No. 23A366

In the

Supreme Court of the United States

MELANIE GRIFFIN,
SECRETARY OF THE FLORIDA DEPARTMENT OF
BUSINESS AND PROFESSIONAL REGULATION,
Applicant,

v.

HM FLORIDA-ORL, LLC,
Respondent.

RESPONSE IN OPPOSITION TO APPLICATION FOR A PARTIAL STAY

To the Honorable Clarence Thomas
Associate Justice of the Supreme Court of the United States
and Circuit Justice for the United States Court of Appeals
for the Eleventh Circuit

November 2, 2023

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PARTIES TO THE PROCEEDING

The caption contains the names of all the parties to the proceeding below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent represents that it does not have any parent entities and does not issue stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

On June 24, 2023, the District Court for the Middle District of Florida entered a preliminary injunction barring the Florida Secretary of Business (the "State") from enforcing Fla. Stat. § 827.11 on the grounds that it violated the First Amendment to the United States Constitution. The State moved to stay the injunction in part, seeking that it be limited to only the parties. The district court ruled that while preliminary injunctions are typically limited to the parties to a lawsuit, injunctions against enforcing overbroad statutes that restrict speech are not because the statutes are presumptively invalid, and their enforcement is prohibited entirely. The State sought a partial stay from the Eleventh Circuit pending the appeal of the preliminary injunction, and the Eleventh Circuit denied the motion.

The State now brings the instant motion before this Court, claiming exigent circumstances. No such exigency exists. The State's application meets none of this Court's requirements for the extraordinary relief it seeks. It cannot demonstrate that this Court is likely to grant certiorari on the narrow issue of the scope of preliminary injunctive relief. The parties and issues in the cases the States cites overwhelmingly concern nationwide injunctions; the State provides no caselaw where a court determined that a restriction on speech was overbroad and then limited injunctive relief to the parties before the Court. Florida already has constitutional laws in place that prevent children from viewing sexually explicit materials, and the State has

previously enforced those laws. The State will suffer no irreparable harm by maintaining the status quo for the duration of this litigation. This Court should deny the State's application.

BACKGROUND

On May 17, 2023, Florida Governor Ron DeSantis signed Senate Bill 1438 into law. *See* 2023 Fla. Laws Ch. 2023-94. Along with amending three existing laws, S.B. 1438 created a new statute – Fla. Stat. § 827.11 ("the Act") – which prohibits any person from knowingly admitting a child to what it terms an "adult live performance." *Id.* Violation of the statute authorizes the Florida Department of Business and Professional Regulation ("DBPR") to impose fines and revoke or suspend the operating and/or liquor license of any public lodging, food service establishment, or other licensee. Fla. Stat. §§ 509.261(10), 561.29(1). Additionally, any person who violates § 827.11 may be prosecuted and subject to punishment as a first-degree misdemeanor. The Act defines an "adult live performance" as:

> [A]ny show, exhibition, or other presentation in front of a live audience which, in whole or in part, depicts or simulates nudity, sexual conduct, sexual excitement, or specific sexual activities as those terms are defined in s. 827.001, lewd conduct, or the lewd exposure of prosthetic or imitation genitals or breasts when it:
>
> 1. Predominantly appeals to a prurient, shameful, or morbid interest;
>
> 2. Is patently offensive to prevailing standards in the adult community of this state as a whole with respect to what is suitable material or conduct for the age of the child present; and

> 3. Taken as a whole, is without serious literary, artistic, political, or scientific value for the age of the child present.

§ 827.11(1)(a).

Respondent HM Florida-ORL, LLC ("HM") is a for-profit business operating Hamburger Mary's Restaurant and Bar in Orlando, Florida. HM frequently hosts drag show performances, comedy sketches, and dancing. Prior to the passage of the Act, none of HM's performances were age-restricted. App. 125a. After the Act was passed and prior to the district court's preliminary injunction, however, HM was forced to place age restrictions on all of its performances except for a single Sunday afternoon performance, which HM tailors to be appropriate for the youngest possible audience in order to avoid running afoul of the Act. *Id.* Following the district court's order granting a preliminary injunction, HM has returned to normal operations, which it contends are not harmful to minors but likely still run afoul of the Act due to its overbreadth and vagueness.

HM is and has always marketed itself as a family restaurant. Parents and grandparents often attend shows with their children, and HM leaves it up to parents to determine whether a particular show is appropriate for the age of their own child. The newly-imposed age restrictions resulted in the immediate cancellation of "20% of [HM's] bookings for its May 2023 shows and for future bookings." App. 124a.

HM brought this suit, challenging the Act as a facial violation of the First Amendment. App. 107a. The district court granted HM's motion for a preliminary

injunction, ruling in part that HM had shown a substantial likelihood of success on the merits of its claims. App. 52a. The district court ruled that § 827.11 is "content-based on its face," because the Act "applies to particular speech because of the topic discussed or the idea or message expressed." App. 43a (quoting *City of Austin, Tex. v. Reagan Nat'l Advert. of Austin, LLC*, 142 S.Ct. 1464, 1471 (2022)). The district court found that the State did not use the least restrictive means of achieving its purported goal of protecting children from explicit content. App. 48a. Additionally, the district court found that the Act is likely unconstitutionally vague, because it fails to define key terms such as "lewd conduct" leaving both citizens and law enforcement to "necessarily guess at [their] meaning." App. 49a (citing *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926)). Finally, the district court determined that the Act is likely overbroad because it is "dangerously susceptible to standardless, overbroad enforcement which could sweep up substantial protected speech[.]" App. 51a.

The State asked the district court for a partial stay of the preliminary injunction, so that it could enforce the Act against everyone except for HM. The district court denied the motion for a partial stay, reasoning that where a statute is found to be overbroad, a preliminary injunction prohibiting all enforcement is proper. The court noted that "[t]his Act, unlike those in most of the cases cited by Defendant, has not merely been adjudged likely unconstitutional in a limited range of applications, and

therefore capable of mitigation. Rather, it was found likely to be unconstitutional on its face." App. 22a. The district court distinguished a statewide injunction of an overbroad criminalization of speech from the cases cited by the State, which primarily involve "nationwide injunctions on limited classes of persons." App. 23a. The district court's preliminary injunction "is neither nationwide, nor does it pertain only to a limited class of individuals. *Id.*

After appealing the district court's preliminary injunction, the State asked the Eleventh Circuit for a partial stay of the injunction pending appeal. A divided panel denied the motion for partial stay, finding that the district court had not abused its discretion when it enjoined the State from all enforcement of the statute. The panel majority emphasized the district court's finding that the Act is likely overbroad, and that "Secretary Griffin does not take issue with that ruling in her motion for a partial stay." App. 10a. The panel determined that "a successful overbreadth challenge 'suffices to invalidate *all* enforcement of th[e] law[.]'" App. 7a (quoting *Virginia v. Hicks*, 539 U.S. 113, 119 (2005)).

On October 19, 2023, the State filed its application to this Court, seeking a partial stay of the district court's preliminary injunction.

ARGUMENT

I. THIS COURT IS UNLIKELY TO GRANT CERTIORARI OR TO REVERSE THE JUDGMENT BELOW.

The State of Florida is unable to satisfy *any* of three requirements necessary for this Court to issue a stay in this matter. To obtain an emergency stay pending the filing and disposition of a petition for writ of certiorari, the State must demonstrate: "(1) a reasonable probability that four Justices will consider the issues sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). "In deciding whether to grant a stay pending appeal or certiorari, the Court also considers the equities (including the likely harm to both parties) and the public interest." *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring in grant for application of stays) (citing *Hollingsworth*, 558 U.S. at 190). An emergency stay is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Murthy v. Missouri*, Nos. 23A243, 23-411, 2023 U.S. LEXIS 4210, at *6 (Oct. 20, 2023) (emphasis added) (Alito, J., Thomas, J., and Gorsuch, J., dissenting from grant of application to stay in First Amendment case) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (discussing the similar standard for an injunction)). Because the State

cannot satisfy any of these requirements, this Court should deny the State's application.

The State asserts that an injunction, "especially when it seeks to enjoin presumptively valid governmental action – should generally apply only to the party before the Court." App. Br. at 9 (citing *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 163 (2010); *Doran v. Salem Inn, Inc.* 422 U.S. 922, 931 (1975)). The State argues that this general principle is without exception and should be applied to this case. However, in the context of a facially overbroad regulation of protected speech, this Court has held that *all* enforcement of such a statute may be lawfully suspended. *Hicks*, 539 U.S. at 119. The district court and panel majority in this case agreed. App. 7a. The Court should reject the State's attempts to conflate nationwide injunctions with appropriate injunctive relief in First Amendment overbreadth matters.

A. The scope of the preliminary injunction is appropriate because the district court found that the Act is likely overbroad.

First, the State is not asking this Court to permit enforcement of a "presumptively valid government action." App. Br. at 9. The district court found that the Act is a facially content-based regulation on protected speech. App. at 43a. The State does not challenge that finding here. Content-based regulations on speech are "*presumptively unconstitutional* and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests. *Reed v. Town of*

Gilbert, 576 U.S. 155; 163 (2015) (emphasis added). The State is owed no special presumption of validity. To the contrary, the First Amendment is "[p]remised on mistrust of governmental power." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010).

Second, this Court has held that, when courts invalidate a speech-restricting law on facial overbreadth grounds, as the district court did here, *all* enforcement may be lawfully suspended. *Hicks*, 539 U.S. at 119. The panel majority in this case agreed. App. 7a. The district court also found that Plaintiff is likely to succeed on the merits of its overbreadth claim, because the Act is "dangerously susceptible to standardless, overbroad enforcement which could sweep up substantial protected speech[.]" App. 51a. For the purposes of this application, the State has conceded that finding.

