No. SC23-53

Supreme Court of Florida

GOVERNOR RON DESANTIS, ET AL.,

Defendants-Appellants,

v.

DREAM DEFENDERS, ET AL.,

Plaintiffs-Appellees.

ON REVIEW OF A CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, CASE NO. 21-13489

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INTRODUCTION

In response to an unprecedented wave of civil rights and police accountability demonstrations occurring nationwide following the 2020 murder of George Floyd and others by law enforcement, Florida enacted legislation known as HB1 (the "Combating Public Disorder Act"). Although Florida law has proscribed "rioting" for well over a century—and although the previous anti-riot law has been used to prosecute the small minority who engage in violence at protests—Defendant-Appellant Governor Ron DeSantis stated that increasing punishments and expanding liability were necessary responses to the recent protests. In fact, he called for Florida law enforcement to make "a ton of bricks rain down on" those who violated the law and touted HB1 as the "strongest anti-rioting, pro-law enforcement piece of legislation in the country." CA11 App. 288.[1]

Recognizing the chill on free speech rights invited by the most natural reading of HB1's definition of the crime of "riot," a federal district court preliminarily enjoined Defendants from enforcing that

[1] Citations to "CA11 App. ___" refer to the Corrected Appendix filed by the Governor in the United States Court of Appeals for the Eleventh Circuit. *See* Case No. 21-13489 (11th Cir. Dec. 14, 2021), ECF No. 51.

natural interpretation of the statute against non-violent protests like those organized by the Plaintiffs in this case. That injunction remains in place to prevent the irreparable harm that would occur if Defendants enforced the plain reading of the statute against them.

But the federal courts faced important limits on what they could consider, and how far they could go, in adopting interpretations other than the statute's most natural meaning. That is why the United States Court of Appeals for the Eleventh Circuit sought this Court's assistance. Only this Court has the power to construe the statute at issue authoritatively, with resort to the full panoply of tools that Florida courts use to determine the meaning of Florida law.

This Court should exercise that authority to give the statutory definition of "riot" a definitive limiting construction. Although (as the district court held) the statute's plain text is most naturally read to encompass non-violent protected speech, it is also fairly possible to construe the text narrowly to maintain the pre-existing common-law definition and avoid encroaching upon constitutionally protected expression. Longstanding canons of interpretation—including the principle of constitutional avoidance, the canon disfavoring changes in the common law, and the rule of lenity—all favor this Court

adopting a narrow, rights-protective interpretation. Plaintiffs therefore respectfully request that this Court adopt the limiting construction set forth below and construe Section 870.01(2) as codifying the common-law definition of "riot" that preexisted its enactment.

STATEMENT OF THE CASE AND FACTS

I. FACTUAL BACKGROUND

Plaintiffs are civil rights organizations that regularly organize, and whose members regularly attend, non-violent demonstrations in Florida to advocate for racial justice and police accountability. CA11 Op. 5; CA11 App. 222–34. The demonstrations that Plaintiffs organize constitute peaceful exercises of protected First Amendment rights to freedom of speech and assembly. CA11 Op. 5 (explaining that "plaintiffs strive to keep the protests free from violence"). Nevertheless, some of Plaintiffs' demonstrations have been targeted by white supremacists and other outside agitators who have provoked confrontation, acted violently, and on at least one occasion spurred a heavy-handed response from police. CA11 App. 149, 153–54, 172–73; *see also* CA11 Op. 5–6.

During the summer of 2020, Plaintiffs and others participated in one of the largest mass movements in the country's history. Seeking to promote racial justice and police accountability, countless people around the country protested multiple police killings of Black people, in the context of historical police violence against Black communities. CA11 App. at 58–59, 162. In Florida, Plaintiffs were among the Black-led organizations who organized most of these protests. *Id.* at 59–60.

Soon thereafter, the Governor and the Florida Legislature enacted HB1. Prior to 2021, it was a crime in Florida to commit a "riot," but that term was undefined and construed to carry its common-law meaning—which requires a "tumultuous disturbance of the peace by three or more persons, assembled and acting with a common intent" to commit violence. *State v. Beasley*, 317 So. 2d 750, 752–53 (Fla. 1975) (adopting this common-law construction of the crime of "riot" in order "to avoid a holding of unconstitutionality"). Section 15 of HB1—codified as Florida Statutes Section 870.01(2)—for the first time defined the term "riot" in statutory text. CA11 Op. 4–5. That statutory definition of the crime of "riot" is the provision this Court has been asked to construe. Other provisions of HB1

increased penalties and required that individuals arrested for rioting "be held in custody until brought before the court for admittance to bail." FLA. STAT. § 870.01(6).

