

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION**

WILLIAM A. LINK, et al.,)	
)	
Plaintiffs,	)	Case No: 4:21cv271
)	
v.	)	Tallahassee, Florida
	)	January 9, 2023
RICHARD CORCORAN, et al.,)	
	)	8:36 AM
Defendants.	)	VOLUME I
)	

**TRANSCRIPT OF *EXPEDITED* BENCH TRIAL PROCEEDINGS
BEFORE THE HONORABLE MARK E. WALKER
UNITED STATES CHIEF DISTRICT JUDGE
(Pages 1 through 275)**

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P R O C E E D I N G S

(Call to Order of the Court at 8:36 AM on Monday,
January 09, 2023.)

THE COURT: All right. We are on the record in Case
No. 4:21cv271. I've got counsel present for both sides. We are
here for a bench trial in this matter.

Let me go over some housekeeping matters first.

Mr. Levesque, my courtroom deputy reached me last
night and asked about laptops. And the same applies to
everybody.

You can keep your seat.

I've told the court security officers, because I know
it can vary from judge to judge, I'm always happy for lawyers
and staff, meaning paralegals and such, to have their laptops
and so forth. I've told them in this case, the bench trial, and
given the nature of the parties, I'm happy for your -- if your
clients show up or you have some of the parties, then they can
have their laptops as well.

If there was a jury present, I'd be concerned about
having an extra five laptops in the courtroom and things going
off and being distracting -- people distracting the jurors, but
I can stay focused, so feel free to have any of your folks that
want to bring in laptops, bring in laptops. And that extends
beyond the lawyers and paralegals, if any of the parties want to
come in, they are free to do that. Okay?

1 MR. LEVESQUE: Thank you, Your Honor.

2 THE COURT: Also, my rule that I have in jury trials
3 about not having your cell phones out, that rule doesn't apply.
4 I don't want the lawyers that are speaking to have their cell
5 phones out because I want you to be asking questions and paying
6 attention. But, actually, I think things move faster in bench
7 trials when you have the capacity to text folks, reach out to
8 people.

9 And I really don't feel the need to have,
10 Mr. Levesque, you or Mr. Wermuth, if you've got other lawyers
11 helping you, get up and leave the courtroom to go text a
12 witness. Quite frankly, that's more distracting than them just
13 sitting there at the desk and texting where they're at.

14 So all the lawyers -- you should have been allowed,
15 and the staff should have been allowed, to have your cell phones
16 with you this morning. I told the court security officers this
17 morning I wanted to be more expansive on who could have them.
18 I'm altering the rule they have to be put away. You need to
19 have the sound off; but other than that, you're free to have
20 those. I think it will just speed things along if you can reach
21 out to witnesses and so forth.

22 Plus, I know y'all have other matters. This isn't
23 your only case, so you may need to address other matters on
24 break. I want to make that as easy as possible.

25 Both sides -- I think I noticed, as I came in the

1 courtroom, to the left through the main doors is a door marked
2 for the defense counsel, and then down the hall was one for
3 plaintiffs' counsel. Y'all are going to be able to use those
4 rooms throughout this week.

5 Judge Winsor does not have a trial this week.
6 Judge Hinkle has a bench trial. Judge Hinkle has the witness
7 room directly opposite my courtroom. There is also a witness
8 room inside the double doors to the right before you go into his
9 courtroom. So he has two witness rooms.

10 If y'all need a second witness room, I've told the --
11 my courtroom deputy that she can use the ones down at the end of
12 the hall where Judge Winsor's courtroom is.

13 Moreover, we do have the attorney lounge. So if
14 either side wants to spread out, I'm happy to put a sign on the
15 door to the attorney lounge and either side can use the attorney
16 lounge. I know sometimes when we have a lengthy trial such as
17 this, folks want to bring in a small fridge or something to
18 stick in the witness rooms or the attorney lounge, and that's
19 fine as well if you want to do that for your convenience.

20 In terms of the schedule for the day -- I know some
21 judges have condensed trial days so they can do other work. I
22 try to do my stuff in the mornings and lunch and the evenings,
23 which sometimes make for late evenings. So I'm going to be
24 respectful of y'all's time in trying to get through the trial,
25 but I'm going to try to stick to the 8:30-5:30 time frame, not

1 that I'll arrive at 8:30 or that I'll leave at 5:30. But rather
2 than having a condensed trial day, I'm going to try to start and
3 stop at those times so I can actually get here and do work
4 before on other matters and do work on other matters in the
5 evening.

6 Having said that, I'm not going to cut off a witness.
7 If we're here at 5:30 and we need another half an hour to finish
8 a witness, then I'll just deal with it and have to stay up
9 later.

10 We had a couple of late filings. When I say "late," I
11 don't mean untimely, just they were filed this weekend.
12 Ordinarily I would have reviewed them. I was trying to get
13 other things done. And I was sick, so I tried to sleep 12 hours
14 yesterday so I wouldn't have to continue this trial. I thought
15 that it was a better use of my time to try to get better so I
16 don't have to continue the trial as opposed to trying to read
17 600 pages of depo designations.

18 I'll tell you for purposes of referencing anything in
19 the depo decisions, I did not read them on Sunday, even though I
20 know y'all filed them on Saturday. I just had -- instructed one
21 of my law clerks to print them out and put them in binders, and
22 I should be able to read all 600 pages tonight and tomorrow
23 night. Ordinarily I would have read it yesterday. I have not
24 read the depo designations. So if you refer to them, I can
25 certainly take notes and note that you're referring to

1 something, but I have not read those depo designations yet, but
2 I plan to do so this evening and Tuesday evening.

3 I also received what -- that was ECF Document 241. I
4 also received ECF Document 242 regarding the admission of
5 exhibits. My standard protocol would have been to scurry around
6 and prepare an order, potentially yesterday, in determining
7 what, if anything, I needed a response from defense for. I have
8 not read that. I've skimmed it, but I haven't given it the
9 attention it deserves.

10 I know that the first three Roman Numerals -- it
11 appeared to me there were joint exhibits, unobjected-to
12 plaintiffs' exhibits, and unobjected-to defense exhibits as
13 outlined in ECF 242.

14 Similarly, I got an amended consolidated trial exhibit
15 list, which is ECF Document 243, which is also divided into
16 categories, beginning on page 2, the joint exhibit list.

17 The joint exhibits, plaintiffs' unobjected-to
18 exhibits, and the defense's unobjected-to exhibits as reflected
19 in ECF Document 242 are now admitted.

20 (JOINT EXHIBITS LISTED IN ECF NO. 242, NOT OBJECTED TO:
21 Received in evidence.)

22 THE COURT: As to the last category of documents to
23 which there are objections, we'll have to address those, to the
24 extent they come up today, although I can tell you what I likely
25 will do is conditionally admit things and defer ruling so we

1 don't have to delay the testimony. I'd rather do that either
2 this evening or tomorrow evening and circle back and address
3 those issues. If there is something that's critical that I need
4 to address, I can at the time. Again, if this were a jury
5 trial, I would be more sensitive to having to stop immediately
6 and address it, but in some instances, I can defer to this
7 evening.

8 Let me ask Mr. Wermuth quickly.

9 There were some exhibits that I've already addressed
10 in a prior order that I said they may have been filed more
11 recently, but I'm not treating them as untimely. Here's why;
12 look, this may be only marginally relevant, but I'm going to
13 determine relevance when I consider legal argument at the end
14 and so forth.

15 I was not able to compare, because I have not fully
16 digested ECF Document 242, which includes Roman Numeral IV, the
17 section of exhibits to which there are objections.

18 But is there an overlap between that order I've
19 already issued and a lot of the stuff under that subcategory IV?

20 MR. WERMUTH: There is, Your Honor. There are a
21 number of documents that are in ECF Document 242 that are
22 referenced that are on the previous motion for judicial notice.
23 And my colleague Robin Kramer can identify those for you.

24 MS. KRAMER: Yes, Your Honor.

25 So you took judicial notice of video files, and the

1 documents that we identified in the motion are the corresponding
2 transcripts to those video files. So those exhibit numbers are
3 170 --

4 THE COURT: Hold on one second.

5 MS. KRAMER: -- 170, 172, 174, 176, 178, 180, 182,
6 184, 186, 188, 190, 192, 194, 196, 199A, 201, 203, 206, 222,
7 224, 226, 228, 233, 235, 237, and 332.

8 THE COURT: And those are the exhibits that are
9 subject to my prior orders; correct?

10 MS. KRAMER: Yes, Your Honor.

11 THE COURT: Mr. Levesque, do you disagree with that?
12 If you need time to go back and double-check, that's fine too.

13 MR. LEVESQUE: If I could double-check, but I don't
14 disagree, at least based upon the concept, that it was addressed
15 in the prior order.

16 THE COURT: All right. So consistent with my prior
17 ruling, I'm going to admit those documents.

18 Let me, though, emphasize --

19 MR. HANCOCK: Excuse me, Your Honor. If I could
20 clarify, I believe the prior motion concerned exhibits that were
21 videos. And this motion -- this more recent motion concerns
22 transcripts that are separate exhibit numbers but are
23 transcripts of a portion of those videos.

24 THE COURT: But would be linked to -- and the logic
25 would be the same. If I've already said there is sufficient

1 authenticity and I've already said that it may be marginally
2 relevant, and, therefore, I'm going to err on the side of
3 letting it in, the -- while there may be more than one iteration
4 of the same thing, a transcript versus a video, they are all
5 consistent with what I had previously said; correct?

6 MR. HANCOCK: Correct.

7 THE COURT: All right. Let me find out. Do we have a
8 list -- that's a subset of Roman Numeral IV in ECF Document 242,
9 which is the most recent motion, or are there other exhibits in
10 addition to those?

11 MR. HANCOCK: It is a subset, so there are additional
12 exhibits subject to the motion.

13 THE COURT: So what I need y'all to do is somebody --
14 not this second, not in an hour, but at some point -- go ahead
15 and generate a list for me and for Mr. Levesque of the other
16 exhibits under IV that have not been addressed then. All right?

17 And let me -- and, Mr. Levesque, I promise I'll let
18 you speak.

19 Let me make plain, though, a couple of things. Just
20 because it's a bench trial doesn't mean you get to introduce
21 four days' worth of inadmissible testimony. And I'm not
22 suggesting that. I am suggesting that if something is
23 marginally relevant, borderline irrelevant, if there is a jury
24 trial, then I find it incumbent -- I think it's appropriate for
25 me to address that directly because of the issue of confusing

1 the jury or the fact finder or misleading, having marginally
2 relevant facts or barely relevant facts becoming the feature of
3 the case and so forth, those things -- I'm far more sensitive to
4 those concerns when there is a jury trial. It doesn't mean that
5 you just wholesale let everything come in.

6 Give me one moment, please.

7 (Pause in proceedings.)

8 THE COURT: But, quite frankly, it would take longer
9 to address and weed out things that I find are so marginally or
10 nominally relevant that I'm not going to -- based on 403 and
11 other rules would otherwise keep them out.

12 Part of that, also logically, is I don't want to retry
13 this case. So judicial economy would suggest in a bench trial,
14 if I find there is a subset of documents, for example, that
15 arguably is marginally relevant to the *Arlington Heights*
16 analysis, even if I believe it would be -- some of the stuff
17 would be afforded very little weight, if any, rather than have
18 an incomplete record and have me suggest that I'm not affording
19 it much weight, if any, and then -- but not have it on the
20 record would be sort of the opposite of judicial economy. I'll
21 give you an example.

22 In a recent case in front of me applying *Arlington*
23 *Heights*, I said repeatedly on the record that historical data
24 from 200 years ago, 75 years ago, and 50 years ago really told
25 me nothing about the motivations of a particular legislature. I

1 wrote the same thing in a lengthy order. It's, I guess, a
2 Christmas miracle that the folks that filed the appellate brief
3 said, Oh, no, no, Judge Walker, that's all he cared about and
4 all he relied on, even though I explicitly said I wasn't relying
5 on it.

6 But *Arlington Heights* says one of the things you got
7 to go through is the history. So even though I said,
8 notwithstanding the briefing to the contrary -- apparently
9 they've got a different transcript and got a different order
10 than I wrote. I said that it told me virtually nothing, and I
11 afforded essentially no weight to it.

12 But because I followed *Arlington Heights* and
13 acknowledged that evidence was there, which is one of the
14 factors to look at, that's why I did it. And so that's an
15 example of why I would do it also in this case. Even if I find
16 something doesn't really inform this Court about the intent of a
17 particular legislature, if *Arlington Heights* says I'm supposed
18 to look at the historical data, I'm going to allow it in the
19 record because I think it would be error otherwise. So that's
20 my thinking as it relates to that.

21 Let me back up, though, and say, on the videos -- I
22 said that they were -- I'd take judicial notice they were
23 authentic, which, by the way, isn't the best way to get
24 something authenticated. A lot of Courts have done it and
25 allowed it. I've got my own thoughts about why that's an odd

1 way to authenticate something. I now found they were marginally
2 relevant. What I did say is all of them were subject to other
3 evidentiary objections. So there is a -- they were only -- they
4 were partially admitted to the extent I found they were
5 authentic and marginally relevant. I did not object -- did not
6 resolve all the other objections. So I understand it's a little
7 bit more complicated than they all come in or they all stay out.

8 Having said that, Mr. Levesque?

9 MR. LEVESQUE: Yes, Your Honor. From our perspective
10 and at the risk of not having to jump up to preserve our
11 objections -- from our perspective, we believe that a lot of the
12 consideration of any of this stuff under *O'Brien* and the *Greater*
13 *Birmingham* case would be inappropriate. The statute, at least
14 as it exists on its face, doesn't require any inquiry into
15 legislative intent at all.

16 If Your Honor would grant us a standing objection, I
17 think that would save me a little bit of exercise jumping up and
18 down. Certainly there are going to be some instances where we
19 believe that the evidence doesn't relate to anything that was
20 going on in the legislature proper but involved kind of the
21 statements of others that are nonparties or the statements of
22 others that are even nonlegislators. Those we might still stand
23 up and object to.

24 THE COURT: And that's why I said it's not all the
25 same.

1 MR. LEVESQUE: Sure.

2 THE COURT: There's clearly a difference between
3 nonparties and nonlegislators versus those that are parties or
4 legislators.

5 And we'll have to -- I don't want to go through and
6 get into the weeds right now too much. I, of course, am aware
7 of *Greater Birmingham*, another example of where I probably wrote
8 about 15 pages and then miraculously was told in the appellate
9 brief that I never mentioned it or considered it. Again,
10 apparently the rules of ethics are now lost on this generation
11 of lawyers.

12 But -- I'm aware of it, but I also think one side
13 understates the significance of that decision, and the other
14 side overstates the significance of that decision. I think it's
15 more nuanced than either side suggests here.

16 As far as something being facially neutral -- and
17 we'll have to talk about this later. Again, I don't want to get
18 into this now. I did read the pretrial stip, and I originally
19 recognized there was case law that suggested you could have a
20 facially neutral law, but if it was passed with discriminatory
21 intent, it would be analyzed under *Arlington Heights*. I believe
22 that was my order when I denied the motion for preliminary
23 injunction but also denied the motion to dismiss. And I didn't
24 suggest that was the only theory that the plaintiffs could
25 travel under, but I recognized, I believe in the order denying

1 the motion to dismiss, that that was at least a viable theory.

2 I don't believe I'm confusing this with another case.
3 Isn't that what I put in the order denying the motion to
4 dismiss?

5 MR. WERMUTH: Yes, Your Honor.

6 THE COURT: Which is -- I was getting ready to pull it
7 out. I printed it off of Word. I didn't print it off the
8 docket, so I don't have the ECF number.

9 In any event, then I get the pretrial stip, and
10 plaintiffs say, Well, Judge, we think you should analyze this
11 under *Bishop*. It seems to me those are two very different
12 things, and there are two different analytical frameworks. And
13 there's case law that qualifies those analyses differently.

14 So let me -- and I'm -- and y'all certainly can
15 address this in your post-trial papers.

16 But, Mr. Wermuth, am I wrong, or they're just all the
17 same thing, all part of the same analysis?

18 Because it seems to me there's case law that deals
19 with a facially neutral law and how you'd analyze it, but
20 there's also case law that talks about if it was passed with
21 intentional discrimination, which, if that case law exists, then
22 it would make the statement that the intent of the legislature
23 doesn't matter, a non sequitur.

24 But I'm --

25 MR. WERMUTH: On this issue I defer to my colleague,

1 Elizabeth Frost.

2 MS. FROST: Your Honor, I'm happy to address that.

3 First of all, I think we maintain our argument that
4 this statute is not facially neutral. So I think if you were to
5 agree with that, either in part or on the whole, the decision in
6 *Pernell* seemed to lay out a framework that would apply here as
7 well.

8 And I think at the end of the day, frankly -- and the
9 First Amendment spaces are all kind of part and parcel of the
10 same thing, and because we do have in this space a speech issue
11 in a higher education setting, and there's been a lot of
12 argument about whether the First Amendment even applies, it
13 seemed like the analysis that was happening in *Pernell* and,
14 frankly, *Bishop*, which is a case we've cited before as well, is
15 relevant at least to the first question of when you pass through
16 the door of the gates of higher education, how the First
17 Amendment is in play here.

18 So I think --

19 THE COURT: But even in my recent application of
20 *Bishop*, I didn't find that everything that's said in a classroom
21 somehow is clothed in a magic cloak of protection under this
22 expansive view of academic freedom. I even -- I mean, I was
23 pretty direct in talking about the limitations that applied in
24 *Bishop*, and it just -- it seems -- I just don't see there
25 being -- and you're going to have to explain this to me at the

1 end of the case. I just don't see there being an overlap
2 between the analysis that says that if you pass a law with the
3 intent to discriminate, that that's applying *Arlington*. It
4 seems to me that's a different way to look at the evidence and a
5 different challenge than the challenge that was at issue in
6 *Bishop*.

7 Is that --

8 MS. VELEZ: So -- excuse me -- I think you could --
9 frankly, I think you could have looked at House Bill 7 through
10 *Arlington Heights* as well from an intent-based standard.

11 I also think the *Pernell* analysis for Steps 1, 2, and
12 3 incorporate into them intent pieces. So, for example, in
13 Step 1, I think the way to describe it is the context in which
14 the provision arose, but some of the identification of that
15 context related to things that were, you know, going on in the
16 legislature or things that were going on sort of in the broader
17 political ecosphere.

18 And then the second step, which was the reasonableness
19 and justification, also, frankly, seems to have some overlap
20 there.

21 And so I think each of those things -- and then the
22 third piece, which is sort of this balancing, you know, of
23 the -- of the strong interest in academic freedom and the strong
24 interest in space, each of these things -- I think when you look
25 at each of the pieces of evidence that are relevant there, some

1 of them are sort -- *Arlington Heights* sort of related. Some of
2 them, you know, are very similar to what's happening in this
3 case.

4 So I think --

5 THE COURT: Counsel, here's the bigger question for
6 you. And, again, you're going to have to explain this to me at
7 the end. I don't necessarily need an explanation now, but it's
8 confusing to me to draw a parallel between, for example, this
9 case and *Pernell* and *Novoa*, inasmuch as that case, the
10 government responded by saying, Absolutely we passed a law that
11 restricts viewpoints. This is a law targeting specific
12 viewpoints that a professor cannot express, but we are allowed
13 to do that because anything said in a classroom is government
14 speech. And we're relying on *Garcetti*, which actually said the
15 Court wasn't holding back, but apparently we now have arrived at
16 a world where we cite cases that explicitly say they're not
17 addressing something, and apparently Judge Thomas dissents are
18 now the law of the land, even though, by definition, a dissent
19 is not precedent.

20 I understand that that's the world in which we now
21 live, for better or worse.

22 But I'm struggling with we have a case where it
23 doesn't say a professor has to say something. So it's not
24 compelled speech. And if you think it's compelled speech, you
25 can explain to me why. It doesn't say that professors -- they,

1 themselves, can't say something or respond to their students.
2 What it says -- and you can explain to me why this isn't so --
3 is that students can't be kept from expressing their views
4 simply because it would upset somebody. And it would run both
5 ways.

6 So, for example, everybody -- and I'll give you an
7 example: New College. They just reconstituted the entire board
8 of trustees at New College because we want to take a school that
9 had historically been ranked as one of the highest -- ranked as
10 one of the best smaller liberal arts schools in the country, and
11 we want to say, We think you've been doing it wrong all these
12 years, and we want to completely rework and have a redo at New
13 College.

14 But it seems to me what this statute says is if the
15 new faculty that's apparently going to be hired at New
16 College -- because, even though they were ranked so high,
17 they've been doing it wrong for decades -- if students still
18 want to go to New College, which, I guess, that will be
19 ultimately a question, they can go to every class and say, Well,
20 Professor, I think that's wrong. I want to offer my opinions
21 about critical race theory and why you're -- the prism through
22 which you're looking at whatever the subject matter is wrong
23 because you should look at it through the prism of critical race
24 theory.

25 And if some snowflake in the class, that the mere

1 mention of critical race theory throws them into spasms, says,
2 Professor, that's awful; they're talking about critical race
3 theory, and the professor stops them, the New College student is
4 allowed to record under the one provision here, and they're
5 allowed to then sue.

6 So it seems to me that this is the opposite of what we
7 had in *Pernell* where you're telling a professor what they can
8 and can't say, and it was directed at a particular viewpoint.
9 You could criticize it. You could condemn it. You just
10 couldn't -- there were certain concepts you couldn't praise,
11 which is, by definition, viewpoint discrimination, which, you
12 know, even the defendants in that case had to concede the
13 obvious, that there was viewpoint discrimination. They just say
14 it's fine and okay.

15 But I just -- it seems to me what you're saying is,
16 Judge, if you pass a law that doesn't tell a professor they can
17 compel -- they have to say something or they can't say
18 something, but it has the effect -- indirect effect of chilling
19 their speech, that states a First Amendment claim, and you'd
20 analyze it under *Bishop*. And if that's the case, you're going
21 to have to explain to me why.

22 Because I understand that if you pass a law with a
23 discriminatory purpose and you prove it, everybody gets in the
24 cloakroom and they're all saying, If we pass that, we can go
25 after these woke professors and we can stop them from talking,

1 and they're going to stop all their nonsense, and they'll all be
2 reading from the same sheet of music -- or singing, I guess,
3 from the same sheet of music.

4 And even though it doesn't directly tell them they can
5 or can't say something because it was passed with that intent
6 and you prove it, I understand how that would be an *Arlington*
7 *Heights*-style claim. But I don't understand how you'd analyze
8 it under *Bishop*. So y'all are going to have to explain that to
9 me at the end of the case.

10 MS. FROST: Okay. May I respond at all, Your Honor?

11 THE COURT: Sure.

12 MS. FROST: Okay. So, I think, first, as Your Honor
13 already knows, there's several different ways to determine
14 whether a law is content based or viewpoint based. And I think,
15 you know, one of the decisions that sort of rocked the First
16 Amendment world in this space was *Reed* in 2015, which surprised
17 the Ninth Circuit, right. And I think one of the lessons out of
18 that case really is that, you know, there are all these
19 different ways, including through discriminatory intent, right,
20 which we've used *Arlington Heights* in certain circumstances to
21 do.

22 I think, you know, we would argue, we will argue, we
23 have argued that there are certain aspects of this law that are
24 content based on their face. The antishielding provision,
25 Your Honor, I would suggest it's actually not so clear what it

1 does and what shielding means. It doesn't actually say no
2 student speech that we're worried about here. But, also, it
3 specially protects certain types of viewpoints, offensive
4 viewpoints. And *Matal* tells us that that is a viewpoint.

5 As for the question as to how *Bishop* fits in here, I
6 think --

7 THE COURT: Here's what, Counsel, I don't understand.
8 When you say that and act like it's this bright line, I
9 thought -- because I live in the state of Florida, I thought the
10 most offensive speech that could be uttered in a classroom was
11 critical race theory. I thought the most offensive thing that
12 could be said in a classroom was to talk about affirmative
13 action. I thought the most offensive thing that could be said
14 in a classroom was systemic racism or talk about systemic racism
15 or even suggesting it exists or it's a construct you should even
16 discuss.

17 So, for the life of me, I don't understand, since it
18 says offensive speech -- it could still be a vagueness issue or
19 other problems. I understand. But I just, for the life of me,
20 don't understand as written how would it possibly only target
21 one side of the equation? It just seems to me that it gives
22 anybody who's -- you can't stop somebody from saying something
23 offensive in the classroom.

24 MS. FROST: So, again, Your Honor, I'm not sure
25 that -- I think you can't stop someone from saying something

1 offensive in the classroom. You actually are -- and we'll
2 present evidence as to why -- impeding on speech in the
3 classroom because of the nature of the classroom, the nature of
4 academic freedom, the nature of the necessity the professors
5 have control over their classroom, including to stop certain
6 conversations.

7 But I think that what you're talking about, your
8 impression about what is offensive speech, right, is obviously
9 different from other people's impressions. And that's a
10 vagueness issue. But where you draw that impression from the
11 other evidence that we will present to you to explain why our
12 impression and our plaintiffs' understanding of what this law is
13 actually doing and what it is they are not supposed to say in
14 this space, that's *Arlington Heights*. That's the content based,
15 right. That's another piece of that evidence.

16 And I think because we are in a classroom, right,
17 we're not out on the street, necessarily, in a public forum, I
18 think that once you hit the content based -- if you say, Yeah,
19 there's evidence of this, it does make sense to go through
20 *Bishop* and *Pernell*. You don't necessarily have to, but it's
21 certainly a logical place to go, and I think that decision does
22 weigh the different sort of competing interests that you see in
23 the classroom.

24 THE COURT: Then another question, because I just want
25 y'all to be thinking about these things -- and I'm sure you

1 have. I don't mean that in a -- meaning to suggest that you
2 haven't. But when y'all prepare your final papers, I need y'all
3 to go through -- both sides to go through, for example,
4 standing, much the way I did in my last orders, and talk about
5 each person as it relates to each claim, as it relates to each
6 claim as it relates to each statute that's being challenged.

7 And for purposes of that, it would seem to me the way
8 to do what I was just asking plaintiffs' counsel -- I'm
9 interested in if you have standing under one First Amendment
10 theory, does that give you standing under every First Amendment
11 theory?

12 So I know we've talked about and I've made plain and
13 you're going to have to, whether you like it or not, talk about
14 standing as it relates to each provision, but -- and you're
15 going to have one plaintiff for each provision as it relates to
16 a particular defendant. But you're also going to have to help
17 me to understand, if you just can suggest under this one theory,
18 for example, under *Arlington Heights* we've got standing and
19 here's why, does that somehow bootstrap you in if there's
20 standing problems with the other theories as opposed to
21 different claims? Because you can have a First Amendment claim
22 with different theories. And so I'm going to need y'all to
23 address that as well. Okay?

24 MS. FROST: Your Honor, we will.

25 THE COURT: And, Mr. Levesque, I didn't mean to not

1 have you join in the party, but I wanted to make sure the
2 plaintiffs' counsel knew that I had concerns that needed to be
3 addressed about -- to help me to understand what this is doing,
4 what the appropriate analytical framework is, and so forth.

5 MR. LEVESQUE: I appreciate that, Your Honor.

6 THE COURT: Anything you want to be heard on now?

7 MR. LEVESQUE: Only in the sense that there was a fair
8 bit of discussion there about the idea of speech in the
9 classroom and how that would interact with the antishielding. I
10 think our position would be a little more nuanced. Certainly
11 when it comes to lectures where -- particularly a pure lecture
12 style, we don't believe that would be like an open public forum
13 that would entitle a student to be able to stand up and talk
14 about whatever they want to talk about. So if it's a math
15 class, they can't get up and talk about --

16 THE COURT: Oh, absolutely. I didn't mean to suggest
17 it was that simple. I meant -- I was assuming that it was on
18 topic. We're talking about -- we're in an anthropology polling
19 class and we're talking about X and what you raise would be
20 germane. I didn't mean to suggest that you can start talking
21 about, you know, either pro-choice or pro-life in a math class,
22 for example.

23 I was assuming that that was and -- so my prior
24 comment should be read through that prism. I was assuming that
25 you have a class where you were talking about -- for example, I

1 gave the example of an economic model and somebody saying you're
2 claiming X is fair and so forth, but it seems to me it's not
3 fair, and here's why, and we should consider it through the
4 prism of critical race.

5 I was assuming that it was somebody offering a comment
6 in response, and it was germane to the class discussion but
7 would otherwise potentially offend somebody.

8 MR. LEVESQUE: Sure. And I guess -- I think there
9 would probably be even more nuance there to the extent you're
10 talking about a professor who is teaching capitalism in Ireland.
11 The idea of bringing in concepts of socialism or other things
12 that are not germane to the topic that that narrow class is
13 focused on, we think even in that context the professor probably
14 would have the ability to shut down the discussion because it's
15 not appropriate to curriculum that the professor has created,
16 and it's not really appropriate to the direction that the
17 professor wants to take the class.

18 We think the antishielding actually, to the extent
19 it's targeted at institutions, it's really about whether they're
20 establishing policies. For example, if there are going to be
21 demonstrations -- if you're going to do this demonstration in
22 this public area, you can't send them down to some area of the
23 campus where there a demonstration would be less effective.

24 We think -- and we see the antishielding provision as
25 being discussed as really being just a flip side of the First

1 Amendment not regulating speech at all but regulating the
2 conduct of government actors.

3 THE COURT: Give me one moment, please.

4 (Pause in proceedings.)

5 THE COURT: And, of course, the question I'm going to
6 have for you under the vagueness challenge is how, if I'm a
7 professor, do I read all that in and know what I can -- if I'm
8 part of the University -- what I can and cannot allow in the
9 scope of it. And, obviously, I don't think you are going to be
10 shocked that's going to be the question I've got for you as it
11 relates to vagueness; okay.

12 MR. LEVESQUE: Yes, sir.

13 THE COURT: All right.

14 I'm not sure we really particularly moved the ball,
15 but I just wanted to let everybody know that those are some
16 questions I had.

17 Mr. Wermuth, something else?

18 MR. WERMUTH: Yes, Your Honor. Well, there were some
19 additional issues with the exhibits beyond the scope of what you
20 covered, and I would just offer that, you know, my colleague
21 Robin Kramer is prepared to argue those points at some point, if
22 the Court would allow it.

23 THE COURT: Yeah. I don't want to do that right now.

24 MR. WERMUTH: Okay.

25 THE COURT: We can do that later.

1 MR. WERMUTH: All right. And then, otherwise, I can
2 introduce the plaintiffs' counsel at table, and then we're ready
3 to call our first witness, who is Allan Lichtman.

4 THE COURT: Let me also find out, does anybody wish to
5 invoke the rule?

6 MR. LEVESQUE: Yes, Your Honor, we would.

7 THE COURT: All right. Does anybody -- and I'm not
8 suggesting that just because you're an expert, that's the end of
9 the inquiry. I have to go through an analysis of whether it's
10 helpful and they need to be here. Does anybody -- and it's not
11 as simple as if you're an expert, the rule of sequestration
12 doesn't apply to you. And I'm well aware of the case law that
13 says that.

14 Anybody want to be heard on lay witnesses --
15 obviously, the parties can be present, anybody that's a party.
16 Everybody agree with that; correct?

17 Mr. Wermuth?

18 MR. WERMUTH: Yes.

19 THE COURT: Mr. Levesque?

20 Everybody is shaking their head yes.

21 So the parties can be present.

22 Does anybody want to be heard, or do we think we need
23 to do it on a witness-by-witness basis as it relates to experts?

24 MR. LEVESQUE: Your Honor, we would be fine not
25 invoking the rule for experts, just for lay witnesses.

1 THE COURT: Mr. Wermuth?

2 MR. WERMUTH: That is plaintiffs' preference as well.

3 THE COURT: Very well. So neither party objects to
4 that blanket rule, recognizing that if either party did, I would
5 have to do it on an expert-by-expert basis. I've invoked the
6 rule of sequestration, but it only applies to lay witnesses, not
7 to parties and not to expert witnesses.

8 All right. Why don't we do this. I'm going to go
9 ahead and we are going to take a five-minute break, and when we
10 come back, we'll hear from the first witness; okay.

11 Thank you.

12 MR. WERMUTH: Thank you, Your Honor.

13 (Recess taken at 9:20 AM.)

14 (Resumed at 9:31 AM.)

15 THE COURT: And just for everybody, moving forward, we
16 are not going to jump up and down when I come in the courtroom.
17 There is no jury present and y'all can keep your seats.

18 But thank you to my court security officer. I
19 appreciate it.

20 COURT SECURITY OFFICER: Yes, sir.

21 THE COURT: All right.

22 Mr. Wermuth, you can call your first witness. It's my
23 understanding that Mr. Hancock is going to do the direct?

24 MR. WERMUTH: That's correct, Your Honor. So William
25 Hancock of the Elias Law Group is going to be questioning Allan

1 Lichtman.

2 (Allan Lichtman entered the Zoom conference.)

3 THE COURT: Will you swear in the witness.

4 **ALLAN LICHTMAN, PLAINTIFFS WITNESS, DULY SWORN**

5 THE COURTROOM DEPUTY: Please state your name and
6 spell your last name for the record.

7 THE WITNESS: Allan J. Lichtman, A-l-l-a-n J.
8 L-i-c-h-t-m-a-n.

9 THE COURTROOM DEPUTY: Thank you.

10 DIRECT EXAMINATION

11 BY MR. HANCOCK:

12 Q. Dr. Lichtman, can you hear me all right?

13 A. Yes, I can hear you just fine. Thank you.

14 Q. And can you please introduce yourself to the Court?

15 A. Yes. Your Honor, as I just mentioned, I'm Allan J.
16 Lichtman, distinguished professor of history at American
17 University in Washington, D.C. And this year I'll be
18 celebrating my 50th year of teaching at American.

19 Q. Dr. Lichtman, do you have anything with you on your desk
20 today?

21 A. I have copies of my reports and my CV.

22 Q. Do you have anything else on your desk with you today?

23 A. No.

24 Q. And were you engaged as an expert in this matter?

25 A. Yes.

1 Q. And by whom were you engaged?

2 A. I was engaged by you.

3 Q. And for what purpose, Dr. Lichtman?

4 A. I was engaged for the purpose of analyzing whether the
5 adoption and signing of HB 233 in Florida had the intent to
6 discriminate against free speech and association at Florida's
7 public colleges and universities.

8 Q. And did you conduct that analysis?

9 A. I did.

10 Q. Are you prepared today to discuss your findings, opinions
11 and reasons for them?

12 A. I am.

13 MR. HANCOCK: Can we show the witness what's been
14 premarked as Plaintiffs' Exhibit 12?

15 BY MR. HANCOCK:

16 Q. Can you see that, Dr. Lichtman?

17 A. I can.

18 Q. And do you recognize this document?

19 A. Yes; copy of a CV that I submitted, I think back in May,
20 when I submitted my first expert report in this matter.

21 Q. And do you maintain a CV as part of your professional work?

22 A. Yes, I do.

23 Q. And for how long have you maintained a professional CV?

24 A. Well, I've been teaching for some 50 years, so at least
25 that long. Probably a little bit longer since I'd be applying

1 for jobs even before I came to American University.

2 Q. And do you update your CV?

3 A. Yes, I do.

4 Q. When do you update it?

5 A. Well, not every day. Things don't change that rapidly in
6 my field, but certainly every few months.

7 MR. HANCOCK: Your Honor, at this time I'll move to
8 admit Plaintiffs' Exhibit 12 into evidence.

9 THE COURT: Mr. Levesque?

10 MR. LEVESQUE: No objection, Your Honor.

11 THE COURT: Without objection, Exhibit 12 is admitted.

12 (PLAINTIFFS' EXHIBIT 12: Received in evidence.)

13 BY MR. HANCOCK:

14 Q. Dr. Lichtman, earlier you mentioned that you were a
15 distinguished professor. What does that mean?

16 A. Yeah, it's not a title I've made up, and it's not a history
17 department title, although I teach in the history department.
18 It's a university title. It is the highest academic rank in the
19 university, above the rank of full professor. You had to go
20 through a very rigorous review to obtain the title of
21 distinguished professor at American University, demonstrating
22 national, and even international, renown. And only a very small
23 handful of us, maybe six or seven out of many thousands of
24 faculty members at American University, have the rank of
25 distinguished professor, which I've held since 2011.

1 Q. And do you teach in any particular department at American
2 University?

3 A. As I mentioned, I teach in the history department.

4 Q. Do you have any degrees in history?

5 A. I do. I graduated from Brandeis University in 1967 with a
6 degree in history, although I switched my senior year from
7 medicine and biology, much to the chagrin of my parents, to
8 history. So I also have a scientific background.

9 And then in 1973, I received my Ph.D. in history from
10 Harvard University, with a specialty in American political
11 history and quantitative methods of analysis, reflecting my
12 scientific background.

13 Q. And how would you characterize your relative areas of
14 expertise?

15 A. I would say for this matter I would characterize my
16 expertise as follows: historical and quantitative methodology,
17 American political history and political analysis, and
18 education.

