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.

REPLY 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, in addition to the individuals and entities named in the Certificate of Interested Persons contained in the previous briefs, the following is a complete list of interested persons required by Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 to 26.1-3:

1. Agarwal, Shalina Goel
2. Bokat-Lindell, Noah
3. Clarke, Kristen
4. Flynn, Erin H.
5. Kwon, Christine
6. Parker, Kristy
7. Paredes, John
8. PEN American Center, Inc.
9. Protect Democracy Project, Inc.
10. The Niskanen Center
11. United States of America

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

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INTRODUCTION

Plaintiffs challenge, and the district court preliminarily enjoined as unconstitutional, a law duly enacted by the State of Florida to counter violent civil unrest. Plaintiffs stake their constitutional case against this important statute on the premise that it may be read to criminalize peaceful protest. *See* Pls. Br. 28–29, 35–58. But the law could hardly be more clear that it "does not prohibit . . . peaceful protest," Fla. Stat. § 870.01(7), and it is only peaceful protest, Plaintiffs repeatedly assure us, in which they wish to engage, *see* Pls. Br. 7, 8, 20, 32, 43, 47, 52, 60. None of Plaintiffs' gymnastics in straining to read the statute to mean the opposite of what it says demonstrates an interpretation that is "arguably" correct, Pls. Br. 28, and even less so do their efforts foreclose a "reasonable and readily apparent" way to read the statute to exclude peaceful protesters. Pls. Br. 39. Plaintiffs therefore cannot establish standing, much less show a constitutional violation.

The district court's order should be reversed.

ARGUMENT

I. PLAINTIFFS FAILED TO SHOW A LIKELIHOOD OF SUCCESS ON THE MERITS BECAUSE THEY LACK STANDING.

A. Plaintiffs failed to show injury-in-fact.

1. Pointing to *Susan B. Anthony List v. Driehaus*, Plaintiffs contend that the statute "arguably" covers peaceful protesting and that they face a "credible threat of prosecution" under it. Pls. Br. 24 (quoting *Driehaus*, 573 U.S. 149, 159 (2014)). But

Driehaus held that the injury-in-fact requirement may be satisfied by showing "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." 573 U.S. at 159. In other words, (1) the intended conduct must "arguably" be "affected with a constitutional interest," (2) the intended conduct must actually—not arguably—be "proscribed by [the] statute," and (3) there must actually—not arguably—"exist[] a credible threat of prosecution" under the statute. *Id.*

Plaintiffs flunk that test at the threshold, as the challenged provision does not even *arguably* proscribe Plaintiffs' intended conduct. To the contrary, it expressly "does not prohibit . . . peaceful protest[ing]." Fla. Stat. § 870.01(7). As the Supreme Court in *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013), made clear, "in assessing the lack of an impending injury," "the Court [must] credit[] the specific rules of construction contained in the statute meant to protect [the] rights" asserted by the plaintiffs. *Blum v. Holder*, 744 F.3d 790, 798 (1st Cir. 2014) (citing *Clapper*, 568 U.S. at 406 n.3).[1] So too here, subsection (7) "protect[s] [the] rights" asserted by Plaintiffs in excluding peaceful protest from the scope of the statute. As in *Clapper*, the Court should "credit[]" that provision, and that should be the end of

[1] *See also Club Madonna, Inc. v. City of Miami Beach*, 924 F.3d 1370, 1382 (11th Cir. 2019) ("standing analysis requires . . . a 'peek' at the merits").

this case.

For much the same reason, Plaintiffs cannot show a credible threat of enforcement. The alleged "threat of harm" must be "'certainly impending'" or there must be "a 'substantial risk' of such harm." *Tsao v. Captiva MVP Rest. Partners*, 986 F.3d 1332, 1339 (11th Cir. 2021) (quoting *Clapper*, 568 U.S. at 416). Plaintiffs say many things in their brief, but they point to no indication that they face any such risk, and that "substantially undermines" their theory of standing, *Clapper*, 568 U.S. at 411.

