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

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFFS-APPELLEES

KRISTEN CLARKE
Assistant Attorney General

ERIN H. FLYNN
NOAH B. BOKAT-LINDELL
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 598-0243

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, the United States as amicus curiae certifies that, in addition to those identified in the briefs filed by plaintiffs-appellees and defendants-appellants, the following persons may have an interest in the outcome of this case:

1. Bokat-Lindell, Noah B., U.S. Department of Justice, Civil Rights Division, counsel for the United States;
2. Clarke, Kristen, U.S. Department of Justice, Civil Rights Division, counsel for the United States;
3. Flynn, Erin H., U.S. Department of Justice, Civil Rights Division, counsel for the United States.

The United States certifies that no publicly traded company or corporation has an interest in the outcome of this appeal.

s/ Noah B. Bokat-Lindell
NOAH B. BOKAT-LINDELL
Attorney

Date: February 3, 2022

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INTEREST OF THE UNITED STATES

The United States has a strong interest in supporting lawful protests on important civil rights issues, including those promoting non-discriminatory policing, and in protecting protesters and demonstrators from infringements on their First Amendment rights by local police departments. The Civil Rights Division of the Department of Justice has engaged in this work since its earliest days. For instance, the Solicitor General's Office and the Division filed amicus briefs before the United States Supreme Court arguing that state trespass laws were

unconstitutional as applied to sit-in demonstrators who were arrested for protesting segregation in places of public accommodation. *E.g.*, U.S. Br. as *Amicus Curiae*, *Griffin* v. *Maryland*, 378 U.S. 130 (1964) (No. 6). Today, the Department of Justice exercises authority under 34 U.S.C. 12601 to seek declaratory and injunctive relief to remedy patterns or practices of law enforcement conduct that violate federal statutory or constitutional rights, including First Amendment rights. *E.g.*, *United States* v. *Police Dep't of Balt. City*, No. 1:17-cv-99, Doc. 2-2, at 87-88 (¶¶ 240-242) (D. Md. Jan. 12, 2017); *United States* v. *City of Ferguson*, No. 4:16-cv-180, Doc. 12-2, at 33 (¶ 123) (E.D. Mo. Feb. 10, 2016).

The United States also has an interest in protecting against riotous conduct that may occur, among other places, at an otherwise peaceful protest or demonstration. Numerous courts have upheld the federal Anti-Riot Act, 18 U.S.C. 2101-2102, against overbreadth and vagueness challenges. The United States files this brief under Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUE

The United States addresses the following question regarding plaintiffs' First Amendment overbreadth claim:

Whether, given the parties' plausible competing interpretations of Florida's amended anti-riot law, this Court should certify the question of the statute's meaning to the Florida Supreme Court to afford that Court an opportunity to adopt

an authoritative limiting construction, while maintaining the preliminary injunction in the meantime.[1]

STATEMENT OF THE CASE

1. The Meaning Of "Riot" Under Florida Law

a. Florida has long criminalized rioting or "inciting or encouraging a riot." Fla. Stat. § 870.01(2) (1971). Because the Florida Legislature did not initially define "riot," the Florida Supreme Court construed the 1971 version of the statute according to that term's common-law definition.

At common law, for someone to engage in the crime of "riot," he must himself have been one of "three or more persons [who] acted 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." *State* v. *Beasley*, 317 So. 2d 750, 753 (Fla. 1975). In *Beasley*, the Florida court further recognized that "the offense of inciting or encouraging a riot" could potentially trench on "an individual's right to free speech." *Ibid.* So the Florida court limited that offense to language that "tended to incite the persons assembled to an immediate breach of the peace." *Ibid.* Under this construction, a person on the scene but not "mutually assist[ing]" in violence would not have committed the crime of "riot," and could not be convicted unless he had been "promoting, encouraging, and aiding" the malefactors sufficiently to

[1] The United States takes no position on any other issue in this appeal.