The State relies on two of this Court's decisions for the proposition that, as a general rule, even where courts apply the overbreadth and chilling effect doctrines, relief should be narrowed only to the parties before the court. Neither case bears any resemblance to the instant dispute. The first case is *United States v. Nat'l Treas. Emps. Union ("NTEU")*, 513 U.S. 454 (1995). *NTEU* addressed a preliminary injunction barring enforcement of a federal ban on all executive branch employees of any grade or rank from accepting payment for writing or speaking engagements regardless of whether there was a nexus with their actual employment. *NTEU*, 513 U.S. at 477. The Plaintiffs were a class comprising "all Executive Branch employees

below grade GS-16" and a single GS-16 lawyer for the Nuclear Regulatory Commission who had published articles unrelated to his position in the Executive Branch. The injunction on appeal applied to "the entire Executive Branch of the Government" including officials above grade GS-15 who were not party to the case.

The government asked this Court to narrow the injunction by permitting enforcement against employees who were not party to the case – Executive Branch employees above grade GS-15. *Id.* Those officials had also received a 25% pay increase to offset the ban. *Id.* The Court reasoned that Congress "reasonably could assume that payments of honoraria to judges or high-ranking officials in the Executive Branch" might result in the "appearance of improper influence." *Id.* But the government provided no similar justification for applying the ban to low-level employees "with negligible power to confer favors on those who might pay to hear them speak or to read their articles." *Id.* Thus, it made sense for this Court to narrow the scope of the injunction to the parties before the Court, which included all Executive Branch employees below grade GS-16. The Court made no finding of overbreadth in that case. *See id.* at 46-46, 60 (declining to entertain a facial challenge in a case where respondents admitted their objective could be achieved through an as-applied challenge). HM did not bring an as-applied challenge here, and the district court determined that HM is likely to succeed on its overbreadth claim. App. 52a.

The second case the State relies on is *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975). At issue in *Doran* was a local strip club ordinance, rather than a state law. Two of the *Doran* plaintiffs had complied with the ordinance and sought pre-enforcement relief; the third plaintiff had violated the ordinance and was already being prosecuted in state court. In that case, this Court considered whether federal injunctive relief is permitted when a state prosecution is pending against the plaintiff. The Court limited the scope of the injunction to the two compliant corporations, affirming that the *Younger* doctrine bars federal courts from issuing injunctions if doing so would interfere with pending state proceedings. *Id.* The injunction in this case does not interfere with any existing state court prosecutions, because the law has not yet been enforced. Resp. App. 24a. *Doran*, too, is inapposite.

Judge Brasher's dissent claims, and the State argues, that the majority's reasoning "conflates the merits of a legal claim with the scope of the remedy for that claim." App. 14a (Brasher, J., dissenting from denial of partial stay). But the panel did not merely infer this remedy from the overbreadth doctrine. Rather, this Court explicitly "provided this *expansive remedy* out of concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech." *Hicks*, 539 U.S. at 119. (emphasis added). "Overbreadth adjudication, by suspending *all* enforcement of an overinclusive law, reduces the social costs caused by the withholding of protected speech." *Id.*

The overbreadth doctrine is concerned not only with the parties before the court, but with a chilling effect on society as a whole. The State asks this Court to require that every person affected by an overbroad restriction on speech litigate the issue individually in order to secure their own rights. This impracticality is precisely what the overbreadth doctrine seeks to remedy. "Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech – harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas." *Id.*

The overbreadth doctrine permits litigants to challenge a statute "not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Okla.*, 413 U.S. 601, 612 (1973). A plaintiff must, of course, demonstrate harm sufficient to establish Article III standing. However, he need not show that the statute is unconstitutional as applied to his own conduct, so long as he demonstrates that the statute is substantially overbroad "judged in relation to the statute's plainly legitimate sweep." *Id.* at 615. The remedy in such cases cannot rationally be limited to the plaintiff, whose own speech may or may not be regulated by the law.

HM does not operate its restaurant and present its performances in a vacuum. The artists who perform at HM's establishments perform in other venues across the State of Florida. If the injunction were limited to HM, other establishments could be subject to penalties under the Act for the same performances by the same performers. Artists who perform anywhere *other* than this single Hamburger Mary's location will be forced to censor their performances to avoid running afoul of the law. HM's establishment would become the only business in the State of Florida where performers have the freedom of speech and expression guaranteed by the First Amendment. A stay would chill creative competition and public conversation through performance art. That scenario is far from the "uninhibited marketplace of ideas" this Court has consistently sought to protect. *Hicks*, 539 U.S. at 119.

B. There is no circuit split as to the scope of injunctive relief when a court finds that a speech-regulating statute is overbroad.

The circuit courts are not split on this issue. The State's claim to the contrary depends on decisions having nothing to do with the First Amendment overbreadth doctrine. In fact, the State cites not one court of appeals decision that limited an injunction to the parties after finding a statute overbroad. Of the many cases the State cites to demonstrate "a growing disparity in the lower courts on the propriety of extending injunction relief to nonparties," only two cases involve a First Amendment facial challenge. App. Br. at 20. Both cases undermine the State's argument. The first case is *Rodgers v. Bryant*, where the Eighth Circuit found that "broad

preliminary injunctive relief is often appropriate under current law where, as here, a plaintiff brings a facial challenge to a statute under the First Amendment." 942 F.3d 451, 459 (8th Cir. 2019). The second case is *Free Speech Coal., Inc. v. Att'y Gen.*, where the Third Circuit narrowed the scope of injunctive relief to the parties before the court only *after* finding that the statute at issue was not overbroad. 974 F.3d 408, 430-31 (3rd Cir. 2020).

The remaining cases that demonstrate this supposed circuit split are entirely unrelated to the First Amendment. *See Brown v. Trs. of Boston Univ.*, 891 F.2d 337 (1st Cir. 1989) (limiting injunctive relief in a Title VII gender discrimination claim); *Louisiana v. Becerra*, 20 F.4th 260 (5th Cir. 2021) (limiting the scope of a preliminary injunction in a challenge to a COVID-19 vaccine mandate); *L.W. v. Skrmetti*, 73 F.4th 408 (6th Cir. 2023) (staying a preliminary injunction in a Fourteenth Amendment Equal Protection challenge because the State was likely to succeed on appeal); *California v. Azar*, 911 F.3d 558 (9th Cir. 2018) (limiting a nationwide injunction in a case challenging agency rules under the Administrative Procedure Act); *Georgia v. President of the U.S.*, 46 F.4th 1283 (11th Cir. 2022) (limiting the scope of a nationwide injunction in a challenge to COVID-19 vaccine mandates). The State has not pointed to a single case wherein a court determined a regulation on speech to be overbroad and then limited injunctive relief to the plaintiff.

* * *

The State conflates the broader issue of universal injunctions with the unique nature of First Amendment overbreadth challenges. Even if the Court ultimately decides to address the question of universal injunctions, the State offers no explanation for why it would do so first in a First Amendment overbreadth case, given the lack of any relevant division of authority and the special considerations that apply in that context. If the Court did grant certiorari, it will likely affirm the exceptional remedies it provided in *Broadrick* and *Hicks*. These factors decide the matter in HM's favor.

II. THE STATE WILL NOT SUFFER IRREPARABLE HARM BY MAINTAINING THE STATUS QUO, AND THE BALANCE OF EQUITIES WEIGHS HEAVILY IN FAVOR OF HM.

In *Ashcroft v. ACLU*, 542 U.S. 656, 670-71 (2004), this Court upheld the issuance of a preliminary injunction, which prohibited all enforcement of a federal statute (COPA) aimed at protecting children from sexually explicit internet content. The Court determined that "the potential harms from reversing the injunction outweigh those of leaving it in place by mistake . . . there is a potential for extraordinary harm and a serious chill upon protected speech." *Id.*

That same harm is inevitable here, if the Court limits the scope of the preliminary injunction to apply only to HM. Doing so would leave in place a law that the district court determined would chill the speech of many Floridians. Rather

than an uninhibited marketplace of ideas, the State seeks to turn HM's establishment into the only business in the State of Florida where the First Amendment has full effect. And HM's own artists, all of whom perform at a variety of establishments across the state, risk arrest and prosecution under the law whenever they perform outside of HM's Orlando restaurant.

On the other hand, the harm to the State is negligible. The State asserts that Florida "suffers a form of irreparable injury" any time it is enjoined from enforcing one of its statutes." App. Br. at 22 (quoting *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Robers, C.J., in chambers)). In *King*, however, the government's assertion was supported by evidence of ongoing, concrete harm to law enforcement and public safety. *Id.* The State has presented no such evidence here.

Additionally, as the district court noted, "constitutionally valid statutes already exist to further the state's compelling interest in protecting minors from exposure to obscene exhibitions." App. 26a. For instance, Fla. Stat. § 847.013 prohibits permitting minors to view obscene "motion pictures, exhibitions, shows, presentations, or representations." At the preliminary injunction hearing, the State conceded that it has already used other state laws to investigate and penalize establishments for what it terms "sexually explicit conduct." Resp. App. 24a. The State conceded that the other statutes do "the same thing that this statute does here." *Id.* When the State already has to the power to penalize businesses for exposing

children to "sexually explicit conduct", then it suffers no harm because it is enjoined from enforcing the Act.

Finally, the State's claim to ongoing harm rings hollow in light of its own conduct of this litigation. The State has not sought to expedite its appeal of the district court's preliminary injunction in the Eleventh Circuit. To the contrary, it has *slowed* the appeal by seeking two (2) extensions of time to file its opening brief, postponing the appeal by two months. Resp. App. 51a-61a. One would think that a party truly harmed by a preliminary injunction would be doing everything in its power to secure its reversal as quickly as possible. The State here is doing the opposite – simultaneously imposing on this Court by seeking extraordinary relief while taking its time in the lower court with the power to give it a full reversal.

