ADDENDUM 1

Throughout trial, the Court asked counsel for the parties to make sure that they addressed certain questions in their post-trial briefing. In this addendum, Plaintiffs summarize and provide short answers to those questions, and identify where in their post-trial brief the Court can find additional responsive information.

COURT'S QUESTION: How are the Anti-Shielding Provisions viewpoint discriminatory?

This question is addressed in Plaintiffs' post-trial brief at 15-24, 142-148, 166-168, 196-198.

The short answer is that Anti-Shielding Provisions are viewpoint discriminatory on their face because they provide special protections only to certain ideas, like offensive speech, and—under binding U.S. Supreme Court precedent—"[g]iving offense is a viewpoint." *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017); *see also Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019) (finding law that discriminated against "immoral" and "scandalous" speech "viewpoint- based"); *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 11 F.4th 1266, 1291 (11th Cir. 2021) (similar). Further, just as the government cannot punish certain viewpoints, it may not constitutionally single out for special protection certain viewpoints. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992). Thus, the Court need not look any further than the plain text of the Anti-Shielding Provisions to find that they are viewpoint-

based regulations of speech, under binding Supreme Court and Eleventh Circuit precedent.

But the evidence, as well, overwhelmingly proves that the intent of the Anti-Shielding Provisions was to elevate and protect favored *conservative* viewpoints. This evidence is addressed at length in Plaintiffs' post-trial brief, but it includes statements made by proponents that the concern that was motivating them were anecdotes that conservative students were self-censoring, JX 7 at 3:25-4:22; 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 (Rep. Roach)[1]; that the bill would operate to "*stem the tide of* Marxist indoctrination on university campuses" PX 354 (Rep. Roach) (emphasis added); *see also* PX 388 (Representative Roach again taking to social media to tout HB 233's passage, 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").

The unrebutted evidence further shows that the Anti-Shielding Provisions are broadly understood this way in practice. For example, shortly after the challenged

[1] That this was a reference to the conservative view that liberal students demand to be treated as special snowflakes and is the only reasonable interpretation of this statement, particularly in light of Rep. Roach's other contemporaneous comments and the actions from the Legislature that followed.

provisions were enacted (but before the enactment of HB 7), Dr. James Maggio was instructed for the very first time that he need to refrain from teaching certain 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). And since the enactment of the Anti-Shielding Provisions, students have observed school administrators oppose progressive student activism in response to Neo-Nazi activity, including by complaining about the progressive students' use of "amplified sound," despite allowing disruptive protests from antiabortion protesters and other right-leaning groups. *Id.* at 1311:6-1313:1 (Solomon).

And, of course, since the enactment of the Anti-Shielding Provisions, there have been numerous actions taken by Defendants (who are expressly bound by the Anti-Shielding Provisions), to "shield" students from specific viewpoints—including most recently by demanding a "comprehensive list of all staff, programs, and campus activities related to diversity, equity, and inclusion, and critical race theory." PX 487. Indeed, the same members of the Legislature who enacted the challenged provisions have gone so far as to mandate that staff and students are "shielded" from some of these viewpoints in HB 7. *See* PX 237 at 3:25-4:9; *see also* Br. at 165-166.

If, in fact, the Anti-Shielding Provisions were "equal opportunity" protectors, "protect[ing] groups on both sides," as the Court at one point asked, Trial Tr. 301:6-7, then we would see equal opportunity protection. Instead, we see the opposite: disfavored so-called liberal viewpoints are under unrelenting attack, while conservative viewpoints are consistently protected and elevated. *See, e.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540-42, 535 (1993) (in free exercise case considering evidence of intent and looking not only to historical background, legislative history, and statements made by decisionmakers, but also to the actual impact of law in operation, holding that, while it is not always dispositive, "[t]he effect of a law in its real operation is strong evidence of its object").