constitute incitement. *Ibid.* Upon adopting these restricted readings of the anti-riot statute, the Florida Supreme Court upheld it against First Amendment and vagueness challenges. *Ibid.*

b. Last year, Florida materially amended its riot statute in reaction to the summer 2020 protests against the police killing of George Floyd in Minnesota. See Fla. House Journal, 2021 Reg. Sess., No. 1, 277 (Mar. 2, 2021) (Fla. House Journal), https://perma.cc/3XLA-3XZH; Staff of Fla. H.R., Staff Final B. Analysis, H.B. 1, at 2 (Fla. May 3, 2021), https://perma.cc/V62Q-UN7C (describing 2020 protests as background for bill). At the start of the 2021 legislative session, Governor Ron DeSantis gave a speech noting his work on the bill with legislative leaders and touting it as "the strongest anti-rioting pro-law enforcement reform[] in the nation." Fla. House Journal at 277.

Section 15 of the new law, H.B. 1, amended the definition of "riot" and increased penalties for certain riotous activity. 2021 Fla. Sess. Law Serv. Ch. 2021-6 (West). Florida law now provides: "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" imminent danger of, or actual, personal injury or property damage. Fla. Stat. § 870.01(2) (2021). Section 15 includes a savings clause, which states: "This section does not prohibit constitutionally protected

activity such as a peaceful protest." *Id.* § 870.01(7). Florida courts have not yet interpreted H.B. 1's definition of "riot."

2. Procedural History

a. Plaintiffs are several "Black-led groups of Florida residents who organize and conduct racial justice protests." Doc. 1, at 2-3.[2] They allege that H.B. 1 makes them "fearful that their members risk criminal liability merely for speaking out and advocating for change." Doc. 1, at 3. Plaintiffs filed suit in the Northern District of Florida against Governor DeSantis and three county sheriffs, alleging that Section 15's definition of "riot" is unconstitutionally overbroad in violation of the First and Fourteenth Amendments and unconstitutionally vague in violation of the Fourteenth Amendment. Doc. 1, at 51-60.

Plaintiffs sought a preliminary injunction on their overbreadth and vagueness claims (Doc. 137, at 4), which the district court granted. The court determined that plaintiffs had shown a substantial likelihood of success on the merits of both claims and that the remaining preliminary injunction factors favored plaintiffs. Doc. 137, at 78.

i. To evaluate the merits of plaintiffs' challenge, the court started with Section 15's amended definition of "riot." Doc. 137, at 45-67.

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[2] "Doc. __, at __" refers to the docket entry and page number of documents filed on the district court's docket. "__ Br. __" refers to the page number of the relevant party's brief filed in this appeal.

The court found that Section 15's use of the phrase "willfully participate" provides no clear distinction between actual participation in violence and peaceful participation in a broader protest during which other actors engage in violence. Doc. 137, at 52-53. The court reasoned that the phrase "violent public disturbance" does not obviously distinguish between an inherently violent event and a peaceful protest that later turns violent or that contains a smaller violent incident. Doc. 137, at 53-54. And the court found that the phrase "violent public disturbance involving an assembly of three or more persons" may encompass disturbances that occur within a larger, peaceful protest. Doc. 137, at 54-57 (internal quotation marks and citation omitted).

The court rejected each of defendants' arguments for a limiting construction. Doc. 137, at 59-67. The court explained that, because a state rather than a federal statute was at issue, federalism principles prohibited federal courts from adopting a narrowing construction "unless such a construction is *reasonable and readily apparent*." Doc. 137, at 47 (citation omitted). The court concluded that defendants' proposed readings did not satisfy that test. Doc. 137, at 52-58. In particular, the court rejected defendants' assertion that the new definition merely codified the common-law definition of a "riot," reasoning that Section 15's addition of 17 words to the common-law formulation defeated that argument. Doc. 137, at 63.

ii. Because it could not identify a sufficiently clear narrowing construction, the court found that plaintiffs were likely to succeed on their vagueness and overbreadth claims. Doc. 137, at 68-78. As to vagueness, the court determined that the different possible readings of the above-mentioned statutory phrases rendered the new definition of "riot" incomprehensible to the average reader. Doc. 137, at 70-71. The court also found that Section 15 was intended to, and does, empower law enforcement to punish its critics, enabling arbitrary and discriminatory enforcement. Doc. 137, at 71-73. As to overbreadth, the court found that, "in its ambiguity," Section 15 "consumes vast swaths of core First Amendment speech" even if it also "criminalizes a large amount of unprotected activity." Doc. 137, at 75-76.