II. PROCEDURAL BACKGROUND

In May 2021, Plaintiffs filed a federal lawsuit challenging HB1 on several grounds, including that its new definition of "riot" was unconstitutionally vague and overbroad in violation of the First and Fourteenth Amendments. CA11 App. 97–99, 219. In September 2021, the district court granted a preliminary injunction that enjoins Defendants from enforcing Section 870.01(2)'s new "riot" definition. CA11 App. 304–05.[2]

In granting the preliminary injunction, the federal district court held that Plaintiffs showed a likelihood of success on their claim that Section 870.01(2)'s definition of "riot" is both impermissibly vague and overbroad. After parsing the statutory language for over 20

[2] The Defendants against whom the preliminary injunction runs are Governor Ron DeSantis, Sheriff Mike Williams of Duval County, Sheriff Walt McNeil of Leon County, and Sheriff Gregory Tony of Broward County. CA11 App. 305. Sheriff McNeil and Sheriff Tony did not appeal the preliminary injunction. *See* CA11 Op. 9. Attorney General Ashley Moody was originally named as a Defendant but has since been dismissed from the case. CA11 App. 219 n.8.

pages, the court reasoned that a person of ordinary intelligence would not know if the law "meant that she had to merely avoid sharing a common intent to assist two others in violent and disorderly conduct"—a narrow interpretation that would mirror the common-law definition—or "if she had to avoid participating in any public event where such violent and disorderly conduct could occur." CA11 App. 286.

Out of deference for this Court's primacy in matters of state law, the district court expressly refrained from applying traditional constitutional avoidance principles or otherwise adopting a limiting construction of the statute. CA11 App. 261–63.

Defendants Governor DeSantis and Sheriff Williams appealed the district court's preliminary injunction to the Eleventh Circuit. Explaining that Plaintiffs' First Amendment claims for vagueness and overbreadth turn on the proper construction of the statute, the Eleventh Circuit declined for now to resolve the merits of Plaintiffs' challenge. CA11 Op. 17–19. Instead, it certified the issue of the statute's meaning to this Court, seeking an authoritative construction and noting that certification would give this Court "an opportunity to . . . attempt to interpret state law in such a way as to

make it constitutional." CA11 Op. 25 (internal quotation marks, citation, and alterations omitted).

The precise certified question posed by the Eleventh Circuit is:

> What meaning is to be given to the provision of Florida Stat. § 870.01(2) making it unlawful 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, resulting in . . . [i]njury to another person or damage to property"?

CA11 Op. 26–27 (alterations in original).[3]

SUMMARY OF ARGUMENT

Although Section 870.01(2)'s definition of the crime of "riot" is most naturally read to encompass non-violent expressive activity, several canons of construction available to this Court favor adopting a limiting construction that avoids those unconstitutional applications and leaves the existing common-law definition unchanged.

I. Section 870.01(2)'s definition of "riot" is most naturally read to allow the arrest and prosecution of a person who participates

[3] "To assist the Florida Supreme Court in answering our question," the Eleventh Circuit also "ask[ed] the Court to consider" four additional inquiries. CA11 Op. 27–28. These additional queries are addressed *infra*, in Part III.

peacefully in a protest in which others act violently. Essentially, that is because Section 870.01(2) states that the person must participate in a "violent public disturbance *involving*" a common-law riotous assembly, which means that the phrase "violent public disturbance" is most naturally read to encompass both the violent and peaceful elements of a protest where violence occurs. The statute's plain text thus is most naturally read to expand the prior common-law definition in a way that is unconstitutionally vague and overbroad, because it would fail to provide reasonable notice of what it prohibits and criminalize protected First Amendment activity.

II. Canons of construction favor adopting a limiting construction that leaves the existing common-law definition unchanged and thereby resolves the grave constitutional concerns identified by the federal district court.

