No. 23A-366

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.

REPLY IN SUPPORT OF APPLICATION FOR PARTIAL STAY PENDING APPEAL

Directed 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

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November 3, 2023

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The district court enjoined application of Florida's Protection of Children Act throughout Florida, though there is only one plaintiff—Hamburger Mary's—and this case is not a class action. Florida's stay application demonstrated that this universal injunction should be partially stayed pending appeal to the extent it applies to nonparties. The district court's conclusion to the contrary inflicts irreparable harm on Florida and its children by categorically precluding Florida from enforcing a law that restricts displaying lewd live adult performances to children.

But Hamburger Mary's is not content to have secured an injunction that fully protects its own interest in presenting such performances. It insists

that the injunction should extend to the rest of the universe as well because, in the view of a single district-court judge, the statute is unconstitutionally overbroad. Resp. 7–12. But Hamburger Mary's makes no attempt to square that insistence with the bulk of this Court's cases, and is mute about historical tradition, both of which limit the equitable powers of the federal courts to what is necessary to remedy a plaintiff's injury. *See* Appl. 9–14. If Hamburger Mary's believes that prohibiting businesses from displaying lewd performances to children is "chill[ing] creative competition and public conversation through performance art," Resp. 12, it could have sought class certification to protect nonparties. Instead, it obtained a universal injunction as a shortcut to "circumvent rules governing class-wide relief." *United States v. Texas*, 143 S. Ct. 1964, 1980 (2023) (Gorsuch, J., concurring in judgment, joined by Thomas & Barrett, JJ.).

Hamburger Mary's also ignores altogether Florida's showing that universal injunctions present a critically important issue that this Court is likely to grant certiorari to address. The U.S. Solicitor General took the same position as Florida in a 2018 application seeking a similar partial stay of a universal injunction. *See* Appl. 21–22. And Hamburger Mary's does not deny that, since then, the confusion in the lower courts has only worsened.

Finally, Hamburger Mary's does not dispute that it would suffer no harm from a partial stay, while Florida suffers irreparable harm from being unable to enforce its law at all.

The district court's universal injunction should be stayed to the extent it grants relief to nonparties.

I. IF THE ELEVENTH CIRCUIT AFFIRMS, THERE IS A FAIR PROSPECT THIS COURT WILL GRANT CERTIORARI AND RULE THAT THE DISTRICT COURT ERRED IN AWARDING UNIVERSAL RELIEF.

A. The district court erred in awarding preliminary injunctive relief beyond what was necessary to prevent injury to Hamburger Mary's.

Hamburger Mary's largely declines to engage with Florida's arguments demonstrating that the equitable powers of the federal courts do not permit issuance of a universal injunction against Florida's law. It leaves unrebutted that this Court's precedents, as well as principles of relief "traditionally accorded by courts of equity," *Grupo Mexicano de Desarrolo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 319 (1999), limit the equitable powers of the district court to issuing injunctions that are needed to remedy the plaintiff's injury in fact. Appl. 9–14. It also does not dispute that an injunction limited to Hamburger Mary's would fully remedy Hamburger Mary's alleged injury in fact.

Hamburger Mary's instead contends (Resp. 8–12) that an overbreadth case uniquely warrants injunctions applicable to the entire universe. But that

mistakes the purpose and function of overbreadth doctrine. Overbreadth is simply a device for expanding the range of substantive arguments a plaintiff may advance on the merits. Appl. 15–16. It gives a plaintiff whose speech is constitutionally unprotected under the Free Speech Clause of the First Amendment third-party standing to challenge a statute on its face based on the assertion that the statute unconstitutionally chills the protected speech of others. *See Broadrick v. Oklahoma*, 413 U.S. 601, 611–13 (1973). But it does not excuse a plaintiff from establishing personal injury in fact. Nor does it change that the district court's equitable power should be directed to redressing that injury in fact. *See* App. 14a (Brasher, J., dissenting from denial of partial stay).

Hamburger Mary's does not dispute that description of the overbreadth doctrine. Instead, it emphasizes certain statements from *Virginia v. Hicks*, 539 U.S. 113 (2003), and others from *Broadrick*. Resp. 8, 11. It declares, for instance, that *Hicks* "held that, when courts invalidate a speech-restricting law on facial overbreadth grounds . . . *all* enforcement may be lawfully suspended." Resp. 8. But as Florida has explained (Appl. 18–19), *Hicks* simply rejected an overbreadth challenge to the trespass policy of a Virginia housing authority, 539 U.S. at 121–24, while *Broadrick* rejected an overbreadth challenge to an Oklahoma civil-service law, 413 U.S. at 616–18. The cases held nothing about remedy; on the contrary, *Broadrick* describes overbreadth doc-

trine in just the way Florida urges here. *Id.* at 613 (noting that overbreadth is a "departure from traditional rules of standing").

