UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

WILLIAM A. LINK, et al.,

Plaintiffs,

v.

MANNY DIAZ, JR., in his official capacity as the Florida Commissioner of Education, et al.,

Defendants.

Case No. 4:21-cv-00271-MW-MAF

PLAINTIFFS' WRITTEN CLOSING STATEMENT AND POST-TRIAL BRIEF

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TABLE OF ABBREVIATIONS AND DEFINED TERMS

AAUP	American Association of University Professors
ACFS	Advisory Council of Faculty Senates
BOE	Board of Education, Defendant (together with BOG, the "Boards" or "Defendants")
BOG	Board of Governors, Defendant (together with BOE, the "Boards" or "Defendants")
CFEA	Campus Free Expression Act of 2018
CRT	Critical Race Theory
DEI	Diversity, Equity, and Inclusion
Faculty Plaintiffs	William Link, Barry Edwards, Jack Fiorito, Robin Goodman, David Price, UFF
FAU	Florida Atlantic University
FCS	Florida College System
FEA	Florida Education Association
FIRE	Foundation for Individual Rights and Expression
FSU	Florida State University
HERI	Higher Education Research Institute
IOP	Institute of Politics
IRB	Institutional Review Board
MFOL	March for Our Lives Action Fund, Plaintiff
SJRSC	St. John's River State College
Student Plaintiffs	Julie Adams, MFOL
SUS	State University System
UCF	University of Central Florida
UF	University of Florida
UFF	United Faculty of Florida, Plaintiff

I. INTRODUCTION

Florida has declared war on higher education. Make no mistake: the Legislature and the Governor have not taken a keen interest in speech in higher education because of some broad, viewpoint-neutral concern about free speech. As the evidence at trial overwhelmingly demonstrated, they believe that these institutions are infested with viewpoints with which they disagree—specifically, that Florida's public colleges and universities are *too liberal*. To this end, they have enacted a slate of legislation to target speech they disfavor, with the clear message that those who persist in expressing disfavored viewpoints will suffer consequences.

Plaintiffs challenge three critical tools in this war, all provisions of HB 233, which was enacted by the Legislature on partisan lines and signed by the Governor in June of 2021: the Survey Provisions, Fla. Stat. §§ 1001.03(19)(b), 1001.706(13)(b), the Anti-Shielding Provisions, *id*. § 1004.097(3)(f); *see also id.* §§ 1001.03(19)(c), 1001.706(13), and the Recording Provision, *id.* § 1004.097(3)(g) (together, the "challenged provisions"). Each are designed to and—as the evidence overwhelming proved—have been effective in discouraging disfavored speech, while elevating, encouraging, and providing special protection for favored speech.

The Court need not search long to come to this conclusion. It is reflected in the text of the challenged provisions themselves, reiterated and further proven through the legislative history—including statements during official legislative

proceedings recorded by the Florida Channel—and littered across the trial record in virtually every form of evidence imaginable, even including clear statements by the sponsors and proponents about what they mean to target and why, in addition to circumstantial evidence that satisfies nearly all of the *Arlington Heights* factors.

At trial, the Court heard seven days of evidence over the course of two weeks. It included unrebutted testimony from eight faculty members from a diverse collection of Florida's public colleges and universities, teaching a range of disciplines and subjects. They included Dr. William Link, recently retired from nearly two decades of teaching history at the state's "first and finest" university, the University of Florida ("UF"), as well as faculty that teach history, political science, English, management studies, media studies, and women, sexuality and gender studies at multiple different universities and colleges. The testimony presented included evidence that, because of the challenged provisions, faculty are being instructed not to teach viewpoints understood to be disfavored by the governing majority in Tallahassee, including that slavery was a main cause of the civil war, as well as the concept of a "living constitution." Trial Tr. at 1197:14-21; 1202:16-03:1 (Maggio).[1] It included unrebutted evidence from students who testified that they are

[1] Because the pages of the trial transcript are numbered in a single series of consecutive numbers across volumes, Plaintiffs do not include dates or volume numbers when citing the trial record. For ease of reference, the page range for each

less comfortable participating in class, *id.* at 916:16-917:14 (Adams), and that, since the enactment of the challenged provisions, their school administrators have favored anti-abortion and Neo-Nazi activity over progressive student activism, *id.* at 1311:6-1313:1 (Solomon).

The evidence also included a slew of unrebutted expert testimony, including from: (1) Dr. Allan Lichtman, a decorated political historian who detailed extensive and broad-reaching evidence that the challenged provisions were intended to discriminate, viewed through the lens of the *Arlington Heights* factors, *id.* at 30:10-386:3; (2) Dr. Michael Bérubé, an expert in the origins, history, and application of academic freedom in higher education in the United States, who explained how the challenged provisions relate to a history of attacks on academic freedom and how their features—and justifications offered for them—resemble those prior attacks, none of which have had any legitimate basis, *id.* at 386:17-486:13; (3) Dr. Matthew Woessner, a political scientist and now the Professor of Institutional Research at the U.S. Army War College, who has studied the impact of faculty ideology in higher education for decades—including the perennial claim that students are suffering from liberal indoctrination—and repeatedly found that none of these claims have any basis in fact, *id.* at 802:20-881:13; (4) Dr. Isaac Kamola, a political scientist who

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day is as follows: Day 1 (1-275); Day 2 (276-564); Day 3 (565-883); Day 4 (884-1139); Day 5 (1140-1351); Day 6 (1352-1585); Day 7 (1586-1757).

studies the political economy of higher education and testified about his peer-reviewed research about an apparatus of organizations that exists to create public outcry about perceived left-leaning speech, which results in the harassment and targeting of faculty, *id.* at 1092:16-1174:5, and (5) Dr. Sylvia Hurtado, one of the nation's foremost experts in survey science—who for over a decade ran the Higher Education Research Institute ("HERI"), "a very large, very well-respected data-gathering operation" in the higher education space, *id.* at 824:5-7 (Woessner)—and who testified in detail about the ways in which the Survey Provisions as conceived, designed, and implemented are so outside the realm of sound methodology that they cannot credibly be understood as anything but an effort to suppress disfavored speech through a ruse of gathering "data," the only conceivable use of which is to falsely prop up further efforts to police, punish, and suppress disfavored speech, *id.* at 1373:21-1434:18.

From all of this evidence, only one conclusion is possible: the challenged provisions, together and independently, violate the First Amendment, and the Anti-Shielding Provisions are further void for vagueness. Absent an order finding them invalid and issuing a permanent injunction, the challenged provisions will continue to aggressively and unconstitutionally chill protected speech and association rights in public college and university classrooms across Florida. The promise of the First Amendment is simple: the state shall "make no law . . . abridging the freedom of

speech." U.S. Const., Am. I. With the challenged provisions, Florida has broken that promise. Judgment should be entered in Plaintiffs' favor on all of their claims.[2]

II. FACTUAL BACKGROUND

A. The Challenged Provisions

Plaintiffs begin by describing each of the challenged provisions, starting with their plain terms and also providing relevant background and context.

1. The Survey Provisions

The Survey Provisions' plain language is content-based, and the history of these Provisions proves that they are not just content-based but viewpoint-based—intended to chill disfavored speech perceived as liberal while providing special protections for and elevating favored speech by conservative speakers. The same conclusion is necessarily reached when the Survey Provisions are considered together with the other challenged provisions, including particularly the Anti-Shielding Provisions, which the evidence demonstrates they are intended to enforce.

By their terms, the Survey Provisions mandate that Defendants the Board of Governors ("BOG") and Board of Education ("BOE") (together, the "Boards") require each higher education institution in their respective jurisdictions to "conduct

[2] In addition to this brief, Plaintiffs attach an Addendum (Exhibit 1) which provides brief responses to express questions raised by the Court during trial, as well as cross-references to where the answers to those questions are discussed at further length in this brief.

an annual assessment of the intellectual freedom and viewpoint diversity . . . which considers the extent to which competing ideas and perspectives are presented and members of the [college or university] community . . . feel free to express their beliefs and viewpoints on campus and in the classroom." Fla. Stat. §§ 1001.03(19)(b), 1001.706(13)(b).

That these Provisions are content-based is made clear by their definition of the term "Intellectual freedom and viewpoint diversity," which is narrowly limited to "the exposure of students, faculty, and staff to, and the encouragement of their exploration of, a variety of *ideological and political perspectives*," *id*. §§ 1001.03(19)(a)(1), 1001.706(13)(a)(1) (emphasis added), rather than including intellectual freedom and viewpoint diversity in all of its forms, on any topic. In addition, that the Survey Provisions are meant to compel speech about these topics specifically (and not just collect "evidence" about them) is evidenced by the fact that the definition of "intellectual freedom and viewpoint diversity" expressly includes both "the exposure . . . to" and "*encouragement of* their exploration" among students, faculty, and staff. *Id*. (emphasis added).

The text is also notable for what it leaves out. In particular, the Legislature leaves the mechanics of this annual survey of these sensitive topics entirely to the Boards' discretion. The only direction to the Boards is that they must "select or create an objective, nonpartisan, and statistically valid survey to be used by each"

institution within their jurisdiction, and they must annually "compile and publish the assessments by September 1," beginning in 2022. *Id.* §§ 1001.03(19)(b), 1001.706(13)(b).

That no further requirements, benchmarks, or safeguards are included is particularly telling given the legislative history of these Provisions. For example, although the surveys that HB 233's proponents repeatedly pointed to as precedent were conducted by *independent survey experts*, Senator Rodrigues (the primary Senate sponsor) admitted that the Legislature was *not* including language to require that of *this* survey. JX 15 at 30:22-32:5. Indeed, there is no requirement that the Boards engage or involve anyone with *any* expertise in drafting or implementing surveys in the process. *Id.* Similarly, while many of the other surveys that the bill's proponents cited as inspiration involved the input of faculty or students, nothing in the law requires or even encourages the Boards to obtain input from those critical stakeholders. JX 8 at 37:10-16; JX 15 at 8:24-9:18.

Nor did the Legislature even attempt to define the bill's use of the terms "objective, nonpartisan, or statistically valid," or include any requirements that would help ensure that those ends were achieved. *But see Pernell v. Fla. Bd. of Governors of State Univ. Sys.*, No. 4:22CV304-MW/MAF, 2022 WL 16985720, at *45-48 (N.D. Fla. Nov. 17, 2022) (discussing inherent ambiguity in term "objective"); *Honeyfund.com, Inc. v. DeSantis*, No. 4:22CV227-MW/MAF, 2022

WL 3486962, at *13-14 (N.D. Fla. Aug. 18, 2022) (same). The Legislature could have included language or guardrails to address these concerns, but it did not. For example, in Florida Statute § 106.24, the Legislature expanded on the law's "nonpartisan" requirement by excluding "a member of any county, state, or national committee of a political party[,] . . . an officer in any partisan political club or organization[,] or [anyone] hold[ing] . . . any other public office." In contrast, while the Survey Provisions state that the surveys must be "nonpartisan," they do not explain what that means. As a result of that failure, witnesses from the Boards testified that they believed that it was perfectly fine for a *political party* to draft the survey, so long as the final questions were "not from one or another political point of view." ECF No. 264-1 ("BOE Tr.") at 212:18-213:17 (ECF No. 264-1 at 214-215).[3]

Perhaps this made sense to the Legislature and the Boards because it was no secret that, far from an innocent effort to gather valid data on free speech issues, the Survey Provisions are motivated by highly partisan concerns, meant to achieve partisan ends. The sponsors admitted on the record during the legislative proceedings that they were prompted by anecdotes that conservative students were self-

[3] For ease of reference, citations to deposition designations refer to both the ECF docket number and page, as well as the transcript pages and line numbers where the cited testimony appears.

censoring, acknowledging that their very hypothesis was to unearth evidence of discrimination against speakers who shared their political preferences. JX 6 at 13:13-18. Remarkably, they also admitted that they did *not* have any actual evidence that this was happening, or that it if it was, it was because of liberal bias in schools that was intentionally muting conservative student speech, JX 7 at 8:22-9:5. And they pressed on with the legislation over the very vocal opposition of Florida faculty, who rightfully worried that it "will stifle the very free speech you wish to promote." JX 10 at 12:4-7.

Outside the formal legislative record, the bill's proponents were even more explicit about their intentions. While HB 233 was under consideration, Representative Roach exclaimed on Facebook that the bill would "stem the tide of Marxist indoctrination on university campuses." PX 354. Similarly, Governor DeSantis gave a press conference in Naples, Florida on March 17, 2021, where he attacked specific ideologies he disagreed with and re-affirmed the state's role in regulating ideology: "Let me be clear. There is no room in our classroom for things like critical race theory . . . Teaching kids to hate their country and hate each other is not worth one red cent of taxpayer money." Trial Tr. at 194:8-195:2 (Lichtman).[4]

[4] Dr. Lichtman is a distinguished professor at American University, where he has taught for 50 years, and has published extensively on issues of political history, political analysis, historical methods, and quantitative analysis. Trial Tr. at 32:14-35:4. He has testified as an expert witness in more than 100 cases, including

Further evidencing that the Survey Provisions were an entirely partisan enterprise is the fact that HB 233's sponsors repeatedly attempted to enact a similar "viewpoint diversity" survey in past cycles, but failed each time. *See* HB 423 (2018); HB 909 (2018); HB 839 (2019); SB 1296 (2019); HB 613 (2020); *see also* PX 198 at 121:9-122:23 (then-Senator Bradley saying these proposals are "going to keep coming up again, and I'm going to stand here every time this comes up again until I'm done in two years and say don't do this" because it is "a dangerous road to go down"). But at the outset of the 2021 session, then-Senator Rodrigues announced that he anticipated he would finally be able to pass the Survey Provisions, because the Legislature had "shifted to the right." Trial Tr. at 101:18-102:19 (Lichtman).

This rightward bias permeated the Boards' implementation of the Survey Provisions in 2022. They did not involve any experts or outside firms to develop or administer the survey. *Id.* at 116:1-17 (Lichtman). Nor did they solicit any student, faculty, or administrator input. *Id.* Instead, the *only* outside involvement came from the Governor's Office, most notably in the close involvement of the Governor's deputy chief of staff, Alex Kelly. *Id.* at 1557:13-1559:10 (Kelly); *see also* ECF No.

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analyzing intent using the *Arlington Heights* factors; his testimony has been accepted by courts for this purpose and has also been relied upon by the U.S. Supreme Court. *Id.* at 38:2-18. Here, Dr. Lichtman was offered without objection as an expert in "American political history and analysis as well as quantitative and historical methods." *Id.* at 42:13-19. His testimony is unrebutted.

241-1 ("BOG Tr.") at 156:6-158:9 (ECF No. 241-1 at 158-160). In just a few weeks in February of 2022, Defendants and the Governor's Office rushed a draft of the survey that went through only minor tweaks before it was sprung on the colleges and universities in April. *See* PX 95 at 3-5, PX 73 at 4-5; *compare* JX 2 and JX 3.

In doing so, Defendants actively circumvented review by the Institutional Review Board ("IRB")—a federally mandated ethics board that protects subjects of survey science—which would typically be required for surveys like those administered pursuant to the Survey Provisions. *See* Trial Tr. at 1397:5-1398:22, 1401:8-25, 1409:16-10:4 (Dr. Hurtado explaining IRB review process, including that she expected the 2022 Surveys to undergo that process); *id.* at 1299:8-1300:3 (Dr. Fiorito testifying that he seeks IRB approval for all of his survey research); *id.* at 1542:22-1543:6 (Ms. Cruess testifying that UNF diversity and inclusion surveys went through IRB process). Although Defendants originally contracted with Florida State University's ("FSU") Institute of Politics ("IOP") to develop the surveys, they stopped working with IOP *because* FSU indicated that the survey would be subject to IRB review. *See* PX 48 at 4-5 (BOG interrogatories explaining Chancellor Criser's concerns with IRB requirements, particularly that survey may require the exclusion of students under 18 and be subject to a public records exemption); BOG Tr. at 144:4-145:16 (ECF No. 241-1 at 146-147); *see also* Trial Tr. at 116:13-17:10 (Dr. Lichtman testifying that Boards abandoned IOP in part because doing so

allowed them to avoid IRB review); PX 401 (IOP's IRB Protocol for the surveys).

Moreover, Defendants ignored the deluge of incoming messages they got from faculty and students who were shocked at and confused when the survey was distributed to them, just as the Legislature had ignored the complaints from faculty when it considered HB 233. *See* PX 119. Despite the broad and pointed criticism and low response rates, Defendants published the results without any further explanation or comment. PX 120 (BOG); PX 121 (BOE). Right wing media immediately began to distort the results, claiming that it was evidence that "professors and their colleagues are so intolerant of alternative views that [students] feel too intimidated to share their real opinions." PX 148.[5]

In reality, the results of the 2022 Surveys are meaningless. Dr. Woessner was "appalled by the survey construction in both the faculty and the staff survey," finding "the questions to be muddled, unclear, and biased." Trial Tr. at 840:13-16.[6] Dr.

[5] In PX 148, BOG employees share a link to an article entitled, "Florida's most politically oppressive college campuses, ranked," published by The Capitolist on September 10, 2022. That link is available here: https://thecapitolist.com/floridas-most-politically-oppressive-college-campuses-ranked/.

[6] Dr. Woessner is a political scientist who is highly qualified to offer the unrebutted testimony that he offered in this case about survey design and use, as well as the scientific research on whether faculty indoctrinate students—to which he made significant original contributions, including through the use of survey science—and the challenged provisions' impact on free speech. *Id.* at 802:20-881:13. He has specialized in the study of politics and ideology in higher education for two decades, *id.* at 813:7-9, and he was offered, without objection, as an expert in "the fields of

Hurtado offered a similar opinion, explaining that, among other things, the surveys were markedly myopic and asked no questions that would help to ascertain the *reason* for any survey respondent's asserted discomfort in expressing ideas—students who responded that they were intimidated could be "intimidated by faculty because of the knowledge difference," or they could be "confronted for the first time . . . with scientific evidence that countered their previous perspective," or they could be concerned with their "peers rather than with faculty," but nothing in the survey would indicate any of this. *Id.* at 1425:25-1426:17.[7] Based on a careful examination of the 2022 Surveys as constructed, Dr. Hurtado concluded that the only rational explanation is that they were in fact "intended to try to ferret out faculty in terms of . . . if any of their political views are being transferred to students . . . and the fact that it's administered annually, it's almost like harassment . . . or, really, surveillance." *Id.* at 1426:18-1427:3.

At the same time, the testimony of the Boards made clear they are confident

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politics and ideology in higher education as well as survey[] research[] and design," *id.* at 812:1-5. His testimony is unrebutted.

[7] Dr. Hurtado is one of the foremost survey researchers in the higher education context, and she recently led HERI. Trial Tr. at 1377:6-10. She is extremely qualified to offer the testimony she offered in this case, which was about how features of the Survey Provisions and the resulting 2022 Surveys bear on the reliability and validity of their results and purpose. *Id.* at 1373:21-1432:18. She was offered, without objection, as an expert "in survey design, drafting, administration, and higher-education teaching and administration." *Id.* at 1394:21-1395:2. Her testimony is unrebutted.

that they dutifully implemented the law as it was written and intended by the Legislature, and they maintain that they believe this process resulted in a survey that complied with "the requirements of the law." Trial Tr. at 1679:9-14 (Hebda). In reality, the most that the Surveys have done is create "evidence" that is even *less reliable* than the unsourced and unverifiable anecdotes that the proponents of the law claimed they were attempting to "investigate" from the outset. Defendants' 2022 Surveys tell you absolutely nothing about why anyone is responding to the surveys' questions in any particular way, making it impossible to determine both if there is actually a problem and, if so, what it is stemming from. Defendants seem to think this is a perfectly acceptable outcome. *See, e.g.*, Trial Tr. at 1685:15-20 (Hebda). The only rational explanation for their head-in-the-sand mentality is that everyone knows the whole process was a sham from the get-go.

The 2022 Surveys were voluntary; however, there is no requirement in the law that they be so in the future. Fla. Stat. §§ 1001.03(19)(b), 1001.706(13)(b). Even more importantly, as designed and implemented, the Survey Provisions have speech suppressing consequences whether they are voluntary for the survey recipients or not. Even if faculty or students are not required to take part, the Boards and the institutions they oversee are *required* to conduct them annually, and the Boards are *required* to report the results—regardless of how questionable the survey design, how paltry the participation, or how untrustworthy the data. Fla. Stat. §§

1001.03(19)(b), 1001.706(13)(b). Nor is there any restriction on how any of the data collected or the survey "results" may be used. *See* PX 95 at 7.

As a result, even without any further coercion, this mandatory annual cycle operates to put significant pressure on Florida colleges, universities, and faculty to avoid any speech that could cause them to be reported to Defendants as excessively liberal in the annual surveys. *See, e.g.*, Trial Tr. at 664:17-665:6 (Gothard); *id.* at 978:23-982:8 (Edwards); *id.* at 524:16-525:5 (Link). That this was one of the law's likely aims is further supported by the fact that the Survey Provisions, as designed, and the surveys as implemented, by definition collect information about speech outside of any useful context in which actual concerns about problematic bias could be appropriately investigated and addressed—realities that further undermine Defendants' attempts to justify them as a good faith tool to achieve legitimate ends.

2. The Anti-Shielding Provisions

By their terms, the Anti-Shielding Provisions are viewpoint-based, providing special protections for speech that reflects certain viewpoints, and only those viewpoints. That this was the intention of the Legislature is only further evidenced by the history surrounding these Provisions.

The Anti-Shielding Provisions prohibit the Boards and the public post-secondary institutions within their jurisdictions from "shield[ing] students, faculty, or staff from expressive activities," Fla. Stat. § 1004.097(3)(f), or "from free speech

protected by the First Amendment to the United States Constitution, Art I of the State Constitution or s. 1004.097," §§ 1001.03(19)(c) (BOE), 1001.706(13)(c) (BOG).[8] "Shielding" is broadly defined as "limit[ing] students', faculty members', or staff members' access to, or observation of" certain types of ideas and opinions—namely, those "that [the listener] may find *uncomfortable, unwelcome, disagreeable, or offensive*." *Id*. §§ 1004.097(2)(f), 1001.03(19)(a)(2), 1001.706(13)(a)(2) (emphasis added). The law further defines "[e]xpressive activities protected under the First Amendment" to include "*any* lawful oral or written communication of ideas, *including . . . faculty research, lectures, writings, and commentary*, whether published or unpublished." *Id*. § 1004.097(3)(a) (emphasis added).

Of note, the Anti-Shielding Provisions *added* the terms "faculty research, lectures, writings, and commentary" to a definition of "expressive activities" that originally came from the Campus Free Expression Act of 2018 ("CFEA")—a law expressly focused on *outdoor* expression. *Compare* JX 1 and PX 159 at 49. And the word "including" is generally understood to indicate that the specific examples given are not exhaustive but illustrative, included in the broader category of "*any* lawful oral or written communication of ideas." Fla. Stat. § 1004.097(3)(a). The Anti-

[8] Notably, "s 1004.097" includes the Recording Provision, which was added to that section as a new free speech right afforded to students at Florida's public post-secondary institutions.

Shielding Provisions give sharp teeth to this provision, providing "any person injured" by a "violation of this section" with a cause of action "[a]gainst a public institution of higher education based on the violation of the individual's expressive rights[.]" *Id.* § 1004.097(4)(a).[9]

Equally problematic as the fact that the Anti-Shielding Provisions single out for special protection speech that expresses a particular viewpoint is that no one seems able to say what constitutes "shielding," or to confidentially conclude when the Provisions apply or what they require, including specifically of faculty in the classroom. Those who contend that they understand the Provisions read into them language and limitations that are not found anywhere in their text, and often reach differing conclusions about their reach and their meaning.

Inconsistencies in interpretation are rife even among Defendants' own proffered interpretations of the Anti-Shielding Provisions. While Defendants have at times argued in legal papers that the Anti-Shielding Provisions do not apply in the classroom, *see, e.g.*, ECF No. 177 at 33, Chancellors at the BOG and BOE testified that they *do* apply in the classroom. *See* ECF No. 267-2 ("Mack Tr.") at 38:7-18 (ECF No. 267-2 at 40); *see* BOG Tr. at 101:3-14 (ECF No. 241-1 at 103). At trial, Defendants' counsel tempered Defendants' prior position, admitting that "it's

[9] The Recording Provision, discussed further below, provides a new means of obtaining "evidence" to support any such claims (among other things).

probably still an open question about whether it applies to the classroom," Trial Tr. at 307:8-10 (Levesque), before offering an interpretation that the Anti-Shielding Provisions apply only to discussion-based classes, but not lectures, and contending—without any basis in the text—that students could not interrupt professors during a lecture "because that's not the open forum." *Id.* at 308:4-10; *but see* Trial Tr. 310:8-21 (Dr. Lichtman pushing back on notion that the Recording Provision could in practice be limited to not shutting down students who seek to offer views that are uncomfortable, unwelcome, disagreeable, or offensive, because there is nothing to keep students from "complain[ing] that, this lecture shields me from the view that the election of 2020 was stolen," and pointing to the Recording Provision as a mechanism to encourage that, where a student could offer a recording of a lecture to bolster some kind of complaint).

That the parameters and appropriate application of the Anti-Shielding Provisions are still an "open question" is particularly notable given that questions about what they require and when they apply have been raised repeatedly—ever since the Provisions were introduced. Even the Legislature knew the language was vague. When Representative Hardy noted that "uncomfortable, unwelcome, disagreeable, offensive" may mean different things to different people, bill sponsor Representative Roach responded: "I think that's kind of the beauty of the thing." JX 6 at 17:13-19:1. And even a lawyer from Defendants' own firm flagged vagueness

concerns in a memorandum to BOG's general counsel and counsel for the State University System ("SUS") institutions before HB 233's enactment—including specifically concerns that *the language could be read to require faculty to actively engage in speech that they otherwise would not*, in order to ensure "viewpoint diversity" in the classroom. PX 271 ("Does shield provision put an affirmative duty on faculty to actively promote diversity of viewpoints in their classrooms? Is failing to have guest lecturers on both sides of a controversial issue 'limiting' access to unwelcome ideas?").[10]

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[10] The Court admitted PX 271 for a limited purpose. However, the email and memorandum in PX 271 are not hearsay because they are not being offered "to prove the truth of the matter asserted." Fed. R. Evid. 801(c)(2). The relevance of the email and memorandum lie not in the truth of the matters "asserted" in the memo, which on their face are more in the nature of questions, "that, to a large degree, [are] not even capable of being true or false." *United States v. Perez*, No. 21-14469, 2023 WL 1457901, at *2 (11th Cir. Feb. 2, 2023) (citing *United States v. Rivera*, 780 F.3d 1084, 1092 (11th Cir. 2015)), but instead to the sender's state of mind regarding the ways in which HB 233's challenged provisions might be read, rightly or wrongly, which goes to the merits of Plaintiffs' void-for-vagueness claim and the reasonableness of Plaintiffs' self-censorship and associational chill. *See* Fed. R. Evid. 803(3); *see also United States v. Pagan*, 2022 WL 7811971, at *7 (finding that statements were not "offered for the truth of the matter asserted because these statements are incapable of being proven true or false"); *see infra* 189-198. They are also relevant to for their effect on the listeners, who included BOG's own internal counsel, as well as the counsel of the universities who have had to interpret these provisions entirely on their own, as their requests for guidance from the Boards have gone unanswered. *See, e.g.*, BOG Tr. at 87:18-89:12 (ECF No. 241-1 at 89-91). Moreover, even considering the Court's initial limitation, ECF No. 262 at 2-3, although PX 271 does not itself contain responses from the party opponents, the

And while the "Chicago Statement" was cited as precedent for the Anti-Shielding Provisions by some proponents, JX 7 at 22:1-23:8, the Anti-Shielding Provisions differ from that statement significantly, both in that they are legally binding and in that they include no limits to allow for control of the classroom, genuine pedological concerns, or anything else. Trial Tr. at 460:1-462:6 (Bérubé). For example, the Chicago Statement included several explicit caveats and carveouts, including a warning that "[t]he freedom to debate and discuss the merits of competing ideas does not, of course, mean that individuals may say whatever they wish, whenever they wish," *id*. at 460:22-25, and, even more expressly, that "[t]he university may restrict expression" in several circumstances, including when it is "incompatible with the functioning of the university," *id*. at 461:20-462:1.

To this very point, the free speech advocacy organization the Foundation for Individual Rights and Expression ("FIRE") repeatedly attempted to convince the Legislature to either jettison the Anti-Shielding Provisions altogether or revise them to include language that would except "policies or practices to maintain order" in the classroom. *See* PX 137. This would have tracked the Legislature's approach to the CFEA, which created protections for "expressive activities in outdoor areas of the campus … *as long as* the person's conduct is lawful and does not materially and

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statements contained therein provide context for BOG's response to the challenged provisions generally.

substantially disrupt the functioning of the [school]." PX 159 at 49. As noted above, in enacting HB 233 and its challenged provisions, the Legislature actually amended the CFEA, which created the section of the code—1004.097—that the Recording and Anti-Shielding Provisions amended, that applies directly to the colleges and universities. Indeed, the CFEA's carve out language, which makes it clear that those institutions may still regulate "expressive activities in *outdoor* areas of the campus" if the conduct materially and substantially disrupts the functioning of the school, can *still* be found in 1004.097(3)(b) (emphasis added). The Legislature's refusal to include similar limiting language in the Anti-Shielding Provisions to ensure that faculty could still control their classroom, strongly evidence that it intended to deny faculty that control.[11]

Furthermore, as this Court pointed out during trial, interpreting the Anti-Shielding Provisions to apply to classroom speech—by faculty *and* students—only makes sense, given that the Anti-Shielding Provisions' own definition of what it covers expressly includes *lectures*, as well as the fact that the legislative sponsors repeatedly stated that they were trying to address *concerns of students self-censoring in the classroom*. Trial Tr. at 307:11-308:5 (Lichtman); *see also* JX 7 at 3:25-4:22,

[11] In doing so, the Legislature also created the absurd situation in which institutions have more ability to manage speech to avoid disruption to the their educational functions *outside* the classroom, than *within* it.

14:11-18. Sponsors also drew express connections between HB 233 and the conservative movement to combat "cancel culture." *Id.* at 24:15-21.

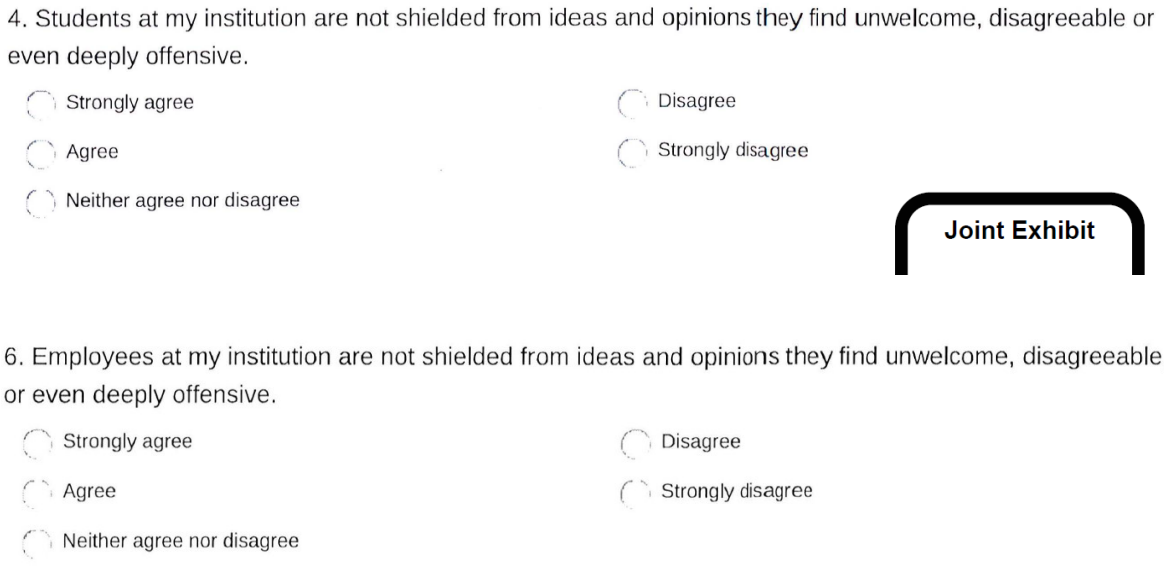
Add to that evidence of the Legislature's refusal to include any exceptions for faculty to maintain order in the classroom as urged by FIRE and others, and the Anti-Shielding Provisions *only* make sense as being intended to prohibit faculty from controlling their classrooms to avoid disruptive speech by conservative speakers. And by drafting the provision to apply to protect any speech that anyone could possibly find offensive, uncomfortable, unwelcome, or disagreeable, the Legislature ensured that the Provisions could be used as a weapon against faculty who attempt to do so. *See* Trial Tr. at 592:3-596:22 (Dr. Gothard explaining that the terms of the Anti-Shielding Provisions seemingly cover comments that are off-topic and do not leave room for classroom management); *id.* at 855:6-856:20 (Dr. Woessner explaining normal classroom interactions that would be hampered by Anti-Shielding Provisions).

It is also highly relevant that, not nine months later, the same Legislature passed HB 7, which prohibited the "non-objective" teaching of specific subjects, precisely because—in the Legislature's view—some listeners may find such discussions uncomfortable, unwelcome, disagreeable, or offensive. Even before HB 7, faculty were self-censoring and engaging in speech they otherwise would not have in an attempt to comply with the befuddling Anti-Shielding Provisions, but HB 7's

passage only further underscored that the intention all along was to chill speech that the Legislature deemed too liberal and elevate opposing viewpoints with which it agreed. *See* Trial Tr. at 604:10-605:7 (Dr. Gothard testifying that given HB 7 and HB 233's co-existence, "the only response that a reasonable faculty member has is to pull far back from any of this subject matter that is restricted in HB 7 in order to also try to comply with the requirements of HB 233"); *id*. at 953:5-954:19 (Dr. Edwards recounting that he wrote a letter to the University of Central Florida ("UCF") regulations administrator about how HB 7 and the Anti-Shielding Provisions interact); *id*. at 1024:9-14 (Representative Smith testifying that after HB 7 was passed, some UCF departments took down anti-racist statements).

