: "A person commits a riot if he or she willfully participates in a violent public disturbance involving an assembly of three or more persons, acting with a common intent . . . ." Fla. Stat. § 870.01(2). "[T]he

[13] *See also Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1170 (2021) ("'[A] qualifying phrase separated from antecedents by a comma is evidence that the qualifier is supposed to apply to all the antecedents instead of only to the immediately preceding one.'" (quoting treatise)); *Quindlen v. Prudential Ins. Co. of Am.*, 482 F.2d 876, 878 (5th Cir. 1973) (holding modifier referred only to immediately preceding antecedent where modifier was *not* set off from the antecedent by a comma); 73 Am. Jur. 2d Statutes § 130 ("The presence of a comma separating a modifying clause in a statute from the clause immediately preceding it is an indication that the modifying clause was intended to modify all the preceding clauses and not only the last antecedent one.").

modifying phrase" thus "refer[s] to both antecedents," *Bingham, Ltd. v. United States*, 724 F.2d 921, 925 n.3 (11th Cir. 1984), such that the second clause requires "common intent" among the "person" (the accused) and the "assembly of three or more persons," *see also Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1170 (2021) (same, citing treatises).

In sum, a person "commits a riot" under Section 870.01(2) only if he (1) "willfully participates in a violent public disturbance," (2) "act[s] with a common intent to assist [an assembly of three or more persons] in violent and disorderly conduct," (3) "resulting in" injury or imminent danger of injury to another person or property. So the answers to Plaintiffs' questions are as follows:

> Does "violence among a few at a demonstration render[] the entire event a 'riot,'"? **No.**
>
> "[W]ho must share a 'common intent to assist each other in violent and disorderly conduct'"? **The "person" accused under the statute and the "assembly of three or more persons."**
>
> Can "a nonviolent demonstrator . . . be considered as 'willfully participating' in a violent public disturbance simply because violence occurs among others who are in close proximity"? **No.**

DE 65, at 4–5.

That is by far the best way to read the challenged statute. But it is, at a minimum, a "reasonable and readily apparent" construction. *Stenberg v. Carhart,* 530 U.S. 914, 944 (2000) (quoting *Boos v. Barry,* 485 U.S. 312, 330 (1988)). And it "has long been a tenet of First Amendment law that in determining

a facial challenge to a statute, if it be 'readily susceptible' to a narrowing construction that would make it constitutional, it will be upheld." *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988). The same is true of Fifth Amendment vagueness challenges. *Pine*, 762 F.3d at 1276. That should be the end of the overbreadth and vagueness challenges to this statute.

2. The statute is not unconstitutionally overbroad.

The First Amendment overbreadth doctrine allowing facial invalidation is a "limited" exception that the Supreme Court calls "strong medicine," *L.A. Police Dep't v. United Reporting Pub. Corp.*, 528 U.S. 32, 39 (1999), to be used only "as a last resort," *United States v. Waymer*, 55 F.3d 564, 569 (11th Cir. 1995). The Court has "vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *Williams*, 553 U.S. at 292.

Again, under a proper reading of the statute, a person "commits a riot" only if he (1) "willfully participates in a violent public disturbance," (2) "act[s] with a common intent to assist [an assembly of three or more persons] in violent and disorderly conduct," (3) "resulting in" injury or imminent danger of injury to another person or property. Fla. Stat. § 870.01(2). The statute therefore prohibits no constitutionally protected speech, let alone a "substantial" amount, and thus cannot be overbroad. *See Williams*, 553 U.S. at 292.

Over many decades, the courts have repeatedly rejected constitutional challenges to statutes like Florida's. "[I]t is no abridgment of free speech or assembly for the criminal sanctions of the state to fasten themselves upon one who" has "actively and consciously assisted" with "promoting, encouraging, and aiding an assemblage the purpose of which is to wreak violence," the Supreme Court held in *Cole v. Arkansas*, 338 U.S. 345, 353–54 (1949).

