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“The Happiest Courtroom on Earth”: Disney & Friends Take on DeSantis

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Three amicus groups, with briefs filed by MLRC Defense Counsel Section member firms, have come to the aid of the Walt Disney Company in its pursuit of a Section 1983 retaliation claim against Florida Governor Ron DeSantis. The briefing stems from DeSantis’ year-long campaign to punish Disney for speaking out against state policies that target the LGBTQIA+ community.

Background: Disney’s Opposition to “Don’t Say Gay” and DeSantis’s Response

On March 28, 2022, the Florida Legislature passed, and Governor DeSantis signed, the so-called “Don’t Say Gay” law, which restricts teachers’ ability to discuss gender identity or sexual orientation in the classroom. The law’s introduction and passage predictably led to a firestorm of criticism, with citizens and politicians of all types weighing in both before and after the law was passed. Among the more prominent opposition was Disney, Florida’s single largest taxpayer and private employer. Disney put out a press release stating that the company “will not stand for discrimination in any form” and “oppose[d] any legislation that infringes on basic human rights.” The day the law was passed, Disney also told the public that the legislation “never should have been signed into law” and that its “goal as a company is for this law” to be repealed or struck down.

Within a day, Governor DeSantis responded by declaring that Disney had “crossed the line” and that he would “fight back” against the company.

As he later recounted in his own memoir, DeSantis immediately set about doing exactly that. Within days, both DeSantis and several members of the Florida Legislature had announced their intention to dissolve the Reedy Creek Improvement District (“RCID”), a legislatively-created special district whose board had exercised administrative power over the Disney World campus in Orlando since its development over 60 years ago. Mere weeks later, on April 20, 2022, identical bills were introduced in the Florida House and Senate that would accomplish this aim. Within two days, both bills passed within meaningful debate or analysis, and DeSantis signed them into law on April 22. While the legislation was passed without any plan for how it would be implemented, nearly a year later, in February of 2023, Florida passed additional legislation that effectively replaced the prior oversight of RCID with an administrative body comprised of people hand-picked by DeSantis.

Neither DeSantis nor his allies in the Legislature made any bones about the fact that the legislation was enacted in retaliation for Disney’s public opposition to the Don’t Say Gay law. Indeed, DeSantis dedicated an entire section of his recently published memoir to making exactly that point, describing how he planned with the Speaker of the Florida House to punish Disney for its “embrace [of] woke ideology” and for its “support of . . . woke gender identity politics,” calling Disney’s opposition to the law “a textbook example of when a corporation should stay out of politics.” Other Florida lawmakers who supported the legislation confirmed that their intent was to “target the Walt Disney Company” and that “Disney is learning lessons and paying the . . . price of jumping out there on an issue.” At the signing ceremony, Governor DeSantis expounded at length that Disney’s opposition to Don’t Say Gay was the primary motivation for the disbanding and reconstitution of RCID.

As it was sunsetting, the outgoing board of RCID approved a number of development plans and contracts designed to allow Disney to continue investing in and supporting Disney World insulated from fear that the reconstituted oversight board would engage in additional retaliation. In response, Governor DeSantis and his allies then passed additional legislation purportedly “voiding” the development plans and contracts. That law was passed on May 5, 2023. Three days later, on May 8, 2023, Disney sued the Governor and the new members of the oversight board, alleging violations of the Contracts clause, the Takings clause, the Due Process clause, and the First Amendment.

Lawsuit: Powerful Amici Weigh In

Unsurprisingly, the case generated a massive amount of public interest. The First Amendment bar raised concern given the brazenness of the government's retaliation against Disney for engaging in protected speech. Numerous former government officials spoke out about the misuse of executive and legislative power. And the business community raised its eyebrows over the troubling implications of government using economic coercion to punish a company for expressing disagreement on a matter of public policy. These three interests filed separate amicus briefs, in support of Disney, when Governor DeSantis and his co-defendants moved to dismiss Disney's complaint in June of 2023.