This Court has the power to adopt a narrower construction than the most natural reading of the statute if such a limiting construction is fairly possible. At least three different principles of statutory interpretation support such a result here. First, the canon of constitutional avoidance applies: a federal district court has already enjoined Section 870.01(2) on the ground that it likely violates the

First and Fourteenth Amendments, and the Eleventh Circuit has indicated that certain interpretations of the statute would render it unconstitutional. Second, the presumption against alterations to the common law counsels in favor of a limiting construction that reads Section 870.01(2)'s definition of "riot" to mirror the common-law meaning that has long applied under Florida law. Finally, the rule of lenity supports a limiting construction of Section 870.01(2).

Applying these interpretive principles, it is fairly possible to construe Section 870.01(2) to reach no farther than the preexisting common-law definition of "riot" adopted in *Beasley*, 317 So. 2d at 752–53. First, it is fairly possible to read the phrase "participates in a violent public disturbance" to merely reinforce that an individual must be involved in the same "violent or disorderly conduct" as the assembly of riotous individuals. Second, it is also fairly possible to read both of the statute's *mens rea* requirements broadly. It is fairly possible to read the statute's first reference to intent—"willfully"—to apply to every subsequently listed element of the offense. And it is fairly possible to construe the statute's second reference to intent—"acting with a common intent"—to apply not just to the "assembly of three or more persons," but also to the "person" who "commits a riot."

This Court should adopt these interpretations to limit the sweep of Section 870.01(2) and preserve the preexisting common-law definition of the crime of "riot."

III. Adopting these limiting constructions would fully resolve the federal courts' constitutional concerns about the statute by giving a definitive, clear, and narrow construction to the otherwise vague and overbroad term "participates in a violent public disturbance." These limiting constructions would also provide answers to each of the four additional questions posed by the Eleventh Circuit.

ARGUMENT

The crux of the question certified by the Eleventh Circuit is whether Section 870.01(2)'s definition of "riot" covers a person who participates in a protest during which violence occurs but who "d[oes] not engage in, or intend to assist others in engaging in, violent and disorderly conduct[.]" CA11 Op. 28; *see* Governor's Br. 11.

Section 870.01(2) defines a person who "commits a riot" as follows:

> 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.

FLA STAT. § 870.01(2).

I. THE STATUTE IS MOST NATURALLY READ TO CRIMINALIZE CONSTITUTIONAL EXPRESSION, MAKING IT UNCONSTITUTIONALLY VAGUE AND OVERBROAD

As Plaintiffs argued in federal court, and as the federal district court held, the most natural reading of the statute's text encompasses non-violent expressive activities and thus gives rise to "grave constitutional concerns" under the First and Fourteenth Amendments. CA11 App. 272; *see* CA11 Op. 7.

More specifically, the federal district court applied established constitutional standards to conclude that the most natural reading of the text was likely unconstitutionally vague and overbroad. CA11 App. 283–93. A law is unconstitutionally vague if it "subjects the exercise of the right of assembly to an unascertainable standard," such that persons "of common intelligence must necessarily guess at its meaning" and differ as to its application. *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971). "[S]tandards of permissible statutory vagueness are strict in the area of free expression."

N.A.A.C.P. v. Button, 371 U.S. 415, 432 (1963). "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Id.* at 433. Moreover, a statute may be unconstitutionally overbroad if it criminalizes "a substantial amount of protected free speech, judged in relation to the statute's plainly legitimate sweep." *Virginia v. Hicks*, 539 U.S. 113, 118–19 (2003) (internal quotation marks omitted). As the federal district court explained, vagueness and overbreadth are "interrelated" and a law can be "both overbroad and vague." CA11 App. 259–60.

The most natural reading of the statute violates these precepts because it allows arrest and prosecution of someone who merely non-violently "participates" in a protest during which others foment violence. As the federal district court concluded, it is unclear whether the "violent public disturbance" in which a person must "participate[]" to commit the offense of "riot" encompasses solely the violent and disorderly "assembly of three or more persons" referred to in the remainder or the statute, or whether a "violent public disturbance" also extends to additional, peaceful elements of a public event where violence breaks out. The latter interpretation is the most

natural reading because the new phrase "violent public disturbance" is described as "*involving*" a violent assembly of three or more persons that essentially mirrors the common-law definition of "riot," suggesting that this new prefatory language encompasses something broader than the preexisting definition.[4] The operative verb "participates" reinforces that reading because it simply means "to take part in something . . . to have a part or share in something." *Participate*, Webster's New Third International Dictionary 1646 (2002). One can "take part in" a larger public gathering where violence occurs without taking part in violence specifically.[5]

Although the statute contains multiple references to mental state, the most natural reading of those intent requirements does not cabin the federal district court's broad interpretation. The requirement to participate "willfully"—*i.e.*, "intentionally and

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[4] The federal district court explained the point this way: "By using the modifier 'involving,' the Florida Legislature appears to have intended for the riotous assembly to be only a smaller component of the larger whole, in the same sense that a movie involving sex and violence is not necessarily a film in which all the characters do throughout the film is engage in sex and violence." CA11 App. 271; *see also* CA11 Op. 20–21.