19 Q. Can you briefly summarize for me your experience as it
20 relates to American political history?

21 A. Yes. I have extensive experience in American political
22 history, having taught it for some 50 years. I have also
23 published numerous articles and books on American political
24 history. I have published articles, such flagship journals as
25 the *American Historical Review*, the *Journal of Social History*,

1 the *Proceedings of the United States National Academies of*
2 *Sciences.*

3 I have published a number of books on American political
4 history, including going way back into the 1970s, *Prejudice and*
5 *the Old Politics: The Presidential Election of 1928*, which
6 covered an analysis of early 20th Century presidential
7 elections.

8 Later I published *White Protestant Nation: The Rise of the*
9 *American Conservative Movement*, which was a finalist for the
10 National Book Critic Circle Award in general fiction. There
11 were only five finalists included, all books published in
12 nonfiction.

13 I published -- co-authored with my colleague, Richard
14 Breitman -- *FDR and the Jews*, which won the National Jewish Book
15 Award in American Jewish history; was a finalist for the Los
16 Angeles Times Book Prize, which covers all books in history; and
17 was published by Harvard University Press under the Belknap
18 Imprint Reserve for books of special significance and lasting
19 import.

20 I published a number of additional books in recent years,
21 including one that was an independent book, so a best seller,
22 *The Case for Impeachment.*

23 I've also published in recent years *Repeal the Second*
24 *Amendment: The Case for a Safer America; The Embattled Vote in*
25 *America: From the Founding to the Present; and 13 Cracks:*

1 *Repairing American Democracy after Trump.*

2 I've also lectured extensively around the country and
3 around the world on American political history and current
4 American political affairs.

5 Q. And, Dr. Lichtman, can you briefly summarize for me your
6 experience as it relates to historical and quantitative methods?

7 A. Yes. I'll start with historical methods. Obviously, I've
8 gained expertise in historical methods through 50 years of
9 teaching at American University and operating as a historian.
10 And even before that, I had taught at my alma mater, Brandeis
11 University, and published articles as well while I was in
12 graduate school.

13 I also, along with my late colleague, Valerie French,
14 published a book on historical methodology called *Historians and*
15 *the Living Past*.

16 With respect to quantitative methodology, as I mentioned, I
17 have a science background from college. And back in the late
18 1970s, I published *Ecological Inference*, a monograph that's part
19 of the Sage Series on quantitative applications in the social
20 sciences. Despite the title, it has nothing to do with the
21 environment. It has to do with mathematical methodologies for
22 inferring the behavior of groups from aggregate-level data like
23 for school districts or political wards.

24 I have also published numerous methodological articles in
25 journals, such as *Evaluation Review*, *Political Methodology*,

1 *Social Science History, Journal of Interdisciplinary History,*
2 *International Journal of Forecasting, and the Proceedings of the*
3 *United States National Academies of Sciences.*

4 I've also published articles in encyclopedias on
5 quantitative methodologies as well and have extensively deployed
6 quantitative methodologies in close to 40 years in my work as an
7 expert consultant and witness.

8 Q. Can you briefly summarize for me your experience as it
9 relates to higher education?

10 A. Yes. First of all, I have practical experience, having
11 taught now for 50 years at American University and having taught
12 previous to that. I've also lectured at other institutions as
13 well.

14 At American University, I have been associate dean of the
15 College of Arts and Sciences, the largest academic unit in the
16 institution. I have been the chair of the Department of
17 History. I chaired the Demographic Subcommittee back in the
18 1990s on the Middle States' accreditation review of American
19 University. I have been a member of the executive board and
20 parliamentarian of the university senate. I was chair of the
21 College of Arts and Sciences budget committee, as well as other
22 committees. I was chair of the rank and tenure of personnel
23 committee of the Department of History. I have sat in and
24 participated in more hiring, tenure, promotion decisions than I
25 could possibly count.

1 I was also a member of Governor Martin O'Malley's higher
2 education task force. I think I was the only member who taught
3 outside of a Maryland institution.

4 I have also numerous times, since the 1990s, contributed
5 articles to *Social Education*, the magazine of the National
6 Association for the Social Studies. My articles were not
7 explicitly on education. They were on my system for predicting
8 the outcomes of presidential elections, which I have been doing,
9 gosh, for 40 years now, since predicting the 1984 presidential
10 election.

11 The reason that it continually published this article in
12 *Social Education* is because my system is historically based. It
13 looks at things like scandals, social unrest, policy change,
14 foreign policy, failures and successes and, thus, is a great
15 teaching tool that requires students to basically go over
16 American history since the Civil War to answer the questions on
17 my system, The 13 Keys to the White House.

18 I also testified extensively in the state of Maryland on an
19 education case. It was a challenge by plaintiffs to -- my part
20 of it dealt with funding for historically black colleges and
21 universities.

22 I testified on behalf of the State of Maryland essentially
23 on the proposition that -- contrary to claims of the plaintiffs,
24 that funding for historically black colleges and universities in
25 Maryland was equitable. And the judge did not credit the

1 plaintiffs' claims and agreed that funding was equitable.

2 Q. And, Dr. Lichtman, in how many cases have you previously
3 served as an expert witness?

4 A. Oh, my gosh, I've been doing it for nigh on 40 years. I
5 haven't counted, but I would say maybe north of 110.

6 Q. And has your opinion ever been credited by the U.S. Supreme
7 Court?

8 A. It was in the landmark Texas congressional redistricting
9 case, *LULAC v. Perry*, back in 2006. Justice Kennedy, in his
10 majority opinion, credited my analysis with -- for the
11 overturning, under the Voting Rights Act, of a district in
12 southwest Texas because it did not provide equal opportunities
13 for Hispanics to elect candidates of their choice.

14 As far as I know -- and I could be wrong -- but as far as I
15 know, that's the only time the United States Supreme Court acted
16 to overturn a congressional district, at least recently, based
17 on the Voting Rights Act. It's an unusual thing to do, and they
18 credited my work for it.

19 Q. Dr. Lichtman, if we set aside the education case about
20 historically Black colleges, have you ever served as an expert
21 witness on behalf of a defendant?

22 A. I have served numerous times as an expert witness on behalf
23 of state and local defendants, including in intentional
24 discrimination cases.

25 Q. When was the most recent case where you testified on behalf

1 of a defendant in a discriminatory intent case?

2 A. Probably on defendants it was just recently. In the
3 post-2020 round of redistricting, I testified on behalf of state
4 defendants in Illinois, and it was a challenge to the state
5 legislative redistricting plans for Senate and State House, and
6 there were lots of challenges, but among them was an intentional
7 discrimination challenge. I think I was the only expert for the
8 State on all the challenges, and the Court rejected all the
9 challenges, including the intent challenge.

10 Also, fairly recently I testified on behalf of a local
11 governmental entity, the City of Santa Monica, which was being
12 sued under the California Voting Rights Act, both on straight
13 voting rights but also on intentional discrimination. And I was
14 the expert for the city on intentional discrimination, analyzing
15 the situation and indicating that there was not intentional
16 discrimination.

17 And after an adverse decision from the lower court, the
18 Court of Appeals reserved. The Court of Appeals found that
19 there was no intentional discrimination. This referred to the
20 adoption and maintenance of an at-large system for electing
21 members of the city council in Santa Monica.

22 The California state Supreme Court then took up the case,
23 but it did not take up the finding of the appeals court that
24 there was no intentional discrimination. That stood. The state
25 Supreme Court took up the case on other matters on which I did

1 not testify, and we're still waiting for an opinion on those
2 other matters from the Court.

3 So those are two recent examples where I testified for
4 defendants, state and local, in intentional discrimination
5 cases.

6 Q. Dr. Lichtman, have you ever conducted expert work for a
7 Republican-run government?

8 A. I have. I testified on behalf of the Massachusetts
9 Republican Redistricting Task Force in the 1990s, and my longest
10 stint as an expert was actually in the city of New York for
11 Mayor Giuliani and then Mayor Bloomberg who at that time was a
12 Republican.

13 I was the voting rights adviser to their charter review
14 commission. The charter review commission, its goal under these
15 two Republican mayors was to change the system for elections in
16 New York from partisan to nonpartisan elections, and, as you can
17 imagine, our vehement opposition came from the Democrat party,
18 because they had such a strong hold on politics in the city of
19 New York and did not want to move away from partisan elections.

20 I wrote extensive reports indicating that the switch to
21 nonpartisan elections would not violate the Voting Rights Act.
22 I testified before the commission. I did not testify in court,
23 however, because litigation, as far as I remember, never got
24 that far.

25 I also testified a number of times for the United States

1 Department of Justice under Presidents Ronald Reagan and George
2 H.W. Bush. That included a notable case here in Florida that
3 was the *De Grandy* case that went up to the Supreme Court. And
4 working with the Justice Department, we were coordinating with
5 the Republican litigation team, and our opposition was the
6 Democratic Party. I kind of vividly remember the meetings with
7 the Republican team because their lead attorney, Benjamin
8 Ginsberg, had such memorable red hair, at least at that time.
9 So those are just some examples.

10 Q. Dr. Lichtman, do you know if a Court has ever found that
11 you are not qualified when you've been offered as an expert?

12 A. No. I've had, oh, I don't know, three, maybe, *Daubert*
13 motions filed against me; none were granted. A minor
14 emendation: Here in Florida, I testified as an expert for
15 plaintiffs in the *City of South Miami versus DeSantis*, the
16 successful challenge to the so-called antisanctuary cities law.
17 I testified on discriminatory intent, and Judge Beth Bloom found
18 discriminatory intent.

19 And in response to the *Daubert* motion, she pointed out that
20 I was well qualified to testify, but simply said I should not be
21 opining on the ultimate legal issue, which did not change my
22 testimony at all. I won't be opining on the ultimate legal
23 issue here, but I will be providing a lot of information as an
24 expert in these various areas for the Court's consideration.

25 Q. Dr. Lichtman, did your analysis in this case use the same

1 methods you've used in your other discriminatory intent cases?

2 A. Yes. As in other cases, I followed the nonexhaustive
3 guidelines of the *Arlington Heights* Supreme Court case. Along
4 with applying to this analysis my own expertise in my 50-plus
5 years' work as a historian, my expertise in quantitative
6 methodology, historical methods, American political history and
7 education were all brought to bear on this analysis, as they
8 were in other cases, although this one kind of uniquely includes
9 education. But, in a sense, you apply the same or very similar
10 methodologies whether it's an education case or a racial case or
11 an immigration case, and I've been involved in, you know, all of
12 them.

13 MR. HANCOCK: Your Honor, at this time plaintiffs
14 offer Dr. Lichtman as an expert in American political history
15 and analysis as well as quantitative and historical methods.

16 THE COURT: Mr. Levesque, do you wish to voir dire the
17 witness?

18 MR. LEVESQUE: No, Your Honor. We'll stipulate on
19 those two areas of expertise.

20 THE COURT: Thank you.

21 Counsel, you may proceed.

22 BY MR. HANCOCK:

23 Q. Dr. Lichtman, a moment ago you mentioned *Arlington Heights*.
24 What is your understanding of the factors identified in that
25 case?

1 A. Yeah, I've used these factors many times before. As best I
2 remember them, there is the historical background, particularly
3 if there are examples of past invidious discrimination. There
4 is the sequence of events leading up to the legislation or
5 whatever initiative is under challenge in the litigation. There
6 are procedural and substantive deviations.

7 There is the discrim -- analysis of the discriminatory
8 effect of the law or initiative, although, of course,
9 discriminatory effect by itself is not sufficient to prove
10 intent is why we look at the broader picture.

11 And, finally, there are contemporary statements,
12 particularly of those made by decision-makers involved in the
13 legislation or initiative under consideration in the particular
14 litigation that you're looking at.

15 Q. And, Dr. Lichtman, were those the only factors you looked
16 at in this case?

17 A. No. Applying my expertise, my knowledge and experience,
18 I've gone beyond these nonexhaustive factors. I've looked at
19 whether discriminatory impact of, in this case HB 233, was
20 foreseeable and presented, known to decision-makers.

21 I've looked at the availability of less discriminatory
22 alternatives as a different means of perhaps achieving similar
23 goals to that of the legislation. And, very importantly,
24 because there is so much context in this case, I've looked at
25 the broader context for the adoption, implementation and

1 enforcement of HB 233, particularly the immediate context with
2 respect to laws and initiatives involving free speech and
3 association and involving education.

4 Q. Are these factors the kinds of things you would consider in
5 your scholarly work?

6 A. Yes. As I said, I bring to bear not only guidance provided
7 by the Supreme Court, but in this, as in all my cases, I bring
8 to bear my expertise, knowledge, and experience as a scholar of
9 American political history and current affairs.

10 Q. And aside from these factors, was there anything else you
11 looked at in this case?

12 A. Well, there was something else that's unusual in this case.
13 Way back in the '70s, the Supreme Court warned you're not likely
14 to get direct evidence from decision-makers where they're
15 admitting their intent to discriminate. It was a racial case,
16 and most intent cases in my experience have been racial cases.

17 And decision-makers are very careful, for good reason, in
18 not explicitly giving direct evidence of racially discriminatory
19 intent. You're not going to have, likely, decision-makers
20 coming out and saying, Oh, yes, our intent is to discriminate
21 against African-Americans in this legislation.

22 But this is a different situation here. This is -- we're
23 dealing with education and kind of cultural issues involved in
24 the hot cultural wars that are reiling our politics. And what
25 I found was decision-makers in Florida were not only not wary of

1 explicitly talking about controlling and regulating free speech
2 and association in education, but, in fact, this was part of a
3 broad strategy to achieve political benefits for Republicans,
4 both by appealing to their political base in these culture wars,
5 and putting Democrats on the defense, that education,
6 particularly the accusation of it being dominated by
7 indoctrinating liberals, could be a powerful wedge issue for
8 Republicans.

9 So we have a situation that's quite extraordinary and
10 unusual here. In addition to all of the circumstantial evidence
11 encompassed by the *Arlington Heights* factors, and my enhancement
12 of the *Arlington Heights* factors, we have the unusual situation
13 of decision-makers, directly through their statements, providing
14 direct evidence of discriminatory intent with respect to free
15 speech and association in Florida's public colleges and
16 universities.

17 I have in my section on contemporary statements quite a few
18 of those statements, and I think I highlighted a couple earlier
19 in my report.

20 MR. HANCOCK: Can we show the witness what's been
21 premarked as Plaintiffs' Exhibit 222.

22 BY MR. HANCOCK:

23 Q. Dr. Lichtman, do you recognize this document?

24 A. Yes, this is a document that I've utilized in my report.
25 It is a transcription of the signing ceremony for HB 233 with

1 respect to Governor DeSantis.

2 MR. HANCOCK: And can we refer the witness to page 7.

3 BY MR. HANCOCK:

4 Q. Do you see this statement, Dr. Lichtman?

5 A. I do.

6 Q. Do you recognize this statement?

7 A. I do. It's in my report.

8 Q. And who made this statement?

9 A. Governor DeSantis --

10 Q. And why --

11 A. -- with respect to HB 233 specifically.

12 Q. And why did you note this statement in your report?

13 A. Because I think, along with many other statements by
14 Governor DeSantis and other decision-makers, it illustrates my
15 point about the willingness of decision-makers to assail what
16 they perceive as liberal bias and indoctrination -- what he
17 calls the stale ideology -- and because they are supporting
18 public institutions of higher learning with tax dollars, an
19 indication that they are willing to take action against it.

20 So he's saying we don't want them as, basically, hotbeds
21 for stale ideology, you know, a euphemism for this liberal
22 ideology and indoctrination, and he says, That's not worth tax
23 dollars. In other words, we can control what's going on in
24 teaching in public colleges and universities because we, the
25 State, are providing them tax dollars. And then he's quite

1 explicit in saying, And that's not something we're going to be
2 supporting going forward, that we intend to take action against
3 these hotbeds of stale ideology.

4 Q. Dr. Lichtman, why did you consider statements from
5 Governor DeSantis in your analysis?

6 A. Governor DeSantis backed HB 233; he signed HB 233, but
7 there's much more to it. Governor DeSantis, who became governor
8 in 2019, is not your everyday garden-variety governor. He is an
9 extremely aggressive, extremely partisan, extremely influential
10 governor with tremendous sway over the State Legislature, and
11 I've illustrated that in a number of ways in my report. I'll
12 summarize some of them.

13 Immediately upon taking office, within weeks, he issued an
14 executive order for a review of K-12 education in the state
15 without any substantial demonstration that there were problems
16 that needed to be reviewed, and that led to a whole revision of
17 the state curriculum later on, which we'll talk about, that
18 really reflected Republican viewpoints.

19 And then very recently, just, God, less than two weeks ago,
20 I think it was on December 28th, 2022, through his budget
21 director, he issued a directive to all institutions that are
22 public colleges and universities in the state of Florida that
23 they had to provide information where they're using budgetary
24 resources for critical race theory, diversity, inclusion, and
25 equity.

1 And, you know, by tying this to budget, there's the obvious
2 implication that, you know, there could be threats to the
3 budget, and he gave basically two weeks for all this information
4 to be funneled up during spring break.

5 Another example would be that after Disney had criticized
6 what became known colloquially as the "Don't Say Gay" bill, a
7 bill designed to control mention of sexual orientation or gender
8 identity in schools, he criticized it, and then the governor,
9 within three days, persuaded the legislature to aggregate their
10 special independent district with the State that had been in
11 place since the 1960s.

12 Another example is in the critical area of congressional
13 redistricting. The State Legislature had come up with its own
14 redistricting plan. The governor didn't like it. He came up
15 with his own much more aggressive gerrymandered plan.

16 MR. LEVESQUE: Your Honor, pardon me.

17 THE COURT: Hold on one second.

18 Yes, sir?

19 MR. LEVESQUE: Your Honor, the congressional
20 redistrict plan doesn't have anything to do with House Bill 233.
21 It doesn't have anything to do with discriminatory intent or
22 anything related to this litigation. It wasn't even mentioned
23 in this exhibit. So to the extent that we're kind of getting
24 far afield from House Bill 233 and any matters related to
25 education, we would at least object at this point to testimony.

1 THE COURT: I'm going to overrule the objection, but
2 with a directive to the parties. The witness is testifying that
3 he believes the reason why the governor's intent has something
4 to do with legislative intent is we had a governor who is the
5 grand puppeteer of the Florida Legislature. Generally that was
6 what the witness was saying, so that's what -- why this is
7 different and why I actually looked at --

8 THE WITNESS: I can't hear anything. Am I to continue
9 and not --

10 THE COURT: I'm sorry. My mic was off.

11 So I overruled the objection. As I just said -- and
12 I'll repeat since my microphone was off -- the witness has
13 indicated the reason why he believes it's appropriate to look at
14 the governor's statements as part of legislative intent is
15 because the governor is exercising his power differently than
16 the average or typical governor and virtually has absolute
17 control over the Florida Legislature and is acting as a
18 puppeteer or something.

19 To the extent he's offering this as an example that
20 supports that view, I'm going to overrule the objection that
21 it's irrelevant. However -- and I was going to wait until
22 later, but I'll just -- as we go through this process will note
23 for the lawyers things I need y'all to address.

24 I'm pretty sure the Eleventh Circuit has talked about
25 whether or not I should consider the governor's statements as

1 part of construing legislative intent, so not for the witness to
2 discuss, but I am going to need both sides -- and this is
3 politically targeted at the plaintiffs -- to address to what
4 extent is it even appropriate to consider the governor's
5 statements as part of legislative intent.

6 There are -- admittedly, some of the strongest
7 statements that have been made by the Eleventh Circuit have been
8 made at oral argument, which have not yet generated written
9 opinions, but I believe you'll also find some statements to the
10 Eleventh Circuit addressing this point. But we don't have to
11 argue that now, but I understand that's -- whether or not it's
12 relevant for purposes of the witness forming their opinion and
13 why, I overrule the objection.

14 Whether or not I should properly consider it for
15 purposes of the *Arlington Heights* factors is a different
16 question; okay?

17 MR. LEVESQUE: Thank you, Your Honor.

18 THE COURT: Counsel, you may proceed.

19 THE WITNESS: Thank you, Your Honor.

20 BY MR. HANCOCK:

21 Q. Dr. Lichtman, do you have anything else to your answer?

22 A. Yes. I've not quite completed my answer yet.

23 So this was another example. Even though it's not an
24 education of my point of the power of the governor and the sway
25 he holds over the legislature, he also got -- I'll leave it

1 there. That's enough examples.

2 I also cite in my report four Florida-based authorities on
3 politics, history and law, Professors Jarvis, McManus, Zeldin,
4 and Foreman and all of them comment on the extraordinary powers
5 of the governor and, in particular, his sway over the State
6 Legislature.

7 And they even point out that, in effect, this governor is
8 so powerful in his sway over the State Legislature that he has
9 in effect aggregated the normal checks and balances between the
10 governor and the legislature. Even his own allies have
11 commented upon this.

12 Anthony Verdugo, who heads a Christian conservative group
13 in Florida, called Governor DeSantis a king maker. House
14 Speaker Sprowls said that in his willingness to take on
15 political enemies and exercise his powers, he's brought us into
16 a whole new era that's different from what's gone on in the past
17 20 years.

18 So the governor is extremely important, not only as the
19 governor in exercising executive powers of signing bills, but
20 also in his almost absolute influence over what goes on in the
21 State Legislature.

22 MR. HANCOCK: And we can take down Plaintiffs' Exhibit
23 222, and I want to flag for the Court that this is a transcript,
24 you know, related to our discussion this morning, and so it is
25 already, at least somewhat, in the record consistent with that

1 discussion. But we would --

2 THE COURT: I said that it's authentic, and I said
3 that it was relevant, but that if there's any additional hearsay
4 objections, I'll address those.

5 But Mr. Levesque has already indicated that what he's
6 going to do is, Judge, if it's from a nonparty or not a
7 legislator or something, that we reserve the right to, at the
8 time, make a specific objection in addition to any standing
9 objection, so we'll follow that protocol suggested by
10 Mr. Levesque earlier.

11 MR. HANCOCK: That's fine by us, and so at this time I
12 would move to admit Plaintiffs' Exhibit 222 into the record.

13 MR. LEVESQUE: Your Honor, we would still stand on our
14 hearsay objections and the arguments that we made in our motion
15 in limine. We don't believe that this would be appropriate for
16 consideration.

17 THE COURT: And 222 is related to -- which you just
18 introduced -- statements attributable to the governor; correct?

19 MR. LEVESQUE: That is correct.

20 THE COURT: All right. I'm going to conditionally
21 overrule the objection. I've already indicated to the parties
22 that I think this is going to be a significant issue that we'll
23 need to address. I want to make plain, earlier when I was
24 summarizing the position of the witness, perhaps with some
25 flair, that was not my view, and I wasn't expressing my

1 characterization of what the record shows, but I was simply in a
2 shorthand way trying to describe what the witness is testifying
3 to.

4 I understand the witness's statements that, Judge, you
5 have to take cognizance of reality, and while there may be some
6 instances in which a governor's statements may shed no light on
7 what the legislature does or does not do, in the case of Florida
8 and this governor, you'd be burying your head in the sand and
9 ignoring the reality to suggest that the governor's statements
10 were not reflective of, indicative of or related to legislative
11 intent, and he was offering examples of why that's so and this
12 represents special circumstances.

13 I've got to square that with what the Eleventh Circuit
14 has said about the statements of the governor, which is why I
15 said I'm going to expect both sides to address that at the end
16 of these proceedings. So I'm going to conditionally admit it
17 with the understanding that I recognize that, as a general rule,
18 the statements of the governor absolutely would not be relevant
19 and Mr. Levesque would be spot on in light of existing case law.

20 The question is is whether or not these special
21 circumstances would -- as outlined by this witness would yield a
22 different result as to whether or not I should or should not
23 consider the statements of the governor as it relates to why the
24 legislature took the actions it did with respect to the bill at
25 issue.

1 Counsel, you may proceed.

2 MR. HANCOCK: And if I may flag one thing, Your Honor,
3 I think this discussion will -- there are many similar
4 transcripts and statements, and that can streamline how we
5 address those, but I do want to flag that this transcript is
6 unique because it is the signing ceremony for the bill at issue,
7 and so it is sort of relevant in its own right separate from the
8 individual statements that the parties may have their own
9 arguments about.

10 THE COURT: Well, let me -- I just want to give y'all
11 some guidance.

12 Whether it's a signing ceremony or a political rally
13 two weeks after the bill is signed, as a general rule, somebody
14 who wasn't involved in the legislative process saying, I think
15 this is a great bill and here's why, is not particularly -- is
16 not relevant for determining why the legislature did what it
17 did.

18 So whether it's the signing ceremony or something
19 else, I guess you would argue, Judge, we get at some point it
20 would be so far afield -- for example, at a political rally or
21 something -- that it might not shed any light. I understand
22 it's closer, but it still begs the question as to what extent
23 does the statement of the governor shed any light on legislative
24 intent. And that's what y'all are going to have to address for
25 me at the end of these proceedings, and, you know, the

1 Eleventh Circuit has said what it said, and I'm bound by what
2 they said.

3 MR. HANCOCK: Understood. Thank you, your Honor.

4 May I proceed?

5 THE COURT: Unless what they've said somehow suggests
6 there's an opening and these are special circumstances.

7 But, go ahead.

8 MR. HANCOCK: Can we show the witness
9 Plaintiffs' Exhibit 354.

10 BY MR. HANCOCK:

11 Q. Can you see this, Dr. Lichtman?

12 A. Yeah. Now it's nice and large so my old eyes can see it,
13 yes.

14 Q. And do you recognize this statement?

15 A. I do. It's in my report.

16 Q. And who made this statement?

17 A. State Representative Spencer Roach, the chief sponsor in
18 the House of HB 233, and the legislator who guided the
19 discussion in the House of HB 233.

20 Q. And why did you include this statement in your report?

21 A. A, because of the importance of Senator Roach. This was
22 made during the deliberations over HB 233. And, again, this
23 shows that decision-makers in Florida are quite willing to
24 explicitly indicate their intent to regulate and control what
25 they believe to be left-wing indoctrination on campus. He's

1 quite explicit about that. *Thank you to my House colleagues for*
2 *passing this bill to protect our right to free speech and stem*
3 *the tide of Marxist indoctrination on university campuses.*

4 This presumes there is Marxist indoctrination, whatever
5 that may mean. You know, Marxism is actually a perfectly
6 legitimate form of academic inquiry. There's a whole line of
7 academic inquiry that looks at it from a Marxist perspective;
8 that is, from the perspective of economic systems and the
9 influence of economic systems on society. That's an academic
10 discipline. It doesn't mean they're politically indoctrinating
11 anyone. But this shows, This is what I believe, and I have this
12 intent that we are going to stop this with HB 233.

13 He kind of puts in a little reference to free speech, but
14 it's not free speech when you're talking about stopping the
15 teaching at institutions of public higher learning in the state
16 of Florida.

17 THE COURT: Doctor, let me ask you this question. Why
18 couldn't that statement also be fairly read to mean that,
19 consistent with First Amendment case law, the way to combat
20 ideas in speech that you don't like is with more speech? And so
21 State Representative Spencer Roach was saying, We're going to do
22 exactly that. In response to ideas that we don't like, we're
23 going to ensure there's a complete open marketplace of ideas and
24 contrary views are allowed, because the way to have free speech
25 and combat ideas you don't like is to allow more speech, not

1 less. And that's simply a statement saying that we're going to
2 allow more speech.

3 Why isn't that also a fair reading of that statement?

4 THE WITNESS: That's an excellent question,
5 Your Honor.

6 And that shows the importance of context. I have
7 quite a few other statements of Spencer Roach which indicate,
8 you know, that they're not just trying to get more speech, but
9 they're trying to stop what they see as dangerous indoctrinating
10 speech.

11 We can also look at the broader context, which is in
12 my report, that actually the State Legislature has acted to ban
13 forms of speech that they found politically repugnant, where
14 that cut against what they believed.

15 THE COURT: I'm familiar with those --

16 THE WITNESS: And I know you're familiar with that.
17 But I think you've got to put it in context; that this is the
18 same legislature, same influential Spencer Roach who's not just
19 interested in creating more speech, but they have clearly
20 indicated in the broader context and other statements that are
21 in my report by Spencer Roach that they are interested in
22 stopping things like what they call critical race theory from
23 being taught on campus. It's not just that they want other
24 forms of speech. Nor have they indicated anywhere that anyone
25 is stopped from presenting whatever ideas or theories, you know,

1 that are, you know, academically sound that they want to
2 present.

3 MR. HANCOCK: Can we show the witness
4 myfloridahouse.gov?

5 BY MR. HANCOCK:

6 Q. Dr. Lichtman, do you recognize this website?

7 A. Yes, I do.

8 Q. And what do you recognize it as?

9 A. Website of the Florida House of Representatives.

10 MR. HANCOCK: And can we go to the representative
11 page and find Spencer Roach?

12 MR. LEVESQUE: Your Honor, this was not disclosed as a
13 demonstrative or an exhibit, and I'm not sure where we're going
14 with this.

15 THE COURT: Counsel?

16 MR. HANCOCK: Well, we can start by trying to admit
17 Plaintiffs' Exhibit 354. I expect an authentication objection
18 and so I'm trying to publish foundation.

19 MR. LEVESQUE: Yes, Your Honor, we do have an
20 authentication objection. We don't have Mr. Roach here.
21 Mr. Roach is not here to explain his words either to
22 Your Honor's question to the witness earlier, so --

23 THE COURT: Well, he wouldn't be, because if he was
24 here, y'all would object to privilege, arguing that he couldn't
25 be here; right?

1 MR. LEVESQUE: Yes, Your Honor.

2 THE COURT: So let me ask you a question. Here's what
3 I don't understand about any of this.

4 I've had authentication objections both as a lawyer
5 and as a judge where there's an issue of these medical records,
6 ADL's, activities of daily living, at the nursing home are not
7 what was maintained; somebody has messed with them and changed
8 them, so we are having to decide what's the real document.

9 But the bar set for authentication, if somebody says,
10 "I know that this is this person. I pulled it off this
11 website," or "I reviewed it. I've heard their voice before,"
12 whether or not he's listing it as an exhibit or not, if he's
13 asking this witness to go through the process of how he
14 ascertained that these were this because he pulled these
15 statements, "Where did you get them from?" is laying a predicate
16 for 354.

17 What's the basis that you have to identify as exhibits
18 documents you are using to authenticate a document?

19 MR. LEVESQUE: Well, I guess, Your Honor, being
20 familiar with the way some of the representatives and senators
21 operate their Twitter accounts, some of them never actually look
22 at them unless somebody draws their attention to them. They're
23 not necessarily all personal tweets. Certainly I recognize
24 there's an agency aspect to that, but many, many of these
25 accounts may be managed by political consultants or somebody

1 else and may not necessarily reflect the actual words of the
2 member.

3 MR. HANCOCK: And, Your Honor, we would essentially
4 object to taking that statement as anything more than
5 speculation. Spencer Roach is not here to describe --

6 THE COURT: Well, the issue is y'all are -- the
7 difference is is do I think what you're doing, which I haven't
8 heard yet, is enough to authenticate versus, Mr. Levesque, you
9 can argue this is why it wouldn't be authenticating it.

10 And there's also two things. One -- the other thing
11 would be it's authentic. It was on their website. The question
12 becomes is it truly a statement of the representative, which is
13 a different layer and a different question, is it not?

14 MR. LEVESQUE: Yes, Your Honor. And I don't actually
15 believe the tweet necessarily is going to be on the Florida
16 House of Representatives' website. Representative Roach
17 certainly is on that website as somebody who is still in office.

18 THE COURT: I'm going to overrule the objection. To
19 the extent there's a suggestion that the use of documents that
20 were not identified exhibits to lay a foundation for
21 authenticity as a document, I'm going to overrule that
22 objection.

23 What's being displayed right now is not a
24 demonstrative aid. It's not an exhibit. It's something that
25 the witness is going to use to describe how he -- or seek to

1 authenticate another document which is not currently on the
2 screen, which is mainly Exhibit 354, is what I understand
3 Mr. Hancock's position to be.

4 Is that correct?

5 MR. HANCOCK: That's correct.

6 THE COURT: All right. So you can, through the
7 testimony of the witness and whatever you want to use, try to
8 authenticate the documents.

9 MR. HANCOCK: And can we show the witness Spencer
10 Roach's page?

11 THE WITNESS: Yes, okay. That's Spencer Roach.

12 BY MR. HANCOCK:

13 Q. Dr. Lichtman, can you see the headshot?

14 A. Yes.

15 Q. Do you recognize that headshot?

16 A. Yes. That's Spencer Roach.

17 MR. HANCOCK: And can we show the witness
18 spencerforstatehouse.com?

19 BY MR. HANCOCK:

20 Q. Dr. Lichtman, do you see this webpage?

21 A. Yes. That's also Spencer Roach.

22 Q. And is that the same photograph from the other page?

23 A. Yes.

24 MR. HANCOCK: Can we scroll to the bottom of this
25 page?

1 BY MR. HANCOCK:

2 Q. Dr. Lichtman, do you see where it identifies who paid for
3 this website?

4 A. Spencer Roach.

5 MR. HANCOCK: And can we click on the Facebook icon in
6 the bottom left?

7 BY MR. HANCOCK:

8 Q. Dr. Lichtman, do you recognize this Facebook profile?

9 A. Yes; Spencer Roach.

10 Q. And does this appear to be the same Facebook profile that
11 posted the exhibit we were looking at before?

12 A. Yes.

13 MR. HANCOCK: Can we return to the previous page?

14 Can we click on the Twitter icon at the bottom?

15 BY MR. HANCOCK:

16 Q. Can you see this, Dr. Lichtman?

17 A. Yes.

18 Q. Do you recognize this Twitter account?

19 A. Yes; Spencer Roach.

20 Q. Do you see the photo for the profile?

21 A. Yes.

22 Q. Do you recognize that photo?

23 A. Same one we've seen; Spencer Roach.

24 Q. Can you see what the Twitter handle is?

25 A. No. It looks like @spencerroachfl.

1 MR. HANCOCK: At this time I'll move to admit
2 Plaintiffs' Exhibit 354 into evidence.

3 THE COURT: All right. Well, there's a couple of
4 layers here.

5 First, the question is if you've got a witness that
6 pulls up something on Facebook and Twitter, is it enough to
7 authenticate to say, I've cross-compared them in terms of the
8 picture, what's on them; they, A, appear to be official sites
9 based on this person's training and experience; B, it appears to
10 be using the same pictures, and so forth.

11 And so, Judge, we would submit that based on this
12 witness's use of social media, he's been able to authenticate
13 that this isn't just some rogue Twitter account or Facebook
14 account where somebody appears to be using somebody else's
15 identity. It appears to be consistent. The one is his paid-for
16 account, and so forth. And based on all that and cross-checking
17 and comparing, we believe both of these are his sites for
18 purposes of authenticity.

19 Is that correct?

20 MR. HANCOCK: Yes, Your Honor.

21 THE COURT: All right. Let's start with authenticity.

22 Mr. Levesque, separate and apart whether or not these
23 are his statements or can be attributed to somebody else, why is
24 that not enough for authenticity?

25 MR. LEVESQUE: Well, Your Honor, I think for the

1 authenticity of the website, it shows it is clearly his campaign
2 website. The campaign website is not the person. And while
3 it's not a formal legal entity, it stated clearly there at the
4 bottom "Paid for by Spencer Roach, Republican for Statehouse" in
5 compliance with Florida's election laws.

6 The additional website that they went -- took you to
7 in terms of the Facebook was also a Facebook election website.
8 And, again, a lot of those operations, a lot of those
9 activities, and even the Twitter account were all linked from
10 the campaign website. A lot of those campaigns are run by
11 political operatives.

12 THE COURT: That's a second issue. I'm strictly
13 dealing with authenticity, which just because it's a low bar
14 doesn't mean it's no bar. So the question is is based on what
15 they've presented -- and I don't want to spend too much time on
16 the authenticity question because it appears everybody agrees
17 that these are, in fact, the Facebook and Twitter account. We
18 just disagree whether or not they're the statements of the
19 representative such that they should come in over hearsay
20 objection. Correct?

21 I just -- and maybe not. There are two different
22 issues. One is authenticity and one is hearsay. And to the
23 extent --

24 MR. LEVESQUE: Your Honor, we'll -- I think there are
25 real issues, because I'm not in a position to -- because

1 Representative Roach did assert legislative privilege, I'm not
2 in a position to get clarification, Are those your words or are
3 those your political consultant's words? That's the --

4 THE COURT: You're not disagreeing, though, that these
5 are his websites. These aren't, like, for example, the recent
6 people on Twitter that were paid \$10 and claiming they were the
7 Pope or whatever, the blue checks, or whatever that nonsense
8 was. We're not claiming that. We're saying, Judge, we just
9 don't believe it's fair to attribute these statements because,
10 as you know, just because the statement is made doesn't mean
11 that it is him personally typing it. It could be somebody else.

12 MR. LEVESQUE: That's correct.

13 THE COURT: All right.

14 I'm going to overrule the objection as to
15 authenticity. There doesn't appear to be a challenge to
16 authenticity.

17 I'm also going to overrule the objection with respect
18 to the statements. You can have a statement or a statement that
19 you adopt. They are on his, you know, website. And there's no
20 suggestion they were taken down and there was some controversy
21 or had some rogue employee that wasn't doing that.