And although Defendants are charged with enforcing the Anti-Shielding Provisions (and students may even file complaints with BOG directly, *see* PX 496; *see also* Trial Tr. at 1693:6-9 (Florida College System ("FCS") Chancellor Kathryn Hebda agreeing that "student complaints can morph into something that relates to the violation of state law by the institution such that the Commissioner could investigate it"), when asked directly about whether they would apply to certain scenarios, Defendants were unable to state with certainty that they would apply in any given case, further making it impossible to know in advance how to avoid violating them. *See* BOE Tr. at 167:8-168:25 (ECF No. 264-1 at 169-170); *see also* BOG Tr. at 106:22-107:14 (ECF No. 241-1 at 108-109).

Finally, the Boards included questions about "shielding" in their surveys to staff and faculty, further evidencing that Defendants, too, understand the Anti-Shielding and Survey Provisions to work in concert. *See* JX 4:


4. Students at my institution are not shielded from ideas and opinions they find unwelcome, disagreeable or even deeply offensive.

Strongly agree
Agree
Neither agree nor disagree
Disagree
Strongly disagree

Joint Exhibit

6. Employees at my institution are not shielded from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive.

Strongly agree
Agree
Neither agree nor disagree
Disagree
Strongly disagree

The Survey Provisions, like the Recording Provisions, discussed *infra*, thus monitor classroom speech to insure that "shielding" is not occurring, further compounding the chilling effect of the Anti-Shielding Provisions.

3. The Recording Provision

The plain language of the Recording Provision also evidences that it was intended to chill faculty speech. The Recording Provision carves out a *sui generis* exception to Florida's otherwise strict two-party consent law for recordings, allowing students (and only students) to record "class lectures" without consent, to obtain evidence to support civil or criminal legal proceedings or institution-level

complaints, including to enforce the Anti-Shielding Provisions. Fla. Stat. § 1004.097(3)(g).

As a threshold matter, the fact that the Recording Provision applies to "class lectures" further undermines any argument that the challenged provisions were about promoting free speech generally, including specifically furthering the Legislature's concern that *conservative students* may be afraid to express unpopular opinions in the classroom. After all, if the target for the recording is the *lectures* themselves, then what could possibly be the free speech concern for the *students*—unless the intention is, as Plaintiffs have argued, to monitor *faculty speech* specifically, and chill their expression of viewpoints disfavored by the governing majority. The fact that students are now specially authorized to record these "lectures" moreover, in order to use them in connection with "complaints" or legal proceedings, further indicates that the Plaintiffs' belief that the Anti-Shielding Provisions require them *not only to not stop students from* engaging in speech that could be viewed as uncomfortable, unwelcome, disagreeable, or offensive, *but also to give voice to those types of viewpoints*, lest their institutions be accused of shielding, with a recording authorized by the Recording Provision used to "prove" it. And the Legislature ensured that the breadth of the statute would be expansive, and broadly chill faculty speech, by declining to define "class lectures."

That the Recording Provision would chill speech was known from its very

inception. In preparing BOG's bill analysis of HB 233, BOG's general counsel Vikki Shirley noted in an email that she "need[s] to add language about the chilling effect on speech in the classroom to the student impact section." PX 124 at 1. The BOG's bill analysis ultimately reflected that, stating a concern that "[s]tudents have an expectation of privacy in the classroom" and would otherwise be protected from "having their communications surreptitiously recorded by another without their consent." JX 30 at 3. Others within BOG were clearly surprised to discover that provision in the draft legislation when it was circulated. *See* PX 285 at 1 (Christy England, BOG Vice Chancellor for Academic and Student Affairs, emailing Shirley: "Wow, didn't realize there was language about recording classroom activities without consent from the people on the video. . .").

The Legislature was also aware that the Recording Provision would chill speech, viewing that as a feature, not a bug. For example, while speaking in support of the Recording Provision, Senator Broxson compared it to Florida's "sunshine" law, which he acknowledged "does temper our conversation" within the Legislature, "mak[ing] us more civil, more considerate," and indicating that was a desired effect. JX 10 at 22:20-23:16.[12] And FIRE vehemently opposed the Recording Provision

[12] In doing so, Senator Broxson acknowledged that enacting the Recording Provision would change the content of classroom speech—indeed, was intended to temper it—but failed to recognize the difference between elected representatives and classroom instructors and students. *See* Trial Tr. at 860:11-862:16 (Woessner). Moreover, any

before it was enacted, even advocating Senator Rodrigues's office to cut this Provision altogether, warning that "[i]t is a near certainty that this will be misused by students to record disfavored statements by other students in order to shame them online, often on political or ideological grounds." PX 131 at 6. When direct conversations with Senator Rodrigues's office failed, FIRE went public with its concerns. *See* PX 136. Faculty members expressed similar concerns: on March 9, 2021—before HB 233 passed either chamber—the Advisory Council of Faculty Senates ("ACFS") finalized a resolution warning that the Recording Provision would chill speech and impede faculty recruitment and retention. PX 41. Not only did the ACFS go public with its concerns, it transmitted them directly to SUS Chancellor Criser. *Id.* A few weeks later, on March 26, 2021, Representative Plasencia and staff from Senator Rodrigues's office attended an ACFS meeting, and members of the ACFS expressed their concerns to them directly. Trial Tr. at 177:2-8 (Lichtman).

It was also well known that the Recording Provision's undefined terms could cause confusion, exacerbating the threat of chill. *See* PX 271 at 4 (Higher Education

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interest in making conversation "more civil" or "considerate" is obviously not furthered—and in fact, undermined—by the Anti-Shielding Provisions, which elevate for special protection speech that is "uncomfortable, unwelcome, disagreeable, or offensive." It is also notable that, in the same statement, Senator Broxon relied on the same justification that has motivated attacks against academic freedom for over 100 years—namely, that because state governments fund the universities, they are entitled to address speech issues they identify within them. *Compare* JX 10 at 22:23-23:2, *with* Trial Tr. at 402:6-12 (Bérubé).

Practice at the firm that now represents Defendants identifying same concerns: "What constitutes a class 'lecture'? Is anything other than faculty talking to class without interaction included?" and "What constitutes 'publishing' a recorded lecture?"); *see also* PX 42 at 1 (June 25, 2021 email from Shirley to Criser about university and college general counsels immediately requesting that BOG define "class lecture" and "publish" in the Recording Provision). The Boards, too, have declined to define it.

Beyond the Recording Provision's independent chilling of speech, it also acts as an enforcement mechanism for the Anti-Shielding Provisions, *see* Fla. Stat. § 1001.03(19)(c) (mandating that BOE "may not shield students, faculty, or staff at Florida College System institutions from free speech protected by the First Amendment . . . or s. 1004.097," which includes the Recording Provision); *id.* § 1001.706(13)(c) (same for BOG), and other speech restrictions that the Legislature has implemented since, Trial Tr. at 1472:5-14 (Dr. Morse testifying that Florida Atlantic University ("FAU") administrators reminded all faculty in Summer 2022 that HB 233 worked with the subsequently enacted HB 7—a law prohibiting instruction on certain topics regarding systemic prejudices—because the Recording Provision is mechanism for policing faculty speech); *see also id.* at 185:4-188:16 (Lichtman).

And while the Legislature added a cause of action for professors to sue

students for misuse of recordings, the unrefuted evidence overwhelming demonstrated at trial that it provides no meaningful protection. As multiple faculty members testified, after a student publishes a recording, "it's too late for me to actually do anything about it. So I could sue them and maybe even win, but my career is over." Trial Tr. at 1250:2-10 (Goodman); *id*. at 1486:13-1487:3 (Dr. Morse explaining "it might be challenging to take advantage of that opportunity to sue our students," including because when "faculty become the center of a kind of viral video storm, the damage is done very quickly"). FIRE, too, made this point publicly while the bill was still pending before the Legislature, warning that the sue-your-students provision "does nothing to protect a faculty member from recordings being used as the basis for politically motivated complaints," and that "it seems unwise to create a system where faculty members' legal remedy is to sue their own students." PX 136 at 2. And, indeed, as unrebutted expert testimony established, the threat to faculty members' reputations, careers, and safety is both real and serious: organizations like Campus Reform publish stories online to create public outcry about perceived left-leaning speech, and those stories regularly result in the harassment of targeted faculty. Trial Tr. at 1165:17-1166:18 (Kamola).[13]

[13] Dr. Isaac Kamola is exceptionally qualified to offer that testimony, which was based on his original peer-reviewed research. Trial Tr. at 1097:19-1112:7. He was offered, without objection, as an expert in "the political economy of higher education, the phenomenon of targeted harassment of faculty for perceived liberal

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In sum, each of the challenged provisions work together to monitor, threaten, and chill disfavored speech, while elevating the Legislature's and Governor's preferred speech. They have created an environment completely antithetical to what higher education is supposed to be—rather than protect and support a freewheeling space of discussion and intellectual exploration bolstered by trust, the Legislature has created an Orwellian surveillance state, where students are encouraged to monitor their faculty for egregious crimes of expression using the tools created by the challenged provisions—including by contributing to annual reports as to whether faculty and their institutions are complying via an "evidence gathering" tool that is designed to do anything but; by enforcing obtuse and impossible to follow prohibitions on "shield[ing]" specific types of speech favored by the Legislature; and by making secret recordings that could be taken out of context (and indeed, if the argument that Defendants have made is true—that students can *only* record when a professor is speaking and cannot record anyone else in the class, Trial Tr. at 725:5-729:6—then, by design, will be created and weaponized *without* their full context) and could destroy a faculty member's career, or their lives.

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bias, and the consequences of targeted harassment." *Id.* at 1112:8-15. His testimony is unrebutted.

B. *Arlington Heights* Factors

In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), the Supreme Court identified the following five factors as relevant to a court's analysis of circumstantial evidence of discriminatory intent: (1) the historical background, "particularly if it reveals a series of official actions taken for invidious purposes," *id.* at 267; (2) "[t]he specific sequence of events leading up to the challenged decision," *id.*; (3) any procedural or substantive departures, "particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached," *id.*; (4) legislative history, including contemporary statements and justifications by decisionmakers, *id.* at 268; and (5) the discriminatory impact of the official action, *id.* at 266. These are non-exhaustive factors and, in all cases, courts must conduct "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id.* at 265-66. The Eleventh Circuit has since identified the following additional factors relevant to questions of discriminatory intent: (6) the foreseeability of discriminatory effects; (7) knowledge of those discriminatory effects; and (8) availability of less discriminatory alternatives. *See, e.g.*, *Greater Birmingham Ministries v. Sec'y of State of Ala.*, 992 F.3d 1299, 1322 (11th Cir. 2021).

Consistent with the Court's direction that it will consider Plaintiffs' intentional discrimination arguments using the *Arlington Heights* framework,

Plaintiffs summarize the context and factual background of HB 233 and its challenged provisions using its relevant factors.

1. Historical Background

The challenged provisions can only be properly understood against the historical background of (1) Florida's history of leveraging state power to surveil and suppress the speech of politically unpopular groups, and (2) the history of viewpoint- and content-based attacks on academic freedom in higher education in this country, both of which share assumptions and form with the challenged provisions. Several witnesses testified to this historical background at trial, including Dr. Lichtman, Dr. Bérubé, and individual faculty witnesses.[14] *See, e.g.*, Trial Tr. at 1461:11-21 (Morse); *id.* at 521:11-523:6 (Link).

In Florida, this background includes (1) the Florida Legislature's 1950s investigation of Communist influence in the N.A.A.C.P. and (2) the Johns Committee's 1960s investigation of homosexual faculty in higher education. *See id.* at 90:2-94:18 (Lichtman). Both involved an excessive overreach of the Florida government's investigatory and surveillance activities without sufficient basis, much

[14] Dr. Bérubé has been studying academic freedom in higher education for more than 37 years and has written four books and more than a dozen articles on the subject. Trial Tr. at 388:1-24. He served nearly ten years on the AAUP Committee A on Academic Freedom and Tenure. *Id.* at 388:25-389:3. Dr. Bérubé was offered, without objection, as an expert in "academic freedom in higher education in the United States." *Id.* at 394:4-11. His testimony is unrebutted.

like the Recording and Survey Provisions. *See id.* at 90:21-94:15 (Lichtman). As the U.S. Supreme Court noted, Florida's investigation of the N.A.A.C.P. was a particularly concerning instance of the predominant political powers targeting views with which they disagreed. *Id.* at 90:21-92:18; *see also Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 556-57 (1963). The Johns Committee investigation is particularly resonant because not only were homosexual faculty a political target—as they are again today in Florida—but the purported concerns of the Committee were also directly animated by baseless and discriminatory concerns that homosexual faculty would recruit or, in today's terms, "groom" or "indoctrinate" students. Trial Tr. at 92:21-94:15 (Lichtman); *see id.* at 1461:17-21, 1465:13-16 (Morse). Moreover, in a direct link to the speech monitoring and suppressing tools that the Legislature enacted with HB 233, the Johns Committee specifically made use of "secret recordings." *Id.* at 93:6-13 (Lichtman). Though these incidents occurred decades ago, they are illustrative of the playbook used time and again to suppress unpopular views, in Florida and elsewhere, including now via HB 233's challenged provisions. Indeed, Florida's faculty is acutely aware of the history of the Johns Committee and the forms that a legislature's hostility towards academia can take. *See, e.g.*, *id.* at 1461:11-21 (Morse); *id.* at 521:11-523:6 (Link).

HB 233's challenged provisions—and justifications offered for them—are also strikingly similar to other viewpoint- and content-based attempts to target and

quelch speech in higher education that have been attempted in the past. Viewpoint-based attacks on faculty speech began in this country shortly after the American university (in the form that we now know it) began to thrive. In fact, the very concept of academic freedom in higher education became standardized as a result of efforts by Committee A of the American Association of University Professors ("AAUP"), following a series of incidents in which faculty were targeted because their political views were at odds with those of trustees and others who believed that, if they were funding the institutions, they should be able to control what was said by the faculty in them. *Id.* at 389:7-13; 398:3-399:1 (Bérubé). As Dr. Bérubé testified, the resulting concept of academic freedom—specifically, the 1940 statement, which is the "gold standard" that appears "in almost every faculty handbook . . . throughout the country"—is critical to the entire higher education enterprise, and central to that is the fundamental idea that the pursuit of truth and knowledge that is the calling of higher education cannot be beholden to the political or ideological orthodoxy of elected officials, clerics, or trustees. *Id.* at 396:25-397:15, 416:6-10.

The first major written attack on academic freedom in higher education was William F. Buckley Jr.'s 1951 book, *God and Man at Yale*, which some consider "the origin of the conservative movement" itself. *Id.* at 434:7-21. Buckley's rhetoric makes a "striking" parallel to the rhetoric that we now hear routinely from Republican politicians in Florida today, accusing what Buckley described as Yale's

"atheist" and "collectivist" faculty as "indoctrinating students into atheism and collectivism." *Id*. at 435:1-3; *see also id.* at 436:1-8. This theme of "indoctrination" has been a core component of conservative attacks on higher education for decades. *Id*. at 435:21-437:19. In the late 1980s and early 1990s, a series of books were published repurposing Buckley's complaints for the modern era, including Charlie Sykes' *ProfScam*, Roger Kimball's *Tenured Radicals*, and Dinesh D'Souza's *A Liberal Education*. *Id.* at 441:7-442:8.

Still, over all these years, these politically-motivated claims that liberals were "indoctrinating" students in higher education were confined to public discourse and not used as cudgels to attempt to control speech through state action. *Id.* at 442:20-443:2. Then, in the early 2000s, conservative activist David Horowitz began advocating for state legislatures to legally effectuate his "Academic Bill of Rights." *Id.* at 443:3-445:2. Around the same time, the phrase "viewpoint diversity" began to emerge as a conservative reaction to U.S. Supreme Court's decisions on affirmative action. *Id.* at 445:3-23. In that way, the concept of diversity is "played off" affirmative action policies and "goes hand in hand with the attacks you see on diversity, equity, and inclusion." *Id.*[15] The idea of legislating to control the

[15] Thus, the inclusion of the term itself in the Survey Provisions is evidence of the partisan intent of the Legislature here. *See* Fla. Stat. §§ 1001.03(19)(b), 1001.706(13)(b). The modern instantiation of this tradition can most clearly be seen in the villainizing of concepts like Critical Race Theory ("CRT") and diversity,

expression of ideas in this space, however, was so far afield that despite taking his ideas to over 25 legislative bodies, Horowitz was unable to convince a single one to act on it. *Id.* at 445:24-446:8. The most that Horowitz was able to do was convince the conservative Pennsylvania legislature to launch an extensive investigation of these accusations in Pennsylvania's higher education system. *Id.* at 446:9-447:3. That investigation—which sought specific evidence of liberal bias, demanded production of any reports of any incidents of bias over several years, and involved multiple hearings—came up empty-handed. *Id*. at 446:9-448:16. The worst incident uncovered was a complaint about a professor who a student believed had treated them poorly due to the professor's conservative bias. *Id.* at 448:3-9. Indeed, Dr. Bérubé testified that he could not think of a *single attack* on academic freedom in higher education over the past 80 years that turned up concrete evidence to support

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equity and inclusion ("DEI") efforts. Christopher Rufo, a conservative political operative, has developed "attack[s] on critical race theory as a great wedge issue for Republicans." Trial Tr. at 88:12-19 (Lichtman). This strategy has been extremely influential in Florida. On April 22, 2022, Governor DeSantis held a press conference for the signing of HB 7, which, in his own words, "do[es] not allow pernicious ideologies like critical race theory to be taught." PX 237 at 3:25-4:9. Mr. Rufo was present for the signing of HB 7, and Governor DeSantis referred to him as "the architect of focusing attention on some of the pernicious ideologies" and explained that he "has obviously helped fuel what we've done in Florida and in other states." *Id.* at 2:12-15; 13:15-17. Just before trial, Governor DeSantis appointed Mr. Rufo to the New College Board of Trustees. *Id.* at 232:1-7 (Lichtman).

concerns about liberal indoctrination in higher education. *Id.* at 448:17-25.[16]

In 2021, the Florida Legislature broke from the legislatures of the past and decided—nevermind that decades of these same accusations and resulting investigations turned up *no* evidence to substantiate them—Florida was going to act. As discussed in the next section, it was able to do so because of specific and important changes in the political climate, which for the first time made the Legislature ideologically extreme enough to embrace these speech suppression tactics that even some among their party had previously warned against adopting because they are a "dangerous road to go down." PX 198 at 121:9-123:2.

2. Specific Sequence of Events Leading Up to HB 233

Proposals for an "Intellectual Freedom and Viewpoint Diversity" survey in the Florida Legislature date back as far as 2018. *See* Trial Tr. at 1036:4-22 (Smith). In each of the 2018, 2019, and 2020 legislative sessions, a viewpoint diversity survey nearly identical to HB 233's Survey Provisions was proposed and rejected by the Florida Legislature. *See, e.g.*, HB 423 (2018); HB 909 (2018); HB 839 (2019); SB 1296 (2019); HB 613 (2020) (sponsored by then-Representative Rodrigues). All of

[16] The lack of evidence is consistent with the empirical work of Dr. Woessner and others who have studied allegations that because higher education faculty tend to be liberal, they indoctrinate, influence, or otherwise cause difficulties for conservative students, and have found, consistently, that there is no basis for these allegations. Trial Tr. 830:2-832:23; *see also infra* 170-171, 175 (more fulsome discussion of Dr. Woessner's research and conclusions).

these bills were sponsored by either then-Representative Rodrigues (who would go on to sponsor HB 233 as a senator before being appointed by Governor DeSantis to Chancellor of SUS) or then-Senator Manny Diaz, Jr. (now a Defendant in this action, as a result of his appointment to Commissioner of Education at the recommendation of Govenor DeSantis).[17]

Repeatedly, these bills were justified based on purported concerns that liberal "indoctrination" or discriminatory bias infected Florida's institutions of higher education. *See, e.g.*, PX 186 at 63:23-64:5 (at hearing concerning HB 839 (2019), then-Representative Cord Byrd spoke in favor of the bill explaining that: "There is a concern that there is more indoctrination than education taking place. Just last night, I spoke to a student from Florida State University in preparation from this committee who is a committed, devoted Christian, and she says she does not feel that she can express her ideas comfortably on the campus of Florida State University")[18]; PX 190 at 86:22-87:7 (at hearing concerning SB 1296 (2019), Senator Baxley expressed support for the bill based on his claim that "students that are conservative, feel very pinched on campuses around this state and around this

[17] Specifically, then-Representative Rodrigues sponsored HB 423 (2018), HB 909 (2018); HB 839 (2019); and HB 613 (2020), before sponsoring HB 233 (2021). Then-Senator Diaz sponsored SB 1296 (2019).

[18] Byrd has since been appointed Secretary of State by Governor DeSantis.

country" and that "you may not get your graduation letter -- graduate letter to go to graduate school").

It was not until 2021 that the political conditions were such that the Survey Provisions had a chance of passage in Florida. And by then, the environment was so conducive to supporting a legislative attack on the majority's concern about the presence of viewpoints it disfavored in higher education that the Legislature was not satisfied to enact only the Survey Provisions that had been the subject of HB 233's predecessor bills, but *also* added in the Anti-Shielding and Recording Provisions. As noted, even the few outsiders who supported the Survey Provision (e.g., FIRE) were vehemently against the Anti-Shielding and Recording Provisions, precisely because of their warnings that they would broadly chill speech in higher education. *See* PX 136. But by then, the Legislature was so committed to targeting disfavored speech in higher education that it ignored all of those warnings.[19]

[19] The inclusion of the Anti-Shielding and Recording Provisions in HB 233 gives further reason to doubt claims by Defendants and (at times) members of the Legislature that all they were trying to do with the Survey Provisions was figure out if there was a problem to be solved. Instead, eager to take advantage of a willing body, they plowed forward with other speech suppression tactics in the same breath, not waiting to learn the "results" of their "investigation." And, as discussed at length, *supra* 15-24 (the Anti-Shielding Provision) and 24-30 (the Recording Provision), there was both surprise at and immediate opposition to these two provisions upon their introduction.

There were two significant political changes that laid the groundwork for HB 233's passage in 2021. The first was the election of Governor DeSantis in 2018. As reflected by comments that DeSantis had made previously as a member of Congress, he came into the Governor's mansion already with the strong view that college professors "[o]bviously" are "overwhelmingly on the left" and that some of them are "pushing the ideology." PX 384 at 31. He also stressed the role of government in influencing the views expressed in public higher education, "given that we are funding it." *Id.* And, indeed, as soon as Governor DeSantis took office, he made addressing his perceived concerns of liberal bias in education a cornerstone of his administration. Before the end of his first month in office, Governor DeSantis ordered a biased review of K-12 civics education that was "not based on sound academics but [was] largely driven by the political priorities." Trial Tr. at 210:15-22 (Lichtman); *see also* Executive Order Number 19-32.[20] And in June 2021, before HB 233 was enacted, "at [Governor DeSantis'] direction, the State Board of Education took action to stop critical race theory and the 1619 Project curriculum" by proposing a rule to prohibit them in K-12 education. *See* PX 222 at 8:12-15. At

[20] Executive Order Number 19-32 is available at: https://www.flgov.com/wp-content/uploads/2019/01/EO-19-32.pdf. This public record maintained by a government agency is properly subject to judicial notice under FRE 201.

every turn, Governor DeSantis has made fighting "woke indoctrination" and liberal speech in education a prominent and key feature of his administration. PX 460.

Second, in 2021, the Senate had moved to the right—so much so that Senate President Simpson publicly commented on it. Trial Tr. at 102:6-19 (Lichtman); *see also id.* at 101:18-102:19 (Dr. Lichtman testifying that then-Senator Rodrigues stating that HB 233 would be more likely to succeed because "the state has shifted to the right"). Prior attempts to enact "viewpoint diversity" surveys were rejected at least in part because the influential Republican Senator Rob Bradley repeatedly and vocally opposed them, expressly warning the entire Senate that they were "a dangerous road to go down." PX 198 at 121:9-123:2. But Senator Rob Bradley retired in 2020, *id.* at 121:223-24; Trial Tr. at 101:7-14 (Lichtman), and the 2020 election resulted in a new legislative body wherein "the ideological makeup of the Florida Senate was transformed to be even more conservative and more aligned with the Governor," *id.* at 1058:21-1059:17 (Smith).[21]

There was otherwise no new impetus for a law like HB 233 in 2021. Far from being wastelands of liberal indoctrination where free speech was under siege and required legislative protection, Florida's public colleges and universities were

[21] Though Senator Bradley's replacement also voted against HB 233, his retirement mean the loss of a highly influential "veteran senator" who had long served as the "chairman of the Appropriations committee" advocating against the bill. Trial Tr. at 345:12-22 (Lichtman).

flourishing—frequently recognized as "top of the list" by U.S. World News and Report. *Id.* at 1050:15-1051:10 (Smith). Even in national surveys focused on issues of intellectual diversity and free speech, Florida's public universities performed extremely well—placing three institutions in the top seven in the country. Trial Tr. at 84:3-19 (Lichtman). Nor were there any incidents of note or any other evidence indicating that free speech on Florida's campuses was not already well protected. In fact, Florida had recently enacted the broadly popular CFEA—which expanded protections for outdoor expressive activities and prohibited limiting expression to "free speech zones." PX 159 at 47-49. Notably, in enacting that law just three years before HB 233, the Legislature was "in conversations with the universities to make [it] work," PX 178 at 24:4-16, and was careful to include express language making clear that, even in protecting expression, the law did not prohibit institutions from acting to limit expression that is not "lawful" or that "materially and substantially disrupt[s] the functioning of the [school]," PX 159 at 49. And, similarly unlike HB 233, CFEA received broad bipartisan support—passing with supermajorities from both chambers. *Id.* at 2.

The change in the 2021 session was merely political—and, indeed, HB 233 passed almost exactly along partisan lines. *See* JX 42 at 37 (House vote); *see also* DX 22 at 2-3 (Senate vote).

3. Procedural and Substantive Departures

Before 2021, proponents of a viewpoint diversity survey tried using procedural maneuvers to secure its passage. For example, when the broadly popular CFEA was moving through the Legislature in 2018, Senator Rodrigues introduced a version that included a viewpoint diversity survey like HB 233's Survey Provisions. *See* PX 158 at 23. Indeed, opponents of the survey often had to "strip it out" of more broadly supported education bills to prevent its passage. *See* Trial Tr. at 1059:8-11 (Smith).

However, as noted, by the 2021 Session, political winds had shifted. Instead of moderating their proposal or inserting the Survey Provisions into a more popular bill, HB 233's proponents *added* controversial new provisions—the Anti-Shielding Provisions and the Recording Provision. There had been no proposals related to shielding or recording in prior legislative sessions. Procedural techniques were no longer required to ensure the passage of these speech monitoring and suppression tools, because of the rightward shift of the chamber. *See supra* 41.

That said, while there was no need for procedural deviations to ensure the bill's passage, its enactment was marked with notable substantive deviations. First, the proponents of HB 233 relied entirely upon anonymous, unverified anecdotes and did not present any evidence or information to the Legislature about problems with free speech, shielding, or bias. *See* Trial Tr. at 104:18-25 (Lichtman). Second, the

Legislature did not consult experts or stakeholders in drafting or debating HB 233; on the contrary, HB 233's sponsors misconstrued the extent of the feedback received from stakeholders—which was all negative. *Id.* at 104:6-17 (Lichtman).

Instead of being driven by the institutions themselves, the educators within them, or the agencies that oversee them, the basis for the challenged provisions was entirely political, informed by unrepresentative and unsubstantiated anecdotes and extreme logical leaps. Proponents claimed that "there's too many liberals on campus. Therefore, the reason there's not enough conservative ideas on campus is because students are being shielded and their free speech is being taken away." Trial Tr. at 1038:2-1039:11 (Smith). But proponents never presented any evidence to the rest of the legislature that demonstrated shielding, indoctrination, or any speech being suppressed. *Id.* The chief Senate sponsor of HB 233 (Rodrigues) was asked to identify a *single* example of problems with free speech, and he could not. JX 7 at 8:22-9:5. Similarly, the chief House sponsor of HB 233 (Roach) admitted that the concerns of bias and speech suppression were entirely anecdotal. JX 6 at 13:13-18. The best that any legislator could do was claim that legislation was necessary based on their own claims of facing discrimination due to their political beliefs *decades earlier*, projecting (without any basis or support) that "I can only imagine it's gotten worse." PX 188 at 44:6-45:5.

If the problems that the proponents of HB 233 claimed to be concerned about were legitimate, there is no good reason why they could not muster *any* evidentiary support for their claims of bias and indoctrination. There have always been mechanisms for students to complain about faculty or their university administration. *See, e.g.*, Trial Tr. at 1674:13-23, 1685:23-1687:10, 1687:17-1689:10 (Hebda). Moreover, student evaluations—which are regularly conducted in the context of specific courses provide a window into what is happening within the classroom that is actually contextual, and as such may actually be addressed in a tailored fashion and better evaluated and understood. Trial Tr. at 452:7-22 (Bérubé); *see also id.* at 973:12-974:17 (Dr. Edwards testifying that mechanisms for students to complain about course instruction—like student evaluations and grade complaints—existed before HB 233's passage). Yet proponents of HB 233 identified *zero* student complaints, student evaluations, or any specific details of any incidents at all that supported concerns about bias, indoctrination, or suppression of speech. *Id.* at 1053:14-1054:23 (Smith).[22]

In another notable substantive departure, the proponents of HB 233 did not

[22] Indeed, a year after HB 233, Governor DeSantis' spokesperson attempted to marshal evidence of liberal bias and indoctrination in Florida and was bereft of examples from Florida. *See* Trial Tr. at 83:13-22 (Lichtman). Even going back to 1998, the only "disinvited speaker" that Governor DeSantis's spokesperson could identify "was not a conservative" but "Carl Hart, a Black radical." *Id.* at 84:20-85:2.

consult experts or solicit input from stakeholders—even going so far as to misconstrue the responses the Legislature had already received from stakeholders. In fact, all of the testimony received from outside the Legislature on HB 233 (save a singular witness, who complained that a principal had been the victim of "cancel culture" for saying "he couldn't verify for or against whether the Holocaust happened," JX 14 at 10:10-16), was strongly against it. *See* JX 7 at 40:6-16 (Matthew Lata of United Faculty of Florida (UFF)); JX 8 at 42:21-45:16 (Karen Morian of UFF), 56:19-57:14 (Yale Olenick of FEA), 65:21-66:3 (Krystal Williams of FAMU Graduate Assistants United); JX 10 at 12:4-7 (Cathy Boehme of FEA), 10:10-20 (Dr. Martin Balinsky of Tallahassee Community College). No one from either the BOG or BOE or any of Florida's institutions of higher education spoke in favor of the bill, and bill analyses prepared by BOE identified *no* "affected citizens or stakeholder groups" who supported the bill. JX 41 at 3; *see also* JX 29 at 3.[23] Those same bill analyses even declined to answer the question of whether the legislation was consistent with "agency's core mission." JX 41 at 3. Similarly, the BOG's bill analysis expressed concern that "[s]tudents have an expectation of privacy in the classroom" and would otherwise be protected from "having their communications

[23] At the same time, BOE expressly identified opposition to the bill from faculty members based on concerns that the "survey on political views" would be compelled, that "there is uncertainty about how the results will be used, and because it may conflict with the principle of academic freedom clauses." *Id.*

surreptitiously recorded by another without their consent." PX 30 at 3.

The Legislature's approach as to stakeholders was markedly different from the approach it took when passing the CFEA in 2018. That bill received public support from FIRE, who even sent a representative to testify positively at legislative hearings. PX 174 at 55:23-56:6. And it was developed "in conversations with the universities." PX 178 at 24:4-16. None of this was true of the Legislature's approach to HB 233.

In fact, when HB 233 was first introduced and its Senate sponsor was asked whether "administrations or presidents of these universities ha[d] chimed in," Senator Rodrigues confirmed that he "ha[d] not solicited their input, nor have they sought to provide it to me." JX 7 at 37:8-15. But, in reality, by that time, the BOE had already produced a bill analysis identifying *opposition* from affected stakeholders at colleges and universities. *See* JX 41 at 3 and JX 29 at 3; *see also infra* 55-56. Months later, when asked whether anyone from Florida's colleges and universities had weighed in on HB 233, Senator Rodrigues responded, "the answer to that would be no." JX 15 at 12:14-20. Senator Rodrigues also confirmed that he had "not had discussions with the individual university administrators." *Id.* at 12:7-9. But by this time, the ACFS had published their resolution opposing HB 233, *see* PX 41, and they had met with Senator Rodrigues's staff to discuss their concerns about HB 233 the week prior to his denial, *see* Trial Tr. at 177:2-8 (Lichtman). *See*

also infra 59-60. This to say nothing of the extensive feedback provided by the students, faculty, and advocates at Senate hearings where Rodrigues was in attendance. *See infra* 56-57.

Similarly, while HB 233's proponents claimed to rely on studies by FIRE to support their assertion that there were free speech issues at Florida institutions and nationally that required solving, they completely ignored FIRE's opposition to the Anti-Shielding and Recording Provisions, as well as their detailed input as to how the Legislature might modify the former to protect free speech in the classroom. *See infra* 58-59.

