SC23-53

In the Supreme Court of Florida

GOVERNOR RON DESANTIS, ET AL.,
Appellants,

v.

DREAM DEFENDERS, ET AL.,
Appellees.

On Review of a Certified Question from the United States Court of Appeals for the Eleventh Circuit
Case No. 21-13489

REPLY BRIEF OF GOVERNOR RON DESANTIS

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ACTS OF PEACEFUL PROTEST DO NOT VIOLATE FLORIDA'S RIOT STATUTE.

The parties agree that the Court should read HB 1 not to criminalize the mere act of attending a protest where others behave violently. That interpretation resolves the federal district court's concern that the law is unconstitutionally vague or overbroad.

Yet the parties disagree on how to arrive at that result. Plaintiffs insist that the "most natural reading" of HB 1 would render "non-violent expressive activities" unlawful, making a narrowing construction necessary. Ans. Br. 11, 15–17. The Governor maintains that the law means what it says: that it "does not prohibit . . . peaceful protest," § 870.01(7), Fla. Stat., and instead penalizes only "willfully participat[ing] in a violent public disturbance," *id.* § 870.01(2)—the antithesis of non-violent First Amendment activity. Init. Br. 10–22. For three reasons, the latter reading is correct.

First, and most obviously, HB 1 expressly provides that the law's operative provision, Section 870.01(2), "does not prohibit constitutionally protected activity such as a peaceful protest." § 870.01(7), Fla. Stat. That should end the matter. Any reading of HB 1 that *would*

proscribe peaceful protest cannot be the most natural reading. "[I]f [peaceful protest] could be characterized as a [riot]," after all, "the statute's specific exclusion of [peaceful protest] . . . would not make sense." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 24 (2010).

Subsection (7) is not a mere "[s]avings [c]lause," as Plaintiffs argue. Ans. Br. 19. Rather than simply "restate[] the constitutional avoidance canon," *id.*, that provision identifies particular conduct—"peaceful protest"—that is excluded from the law's ambit. Plaintiffs' proposal to disregard the critical statutory context provided by Subsection (7) contravenes this Court's recent discussion emphasizing that the Court reads statutory language in context, not in isolation. *See Conage v. United States*, 346 So. 3d 594, 598 (Fla. 2022).

Second, HB 1 penalizes rioting only if the person "*participates*" in the "violent public disturbance." § 870.01(2), Fla. Stat. (emphasis added). The verb "participates" denotes active engagement in the violent public disturbance. Init. Br. 16–17. Just as a concertgoer does not "participate in drug use" solely because others at the concert are smoking marijuana, a protestor does not participate in a violent pub-

lic disturbance through mere proximity to the disturbance. A peaceful protest and a violent public disturbance can occur simultaneously yet separately in the same area. In that circumstance, some people peacefully protest (say, by holding signs or chanting) while others engage in violence (for instance, by throwing rocks). But the one is not the other.

Plaintiffs barely engage with the meaning of "participates." *See* Ans. Br. 11–15. The closest they come is their suggestion that "[o]ne can 'take part in' a larger public gathering where violence occurs without taking part in violence specifically." Ans. Br. 13. While true, that is also irrelevant. HB 1 does not criminalize participating in a "larger public gathering where violence occurs"; it criminalizes participating in a "violent public disturbance." And Plaintiffs offer no reason to believe that the "most natural reading" of the statute envisions *peaceful* participation in a *violent* public disturbance—an obvious contradiction in terms.

The propriety of the Governor's approach is even clearer considering that the statute imposes liability only for "willful[]" participa-

tion. § 870.01(2), Fla. Stat. "Willfully" means "intentionally, knowingly and purposely." *In re Standard Jury Instructions in Crim. Cases-Rep. 2016-12*, 216 So. 3d 1281, 1282 (Fla. 2017). That *mens rea* element guarantees that a person is not penalized unless he appreciates the nature of the violent public disturbance in which he participates—indeed, *intends* to participate in violence or incitement of violence.

Third, were there any doubt that HB 1 does not outlaw nonviolent protest, both the constitutional-avoidance canon and rule of lenity dispel it. A statute "must be construed, if fairly possible, as to avoid unconstitutionality and to remove grave doubts on that score." *Franklin v. State*, 887 So. 2d 1063, 1073 (Fla. 2004). The Governor's commonsense construction is "fairly possible" and accomplishes that objective. Moreover, the rule of lenity states that "if the statute remains ambiguous after consulting traditional canons of statutory construction," the statute "shall be construed most favorably to the accused." *Conage*, 346 So. 3d at 602–03. Any honest confusion about the law's scope should therefore be resolved in favor of preserving the right of peaceful protest.

* * *

In sum, HB 1 needs no "sav[ing]." Ans. Br. 28. The best reading of the law is also a constitutional one: that Section 870.01(2) criminalizes only "personally engaging in violence and disorderly conduct or advocating for violence and disorderly conduct," *Dream Defs. v. Gov. of the State of Fla.*, 57 F.4th 879, 894 (11th Cir. 2023), not peaceful protest.

CONCLUSION

The Court should respond to the certified question consistent with the discussion above and in the Governor's initial brief.

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Respectfully submitted,

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I certify that the size and style of type used in this brief is 14-point Bookman Old Style, in compliance with Fla. R. App. P. 9.210(a)(2), and that this brief contains 807 words in compliance with Fla. R. App. P. 9.370(b).

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