[5] As the Eleventh Circuit explained, "the same participation trophy goes to the child who hit the game-winning home run and the child who simply showed up to play the game." CA11 Op. 20.

purposefully," *State v. Dorsett*, 158 So. 3d 557, 562 (Fla. 2015)—is most naturally read to modify only the immediate next phrase "participates in a violent public disturbance," giving the word all the same infirmities as that phrase. And the limiting phrase "acting with a common intent to assist each other in violent and disorderly conduct" is most naturally read to modify only the "assembly of three or more persons" that immediately precedes it, not the "person" at the beginning of the sentence who "participates in a violent public disturbance." *See Lockhart v. United States*, 577 U.S. 347, 351 (2016); *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003).

For these essential reasons and others elaborated upon in the federal court proceedings, the most natural reading of the statute is unconstitutional. Because "participates in a violent public disturbance" is most naturally read to encompass an undefined swath of non-violent conduct, the statute fails to give Floridians reasonable notice of what the statute prohibits, and invites arbitrary and discriminatory enforcement on the part of law enforcement—both of which render the statute unconstitutionally vague. *See Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293, 1319 (11th Cir. 2017) (en banc); *Hill v. Colorado*, 530 U.S. 703, 732 (2000). The most

natural reading of the statute likewise impermissibly sweeps in "vast swaths of core First Amendment speech," thus rendering it unconstitutionally overbroad. CA11 App. 291 (preliminary injunction order, finding a likelihood of success on this claim); *see Hicks*, 539 U.S. at 118–19. As the federal district court recognized in granting the preliminary injunction, such a vague and overbroad statute offends the constitution by giving the government "leeway to punish protected conduct." CA11 App. 260.

II. BECAUSE A NARROWER READING IS FAIRLY POSSIBLE, THIS COURT SHOULD APPLY A LIMITING CONSTRUCTION TO SAFEGUARD CONSTITUTIONAL RIGHTS AND PRESERVE THE COMMON LAW

Although the most natural reading of Section 870.01(2)'s definition of "riot" renders Section 870.01(2) unconstitutional, this Court's inquiry does not end there. Background principles of statutory construction may require this Court to adopt a narrower reading of the statute, so long as such an interpretation is fairly possible.

Importantly, such a limiting construction was not available to the federal courts. Because "it is not within [the] power [of the federal courts] to construe and narrow state laws," *Grayned v. City of*

Rockford, 408 U.S. 104, 110 (1972), federal courts entertaining constitutional challenges to state statutes are required to consider only the "actual text of the statute" and "any limiting constructions that a state court has . . . proffered," CA11 Op. 19 (quoting *Boos v. Barry*, 485 U.S. 312, 329 (1988)) (ellipsis in original). That means that a federal court will consider a novel limiting construction of a state statute only if that interpretation is "*both* reasonable and readily apparent" on the face of its text. CA11 App. 275 (preliminary injunction order); *see also Boos*, 485 U.S. at 330 (comparing state and federal standards); *Stenberg v. Carhart*, 530 U.S. 914, 944 (2000) ("[A]dopting the Attorney General's interpretation might avoid the constitutional problem discussed[,] . . . [b]ut we are without power to adopt a narrowing construction of a state statute unless such a construction is reasonable and readily apparent.") (internal quotation marks omitted).

This Court, however, has more latitude. As the Eleventh Circuit noted in its certification order, principles of federalism suggest that this Court is "less constrained than is the federal judiciary with respect to statutory interpretation." CA11 Op. 25 (quoting *Pittman v. Cole*, 267 F.3d 1269, 1290 (11th Cir. 2001)). Indeed, as explained

below, this Court is empowered to adopt a limiting construction of the statute to eliminate constitutional concerns so long as that construction is "fairly possible."