Plaintiffs insist that this Court should pay no heed to the Governor's "litigation" position that the statute does not criminalize peaceful protest, citing cases "warning against accepting a state's litigation position when it does not bind state courts or law enforcement authorities." *W. Ala. Women's Ctr. v. Williamson*, 900 F.3d 1310, 1328 (11th Cir. 2018); *see* Pls. Br. 28. But in assessing whether a plaintiff faces a credible threat of enforcement, the Supreme Court and this Court have examined whether the defendants have affirmatively disavowed the interpretation of the statute that would cover the conduct in question. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 16 (2010); *Support Working Animals, Inc. v. Gov. of Fla.*, 8 F.4th 1198, 1204 (11th Cir. 2021) (citing *Doe v. Pryor*, 344 F.3d 1282, 1287 (11th Cir. 2003)); *Wilson v. State Bar of Ga.*, 132 F.3d 1422, 1428–29 (11th Cir. 1998). The two defendants here—even apart from whether they have any

enforcement authority at all—have consistently taken the position that the challenged provision does not prohibit peaceful protesting.

In response, Plaintiffs' point to the views of third parties—law enforcement and counter-protesters—who are not before the Court. Pls. Br. 34. The Supreme Court has rejected that approach and expressed reluctance "to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment." *Clapper*, 568 U.S. at 413.

Plaintiffs also say that they fear the statute will "*exacerbate* discriminatory policing" generally. Pls. Br. 34. But that argument hinges on speculation not just about the future actions of third parties, but actions that would be unlawful—and thus even more speculative. Such assertions of "elevated" or "increased" risk of harm are "simply not enough to confer standing," *Tsao*, 986 F.3d at 1343 (quoting *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 933 (11th Cir. 2020) (en banc)); *see also Los Angeles v. Lyons*, 461 U.S. 95, 105–110 (1983) (allegations of past injury cannot support standing for prospective relief). What is more, *all* of Plaintiffs' evidence about historical, third-party actions that, they say, create a fear of enforcement predate the statute. Pls. Br. 13–14. There is no hint of a threat of unlawful enforcement from the statute actually at issue here.

The "pre-*Clapper* decision[s]," *Tsao*, 986 F.3d at 1341, on which Plaintiffs rely, Pls. Br. 24–27, are inapposite because it "is unclear if [this Court] would have

(or could have) reached the same conclusion" in them "with the benefit of the Supreme Court's opinion" in *Clapper*. *Tsao*, 986 F.3d at 1341. Plaintiffs' two post-*Clapper* cases are likewise inapposite. Pls. Br. 26–27. *Driehaus* featured "a history of past enforcement" against the plaintiffs, 573 U.S. at 154–55, 164, and *Wollschlaeger v. Governor of Florida* featured a statute that "expressly limit[ed]" the plaintiffs' speech such that there was "no doubt" that the statute "trigger[ed] First Amendment scrutiny," 848 F.3d 1293, 1307 (11th Cir. 2017).

To the extent Plaintiffs argue that the Court may infer intent to enforce a recently enacted statute from a defendant's "vigorous[] defen[se]" of the statute, *Wollschlaeger*, 848 F.3d at 1305; *Harrell v. The Fla. Bar*, 608 F.3d 1241, 1257 (11th Cir. 2010); *see also* Pls. Br. 26–27, the nature of the defense matters. The defendants in *Wollschlaeger* and *Harrell* interpreted the provisions at issue in ways that implicated the First Amendment. *See Wollschlaeger*, 848 F.3d at 1307 (restricting doctors' speech); *Harrell*, 608 F.3d at 1250 (11th Cir. 2010) (restricting lawyers' speech). Here, Defendants have done the opposite, "vigorously defend[ing]" an interpretation of the statute at issue that *does not cover Plaintiffs' desired conduct.*

2. Plaintiffs also argue that they have been injured by being "forced to divert significant resources to responding to" their own erroneous interpretation of statute. Pls. Br. 23. That circular argument has been rejected by this Court and by the Supreme Court in *Clapper.* "[I]f the hypothetical harm alleged is not 'certainly

impending,' or if there is not a substantial risk of the harm," this Court has explained, "a plaintiff cannot conjure standing by inflicting some direct harm on itself to mitigate a perceived risk." *Tsao*, 986 F.3d at 1339 (quoting *Clapper*, 568 U.S. at 416, 422). The lesson of those cases is that a plaintiff cannot manufacture standing simply by spending money to address a fear of enforcement that does not exist.

Plaintiffs invoke a decision of this Court upholding the standing of voter registration organizations to challenge voters' deregistration because the organizations diverted resources to address that action. *See* Pls. Br. 22–23 (citing *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1341 (11th Cir. 2014)). But unlike here, the challenged action in that case was not a nonexistent threat of future enforcement—the action was already occurring and the diversion of resources flowed directly from that action. *Arcia*, 772 F.3d at 1341–42. Here, as in *Clapper*, the alleged harm results not from anything concrete, but from Plaintiffs' own amorphous, subjective fears of enforcement lacking any grounding in fact.