The Seventh Circuit in *National Mobilization Committee to End War in Vietnam v. Foran*, 411 F.2d 934 (7th Cir. 1969), relied on *Cole* years later to reject a constitutional challenge to a statute that criminalized interstate travel "with the intent [] 'to incite, organize, promote, encourage, *participate in*, and carry on a riot.'" *Id.* at 938 (emphasis added). "Given a normal and natural construction, much less a narrow construction," the court explained, the statute did not penalize "mere presence" in a crowd where violence occurs. Instead, the statute's explicitly requiring "*the intent* to engage in one of the prohibited overt acts" rendered "any challenge based on innocent intent or unexpected result"—like violence developing—"wide of the mark." *Id.* (emphasis added). And in *Ferguson v. Estelle*, 718 F.2d 730 (5th Cir. 1983), the Fifth Circuit rejected the argument that a statute criminalized "innocents" participating in a protest that later turned violent because the statute had been construed not to apply to persons who did "not take part in the group's actions creating an imminent threat of violence." *Id.* at 733–34.

The statute here, properly construed, leads to the same conclusion. *First*, as in *Foran*, the statute includes an explicit requirement of intent to assist in violent or disorderly conduct. Fla. Stat. § 870.01(2). *Second*, as in *Ferguson*, the statute here excludes those who do "not take part"—or "participate"—in the violent public disturbance. *Id. Third*, the statute explicitly excludes "peaceful protest[ers]." *Id.* § 870.01(7).

Moreover, even if the district court were correct that the statute "separates a person from an assembly of three or more persons sharing th[e] intent" to commit violence, DE 137, at 53, this Court should still uphold the statute. That is because, even under that incorrect interpretation, the statute still requires a person to "willfully participate[] in a violent public disturbance." Fla. Stat. § 870.01(2). And again, that requires both knowledge that what the person is "participating" in is violent and that the "participation" in question be in violence itself. *See supra* 22–23. So even under the district court's incorrect interpretation that the statute does not require the "person" to "act with a common intent to assist" in violent or disorderly conduct, the statute still would cover only violent action of some sort.

While "peaceful demonstrations in public places are protected by the First Amendment," "they lose their protected quality as expression under the First Amendment" when "they turn violent." *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972). This principle has existed for over 300 years: "a combination, lawful in

the first instance, can be rendered unlawful by subsequent acts; and then what is done may be a riot." 2 Joel Prentiss Bishop, *Commentaries on the Criminal Law* 640 (6th ed. 1877). For equally long the law has regarded as "certain" that anyone who "join[s]" with "others actually engaged in a riot," also is guilty of rioting. 1 Hawkins, *Pleas of the Crown* 514 (8th ed. 1824). The statute here falls well within this tradition in criminalizing intentional participation in violent rioting activity.

At bottom, the district court's "basic mistake" in pronouncing the statute unconstitutionally overbroad "lies in" giving in to the "tendency of [the] overbreadth doctrine to summon forth an endless stream of fanciful hypotheticals." *Williams*, 553 U.S. at 301. Even if "[m]arginal applications" of the statute can be imagined, *Parker*, 417 U.S. at 760, like someone "giv[ing] a rioter a bottle of water" while "leaving the [violent public] disturbance," DE 137, at 52, and even assuming these hypotheticals "would infringe on First Amendment values," *Parker*, 417 U.S. at 760, they do not "dwarf" or "far outnumber" the statute's constitutional applications, *United States v. Stevens*, 559 U.S. 460, 481–82 (2010).

Finally, even if the statute could be read to cover some protected speech (even after reading it to avoid any constitutional issues), if the State ever sought to enforce that broader reading against Plaintiffs, doing so "could of course be the subject of an as-applied challenge." *Williams*, 553 U.S. at 302. Courts prefer that route anyway. *See Texas*, 523 U.S. at 301. Although "'too broadly worded'" laws "'may deter

protected speech to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face.'" *New York v. Ferber*, 458 U.S. 747, 770 (1982) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)).