Accordingly, the district court preliminarily enjoined defendants from enforcing Section 15. Doc. 137, at 89-90. The Governor and defendant Sheriff Mike Williams appealed. Docs. 145-146.

SUMMARY OF ARGUMENT

Before engaging in any overbreadth analysis, courts first must interpret the statute under challenge. In this case, both sides present facially plausible readings of Section 15's amended definition of "riot." In defendants' view, the statute is properly limited to those who engage in or aid or abet violence because its two intent elements work together and both apply to the criminally accused. In

plaintiffs' view, the Legislature's decision to add new phrasing to the common-law definition of "riot" indicates that Section 15 reaches more persons than its predecessor statute and sweeps in the constitutionally protected activity of non-violent demonstrators who are part of an assembly that turns violent. Because Section 15 is a state rather than a federal law, and because there is no clear indication of how the Florida courts would interpret the statute, this Court should not simply adopt defendants' proffered limiting construction to avoid the constitutional questions in this case. Moreover, even if this Court were nonetheless to adopt defendants' limiting construction, state authorities still could enforce an interpretation of the statute that chills constitutionally protected speech. The Court should therefore certify the question of Section 15's scope to the Florida Supreme Court and maintain the preliminary injunction pending an answer.

ARGUMENT

TO OBTAIN A BINDING CONSTRUCTION THAT COULD ELIMINATE THE CONSTITUTIONAL ISSUES IN THIS CASE, THIS COURT SHOULD CERTIFY TO THE FLORIDA SUPREME COURT THE QUESTION OF SECTION 15'S SCOPE

A. This Court Cannot Determine Whether Florida's Amended Definition Of "Riot" Is Impermissibly Overbroad Without First Determining Its Scope

"In the First Amendment context, * * * a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *United States* v. *Stevens*, 559

U.S. 460, 473 (2010) (citation omitted). "The fact that there may be some conceivable impermissible applications is not enough to render a statute overbroad"; rather, courts may invalidate a statute only if its overbreadth is "real" and "substantial as well, judged in relation to the statute's plainly legitimate sweep." *FF Cosms. FL, Inc.* v. *City of Mia. Beach*, 866 F.3d 1290, 1303-1304 (11th Cir. 2017) (citations omitted).

When a court confronts a claim of unconstitutional overbreadth, "the first step * * * is to construe the challenged statute." *Stevens*, 559 U.S. at 474 (alteration and citation omitted). After all, "it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *Ibid.* (citation omitted). In reading a statute for overbreadth purposes, "a court should evaluate the ambiguous as well as the unambiguous scope of the enactment." *Village of Hoffman Ests.* v. *Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 494 n.6 (1982).

B. This Court Cannot Adopt An Authoritative Limiting Construction Of Section 15

Plaintiffs urge a broad construction of Section 15 that even defendants do not dispute would sweep in conduct protected by the First Amendment. Defendants, in contrast, urge this Court to invoke the canon of constitutional avoidance and adopt a limiting construction that would eliminate that constitutional problem. But because Section 15 is a recently enacted state statute,

this Court's resolution of that interpretive dispute takes on an added layer of difficulty. As the Supreme Court has instructed, "federal courts are without power to adopt a narrowing construction of a state statute unless such a construction is reasonable *and readily apparent*." *Boos* v. *Barry*, 485 U.S. 312, 330 (1988) (emphasis added). Thus, unlike when it construes a federal law, a federal court cannot adopt a limiting construction of a state law to avoid a constitutional problem on the ground that it is one potentially "reasonable" way to read the statute. *Ibid.* A limiting construction of a state law must be "readily apparent" from a thorough canvassing of the statutory text and context. *Ibid.*; see *Gooding* v. *Wilson*, 405 U.S. 518, 520 (1972) ("Only the [state] courts can supply the requisite [narrowing] construction, since of course 'we lack jurisdiction authoritatively to construe state legislation.'" (citation omitted)). Here, both parties put forward plausible interpretations of Section 15, and no Florida court has yet passed on the statute's meaning. Because only Florida courts have "authority to interpret" Florida law, *Stevens*, 559 U.S. at 474; see pp. 14-17, *infra*, this Court should avoid construing Florida's amended definition of "riot" in the first instance.