4. Contemporary Statements About HB 233

In most discriminatory purpose cases, there is no direct evidence of intent because politicians are strategic actors who—whether for political or legal cover—deliberately mask their intentions with pretextual justifications. *See, e.g.*, *Arce v. Douglas*, 793 F.3d 968, 978 (9th Cir. 2015) ("[G]iven that 'officials acting in their official capacities seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority,' we look to whether they have 'camouflaged' their intent.") (quoting *Smith v. Town of Clarkton, N.C.*, 682 F.2d 1055, 1064, 1066 (4th Cir. 1982)). Reflecting this reality, the Eleventh Circuit has "long recognized that discriminatory intent may be found to exist even when the record contains no direct evidence." *Williams v. City*

of Dothan, Ala., 745 F.2d 1406, 1414 (11th Cir. 1984). This case, however, presents the unusual situation where there are a surprising number of statements from key players in HB 233's passage that openly demonstrate hostility towards certain viewpoints.

When HB 233's Senate companion bill was first introduced by Senator Rodrigues, he expressly framed it as responsive to a concern that conservative views were being dominated by liberal ones. He referred to a survey by FIRE which found that "72 percent of students who identify . . . as conservative had reported a prior *self-censorship* incident." JX 7 at 3:25-4:8 (emphasis added). He went on to cite a survey from the University of North Carolina which he said reported that "students almost ubiquitously perceived political liberals to be the majority on campus," and that students "reported commonly hearing disparaging comments about political conservatives." *Id.* at 4:9-22. He also linked HB 233 to the larger Republican narrative about woke cancel culture, claiming that "what we are seeing and what we have seen across the country are acts of a 'cancel culture' in which people are shouted down," although he failed to identify a single example of this problem from Florida. JX 7 at 24:15-21.

The chief House sponsor of HB 233, Representative Roach, similarly repeatedly expressed animus for faculty and their allegedly "woke" or "Marxist" viewpoints. His closing comments—right before HB 233 went up for its final House

vote on March 18, 2021—directly linked HB 233 to Republican attacks on diversity, equity, and inclusion, saying "when you value people that look different but think the same, that's not diversity. That's conformity." JX 6 at 37:8-10. The very next day, Representative Roach posted on Facebook thanking his "House colleagues for passing this bill to protect our Right to Free Speech and stem the tide of Marxist indoctrination on university campuses." PX 354. Notably, Representative Roach does not say "balance [Marxism] with something else"; his comments are exclusively focused on *stemming* speech with which he disagrees. Trial Tr. at 66:15-23 (Lichtman). When HB 233 passed the Senate on April 7, 2021, Representative Roach again took to social media to tout its passage, again making clear that specific viewpoints were in the legislation's crosshairs, declaring: "Freedom of speech is an unalienable right, despite what Marxist professors and students think." PX 388.

Governor DeSantis and other executive branch officials—including those that the Governor appointed to the Defendant Boards—have long engaged in similar rhetoric, including while HB 233 was pending before the Legislature. For example, in March 2021, when HB 233 and its companion bill had been introduced, but before HB 233 passed either chamber, the Governor gave a press conference where he attacked specific ideologies and made clear that he viewed the state to have a duty to regulate ideology in education—including with the power of the purse—with an unambiguous political slant: "Let me be clear: there's no room in our classrooms for

things like critical race theory . . . Teaching kids to hate their country at to hate each other is not worth one red cent of taxpayer money." Trial Tr. at 194:8-195:2 (Lichtman); *see also id*. at 201:3-13. Not two months later, in May 2021, before HB 233 was signed, then-Commissioner of Education Richard Corcoran gave a speech at the conservative Christian Hillsdale College in which he claimed that textbook "publishers are just infested with liberals." PX 220 at 35:9-20. He warned that "you have to police [teachers] on a daily basis" and stated that this policing was "working in the universities." *Id.* at 36:16-22. He also boasted that he had "censored or fired or terminated numerous teachers" in the university setting. *Id.*[24]

When Governor DeSantis signed HB 233, he held a press event and left no doubt as to *why* he was enacting the legislation. At that event, he claimed that, at Florida's public colleges and universities, "the norm now is really that these are more intellectually-repressive environments. You have orthodoxies that are promoted, and other viewpoints are shunned and even suppressed." PX 222 at 6:24-7:3. He then made another clear threat tying funding to speech in higher education, warning that:

[24] Corcoran was recommended to the position of Commissioner of Education by Governor DeSantis before he was even officially sworn in as Governor. BOE followed that recommendation and Corcoran became Commissioner on DeSantis very first day as Governor—January 8, 2019. When Corcoran stepped down from that role in May of 2022, Governor DeSantis appointed him to BOG that very same month. And, in January 2023, Corcoran was made the interim President at New College of Florida.

"We do not want [our universities] as basically hotbeds for stale ideology. That's not worth tax dollars, and that's not something that we're going to be supporting going forward." *Id.* at 7:19-23. After discussing HB 233, Governor DeSantis said: "these bills build off of a lot of the work we've done since I took office." *Id.* at 7:24-25. As part of that work, Governor DeSantis mentioned that "two weeks ago, . . . at my direction, the State Board of Education took action to stop critical race theory and the 1619 Project curriculum." *Id.* at 8:12-15.

Further corroborating that the intent of HB 233 was to target certain viewpoints, one of the law's co-sponsors—Representative Sabatini—gave a public media interview shortly after its enactment, in which he said: "My only complaint with the bill is it doesn't go far enough. But it does take a first initial step, which is to conduct a survey . . . that to be honest, we already know, which is that we've lost these campuses to the radical left. 99 percent of these professors are radical leftists." PX 231 at 7:5-12. He said that, "this survey gives us some tools, lets us know what's going on. But the truth is we should be defunding the radical institutions . . . and . . . these insane professors that hate conservatives and hate this country." *Id.* at 7:19-24. He also emphasized, "We know where these professors are. They're radical left. We know what [the survey is] going to tell us, but once we have that data, then we can make our next step. I think the next step should be defunding and putting mandates in that they hire people who have a diversity of thought." *Id.* at 8:2-22.

And now a vision for that next step—defunding ideologies that are disfavored by the Republican Legislature and Governor—has come to fruition. On January 31, 2023, Governor DeSantis proposed dramatic new higher education legislation that would "further push[] back against the tactics of liberal elites who suppress free thought in the name of identity politics and indoctrination."[25] On February 21, 2023, Republican Representative Andrade introduced HB 999 (2023), which precisely conforms to Governor DeSantis' January 31 proposal.[26] Among its many attacks on higher education, the bill would amend the statute outlining specific expenditures by Florida's public colleges and universities that are prohibited "regardless of [funding] source." Fla. Stat. § 1004.06. The bill would add to the scope of that prohibition "any programs or campus activities that violate [Fla. Stat. § 1000.05(4)(a)] or that espouse diversity, equity, and inclusion or Critical Race Theory rhetoric."[27] Separately, the

[25] "Governor DeSantis Elevates Civil Discourse and Intellectual Freedom in Higher Education," New Release by Staff, available at: https://www.flgov.com/2023/01/31/governor-desantis-elevates-civil-discourse-and-intellectual-freedom-in-higher-education/. This public record maintained by a government agency is properly subject to judicial notice under FRE 201.

[26] "HB 999: Public Postsecondary Educational Institutions," The Florida Senate, available at: https://www.flsenate.gov/Session/Bill/2023/999. This public record maintained by a government agency is properly subject to judicial notice under FRE 201.

[27] HB 999 (2023), as filed, is available at: https://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=_h0999__.docx&DocumentType=Bill&BillNumber=0999&Session=2023. This public record maintained by a government agency is properly subject to judicial notice under FRE 201.

bill would also modify requirements for general education courses to prohibit "curriculum that teaches identity politics, such as Critical Race Theory."[28]

5. Foreseeable Discriminatory Effects of and Less Discriminatory Alternatives to HB 233

As Plaintiffs detail further in addressing their standing, *see* Section III.A.1. *infra* 72-121, HB 233 infringes on their speech and association in myriad ways.

By their terms, the Survey Provisions require inquiry into the political ideologies of students and faculty, in order to fulfill their mandate that the Boards "annual[ly] assess[]" the "variety of ideological and political perspectives" "presented" on campus, as well as the degree to which members of those communities "feel free to express their beliefs and viewpoints" on the same "on campus and in the classroom." Fla. Stat. §§ 1001.03(19)(b), 1001.706(13)(b). And they do so with no guardrails whatsoever, including protections for the survey respondents and their institutions; requirements that would help ensure that the survey results would in fact be non-partisan, objective, and statistically valid; or defenses against concerns that the surveys—either by their very existence or through use of their results—will actually impede free speech on campuses. *See supra* 7-8. As a result, even faculty and students who do not take the surveys themselves are self-censoring to avoid contributing to an environment that could then be "reported"

[28] *Id.*

to Defendants in these annual surveys as being too liberal. *See infra* 90-91, 93-94, 96-97, 101, 105, 109-111. In order to avoid drawing a "shielding" claim against their institution, faculty attempting to comply with the Anti-Shielding Provisions' vague and overly broad language have felt compelled to present views they would otherwise omit, as well as to avoid topics entirely now that their ability to moderate discussion is compromised. *See infra* 85-86, 91-92, 95, 97-99, 102-104, 106-108. And the Recording Provision works as the Legislature anticipated it would, chilling speech by imposing an everpresent fear in the classroom that a student may be secretly recording, and that these recordings could be published anonymously or used as part of a complaint or lawsuit. *See infra* 84-85, 89-90, 92-93, 95-96, 100-101, 104-105, 108-109. These threats to free speech were not only foreseeable but were directly presented to key decisionmakers while HB 233 was being considered.

Indeed, as noted, from the outset of the legislative session—in fact, even before it, when HB 233's Senate companion bill was filed on December 14, 2020—the legislature had a bill analysis from BOE that identified *zero* "affected citizens or stakeholder groups" who supported the bill. *See* JX 41 at 3. BOE did however identify *opposition* from faculty members based on concerns that the "survey on political views" would be compelled, that "there is uncertainty about how the results will be used, and because it may conflict with the principle of academic freedom clauses." *Id.* When HB 233 was introduced in the House on January 13, 2021, BOE

prepared an identical bill analysis that similarly identified *zero* supporters, while citing the same concerns from faculty members. *See* JX 29 at 3.

When HB 233 was first taken up in the Senate Committee on Education on January 26, 2021, public testimony raised important concerns about the bill. Dr. Matthew Lata, testifying on behalf of UFF, raised concerns about the ineffectiveness of the survey because it is "asking them to opine on something which cannot be measured," and explained that such surveys are unnecessary because incidents of bias and indoctrination could already be investigated via anonymous student evaluations. JX 7 at 39:8-40:16. Senators also heard from a Florida Education Association ("FEA") representative, who described HB 233 as "a solution in search of a problem" because none of the media reports about free speech issues relate to incidents in Florida and because "Florida universities are not reporting issues and students are not complaining." *Id.* at 45:4-19. Benjamin Serber, from the FSU chapter of Graduate Assistants United, warned that the Recording Provision would be particularly detrimental to graduate assistants who are "still learning how to teach," as recordings could capture a "moment that gets us on Fox News in a way that ends our career." *Id.* at 46:15-25.

When the Senate took up the bill on February 9, 2021, Senators were again warned by members of the public that "non-consensual recordings of classroom discussions . . . will stifle the very free speech you wish to promote." JX 10 at 12:4-

7 (FEA witness). Dr. Martin Balinsky, a professor of science at Tallahassee Community College, expressed concern that the survey "revive[s]" McCarthyism and the "idea of playing political watchdog on the faculty of our institutions." JX 10 at 10:10-15. He also argued that the survey is unnecessary given the existence of student evaluations. *Id.* at 10:15-20.

When the House first took up HB 233 on February 17, 2021, the Post-Secondary Education & Lifelong Learning Subcommittee received similar warnings from the public. Karen Morian, who testified on behalf of UFF, also warned about the viability of the survey and posed the incisive question: "Who do I sue if an anonymous person posts a video of me out of context . . . ?" JX 8 at 42:21-45:16. She noted that if the Legislature *actually* wanted empirical data about bias or suppression, they could ask the universities for "the records of student and employee complaints." *Id.* at 48:23-49:7. Yale Olenick, of FEA, emphasized that the "survey is shaky evidence on which to base policy, even under the best conditions," and warned that "nonconsensual recordings of classroom discussions will stifle the free speech the bill is attempting to promote." *Id.* at 56:19-57:14. In addition, Krystal Williams, from the FAMU chapter of Graduate Assistants United, warned that the Anti-Shielding Provisions impaired institutions' ability to "set reasonable limits to maintain order and academic focus." *Id.* at 65:21-66:3.

And while FIRE had been in favor of the survey provisions, it was staunchly

against the Anti-Shielding and Recording Provisions. Repeatedly, FIRE attempted to convince members of the Legislature to drop or dramatically amend those provisions out of dire concerns that they would suppress speech. This included extensive direct advocacy targeting Senator Rodrigues, the primary Senate sponsor, and his staff. Thus, in February 2021, FIRE reached out to Senator Rodrigues's office to express two concerns: First, FIRE emphasized that the Anti-Shielding Provisions "should clarify that professors may still maintain order in the classroom," pointing out that, "[t]he language currently in the bill, if applied literally, would intrude on faculty's ability to ensure the smooth operation of the classroom."[29] PX 131 at 6. Second, FIRE strongly urged that the Legislature cut the Recording Provision entirely, because "[i]t is a near certainty that this will be misused by students to record disfavored statements by other students in order to shame them online, often on political or ideological grounds." *Id.* FIRE even proposed specific amendments to HB 233 and provided an alternative draft, to remove the right to record in classrooms and add language clarifying that the Anti-Shielding Provisions do not affect faculty's ability to maintain order in the classroom. *See* PX 137 at 1-2, PX 131 at 1.

[29] As noted above, this would have been in line with the Legislature's approach to the CFEA, which cabined its protections for outdoor expression with the only conduct that is "lawful and does not materially and substantially disrupt the functioning of the [school]." PX 159 at 135.

Although Senator Rodrigues publicly touted studies by FIRE to justify HB 233, JX 7 at 3:25-4:8, he ignored all of their warnings that the Anti-Shielding and Recording Provisions would chill speech in the classroom. Finding no traction in these advocacy efforts, FIRE then went public with its concerns on March 22, 2021, publishing an article titled "Florida legislation on recording classes invites 'gotcha' politics into the classroom." PX 136. Specifically, FIRE warned that the bill "does nothing to protect a faculty member from recordings being used as the basis for politically motivated complaints," and that "it seems unwise to create a system where faculty members' legal remedy [for publishing a recording] is to sue their own students." *Id.* at 2. FIRE also warned that the Anti-Shielding Provisions are "overly broad" and deeply problematic because they "make[] no exception allowing faculty to maintain order in the classroom or decide the scope of classroom discussions." *Id.* Even Defendants repeatedly recognized the relevance of FIRE's views on free speech in higher education by raising their studies at trial. *See, e.g.*, Trial Tr. at 349:12-357:14, 1077:11-1078:1.

Legislators also received repeated warnings from faculty that the challenged provisions would chill speech. These included not only public testimony but also formal communications from ACFS. On March 9, 2021—before HB 233 had passed either chamber—ACFS finalized a resolution condemning HB 233. PX 41. The resolution warned that the Recording Provision and the viewpoint diversity survey,

"even if administered well," would chill speech and impede faculty recruitment and retention. *Id.* at 2. Not only did the ACFS go public with its concerns, it transmitted them directly to SUS Chancellor Marshall Criser. *Id.* at 1. A few weeks later, on March 26, 2021, Representative Plasencia and staff from Senator Rodrigues's office attended an ACFS meeting, and members of ACFS expressed their concerns regarding HB 233. Trial Tr. at 177:2-8 (Lichtman).

Warnings about the obvious, foreseeable discriminatory effects of HB 233 also came from within the Legislature. Before HB 233 passed the House, Democratic Representative Hardy voiced concern that "this bill is so vague that nearly anything an administrator or professor would do to control the academic environment could be recast as shielding or limiting someone's access to or observation of expressive activities or speech that might be offensive, unwelcome, and so on." JX 6 at 26:15-20. There were even efforts to amend the bill to ameliorate problems with the Survey Provisions. Democratic Senator Berman asked Senator Rodrigues to consider an amendment to ensure that the survey "will actually be truly anonymous." Senator Rodrigues rejected that proposal, saying "at this point, I would not be interested in amending the bill. However, if that's a deep concern of yours, I'd be happy to co-sponsor a bill next year doing that very thing." JX 15 at 7:1-17. There has been no such amendment in subsequent sessions.

Legislators also warned that HB 233 would usurp "the role of the university

president and administration" to manage issues of free expression on campus. JX 7 at 50:7-14; *see also id.* at 54:17-23 (Senator Polsky stating, "I don't think we – as a legislative body, that we should be doing to tie the hands of leaders on campuses . . . where universities' presidents are not asking that we do this for them."). Indeed, the Legislature was well aware that Florida's public colleges and universities were *already* pursuing thoughtful, effective policies that were less discriminatory than HB 233. In 2019, every single college and university signed on to a statement on free expression, JX 13, which even HB 233's proponents recognized affirmed the purported principle of the Anti-Shielding Provisions—namely, to encourage and protect free speech—but in clearer terms and without a threat of punishment, such that faculty were still free to manage their classrooms as appropriate. *See* JX 15 at 28:12-29:10. And beginning in January of 2021, SUS had launched the "Civil Discourse Initiative," which seeks to promote civil discourse and "ensur[e] academic and intellectual freedom" through *more speech*—including workshops, presentations, lectures, debates, and other outreach to facilitate dialogue. *See* JX 9 at 2-3. These local efforts have been broadly inclusive of stakeholders and well-received by students, faculty, and administrations. BOG Tr. at 53:6-56:17; 56:23-58:22; 59:5-63:21; 65:12-66:15 (ECF No. 241-1 at 55-65, 67-68). This was in addition to CFEA, which enhanced protections for outdoor expression at public colleges and universities with a more measured, bipartisan approach. *See* PX 159.

In marked contrast, HB 233's challenged provisions were none of these things. And at no point did anyone even assert—much less identify any reason to believe—that any of these initiatives to protect and encourage free speech at Florida's public institutions of higher learning were falling short in any way.

C. Defendants' Enforcement Powers

Defendants have both the authority and duty to enforce each of HB 233's challenged provisions. This is apparent from the text of the challenged provisions themselves and their legislative history, as well as Defendants' general enforcement power over FCS and SUS institutions.

Text of the Challenged Provisions: First, BOG and BOE are expressly charged with implementing and enforcing HB 233's Survey Provisions. Defendants must annually (1) "select or create" the Survey required by HB 233; (2) "require" each public post-secondary institution to conduct that Survey on an annual basis; and (3) compile and publish the assessments resulting from that Survey by September 1 of each year, beginning on September 1, 2022. Fla. Stat. § 1001.03(19)(b), (2022) (BOE)[30]; *id*. § 1001.706(13)(b) (BOG). The Boards acted pursuant to that explicit duty in 2022, *see* PX 120; PX 121, and are poised to do so again this year, *see* Trial Tr. at 1685:9-20 (Hebda).

[30] BOE was expressly granted rulemaking authority to implement this provision. *Id.* § 1001.03.

Second, BOG and BOE are themselves expressly subject to and have a duty to enforce the Anti-Shielding Provisions. Specifically, Fla. Stat. § 1001.03(19)(c) and Fla. Stat. § 1001.706(13)(c) impose the requirement on BOE and BOG, respectively, that they "***may not shield*** students, faculty, or staff . . . ***from free speech protected under the First Amendment ... or [Fla. Stat. § 1004.097***]." (emphases added). The cross-referenced Section 1004.097 applies to public colleges and universities and includes within it subsection (3)(f), which prohibits colleges and universities from "shield[ing] students, faculty, or staff from expressive activities." Fla. Stat. § 1004.097(3)(f). The term "[e]xpressive activities" is in turn defined in subsection 1004.097(3)(a). Together, these provisions impose on the Boards an affirmative duty not only to avoid shielding students, faculty, or staff themselves, but also to enforce those Provisions at the institutions over which they have jurisdiction.

Third, the new language that the Legislature added to the Boards' statutory duties in enacting HB 233 requiring them to abide by and enforce the Anti-Shielding Provisions also imposes upon them a duty to enforce the Recording Provision. This is not only because the Recording Provision is an enforcement mechanism for the Anti-Shielding Provisions, but because the Recording Provision was added to the same section—section 1004.097—that the plain text of HB 233 requires the Boards to enforce as a new free speech right afforded to students in Florida's public higher

education institutions. If the Legislature had intended to *limit* BOG's and BOE's duties to enforce *only* the Anti-Shielding Provisions, it would have cross referenced only to that subsection of 1004.097 that imposes the Anti-Shielding mandate upon the institutions. Fla. Stat. § 1004.097(3)(f). But instead of limiting the BOG's and BOE's duties to ensure only enforcement of the Anti-Shielding Provisions as they apply to the institutions, the Legislature cross-referenced *to 1004.097 in its entirety*, which includes the Recording Provision.

Legislative History of HB 233: The Legislature knew Defendants had the power to enforce HB 233's challenged provisions, as evidenced repeatedly in the legislative history and the Legislature's own bill analyses. For example, the Florida Senate Committee on Education prepared a bill analysis of HB 233's companion bill, SB 264, and cited the state constitution to support that "[BOG] is required to operate, regulate, control, and be fully responsible for the management of [SUS]" and "[BOE] is responsible for supervising [FCS]." JX 5 at 1-2 (citing Fla. Const. Art. IX, §§ 7(d), 8(b)); *see also* JX 28 at 2 (House bill analysis of HB 233 stating same).

General Enforcement Power: In addition to the express duties to enforce the challenged provisions themselves as set forth in the text of HB 233, the Commissioner, BOE, and BOG each also have not just the power but an affirmative duty to ensure that the institutions in their jurisdiction comply with state law, which

of course now includes HB 233 and its challenged provisions. Moreover, as detailed below, Defendants have repeatedly and recently evidenced a willingness and intent to use their powers to police and punish disfavored speech in institutions within their jurisdictions.

Commissioner of Education Manny Diaz, Jr., named as a Defendant in this lawsuit in his official capacity, "is the chief educational officer of the state," Fla. Stat. § 1001.10(1), and has enforcement authority over the FCS. He must ensure that all institutions under BOE jurisdiction—including those within FCS—comply with all applicable laws, which now include the challenged provisions of HB 233. *See id.* § 1008.32(2)(a) ("The Commissioner of Education may investigate allegations of noncompliance with law or state board rule and determine probable cause" and "shall report determinations of probable cause" to BOE, which in turn "shall require" the institution's board of trustees to document compliance); Trial Tr. at 1688:13-1689:10. The Commissioner is also a member of BOG. Fla. Stat. § 1001.70(1).

Neither Commissioner Diaz nor his predecessor former Commissioner Corcoran have shied away from using the authority granted the Commissioner to police and punish disfavored speech in and by the educational institutions and actors over which the Commissioner may exert power. For example, in August 2021, Commissioner Corcoran invoked BOE's powers and duties to require that institutions within its jurisdiction follow Florida law—specifically the powers

conferred under Section 1008.32—to immediately launch an investigation into the Broward County Schools' compliance with the Governor's anti-masking order. PX 495. He sent a letter on August 10, 2021, which threatened that the Commissioner "may recommend to the [BOE] that the Department withhold funds in the amount equal to the salaries of the Superintendent and all the members of the School Board." *Id.* at 3. Less than three weeks later, the Commissioner and BOE made good on that promise and withheld the salaries of the County School Board's members. PX 309; *see also* Trial Tr. at 1689:11-1690:8; 1714:24-1717:2 (Hebda).

Similarly, and shortly after taking up the mantle of Commissioner in July 2022, Commissioner Diaz made thinly-veiled threats against Florida schools if they followed guidance from the U.S. Department of Education and Department of Agriculture, including if they were so brazen as to post "And Justice for All" posters in their institutions, with the Commissioner warning that the Florida Department of Education "will not stand idly by as federal agencies attempt to impose a sexual ideology on Florida schools," and that it "will do everything in its power to" address what it views as this conflict. PX 147 at 2. Even more recently, and mere weeks before trial in this matter began, on or around December 28, 2022, Commissioner Diaz demanded that every FCS institution provide budgetary information related to DEI and CRT programs and initiatives. *See* Trial Tr. 263:9-16 (Dr. Lichtman testifying about PX 487); 375:2-11 (same). Then, on January 18, 2023, the FCS

Presidents jointly pledged to "not fund or support any institutional practice, policy, or academic requirement that compels belief in critical race theory or related concepts."[31] BOE issued a press release praising the move and describing it as a "commit[ment] to removing all woke positions and ideologies by February 1, 2023."[32]

BOE "is the chief implementing and coordinating body of public education in Florida" for all public educational institutions "except for the [SUS]." Fla. Stat. § 1001.02(1). BOE "*shall* enforce compliance with law" by all FCS institutions. Fla. Stat. § 1001.03(8) (emphasis added). If an institution "is unwilling or unable to comply with law or state board rule within the specified time," BOE is empowered to take a range of actions, including withholding funding and declaring the institution ineligible for grants. Fla. Stat. § 1008.32(4)(b), (c).

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[31] Florida College System Council of Presidents, "Statement on Diversity Equity, Inclusion and Critical Race Theory" (Jan. 18, 2023), available at: https://www.fldoe.org/core/fileparse.php/5673/urlt/FCSDEIstatement.pdf. This public record maintained by a government agency is properly subject to judicial notice under FRE 201.

[32] Florida Department of Education Press Office, "Florida College System Presidents Reject 'Woke' Diversity, Equity and Inclusion (DEI) Critical Race Theory Ideologies and Embrace Academic Freedom" (Jan. 18, 2023), available at: https://www.fldoe.org/newsroom/latest-news/florida-college-system-presidents-reject-woke-diversity-equity-and-inclusion-dei-critical-race-theory-ideologies-and-embrace-academic-freedom-.stml. This public record maintained by a government agency is properly subject to judicial notice under FRE 201.

BOE, both on its own and in conjunction with the Commissioner—who "is responsible for giving full assistance to the [BOE] in enforcing compliance with the mission and goals of the Early Learning-20 education system, except for the [SUS]" and "operate[s] all statewide functions necessary to support the [BOE]," *id.* § 1001.10(1)-(2)—has recently not hesitated to use this authority to retaliate against institutions within its control in political disputes, including using that power to withhold salaries of school board members who refused to repeal their mask mandate. BOE has also consistently used its power to engage in blatant viewpoint discrimination, including banning CRT and materials from the 1619 Project in K-12 education, *see supra* 40, and rejecting mathematics textbooks for Florida's K-12 system that allegedly contain CRT, PX 308; *see also* Trial Tr. 697:10-25 (Gothard).

BOG is "fully responsible for the management of" SUS, Fla. Stat. § 1001.705(2), and all SUS institutions' "compliance with state and federal laws, rules, regulations, and requirements." *Id.* § 1001.706(8). Like BOE, BOG can require a university's board of trustees to document compliance, withhold a university's funding, and declare a university ineligible for competitive grants. BOG Regulation 4.004(5), (6), BOG Oversight and Enforcement Authority, https://www.flbog.edu/wp-content/uploads/2022/07/Regulation_4.004_BOGOversightEnforcementAuthority_Final.pdf (last visited Feb. 24, 2023); BOG Tr. at 111:1-3; 113:3-16 (ECF No. 241-1 at 113, 115). Students may file complaints directly with

BOG (and attach supporting documentation, which could presumably include recordings) if a university is not complying with state law, PX 496 at 2, 5-7, and BOG has proposed a post-tenure review regulation that takes into account a faculty member's adherence to state law,[33] *see* Trial Tr. at 642:2-20 (Gothard); BOG Tr. at 121:11-122:6 (ECF No. 241-1 at 123-124). BOG is also authorized to approve new performance-based funding metrics and to suspend professional and doctoral degree programs. BOG Tr. at 113:17-114:109; 118:17-119:19 (ECF No. 241-1 at 115-116, 120-121).

Like the Commissioner and BOE, BOG has taken steps to show that it will not hesitate to use its authority over SUS to enforce compliance not just with state law, but also with the Governor's education agenda. In December 2022, SUS Chancellor Rodrigues emailed each SUS institution, at the Governor's office's bidding, seeking information "regarding the expenditure of state resources on programs and initiatives [including "academic instruction"] related to diversity, equity and inclusion, and critical race theory within our state colleges and universities." PX 489 at 2 (email from University of North Florida administrator describing email from Rodrigues); *see also* PX 487 (underlying memo from

[33] BOG, Proposed Regulation 10.003(1)(b), Post-Tenure Faculty Review, https://www.flbog.edu/wp-content/uploads/2022/11/Regulation-10.003.pdf (last visited Feb. 24, 2023).

Governor's office). In implementing the Governor's request, an Associate Vice President at the University of North Florida noted that "UNF's timely compliance is not optional." PX 489 at 2.

III. PLAINTIFFS HAVE STANDING FOR ALL CLAIMS ALLEGED IN THE SECOND AMENDED COMPLAINT.

To have standing in federal court, a plaintiff must establish, for each claim, an injury-in-fact that is fairly traceable to the defendant and is likely to be redressed by a favorable decision. *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1119 (11th Cir. 2022). Plaintiffs assert two different types of claims: violations of their speech and associational rights under the First Amendment and a void-for-vagueness claim under the First and Fourteenth Amendments. As shown in the following Table and discussed further below, under the Eleventh Circuit's binding precedent, at least one plaintiff—indeed, *multiple* plaintiffs—have standing for each of these claims.

Claim/Provision	Plaintiff	Page(s)
Count I: Anti-Shielding Provisions	UFF	75-79, 82-83, 85-89
	Dr. Edwards	91-92
	Dr. Fiorito	95
	Dr. Goodman	97-100
	Dr. Link	102-104
	Dr. Price	106-108
	MFOL	112-116
	Mx. Adams	119-120
Count I: Recording Provision	UFF	75-76, 79-80, 84-85, 89-90
	Dr. Edwards	92-93
	Dr. Fiorito	95-96
	Dr. Goodman	100-101
	Dr. Link	104-105

	Dr. Price	108-109
	MFOL	112-117
	Mx. Adams	120-121
Count I: Survey Provisions	UFF	75-76, 80-81, 90
	Dr. Edwards	93-94
	Dr. Fiorito	96-97
	Dr. Goodman	101
	Dr. Link	105
	Dr. Price	109-111
	MFOL	112-118
	Mx. Adams	121
Count II	UFF	75-76, 128-129
	Dr. Edwards	129-130
	MFOL	112-114, 130-132
Count III	UFF	75-79, 82-83, 85-89
	Dr. Edwards	91-92
	Dr. Fiorito	95
	Dr. Goodman	97-100
	Dr. Link	102-104
	Dr. Price	106-108
Count IV	UFF	75-76, 134-135
	Dr. Edwards	135-136
	Dr. Fiorito	136
	Dr. Goodman	136
	Dr. Link	136
	Dr. Price	137

A. Plaintiffs have standing for their First Amendment speech restriction claims (Counts I and III).

First, Plaintiffs bring pre-enforcement challenges alleging that the challenged provisions infringe upon their free speech rights in violation of the First

Amendment.[34] The record overwhelmingly proves that Plaintiffs have chilled their speech, engaged in speech they otherwise would not have, or defied the challenged provisions and risked enforcement, because they face an objectively reasonable risk of suffering negative consequences for engaging in disfavored speech, as a direct result of those provisions. Because Defendants have enforcement and implementation authority over the challenged provisions, Plaintiffs' injuries are directly traceable to Defendants, and enjoining Defendants' enforcement and implementation of the challenged provisions would provide meaningful redress to Plaintiffs.

1. Injury-in-Fact

In the context of standing to bring pre-enforcement First Amendment claims, the Eleventh Circuit has "long emphasized that the injury requirement is most

[34] Although Plaintiffs pled Count I and Count III separately in their Second Amended Complaint, ECF No. 101 at 48-56, 65-71, both are properly understood as claims that the challenged provisions infringe Plaintiffs' First Amendment speech rights, either by chilling it (Count I) or compelling it (Count III). Because both claims employ the same analysis, *see, e.g.*, *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (explaining that a law is content-based if it alters the content of speech by requiring speaker to carry different message than one they would otherwise convey), they may be treated together for purposes of both standing and merits analysis. As detailed in the rest of this Section, those Plaintiffs that assert standing to bring Count III in addition to Count I—UFF and all Faculty Plaintiffs—have established not only that the challenged provisions have chilled their speech, but also that the Anti-Shielding Provisions have compelled them to engage in speech they otherwise would not have.

loosely applied—particularly in terms of how directly the injury must result from the challenged governmental action— . . . because of the fear that free speech will be chilled even before" the law is enforced. *Speech First*, 32 F. 4th at 1119 (citations omitted) (cleaned up). In essence, the injury-in-fact requirement for a pre-enforcement action has two parts: *First*, a plaintiff must establish that, on account of the challenged provision, they have suffered a cognizable First Amendment injury—examples of which include "self-censoring," *Henry v. Att'y Gen., Ala.*, 45 F.4th 1272, 1288 (11th Cir. 2022) (citing *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 926 (11th Cir. 2020) (en banc)) and "intending to defy the government's speech restriction despite risk of enforcement," *Pernell*, 2022 WL 16985720, at *18.[35] *Second*, a plaintiff must establish that "'the [law's] operation or enforcement . . . would cause a reasonable would-be speaker to self-censor—even where the policy falls short of a direct prohibition against the exercise of First Amendment rights.'" *Henry*, 45 F.4th at 1288 (quoting *Speech First*, 32 F.4th at 1120).