3. The statute is not unconstitutionally vague.

Like overbreadth challenges, void-for-vagueness challenges are disfavored. A statute is unconstitutionally vague only if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Williams*, 553 U.S. at 304. This is a high bar. It is not enough that close cases can be imagined, *id.* at 306, or for courts to divide over the best interpretation, *Skilling*, 561 U.S. at 403. Plaintiffs must show "that *no* standard of conduct is specified *at all*." *Flipside*, 455 U.S. at 495 n.7 (emphases added). The district court, therefore, flatly misstated the law when it held the statute to be vague merely because "it is subject to multiple reasonable constructions." DE 137, at 75.

For example, in *United States v. L. Cohen Grocery*, 255 U.S. 81 (1921), the Supreme Court struck down a law criminalizing "any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries," reasoning that the law "le[ft] open . . . the widest conceivable injury, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against." *Id.* at

89. The Court has also "struck down statutes that tied criminal culpability to whether the defendant's conduct was 'annoying' or 'indecent,'" which are "wholly subjective judgments." *Williams,* 553 U.S. at 306 (citing cases). The statute here is not that for at least two reasons.

The statute provides fair notice of what not to do. For one, the statute explicitly includes a mens rea requirement, which goes a long way to mitigating any concerns about notice. *See Boyce Motor Lines v. United States*, 342 U.S. 337, 342 (1952) (collecting cases holding same). And "[t]he touchstone of the [vagueness] inquiry is the meaning of the statute in light of common understanding and practice." *Hunt*, 526 F.3d at 743. Indeed, "[t]he use of common experience as a glossary is necessary to meet the practical demands of legislation." *Boyce Motor Lines*, 342 U.S. at 341.

Thus "ambiguity" in "the lot of language generally," the D.C. Circuit held, was not enough to invalidate the District of Columbia's riot statute. *Matthews*, 419 F.2d at 1181. "The language" of that statute, like the statute here, "contain[ed] several specific strictures, each of which a person must disobey in order to be subject to its penalties." *Id.* A person must not only willfully participate in a violent public disturbance, but he must also act with a common intent to assist an assembly of three or more persons in violent and disorderly conduct, and his action must result in injury or imminent danger of injury to another person or property. *See id.* (discussing similar strictures). In other words, under common understanding and practice, the

statute "sets forth plainly perceived boundaries," *United States v. Duran*, 596 F.3d 1283, 1291 (11th Cir. 2010): Do not intentionally participate in a public disturbance that is violent and do not act with a common intent to assist an assembly of three or more persons in violent or disorderly conduct.

It also cannot be said that the statute "contains *no* standards *at all*," *Giaccio v. Pennsylvania*, 382 U.S. 399, 403 (1966) (emphases added), "to guide the judge in its application," *Boyce Motor Lines*, 342 U.S. at 340. The statute does not "delegate[] basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis," *Grayned*, 408 U.S. at 108–109, or give them "virtually complete discretion," *Kolender v. Lawson*, 461 U.S. 352, 358 (1983). Due Process requires only that a statute "establish[] minimal guidelines to govern law enforcement," *id.* at 358, and the provision here does much more than that.

As with its overbreadth analysis, the district court mistakenly "belie[ved] that the mere fact that close cases can be envisioned renders a statute vague." *Williams*, 553 U.S. at 305–06. But just because "it may be difficult in some cases to determine whether [a statute's] clear requirements have been met" does not mean the statute is vague. *Id.* at 306.

The statute provides notice of what it prohibits and standards for officials to follow when applying it. It is not unconstitutionally vague.

* * *

Plaintiffs are not likely to succeed in their pre-enforcement claim that the statute is unconstitutionally overbroad and vague for at least four reasons. *First*, they lack standing to bring their claims in the first place. *Second*, even if they do, the statute's plain text reveals a clear meaning, particularly given common English usage and ordinary tools of statutory interpretation. *Third*, even if any reason to doubt that meaning existed, a constitutional way to read the statute is reasonable and readily apparent. *Fourth*, the statute, properly construed, does not cover any, much less a substantial amount of, protected speech. It simply cannot be said that the statute includes no standard such that its application turns on the "wholly subjective" whims of law enforcement, prosecutors, and judges. Plaintiffs stand no chance on the merits—let alone a likelihood of success.