This Court's decision in *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975) (Rehnquist, J.), by contrast, does speak to remedy. There, this Court declined to give universal effect to a preliminary injunction awarded to two bars who had challenged a New York ordinance banning topless dancing because the ordinance was unconstitutionally overbroad. The Court affirmed the injunction on the merits as to those two bars. *Id.* at 931–34. But it also held that a third bar, M&L, was not entitled to be protected by that injunction because a state criminal prosecution was pending against it at the time the three bars had sued in federal court. *Id.* at 928–29. The Court justified that disparity by explaining that "neither declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs, and the State is free to prosecute others who may violate the statute." *Id.* at 931.

Hamburger Mary's tries to distinguish *Doran* on the ground that it is a *Younger* abstention case. Resp. 10. But that is the whole point. The criminal prosecution against M&L could be a basis for *Younger* abstention only because this Court concluded that the preliminary injunction the other plaintiffs had obtained did not automatically enjoin that prosecution. *Doran* thus rejected Hamburger Mary's notion that universal injunctions reign supreme

in overbreadth cases. The same logic underlies why, when this Court holds a criminal statute facially overbroad, it orders the conviction vacated, not the statute universally invalidated. *See, e.g.*, *United States v. Stevens*, 559 U.S. 460, 467, 482 (2010); *see also United States v. Nat'l Treas. Emps. Union*, 513 U.S. 454, 467, 477 (1995) (declining to grant universal relief despite concluding that a statute was a "deterrent to a broad category of expression by a massive number of potential speakers" and thus violated the First Amendment).

Hamburger Mary's sets afire the straw man that Florida "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." Resp. 11. But nonparties are fully capable of obtaining such relief through class certification or joinder and intervention in overbreadth cases just like others. The point is not that such relief is unavailable, only that Hamburger Mary's cannot use a universal injunction to "circumvent" those reticulated procedures. *Texas*, 143 S. Ct. at 1980 (Gorsuch, J., concurring).

Hamburger Mary's has little to say about why this Court should tolerate the havoc universal injunctions wreak in overbreadth cases. *See* Appl. 14–15, 22. Here, for instance, instead of allowing "other lower courts . . . to weigh in on important questions," *Texas*, 143 S. Ct. at 1980 (Gorsuch, J., concurring), Hamburger Mary's raced to obtain an injunction just five days after

Florida's law took effect. Appl. 15. Predictably enough, the district court made a "rushed, high-stakes, low-information decision[]" to enjoin the statute universally a mere month later. *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring in grant of stay, joined by Thomas, J.). That is bad practice in overbreadth cases no less than others.

B. There is a reasonable probability that this Court would grant certiorari if the Eleventh Circuit affirms the universal injunction.

Contrary to Hamburger Mary's assertion, this Court is likely to grant review if the Eleventh Circuit affirms the universal scope of the injunction.

Hamburger Mary's does not dispute that the equitable authority of federal courts to issue universal relief to protect the interests of nonparties is an issue of exceptional importance. Nor does Hamburger Mary's dispute that this case cleanly presents the issue for this Court's resolution. The Court is likely to grant certiorari on that basis alone. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2429 (2018) (Thomas, J., concurring); *New York*, 140 S. Ct. at 601 (Gorsuch, J., concurring); *Texas*, 143 S. Ct. at 1980 (Gorsuch, J., concurring). The U.S. Solicitor General has urged as much. *See* Application for Partial Stay Pending Rehearing En Banc at 18–21, *Sessions v. City of Chicago*, No. 17A1379 (U.S. June 18, 2018).