In other words, the key question is: Does the challenged law "objectively" cause the First Amendment injury, even if it does not explicitly prohibit or require

[35] Self-censorship as a cognizable harm in this context is so well accepted at this point that in writing for a recent unanimous panel, Judge Luck described a defendant's decision *not* to challenge a plaintiff's assertions of self-censorship as an insufficient injury-in-fact as "wise[]," noting such speech violations "are concrete and particular injuries for purposes of Article III standing." *Henry*, 45 F.4th at 1288 (citations omitted).

specific speech? *Speech First*, 32 F.4th at 1120; *id.* at 1123 (explaining that "[n]either formal punishment nor the formal power to impose it is strictly necessary to exert an impermissible chill on First Amendment rights—indirect pressure may suffice").

Separately, an organization may establish an injury-in-fact in two ways: *First*, an organization may assert associational standing if (1) its members would have standing to sue in their own right, (2) the interests it seeks to protect are germane to its organizational purpose, and (3) the claims and relief requested do not require individual members' participation. *Dream Defs. v. DeSantis*, 553 F. Supp. 3d 1052, 1071 (N.D. Fla. 2021) (citing *Greater Birmingham Ministries*, 992 F.3d at 1316). *Second*, an organization has direct standing where a law impairs its ability "to engage in [their] own projects by forcing" them "to divert resources in response." *Dream Defs.*, 553 F. Supp. 3d at 1071 (citing *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1341 (11th Cir. 2014)).

As detailed below, the record shows that UFF, each individual faculty plaintiff (all of whom are members of UFF besides Dr. Price), March for Our Lives Action Fund (MFOL), and student plaintiff Mx. Adams have each reasonably suffered cognizable First Amendment injuries as a result of the challenged provisions and, for the organizations, established both associational and direct organizational standing.

United Faculty of Florida: UFF is a statewide teachers' union. Trial Tr. at 571:22-24. Its membership includes nearly 25,000 higher-education faculty and graduate teaching assistants across Florida, with local chapters at all of the state's 12 public universities and 16 of its public colleges. *Id.* at 571:25-572:2. UFF also has four Graduate Assistants United chapters, and one chapter of retired members. *Id*. at 572:4-6. All members of UFF's 34 local chapters are also members of the statewide chapter. *Id*. at 573:2-12. The statewide chapter handles union dues, provides support to local chapters, employs and supervises staff, and handles all membership rosters. *Id*. at 573:9-23. UFF's President Dr. Andrew Gothard, see *id*. at 571:5-8, testified on UFF's behalf at trial. The Court also heard testimony from seven UFF members: UFF President Dr. Andrew Gothard (who is also a member), as well as Dr. Nicole Morse and Dr. James Maggio, and Plaintiffs Dr. Edwards, Dr. Goodman, and Dr. Fiorito, and Dr. Link.

UFF has standing to bring each of the claims in its Second Amended Complaint on two independent, alternative grounds. First, it has standing in its own right, because the challenged provisions constitute "a direct threat to [UFF's] members, [its] values, [its] mission, to really every institution that [it] represent[s] across the state," and as a result UFF has "had to divert resources," including significant time and effort from the UFF President himself, to mitigate against the many negative consequences of the challenged provisions. *Id.* at 644:3-11 (Gothard).

In fact, Dr. Gothard had to divert about "40 percent of [his] time" as UFF President during the 2021-22 Academic Year on "a number of activities related to responding to HB 233." *Id.* at 644:18-20. This has included "developing classroom and legal guidance for [UFF's] members across the state, communicating with members, local leadership about issues related to it, holding town halls for members so that they could ask questions and try to understand and interpret this law, as well as proposing and trying to get moved through the legislature a piece of legislation that would revoke" the challenged provisions. *Id.* at 644:20-645:3. UFF has also had to divert other staff time to similar activities and efforts as a direct result of the enactment of the challenged provisions. *Id.* at 645:4-11.

Second, UFF has standing on behalf of its members, many of whom testified about the harm they have suffered as a direct result of the challenged provisions. Key testimony establishing UFF's standing—and, in the case of the individual members who are also named Plaintiffs in this action, their own standing—as to each of the challenged provisions, is summarized below:

***The Anti-Shielding Provisions*:** UFF's members have no idea how one could reasonably interpret the plain text of these befuddling Provisions out of the context in which they were passed, but in that context they really needn't guess. *Id.* at 593:4-18; *see also id.* at 579:25-582:20, 618:14-619:23. They know these Provisions are intended to suppress liberal ideology amongst faculty. *See id.* at 615:5-18

(explaining this is the only rational interpretation of the Anti-Shielding Provisions). This interpretation is bolstered by the fact that the Provisions do not contain any exceptions or exemptions that would allow a faculty member to "enforc[e] standard decorum or . . . ensur[e] that all the students are receiving the education" they are entitled to. *Id.* at 595:16-22.

As a result, "faculty are intimidated, and . . . feel they cannot teach and speak" freely and have broadly self-censored. *Id.* at 580:9-12; *see id.* at 596:16-22, 612:24-613:1. This response is objectively reasonable given the concerns raised by legislators and FIRE during the Anti-Shielding Provisions' consideration. *See* JX 6 at 26:15-20 (Rep. Hardy stating "this bill is so vague that nearly anything an administrator or professor would do to control the academic environment could be recast as shielding"); PX 137 at 1 (FIRE proposing amendment to the Anti-Shielding Provisions to preserve "policies or practices to maintain order" in the classroom). That is not to mention the unrelenting recent attacks on specific types of viewpoints by the Governor, the Legislature, and even Defendants themselves, which further support the reasonableness of faculty members altering their speech in response to the Anti-Shielding Provisions. UFF and its members are well aware that, over the last few years, "Governor DeSantis, his supporters in the legislature and [Defendants] have consistently made clear statements about how faculty are supposedly indoctrinating students, that faculty as a whole are . . . left-leaning

Marxists, these very broad, sweeping, universal generalizations that are patently false." Trial Tr. at 580:4-9. Just a week before trial, the "Governor [] again repeated that these faculty indoctrinators needed to be brought under control." *Id.* at 580:13-16.

As a result of this unrelenting rhetoric, UFF reasonably understands the Provisions to police their members' speech, with the clear message that "any viewpoint that would disagree with the Governor's position as a conservative politician is not welcome in the higher-education system and . . . will be punished; and institutions that have faculty who express any of those positions, who research that subject matter or teach in any of those areas, will also be punished both on the individual level and on the institutional level." *Id.* at 580:18-581:3; *see also id.* at 614:11-16. Retaliation could come in the form of "a disciplinary action against the individual faculty member that could be based on . . . HB 233, or it could be a reduction of funding to either an entire institution or a targeted program." *Id.* at 581:3-7; *see also id.* at 581:10-21 (attributing similar remarks to Defendants Corcoran and Commissioner Diaz); *id.* at 582:15-20 (attributing similar statements to members of the Legislature with regard to HB 233, in particular). "[P]art of the chilling effect here is that even the investigation of a student complaint on this front can be very damaging for a faculty member, partly because of how uncomfortable that kind of investigation can be, [and] the way that it can cling to a faculty member

long term." *Id.* at 596:12-16.

***The Recording Provision*:** The Recording Provision chills speech in its own right and also facilitates and exacerbates the harms imposed by Anti-Shielding Provisions (as well as other speech suppressing legislation that has followed HB 233), by threatening faculty "that at any time a student could be secretly recording what it is [they are] saying to use in a complaint against the university." *Id.* at 594:20-24. As a direct result, members "feel they can no longer reasonably navigate class discussion." *Id.* at 594:23-24.

The evidence proves that UFF members' self-censorship as a result of the Recording Provision is objectively reasonable in several different ways. Not only did the Legislature acknowledge that the Recording Provision would "temper" speech, and tout that as a virtue, Defendants also warned that it would do the same, and FIRE aggressively lobbied against it for this very reason. *See supra* 25-27. *Already* at least one UFF member has been reprimanded for engaging in disfavored speech following a recording, *see infra* 84-85 (Maggio), another has been expressly advised to be wary of it when they are speaking in class, *see infra* 89-90 (Morse), and, as Dr. Gothard testified, as part of their "reporting mechanisms for violations of HB 7," institutions are affirmatively providing "opportunities for individuals to upload recordings, particularly audio or video recordings of classrooms, to prove that faculty were doing this heinous thing" of recognizing the realities of systemic

oppression, or the legitimacy of CRT. *Id.* at 605:22-606:4. Thus, the Recording Provision in particular is uniquely nefarious—giving teeth not only to the Anti-Shielding Provisions but also to the deluge of other laws enacted after HB 233 that similarly target faculty viewpoints and speech. *Id.* at 604:13-606:6.

***The Survey Provisions*:** UFF members are also reasonably self-censoring as a result of the Survey Provisions. As discussed *supra* 14-15, the Survey Provisions have a marked chill on speech regardless of whether any individual faculty member feels compelled to take the survey themselves. This is because the Boards are *required* to ensure their implementation annually, and are *required* to report the results—even if the methodology or results of the survey are entirely unreliable or invalid. And there is no restriction on how those results may be used—again, even if the survey instruments or results are entirely unreliable or invalid. As a result, the chilling effects from this annual mandatory speech surveillance program exist regardless of whether faculty are ever expressly mandated to take part in the survey themselves. *See, e.g.*, Trial Tr. at 664:14-18 ("[T]he existence of the survey itself is obviously very concerning to our members."); *id.* at 671:19-672:10 (Gothard explaining UFF's concerns about how results will be used).

And the objectively reasonable chill resulting from this mandatory annual speech monitoring tool is further exacerbated by "comments that have been made by Governor DeSantis, former Commissioner of Education Richard Corcoran,

former legislators, as well as sponsors of the bill," all of which UFF understands to convey the message "that if the results that came out of those surveys did not match the appropriate ideology that these individuals were looking for . . . there would be consequences for these institutions," including not only threats of defunding, but also harassment and other consequences, all based on this drumbeat of accusations that these institutions are "left leaning, indoctrinating [and] all of these sort of false characterizations that we've heard about how higher education works." *Id.* at 664:17-665:4 (Gothard); *see also id*. at 664:17-665:6 (explaining that the mere "existence of the survey itself is obviously very concerning to our members," and that those concerns stem in large part from this type of rhetoric from the Governor, members of the legislature, and Defendants). Dr. Gothard testified that the fears were "reinforced" even as trial was taking place, "with [public] statements that were made about New College of Florida, in particular." *Id.* at 665:4-6.

* * *

Dr. Gothard's testimony was followed by testimony of several individual UFF members, who offered evidence regarding their own speech injuries, further establishing the organization's standing on behalf of its membership. Key components of that testimony are summarized below.

Dr. James Maggio:[36] Dr. Maggio has been a political science professor at St. John's River State College ("SJRSC") for more than a decade, Trial Tr. at 1187:17-1190:23, was a founding member of the UFF chapter at SJRSC and remains a current member of UFF. *Id.* at 1188:21-1189:13. He teaches U.S. Federal Government, Intro to Political Theory, and International Relations. *Id.* at 1191:19-1192:4. Over the last several years, Dr. Maggio has noticed a sharp uptick in aspects of his courses being considered controversial. *Id.* at 1194:23-1195:1. For example, he has long taught about CRT and "systemic racism," but those topics were not "particularly partisan . . . until recently." *Id.* at 1195:3-13.

Dr. Maggio's testimony focused primarily on his personal experience with the immediate censoring of his classroom speech shortly after HB 233 was enacted into law. HB 233 was signed by the Governor in June 2021, and became law on July 1, 2021. JX 42 at 1-2. Immediately thereafter, beginning in Fall 2021, Dr. Maggio began receiving repeated directives about his in-class speech from administrators—something that had *never* occurred before. *Id.* at 1197:5-8; 1198:1-3; *see also id.* at 1201:10-12. Between February 2022 and the time of trial, he was

[36] Dr. Maggio and Dr. Morse are not themselves named plaintiffs in this litigation. They testified in their capacity as members of UFF in support of UFF's associational standing, as well as to offer evidence about the impact of the challenged provisions on faculty, in support of Plaintiffs' claims on the merits.

reprimanded about his speech "maybe twice a month," or "five to ten times." *Id.* at 1202:2-15.[37] Those directives included the following:

(1) In or around February 2022, [SJRSC] administrators told Dr. Maggio that he "needed to teach the Civil War such that slavery, States' rights and slavery. . . and changes in the economic systems were equal causes to the war," and to stop teaching that "slavery was the main cause [of the Civil War]," despite that "historians generally" agree that slavery was the primary cause of the War. *Id.* at 1197:14-21; 1199:22-1200:1.
(2) On January 6, 2023, [SJRSC] administrators told Dr. Maggio to "[s]top teaching critical race theory, systemic racism, . . . gender theory, and the living [C]onstitution." *Id.* at 1202:16-1203:1.

Dr. Maggio has reluctantly followed the directives he has received regarding the content of his in-class speech. *Id.* at 1207:19-25; *see also id.* at 1204:12-23. As Dr. Maggio testified, this has had a devastating impact on his emotional health. *Id.* at 1204:12-16.

Dr. Maggio does not blame the administrators, many of whom he considers friends, for the new prohibitions on his in-class speech. He attributes these changes to the passage of HB 233's challenged provisions, as understood by his institution. *See id.* at 1205:2-8. It has not been difficult to deduce the source of this newfound policing of the content of his instruction: "if the issues [faculty are] being told [they] can't teach line up with the . . . bill that allows . . . censorship [of your speech], . . .

[37] Defendants sought to suggest in cross-examination that the directives that Dr. Maggio received were the result of a separate legislative enactment, House Bill 7 (2022), but that law was not passed until April 22, 2022. *See* PX 237.

and then a governor who is talking about those issues should just sign that bill, I mean, it doesn't take Columbo to figure [] out" that HB 233 is about suppressing those same topics and ideas. *Id.* at 1209:7-14; *see also id.* at 1219:13-23 (Defendants' counsel eliciting on cross examination that SJRSC administrators told Dr. Maggio that the directives were based on "quote, '. . . what's coming out of Tallahassee,' end quote. And that was the phrase that triggered us to know this had to do with the DeSantis laws, the new laws, and don't mess with it"). Dr. Maggio often considers leaving his job now. *Id.* at 1206:8-10. And he is not the only one: since the Fall of 2021, he has noticed a sharp decline in applicants for open faculty positions, and that faculty resignations have increased, such that as many as ten of the approximately 140 faculty at his college have resigned. *Id.* at 1216:17-1218:4.

Dr. Maggio's speech has been censored as a result of the challenged provisions operating collectively, but he also testified that ***the Recording Provision*** has specifically exacerbated the issue, making him more "timid on certain issues," and the result is that his "class[es] [are] a little less dynamic because [he is] not taking chances." *Id.* at 1214:18-22. Because of the Recording Provision, Dr. Maggio has made objectively reasonable decisions to self-censor his speech regarding "systemic racism" and even his speech regarding certain topics of economics. *Id.* at 1216:1-12. He testified that the Recording Provision has created a climate of terror on his campus, which he has noticed has impacted some of his colleagues even more

than himself. *Id.* at 1214:23-1215:8. The evidence proved that Dr. Maggio's self-censorship is objectively reasonable: one complaint that resulted in one of the many directives Dr. Maggio has received since the passage of HB 233 "came from a recording." *Id.* at 1215:22-25.

Dr. Nicole Morse: Dr. Morse, who is gender queer and uses "they/them" pronouns, is an Assistant Professor and Director of the Center for Women, Gender, and Sexuality Studies at FAU. Trial Tr. at 1436:11-1437:25. Dr. Morse has been at FAU and a member of UFF for five years. *Id*. at 1444:16-24; 1446:19-22. Dr. Morse is "aware that the work [they] do can be considered controversial and that that work can be threatened or attacked," making "the protection and solidarity" that UFF provides especially important. *Id.* at 1445:17-21.

Dr. Morse testified extensively about how each of the challenged provisions have caused them to self-censor and otherwise alter their speech. Key testimony about the impact of each challenged provision is summarized below.

***The Anti-Shielding Provisions*:** Before HB 233 was enacted, Dr. Morse moderated in-class speech to further learning objectives by "having open conversations with [their] students about what kinds of language and behaviors we would consider acceptable in the classroom." *Id.* at 1452:15-21. As a result of the Anti-Shielding Provisions, they no longer feel free to have these discussions—which engaged the class to come up with its own rules to govern its conversation and

facilitate dialogue about sometimes contentious or difficult topics—because they are "concerned" that their speech "facilitating a group agreement about how to create the optimal learning environment" will form the basis of a shielding violation allegation. *Id.* at 1453:3-9. Dr. Morse held these conversations in order to help *promote* students' free expression, *id.* at 1453:19-23, and testified that conversations like these are especially necessary in the field of LGBTQ studies, as "there's no consensus on what terminology is respectful or acceptable." *Id.* at 1454:3-12. But because of the Anti-Shielding Provisions, Dr. Morse now self-censors and generally refrains from opening up these conversations; they feel limited to only stating what their own "boundaries and practices will be," saying things like, "I will not be using words that I know to be slurs, and I will be using [preferred] pronouns and gender terms." *Id.* at 1454:13-22. Where they sometime engage in these conversations *despite* HB 233's threatened consequences, those experiences have been "very nerve-wracking," causing Dr. Morse to "self-select which classes [they] felt comfortable doing that in." *Id.* at 1456:3-12.

Dr. Morse's self-censorship is reasonable for all of the reasons previously discussed. But in the particular context in which Dr. Morse teaches, there is further reason to find their decision to temper, restrain, and change their speech objectively reasonable. Specifically, higher education in Florida is currently operating in an "environment where [queer] teachers, like [Dr. Morse], are being referred to" by the

Governor and HB 233's proponents "as predators, as groomers" on a regular basis. *Id.* at 1465:13-15. That a student might take offense at Dr. Morse's area of expertise *and their queer identity* is not hypothetical—Dr. Morse has taught several students who are "antagonistic to . . . LGBTQ content," and some of those students complained about Dr. Morse's use of queer media on their syllabus in the past. *Id.* at 1457:4-17.

Dr. Morse firmly (and reasonably) believes that HB 233 is designed to stamp out "queerness and queer studies" in public higher education, *id.* at 1460:19-21, a belief that is rooted not only in their own experience and observation of the anti-LGBTQ rhetoric that has come unrelentingly and consistently out of the legislature and Governor's office (as well as from Defendants themselves) over the past few years, but also because of the text of the Anti-Shielding Provisions themselves. Specifically, Dr. Morse pointed to the fact that the language of the Anti-Shielding Provisions evidence that its proponents believe "thinking carefully about language," which is required in the queer studies field, "automatically is censorship . . . that comes from a place of coddling or unreasonably protecting young people from the harsh realities of the world." *Id.* at 1461:1-4. And, in fact, Dr. Morse's interpretation of this text is supported by statements made by HB 233's prime sponsor, Representative Roach, who asserted during legislative hearings that the "intent" of HB 233 was to "push back hard against . . . this belief that our college students are

somehow fragile and we need to protect them from views they don't agree with." JX 8 at 34:15-35:17. Similarly, during HB 233's signing ceremony, House Speaker Sprowls referenced "a great book called The Coddling of the American Mind, [which is] all about an analysis of higher education throughout the United States and how, since 2013, individuals who are going to the universities have been deprived of what so many of us had the benefit of, and that is rigorous debate, where we could say things, sometimes silly things, so that we could test out ideas to find out what it is we truly believe in." PX 222.[38]

Of course, as the evidence overwhelming shows, the same actors have no qualms about prohibiting or starkly limiting "rigorous debate" about views with which they disagree, particularly about race, gender, and sexuality. *See, e.g.*, PX 237 at 3:25-4:9 (signing ceremony for HB 7, at which Governor DeSantis exclaimed that the new law "do[es] not allow pernicious ideologies like critical race theory to be taught."). Dr. Morse's testimony evidenced that they, too, are acutely aware of this hypocritical—but undeniable—disconnect, and the clear message it conveys. *See, e.g.*, Trial Tr. at 1469:14-1470:5, 1472:3-14. Indeed, since Dr. Morse testified about "moves by politicians in power" like "the recent memorandum to make lists of all

[38] *See also* Trial Tr. at 457:11-458:25 (Dr. Bérubé describing The Coddling of the American Mind as including "just a barrage of anecdotes" and "garbled stories" about "kids today [being] a bunch of coddled snowflakes").

staff, programs, and courses that intersect with diversity, equity and inclusion and critical race theory," *id.* at 1462:1-8, the political majority in Florida has continued to act in ways that confirm Dr. Morse's fears, *see supra* 53-54.

***The Recording Provision*:** Dr. Morse has also self-censored and altered their speech as a direct result of the Recording Provision. Specifically, because of the Recording Provision, Dr. Morse now leans more heavily on class discussion than lecture, even when that discussion format is not necessarily "the ideal pedagogical choice." *Id.* at 1465:3-5. Dr. Morse also stopped assigning materials that are "incidentally LGBTQ focused" from classes not explicitly centered on LGBTQ issues. *Id.* at 1465:9-18. Dr. Morse was "concerned" that if they did not remove those materials from those classes, they "could be recorded and presented as someone who was biased and pushing a . . . 'gay agenda.'" *Id.* at 1466:2-7.

Dr. Morse's self-censorship in the face of this Provision is objectively reasonable because, as Dr. Morse testified, a "recording could potentially be taken out of context and used, either in a complaint against [them] or . . . published to misrepresent [them]." *Id.* at 1453:11-16. They understand the Recording Provision to be an "enforcement mechanism" for the state to police disfavored speech. *Id.* at 1462:9-16; *see also id.* at 1460:19-1461:4. This is not simply Dr. Morse's impression. In Summer 2022, FAU administrators explicitly "remind[ed]" faculty to keep in mind as they worked to comply with the later-enacted HB 7 that, "because

of HB 233, the possibility of recording was ever present," making clear that the institution, too, understands the Recording Provision as an enforcement mechanism to police speech disfavored by the Legislature. *Id.* at 1472:10-12.

***The Survey Provisions*:** Dr. Morse has also self-censored as a result of the Survey Provisions. As Dr. Morse testified, the Survey Provisions "interact with the other provisions to create this adversarial climate where [Dr. Morse is] more nervous about how [their] students might perceive [them] than [they were] . . . previously." *Id.* at 1468:14-16. "The survey contributes to a climate that is structured by this idea of surveillance and the sense that our activities on campus are being surveilled and monitored for speech, ideological content, [and] belief that is not pleasing to those in power" which comes with "potential negative or disciplinary consequences." *Id.* at 1469:14-1470:5.

Dr. Morse's self-censorship is reasonable for all of the reasons already discussed. Moreover, Dr. Morse testified that—further confirming their fears—they found the 2022 Surveys to be "very ideologically slanted" and to be "targeting this perception that faculty are liberal and are indoctrinating students into liberal ideology." *Id.* at 1468:22-1469:8. "[A]ll together it feels like the survey is . . . creating a climate where faculty and students['] . . . conversations are being judged, measured, and evaluated by the State." *Id.* at 1470:2-5.

Dr. Barry Edwards: Dr. Edwards is an individual Plaintiff in this litigation and a member of UFF. *Id.* at 946:15-19. He has been an associate lecturer at UCF since 2014. *Id.* at 943:19-20, 944:20-21. He teaches political science research methods, survey research and design, American constitutional law, judicial process and politics, the American presidency, American government, and the politics of gun control. *Id.* at 949:2-11. Dr. Edwards does not have tenure. *Id.* at 946:17-19. Key aspects of his testimony about how the challenged provisions, together and independently, have chilled and altered his speech, is summarized below.

***The Anti-Shielding Provisions*:** Dr. Edwards has self-censored as a direct result of the Anti-Shielding Provisions. *Id.* at 957:17-25. As he described it, the Anti-Shielding Provisions effectively require him "to drive a car that doesn't have steering and brakes." *Id.* at 958:8-14. As a result, he now must drive "very slowly and very cautiously and try as much as possible to stay in the middle of the road and hope that the car doesn't drift to one side or the other." *Id.* at 958:13-19. This has manifested in him being "more tentative to broach certain topics or introduce certain materials that students might have strong opinions on." *Id.* at 958:3-7. For example, in his Introduction to American Government course, Dr. Edwards chose to forgo "thoughtful material" that students would find "critically engaging" in favor of "fun material" in order to "avoid controversy or starting a controversy that [he] would need to redirect." *Id.* at 958:21-959:16.

Dr. Edwards's self-censorship and altering of his speech are objectively reasonable for all of the reasons already discussed. As evidenced by his background, Dr. Edwards has extensive experience in reading and interpreting legal text. Dr. Edwards reads the plain text of the Anti-Shielding Provisions to "apply to [him] and [] to [his] classroom instruction because [he's] a public employee teaching for [UCF], and [his] university has implemented it as a policy." *Id.* at 957:15-22. That this is objectively reasonable is further evidenced by all of the evidence discussed *supra* 17-19, showing that the Legislature, Defendants, and others have all at various times evidenced or endorsed the same or a similar interpretation.

***The Recording Provision*:** Dr. Edwards has also self-censored and altered his speech as a direct result of the Recording Provision. *Id.* at 968:24-975:21. It has made him more cautious about what he says in class and about sharing material with students via PowerPoint presentation and recorded videos. *Id.* at 967:20-969:3, 969:19-970:19. He testified that—unlike other mechanisms for his students and university to report on or monitor his teaching, *id.* at 973:12-975:21—the Recording Provision makes him feel "like a criminal under suspicion" because he is no longer subject to Florida's two-party consent rules for recording, *id.* at 969:3-18.

Dr. Edwards's self-censorship is reasonable for all of the reasons discussed. In addition, he testified that his fear of being recorded and taken out of context stems from past instances of instructors being fired and facing death threats based on their

in-class comments going viral during the pandemic. *Id.* at 970:20-973:11; *see also id.* at 982:19-25 (describing his "general fear" that "some incident in class is clipped out and . . . 10 seconds of a Zoom recording or a classroom recording . . . become [] all th[at] people know about you," and that it "could reflect really badly, unfortunately, and unfairly . . . on [him], [his] department, [his] university"). That these fears are objectively reasonable is only further bolstered by the unrebutted expert testimony of Dr. Kamola about his experience and research documenting exactly these types of incidents, how they are amplified across right-wing publications, and the very serious harms that faculty members suffer as a result. *See, e.g.*, *id.* at 1092:20-1174:7.[39]

***The Survey Provisions*:** The Survey Provisions have also chilled Dr. Edwards's speech. *Id.* at 978:23-982:8. As a result of the knowledge that his students will be surveyed annually to offer their perceptions on "viewpoint diversity" at his institution, he is "consciously less political in class" and "deterred and a little scared from presenting a viewpoint." *Id.* at 980:19-981:3. He has reasonably responded by sanitizing and simplifying his classroom presentations. For example, when he was

[39] Dr. Kamola was offered, without objection, as an expert in "the political economy of higher education, the phenomenon of targeted harassment of faculty for perceived liberal bias, and the consequences of targeted harassment." Trial Tr. at 1112:8-15. He is exceptionally qualified to offer that testimony, which was based on his original peer-reviewed research. *Id.* at 1097:19-1112:7.

looking for a video to explain debtor-creditor relations in American political history, he chose a clip that "didn't have much critical bite" rather than something that his students might characterize as coming from a liberal source. *Id.* at 981:4-982:8.

Dr. Edwards's self-censorship is reasonable for all of the reasons already described. Indeed, he testified that he sees the Survey as "a weaponized question to determine whether . . . faculty are in political agreement with the State." *Id.* at 977:10-13. Dr. Edwards has also seen that his "department discusses . . . the different metrics that are used to evaluate teaching, to evaluate departments," and that when "measures . . . come out, [his department is] certainly sensitive to [those measures]" and "signal[s] what [the state government] want[s] to hear" and the "views [the state government] want[s] represented" because of the reliance on public funding. *Id.* at 979:12-25.

Dr. Jack Fiorito: Dr. Fiorito is an individual Plaintiff and the J. Frank Dame Professor of Management at FSU. *See* Trial Tr. at 1268:5-8. He has been a dues-paying member of UFF since he started at FSU more than 32 years ago and has served in various leadership positions since. *Id.* at 1269:13-1270:2. His courses at FSU include negotiation, labor relations, and a doctoral seminar on data analysis. *Id.* at 1272:6-10. Key aspects of his testimony about how the challenged provisions, together and independently, have chilled and altered his speech, is summarized below.

***The Anti-Shielding Provisions*:** Dr. Fiorito's ability to teach his courses consistent with the material and his pedagogical judgment has been significantly and directly chilled by the Anti-Shielding Provisions. As Dr. Fiorito testified, he reads the Provisions to prohibit him from making an informed decision not to cover certain material or points of view that could make his students feel guilty or uncomfortable—even if an alternative assignment would better serve a student. *Id.* at 1282:2-1283:8. For example, before HB 233 was enacted, when a student expressed discomfort with a documentary that Dr. Fiorito regularly showed in class, he offered alternative assignments for students who had that reaction. *Id*. at 1282:10-25. But if a student came to him today with this type of issue, Dr. Fiorito is unsure whether he could accommodate them consistent with the shielding provision. *Id*. at 1283:1-8.

Dr. Fiorito's concerns about and response to the Anti-Shielding Provisions are reasonable for all of the reasons already discussed. Moreover, like Dr. Edwards, Dr. Fiorito specifically understands the plain mandate of the Anti-Shielding Provision to prohibit shielding at "the university and we as its agents and instructors cannot shield." *Id.* at 1281:21-1282:1.

***The Recording Provision*:** Dr. Fiorito has also altered his speech as a result of the Recording Provision. As he testified, it has directly changed his style of teaching; he is now more "self-conscious" and it "inhibits [his] spontaneity." *Id*. at

1286:17-21. For example, instead of engaging with student commentary and connecting it to the course material, Dr. Fiorito feels compelled to "stick to the script and not add any embellishments that might relate to their story." *Id.* at 1287:3-6. He does this, moreover, even though he recognizes that students lose the "learning benefit" that comes from making course material "more concrete to them" through the means that he would have used prior to the enactment of the Recording Provision. *Id*. at 1286:22-1287:15.

Dr. Fiorito's self-censorship is objectively reasonable for all of the reasons previously discussed, including that there is no requirement that students record "the full context" of his lectures, *id.* at 1298:21-1299:7; *see also id.* at 1296:23-25. Moreover, Dr. Fiorito testified that he is particularly concerned because he knows that he teaches "perspectives not favored by the state," *id.* at 1272:25-1273:15, heightening his fear that students may be secretly recording him and that those recordings could get him or his institution in trouble, *id.* at 1286:17-1287:14.

***The Survey Provisions*:** Dr. Fiorito has serious concerns about continuing to teach controversial subjects, including in particular the Marxist model of industrial-labor relations, the political activity of unions, and racial discrimination in the history of employers and unions. *Id.* at 1272:25-1274:13. He ultimately remains committed to teaching those materials but is aware that he is risking retaliation in doing so. *Id*. at 1274:14-1275:3. He is particularly concerned about the risk to him

and his institution as he continues to teach these types of controversial subjects in an environment where his students, his colleagues, and himself are subject to an annual survey reporting on the respondents' perspectives of "viewpoint diversity" on their campuses—a tool that, in Dr. Fiorito's view, "could only be used in a way that would be unfortunate." *Id*. at 1280:1-7.

Dr. Fiorito's fears of retaliation are objectively reasonable for all of the reasons already discussed. In addition, although the 2022 Survey was voluntary, Dr. Fiorito remains concerned that future surveys will not be voluntary, especially given the 2022 Survey's low response rates. *Id*. at 1281:9-14, 1297:6-12.

Dr. Robin Goodman: Dr. Goodman is an individual Plaintiff and an English Professor at FSU, where she has taught for 21 years. Trial Tr. at 1231:20-1232:9. Dr. Goodman has been a member of UFF for 20 years over which time she has held various leadership roles in the organization. *Id.* at 1232:16-1233:1. At FSU, Dr. Goodman regularly teaches courses in "critical theory," "feminist theory," and "postcolonial literature," like "Third World Cinema" and literature and authoritarianism. *Id.* at 1237:22-1238:9. Key aspects of her testimony about how the challenged provisions, together and independently, have chilled and altered her speech, is summarized below.

***The Anti-Shielding Provisions*:** Dr. Goodman has self-censored her in-class speech as a direct result of the Anti-Shielding Provisions. As she testified, "it [i]s all

very confusing about what we should be doing, but I do think I hold back on lecturing in class," out of concerns that she may inadvertently trigger a shielding complaint. *Id.* at 1241:15-25. In addition, because of the Anti-Shielding Provisions, Dr. Goodman felt required to remove a prohibition against neo-Nazi and fascist speech in her classroom from her syllabi, which she had included in her syllabi since 2017 in response that year's "Unite the Right rally" in Charlottesville. *Id.* at 1242:13-18. In light of the increasing visibility and amplification of the white supremacist movement at that event and others, Dr. Goodman felt that drawing these lines were important in order to enable her to manage her classroom and avoid unnecessary interruptions to instruction and disruptions to her students' ability to learn. *Id.* at 1242:5-1243:1. This disclaimer was never about censorship; quite to the contrary, Dr. Goodman testified that it is important to her that students can express themselves freely in her classroom, not least of all because she sees that as a critical tool necessary to their learning. *Id.* at 1243:2-7.

Dr. Goodman also testified that she understands the Anti-Shielding Provisions to require that she "not only [] teach the point[s] of view that are [her] own point of views or the point of views that the students have, but also to make sure that points of view that aren't voiced by me or the students are still taken up somehow." *Id.* at 1238:25-1239:4. As a result, when certain viewpoints are not expressed in the course of classroom discussions, Dr. Goodman now feels compelled to express them. *Id.* at

1239:5-7. For example, in a recent class—in which approximately half of her students were business majors—she asked her students "three times" whether capitalism has done anything good, but no one was willing to speak up in defense of capitalism in a discussion. *Id.* at 1245:21-1246:12. Because of the Anti-Shielding Provisions, and her concern that she might be accused of violating them if she said nothing, she felt compelled to make the case for capitalism herself—something she would not have otherwise done. *Id.* at 1246:9-12.