Also indicative of the fact that the Anti-Shielding Provisions are viewpoint-based regulations of speech is the fact that by their terms, they can be read to *require faculty to actively engage in speech that they otherwise would not*, in order to ensure "viewpoint diversity" in the classroom. This concern was raised by FIRE, who publicly attacked the legislation for failing to "allow[] faculty to maintain order in the classroom or decide the scope of classroom discussion." PX 136. This concern was even raised by lawyers who specialize in the Higher Education Practice in Defendants' own law firm. 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?").[2] And, as multiple Faculty Plaintiffs testified, in practice, this is how they are implementing the Anti-Shielding Provisions, including by offering "counterpoints" of viewpoints that they would otherwise not, to avoid running afoul of the Provisions. *See, e.g.*, Br. at 95, 98-100, 107-108. The faculty are well aware that the Anti-Shielding Provisions' complete lack of clarity as to when they apply and what they require makes them ripe for discriminatory enforcement, and the unrebutted evidence at trial establishes that the collective response has been to tamp down on expression that could be deemed too liberal and elevate and even personally become a mouthpiece for speech that expresses conservative viewpoints. *Id.*; *see also* Br. at 196-198.

COURT'S QUESTION: How do the Anti-Shielding Provisions compel speech?

This question is addressed at length in Plaintiffs' post-trial brief at 15-24, 95, 98-100, 107-108, 166-168.

The short answer is the one already alluded to above, that the Anti-Shielding Provision compels speech largely through its vagueness, which leads faculty engage in speech that they otherwise not, in order to protect against inadvertently running afoul of those provisions and triggering negative consequences for their institutions

[2] *See* n.10 in post-trial brief regarding the relevance of this memorandum.

and themselves, an objectively reasonable fear particularly in light of the inscrutable text, which enables Defendants to enforce the Provisions in a discriminatory manner.

The ways in which the Anti-Shielding Provisions' prohibition on "limiting … access to or observation of" certain ideas is extremely vague are detailed at length in Plaintiffs' post-trial brief. *See, e.g.*, Br. at 190-196. As a direct result of the lack of clarity that still surrounds the Provisions' reach, what they require, and when they might be violated—even years into this litigation—multiple Plaintiffs have interpreted the Anti-Shielding Provisions to require them to present or engage with ideas or opinions that have been given special protection under HB 233, or to artificially promote "viewpoint diversity." *See* Br. at 98-100, 107-108.

Nor are Plaintiffs alone in this regard. Many others have read the language in the same way, including legislators, FIRE, and a lawyer from Defendants' own firm. *See* Br. at 17-22. Even Defendants' own witness Chancellor Hebda admitted that the plain language "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.

<u>COURT'S QUESTION:</u> What is Defendants' enforcement mechanism for the Recording Provision?

This question is addressed in Plaintiffs' post-trial brief at 24-30, 62-70, 125-126.

The short answer is that, first, the Recording Provision is an enforcement mechanism for the Anti-Shielding Provisions, which the Boards have an

affirmatively duty to enforce under the plain terms of HB 233 as enacted—specifically the provision that expressly prohibits the Boards from "shield[ing] students, faculty, or staff," Fla. Stat. §§ 1001.03(19)(c) (BOE), 1001.706(13)(c) (BOG), something that could really only be done at the institutions that the Boards oversee themselves. *See* Br. at 62-70. Further, the Boards have express duties to ensure that the institutions within them are complying with all Florida laws, which now includes the Recording Provisions. *See* Br. at 24-30. But, in addition, the Recording Provision was added to the statutory rights of students at Florida's public post-secondary institutions as new free speech right—specifically, to record "class lectures" without two-party consent—a right that is now codified in section 1004.097(3)(g) of the Florida Statutes. At the same time, HB 233 added language to the Boards' express statutory powers, referenced above, which expressly prohibit them from "shield[ing] students, faculty, or staff . . . from free speech protected by the First Amendment ***or s 1004.097***." Fla. Stat. §§ 1001.03(19)(c) (BOE), 1001.706(13)(c) (BOG). Because the Recording Provision was added to this very section—section 1004.097—the Boards have a duty to enforce the Recording Provision. If the Legislature had intended to *limit* BOG and BOE's duties to enforce *only* the Anti-Shielding Provisions, the Legislature presumably would have cross referenced only to that subsection of 1004.097. *See* Fla. Stat. § 1004.097(3)(f).