The confusion in the lower courts has only grown since 2018. Appl. 20–21. Hamburger Mary's attempts (Resp. 12) to downplay that confusion by

suggesting that all lower courts agree that universal injunctions are at least appropriate in First Amendment overbreadth cases. But not even the panel majority below went that far, acknowledging that the "governing law" is at least "divided or unclear" on that point. App. 11a. And five circuits have squarely held that courts lack authority to issue injunctive relief solely to protect the interests of nonparties. *See Brown v. Trs. of Boston Univ.*, 891 F.2d 337, 361 (1st Cir. 1989) (courts may issue injunctions benefitting nonparties only if there is a "properly certified class" or "such breadth is necessary to give prevailing parties" relief); *Louisiana v. Becerra*, 20 F.4th 260, 263–64 (5th Cir. 2021) (per curiam) (the existence of nonparties "who also need protection" does not authorize courts to extend injunctive relief beyond plaintiffs); *L.W. ex rel. Williams v. Skrmetti*, 73 F.4th 408, 415 (6th Cir. 2023) ("A court order that goes beyond the injuries of a particular plaintiff to enjoin government action against nonparties exceeds the norms of judicial power."); *California v. Azar*, 911 F.3d 558, 584 (9th Cir. 2018) ("The scope of the remedy must be no broader and no narrower than necessary to redress the injury shown by the plaintiff . . . ."); *Georgia v. President of the U.S.*, 46 F.4th 1283, 1306–07 (11th Cir. 2022) ("A district court cannot . . . provid[e] injunctive relief only for nonparties' benefit.").[1] Those courts thus reject the precise ra-

[1] *Contra Roe v. U.S. Dep't of Def.*, 947 F.3d 207, 232 (4th Cir. 2020); *City of Chicago v. Barr*, 961 F.3d 882, 916 (7th Cir. 2020); *Rodgers v. Bryant*,

tionale Hamburger Mary's offers (Resp. 10–11) for recognizing a special overbreadth exception: protecting the rights of nonparties. The Court is likely to grant certiorari to resolve that tension, even apart from the manifest importance of the question, and the conflict between the court of appeals' reasoning and this Court's decisions in this field.

II. ABSENT A STAY, FLORIDA WILL CONTINUE TO SUFFER IRREPARABLE HARM TO ITS SOVEREIGN INTEREST IN ENFORCING ITS LAWS.

"Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (alteration accepted) (citation omitted).

Hamburger Mary's (Resp. 15) minimizes that harm, suggesting that the Florida Legislature did not really need to enact the Protection of Children Act because other Florida statutes protect children from lewd performances. It points to § 847.013 of the Florida Statutes, but that provision establishes a narrower prohibition than does the Protection of Children Act.[2] Hamburger

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942 F.3d 451, 459 (8th Cir. 2019).

[2] Hamburger Mary's wrongly asserts that, in the district court, Florida "conceded that the other statutes do 'the same thing that this statute does here.'" Resp. 10 (quoting Resp. App. 24a). The point Florida's counsel was making there was just that Florida law contains other prohibitions on engaging in sexually explicit conduct around minors, without targeting drag performances. *See* Resp. App. 24a. Counsel was not saying that such laws cover

Mary's management is welcome to seek election to the Florida Legislature, but the Court should not discount the irreparable harm the State is suffering based on Hamburger Mary's belief that the statute is unnecessary.

III. THE BALANCE OF EQUITIES FAVORS A STAY.

Hamburger Mary's does not dispute that it suffers no harm from a stay of the injunction only as to nonparties. It concedes that, after obtaining an injunction, it "returned to normal operations," Resp. 3, free of the alleged "chill" imposed by the statute. An injunction limited to Hamburger Mary's would continue to do that even if it were narrowed.

Hamburger Mary's does say (Resp. 16) that Florida's claim to "ongoing harm rings hollow in light of its own conduct of this litigation," pointing to the fact that Florida has sought extensions of time to file its merits brief in the Eleventh Circuit. But Florida moved for a partial stay in the district court just five days after it entered its universal injunction; for a partial stay in the court of appeals nine days after the district court denied relief; and for a partial stay in this Court eight days after the court of appeals denied relief. Florida troubled this Court with a partial stay application only because the Eleventh Circuit, 75 days after Florida asked for a partial stay, denied relief.

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the same conduct. *See* Resp. App. 23a (explaining what the Protection of Children Act adds to Florida law).

CONCLUSION

The application for a partial stay pending appeal, and pending further proceedings in this Court, should be granted.

Respectfully submitted,

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November 3, 2023

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CERTIFICATE OF SERVICE

I hereby certify that I am a member in good standing of the bar of this Court and that on this 3d day of November 2023, I caused a copy of the foregoing Reply in Support of Application for Partial Stay Pending Appeal to be served by e-mail on the counsel identified below, and that a hard copy will be served on each counsel by overnight delivery on the 3d day of November 2023. All parties required to be served have been served.

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