B. Plaintiffs' alleged injury is not traceable to the Governor and would not be redressed by a judgment against him.

Because the Governor has no authority to enforce the statute, Plaintiffs simply cannot trace any alleged injury to him. Nor would a judgment against him redress Plaintiffs' alleged injuries.

Plaintiffs do not dispute that the Governor has no authority to enforce the riot statute directly. Plaintiffs thus resort to a hodgepodge of statutory and constitutional

powers, such as the Governor's executive authority to call on the National Guard, to argue that the mere fact that the Governor has ultimate enforcement "authority" is enough to sue him. Pls. Br. 31–33. If that were sufficient, the Governor could be automatically subject to suit in connection with a constitutional challenge to any criminal statute. *Cf. Women's Emergency Network v. Bush*, 323 F.3d 937, 949–50 (11th Cir. 2003). That is not the law: Plaintiffs must show that the Governor has actually enforced or threatened to enforce the statute against Plaintiffs for their desired actions. *See Support Working Animals*, 8 F.4th at 1202.

Plaintiffs say the Governor's "threat" that he would "have a ton of bricks rain down on those who violate the law" creates a "'substantial risk' that [he] will" enforce the statute "in the manner Plaintiffs fear"—meaning, to arrest peaceful protestors. Pls. Br. 33. The Governor's full statement belies that assertion:

> "You also will not be eligible for state benefits or employment if you get convicted *of participating in a violent or disorderly assembly* . . . . if you can do *this* and get away with it, then you are going to have more people do *it*. If you do *it* and you know that there is going to be a ton of bricks rain down on you, then I think that people will think twice about engaging in *this type of conduct*."[2]

It is plain that the Governor was speaking of *violent* conduct—not peaceful protest, which is the only conduct that Plaintiffs claim to fear enforcement against. And what is dispositive here is that Plaintiffs muster not even a shred of evidence

[2] DE 65 at 4 n.3 at 7:05–7:40 (emphases added).

that the Governor has ever threatened to enforce (much less actually enforced) the statute against peaceful protesters—and every indication is that he would not do so given that, as he has repeatedly stressed here, the statute expressly does not apply to such conduct.

In any event, an injunction against the Governor would not redress Plaintiffs' alleged injuries because almost *every* state actor capable of enforcing the statute remains free to do so regardless of the preliminary injunction. Sixty-four sheriffs are not parties to this case and, as the United States notes, could enforce the statute regardless of what happens in this litigation. *See* DE 137, at 85; U.S. *Amicus* Br. 16. Moreover, as the district court and Plaintiffs emphasize, Pls. Br. 63; DE 137, at 85, the district court's injunction does not bar anyone from suppressing a riot under the common-law definition. In these circumstances, it is impossible to see how an injunction against the Governor would even begin to redress Plaintiffs' broad, amorphous claimed fears of "discriminatory policing." Pls. Br. 34; *see Support Working Animals*, 8 F.4th at 1205.

II. PLAINTIFFS HAVE FAILED TO SHOW A LIKELIHOOD OF SUCCESS ON THE MERITS BECAUSE THE STATUTE IS NEITHER VAGUE NOR OVERBROAD.

For decades, Florida's riot statute said only that "[a]ll persons guilty of a riot . . . shall be guilty of a felony." Fla. Stat. § 870.01(2) (1973). Because the legislature did not define "riot," Florida courts used the common-law definition: "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). And as the district court stressed, criminalizing rioting using the common-law definition is plainly constitutional. DE 137, at 62, 86; *Beasley*, 317 So. 2d at 752.

In 2021, the Florida Legislature clarified when a person is or is not guilty of "commit[ting] a riot." Fla. Stat. § 870.01(2). A person is *not* guilty of "commit[ting] a riot" when he participates in "a peaceful protest." *Id.* § 870.01(7). Instead, a person is guilty of rioting *only* when 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: (a) Injury to another person; (b) Damage to property; or (c) Imminent danger of injury to another person or damage to property."

Id. § 870.01(2). Plaintiffs' overbreadth and vagueness claims fail on the merits because these statutory provisions can reasonably and readily be read not to cover "peaceful protest[ers]." *Id.* § 870.01(7); *see Stenberg v. Carhart*, 530 U.S. 914, 944 (2000); Pls. Br. 39.