II. PLAINTIFFS' DELAY PRECLUDES A FINDING OF IRREPARABLE HARM.

Irreparable harm is "the sine qua non of injunctive relief." *Siegel*, 234 F.3d at 1176. Because a preliminary injunction "requires showing 'imminent' irreparable harm," a "party's failure to act with speed or urgency in moving for a preliminary injunction necessarily undermines a finding of irreparable harm." *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2016). The whole point of preliminary-injunctive relief is "to protect a plaintiff's rights before a case can be resolved on its merits." *Id.*

Plaintiffs found out about the bill that would become the statute in September 2020. DE 65-2 ¶ 6; DE 65-3 ¶ 7. They "understood" that it would be "fast-tracked." DE 65-2 ¶¶ 6–7. So they immediately sought to "combat[]" it at every turn. DE 65-4 ¶ 19.[14]

But when the bill became law almost six months later in April 2021, DE 65-3 ¶ 8, Plaintiffs did not sue, let alone seek equitable relief through an injunction, for a full month, DE 1. And they did not seek a preliminary injunction for another two months—three months since the statute was passed and ten months since Plaintiffs were on notice of its imminence. DE 64. Indeed, the parties briefed and argued the preliminary injunction, DE 128, after a motion to dismiss had been fully briefed and decided, DE 90, and after starting discovery, DE 33; DE 53—even though no facts had changed prompting the sudden purported urgency.

Plaintiffs cannot invoke a court's extraordinary equitable powers after sitting on their hands for so long. "Court[s] of equity . . . ha[ve] *always* refused" to give "aid to stale demands." *Bowman v. Wathen*, 42 U.S. 189, 193 (1843) (emphasis added).[15] In *Wreal*, this Court affirmed the district court's denying a motion for a

[14] *See also* DE 65-1 ¶¶ 12, 16 (providing examples of more efforts to defeat the statute); DE 65-2 ¶¶ 8–9 (same); DE 65-3 ¶ 7 (same); DE 65-4 ¶¶ 18–19 (same); DE 65-5 ¶ 6 (same); DE 65-7 ¶ 14 (same).

[15] *See also Elmendorf v. Taylor*, 23 U.S. 152, 168 (1825) ("From the earliest ages, Courts of equity have refused their aid to those who have neglected . . . to assert their claims.").

preliminary injunction filed five months after the complaint. *Id.* at 1247. In doing so, the Court explained that delaying "even only a few months" before seeking a preliminary injunction "militates against a finding of irreparable harm." *Wreal*, 840 F.3d at 1248. The same is true here. Plaintiffs have no explanation for waiting so long. The district court should have denied Plaintiffs' delayed request for extraordinary relief.

III. THE EQUITIES AND PUBLIC INTEREST FACTORS FAVOR THE STATE.

The district court harmed Florida and the public by entering the preliminary injunction. DE 137, at 89–90. Although the court worried about "usurp[ing] the powers of the Florida Legislature," DE 137, at 67, that is exactly what its injunction did. "[A]ny time a State is enjoined by a court"—particularly a federal court—"from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers).

This harm is increased when the court does so on overbreadth grounds. "[T]here are substantial social costs *created* by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct"—"particularly a law that reflects 'legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct.'" *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (quoting

Broadrick, 413 U.S. at 615). The statute does no more than "criminal[ize] the promoting, encouraging, and aiding of an assembly, the purpose of which is to wreak violence." *Beasley*, 317 So. 2d at 753.

That other laws exist that might help prevent those same harms does not mean enjoining the statute has no effect, as the district court seemed to believe. *See* DE 137, at 83–84. Setting aside that this logic inserts serious questions over whether an injunction could provide Plaintiffs any redress, *see supra* 15, legislatures often create overlapping statutes "out of an understandable desire to make sure that no form of [a crime] be left out," *United States v. Carona*, 660 F.3d 360, 369 (9th Cir. 2011). Whether any given statute is a necessary addition to Florida's legislative scheme to better prevent crime is for the people's representatives in the state legislature, not a federal district court, to decide.