Dr. Goodman's self-censorship and compelled speech are reasonable for all of the reasons already discussed. Moreover, in the case of Dr. Goodman specifically, Defendants have consistently made clear that they view the language she used to include in her syllabus as intended to suppress student speech, allegations that have left Dr. Goodman "shocked and scared" because "[i]t seemed like the kind of thing that [she] could be punished for or even fired for." *Id.* at 1244:12-25. She is familiar with threats to punish and fire teachers for similar reasons from former-Commissioner Corcoran, including his assertions that academia is "infested with liberals," and that you have to "police" educators "on a daily basis" against "indoctrinat[ing] students"—something he says is "*working in the universities*, . . . *I've censored or fired or terminated numerous teachers for doing that*." PX 220 at 35:9-367:322 (emphasis added); *see also* PX 219 (video) at 37:02-38:51. Her concerns are further exacerbated by Defendants' recent changes to tenure review

requirements, which she believes will ultimately include consideration of alleged violations of HB 233's challenged provisions. *See* Trial Tr. at 1245:1-6.

***The Recording Provision*:** Dr. Goodman has also self-censored in direct response to the Recording Provision. First, she has self-censored because FSU's directives about the Recording Provision's application have been confusing: FSU administrators simultaneously directed faculty that only "lectures" could be recorded *and* that "incidental speech" from students could be recorded. *Id.* at 1247:6-1248:19. Second, Dr. Goodman testified that the secrecy of possible recordings exacerbates the chill: "[i]t's scary . . . you don't know if you're being recorded, and you have to always assume that you are being recorded." *Id.* at 1248:20-1249:3.

Dr. Goodman's self-censorship is reasonable for all of the reasons already discussed. Moreover, Dr. Goodman testified that the new climate created by the Recording Provision specifically puts Dr. Goodman at odds with her students, creating an atmosphere of suspicious and distrust. Now she is on high alert that "they could always be making a case against me that they don't have to tell me about, and . . . I have to be constantly worrying about when the axe is going to come down and when I'm going to have to answer for something that I said in a more criminal way." *Id.* at 1249:15-23. As other faculty members similarly testified, Dr. Goodman is also concerned that recordings might be taken out of context and used to damage her career. *Id.* at 1250:11-21. That HB 233 includes a provision allowing Dr. Goodman

to sue her students if they improperly publish a recording of her is cold comfort: The student "would have [already] published [the recording], because that's how I would know that they're misusing it. And once that happens, it's too late for me to actually do anything about it. So I could sue them and maybe even win, but my career is over." *Id.* at 1250:6-10.

***The Survey Provisions*:** While Dr. Goodman would self-censor in response to the Survey Provisions if she could understand how to do so, she cannot even figure out "how to censor [herself] in order to make the survey less scary." *Id.* at 1252:20-23. These fears, too, are objectively reasonable. Specifically, Dr. Goodman testified that she is afraid that if FSU is found to be too liberal or progressive in response to the Survey, funding is likely to be cut and the political actors in the state are likely to take over the leadership of the institution. *Id.* at 1255:9-14. In support of this belief, Dr. Goodman pointed to the example of the Governor's recent replacement of the entire Board of Trustees at New College of Florida, and "all sorts of chatter about how the Governor is not going to stop with New College; how he's going to take over all the Board of Trustees and put in right-wing ideologues." *Id.* at 1255:9-14.

Dr. William Link: Dr. Link is an individual Plaintiff in this litigation. Trial Tr. at 490:9-10. He recently retired from UF and is now a member of UFF's retiree chapter. *Id*. at 11-24. Prior to that, Dr. Link spent 18 years as the distinguished

Richard J. Millbauer Professor in Southern History. *Id.* at 490:17-22. He primarily taught survey courses in U.S. history and more advanced courses in Southern history. *Id.* at 494:4-18. However, the challenged provisions impeded Dr. Link's ability to teach his courses consistent with the scholarly consensus and were an important reason why Dr. Link decided to retire. Trial Tr. at 490:11-22; 503:20-504:4; 546:4-12.

Dr. Link continues to teach, and hopes to continue to present as a speaker, at UF in his retirement. *Id.* at 532:8-534:12. He remains on the dissertation committees of several UF PhD candidates, and he would like to be able to speak more broadly on campus—particularly regarding his publications. *Id.* As his testimony summarized below further illustrates, the challenged provisions harmed Dr. Link's ability to continue teaching and they impede his ongoing relationship with Florida universities as an emeritus professor, supervisor of graduate students' dissertation projects, guest speaker, and author.

***The Anti-Shielding Provisions*:** Although Dr. Link only taught under the challenged provisions for a short period of time, he testified that period was notable in particular because, during it, the Anti-Shielding Provisions operated as a "sword of Damocles [] hanging over the faculty member in terms of how . . . and what they teach." *Id.* at 502:19-503:19. In attempting to understand and apply the Anti-Shielding Provisions to his own classes, Dr. Link testified that no one can really

determine "whether expressive attitudes are being suppressed or not," and it is unclear whether faculty members must "spend[] class time on certain topics that don't relate really to the course or aren't historically substantiated." *Id*. at 503:6-10. Fundamentally, Dr. Link was unable to teach his courses *and* comply with the Anti-Shielding Provisions because it "goes to the heart of [his] ability to teach the content as content that's recognized as up-to-date scholarship." *Id.* at 503:14-17. For example, Dr. Link understood the Anti-Shielding Provisions to oblige him to present the Dunning School "as a legitimate way to interpret the period" of Reconstruction. *Id*. at 511:15-512:13. What's more, Dr. Link would "have to elevate Dunning to a position of equal or equivalence to what current interpretation about Reconstruction is about." *Id*. at 512:10-13. Dr. Link simply could not in good conscience continue to teach Southern History when faced with the prospect of including those distortions into his instruction. *Id*. at 503:20-504:4. Dr. Link's concerns are objectively reasonable for the same reasons already discussed.

The Anti-Shielding Provisions also obstruct Dr. Link's ongoing scholarship; he reasonably expects that future speaking engagements that would have in the past been par for the course for a retired professor of his stature, particularly as he publishes new work, will now result in his work being scrutinized for sufficient "viewpoint diversity," including in particular whether he has sufficiently (in the eye of the beholder) presented alternative—including offensive or unwelcome—

viewpoints. *Id.* at 535:4-11. As a result, Dr. Link doubts that the opportunities to continue engaging with and speaking on the campus that he would have otherwise had will come to fruition, specifically because of the challenged provisions. *Id.* at 534:19-535:21. Indeed, Dr. Link testified that his existing and forthcoming scholarship emphasizes topics like "race and sexuality" in ways that are disfavored by HB 233's proponents, and because of the challenged provisions, he is aware that there are now "political dangers [to UF] associated with those topics." *Id.* at 534:3-12. Dr. Link has similar doubts over whether the graduate students that continue to work with him are free to pursue their research without these constraints hanging over them. *Id*. at 532:23-533:15.

***The Recording Provision*:** Dr. Link also testified that the imposition of HB 233's Recording Provision "chill[ed]" the speech in his classrooms, resulting in "a great deal of hesitation . . . in terms of how [both the lecturers and the students] perform in class." *Id*. at 496:11-20. Dr. Link testified that HB 233's introduction of secret, undisclosed recording of faculty speech created a toxic "erosion of that trust" between students and faculty that made him "cautious about what sort of things that might be construed as code words . . . [or] construed as biased presentation." *Id.* at 498:5-499:14. Dr. Link fully anticipates that the Recording Provision will continue to chill his speech and those of his students in his intended future interactions with

UF. *Id*. at 534:19-535:3. His self-censorship is objectively reasonable for all of the reasons already discussed.

***The Survey Provisions*:** Dr. Link's speech was also threatened by the Survey Provisions. As Dr. Link testified, the Survey Provisions impose an intolerable "surveillance system," which creates "an atmosphere of fear." *Id*. at 517:21-518:12. As a direct result of the Survey Provisions, the UF history department—and those that work within it and with it—face the risk that faculty ideology could result in the department being "identified as politically problematic." *Id*. Given the concerns for budget cuts, Dr. Link also fears anticipatory compliance—where administrators will proactively discourage topics that might look bad to legislators, such as CRT or institutional racism, because the school may be "penalized by political forces." *Id*. at 524:16-525:12. This concern would also discourage students and faculty from engaging with Dr. Link's existing and forthcoming scholarship, which emphasizes topics like "race and sexuality," because of the "political dangers associated with those topics." *Id*. at 534:3-12. Dr. Link's fears are objectively reasonable for all of the reasons already discussed.

* * *

In addition to the UFF members discussed above, Dr. David Price rounds out the individual Faculty Plaintiffs who brought this case. Dr. Price is not a member of UFF. His testimony about the ways in which the challenged provisions have altered

and suppressed his speech causing him an injury in fact sufficient to maintain standing to bring Plaintiffs' First Amendment speech claims on his own behalf, is summarized below.

Dr. David Price: Dr. Price has taught American government, American history, international relations, and world history at Santa Fe College for 22 years. Trial Tr. at 755:21-756:5, 757:8-15. As Dr. Price testified, "there's something that will strike someone as controversial in pretty much all of the courses that [he] teach[es]," and even though he has taught "divisive issues" for more than 30 years, "[i]t was not until HB 233 that [he] was concerned that teaching [those] topics . . . would get [him] in trouble with the State." *Id.* at 757:21-758:17. Together, HB 233's challenged provisions "have cumulatively caused [Dr. Price] to make [his] courses more bland and, in so doing, have made it more difficult to achieve the general education learning outcome mandated by the State of critical thinking." Trial Tr. at 779:6-12. In addition, specific evidence regarding each of the challenged provisions' impact on Dr. Price's speech is summarized below.

***The Anti-Shielding Provisions*:** As a direct result of the Anti-Shielding Provisions, Dr. Price is now avoiding classroom discussion of certain topics altogether to avoid accusations of shielding. *Id.* at 764:1-766:7. For example, Dr. Price has changed the way he teaches the Second Amendment. *Id.* at 764:7-18. Rather than delving "into the logic behind the rulings in [Second Amendment]

cases" and "get[ting] the students to discuss that in a robust way," Dr. Price now does "a really, really bare bones, basic coverage of" the topic, to avoid drawing a shielding complaint. *Id.* at 764:7-18. In the absence of the Anti-Shielding Provisions, Dr. Price would teach the Second Amendment the way he used to, as "it is something that could engage students and get them to really think about things critically," *id.* at 765:24-766:7, and "meet the general education learning outcome of the course," *id.* at 764:12-18.

Dr. Price also understands the Anti-Shielding Provisions to require him to teach content that he knows has offended and disturbed students in the past. Trial Tr. at 762:24-763:3. When teaching the Vietnam War, Dr. Price used to show a "particularly graphic [video] clip" of an execution. *Id.* at 761:6-16. After a student told him she found the video "disturb[ing]," Dr. Price realized that showing the clip was "counterproductive to the [educational] goal" and replaced it with "less potentially traumatizing" alternatives. *Id.* at 761:14-19, 762:7-8. After HB 233's passage, Dr. Price has reintroduced the execution video clip into his Vietnam War curriculum "to comply with the law," precisely because he knows students find it "uncomfortable, unwelcome, disagreeable, or offensive." *Id.* at 762:23-763:25.

Dr. Price's self-censorship and compelled speech in response to the Anti-Shielding Provisions are objectively reasonable for the reasons already stated. As the other individual Faculty Plaintiffs similarly do, Dr. Price reads the Anti-

Shielding Provisions "to permeate every type of activity that the college does to try to facilitate learnings, whether that be a cocurricular activity from the student affairs area or a classroom lecture," including his own classroom instruction. *Id.* at 760:12-25. Moreover, he understands, based on public statements made by HB 233's supporters in the Legislature and the executive branch that the challenged provisions are intended "to keep those evil Marxists from indoctrinating our students," *id.* at 768:7-12, 773:20-23, making him particularly cautious about engaging in speech that could make him or his institution a target. Dr. Price also testified that his fears are further informed by conversations with the Association of Florida Colleges about potential funding cuts in response to HB 233, *id.* at 770:19-773:1, and a recent memo seeking quantified information about the resources used on DEI and CRT, *id.* at 768:13-20; 773:4-19, 773:24-774:1.

***The Recording Provision*:** The Recording Provision has also had a significant chilling effect on Dr. Price's speech. First, despite the Recording Provision's reference to "lectures," Dr. Price has noticed that students are unwilling to participate in class discussions since the Provision's enactment, presumably out of fear of being recorded by their peers. *Id.* at 774:19-775:1. Dr. Price explained that FCS classrooms do not use the typical lecture format, and therefore any limit to "lectures" is meaningless in practice. *Id.* at 775:12-776:20. Nevertheless, as his students have become more reluctant to speak following the enactment of HB 233,

Dr. Price has limited his use of discussions altogether and resorted to more lecturing. *Id.* at 775:2-11. This has made him concerned about his own speech being recorded and "taken out of context." *Id.* at 779:2-4. As a result, Dr. Price has made "the courses more bland," which has made "it more difficult to achieve the general education learning outcome mandated by the State of critical thinking." *Id.* at 779:5-12.

Dr. Price's self-censorship in response to the Recording Provision is objectively reasonable for the reasons already stated. Moreover, Dr. Prices's changes in expression are reasonable given his own experience with students over the course of more than two decades of teaching: he cited "some students at that age have little impulse control" and "the ubiquitousness of social media," for example. *Id.* at 776:21-777:12.

***The Survey Provisions*:** Finally, the Survey Provisions, too, have caused Dr. Price to self-censor. He has "reduced what some semesters have been very robust discussions that [he is] sure created important intellectual memories for students to much more bland topics." *Id.* at 769:2-5. He has also changed the kinds of questions he asks students on current events quizzes, no longer thinking primarily about whether he is "picking the question that is most appropriate to gauge how well the students are able to follow news about American government," but about how certain questions may impact his students' responses to the Survey such that his

"college doesn't look bad." *Id.* at 769:6-770:18. This has resulted in him fundamentally altering the content of what he asks about and discusses, to try to obtain an artificial "both sides" or "viewpoint diversity" equilibrium. For example, last semester, he included questions about "the Mar-a-Lago document search," in the quiz, but also "felt compelled to put [a question about the Hunter Biden investigation] on [the quiz] even though, strictly speaking, it's not really relevant to the issue of government officials being corrupt or having a conflict of interest," as "Hunter Biden is not a government official." *Id.* at 770:2-12.

Dr. Price's alteration of his speech in response to the Survey Provisions is objectively reasonable for the reasons already stated. In particular, Dr. Price is reasonably concerned that "the survey is going to be used to punish institutions that the legislature and politically appointed members of the State Board of Education feel are too liberal," *id.* at 768:4-7. He testified, "[I]f I'm not helping the college appear not to antagonize the legislature, our budget could get cut is how I interpret the law." *Id.* at 768:21-23. Further informing the ways in which he has self-censored and altered his speech in the face of the challenged provisions—including in particular the Survey Provision, which now asks his students to report on their perceptions of ideology in the classroom—is the fact that Dr. Price has learned that students are hyper-sensitive to his discussion of current events in particular, and that his mere discussion of those events can cause students to make (often wrong)

assumptions about his personal ideology. *Id.* at 767:10-13. He has also discovered that many do not accurately understand terms like "liberal," "moderate," or "conservative": on an extra-credit assignment that Dr. Price gives at the end of his class, he asks where his students think he "fall[s] on the political spectrum based on how [he has] presented material in this course," and "they're not correct most of the time," often using examples that betray a misunderstanding of the terms "liberal," "moderate," and "conservative." *Id.* at 767:13-768:1.

* * *

The second organizational Plaintiff is MFOL. Alyssa Ackbar, a national organizer with MFOL who graduated from FSU in December 2022, *see id.* at 1329:21-1332:10, testified about the impacts the challenged provisions have had and are having on MFOL at trial. Olivia Solomon, a current UCF undergraduate who joined MFOL as a high school student in 2018 and now both leads MFOL's UCF chapter and serves as MFOL's Florida spokesperson, *id.* at 1303:7-15, 1304:20-1305:2, 1305:11-1306:5, also testified at trial. Tej Gokhale, MFOL's former interim executive director, *see* ECF No. 241-2 ("Gokhale Tr.") at 9:2-9 (ECF No. 241-2 at 11), testified via deposition designation. Key aspects of the evidence that establishes that organization's standing—both on its own behalf and on behalf of its members—is summarized below.

March for Our Lives Action Fund: MFOL is a national gun violence prevention organization that was formed in response to the 2018 school shooting at Marjory Stoneman Douglas High School in Florida. Trial Tr. at 1305:12-20 (Solomon). Its mission is to "support[] and empower[] young people to enact the change that they see is necessary in the world today." *Id.* at 1330:18-1331:2 (Ackbar). MFOL is a 501(c)(4) nonprofit organization with chapters at five SUS institutions. Gokhale Tr. at 19:2-7, 22:17-24:4 (ECF No. 241-2 at 21, 24-26). Chapters must apply for official recognition by MFOL, and they report directly to the national organization. *Id.* at 20:5-9, 20:22-21:2 (ECF No. 241-2 at 22-23). Because of MFOL's focus on youth empowerment, it has many college and university student members in Florida, Trial Tr. at 1331:3-10, including some who are not affiliated with campus-specific chapters, Gokhale Tr. at 94:6-9 (ECF No. 241-2 at 96). The MFOL "mission . . . thrives around recruitment, around bringing people into [the] movement to educate them about the harms of gun violence and to show them the path forward, the solutions." *Id.* at 37:7-11 (ECF No. 241-2 at 39).

Organizational standing: Like UFF, MFOL has standing to bring each of the claims in its Second Amended Complaint on two independent, alternative grounds. First, HB 233's effects on campus have directly harmed MFOL as an organization. Students' lack of exposure to ideas in the classroom has affected whether those students join MFOL. Trial Tr. at 1336:5-1337:3 (Ackbar). For example, before HB

233's enactment, Ms. Ackbar found classroom discussion to be a rich forum for sharing her experiences with MFOL and meeting like-minded students that she could recruit to join MFOL's FSU chapter. 1336:5-19. The classroom experience "is a way that [MFOL] spread[s] [its] mission and [its] goals and recruit[s] students to either come learn about the organization or join our work." *Id.* at 1336:20-1337:3; *see also id.* at 1338:20-1339:8 ("[W]hen . . . there's a less enriching educational environment, you get organizers that are less experienced."). That has changed significantly since the enactment of the challenged provisions. *See id.* at 1314:1-1317:6 (Ms. Solomon describing the changes in her classes and her experience as a student since HB 233 took effect); *see also id.* at 1337:15-1338:1 (Ms. Ackbar describing the "drop-off in professors being open to having political conversations in class" after HB 233's passage).

And the fact that HB 233's Anti-Shielding Provision expressly protects speech on campus that could be deemed "uncomfortable, unwelcome, disagreeable, or offensive" has emboldened views that directly oppose MFOL's mission. *See* Gokhale Tr. at 74:2-7 (ECF No. 241-2 at 76). As a result of the dramatically changed on-campus environment, Turning Point USA, a group that holds opposing views, has physically hampered MFOL's recruiting efforts on UCF's campus without any interference from the university administration. *See* Trial Tr. at 1319:7-19 (Solomon).

The challenged provisions have also affected MFOL's time and monetary resources because chapters are now taking time to vet people who attend their campus events, "to make sure that people are not joining just to disrupt their meetings, just to expose viewpoints that are harmful to their mental health and harmful to their organizing." Gokhale Tr. at 37:12-18 (ECF No. 241-2 at 39); *see also id.* at 94:10-95:6. MFOL is also considering hiring security for its members at public university campuses as a result of the challenged provisions and the environment they have engendered. *Id.* at 63:7-15, 83:20-24.

Associational standing: MFOL also independently has standing on behalf of its members. MFOL asserts two distinct speech injuries: The first is a right-to-receive-information injury, *Martin v. Struthers*, 319 U.S. 141, 143 (1943) (explaining the First Amendment protects not only the "right to distribute" information but the corresponding "right to receive it"), which is coextensive with Plaintiff UFF's free speech injury.[40] The second is an injury that HB 233's challenged provisions independently chill their own speech.

[40] Student Plaintiffs' right-to-receive information claim is a corollary to their professors' pre-enforcement First Amendment claim, and therefore the threat they face is not of enforcement against Student Plaintiffs directly, but against their professors. *See Pernell*, 2022 WL 16985720, at *31 (finding that student had standing to bring right-to-receive information claim because he planned to enroll in a course taught by a professor who provided evidence that she was credibly self-censoring in response to the challenged law).

Right to receive injury: With regard to the first speech injury—caused cumulatively by all three of the challenged provisions—MFOL's members' professors are less willing to engage in discussion of political topics in the classroom, which in turn hinders MFOL's members' learning experience and limits MFOL members' right to receive speech and information. Trial Tr. at 1337:15-19 (Ackbar). Ms. Solomon "ha[s] noticed professors become more wary of what they're saying," even when based on their expertise. *Id.* at 1315:6-13. Discussions in class are less robust, and professors are less engaged with students. *Id.* at 1315:23-1316:3.[41] As a direct result of the challenged provisions, MFOL members are not having the enriching classroom experiences that Ms. Ackbar described, such as learning about theories that she could apply to her own organizing work. *Id.* at 1334:16-1336:4. In fact, HB 233 and the bills following it ultimately influenced Ms. Solomon's plans to graduate from UCF a year early and leave Florida. *Id.* at 1316:17-25. Although she intends to pursue graduate studies, she "do[es] not see [her]self coming back to Florida to find that" because she wants to "get the most out of [her] education." *Id.* at 1316:21-25.

Relatedly, MFOL is concerned about its members' well-being in the classroom being threatened by harmful speech that faculty members are no longer

[41] At least some of Ms. Solomon's course instructors are members of UFF. *See* Trial Tr. at 676:2-12 (Gothard) (UFF President confirming).

able to manage as a result of the challenged provisions. Gokhale Tr. at 35:7-15, 37:1-4 (ECF No. 241-2 at 37, 39). For example, as a Jewish student, Ms. Solomon is concerned about the risks of her classmates being exposed to misinformation about the Holocaust. Trial Tr. at 1315:14-22. MFOL also understands that HB 233 protects rhetoric around gun violence and conspiracy theories that MFOL itself has worked to combat. Gokhale Tr. at 58:20-59:2 (ECF No. 241-2 at 60-61). The repetitive nature of the discussion around such conspiracy theories disrupts the learning environment and makes it more difficult for MFOL's members to receive faculty speech. *See id.* at 59:4-60:3 (ECF No. 241-2 at 61-62).

Direct injury to MFOL's members' speech rights: As for MFOL's second speech injury, it is the result of the challenged provisions operating together and independently. Key testimony regarding the impact of each provision in this regard is summarized below.

***The Recording Provision*:** The Recording Provision directly threatens and infringes on MFOL members' free speech rights because it "create[s] an environment in which if [members] are to speak in class, they could be recorded and that could be used against them." Gokhale Tr. at 89:9-17 (ECF No. 241-2 at 91); *see also id.* at 89:20-90:2 (explaining that lectures usually involve some student comments) (ECF No. 241-2 at 91-92); *id.* at 96:13-23 (testifying that members have not received any guidance about the provision) (ECF No. 241-2 at 98).

MFOL members' self-censorship in response to the Recording Provision is objectively reasonable because, in the past (and unrelated to HB 233), there have been incidents in which recordings of MFOL members have been used on social media to embarrass or harass them. *Id.* at 98:2-13 (ECF No. 241-2 at 100); *see also* PX 39. MFOL members in Florida have observed "statements from officials in Florida that build up a rhetoric around what kinds of viewpoints are supported, and the March For Our Lives viewpoint is not one that specifically aligns with those officials." Gokhale Tr. at 51:21-52:2 (ECF No. 241-2 at 53-54). Moreover, members like Ms. Solomon are involved in several other "progressive, grassroots organizations"; she is vulnerable to harassment because her views are at odds with those of Florida's legislative majority and the Governor. Trial Tr. at 1306:7-1308:1.

***The Survey Provisions*:** The Survey Provisions have also had a markedly negative impact on MFOL members' free speech rights. In particular, they are concerned about their academic institutions facing consequences if they are reported for as being more liberal than not, and have thus created "a sense of tension and wariness for students getting involved, especially [in] March for Our Lives. No one wants that target on their back. Nobody wants to be seen as the ultraliberal student when things like this are going on because we have seen and we know repercussions can happen." *Id.* at 1318:24-1319:6 (Solomon).

MFOL members' self-censorship and fears of retribution if they engage in

conduct or speech that could cause their institutions to be ranked too liberal in the survey are objectively reasonable for all of the reasons already discussed. In addition, further bolstering that fear, MFOL member Ms. Solomon testified that, following the enactment of the challenged provisions, her own institution, UCF, did not support a rally that she and other students organized on the "free speech lawn" to protest Neo-Nazi activity—instead the institution actively worked against it, complaining about the students' use of "amplified sound," despite allowing disruptive protests from antiabortion protesters and other right-leaning groups. *Id.* at 1311:6-1313:1. Ms. Solomon also testified that her fears in this regard have only been exacerbated as she has seen other universities—namely, New College—face consequences for appearing "too liberal" or "too progressive." *Id*. at 1318:1-23.

* * *

Finally, Julie Adams, a Florida student, is also a Plaintiff in this action. Key testimony establishing their standing to bring the Plaintiffs' First Amendment speech claim is summarized briefly below.

Julie Adams: Julie Adams uses "they/them" pronouns and is a twenty-year-old junior at FSU studying theater. Trial Tr. at 898:14-899:21. Like MFOL, Mx. Adams asserts two injuries: an infringement of their right-to-receive information and their own self-censorship.

First, Mx. Adams is reasonably afraid that the challenged provisions will impede their right to receive information. Mx. Adams's professors, at least some of whom are members of UFF, *see* Trial Tr. at 675:16-676:1 (Gothard) (UFF President confirming), often teach controversial pieces of theater in Mx. Adams's courses. Trial Tr. at 901:2-4; *id.* at 901:5-907:15. Mx. Adams fears that their professors will be hesitant to teach controversial plays because of the censoring nature of the challenged provisions, despite the fact that Mx. Adams has learned so much in the past from these types of learning experiences. Trial Tr. at 911:19-913:17, 917:15-21. Mx. Adams worries their professors will be "much less willing to engage" with such plays for fear that students might accuse them of not voicing a particular (and specifically offensive or unwelcome) side of a debate. *Id*. at 913:9-17.

Mx. Adams is also concerned about other ways that the challenged provisions—including the confusing ***Anti-Shielding Provisions***—will negatively impact their learning environment. For example, in the past, Mx. Adams's professors have at times offered students the option of studying different plays to avoid language some students found upsetting, including repeated use of the "n-word." Trial Tr. at 907:16-908:4. Affording students the option to choose between two plays furthered learning goals. *Id.* at 908:5-10. Mx. Adams is concerned that the Anti-Shielding Provisions will prohibit their professors' ability to do so.

Mx. Adams is also reasonably concerned that their professors may no longer manage their classrooms to protect Mx. Adams from hateful speech. Specifically, Mx. Adams understands ***the Anti-Shielding Provisions*** to require their professors to let students share irrelevant information simply because it is offensive, uncomfortable, unwelcome, or disagreeable—thereby prohibiting Mx. Adams's professors from expressing ground rules for civil discourse in the classroom to foster a functioning learning environment. *Id.* at 913:18-22; *see also id.* at 915:2-7. Mx. Adams's ability to receive information is harmed by the prohibition on their professors from requiring all students to be respectful in the classroom and avoid using "hate speech or slurs." *Id.* at 922:11-16. This chill of Mx. Adams's professors' speech exacerbates the impact on Mx. Adams's ability to receive faculty speech by disrupting their learning environment.

Second, Mx. Adams's own speech has been chilled because of the ***Recording Provision***. Mx. Adams testified that they and other students regularly give student presentations that could reasonably be considered lectures under the Recording Provision, subjecting Mx. Adams and other students to recording by their peers. Trial Tr. at 916:7-15. Moreover, it is unclear to Mx. Adams what parts of their classes are lectures versus some other style of teaching or learning, making them less comfortable participating in class. *Id.* at 916:16-917:14.

Mx. Adams's self-censorship and other fears are reasonable for all of the

reasons already discussed. In addition, Mx. Adams testified that their fears were exacerbated by threats from the Governor and others that Mx. Adams has heard in the news, *see id.* at 919:24-920:15, as well as reports they have heard that a UCF professor cancelled a class because of political pressure about the topic, and that the Governor has replaced the entire Board of Trustees at New College of Florida with right-wing ideologues. *Id.* at 923:5-925:6. Mx. Adams understands HB 233 and these other attacks on higher education as aimed at "dismant[ling]" public higher education in Florida to rebuild the institutions in the image of "conservative ideals." *Id.* Mx. Adams is also reasonably concerned that funding could be cut to their department if FSU, or the FSU theater department, is found to be too "progressive" in the survey. *Id.* at 919:8-23; *see also id.* at 921:1-10 (expressing further concerns they never received the survey and could not participate despite the threatened consequences).

2. Traceability

Plaintiffs also satisfy Article III's traceability requirement for their First Amendment claims. The traceability prong merely requires Plaintiffs to show that their "injuries are connected with" Defendants' conduct. *Wilding v. DNC Servs. Corp.*, 941 F.3d 1116, 1125 (11th Cir. 2019) (cleaned up) (quoting *Trump v. Hawaii*, 138 S. Ct. 2392, 2416 (2018)). Moreover, a plaintiff can show traceability where the injury suffered is "produced by [the] determinative or coercive effect" of the

defendant's conduct "upon the action of someone else." *Bennett v. Spear*, 520 U.S. 154, 169 (1997); *see also id.* at 168-69 (admonishing that courts should not "equate[] injury 'fairly traceable' to the defendant with an injury as to which the defendant's actions are the very last step in the chain of causation"). Here, the traceability requirement is easily satisfied. As discussed *supra* 62-70, Defendants have both express and implicit authority to enforce each of the challenged provisions, and Plaintiffs' chilled speech is fairly traceable to Defendants as a result.

Binding Eleventh Circuit precedent establishes that traceability is satisfied here. This is not a case like *Support Working Animals, Inc. v. Governor of Florida*, 8 F.4th 1198, 1204 (11th Cir. 2021), or *Jacobson v. Florida Secretary of State*, 974 F.3d 1236, 1253-54 (11th Cir. 2020), both of which involved—at best—general supervisory powers, not affirmative duties to ensure compliance with the law by the persons or institutions within their jurisdiction. And neither involved pre-enforcement First Amendment challenges, in which the Eleventh Circuit has explained that "we needn't know for certain how the rules will be applied to fairly conclude that they chill [plaintiff's] speech." *Harrell v. The Florida Bar*, 608 F.3d 1241, 1260 n.7 (11th Cir. 2010) (discussing traceability).

Reading these cases to establish a broad rule that an express duty to ensure compliance with law is insufficient to establish traceability in a First Amendment pre-enforcement challenge would be wholly inconsistent with *Speech First*, which

was decided by the Eleventh Circuit *after* both of those opinions were issued, and which found no "real dispute" that plaintiffs' injuries were traceable to a defendant who implemented the challenged policy and exerted indirect pressure to comply, even if that defendant did not in fact have any actual "power to punish," *Speech First*, 32 F.4th at 1119, 1122.

Finding that the Eleventh Circuit meant to announce a general rule foreclosing standing based on a defendant's power to enforce the law would also be inconsistent with the U.S. Supreme Court's decision in *Whole Women's Health v. Jackson*, 142 S. Ct. 522 (2021), which also post-dated *Jacobson* and *Support Working Animals*, and held—even outside the First Amendment context—that licensing officials who "may or must take enforcement actions against the petitioners if they violate the terms of" the challenged provisions were proper defendants. *Jackson*, 142 S. Ct. at 535-36. Although *Jackson* involved a question of whether licensing officials were proper defendants under *Ex parte Young* and not whether plaintiffs established Article III standing, 142 S. Ct. at 531-32, the principle that the Court applied confirms that Defendants' conduct is sufficiently tied to Plaintiffs' injuries.

Finally, Defendants' intent to enforce the challenged provisions may be inferred here, where they have consistently and vigorously defended it over the course of this litigation. *Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293, 1305 (11th Cir. 2017) (citing *Harrell*, 608 F.3d at 1257).

3. Redressability

"Redressability is established [] when a favorable decision 'would amount to a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered.'" *Harrell*, 608 F.3d at 1260 n.7 (quoting *Utah v. Evans*, 536 U.S. 452, 464 (2002)); *see also Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 801 (2021) ("[T]he ability 'to effectuate a partial remedy' satisfies the redressability requirement." (quoting *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 13 (1992))). And because traceability and redressability go hand in hand, an injunction "prohibiting [Defendants'] enforcement would be effectual" and would redress Plaintiffs' injuries. *Support Working Animals*, 8 F.4th at 1201. This is true for the challenged provisions collectively, and each independently.