A. The statute "does not prohibit . . . peaceful protest." Fla. Stat. § 870.01(7).

The statute "does not prohibit . . . peaceful protest." Fla. Stat. § 870.01(7). Peaceful protesters were thus "not intended by the legislature to be brought within [the statute's] purview." *Minis v. United States*, 40 U.S. 423, 445 (1841) (Story, J.). The "cardinal canon before all others" is that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992). The statute therefore cannot be read to cover peaceful protesters who merely "attend[]" a disturbance but "do[] not engage in violence or conduct that poses an imminent risk of injury or property damage." Pls. Br. 43.

Plaintiffs respond that subsection (7) is "the equivalent of a savings clause" that merely "restate[s] the constitutional avoidance canon." Pls. Br. 55. It is not. Subsection (7) specifies the conduct it excludes from the ambit of the statute: "peaceful protest." The Florida Legislature "would not have prohibited under [§ 870.01(2)] what it specifically exempted from prohibition under [§ 870.01(7)]." *Holder*, 561 U.S. at 24.

But Plaintiffs' cases support at most the idea that a savings clause "*on its own*" cannot "save an otherwise invalid statute." Pls. Br. 55 (emphasis added). Even if it were a mere savings clause, subsection (7) should still inform the proper meaning and scope of the rest of the statute. Courts do not "construe statutory phrases in

isolation"; they "read statutes as a whole." *United States v. Morton*, 467 U.S. 822, 828 (1984). Read together with the remaining provisions of the statute that target violent conduct, *see infra* pp. 12–16, subsection (7) at least strongly reinforces that the statute does not criminalize peaceful protest.

Plaintiffs' next attempt to read that critical limiting language out of the statute is to dismiss subsection (7) as a mere "affirmative defense." Pls. Br. 55. That is wrong because subsection (7) describes what the statute "does not prohibit"—"peaceful protest," Fla. Stat. § 870.01(7). By contrast, in Florida an affirmative defense provides an excuse for someone who has committed an offense. *See State v. Cohen*, 568 So. 2d 49, 51–52 (Fla. 1990) (explaining that an affirmative defense "concedes" the "elements of the offense" but "establish[es] a valid excuse or justification or a right to engage in" otherwise prohibited conduct). Plaintiffs' argument is contrary to the structure of the Florida criminal code, in which affirmative defenses typically appear in their own statutory section. *E.g.*, Fla. Stat. § 775.027 (insanity); *id.* § 776.012 (self-defense). Indeed, that is what the Florida Legislature did in the very Act that created the statute. A separate statutory section titled "affirmative defense in civil action" creates an "affirmative defense." *Id.* § 870.07.

B. Plaintiffs' other efforts to manufacture constitutional infirmities within the statute fail.

Common Intent. Quite apart from subsection (7), the rest of the statute confirms that it does not criminalize peaceful protest. *See* Gov. Br. 21–27. The statute makes it a crime for a "person" to "willfully participate[] in a violent public disturbance involving an assembly of three or more persons, acting with a common intent to assist each other in violent and disorderly conduct." Fla. Stat. § 870.01(2). The best reading of that language is that a "person commits a riot" only if he is "acting with a common intent to assist . . . in violent and disorderly conduct." *See* Gov. Br. 24–26.

Plaintiffs disagree, contending that, under the "nearest reasonable referent" rule of interpretation, the statute must criminalize peaceful protest because the common-intent language refers only to *some* of the "persons" mentioned in the preceding clause—specifically only those in the "assembly of three or more persons"—but does not require the "person" accused of violating the statute to have any such intent. Pls. Br. 44, 52–54. That argument fails to give effect to the comma that separates the opening clause (which refers to the "person" accused of violating the statute and his participation in a violent public disturbance of three or more "persons") from the qualifying phrase ("acting with a common intent to assist each other in violent and disorderly conduct").

As the Supreme Court has explained, "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." *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1170 (2021) (cleaned up); *accord Glasser v. Hilton Grand Vacations Co.*, 948 F.3d 1301, 1311 (11th Cir. 2020) (Sutton, J.). Here, then, the common-intent element, separated from the opening clause by a comma, applies to all "persons" mentioned in that clause. That is especially true because the relevant antecedents—the rioting "person" and the "persons" in the "assembly"—are both "persons." "When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." *Porto Rico R., Light & Power Co. v. Mor*, 253 U.S. 345, 348 (1920). Accordingly, the relevant referent here is the *entire* preceding clause—and all the "persons" within it. The statute therefore criminalizes rioting only if a person is acting with an "intent" to engage "in violent and disorderly conduct." Fla. Stat. § 870.01(2).