Instead, the Legislature cross-referenced *to the entire section*, which includes the Recording Provision.

COURT'S QUESTION: To what extent can the Court consider statements of the Governor in analyzing the intent of HB 233?

First and foremost, Governor DeSantis and his intentions are directly relevant because he played a necessary role in enacting HB 233 by signing it into law. From the beginning, the *Arlington Heights* inquiry has always focused on "the decisionmaker's purpose," whether that be the decisions of a legislator, an administrative body, or an executive official. 429 U.S. at 267. Plaintiffs allege that the decision to enact HB 233 into law was motivated by discriminatory purpose. But HB 233 did not have support from two thirds of each chamber of the Legislature and accordingly could not have become law without Governor DeSantis' signature. *See* Fla. Const. Art. III, § 8. As a result, the Governor's motivations are causally linked to the enactment of HB 233. Put another way, if the Governor signed HB 233 *because* he wanted to discriminate against liberal views and protect conservative views, then HB 233 became law *because* of those motivations.

At the oral argument in *NetChoice, LLC v. Attorney General of Florida*, 34 F.4th 1196, 1203 (11th Cir. 2022), the panel questioned both sides about whether a signing statement by Governor DeSantis was relevant for assessing the intent behind the law at issue. At first, Judge Carnes, likened it to a presidential signing statement, which generally holds very little weight in *interpreting* the meaning of a federal

statute. But later, Judge Newsom also recognized that the governor's role can be considered "50 percent of the law making process," and described the governor's signing statement as "part of the record, so to speak, of the law's passage." Though none of these questions materialized in an opinion, they are both consistent with Plaintiffs' position here. If this were a statutory interpretation case, Plaintiffs agree that statements by Governor DeSantis would hold very little weight in determining what legal effect to give the text of HB 233. However, in a *discriminatory purpose* inquiry, Governor DeSantis's statements are powerfully relevant because his signature necessarily enacts the law and he is, indeed, the single most important person in the law-making process.

This view is also supported by case law reflecting that the phrase "legislative intent" encompasses the intent of chief executives, like Governor DeSantis, who sign or veto bills because that act is part of the legislative process. *See, e.g.*, *Edwards v. United States*, 286 U.S. 482, 490–91 (1932) (holding "President acts legislatively under the Constitution" when approving a bill); *see also State v. Rizzo*, 303 Conn. 71, 199–200 (2011) ("[I]t is axiomatic that when the governor exercises this power, he or she is acting in a substantive legislative role."). When applying "legislative privilege," the Eleventh Circuit has consistently treated a governor's act of signing a bill as part of "the legislative process itself." *In re Hubbard*, 803 F.3d 1298, 1308 (11th Cir. 2015); *see also Women's Emergency Network v. Bush*, 323 F.3d 937, 950

(11th Cir. 2003) (holding that legislative privilege applies to a governor "signing a bill into law.") (*citing Supreme Ct. of Va. v. Consumers Union of United States, Inc.*, 446 U.S. 719, 731–34 (1980)).

Other courts have expressly recognized that the intentions of chief executives—like Governor DeSantis—are relevant to discriminatory purpose inquiries. *See, e.g.*, *Smithfield Foods, Inc. v. Miller*, 367 F.3d 1061, 1065–66 (8th Cir. 2004) ("[S]tatements by legislators and the governor about the challenged statute may be indirect evidence of an act's discriminatory purpose."); *see also Luddington v. Indiana Bell Tel. Co.*, 966 F.2d 225, 227 (7th Cir. 1992) (considering presidential veto part of legislative intent analysis because "the President is by virtue of the veto power a key participant in the legislative process."); *see also State v. Rizzo*, 303 Conn. at 199-200 ("[A] governor's approval of legislation may provide evidence of the motivations underlying the legislation."); *see also Perez v. Rent-A-Ctr., Inc.*, 186 N.J. 188, 215, clarified on denial of reconsideration, 188 N.J. 215 (2006) ("[I]t is well-established that the governor's action in approving or vetoing a bill constitutes a part of the legislative process, and the action of the governor upon a bill may be considered in determining legislative intent.") (quotations omitted).