22 Moreover, I'm going to consider these statements
23 because if they're consistent with other statements he made on
24 the public record where he spoke, then it would be corroborative
25 of it wasn't a one-off or he didn't misspeak on that other

1 occasion. Because are you going to have statements from the
2 legislative record as well?

3 MR. HANCOCK: Yes, Your Honor.

4 THE COURT: And so, Judge, additionally, we think this
5 would be corroborative of the statements in the legislative
6 record and would be consistent with, and it's for that reason we
7 believe that it should come in. Moreover, it's either his
8 statement or somebody at his behest making the statement.
9 Correct?

10 MR. HANCOCK: Yes, that's our position.

11 THE COURT: All right. Thank you.

12 I overrule the objection on that basis.

13 (PLAINTIFFS EXHIBIT 354: Received in evidence.)

14 BY MR. HANCOCK:

15 Q. Dr. Lichtman, why did you consider statements from
16 Representative Roach?

17 A. Representative Roach was a very important player in the
18 adoption of HB 233, and he was chief House sponsor. He led the
19 discussion of the bill in the House. And so he would be a very
20 important decision-maker to look at his statements.

21 And I think this is an important statement. And he does
22 say "stem the tide of Marxist indoctrination." He doesn't say,
23 you know, balance it with something else.

24 Q. Let's shift to talking about HB 233 itself.

25 MR. HANCOCK: Can we pull up Joint Exhibit 1?

1 BY MR. HANCOCK:

2 Q. Do you recognize this, Dr. Lichtman?

3 A. I do.

4 Q. And what do you recognize it to be?

5 A. HB 233.

6 MR. HANCOCK: And can we cull out the survey provision
7 for the Board of Governors?

8 BY MR. HANCOCK:

9 Q. Can you see this, Dr. Lichtman?

10 A. I do.

11 Q. What's your understanding of what this provision does?

12 A. Yeah. It's pretty self-explanatory, actually. This
13 provision for the first time mandates that the authorities that
14 govern public universities and also colleges in the state of
15 Maryland -- excuse me -- state of Florida -- sitting here in
16 Maryland -- shall create what they call an Intellectual Freedom
17 and Viewpoint Diversity Survey. It is not a one-off. It's to
18 be conducted every year, and its results are to be published by
19 September 1 of every year. So this goes on indefinitely.

20 And it says: *The governing board shall select or create an*
21 *objective, nonpartisan and statistically valid survey.* Those
22 are all very important elements that they are mandating in this
23 law, and it's to be used by each state university to consider
24 the extent to which competing ideas and perspectives are
25 presented and members of the university community, including

1 students, faculty, and staff, feel free to express their beliefs
2 and viewpoints on campus and in the classroom.

3 But the operating element of it, aside from that rhetoric,
4 is the objective, nonpartisan statistically valid survey to be
5 administered indefinitely each year and results to be made
6 public.

7 MR. HANCOCK: And can we cull out the antishielding
8 provisions?

9 BY MR. HANCOCK:

10 Q. Can you see these, Dr. Lichtman?

11 A. I do.

12 Q. And what's your understanding of what these provisions do?

13 A. This isn't an easy provision to parse because it's quite
14 confusing. But basically the authorities who govern the
15 institutions cannot shield, which means to limit students' or
16 faculty members' or staff members' access to or observation of
17 ideas and opinion that they may find uncomfortable, unwelcome,
18 disagreeable, or offensive.

19 And they also may not shield students or faculty from what
20 they call expressive activities.

21 MR. HANCOCK: And can we cull out the recording
22 provision?

23 THE WITNESS: Yes.

24 BY MR. HANCOCK:

25 Q. Dr. Lichtman, what's your understanding of what this

1 provision does?

2 A. Yeah. This provision overrides the two-party explicit
3 consent rule in Florida and authorizes any student in any class
4 to record, whether video or audio, class lectures for their own
5 personal education use. In other words, you can surreptitiously
6 record a class. And this can also be used in connection with a
7 complaint to the public institution of higher education where
8 the recording was made or as evidence in or preparation for a
9 criminal or civil proceeding. This has real teeth to it. And a
10 recorded lecture may not be published without the consent of the
11 lecturer. It does not mention student consent.

12 Q. And, Dr. Lichtman, did you form an opinion about the intent
13 behind these provision?

14 A. Yes.

15 Q. And what is that opinion?

16 A. I formed the opinion that the intent behind these
17 provisions was to effectuate what decision-makers were talking
18 about, that is, to control and regulate speech which they find
19 is representative of alleged liberal bias and liberal
20 indoctrination which they see as pervading higher education in
21 public colleges and universities.

22 Q. And, Dr. Lichtman, how would these provisions serve those
23 intended goals?

24 A. Yeah. Just -- I mean, my whole report -- well, several
25 reports analyzes that. But to kind of look at it from the

1 mountaintop, start with the survey provision. These are surveys
2 in perpetuity. There is no restriction on how they are to be
3 used by politically-appointed governing bodies, by the
4 legislature, which has the power of the purse, or by the
5 Governor who also has very important powers, as we just saw
6 through his December 28, 2022, memo.

7 And so, particularly in light of all the rhetoric about
8 liberal indoctrination, Marxist, et cetera, whether or not this
9 leads to actual impositions on public colleges and universities
10 and it could be used as a basis for that since there are no
11 restrictions, this survey in perpetuity has a chilling effect,
12 and faculty members have attested to that, on free speech and
13 association.

14 At the highest level, with respect to the antishielding
15 provision, this provision is both overly vague and overly broad.
16 It could apply to anything, and no one exactly means what it is
17 to shield from ideas and opinions that, they may find them
18 comfortable, unwelcomed, disagreeable, or offensive.

19 Does that mean -- and faculty members have talked about
20 this -- that you have to present ideas or opinion or information
21 that your discipline has rejected but, in fact, has been
22 embraced by political authorities in Florida? Do I have to
23 present that the 2020 election was stolen? Do I have to
24 present, even though, again, I know it's wrong, that there is no
25 racial discrimination in America today?

1 If I'm -- Professor Meera Sitharam, professor of computer
2 science at the University of Florida, said this could even chill
3 free expression in the sciences because the sciences --
4 professors in the sciences may not know what information,
5 however outside, you know, the mainstream of their field, they
6 have to present. You know, does a geology professor have to
7 present the six-day creation theory or, you know, an evolution
8 -- or a biology professor present creationism along with the
9 theory of evolution? You just don't know, and that's why it's
10 chilling.

11 Q. Again, asking at a high level, did you form an opinion
12 about whether the recording provision serves --

13 A. Yes.

14 Q. -- the intended goals?

15 A. Yes. In many ways the recording provision has the effect
16 of chilling free speech and association. First of all, you've
17 got to consider it in conjunction with the antishielding
18 provision; that is, recordings which are conducted secretly
19 could be used for complaints and even the initiation of legal
20 action based upon allegations of violations of the antishielding
21 provision. Recordings could be edited. They could be presented
22 incompletely. And because they are conducted in secret, there
23 is no way to check that.

24 In addition, although it says you can't post recordings
25 without the permission of the professor, because no one knows

1 where the recording is taking place, the recorder could go to an
2 Internet cafe or a library and post it untraceably on the web,
3 post, again, edited excerpts.

4 And it's not only the professor's speech that could be
5 publicly presented, also students' speech. And students have no
6 way of -- they have no control, no influence over this.

7 So both by itself and in conjunction with the antishielding
8 provision, this provision chills free speech and association.

9 Q. And, Dr. Lichtman, you've discussed chill a lot. Do these
10 provisions chill all forms of speech equally?

11 A. In principle, perhaps, but in practice, no. Because of the
12 preconceptions and beliefs and manifold actions of
13 decision-makers in Florida, that their concern is not with
14 speech that they believe is on the liberal side. In fact,
15 that's something you want to stem and stop, and they -- their
16 concern is that they want to regulate and control so-called
17 left-wing speech, left-wing indoctrination.

18 There's not a single statement from any decision-maker that
19 they're concerned with stemming or stopping the tide of alleged
20 conservative speech on campus. So, again, you've got to look at
21 the context.

22 Q. Dr. Lichtman, do you have personal political views?

23 A. I absolutely do, like everybody else.

24 Q. Do those views affect what you teach?

25 A. Absolutely not. And this is something that's really

1 important to consider, because the entire approach of HB 233 and
2 manifold other restrictions on teaching and research recently
3 adopted in Florida proceeds on a fundamentally false premise.
4 And that is that somehow academic work falls along liberal or
5 conservative lines, leaving aside, as I point out in my report,
6 the difficulty of pinning down ideologically exactly what
7 conservative or liberal means. Leave that aside. That's not
8 what academic work is all about. Academic work is about the
9 search for truth. It is the search for truth through research,
10 evidence, analysis, and the like.

11 Now, work in areas that, you know, have come to be
12 politically sensitive, like climate change, or racial
13 discrimination, or supply side economics, have been interpreted
14 and exploited politically by political actors. But that does
15 not mean that the work itself is inherently liberal or
16 conservative.

17 Moreover, we have a mechanism within academia for checking
18 whether work is driven by politics or driven by the search for
19 truth. That's called a peer review. I've published many
20 peer-reviewed articles. I've published books that are peer
21 reviewed. We can argue and debate about my books and my
22 articles, but they survived peer review.

23 A classic -- a clear example that I point out in my report
24 of how peer review has operated is the 1776 report of the
25 commission appointed by then-President Donald Trump. The report

1 purports to be an objective, sound academic account of the
2 American experience as a guide for teaching. But as I point
3 out, this is a politically driven document, not a search for
4 truth.

5 Just to give a couple of examples.

6 The report lists progressivism as a threat to freedom equal
7 to Nazism, communism, and slavery. You know, progressivism gave
8 us women's suffrage, direct election of senators, direct
9 primaries, pure food and drug regulation, child labor laws,
10 et cetera.

11 One prominent historian said, Must I now say that child
12 labor laws and meat inspection equals Hitlerism? Another clear
13 example was that the report truncates quotations from Martin
14 Luther King to make it look like Martin Luther King believed in
15 the 1960s that America had achieved a color-blind society. But
16 when you look at the complete quotation, the part they cut out,
17 you see Martin Luther King is saying just the opposite, that we
18 still have not redeemed that promise in America.

19 And as far as peer review is concerned, the American
20 Historical Association critiqued *The 1776 Report* in a letter
21 that was cosigned by dozens, dozens of the leading academic and
22 educational institutions in the United States, and the critique
23 said that this document simply ignores the last 70 years of
24 historical scholarship. So there -- you know, that's the
25 strongest example of peer review I've ever seen with so many

1 leading educational and academic organizations weighing in.

2 Q. And, Dr. Lichtman, do your personal or political views
3 affect your scholarly work?

4 A. No. My scholarly work is a search for truth. Of course,
5 it has been and can be interpreted politically. Let me give you
6 an example. One thing I've been engaged in -- and I think I
7 mentioned that in the context of my social education articles --
8 is the prediction of presidential election results, you know,
9 fraught with the possibility of politics.

10 But if I let politics guide and direct my political
11 predictions as opposed to fidelity to my model and to the
12 historical record, I'd be useless as a predictor, and I wouldn't
13 have been in this business for 40 years, keynoted the
14 International Forecasting Summit, published in numerous
15 forecasting journals, lectured all over the world about this.

16 And, in fact, I have predicted about as many Republican as
17 Democratic victories. These are predictions. I may have my own
18 views, but they're not endorsements. And you can imagine, it
19 did not make me very popular in a 90 percent-plus Washington,
20 D.C., where I -- 90 percent-plus Democratic Washington, D.C.,
21 where I teach at American University to have predicted Donald
22 Trump's victory in 2016.

23 I have to say, though, I did get a very nice handwritten
24 congratulatory note from President-Elect Donald Trump
25 congratulating me on my prediction. So I've endeavored my best

1 to keep my political views and my scholarly work separate, and,
2 as I said, my work has stood the test for over 50 years of peer
3 review.

4 THE COURT: Doctor, let me ask you this: You --

5 THE WITNESS: Sure.

6 THE COURT: -- indicated that part of what you looked
7 at as it relates to the intent of the Florida Legislature
8 regarding the provision at issue is that there's this false
9 assumption that universities are hotbeds of liberalism,
10 progressivism, Marxism. They seem to collapse all those
11 concepts as if they're one idea. But setting that aside -- but
12 then at the same time -- and I understand there may be some
13 flaws with its execution -- the Florida Legislature says, We're
14 going to put our money where our mouth is, and we're going to
15 order a survey.

16 So help me to understand, how do I square the idea
17 that the legislature is just drop -- jumping to a false
18 assumption and is going to ram something down everybody's
19 throats and there's no basis for it when they say, We believe it
20 anecdotally and, by the way, we're going to order one of the
21 three provisions at issue -- or challenge -- we're going to
22 order a survey to see if, in fact, we're right, that there is a
23 suppression of conservative ideas on campus and a left wing.

24 So it just seems to me that it puts the Florida
25 Legislature in a bit of a trick box to say they're doing this

1 without any empirical data, at the same time challenging their
2 efforts to get empirical data. Is that -- help me to understand
3 why that's not so.

4 MS. VELEZ: Another great probing question,
5 Your Honor.

6 First of all, the -- and, you know, I discussed this
7 at great length. I'm probably not going to go into it now.
8 This survey was not nonpartisan, objective and statistically
9 valid.

10 THE COURT: And I -- that's why I said I -- actually,
11 I try to be careful.

12 THE WITNESS: Do you want to leave that aside?

13 THE COURT: That's why I said it could be flawed, the
14 survey.

15 THE WITNESS: Yeah. Right.

16 THE COURT: And I understand it could arguably -- not
17 arguably. It probably is self-selecting.

18 THE WITNESS: Right.

19 THE COURT: You got 2 percent respond, and the
20 2 percent respond are people that hate the universities --

21 THE WITNESS: Right.

22 THE COURT: -- and think that, you know, they're
23 hotbeds of liberalism, and so you get a result you want, so I
24 understand all that criticism.

25 But here the Florida Legislature didn't mandate a

1 particular survey. They didn't vote on a particular survey.
2 They didn't choose the survey that went out. They just said, We
3 need a statistically, you know, valid survey so we can gather
4 statistical information to see if our thoughts are right and
5 reasonable; namely, that our public universities are hotbeds of
6 fill-in-the-blank.

7 So how do I -- because the people that actually
8 executed on their directive, those that drafted the surveys,
9 arguably came up with a flawed process, how do I impute that to
10 the legislature that when they drafted and passed the statute,
11 they had a bad intent?

12 THE WITNESS: Okay. Let me -- that's a very large
13 question, and I'll try to, Your Honor, unpack it as best as I
14 can.

15 First of all, they could have -- if they really wanted
16 an objective, nonpartisan, statistically valid survey, like the
17 other institutions that conducted surveys, which they claim was
18 a model, they could have put more guidelines in here. They
19 could have put that the survey must be conducted, as the surveys
20 elsewhere, in consultation with faculty, staff, and students.
21 That isn't in here.

22 They also could have put in that, as in other
23 institutions, the specific drafting of the survey would draw
24 upon the expertise of independent, nonpartisan, outside
25 institutions. They didn't do that either. They pretty much

1 left everything to the political appointees who govern the
2 Florida system. I understand they're not legislators, but,
3 again, you got to use your common sense. These are the same
4 Republicans -- these are Republican donors and loyalists who
5 passed the law.

6 Now, on the bigger question: Even if they had solved
7 all those other problems and specified all these things they
8 could have and should have, the whole approach and -- reflected
9 in the survey is incorrect. Academics do not fall on
10 liberal-conservative lines, so all these questions about
11 liberalism and conservatism in teaching and research do not give
12 you any valid answers because they don't accurately describe how
13 teaching and research takes place.

14 The -- they're even asked to speculate about
15 liberalism and conservatism in the entire institution or
16 research outside of their areas. Plus, there are whole swaths
17 of academic -- or physics, chemistry, astronomy, kinesiology,
18 veterinary medicine where this whole liberal-conservative
19 dichotomy doesn't make sense. And so conceptually, when you're
20 pivoting everything on what's liberal and conservative, you're
21 not accurately reflecting in any way what goes on in the
22 teaching at a college or university.

23 THE COURT: So in short is it, Judge, it's such a bad
24 idea, it's so fatally flawed, the construction of what they're
25 trying to do is so nonsensical, from that you can impute either

1 a bad motive or no interest in getting the right answer -- or
2 the true answer, I should say, or real answer -- and, further,
3 their delegation -- although I'm interested in you addressing
4 this -- it seems to me that legislative bodies delegate to
5 subject matter experts all the time, but their absolute
6 delegation without any limitation is further evidence of the
7 fact they already had the answer they wanted and they really
8 didn't care what the tests yielded? Is that the -- what I'm
9 supposed to glean?

10 THE WITNESS: That's part of it. Absolutely right.
11 They had this preconception, and it's manifest in many of the
12 statements, not just the two we looked at, that are in my
13 report. And, of course, they did not provide the survey to
14 experts in survey design, development, but to politically
15 appointed state governing bodies.

16 Now, if you really wanted to know what was going on in
17 the teaching of -- and research at Florida's public
18 institutions, as I said, you would put all these other things
19 into the law that model what they claim to be the model of other
20 institutions, but you could go about it in an entirely different
21 way.

22 You could have focus groups, consultations that buy in
23 and bring in faculty, students, administrators and actually talk
24 about what actually goes on in the classroom, rather than try to
25 Procrusteanly -- in a Procrustean way force teaching and

1 research into this false liberal-conservative dichotomy.

2 And if you are truly interested in what was going on
3 on campus and how students were affected, you would also model
4 it on those other institutions and look at diversity and
5 inclusion with respect to things like race, sexual orientation,
6 gender, and ethnicity.

7 So there are other ways of going about this, either if
8 you wanted to do a survey, or mechanisms that are less
9 Procrustean and less susceptible to abuse than a survey that can
10 be interpreted any way they want by decision-makers in Florida.

11 For example, I cite a spokesperson for the Department
12 of Energy who said, Well, a 2.4 response rate is just fine. We
13 can use it because it's thousands of responses, and surveys of
14 politics and elections also have small samples, totally
15 confusing the difference between a scientifically designed and
16 selected survey and a survey like this one, kind of a straw
17 poll, a self-selected, self-response type of survey.

18 BY MR. HANCOCK:

19 Q. Dr. Lichtman, did you assess whether Florida's public
20 colleges and universities had issues with liberal bias or
21 indoctrination?

22 A. I did.

23 Q. And what did you find from that assessment?

24 A. Yeah. First of all, I found --

25 MR. LEVESQUE: Excuse me, Your Honor. I don't believe

1 this was one of the issues that they qualified him as an expert
2 on.

3 MR. HANCOCK: Well, we talked extensively about
4 Dr. Lichtman's expertise in the area of higher education, his
5 experience there, and part of analyzing, you know, the political
6 history and the intentions behind this bill --

7 THE COURT: More importantly, I'm interested in -- and
8 I understand that would be a subset of political history
9 analysis. What I'm more interested in is this part of his
10 report. If it's outside the scope of what he put in his report,
11 I would sustain that objection, but, otherwise, it seems to me
12 to fall under the ambit of the analysis and -- that he
13 previously described as what he was doing, but is it in his
14 report?

15 MR. HANCOCK: It's multiple times in his report.

16 THE COURT: All right. You've made your record,
17 Mr. Levesque. I would have not allowed him to go into it if he
18 had not discussed it in his report, but it seems to me to fall
19 under the general umbrella of what he was testified -- what he
20 was qualified as an expert in. Thank you.

21 You may proceed.

22 BY MR. HANCOCK:

23 Q. Dr. Lichtman, what did you find from assessing whether
24 there were problems with liberal bias or indoctrination at
25 Florida's public colleges and universities?

1 A. I kind of did it -- and it's all in my report -- in a dual
2 way, sort of, one, the dog didn't bark and, two, what message
3 was the dog sending. In assessing the justifications for
4 HB 233, what I found was that proponents could not cite a single
5 complaint from any of the 40 public colleges and universities
6 encompassing some 700,000 students, tens of thousands of
7 faculty, staff and administrators; could not cite a single
8 complaint from any institution at any time, nor could they
9 relate any specific examples of liberal indoctrination,
10 suppression of conservative views. They just related the
11 vaguest kind of anecdotes, without even any specificity, with
12 respect to how supposedly indoctrination was taking place.

13 I note in my report a year after the passage of HB 233, the
14 spokesperson for Governor DeSantis, Christine Pushaw, presented
15 what she thought was a body of evidence proving this liberal
16 indoctrination with an introduction in which she said, you know,
17 I didn't think I had to do this because it's common knowledge
18 that there is this liberal indoctrination going on.

19 But as I went through it, and as I point out in my report,
20 she did not cite a single example of liberal indoctrination or
21 suppression of conservative views from any of the 40 Florida
22 public colleges and universities.

23 Similarly, the expert for the State, who had even more time
24 to analyze this issue, could not cite in his report a single
25 example of liberal indoctrination, suppression of conservative

1 views from any of the 40 public Florida colleges and
2 universities. His examples came from outside of Florida.

3 Now, sort of on the positive side, there are a couple of
4 surveys that I cite in my report that are also mentioned by the
5 spokesperson for Governor DeSantis and the State's expert, but
6 neither one of them actually looked at the results of those
7 surveys for Florida institutions. I cite three surveys in my
8 various reports from the Heterodox Foundation and the Foundation
9 for Individual Rights and Education, groups dedicated to
10 promoting intellectual diversity and free speech.

11 And they looked at between 150 and 154 leading institutions
12 of higher learning in the U.S., and included in that was the
13 flagship University of Florida and Florida State University, and
14 they came in extremely high. In at least one of the surveys one
15 of the institutions finish in -- fifth highest, seventh highest
16 and second highest of 150-plus institutions in the
17 United States. So when you zero in and narrow in on Florida
18 public institutions, you find quite the opposite of what is
19 being claimed without evidence.

20 Finally, I also cite in my report that Florida has welcomed
21 on its cam -- Florida public institutions have welcomed on their
22 campuses many conservative speakers: Oliver North, Donald
23 Trump, Pat Buchanan, among others.

24 The only example that the spokesperson for the Governor
25 presented with respect to speakers -- and her list went all the

1 way back to 1998 -- was one disinvited speaker who was not a
2 conservative. It was Carl Hart, a Black radical. That was it.

3 So both in terms of the inability of the stated
4 spokesperson's -- its expert to come up with positive evidence
5 of liberal indoctrination and bias, and in terms of the weight
6 of evidence, which they don't consider on the other side, I
7 think there was no basis for claiming that Florida public
8 institutions of higher learning are hotbeds of liberal indoc --
9 left-wing indoctrination.

10 THE COURT: Doctor, do they suggest that there's any
11 value to looking to the fact that college-educated young people
12 in Florida dramatically disproportionately vote for one party
13 over the other as evidence that universities are a -- create an
14 echo chamber of thought? Is that anything that anybody relied
15 on?

16 THE WITNESS: I did not see any such evidence
17 presented in the debates over HB 233 or in the subsequent
18 analyses by the spokesperson for the Governor and the expert.
19 That's also, you know, an interesting, but difficult to analyze,
20 issue.

21 If I may parse it out a little bit, one, presuming
22 that's true, that may reflect those who go into higher
23 education, the students themselves, rather than any liberal or
24 conservative indoctrination. The spokesperson for the Governor
25 and the expert for the State also leave out the biggest study of

1 campuses; 100 campuses studied by professors from North Carolina
2 State University and Ohio State University, and they found that
3 only about 10 percent of students say, you know, they experience
4 significant pressure from their professors.

5 And they found that among those students were more
6 likely to turn to be more conservative than liberal, and they
7 suggest that perhaps it is conservative professors who have more
8 influence, you know. You've got to not just look at what the
9 alleged attitude of the professors was, and that itself is
10 fraught with problems, but are they actually indoctrinating
11 anyone.

12 BY MR. HANCOCK:

13 Q. Dr. Lichtman, based on your experience as a political
14 historian, can you describe at a high level why governments
15 suppress speech?

16 A. Yes. I'll describe this at a high level and try to give
17 you an example.

18 Every modern authoritarian-inclined government has sought
19 to suppress, regulate, control speech. The extreme examples, of
20 course, are the Soviets who registered typewriters so they could
21 trace allegedly subversive content. They banned so-called
22 bourgeois science and social science. The Nazis we know marched
23 through the streets and burned books.

24 Now, modern authoritarian-inclined governments are not that
25 ham-handed, you know, necessarily. They're not the Soviets or

1 the Nazis, but as Professors Guriev and Treisman explain in the
2 book I cite in my report, *Spin Doctors* [sic], governments --
3 modern governments still use control over information to cement
4 their power to gain and hold power, and they point out that
5 control over information can be more powerful than violent means
6 to gain and keep power because they affect people's hearts and
7 minds, what people think.

8 And, you know, repression backfires, but if you affect
9 people's hearts and minds, then it has enduring effects that
10 doesn't have to be used through violent suppression, and there
11 are a number of means that spin could be put on information in
12 the interests of a regime: discouraging speech that doesn't
13 comport with the values and interests of the regime; encouraging
14 speech that does comport; discrediting your speech of your
15 political opponents as unAmerican, dangerous; using
16 surreptitious means of surveillance; weaponizing information in
17 the interests of controlling and regulating speech.

18 And this becomes especially powerful in the area of
19 education for a number of reasons. First of all, when it comes
20 to education, you have audiences of students daily for years,
21 even decades. That's why, you know, you can't draw a
22 hard-and-fast dark line between K-12 and higher education. The
23 two very much affect one another, and you're influencing young
24 people, and you are shaping the future.

25 And let me give you an example of something that, you know,

1 is at the center of efforts to regulate and control speech in
2 Florida and elsewhere, and that is so-called critical race
3 theory, which has been attacked by decision-makers in Florida.
4 They've attempted to ban teaching on so-called critical race
5 theory, B.ut what is critical race theory?

6 It is simply the proposition that racial discrimination is
7 systematically included within American law and practice. This
8 is not fringe scholarship. This is mainstream scholarship -- as
9 I illustrated in my report by citing ten award-winning books --
10 and that's just the tip of the iceberg of the scholarship
11 documenting ongoing discrimination in this country.

12 Now, the attack on critical race theory as it pertains to
13 education does not come from scholars or educators. It is not
14 based upon some grand body of scholarship. There isn't one that
15 proves that there isn't any racial discrimination left in
16 America. It was developed and promoted by a political
17 operative, Christopher Rufo -- and I discuss this in my
18 report -- who looked at an attack on critical race theory as a
19 great wedge issue for Republicans.

20 You could make it seem like Democrats and left-wingers are
21 promoting a theory that causes students to hate White people
22 and, in turn, to hate their country, you know, a very powerful
23 means to appeal to the base and to put Democrats on the
24 defensive, and it shows how you could excerpt, you know,
25 individual phrases and quotes, a lot of it from works posted a

1 long time ago, to try to make critical race theory into a wedge
2 issue, no scholarship behind it, and it completely misrepresents
3 what critical race theory is all about.

4 Critical race theory is the opposite of teaching students
5 to hate White people or to hate anyone. The purpose of critical
6 race theory, properly understood as simply ongoing racial
7 discrimination, is to turn attention away from accusations of
8 individual racism and look at systematic factors.

9 My former American University colleague, now at Boston
10 University, national book award winner Ibram X. Kendi, is a
11 frequent target of those attacking, so-called, the character of
12 critical race theory. But in his book *How to Be an Antiracist*,
13 he has a whole chapter talking about that, denouncing the idea
14 of, you know, focusing and attacking White racism. He says,
15 That's not what this is about.

16 And he also points out how policies designed to achieve
17 equity and opportunity across racial lines benefits everyone,
18 minorities and Whites. Antipoverty programs pulls everyone up.
19 Affordable housing programs provides housing across the races.
20 Improvements in equity in education creates a much better
21 workforce, diminishes criminal activity.

22 So this is a classic example of infusing into education a
23 politically devised wedge issue that has no relationship to the
24 state of scholarship in the field but be tremendously
25 influential in shaping the views of students and the next

1 generation.

2 Q. Dr. Lichtman, earlier you mentioned examining the
3 historical background. What were you referring to there?

4 A. I'm referring to that *Arlington Heights* factor that focuses
5 us on of past examples of invidious discrimination.

6 Now, you know, I've done a lot of work before in Florida,
7 and I could, in looking at a history of discrimination, write an
8 extensive treatise there. I could look at the whole history,
9 for example, of voting discrimination right up virtually to the
10 present. I chose not to do that. I chose instead to focus on
11 historical examples that resonate what's going on with HB 233
12 and policy towards education in Florida.

13 I chose to focus on examples, just a couple of them, that
14 relate to issues of free speech and association, and one of them
15 also relates to those issues as they tie into education.

16 Q. What are those examples, Dr. Lichtman?

17 A. They are the investigation of the NAACP during the
18 resistance to integration in Florida after the *Brown v. Board of*
19 *Education* decision in 1954 and the 1960s investigations into
20 alleged homosexuality in institutions of public higher learning.

21 Q. What was the significance of the investigation into the
22 NAACP?

23 A. Yeah. So, you know, as we know, after the *Brown v. Board*
24 *of Education*, there was massive resistance to integration across
25 the South, including in Florida. And one way resistance took

1 place in Florida and around the South was attacking the NAACP,
2 the leading civil rights organization of the 1950s.

3 And Florida established a special legislative investigative
4 committee to look into the NAACP and, in particular, to
5 investigate alleged communist infiltration and subversion of the
6 NAACP, obviously a way of fundamentally discrediting the
7 organization.

8 And they called upon Mr. Gibson, who was the head of the
9 Miami branch of the NAACP, to come before the committee and
10 present membership lists so they could comb through the lists
11 and see if they included any communists. Gibson refused to
12 bring membership lists, but he said, I will appear before the
13 committee and I will answer your questions. And they presented
14 names of alleged communists to him, and he testified that none
15 of them, as far as he knew, were associated with a branch or the
16 NAACP.

17 Nonetheless, because of his refusal to bring the records
18 and talk about the records, he was held in contempt of court
19 with penalties, and the state Supreme Court upheld the contempt
20 citation, but the U.S. Supreme Court overturned it.

21 And, again, I'm not presenting the Supreme Court decision
22 for legal exegesis, but just for the substance of what they
23 found. They found that the State had unconstitutionally
24 infringed upon the rights of free speech and association of
25 Mr. Gibson, and they made two very important findings that

1 resonate with what's going on with HB 233 and other educational
2 initiatives in Florida.

3 First, they said if you're going to infringe and intervene
4 on people's free speech and association, there has to be some
5 substantial basis for it. And I just talked about how my
6 analyses show there isn't a substantial basis for what the State
7 is doing with respect to HB 233.

8 And, secondly, it points out you've got to be particularly
9 careful when you're dealing with the free speech and association
10 rights of individuals or groups whose views may clash with that
11 of the predominant political powers in the states, as obviously
12 the NAACP clashed with the predominant political powers back
13 then, which happened to be Democrats, actually, in those days,
14 with Southern Democrats upholding segregation.

15 And that, again, resonates with what's going on in Florida
16 today, the so-called left-wingers, the Marxists of those, whose
17 alleged views clash with the predominant political powers in the
18 state of Florida.

19 Q. Dr. Lichtman, earlier you mentioned an example related to
20 higher education. What were you referring to there?

21 A. I was referring to the investigations of the so-called
22 Johns Committee in the 1960s, another state legislative
23 investigative committee called the Johns Committee after its
24 chair, Mr. Johns. And it focused on the investigation of
25 alleged homosexuality in institutions of public higher learning

1 in the state of Florida under the presumption that homosexuals
2 were threats to national security; they were dangerous, and,
3 moreover, they were recruiting young people to become
4 homosexuals. They presented a -- they published a whole
5 pamphlet on homosexuality that brought forth these views.

6 Their investigations involved, in fact, secret recordings,
7 examinations of books and curriculum and did involve the
8 chilling of the speech of faculty members, including some
9 dismissals of faculty members on the grounds of homosexuality.

10 They also justified this intervention on the grounds that
11 taxpayers were funding public institutions of higher learning,
12 and the legislature had an interest in investigating the
13 dangerous influence of homosexuals.

14 I selected this again for its resonance with what's going
15 on with HB 233. I related initiatives currently in the state of
16 Florida. Once again, you have a group that clashes with the
17 predominant political forces, in this case alleged homosexuals,
18 just like alleged left-wingers clash today with the views of the
19 predominant Republicans who hold power in Florida. The State
20 presently also legislated with regard to homosexuality -- I
21 guess talk about that later -- the famous bill regulating any
22 mention of sexual orientation or gender identity.

23 Like HB 233, the Johns Committee relied upon surreptitious
24 recordings, and like current decision-makers, the Johns
25 Committee could not establish a scientific, academic research

1 basis for either of their claims that homosexuals were
2 inherently dangerous or recruiting students into the homosexual
3 lifestyle.

4 And, by the way, that so-called "Don't Say Gay Bill" was
5 also justified on the false grounds that homosexuals in
6 Florida's system of education were recruiting students --
7 grooming students was the word -- to become homosexuals. The
8 spokesperson for the Governor said, This bill must accurately be
9 called an antigrooming bill, again without any evidence.

10 And I cite in my report an extensive study which shows that
11 this so-called recruitment or grooming hypothesis has no basis
12 in fact. And, moreover, the greater danger comes from
13 repression of homosexuality which causes a great distress to the
14 millions of individuals who, one way or another, might not fully
15 embrace absolute straight heterosexuality and gender identity.

16 Q. Dr. Lichtman, these examples you described are more than 50
17 years old; is that right?

18 A. That's correct.

19 Q. Is it common for historians to look back more than 50 years
20 to understand the present?

21 A. If it's relevant, absolutely. Historians look back to
22 Reconstruction, back to Jim Crow, in order to understand current
23 race relations in the United States. It's not the only thing
24 they look at, but if it's relevant and there is resonance for
25 past and present, historians go much farther back even than 50

1 or 60 years.

2 Q. Dr. Lichtman, earlier you mentioned the sequence of events
3 leading up to the enactment of HB 233. What were you referring
4 to there?

5 A. I'm referring to events that explain the adoption of HB 233
6 in 2021. Here I don't go back 50 or 60 years. I try to look at
7 events reasonably proximate to the sequence of events to the
8 adoption of HB 233.

9 Q. And what events did you examine?

10 A. Well, the first thing that I examined was the commentary of
11 then-Representative DeSantis, who would soon become the very
12 influential Governor DeSantis, with respect to what he claims is
13 going on in colleges and universities and his commitment to
14 doing something about it where taxpayers' dollars are being
15 funded. This is important because, as we'll see, the election
16 of Governor DeSantis, a strong advocate for regulating and
17 controlling what he believes is liberal indoctrination, then
18 becomes the next important step in the sequence of events,
19 followed by what happens in the election of 2020.

20 MR. HANCOCK: Can we show the witness what's been
21 marked as Plaintiffs' Exhibit 384?

22 BY MR. HANCOCK:

23 Q. Dr. Lichtman, do you recognize this document?

24 A. I do.

25 Q. And what do you recognize it to be?

1 A. It's a transcript of a hearing -- congressional hearing
2 from July 27, 2017, of the Subcommittee on Healthcare, Benefits,
3 and Administrative Rules and the Subcommittee on
4 Intergovernmental Affairs, which are subcommittees of the
5 Committee of Oversight and Government Reform in the U.S. House.

6 Q. And did you examine this transcript as part of forming your
7 opinions in this case?

8 A. I did.

9 MR. HANCOCK: Can we direct the witness to page 31 and
10 highlight the first call-out?

11 BY MR. HANCOCK:

12 Q. Do you see this, Dr. Lichtman?

13 A. Let me look.

14 Yes. These are the views expressed by then-Representative
15 DeSantis.

16 Q. And did you note this statement in your report?

17 A. I did.

18 Q. And why did you note this statement in your report?

19 A. Because it is indicative of the attitudes of this very
20 influential Governor -- who would become this very influential
21 Governor and what his agenda was with respect to education once
22 he became Governor. He says: *Obviously, the professors are*
23 *overwhelmingly on the left.* This is very much the same as
24 statements made by DeSantis and other decision-makers in 2021.

25 He said: *Some are fair. Some are more pushing the*

1 ideology, meaning the left-wing ideology, allegedly. Again, he
2 didn't present any evidence to that effect.

3 *It seems like, he goes on to say, there are a lot of*
4 *radical students anyway, and a lot of them were going to do this*
5 *even if their professors weren't egging them on. Again, not*
6 *only are professors overwhelmingly on the left, but some of them*
7 *are egging on the students and pushing this left-wing ideology.*

8 MR. HANCOCK: And can we show the witness Call-out 2
9 on this same page?

10 BY MR. HANCOCK:

11 Q. Dr. Lichtman, do you recognize this statement?

12 A. Yes, I do.

13 Q. And who made this statement?

14 A. This is the same representative later, Governor DeSantis.

15 Q. And did you note this statement in your report?

16 A. I did.

17 Q. Why did you note this statement?

18 A. Because this is a further elaboration of the views he had
19 as a U.S. Representative and that he would be able to push in
20 the State Legislature and in his own actions as this very
21 powerful Governor who holds sway over the State Legislature, the
22 kingmaker, as one of his allies pointed out, ability to override
23 the usual checks and balances, as a number of authorities have
24 pointed out.