Plaintiffs dismiss the statute's punctuation as irrelevant largely on the strength of *Parm v. National Bank of Cal.*, 835 F.3d 1331 (11th Cir. 2016), *see* Pls. Br. 54, but that case is no warrant for doing so. In *Parm*, this Court construed an arbitration clause in a contract establishing that "any Dispute, except as provided below, will be resolved by Arbitration." *Id.* at 1336. The Court said nothing of commas, but did

hold that the modifier "except as provided below" applied only to the *preceding* words "any Dispute"—and did not also carry *forward* to apply to matters mentioned later in the contract having nothing to do with disputes. *Id.* at 1336–37. Here, however, the relevant antecedents—the rioting "person" and the "persons" in the assembly—are in the same clause, which the common-intent language unquestionably modifies. No one contends that the common-intent element modifies language that appears *later* in the statute—"injury to another person," for example. Fla. Stat. § 870.01(2)(a).

Willfully Participate. Consistent with subsection (7)'s exclusion of "peaceful protest[ing]," the statute requires "willful[] participat[ion] in a violent public disturbance." *Id.* § 870.01(2). And to act "willfully" under Florida law, a person must both know that the protest is violent and "participate" in the violence itself. *See* Gov. Br. 22–23.

Plaintiffs agree that "willfully" requires at least knowledge of violence, Pls. Br. 51, but they argue that a person can know that a protest is violent and still "participate" peacefully in that violent protest, such as through "peaceful presence near the violence," and complain that "the Legislature made even non-rioting 'participants' subject to arrest," Pls. Br. 52. Despite their concerns for nearby observers as potential "participants," Plaintiffs nevertheless contend, somewhat inconsistently, that "participate" is "incomprehensible." Pls. Br. 50.

There is nothing vague or incomprehensible about the word "participate." To participate in a murder, a robbery, or—as here—a violent public disturbance means "[t]o be active or involved in something." *Participate*, AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1285 (5th ed. 2016). So in other words, the statute requires the accused to "willfully [be active] in a violent public disturbance." Fla. Stat. § 870.01(2). Peacefully protesting in the vicinity is not enough. "Context matters," of course, Pls. Br. 50, but nothing about the context of this statute suggests a more amorphous scope for the familiar term "participate" here, a term many jurisdictions use in defining the crime of rioting. *See* Gov. Br. 22 & nn.10–11.

17 words. Plaintiffs argue that the statute must criminalize peaceful protest because the Legislature, in enacting the riot statute, qualified the common-law definition of a "riot"—a riotous "assembly of three or more persons"—with "17 words" that define with more precision than did the common law what riotous conduct actually is: "willfully participating" in that riotous assembly. Pls. Br. 48. The notion appears to be that adding those words expanded the crime of rioting to criminalize peaceful protest. *See id.* That is nonsense. Rioting at common law was "a tumultuous disturbance of the peace by three or more persons, assembled and acting with a common intent" to commit violence. *Beasley*, 317 So. 2d at 752. In adding the 17 words the Legislature has simply clarified the conduct that is riotous. If anything, the additional words narrow what constitutes riotous conduct compared

to the common-law concept, which, as the district court observed, "criminalized rioting 'or . . . inciting or encouraging a riot.'" DE 137, at 5 (quoting Fla. Stat. § 870.01 (1973)). Through the new statute, the Legislature has now limited rioting to willful participation in a violent public disturbance rather than, for example, a violent domestic disturbance within a home or backyard.