At least three background principles of Florida law counsel in favor of a limiting construction of Section 870.01(2): (1) the principle of constitutional avoidance; (2) the presumption against changes to the common law; and (3) the rule of lenity. And although not a "readily apparent" interpretation of Section 870.01(2), it is fairly possible to construe the definition of "riot" to reach no farther than its concededly constitutional common-law meaning.

A. Applicable Interpretive Principles Support A Limiting Construction

1. Constitutional avoidance

As the Eleventh Circuit contemplated in its certification order, the first basis for a limiting construction is the principle of constitutional avoidance. *See* CA11 Op. 25 (noting that "certification gives the highest court of a state an opportunity to attempt to interpret state law in such a way as to make it constitutional") (alterations, internal quotation marks, and ellipsis omitted).

This Court "has an obligation to give a statute a constitutional construction" when doing so "avoids an unreasonable and unconstitutional result." *Florida Dep't of Highway Safety & Motor Vehicles v. Hernandez*, 74 So. 3d 1070, 1079 (Fla. 2011). Accordingly, this Court will adopt a constitutional interpretation of a statute "if fairly possible." *Franklin v. State*, 887 So. 2d 1063, 1073 (Fla. 2004) (a statute "must be construed, if fairly possible, as to avoid unconstitutionality and to remove grave doubts on that score"); *see also, e.g.*, *Del Valle v. State*, 80 So. 3d 999, 1012–13 (Fla. 2011) ("where such a construction is possible"); *Florida Dep't of Revenue v. Howard*, 916 So. 2d 640, 642 (Fla. 2005) (similar). By contrast, this Court has said that it will adopt an interpretation that renders the statute unconstitutional only when that unconstitutional interpretation "appear[s] beyond reasonable doubt." *Crist v. Florida Ass'n of Crim. Def. Laws., Inc.*, 978 So. 2d 134, 139 (Fla. 2008).

The canon of constitutional avoidance clearly applies here. A federal district court has already determined that the most natural reading of Section 870.01(2) likely violates the First Amendment, and the Eleventh Circuit's decision to certify this question similarly indicates that certain interpretations of Section 870.01(2) would

render it unconstitutional. *See* CA11 Op. 17 (justifying certification to this Court by explaining that "[r]esolution of the plaintiffs' vagueness and overbreadth claims requires interpretation of [Section] 870.01(2)"). In fact, Defendants have never seriously contested that the reading of the statute endorsed by the federal district court renders the statute unconstitutional; they have simply argued that the statute should be construed more narrowly. Moreover, as the district court recognized, the statute's Savings Clause, which states that the statute "does not prohibit constitutionally protected activity such as a peaceful protest," Fla. Stat. § 870.01(7), explicitly invites application of the constitutional avoidance canon. *See* CA11 App. 276 (Savings Clause "restate[s] the constitutional avoidance canon"). Although the district court was constrained from applying constitutional avoidance to a State enactment, this Court is under no such constraint. *See Boos*, 485 U.S. at 330; *Grayned*, 408 U.S. at 110; *Stenberg*, 530 U.S. at 944.

2. Common-law preservation

The presumption against alterations to the common law further counsels in favor of a limiting construction—specifically one that

reads Section 870.01(2)'s definition of "riot" to mirror its common-law meaning.

"A basic rule of textual interpretation is that 'statutes will not be interpreted as changing the common law unless they effect the change with clarity.'" *Peoples Gas Sys. v. Posen Constr., Inc.*, 322 So. 3d 604, 611 (Fla. 2021) (citation omitted). "The presumption is that no change in the common law is intended unless the statute is explicit and clear in that regard." *Thornber v. City of Fort Walton Beach*, 568 So. 2d 914, 918 (Fla. 1990). This interpretive presumption often works hand-in-hand with constitutional avoidance principles, specifically to narrow the reach of criminal statutes.

This Court thus interpreted the prior version of Florida's anti-riot statute to presume the continuity of the common law, in part to neutralize First Amendment concerns arising from a contrary interpretation. *Beasley*, 317 So. 2d at 753. It has done the same with other criminal statutes raising First Amendment concerns. *See, e.g.*, *Mobley v. State*, 409 So. 2d 1031, 1034 (Fla. 1982) ("Because we construe this section to include the common law elements of unlawful assembly, we find that it is not unconstitutionally vague

and that it does not violate the first amendment right to freedom of assembly.").[6]