25 So he says, you know, Do we really want to get government

1 involved? But he says there is a basis for getting government
2 involved: *We are funding these universities, so the American*
3 *taxpayer is underwriting a lot of this stuff,* harkening back to
4 his idea of liberal indoctrination. *So is there a role for*
5 *government, given that we are funding it, or is it just the type*
6 *of thing that, you know, we fund it and still have got to keep*
7 *our hands off. If we weren't funding it, then I think there*
8 *would not be a role for government at all, but given -- I mean,*
9 *a lot of money is going to these universities.*

10 Now, as a U.S. Representative, he's talking about a federal
11 role and the federal government, but as the influential Governor
12 of the state, the money that's going to the public institutions
13 of higher learning in Florida would be state appropriations.
14 And state funding of public institutions of higher learning is
15 far greater than federal funding. It's a much more substantial
16 portion of their budget, and any budgetary restrictions on
17 institutions of public of higher learning would be very
18 significant.

19 Moreover, this presents even more of a rationale because
20 the funding is so much greater for intervening to stop what he
21 sees as this pushing of liberal, left-wing, ideology.

22 Again, I would stress in all these statements DeSantis,
23 decision-makers in the legislature, they're not talking about,
24 Well, we want to balance this left wing educational approach
25 with more conservative views, whatever that may mean. You know,

1 I'm not going to get into that again. They are always talking
2 about stopping it, stemming it, controlling it, regulating it.
3 And in their actions, as, you know, we briefly mentioned HB 7,
4 with which Your Honor is so familiar, they actually banned forms
5 of teaching that they considered to be liberal, left wing.

6 MR. HANCOCK: Your Honor, at this time I'll move to
7 admit Plaintiffs' Exhibit 384.

8 THE COURT: Consistent with the same objections, I'll
9 conditionally admit it for the same reasons as I indicated
10 before.

11 (PLAINTIFFS EXHIBIT 384: Received in evidence.)

12 And I'll try to provide y'all with some authority that
13 I'm aware of that deals with the -- what, if any, relevance the
14 Governor's statements would have as it relates to the *Arlington*
15 analysis; okay?

16 MR. HANCOCK: Thank you, Your Honor. We definitely
17 appreciate that.

18 BY MR. HANCOCK:

19 Q. Dr. Lichtman, what else did you look at in terms of the
20 sequence of events leading up to House Bill 233?

21 A. Well, the next thing I looked at was, of course, the
22 election of Governor DeSantis, who immediately, within days or
23 maybe very few weeks of his inauguration, intervened in the
24 education through an executive order to, in this case, review
25 the content of K-12 education, again without presenting any

1 studies or analyses demonstrating what the problem was that had
2 to be addressed. And this, as I mentioned previously, led to a
3 revamping of educational standards that very much reflected
4 Republican orthodoxy, not a balanced, scholarly approach to
5 history and to civics.

6 The next thing was the election of 2020. Now, at least
7 part of HB 233, particularly the survey part, had come up in the
8 past, had come up, for example, in 2019 and even before that,
9 and it didn't get through the Senate. The objections in the
10 Senate were not only raised by Democrats -- they weren't raised,
11 as I point out, by academics -- but they were also raised by
12 Republicans, in particular, the very influential veteran
13 Republican Senator Bradley, the chair of the Appropriations
14 Committee, who warned against adoption of this survey provision.

15 But then you had the election of 2020. You had the
16 retirement of Senator Bradley, and you had the election of a
17 more right-oriented legislature and Senate, and a Senate that
18 was more inclined to entertain bills like HB 233. And this was
19 attested to, actually, by members of the State Legislature
20 themselves.

21 MR. HANCOCK: Can we show the witness Plaintiffs'
22 Demonstrative Exhibit 1?

23 BY MR. HANCOCK:

24 Q. Dr. Lichtman, do you see this?

25 A. I do.

1 Q. And do you recognize this?

2 A. I do. It's an article that I drew some information out of
3 in my report, in particular, I think, some quotations from
4 decision-makers.

5 MR. HANCOCK: Can we highlight the quotations?

6 BY MR. HANCOCK:

7 Q. Do you see the mention of Rob Bradley in the middle?

8 A. Yes. And it says, as I pointed out, he warned against
9 so-called legislative intellectual freedom surveys, that it
10 would keep coming up again, and urged the Senate to block it
11 from passing every time, calling the idea dangerous. So his
12 retirement and the election of 2020, which created a Senate with
13 a slightly different composition, was very important in the
14 sequence of events leading to the adoption of HB 233.

15 Q. And do you see the discussion of Senate President Wilton
16 Simpson below that?

17 A. Yes.

18 Q. Did you note that in your report?

19 A. I did. And that's important because he is the Senate
20 president, you know, very knowledgeable and influential member
21 of the State Legislature, and specifically says the proposal
22 which had been rejected on -- they're talking about the survey
23 provision -- gained traction because, quote, "with our new
24 freshman members, we have a different makeup of the Senate."
25 This is following the election of 2020, following the election

1 of Governor DeSantis, and the next critical step in the sequence
2 of events that would lead to the adoption of HB 233.

3 Q. And, Dr. Lichtman, do you see the discussion of Rodriguez
4 at the top?

5 A. Yes.

6 Q. Did you note this in your report?

7 A. Yes. Rodriguez, of course, was very important, made
8 sponsor of HB 233, guided the discussion. And he also basically
9 makes the same point, that the bill is going to move faster this
10 time, whereas it was blocked in previous years, because, quote,
11 "the state has shifted to the right."

12 So both Simpson and Rodriguez, one from the Senate and one
13 from the House, very influential members, a sponsor, a Senate
14 president, acknowledged how important the movement to the right,
15 particularly in the State Senate, as a result of the 2020
16 elections were in the adoption of HB 233 following on the
17 election of a very influential and powerful governor who
18 shatters separation. If the governor had weighed in against
19 this, all the evidence suggests it never would have passed.

20 Q. Dr. Lichtman, based on this article, do you believe the
21 Senators actually made those statements?

22 A. Absolutely.

23 First of all, the statements are consistent with one
24 another, and I have not seen any retraction, objections, or any
25 issue with these, and the expert for the State did not take any

1 issue with these quotations. In fact, he did not take any issue
2 with any quotations in my report or a single piece of
3 information of any kind in my report.

4 Q. Dr. Lichtman, would you rely on newspaper reports to
5 ascertain the statements of political figures in your scholarly
6 work?

7 A. Absolutely. I'm not the only one. You know, political
8 historians rely on this all the time. We have to because this
9 is how politicians communicate. They communicate through giving
10 statements -- I wouldn't call it the media because it
11 encompasses not just written material, but also broadcast,
12 cable, social media. This is how politicians communicate. And,
13 you know, it would be like putting zip ties around our hands if
14 we couldn't draw upon, carefully as I did here, statements by
15 politicians that naturally get communicated to the press.

16 Q. When House Bill 233 was enacted, what is your understanding
17 of the vote count by party?

18 A. Yeah, this is in my report as well. I point out it passed,
19 not quite, but almost exactly along party lines. There's just
20 one or two dissenters across the two parties.

21 Q. And, Dr. Lichtman, earlier you mentioned procedural and
22 substantive deviations. What were you referring to there?

23 A. Yeah. We have a situation in Florida in 2021, when
24 Republicans had complete control over the government. They had
25 substantial majorities in both chambers of the State

1 Legislature, which had moved to the right after 2020. They had
2 support from the very influential Republican governor who had
3 spoken out during -- even during the debates, not just in the
4 signing ceremony, about the need to control left-wing
5 indoctrination and critical race theory, in particular.

6 So they didn't have to break any laws, break any rules, to
7 adopt HB 233. But what I focused on in terms of deviations was
8 the fact that this was legislation that fundamentally affected
9 education in Florida. It affected hundreds of thousands of
10 students, tens of thousands of faculty, staff, and
11 administrators. And yet, despite the grave importance of this
12 bill, the backers of HB 233 did not draw upon the expertise of
13 educators or scholars. They did not draw upon any academic
14 studies of what goes on in teaching in Florida. They did not
15 draw on any survey information. And as I said, had they, they
16 would have shown quite the opposite of how they would portray
17 education in Florida.

18 They did not do anything other than these unverifiable,
19 vague anecdotes which explain nothing and told you nothing.
20 They certainly did not point to any crisis in higher education
21 in Florida. Quite the contrary -- and this is in my report as
22 well -- Florida was ranked right at the top in terms of the
23 excellence of the institutions of public higher education. And
24 this excellence was lauded in 2021 by none other than the
25 state's Republican Senator Rick Scott.

1 So while they didn't do anything illegal or procedurally
2 invalid, they didn't do the due diligence that you would expect
3 for something this important, and they ignored all the evidence
4 that's contrary to their preconceptions about higher education
5 and why they needed to institute this bill.

6 MR. HANCOCK: Can we show the witness
7 Plaintiffs' Exhibit 205?

8 BY MR. HANCOCK:

9 Q. Dr. Lichtman, do you recognize this document?

10 A. I do. It's a transcription of the Florida Senate Committee
11 on Education that I utilized, to the best of my recollection, in
12 my report.

13 MR. HANCOCK: Can we direct the witness to the
14 exchange starting on page 8, line 22?

15 BY MR. HANCOCK:

16 Q. Can you see this, Dr. Lichtman?

17 A. Let me look.

18 Yeah, I do see this and I do remember it.

19 Q. And did you discuss this exchange in your report?

20 A. I believe I did.

21 Q. And why did you discuss this exchange?

22 A. Because it illustrates the lack of any substantial basis
23 for HB 233, resonating back to the investigation of the NAACP
24 and the Johns Committee, which also lacked substantial basis for
25 what they were doing.

1 So Senator Thurston says very simply to Senator Rodrigues,
2 the chief senate sponsor who I believe is now the chancellor of
3 the state public system of higher education, he says: *Can --*
4 *talks about, you know, kind of this broad explanation. He wants*
5 *something more. He says: Can you point me to maybe one or two*
6 *instances where faculty or administration have been suppressing*
7 *conservative thoughts or limiting here in Florida?*

8 So he says -- Senator Rodrigues -- *Thank you, Chair.*
9 *Without doing the survey, I cannot.*

10 If you don't ask the question, then you don't have the
11 answers. You can't have the answers. That's why it's important
12 to ask the questions to see what the answers will be.

13 Several ways of unpacking this. First of all, Rodrigues
14 and other decision-makers have, in fact, been asserting -- as we
15 saw from the quotation about in a Marxist indoctrination -- have
16 been asserting that they already know that institutions of
17 higher learning that are public in Florida are hotbeds of
18 left-wing ideology, whatever that may mean, and left-wing
19 indoctrination. So this answer is kind of disingenuous.

20 Moreover, the survey cannot answer that question. The
21 survey does not provide any information about anything that
22 happens in teaching, or anything else on campuses, that
23 suppresses conservative thoughts or limitations. It asks these
24 broad general, really, I think, fundamentally flawed questions
25 generally about liberalism or conservatism on campus but gives

1 no insight whatsoever to any suppression of conservative
2 thoughts or limitations of conservative thoughts on the campus.

3 In order to do that, as I said, there are other ways of
4 getting at that that are much less biased and much more
5 effective, such as having, you know, collegial meetings among
6 students and faculty and staff and administrators and discussing
7 in a nonthreatening way what actually goes on in teaching and
8 actually seeing and -- you know, whether or not there is this,
9 you know, cracking down and suppression of conservative thoughts
10 and ideas.

11 And remember, there have been no complaints out of 700,000
12 students at any time in any institution that any advocate of
13 HB 233 has been able to cite. And none of the advocates, such
14 as Spokesperson Pushaw and Expert McClay have cited any examples
15 that they could find from any Florida institutions of
16 suppression.

17 MR. HANCOCK: Your Honor, at this time I move to admit
18 Plaintiffs' Exhibit 205.

19 MR. LEVESQUE: No objection, Your Honor.

20 THE COURT: Without objection, it's admitted.

21 (PLAINTIFFS EXHIBIT 205: Received in evidence.)

22 MR. HANCOCK: Can we direct the witness to Joint
23 Exhibit 6?

24 BY MR. HANCOCK:

25 Q. Do you recognize this, Dr. Lichtman?

1 A. I'm looking.

2 It looks like another transcription in this case -- excuse
3 me -- in this case of a session of the Florida Statehouse.

4 MR. HANCOCK: And can we direct the witness to
5 page 13, lines 13 to 18?

6 BY MR. HANCOCK:

7 Q. Can you see this, Dr. Lichtman?

8 A. Yes, I see it.

9 Q. Do you recognize this statement?

10 A. Yes. It's in my report.

11 Q. Who is making this statement?

12 A. Again, Representative Roach, chief house sponsor, the
13 representative who got into the discussion of HB 233.

14 Q. Why did you note this statement in your report?

15 A. Because I was looking to see -- and, you know, I already
16 discussed this -- whether or not any of the advocates,
17 particularly the influential ones for HB 233, could provide any
18 specific information about the suppression of conservative ideas
19 or speech on campus.

20 And this is important because he doesn't provide anything
21 specific. He just says: *It's borne of anecdotal stories that I*
22 *and other representatives and faculty have heard from students.*

23 They did not call up any faculty to testify and to
24 demonstrate that, in fact, faculty can validate self-censorship
25 on college campuses and their approach to getting this kind of

1 knowledge. Can't do it. As I said, there are other ways of
2 getting at it that they do not establish in any of their
3 legislation.

4 In addition -- again, this is unverifiable, uncheckable,
5 and isn't specific -- he doesn't say this anecdote says this is
6 the specific way in which this student had his ideas suppressed.
7 It's just a general reference to anecdotal stories.

8 Q. Dr. Lichtman --

9 THE COURT: Before you go on, is -- and I don't say
10 this to be glib, but is this really a deviation from the normal
11 legislative process? I mean, I understand that it would be
12 better to bring in experts. I understand it would be better,
13 potentially, to have lengthy hearings where, you know, you call
14 all kinds of subject matter experts.

15 But I don't understand the *Arlington Heights* factor to
16 be that there's a departure -- an illegal departure of
17 violating, for example, House or Senate rules. As I understand
18 it, what I'm supposed to look at, because it's circumstantial
19 evidence of there's something amiss, is if you are doing
20 something that's not typical.

21 You wait until the very end of the session, under
22 cover of darkness, where nobody has had a chance to look at it,
23 and pass it. You substantially change the bill to add in the
24 pernicious provisions, pass it out at 2 a.m. and have everybody
25 vote on it at 8 a.m. You typically allow X amount of debate on

1 particular bills of a particular committee, and it goes to
2 another committee, and you cut out both committees and all
3 debate. And it seems to me those are the types of things that
4 you can look to to say, Well, from that -- not necessarily that
5 alone, but from those deviations, one could infer that something
6 is amiss.

7 Is the fact that the Florida Legislature passes a law
8 based on anecdote and impression as opposed to thoroughly
9 investigating the issue really a departure from the normal
10 proceedings in Tallahassee? And, again, I say that not to be
11 cute or funny. But is it really a deviation?

12 THE WITNESS: Well, you know, as I said, the *Arlington*
13 *Heights* guidelines are nonexhaustive. They're guidelines. And
14 I completely understand what you're saying. And in many other
15 cases you do see these kinds of, you know, bills expanding from
16 2 pages to 90 pages, midnight sessions, a lack of input from the
17 public or from experts.

18 But as I said here, the Republicans are totally in
19 control of the process. They didn't need to do those kinds of
20 things. And so what I focused on as part of the circumstantial
21 evidence resonating back to what happened with the Supreme Court
22 decision in *Gibson*, back to what happened with the Johns
23 Committee, I was looking at whether or not in terms of the
24 procedure, not so much these technical deviations, but whether
25 or not there was a substantial basis for intruding upon the free

1 speech and association of colleges and universities even to the
2 extent of authorizing surreptitious recordings of classes, you
3 know. If anyone -- if I thought anyone was surreptitiously
4 recording my classes -- and I'm at a private institution -- it
5 would have, you know, a dramatic effect on how I might teach.
6 Maybe not. But, you know, it would certainly be something
7 chilling.

8 So I think this is relevant to assessing the
9 circumstances of passage, even though it's not technically
10 anything illegal or a departure from procedure. I understand
11 that. And certainly one thing that is a departure from
12 procedure is lack of input.

13 My -- you know, I haven't studied every bill in
14 Florida and other states, but I've studied a lot. Normally
15 there is hearings and input, input from experts, input from the
16 public. I didn't see that kind of input with respect to HB 233.
17 Again, we just got these anecdotal claims or attempt to shift
18 the discussion misleadingly back to the survey.

19 So maybe it technically isn't the way it often is
20 done, but I still think what I present here is very relevant as
21 part of the circumstantial evidence.

22 THE COURT: Hold on, please.

23 (Pause in the proceedings.)

24 THE COURT: All right. We are going to go until noon.
25 So when you get to a stopping point in the next five minutes,

1 let me know.

2 MR. HANCOCK: I was about to start another section,
3 so --

4 THE COURT: All right. Then we'll break for lunch,
5 and we'll come back at 1 o'clock.

6 Thank you.

7 MR. HANCOCK: Thank you.

8 THE COURT: Thank you, Doctor.

9 (Recess taken at 11:56 AM.)

10 (Resumed at 1:02 PM.)

11 THE COURT: All right. We're back on the record.
12 Counsel, are you ready to proceed?

13 MR. HANCOCK: Yes, Your Honor.

14 THE COURT: All right. I have the witness back on
15 Zoom. The witness is still under oath.

16 Counsel, you may proceed.

17 MR. HANCOCK: Your Honor, if I could bring something
18 to your attention at the outset.

19 Dr. Lichtman has a medical condition that may necessitate
20 him taking a break at some point. Is it all right if he just --

21 THE COURT: Doctor, all you have to do is let me tell
22 you -- all you have to do is let me know you need a break, and
23 we'll take a break; okay?

24 MR. HANCOCK: Perfect. Thank you.

25 THE WITNESS: Thank you.

1 BY MR. HANCOCK:

2 Q. Dr. Lichtman, earlier today you mentioned examining
3 discriminatory effects from House Bill 233.

4 What were you referring to there?

5 A. I think I gave you the top-of-the-mountain overview of the
6 ways in which the three provisions plus the enforcement
7 provision of HB 233 have the effect of discriminating against
8 freedom of speech and association at public institutions of
9 higher learning in Florida.

10 Q. And can you tell me about your examination of how the
11 survey provision has discriminatory effects?

12 A. Yeah. I examined this in three ways. First, the
13 conception of the survey; second -- excuse me. First the law
14 itself; second, the conception of the survey; third, the actual
15 design and implementation of the survey; and, finally, the
16 actual survey results.

17 If we look at the law itself, and I think I alluded to some
18 of this previously, there are deep problems with the law. It
19 does not guarantee anonymity. The survey was conducted
20 anonymously this time, but this is not a one-off survey. This
21 is a survey -- unless something is amended or appealed or
22 enjoined or struck down, this survey continues indefinitely.

23 And it is certainly possible, A, that the anonymity could
24 be breached and, B, that future surveys, because the law does
25 not provide protection, may not be anonymous, and that would

1 apply not just to students but also to faculty as well.

2 As I previously mentioned, the law is extremely vague in
3 terms of how the survey should be designed, what's meant by an
4 objective, nonpartisan and statistically valid survey. It does
5 not guarantee stakeholder input from faculty, students and
6 administrators, and it does not guarantee the drawing upon
7 outside organizations that are independent and nonpartisan and
8 have expertise in the design and implementation of the survey.

9 And, perhaps, very significantly, the survey has no
10 constraints; that is, officials in Florida in the Governor's
11 office, in the State Legislature, in the politically appointed
12 boards, can interpret the survey results any way they want and
13 use them as any justification that they want in order to
14 restrict free speech and association, perhaps through funding,
15 through limitations on tenure, through restrictions on the
16 curriculum.

17 We already saw, just a couple of weeks ago, the Governor
18 intervening in demanding information of a budgetary nature that
19 goes into great detail into the curricular decisions of faculty
20 in Florida public colleges and universities. So that's the
21 first issue with the law itself.

22 Q. And, Dr. Lichtman, you mentioned issues with the conception
23 of the survey. What were you referring to there?

24 A. Yeah. I was referring to this misguided notion that's
25 expressed in justifications for the survey and manifests itself

1 in the survey itself that somehow academics can be pigeonholed
2 as liberal or conservative; but, in fact, as I note in my report
3 and discussed here, that's not the way academics work.

4 Academic findings can be interpreted, particularly by
5 politicians who have self-interests, as liberal or conservative,
6 and as I showed through the attack on critical election theory,
7 they can be used to political advantage as a wedge issue, but
8 the academic research in teaching itself is not by its very
9 nature liberal or conservative.

10 And so if you're asking faculty and staff to speculate
11 about what content is liberal or conservative -- and not even
12 just content in which they come into -- that they directly are
13 involved in with content across the institution, even if the
14 survey was statistically reliable, the validity of what those
15 questions are asking, and what the answers are likely to be, are
16 extremely problematic by the very nature of what they are doing
17 conceptually in this survey.

18 Q. And, Dr. Lichtman, earlier you mentioned issues with the
19 design of the survey. What were you referring to there?

20 A. Yeah. The law talks about an objective, nonpartisan and
21 statistically valid survey. Well, in the actual design it
22 didn't fulfill any of those promises, but there's no controls;
23 there's no way of rectifying that, remedying it, dealing with
24 it, because officials in Florida have total autonomy in dealing
25 with the survey. There is no constraints.

1 As I point out in my report, decision-makers promise that
2 stakeholders, faculty, staff and students would be involved;
3 they would draw on the expertise of an outside firm, like other
4 institutions in other states have done. Well, there's no
5 expertise from outside the institutions that is being drawn
6 upon. There is no significant input from student, faculty, and
7 staff. Instead, decision-makers said they would draw upon the
8 Institute of Politics at Florida State University for expertise
9 in drafting the survey.

10 Well, this is just five faculty members out of tens of
11 thousands across the institutions, and the driving force behind
12 the institute was Mr. Cardenas, former Republican state chair.
13 But, regardless, it turns out they did not have the Institute of
14 Politics design the survey. Rather, the survey, according to
15 the testimony of Marshall Criser, the chancellor of the system
16 of public institutions that I cite in my report, was pulled from
17 the Institute of Politics.

18 And rather than having an objective, nonpartisan design,
19 the survey was actually designed by Mr. Kelly in the office of
20 Governor DeSantis. This achieved a couple of things, as
21 indicated by the email evidence. One, it avoided review by the
22 Institutional Review Board, and here's the issue there.

23 There are students in the public system of higher education
24 in Florida who are below the age of consent, who are under 18.
25 Well, it is a requirement for any kind of internal survey or

1 inquiry that either they get waivers from the parents of those
2 students -- you know, very long and difficult process -- or the
3 matter gets reviewed by the IRB, the Institutional Review Board,
4 and the Institutional Review Board gives the study or the survey
5 a waiver. The emails indicate that's a very fraught and
6 difficult process.

7 So by moving it into the office of the Governor, you avoid
8 having to get waivers and you avoid review by the Institutional
9 Review Board, thus bypassing mechanisms designed to preserve the
10 rights of those students who are under 18.

11 Second thing, of course, you do is you give political
12 control over the survey, and Mr. Criser indicated that he had no
13 idea what kind of survey design expertise that the -- Mr. Kelly
14 or anyone else in the Governor's office might have.

15 And as I pointed out later on in my report, the design
16 violated a lot of basic standards by which you create reports,
17 including pretesting, which they didn't do; including avoiding
18 dichotomous choices, like liberal, conservative. Even assuming
19 that was legitimate, there are obviously lots of other positions
20 that people could put themselves in; populist, nationalist,
21 socialist, you name it. There are all kinds of other positions
22 other than forcing it into that dichotomy.

23 Chancellor Criser testified that when it came to his
24 office, they made only some minor changes, which actually made
25 the survey more problematic. For example, in one question they

1 changed "reprisals," which, pretty clear meaning, to "negative
2 consequences," which could mean anything, and they added a
3 question on asking staff, faculty, and administrators to
4 actually disclose their personal political affiliations.

5 Q. Dr. Lichtman, did you examine --

6 THE COURT: Let me ask you a quick question. I
7 realize you're the lawyer and not the witness, but it's just
8 more efficient for me, particularly in this type of proceeding,
9 to do it this way -- and this may just be you want to take notes
10 and answer these questions later or you may want to follow up
11 with the witness.

12 If the purpose of *Arlington Heights* is to divine the
13 intent of a legislative body to do something that violates the
14 Constitution -- that's the exercise we're going through; right?

15 MR. HANCOCK: Yes, Your Honor.

16 THE COURT: I don't, for the life of me, understand
17 how -- unless there's some evidence that the legislature knew
18 that the Governor's office was going to hijack the survey, how
19 in the world does the fact that the person -- that entities that
20 ultimately came up with the survey did a bad job tell me
21 anything about the intent of the legislators that voted for the
22 bill at issue?

23 I just -- and you can ask a follow-up question. I
24 definitely am going to need you to help me understand that. I
25 understand that -- and I understood the witness earlier to say,

1 Well, Judge, if you give -- if you don't put any contours or
2 guardrails, that suggests a lack of interest in it, or if you
3 don't, it gives people the ability to do it. I understand that,
4 but I don't see how it evinces an intent to arrive at a
5 particular result if, in fact, the people that designed the
6 survey do what the witness has just said is directly contrary to
7 the directive of the statute, which was come up with a
8 statistically relevant -- it seems to me that the folks that
9 executed on the plan did the exact opposite of what the
10 legislature, by statute, told them to do.

11 So -- but -- I could have done that quicker, faster
12 and been more articulate, but I don't feel great, so you can do
13 that now or do that later or follow up with the witness.

14 BY MR. HANCOCK:

15 Q. Dr. Lichtman, this morning --

16 THE WITNESS: I would like to comment on that.

17 BY MR. HANCOCK:

18 Q. I'll let you take the first crack, Dr. Lichtman.

19 A. Yeah.

20 I think, Judge Walker, you got partially what I was saying.
21 There was so much controversy about this provision. It had been
22 around for a long time. It had been criticized and attacked for
23 being too vague, too general, open to abuse, open to chilling
24 free speech or even coming down and directly infringing upon
25 free speech.

1 THE COURT: But, Doctor, let me -- let me ask you a
2 question under 614 there -- let me pause there, because I
3 thought about this earlier.

4 THE WITNESS: Sure.

5 THE COURT: It seems to me what you just said sort of
6 cuts against the plaintiffs' position. If this is a piece of
7 legislation that's been repeatedly discussed in prior -- with
8 prior -- in prior legislative sessions, and now you got the
9 votes and you lost the main Republican opposition to it, that
10 suggests you now have the ability to get what you want. But I
11 don't understand how the fact that you -- it seems to me that
12 this idea that it was passed in this complete void where there
13 was no contrary position or dissent allowed, you just told me
14 that there was dissent, there was discussion, there was even
15 Republican opposition. What changed is they now had the votes.

16 So doesn't the fact that it had been -- in terms of me
17 putting all the facts in the mix and weighing them to see what
18 the circumstantial evidence would suggest, I mean, doesn't that
19 cut against the idea that there was no pushback, no discussion?
20 It had been discussed; they just now had the votes.

21 THE WITNESS: Yeah. It was discussed, at least one
22 part of it. The other two parts were not recorded --

23 THE COURT: We are talking about the survey right now;
24 correct?

25 THE WITNESS: Yeah. It was just the survey that was

1 brought up previously. And it was discussed in the context of
2 legislative debates. At no point, either before or after they
3 got the votes, as far as I could tell, did the State Legislature
4 bring forth any substantial evidence from hearings, from
5 studies, in any way justify the need for such a survey.

6 THE COURT: The record -- what you're telling me is,
7 Judge, the record is devoid of the fact they went through
8 workshops and a lot of the things that you normally would
9 associate with a piece of legislation such as this?

10 THE WITNESS: Exactly.

11 THE COURT: I understand.

12 THE WITNESS: When I did my report for the sanctuary
13 cities, there was extensive input and discussion from all kinds
14 of organizations. As we said, this was absolutely devoid here.

15 And it's not -- the reason I bring up the fact that,
16 you know, within the debates the Democrats had objected to this
17 is, you know, they knew that this was problematic. And they did
18 not put in any of the restrictions, safeguards, including those
19 that they promised. There's nothing in here that says you need
20 to draw upon the -- an outside firm, like Giuliani (phonetic)
21 Associates, another institution that joined in, and that the
22 said would be a model. There is nothing in here that guarantees
23 input from the stakeholder student, faculty, administrators.
24 There really is nothing in here that preserves anonymity or even
25 in any way constrains political appointees in the university

1 system from doing as they will.

2 Plus, this notion of the misguided approach of conservative
3 versus liberal was not accidental. It just didn't come because
4 the Governor's office seized the survey. This was fundamental
5 to the whole approach and the whole kind of informal
6 justification with, you know, key decision-makers, the Governor,
7 without whom this never would have passed.

8 THE COURT: Doctor, riddle me this. Because it seems
9 to me on one side the negative is associated with the survey,
10 the fact that it's -- the way it's drafted, the way the
11 questions are drafted, and so forth, is used as a bludgeon
12 against the legislature and reflects an intent to go after a
13 nonexistent problem as you've suggested it.

14 But what do I do with the fact that the Governor's
15 office made it anonymous? What do I do with the fact the
16 Governor's office made it nonmandatory? So I only look at the
17 things the Governor's office did wrong through your work -- I'm
18 not -- that's not my characterization. That was your
19 characterization.

20 THE WITNESS: Yeah.

21 THE COURT: -- to suggest that it's problematic? I
22 don't -- in terms of the intent of those involved, don't I also
23 look at the whole picture, the fact that they generated an
24 anonymous nonmandatory survey?

25 THE WITNESS: Well, making it anonymous was not a

1 negative. I think that was, you know, an essential element for
2 the first survey. It doesn't mean it's going to stay anonymous,
3 because there is nothing in the bill that guarantees anonymity.
4 And despite all these criticisms about, you know, how vague and
5 general the bill is and how it's open to dispute and how
6 chilling it is, there was no attempt on the part of the
7 legislature to put in the safeguards, safeguards they themselves
8 promised.

9 It wasn't like these were just safeguards proposed by
10 opponents. Advocates of the bill talked about the need for the
11 independent, outside organization. They talked about modeling
12 it on these surveys taken in these other institutions in other
13 states. They talked about having all of the stakeholders
14 involved in this.

15 But none of that, despite the promises, were put in
16 the bill, and that created this open-ended situation for
17 decision-makers in Florida who had already made up their mind
18 about what was going on in institutions of public higher
19 education and what they were going to do.

20 THE COURT: And tell me why this isn't the critical
21 question, though. For me to give that weight in determining
22 that there was animus on the part of the legislators and they
23 passed it this way, doesn't there have to be some evidence
24 before me -- and the answer is, Judge, there is, and you can
25 answer that if you believe there is. Doesn't there have to be

1 some evidence to suggest that they knowingly did it this way for
2 that purpose so that -- I mean, for example, there could be --
3 public records laws are a wonderful thing. You can get
4 emails -- and I remain astounded by what people put in emails --
5 you know, where people suggest and acknowledge, well, you know,
6 the Governor can take this over anyway, so don't worry about it,
7 or, you know, give me general language -- we need general
8 language so that they can do it the way they want to do it or
9 something, I mean.

10 But is there any evidence to suggest that this was the
11 plan all along? We put in a provision that says it needs to be
12 statistically -- well, I'm not going to go pull the provision --
13 but the provision at issue, knowing that they weren't, in fact,
14 going to do that?

15 THE WITNESS: Yes. I mean, I --

16 THE COURT: Let me give you an example.

17 THE WITNESS: Yeah.

18 THE COURT: And I realize --

19 THE WITNESS: Yeah.

20 THE COURT: And I'll simply agree to disagree with one
21 of the judges on the Eleventh Circuit. I had a case in front of
22 me where I had thousands of pages of documents, testimony, and
23 exhibits. I had hundreds of hours of testimony where the record
24 was replete that individuals with surgical precision amended the
25 Florida Election Code to make sure that there were fewer

1 African-Americans voting in Florida. So they took a scalpel to
2 the law and crafted it in such a way to get a particular result.

3 I understand why that's evidence of intent. Because
4 you have folks that know that this is -- these will
5 disproportionally limit access of this group. They've done it
6 in the past. It resulted in the past in lowering minority
7 turnout. They are doing it again. I understand that.

8 But what evidence is here that the Florida Legislature
9 passed this law, did it with general language, knowing that it
10 was going to be hijacked by somebody who would craft a survey
11 designed to be able to have, A, zero value and, B, manipulate it
12 however you want to be used in a particular way? What evidence
13 is there of that, other than the fact that's what we got?

14 THE WITNESS: I think there is -- obviously, I don't
15 have that kind of email evidence that maybe some other witness
16 does that you are referring to, you know, where the members of
17 the State Legislature explicitly say, you know, We are doing
18 this for this purpose. But there is no --

19 THE COURT: By the way, Doctor, I didn't mean to
20 suggest -- I mean, we live in a day where people generally don't
21 announce on the Senate floor, "I shot JR."

22 They might inadvertently acknowledge they were at JR's
23 house the night he was shot which gives us, you know,
24 opportunity, coupled with the statement two days later that I
25 don't like, you know, JR. So you can sort of put the pieces

1 together, the mosaic together to form a picture or, as a
2 thoughtful judge recently said, pointillism. You put the colors
3 together and it forms an image.

4 But -- so, I mean, are there those -- there are people
5 that could have said, We don't want to get into the specifics.
6 We are going to punt. We'll let the Governor's office figure it
7 out. I mean, that's the kind of --

8 THE WITNESS: Yeah.

9 THE COURT: That's not a direct statement, but it's a
10 statement that suggests what the thought process was.

11 THE WITNESS: Yeah, I would have to look to pull it
12 up, but there is a colloquy in the legislative debates with one
13 of the sponsors where this issue is brought up, you know, what
14 are the constraints? What are the limitations? What are the
15 controls on this legislation?

16 And the sponsor says, you know, there aren't any.
17 There aren't any constraints. There aren't any controls.

18 So it wasn't an accident that they put it this way.
19 This was something that they were very much aware of. Did they
20 go on to say, And that means, you know, these political
21 appointees who designed the survey are going to design it in a
22 certain way? No. But they're not naive. They know who they're
23 giving the power to. It's these political appointees and the
24 loyal --

25 THE COURT: So what I'm hearing -- and correct me if

1 I'm wrong -- Judge, my best evidence is that there was pushback
2 by not having guardrails. They recognized the importance of the
3 guardrails for the survey. And they said -- and affirmatively
4 decided -- notwithstanding the discussion of the guardrails and
5 the importance of guardrails, we are not going to include
6 guardrails. And, Judge, that's evidence of an intent to forge
7 ahead, notwithstanding the identified and known dangers by not
8 having guardrails.

9 THE WITNESS: That's part of it. I was going to add a
10 few other things, but you said it very eloquently.

11 The next thing was this anonymity issue. That was
12 also brought up in debates. And, again, it was either Roach or
13 Rodrigues who said, Yeah, we understand it's -- you're not
14 protected in the law, but I will consider a bill to change that.

15 No bill was ever enacted to change that.

16 Third point is a point I made very early and haven't
17 had a chance yet to elaborate with any specifics, and that is
18 you can't just look at this piece of legislation, or I guess
19 we're looking at the survey part of it, in isolation. You've
20 got to look at other acts on the part of the legislature, which
21 clearly indicates -- same people, same legislators, same
22 Governor, which clearly indicate an intent to regulate and
23 control the content of teaching, not to balance it with -- you
24 know, balance liberal teaching with conservative teaching, even
25 if that meant anything, but actually to stop what they believed

1 to be, quote/unquote, "left-wing teaching" to erase it.

2 That's about as extreme a restriction on free speech
3 as can be. And, of course, you know, you are the one who, you
4 know, dealt with HB 7 which attempted to erase various kinds of
5 teachings. These are the same folks that set up this survey.

6 THE COURT: What -- Doctor, and that's important, and
7 hopefully the lawyers are listening as well because I'm going to
8 have the same question for them. The same legislature did draft
9 that language, and they drafted it where it was one sided and
10 exclude -- said you can condemn the viewpoints; you can talk
11 about them; you just can't endorse them. It was classic
12 viewpoint discrimination. It was barring only one viewpoint.

13 What do I do with the fact that the statute at issue
14 here, the legislature doesn't say you have -- under the
15 assumption that all -- almost all college professors are
16 left-wing ideologues, that these professors have to let their
17 students push back on these particular topics? And they craft
18 it in a narrow way, more narrow like the other statute was where
19 they were addressing specific topics they wanted to get out. So
20 here you must allow students to push back on these specific
21 topics and the professor must endorse, which would be compelled
22 speech, that there is this other way of looking at the world.