1. Section 15's definition provides 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) (2021). Much of the parties' dispute focuses on that provision's two intent elements. The first intent element focuses solely on the individual "person," who must "willfully" participate in a violent public disturbance. Fla. Stat. § 870.01(2) (2021). The second intent element is a collective element: The public disturbance must involve an "assembly of three or more persons, acting *with a common intent to assist each other* in violent and disorderly conduct." *Ibid.* (emphasis added).

Defendants argue that the second, common-intent element modifies both the "assembly" and the "person" referenced at the beginning of the statute. See Governor's Br. 25-27; Williams Br. 15. Construed that way, the statute would reach only individuals who themselves intend to engage in or abet collective violent conduct. That would mean that despite its different language, Section 15 would have essentially the same meaning that the Florida Supreme Court had given to the State's prior riot statute in *Beasley*. But that limiting construction would also eliminate any constitutional problem. Courts routinely uphold anti-riot laws that criminalize those forms of activity. Most prominently, the federal Anti-Riot Act prohibits taking certain actions "with intent" to "participate in" a riot, 18 U.S.C. 2101(a), defining "riot" as "a public disturbance involving (1) an act or acts

of violence by one or more persons part of an assemblage of three or more persons" that "constitute a clear and present danger of, or shall result in, [property or personal] damage or injury," or (2) threats thereof, 18 U.S.C. 2102(a). Numerous courts have upheld the Anti-Riot Act's prohibition on intentional participation in a riot, deeming such direct action "unprotected" by the First Amendment. *United States* v. *Rundo*, 990 F.3d 709, 719, 721 (9th Cir. 2021), cert. denied, 2022 WL 145199 (S. Ct. Jan. 18, 2022); *United States* v. *Miselis*, 972 F.3d 518, 541 (4th Cir. 2020), cert. denied, 141 S. Ct. 2756 (2021); *United States* v. *Dellinger*, 472 F.2d 340, 354-364 (1972), cert. denied, 410 U.S. 970 (1973); see *National Mobilization Comm. to End the War in Viet Nam* v. *Foran*, 411 F.2d 934, 938 (7th Cir. 1969) (rejecting argument that "mere presence in a crowd, some of [which] might be performing acts of violence, could be considered participating in a riot" under the Act). Indeed, plaintiffs do not seriously contest the validity of such a statute.

Instead, plaintiffs argue, and the district court agreed, that the common-intent element modifies only the immediately preceding phrase "an assembly of three or more persons." Doc. 137, at 56-57; Pls.' Br. 52-54. And plaintiffs further contend that, if Section 15 is construed this way, a person can violate the statute even if he or she does not engage in violence or intend that violence occur, so long as he or she participates in a broader protest in which other people are acting with a

common intent to engage in violent conduct. For example, plaintiffs argue (Br. 58-59) that Section 15 would punish "those who merely attend protests 'involving' violence"—or those who engage in other constitutionally protected activity, like "'photographing or videotaping police conduct' after violence erupts." Defendants do not dispute that a statute reaching such conduct would pose serious First Amendment concerns.

2. As the district court's analysis and the parties' competing submissions illustrate, both sides have presented plausible readings of Section 15. And despite each party's assertions that their reading of Section 15 is the *only* reasonable one (Williams Br. 14-16; Pls.' Br. 58-59; see also Governor's Br. 26), neither interpretation is so readily apparent that this Court can adopt that reading when it normally "lack[s] jurisdiction" to do so. *Gooding*, 405 U.S. at 520. Particularly since no Florida court has yet interpreted Section 15. See, *e.g.*, *Gonzalez* v. *Governor of Ga.*, 969 F.3d 1211, 1212 (11th Cir.) (certifying rather than conducting state-law statutory and constitutional interpretation in due process case when state courts had not yet addressed interpretive question), certified question answered *sub nom. Kemp* v. *Gonzalez*, 849 S.E.2d 667 (Ga. 2020).