* * *

HM is not asserting its right not to lose its liquor license; it is asserting its right to be free from prior restraints on speech. HM's artists perform in a number of different venues, in different municipalities. If performers cannot be sure how and where the law is applied, they will feel compelled to censor their performances generally. The free expression of HM's performers, and thus of HM, will be chilled.

This Court should reject the argument that restrictions on the speech of non-parties have no impact on the speech of the litigants themselves. Speech, art, and expressive conduct do not take place in a vacuum. Rather, they are an ongoing

conversation within our society. Art is frequently commentary on and a reflection of the broader social conversation, including the work of other artists. The First Amendment protects "a free marketplace of ideas, a marketplace that provides access to 'social, esthetic, moral, and other ideas and experiences.'" *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 583 (2011). Silencing every other party in the "marketplace of ideas" inherently limits HM's speech.

CONCLUSION

For the foregoing reasons, this Court should DENY the State's application.

Respectfully submitted,

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RESPONDENT'S APPENDIX

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

HM FLORIDA-ORL, LLC, Plaintiff, vs. RON DeSANTIS, MELANIE GRIFFIN, and STATE OF FLORIDA, Defendants.	Case Number 6:23-CV-950-GAP-LHP

TUESDAY, JUNE 6, 2023; 1:30 P.M.
MOTION HEARING
BEFORE THE HONORABLE GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

APPEARANCES:

COUNSEL FOR PLAINTIFF,
Brice Timmons, Esq.
Melissa Stewart, Esq.
Gary Israel, Esq.
(by phone)

COUNSEL FOR DEFENDANTS:
Nathan Forrester, Esq.
Jeffrey DeSousa, Esq.
Daniel Bell, Esq.

Official Court Reporter:
K. Stanford

Proceedings recorded by mechanical stenography.
Transcript produced by computer-aided transcription.

P R O C E E D I N G S

THE COURT: Good afternoon, everyone.

Be seated, please. Okay, Anita. Call the case.

THE COURTROOM DEPUTY: This is in the matter of HM Florida-ORL, LLC versus Ron DeSantis, Melanie Griffin, and the State of Florida, Case number 6:23-Civil-950-GAP-LHP.

Will counsel please state your name for the record.

MR. TIMMONS: Brice Timmons, B-r-i-c-e T-i-m-m-o-n-s, representing the plaintiffs.

MS. STEWART: Melissa Stewart, M-e-l-i-s-s-a S-t-e-w-a-r-t, representing the plaintiffs.

THE COURT: Okay. And I think Mr. Israel is on the phone, correct?

THE COURTROOM DEPUTY: Yes, sir.

THE COURT: Okay. And for the defendants?

MR. FORRESTER: Nathan Forrester, N-a-t-h-a-n F-o-r-r-e-s-t-e-r, for the defendants.

THE COURT: Okay.

MR. DeSOUSA: Jeffrey DeSousa, D-e-S-o-u-s-a.

MR. BELL: And Daniel Bell for the defendants.

THE COURT: Okay. All right.

Well, some housekeeping matters before we begin.

We're here, obviously, on the motion for a temporary injunction filed by the plaintiff. And in their response, defendants raised a motion to dismiss.

And so because of that, I gave the plaintiffs an opportunity to respond to that in writing.

So technically, today's hearing is just on the motion for temporary injunction, although there are obvious issues that are common to both.

I didn't put a time limit in my order noticing this hearing. I would think 40 minutes should be adequate. If you think you need more time than that, just let me know, but let's try to do it in 40 minutes per side. And if the plaintiff wants to reserve five or ten minutes for rebuttal, that will be fine.

Also a housekeeping matter, there's an issue of the propriety of including the governor and the State as defendants.

Are plaintiffs willing to concede that they ought not to be parties to this?

MR. TIMMONS: We are, Your Honor.

THE COURT: Okay. So --

MR. TIMMONS: We think Ms. Griffin is the proper defendant.

THE COURT: Okay. Thank you.

And I assume the defendants agree that Ms. Griffin is an appropriate defendant, correct?

MR. FORRESTER: Yes, Your Honor.

THE COURT: Okay. All right.

Well, let me go ahead and entertain argument, then.

I'll begin with plaintiffs, and we'll go from there.

MR. TIMMONS: Your Honor, we would like to reserve ten minutes for rebuttal.

THE COURT: Okay.

MR. TIMMONS: Thank you, Your Honor.

My name, again, is Brice Timmons. And I appreciate the Court indulging us with pro hac vice admission.

Ms. Stewart and I are from Memphis, Tennessee, but we've been asked to come down and represent the plaintiff in this matter, HM Florida-ORL, LLC.

THE COURT: Were you involved in the Friends of George case?

MR. TIMMONS: We were the -- yes, Your Honor. We were lead counsel.

THE COURT: Okay. You have a judge up there who likes to write long opinions. Don't expect that from me.

MR. TIMMONS: Judge Parker is usually pretty succinct, but 70 pages is -- that was impressive. He also made us go to trial in 58 days from filing. So that was --

THE COURT: I'm going to give you 60.

[Light laughter.]

MR. TIMMONS: I appreciate that.

But that has allowed us -- Ms. Stewart and I have been pretty deep in this case law for a while now, and so

we're pretty familiar with the standards in both -- both the Supreme Court standards and the Eleventh Circuit.

The Eleventh Circuit is not a circuit with a great breadth of obscenity case law, but the standards at issue here really are all set by Supreme Court precedent. There's very little need to drill down further.

I do want to first address the issue of standing. The State has raised -- and even though Ms. Griffin is the proper defendant, I will probably continue to refer to the State as the State.

The State has raised concerns about whether Hamburger Mary's is an appropriate plaintiff in this matter, specifically because at present, Hamburger Mary's is particularly careful not to violate this statute. We don't really know what the statute means, and we'll get to that in a moment. But the -- the question is whether Hamburger Mary's engages in conduct that could arguably fall within the statute's reach. And that is from the Susan B. Anthony Foundation case that's cited in our brief.

THE COURT: Mr. Timmons, let me help you. I really don't have much concern about the standing issue.

MR. TIMMONS: All right. Let's move on.

THE COURT: If, after you hear from the State, you think you need some rebuttal time on that, I'll be happy to hear it, but --

MR. TIMMONS: Okay. Well, let's move on, then.

The statute is vague and overbroad in three ways that specifically affect Hamburger Mary's. And HM Florida-ORL, LLC, does business as Hamburger Mary's, and I will refer to them that way because it's a lot easier.

The statute permits the Division of Professional Regulations to revoke the licensure of any business that permits children to attend what they call an adult live performance. Adult live performance is defined in a way that is largely extremely specific and consistent with constitutional standards. However --

THE COURT: Constitutional standards for obscenity.

MR. TIMMONS: For obscenity. However --

THE COURT: What about lewd conduct? Is there any definition of that in Florida?

MR. TIMMONS: You nailed it, Your Honor. There is no definition of lewd conduct in Florida. There is no definition of lewd conduct within the Eleventh Circuit. There is no definition of lewd conduct that we've been able to find in Florida state case law.

There is -- the term "lewd conduct" has never been utilized by the Supreme Court in my lifetime and certainly is not permissible as a term for defining regulable speech within the bounds of Ashcroft versus ACLU or Reno versus ACLU, the critical cases involving the protection of minors from

inappropriate material.

Also, there's no definition of lewd exposure of prosthetic or imitation genitals or breasts. And I really want to talk about that one, because the statute does not appear to target drag performers specifically. However, that language right there -- lewd exposure of prosthetic or imitation genitals or breasts -- belies the statute's real purpose, which is to target drag performers.

We know that's true because Governor DeSantis went on television yesterday and said it. He said, There is no such thing as a harmless drag show, when referencing this legislation. But the text of the legislation is the more important place to look and where the Court should ground its decision to grant the preliminary injunction.

It should -- the Court should look to the issue of lewd exposure of prosthetic or imitation genitals or breasts to know who it's targeting, because there are two categories of people in the world who wear prosthetic breasts. They are people who have undergone a mastectomy and drag performers.

And I think the Court can safely infer that the Florida legislature was not attempting to target women who had undergone a mastectomy when they drafted a statute about adult live performances. There's only one category of performer that wears prosthetic breasts.

And, again, what does lewd exposure mean?

Is that showing some cleavage?

You know, in most statutes that govern these types of performances, like strip club regulations, there will be very detailed, specific language about the number of inches below or, you know, the -- the areola that a top can --

THE COURT: Well, I think Florida's general obscenity statute has all those requirements, right?

MR. TIMMONS: It does, Your Honor. It absolutely does. And you will note also that Florida's obscenity statute does not contain the words "lewd conduct" or "lewd exposure." Those were added specifically to this statute, and they enabled the State to target drag performers because of their vagueness.

We know that the State has, in fact, targeted drag performers. We know that police were present undercover at a drag performance entitled -- it was a Christmas drag show.

We know that the --

THE COURT: Was that the one here in Orlando?

MR. TIMMONS: I believe so, Your Honor. Let me confirm.

THE COURT: Yeah, the Plaza Live.

(Brief pause in proceedings.)

MR. TIMMONS: Yes, Your Honor. That was here in Orlando.

These drag performers were surveilled, targeted, and

a police report was ultimately written that said that they didn't do anything illegal. And yet the department -- or, rather, the Division of Professional Regulations still targeted them for the revocation of a liquor license. This has happened to another -- another venue as well.