23 But in this case the statute -- and tell me what I'm
24 reading wrong -- doesn't say -- it seems to me that if I've got
25 a History of Economics in America class, which would seem to me

1 to invite discussions or pushbacks for systemic racism, if
2 there's a conservative professor, doesn't this statute permit
3 the more liberal student to record the professor to seek to
4 challenge the professor? And if the professor doesn't let him
5 state his view, they could argue it's because he's going to make
6 other people in the class uncomfortable?

7 I mean, doesn't it -- because of the way it's written,
8 it allows both sides to do the same thing. Does that matter,
9 given the way it's drafted, for purpose of this Court's analysis
10 as to whether or not its targeting is content or viewpoint
11 related?

12 THE WITNESS: Are we talking now about the recording
13 provision? We've moved on to recording --

14 THE COURT: No. I'm talking about them all together.
15 Because it seems to me that you've got the student who can --
16 you can't silence him; right. That's the one section that
17 you've got to allow somebody to express their viewpoint even if
18 it's going to upset somebody in the class; right?

19 THE WITNESS: Right.

20 THE COURT: You've also -- that's tied to the
21 recording provision, right, which is part of the enforcement
22 mechanism?

23 THE WITNESS: Correct.

24 THE COURT: When I say enforcement, it gives, as I
25 believe you said, teeth to that law; correct?

1 THE WITNESS: Correct.

2 THE COURT: So it just seems to me, unlike the other
3 provisions in front of me that have been targeting specific
4 positions and specific speech -- help me to understand why the
5 fact they drafted this in a neutral way where someone on either
6 end of the ideological spectrum could use these provisions --
7 why does that not undercut the argument that it was passed with
8 the intent to discriminate against particular -- one set of
9 ideas to the exclusion of another?

10 THE WITNESS: Well, you know, you make an important
11 point. In principle this could chill any kind of speech. Any
12 kind of speech that students find offensive could be
13 surreptitiously recorded and used for purposes of complaints,
14 litigation, taken out of context, edited, put on the web.

15 So I think in principle the chilling effect could be
16 applied to different kinds of speech. Again, I don't, you know,
17 buy into necessarily the liberal versus the conservative
18 dichotomy, but that's not the point here.

19 But I do believe that it's crystal clear that, you
20 know -- first of all, it's very hard to draw a statute that
21 specifically targeted only one kind of speech. That was, like,
22 you know, putting a big headline --

23 THE COURT: Well, as I noted, recently the legislature
24 did a pretty good job of that in the last session.

25 But go ahead.

1 THE WITNESS: And look what happened. It got struck
2 down. They were a little bit more careful in drafting this one,
3 I have to say.

4 But, clearly, in the full context of other things this
5 legislature has done, in the full context of what the key
6 decision-makers have said is going on at campuses, I don't think
7 they're worried about this chilling conservative speech. I
8 think they clearly believe that this is targeted to what they
9 see as the predominant element within public institutions of
10 higher learning. And that is left-wing bias and left-wing
11 indoctrination. It's kind of the other side of the point of
12 HB 7. HB 7 eradicates certain kinds of speech that
13 decision-makers in Florida --

14 THE COURT: Or it allows -- it requires the
15 indoctrination, because you're going to advance one viewpoint,
16 the State's viewpoint?

17 THE WITNESS: Exactly.

18 THE COURT: There are different ways of looking at it,
19 I guess.

20 THE WITNESS: Yes, agreed. And both ways kind of are
21 consistent with what I'm saying, whereas the intent here is to
22 make sure that, however you want to call them -- because, you
23 know, the legislature has this strange view of academics --
24 conservative, nonliberal points of view are expressed and
25 students are not shielded from that.

1 So, you know, as I said about teaching my president's
2 class, even though I know it's false, do I have to put forth the
3 view that's held by most Republicans, including in Florida, that
4 the 2020 election was stolen? Do I have to put forth the view
5 that there is no discrimination in American life today even
6 though I know that's false?

7 THE COURT: And that's based on the reading of the
8 antishield provision that it's not a way to say you can't
9 silence a dissenter in the class if it's on topic or you can't
10 stop somebody from coming through the speaker program at UF
11 because you don't like what they're saying.

12 THE WITNESS: Yeah.

13 THE COURT: Judge, the way it's written, it can also
14 be viewed as a way of requiring you to present a dissenting
15 view. And that's one construction of the provision at issue?

16 THE WITNESS: Right. Even if you -- as, you know,
17 Meera Sitharam said, even if you know it's wrong, there is no
18 way you can know whether or not you are going to run afoul of
19 the statute by not presenting views which you know are
20 politically sensitive but you know are wrong, that they are not
21 consistent with the scholarship in your field.

22 And given the starting point of all this -- and I
23 don't care which decision-maker you look at. They're all saying
24 the same thing; that Florida's institutions of public higher
25 learning are infested with liberals and liberal indoctrination.

1 Clearly, the thrust has to be we want to make sure that
2 non-left-wing, not liberal views, whatever they may be, are
3 expressed in the class. And if they're not, we have got this
4 surreptitious recording which could control it.

5 And, again, I think that's clear from the whole
6 context, even though it's not spotlighted, you know. As I said,
7 this, you know, big neon sign of saying, hey, you know, strike
8 this statute down.

9 MR. HANCOCK: Yeah. And, Your Honor, I think
10 Dr. Lichtman has covered some of the factual discussion very
11 thoroughly.

12 THE COURT: That's fine. You can make other legal
13 argument later if you would.

14 MR. HANCOCK: If I could clarify a few quick points
15 that may make this a little easier.

16 The first is that in addition to their challenge to
17 the statute, plaintiffs have an as-applied challenge to how the
18 survey was implemented in the last year, and in that way these
19 details about that are relevant.

20 THE COURT: I understand.

21 MR. HANCOCK: I also would highlight that, in addition
22 to the *Arlington Heights* factors and the Supreme Court
23 precedence, the Eleventh Circuit has expressly added
24 consideration of whether discriminatory effects were foreseeable
25 and whether less discriminatory alternatives were available.

1 And it's appropriate to draw inferences about intent from the
2 fact that those possible consequences were made known to and
3 could have been fixed by the enactors of House Bill 233.

4 THE COURT: Hence, my exchange with your witness about
5 what were you looking at. On the record he said, Judge, this is
6 what was proposed and they chose not to do it. I understood. I
7 was trying to make sure I understood the universe of information
8 you can rely on to make that point. But go ahead.

9 MR. HANCOCK: Understood. Thank you, Your Honor.

10 BY MR. HANCOCK:

11 Q. Dr. Lichtman, did you examine the survey that resulted from
12 that process you were discussing earlier?

13 A. I did. And I outlined some of the questions in the survey
14 that I think are highly problematic, not by accident, not
15 because the survey was hijacked by the Governor's office, which,
16 you know, is not unpredictable given the statute, but by the
17 very conception of the survey, what it's supposedly intended to
18 do, which is to examine this liberal versus conservative
19 dichotomy to make sure, allegedly, that they are both
20 represented on campus.

21 MR. HANCOCK: And can we show the witness what's been
22 premarked as Joint Exhibit 3?

23 If we can zoom in on the title.

24 BY MR. HANCOCK:

25 Q. Can you see this, Dr. Lichtman?

1 A. Let me -- it's a little hard to see.

2 Yeah, now I see it. Sorry. I got old eyes.

3 Yes, this is the student survey.

4 Q. And did you examine this as part of your report?

5 A. I did.

6 MR. HANCOCK: Can we direct the witness to questions 5
7 and 6 on page 2?

8 BY MR. HANCOCK:

9 Q. Can you see these?

10 A. Yes.

11 Q. Did you form any opinions about these questions?

12 A. I think these questions are highly problematic, and they
13 are reflective of the whole approach taken by the State
14 Legislature, asking whether professors use class time to express
15 their own social and political beliefs without objectively
16 discussing opposing social or political beliefs.

17 First of all, it kind of presupposes that instruction takes
18 place along political beliefs. That's kind of -- you know, it's
19 kind of a "when did you stop beating your child?" kind of
20 question. It's, you know, embedded within the question itself,
21 a loaded type of question and then without objectively
22 discussing opposing social or political briefs.

23 Objectively -- the word "objective" is a very fraught and
24 very difficult word to define and understand in these contexts.
25 I think students would have a great deal of difficulty

1 understanding what it means to objectively discuss opposing
2 social or political beliefs.

3 So if I'm talking about race relations, do I have to
4 objectively discuss the White Nationalist view of race
5 relations? And opposing social or political beliefs could be
6 anything, I mean, if you are presenting left-wing political
7 beliefs. Again, just for the sake of argument -- not that I buy
8 into that -- could opposing political beliefs be socialism,
9 communism, some -- you know, it's not necessarily true that an
10 opposing political belief has to be liberal versus conservative.

11 As we saw in the 2016 contest between democratic socialist
12 Bernie Sanders and Hillary Clinton, democratic socialism could
13 be considered as an opposing social or political belief to
14 liberalism.

15 And similar problems -- yeah.

16 Q. I'm sorry. If you have more, go ahead.

17 A. Yeah. I didn't do No. 6 yet.

18 Similar, and maybe even worse, problems with question 6,
19 that your instructors use class time to express their own
20 beliefs, what does that mean? Does that mean a belief is a
21 proposition that is thoroughly supported by the scholarship in
22 the field, such as there is ongoing racial discrimination in
23 America? Is that a belief, or is that an academic finding?

24 And then which ideas and beliefs are more prevalent? It
25 presumes, again, that they call in this dichotomy of liberal

1 versus conservative which, as I said, the whole approach is
2 problematic, plus there are so many other possibilities besides
3 one pidgeon holey so-called beliefs into liberal, conservative,
4 you know, moderate, populist, socialist, libertarian.

5 And as I point out in my report and explain with
6 scholarship, it's not at all clear in an ideological context
7 exactly what liberal and conservative means. So if I'm talking
8 about tariffs, is tariff protection liberal or is tariff
9 protection conservative? You know, both Donald Trump and Bernie
10 Sanders could be considered protectionists. So it's fraught in
11 so many ways.

12 MR. HANCOCK: Can we direct the witness to question 13
13 on page 3?

14 THE COURT: Let me ask the witness a quick question.

15 Doctor, when you were talking about how I should read
16 the antishield provisions and it was suggested that I had too
17 cramped of a reading that simply was permitting countervailing
18 views on campus or for students to speak up in class with
19 countervailing views, is it your suggestion that, Judge, one way
20 you need to look at this is read the survey, for example,
21 question No. 5, and it informs us that, in fact, we're talking
22 about something other than simply allowing a student to express
23 a countervailing view that might offend other students, the
24 professor -- because it's talking about is the professor,
25 himself or herself, presenting the countervailing views. And so

1 when you're reading the statute, the survey questions inform us,
2 you know, the scope of the statute; namely, to ensure that it's
3 not just that students be allowed to present countervailing
4 views in class to their professors, but that the professor
5 themselves presents sort of the countervailing views that they've
6 expressed their own personal beliefs in class, again, whatever
7 that means.

8 THE WITNESS: I agree with you completely. And I
9 think I've talked about that earlier, saying if I'm a professor
10 and I'm under the statute and there are threats of, you know,
11 litigation and complaints, and even if I'm not out of pocket,
12 the school is, you know, it's a tremendous psychic, you know,
13 blow to me, blow to my reputation.

14 So if I'm under this statute in this enforcement
15 provision, I presume it applies to me. And as I said, I have no
16 idea whether I've got to present views that are opposing,
17 whatever that means exactly, that I believe are false, but that
18 officials -- assuming I'm in a public institution -- that State
19 officials and the governing boards and the legislature and the
20 Office of the Governor think are true.

21 THE COURT: I guess another way of asking the question
22 is, Judge, the reason why that's a reasonable construction of
23 the antishielding provision that would give rise to a legitimate
24 concern if you're on behalf of the professors, when they read it
25 in conjunction with this survey that was sent out to them,

1 that's what would help -- that's what would support their belief
2 that it's also compelling them to present certain information to
3 their students. Is that correct?

4 THE WITNESS: Absolutely. And when you read it in
5 conjunction with everything the decision-makers have been saying
6 denouncing, you know, this so-called left-wing indoctrination
7 and the other things that the same decision-makers have done,
8 like HB 7 and other -- like the new tenure and accreditation
9 rules, it's all a piece. And if I'm a professor and I see all
10 this, it seems pretty clear to me the ways in which this is
11 going to chill my speech.

12 And I have in my report statements from professors in
13 the system. You know, I'm not in the system. I'm not even in
14 Florida. I'm not even at a public institution. But we have
15 statements from professors pretty much expressing these kinds of
16 issues that I've raised and the ways in which, taken as a whole,
17 this statute has a fundamentally chilling effect, particularly
18 from professors like Robin Goodman, a feminist who fully
19 understands that, you know, even if she's speaking the truth,
20 the kinds of things she's going to be talking about in class are
21 going to be very, very offensive to the powers that control
22 politics and that control the Board of Governors in the state of
23 Florida.

24 BY MR. HANCOCK:

25 Q. Dr. Lichtman, earlier you mentioned Chancellor Criser's

1 role in the survey development.

2 Do you know who the current chancellor is of the state
3 university system?

4 A. I think it's former State Senator Rodrigues who is also the
5 chief sponsor of HB 233. And, you know, this fits with what
6 I've been saying in many different contexts. You know, you can
7 create hermetic seals. There's the legislature; there's the
8 Governor; there's the chancellor; there's the governing boards,
9 but they're, you know, all tied together. They are all partisan
10 Republicans or partisan Republican appointees who are committed
11 to this idea that their institutions, despite, you know, there
12 being -- the institutions being excellent in terms of their
13 education, scoring well on surveys of diversity and
14 intellectual -- despite all of that, they are convinced that
15 these institutions are hotbeds of left-wing indoctrination and
16 that, of course, the power of the state, in whatever context,
17 needs to be applied against them.

18 And as I said, they are now all watertight. You know, you
19 have the Governor having this tremendous sway over the
20 legislature, nothing -- even the authorities in the field say
21 he's just shattered any kind of balance of power between the
22 two. You have these political appointees in the governing
23 bodies and officials of the university who share the same
24 approach. These are the officials who tried to deny the right
25 of University of Florida professors to testify on their academic

1 expertise in litigation. These are the same officials who
2 appointed former Republican officeholders to every most critical
3 positions in the system. These are the folks who fast-tracked,
4 against standard procedures, the appointment of -- I can go on
5 and on and on.

6 They are all doing the same thing. They are all expressing
7 the same kinds of beliefs. Even in denying the right of
8 Professor Smith and others to testify, Board of Trustees UF
9 Chair Hosseini talked about, We're not going to allow these
10 people to go out and express their own political viewpoints.
11 That's not what these professors were about to do. They were
12 about to express their own analyses based on their own research
13 and expertise.

14 And, you know, I can't stress too strongly, you got to
15 break down those walls, because it's pretty much a monolith when
16 it comes to controls in higher education that's public in
17 Florida.

18 Q. Dr. Lichtman, now that Ray Rodrigues is chancellor of the
19 state university system, have you seen any statements or
20 indication that he's dissatisfied with how the system handled
21 the survey last year?

22 A. I did not.

23 Q. Have you seen any indication that Chancellor Rodrigues will
24 handle the survey differently next year?

25 A. I did not. I did not see any indication that there would

1 be reform of the survey. In fact, I think I mentioned
2 previously that there was a spokesperson for the Board of
3 Education who tried to defend the survey by confusing self --
4 what do you call it? -- self-expressed voluntary surveys with
5 scientific sample-designed surveys, two couldn't be more
6 different.

7 Q. And, Dr. Lichtman, since the survey was distributed, have
8 you seen any proponents of HB 233 criticize the survey?

9 A. I have not.

10 MR. HANCOCK: Can we direct the witness to Question 13
11 on page 3?

12 BY MR. HANCOCK:

13 Q. Can you see this, Doctor?

14 A. Yes. This is -- yeah. Go ahead.

15 Q. I was just going to ask if you assessed this question as
16 part of your report.

17 A. Yes.

18 Q. And what was your reaction?

19 A. This is another deeply problematic survey, because it asks
20 students to classify classroom instruction politically. And it,
21 again, you know, even though it has an another category,
22 essentially dichotomizes conservative and liberal, which are, I
23 explained, very fraught ideologies to understand and reflects
24 the view of the legislature, the Governor, the governing boards
25 that somehow instruction can be understood as the same as

1 political advocacy.

2 As I explained, you can't conflate the two. You know,
3 research on climate change or racial discrimination or
4 supply-side economics is not inherently liberal or conservative.
5 It's a search for the truth. And you can debate and discuss and
6 examine the substantive conclusions, but it then gets
7 interpreted politically by political actors, all of whom, of
8 course, have political goals and objectives in mind.

9 And the classic example of that is the weaponization of
10 critical election theory, which is not only characteristic in
11 Florida, but has been spread across the country by Republican
12 interests. The Heritage Foundation, ALEC, the American
13 Legislative Exchange Council, the primary conservative influence
14 on state and local policy, FOX News, all have perpetrated --

15 THE COURT: Doctor, you meant CRT, not CET; correct?

16 THE WITNESS: Oh, yes, I'm sorry. You know, I've just
17 written about critical election theory. Thank you.

18 Yes.

19 THE COURT: You had discussed it earlier, so I assume
20 that's what you are talking about.

21 THE WITNESS: Yes. If I ever say "critical election
22 theory," I'm wrong. I do mean critical race theory.

23 -- FOX News, ALEC, the main conservative influence on
24 policymaking in state and local governments, The Heritage
25 Foundation.

1 Other states other than Florida have tried to restrict
2 and control discussions of the notion that racial discrimination
3 is embedded in American society.

4 So, as I said, the facts of that can be discussed and
5 debated, but -- the facts are not by themselves political, but
6 they can be interpreted and are interpreted and used and
7 exploited as part of the spin control, that the book talked
8 about by Guriev and Treisman, politically.

9 MR. HANCOCK: Can we show the witness what's been
10 marked as Joint Exhibit 4?

11 BY MR. HANCOCK:

12 Q. Can you see that, Dr. Lichtman?

13 A. I can.

14 Q. And do you recognize this?

15 A. Let me look.

16 It's the same survey, except it's from employees, so it's
17 not exactly the same questions.

18 MR. HANCOCK: And can we direct the witness to
19 Questions 8 and 9 on page 2?

20 BY MR. HANCOCK:

21 Q. Can you see these?

22 A. Yes.

23 Q. Dr. Lichtman, did you assess these questions as part of
24 your report?

25 A. I did in my report, yes.

1 Q. What was your assessment?

2 THE COURT: Can we go back real quick --

3 MR. HANCOCK: Of course.

4 THE COURT: -- to the last slide?

5 MR. HANCOCK: The cover page?

6 THE COURT: Yeah.

7 THE WITNESS: I'm sorry.

8 THE COURT: Doctor, let me ask a question.

9 Identities will never be published; anonymous; free
10 not to answer any question, so you can answer one question, all,
11 some, or Christmas-tree it --

12 THE WITNESS: Yes.

13 THE COURT: -- you can withdraw from the survey.

14 Aren't all of those -- whoever did it, good, bad, or
15 indifferent, aren't all of those things incorporated in the
16 survey, imperfect as it may be, guardrails against chilling
17 speech?

18 THE WITNESS: I don't think they're especially
19 effective. As it says, this survey is anonymous. That's not a
20 law. That's just whoever designed the survey threw that in.
21 There was no protection under the law for anonymity. There's no
22 waiving, for example, of the Florida Sunshine Laws.

23 THE COURT: We've also got an at-will -- as counsel so
24 aptly pointed out earlier, we've got an at-will challenge as
25 well; correct?

1 THE WITNESS: Yes.

2 THE COURT: Not at will. I'm sorry.

3 MR. HANCOCK: As applied.

4 THE COURT: As applied. Employment on my mind. I had
5 to let somebody go last week. My apologies. Not a law clerk.

6 But it seems to me that if we're looking at the survey
7 as drafted -- even if it wasn't required, viewing it as -- the
8 survey as drafted, did not the survey as drafted include
9 guardrails against chilling speech by saying it's anonymous; you
10 don't have to answer; you can answer questions -- only those you
11 want to answer; you can even withdraw when you are in the middle
12 of it; and we're not going to be reported at a group level or an
13 individual level, so you're not going to know who the student
14 was, who the teacher was; identities are never going to be
15 published or compromised in any way? Doesn't the survey itself
16 say, We understand some people may not want to answer these
17 questions and why, and we're telling you that's okay because
18 here's what we are doing to protect you?

19 THE WITNESS: Okay. Let me unpack that as best I can.

20 As I said, there is -- this is not real protection for
21 anonymity, because this is just something that whoever designed
22 the survey says. It has no weight of law whatsoever, and the
23 survey, despite promises to amend it to guarantee anonymity,
24 doesn't do that. So there is no suggestion of suspension of the
25 Sunshine laws whereby someone could attempt to gain access to

1 the individual responses.

2 Two, reporting at the group level does not necessarily
3 protect individual identity. We saw how small the responses
4 were, you know, less than 1 percent for some institutions. When
5 you get that few -- that small number of responses, it is quite
6 possible to break anonymity and identify individuals.

7 The U.S. Census, which I analyze all the time as a
8 redistricting expert, is well aware of that, and that's why it
9 takes measures to protect individual anonymity when dealing with
10 small numbers of responses.

11 The final sentence is just kind of a repetition of the
12 survey being anonymous. So for those two reasons, the
13 protection is not as strong as one might think. Plus, there is
14 no guarantee that the next survey or the next survey after that
15 will be anonymous since it's not written into the law.

16 And, finally, you're free not to answer any question
17 or withdraw from the survey; that's the very nature of a
18 self-selected survey. You can't force anyone to respond to the
19 survey. And that did not take care of the design of the survey,
20 the intent of the survey, the deep flaws in the questions, the
21 open-ended way in which the survey can be used and interpreted.

22 Even if you assume all this was effective, which I
23 think I've -- you know, in my view, it is not, it doesn't change
24 anything beyond protection of the individuals. It doesn't
25 change the full nature of the survey. It doesn't change the

1 preconceptions of those who have the power to use the survey.
2 It doesn't change anything other than certain things pertaining
3 to individuals not to the questions asked and how those
4 questions could be used by those with power over public colleges
5 and universities.

6 We already saw the Governor is quite willing to
7 exercise his power. I don't know if his December 28th memo had
8 anything to do with the survey responses or not, but it shows,
9 I'm coming in to your institutions, and I'm demanding, for my
10 budget purposes, information about instruction, which is
11 absolutely nonproblematic from an academic point of view,
12 instruction on diversity, equity and inclusion, critical race
13 theory properly interpreted, perfectly legitimate discussion.
14 But I'm going to come in; I'm going to demand information on
15 that, and I'm going to tie it to budgetary decisions.

16 BY MR. HANCOCK:

17 Q. Dr. Lichtman, can we direct you to Questions 8 and 9 on
18 page 2?

19 Do you recall these?

20 A. I do.

21 Q. And what was your assessment of these questions?

22 A. Yeah. I assessed them in my report. Let's look at
23 Question 8.

24 What this question asks a staff member to do -- let's say
25 my administrative assistant in the department of history who's

1 an American University alum, a graduate of the history
2 department -- this question is asking anyone on the staff or
3 administration or faculty to assess not just liberal or
4 conservative ideas of those with whom they may have come into
5 immediate contact, but across the entire institution.

6 That kind of question has no validity whatsoever since
7 individuals in an institution are not in a position -- even
8 assuming this liberal or conservative dichotomy was meaningful,
9 not in a position to make this kind of judgment.

10 I've been teaching for 50 years at American University. I
11 couldn't tell you what's being taught in the business school or
12 the law school or the economics department. How in the world
13 can this be a valid question for anyone who is employed by an
14 institution?

15 And we have similar problems with Question 9, very similar
16 kind of question, which asks, again, for an individual staff or
17 faculty or administrator to make judgments about the entire
18 institution. I guess this would include the -- you know, if
19 they're in engineering or the veterinary school or the chemistry
20 department, who knows, but it's not a valid question that has --

21 THE COURT: Doctor -- Doctor --

22 THE WITNESS: -- any kind of meaning -- yeah.

23 THE COURT: You indicated, I believe, before for
24 students there was a response rate between 2 and 3 percent; is
25 that correct?

1 THE WITNESS: That is correct.

2 THE COURT: The response rate for faculty
3 professors -- staff and faculty, it was higher; correct?

4 THE WITNESS: 9.4, I believe. That's correct.

5 THE COURT: When comparing, were the questions
6 different or similar?

7 THE WITNESS: They were similar, but different. And
8 are you asking me why I think there is a differential response
9 rate?

10 THE COURT: No, no. My next question was going to be
11 did you or anyone else compare -- well, let's start with in
12 terms of those that answered, I neither agree nor disagree
13 versus agree versus disagree about a tilt one way or the other.

14 Was there a similar response between both the students
15 and the faculty, or was there a variation between those two?

16 And just out of interest, just -- and I don't know how
17 the information was recorded -- what was the general response
18 for both groups?

19 THE WITNESS: That's a really good question, and
20 because the questions are similar but not the same, it's very
21 difficult to do a comparison of responses.

22 The other problem in trying to do that is the response
23 rate is so low for the students that, you know, any response
24 rate really cannot be meaningful -- meaningfully analyzed in any
25 way. In some institutions the response rate is actually under

1 1 percent.

2 But along those lines, one thing I did look at,
3 because it's within the context of --

4 THE COURT: The reason -- let me just cut to the
5 chase. The reason I was asking, Doctor --

6 THE WITNESS: Yeah.

7 THE COURT: -- what I'm trying to find out is did the
8 results suggest that there was this self-selection process that
9 was going on such that if 90 percent of FSU that responded said,
10 Yes, we lean liberal; yes, we are dissuaded from offering our
11 conservative viewpoints and so forth --

12 THE WITNESS: Right.

13 THE COURT: -- that would seem to be an anomaly and
14 not match up to the percentages at a university, because it
15 would be so skewed one way or the other. So I just wondered if
16 there was any sort of -- while it may not be statistically
17 significant, while the survey may be flawed, was there anything
18 that could be gleaned that would suggest -- and I'll give you an
19 example.

20 I have testimony all the time in front of me about
21 these are indicia of malingering, that doctors think a patient
22 is malingering, exaggerating their injuries for self-gain or
23 secondary gain.

24 So is there anything from the numbers, the results,
25 that would say, Yes, this does appear to be sort of

1 self-selecting, because there is such a low response because the
2 numbers are so skewed one direction or the other?

3 THE WITNESS: Well, the one thing --

4 THE COURT: And I may have that wrong in terms of
5 statistics.

6 THE WITNESS: Yeah. I get you.

7 THE COURT: I just would assume if you only have
8 2 percent responding and you end up with 95 percent lockstep
9 saying the same thing, that -- and maybe I'm wrong. You're the
10 guy that does this for a living -- I would think that that would
11 be something you could look at -- not determinative, but to look
12 at that would undermine the statistic relevance, because it
13 would be hard to imagine you'd end up with such a skewed result.

14 THE WITNESS: Right. No, that's a very good question.

15 And I have to say I did not in depth analyze the
16 student responses because, as I said, the response rate was so
17 low and was so skewed, you know, across institutions.

18 But I do not recall anything like, you know, 90,
19 95 percent on one side or the other. I recall much closer
20 divisions.

21 One thing I did look at, though, because it was
22 such -- can we look at I think it's Question 6 on the faculty
23 staff survey?

24 No. It was the one that asked them to specify their
25 own political affiliations.

1 BY MR. HANCOCK:

2 Q. Question 24 on page 6.

3 A. Okay.

4 Q. It's the last one.

5 A. Yeah. So I did look at this because -- well, as you say, I
6 wasn't ready to draw statistical conclusions. But the reason I
7 looked at this one is it's not asking someone to speculate
8 what's going on in the engineering department when you're in
9 history, but it's placing yourself, and it doesn't tie it
10 actually to instruction. It just says, you know, what's your
11 political view.

12 And --

13 THE COURT: And it's not tied to the parties. It's an
14 ideological spectrum based upon viewpoint.

15 THE WITNESS: Correct, exactly. And unlike a lot
16 of -- I think all the other questions, it also does dichotomize.
17 It includes, as you can see, a category for moderate.

18 So this is one I actually looked at. I'm not going to
19 draw statistical conclusions, but if Rodrigues and Roach and
20 DeSantis, Sprowls, Simpson are right and public higher education
21 in Florida is utterly dominated by liberals and liberal
22 indoctrination, as you say, I might not be able to draw actual
23 statistical conclusions, but it certainly should show a
24 predominance of faculty, staff, and administrators who regard
25 themselves as liberal.

1 In fact, it showed quite the opposite. The modal
2 response, the plurality response was moderate, 36 percent, and
3 more of the staff identified themselves as conservative than
4 liberal, 21 percent versus 17 percent.

5 Again, I'm not going to draw precise statistical
6 conclusions, but that's pretty shocking given, you know, all
7 these claims about the infestation of liberals in institutions
8 of public higher education in Florida. If that was true, at
9 least there would be some indication of liberal predominance,
10 not the results that we see here. And if these results mean
11 anything at all, they shatter the whole premise of the need for
12 SB 233.

13 THE COURT: Couldn't it also mean that the
14 conservative professors self-selected and the vast majority of
15 people that would identify as liberal followed the lead of the
16 teachers' unions and didn't answer the survey? Isn't that just
17 as plausible a conclusion?

18 THE WITNESS: That is certainly possible, unknowable.
19 Nonetheless, even with the UF faculty indicating not to do the
20 survey, such a small percentage of conservative, still quite,
21 quite surprising to me, given that there's supposed to be --
22 excuse me -- a small set of liberals, 70 percent, given that
23 they're supposed to be predominant.

24 I can't -- I mean, we are speculating a bit here. All
25 we have is the results. It's hard to fathom that the influence

1 of the union could have been that persuasive to utterly turn
2 around what advocates of this legislation are claiming.

3 THE COURT: I understand your response.

4 Counsel, you may proceed.

5 MR. HANCOCK: Can we show the witness
6 Plaintiffs' Exhibit 120?

7 BY MR. HANCOCK:

8 Q. Do you recognize this, Dr. Lichtman?

9 A. I do. That's the same survey for the state university
10 system, and, I believe, its results.

11 MR. HANCOCK: And can we direct the witness to page 5,
12 Table 3.1?

13 BY MR. HANCOCK:

14 Q. Can you see this?

15 A. Yes. These are the response rates by institution and
16 overall for the student survey. So it gives you the total
17 response, and it breaks it down by individual institution.

18 Q. And what does this table reflect?

19 A. It reflects two things, and I think, you know, we've kind
20 of been alluding to them as we've had our back-and-forth with
21 His Honor.

22 First of all, an incredibly low overall response rate, just
23 2.4 percent. I think the student response rate for the survey
24 cited in the State's expert report, University of Central
25 Florida survey, was about 9 percent, and they said it was too

1 low to draw any conclusions.

2 And, you know, I cited evidence from the editor of a
3 journal dealing with college pharmacy, and he indicated that,
4 you know, if you're looking at a lot of different institutions
5 and you want to make a generalization about all the
6 institutions, you need a really high response rate for a
7 self-selected survey, somewhere about 60 percent. I'm not
8 endorsing that, but I'm just saying this falls so far below
9 anything that would enable you to draw any conclusions.

10 The other problem is because you're generalizing about a
11 dozen institutions, you would want a fairly uniform response
12 rate so that the responses are not skewed by institution. And
13 that's not what we see here.

14 We see at the low end Florida A&M, .6 percent, and we see
15 Florida International University at .8 percent.

16 And we see, in contrast, Florida Polytechnic at
17 12.1 percent, New College of Florida at 12.1 percent, you know,
18 14 times higher than the -- 15 times higher more than those
19 lower rates, and we see University of Florida at 4.2 percent.

20 The other thing I would draw out of here is look at New
21 College or particularly Florida A&M, just 50, 30 responses.
22 That's across all of the departments and programs at the
23 university. That's a small enough response rate -- or 77 at the
24 New College or even 171 at Polytech. That might be quite
25 possible to break the seal of anonymity and figure out who the

1 respondents are.

2 If you couldn't do that, you could at least figure out what
3 programs and departments are responding and what their responses
4 were, and that could be a means of taking negative action
5 against those programs and departments.

6 THE COURT: Can I ask a question? I'm perplexed
7 because I understand in this age of technology there's all kinds
8 of data that could be mined, and if you wanted to spend enough
9 time, effort and money, that you could drill down and secure
10 information. But I thought that the -- am I wrong that the -- I
11 thought the -- some of the documents I read, that emails were
12 sent to students by the university. When we're talking about it
13 could be identified by department and so forth, I didn't recall
14 there being any identifying information on the survey that would
15 say, I'm a history student, or, I'm a math student, or, I'm a
16 biology major.

17 And I also thought the email was sent out by the
18 university, not -- if I'm in a college of liberal arts and
19 sciences at UF, it was sent by my college. So I understand
20 anything's possible --

21 THE WITNESS: It is possible.

22 THE COURT: -- to do data mining, but, as I understood
23 it, am I wrong that the emails -- first of all, the surveys had
24 no identifying information on it, departments, et cetera, only
25 the school -- and the only reason why we know it's the school is

1 because it was the schools that sent out the emails. Do I have
2 that wrong?

3 THE WITNESS: Let me look. I'm not certain.

4 MR. HANCOCK: Can we put up Joint Exhibit 4 again?

5 THE WITNESS: I think we have information on that,
6 yeah.

7 MR. HANCOCK: Can we go to page 24?

8 THE COURT: So this is the -- Exhibit 4 is the
9 professor not the students; correct?

10 MR. HANCOCK: That's correct.

11 THE WITNESS: And what am I looking at?

12 MR. HANCOCK: Can we look at the last page, which
13 should be 24?

14 Can you zoom in on all but the last question?

15 BY MR. HANCOCK:

16 Q. Can you see these, Dr. Lichtman?

17 A. Yes.

18 So there is individual information.

19 What's 24? I can't see that -- or is 23 the last one?

20 Q. That's what we looked at a moment ago about the --

21 A. Oh, yeah. Right.

22 So there is some -- some individual information. It may,
23 you know, not on its face be sufficient, but, you know, as you
24 say, you know, the census runs into the same kind of problem,
25 even though it tries to not, you know, maintain -- but tries to

1 maintain anonymity, whether or not someone determined enough
2 could drill down with 50 or 70 responses -- I'll have to say
3 this is the employee survey, so --

4 THE COURT: Well, those same questions were also asked
5 on the student surveys about some race and ethnicity questions;
6 correct?

7 MR. HANCOCK: That or very similar.

8 THE COURT: All right. And, actually, my question was
9 a little bit different, which was, I thought the emails were
10 sent out and collected at the university level, not by
11 individual departments, and so this idea that we only have --
12 we've got a small university like New College, and we have ten
13 people responding and ten people are responding from the liberal
14 arts -- I mean, the history department or something, and it's
15 small enough you might be able to ascertain, well, there are
16 only 12 people; 10 of them responded, and the two minorities did
17 not respond, so we know which 10 did, so we could readily
18 identify, based on such a small number of people, who they were.

19 But I thought as an added protection -- and I could
20 have it wrong. I just -- y'all let me know if I've got it
21 wrong. I thought they were sent out at the university level,
22 not at the department or subdepartment level, to the individual
23 students. Do I have that wrong?

24 THE WITNESS: I'm not certain. I'd have to -- I'd
25 have to review that.

1 THE COURT: The lawyers can answer that question for
2 me.

3 MR. HANCOCK: No, that's not wrong, but I would point
4 to -- if we could look at the prior page and highlight Question
5 17.

6 The faculty survey does provide --

7 THE WITNESS: There you go.

8 MR. HANCOCK: -- even further granularity on the
9 employee response and where they are in the school.

10 THE COURT: And, again, by asking what area generally
11 do you teach in -- liberal arts and humanities, business,
12 science, technology, public safety, and so forth -- I understand
13 that if you've got a small faculty, that you might be able to
14 deduce when you combine the ethnicity questions with that, but
15 it seems to me that to do that, say, at the University of
16 Florida, a large university with a huge staff, would be next to
17 impossible, but -- absent some data mining.

18 But, regardless, I understand.

19 THE WITNESS: Yeah. You're absolutely right,
20 Your Honor. It would be very difficult at the University of
21 Florida, not so hard at other universities given, you know, the
22 sophistication of modern technology and programming, of which I
23 am not conversant, and I'm an old dinosaur, but my son is, and I
24 know how sophisticated these programs are.

25 THE COURT: But just out of curiosity, were the

1 results -- are those an exhibit?

2 MR. HANCOCK: That's what we were looking at before.
3 If we can put Plaintiffs' Exhibit 120 back up.

4 THE WITNESS: Can we go back to the one we just had,
5 though? I wasn't quite finished analyzing that, the one with
6 the -- you know, the different disciplines.

7 MR. HANCOCK: Yeah. Can we put up Joint Exhibit 4,
8 page 23, again?

9 THE WITNESS: As I was saying, you might not -- this
10 information, even in conjunction with the other information we
11 saw, might not be sufficient to identify individuals without
12 someone going through a lot of effort, frankly, which, you know,
13 they may not do.

14 I think if you wanted to find out the identity of
15 individuals, you'd go through the sunshine laws and try to get
16 the information released rather than do this. But what this can
17 do, at a minimum, because you'll have the aggregate numbers in
18 all of these areas, is at least give some indication of how the
19 responses fall down among different units of the university.