C. This Court Should Certify The Antecedent Statutory Interpretation Issue To The Florida Supreme Court

If Section 15 were a federal statute, constitutional avoidance doctrine would provide a clear rule for deciding between these competing interpretations. If a

narrowing construction of a federal law even "is fairly possible," as defendants' interpretation of Section 15 is here, "the federal courts have the duty to avoid constitutional difficulties by" adopting that construction. *Boos*, 485 U.S. at 331. That approach "allows courts to avoid the decision of constitutional questions" that a different interpretation would present, *Clark* v. *Martinez*, 543 U.S. 371, 381 (2005) (emphasis omitted), consistent with "the obligation of all federal courts to avoid constitutional adjudication except where necessary," *Jean* v. *Nelson*, 472 U.S. 846, 857 (1985).

In this case, however, federalism concerns counsel against this Court resolving the ambiguity by itself adopting defendants' limiting construction. As the Supreme Court has instructed, "federal courts are without power to adopt a narrowing construction of a state statute unless such a construction is reasonable *and readily apparent*." *Boos*, 485 U.S. at 330 (emphasis added). Moreover, any narrowing construction this Court might adopt would not be authoritative. While federal-court interpretations of federal law bind federal prosecutors, a narrowing construction of a state statute here would bind neither state prosecutors nor state courts. Since potential protesters or demonstrators would continue to risk prosecution for protected conduct, they would continue to be chilled even if this Court interpreted Section 15 narrowly. The only entity that can provide an authoritative interpretation of Florida state law is the Florida Supreme Court.

Therefore, the Court should certify the question of Section 15's meaning to the Florida Supreme Court.[3]

1. Defendants' limiting construction would blunt Section 15's reach, but the Court should not itself adopt that construction at this point in the case. "It is well settled that federal courts have the power to adopt narrowing constructions of *federal* legislation." *Boos*, 485 U.S. at 330-331 (emphasis added). By contrast, "it is not within [federal courts'] power to construe and narrow state laws." *Grayned* v. *City of Rockford*, 408 U.S. 104, 110 (1972); *Brown* v. *Entertainment Merchants Ass'n*, 564 U.S. 786, 813 (2011) (Alito, J., concurring in the judgment) (same).

Bedrock federalism principles animate this distinction. For one thing, "the federal tribunal risks friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court." *Arizonans for Off. Eng.* v. *Arizona*, 520 U.S. 43, 79 (1997). For another, any federal interpretation could well prove ephemeral. Because "state supreme courts are the final arbiters of state law, 'when [federal courts] write to a state law issue, [they] write in faint

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[3] The Governor argues (Br. 37-39) that the district court should have abstained. However, certification is clearly preferable to abstention in this case, as a matter of both doctrine and judicial policy. See *Cate* v. *Oldham*, 707 F.2d 1176, 1184 (11th Cir. 1983) ("Abstention is to be invoked particularly sparingly in actions involving alleged deprivations of First Amendment rights."), certified question answered, 450 So. 2d 224 (Fla. 1984); *Arizonans for Off. Eng.* v. *Arizona*, 520 U.S. 43, 75-76 (1997) (favorably contrasting certification with abstention in terms of "reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response").

and disappearing ink,' and 'once the state supreme court speaks the effect of anything [the federal courts] have written vanishes.'" *LeFrere* v. *Quezada*, 582 F.3d 1260, 1262 (11th Cir. 2009) (citation omitted). Accordingly, the Supreme Court has cautioned that "federal courts are without power to adopt a narrowing construction of a state statute unless such a construction is reasonable and readily apparent." *Boos*, 485 U.S. at 330. This Court too has repeatedly warned that, "[a]s a federal court, [it] must be particularly reluctant to rewrite the terms of a *state* statute." *Matamoros* v. *Broward Sheriff's Off.*, 2 F.4th 1329, 1333 (11th Cir. 2021) (citations omitted).[4]