As with constitutional avoidance, the presumption against alterations to the common law is plainly implicated here. The prior version of Florida's anti-rioting statute was interpreted for decades to incorporate the common-law definition of the term "riot." *Beasley*, 317 So. 2d at 752–53. Rather than being "explicit and clear" in rejecting that definition, *Thornber*, 568 So. 2d at 918, part of the new statute closely tracks the common-law definition's language. *See* CA11 App. 277 (preliminary injunction order, observing that "the common-law definition appears to be engrafted, in part, into the statute's definition"); Sheriff's Br. 23–24. Moreover, interpreting the statute to codify the longstanding common-law definition of a riot would avoid an unconstitutional result: The federal district court has already stated that it "would not hesitate to uphold the law against a

[6] *See also Deehl v. Knox*, 414 So. 2d 1089, 1092 (Fla. 3d DCA 1982) (observing that this Court has "consistently engrafted the limiting common law definitions of riot and unlawful assembly upon the Florida statutory law," specifically "in order to remove a first amendment overbreadth objection which would admittedly have been well-taken" based on the text alone).

vagueness or overbreadth challenge" were it interpreted to mirror that definition. CA11 App. 277.

3. The rule of lenity

Finally, if necessary, the parties agree that the rule of lenity can further support a limiting construction of Section 870.01(2)'s definition of the crime of "riot." *See* Governor's Br. 12 (asserting that if this Court "find[s] the statute ambiguous . . . the same result obtains under the rule of lenity").[7]

The rule of lenity instructs that criminal statutes "must be strictly construed in favor of the accused where there is doubt as to their meaning." *Kasischke v. State*, 991 So. 2d 803, 814 (Fla. 2008) (quoting *State v. Winters*, 346 So. 2d 991, 993 (Fla. 1977)). It typically comes into play as a tiebreaker if other textual canons for ascertaining meaning prove inconclusive. *See id.* at 814; *Conage v. United States*, 346 So. 3d 594, 602–03 (Fla. 2022); FLA. STAT.

[7] Although the U.S. Supreme Court has declined to apply lenity principles in facial challenges like the federal court proceedings in this case, *see* Pls.' CA11 Br. 56–57 (citing *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 704 n.18 (1995)), Plaintiffs are aware of no similar rule that would prevent this Court from applying the rule of lenity in answering the question of statutory construction certified to it by the Eleventh Circuit.

§ 775.021(1) (providing that a criminal statute must be strictly construed in favor of defendants "when the language is susceptible of differing constructions").

Because Section 870.01(2) is a criminal statute, and the Eleventh Circuit has recognized that it is at least arguably susceptible of multiple competing interpretations, if this Court determines that ambiguity remains after resort to the two canons discussed above, the rule of lenity should tip the balance in favor of a narrow limiting construction.

B. A Limiting Construction That Safeguards Constitutional Rights And Preserves The Common Law Is Fairly Possible

Applying the canons above, it is fairly possible to construe the definition of "riot" in Section 870.01(2) to reach no farther than its common-law meaning. Doing so would both avoid the significant constitutional problems previewed in the federal courts and preserve the common law. *See* CA11 App. 301 ("[H]ad the Florida Legislature simply codified the definition that the Florida Supreme Court announced in the *Beasley* case, Plaintiffs' [First Amendment] claims would likely fail.").

Under the common law, the offense of rioting is restricted to "three or more persons act[ing] with a common intent to mutually assist each other in a violent manner to the terror of the people and a breach of the peace." *Beasley*, 317 So. 2d at 753. As noted, much of Section 870.01(2)'s text echoes that definition. *See* CA11 App. 277. By narrowly interpreting the phrase "participates in a violent public disturbance" and by applying Section 870.01(2)'s *mens rea* requirements across all its elements, it is fairly possible to give Section 870.01(2)'s definition of "riot" a limiting construction that merely codifies that preexisting definition.

1. Narrowly construing "participates in a violent public disturbance"

It is fairly possible to read the phrase "participates in a violent public disturbance" as requiring a person to participate specifically in the "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). Such a reading restates the essential elements of a common-law riot, CA11 App. 277; Governor's Br. 14–16; Sheriff's Br. 22–24, and thereby avoids the First Amendment problems

inherent in any definition of "riot" that does not require personal involvement in the "violent or disorderly conduct."