20 Do we really need to target liberal arts and
21 humanities, and we don't care about business, because business
22 shows conservative, whereas liberal arts and humanities shows
23 liberal or communications shows liberal; public safety shows
24 conservative?

25 In other words, in order for this to be used in a

1 political way, you don't have to actually pierce the veil of
2 individuality, which, as I said, if I wanted to do that, I'd
3 take a different approach, but you can, in fact, figure out what
4 segments of the university political actors want to target, even
5 a university as big as the University of Florida. But when
6 you're getting much smaller numbers of responses, that becomes,
7 nonetheless, easier.

8 MR. HANCOCK: Your Honor, would you like a paper copy
9 of the results?

10 THE COURT: No, I've got it pulled up. I didn't know
11 if we had -- let me ask you this: I know that y'all are
12 introducing -- I'm going to call it the wrong thing because I'm
13 a Luddite. What do I call this that y'all gave me?

14 MR. HANCOCK: I wouldn't know either.

15 MS. VELEZ: An external hard drive.

16 THE COURT: External hard drive. All right. My
17 understanding, because I don't want to keep calling it the wrong
18 thing, is that you provided me with an external hard drive,
19 which I've now plugged in, to access the plaintiffs' exhibits,
20 because I have a hard copy of defense exhibits and joint
21 exhibits I was looking at earlier.

22 You also were providing a second external hard drive
23 you gave to my courtroom deputy, and that's what we're going to
24 be using to -- based on what exhibits are ultimately admitted;
25 is that correct?

1 MS. VELEZ: Yes.

2 THE COURT: All right. And then my understanding is
3 y'all did not -- I know we did before in some of the other cases
4 y'all have had in front of me, sometimes y'all also filed them
5 on the docket separate and apart from the copy that's, in this
6 case, on the external hard drive. I'm not requiring that to be
7 done. I just want the record to be clear how it's been done.

8 MR. WERMUTH: Your Honor, we haven't yet filed the
9 exhibits because we weren't sure what your preference would be.
10 Some of them are quite large, and some of them are videos which
11 makes it -- the videos, it's impossible to file those, but we
12 can file --

13 THE COURT: It seems to me -- and y'all tell me if
14 you -- I don't want to create busywork for anybody and make it
15 harder, but -- and you, Mr. Wermuth and Mr. Levesque, can talk
16 to one another. What I would think would be appropriate, if
17 there are voluminous -- and I understand the difficulty of doing
18 that -- is to submit at the end of these proceedings a
19 modified -- I don't need one because I can go find them -- but a
20 modified external hard drive that only has that which I
21 admitted.

22 In other words -- because right now the universe of
23 documents is going to be larger than what's going to be
24 referenced or discussed, potentially, so any reviewing court
25 would then only have that which was admitted on the external

1 hard drive just to keep things clean.

2 MR. WERMUTH: I think --

3 THE COURT: Y'all talk and decide how you think it
4 needs to be done. I also don't want to create -- I understand
5 the problem -- if y'all had 3,000 pages of just documents, I'd
6 say just file them on ECF, but I understand when we start doing
7 videos and so forth, it creates some issues and so forth. And
8 so to make sure that we have only what was admitted and only in
9 a way that the -- any reviewing court could get it, digest it
10 and review it easily, it seems to me that may be the best way to
11 do it. Again, I'm not insisting on it that way; I'm just
12 suggesting because y'all probably have a better idea of what
13 works better than I do.

14 MR. WERMUTH: We can confer and get back to you with a
15 proposal.

16 MR. HANCOCK: Let's return to Plaintiffs' Exhibit 120.

17 THE WITNESS: Yeah. I think -- unless you have some
18 other questions about this, I think I've finished my analysis
19 about the low and skewed response rates, and I think we have a
20 similar table for staff.

21 BY MR. HANCOCK:

22 Q. Right. Can we go to page 17 and look at Table 4.1?

23 A. Yeah.

24 So, again, you have a relatively low response rate,
25 although it's higher, quite higher, than the student response

1 rate. It's about equivalent to the student response rate for
2 the University of Central Florida study I talked about where
3 they said it wasn't large enough to draw statistically valid
4 conclusions. That's true for a self-selected survey of this
5 nature. It also -- while not quite as skewed as the student
6 survey, it is, nonetheless, skewed by institution.

7 Florida A&M has a 6 percent response rate. University of
8 North Florida as a 6 percent response rate. I believe those are
9 the two lowest. In contrast, Florida Polytech has a
10 21.6 percent response rate, and New College of Florida has a
11 19.6 percent response rate, and University of West Florida,
12 14.4. So there's also very much of a skew when it comes to the
13 staff survey.

14 And you can also see in a number of cases the responses are
15 fairly low; 140, 101, 108, 255, 391. That might not be small
16 enough to try to pierce individual identities, but it would be
17 small enough, as I said previously, to look at how the responses
18 fall down into those various categories to which employees
19 define themselves: Humanity, social science, business, public
20 safety.

21 And even with the larger response rates, it would be quite
22 possible to determine substantial differences among those. It
23 wouldn't necessarily be dependent on response rate, and this is
24 much more important for faculty because faculty are at far
25 greater risk with respect to their situation than students.

1 Not much you can do to students. You're not going to fire
2 them. You're not paying them. You're not going to reduce their
3 wages. You're not going to deny them tenure or promotion.
4 You're not going to deny them -- take away their scholarships.
5 But staff is much more at risk.

6 Departments, if they are identified, you know, as allegedly
7 particularly liberal, you know, as compared to more conservative
8 departments, could well be targeted for resource reduction and
9 other negative consequences for faculty, staff and
10 administrators in those departments. That's not farfetched when
11 we see the Governor demanding detailed information about
12 curricular content in areas that the Governor finds clash with
13 his own views and interests.

14 MR. HANCOCK: Can we look at page 29 of this exhibit?

15 Can we highlight the table on the bottom?

16 BY MR. HANCOCK:

17 Q. Can you see this, Dr. Lichtman?

18 A. Yes.

19 Q. And what is the most prevalent response on this table?

20 A. Yeah. I think I mentioned that before. The plurality
21 response, by a wide margin, is "moderate."

22 Q. And what's the next most popular response?

23 A. The next response by a margin, but not as wide a margin, is
24 "conservative."

25 Q. And then what's the next most prevalent response?

1 A. "Liberal."

2 MR. HANCOCK: And can we look at page 22 of this
3 exhibit?

4 And can we highlight the table on the top?

5 BY MR. HANCOCK:

6 Q. Dr. Lichtman, is "moderate" an option for this question?

7 A. It is not an option. So you've got this -- you know, as I
8 said, you really couldn't compare the student and the staff
9 surveys because they're asked differently. You can't compare
10 this to the distribution of the staff because they leave out the
11 largest component of responses.

12 It may well be most of the responses that call themselves
13 liberal might well be moderate and that might flip the
14 relationship between conservative and liberal. Also, this is
15 much less accurate than defining your own political views. This
16 asks -- and we've gone over this before -- staff members to
17 speculate about the alleged political composition of ideas and
18 belief across the entire institution.

19 MR. HANCOCK: Your Honor, at this time I'll move
20 Plaintiffs' Exhibit 120 into evidence.

21 THE COURT: Any objection?

22 MR. LEVESQUE: No objection.

23 THE COURT: Without objection, Plaintiffs' 120 is
24 admitted.

25 (PLAINTIFFS' EXHIBIT 120: Received in evidence.)

1 MR. HANCOCK: I'm about to start a separate section.
2 I don't know if this is a good time for a break for anyone.

3 THE WITNESS: It's a good time.

4 THE COURT: Okay. Certainly, Doctor. I indicated
5 we'd let you take a break. We'll take a break, and we'll come
6 back at 2:40.

7 Thank you.

8 MR. HANCOCK: Thank you, Your Honor.

9 (Recess taken at 2:36 PM.)

10 (Resumed at 2:57 PM.)

11 THE COURT: Mr. Hancock, you may proceed.

12 MR. HANCOCK: Thank you, Your Honor.

13 BY MR. HANCOCK:

14 Q. Dr. Lichtman, we've been discussing at length some of the
15 discriminatory effects of House Bill 233.

16 Did you assess whether these effects were foreseeable?

17 A. Yes, I did, foreseeable and known.

18 Q. And can you explain how you knew that?

19 A. I knew that because of what was being presented to the
20 State Legislature during the debates over and the time of
21 deliberation over HB 233, and not just as you would expect from
22 Democratic members of the State Legislature, but also from
23 representatives of the faculty of public colleges and
24 universities and outside authorities.

25 MR. HANCOCK: Can we direct the witness to Joint

1 Exhibit 6?

2 BY MR. HANCOCK:

3 Q. Dr. Lichtman, do you recognize this?

4 A. Yes. That's the transcript of a Florida House session
5 during the process of adopting HB 233, March 18, 2021.

6 MR. HANCOCK: And can we go to page 24?

7 BY MR. HANCOCK:

8 Q. Dr. Lichtman, do you see that statement from Representative
9 Hardy begins on this page?

10 A. I can't see it yet.

11 Yes, I see it.

12 MR. HANCOCK: And we're going to look at a later
13 portion. Can we go to the next page and highlight lines 15 to
14 20?

15 BY MR. HANCOCK:

16 Q. Can you see this, Dr. Lichtman?

17 A. I do.

18 Q. Do you recognize this statement?

19 A. I do.

20 Q. Did you note this in your report?

21 A. I did.

22 Q. And why did you do that?

23 A. Because this is an indication presented, in this case I
24 believe by a member of the legislature, of discriminatory intent
25 of HB 233, the legislation that was being considered at this

1 time. And it's pretty pointed. It says the bill is so vague
2 that nearly anything an administrator or professor would do to
3 control the academic environment could be recast as shielding or
4 limiting someone's access to or observation of expressive
5 activities or speech that might be offensive, unwelcome, and so
6 on.

7 To unpack it, he's talking about the actions of
8 administrators, and particularly professors, who, of course,
9 control the academic environment all the time in their class.
10 As I said, I don't present things in my classes that I know to
11 be fabricated or false. And I also control the academic
12 environment to make sure it's civil, although, frankly, I've
13 never had to worry about that in my 50 years of teaching. I
14 never had an uncivil experience in any class out of countless
15 thousands of students. But some professors routinely do this.
16 You couldn't do it. You couldn't teach. Teaching would be
17 chaotic and a mess.

18 But because the bill is so vague, I guess particularly the
19 antishielding provision, as we've talked about here, anything
20 you do could be recast as shielding or limiting someone's access
21 or observation of speech activities that could be offensive,
22 unwelcome, and so on.

23 MR. HANCOCK: And can we show the witness Plaintiffs'
24 Exhibit 41?

25

1 BY MR. HANCOCK:

2 Q. Dr. Lichtman, do you see the recipients of this email?

3 A. Yes. This is an email from the Council of Senate -- yes,
4 the Council of Faculty Senates across the institutions to the
5 chancellor, then-Chancellor Marshall Criser III. And I'm not
6 sure who the cc's are.

7 MR. HANCOCK: Can we look at the attachment on the
8 next page?

9 BY MR. HANCOCK:

10 Q. Do you recognize this, Dr. Lichtman?

11 A. I do.

12 Q. And what is this?

13 A. In fact, I reprint a lot of this in my report. This is the
14 resolution of the Council of Faculty Senates. It's called the
15 free change -- exchange of ideas on campus and, therefore,
16 opposes a legislative entitlement to record classes and
17 mandatory survey; in other words, saying key provisions of
18 HB 233 clash with the faculty's understanding of the free
19 exchange of ideas on campus; in other words, that the
20 legislation impedes free speech.

21 MR. HANCOCK: Can we direct the witness to the block
22 of text starting with line 23?

23 BY MR. HANCOCK:

24 Q. Dr. Lichtman, what is being communicated here?

25 A. This is one of the components of this quite lengthy and

1 detailed resolution of the ACFS, and it says: *Whereas, a*
2 *recording entitlement will have the counterproductive effect of*
3 *limiting the range of viewpoints expressed in class, because*
4 *students and faculty will choose not to experiment with new*
5 *ideas, discuss sensitive or controversial issues, or engage in*
6 *what they feel will be disfavored speech, when they understand*
7 *that speech might be made permanently available without their*
8 *consent, and particularly out of context, on the internet or in*
9 *others' hands.*

10 Now, to unpack that a little bit, it's pretty
11 self-explanatory. It's similar to what we've been discussing.
12 There will be a chilling effect on your speech if that speech
13 could be surreptitiously recorded without your consent and then
14 made available. We talked about how it could be made available
15 without any blowback to the person that makes it available,
16 potentially out of context, on the Internet or just to be passed
17 on to other individuals, as this points out here. And just like
18 putting it anonymously on the Internet, you never know who you
19 are giving it to. They might not even know who it comes from
20 since it was recorded secretly.

21 MR. HANCOCK: And can we direct the witness to the
22 block of text starting with line 37?

23 BY MR. HANCOCK:

24 Q. Can you see that, Dr. Lichtman?

25 A. Yes.

1 Q. And what is being communicated there?

2 A. This also refers to the recording, and it relates to
3 something I commented on previously, the excellence of the
4 education at Florida's public colleges and universities, ranking
5 at or near the top of public universities and college systems
6 across the nation. And that's something, of course, the faculty
7 wants to sustain. They don't want to see anything that might
8 sink the reputation of the institution. And they are worried
9 that the ability to recruit and retain faculty in the system
10 will be substantially harmed by a student entitlement to record
11 class, reducing the competitiveness of our institutions and
12 threatening the SUS's ranks and hard-won gains in the national
13 ranking; in other words, referring to its excellent rankings
14 nationally.

15 There is no crisis in higher education that's public in
16 Florida, but it suggests maybe not that this provision would
17 create a crisis, but it would certainly, they believe -- and
18 particularly over the long run -- these things operate over
19 time, and there's no limitation of time in HB 233 -- it's going
20 to harm in substantial ways the ability to maintain excellence
21 by the ability to recruit and retain faculty who may not want to
22 go to an institution where they can be secretly recorded and all
23 the consequences we talked about.

24 THE COURT: Mr. Hancock, if something is an
25 ill-advised policy, help me to understand. The Florida

1 Legislature and the Governor are free to gut our public
2 university so long as they don't violate the First Amendment;
3 right?

4 MR. HANCOCK: In terms of the Governor and
5 government's actions?

6 THE COURT: Sure.

7 MR. HANCOCK: Right. They hold the power of the
8 purse.

9 THE COURT: But I meant, while it may not be a good
10 idea and why it may not be in the interests of universities,
11 they can undermine, they can run off the best professors, they
12 just can't violate the First Amendment; right?

13 MR. HANCOCK: Right. There's no constitutional --

14 THE COURT: What part of my analysis, for purposes of
15 this case, do I care that these are all bad policy decisions
16 that are undermining the university in terms of the recruitment
17 and retention of professors?

18 MR. HANCOCK: Well, when these --

19 (Indiscernible crosstalk.)

20 THE COURT: And I understand as a citizen, I
21 understand why I might care because I attended the state
22 university, but --

23 THE WITNESS: Are you asking --

24 THE COURT: No. I'm asking, from a legal standpoint,
25 Mr. Hancock.

1 MR. HANCOCK: Sure. I think because these concerns
2 were presented before the bill was passed, these concerns were
3 made to the legislators, they had opportunities to --

4 THE COURT: So the relevance is the less restrictive
5 ways to accomplish the same ends which is part of the *Arlington*
6 *Heights* analysis?

7 MR. HANCOCK: Exactly.

8 THE COURT: I understand. And that's -- you answered
9 my question directly, and that was a simple answer, and I made
10 it more complicated than it needed to be.

11 Okay. Thanks.

12 MR. HANCOCK: And can we direct Dr. Lichtman to the
13 block of text starting with line 41?

14 BY MR. HANCOCK:

15 Q. And, Dr. Lichtman, what's being communicated there?

16 A. Yeah. This now switches focus to another component, one
17 we've discussed a lot, the intellectual diversity survey. It
18 says: *A legislative --*

19 THE COURT: Doctor, I'm sorry. How do I know who this
20 went to and how it went to them?

21 Do I know that yet?

22 MR. HANCOCK: No. We'll discuss that in a moment.

23 THE COURT: Okay.

24 A. It says: *A legislatively imposed intellectual diversity*
25 *survey, even if administered well, would create many of the same*

1 *negative impacts as a recording entitlement: Chilling speech,*
2 *impeding faculty recruitment and retention, and threatening our*
3 *national standing.*

4 So this made the point I made. You know, even if the
5 survey was administered well, protected students and faculty as
6 individuals, it still, like a recording entitlement, would chill
7 free speech because it could be used by these governing
8 bodies -- the Governor, the State Legislature -- all of which
9 are of the same mind about the need to quell alleged left-wing
10 indoctrination. And because it's no limitation, this can hang
11 over faculty indefinitely.

12 So the very nature of the survey, who passed the
13 legislation -- and we talked about the lack of any kind of
14 constraints on how it would be enforced -- even if they had an
15 outside firm, even if they designed an excellent survey, because
16 it's open to the broadest interpretation by these same
17 self-interested folks who hold power, the faculty is saying it's
18 still chilled speech and would impede recruitment and retention
19 and perhaps threaten the excellent national standing of the
20 Florida institutions of public higher learning.

21 MR. HANCOCK: Can we return to that email on the first
22 page?

23 BY MR. HANCOCK:

24 Q. Dr. Lichtman, this was shared with Marshall Criser; is that
25 right?

1 A. That is right.

2 Q. Are you aware of this resolution being communicated to
3 anyone else?

4 A. Yes. And it's in my report. It was also communicated
5 directly to a staffer for, I think it was, Senator Rodrigues.
6 And also there at the meeting was the chair of the House Higher
7 Education Committee. I'm not sure how to pronounce the name,
8 but I got the title right.

9 MR. HANCOCK: I'll now move to admit -- or, yeah --
10 admit Plaintiffs' Exhibit 41 into evidence.

11 MR. LEVESQUE: No objection, Your Honor.

12 THE COURT: Without objection, it's admitted.

13 (PLAINTIFFS EXHIBIT 41: Received in evidence.)

14 (PLAINTIFFS EXHIBIT 41: Received in evidence.)

15 BY MR. HANCOCK:

16 Q. Dr. Lichtman, a moment ago you mentioned outside
17 organizations. What were you referring to there?

18 A. I think I was referring to the organization known as FIRE,
19 the Foundation for Individual Rights in Education, which is an
20 organization dedicated, in fact, to combating some of the same
21 things that legislators in Florida are talking about, WOKE
22 education. It's been funded by conservative groups like the
23 Koch brothers, the Bradley Foundation. And so this isn't, you
24 know, what anyone could term a left-wing organization. And they
25 weighed in pretty heavily on this.

1 MR. HANCOCK: Can we show the witness Plaintiffs'
2 Exhibit 136?

3 BY MR. HANCOCK:

4 Q. Dr. Lichtman, do you recognize this document?

5 A. It's a little hard to see.

6 Awe, that's better.

7 Yes, this is a document that I've examined in my report,
8 and the headline kind of says it: *Florida legislation on*
9 *recording classes invites 'gotcha' politics into the classroom.*
10 It's one of the critiques of HB 233 issued by FIRE.

11 MR. HANCOCK: Can we go to the second page?

12 BY MR. HANCOCK:

13 Q. Do you see that, Dr. Lichtman?

14 A. Yes, I do.

15 Q. This says that the bill is in good faith.

16 Do you see that?

17 A. I certainly do.

18 Q. Do you agree with that characterization?

19 A. No. But I can understand why FIRE says that. It's because
20 they're in litigation. They're trying to persuade the
21 legislature to change the bill that they think is extremely
22 problematic and doesn't provide adequate safeguards, something
23 I've been trying, I guess -- you know, of course, they're not
24 going to attack the legislature. If you want to persuade
25 someone, you talk about it being -- you know, that they're being

1 in good faith; you are good guys. Why don't you listen to what
2 we have to say?

3 Q. And what do they -- what concerns are they expressing here?

4 A. First they say that the bills require that recordings are
5 only permitted to the extent they would be permissible under
6 FERPA, the federal privacy law that prohibits the disclosure of
7 students' academic records. But they say this really doesn't
8 help. They say FERPA provides little help here since private
9 recordings, as opposed to recordings by the institution, aren't
10 student educational records and are not, therefore, covered by
11 FERPA. This caveat provides no discernible limitation on the
12 use of these recordings.

13 MR. HANCOCK: Can we pull down that column?

14 Sorry. Can we keep the exhibit, though?

15 Actually, can we show the witness Plaintiffs' Exhibit
16 375?

17 BY MR. HANCOCK:

18 Q. Dr. Lichtman, do you recognize any of the recipients of
19 this email?

20 A. Yes. I recognize Senator Rodrigues, chief Senate sponsor
21 of HB 233, and also Republican Senator Krissy. I don't know who
22 Tyler Coward is.

23 Q. When is this email dated?

24 A. March 23, 2021, entering the process for adopting HB 233.

25 Q. Do you see that the word "article" is hyperlinked towards

1 the bottom?

2 A. Yes.

3 MR. HANCOCK: Can we open that?

4 A. It says -- let me finish. It says: *Attachments: FIRE*,
5 and then they have the hyperlink to the article.

6 MR. HANCOCK: Can we click on that hyperlink?

7 BY MR. HANCOCK:

8 Q. Can you see that, Dr. Lichtman?

9 A. Yes. I think that looks like the same article that we were
10 just discussing.

11 MR. HANCOCK: I'll now move to admit Plaintiffs'
12 Exhibit 136 and Plaintiffs' Exhibit 375 into evidence.

13 MR. LEVESQUE: We still have the same hearsay
14 objections, Your Honor.

15 MR. HANCOCK: And we are only introducing it for
16 effect on the listener, that the Senators were put on notice of
17 these claims.

18 THE COURT: Judge, actually, we don't necessarily
19 agree or disagree with the contents. The question is what
20 information was provided to senior members of the legislative
21 team that passed this legislation; correct?

22 MR. HANCOCK: Exactly.

23 THE COURT: On that basis, and that limited basis
24 only, I will admit it.

25 But let me also say, Mr. Hancock, when y'all are doing

1 your final written closing arguments, what would be very helpful
2 to me is anything that you are relying on -- and it doesn't have
3 to be where you're going to publish it in a law review. Quite
4 frankly, how y'all did your pretrial stip with bullet points is
5 helpful.

6 But what will be very helpful for me in this regard,
7 for example, if one person gets an email -- and I understand
8 under *Arlington Heights* they say that you look to the sponsors
9 and critical folks, and that matters. But it matters a whole
10 lot more to me if the entire Florida Legislature heard about
11 something or discussed something and were told these are
12 safeguards that need to be put in place and they rejected them.

13 So what's very helpful for me is when y'all identify
14 through any discussion that was had by the legislature on the
15 floor, coupled with these are statements or information that was
16 provided to them, distinguish. Because it's not an all --
17 they're all afforded the same weight. It depends on who knew
18 and when it was said, and so forth.

19 So that's the kind of thing that's helpful, to have a
20 summary when you file your final closing arguments; okay.

21 MR. HANCOCK: Understood. That's very helpful,
22 Your Honor.

23 BY MR. HANCOCK:

24 Q. And, Dr. Lichtman, do you know if this article was
25 published on the Internet?

1 A. It was.

2 Q. Earlier you mentioned examining less discriminatory
3 alternatives, and I think we've discussed that extensively with
4 respect to the survey provision.

5 Did you form an opinion about alternatives to the recording
6 provision?

7 A. I did. I formulated, you know, less discriminatory
8 alternatives on a general basis through the whole approach.

9 But with respect to the recording provision, I indicated
10 that if you wanted to be less discriminatory, you've got to make
11 it explicit; that any use of the recording has to include the
12 recording in its entirety, not excerpted, not edited; and that
13 if the recording is to be made public, you need not only to have
14 the permission of the instructor, you also need to have the
15 permission of the students, because student speech is, likewise,
16 going to be included in any kind of class recording.

17 And as I further indicated in my report, you could have a
18 less discriminatory alternative which encourages recording but
19 still asks for permission from faculty and students to record.
20 So it's something that's encouraged, but not done in secret with
21 all the kinds of problems that we've been examining and that
22 FIRE has pointed out as well.

23 Q. And did you form an opinion as to less discriminatory
24 alternatives to the antishielding provision?

25 A. You know, I looked at that, and I really don't see --

1 THE COURT: Doctor, let me ask you a question.

2 Short of permission -- because if I say no, then the
3 rule is kind of pointless if I've got to secure everybody's
4 permission -- at the bare minimum wouldn't an alternative be
5 notice so that if I'm another student and I don't want to --
6 when I -- I don't know. Say I'm in law school and want to be a
7 federal judge one day. I don't want to end up at my
8 confirmation hearing having somebody hit play from a recording
9 and something I said to be a prevaricator in class. Wouldn't
10 there at least be notice so that I, as a student, attending the
11 class may not want to engage with the other student and forever
12 end up with my statement out of context being used against me
13 for whatever purpose?

14 THE WITNESS: I think that would probably be
15 preferable to what we have currently in HB 233, and I would
16 still prefer my alternative. But we can, you know, debate that.

17 However, there is a problem with notice, and the
18 problem is -- so if I'm given notice that in my next lecture I'm
19 going to be recorded, that notice by itself could chill my
20 speech and affect how I teach. It would chill the speech of my
21 students. So, you know, Hey, as you say, I don't want this
22 played back at my confirmation hearing, so I'm going to shut up.
23 I'm not going to say a thing, even though I normally might
24 exercise my free speech rights. But if I'm told, Oh, my gosh,
25 this is going to be recorded, that, I think, is a less

1 discriminatory alternative than the current, when you never know
2 when you are going to be secretly recorded. But I still think,
3 while it's much better, it does have issues.

4 THE COURT: Well, there's all kinds of classes that
5 are recorded; right?

6 I mean, I went to UF in the Stone Age, but Denslow
7 taught economics. Everybody took the class. And if you got
8 there early in the morning, you were there for the live class.
9 Everybody listened to it by video. So it would only be the
10 people that were there live got questions.

11 Every engineering class at UF was recorded. How do I
12 know that? Because that's how I ate in college was I was a
13 cameraman and videotaped the program called Genesis at the
14 time -- I have no idea what it's called now -- for all the
15 engineering classes.

16 But it really isn't that far -- in terms of this
17 concept that if you record something in class that's going to
18 have a chilling effect, there are all kinds of classes that have
19 been historically and continue to be recorded primarily for the
20 benefit of students that missed class or particularly
21 complicated classes. I must say I might as well have been in a
22 class being taught in Chinese when I was listening to the
23 engineering classes, but even those students wanted to listen to
24 them again and again.

25 So I guess it's an alternative, but it's really this

1 idea that, by definition, it's a First Amendment issue and
2 chilling effect on speech to record a classroom. It's really
3 not that uncommon or atypical, is it?

4 THE WITNESS: I agree completely. In fact, I
5 encourage students to record my classes, but that's with my
6 permission and the understanding of the students that they give
7 their permission as well, so we know exactly what's going to
8 happen.

9 Plus, there's no cause of action from that. Let's not
10 forget the recording provision is not in isolation. It's tied
11 to the antishielding provision, which is also tied to this
12 enforcement that can lead to lawsuits. So I'm not really
13 worried when I have my students record my classes, which I
14 encourage, that, you know, I risk litigation, you know, civil
15 action, complaints, et cetera. The real problem is not
16 recording. The real problem is secret recording. That is the
17 issue --

18 THE COURT: But didn't the legislature -- and it may
19 have been the wrong way to do it and maybe an ill-advised way to
20 do it. It may not be the best way to do it, however you want to
21 go about it. They did also tie to it a cause of action if you
22 publish the video without consent; right?

23 THE WITNESS: Right.

24 THE COURT: So even if it's imperfect, they made some
25 effort to draft the statute to say it's just not going to be

1 open season on students and professors by publishing the video
2 without consent; right?

3 THE WITNESS: That's only part of it. Let's not
4 forget, again, it's tied to civil action. And one chilling
5 effect, obviously, would be the publication not only without
6 consent, but without even knowledge. All of a sudden something
7 you had no idea was being recorded pops up on the Internet. It
8 may be edited. It may be excerpted. So, you know, that's one
9 of the problems.

10 But the other problem is --

11 THE COURT: Maybe I misapprehend how this works. I
12 thought the way it worked is you can use it if you believe --
13 for example, I want to bring up a viewpoint related to the
14 subject matter in class that my professor doesn't want to hear
15 because they only want to hear liberal dogma. They stop me
16 cold, won't let me talk. I then -- I've recorded it because I
17 figured that was what was going to happen because it's happened
18 before.

19 I can use that, go to the university, and say, Look,
20 Professor X is not letting me talk. I also have potentially a
21 cause of action against not the professor, but the university,
22 depending on what happens and how this plays out.

23 THE WITNESS: Sure.

24 THE COURT: And what it says, though, is if the
25 student -- there's some teeth in it in the other ways. I

1 thought the student, or whoever publishes the video without
2 consent, can be sued for up to \$200,000 to dissuade people from
3 running out and posting it on Facebook or the Internet.

4 Again, maybe I misapprehend how this works, but is
5 that how it's drafted? Whether or not it's perfect, not
6 perfect, or really bad, isn't that what it says?

7 THE WITNESS: Yes and no.

8 First of all, as I indicated, if you want to post it
9 on the web -- first of all, no one even knows you've done it
10 since it's secret. And, number two, you can post it in an
11 absolutely untraceable way. And, you know, I know nothing about
12 technology, but I know you can go to an Internet cafe or
13 library, and no one can track it back to you. And I know there
14 are very sophisticated other ways to post things without it
15 being traced back to you since you've done it anonymously and no
16 one knows you had it. If you do it in an open fashion and
17 people know, then they are going to know who's posted it.

18 Secondly, I think the real issue is not so much
19 professors stopping students from talking. I think if it's that
20 blatant, you don't need a recording. You can go and make a
21 complaint, and it's going to be taken very, very seriously, I
22 can tell you. I've been a chair and a dean. If I ever got a
23 complaint like that, I wouldn't need a recording. I would
24 launch a very serious investigation.

25 The real serious issue is the opposite, that is,

1 professors who are shielding students from viewpoints that they
2 may find disagreeable or uncomfortable; in other words,
3 professors not presenting certain kinds of information in class
4 with a statute so vague that you have no idea what it is you
5 should and should not present. And because you are being
6 recorded secretly, it can be used against you.

7 I understand the action is against the university, but
8 you're the one who is going to be accused, not the university
9 per se. The university doesn't teach; faculty members teach.
10 And even though you might not be liable for the money, it's
11 going to be a huge strain on you. You may have to find your own
12 lawyer. It's going to be a huge hit on your reputation.

13 And so since I don't know, you know, when students are
14 recording and, as FIRE said, when it's going to be a gotcha, I'm
15 going to sensor my speech.

16 THE COURT: I understand.

17 BY MR. HANCOCK:

18 Q. And, Dr. Lichtman, did you form an opinion as to what
19 alternatives may exist for the antishielding provisions?

20 A. Yeah. As I said, I find it very difficult to figure out
21 how you would fix the antishielding provision in a way that
22 wouldn't chill speech, but I did outline a whole series of
23 alternatives, less discriminatory, that could deal with the
24 whole issue of viewpoint and intellectual diversity and freedom
25 at public colleges and universities.

1 These are a series of ways in which -- of ways you would
2 deal with these issues collegially, nonpunitively, in a way that
3 brings people together. And I outline the kinds of statements
4 that would be official from the university, the kind of
5 orientation that would be given to students and to faculty, the
6 kinds of meetings that would take place where, without punitive
7 measures hanging over them, student and faculty could express
8 their concerns.

9 And I think I mentioned that's a much better way of
10 actually finding out about viewpoint diversity than this
11 ham-handed survey that dichotomizes everything into liberal or
12 conservative. If you're actually talking to people in a
13 nonthreatening way -- students, faculty, staff,
14 administrators -- you can get to the root of the problem, if
15 there is one, and find out exactly what's going on in the class
16 in a way that may be -- maybe there's nothing going on in the
17 class.

18 And I also indicated that these nonpunitive, collegial
19 diversity initiatives should follow the model which advocates of
20 HB 233 said HB 233 was going to follow but didn't, and, that is,
21 not to limit diversity to so-called political viewpoint, but
22 rather to incorporate what is a critical issue of diversity on
23 college campuses and inclusion, and that is race, sexual
24 orientation, religion, ethnicity, gender, how the university
25 deals with these issues in a diverse and pluralistic concept --

1 context, which is the university -- it's critical to how
2 individuals adjust to the university and what they get out of
3 the university.

4 I know these issues arise pretty frequently from my
5 experience as a 50-year-plus college teacher. So there are ways
6 of dealing with this which are much more effective, drill down
7 much more deeply into the problem, but don't create this kind of
8 punitive gotcha situation, particularly when you have
9 legislators, the Governor, the Governor's office, and
10 administrators who have expressed a lot of hostility to
11 so-called liberal left-wing faculty at institutions.

12 Q. Dr. Lichtman, earlier you mentioned contemporaneous
13 statements and justifications for House Bill 233. What were you
14 referring to there?

15 A. Yeah. I was referring to statements made by
16 decision-makers that would be indicative of intent, one,
17 because, as I said, we do have unusually here some pretty direct
18 statements about what they think is going on at universities and
19 colleges that are public before any survey or anything else and
20 their intent not to balance it, but to stem and halt that kind
21 of what they believe to be liberal bias and liberal
22 indoctrination.

23 In addition, another thing is that historians typically
24 examine other positive justifications, you know, what are the
25 justifications for what we're doing and how do we explain that

1 we're doing it in a way that doesn't chill free speech and
2 association.

3 And, of course, you need to interrogate all of those
4 claims. You never can take a politician's claims -- I don't
5 care who the politician is -- just at face value without
6 interrogating those claims. For example, no historian takes at
7 face value claims of southern politicians during Jim Crow that
8 the White primary was designed to achieve the purity of the
9 ballot and not based on race.

10 MR. HANCOCK: Can we show the witness
11 Plaintiffs' Exhibit 11?

12 BY MR. HANCOCK:

13 Q. This is your report, right, Doctor?

14 A. Yes, that's my initial report. A little hard to see, but,
15 yes, it is.

16 MR. HANCOCK: Can we go to page 89 and just highlight
17 the block under that first heading?

18 BY MR. HANCOCK:

19 Q. You see that statement?

20 A. I'm sorry. Did you ask me a question?

21 Q. Dr. Lichtman, who is making that statement?

22 A. Spencer Roach.

23 Q. And did you assess the accuracy of this statement?

24 A. I did. I interrogated the statement by looking at other
25 statements, and we saw one of them, from Spencer Roach as to

1 where he really is totally open, has no ideological commitments.
2 And by looking at other statements of Spencer Roach -- and I
3 also looked at statements of other decision-makers -- I found
4 that this claim was pretextual and misleading.

5 MR. HANCOCK: Can we show what's been marked as
6 Plaintiffs' Exhibit 388?

7 BY MR. HANCOCK:

8 Q. Can you see this, Dr. Lichtman?

9 A. Yes. I think we had examined this previously. This is a
10 statement by Spencer Roach which goes against his notion that
11 we're open-minded; we don't have ideas one way or the other,
12 left or right; we're just going to let the chips fall where they
13 may. In fact, he's talking about the intellectual diversity
14 bill, HB 233. He's talking about freedom of speech, which we'd
15 all agree with that's unexceptionable.

16 But who does he single out? He does not say, We want to
17 make sure there's no bias from left or right, and we have no
18 preconceptions about it. Rather, he goes even beyond talking
19 about liberals. He's talking about Marxist professors, that,
20 you know, we have this freedom of speech, but despite what
21 Marxist professors think, indicating that they don't believe in
22 freedom of speech -- but that these Marxists, these extreme
23 radicals, are, in fact, indoctrinating students.

24 MR. HANCOCK: And, Your Honor, at this time I'll move
25 Plaintiffs' Exhibit 388 into evidence.

1 THE COURT: Response?

2 MR. LEVESQUE: Same objections as I did before,
3 Your Honor.

4 THE COURT: This is just the tweet; correct?

5 MR. HANCOCK: Yes.

6 THE COURT: For the reasons previously articulated,
7 it's admitted.

8 (PLAINTIFFS EXHIBIT 388: Received in evidence.)

9 MR. HANCOCK: Can we show Plaintiffs' Demonstrative
10 Exhibit 2?

11 BY MR. HANCOCK:

12 Q. Do you recognize this, Dr. Lichtman?

13 A. I do.

14 Q. And what is this?

15 A. This is, I believe, during the process for the adoption of
16 HB 233, you have the very influential Governor DeSantis weighing
17 in by lashing out at, again, so-called left wing and bias and
18 indoctrination, in this case through critical race theory. And
19 we discussed at great length how Republicans had weaponized a
20 caricature of critical race theory as a wedge issue to appeal to
21 their base and put Democrats on the defensive.