IV. TO THE EXTENT THERE IS ANY DOUBT ABOUT THE MEANING OF THE STATUTE, THE DISTRICT COURT SHOULD HAVE ABSTAINED.

"[Florida] law is what the [Florida] Supreme Court says it is." *Blue Cross & Blue Shield of Ala., Inc. v. Nielsen*, 116 F.3d 1406, 1413 (11th Cir. 1997).[16] Not, though, according to the court below, which rushed to interpret a new Florida statute before any Florida court could do so. To the extent there were any doubt about the

[16] *See also Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) ("[S]tate courts are the ultimate expositors of state law.").

meaning of the law, the district court should have abstained rather than invalidate the statute.

Courts should abstain from "premature constitutional adjudication" until the state addresses its own law. *See Siegel*, 234 F.3d at 1174 (discussing *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941)). That way the "federal judgment will be based on something that is a complete product of the State, the enactment as phrased by its legislature *and* as construed by its highest court." *Harrison v. NAACP*, 360 U.S. 167, 178 (1959) (emphasis added) (vacating and remanding for "opportunity to bring appropriate proceedings in the [state] courts"). This helps "avoid federal-court error in deciding state-law questions antecedent to federal constitutional issues." *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 76 (1997).

Abstention is particularly apt where, as here, "the challenged state statute is susceptible of a construction by the state judiciary that would avoid or modify the necessity of reaching a federal constitutional question," *Babbitt*, 442 U.S. at 306, especially when "the [statute] has never been construed by a state court," *Fields v. Rockdale Cty.*, 785 F.2d 1558, 1562 (11th Cir. 1986). The district court's refusal to do so warrants vacatur.

The Supreme Court, for example, vacated and remanded the lower court decision in *Harrison*, holding that the challenged state statutes there "should be exposed to state construction or limiting interpretation before the federal courts are

asked to decide upon their constitutionality." 360 U.S. at 178. The Court also reversed in *Babbitt* for similar reasons. There the Court explained that abstention "may be *required* in order to avoid unnecessary friction in federal-state relations'" and "interference with important state functions." *Babbitt*, 442 U.S. at 306 (emphasis added). Even though the plaintiffs brought a vagueness challenge, because the state "statute [was] reasonably susceptible of constructions that might undercut or modify [the] vagueness attack," the Court held that "the [state] courts should be afforded a reasonable opportunity to pass upon the section under review." *Id.* at 307–08.

So too here. "The [statute] has not been construed in any [Florida] court" and Plaintiffs argue "in attacking it for vagueness" that "its terms are far from clear." *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 511 (1972). Thus the "authoritative resolution" of the alleged "ambiguities in the [Florida] law is sufficiently likely to avoid or significantly modify the federal questions [Plaintiffs] raise to warrant abstention." *Id.* at 512. To the extent it had concerns about the clarity of the statute—and the Governor respectfully submits those concerns were unfounded—the proper course would have been to abstain from adjudicating the question, rather than invalidate the statute.[17]

[17] Alternatively, if this Court has any doubt about the meaning of the statute, and did not believe abstention were appropriate, it should certify the question of state law to the Florida Supreme Court for it to construe the statute in the first instance. *See* Fla. R. App. P. 9.150; *Pittman v. Cole*, 267 F.3d 1269, 1290–91 (11th Cir. 2001).

CONCLUSION

For all these reasons, this Court should reverse the district court's order and vacate the preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limits of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Eleventh Circuit Rule 32-4, this document contains 9,775 words.

2. This brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

/s/ Jason H. Hilborn

CERTIFICATE OF SERVICE

I certify that on December 6, 2021, I electronically filed this brief with the Clerk of Court by using the Court's CM/ECF system, which will send a notice of electronic filing to all parties in the case who are registered through CM/ECF.

/s/ Jason H. Hilborn