So we know that law enforcement are interpreting that language, lewd conduct, to mean drag performances. We know that the governor's said it out loud. We know that it is vague enough that it can certainly encompass anything that a law enforcement officer believes subjectively to violate their moral standards. And we know that that's going to be used against businesses, specifically LGBT-friendly businesses like Hamburger Mary's that actively present drag performances.

This is a question that parents should answer: Should my children go to a drag show? What is the level of appropriate -- you know, what's the appropriate level of conduct for my child to see? Those are things that parents should figure out, not the State.

The third portion of the law that is problematic is the provision about the age of the minor present.

Specifically -- let me get the exact quote again. The statute requires the venue to ensure that the performance is appropriate for the age of the minor present.

Now, that specific provision is problematic under Reno versus ACLU and Ashcroft versus ACLU, but the best

analysis of that type of provision is found at ACLU versus Mukasey, which is actually Ashcroft -- it's the Ashcroft case on remand to the Third Circuit. And in the Mukasey analysis, the Third Circuit explicitly discusses this sort of moving target age-range framework.

What the court said in that case -- and the Supreme Court seems to have at least tacitly endorsed this result. The court upheld the preliminary injunction in that case. That was the Ashcroft versus ACLU opinion. And the same reasoning was found -- it was reiterated in the Mukasey opinion and certiorari was denied after the Mukasey court followed its own precedent and the Supreme Court's instructions on remand and upheld the permanent injunction against the Child Online Protection Act.

The court took specific issue with a definition of minor that was essentially subjective, that it could -- that minor could mean anything. And when you talk about community standards, as this statute does, the community standards for what content is appropriate for a five-year-old and a 17-year-old are very different things.

So when you give law enforcement officers this power to decide what is and isn't appropriate for minors, and especially when you specifically tell them for the age of the minor present, they get to make a lot of subjective decisions of what they think is appropriate for any given age group to

see.

That gives businesses no guidance on what they can and cannot do. And it's completely inconsistent with the Reno decision's requirement that Congress -- or the legislature in this case -- not reduce all speech that is fit for the mailbox to what is fit for the sandbox.

It requires businesses to essentially turn all of their performances into performances that are appropriate for kindergartners. And the First Amendment simply does not permit that. The Supreme Court has reiterated it in Reno and in Ashcroft, and then the McKenzie court in the Third Circuit did a detailed analysis that I would encourage the Court to take a look at.

Honestly, Your Honor, I had gotten up here planning to spend ten minutes talking about standing issues, and if the Court doesn't have concerns about that --

THE COURT: Well, you can go ahead and summarize your argument for me. It may help. I just -- I tend to be one of these people up here that tell you what's on my mind. So --

MR. TIMMONS: Well, no. I appreciate it. I just don't want to waste the Court's time.

THE COURT: You're not wasting my time.

MR. TIMMONS: Okay. The standing argument simply is that Hamburger Mary's has already had to self-censor.

They have taken shows that used to be 18 -- that used to be all ages -- these are not shows where children were encouraged to attend, but parents would bring their kids because they wanted to go out and have fun and they wanted to bring their kids with them -- and they've turned all the shows except for Sunday shows into 18 and up. And those Sunday shows are now literally things like spoofs on the Lion King and other G-rated, you know, Disney-type movies. I think they're doing Les Mis next week.

But Hamburger Mary's has been forced to self-censor. They are directly impacted by this law, and they have a reasonable concern that there's a credible threat of enforcement based on Florida's -- the Department of Professional Regulations' recent conduct.

THE COURT: So there is -- their speech has been chilled, as they would say.

MR. TIMMONS: Their speech has been chilled, but I would say that they -- it's more than just the chilling effect. This law is specifically targeted at the kind of speech that drag performers typically engage in and is being used to -- is actually being used against venues where drag shows take place. So they face a specific credible threat of enforcement. The standard is only that their speech, the speech being put on at their performances, must arguably fall within the bounds of the statute.

Lewd conduct is so generalized a term that it scoops up a tremendous amount of speech and places them at a real risk of enforcement of a criminal statute with heavy fines and the revocation of the licenses necessary to operate their business.

THE COURT: Let me ask you your view about -- and you mentioned it just a minute ago -- the legislative history.

As you know, courts are somewhat reluctant to put a whole lot of confidence in legislative history because it's so broad and difficult to discern. But I notice Judge Parker spent a lot of time in his opinion dealing with the legislative history of the Tennessee Act. And then you just mentioned something Governor DeSantis said yesterday?

MR. TIMMONS: Yes, Your Honor.

THE COURT: What did he say yesterday?

MR. TIMMONS: He gave a speech yesterday.

THE COURT: I can't keep up with all his speeches. See, that's the problem.

MR. TIMMONS: I just found out about this. So let me see if I've got it here.

Melissa, would you send me that?

(Brief pause.)

That's it, Your Honor.

While Ms. Stewart pulls that up, I do want to be clear. We aren't basing any of our argument in the external

comments of political leadership. I think it's important that we -- let's not lie to ourselves or pretend that the legal fiction is true, that this is not -- this statute wasn't specifically targeted at drag queens. The legislators passing the law all said it. Governor DeSantis has said it. It's very clear what they meant to do. However, that's not where the Court should ground the opinion. You're right, Judge Parker did undergo a lengthy analysis of the legislative history.

Oddly enough, it's an analysis that Ms. Stewart and I did not spend a great deal of time arguing, because we were much more concerned with the text of the statute in question and comparing it to other obscenity laws or other public indecency laws in the State of Tennessee. You could see very clearly what the legislature was trying to do by just comparing the statutes to existing statutes on the books, and it's the same here.

Lewd conduct doesn't appear in any of these other Florida obscenity statutes in a meaningful -- you know, it is not a term that is defined anywhere in Florida law. It's -- the statute is just designed to broaden the sweep of what Florida law enforcement officers can do in their discretion to arrest or shut down businesses or effect fines on those businesses.

By the time -- even if the Court were to adopt an

as-applied challenge here or to prefer an as-applied challenge, the harm will already have been done to any business by the time a court is reviewing that -- those cases because there are criminal penalties to this law. Enforcement can begin with an arrest. Once that happens, the harm is already done.

THE COURT: Let me ask you about that.

It occurred to me that if an injunction is granted, I would enjoin Ms. Griffin from using the department's resources to fine or revoke a license.

But what about the state attorney in Orange County bringing a misdemeanor charge against Hamburger Mary's.

How do I -- how do you deal with that? Do I need to enjoin the state attorney or the attorney general?

MR. TIMMONS: I think you need to enjoin the attorney general, Your Honor.

THE COURT: Well, maybe the State's lawyers can help me on that. So --

MR. TIMMONS: Understood.

Also, in order to determine that the statute warrants injunctive relief, the Court functionally has to grant declaratory relief first, finding that the statute is unconstitutional.

THE COURT: Sure.

MR. TIMMONS: And I would like to believe that we

live in a place where law enforcement officers follow the dictates of federal judges.

We -- certainly, that's not always been the case throughout history, but as a general rule, I find that when federal judges declare laws unconstitutional, law enforcement officers don't spend a lot of resources on enforcing unconstitutional laws.

THE COURT: Well, that's hopefully still true.

MR. TIMMONS: I hope it's still true.

Your Honor, honestly, I think that gets to the bulk of my concerns with the statute. And unless the Court has any questions, I think I'll let the State tell you why I'm wrong.

THE COURT: That's fine. I appreciate you coming down here from Memphis and appreciate your thoughts, and I'll recognize you for rebuttal.

MR. TIMMONS: Thank you, Your Honor.

THE COURT: Okay. Mr. Forrester.

MR. FORRESTER: Your Honor, may I have a second to confer with --

THE COURT: Sure.

(Pause in proceedings.)

MR. FORRESTER: Thank you, Your Honor. And may it please the Court.

My name is Nathan Forrester. I represent the three defendants in this case. With me are my co-counsel,

Jeffrey DeSousa and Daniel Bell.

The plaintiff in this case, which I will just abbreviate as HM, has brought a facial challenge to the constitutionality of Florida's recently enacted Protection of Children Act, and this Act makes it a misdemeanor to knowingly admit a child to an adult live performance.

An adult live performance is defined as a sexually explicit show -- and I'm condensing slightly here -- that the adult community of the state would consider patently offensive for the age of the child present. And my opposing counsel made something of the -- that phrase, for the age of the child present, which I will come to in a second.

Our position, of course, is that this statute is entirely constitutional because it tracks language that the Supreme Court and the Eleventh Circuit have held constitutional in other cases in which a state was seeking through legislation to protect children from exposure to activity or material that is obscene for the child; not necessarily for adults, but for the child.

THE COURT: Let me see if I can understand this. Your briefing seems to switch from what I think is the issue in this case, that is, a new standard that is -- I mean, if we look at it, 827.11, as you know, defines adult live performance meaning a show, exhibition, et cetera, that depicts, simulates nudity or sexual conduct as defined in

847.001, which is Florida's obscenity statute. So I read that as not doing anything except reaffirming what is already in the Florida statutes.

But then it goes further and says, sort of out of the blue, lewd conduct. And then it goes even a further step by referencing the lewd conduct as the exposure of prosthetic or imitation genitals or breasts, which seems to me to be a brand-new standard, to the extent it is a standard, of lewd conduct that applies to someone wearing a prosthetic breast, I suppose, for -- as a drag person.

And then in your briefing, you keep going back to the obscenity standard. We're not dealing with an obscenity case here. We're dealing with a new statute that talks about lewd conduct, including lewd exposure of a prosthetic or imitation female breast. So your reference to obscenity in your briefing, as well as, I think, where you're starting to go now, seems to me to be sort of not dealing with -- with the elephant in the room.