In addition to his constitutional role in enacting HB 233, Governor DeSantis's motives are relevant to the intent inquiry in terms of his influence on the Florida Legislature and its public colleges and universities. In Florida, the Governor has line-

item veto power, which enables him to eliminate tens or even hundreds of millions of dollars of funding from a college or university at his discretion. *See* Trial Tr. at 1014:17-1016:3 (Smith). In addition, he has appointment power over the schools' boards of trustees, through which he can "essentially transform that institution," as he recently did at New College. *Id.* The political realities in Florida confirm Governor DeSantis' outsized influence. As former Representative Guillermo-Smith testified, Governor DeSantis possesses "substantial influence over [education] policy because of not only his executive power . . . , but also because of how aligned the legislature is with the Governor's administration and with the Governor's point of view." Trial Tr. at 1017:9-1018:3. And Governor DeSantis has been particularly active in higher education policy—it is a "top priority" for the Governor. *Id.* at 1018:19-1019:5. Separately, the fact of Governor DeSantis's outsized influence and his repeated rhetoric is also relevant to Plaintiffs' objectively reasonable fears of HB 233's enforcement in the standing inquiry, as the Court properly recognized. Trial Tr. at 279:24-280:22.

COURT'S QUESTION: Why should the Court consider post-enactment statements and actions?

As the Court pointed out, there are many cases that counsel against considering post-enactment statements in determining "legislative intent." *See, e.g.*, *CSX Corp. v. United States*, 18 F.4th 672, 684 (11th Cir. 2021); *see* 1/9/23 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. *Id.* ("post-enactment legislative history . . . is not a legitimate tool of *statutory interpretation*.") (cleaned up) (emphasis added). Where the sole question is determining *the legal effect 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)).

The Fifth Circuit has recently recognized the distinction between the statutory interpretation context and discriminatory purpose inquiries with respect to post-enactment events: "But here, the court is not tasked with interpreting Section 241. Rather, the inquiry is one of motivation: whether Section 241 would have been enacted in its current form absent racial discrimination. Later events—even if they ultimately result in legislative inaction—are not irrelevant to demonstrating intent." *Harness v. Watson*, 47 F.4th 296, 310 (5th Cir. 2022).

This is also consistent with how courts examine discriminatory motives in other contexts. For example, in employment discrimination cases, a fundamental indicator of discriminatory intent is whether the plaintiff was subsequently replaced with an employee who differs based on the alleged discriminatory axis. *See, e.g.*, *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 142, 120 S. Ct. 2097, 2106,

147 L. Ed. 2d 105 (2000) (holding a plaintiff established a prima facie case of age discrimination by showing, among other things, that defendant subsequently "hired three persons in their thirties to fill [plaintiff's] position."). Similarly, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540-42, 535 (1993), the Court looked not only to the historical background, legislative history, and statements made by decisionmakers in attempting to discern legislative intent, but also to the actual impact of the law in operation, holding that, while it is not always dispositive, "[t]he effect of a law in its real operation is strong evidence of its object." And, even more recently, in *Barr v. American Association of Political Consultants, Inc*., 140 S. Ct. 2335 (2020), the plaintiffs challenged a 2015 law that carved out an exception to the federal regime regulating robocalls for calls made to collect debts owed to the United States. In considering congressional intent, the Court examined the federal legislative landscape as a whole, including legislative developments from 1991 *through 2020* related to restriction of robocalls, to determine if the exception served to "diminish the credibility of the government's rationale for restricting speech … in the first place." *Id*. at 2348 (plurality op. by Kavanaugh, J., joined by Roberts, C.J. and Alito, J.). The Court carefully considered the entire legislative landscape before coming to a conclusion, based in large part on the fact that, for many years, Congress had retained a largely consistent position with regard to this type of speech. *Id*. at 2348. As a result, the Court found that the exception was

unconstitutional, but declined to invalidate the broader scheme in regulation of robocalls.[3]

These cases are consistent with Plaintiffs' approach: analyzing the subsequent actions of relevant actors to see whether they corroborate the alleged discriminatory motive behind HB 233 or demonstrate that alternative justifications were merely pretextual. *See* Br. at 155-166.