Legislative History. Departing from the text, Plaintiffs argue that legislative history shows the statute "expand[s] the common law definition to encompass more people and conduct" by "creat[ing] *more* enforcement targets for police and *more* police discretion." Pls. Br. 45 (emphases in original). Even if that characterization of the history were correct (and it is not), legislative history cannot be used to "void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it." *United States v. O'Brien*, 391 U.S. 367, 384 (1968). What one or a few of Florida's 160 Representatives and Senators said about the statute is irrelevant to whether the statute is facially unconstitutional. *See id.*

At any rate, the passages Plaintiffs quote from the legislative history do not tell the full story. Indeed, Plaintiffs focus on statements by a single Representative. Pls. Br. 46. But that Representative, in other portions of the same statement, explained that "*violence committed* by a large group of people" is "even worse" than "*violence committed* by an individual" because it "adds [the] special dangerous

element" that "individual[s] lose[] their personal sense of responsibility" when "in a group." Hearing on: HB1 Combating Public Disorder Before H. Crim. Just. & Pub. Safety Subcomm., 2021 Leg. Sess. 3:50–5:02 (Fla. 2021) (statement of Rep. Fernandez-Barquin) (emphases added).[3] He further explained that the statute "increases the *penalties*" for *violent* crimes committed "in the context of a riot." *Id.* (emphasis added). He also emphasized in his remarks that Americans "have the right to a peaceful protest" and that the statute's "purpose" "is to prevent violence." *Id.* at 35:05–36:05. As another Representative remarked, the statute "is solely focused on preventing violence" and "protects peaceful protesters from bad actors who want to perpetrate violence." *Id.* (statement of Rep. Barnaby). These statements reflect what is apparent on the face of the statute: It is directed at violent conduct, and "does not prohibit . . . peaceful protest." Fla. Stat. § 870.01(7).

* * *

The best reading of the statute, taken as a whole—including the proviso that the statute "does not prohibit . . . peaceful protest"; the common-intent element; and the qualification that the statute applies to "willful participat[ion]" in violence—is that it does not criminalize peaceful protest. That reading is, at minimum, reasonable, readily apparent, and all that is necessary here. *See Carhart*, 530 U.S. at 944.

[3] https://thefloridachannel.org/videos/1-27-21-house-criminal-justice-public-safety-subcommittee/.

C. Given the statute's substantial textual limitations, the statute is not overbroad.

Plaintiffs claim that the statute is unconstitutionally overbroad because there is no "reasonable and readily apparent reading that excludes those who merely attend protests involving violence—even if the individual neither participates nor intends to participate in violence." Pls. Br. 58 (cleaned up). As discussed above, that is wrong.

But even if the statute could be read to cover peaceful protest, Plaintiffs misstate the law. The question is not whether the statute criminalizes *some* "protected expressive activity," Pls. Br. 58, but rather whether the unconstitutional sweep of the statute is "substantial" relative to its "plainly legitimate sweep." *See United States v. Williams,* 553 U.S. 285, 292 (2008). Plaintiffs must establish that *substantial* overbreadth "from the text of [the statute] *and from actual fact*." *Virginia v. Hicks*, 539 U.S. 113, 122 (2003) (emphasis added). And their burden is especially heavy given that they have failed to point to any "evidence that the [statute] ha[s] been applied in the scenarios posited by the[m]." *Cheshire Bridge Holdings, LLC v. City of Atlanta*, 15 F.4th 1362, 1377–78 (11th Cir. 2021). That "lack" of evidence requires Plaintiffs to make a "convincing case" that the statute is, on its face, "substantially overbroad." *Id.*

Plaintiffs make no effort to satisfy that demanding standard. They do not weigh the constitutional applications of the statute against their imagined

unconstitutional applications. Indeed, they concede that the statute covers "much unprotected activity." Pls. Br. 59. They assert only that in the statute's "ambiguity, it also consumes vast swaths of core First Amendment speech," Pls. Br. 59, revealing that their "overbreadth" argument is really just a repackaged version of their vagueness argument. Plaintiffs offer little more than an "endless stream of fanciful hypotheticals," *Williams*, 553 U.S. at 301, such as a peaceful protester who hands out a water bottle while leaving the violent public disturbance, or the peaceful protester filming the violence. Pls. Br. 42. But that "speculat[ion]" about "'imaginary' cases," *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008) (quotations omitted), is not appropriate for facial overbreadth adjudication and not representative of *substantial* overbreadth relative to the statute's legitimate reach, *see Williams*, 553 U.S. at 301.

III. THE REMAINING PRELIMINARY INJUNCTION FACTORS FAVOR THE GOVERNOR.

A. Plaintiffs unreasonably delayed in seeking injunctive relief.

Plaintiffs' months-long delay in seeking injunctive relief after the enactment of the statute, and even after filing their complaint, severely undercuts their claims of imminent, irreparable harm. *See* Gov. Br. 34–36; *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2016). In contending otherwise, Plaintiffs simply ignore *Wreal*, which denied injunctive relief based on a delay three months longer than Plaintiffs' delay here, instead relying on decisions from the Seventh and

Tenth Circuits suggesting that their delay might be excused. Pls. Br. 62–63. Plaintiffs cannot sleep on their rights for so long and then demand the extraordinary equitable relief they seek here. *See Beame v. Friends of the Earth*, 434 U.S. 1310, 1313 (1977).