In this case, a federal narrowing construction would offer little help to plaintiffs. Even if this Court were to read Section 15 to reach only constitutionally prohibited conduct, the Court's construction "would fail to bind state prosecutors" and courts, "leaving the citizens of [the state] vulnerable to prosecutions under the actual language of the statute." *Citizens for Responsible Gov't State Pol. Action Comm.* v. *Davidson*, 236 F.3d 1174, 1194-1195 (10th Cir. 2000). Protesters and demonstrators would still have to limit or cease their constitutionally protected

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[4] See, *e.g.*, *Solantic, LLC* v. *City of Neptune Beach*, 410 F.3d 1250, 1256 n.6 (11th Cir. 2005); *Florida Right to Life, Inc.* v. *Lamar*, 273 F.3d 1318, 1326 (11th Cir. 2001); *BellSouth Telecomms., Inc.* v. *Town of Palm Beach*, 252 F.3d 1169, 1180 n.4 (11th Cir. 2001); but cf. *Cheshire Bridge Holdings, LLC* v. *City of Atlanta*, 15 F.4th 1362, 1367-1368 (11th Cir. 2021) (applying a somewhat more lenient standard for adopting limiting constructions, but not altering—as it could not—the preexisting "particularly reluctant" rule).

activities, as plaintiffs and their members already are doing (Pls.' Br. 10-14), any time violence by others looms for fear that state officials could punish them for incidental violent acts not involving them.

2. The same federalism concerns that counsel against this Court adopting a limiting construction point instead toward certification. As the Supreme Court instructed in *Arizonans for Official English*, "[s]peculation by a federal court about the meaning of a state statute in the absence of prior state court adjudication is particularly gratuitous when … the state courts stand willing to address questions of state law on certification from a federal court." 520 U.S. at 79 (citation omitted). This option was not open to the district court, as Florida authorizes certification only from courts of appeals. See Fla. R. App. P. 9.150(a). This Court should do what the district court could not: certify the case to the Florida Supreme Court to determine whether Section 15 should be read in a manner consistent with the First Amendment.

There is no barrier to certification here. The choice whether to certify "rests 'in the sound discretion of the federal court.'" *McKesson* v. *Doe*, 141 S. Ct. 48, 51 (2020) (citation omitted). The parties need not request or support certification: "'Ordinarily a court will order certification on its own motion,' given that it is in the 'best position to determine whether it feels confident in its reading of the state

law.'" *Whiteside* v. *GEICO Indem. Co.*, 977 F.3d 1014, 1018 (11th Cir. 2020) (citation omitted), certified question answered, 857 S.E.2d 654 (Ga. 2021).

When deciding whether to certify, this Court "consider[s] many factors," the "most important" of which "are the closeness of the question and the existence of sufficient sources of state law to allow a principled rather than conjectural conclusion." *Hammonds* v. *Commissioner, Ala. Dep't of Corr.*, 822 F.3d 1201, 1208 (11th Cir. 2016) (citation omitted), cert. denied, 139 S. Ct. 106 (2018). Also relevant are the "degree to which considerations of comity are relevant" and the "practical limitations of the certification process." *Ibid.* (citation omitted).

Each of these factors points toward certification here. As discussed above, the constitutionality of Section 15 depends on which of the parties' competing interpretations of the statute is correct. No state court has yet interpreted Section 15's definition of "riot," and the new statutory definition is sufficiently distinct from the prior one that *Beasley* and other earlier cases do not provide the necessary guidance. "[C]ertification is generally appropriate where," as here, the federal court faces "substantial doubt on a dispositive state law issue." *Blackburn* v. *Shire US Inc.*, 18 F.4th 1310, 1322 (11th Cir. 2021) (internal quotation marks and citation omitted). Indeed, this Court has often certified when the answer to a state statutory-interpretation "issue of first impression" could resolve federal claims and there were "reasonable arguments on both sides." *Florida VirtualSchool* v. *K12,*

Inc., 735 F.3d 1271, 1274 (11th Cir. 2013), certified question answered, 148 So. 3d 97 (Fla. 2014).[5]

Comity interests likewise favor certification. In asking who may be prosecuted under Florida's amended anti-riot law, courts must resolve "a question at the core of the state's authority." *Gonzalez*, 969 F.3d at 1212. And comity interests are likewise heightened where, as here, "a federal court is asked to invalidate a State's law" and the law's validity turns on its interpretation. *Arizonans for Off. Eng.*, 520 U.S. at 79.