Such an interpretation is fairly possible if "participates in a violent public disturbance" is read to merely reinforce that a person must be involved "in violent or disorderly conduct" in order to commit the offense, rather than to alter or supplement the existing common-law rule. *See* Governor's Br. 16–19; Sheriff's Br. 24. Although courts should be wary of surplusage, a statute can sometimes be construed to "contain[] some redundancy" when there are good reasons to adopt that reading. *Rimini St., Inc. v. Oracle USA, Inc.*, 139 S. Ct. 873, 881 (2019); *see, e.g.*, *King v. Burwell*, 576 U.S. 473, 502 (2015) (Scalia, J., dissenting) (explaining that legislators "sometimes repeat themselves"). Here, constitutional avoidance and other interpretive canons support such a construction.

Such an interpretation is also fairly possible if the word "involving" is defined to mean something like "involving intrinsically." *See* Involve, Merriam-Webster, https://www.merriam-webster.com/dictionary/involving (last visited May 18, 2023) (defining "involve" to include "to relate closely" and "to surround as if with a wrapping: envelop"); *Allied-Bruce Terminix Cos. v. Dobson*, 513

U.S. 265, 275–76 (1995) (entertaining an argument that the word "involving" in a statute could be understood to mean "involv[ing] . . . intrinsically") (emphasis omitted). Under such a definition, a person would be guilty of committing a "riot" only if her willful participation in a violent public disturbance *intrinsically involved* willful participation in conduct that would have constituted rioting at common law. In other words, despite the distinction with the common-law wording, it is fairly possible to read the new requirement that a person "participates in a violent public disturbance *involving*" a common-law riotous assembly to merely restate and codify what it means for a person to commit a common-law riot.

2. Broadly construing Section 870.01(2)'s intent requirements

> There are two different references to intent in the statute:
>
> 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, acting with [2] a common intent to assist each other in violent or disorderly conduct, resulting in: [personal injury, property damage, or imminent danger of either one].

FLA STAT. § 870.01(2) (emphasis added).

It is fairly possible to read both of these intent requirements as applying to all elements of the offense, thus limiting its scope to those who intentionally participate in a common-law riot.

1. *"Willfully."* It is fairly possible to read the statute's first reference to intent—"willfully"—to apply to every subsequent element of the offense, including those elements that encompass the common-law definition of a riot, in order to ensure that the statute does not apply to constitutionally protected conduct. *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 70 (1994); *Elonis v. United States*, 575 U.S. 723, 734 (2015); *Chicone v. State*, 684 So. 2d 736, 743–44 (Fla. 1996); *see also* Governor's Br. 13, 18–19; Sheriff's Br. 12, 25–28. Courts sometimes infer even non-explicit *mens rea* requirements when a more natural reading of the plain text would encompass innocent or constitutionally protected conduct. *See X-Citement Video*, 513 U.S. at 70–73; *Rehaif v. United States*, 139 S. Ct. 2191, 2196–97 (2019) (collecting cases). Under such a construction, the statute would require an individual to be "willfully . . . involv[ed in] an assembly of three or more persons, acting with a common intent to assist each other in violent or disorderly conduct, resulting in [personal injury, property damage, or imminent danger]." FLA STAT.

§ 870.01(2). In other words, this construction would require willful involvement in a common-law riot.

This Court has taken a similar approach to save criminal statutes from unconstitutionality in the past. For instance, although the relevant statutory provision in *Del Valle* lacked *any* textual mention of a "willfullness" requirement, this Court nevertheless inferred such a requirement as a limiting construction. *See* 80 So. 3d at 1111–13. Here the statute includes an express textual reference to willful conduct, and it is therefore fairly possible to interpret that *mens rea* requirement as applying to each element of Section 870.01(2) rather than only to the word "participates."

2. *"Acting with a common intent."* It is also fairly possible to construe the statute's second reference to intent—"acting with a common intent"—to apply not just to the "assembly of three or more persons," but also to the "person" who commits a "riot." *See* Governor's Br. 20; Sheriff's Br. 18, 25, 28. Although well established and "'quite sensible as a matter of grammar,'" the rule that "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that immediately follows" is nevertheless "not an absolute." *Barnhart*, 540 U.S. at 26; *see Kasischke*, 991 So. 2d at 812

(explaining that this "last antecedent" rule is neither "inflexible" nor "uniformly binding"). In light of the interpretive canons that favor a limiting construction here, and given the comma before "acting with a common intent," it is fairly possible to read "acting with a common intent" to modify the accused "person" referenced early in the preceding clause. *See Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1170 (2021); *see also* Governor's Br. 20–21.