First, enjoining Defendants from enforcing the Anti-Shielding Provisions would "remove some chill" on Faculty Plaintiffs' speech, *Pernell*, 2022 WL 16985720, at *29, because Faculty Plaintiffs would no longer be subject to Defendants using their enforcement authority described above, *see supra* 62-70, to ensure Faculty Plaintiffs' or their universities' compliance with the Provisions. That would, in turn, alleviate the burden on Student Plaintiffs' right to receive information. *See Pernell*, 2022 WL 16985720, at *31 (finding that because "enjoining [challenged provisions'] enforcement would redress much of the chilling effect on [faculty member's] speech," student had also demonstrated redressability

for right-to-receive-information injury). Although HB 233 also provides a private cause of action to enforce the Anti-Shielding Provisions, redress need not be total to satisfy Article III, *Reeves v. Comm'r*, 23 F.4th 1308, 1318 (11th Cir. 2022) (citing *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 801 (2021)), and enjoining Defendants here will provide at least partial redress. *See Pernell*, 2022 WL 16985720, at *30 (finding redressability even though the law "still permits individual lawsuits for discrimination").[42]

Second, enjoining Defendants from enforcing the Recording Provision would remove some chill on Plaintiffs' speech because Defendants would no longer enforce students' right to record them and, as a result, faculty, students, and staff would not fear retribution from Defendants for not allowing a student to record them without consent or notification. *See* Trial Tr. at 967:20-968:23 (Dr. Edwards

[42] In fact, many landmark cases grew out of pre-enforcement challenges to enjoin government officials from enforcing statutes that also provided a concurrent private right of action. *See, e.g.*, *Heart of Atlanta Motel, Inc. v. United States*, 231 F. Supp. 393, 394 (N.D. Ga.), *aff'd*, 379 U.S. 241 (1964) ("This is a complaint filed by Heart of Atlanta Motel, a large downtown motel in the city of Atlanta, regularly catering to out of state guests, praying for a declaratory judgment and injunction to prevent the Attorney General of the United States from exercising powers granted to him under the Civil Rights Act of 1964."); *Katzenbach v. McClung*, 379 U.S. 294, 295 (1964) ("This complaint for injunctive relief against [the Attorney General] attacks the constitutionality of the [Civil Rights] Act as applied to a restaurant."); *see also* 42 U.S.C. § 2000a-3(a) (providing a private right of action to a "person aggrieved" by a violation of Title II of the Civil Rights Act of 1964, which prohibits discrimination in public accommodations).

explaining prior practice of permitting students to record by request); *see also id.* at 498:14-499:3 (Dr. Link explaining same). Further, this Court can and should enjoin Defendants from using unconstitutional recordings taken in classrooms without evidence that everyone recorded consented to being recorded in any circumstance and for any purpose—including in considering allegations that an institution has violated the Anti-Shielding Provisions—because, absent the Recording Provision's express carve-out, all such recordings would violate Florida law. Fla. Stat. § 1004.097(3)(g) (explaining that students' right to record is "[n]otwithstanding s 934.03"); *id.* § 934.03 (making it a crime to intentionally intercept or disclose a person's oral communications without the prior consent of all parties to the communication). This, too, will go far to alleviate the chill that has broadly settled over higher education classrooms in Florida as a direct result of the Recording Provisions. *See Brown v. Plata*, 563 U.S. 493, 538 (2011) ("Once invoked, the scope of a district court's equitable powers . . . is broad, for breadth and flexibility are inherent in equitable remedies." (cleaned up)); *see also Kansas v. Nebraska*, 574 U.S. 445, 465 (2015); *McCullen v. Coakley*, 573 U.S. 464, 492 (2014).

Finally, enjoining Defendants from enforcing the Survey Provisions would provide Plaintiffs absolute relief from the chilling effects of those Provisions, which are expressly implemented by Defendants by their terms. Fla. Stat. §§ 1001.03(19)(b), 1001.706(13)(b).

B. Plaintiffs have standing for their First Amendment associational claim (Count II).

Plaintiffs' associational claim is a pre-enforcement challenge to the Survey Provisions under the First Amendment and the same legal standard applies for standing purposes as discussed above, with regard to Counts I and III. *See, e.g.*, *File v. Martin*, 33 F.4th 385, 389-90 (7th Cir. 2022) (applying "pre-enforcement standing principles" to speech and associational claim); *Towbin v. Antonacci*, 885 F. Supp. 2d 1274, 1282 (S.D. Fla. 2012) (same); *see also Ams. For Prosperity Found. v.. Bonta*, 141 S. Ct. 2373, 2384, 2388 (2021) (holding compelled disclosure regime unconstitutionally infringed on plaintiffs' associational rights where the chill to plaintiffs' associational rights arose "indirectly" from third-party threats and harassment, "because First Amendment freedoms need breathing space to survive"). The record establishes that the Survey Provisions have had a chilling effect on Plaintiffs' associational rights—i.e. that they have suffered a cognizable First Amendment injury—and that the chill on Plaintiffs' associations is objectively reasonable. Because Defendants have enforcement and implementation authority over the Survey Provisions, Plaintiffs' injuries are directly traceable to Defendants, and enjoining Defendants' enforcement and implementation of the Survey Provisions would provide meaningful redress to Plaintiffs.

1. Injury-in-Fact

To establish an injury-in-fact, Plaintiffs must demonstrate that the Survey

Provisions have chilled their associations and that the chill is objectively reasonable. *See supra* 72-74. The record shows that UFF, Dr. Edwards, and MFOL have suffered cognizable First Amendment injuries that are reasonably caused by the operation of the Survey Provisions.

United Faculty of Florida: UFF again has standing for two independent reasons: First, it has suffered a direct organizational injury, as the Survey Provisions reduce the number of qualified potential faculty who are willing to subject themselves to Florida's crusade against faculty ideology, thereby affecting UFF recruitment. *See* Trial Tr. at 643:23-644:2 (Gothard); *id.* at 1216:17-1218:4 (Maggio); *see also supra* 75-76 (establishing UFF's direct organizational standing).

Second, the Survey Provisions chill UFF's members' associations. For example, UFF member Dr. Morse is "out and [ ] not willing to closet myself in order to conceal my identity at work." *Id.* at 1472:17-19; *see also* 1438:1-24. However, HB 233 and other recent laws have "politicized" Dr. Morse's very identity as a queer person, such that some faculty might feel that hiding their identity is "one possible route forward." *Id.* at 1473:20-22. Dr. Morse understands HB 233 (including its Survey Provisions) is designed to target and suppress queerness on Florida's public college and university campuses, *see id.* at 1460:19-22, and this inhibits the ability of faculty members, like Dr. Morse and UFF's many other LGBTQ members, from recognizing one another, building solidarity and support amongst their ranks, and

meaningfully mentoring their queer students. *See id*. at 1439:18-22. Even though Dr. Morse is unwilling and unable to hide their identity at work, their freedom of association is reasonably hindered if their colleagues and students feel they have no choice but to hide who they are. *See id.* at 1473:17-1474:6; *see also id.* at 1439:18-22 (Dr. Morse describing being a role model "for many of my students . . . grappling with their own identities").

Dr. Barry Edwards: Dr. Edwards sees the Survey Provisions as a "weapon[] to determine whether . . . faculty are in political agreement with the State and to . . . evaluate [their] political correctness from the government's viewpoint." *Id.* at 977:4-13. As a result of the Survey Provisions, he does not "discuss [his] political affiliation or [his] personal ideology" in the classroom, *id.* at 978:23-979:11; *see also id.* at 980:19-981:3, because his "political affiliation . . . is out of step with what the political affiliation of . . . the government is, and [he] do[es]n't want to be targeted for that," *id.* at 982:12-18. The Survey Provisions have impacted his ability to teach his students authentically, *see id.* at 983:2-13, and to build trusting relationships with others at the university, *see id.* at 977:20-978:22; *see also id.* at 994:23-995:3 (refraining from joining university task force on diversity and inclusion).

Dr. Edwards did not take the 2022 Survey because, as he testified, "asking the faculty about . . . their political affiliations and personal ideology . . . didn't seem very directly relevant to our ability to teach, our capacity to teach, or our classroom

instruction." Trial Tr. at 976:17-21. Dr. Edwards' chilled association is reasonable because he does not "want to give the wrong signals to the state government about [his] political beliefs and political ideology for fear of what the consequences could be for [his] teaching, for [his] department, for [the] budgeting for [his] university." *Id.* at 979:12-25.

March for Our Lives Action Fund: MFOL has both direct organizational standing and standing on behalf of its members to bring its associational claim.

First, the Survey Provisions have directly harmed MFOL's recruitment efforts, which are critical to its mission as an associational organization. *See* Gokhale Tr. at 37:7-11 (ECF No. 241-2 at 39) (explaining that MFOL's "mission . . . thrives around recruitment, around bringing people into [the] movement to educate them about the harms of gun violence and to show them the path forward, the solutions."). As MFOL member Ms. Solomon testified, MFOL's members are reasonably concerned about their universities facing consequences for appearing "too liberal" or "too progressive" as a result of the "findings" of the Survey, a fear that has become exacerbated as a result of the recent shake-up in administration at New College. Trial Tr. at 1318:1-23. Those concerns have created "a sense of tension and wariness for students getting involved" in the organization, in an environment where "[n]obody wants to be seen as the ultraliberal student when things like this are going on because we have seen and we know repercussions can happen." *Id.* at 1318:24-1319:6.

Ms. Solomon also testified that the university's response to progressive activity like the counter-protest to Neo-Nazi activity that Ms. Solomon helped coordinate—a response that followed the enactment of the challenged provisions and the unique pressures they impose on institutions to clamp down on disfavored expression, lest they be "reported" in the Survey in an unfavorable way—also makes students reluctant to join progressive organizations like MFOL. *Id.* at 1313:2-8.

In response to the increasingly hostile environment for progressive speech on campus (directly attributable to the challenged provisions, including in particular the annual "report" required by the Survey Provisions), MFOL chapters like the one at UCF are moving more of their activities off campus. *Id.* at 1321:5-11. That same environment "dissuades members from joining the March For Our Lives organization because of the perceived harm that they could experience as a result of [] violent and hateful speech." Gokhale Tr. at 38:8-14 (ECF No. 241-2 at 40); *see also id.* at 38:24-39:7 (explaining that "the rhetoric around passing this law from the DeSantis Administration and the Department of Education" contributes to students' hesitation to join MFOL) (ECF No. 241-2 at 40-41).

Second, the Survey Provisions have also caused MFOL to have to divert significant resources in an attempt to quell the concerns among its members and would-be members about the Survey. In particular, "Florida student organizers[] . . . have spent their time educating their peers about the fears that this law has placed

upon their organizing and the implications of what the survey means for . . . these chapters on these campuses." Gokhale Tr. at 78:3-7 (ECF No. 241-2 at 80). Moreover, "when chapters start to move off campus," as MFOL's chapters have in direct response to the environment created by the challenged provisions, as discussed above, "it creates a financial burden on the [national] organization," because those chapters lose access to school funding and also need to seek MFOL's assistance with transportation and venue costs. Trial Tr. at 1340:4-1341:2 (Ackbar). That leaves less money for MFOL to support its chapters outside Florida. *Id.*

2. Traceability and Redressability

For the same reasons that the above-listed Plaintiffs have demonstrated traceability and redressability for their speech claim against the Survey Provisions, they have satisfied these requirements as to their associational claim. *See supra* 121-126.

C. Plaintiffs have standing for their Fourteenth Amendment void-for-vagueness claim (Count IV).

Plaintiffs bring a void-for-vagueness challenge to the Anti-Shielding Provisions under the Fourteenth Amendment. To successfully bring such a challenge, a plaintiff must show that they "seriously wish[] to speak," that "such speech would arguably be affected by the challenged prohibition, but the rules are at least arguably vague as they apply to [them]," and "there is at least a minimal probability that the rules will be enforced if they are violated." *Pernell*, 2022 WL

16985720, at *32 (citing *Harrell*, 608 F.3d at 1254). As detailed below, the record amply establishes this for each Plaintiff that brings this claim. Moreover, in addition to the specific testimony from each of these Plaintiffs, the facts recounted above at *supra* 17-19, show that many other people—including, at times, members of the Legislature, FIRE, lawyers who specialize in Higher Education at Defendant's counsel's law firm, and even Defendants themselves—have indicated that it is possible that this language covers Plaintiffs' conduct (with extensive disagreement as to the extent it covers it, what it requires, or when the Provisions may be violated). That, in and of itself, is strong evidence supporting Plaintiffs' standing to challenge those Provisions as void for vagueness. *See Speech First, Inc.*, 32 F.4th at 1121-22 ("If [the Defendant University's] own attorney—as one intimately familiar with the University's speech policies—can't tell whether a particular statement would violate the policy, it seems eminently fair to conclude that the school's students can't either.") Because Defendants have enforcement and implementation authority over the Anti-Shielding Provisions, Plaintiffs' injuries are directly traceable to Defendants, and enjoining Defendants' enforcement and implementation of the Anti-Shielding Provisions would provide meaningful redress to Plaintiffs.

1. Injury-in-Fact

The injury analysis for a Fourteenth Amendment void-for-vagueness claim is comparable to that applicable to the First Amendment claims because, for both, "the

claimed injury is self-censorship or speaking with the risk of discipline." *Pernell*, 2022 WL 16985720, at *32. The only additional requirement is that the challenged prohibition be arguably vague as it applies to the plaintiff. *See Harrell*, 608 F.3d at 1254 (cleaned up). A plaintiff need only establish that "it is at least arguable that the [challenged law's] alleged vagueness exerts a chilling effect on" the plaintiffs' speech. *Id.* at 1257. Each Plaintiff discussed below testified as to how the Anti-Shielding Provisions are vague as applied to them, meeting the injury-in-fact requirement for their void-for-vagueness claim.

United Faculty of Florida: Dr. Gothard testified that UFF's members have no assurance that stopping disruptive class comments would not violate the Anti-Shielding Provisions, exposing the faculty member to the risk of a complaint under HB 233 being filed against their institution. Trial Tr. at 596:7-10. It is "very difficult for a faculty member to define what does count as unwelcome[], disagreeable, or uncomfortable. It sounds like it would also cover ideas that are off topic or ideas that other students don't want their time wasted on." *Id*. at 595:23-596:3. The unclear language invites anticipatory obedience, whereby institutions and faculty "take extra action to follow up with what they know to be the intent of that law because they're having trouble navigating the sort of vague text of the law as it is written." *Id*. at 612:17-24.

Testimony from UFF members further corroborated Dr. Gothard's testimony.

For example, UFF member Dr. Morse does not have a clear understanding of the Anti-Shielding Provisions' mandate, and as a result testified that they must rely on their "guesses based on the text of the law" coupled with the impressions that they have "gleaned from . . . comments made by [HB 233's] proponents." Trial Tr. at 1460:10-14. They do not know whether correcting a student who misgenders a classmate—either intentionally or unintentionally—would amount to "shielding." *Id*. at 1460:15-18. As the Director for the FAU Center for Women, Gender, and Sexuality Studies, Dr. Morse has also found it to be "very challenging" to provide guidance to fellow faculty and graduate teaching assistants on how to comply with HB 233 and other laws. *Id.* at 1464:2-8. In addition, UFF has standing to maintain this claim on behalf of its other members, including the individual Faculty Plaintiffs discussed below who gave similar testimony at trial.

Dr. Barry Edwards: Dr. Edwards testified that he "find[s] [the Anti-Shielding Provisions] fairly confusing and, frankly, [is] not certain what conduct is prohibited and what conduct is encouraged or required[.]" Trial Tr. at 952:16-953:4. He sought guidance from UCF about the Provisions and received no response. *Id.* at 953:5-15. Due to the ambiguity and potentially extensive breadth of the Provisions, he is "afraid to introduce topics and material that would provoke . . . a rigorous exchange of ideas. Because if that rigorous exchange of ideas becomes something

that's unwelcomed and offensive and hurtful, the law says I can't try to protect students or shield any student from that." *Id*. at 960:1-961:9.

Dr. Jack Fiorto: Dr. Fiorito understands the Anti-Shielding Provisions to mean that, "[i]f there is a point of view that I should be covering but for some reason I choose not to because I'm afraid of making them uncomfortable or guilty, that would be shielding." Trial Tr. at 1282:2-6. He does not know in advance what ideas or opinions make his students uncomfortable. *Id.* at 1282:7-9. He does not know if he can accommodate students who have discomfort with aspects of the curriculum, like graphic imagery. *Id*. at 1283:1-8.

Dr. Robin Goodman: Dr. Goodman finds the Anti-Shielding Provisions "very confusing, so even if I wanted to follow the law, I wouldn't know what to do." Trial Tr. at 1243:19-20. For example, she does not know if "teaching Sigmund Freud" in her classes could be construed as shielding her students from "a whole bunch of anti-Freudian thought." *Id.* at 1243:21-25. She finds the language of the law "so vague and confusing to me that I wouldn't even know how to follow the law." *Id.* at 1244:1-5.

Dr. William Link: Dr. Link finds it impossible to know if he should spend "class time on certain topics," particularly topics that "don't relate really to the course or aren't historically substantiated." Trial Tr. at 502:19-503:19.

Dr. David Price: Dr. Price does not know "unless a student tells [him], what makes them uncomfortable, unwelcome, or that they find offensive or disagreeable." Trial Tr. at 760:9-11. He finds compliance with the law to be impossible, *id.* at 765:7-8 ("I see no out in the phrasing of the law"), but he has attempted to follow the law by erring on the side of caution and avoided teaching certain topics altogether, *id.* at 765:10-19; *see also id.* at 764:19-765:8 (explaining that complying with the law is "a real quandary" and that he "suppose[s] that someoen could say [his attempt to comply *itself*] violates the [Anti-Shielding Provisions]").

2. Traceability and Redressability

For the same reasons the above-listed Plaintiffs have demonstrated traceability and redressability for their First Amendment claims against the Anti-Shielding Provisions, they have also satisfied these requirements as to their vagueness claim. *See supra* 121-126.

IV. PLAINTIFFS ARE ENTITLED TO JUDGMENT ON EACH OF THEIR CLAIMS.

Plaintiffs bring three distinct claims: they challenge HB 233's challenged provisions as violating their First Amendment free speech rights; they challenge the Survey Provisions as violating their First Amendment associational rights; and they challenge the Anti-Shielding Provisions as void-for-vagueness in violation of their Fourteenth Amendment due process rights. The Court should find that they prevail on and enter judgment in their favor on all three.

A. HB 233's challenged provisions violate the First Amendment because they abridge the right to free speech (Counts I & III).

The challenged provisions infringe Plaintiffs' free speech rights both by chilling that speech (Count I) and compelling Plaintiffs to engage in speech they otherwise would not (Count III). *See supra* note 34. When considering whether a state law violates the Constitution's clear admonition that neither Congress nor the state "shall make no law . . . abridging the freedom of speech," U.S. Const., Am. I, there are (as Raymond Carver would say), many paths to the waterfall. In this case, all paths lead to invalidation of the challenged provisions.

1. Under any applicable standard of review, the challenged provisions unconstitutionally infringe on Plaintiffs' First Amendment speech rights.

Plaintiffs argue that the challenged provisions violate the First Amendment's free speech protections under several different alternative theories.

First, Plaintiffs argue that the challenged provisions are *viewpoint*-based restrictions on speech. The Eleventh Circuit has indicated that viewpoint-discrimination is *per se* unconstitutional. *See Speech First*, 32 F.4th at 1126 (quoting *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1885 (2018) ("'[R]estrictions . . . based on viewpoint are prohibited,' seemingly as a *per se* matter.") & citing *Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019)). However, some courts (including this one), noting that the Supreme Court has not yet *expressly* adopted a *per se* rule have continued to review viewpoint-based regulations under strict scrutiny. *See*

Honeyfund.com, 2022 WL 3486962 at *10 n.8. Under strict scrutiny, regulations "are *presumptively* unconstitutional" and "may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* at *10 (emphasis added) (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)).

In the alternative, Plaintiffs argue that the challenged provisions are content-based speech regulations, which are invalid unless they can satisfy strict scrutiny—that is, the regulation is (1) justified by a compelling state interest, and (2) narrowly tailored to advance that interest. *Reed*, 576 U.S. at 163.

Again, *in the alternative*, if the Court finds that some or all of the challenged provisions are content-neutral regulations that implicate Plaintiffs' speech rights, the provisions can only survive if they satisfy intermediate scrutiny—that is, they must be "narrowly drawn to further a substantial governmental interest . . . unrelated to the suppression of free speech." *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 11 F.4th 1266, 1291 (11th Cir. 2021).

Finally, when speech restrictions operate in an academic setting, and specifically when the state acts pursuant to its authority to prescribe curriculum or course content, *see Pernell*, 2022 WL 16985720, at *7, some of these tests may be modified. *See, e.g.*, *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Bishop v. Aronov*, 926 F.2d 1066, 1074 (11th Cir. 1991); *Pernell*, 2022 WL 16985720, at

*7.[43]

Under any of these potentially available paths, each discussed in turn below below and depicted in an Addendum (Exhibit 2), the result is the same: the challenged provisions cannot survive.

2. The challenged provisions are unconstitutional viewpoint- and content-based infringements on speech.

Viewpoint-based discrimination is the most "egregious" and "blatant" form of speech regulation. *Rosenberger*, 515 U.S. at 829. The challenged provisions are

[43] In Plaintiffs' pre-trial brief, they laid out how the Court would analyze the challenged provisions if it applied the *Bishop* test. ECF No. 207 at 10-28. However, the Court need not apply *Bishop*'s balancing test here, for two reasons. First, although *Bishop* uses some confusing language, at times referring to the plaintiffs' interventions in the classroom as his religious "viewpoint," elsewhere the opinion makes clear that the case involved a *content*-based restriction on speech. *Bishop*, 926 F.2d at 1076 (explaining that the professor subject to the speech restriction and defendant university disagreed about "a matter of content in the courses he teaches"—not about the viewpoint expressed); *id.* at 1077 (disagreeing that university was excluding a particular religious viewpoint: "the University seeks only to extricate itself from *any* religious influence or instruction in its secular courses" (emphasis added)). Nothing in *Bishop* or *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988)—*Bishop*'s "polestar," 926 F.2d at 1074—changed anything about the analysis for *viewpoint* discrimination claims. Second, in this case this, the challenged provisions are not squarely within the state's right to exercise control over curriculum. *See Searcey v. Harris*, 888 F.2d 1314, 1319 n.7 (11th Cir. 1989) (explaining *Hazelwood* emphasized "control over curricular expression" to distinguish itself from other First Amendment cases and that "there is no indication that" it "intended to drastically rewrite First Amendment law to allow a school official to discriminate based on a speaker's views"); *see id.* at 13254-25 ("The prohibition against viewpoint discrimination is firmly embedded in first amendment analysis."). Nevertheless, as discussed further *infra* 177-180, even if the Court were to apply *Bishop*'s more forgiving test, the challenged provisions still cannot survive.

viewpoint-based for five independent reasons: (1) on their face, they discriminate in favor of "uncomfortable, unwelcome, disagreeable, [and] offensive" viewpoints; (2) they cannot be justified without reference to the viewpoint of the speech that is regulated; (3) as established by direct and circumstantial evidence, they were intended to discriminate against viewpoints with which the government disagrees; (4) they alter the viewpoint of faculty speech; and (5) they are viewpoint discriminatory as applied by Defendants. The Court need only find that the evidence supports one of these theories to conclude that the challenged provisions are viewpoint based. Alternatively, to the extent this Court finds that any or all of the challenged provisions are not viewpoint-based, but that they "target speech based on its communicative content" under any of the same theories outlined above, they are *content*-based and invalid on those grounds. *See Reed*, 576 U.S. at 163.[44] Finally, if the Court finds that any of the challenged provisions was enacted pursuant to the

[44] Because "[v]iewpoint discrimination is . . . an egregious form of content discrimination," *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995), any viewpoint-based law is also necessarily content-based because "[m]uch like all toads are frogs but not all frogs are toads, all viewpoint-based laws are content-based, but not all content-based laws are viewpoint-based." *Honeyfund.com*, 2022 WL 3486962, at *10 n.9. Because a finding that a provision is either content- or viewpoint-based is likely to lead this Court to apply the same level of scrutiny (strict), Plaintiffs address both their viewpoint- and content-based claims in one section. Each subsection will lead with their viewpoint based arguments, and then follow with the alternative content-based arguments.

state's authority over content of curriculum, *Bishop*'s balancing test would apply. *See supra* note 43. The challenged provisions fail all applicable tests.

a. The challenged provisions are impermissibly viewpoint- and content-based on their face.

On their face, challenged provisions are viewpoint-based for three reasons. First, the Anti-Shielding Provisions (which operate in conjunction with and are enforced by the Survey and Recording Provisions, as discussed *supra* 5-30) facially privilege speech that may make others "uncomfortable, unwelcome, disagreeable, or offensive" over all other speech.[45] Fla. Stat. § 1004.097(2)(f); *see Reed*, 576 U.S. at 163 (law may be viewpoint- or content-based on its face if it "draws distinctions based on the message a speaker conveys"). As the Supreme Court has found, "[g]iving offense is a viewpoint." *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017); *see also Iancu*, 139 S. Ct. at 2299 (finding law that discriminated against "immoral" and "scandalous" speech "viewpoint- based"); *Fort Lauderdale Food Not Bombs*, 11

[45] Although Plaintiffs' first and second facial arguments train their attention on the text of the Anti-Shielding Provisions, they apply equally to all three challenged provisions because the three operate together as a "scheme of speech regulation." *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1264 n. 13, 1268 (11th Cir. 2005) (treating entire code as content-based and striking down under strict scrutiny despite that only some of its parts were content-based). This is distinct from the situation in *NetChoice*, where several different restrictions on social media moderation were analyzed separately, because none of those restrictions operated as surveillance and oversight mechanisms for other restrictions. *See NetChoice, LLC v. AG, Fla.,* 34 F.4th 1196, 1226 (11th Cir. 2022).

F.4th at 1294 (similar). Thus, under this line of cases alone, the Anti-Shielding Provisions are, on their face, impermissibly viewpoint-based, as "[t]he statute, on its face, distinguishes between two opposed sets of ideas: . . . those inducing societal nods of approval and those provoking offense and condemnation." *Iancu*, 139 S. Ct. at 2300.

Second, just as the First Amendment prohibits discriminating *against* offensive speech, it also prohibits *prioritizing* it over other speech. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) (explaining a law may run afoul of the Constitution based on "agreement or disagreement with the message" certain speech "conveys"); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992) (holding government may not show "hostility—or favoritism—towards" expression). HB 233 does precisely this, *mandating* that students, faculty, and staff *must* be exposed to the speech it privileges. Moreover, the Anti-Shielding Provisions' "careful limitation to only a subset of derogatory statements . . . raises the possibility that official suppression of ideas is afoot." *Grimmett v. Freeman*, No. 22-1844, 2023 WL 1807471, at *5 (4th Cir. Feb. 8, 2023) (finding statute facially unconstitutional) (cleaned up).

Third, all three challenged provisions include text that targets specific speakers—faculty members—itself an indicator of viewpoint discrimination. For example, in *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011), the Court found that

because the challenged law there "prohibits pharmaceutical manufacturers from using [prescriber-identifying] information for marketing," it "disfavors specific speakers, namely pharmaceutical manufacturers" and thus "on its face burdens disfavored speech by disfavored speakers." *Id.* at 564. The Court found that the "speaker-based" law also provided evidence that the "impose[d] burdens . . . are aimed at a particular viewpoint." *Id.* at 565.

Here, the Anti-Shielding Provisions add "*faculty* lectures" to "expressive activities" to which the Anti-Shielding Provisions expressly apply. Fla. Stat. § 1004.097(3)(a) (emphasis added)). The Survey Provisions evaluate whether "competing ideas and perspectives are presented . . . in the classroom," again implicating specific types of speakers who present ideas and perspectives in the classroom. *Id*. §§ 1001.03(19)), 1001.706(13)(a)(1). And, indeed, the Defendants clearly understood the Survey Provisions to serve as an enforcement tool for the facially viewpoint-based Anti-Shielding Provisions, as evidenced by the fact that they asked specific questions about shielding in the faculty and staff survey issued in 2022. *See supra* 24. The Recording Provision is similarly an enforcement mechanism for the facially viewpoint-based Anti-Shielding Provisions, *see supra* 28-29, but in addition, its text carves out an entirely unique exception to Florida's otherwise strict consent rule for recordings to permit students to record "class lectures" without consent, treating the only speakers who teach "class lectures"—

faculty—differently than everyone else in Florida who is entitled to two-party consent before they may be recorded. *Id.* § 1004.097(3)(g). The challenged provisions' facial targeting of faculty is further proof that they are viewpoint-based. *See Sorrell*, 564 U.S. at 564-65.

In the alternative, this Court may consider the same arguments above to find that any or all of the challenged provisions do not go quite so far as to facially discriminate based on viewpoint, but do still "target speech based on its communicative content," such that they are content- (rather than viewpoint-) based restrictions on speech. *Reed*, 576 U.S. at 163. Like the category of signs at issue in *Reed*, on their face, the challenged provisions single out for special treatment certain categories of expression. The Survey Provisions, for example, do not seek to obtain information broadly about free expression on campus, but *only* about that involving a very specific category of communicative content—that involving "the exposure of students, faculty, and staff to, and the encouragement of their exploration of, a variety of *ideological and political perspectives*," Fla. Stat. §§ 1001.03(19)(a)(1), 1001.706(13)(a)(1) (emphasis added). The Recording Provision, too, applies only to a specific category of communicative content—that which is conveyed in "class lectures." *Id.* § 1004.097(3)(g). Finally, as already discussed, the Anti-Shielding Provisions, too, are specially concerned only with expression that communicates a certain type of content—that which a listener may find uncomfortable, unwelcome,

disagreeable, or offensive." *See, e.g.,* Fla. Stat. § 1004.097(2)(f). As a result, on the same bases detailed above, the Court may find the challenged provisions to be content-based on their face.

b. The challenged provisions are impermissibly viewpoint- and content-based because they can be justified only based on the viewpoint or content of the speech they regulate.

HB 233 is independently a viewpoint-based restriction because it can only be justified by reference to the viewpoint of the regulated speech. *See Boos v. Barry*, 485 U.S. 312, 320-21 (1988); *see also Reed*, 576 U.S. at 164 (explaining even a facially neutral law can be content-based if it "cannot be justified without reference to the content of the regulated speech"). As both the history of the challenged provisions and Defendants' own arguments in this case have proved, they cannot be justified without reference to the speech that they regulate.

First, as reflected by the legislative record, the sponsors of HB 233 justified the challenged provisions repeatedly based on purported concerns that *conservative* students were self-censoring in class. JX 6 at 13:13-18; JX 7 at 4:9-8:19. Defendants likewise cited "speaker disinvitations and shout-downs" in their motion for summary judgment. ECF No. 165 at 46. Beyond those statements, as already discussed, the record is replete with explanations based on concerns about the alleged expression or suppression of certain viewpoints. *See supra* 48-54.

And, repeatedly, even as they attempt to avoid expressly referencing the

favored and disfavored viewpoints that clearly motivated the Legislature and other proponents of the challenged provisions, Defendants have proved unable to explain what interests the challenged provisions serve—including in particular the Anti-Shielding Provisions—without reference to the very viewpoints that it elevates for special protection. *See* ECF No. 166-69, at 17-18 (Defendants asserting that "[t]he Anti-Shielding Provisions [] serve the State's interest by preventing censorship or marginalization of expressive activities that may involve ideas and opinions that some may find *uncomfortable, unwelcome, disagreeable, or offensive*, by discouraging self-censorship, . . . [and] ensuring university students are confronted with *difficult ideas* that foster their growth and development") (emphasis added); *see also* ECF No. 166-70, at 17-18 (same).

If there were any doubt remaining that the challenged provisions are, in reality, "focuse[d] *only* on the [viewpoint] of the [targeted] speech and the direct impact that speech has on its listeners," *Boos*, 485 U.S. at 321 (assessing content-based restriction), the Survey and Recording Provisions dispel it: their very function is to surveil the viewpoint and impact of speech targeted by the Anti-Shielding Provisions. *See supra* 5-30. The same is true of evidence demonstrating that the Legislature hoped to "temper" the conversation, JX 10 at 22:20-23:5 (Senator Broxson comparing Recording Provision to Florida's "sunshine" law, which he acknowledged "does temper our conversation" within the Legislature, "mak[ing] us

more civil, more considerate"), or otherwise put their thumb on the scale—even just a little bit—in favor of speech that they preferred, in an environment that they perceive to be overrun by liberal professors, to whom they fear they are losing a war to persuade young minds, *see, e.g.*, JX 8 at 34:15-35:17 (Representative Roach expressing need to "push back hard against . . . this belief that our college students are somehow fragile and we need to protect them from views that they don't agree with"). "But the concept that government may restrict the speech of some elements of our society . . . to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

In the alternative, even if the Court were to determine that some or all of the challenged provisions were not viewpoint-based, the state's listener-based justification for the provisions establishes that, at a minimum, they are content-based: binding case law holds that "a justification related to listeners' reaction to speech" is not "content-neutral." *Fort Lauderdale Food Not Bombs*, 11 F.4th at 1294 (cleaned up) (quoting *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992)); *see also Boos*, 485 U.S. at 321 ("[T]arget[ing] the direct impact of a particular category of speech . . . leads readily to the conclusion that the [challenged law] is content-based.").

c. The challenged provisions are viewpoint or content-based because they were intentionally enacted for the purpose of discriminating against or in favor of specific speech communicating certain viewpoints or content.

Under the First Amendment, a regulation of speech is viewpoint-based if the law was adopted with the purpose of discriminating between certain viewpoints. *See Reed*, 576 U.S. at 163-64 (holding laws are subject to strict scrutiny if they "were adopted by the government because of disagreement with the message the speech conveys") (cleaned up). The same analysis applies to deliberate attempts to impede disfavored viewpoints *or* show favoritism toward approved viewpoints. *R.A.V.*, 505 U.S. at 386 (holding government may not show "hostility—or favoritism—towards" different viewpoints); *see also Otto v. City of Boca Raton, Fla.*, 981 F.3d 854, 862 (11th Cir. 2020) ("Forbidding the government from choosing favored and disfavored messages is at the core of the First Amendment's free-speech guarantee."). In discriminatory purpose cases, it is enough that a law was enacted "at least in part because of, not merely in spite of" its discriminatory effects. *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979) (cleaned up).