MR. FORRESTER: I understand what Your Honor is saying. I think there are two parts to your question --

THE COURT: Okay.

MR. FORRESTER: -- and I'll try to start with the latter part first.

We would, with respect, dispute that this is not about obscenity, because the list of activities that you just

read out are still modified and narrowed by the three-part obscenity test that derives from cases like Ginsberg v. New York and --

THE COURT: I agree with you. I agree. I think what you're doing here is trying to tie the term "lewd" into the standard recognized for obscenity.

MR. FORRESTER: "Lewd" is being narrowed by the terms that define what is obscene so that really what is being proscribed here is what is obscene for the age of the child present. So it is still something that is obscene for that child.

THE COURT: So it's your position that "lewd" falls within the same definition of what would be obscene if it's not appropriate for the particular age of that child?

MR. FORRESTER: Yeah. It is circumscribed by that three-part test, which is critical to determining that a particular activity is obscene under the Supreme Court's and the Eleventh Circuit's case law here.

THE COURT: So what the statute really does, then, is make the obscenity standard applicable to someone wearing a prosthetic breast.

MR. FORRESTER: If it is done in a --

THE COURT: I just said that. If it's done -- if it falls within one of these obscene standards. The State of Florida wants to make clear that something obscene by a drag

queen is illegal in Florida as if it was done by anybody else.

MR. FORRESTER: Well, it's not necessarily just a drag queen. It is lewd exposure of prosthetic or imitation genitals or breasts. I mean, that could be done by anybody. And lewd conduct is actually a word -- a phrase that is also -- it does have a definition in Florida law. It's a --

THE COURT: It does? Where?

MR. FORRESTER: It's a phrase that appears throughout Florida statutes.

THE COURT: Where is it? I've never seen it.

MR. FORRESTER: There's a statute that -- several statutes that prohibit lewd and lascivious conduct. One of them is discussed in this 1973 Florida Supreme Court case called -- or 1971 Florida Supreme Court case called Chesebrough, which we cite in our brief. And it includes a definition of lewd in there.

THE COURT: Well, okay. But there's no statutory definition of it, right?

MR. FORRESTER: Not in -- not in this particular statute, no. There is another lewd conduct statute that includes a definition, but for this one, no, there is not a definition.

But it is a term that has -- as the Florida Supreme Court put it in Chesebrough, is a word in common use and it connotes wicked, lustful, unchaste, licentious, or sensual

design on the part of the perpetrator.

So it does -- that comes -- the court talked in that case about how lewdness or open and public indecency were offenses even at common law. It brings with it this entire common law gloss of what the word "lewd" means.

And I would submit it's no more vague than the words that are in the actual Miller test which have been imported into the Florida statute, like prurient, shameful, or morbid, and that those, obviously, have been approved by the courts.

The obscenity standards can only, you know, be precise to a certain point in describing that the line here is obviously a somewhat ineffable line that, you know, Potter Stewart famously called difficult to discern; I would know it when I see it. But that is -- it's endemic to obscenity, in general. It's not unique to the Florida statute in this respect. So we do believe that this is about what is obscene for the child. Again, not necessarily for the adult, but for the child.

THE COURT: Let's talk about the vagueness in terms of age appropriateness.

Would you agree that some things that would be obscene, inappropriate, or lewd with respect to a six-year-old would not be for a 16-year-old?

MR. FORRESTER: Yes, Your Honor. And that's precisely why this statute has it keyed to the age of the

child present. It actually addresses the concern from the ACLU v. Ashcroft and ACLU v. Mukasey cases that opposing counsel raised about what might be appropriate for a 17-year-old might not be appropriate for a five-year-old.

At it does is it actually prohibits the admission of a child to the performance based on the age of that child. And I would emphasize here, it doesn't prevent the performance from happening, and it doesn't prevent adults from attending the performance. And it may very well be the case that the kind of performance at issue would be one that 17-year-olds, 16-year-olds, 12-year-olds could attend, but not a five- or a six-year-old.

THE COURT: But you have the State of Florida making that subjective -- that's such a subjective decision. How is anybody going to risk their liquor license by taking that chance?

MR. FORRESTER: Well, the Supreme Court in Ginsberg upheld the harmful to minors test there that was actually based on what was inappropriate for minors as a category, which is, obviously, broader than one that is keyed to the age of the child present.

And actually, in the Eleventh Circuit case American Booksellers v. Webb, they said, We would interpret that, the word "minors," to mean a reasonable 17-year-old.

And all that Florida has done in this case is said,

We're just going to now make it so that the prohibition here on admission of the child is just simply keyed to the age of the child. We're no longer going to make it based on what would be obscene for minors, which would then effectively be a definition keyed to the reasonable 17-year-old.

THE COURT: Let me ask you this. Why does Florida need this statute? Doesn't Florida already have laws that would prohibit everything we've been talking about today?

MR. FORRESTER: It's not totally clear, Your Honor. There is -- some of these -- some of the other statutes come with requirements that the activity in question be done for consideration. Some have -- actually just enumerate specific categories of sexual activity.

This brings together in one place and it does so with a very tightly-tailored obscenity standard that is designed to ensure compliance with the obscenity standards that have been approved by the Supreme Court and Eleventh Circuit.

It actually, in a very real sense, addresses vagueness concerns that could otherwise arise from application of statutes like nuisance and disorderly conduct to conduct of this nature.

THE COURT: What's the status of your case against the Plaza Live?

MR. FORRESTER: I'm sorry, Your Honor?

THE COURT: The Secretary is seeking to revoke the liquor license of the Plaza Live Foundation here, right?

MR. FORRESTER: Oh. I'm actually not sure, Your Honor. I don't know where that is. We attached the administrative complaint, but I don't know what the status of it is.

THE COURT: Well, I'm just -- I'm curious, because, I mean, they're going after a license revocation and they're not using this statute. They're using another statutory framework to do that, right?

MR. FORRESTER: That was actually a point I wanted to make. These other complaints were brought under actually different statutes than this one. This one has not yet been enforced, so -- and I would also point out that in the investigations to which opposing counsel has referred, in some cases they went and looked at drag clubs and determined that they were not engaged in any problematic conduct under Florida law.

So they're not just targeting drag clubs even in that enforcement under a different statute. They're looking specifically for sexually explicit conduct. And that's a bit of a shorthand, I know, for the terms of these other statutes, but that's the same thing that this statute does here.

On its face, it is simply making it unlawful to admit a child to a sexually explicit performance meeting the

obscenity standard that would be inappropriate for the age of that child present. And in so doing, it is, again, not prohibiting any speech by adults. These adult live performances could continue to go on. It's not prohibiting adults from having access to these performances. They could continue to attend. It is only barring the admission of the child.

THE COURT: Well, it would bar a parent from bringing a child that he thinks is age appropriate, right?

MR. FORRESTER: Yes, it would.

THE COURT: Does that square with the Florida Parental Rights Act?

MR. FORRESTER: In what way, Your Honor? I'm --

THE COURT: Telling the parent what the State thinks is age appropriate for their child in terms of a drag show.

MR. FORRESTER: Well, there are times when, you know, the State, in the exercise of its police power, can determine that something is inappropriate even for a parent to, you know, allow a child to do or to do to a child. That sounds like a suggestion of perhaps -- actually, like a Fifth Amendment substantive due process parental right to direct the upbringing of the children claim. That's not one that --

THE COURT: No. I'm talking about Florida's parental rights statute.

MR. FORRESTER: I'd have to go and look at what that

says specifically, Your Honor, in order to address that.

THE COURT: I've got it up here somewhere.

(Brief pause.)

Parents' Bill of Rights, Chapter 101.4.

It raises another interesting issue. You say this doesn't have to be for compensation to be illegal, right?

MR. FORRESTER: Right.

THE COURT: So if on Father's Day a father went out in the backyard for his Father's Day party dressed as -- in female garb, he could be at risk of violating the statute if he did anything that might suggest something sexual?

MR. FORRESTER: It would have to be a show, exhibition, or other presentation in front of a live audience.

THE COURT: Yeah. What's a live audience? That's another good question. Does it take more than one person? What's a live audience?

MR. FORRESTER: Yeah. I imagine at least one, Your Honor.

Those are questions of interpretation that do remain to be determined in the way we apply the law.

THE COURT: Well, there are also questions of vagueness and overbreadth of a statute, I think.

MR. FORRESTER: Yeah, I just continue to think that to say that this statute is vague in any respect is to suggest that statutes like were upheld in Miller and Ginsberg and in

American Booksellers v. Webb also suffer from the same infirmity. They also use general phrases to describe both the category of conduct that was of concern. And then the familiar three-part test for Miller that defines whether -- when that kind of conduct actually qualifies as obscene and uses phrases like prurient, shameful, morbid. You know, those obviously come with a certain imprecision, but that's just inherent in the nature of -- the standards of this nature.

I, again, just do not think the Florida statute here is unique in this respect. I think it represents a very good-faith effort on the part of the State to tailor the prohibition in this statute as closely as possible to what is proscribable under these -- in these cases.

THE COURT: With respect to these standards, something that's patently offensive to prevailing standards in the adult community of the state as a whole, how would a judge go about determining that?

MR. FORRESTER: I didn't quite hear, Your Honor. I apologize.

THE COURT: Sometimes I don't speak into the mic.

Part of the standard, the obscenity standard, is something that's patently, which means obviously, offensive to prevailing standards in the adult community of the state as a whole with respect to what is suitable material for the age of the child.

And I'm sitting up here thinking, How in the world would I -- if I were trying a criminal case -- would I know where that line is? Am I in Key West or am I in Jacksonville? Am I in Miami Beach or am I in Pensacola?

MR. FORRESTER: I understand the concern, Your Honor.