COURT'S QUESTION: How does the survey's implementation relate to legislative intent?

Defendants' flawed execution of the 2022 Survey is relevant to the question of legislative intent because Defendants' application of the 2022 Survey is so bizarre and so non-serious that it *only* makes sense in the context of Defendants having understood, loud and clear, the actual intent behind HB 233: not to engage in any type of serious evidence-gathering exercise, but rather to attempt to create smoke so

[3] A direct analogy would be if the Plaintiffs here argued that, due to the singular exception that the Recording Provision carves out to Florida's broad criminalization of recording without consent, *see* Fla. Stat. § 1004.097(3)(g) (creating exception to Florida Statute 934.03 to allow students to "record video or audio of class lectures for their own personal educational use, in connection with a complaint to the public institution of higher education where the recording was made, or as evidence in, or in preparation for, a criminal or civil proceeding"), Florida's entire recording-consent law, Fla. Stat. 934.03, should be invalidated due to the content-based carve out. Plaintiffs do not make that argument. As in *Barr*, "[t]his is not a case where" Florida's two-party consent law "is littered with exceptions that substantially negate" its ordinary treatment of speech. *Id*. at 2348. HB233, and its content-based treatment of speech—including in the Recording Provision, Survey Provision, and Anti-Shielding Provision—*represent very idiosyncratic exceptions* to Florida's general treatment of speech not only more broadly, but in higher education, as well.

that Florida could yell fire, and provide cover for its ongoing, viewpoint-based attacks on speech in higher education. Multiple courts have found that the implementation of a law can be relevant to questions of discriminatory purpose, including *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540-42, 535 (1993), in which the Court looked not only to the historical background, legislative history, and statements made by decisionmakers, but also to the actual impact of the law in operation, holding that, while it is not always dispositive, "[t]he effect of a law in its real operation is strong evidence of its object." *See also R.A.V. v. City of St. Paul*, 505 U.S. 377, 394 (1992) (considering, among other things, the "practical application" of the ordinance itself in determining whether it was not just content-based, but also viewpoint-based); *also cf. City of Austin v. Reagan Nat'l Advertising of Austin, LLC*, 142 S. Ct. 1464, 1470 (2022) (affirming district court's conclusion that statute was content-neutral because there was "*no* evidence in the record" that the government's stated purpose for the provisions was a "pretext for any other purpose," with concurrence reiterating that there was "no evidence" that government issued the regulation "to censor a particular viewpoint or topic, *or that its regulations have had that effect in practice*") (Breyer, J., concurring in quote in parenthetical) (emphasis added).

<u>COURT'S QUESTION:</u> HB 233 is not narrowly focused on certain topics, how does that effect the intent inquiry?

Because HB 233 does not specify topics of instruction and instead applies broadly to all expressive activity, it cannot purport to be an exercise of the state's authority to set curriculum or course content. *Cf. Pernell v. Fla. Bd. Of Governors of State Univ. Sys.*, No. 4:22CV304-MW/MAF, 2022 WL 16985720, at *7 (N.D. Fla. Nov. 17, 2022) (acknowledging that the "authority of the State to prescribe the content of its universities' curriculum . . . makes intuitive sense"). Accordingly, HB 233 is subject to traditional First Amendment analysis rather than the more forgiving balancing test set forth in *Bishop v. Aronov*, 926 F.2d 1066, 1074 (11th Cir. 1991), which accounts for the special role that state authorities may play but is inapposite here. This is addressed further in Plaintiffs' post-trial brief at 138-140.