B. The equities and the public interest favor the Governor.

The equities and the public interest likewise favor vacating the injunction. *See* Gov. Br. 36–37.

When a State is "enjoined . . . 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). Plaintiffs nevertheless contend that the equities favor the injunction because the district court left the common-law crime of rioting in place pending trial—and that this law and many others "remain available to arrest and prosecute those who engage in rioting and other forms of violence." Pls. Br. 64. The flip side to that, though, is that keeping an injunction in place will do virtually nothing to remedy Plaintiffs' abstract fears of "discriminatory policing." Pls. Br. 34. Precisely because the injunction leaves law enforcement many other tools to quell riots—including enforcing the common-law crime of rioting (which, unlike the provision at issue, does not expressly exclude "peaceful protest")—the injunction does nothing to address Plaintiffs' stated concerns and thus cannot serve the public interest even from their perspective. The district court abused its discretion in entering an injunction that provides little benefit

to Plaintiffs, while enjoining a presumptively valid law enacted by a sovereign state.

Plaintiffs' appeal to federalism does not support upholding the injunction. *See* Pls. Br. 65. To the contrary, invalidating state statutes based on imagined applications instead of as-applied facts "short circuit[s] the democratic process by preventing laws embodying the will of the people" of the State of Florida, *Wash. State Grange*, 552 U.S. at 451. The only affront to federalism here is the district court's order. The equities and public interest favor vacating it.

IV. IN THE ALTERNATIVE, THE COURT SHOULD CERTIFY THE QUESTION OF WHETHER THE STATUTE CRIMINALIZES PEACEFUL PROTEST TO THE FLORIDA SUPREME COURT.

The Governor agrees with Plaintiffs that certification to the Florida Supreme Court is inappropriate. Pls. Br. 67 n.20. But that is because the statute plainly does not criminalize peaceful protest—not because, as Plaintiffs contend, it does. But the Governor does agree that certification to the Florida Supreme Court would be appropriate if the Court disagrees with the Governor's arguments for why the injunction should be reversed. To be clear, certification should not be the preferred course. Only if the Court disagrees with the Governor's arguments for reversing the injunction should the Court certify to the Florida Supreme Court.

The United States has filed an amicus brief—the cover of which is labeled as "SUPPORTING PLAINTIFFS-APPELLEES." Oddly, though, the central claim of this brief is that the Court should reject Plaintiffs' contention that certification to the

Florida Supreme Court is inappropriate because, in the United States' view, both sides advance "plausible" interpretations of the statute. U.S. *Amicus* Br. 7, 17–20. The United States takes this position even though no party to this case seeks certification as a front-line remedy. The United States also makes no effort to demonstrate why it is "plausible" to read a statute that "does not prohibit . . . peaceful protest," Fla. Stat. § 870.01(7), to criminalize peaceful protest. Nor does the United States defend the district court's injunction on the merits—even as it urges the Court to leave that injunction in place while the parties undertake the time-consuming process of seeking a ruling from the Florida Supreme Court on the correct interpretation of the statute. *See* U.S. *Amicus* Br. 20–21. That unreasoned position should be rejected.

The United States is also wrong that, should the Court certify to the Florida Supreme Court, it should keep the injunction in place as that process moves forward. The whole point of certification is to avoid "infring[ing] on the sovereign immunity of states" by "depriv[ing] state courts of the opportunity to construe their own statutes." *Pittman v. Cole*, 267 F.3d 1269, 1289–90 (11th Cir. 2001). That is exactly what the district court did below by enjoining the statute as facially overbroad. Maintaining the injunction would undercut the justifications for certification in the first place, which sound in federalism and comity. *See* U.S. *Amicus* Br. 17–20. It would be contradictory to certify a disputed question out of respect for the State,

while at the same time leaving in place an injunction against a duly enacted state law.

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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February 17, 2022

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limits of Federal Rule of Appellate Procedure 32(a)(7)(B)(ii) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Eleventh Circuit Rule 32-4, this brief contains 5,427 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 February 17, 2022, 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