22 MR. HANCOCK: And can we show Call-out 1?

23 BY MR. HANCOCK:

24 Q. Do you see that second quote there, Dr. Lichtman?

25 A. Yes.

1 Q. What is the significance of that statement?

2 A. He draws this distinction between knowledge and
3 indoctrination, pushing specific ideologies. And as I
4 explained, yeah, academics is the search for the truth; and to
5 the extent your academic work is not a search for the truth but
6 just driven by ideologies, that's going to be controlled and
7 checked by peer review.

8 But the real rub of what he's saying comes in the next two
9 sentences where he says -- identifies, in effect, ideology as
10 opposed to knowledge, critical race theory: *Let me be clear.*
11 *There is no room in our classroom for things like critical race*
12 *theory*, you know, again, following through on the weaponization
13 of the caricature of critical race theory, which, in fact, is
14 probably understood as the idea of systematic racial
15 discrimination being part of our society as mainstream
16 scholarship. And there isn't anywhere close to a comparable
17 body of scholarship denying that.

18 So he's created this false dichotomy between knowledge and
19 what he proclaims is ideology, which is critical race theory,
20 which, in fact, is an academically well-accepted theory. It can
21 be debated, discussed, argued, but it can't just be dismissed as
22 ideology with no foundation of knowledge.

23 He then goes on to say, obviously implying that this is
24 what critical race theory does in the hands of these left-wing
25 professors: *Teaching kids to hate their country and hate each*

1 *other is not worth one red cent of taxpayer money. This is part*
2 *of --*

3 THE COURT: Doctor --

4 THE WITNESS: Yeah.

5 THE COURT: -- let me ask you a question because I
6 understand that a great many folks in both the court system and
7 political figures conflate issues, mix things up, and take
8 things out of context. And I also understand that -- your view
9 that you respectfully disagree with his characterization of
10 critical race theory.

11 But I couldn't help but notice that this came out of
12 an article talking about overhauling Florida's civics
13 curriculum. I didn't realize there was a civics curriculum at
14 the university level. I think this is talking about -- and I
15 get that there's not a single elementary school in Florida
16 probably that's ever taught critical race theory, unless things
17 have changed dramatically since I was in school or my children
18 attended school here in the public schools in Florida.

19 But isn't this article and these statements talking
20 about what should and should not be taught in primary and
21 secondary school in civics and what is or isn't appropriate?
22 That begs the question is any elementary school teaching
23 critical race theory in Florida?

24 I get it. But I'm just -- aren't we cherry-picking
25 statements that the Governor has made talking about elementary

1 school and civics classes and secondary school, which I believe
2 they still teach it in -- 7th grade, I believe, is the year you
3 have civics in Florida public education. Isn't that what this
4 article is about, and isn't that what those statements are
5 about?

6 THE WITNESS: Yes and no.

7 I don't think these statements are tied to any
8 particular level of education. They would apply equally well to
9 college and university education. These are substantive
10 statements about critical race theory being this indoctrination
11 of left-wing ideology. If that's true in the 12th grade, it's
12 true for college sophomores, juniors, seniors, et cetera. You
13 can't somehow create a hermetic seal between what applies to
14 K-12 and what would apply after.

15 And, in fact, we've seen DeSantis applying these same
16 ideas that he's expressing here to colleges and universities.
17 I'm not going to get into HB 7 which he supported and signed.
18 You know all about it. But I will mention his December 28,
19 2022, memo from his budget director in which he demands
20 information about budgetary resources devoted to critical race
21 theory. In other words, this is four colleges and universities.
22 He's drilling down to the content of courses --

23 THE COURT: The request actually wasn't CRT. It was
24 for anything related to diversity at all; right?

25 THE WITNESS: I think -- let me look. I think it did

1 mention diversity, equity --

2 THE COURT: I understand.

3 And I'll just let counsel know, when y'all are -- I
4 thought it was diversity, equity, and inclusion, which is a heck
5 of a lot broader than the concept of CRT. That doesn't make it
6 good or bad. It just means that, as I recall what had been
7 submitted through documents earlier, it was not just CRT.

8 But for counsel, y'all are going to have to let me
9 know. My understanding of the law is that the Governor and the
10 legislature are going to have a lot more of an ability to
11 control what is or is not done in primary and secondary school
12 than they do in universities. So while everybody else may be
13 treating it as one and the same and the concept as one and the
14 same, I think for my purposes in analyzing whether something
15 does or doesn't pass constitutional muster, that context,
16 whether it's directed at the university level or primary and
17 secondary, I think does make a difference. If y'all disagree,
18 you can certainly let me know. Okay?

19 MR. HANCOCK: Of course, Your Honor.

20 THE WITNESS: Yeah. I do have the memo in front of
21 me, Your Honor, and it does say specifically: *This letter is a*
22 *request for information from the Department of Education and the*
23 *state university system, which covers both colleges and*
24 *universities, regarding the expenditure of state resources on*
25 *programs and initiatives related to diversity, equity, and*

1 *inclusion and critical race theory within our state colleges and*
2 *universities.*

3 So, in other words, diversity, equity, inclusion are
4 very general, vague terms. But for Governor DeSantis and other
5 decision-makers in Florida, critical race theory is something
6 very specific, and it's the only specific thing that is cited
7 here in terms of what they want to get from public colleges and
8 universities in terms of the expenditures of state resources.

9 THE COURT: By the way, I didn't mean to suggest that
10 in all contexts and in the application of all analytical
11 frameworks there's no daylight between -- I mean, there's
12 absolute divergence in how you analyze primary and secondary
13 versus university. It depends on the analytical framework
14 that's being applied.

15 I got to ask, because I don't live in a vacuum -- and
16 I understand there's a part of it where you are going out of
17 record, but part of it is legal. We've got a case in front of
18 the U.S. Supreme Court where affirmative action may be ended.
19 We've got the Florida Supreme Court that -- we've got at least a
20 handful of our justices who've said one of the most pernicious
21 things that exist in our society is the concept of diversity,
22 and they were directing the Florida Bar not to have any sort of
23 affirmative action or diversity with respect to any of the CLEs,
24 and the ABA continued to do it, and you couldn't get CLE for
25 ABA.

1 So I guess my question is if the Governor, good, bad,
2 or indifferent -- it's not up to me to decide whether something
3 is a good policy or a bad policy. That's not my role. But if
4 this state's highest court and this nation's highest court are
5 both talking about and speaking in terms of we've got to undo,
6 roll back and/or eliminate diversity programs, I don't really
7 understand how I'm supposed to glean some evil, nefarious
8 purpose for the Governor requesting information about programs
9 that are on the chopping block, both at the national and state
10 level. If anything, it's taking his cues from the United States
11 Supreme Court and the Florida Supreme Court.

12 How do I have that wrong?

13 THE WITNESS: Yeah. I'm not going to comment on the
14 legal exegesis here, but I will make what I think is a very
15 important point.

16 No matter how you regard diversity education -- and
17 I'm not sure what the Governor even means when he says programs
18 related to diversity, but leave that aside for a moment. No
19 matter whether you think affirmative action is a desirable
20 policy or not, that's not what's at stake here.

21 What's at stake here is the State using its power to
22 try to erase from teaching -- and I think it applies across the
23 board both for elementary and high school and for higher
24 education -- entirely well-supported mainstream body of academic
25 work, a huge body of academic work, that however you want to

1 characterize it -- you know, he uses critical race theory --
2 and, as I said, that's been distorted -- which simply says that
3 there is still racial discrimination embedded in our society.

4 Now, you can then argue whether or not that should be
5 combated by affirmative action or not, but that's not equivalent
6 to affirmative action. That is a factual-based inquiry. Either
7 there is or there isn't racial discrimination still existent in
8 our society, and you can't waive that away because politically
9 you don't like that idea. You can't just erase it from teaching
10 and research any more than you can erase the theory of
11 evolution, which a lot of people might not like and might object
12 to.

13 Again, that's not the same as affirmative action or
14 diversity issues. That's a factual inquiry. The other is a
15 policy matter, and I think that's the critical distinction here.
16 DeSantis is not objecting -- although I'm sure he would -- to
17 affirmative action. He's objecting to any teaching or research
18 which is the great mainstream of teaching and research that
19 would suggest that there remains racial discrimination in our
20 society.

21 BY MR. HANCOCK:

22 Q. Dr. Lichtman, let's look at another positive justification
23 for HB 233.

24 MR. HANCOCK: Can we pull up --

25 THE WITNESS: Can I finish this? We kind of got off

1 on --

2 BY MR. HANCOCK:

3 Q. Sure.

4 A. I just want to make a point about the last sentence, which
5 is: *Teaching kids to hate their country and hate each other.*
6 Of course, as I explained, that's the exact opposite of properly
7 understood critical race theory, which focuses on things that
8 are systematic and calls attention away from claims of racism on
9 the part of White people or anything else.

10 And, again, he says: *This is not worth one red cent of*
11 *taxpayer money*, indicating his willingness to use budgetary
12 powers to chill speech as it regards issues of race in our
13 society today.

14 And then fast-forward to his demanding information about
15 critical race theory not in K-12, but in colleges and
16 universities.

17 MR. HANCOCK: And can we pull up Joint Exhibit 15?

18 And can we go to page 12?

19 THE WITNESS: Well, first, let me identify it.

20 MR. HANCOCK: Sure. Let's go back to the top.

21 THE WITNESS: Yeah.

22 BY MR. HANCOCK:

23 Q. Do you recognize this, Dr. Lichtman?

24 A. I can't really see it.

25 Yeah. So it's a transcription of the Florida State Senate

1 from the beginning of April 2021.

2 MR. HANCOCK: And let's look at page 12.

3 BY MR. HANCOCK:

4 Q. Do you see this exchange, Dr. Lichtman?

5 A. Yes, I do see that.

6 Q. And what is the significance of this exchange?

7 A. Yeah, this is an exchange that I included in my report.
8 One of the big issues is bringing in the stakeholders, getting
9 the stakeholders, those who are affected by this, the students,
10 the faculty, the administrators.

11 And he's asked -- this is Senator Rodrigues, the Senate
12 sponsor, is asked: *So all of our colleges, all of our*
13 *universities here in the state of Florida, not one of them have*
14 *chimed in to say this is a great idea or this is an awful idea?*
15 *Not one of them?*

16 And Senator Rodrigues responds and that -- *And the answer*
17 *to that would be no.* That is, no one has chimed in one way or
18 the other from the colleges and universities, the stakeholders,
19 to say whether it's a great idea or an awful idea.

20 And then he goes on to talk a lot about he's been running
21 higher education bills for a long time and on none of those
22 occasions did any of the individual presidents reach out to me
23 and ask me to do that in the legislation.

24 Of course, the question is not about necessarily
25 presidents, but -- you know, there's very few of those and

1 they're the ones, you know, appointed politically, who, you
2 know, are not likely to be affected by this. Really it's
3 hundreds of thousands of students, tens of thousands of staff
4 members.

5 But the rub, the critical point here, is he goes on to say:
6 *So the fact that they've not reached out to me on this*
7 *legislation from my perspective is no different than any of the*
8 *other higher education that I've run in the past.*

9 And the significance of that is, of course, stakeholders;
10 namely, the Council of Faculty Senates across public colleges,
11 public universities have, in fact, weighed in on this
12 legislation and quite negatively.

13 MR. HANCOCK: And can we turn now to page 31?

14 BY MR. HANCOCK:

15 Q. Do you see this statement, Dr. Lichtman?

16 A. Yes.

17 Q. What is the significance of this statement?

18 A. Well, it's a pretty long statement. Give me a minute, if I
19 may. Even though I'm familiar with it, I'd rather be careful
20 and take a minute to read it, if that's all right.

21 Q. Sure.

22 A. Yeah.

23 (Pause in proceedings.)

24 A. Okay. I've read it and can unpack it. There's a lot in
25 it.

1 First of all, he does admit something, you know, we've
2 discussed a lot here, that they didn't lay out anything about
3 the processes for effectuating this. I quote in my report a
4 professor emerita from the University of Florida, political
5 science, Susan MacManus who says, you know, I'm in favor of the
6 survey idea. She's -- you know, I know her well. She's pretty
7 conservative politically, but everything is in the process, has
8 got to be the right process.

9 And they didn't lay out -- as he admits, they did not lay
10 out the process, but they said, you know, We have a model here,
11 the process that was done in Colorado, the process that was done
12 in Nebraska, the process that was done in South Dakota, the
13 University of North Carolina-Chapel Hill, and then it outlines
14 what should be done and what they could have included in the
15 bill.

16 Convene a committee that would include representatives from
17 the faculty as well as students and then together that
18 committee, working with the university administrators, would
19 come up with the climate assessment questions that are going to
20 be included in the survey. Not only was there no such
21 requirement for this kind of consultation -- and it easily could
22 have been put in the bill; it's not complicated -- but, as I
23 explained, that never happened in the process. There was no
24 such coordination with students, faculty, and other stakeholders
25 at the institution.

1 And that could have made enormous difference both in terms
2 of what was being asked and the willingness of the stakeholders
3 to participate and certainly could have, in principle,
4 significantly boosted the very low response rates that we've
5 seen.

6 And Senator Rodrigues goes on to say: *Then they'll*
7 *contract with a third party that's a professional survey firm,*
8 *work with them to make sure that the questions they come up with*
9 *fit the format that can be done in a valid survey method, and*
10 *then it will be the responsibility of the survey form taking the*
11 *base of who can -- the universe of who can be included in the*
12 *sample to administer that survey in a statistically valid*
13 *format.*

14 And we know, again, that could have been written into the
15 legislation, not that complicated, and we know that didn't
16 happen. There was no professional survey form involved. There
17 wasn't even a faculty group with expertise in survey design and
18 implementation that was involved in this.

19 And so, again, this would have greatly facilitated both the
20 validity of the survey and the willingness of participants to
21 respond in this kind of self-selected survey and to create a
22 statistically valid format, but, again, none of this happened;
23 in fact, kind of the opposite.

24 THE COURT: Doctor, I'm not in the Florida Senate, but
25 if I was, and I heard this exchange, and then I'm being called

1 upon to vote for it, it just seems to me we just had a
2 discussion that says while we don't go into all this granular
3 detail on the bill, here's what we contemplate happening.

4 Why do I as -- so is the idea that
5 Senator Rodrigues -- under *Arlington Heights*, I look at it
6 because he's the bill sponsor, and he was trying to get people
7 to vote for the bill, so he intentionally misrepresented what
8 was going to happen, such that I put a lot of weight on that in
9 determining the intent or -- because it seems to me that if
10 Senator Rodrigues believed that was what was going to happen,
11 and other Senators are listening and vote on the bill because
12 they think we're going to follow these other models, then the
13 fact that it ultimately didn't happen, how do I then impute this
14 animus to the Senators that voted for the bill thinking that the
15 survey was going to be more balanced and consistent with the one
16 in Colorado and Nebraska, South Dakota and the University of
17 North Carolina, unless --

18 THE WITNESS: Yes.

19 THE COURT: -- I believe -- there's evidence in front
20 of me to believe that Senator Rodrigues just made this up and
21 duped everybody into voting for something so it passed with that
22 animus because he basically duped the rest of the Florida
23 Senate?

24 THE WITNESS: Let me try to answer that very good, but
25 very complex question.

1 First of all, this is only one excerpt from
2 Senator Rodrigues. When we look more deeply at what he promises
3 with respect to these other institutions, we see -- aside from
4 any of these questions of design, these institutions that he
5 says are going to be a model, they're fundamentally different
6 than even the conception of the survey.

7 They do not focus on conservative or liberal like this
8 survey does. Rather, they focus mostly on inclusion in a
9 diverse and pluralistic kind of institution, and they are very
10 explicit about the -- this is not a minor thing, about the
11 absolute need for a buy-in from all of the stakeholders.

12 You know, if -- and I don't think he's necessarily
13 trying to dupe everyone, but I think he is trying to present a
14 flawed bill in the most positive light by suggesting all of
15 these things that not only aren't in the bill but are
16 contradicted when you actually look at what's going on at
17 North Carolina, Nebraska and Colorado.

18 Now, you are asking me what I would do if I were a
19 Senator sitting in the Florida Legislature, and I was not just
20 concerned with stamping out my preconceptions about left-wing
21 indoctrination but was genuinely concerned about doing the best
22 I can to develop a survey that would be beneficial to the entire
23 community? I'd move to amend the bill. I'd move to amend the
24 bill to move it not just to include some of these, but to move
25 it much closer to the models that Senator Rodrigues is outlining

1 should be the models for a sound and effective and valid survey.

2 THE COURT: Is there anybody that proposes that or
3 discusses that? And, again, I understand less restricted
4 alternatives is part of the *Arlington Heights* analysis, but
5 going through the legislative history, is anybody going, Wait a
6 second. We have the most generic language possible. Why are we
7 not putting more meat on the bones?

8 Is that discussion had or any discussion along the
9 lines of, you know, how is this -- how does what we're doing
10 differ from what was done in these other states and so forth?
11 Was that type of debate had?

12 THE WITNESS: Yeah, I'm doing this from memory, of
13 course, and I've been through thousands of pages of documents,
14 but I do not recall any Republican suggesting that there was any
15 problem with HB 233 or any need to amend it in any way. Of
16 course, Democrats, as we pointed out, raised lots of objections
17 to all of this.

18 However, there was one colloquy that at least relates
19 to the willingness of Republicans to improve the bill and make
20 it less chilling of free speech, and I think I mentioned that
21 before, and that was to put in the bill itself, so you'd have
22 legal protections of anonymity.

23 And I think it was Senator Rodrigues who responded, I
24 have no intention of amending this bill, but, you know, next
25 time around, I will consider putting in legislation so there

1 could be real protection legislatively for anonymity, and that
2 was never done. So there's no inclination to improve the bill,
3 even on such a small and easily changeable provision like a
4 legislative legal guarantee of anonymity.

5 BY MR. HANCOCK:

6 Q. Dr. Lichtman, earlier you mentioned examining the broader
7 context around House Bill 233. What were you referring to
8 there?

9 A. Yeah.

10 In Florida you had an extraordinary number of actions by
11 the legislature, the Governor, and the politically appointed
12 governing bodies of public colleges and universities relating to
13 education at every level and having a significant impact on free
14 speech.

15 As I mentioned, you cannot analyze a piece of legislation
16 in isolation. You know, if you had just looked at the Jim Crow
17 registration laws in isolation, they would have seemed perfectly
18 okay, but when you looked at them in context, you realized the
19 intent behind them was discriminatory. You know, the same folks
20 who are passing these registration laws were passing literacy
21 tests, poll taxes and grandfather laws.

22 People don't, you know, change their hats, change their
23 clothes when they move from one bill to another in the same
24 domain of activity, and so it is very relevant to understanding
25 both the intent and the effect of HB 233 to put it in the

1 context of a whole host of other initiatives by these
2 decision-makers that impact free speech and impact education
3 because it's indicative of the attitudes of the same
4 decision-makers, the underlying commitments and beliefs they
5 have and also how these things will be enforced.

6 MR. HANCOCK: Can we show the witness
7 Plaintiffs' Exhibit 11C.

8 BY MR. HANCOCK:

9 Q. Do you recognize this table, Dr. Lichtman?

10 A. I do. It's a table from my report, which is just a summary
11 table of those kinds of initiatives that I was just talking
12 about that I develop in depth in the body of the report.

13 MR. HANCOCK: Can we call out Row 1?

14 BY MR. HANCOCK:

15 Q. Dr. Lichtman, what does that refer to?

16 A. That refers to a review of K-12's civics education, and I
17 call it a biased review because it is not based on sound
18 academics but is largely driven by the political priorities of
19 the political appointees who are in charge directly of K-12
20 civics education. That's the beginning of it, and that would
21 become fully manifest later on when new standards were adopted
22 in 2021.

23 MR. HANCOCK: And can we highlight Row 3?

24 BY MR. HANCOCK:

25 Q. Dr. Lichtman, what does this refer to?

1 A. Yes. Judge Walker's very familiar with this. This was
2 legislation designed to establish criminal penalties for
3 participation in a riot. And the way it chilled free speech and
4 expression was to catch up in the penalties those who were
5 attending a demonstration to peacefully protest, even if it was
6 the great majority when, in fact, a very few who had nothing to
7 do with the peaceful protesters may be engaging in violent
8 activity.

9 I believe it was this Court that enjoined it and then the
10 State, after the decision, amended the legislation, but they did
11 later pass legislation criminalizing demonstrations near a
12 dwelling. By the way, this first one was passed in the wake of
13 the George Floyd demonstrations. The second one passed in the
14 wake of demonstrations near the homes of Supreme Court justices
15 after the release, I think, of the leak of the *Dobbs* decision on
16 abortion.

17 And it was also pretty vague and general talking about
18 criminalizing those who engage in demonstrations designed to
19 harass or disturb. I presume all demonstrations are designed to
20 disturb. That's the point of a demonstration, to get your point
21 across.

22 So I'm not sure this is a subject of litigation or not;
23 it's fairly recent, but as an analyst I see this as yet another
24 example of the willingness of these same state legislators to
25 engage in activity that restricts free speech.

1 MR. HANCOCK: And can we highlight Row 4?

2 BY MR. HANCOCK:

3 Q. Dr. Lichtman, what does this refer to?

4 A. Yes. We're back to critical race theory, and this is the
5 Board of Education banning the teaching of critical race theory
6 in K-12. And the Commissioner of Education also sits on one of
7 the governing boards for higher education in Florida, and so
8 this is an outright infringement of free speech for educators,
9 saying they can't teach critical race theory, that is, as
10 defined here, that they can't teach the proposition that there
11 is still racial discrimination embedded in American society,
12 things like a differential policing for Black and White
13 neighborhoods, differential treatment in the criminal justice
14 system, school assignment patterns that create segregation,
15 lending patterns that create segregation, different punishments
16 meted out to Blacks and Whites in schools or other minorities as
17 well, differential access to health care.

18 This is mainstream scholarship, and it explains why there
19 is such a wide gap between, say, Whites and Blacks and Whites
20 and Hispanics when it comes to education, wealth, income,
21 poverty. As I said, this is the mainstream. The denial of this
22 is not the mainstream, and I have yet to see any critic of
23 critical race theory, either in Florida or, you know, in the
24 Heritage Foundation or ALEC or FOX News actually present a body
25 of scholarship suggesting that all racial discrimination has

1 been wiped out and we somehow are a completely color-blind
2 society, despite these very significant socioeconomic gaps. So
3 this is, you know, not just chilling speech; this is directly
4 restricting speech.

5 MR. HANCOCK: Can we show Dr. Lichtman Plaintiffs'
6 Exhibit 139.

7 And can we highlight Subsection 3(b)?

8 THE WITNESS: Yes.

9 BY MR. HANCOCK:

10 Q. Do you recognize this, Dr. Lichtman?

11 A. I do. And I talk about this in my report.

12 Q. And what do you understand this provision to do?

13 A. Yeah. It's really important to unpack this because, you
14 know, I understand it's K-12, but it's the same attitudes, the
15 same ideas that have been applied up through colleges and
16 universities.

17 So, again, there's this kind of past which, you know, is
18 unexceptionable: *Instruction on required topics must be factual*
19 *and objective* -- I certainly don't have a problem with
20 instruction being factual. I'm not sure what's meant by
21 "objective." I think objective is a very fraught concept and is
22 not unpacked here.

23 And: -- *May not suppress or distort significant historical*
24 *events* -- I have no problem with that -- *such as the Holocaust,*
25 *slavery, civil rights -- Civil War Reconstruction, civil rights*

1 movement, contributions of women, African-Americans and Hispanic
2 people to our country, as already provided in this section
3 that's listed here.

4 But then we get to the rub here. After kind of this, you
5 know, yeah, this looks all right, this first sentence, then we
6 get to the rub, what really matters.

7 *Examples of theory that distort historical events and are*
8 *inconsistent with State Board-approved standards include the*
9 *denial or minimization of the Holocaust -- unexceptional;*
10 *nobody -- no respectable academic or teacher denies or minimizes*
11 *the Holocaust. The so-called Holocaust deniers have been called*
12 *out, you know, have been controlled by peer review, the one*
13 *case -- even a court case involving my friend Deborah Lipson --*
14 *on the proof of the Holocaust.*

15 Except here's where it becomes significant. They equate
16 denial or the minimization of the murder of 6 million Jews with
17 *the teaching of critical race theory as another example of a*
18 *theory that distorts historical events, meaning the theory that*
19 *racism is not merely the product of prejudice, but racism is*
20 *embedded in American society and its legal systems to uphold the*
21 *supremacy of White persons.*

22 It's a bit of a caricature, of course, of critical race
23 theory. Critical race theory doesn't focus on racism per se.
24 It focuses on mechanisms, and I gave some examples of racial
25 discrimination that are embedded into law and practice. But the

1 basic idea, yeah, this discrimination is embedded in American
2 society and its legal systems, although, you know, it's
3 debatable whether the purpose is to uphold the supremacy of
4 White persons.

5 But, nonetheless, the idea that racial discrimination is
6 embedded in American Society, as I said, is the mainstream. It
7 is the vast bulk of scholarship. And to equate the teaching --
8 this teaching with the denial or minimization of the Holocaust
9 and say you can't teach this is, in fact, a very specific and
10 severe restriction on the free speech of educators in Florida.

11 If, you know, my institution told me I couldn't teach that
12 racism is still a part of our -- racial discrimination is still
13 a part of our society, you know, I'm 75, I'd probably be
14 inclined to retire.

15 And it goes on to say, Instruction, may not utilize
16 material from the 1619 Project. That's a Pulitzer Prize-winning
17 project that is designed to bring slavery to the forefront of
18 the American experience. Certainly there are elements of the
19 1619 Project that one could object to and argue with, but it is
20 a vastly more accurate depiction of American society, despite
21 its flaws, than the 1776 Project, which is not mentioned here.
22 To say you can't utilize any material from the 1619 Project,
23 again, is a vast project with lots of material, is another
24 direct imposition on the free speech of educators.

25 And then the politicians and their appointees attempt to

1 define American history. They say you as an instructor may not
2 define American history as something other than the creation of
3 a new nation based largely on universal principles stated in the
4 Declaration of Independence.

5 That might be good Republican orthodoxy that we want to,
6 you know, kind of sanitize the American experience in this way.
7 But it has a very significant restrictive effect on teaching.
8 Does that mean that I cannot teach about the survival of slavery
9 for 80-some years after the Declaration of Independence?
10 Clearly, that violated the university principles. Does that
11 mean that I can't talk about the severe discrimination that
12 follow the end of reconstruction and the establishment of the
13 universal system of a Jim Crow discrimination in the South, both
14 legal and de facto? Does that mean I can't talk about the
15 treatment of Native Americans and the massacres of Native
16 Americans? Does that mean I can't talk about the way in which
17 violence was used to suppress labor movements in the
18 United States?

19 In other words, this simply imposes an orthodoxy on
20 teaching which, you know, greatly restricts the ability of
21 instructors to talk about critical elements of the American
22 experience. It doesn't mean that we deny the universal
23 principles of the Declaration of Independence or say they're
24 irrelevant, but we have to give a balanced presentation.

25 Another example, can I not talk about the fact that, you

1 know, for well over a century after the Declaration of
2 Independence woman could not vote or hold office in the
3 United States?

4 You know, American experience is much more nuanced than
5 this kind of orthodoxy would impose upon teachers.

6 THE COURT: Doctor, let me stop you there and ask you,
7 so is -- I want to make sure I'm not missing the point.

8 Is the point that, Judge, as I've said before, you
9 don't look at the passage of a bill by the same group of
10 legislators in a vacuum. And when you look at this, we've got
11 somebody saying, Let's curb the tide of wokeness indoctrination.
12 Let's not continue to tolerate stale ideology, and so forth, the
13 other quotes you've given me.

14 They said that's the purpose of this bill, and when
15 you consider it in conjunction with the other bills passed
16 targeting speech at the university level, coupled with examples
17 like this, this suggests what the goal, what the purpose, what
18 the intent is. And when you add that to a statute, meaning the
19 antishielding provision, that could be so construed as requiring
20 you to, quote, affirmatively rebut what you as a professor may
21 believe in terms of what you planned on to teach, not just
22 allowing a student to speech, but requiring you to teach the
23 other side.

24 It's all that together that suggests that's a fair
25 reading of it and what is the mischief, the why it compels

1 speech or chills speech and, therefore, runs afoul of the First
2 Amendment. Is that the gist of it?

3 THE WITNESS: That is the gist of it, absolutely
4 right. Context is everything. As I said, you couldn't
5 understand even the Jim Crow laws without putting them in
6 context and understanding what the legislators and others are
7 driving at. And it's all of a piece, and you put it together
8 very nicely.

9 MR. HANCOCK: Your Honor, at this time I'll move to
10 admit Plaintiffs' Exhibit 139 into evidence.

11 MR. LEVESQUE: Your Honor, 139 is the Florida
12 Administrative Code. I don't know that it needs to be admitted
13 into evidence. It's part of Florida law.

14 THE COURT: And I can take judicial notice. I know a
15 lot of it because, as you point out, I can cite it and refer to
16 it, not suggesting I will or won't or I agree with that
17 characterization of it. But, for that reason, I'm going to
18 allow it because I could otherwise simply cite it because it's
19 positive law that's on the books.

20 MR. HANCOCK: Thank you, Your Honor.

21 THE WITNESS: Your Honor?

22 THE COURT: Yes, sir.

23 THE WITNESS: Your Honor, I know we're pushing close
24 to 5:00. I'm not sure what your schedule is, but would this be
25 a good time to take a break, or should we try to push ahead to

1 5:00?

2 THE COURT: If you need a break, I don't plan on
3 breaking immediately. I'm not -- this is not an endurance
4 contest for you as the witness. If you need a break, that's
5 fine, sir.

6 THE WITNESS: I do need a break.

7 THE COURT: Before you go, though, let me find out
8 from the lawyers. What is your pleasure in terms of the
9 timeline? So I know, for example, Mr. Hancock, how much longer
10 you have, and I'm not going to hit you with a taser if you go
11 over. I'm just trying to figure out generally how long you
12 think you've got have left.

13 And, Judge, you keep asking questions, it will take
14 longer. So I understand that's -- you are not going to say
15 that, but that's part of the response.

16 About how long do you need? Because I'm just trying
17 to plan the rest of the day.

18 MR. HANCOCK: No, understood. I'm optimistic this is
19 maybe 20 or 30 minutes left.

20 THE COURT: And then let me -- Mr. Levesque, sometimes
21 starting a cross and then starting back the next day and
22 repeating things you've done actually takes longer and is less
23 efficient. However, also, if we want to move on and, Judge, I
24 only need X amount of time, I'll also happy to stay here later
25 this evening.

1 MR. LEVESQUE: I think given what has been presented
2 today, I could probably -- just what I anticipated to cover
3 without knowing what he was actually going to cover, I would
4 have ballparked it at probably an hour and a half, maybe two
5 hours. I still want to cover that stuff, but he's raised some
6 issues today, so I don't know that I would be able to finish my
7 cross today, but I probably could make it more efficient
8 tomorrow.

9 THE COURT: All right. So what I'm going to do is
10 we're going to take a break. The doctor will come back in ten
11 minutes. But, Mr. Hancock, if you can confer with Mr. Levesque.
12 Y'all are -- actually everybody is being professional. I
13 appreciate y'all working with each other. You're probably a
14 better judge about the most efficient way for us to proceed as
15 it relates to finishing this witness.

16 And if you want to take an hour tonight after you're
17 done with the cross and start, that's fine. If it would be
18 faster to review the notes and streamline the cross and just
19 start back tomorrow morning at 8:30, we can do that. But y'all
20 talk about it, and then you can let me know when we come back;
21 okay.

22 THE WITNESS: I'm sorry, Your Honor. I didn't hear
23 anything that the attorney said. What's the schedule for
24 tonight?

25 THE COURT: We don't know yet.

1 THE WITNESS: Okay.

2 THE COURT: So you go take your break.

3 THE WITNESS: All right.

4 THE COURT: Mr. Hancock is going to talk to
5 Mr. Levesque, and they are going to let me know.

6 THE WITNESS: Thank you.

7 THE COURT: All right. Thank you.

8 (Recess taken at 4:26 PM.)

9 (Resumed at 4:41 PM.)

10 THE COURT: We are back on the record.

11 We have the witness. Doctor, what we are going to do
12 is Mr. Hancock is going to finish your direct examination. Then
13 we're going to break a little bit earlier than I normally would
14 break, and we'll get started back at 8:30 in the morning.

15 All right. Everybody is shaking their head.

16 THE WITNESS: At your disposal.

17 THE COURT: Everybody is shaking their head yes, so
18 that's what we are going to do.

19 THE WITNESS: Yes. And I am virtual.

20 MR. HANCOCK: Can we return to Plaintiffs' Exhibit
21 11C?

22 BY MR. HANCOCK:

23 Q. Dr. Lichtman, what do these rows refer to?

24 A. This refers to the Commission of Education, Commissioner
25 Corcoran, former -- I think he was Speaker, Republican Speaker

1 of the House, who announced plans for new educational standards
2 in the state of Florida and said we had to police teachers on a
3 daily basis, something I highlighted in my report of discussion
4 of authoritarian tendencies in Florida and that we had to do
5 it -- in effect, comb through textbooks to make sure we comb out
6 texts by, quote, publishers that had just infected -- infested
7 with liberals and, ultimately, the board does adopt standards
8 for K to 12 civic education that entrench the Republican
9 orthodoxy that we've been talking about.

10 THE COURT: Doctor, infestation, you're a historian.
11 Correct me if I'm wrong. That seems oddly familiar with a term
12 that's been used historically to describe enemies of the state.
13 Am I confused, or is that accurate?

14 THE WITNESS: It's pretty accurate, yeah. It's pretty
15 accurate.

16 THE COURT: Go ahead, Counsel.

17 MR. HANCOCK: Can we show Dr. Lichtman Plaintiffs'
18 Exhibit 367?

19 BY MR. HANCOCK:

20 Q. Do you recognize this, Dr. Lichtman?

21 A. Yes. These are the new 2021 standards adopted by the Board
22 of Education.

23 Q. And did you assess these standards?

24 A. I did.

25 Q. And what did you find from that assessment?

1 A. Yeah. Without going too deep into it, I'll give you the
2 highlight.

3 As I mentioned in the brief summary, it entrenches the
4 Republican orthodoxy on education consistent with what we saw
5 previously, that you have to portray America as doing nothing
6 more than following the principles of the Declaration of
7 Independence. You can't really talk about ongoing embedded
8 discrimination, and the social studies standards reflect that.
9 They barely discuss segregation legally or de facto segregation
10 today or socioeconomic gaps between Whites and Blacks and
11 Hispanics in the state of Florida or nationally. They don't
12 discuss the resistance to segregation or the long history of
13 voting discrimination in the state of Florida. They don't
14 inform students about the horrific massacres of Black
15 communities that have occurred in Florida.

16 These are just some of them. Any --

17 THE COURT: Doctor, I do have to interject.

18 Actually, the Ocoee Massacre, which was a twin city to
19 where I was born and raised, doesn't the Florida Legislature
20 mandate that the Ocoee Massacre be taught, which was a racial
21 massacre? Isn't that part of the -- isn't that by statute, I
22 believe?

23 THE WITNESS: I think that one, but not Rosewood.

24 THE COURT: Go ahead.

25 THE WITNESS: I'm done.

1 MR. HANCOCK: And I'll move Plaintiffs' Exhibit 367
2 into evidence.

3 MR. LEVESQUE: Again, Your Honor, one of the Florida
4 administrative rules.

5 THE COURT: Same ruling as before. I'm going to admit
6 them, although I could certainly reference them in any event, so
7 that's fine.

8 MR. HANCOCK: And can we return to Plaintiffs' Exhibit
9 11C?

10 BY MR. HANCOCK:

11 Q. Dr. Lichtman, what does this row refer to?

12 A. This refers to something I alluded to previously, that
13 university officials were trying to ban three professors from
14 testifying against state defendants in a voting rights case, not
15 an education case, while at the same time allowed Professor
16 Diego Moreno to testify on behalf of Republican interests in
17 that same litigation.

18 It also included an attempt to ban Professor Goldhagen, a
19 pediatrician, from testifying on COVID-19 matters, but he said
20 he would go ahead and testify anyway.

21 As I mentioned, I'm not going to belabor it again. This
22 ban caused a national backlash. The officials backed down from
23 the ban, and it was the subject of litigation and a decision in
24 this Court. And, of course, it directly involved the freedom of
25 speech of professors whose speech went against what university

1 officials believed to be the interest of those who controlled
2 and dominated political life in the state of Florida.

3 THE COURT: Let me just note, earlier, Doctor, you
4 were talking about the other cases that were pending. And, of
5 course, both the election case and the related case regarding
6 the professors were both my cases, as was the riot bill case
7 that you referred to earlier.

8 The statute in the riot bill was not amended. There
9 was a minor change to it. The language at issue was not
10 amended, and that statute is still on appeal. Oral argument, I
11 believe, was held last March, I think, and we're still waiting
12 on an opinion.

13 Having said that, when you said that there was a
14 change in the law, the university case that you just mentioned,
15 the rules were changed at the University of Florida just
16 recently. And the issue is coming before either this Court
17 and/or the Eleventh Circuit as to whether it moots out the
18 appeal.