III. THE LIMITING CONSTRUCTIONS PROPOSED HERE ADDRESS THE ADDITIONAL QUESTIONS POSED BY THE ELEVENTH CIRCUIT

Adopting the limiting constructions described above would fully resolve the federal courts' concerns about the statute. Combined, these interpretations would require a person to "willfully participate" in the "assembly of three or more persons, acting with a common intent to assist each other in violent or disorderly conduct," while sharing in the "common intent" of the riotous assembly. That effectively restates the longstanding common-law definition. The additional language of the statute would reinforce that such a common-law riot causes a "disturbance" that is both "violent" and "public," without changing the substance of that common-law definition. By giving a definitive, clear, and narrow construction to

the otherwise vague and overbroad phrase "participates in a violent public disturbance," this limiting construction would cure the constitutional concerns that necessitated the preliminary injunction.

To assist this Court in answering the certified question, the Eleventh Circuit posed four additional questions regarding specific terms and potential scenarios to which the statute could apply. CA11 Op. 27–28. The limiting constructions we have proposed provide answers to each of those questions.

1. The Eleventh Circuit asked "[w]hat qualifies as a 'violent public disturbance,'" and specifically whether it constitutes "something more than 'three or more persons[] acting with a common intent to assist each other in violent and disorderly conduct resulting in injury to'" person or property? CA11 Op. 27 (quoting § 870.01(2)) (second alteration in original).

Applying our proposed limiting construction, Section 870.01(2) can be construed narrowly so that "violent public disturbance" is coextensive with the "assembly of three or more persons, acting with a common intent to assist each other in violent and disorderly conduct." The answer to the Eleventh Circuit's question is therefore "no."

2. The Eleventh Circuit next asked "[w]hat conduct is required for a person to 'willfully participate in a violent public disturbance,'" and specifically whether a person can so participate "without personally engaging in violence and disorderly conduct or advocating for violence and disorderly conduct?" CA11 Op. 27 (quoting FLA STAT. § 870.01(2)).

Applying our proposed limiting construction, the phrase "willfully participate in a violent public disturbance" can be construed to require a person to be "willfully . . . involv[ed in] an assembly of three or more persons, acting with a common intent to assist each other in violent or disorderly conduct." FLA STAT. § 870.01(2). So construed, the answer to the Eleventh Circuit's question is "no."

3. The Eleventh Circuit also asked whether, "[t]o obtain a conviction," the State has "to prove beyond a reasonable doubt that the defendant intended to engage or assist two or more other persons in violent and disorderly conduct" and "[i]f not, what must the State prove regarding intent?" CA11 Op. 27.

Applying our proposed limiting construction, Section 870.01(2) can be fairly construed to require the State to show that an individual

"willfully" participated in the "assembly of three or more persons" and shared their common intent "to assist each other in violent or disorderly conduct." The answer to the Eleventh Circuit's question is therefore "yes."

4. The Eleventh Circuit's final question is:

> May a person be guilty of the crime of riot if the person attends a protest and the protest comes to involve a violent public disturbance in which three or more people acting with a common intent to assist each other engage in violent and disorderly conduct and the violent disturbance results in injuries to another person, damage to property, or imminent danger of injury to another or damage to property, but the person did not engage in, or intend to assist others in engaging in, violent and disorderly conduct?

CA11 Op. 28.

Applying our proposed limiting construction, Section 870.01(2) can fairly be construed to require the accused person to have personally engaged in, or intended to assist others in engaging in, violent and disorderly conduct. Construing "participates in a violent public disturbance" narrowly and reading the statute's intent requirements broadly ensures that the new statutory definition does not encroach upon the rights of non-violent protestors engaged in

protected free expression. The answer to the Eleventh Circuit's question is therefore "no."

CONCLUSION

For the foregoing reasons, the Court should respond to the certified question by construing the statute in accordance with the limiting construction above and hold that it maintains the pre-existing common-law definition of the crime of "riot."

Dated: May 19, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing document has been submitted to the Court via the e-filing portal to the below counsel of record on this 19th day of May, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fla. R. App. P. 9.045(e), I hereby certify that the foregoing brief is compliant with Fla. R. App. P. 9.045(b) because it has been prepared in Bookman Old Style 14-point font. I further certify that the foregoing brief is compliant with Fla. R. App. P. 9.210(a)(2)(B), as it contains 6,274 words.

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