As for practical considerations, Florida's certification process is both clear and applicable. Fla. R. App. P. 9.150(a) (authorizing certification "if the answer is determinative of the cause and there is no controlling precedent of the Supreme Court of Florida"). And this Court routinely certifies questions to the Florida Supreme Court. See, *e.g.*, *In re NRP Lease Holdings, LLC*, 20 F.4th 746, 757-758 (11th Cir. 2021); *Somers* v. *United States*, 15 F.4th 1049, 1056 (11th Cir. 2021); *Pincus* v. *American Traffic Sols., Inc.*, 986 F.3d 1305, 1320-1321 (11th Cir. 2021). It should do so here, as well, since an authoritative state-court interpretation could

[5] See, *e.g.*, *Gonzalez*, 969 F.3d at 1212 (certifying antecedent state law claim, without analyzing merits arguments, where district court had granted preliminary injunction on federal due process claim); *Cate*, 707 F.2d at 1184-1185 (certifying in First Amendment case and granting preliminary injunction where "there [was] substantial merit to appellant's claim" but case presented "an unsettled question of state law" that could obviate need for constitutional ruling).

either obviate plaintiffs' constitutional challenge or confirm that the statute poses serious constitutional concerns.

D. The Court Should Maintain The Preliminary Injunction Pending A Response

If the Court does certify, it should maintain the district court's preliminary injunction pending a response by the Florida Supreme Court. The Court can then rule on the merits of the injunction after the state supreme court answers (or declines to answer) the certified question. That is the norm in this Circuit. See, *e.g.*, *Gonzalez* v. *Governor of Ga.*, 978 F.3d 1266, 1269 (11th Cir. 2020); *Butler* v. *Alabama Jud. Inquiry Comm'n*, 245 F.3d 1257, 1266 (11th Cir.), certified question answered, 802 So. 2d 207 (Ala. 2001); *American Booksellers Ass'n* v. *Webb*, 744 F.2d 784, 786 (11th Cir. 1984), certified question answered, 329 S.E.2d 495 (Ga. 1985). Maintaining the district court's preliminary injunction will also ensure that Section 15 cannot be invoked as a basis to prevent protesters and demonstrators from engaging in constitutionally protected activity while the litigation proceeds.

If the Florida Supreme Court adopts defendants' narrowing construction of Section 15, or another that similarly limits Section 15 to prohibiting unprotected conduct, this Court then can vacate the district court's injunction. But if the Florida Supreme Court adopts a construction that criminalizes peacefully protesting or recording violence during a protest, this Court can determine whether and to what extent to invalidate the statute. See *Gay Lesbian Bisexual All.* v.

Pryor, 110 F.3d 1543, 1550 (11th Cir. 1997) ("Generally, a statute should 'be declared invalid to the extent that it reaches too far, but otherwise left intact.'" (citation omitted)).

CONCLUSION

For the foregoing reasons, this Court should certify the question of Section 15's scope to the Florida Supreme Court while maintaining the preliminary injunction pending an answer.

Respectfully submitted,

KRISTEN CLARKE
Assistant Attorney General

s/ Noah B. Bokat-Lindell
ERIN H. FLYNN
NOAH B. BOKAT-LINDELL
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 598-0243

CERTIFICATE OF COMPLIANCE

I certify that the attached BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFFS-APPELLEES:

(1) complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 4660 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2019, in 14-point Times New Roman font.

s/ Noah B. Bokat-Lindell
NOAH B. BOKAT-LINDELL
Attorney

Date: February 3, 2022

CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2022, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFFS-APPELLEES with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. All participants are registered CM/ECF users and will be served by the appellate CM/ECF system.

I further certify that four paper copies identical to the electronically filed brief will be mailed to the Clerk of the Court by Federal Express.

s/ Noah B. Bokat-Lindell
NOAH B. BOKAT-LINDELL
Attorney