I believe in the America Booksellers v. Webb case, they said that the first two of the three prongs of the Miller test that was used in a modified form in the Georgia statute in that case would assess prurience and patent offensiveness by what the average member of that -- of the adult community would consider it to be.

THE COURT: Which is?

MR. FORRESTER: And that would be the measure that --

THE COURT: But that would require a very sophisticated statistical survey, I would think.

MR. FORRESTER: Well, there's an element of judgment inevitably involved in this. I mean, I can't deny that.

But again, it just is endemic to statutes of this nature. The Florida statute is not unique in this respect. You could take issue with nearly every obscenity statute that has been passed in the wake of the Supreme Court decisions from the '60s and '70s --

THE COURT: I'm not trying to do that.

MR. FORRESTER: -- on grounds like these.

THE COURT: Okay. Well, I'm sorry. I didn't mean to interrupt you. I just -- I had these concerns and so I thought I would --

MR. FORRESTER: No. I appreciate it, Your Honor. It's helpful to focus the argument.

I would like to address standing, although it does -- it sounds like Your Honor is skeptical of our standing argument, but we do believe there is a serious standing problem here.

THE COURT: Okay. Go for it.

MR. FORRESTER: Opposing counsel correctly stated what the applicable standard is under Driehaus. There has to be -- the plaintiff has to allege conduct that is at least -- or state an intention to engage in conduct that is at least arguably proscribed by the statute. And that does set a bound. You can't concoct an implausibly expansive interpretation of the statute, say that that applies to your conduct, then use that to bootstrap yourself into standing.

And in the way the plaintiff seems to characterize the statute in this case as giving rise to their alleged injury, in fact, is that it would have the effect of barring even shows like I Love Lucy or Milton Berle comedy sketches. And that is simply not the case. That is not even an arguable reading of the statute.

This is true even if they're invoking the overbreadth standing doctrine, because the Eleventh Circuit has made clear that to invoke the overbreadth standing doctrine, you still have to point to an injury of your own. It may arise from an entirely constitutional application of the statute to you, but you have to show the statute applies to you and would restrict your conduct.

And everything that they say in their complaint indicates that nothing they do here would violate this conduct -- violate this statute. They insist that the performances they host feature, quote, no lewd activity. They evidently are able to determine what lewd means enough to assert that they're not doing it.

No sexually explicit shows. No disorderly conduct. No public exposure. No obscene exhibition or anything inappropriate for a child to see. And they say that if entertainment were to cross a line and then become unsuitable for a child, they would bar children from attending. So they profess an intention to steer well, well clear of any violation of the Act.

And there's also a traceability and a redressability concern with allowing such an implausibly expansive reading of the statute to give rise to standing, because effectively what they're saying is, We've chosen to take something of a prophylactic approach to steer very, very far clear from

violating the statute, and then they are faulting the defendants for that.

But there's nothing that defendants can do about that kind of decision. That is their prerogative, and that's their right. But it has to stem from at least an arguable reading of the statute that would make the conduct that they profess to engage in arguably proscribed. And we just don't see any way on the basis of the allegations in their verified complaint that what they're saying is even arguably proscribed.

THE COURT: Okay.

MR. FORRESTER: And as for -- and the same goes for the argument of standing based on chill. In a recent this recent Equality Florida case, the Northern District of Florida said, You can't demonstrate standing merely by announcing a chill. You must show that the challenged law arguably forbids the chilled speech. And --

THE COURT: What case was that you're referring to?

MR. FORRESTER: Equality Florida versus Florida State Board of Education is a decision from 2022 in the Northern District of Florida. We cite it in our brief.

THE COURT: Okay.

MR. FORRESTER: And it's true that in the case that opposing counsel cited, Driehaus -- Susan B. Anthony List v. Driehaus -- the Supreme Court did allow standing to a

plaintiff who -- whose asserted injury was that they were inhibited from making certain political statements because of enforcement proceedings brought against other -- other parties. But the Court was clear, though, that the reason was that the plaintiff had alleged an intent to engage in the same speech.

And based on the statements in HM's verified complaint, the performances that they say that are typical of their venue, they're nothing like the performances that are described in the administrative complaints, which we've attached to the response for that reason.

There are other First Amendment issues that they have raised. I don't know if Your Honor wants me to go into it, because Your Honor seems chiefly to be concerned with content neutrality, overbreadth, and vagueness. But they have suggested, at least, that the Act is imbued with a viewpoint discriminatory purpose, although they seem to be retreating from that somewhat now by saying they're really not asking the Court to look into legislative history.

But I do want to point out, the Eleventh Circuit has taken a very dim view of the use of isolated lawmaker statements to suggest a purpose to an otherwise facially-neutral statute. It has basically said, We understand that a content-based purpose can be a basis for invalidating a law, but you can't discern that by just picking

and choosing from legislative history.

And basically you have to engage in what is -- what I gather from those cases is sort of a traditional analysis of what the statute means from text structure. And it may be legislative history, you know, considered as a whole, but not isolated statements of lawmakers.

And then finally, they also suggest that what really is up here is an intent to target speakers based on their identity, basically drag performers. And that was a concern that did come up in the Friend of George's case out of Tennessee, which did actually have a list of the kinds of performers that were subject to the prohibition there.

This statute doesn't have any such list. It just prohibits adult live performances. It doesn't matter who is performing it. And we -- you know, we suggested, you know, one example, a strip club risque patriotic performance that, you know, is put on for service members or something like that. By its very operative effect, it is not targeting the identity of any particular speakers.

THE COURT: Well, my concern is it does that by adding this lewd exposure of a prosthetic breast. That, to me, is specifically targeting something, a person wearing a prosthetic breast, which, to me, is either a female who medically requires one or someone performing in drag.

MR. FORRESTER: But it has to be lewd, which, as

I've pointed out, does have a content that Florida law --

THE COURT: I understand that.

MR. FORRESTER: And it still has to satisfy the three-part obscenity test. So it's not just any --

THE COURT: No, I understand that. But there's no question to me that this targets a drag performance and puts them on notice that they are now subject to these standards.

MR. FORRESTER: I would, you know, respectfully disagree and say it may cover drag performances but it's by no means limited to drag performances.

THE COURT: Who else would it cover?

MR. FORRESTER: Anybody who would, you know, choose to wear prosthetic genitalia, I suppose, and do so in a way that was, you know, in the face of a child at a particular establishment. I mean, it doesn't have to be somebody who is of a particular sexual orientation, particular sexual identity. It doesn't have to be someone who identifies as male or female. I mean, it could be anybody.

It would be -- I mean, it's hard for me to hypothesize what -- you know, circumstances in the world would lead somebody to do that, but it's certainly possible. And it falls within a rationale which is itself viewpoint neutral, which is based on the concern that that's just not the kind of thing to do in the presence of a child.

THE COURT: Okay.

MR. FORRESTER: And unless Your Honor has further questions along these lines, I would be happy to --

THE COURT: I think they have some suggestions for you.

(Pause in proceedings; confers with co-counsel.)

MR. FORRESTER: I'm not going to pretend like this thought came from me when it came from my co-counsel, but he wanted -- suggested, I think cogently, that I point out that, of course, the lewd exposure of prosthetic genitalia is only part of a larger category of proscribed conduct, including the sexual conduct that is defined specifically by statute.

And all it is doing, when the statute is read as a whole, is ensuring that drag performances are not excluded, that they are included but it is not, by no means, targeting because it's making clear that if they do that, that they might be within the proscription of the earlier statutes.

THE COURT: Okay.

MR. FORRESTER: Your Honor also raised a question about the state attorneys or the attorney general. They're simply not defendants here so --

THE COURT: I understand, but -- I'll deal with that later if need be.

MR. FORRESTER: Okay. As a matter of -- there's a lot of case law to indicate that the attorney general is not the officer in Florida charged with enforcing statutes of this

nature. It is the state attorney.

I was going to make an argument as to why the governor didn't fall within Ex Parte Young. That's been mooted by Your Honor's introductory remarks. But that would also apply to the attorney general. I think the attorney general is not the one specifically who has the direct connection to enforcement of the statute. So it wouldn't be appropriate, at the very minimum, to include the attorney general in any such injunction. But in any event, neither the attorney general nor the state attorney is a defendant to this case, like was the case in the Friend of George's case.

THE COURT: And I understand.

Well, I think Mr. Timmons commented on that, that an injunction by a federal judge ruling a particular statute unconstitutional, I don't know many state attorneys would try to bring a lawsuit until that was overturned. So I suspect that's not a real concern.

MR. FORRESTER: Okay. Well, thank you, Your Honor.

THE COURT: Okay. Thank you, sir. I appreciate you coming down.

MR. TIMMONS: Thank you, Your Honor.

I do want to -- just so everybody is clear, we may amend to add the state attorney as a defendant.

Ms. Stewart and I were brought on to this case a little bit late in the game and originally were asked just to

do some back office work. Mr. Israel, the attorney who was to be lead counsel, had a medical condition that caused him to have to have surgery on short notice, and he asked us to take over completely.

As a result of that, we may make some decisions to amend and add additional defendants. But, obviously, that's not before the Court right now. And I don't expect my opposing counsel to have to argue against things that we might do in the future.

I want to address this obscenity -- this so-called obscenity standard that's built into the statute. I've heard this referred to as a modified Miller test or a Miller for minors. It's not an obscenity standard.

It looks a lot like the obscenity standards set out in Miller, but it isn't, because it changes the standard that Miller sets forth and adds the term "for minors" to it. That renders the statute intrinsically a content-based regulation, because it pulls that definition back from the line of pure obscenity, which is unprotected speech, and moves it into the realm of speech that is protected, that is at least permissible for adults to engage in.