The first amicus brief, filed by Gibson, Dunn & Crutcher and Thomas & LoCicero on behalf of the Reporter's Committee for Freedom of the Press (RCFP), focuses primarily on the doctrinal First Amendment aspects of Disney's case. The RCFP brief explains that DeSantis' actions directly attacked two bedrock principles of First Amendment doctrine: first, that *anyone*, corporations or individuals, has the right to engage in public and political speech as "a fundamental tenet of American democracy;" and second, that the particular violation alleged in the case – government retaliation against a disfavored viewpoint – is "one of the most egregious types of First Amendment violations" recognized by the law.

The RCFP explains that DeSantis's retaliatory attacks are of particular concern to the news media because the press, given its critical role in providing an independent check on the abuse of government power, has regularly been targeted by those in power throughout American history. The brief points to Lyndon Johnson's forcing the *Houston Chronicle* to support his presidential candidacy in order to secure approval for an unrelated business transaction; Richard Nixon's threats of antitrust enforcement against broadcast networks unless they provided friendlier coverage of his administration; and examples of government agency wiretapping and investigations of members of the press.

The second amicus brief was filed by Ballard Spahr on behalf of a group of 19 former elected and other senior government officials, including two former Republican governors, three former Republican Members of Congress, and other senior figures from both sides of the aisle and both state and federal administrations. This brief explains the ways in which Governor DeSantis' actions are antithetical to the Founders' vision for American democracy, as the Constitution provides. The brief notes that, contrary to the facts of this case, high government officials can and should respond to public criticism of their policies by using their "bully pulpit" – not legislative retaliation – to engage in the "uninhibited, robust, and wide-open" debate that characterizes the American democratic process. This brief further argued that Governor DeSantis fails to acknowledge that public debate over policy disagreement is healthy in a democracy, and that the executives should engage with dissent, not stifle it through government power. These *amici* contend that choosing that the use of legislative force is a breach of the public trust, and that DeSantis's actions would be more typical of Russia or China than an American state.

The third amicus brief was filed by Covington & Burling on behalf of the Leadership Now Project, a national membership organization of business leaders committed to ensuring that the United States has a strong democracy and economy. The Leadership Now brief focuses on the deleterious effects governmental retaliation has on the free market and the economy more broadly. Leadership Now argues that government retaliation against business, especially retaliation that interferes with the enforcement of contracts, jeopardizes economic growth and deters investment, because businesses cannot invest for the future without some assurance that the law (and the government) will honor contractual commitments. The brief further explains how the fear of such retaliation interferes with companies' business judgment and provides numerous examples of how it has caused negative economic effects in the real world. Finally, Leadership Now points out that, even if the courts can rectify illegal retaliation in individual cases, it still undermines confidence in the American economic system, and may lead foreign and domestic businesses to invest elsewhere.

It is rare to see three powerful amicus briefs filed at the motion to dismiss stage. But the unusual context only underscores the fundamental arguments made in the briefs: that DeSantis's actions, as alleged in the complaint, are inimical to and corrosive of three fundamental pillars of American society – law, politics, and business.

The Aftermath: "Moving On" to More of the Same

In an ironic plot twist, less than two weeks after the amicus briefs were filed, DeSantis addressed the litigation in an interview. He opined that he had "basically moved on" from the case, and that Disney should therefore "drop the lawsuit" which it was "going to lose." And at the same time as he was urging Disney to "drop" the case, his hand-picked appointees were continuing to exact retribution from Disney in the pettiest of ways. Most recently, the new oversight board initiated an investigation into Disney's long-standing practices of giving district employees free and discounted passes to the park.

Joe Slaughter and Chuck Tobin of Ballard Spahr LLP, along with Norm Eisen of Norman Eisen PLLC and Matthew Newton of Older Lundy Koch & Martino LLP, filed the amicus brief on behalf of former New Jersey Governor Christine Todd Whitman, former Minnesota Governor Arne Duncan, and 17 other former high-ranking government officials.

Ted Boutrous and Connor Sullivan of Gibson Dunn & Crutcher LLP, along with Carol LoCicero and Daniela Abratt of Thomas & LoCicero LLP, and Bruce Brown, Katie Townsend, and Gabe Rottman of the Reporters Committee for Freedom of the Press, filed the amicus brief on behalf of the Reporters Committee for Freedom of the Press.

Beth Brinkmann, Bradley Ervin, and Kendall Burchard of Covington & Burling LLP filed the amicus brief on behalf of the Leadership Now Project

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