COURT'S QUESTION: Isn't the Legislature free to engage in poor policymaking?

This question is addressed in Plaintiffs' post-trial brief at 173-183.

The bottom line is that legislation that impacts speech is different and, once the Court has found that a plaintiff has made a prima facie case that the challenged provisions regulate free expression, the government is subject to a heightened standard, both of evidence and persuasion, even if the Court finds that the law is content-neutral. *See, e.g.*, *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."). Accordingly, if a restriction infringes on First Amendment rights (even in a content-neutral manner), then the government must show that the restriction was at *least* "narrowly drawn to further a substantial governmental interest" that is "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).

This heightened standard for policymaking in the First Amendment space also applies to the basis for the Legislature's actions. For example, it is significant that the Legislature relied on anecdotes that were unsourced and contrary to the weight of the evidence that stakeholders relayed during proceedings, as well as steadfastly ignored all input it received—including from entities such as FIRE that it otherwise appeared to view as expert and authoritative in the academic free speech space. *See* Br. at 43-48; *see also 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 response (or lack thereof) to input that they make different decisions regarding the books in question; inconsistencies between explanations the board offered for its actions and

other actions that they took; the fact that the board ignored 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).

It is also significant that these charges of liberal bias and indoctrination had been around for decades, and the Legislature took no measures to investigate or verify them. *See* Br. at 45. *See, e.g.*, *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 626, 667 (1994) (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, even where the Court agreed the provisions were content-neutral, and in doing so noting in particular the "paucity of evidence indicating that broadcast television is in jeopardy"—the justification the government gave for the law). The testimony at trial has confirmed that HB 233 undermines rather than advances free speech on campus. *See, e.g.*, Trial Tr. at 502:2-6 (Link); *id.* at 765:10-22 (Price); *id.* at 960:5-961:9 (Edwards); *id.* at 1315:23-1316:3 (Solomon); *id.* at 1464:13-21 (Morse). Defendants cannot carry their burden under any applicable level of scrutiny.

Moreover, the U.S. Supreme Court has been clear that, *even in investigating legitimate issues*, the First Amendment does not "permit legislative inquiry to

proceed on less than an adequate foundation." *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 558 (1963). What's more, the record in this case belies any suggestion that the Survey Provisions are a good faith effort to gather more information. They were conceived as a tool to measure the relative liberalness of universities, which tells the Legislature nothing about whether the problems of bias and indoctrination exist. *See* Br. at 168-173. And the fact that they were passed as an annual monitoring measure alongside the Anti-Shielding Provisions and the Recording Provision in the first instance rather than administered to determine what other provisions may be necessary, further underscores their illegitimacy.

COURT'S QUESTION: What is the definition of academic freedom under the First Amendment? Does that differ from the one advocated by the AAUP?

Courts have not been as specific about the meaning of academic freedom as compared to the AAUP. However, the common principle is the same: "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).[4] This commitment to academic freedom under the First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom." *Keyishian v. Bd. of*

[4] The Court asked Plaintiffs to consider *Minnesota State Board for Community. Colleges v. Knight*, 465 U.S. 271, 288 (1984), *see* 1/10/23 Tr. at 432:7-17, which confirms that "[a]lthough there is no constitutional right to participate in academic governance, the First Amendment guarantees the right both to speak and to associate." Consistent with *Knight*, Plaintiffs do not assert an independent claim based in academic freedom or governance.

Regents of Univ. of State of N. Y., 385 U.S. 589, 603 (1967). Indeed, this long tradition of academic freedom and free inquiry cannot be reconciled with HB 233's mechanisms for supposedly promoting "intellectual freedom"—mandatory insertion of uncomfortable or disagreeable views, political ideology surveys, and surreptitious recordings. These clear intrusions on academic freedom belie any pretextual invocation of the principle of academic freedom and weigh in favor of finding discriminatory intent under the *Arlington Heights* analysis.