Now, the State certainly has a compelling governmental interest in protecting children, no question about that. But any content-based speech regulation must be narrowly tailored to achieve that compelling governmental

interest in order to survive strict scrutiny.

My co-counsel referred to this statute as requiring an element of judgment and suffering from an inherent level of interpretation that he described as endemic to statutes of this nature. It's endemic to statutes of this nature because -- and you see this in a lot of different states', you know, obscenity for minors laws, like display statutes relating to pornography and things like that.

You will see states attempt to just insert the Miller test as it's laid out in Miller and then add the word "for minors," and then say, Okay, law enforcement can enforce -- can stop any conduct or any speech that falls into this category of what lawyers frequently term obscenity for minors.

That's not how Miller is supposed to work. Miller proscribes conduct, clearly defined conduct. It doesn't say you can just cut and paste the language from Miller and say, Any conduct that falls into this category.

Miller is meant to be applied to statutes, not on a case-by-case basis to an individual's speech. That gives law enforcement officers too much of that element of judgment such that they can do anything we -- that they want.

My opposing counsel, respectfully, struggled somewhat to give Your Honor a definition of lewd that could mean anything. The term "wicked" popped up. You know, what is wicked conduct? You know, I think we all might have an

idea, but I think all of our ideas probably vary somewhat.

This is, again, really the sort of thing that parents are supposed to deal with. In fact, Your Honor brought up the Florida Parental Rights statute. That bill of rights contains a right to direct the upbringing and the moral or religious training of his or her minor child. So Florida clearly contemplates that that type of moral decision-making belongs to parents, not to the State.

Let's see here.

(Brief pause.)

Let me go back just a moment to the discussion of why Miller is supposed to apply to statutes that clearly define proscribed conduct. Reno versus ACLU, that's a 1997 Supreme Court case that addressed the CDA, the Communications Decency Act, and struck down provisions of that law.

The court said, The second prong of the Miller test, the purportedly analogous standard, contains a critical requirement that is omitted from the CDA that the proscribed material be specifically defined by the applicable state law. This requirement reduces the vagueness inherent in the open-ended term "patently offensive," as used in the CDA. Moreover, the Miller definition is limited to sexual conduct, whereas the CDA also extends to include -- so on and so forth. That's not really the issue here.

But the Reno court clearly understood that the

Miller test was not to be handed out as an open-ended tool for law enforcement to use to proscribe whatever conduct they deemed patently offensive or, here, lewd, but is to be used by courts to determine the validity of statutes that proscribe specific conduct with particularity.

My opposing counsel described our construction of the statute as implausibly expansive. It appears that it's -- the very fact that we're having this discussion and that it's -- that the conduct that we're talking about is not clearly and specifically defined, it gives law enforcement the ability to make whatever expansive definition of lewdness they wish to.

My opposing counsel mentioned -- and I don't know where this came from -- sketches like Milton Berle or I Love Lucy. Hamburger Mary's, to be very clear, has two separate categories of performances. There are 18 and up shows now. As a result of this statute, there are shows that are 18 and up, which are probably appropriate for older minor children. They are certainly not appropriate for five-year-olds.

This law requires Hamburger Mary's to either make those performances 18 and up or to assume that every minor that comes into -- that anybody coming into the establishment might be a young minor, because they've got to make those performance decisions in advance.

If a parent comes in the door with their

five-year-old, does Hamburger Mary's have to stop all the performances and make sure that they're now tailored to children? The real answer is, No, they just have to become an 18 and up establishment to do drag performances.

And when they did that -- as put out in paragraph 43 of our verified complaint, when they did that, they lost 20 percent of their bookings. They lost 20 percent of their bookings for the next show.

It shouldn't be incumbent on businesses to inquire into the age of every single person who comes into their establishment and then try to guess at what Floridians as a whole think is appropriate for a five-year-old, a ten-year-old, a 16-year-old, what have you.

When a statute is subject to strict scrutiny under the First Amendment, it is not incumbent on the plaintiff to prove that the statute is not narrowly tailored. It is incumbent on the defendant to prove that the statute is narrowly tailored. That's their burden to prove.

And the defendant has put forward no argument as to why the statute is narrowly tailored. Instead, the defendant has ignored questions like, Why is there not a parental consent affirmative defense?

That type of defense existed in the CDA, Communications Decency Act. It existed in COPA, the Children's Online Protection Act. Both of those statutes were

struck down even though they did contain certain affirmative defenses, specifically including one for parental consent.

The State relies heavily on the Ginsberg opinion. I'd note that Ginsberg, while not having been explicitly overturned, pre-dates the Miller case and, thus, the Miller test. It pre-dates Reno. It pre-dates Ashcroft.

Every single case addressing these issues of obscenity and the protection of children from indecent material is post-Ginsberg and essentially modifies the Ginsberg standard. Yes, states have a valid interest in protecting minors from indecent material, but they have to do so in a narrowly-tailored fashion. And that's what every post-Ginsberg case says.

Opposing counsel referenced a 1971 Florida Supreme Court case that appeared to place some definition on lewdness. I'd note, again, that pre-dates Miller. It pre-dates Ginsberg. It pre-dates Ginsberg, pre-dates Miller, pre-dates every other case referenced. So a Florida Supreme Court case from 1971 that does not even apply those modern standards is probably not of very much utility.

The question of parental rights should also be taken into account by the Court when dealing with the issue of narrow tailoring. The State should have included, if they were going to try to -- first, they should have included a definition of lewd conduct. They should have been very clear

about what they meant.

Second, they should have included affirmative defenses for parental consent. They did include an affirmative defense for the ignorance of a child's age. However, they didn't do so in a way that actually protects -- I'm sorry. It included a knowing requirement, a mens rea requirement as to the child's age, but then included a prohibition on using a person's ignorance of a child's age, a child's misrepresentation of his or her age, or a bona fide belief of a child's consent may not be raised as a defense in a prosecution for a violation of this section.

That puts businesses in an awfully awkward position. They have to not only -- they have to guess at the ages of every single person who comes in, and they can't even argue that somebody provided a fake ID or something to that effect.

If we, as attorneys, cannot agree today on a definition of lewd conduct or lewd exhibition that gives meaningful guidance on how a court should interpret the statute, it is absolutely implausible that we could rely on law enforcement officers who have high school or maybe some level of college education to interpret this statute in a way that is even-handed, fair, and conforms to the First Amendment's requirement of narrow tailoring whenever a content-based regulation impacts free speech. And if the Court does not have any questions, I'll conclude.

THE COURT: No. I don't think so. Thank you, sir.

MR. TIMMONS: Thank you, Your Honor.

THE COURT: Mr. Forrester, I'll give you the final few minutes if you need them.

MR. FORRESTER: Thank you, Your Honor.

THE COURT: You know, one thing Mr. Timmons just mentioned is interesting. Florida Statute 847.013, which would apply to letting minors into an R-rated movie, for example, or any other sort of presentation that contains obscenity, as a parental -- it says, The paragraph does not apply to a minor when the minor is accompanied by his or her parents. So there -- Florida already recognizes that with respect to one aspect of this problem, it's the parent that should decide what's appropriate for their child, not the State of Florida, it seems. But anyway, that's just an observation.

MR. FORRESTER: Yeah, that is a point I wanted to address. It's not at all clear that a parental consent defense is compelled by the First Amendment. I had mentioned this earlier. That seems to sound in a Fifth Amendment substantive due process, parental right to direct upbringing of a child claim.

It is true that in -- actually in Ginsberg, the statute there that prohibited sales of obscene material to minors didn't prevent an adult from bringing the same material

home and showing them to their child. And that was an observation that was made later by the court, the Supreme Court, in ACLU v. Reno. But these were passing remarks as part of -- at least in the Reno case -- as part of several grounds of potential distinction.

And in American Booksellers v. Webb, the Eleventh Circuit case which upheld that the Georgia statute that prohibited display of materials under a test very much like this that was geared to what would be obscene for minors, there was no parental consent defense there either. So we don't think it's at all clear that that is required.

And as for the innocent mistake defense, the State would still bear the burden in its case in chief of showing that the admission of a child was knowing and that at least requires reason to have inquired and investigate. And if somebody had inquired and investigated and determined reasonably that the child doesn't appear to be that age, they wouldn't be -- the State wouldn't be able to make out a prima facia case. The lack of that defense wouldn't affect the application of that knowing standard. And that knowing standard also comes directly out of Ginsberg. It tracks the language of Ginsberg almost directly.

I do want to also address the assertion that we haven't made an argument that the statute is not narrowly tailored. We most definitely have.

We, again, have pointed out that this -- nothing in the statute does anything to actually prevent any of these adult live performances from taking place or for the adults to have access to them. It merely denies admission of children to them.

This is -- it's different critically from that Tennessee statute in Friend of George's, which actually said, You just can't put on -- I think the phrase there was -- adult cabaret entertainment in any public place and any place where a child could see it. It was much broader, and it was an actual prohibition on the performance ever occurring to begin with. That is not the case here.

So we believe this is, in fact, precisely tailored to the State's interest, as opposing counsel concedes, which is compelling in preventing children from exposure to materials which is obscene as to them.

I would also point out the Chesebrough case, which is from 1971. It carries forward. That is used as a jury instruction. You can look it up online. But it's -- that exact phrasing is still used in instructions to the juries on what it means for there to be lewd and lascivious conduct under the criminal statutes. So it definitely has carried forward to the present day.

It doesn't bear the characteristics of the statute in ACLU v. Reno, which used the word "indecent," which was a

term that the Congress had come up sort of out of nowhere with no definition, but no sort of common law or other statutory backdrop to give it content. I mean, there is definitely longstanding content to the word "lewd" as a matter of Florida law.