This discriminatory intent doctrine applies with equal force to the educational setting because the First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom." *Keyishian v. Bd. Of Regents of Univ. of State of N. Y.*, 385 U.S. 589, 603 (1967). Indeed, "the dangers of viewpoint discrimination are *heightened* in the university setting." *Gay Lesbian Bisexual Alliance v. Pryor,* 110

F.3d 1543, 1550 (11th Cir. 1997) (emphasis in original). Consistent with viewpoint discrimination doctrine more broadly, the Eleventh Circuit has repeatedly considered whether the government was "motivated by its disagreement with" certain views in determining whether a regulation was viewpoint-based. *Searcey v. Harris*, 888 F.2d 1314, 1325 (11th Cir. 1989) (upholding district court's finding of intentional viewpoint discrimination); *see also Virgil v. Sch. Bd. of Columbia Cty., Fla.*, 862 F.2d 1517, 1522 n.6 (11th Cir. 1989) (recognizing that "Courts have not hesitated to look beyond the stated reasons for school board action" to identify improper motivation); *compare with Am. C.L. Union of Fla., Inc. v. Miami-Dade Cty. Sch. Bd.*, 557 F.3d 1177, 1225 (11th Cir. 2009) (upholding school board's decision to remove book after determining there was no discriminatory purpose motivating that decision).

Here, the record overwhelmingly supports finding that the challenged provisions were enacted at least in part (indeed, likely entirely) because of discriminatory intent. In conducting this analysis, this Court must conduct "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available to determine "whether invidious discriminatory purpose was a motivating factor." *Arlington Heights*, 429 U.S. at 564. Indeed, courts have long recognized that state actors "seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate." *Smith v. Town of*

Clarkton, N.C., 682 F.2d 1055, 1064 (4th Cir. 1982). As a result, the Eleventh Circuit has "long recognized that discriminatory intent may be found to exist even when the record contains no direct evidence." *Williams v. City of Dothan, Ala.*, 745 F.2d 1406, 1414 (11th Cir. 1984) (noting the Fifth Circuit's long recognition of this principle).

That said, this is the exceptional case where the record shows repeated, explicit statements evincing an intent to discriminate against views with which those in power disagree and to favor their own ideology. The most important actors—the chief sponsors in each legislative chamber and Governor DeSantis—were all remarkably transparent about their motivations. Senator Rodrigues was concerned that conservatives were self-censoring, *supra* 49, and co-sponsor Representative Sabatini felt that HB 233 could provide the "tools" necessary to help the Legislature "defund[ ] the radical institutions on these campuses," PX 231 at 7:19-24. Governor DeSantis felt that universities had become "hotbeds" of liberal ideology, something the state is not "going to be supporting going forward," *supra* 50-52, and Representative Roach understood that HB 233 would help "stem the tide" of that disfavored ideology, *supra* 50. These statements echo what Republican lawmakers in Florida have expressed for years, and none of HB 233's proponents spoke up to say otherwise. Trial Tr. at 1036:4-22 (Smith).

Given that record, the Court need not rely on circumstantial evidence to find discriminatory intent. Nevertheless, if the Court proceeds to analyze the

circumstances surrounding the enactment of HB 233, including the *Arlington Heights* factors, it becomes clear that "when all of the evidence is viewed together, a coherent picture emerges." *League of Women Voters of Fla., Inc. v. Lee*, 595 F. Supp. 3d 1042, 1076 (N.D. Fla. 2022). Simply put, HB 233 was intended to chill liberal and promote conservative viewpoints at Florida's public colleges and universities.

HB 233's challenged provisions are the culmination of a long history of partisan attacks on higher education based on the fear that these institutions are overrun by liberals who are biased against conservatives, which has been reborne in recent years as a modern "wedge issue" for the Republican Party. Trial Tr. at 88:6-89:3 (Lichtman). The construction and operation of the challenged provisions echo the broad intrusions and secretive surveillance techniques used by the Johns Committee, and the provisions are built on the same justification that has long animated these types of attacks: namely, the view that, because the state is *paying* for it, they can regulate ideology. *See supra* 50-52, 26-27. But like every one of these eerily similar attacks that have been mounted on liberal faculty over the last 80 years, there is no evidence to support the claims of HB 233's proponents. Trial Tr. at 449:17-25 (Bérubé). Nor is there any evidence of any type of crisis of free speech on Florida's campuses (except, of course, the very real crisis that the challenged provisions themselves have created, as evidenced by the days of testimony the Court

heard about their devastating effects). Instead, as with similar earlier attacks, Florida's Republican legislators relied entirely on unverifiable and non-specific "anecdotal" stories, *supra* 43-45, as a pretext to increase surveillance and oversight of speech.[46] Indeed, in the face of the broad success of Florida's public colleges and universities, prior proposals to intrude with a viewpoint survey had been consistently rejected. *See supra* 37-38. HB 233 was finally enacted, not because of some precipitating incident or evidence of free speech crisis, but because the political winds finally allowed this partisan attack on free speech rights. *See supra* 39-42.

The discriminatory chilling effects of HB 233 were not only foreseeable (and intended) but were expressly raised to decision-makers while the bill was under consideration. Legislators were warned by other legislators, students, faculty,

[46] In many areas of policy, state legislatures may permissibly pass laws based on anecdote or even conjecture, but when those laws implicate free speech rights, the First Amendment requires more. To wit, even when a law is content-neutral, legislation that implicates free speech rights may not be justified simply because it is "rationally" related to a "legitimate" government interest. *See City of Los Angeles v. Preferred Commc'ns, Inc.*, 476 U.S. 488, 496 (1986) ("Where a law is subjected to a colorable First Amendment challenge, the rule of rationality which will sustain legislation against other constitutional challenges typically does not have the same controlling force."); *see also Nat'l Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 736 (1st Cir. 1995) ("[A]ll First Amendment scrutiny is more demanding than the 'rational basis' standard that is often used to gauge the constitutionality of economic regulations."). At the very least, the government must show that the restriction was "narrowly drawn to further a substantial governmental interest" that is "unrelated to the suppression of free speech." *Fort Lauderdale Food Not Bombs,* 11 F.4th at 1291.

agency analyses, and advocacy groups that HB 233 would harm free expression, not help it. *See supra* 56-60. Proponents of HB 233 were given specific, suggested amendments—from both colleagues and FIRE, an advocacy group whose mission aligns with HB 233's purported justification to encourage and protect free speech rights—that would have helped ameliorate concerns about the challenged provisions' chilling effects. *See supra* 58-59. All of these less discriminatory alternatives were ignored—to say nothing of the efforts already being undertaken at Florida's colleges and universities to preserve their culture of free and open expression. *See supra* 61-62. That the Legislature "rejected without explanation" the advice of knowledgeable stakeholders suggests a "possibility that [Defendants' decisions] were highly irregular and ad hoc—the antithesis of those procedures that might tend to allay suspicions regarding [Defendants'] motivations." *Bd. of Education, Island Trees Union Free School Disrict No. 26 v. Pico*, 457 U.S. 853, 872-75 (1982) (finding plaintiffs raised triable question as to whether board's removal of books from high school libraries was motivated by content or viewpoint based discrimination including, *inter alia*, the board's rejection of the views of literary experts, librarians and teachers within the school system, the Superintendent of Schools, and the guidance of respected publications rating books for high school students).

Defendants maintain that the challenged provisions were enacted for entirely

proper reasons, but a necessary part of the discriminatory intent inquiry is assessing whether those reasons are pretextual. *See* Joint Pretrial Stipulation, ECF No. 210 at 7-8. Not only does the factual record rebut these concerns, but their implausibility only serves as *further* evidence of improper intent. When a defendant's explanation for their action is "unworthy of credence," this is "one form of circumstantial evidence that is probative of intentional discrimination, *and it may be quite persuasive.*" *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000) (emphasis added).

Interrogating the non-discriminatory justifications proffered for HB 233 requires an assessment of both contemporaneous and subsequent events. As the Court pointed out, there are many "legislative intent" cases that counsel against considering post-enactment statements. *See, e.g.*, *CSX Corp. v. United States*, 18 F.4th 672, 684 (11th Cir. 2021); *see* Trial Tr. at 250:7-255:4 (Court's discussion). However, this body of law relates *exclusively* to the exercise of statutory interpretation—whereby courts give legal effect to the *text* of a law. *See* C*SX Corp.*, 18 F.4th at 684 ("[P]ost-enactment legislative history . . . is not a legitimate tool of *statutory interpretation*.") (cleaned up) (emphasis added). Where the sole question is the *meaning* of statutory terms, it is appropriate to narrow the Court's inquiry to pre-enactment statements because post-enactment statements "by definition . . . could have no effect" on the vote. *Pitch v. United States*, 953 F.3d 1226, 1240 (11th

Cir. 2020) (citing *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011)).

In discriminatory intent cases, post-enactment statements and actions are relevant, not because they *causally* influence the challenged action, but because they *shed light on the credibility of competing narratives*—whether the action was taken for discriminatory or legitimate reasons. As the Court recognized, when the same actors make statements (or take additional discriminatory actions) that are *consistent* with the contemporaneous discriminatory actions, it "corroborates" the inference that HB 233 was motivated by discriminatory intent. Trial Tr. at 65:13-66:12 (Court), 254:9-21 (Lichtman). This inference "is based upon familiar tort principles that inferences may be drawn from evidence of similar transactions and happenings." *Ammons v. Dade City, Fla.*, 594 F. Supp. 1274, 1303 (M.D. Fla. 1984), *aff'd*, 783 F.2d 982 (11th Cir. 1986).

On the flip side, when the same actors take actions that are *inconsistent* with the proffered non-discriminatory justifications for HB 233, it evidences that those justifications were pretextual. For example, in a challenge to a 1991 statute, the U.S. Supreme Court recently explained that legislation in 2015 "may diminish the credibility of the government's rationale for restricting speech" if it is inconsistent with that proffered interest. *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2348 (2020) (citing *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994)). As the record demonstrates, the Legislature and Governor have been remarkably consistent

in advocating and pursuing viewpoint discrimination.

For example, while it is true that, at times, proponents of HB 233 suggested that they did not have preconceptions about the viewpoints of the faculty or the results of the survey, *see, e.g.*, JX 8 at 17:5-23, the record is replete with evidence that demonstrates exactly the opposite. For years, Republicans in the Florida Legislature have expressed that faculty were overwhelmingly liberal and that this was "a problem to be solved." Trial Tr. at 1034:14-1035:3 (Smith). These concerns about liberal bias permeated the viewpoint survey proposals that preceded HB 233. *See supra* 37-38. Then, when HB 233 was first taken up, its chief Senate sponsor highlighted all the ways that he claimed similar surveys had *found liberal bias*. *See supra* 49-50. Indeed, the wealth of direct evidence discussed above illustrates that all of the key actors driving HB 233's enactment—from the bill's chief sponsors, to cosponsors, to the Governor—had already determined that campuses were dominated by liberals and were suppressing conservative views. *See supra* 49-52. This was expressed most directly by HB 233's cosponsor, Representative Sabatini: "We know where these professors are. They're radical left. We know what [the survey is] going to tell us, but once we have that data, then we can make our next step." PX 231 at 8:12-15. But it was repeatedly echoed by other important legislators and the Governor as well, both while the challenged provisions were being considered by the Legislature, when it was signed, and after. *See* JX 6 at 379:8-105-

13 (Rep. Roach stating: "when you value people that look different but think the same, that's not diversity. That's conformity."); PX 354 (Rep. Roach stating HB 233 will "stem the tide of Marxist indoctrination on university campuses."); PX 222 at 7:19-21 (Gov. DeSantis describing universities as "hotbeds for stale ideology."). This sentiment was even shared by the leaders of both chambers: Senate President Simpson has referred to universities as "socialism factories," and House Speaker Sprowls has called academics as a "roving band of Twitter Robespierre who scours social media looking to ruin the careers and livelihoods of people." Trial Tr. at 333:22-25.

These widely held preconceptions inform not only the intent behind the Survey Provisions, but also the Anti-Shielding and Recording Provisions. For example, when determining which ideas are entitled to special protections under the Anti-Shielding Provisions—i.e., ideas that some may find "uncomfortable, unwelcome, disagreeable, or offensive," Fla. Stat. § 1004.097(2)(f)—one must ask, offensive or uncomfortable to whom? The answer is liberal students and faculty. As former Representative Smith testified, in the context of "how Republican lawmakers were justifying the need to pass this provision, what it really means is that universities, faculty, and staff can't shield students from *Republican* ideas." Trial Tr.

at 1063:12-24 (Smith).[47] Similarly, when the Recording Provision only applies by its terms to class lectures and only directs that extra scrutiny towards class lecturers (unique among *all* Floridians, with everyone else retaining confidence that recordings of them may only be done with their consent), it becomes clear exactly what viewpoints the Legislature wanted to subject to that extra scrutiny.

When proponents of HB 233 lacked any evidence to support their concerns, they portrayed HB 233 as a good faith effort to gather more information. *See, e.g.*, PX 205 at 8:22-9:8. This incredulous characterization is also not borne out by the record. Already, the widespread preconceptions held by Republican lawmakers suggest that the Survey Provision was not a search for answers, but a search for ammunition. Trial Tr. at 106:1-20 (Lichtman). Even taking the Survey Provisions at face value, they were not properly designed to find helpful answers. HB 233 expressly did not "lay out in the bill what their process would be" for developing the survey. JX 15 at 31:5-7. Moreover, the minimalist statutory requirements that were included—that it be "objective, nonpartisan, and statistically valid," Fla. Stat. § 1001.03(19)(b)—were nonspecific and toothless. Trial Tr. at 1041:1-1045:10

[47] This has been proven time and time again by the speech suppressing legislation that the same legislative actors have enacted since, as well as the aggressive attacks on disfavored viewpoints in higher education that have followed, including recent announcements by the Legislature and Governor that DEI and gender studies will be defunded and excised from Florida higher education. *See supra* 53-54.

(Smith). And, predictably, that unrestricted process resulted in a rushed, deeply flawed, and facially biased survey largely written by partisan actors. *See supra* 168-172.

Over the several legislative sessions where a viewpoint diversity survey was proposed, the language remained essentially unchanged—despite the numerous concerns raised. For example, when Senator Rodrigues was offered the opportunity to include a requirement that the survey be anonymous, he refused. JX 15 at 7:1-18. This is particularly notable because, when introducing HB 233, he said "that is why an anonymous survey is so important . . . if students are asked via an anonymous survey, they are much more likely to give a truthful and accurate answer." JX 7 at 11:14-19. If the Survey Provisions were a genuine attempt to solicit the views of students, and its proponents recognized the importance of anonymity for obtaining those views, it is inconceivable that the law would not require an anonymous survey—either from the outset or once it had been suggested by a colleague.

The record also demonstrates that HB 233's enactors had no interest in waiting for the survey results, nor were they open to the possibility that those results would show what was already clear—that Florida's public colleges and universities were broadly succeeding and suffered no issues regarding bias or suppression of speech. Trial Tr. at 104:18-25 (Lichtman); *see also id.* at 1050:2-1051:10 (Smith). For example, when proponents of HB 233 suggested that they are not asking "for any

policy prescription here," JX 8 32:12-21, that was facially disingenuous: HB 233 already asks legislators to make a policy choice to implement the draconian Anti-Shielding Provisions and the intrusive Recording Provision before the Legislature has seen any data to corroborate Republican legislators' anecdotes.

When the results of the 2022 Surveys were published—and they contradicted Republican preconceptions—the response was silent ignorance. As one example, among faculty who responded to the survey and identified their political affiliation, the most popular response was "Moderate," followed by "Conservative," and the least popular response was "Liberal." Trial Tr. at 166:19-167:1 (Lichtman); *see also* PX 58. But Governor DeSantis and Republican leaders have only accelerated their claims of indoctrination to justify further attacks on higher education—including a broad assault on DEI initiatives. This began with Governor DeSantis requesting detailed information from colleges and universities "regarding the expenditure of state resources on programs and initiatives related to diversity, equity and inclusion, and critical race theory." PX 487. Specifically, the memorandum requests specific "[p]ositions, including full and partial FTE." *Id*. As Dr. Lichtman explained, this request is openly hostile to those programs and operates as a tacit threat that funding for CRT or DEI will be cut. *See* Trial Tr. at 258:17-260:25 (Lichtman). This frenzied effort to silence disfavored ideologies extends to newly proposed legislation that would, among other things, prohibit expenditures on *any* programs that "espouse

diversity, equity, and inclusion or Critical Race Theory rhetoric."[48]

Republican leaders have also ignored what the 2022 Survey results say about how universities compare to each other. According to the results of the 2022 Surveys, 69% of student respondents from New College agreed or strongly agreed that "My college or university campus provides an environment for free expression of ideas, opinions, and beliefs." PX 58. This was the *second highest* rate of agreement among *all* of Florida's public universities. Similarly, 78% of student respondents at New College agreed or strongly agreed that "Students at my college or university are encouraged to consider a wide variety of viewpoints and perspectives." *Id.* This was the *highest* rate of agreement with this statement in *all* of Florida's public universities. Despite this data suggesting that New College has the most viewpoint diversity and the best free speech environment, New College has become a target of Governor DeSantis for being "left leaning," Trial Tr. at 664:18-665:6, and "supporting the wrong ideas as compared to those that those in power would want," *id.* at 616:11-16. *See also id.* at 1015:15-1016:3 (Former Representative Smith explaining that Governor DeSantis "said [New College] had

[48] HB 999 (2023), as filed, is available at: https://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=_h0999__.docx&DocumentType=Bill&BillNumber=0999&Session=2023. This public record maintained by a government agency is properly subject to judicial notice under FRE 201.

been captured by a political ideology" and "was able to . . . transform that institution through [the Board of Trustee] appointment process"); *id.* at 1318:10-16 (Ms. Solomon describing New College's reputation as "liberal, hippie, very progressive, open, diverse"). As the Court is well aware, Governor DeSantis appointed six new members of the Board of Trustees, who subsequently terminated the President of New College and replaced her with former Commissioner of Education Richard Corcoran. *See id.* at 673:14-674:21 (Dr. Gothard recounting that Governor DeSantis appointed six trustees at New College).

Finally, it is worth addressing the suggestion that HB 233 was enacted with the purpose of creating an open marketplace of ideas at Florida's public colleges and universities—without discriminating based on viewpoint. *See, e.g.*, JX 8 32:12-21. Again, this justification is not credible when HB 233's enactors have clear preconceptions about which viewpoints are predominant on campus, *and* they consider that predominance a problem that should be addressed with state intervention. As Dr. Lichtman testified, it was clear that there was no intent to "balance [liberal ideology] with something else," they simply wanted to "stem" disfavored ideologies. Trial Tr. at 66:15-23. Governor DeSantis was similarly uninterested in balance, and simply said the state won't be supporting "stale ideology" for which universities have become a "hotbed[]." PX 222 at 6:24-7:23.

This lack of balance has played out in the actual implementation of the Anti-

Shielding Provisions. For example, Ms. Solomon testified that even after HB 233 was passed, her efforts to organize a counterprotest to anti-Semitic and Nazi activity on campus were met with direct discouragement from the university administration. *See* Trial Tr. at 1310:5-1313:1. Similarly, Dr. Maggio received multiple directives to omit content from his classes, despite the ostensible obligation that his institution refrain from "shielding." *Id.* at 1197:14-21, 1199:22-1200:1, 1202:16-1203:1. In contrast, Dr. Goodman has *included* additional viewpoints—like a personal defense of capitalism—that she would not otherwise include in her course. *Id*. at 1239:5-7; 1245:21-1246:12. This imbalanced real-world operation of the Anti-Shielding Provisions demonstrates that the vague mandate is working as intended—to facilitate the exclusion of liberal views and the inclusion of conservative ones. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993) ("the effect of a law in its real operation is strong evidence of its object").

At every subsequent opportunity, HB 233's enactors have sought to leverage the power of the state to chill, or outright prohibit, speech they disagree with. Less than a year after HB 233 was enacted, the Legislature and Governor enacted SB 7044, which increased political influence over hiring and tenure decisions. Under the bill, tenure review occurs every five years and is overseen by the politically appointed BOG and BOE. *See* Trial Tr. at 232:10-234:8 (Lichtman). It also requires universities to periodically seek accreditation from new agencies—in reaction to

oversight from UF's accrediting agency after professors were not permitted to testify as expert witnesses in litigation against the state. *Id*. Notably, while advocating for HB 233 before the House, Representative Roach touted the "accrediting institution['s]" role in "requir[ing] that member institutions preserve intellectual and academic freedom." JX 8 at 15:19-16:4. But a year later, Representative Roach voted to attack academic freedom and the accrediting institutions that seek to preserve it—along with *every* other Representative and Senator who voted for HB 233.[49]

In their most brazen attack on intellectual freedom and viewpoint diversity, Governor DeSantis and the Legislature enacted HB 7—a open and admitted effort at "rank viewpoint discrimination." *Pernell*, 2022 WL 16985720, at *37. HB 7, by its terms, is "antithetical to academic freedom" and it "cast a leaden pall of orthodoxy over Florida's state universities." *Id.* at *41. If the Republican Legislature and Governor who enacted HB 233 were truly interested in creating an open marketplace of ideas, you would expect at least *one* of them to dissent from HB 7. But they did not; the only supporter of HB 233 who voted against HB 7 was Democratic Representative Bush.[50] It is certainly possible that every single Republican legislator

[49] While a handful of legislators who voted in support of HB 233 did not cast a ballot on SB 7044 either way, *none* of HB 233's supporters voted against SB 7044.

[50] The final House vote on HB 7 is available here: https://www.flsenate.gov/Session/Bill/2022/7/Vote/HouseVote_h00007e1563.PDF. The final Senate vote on HB 7 is available here: https://www.flsenate.gov/Session/Bill/2022/7/Vote/SenateVote_h

who voted for HB 233 had a change of heart and decided that, in 2022, they would oppose viewpoint diversity and the open exchange of ideas. Or, in Dr. Maya Angelou's words, when people show you who they are, believe them.

This overwhelming record demonstrates that HB 233 was enacted, at least in part, because it would chill liberal viewpoints and promote conservative ones. Accordingly, even if the Court determines that HB 233 is facially neutral, the law must be treated as viewpoint-based because of this purpose.

In the alternative, if the Court decides that the overwhelming evidence of intent does not support a finding that the challenged provisions are viewpoint-based but instead that they are the less "egregious" content-based, that determination still makes the challenged provisions "presumptively unconstitutional." *Reed*, 576 U.S. at 163-64. In short, HB 233 must, at least, be subject to strict scrutiny because it was "adopted by the government because of disagreement with the message" that Republicans felt was dominant at Florida's public colleges and universities. *Id.*

d. The challenged provisions are impermissibly viewpoint-based and content-based because they alter the content of faculty speech.

HB 233 is also viewpoint-based because it compromises faculty members' "autonomy over [their] message." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*

00007e2003.PDF. These public records maintained by a government agency is properly subject to judicial notice under FRE 201.

of Bos., 515 U.S. 557, 576 (1995). The First Amendment protects against compelled speech with equal force as it protects against compelled silence, and the difference between the two injuries "is without constitutional significance." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796-97 (1988) ("There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say.").

The Anti-Shielding Provisions (which operate in conjunction with the other challenged provisions) compel professors to express ideas considered "uncomfortable, unwelcome, disagreeable, or offensive" at the expense of other opinions or ideas in their limited teaching time. For example, Dr. Goodman felt compelled to defend capitalism, *see supra* 99, and both Dr. Maggio and Dr. Link felt compelled to teach schools of thought about the Civil War and Reconstruction with which they disagreed, *see supra* 83, 103. Further examples of the ways in which the Anti-Shielding Provisions have compelled speech are laid out in the section addressing Plaintiffs' standing to maintain Counts I and III. *See id.*

In the alternative, HB 233 is at least content-based—even if not viewpoint-based—because it alters the content of speech by requiring speaker to carry different message than one they would otherwise convey. *Nat'l Inst. of Fam. & Life Advocs.*,

138 S. Ct. at 2371. For example, regardless of viewpoint, Dr. Edwards felt compelled to use less thoughtful material in favor of "fun material," *see supra* 91, Dr. Price felt compelled to add a video-clip to his curriculum that he had purposefully omitted in the past, *see supra* 107, and Dr. Fiorito faces the prospect of being compelled to teach topics or expose students to material that he would otherwise omit due to discomfort, *see supra* 95.

e. The challenged provisions are viewpoint- and content-based as applied by Defendants.

The Survey Provisions, like the Recording Provision, are designed to surveil and monitor speech to enforce the Anti-Shielding Provisions. Unsurprisingly, the Defendants applied the Survey Provisions in 2022 to create a survey instrument that is *only* useful in furtherance of HB 233's discriminatory intent. Notwithstanding the challenged provisions' facial unconstitutionality, Defendants have applied the Survey Provisions in a viewpoint-discriminatory manner—both on the face of the 2022 Surveys and in terms of what can be gleaned of their purpose, *see supra* 142-166. *See Thomas v. Chi. Park Dist.*, 534 U.S. 316, 325 (2002) (denying facial relief but explaining that challenged regulation *could* be unconstitutional in certain applications and that "this abuse must be dealt with if and when a pattern of unlawful favoritism appears").

Defendants have been just as bombarded with the anti-liberal and anti-academic rhetoric from HB 233's proponents and the Governor and it is reflected in

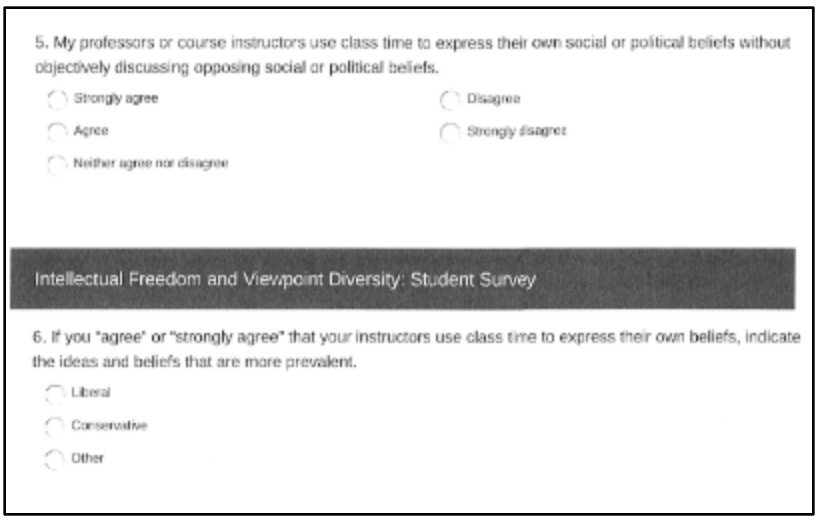
the way that they implemented the Survey Provisions from 2022 from the get go—even before they retrieved the project from the Institute of Politics at FSU to avoid IRB review and launched their own frenzied, cloistered, and entirely uninformed effort to prepare and implement the survey. *See* PX 401 at 4 (showing that the consultants originally hired by Defendants to draft the Survey at FSU understood the Survey and Survey Provisions to be in response to "increasing concerns that university instructors, who are, on average, very liberal, instill and perhaps require their student [sic] to provide a particular political viewpoint," as reflected in their IRB protocol)). And as Plaintiffs' expert Dr. Hurtado testified, the way in which Defendants enforced the Survey Provisions make it "pretty clear" that they internalized that anti-liberal rhetoric as their marching orders when they proceeded to work with the Governor's Deputy Chief of Staff, J. Alex Kelly, to design a survey focused exclusively on "liberal" versus "conservative" viewpoints. *See* Trial Tr. at 1415:9-19, 1419:17-20:9; *see also id.* at 1420:10-15 ("[I]f they were really concerned about intellectual freedom and viewpoint diversity, they would also ask questions about what the faculty actually does do in the classroom that actually promotes a variety of perspectives[.]").[51]

[51] Defendants do not dispute that Kelly—*the person* in the Governor's Office tasked with advancing the Governor's higher education policy agenda, *see* Trial Tr. at 1560:6-8; *see also id.* at 1555:2-4—was personally involved in the drafting and design of the 2022 surveys, *see* PX 95 at 4-5 ("Mr. Kelly offered suggestions of new

The false binary between "liberal" and "conservative" *only* makes sense in the context of the Florida's ongoing culture war against "liberals" in higher education. *See* Trial Tr. at 1423:6-24:8 (Dr. Hurtado explaining that the survey questions about "shielding" will be incomprehensible to faculty participants). The way that the questions are drafted lay bare the political biases of Defendants and their disproven assumptions of why some students might not feel comfortable sharing their political beliefs on campus. *See id.* at 1432:1-5 (Dr. Hurtado testifying that "this was an entirely biased survey" that "is totally against every single social science rigorous method"); *see also id.* at 840:13-16 (Dr. Matthew Woessner testifying "I was appalled by the [2022] survey construction . . . because I felt the questions to be muddled, unclear, biased").

For example, the 2022 Student Survey asked respondents:

survey language for the student survey," which "Mr. Criser printed" and asked his administrative assistant to "retype" and "correct the formatting.").

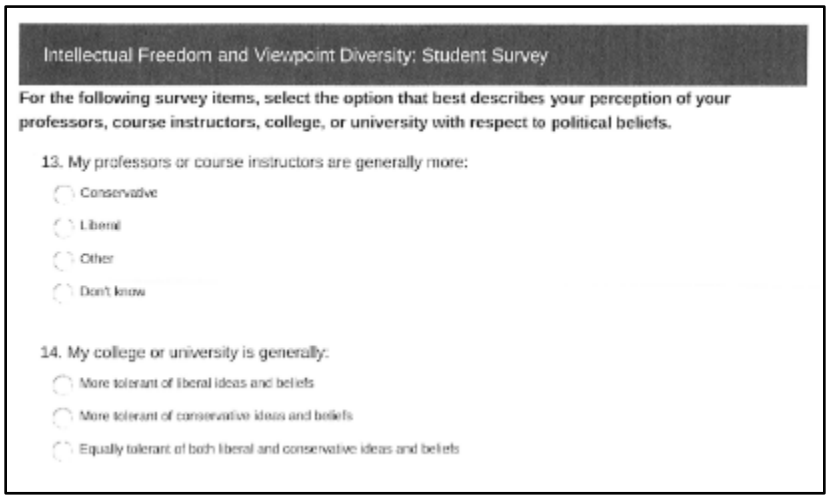

5. My professors or course instructors use class time to express their own social or political beliefs without objectively discussing opposing social or political beliefs.

Strongly agree
Disagree
Agree
Strongly disagree
Neither agree nor disagree

Intellectual Freedom and Viewpoint Diversity: Student Survey

6. If you "agree" or "strongly agree" that your instructors use class time to express their own beliefs, indicate the ideas and beliefs that are more prevalent.

Liberal
Conservative
Other


Intellectual Freedom and Viewpoint Diversity: Student Survey

For the following survey items, select the option that best describes your perception of your professors, course instructors, college, or university with respect to political beliefs.

13. My professors or course instructors are generally more:

Conservative
Liberal
Other
Don't know

14. My college or university is generally:

More tolerant of liberal ideas and beliefs
More tolerant of conservative ideas and beliefs
Equally tolerant of both liberal and conservative ideas and beliefs

JX 3 at 2-3. Dr. Hurtado testified that, as drafted, these questions assume that any self-censorship by students on campus is driven solely by faculty, and further presumes that students are not only accurately aware of the political ideologies of those faculty but also of what constitutes a "political belief[]" versus a legitimate area of class inquiry. *See* Trial Tr. at 1419:10-20:16; *see also id.* at 767:10-768:1 (Dr. Price testifying he gives an extra-credit assignment at the end of his class, in which he asks where his students think he "fall[s] on the political spectrum based on

how [he has] presented material in this course," and "they're not correct most of the time," often using examples that betray a misunderstanding of the terms "liberal," "moderate," and "conservative."). Similarly, Defendants failed to include any questions that would help determine whether a student was self-censoring because, for example, concerns about how their peers might view them, because they were shy, or because they were a brand new student. *See* JX 3. Indeed, the actual legitimate, empirical research into these questions shows that, while faculty tend to generally be more left leaning in their politics than the overall population, faculty indoctrination is not based in fact, *see id*. at 832:1-4 (Woessner), and shifts in college students' viewpoints are rarely attributable to faculty, *see id.* at 830:10-21 (Woessner). And, in addition to their myopic focus, Dr. Hurtado further testified that, as drafted, the survey questions are "very leading" and appear designed to "try to get some evidence that would back up what [the survey drafters] already believe." *Id.* at 1420:4-7.

The 2022 Surveys' questions (1) confirm that Defendants were hewing closely to the directives and statements made by HB 233's proponents in the legislative record and contemporaneously in the press, *see, e.g.*, PX 154 at 7:5-24 (Representative Sabatini complaining the Survey Provisions do not go far enough in suppressing "radical, insane, leftists ideas" on college and university campuses, because the survey is only a "tool[]" that could later be used to "defund[] the radical

institutions"), and they (2) belie any claim by Defendants that they understood the Survey Provisions as intended to meaningfully improve viewpoint diversity on campus. Moreover—despite how utterly useless the 2022 Surveys proved to be—Defendants admit that they intend to use essentially the same exact surveys in 2023. *See* Trial Tr. at 1685:15-20 (Hebda).

For the same reasons, the Court could conclude that the challenged provisions were *content*-based as applied and not *viewpoint*-based.

f. The challenged provisions cannot survive strict scrutiny.

Because HB 233 is viewpoint-based, the Court may invalidate them as a *per se* matter." *Speech First*, 32 F.4th at 1126 (quoting *Mansky*, 138 S. Ct. at 1885, and citing *Iancu*, 139 S. Ct. at 2299). But at a minimum, they are "*presumptively* unconstitutional [and] may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Honeyfund.com*, 2022 WL 3486962, at *10 (emphasis added) (quoting *Reed*, 576 U.S. at 163). Likewise, to the extent the Court finds that any of the challenged provisions are content-based, they are similarly subject to strict scrutiny. *Reed*, 576 U.S. at 163. The challenged provisions cannot survive this test.