Under the First Amendment, there is no separate right to academic freedom. Instead, academic freedom operates as a "transcendent value" that is "a special concern over the First Amendment." *Keyishian*, 385 U.S. at 603; *see also Sweezy*, 354 U.S. at 250 ("The essentiality of freedom in the community of American universities is almost self-evident."). As such, it operates as a background principle that informs how the First Amendment should be applied in academic settings.

The Supreme Court has made clear that "courts must apply the First Amendment 'in light of the special characteristics of the school environment.'" *Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, 141 S. Ct. 2038, 2044 (2021) (quoting *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988)). In some contexts, the government can determine "what is and is not expressed when it is the speaker or when it enlists private entities to convey its own message." *Gay Lesbian Bisexual All. v. Pryor*, 110 F.3d 1543, 1549–50 (11th Cir. 1997). However, "state

colleges and universities are not enclaves immune from the sweep of the First Amendment." *Healy v. James*, 408 U.S. 169, 180–81 (1972). One of the critical considerations in applying the First Amendment in academic settings is the long tradition of respect for academic freedom. *Bishop v. Aronov*, 926 F.2d 1066, 1075 (11th Cir. 1991) (considering "the strong predilection for academic freedom as an adjunct of the free speech rights of the First Amendment").

While the state may have greater latitude to regulate speech in college and university classrooms as compared to a public forum, the state still "'may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum, nor may it discriminate against speech on the basis of its viewpoint.'" *GLBA*, 110 F.3d at 148-49 (quoting *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995)). In sum, if the speech at issue may be "perceive[d] to bear the imprimatur of the school," then the state may exercise control over the "content" of speech, "so long as their actions are reasonably related to legitimate pedagogical concerns." *Kuhlmeier*, 484 U.S. at 273.

COURT'S QUESTION: Are the *Arlington Heights* and *Bishop* inquiries related? How do you explain using both?

To evaluate whether a speech restriction is constitutional under the First Amendment, courts undertake a two-step inquiry: First, they determine whether the restriction is viewpoint-based, content-based, or content neutral. *See* Br. at 138-140. Second, they subject the restriction to scrutiny, the level of which is based on their

determination under the first step and the context in which the restriction operates. *Id.*

Arlington Heights provides a framework to assist in making the Step One determination. *See* Br. at 31. For example, if the *Arlington Heights* factors evidence that the restriction was enacted because of disagreement with a specific viewpoint, then the restriction is viewpoint-based. *Bishop*'s balancing test, on the other hand, is a substitute for the traditional tiers of scrutiny at Step Two. For example, if a restriction is content-based and operates in the context of curricular decisions, then the restriction is subject to *Bishop*'s balancing test. Accordingly, a court could apply both the *Arlington Heights* and *Bishop* inquiries to a single restriction—one at each step of its First Amendment analysis.

While Plaintiffs explained in their pre-trial brief why, if this Court were to apply Bishop's more forgiving standard here, the challenged provisions would not survive scrutiny, for the reasons discussed in Plaintiffs' post-trial brief at 177-180, the Court need not do so unless it finds both that (1) the challenged provisions are not viewpoint-based (i.e., they are either content-based or content-neutral), and (2) one or more of the challenged provisions were enacted pursuant to the state's authority to prescribe curriculum. And as discussed at 138-139 of the Plaintiffs' post-trial brief, the case law is clear that, regardless of the academic environment, viewpoint-based regulations of speech remain per se prohibited. *Searcey v. Harris*,

888 F.2d 1314, 1325 (11th Cir. 1989) (The prohibition against viewpoint discrimination is firmly embedded in first amendment analysis … we will continue to require school officials to make decisions relating to speech which are viewpoint neutral.") (citations omitted). And the challenged provisions are not—at least on their face—clearly curriculum restrictions. Instead, they are far broader speech regulations. As a result, strict scrutiny would still apply, assuming the Court finds them viewpoint or content-based. If, however, the Court were to find the challenged provisions were enacted pursuant to the state's power to regulate curriculum and were content based (after using Arlington Heights or otherwise), the *Bishop*'s balancing test would apply.