And I also want to say, finally, that if this Court is inclined to grant a preliminary injunction, we would ask that it be confined only to these plaintiffs. The Eleventh Circuit has, I believe, just yesterday enjoined an order in a Southern District of Florida case that applied to more than just the plaintiffs in that case. And we think it would be inappropriate to grant an injunction that would be -- that would apply to all the establishments in the case instead of just the plaintiffs in this case.

And I have nothing further, Your Honor.

THE COURT: Okay.

MR. TIMMONS: Your Honor, can I speak to just that very last point, because it wasn't raised previously in argument?

THE COURT: Sure.

MR. TIMMONS: That was the same request that the Tennessee attorney general made at the very end of their argument in the Friends of George's case, that the injunction be confined to only the plaintiffs in this case.

THE COURT: Yeah. But there, the defendant was just

that state attorney, right?

MR. TIMMONS: Correct. But the injunction -- the request is an odd one. To determine that a statute is unconstitutional and then only enjoin its application to one particular defendant belies any understanding of how constitutional arms function.

If you were enjoining somebody -- and this was Judge Parker's observation. Maybe if I were enjoining somebody from burning trash on somebody else's property, that might make some sense. But I don't see how that can apply in the First Amendment context. And we challenged the State to find any case in which a First Amendment injunction had been rendered in that context, and they were unable to produce any. So --

MR. FORRESTER: Your Honor, as I understand it, the case that I mentioned, the Garcia case --

THE COURT REPORTER: Please adjust the microphone.

(Counsel adjusts microphone.)

MR. FORRESTER: The Garcia case that I just mentioned, it was a First Amendment case. And I'll give you the -- I'll give you the case number, at least. I don't have a Westlaw cite. Number 23-10872. Thank you.

THE COURT: One-zero what?

MR. FORRESOTER: 10872.

THE COURT: And that's the Southern District of

Florida case?

MR. FORRESTER: It's the Eleventh Circuit. It was the one that just stayed the -- it was out of the Southern District, and the Eleventh Circuit just stayed that injunction.

THE COURT: Okay. I'll take a look at it.

All right. Well, unless there's something else that somebody feels compelled to comment on, I want to thank you all for being here on short notice and giving your arguments. I've got a lot here to review, obviously.

Are you all inclined to order a transcript?

It would help me to have a transcript of this.

MR. TIMMONS: If it would help the Court, then, certainly, Your Honor.

THE COURT: All right.

Can the State of Florida afford to pay half of it?

MR. FORRESTER: Sure.

THE COURT: Okay. All right. And then I may get another paper from the plaintiffs with respect to the motion to dismiss. So I'll try to get an order out as soon as reasonably possible.

MR. TIMMONS: We'll have that in as quickly as possible for you, Your Honor.

THE COURT: Okay. Thank you.

(Adjourned at 2:48 p.m.)

* * * *

Certificate of Official Reporter

I certify that the foregoing is an accurate transcript of the record of proceedings held in the above-entitled matter.

Koretta Stanford
_____
Official Court Reporter
United States District Court
Middle District of Florida Date: 07/27/2023

09/07/2023	☐	25	30-Day Over the phone extension granted by clerk as to Attorney Nathan Andrew Forrester for Appellant Secretary of the Florida Department of Business and Professional Regulation. Appellants brief due on 10/25/2023 as to Appellant Secretary of the Florida Department of Business and Professional Regulation. Appendix due on 11/01/2023 as to Appellant Secretary of the Florida Department of Business and Professional Regulation. **Any request for a second or subsequent extension of time shall be subject to 11th Cir. R. 31-2(d).** [Entered: 09/07/2023 09:58 AM]

No. 23-12160

In the United States Court of Appeals for the Eleventh Circuit

HM FLORIDA-ORL, LLC,

Plaintiffs-Appellees,

v.

MELANIE GRIFFIN, Secretary,
Department of Business and
Professional Regulation,
State of Florida,

Defendants-Appellants.

UNOPPOSED MOTION FOR SECOND EXTENSION OF TIME TO FILE APPELLANTS' INITIAL BRIEF

On Appeal from the United States District Court
for the Middle District of Florida
Case No. 6:23-cv-950-GAP-LHP

October 12, 2023

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Defendant-Appellant certifies that, to the best of her knowledge, the following is a complete list of interested persons as required by Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 through 26.1-5:

1. Department of Business and Professional Regulation, State of Florida
2. DeSantis, Ron
3. Edgington, Craig A.
4. Forrester, Nathan A.
5. Griffin, Melissa
6. HM Florida-ORL, LLC
7. Israel, Gary S.
8. Moody, Ashley
9. DeSousa, Jeffrey Paul
10. Pernell, Hon. Gregory A.
11. Price, Hon. Leslie Hoffman
12. Stafford, William H.

13. Stewart, Melissa

14. Timmons, Brice M.

15. Whitaker, Henry Charles

UNOPPOSED MOTION FOR SECOND EXTENSION OF TIME TO FILE APPELLANTS' INITIAL BRIEF

Appellants hereby move for a 30-day extension of time to file the initial brief in this case. 11th Cir. R. 31-2(d). This motion is unopposed.

1. Appellants' brief is currently due October 25, 2023. This is Appellants' second request for an extension of time. The first was granted over the phone by the Clerk on September 7, 2023.

2. "A party's second request for an extension will be granted only upon a showing of extraordinary circumstances that were not foreseeable at the time the first request was made." 11th Cir. R. 31-2(d).

3. The Florida Solicitor General's Office has an especially large volume of significant responsibilities for the State in the next 20 days, several of which have arisen after undersigned counsel made the first request for an extension of time in this case. These matters include briefs in opposition to certiorari petitions on which the Supreme Court has called for a response in *Crane v. Florida*, No. 23-5455 (U.S.), *Cunningham v. Florida*, No. 23-5171 (U.S.), *Sposato v. Florida*, No. 23-5575 (U.S.), *Clements v. Florida*, No. 23-107 (U.S.), *Arellano-Ramirez v. Florida*, No. 23-5567 (U.S.), *Hamlet v. Hoxie*, No. 23-7 (U.S.), *Jackson v. Florida*, No. 23-5570 (U.S.), *Morton v. Florida*, No. 23-5579 (U.S.), and

Guzman v. Florida, No. 23-5173 (U.S.); an initial brief in *Garcia v. Executive Director, Florida Commission on Ethics*, No. 23-12663 (11th Cir.); an answer brief in *Shen v. Simpson*, No. 23-12737 (11th Cir.); a reply brief in *Family Health Centers of Southwest Florida, Inc. v. Secretary, Florida Agency for Health Care Administration*, No. 23-10992 (11th Cir.); a preliminary injunction hearing in *Parnell v. School Board of Lake County*, No. 4:23-cv-414 (N.D. Fla.); a reply brief in support of a motion to dismiss in *Disney v. DeSantis*, No. 4:23-cv-163a (N.D. Fla.); an answer brief in *Bojorquez v. State*, No. SC23-0095 (Fla.); a response to a petition for a writ of quo warranto in *West Flagler Associates v. DeSantis*, No. SC23-1333a (Fla.); a jurisdictional brief in *Edenfield v. State*, No. SC23-1106 (Fla.); a response to a jurisdictional brief in *Velez-Ortiz v. Department of Corrections*, No. SC23-1040 (Fla.); an oral argument en banc in *Byrd v. Black Voters Matters*, No. 1D23-2252 (Fla. 1st Dist. Ct. App.); an answer brief in *Doe v. DeSantis*, No. 1D23-149 (Fla. 1st Dist. Ct. App.); a reply brief in *State v. Miller*, No. 3D22-2180 (Fla. 3d Dist. Ct. App.); and an initial brief in *State v. Yanes-Blanco*, No. 5D23-1997 (Fla. 5th Dist. Ct. App.).

4. Undersigned counsel has principal or shared responsibility in a number of these matters. Additional responsibilities are likely to arise for him and the other attorneys in the Florida Solicitor General's Office.

5. The relief requested is necessary to ensure sufficient time for undersigned counsel, other attorneys in the Florida Solicitor General's Office, and their clients to draft and review the initial brief in this case.

6. No party would be prejudiced by the relief requested in this motion. Undersigned counsel has consulted with counsel for Appellees and is authorized to represent that this motion is unopposed. *See* 11th Cir. R. 26-1; 11th Cir. R. 31-2(a).

Wherefore, Appellants respectfully request that the Court extend the time to file the initial brief by 30 days to November 24, 2023.

Respectfully submitted,

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Attorney General

October 12, 2023

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CERTIFICATE OF COMPLIANCE

1. This document complies with Federal Rule of Appellate Procedure 27(d)(2)(A), because, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f), it contains 549 words.

2. This document complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27, 32(a)(5), and 32(a)(6), because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

/s/ Nathan A. Forrester
Senior Deputy Solicitor General

CERTIFICATE OF SERVICE

I certify that on October 12, 2023, I electronically filed this Unopposed Motion for Second Extension of Time to File Appellants' Initial Brief using the Court's CM/ECF system, which will send a notice of docketing activity to all parties who are registered through CM/ECF.

/s/ Nathan A. Forrester
Senior Deputy Solicitor General

In the

United States Court of Appeals

For the Eleventh Circuit

No. 23-12160

HM FLORIDA-ORL, LLC,

Plaintiff-Appellee,

versus

GOVERNOR OF FLORIDA, et al.,

Defendants,

SECRETARY OF THE FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 6:23-cv-00950-GAP-LHP

ORDER:

The motion for an extension of time to and including November 24, 2023 to file Appellant's initial brief is GRANTED, with the appendix due 7 days after the filing of the brief.

/s/ Nancy G. Abudu
UNITED STATES CIRCUIT JUDGE