Defendants proffer two interests in support of the challenged provisions; neither is compelling—or even substantial. *First*, Defendants claim that they ensure freedom of speech and viewpoint expression on campus. *See, e.g.*, ECF No. 40 at 6;

ECF No. 166-69 at 17-18; ECF No. 166-70 at 17-18. But Florida already expressly protected free expression on its public college and university campuses. *See, e.g.*, Fla. Stat. § 1004.097; Fla. Const. art. I, § 4. And, in addition to those statutory and constitutional protections, before HB 233, Defendants had taken their own steps to advance the same interests they now claim the challenged provisions serve, including through the Statement on Freedom of Expression and Civil Discourse Initiative. BOG Tr. at 53:6-56:17, 56:23-58:22, 59:5-62:18, 62:20-63:21; 64:15-66:15 (ECF No. 241-1 at 55-68).

Both of these endeavors enjoyed wide-spread support and were informed by careful, thoughtful input from a wide variety of stakeholders and there is *no* evidence that any of these existing protections were inadequate or that First Amendment rights were at stake. *See Bourgeois v. Peters*, 387 F.3d 1303, 1322 (5th Cir. 2004) ("[T]he availability of alternatives casts serious doubt on any narrow tailoring analysis."). Furthermore, the Defendants' pre-existing free speech initiatives are both far better suited to solving any free speech issue, because the remedy for speech government dislikes is "not enforced silence" but "more speech." *Honeyfund.com*, 2022 WL 3486962, at *11 (quoting *Whitney v. California*, 274 U.S. 357 (1927) (Brandeis, J., concurring)); *see also McCullen v. Coakley*, 573 U.S. 464, 482 (2014). The "existence of adequate content-neutral alternatives" on its own "'undercut[s] significantly'" any defense of HB 233. *R.A.V.*, 505 U.S. at 395; *see supra* 54-62.

Second, Defendants claim HB 233 promotes exposure to a wide variety of viewpoints and opinions. *See, e.g.*, ECF No. 165 at 46; ECF No. 166-69, at 17-18; ECF No. 166-70 at 17-18. But this is either indistinguishable from the interest in promoting free speech on campus or a constitutionally impermissible goal of "tilt[ing] public debate in a preferred direction." *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 578-79 (2011). That HB 233's protections apply only to "uncomfortable, unwelcome, disagreeable, or offensive" ideas, Fla. Stat. § 1001.03(19)(a)(2), and surveils exposure to "ideological and political perspectives," *id*. § 1003.03(19)(a)(1), proves it is the latter. *See Grimmett*, 2023 WL 1807471, at *5 n.9 (explaining that "underinclusiveness can raise doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint" when describing specificity of regulated speech (quoting *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 448 (2015)).

Instead, HB 233's proponents flipped the First Amendment on its head—justifying their intrusion on speech rights based on the *lack* of evidence of a problem. *E.g.*, PX 210, 17:8-14 (Representative Roach "not alleging that" Florida universities are "falling far short of that ideal expression and commitment to the First Amendment"); *id*. 17:14-17; PX 213, 7:19-23; PX 205, 10:11-16; *id*. 12:23-13:2. This "dramatic mismatch . . . between the interest that the [Legislature] seeks to promote" and the evidentiary record cannot survive strict scrutiny. *Bonta*, 141 S. Ct.

at 2386.

Indeed, an interest in suppressing disfavored viewpoints is not legitimate, let alone compelling. *See KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006). Claims that there is an issue with "indoctrination" by left-of-center professors are also meritless. This well-worn conservative talking point is not supported by the research. *See* Trial Tr. at 831:22-832:23 (Dr Woessner). Students' viewpoints about *some* issues (not all) tend to move slightly left while in higher education, but studies have found no evidence tying it to faculty. *See generally id.* at 821:3-827:8, 830:8-831:3 (Woessner). Similarly, the fact that fewer faculty tend to be conservative appears to be due to self-selection, and conservative students do just as well as their liberal peers in higher education. *Id.* at 827:9-828:21 (Woessner). Regardless, if the Legislature was trying to combat a perceived leftward drift once students enter college, the First Amendment *forbids* it from "quiet[ing] the speech or [] burden[ing] its messengers" of viewpoints that are objectionable because they are "too persuasive." *Sorrell*, 564 U.S. at 578.

Nor are the challenged provisions "narrowly tailored" to advance Defendants' asserted interests. Simply put, they cannot be narrowly tailored to accomplish what is already accomplished by the First Amendment or the other pre-existing speech protections that Florida and Defendants had in place. *See McCullen*, 573 U.S. at 490-92; *Honeyfund.com*, 2022 WL 3486962, at *10. Pre-existing protections are always

less restrictive means to reach the same objectives. Of course, the challenged provisions do not simply codify First Amendment rights. They are designed to (and do) *undermine* free speech, intellectual freedom, and even viewpoint diversity by silencing the panoply of so-called liberal viewpoints HB 233's proponents oppose. *See supra* 48-54. Ironically, in attempting to justify the challenged provisions, HB 233's proponents recognized a constitutional harm arises when people "self-censor[] because they believe that they are going to be penalized for sharing constitutionally protected viewpoints." PX 213 at 13:22-14:5. They were talking about their concerns about conservative students based on vague anecdotes that they were self-censoring, but HB 233's challenged provisions have *this precise effect on Plaintiffs*. *See supra* 75-121. Since the challenged provisions undermine, rather than advances, the supposed interest that is offered to justify them, by definition they cannot be reasonable restrictions, let alone narrowly tailored to serve that interest. *Cf. United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813 (2000) ("If a statute regulates speech based on its content, it must be narrowly tailored to *promote* a compelling Government interest.") (emphasis added).

g. *Bishop*'s balancing test favors Plaintiffs' free speech rights over Defendants' enforcement of the challenged provisions.

Content-based restrictions are subject to strict scrutiny, even in the context of public higher education, when they do not stem from the state's authority to control

curriculum or course content. *See Pernell*, 2022 WL 16985720, at *7. As noted above, the challenged provisions are not squarely within a state's authority to set the content of curriculum because they apply broadly to expressive activities on campus rather than to specific topics or subjects. *See supra* note 43. However, if the Court finds that they do stem from that state authority, then it may apply *Bishop*'s balancing test, which considers: (1) the context in which the restriction arises; (2) "the University's position as a public employer which may reasonably restrict the speech rights of employees more readily than those of other persons," recognizing that such restrictions "must be both reasonable and supported by evidence of a sufficiently weighty interest to overcome the employee's right to speak," and (3) "the strong predilection for academic freedom as an adjunct of the free speech rights of the First Amendment." *Id.*, at *35-40 (quoting *Bishop*, 926 F.2d at 1074-75); *see also id.*, at *15-16, n.12, *21, *28-30. To the extent that test applies here, its factors favor Plaintiffs' free speech rights.

First, the context of this case favors Plaintiffs. This is not a case like *Bishop*, because none of the challenged provisions "implicate Establishment Clause concerns, nor [do they] focus on student complaints about a single professor who used class time to discuss personal beliefs that the University had deemed to be outside the scope of his course's curriculum." *Pernell*, 2022 WL 16985720, at *36. Instead, "the context here includes the State of Florida's passage of" sweeping

provisions that apply to every single post-secondary institution within Defendants' jurisdiction and control. *See id.*, at *36. HB 233's challenged provisions "affect[] potentially thousands of professors and serve[] as an *ante hoc* deterrent that 'chills potential speech before it happens,' and 'gives rise to far more serious concerns than could any single supervisory decision,' such as that in *Bishop*." *Pernell*, 2022 WL 16985720, at *36 (quoting *United States v. Nat'l Treas. Emp.'s Union*, 513 U.S. 454, 468 (1995) ("*NTEU*")).

Plaintiffs are not "seeking to inject unsanctioned concepts into their class content or hijack the established curriculum with their own personal agenda." *Id.* at *37. They simply want the freedom to teach as they have before, without fear that discussing their viewpoints, or exercising legitimate classroom management decisions will cause a student to use HB 233's new, expansive monitoring tools to report that their institutions are biased or hostile to intellectual freedom in the annual surveys, or report them for violating the Anti-Shielding Provisions, perhaps secretly recording them in the process. *See supra* 75-121.

Second, the State's interests in HB 233 are not supported by sufficiently weighty evidence, and the restrictions are far from reasonable. *See supra* 149-166, 173-177.

Finally, the third factor of the *Bishop* test strongly favors Plaintiffs and weighs heavily against the Defendants: "Plaintiffs' free speech claims present an interest in

academic freedom of the highest degree. [Faculty] Plaintiffs are not attempting to alter the permitted curriculum. Instead, they seek to prevent the State of Florida from imposing its orthodoxy of viewpoint about that curriculum in university classrooms across the state." *Pernell*, 2022 WL 16985720, at *41.[52]

3. HB 233 is unconstitutional even as a content-neutral speech regulation.

The record is clear that the challenged provisions infringe on Plaintiffs' speech rights. *See supra* 75-121. As a result, even if this Court were to find that some or all of the challenged provisions are content neutral, they would still be invalid unless Defendants can prove that they can survive intermediate scrutiny. Under that test, Defendants must show that the challenged provisions are (1) "narrowly drawn to further a substantial governmental interest," (2) that is "unrelated to the suppression of free speech." *Fort Lauderdale Food Not Bombs*, 11 F.4th at 1291.

Because of the critical importance that free speech rights hold in our society, laws that impede on speech rights—even if content-neutral—are treated differently

[52] At trial, Dr. Bérubé explained the history of academic freedom in the United States, and why HB 233 should be viewed as a quintessential attack pulled straight from the historical playbook. *See e.g.*, Trial Tr. at 484:14-85:22. While historical encroachments on academic freedom may have been more explicit in their language, and while they may not have hidden behind pretextual justifications, HB 233 is even more dangerous because it seeks to avoid judicial scrutiny by sneaking its intended speech code "quiet as cat's feet." Trial Tr. at 485:12-13.

by courts than most other types of laws passed by legislatures. It is only if a law *does not burden expression* that a court may properly apply rational basis review. *Dana's R.R. Supply v. Att'y Gen., Fla.*, 807 F.3d 1235, 1241 (11th Cir. 2015) (explaining that law regulating speech is subject to First Amendment scrutiny whereas law regulating conduct is subject only to rational basis review). But even a content-neutral law that implicates speech is subject to heightened review under intermediate scrutiny, and—as the Supreme Court has made clear—in this context even intermediate scrutiny imposes upon the government an evidentiary or persuasive burden far more substantial than in other contexts where the defense seeks to defend legislation in litigation. *See Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 666 (1994) ("When trenching on first amendment interests, even incidentally, *the government must be able to adduce either empirical support or at least sound reasoning on behalf of its measures*.") (citations omitted) (cleaned up).

As a result, even if the Court finds that some or all of the challenged provisions are content neutral, it should consider whether Defendants have introduced evidence demonstrating that the ills that they sought to address with the challenged provisions were, in fact, actual issues. *See, e.g.*, *id.* at 626, 667 (reversing order granting summary judgment in favor of government in case by cable television system operators challenging constitutionality of federal provisions that required carriage of local broadcast stations on cable systems and noting in particular the "paucity of

evidence indicating that broadcast television is in jeopardy"—the justification the government gave for the law). Defendants cannot carry their burden.

First, as in *Turner Broadcasting*, there is a marked "paucity of evidence indicating that" free speech on Florida's college and university campuses was "in jeopardy," *see id*. at 667, prior to the enactment of the challenged provisions. And while, in the abstract, protecting free speech rights may be a substantial government interest, under intermediate scrutiny review in the First Amendment context, it is not enough to point to that abstract interest without at least "some empirical support or at least sound reasoning," *id*. at 666 (quotation omitted), drawing a connection between that interest and the need to legislate as the Legislature did here. *See also Gibson*, 372 U.S. at 558 (holding the First Amendment does not "permit legislative inquiry to proceed on less than an adequate foundation.")

Furthermore, even if the Defendants could show that the challenged provisions actually do further a substantial government interest (and for all of the reasons already discussed, including *supra* at 173-176, they cannot), Defendants plainly cannot show that the challenged provisions are *narrowly drawn to* further those interests. "To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *McCullen*, 573 U.S. at 465 (applying intermediate scrutiny to a speech restriction).

As detailed above, there there are myriad alternative measures—many of which Defendants are already implementing with the support of relevant stakeholders, *see supra* 61—that burden substantially less speech and *better* achieve the government's interests than the challenged provisions. *See supra* 54-62. Likewise, Defendants' asserted state interests are far from "substantial": they are either entirely redundant of the First Amendment's existing protections or constitutionally impermissible because they aim to "tilt public debate in a preferred direction." *Sorrell*, 564 U.S. at 578-79; *see supra* 174-176. These improper interests flatly conflict with the requirement that the government's interest be "unrelated to the suppression of free speech." *Fort Lauderdale Food Not Bombs,* 11 F.4th at 1291 (11th Cir. 2021). Because the challenged provisions cannot satisfy this test, they are constitutionally invalid.

B. The Survey Provisions unconstitutionally infringe on the right to association (Count II).

Separate from Plaintiffs' free speech claims, the Survey Provisions are also unconstitutional because they infringe upon their associational rights (Count II). *See* ECF No. 101 at 57-64. Furthermore, they cannot withstand exacting scrutiny, under which they "may be justified [only] by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts v. U.S.*

Jaycees, 468 U.S. 609, 623 (1984); *see also Bonta*, 141 S. Ct. at 2383.[53] Here, the Survey Provisions infringe on Plaintiffs' associational rights in three ways: First, on their *face*, the Survey Provisions give the state carte blanche to compel those faculty, staff, and students to disclose their constitutionally protected associational activities and affiliations. Second, the Survey Provisions are *intended* to chill the constitutionally-protected associational activity and affiliations of faculty, staff, and students at Florida's public colleges and universities. Third, Defendants have *applied* the Survey Provisions in a manner that burdens Plaintiffs' associational rights.[54]

1. The Survey Provisions facially burden Plaintiffs' associational speech rights.

The Survey Provisions violate the right to free association because, on their face, they lack any guardrails that might ensure the Survey Provisions will not be used to punish "liberal" associational activity. For example, the Provisions do not define "objective, nonpartisan, [or] statistically valid," or include means to ensure surveys meet those requirements (or challenge those that don't). Fla. Stat. §§

[53] Unlike in the free speech context, in the free association context, the nature of "the beliefs sought to be advanced by" the associational activity is irrelevant to the level of scrutiny that applies. *Bonta*, 141 S. Ct. at 2383.

[54] Plaintiffs bring an as applied challenge here in addition to their facial challenges, but it is worth emphasizing that, as in *Bonta*, their facial challenges are appropriate because "the lack of tailoring to the State's [] goals is categorical—present in every case." 141 S. Ct. at 2387.

1001.03(19)(b), 1001.706(13)(b). And HB 233 gives the Boards unfettered discretion to select or develop whatever survey they wish, without any obligation to consult with students, faculty, or to draw on any survey-drafting expertise in designing the survey instrument. *See id.* The surveys also need not be voluntary or anonymous, as the Legislature rejected amendments to that effect. *See* Trial Tr. at 127:1-8 (Dr. Lichtman testifying that the Legislature specifically rejected an attempt to amend HB 233 to require certain guardrails such as anonymity or voluntariness). There are also no protections for response data or restrictions on how "results" may be used—including to protect against retribution. *See* Fla. Stat. §§ 1001.03(19)(b), 1001.706(13)(b). And legislators admitted HB 233 was *meant* to gather information for future action. *See* PX 205 at 13:3-8; PX 204 (video); PX 210 at 8:9-16; PX 209 (video of same).

This utter lack of commonsense guardrails within the Survey Provisions has a prophylactic impact on Plaintiffs' free association. Plaintiffs cannot be sure that Defendants—who are aware of and have internalized the same legislative intent that motivates HB 233—will not eventually compel them to disclose their past and current affiliations. *See supra* 14; *see also* Trial Tr. at 666:8-9 (Dr. Gothard testifying UFF believes that "if this litigation fails, the next survey will be required").

2. The Survey Provisions intentionally burden Plaintiffs' right to associate.

Relatedly, the Survey Provisions violate the right to free association because

(1) they are *intended* to identify and weed out students and faculty based on their constitutionally protected "liberal" associational activities and affiliations, *see supra* 31-62, (2) HB 233's proponents have threatened to use the survey in precisely that way, *see supra* 52, (3) this plain intent coupled with threats by HB 233's proponents has negatively impacted Plaintiffs' protected associational activity, *supra* 128-132.

The Supreme Court and the Eleventh Circuit have held that the "right to freedom of association extends to public employees being able to engage in associative activity without retaliation." *Hatcher v. Bd. of Pub. Educ. & Orphanage for Bibb Cnty.*, 809 F.2d 1546, 1558 (11th Cir. 1987); *see also Smith v. Ark. State Highway Emps., Local 1315*, 441 U.S. 463, 465 (1979) (per curiam) (same).[55] Retaliation necessarily extends to explicit threats of adverse job action based on constitutionally protected associational activity. *See Bonta*, 141 S. Ct. at 2384 (recognizing the injury of chill is equally actionable in the free association context as it is in the free speech context); *id.* at 2387 (explaining that First Amendment scrutiny is triggered even when the "demand . . . *might* chill association.") (emphasis added); *Roberts*, 468 U.S. at 622 (explaining that "government [] seek[ing] to

[55] Unlike in the free speech context, public employee considerations are inapplicable in the freedom of association context, such that an adverse employment action against a public employee due to "constitutionally protected associational activity" undoubtedly violates the First Amendment. *See Hatcher*, 809 F.2d at 1556-57 (11th Cir. 1987) (citing *Connick v. Myers,* 461 U.S. 138 (1983), and *Pickering v. Bd. of Educ.,* 391 U.S. 563 (1968)).

impose penalties or withhold benefits from individuals because of their membership in a disfavored group" is an action which may violate the right to free association).

But even absent the evidence of HB 233's intent to silence speech and association, "broad and sweeping state inquiries into [the] protected areas" of "a person's beliefs and associations" are constitutionally suspect, because they "discourage citizens from exercising rights protected by the Constitution." *Bonta*, 141 S. Ct. at 2384 (quoting *Baird v. State Bar of Ariz.*, 401 U.S. 1, 6 (1971) (plurality op.)) (cleaned up).

3. Defendants have applied the Survey Provisions in a manner that burdens Plaintiffs' associational rights.

The 2022 Surveys, which Defendants intend to use again without any significant alteration in 2023, *see supra* 172, target "liberal" ideologies and associations on Florida's public college and university campuses on their face. There is no other reasonable way to interpret the questions as asked by Defendants. *See supra* 10-15, 168-172.

4. The Survey Provisions cannot survive exacting scrutiny.

The Survey Provisions cannot withstand exacting scrutiny because the state's interest in HB 233 is either redundant of existing speech protections, as Florida already had several laws and initiatives protecting free speech on its public higher education campuses, *see e.g.*, Senate Bill 4 (2018) (CFEA, which afforded broad protections for free speech on campus without implicating the in-class speech of

faculty and instructors), or is impermissible on its face, because it is intended as an enforcement tool for HB 233's viewpoint discrimination.

In addition, the Survey Provisions are not narrowly tailored to advance important government interests; if they do anything, they *undermine* the purported interest in freedom of expression. *See supra* 75-121. Indeed, in applying exacting scrutiny to strike down a compelled disclosure law in *Bonta*, the Supreme Court pointed the "dramatic mismatch" between the interests that the state claimed to seek to promote and the specific law that had been "implemented in service of that end." 141 S. Ct. at 2386. The facts of this case require the same result: Unlike other higher education survey processes, which maintain "trust" because they "are done by private or quasiprivate organizations," Trial Tr. at 880:7-881:7 (Woessner), the Survey Provisions give full control to the state and provide "no clear information about the use" of the resulting data by Defendants or other state actors, *id.* at 1409 at 10-15 (Hurtado). *See also id.* at 879:21-880:6 (Dr. Woessner describing the State of Florida's work as being under an "ideological cloud" that creates "obstacles to surveying faculty"). Indeed, even the surveys that the legislative sponsors pointed to as inspiration or precedent for HB 233 were conducted by independent experts, who retained access to that data, and analyzed it, separate from an arm of the state. *See id.* at 1576:15-1580:3 (Mr. Kelly testifying that he and the Boards had looked at "actual surveys done in other states" including Colorado and North Carolina, and

that, unlike Florida, Colorado used a "professional external survey company" and refined its survey instrument in response to faculty input); PX 92 (email communication showing that Mr. Kelly sent Board of Education information about Colorado and North Carolina surveys). None of this is true of either the requirements of HB 233's Survey Provisions, or the way that the Survey was implemented by Defendants in 2022. *See supra* 10-15. Accordingly, the Survey Provisions appear to be laser focused on monitoring and policing faculty, staff, and student political ideologies and affiliations only, which is dramatically mismatched from any purported goal of ensuring that there is a general diversity of ideas and viewpoints explored at Florida's higher education institutions. *See supra* 168-172.

C. The Anti-Shielding Provisions are void for vagueness. (Count IV)

Finally, the Anti-Shielding Provisions are also unconstitutional under the Due Process clause of the Fourteenth Amendment (Count IV). It is a "basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Wollschlaeger*, 848 F.3d at 1319 (en banc) (quoting *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972)). Laws that regulate expression are subject to "a more stringent vagueness test." *Vill. of Hoffman Ests. v. The Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 499 (1982). They "must be narrowly drawn to meet the precise evil the legislature seeks to curb . . . and . . . the conduct proscribed must be defined specifically so that the person or persons affected remain secure and unrestrained in

their rights to engage in activities not encompassed by the legislation." *Baggett v. Bullitt*, 377 U.S. 360, 372 n.10 (1964) (citation omitted). Otherwise, vague laws "force potential speakers to steer far wider of the unlawful zone . . . , thus silencing" a wide range of protected speech. *Wollschlaeger*, 848 F.3d at 1320 (cleaned up) (quoting *Baggett*, 377 U.S. at 372).

The Anti-Shielding Provisions are "impermissibly vague for either of two independent reasons." *Id.* at 1319 (quoting *Hill v. Colorado*, 530 U.S. 703, 732 (2000)). *First*, they fail "to provide people of ordinary intelligence a reasonable opportunity to understand what conduct [they] prohibit[]." *Id.* The Provisions are fatally vague across three dimensions—*who* is subject to its mandate, *which* "ideas or opinions" are given special protections, and *what* someone could do to "limit access to or observation of" those protected ideas and opinions. As a result, faculty, students, and staff are not reasonably on-notice as to how to comply with a statutory mandate. *Second,* the Anti-Shielding Provisions "authorize[] or even encourage[] arbitrary and discriminatory enforcement." *Id.* The Provisions' breadth and ambiguity grant Defendants wide latitude to enforce the Provisions in subjective and even discriminatory ways. For these reasons, the Anti-Shielding Provisions cannot be reconciled with the Fourteenth Amendment's Due Process protections.

1. The Anti-Shielding Provisions fail to provide constitutionally required notice.

First, the Anti-Shielding Provisions are impermissibly vague regarding *who*

is subject to their mandate. The relevant provision merely states: "A Florida College System institution or a state university may not shield students, faculty, or staff from expressive activities." Fla. Stat. § 1004.097(3)(f). The text provides no express guidance as to which employees, departments, or entities within a "Florida College System institution or a state university" are statutorily prohibited from shielding. The result is confusion and disagreement over the scope of the Provisions. For example, even one of the bill's sponsors, then-Senator Rodrigues, did not know if the Anti-Shielding mandate would apply to student groups. *See* JX 7 at 26:5-17.

At times, Defendants have argued that the Anti-Shielding Provisions do not apply in the classroom, *see, e.g.*, ECF No. 177 at 33, but at trial Defendants' counsel appeared to temper that position, admitting that "it's probably still an open question about whether it applies to the classroom," Trial Tr. at 307:8-10 (Levesque). This revised position, acknowledging the application of these Provisions to the classroom, is more consistent with the testimony from Defendants' own witnesses. For example, Senior Chancellor Henry Mack testified that the Anti-Shielding Provisions applied to classroom instructors' conduct. *See* Mack Tr. at 38:7-18 (ECF No. 267-2 at 40). Similarly, BOG testified that the Provisions could apply in the classroom context. *See* BOG Tr. at 101:3-14 (ECF No. 241-1 at 103). Faced with these "multiple readings," persons of ordinary intelligence cannot "be sure of [the Provisions'] real-world consequence," rendering them unconstitutionally vague. *Dream Defs.*, 559 F.

Supp. 3d at 1281.

Defendants' shifting litigation position still fails to fully grapple with HB 233's text. The Anti-Shielding Provisions' operative mandate applies to "expressive activities," which is defined by a preceding subsection of the same statute. Fla. Stat. § 1004.097(3)(f). Among the "expressive activities" that students cannot be shielded from, HB 233 added the terms: "faculty research, lectures, writings, and commentary." *Compare* JX 1 at 3, *with* Fla. Stat. § 1004.097(3)(a). Presented with this related provision, even Defendants' witness Chancellor Hebda admitted that it "sounds like that's requiring a faculty person to say something and provide a lecture on a topic." Trial Tr. at 1729:5-16; *see also id.* at 1730:10-12. Therefore, the Anti-Shielding Provisions' mandate at least arguably applies to faculty's classroom expression.

Second, faculty, students, and staff cannot reasonably determine *what* conduct of theirs could constitute shielding. HB 233's definition of "shield" states: "to limit students', faculty members', or staff members' access to or observation of" certain ideas. Fla. Stat. § 1004.097(2)(f). But the terms "limit . . . access to or observation of" do not elucidate how one would run afoul of the Provisions.

This vagueness is unsurprising given that the terms of the Anti-Shielding Provisions are copied from a selective portion of a broad statement of principles issued by the University of Chicago. *See* JX 7 at 22:1-23:8 (Senator Rodrigues

stating that Anti-Shielding Provisions codify language from the Chicago Statement); JX 15 at 29:6-10 (same). As Dr. Bérubé explained, the Chicago Statement was "aspirational," non-binding, and had no enforcement mechanism. Trial Tr. at 460:1-9. Even so, the Chicago Statement included clarifying language to make clear that it "does not . . . mean that individuals may say whatever they wish, whenever they wish" or that the university may not restrict expression that is "directly incompatible with the functioning of the university." *Id.* at 460:19-462:6. The Anti-Shielding Provisions contain *none* of these critical caveats.

Importantly, there is no reason why the Legislature did not include more specificity on the scope of the Anti-Shielding Provisions' prohibition. It was fully aware of the concerns that the language was vague, unclear, and could seriously impede free speech in the classroom when it was considering the legislation. *See* JX 6 at 26:15-20 (Representative Hardy stating "this bill is so vague that nearly anything an administrator or professor would do to control the academic environment could be recast as shielding"). Moreover, just a few years prior, when the Legislature expanded protections for outdoor speech with the CFEA, it included the critical limitation that those protections only extended to conduct that "lawful and does not materially and substantially disrupt the functioning of the [school]." PX 159 at 49. While HB 233 was under consideration, FIRE proposed an amendment to the Anti-Shielding Provisions along similar lines, to preserve "policies or practices to

maintain order" in the classroom. *See* PX 137. However, the Legislature declined to include any such language in the Anti-Shielding Provisions and enacted them with the vague language in place and unclarified. As a result, almost any classroom management decision could be construed as "shielding" under the plain terms of the Provisions' text. *See* Trial Tr. at 855:6-856:20 (Dr. Woessner explaining normal classroom interactions hampered by Anti-Shielding Provisions).

Third, the Provisions' applicability—and enforcement—depends entirely on unpredictable, subjective terms: whether the ideas or opinions at issue are ones that someone "*may* find uncomfortable, unwelcome, disagreeable, or offensive." Fla. Stat. § 1004.097(2)(f) (emphasis added). In that way, the law requires "predict[ing] individual tolerances for hearing" about particular ideas or opinions. *Wollschlaeger,* 848 F.3d at 1321-22; *see also Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (finding law that prohibited annoying passerby unconstitutionally vague because "[c]onduct that annoys some people does not annoy others").

The subjective nature of the Provisions appears on its face—only applying to "opinions that *they may find* uncomfortable." Fla. Stat. § 1004.097(2)(f) (emphasis added). Representative Roach admitted this concern, saying, "you don't have to extrapolate the same meaning from what may be offensive to one person or what may not be offensive to another." JX 6 at 18:3-14. Similarly, BOE admitted that it cannot determine what ideas or opinions would constitute "uncomfortable" ones

because it does not know what other people might find uncomfortable. *See* BOE Tr. at 156:2-7 (ECF No. 264-1 at 158). And if Defendants—which should be intimately familiar with the Provisions, as they bear responsibility for enforcing them and are themselves subject to them, Fla. Stat. §§ 1001.03(8), (19)(c); 1001.706(8), (13)(c)—cannot determine whether particular situations would violate them, "it seems eminently fair to conclude" Plaintiffs cannot either. *Speech First*, 32 F.4th at 1122.

When statutory terms derive their meaning from the subjective views of others, courts have consistently found those statutes to be unconstitutionally vague. For example, in *Speech First*, the trigger for the restriction—conduct that "unreasonably . . . alter[ed]" another's educational experience—was similarly "pretty amorphous," and the Eleventh Circuit found that its "application would likely vary from one student to another," with the "totality-of-known-circumstances approach to determining whether particular speech crosses the line only mak[ing] matters worse." 32 F.4th at 1121; *see also id*. at 1125 (emphasizing the policy applied to "conduct that *may* be humiliating" and "employs a gestaltish" approach to determining which speech came within its ambit). Similarly, in *Coates v. City of Cincinnati*, the U.S. Supreme Court struck down a statute proscribing conduct that would "annoy" others—finding it unconstitutionally vague because the subjective term meant that "no standard of conduct is specified at all" and persons of "common intelligence must necessarily guess at its meaning." 402 U.S. 611, 614 (1971). And

without the constitutionally required level of guidance, the Anti-Shielding Provisions' "imprecision exacerbates [their] chilling effect." *Speech First*, 32 F.4th at 1121.

2. The Anti-Shielding Provisions' vagueness enables discriminatory enforcement.

To satisfy due process requirements, "precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253-54 (2012) (citation omitted). The Anti-Shielding Provisions lack that necessary precision. Instead, they establish a vague and malleable mandate that is ripe for arbitrary and discriminatory enforcement—as intended, *see supra* 148-166.

The Anti-Shielding Provisions' dangerous imprecision is well established by Defendants' own inability to grapple with their mandate. Indeed, when asked whether a Florida college banning a book would violate the Anti-Shielding Provisions, BOE could not answer: "I'm just not positive until I actually saw all of the circumstances around it." BOE Tr. at 167:8-168:25 (ECF No. 264-1 at 169-170). BOG responded similarly when asked whether a professor's decision not to invite a controversial guest speaker to class could violate the Provisions: "There's challenges in thinking about all the different variables that come under [the Anti-Shielding

Provisions], but I don't know that I can make that determination." BOG Tr. at 106:22-107:14 (ECF No. 241-1 at 108-109).

But "the First Amendment cannot countenance a subjective 'I know it when I see it' standard," *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030, 1040 (D.C. Cir. 1980)—which follows directly from the Anti-Shielding Provisions' vague terms. Indeed, the tell-tale sign of an unconstitutionally vague law is when it "impermissibly delegates basic policy matters . . . for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockfort*, 408 U.S. 104, 108-109 (1972).

These concerns about discriminatory enforcement are not merely theoretical; the record confirms that the Anti-Shielding Provisions have, in fact, been enforced selectively. For example, Ms. Solomon testified that even after HB 233 was passed, her efforts to organize a counterprotest to anti-Semitic and Nazi activity on campus were met with direct discouragement from the university administration. *See* Trial Tr. at 1310:5-1313:1. Similarly, Dr. Maggio received multiple directives to omit content from his classes—all of which could be fairly read as an instruction to "shield" his students from certain ideas—despite the ostensible obligation that his institution refrain from "shielding." *See id.* at 1202:2-1205:12. In the most dramatic example yet, on January 18, 2023, the FCS Presidents jointly pledged to "not fund or support any institutional practice, policy, or academic requirement that compels

belief in critical race theory or related concepts."[56] BOE issued a press release describing this pledge as a "commit[ment] to removing all woke positions and ideologies by February 1, 2023."[57] Apparently, Florida's colleges may shield from *some* uncomfortable ideas—so long as that action "publicly support[s] Governor Ron DeSantis' vision of higher education."[58] These blatant inconsistencies not only demonstrate the Anti-Shielding Provisions' fatal imprecision under the Due Process clause, but also the impermissible discriminatory intent behind them. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993) ("the effect of a law in its real operation is strong evidence of its object").

V. CONCLUSION

The Court should hold HB 233's challenged provisions unconstitutional and enter a permanent injunction prohibiting Defendants from enforcing them.

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[56] Florida College System Council of Presidents, "Statement on Diversity Equity, Inclusion and Critical Race Theory" (Jan. 18, 2023), available at: https://www.fldoe.org/core/fileparse.php/5673/urlt/FCSDEIstatement.pdf. This public record maintained by a government agency is properly subject to judicial notice under FRE 201.

[57] Florida Department of Education Press Office, "Florida College System Presidents Reject 'Woke' Diversity, Equity and Inclusion (DEI) Critical Race Theory Ideologies and Embrace Academic Freedom" (Jan. 18, 2023), available at: https://www.fldoe.org/newsroom/latest-news/florida-college-system-presidents-reject-woke-diversity-equity-and-inclusion-dei-critical-race-theory-ideologies-and-embrace-academic-freedom-.stml. This public record maintained by a government agency is properly subject to judicial notice under FRE 201.

[58] *Id.*

Respectfully submitted this 24th day of February, 2023.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 24, 2023 I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel in the Service List below.

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