19 But the one was changed; the other was not thus far.
20 But go ahead.

21 THE WITNESS: Oh, I thought there was a change in the
22 riot law.

23 THE COURT: There was a change, but it was not a
24 substantive change. They did not change the definition of riot,
25 which is what's at issue in that case.

1 THE WITNESS: I gotcha. Yeah, I stand corrected on
2 that because I did think there was a change.

3 Yeah. Thank you.

4 THE COURT: I just wanted to be clear I knew what was
5 happening with the cases.

6 THE WITNESS: Yeah, I'm going through a lot of
7 material here.

8 BY MR. HANCOCK:

9 Q. And, Dr. Lichtman, ultimately, what is your understanding
10 of what the professors were able to do?

11 A. What they were allowed to do ultimately? They were allowed
12 to testify.

13 Q. And any other institutions identify a problem with the
14 handling of those professors?

15 A. Yes. There was a widespread identification of problems by,
16 I believe it was, a committee of the university faculty at the
17 University of Florida, committee of -- I think it was the
18 university senate. Again, doing some of these from memory.

19 MR. HANCOCK: And can we highlight Row 9?

20 BY MR. HANCOCK:

21 Q. Dr. Lichtman, what does that refer to?

22 A. Yeah. This was legislation, again, affecting colleges and
23 universities which, in my view, contradicted the professed goal.
24 I say professed because I don't think that's what it actually
25 achieved, but the professed goal of openness and transparency in

1 what goes on in colleges and universities that are public in
2 Florida. And we saw here that legislation was passed exempting
3 college and university presidential searches from usual
4 disclosure requirements, that college and university -- colleges
5 and universities that are public in Florida did not have to
6 disclose the search process until very late in the process when
7 they reached finalists or maybe only a single finalist.

8 And we saw this play out just a few weeks ago when the
9 University of Florida Search Committee recommended just one
10 presidential candidate, a former Republican U.S. Senator, Ben
11 Sasse. There was no other disclosure of any alternatives to
12 this one choice. And I think I mentioned that means that three
13 of the key positions in the public college and university system
14 are held by former Republican legislators: President of the
15 University of Florida Sass, Commissioner of Education Manny
16 Diaz, and Chancellor Ray Rodrigues.

17 MR. HANCOCK: And can we highlight Row 10?

18 BY MR. HANCOCK:

19 Q. Dr. Lichtman, what does this refer to?

20 A. Yeah. This is something we've discussed at great length
21 that Your Honor knows far better than I, and that is the
22 restrictions not just for K-12, but also college and
23 universities embedded in the legislation known as HB 7.

24 Q. And, Dr. Lichtman, how did HB 7 inform your analysis of the
25 intent of House Bill 233?

1 A. Yeah. As I said, it seems in a sense to be contradictory
2 to HB 233 in that HB 233, again, professedly is designed to
3 expose students to a multiplicity of views; in other words, to
4 open up students to lots of different views, whereas HB 7 does
5 the opposite. It restricts teaching that can be presented to
6 students not just in K-12, but in colleges and universities as
7 well.

8 And, you know, the way I can begin to think about
9 reconciling it is there are two sides of the same coin, two
10 halves of the walnut. On the one hand, you want to keep
11 students from being exposed to teaching of classes with the
12 values and interests of the dominant political forces in
13 Florida. On the other hand -- and that's HB 7.

14 On the other hand, through HB 233, you are trying to make
15 sure that students are not shielded from views that are more
16 consistent with the values and interests of the dominant
17 political forces in Florida.

18 MR. HANCOCK: Can we show the witness Plaintiffs'
19 Exhibit 237?

20 BY MR. HANCOCK:

21 Q. If we zoom in on the title, can you see this, Dr. Lichtman?

22 A. Yes, I can. It's a signing of HB 7.

23 MR. HANCOCK: And can we go to the next page and
24 highlight lines 7 to 15?

25 THE WITNESS: Yes.

1 BY MR. HANCOCK:

2 Q. And who are the people identified here?

3 A. Lieutenant Governor Jeanette Nunez; the president of the
4 Florida Senate, Wilton Simpson; and Christopher Rufo from the
5 Manhattan Institute.

6 Q. Who is Christopher Rufo?

7 A. Yeah. I think it's quite significant that Christopher Rufo
8 is singled out here. You would expect -- you know, not
9 surprising to have the Lieutenant Governor, president of the
10 Senate, but Christopher Rufo stands out because, as I explained
11 previously, he is the single figure most responsible for
12 weaponizing a caricature of critical race theory as a wedge
13 issue for Republicans. He's quite explicit about that.

14 And this is a way, he believes, of putting Democrats on the
15 defensive and appealing to the Republican base. And here he is
16 now being identified and honored by the government as the
17 architect of focusing attention on some of the pernicious
18 ideologies. But these pernicious ideologies are demeaned not
19 through any kind of academic work of scholarship, but through
20 the political activities and the political strategies developed
21 by Christopher Rufo quite specifically.

22 So very openly you're merging political advantage with what
23 is being done in education.

24 MR. HANCOCK: Your Honor, at this time I'll move to
25 admit Plaintiffs' Exhibit 237 into evidence.

1 THE COURT: And, once again, this is a transcript from
2 what?

3 MS. VELEZ: This is a transcript of a video from the
4 Florida Channel that was subject to a previous order on judicial
5 notice.

6 THE COURT: Right. And this was the date relative to
7 the date that the legislation at issue was passed?

8 MR. HANCOCK: This is the signing for House Bill 7
9 event. This happened about a year after.

10 THE COURT: I'm sorry? About a year after; correct?

11 MR. HANCOCK: Correct.

12 THE COURT: Counsel?

13 MR. LEVESQUE: Same objection as before, Your Honor.

14 THE COURT: All right. I'm going to allow it in with
15 the recognition that I've already indicated that this Court is
16 going to treat statements made after the fact and certainly by
17 folks who were not necessarily involved in the passage -- were
18 not responsible for voting on the passage of the bill
19 differently. Whether or not I find, once I've evaluated all the
20 evidence, there is a particular statement for some reason based
21 on the context, et cetera, that has more value, I'm going to
22 allow it in with that recognition, that it's going to be -- will
23 be treated differently than statements made prior to the passage
24 of the bill.

25 (PLAINTIFFS EXHIBIT 237: Received in evidence.)

1 (PLAINTIFFS EXHIBIT 237: Received in evidence.)

2 MR. HANCOCK: And can we return to Plaintiffs' Exhibit
3 11C?

4 BY MR. HANCOCK:

5 Q. Dr. Lichtman, what does --

6 THE COURT: No, don't do that. That's obviously -- I
7 think it's a clear directive to both sides. I believe there's
8 some strongly worded case law of the Eleventh Circuit that talks
9 about, does it not, considering statements made after the fact?

10 MR. HANCOCK: I don't think there's clear preclusion
11 related to those statements.

12 THE COURT: Not in the context of preclusion, but
13 isn't there language that it's --

14 MR. LEVESQUE: Yes, Your Honor. I believe in the
15 *NetChoice* opinion might address some of that.

16 THE COURT: So I -- that's why I didn't say I wasn't
17 going to consider anything that was made after the fact; that it
18 could depend on the context, who made it, how it was said. I
19 mean, if the sponsor of the bill after the fact says, Yes, I did
20 it, here's why; and we all agreed that we've got to do it for
21 this reason, this all then -- suddenly it becomes different
22 because it's the sponsor of the bill and it's an admission after
23 the fact. That would arguably be more relevant than somebody
24 making a political statement at a rally after the fact. So that
25 was the point of that.

1 Anyway -- and Mr. -- I alluded to earlier when we were
2 talking about the composition of the New College of Florida
3 Board of Trustees, I believe Mr. Rufo is one of the newest
4 members.

5 But go ahead.

6 THE WITNESS: I think that's right. He was on the
7 board of the -- was just put on the board of the New College.

8 THE COURT: Fun fact. But go ahead.

9 BY MR. HANCOCK:

10 Q. Dr. Lichtman, what does Row 11 refer to?

11 A. Yeah. Legislation authorizing the Board of Governors to
12 seek a new university accrediting agency and establish a
13 five-year review of tenured faculty.

14 And I just want to make a quick clarification here. Like a
15 lot of these other initiatives that I'm talking about by the
16 same legislature, same Governor, same governing boards, I'm not
17 just referring to statements. I can't speak to the legal side
18 of it. I just want to make clear a lot of what I'm talking
19 about is legislation or actions -- official actions taken by
20 officials in Florida that cast light on the intentions of
21 HB 233, not just after-the-fact statements.

22 I just wanted to clarify that. And that's exactly what
23 happened here after the imbroglio with the attempt to deny the
24 right of professors to testify which, as I mentioned, caused
25 quite a national backlog, even Penn America -- well, I'll let

1 that go -- caused national backlash, and the accrediting agency
2 asked for some explanation.

3 THE COURT: Actually, the UN condemned Florida, didn't
4 they?

5 THE WITNESS: The UN, that's right, yeah. I was
6 trying to remember if it was Penn America or the UN. I think
7 Penn America condemned the book banning. That's what they
8 condemned, yeah.

9 THE COURT: That was the UN passed a resolution in
10 Geneva condemning Florida's --

11 THE WITNESS: Yeah, right.

12 THE COURT: -- rule.

13 THE WITNESS: Yeah. And so after the accrediting
14 agency raised questions, they authorized the Board of Governors
15 by law to seek anew an obviously more compliant accrediting
16 agency and to establish a more restricted review of tenured
17 faculty, a review that would be directed by the politically
18 appointed bodies that govern public higher education in Florida.

19 And there was rhetoric around -- and I will talk about
20 some statements -- around the establishment of the five-year
21 review of tenured faculty, saying, you know, the faculty is now
22 going to have to stand and justify what they're doing. There
23 was already within Florida what is normally done, peer review of
24 tenured faculty. And I didn't see any evidence presented if
25 there was any problem with the peer review system that already

1 existed within the university system of Florida that had
2 established the university system at the very top of public
3 systems of higher education in the United States.

4 So, again, I think, you know, these are actions.
5 These are legislation by the same legislators. And I think they
6 do cast light on what the legislature is intending to do with
7 education policy and here and others, quite specifically
8 education policy as it relates to higher education.

9 MR. HANCOCK: And can we highlight Row 12?

10 BY MR. HANCOCK:

11 Q. Dr. Lichtman, what does this refer to?

12 A. This refers to another very controversial piece of
13 legislation. I understand in this case it is not directed at
14 higher education, but, again, it is legislation by the same body
15 that adopted HB 233, supported by the same governor that
16 supported HB 233.

17 And it bans instruction on sexual orientation or gender
18 identity in K-3, and beyond if not age or developmentally
19 appropriate. Whatever you may think about the K-3 banning, a
20 big problem with this, just like in HB 233, is it's vague and
21 broad. There is no way teachers are going to know what is age
22 or developmentally appropriate. That's not defined, and
23 teachers then could subject themselves to retaliation if they
24 talk about sexual orientation or gender identity.

25 I also highlighted this because it really does harken back

1 to the old Johns Committee, and the attitudes embedded in the
2 Johns Committee are reprised in this piece of legislation. The
3 spokesperson for the Governor, the Governor said this is really
4 antigrooming legislation to keep homosexuals from recruiting
5 young people to become homosexuals.

6 And as I think I mentioned, the academic studies refute the
7 idea that homosexuals are recruiting young people to become
8 homosexuals, but, rather, the much bigger problem is repression
9 and lack of tolerance of those who have a different approach to
10 sexuality, which encompasses many millions of Americans.

11 So here is, again, an attempt to impose a very restricted
12 Republican view of sexual orientation and gender identity on
13 education in Florida that resonates with past discredited
14 attempts to do similar things.

15 MR. HANCOCK: And can we highlight Row 13?

16 BY MR. HANCOCK:

17 Q. Dr. Lichtman, what does this row refer to?

18 A. Yes. This again is legislation, and this does again apply
19 to high school; but, again, it's indicative of the kind of
20 orthodoxy that the legislators try to impose on public education
21 in Florida. It requires high school instruction on the victims
22 of communism. And no one would downplay that there are awful
23 victims of communism. The problem is, once again reflecting
24 Republican ideology, it's biased. It does not require
25 education. For example, on the Hitler -- the victims of Hitler

1 or the fascists in Italy or the fascists in Japan or during
2 World War II or more recently such brutal dictatorships as Kim
3 Jong Un in North Korea or Vladimir Putin in Russia or Bashar
4 al-Assad in Syria, again, it tilts required education in the
5 direction of indicating it's only the left-oriented
6 dictatorships of communism that we need to educate people about,
7 and we need to have students --

8 THE COURT: Doctor? Doctor?

9 (Indiscernible crosstalk.)

10 THE COURT: Doctor, couldn't it just as easily be
11 explained by the fact that Florida has a huge Cuban population,
12 and a significant population -- part of our population in South
13 Florida were generations of families that were devastated and
14 their lives upended by the communist rule in Cuba and that we
15 have a lot of folks of Cuban descent in the Florida Legislature,
16 and they wanted to make sure their story, the story of their
17 families and their suffering, was told?

18 Isn't that just as easy an explanation or just as fair
19 an inference of why the Florida Legislature would focus on the
20 victims of communism?

21 THE WITNESS: I don't think so. You make an
22 interesting point. But, you know, the population of Florida has
23 changed a lot. Even the Latino population has shifted very
24 heavily towards immigrants from Central and South America who
25 are subject to horrible, brutal other kinds of regimes other

1 than communist regimes.

2 And the other point is they could certainly mandate
3 instructions on the victims of communism, absolutely right, and
4 that would resonate with a lot of particularly older Cubans, not
5 so much the new generations. But you can certainly do that
6 without -- you can certainly do that and also include the
7 horrible experiences of other brutal dictatorships.

8 THE COURT: But does the law say you can't talk about
9 Pol Pot in Cambodia; you can't talk about Hitler and the Nazis;
10 you can't talk about Stalin; you can't talk about the Pilgrims
11 in eastern Europe long before the Holocaust? Or does it say, By
12 the way, folks, we also want you to talk about the victims of
13 communism because we think this is a group of victims that have
14 not been discussed --

15 THE WITNESS: The law does not --

16 THE COURT: -- with precision and regularity? I mean,
17 it's --

18 THE WITNESS: The law --

19 THE COURT: Go ahead.

20 THE WITNESS: The law does not prohibit discussions of
21 other, but it certainly places a clear mandate on teachers that,
22 This is what you ought to do. And the teacher would then have
23 to take the initiative to go beyond what is required, you know,
24 given limited time and lots of other mandates.

25 You also, interestingly, mentioned the horrible

1 pogroms and other forms of discrimination against Jews that are
2 not tied to communism. Well, just as Florida has a very heavy
3 population of Cuban-Americans and, as I said, you know, the
4 generations are shifting there and the Latino population is
5 shifting, but Florida also has a very strong Jewish population.

6 THE COURT: And didn't --

7 THE WITNESS: In talking --

8 THE COURT: During the same legislative time frame did
9 not the Florida Legislature -- because I've referenced it in
10 some of my other orders -- talk about requirements as it relates
11 to teaching -- making statements, rather, contrary to -- or
12 antisemitic comments? In fact, I think in one of my prior
13 orders I pointed out that they had a carve-out for the First
14 Amendment. But one of the changes to the statutes in this same
15 time frame -- and I don't recall the specific statute number --
16 was to mandate or create penalties for making antisemitic
17 comments. I'm not saying that law was good, bad, or
18 indifferent.

19 THE WITNESS: Right.

20 THE COURT: But the very folks that were saying, Let's
21 talk about the victims of communism, that those same legislators
22 were also saying, Enough is enough with antisemitic comments, I
23 believe. I think I've got that right. Give me one second.

24 THE WITNESS: Yeah. I haven't seen that. I take your
25 word for it. I'm not sure what the exact -- but that's quite

1 different than actually teaching about the victims of these
2 other kinds of dictatorships that do not tilt to the right but
3 tilt to the left. And as I said, if, in fact, they want to
4 focus -- and I haven't seen them justifying it in this way -- on
5 victims of communism to address Cuban-Americans, as I said,
6 there's also a very strong Jewish population in Florida --

7 THE COURT: Doctor, I stand --

8 THE WITNESS: -- with a similar requirement.

9 THE COURT: Doctor, I stand corrected. The statute --
10 when I said the same general time frame, the older I get, I lump
11 things together. I actually predated it. It was in 2019, a
12 couple of years before the legislation at issue. It was Section
13 1000.05(7) to combat speech-based antisemitism and gave examples
14 such as accusing Jews as the people of the state of Holocaust
15 and then bending or exaggerating the Holocaust, accusing Jewish
16 citizens of being more loyal to Israel, and so forth.

17 But that's the provision, but it was actually two
18 years before, so it wasn't a complete overlap in terms of the
19 same legislators, not critical of this Court's inquiry, but I
20 just thought I'd correct myself.

21 Go ahead.

22 THE WITNESS: Thank you, Your Honor.

23 Did that statute apply to teaching or just sort of
24 general --

25 THE COURT: It was under that chapter, and I believe

1 it is part of the education chapter, so --

2 THE WITNESS: Yeah.

3 THE COURT: In any event, it's discrimination in
4 education. In essence, the Florida Legislature -- and I think
5 I'm paraphrasing properly -- said we're going to treat
6 discrimination with antisemitism the same way we would
7 discrimination based on race.

8 THE WITNESS: I think that sounds right. We shouldn't
9 have hate speech.

10 THE COURT: It's effectively Florida codified its
11 version of Title IX, I think.

12 THE WITNESS: Exactly. That sounds right.

13 But that's quite different from affirmatively teaching
14 students about victims other than the victims of communism. And
15 I don't think it can be explained by --

16 THE COURT: And I understand. Doctor, you're saying,
17 Judge, the same people that are waving around Marxist and
18 communism use that interchangeably with socialism, unless
19 they're talking about Social Security to the people that would
20 acknowledge this, in which case if we are talking about
21 socialist programs in The Villages, suddenly socialism is good;
22 it's only communism that's bad.

23 So I understand. Folks are conflating all of these
24 concepts. They talk about them interchangeably. They're buzz
25 words, and then that ties into, Judge, I've already told you

1 that we started this process by the folks that were sponsoring
2 this bill, as well as the Governor, saying that the purpose of
3 this was to combat the tide of Marxist indoctrination, and so
4 forth, which would be consistent with this very focus on we're
5 going to beat the drum for talking about communists and others
6 and using these terms interchangeably. And it's all the same
7 people, same time frame, beating the same drums, essentially;
8 correct?

9 THE WITNESS: Correct, that's right too.

10 THE COURT: I understood that point.

11 THE WITNESS: Yeah. Okay.

12 MR. HANCOCK: Can we highlight Row 16, please?

13 BY MR. HANCOCK:

14 Q. Dr. Lichtman, what does this refer to?

15 A. Yeah. This was the very controversial banning of math
16 textbooks. These are -- again, this is not in higher education,
17 but, again, it's shows the same attitudes that somehow you could
18 find critical race theory even in math textbooks sufficient to
19 ban 41 percent of them. And the banning took place despite
20 89 percent approval of the textbooks from those who actually
21 reviewed them.

22 So the politically appointed authorities, to a great
23 extent, overrode even their own reviewers. The authorities also
24 appointed, as a singular guest reviewer, Chris Allen, the head
25 of a conservative Republican-oriented group, Moms for Liberty,

1 who had no experience whatsoever in mathematics education.

2 They also reached outside Florida to choose two outside
3 reviewers, both of them from a conservative Christian college,
4 Hillsdale College. One was Jordan Adams, a specialist in civics
5 education who had no specialized training in math. The other
6 was a college sophomore, John Apel, who was listed as the
7 Secretary of College Republicans. And Adams was also on record
8 in an op-ed attacking so-called critical election theory and
9 liberal left-wing indoctrination in education.

10 And, interestingly, it was Allen and Apel -- excuse me. I
11 think it was Allen and Adams, one of the two Hillsdale College
12 reviewers, who were the ones that kept flagging textbook content
13 for critical race theory. And Allen even went beyond that to
14 tag math textbooks as age inappropriate if in their statement of
15 problems they even mention things such as divorce, climate
16 change, or wage gaps between men and women.

17 And this banning of the textbooks also caused a significant
18 national backlash, and this is where Penn America actually
19 weighed in and talked about this process as kind of an
20 educational gag order and using the kind of buzz words like
21 critical election theory that can be used as justification for
22 such.

23 Ultimately, some of the textbooks were restored.
24 Apparently, they claim they were scrubbed of objectionable
25 content, but we don't know exactly what textbooks were scrubbed

1 of what. That was not, as far as I could tell, made public.

2 The reason I know about this in detail, this review process
3 was, when educational -- educational officials in Florida were
4 asked to explain what kind of textbooks were banned, I think it
5 was the Governor's spokesperson referred to not a textbook at
6 all and not Florida, but a homework assignment in the state of
7 Missouri that dealt with Maya Angelou's experience as a pimp and
8 a prostitute. That was a homework assignment that was never
9 approved even in the state of Missouri.

10 And then, with continuing pressure about the process, they
11 released the full accounting of the reviewers, and that's what
12 enabled me to do this detailed in-depth analysis.

13 Another thing that's significant about this review is it
14 conflated social-emotional learning with critical race theory.
15 Social-emotional learning is nothing more than an approach to
16 learning that goes beyond just getting the right answers, that
17 helps students to figure out the best strategies for getting the
18 right answer and the logic behind the problems.

19 Well, again, it was Christopher Rufo who weaponized
20 social-emotional learning, as I point out in my report, and
21 claimed it was a way of softening up students' minds and opening
22 them up to pernicious things like critical race theory, and,
23 yet, social emotional learning got into the evaluation of math
24 textbooks and criteria for possible banning.

25 MR. HANCOCK: Can we show the witness

1 Plaintiffs' Exhibit 368?

2 BY MR. HANCOCK:

3 Q. Can you see this, Dr. Lichtman?

4 A. Yes, I do see it.

5 Q. And do you recognize this document?

6 A. Yes. It's an indication of further assessment of
7 instructional materials in this case for K-12 social studies.

8 MR. HANCOCK: And can we direct the witness to page 24
9 and highlight Call-out 1?

10 THE WITNESS: Yes. Again, this highlights the same
11 thing that was used for banning textbooks in -- for math
12 prohibition of -- it has to be prohibition of critical race
13 theory and its applied principles, and specifically
14 social-emotional learning.

15 By the way, I did some research also into
16 social-emotional learning and found studies showed that, because
17 it helps with strategies for solving problems and learning
18 things, the use of social-emotional learning is actually
19 associated with improvement in education for students.

20 MR. HANCOCK: Can we highlight those top set of
21 bullets?

22 THE COURT: I'm familiar with those. Don't they
23 roughly parallel the *verboden* topics under HB 7?

24 THE WITNESS: I think they're exactly the same. So
25 you understand what these are, and they reappear in the

1 standards for evaluating social studies textbooks.

2 MR. HANCOCK: And can we highlight the lower set of
3 bullets?

4 THE WITNESS: Yes.

5 BY MR. HANCOCK:

6 Q. Dr. Lichtman, what's your understanding of what textbook
7 manufacturers are supposed to take from this?

8 A. Let me see. I'd have to read it.

9 It refers to aspects of CRT, critical race theory, which
10 include, again, kind of -- critical race theory is a catchall
11 for anything that the political -- dominant political forces in
12 Florida find objectionable, that aspects of critical race
13 theory, CRT, include culturally responsive teaching and social
14 justice.

15 So, apparently, you're not supposed to teach in a
16 culturally responsive way, which I don't understand exactly what
17 that means. I would think -- my understanding -- I have no idea
18 what is meant here, and again, when you don't understand what's
19 being meant in prohibitions, that is a way of chilling free
20 speech.

21 But, you know, I understand culturally responsive teaching.
22 As I understand it -- and, you know, I have no idea how they
23 understand it -- to be teaching that respects plurality of our
24 society and tolerant and respectful of cultural differences
25 among different components of our very pluralistic society. We

1 are one of -- maybe the most pluralistic society on the face of
2 the earth and maybe ever on the face of the earth.

3 And then we get into social justice is closely aligned to
4 CRT. That's not really explained. You can be an advocate of
5 social justice and have never heard of CRT. I'm sure that's
6 true with a lot of social justice advocates. And so you can't
7 teach, apparently, about these social justice components seeking
8 to eliminate undeserved disadvantages for selected groups.

9 So we have lots of disadvantages for groups in this
10 country, particularly if you look at Hispanics and
11 African-Americans, huge disadvantages when it comes to law
12 enforcement, education, income, poverty, health. And you can't
13 talk about efforts to eliminate undeserved disadvantages for
14 groups? I don't follow that.

15 And then undeserved disadvantages offer a mere chance of
16 birth and are factors beyond anyone's control, thereby landing
17 different groups in different conditions, I suppose this
18 means -- and, again, it's really unclear, but I suppose this
19 means that if, in fact, people face disadvantages -- and they
20 do -- and they are race related, that these factors are not the
21 result of discrimination, they're not beyond their control but
22 are a result of their own characteristics and behaviors, in
23 other words, placing responsibility for issues upon
24 disadvantaged groups themselves. I'm not saying it's explicit,
25 but at least it implies that somehow these groups are not able

1 to compete because of inherent characteristics on equal basis of
2 likes.

3 MR. HANCOCK: Your Honor, at this time I'll move to
4 admit Plaintiffs' Exhibit 368 into evidence.

5 MR. LEVESQUE: We would stand on our hearsay objection
6 and -- as well as the relevancy objection. Nowhere in his
7 response --

8 THE COURT: I'm going to -- I'm going to overrule the
9 objection, and here's why. It's consistent with other things
10 that were proposed and/or passed closer in time to the provision
11 at issue. I find it's, at best, marginally relevant, which I'll
12 explain at the conclusion of the day. I'm going to give
13 everybody some citations. But I'm going to admit it into the
14 record, and then we'll give it the weight, if any, that it
15 deserves.

16 (PLAINTIFFS EXHIBIT 368: Received in evidence.)

17 THE COURT: I'll only note that as part of those
18 provisions, there's also a section that talks -- I don't think
19 it's indirect or you have to read something in to "stop
20 complaining about your obstacles," because isn't there another
21 section that also says that we're a meritocracy, and you're
22 supposed to teach that we're a meritocracy, and everybody gets
23 what they deserve? I mean, isn't that part a lot of what those
24 same publications offer?

25 THE WITNESS: That's very much a part of that, and I

1 think, you know, without belaboring it too much, I did discuss
2 that at some length when I talked about this stricture that you
3 can only teach that America is this nation consistent with the
4 universal principles of the Declaration of Independence, which
5 is, you know, very much of a piece with the idea that we're a
6 meritocracy and you're responsible for your own fate and there's
7 no such thing as disadvantages resulting from discrimination of
8 any kind.

9 THE COURT: Getting back to sort of your presentation
10 over the last few minutes, Doctor, as I understood it, you said,
11 Judge, I started with the statements made by the bill sponsors;
12 I started with the statements made by the Governor encouraging
13 the folks that, as I offered other examples, were listening to
14 him and doing what he asked about the stated purpose of this law
15 that tied Marxist indoctrination, stale ideology like communism
16 and so forth. They said that that was their purpose, and what
17 I've now done is suggested that it wasn't an aberration. And
18 unless somebody says I'm pulling these statements out of context
19 and misreading them, or they can be viewed as having more than
20 one -- you can read them in more than one way, the purpose of
21 what followed is to say, Judge, it's no mistake, it's
22 consistent, and they continued to repeat these same things for
23 more than two years after the passage of HB -- both before and
24 after the passage of HB 233, the same actors, which is why --
25 while it may not be relevant to legislative intent directly, it

1 corroborates what I say was their stated purpose, which was to
2 limit discussions of these topics at the university level.

3 Do I misapprehend your presentation in how those
4 pieces went together?

5 THE WITNESS: I think that's right. As I would
6 stress, it's not just subsequent statements -- which are not
7 very far off. Most of them are within a year or even just a
8 few months of HB 233 -- it's also actions, legislation, decrees
9 from state officials that provide further corroboration of the
10 discriminatory intent behind HB 233, that these legislators and
11 officials are not interested in diversity and balance but are
12 interested in their own political views and having those
13 political views solidly embedded in education within the state
14 of Florida.

15 You know, to use a bad analogy maybe, no matter --
16 it's a cherry pie. No matter how you cut the pie, it comes out
17 cherry. Whatever point you look at it, it sustains the same
18 point. The same thing with the example I gave of registration
19 laws. It doesn't necessarily matter whether literacy tests or a
20 poll tax came shortly after the registration law or shortly
21 before. It's still the same actors representing the same intent
22 and pursuing the same goals.

23 THE COURT: Mr. Hancock, how much more do you have?
24 And I know I've asked questions.

25 MR. HANCOCK: I think we're within ten minutes.

1 I would also like to admit Plaintiffs' Exhibit 11C
2 into evidence as a summary exhibit.

3 (PLAINTIFFS EXHIBIT 11C: Received in evidence.)

4 THE COURT: Subject to the same objections -- and
5 Mr. Levesque -- and let me just go ahead -- I -- let me put just
6 a couple things on the record so I don't forget.

7 One, because I can't help myself and so it's clear
8 that I'm not just randomly shouting out things that aren't true,
9 I'll note that HB 1213 passed in March of 2021, a month before
10 HB 233, the law at issue.

11 The law -- *Section 1. The Commissioner of Education's*
12 *African-American History Task Force is directed to examine ways*
13 *in which the history of the 1920 Ocoee Election Day Riots will*
14 *be included in instruction of African-American history required*
15 *pursuant to Section 1003.42(2)(h), Florida Statutes. The task*
16 *force shall submit its recommendations to the Commissioner of*
17 *Education and the State Board of Education by March 1st, 2021.*

18 I'm sorry. I said the date of passage, which was
19 incorrect. That was the date by which they had to do something.

20 I only point that out to point out that when we are
21 looking at the legislature and saying what they are or are not
22 mandating being taught, I push back and said the same
23 legislative session was passing legislation also highlighting
24 tragedy in Florida that related to African-Americans that were
25 in -- lived in Ocoee at the time and a massacre that occurred

1 at -- in Ocoee during the 1920s.

2 Also, just so it's clear, what I was -- when I was
3 asking the doctor that I'm just not generally making things up,
4 the U.S. Holocaust Memorial Museum highlights an infamous German
5 film, *The Eternal Jew*, and notes that the most notorious
6 sequence in the film compares Jews to rats as an infestation,
7 which was one of the oldest racial tropes and inflammatory
8 tropes ever used and was used to promote Nazi ideology.

9 Next, I want to go to the -- and I'm going to give the
10 lawyers some cites. In *CSX*, in a recent Eleventh Circuit case
11 from 2021, which is found at 18 F.4th 672, the Court held that
12 cite in the U.S. Supreme Court case, quoting it directly,
13 pointing out that: *Congress stated design expectations*, dot,
14 dot, dot. Then they note: *Post-enactment legislative history*,
15 which this is, *is a contradiction in terms and is not a*
16 *legitimate tool of statutory interruption*, citing the U.S.
17 Supreme Court case *Bruesewitz*, and then pointing out it's in
18 accord with *Pitch versus the United States*, another
19 Eleventh Circuit case, an en banc decision, which is found at
20 953 F.3d 1226.

21 You go on, and *Net Choice*, which was referred to by --
22 referenced earlier by Mr. Levesque, also talks about starting
23 with looking beyond the text of the law and when it's
24 appropriate, and notes that in that case *Net Choice* hadn't
25 cited, and the Court wasn't aware of, any Supreme Court or

1 Eleventh Circuit decision that relied on the legislative history
2 or statements by proponents to characterize it as viewpoint
3 based. The law was challenged on free speech ground. It then
4 goes on. There's some discussion not directly talking about
5 that.

6 I will note, though, that there are a number of other
7 cases -- particularly, the Fifth Circuit has a number of
8 cases -- while not binding, it is, arguably, persuasive -- where
9 they talk about the district court placing inappropriate
10 reliance on postenactment testimony which courts routinely
11 disregard as unreliable, citing another U.S. Supreme Court,
12 *Barber*, which, quote, said: *And whatever interpretive force one*
13 *attaches to legislative history, the Court normally gives little*
14 *weight to statements, such as those of the individual*
15 *legislators, made after the bill in question has become law.*

16 Again, they said "little weight," which is why I said
17 it was a little bit more nuanced than no weight. It also
18 depends on the particular circumstances.

19 But there is, quite frankly, case after case after
20 case that talks about how it sheds little light on legislative
21 intent. However, I did admit it in because there are cases that
22 talk about it may have some weight. It's on that basis that I'm
23 considering it, although at this juncture it appears to me what
24 I've heard thus far has de minimis weight as it relates to
25 intent.

1 What it does do, it seems to me, and what I
2 question -- I'm going to want y'all to address -- that I think,
3 while it's relevant, to the extent there is a question that a
4 statement made that absolutely would be part of the legislative
5 history and would be relevant as to intent, no matter how
6 cramped your view of legislative history is, that is
7 contemporaneous statements made as part of the process in the
8 passage of HB 233, the fact that the same actors are making
9 similar statements a year later talking about other legislation
10 does help suggest that what -- you should accept what they said
11 as true, and they meant what they said, and I didn't misspeak,
12 and it wasn't confusing, and somehow it's this ambiguous
13 statement that we have no idea what the sponsors of HB 233
14 meant.

15 If they continued to make the same statement over and
16 over in other contexts, then it's not that it reflects their
17 intent of what they did when they passed the bill a year before,
18 but it does corroborate a reading of what do their statements
19 mean and what did they mean so that there can be no doubt that
20 somehow it wasn't a slip of the tongue or some arbitrary
21 statement that sheds no light on anything.

22 So it's on that limited basis that I find that it's
23 corroborative of -- it's not -- it's not evidence of intent, but
24 it's corroborative of statements that would properly be
25 considered evidence of intent contemporaneous with the passage

1 of the bill at issue in this case, HB 233.

2 That is not a final ruling by the Court, but I'm
3 letting y'all know my thoughts. So I think it's not -- as a
4 general rule, not relevant to intent, generally wouldn't
5 consider it as it relates to intent, under some special
6 circumstances that the plaintiffs would be crawling up a steep
7 hill to convince me it would have a bearing on. So you'd have
8 to tell me this is unique and why for me to consider it.

9 But I do think for the other purpose I mentioned it
10 does serve -- have probative value, namely -- because I hear
11 this all the time, that, you know, Well, we have no idea what
12 Senator So-and-so meant when he used the word "darkey" in the
13 Florida Legislature. It must have just been an aberration. It
14 was a slip of the tongue. And then you find out he's made eight
15 or nine other racist comments over the next two legislative
16 sessions, so it doesn't sound like the use of "darker" was a slip
17 of the tongue. So not the exact example, but it's pretty close
18 to a real-life example from the Florida Legislature. So I --
19 it's in that sense that it corroborates that it wasn't
20 aberrational, that you don't misunderstand and it's not
21 ambiguous.

22 And since the Doctor earlier referenced Dr. Maya
23 Angelou, I think -- as I understand sort of the ultimate point
24 you've tried to make to me today is when the sponsor says the
25 purpose is to limit Marxist ideology and limit professors and

1 what they're saying at our university levels, do what
2 Dr. Angelou said. When people show you who they are, believe
3 them the first time, and that's why those statements are so
4 critical.

5 Is that correct, Doctor?

6 THE WITNESS: That's correct, Your Honor.

7 THE COURT: All right.

8 THE WITNESS: I didn't follow all your legal exegesis,
9 but I followed that.

10 THE COURT: All right. I got it. I understood what
11 you're saying.

12 And I've also limited -- and want to make plain,
13 anything postenactment, whether it's the summary, the
14 statements, et cetera, I have a very limited view of why that
15 matters; okay.

16 THE WITNESS: I understand that completely,
17 Your Honor.

18 THE COURT: All right. And to the extent there's an
19 unambiguous statement that doesn't need clarification and the
20 defense doesn't say, Judge, that statement is ambiguous and it
21 means something else, then on that basis it would virtually have
22 no evidentiary value. So I want to make plain part of it
23 depends on what people -- something can become more or less
24 relevant depending on what people argue; okay. So it may have
25 no value.

1 THE WITNESS: Yeah.

2 THE COURT: So I want to make plain to Mr. Levesque
3 that I heard you, and I agree with you in general, and in
4 principle it would be a very narrow set of circumstances under
5 which the postenactment statements would have any relevance at
6 all; okay.

7 MR. LEVESQUE: Understood.

8 THE COURT: All right.

9 Counsel, you can continue now that I've --

10 MR. HANCOCK: Of course, Your Honor, I just want to
11 flag that certainly I expect there will be much discussion at
12 the end of this process about the full relevance of that
13 evidence, but if it would be helpful to get to that discussion
14 earlier in the process, just let us know.

15 THE COURT: I'm just going to throw out, which I
16 obviously wouldn't do in a jury trial -- throw out if there is
17 something I want y'all to answer or think about. I don't
18 necessarily need an answer then or there.

19 I just don't want y'all -- and I don't think I do
20 this. That's why I have lengthy exchanges with counsel at oral
21 argument in court. I don't want you guessing what I'm thinking,
22 what my concerns are. You shouldn't wait until you get my
23 written order and go, Oh, man, I had no idea Judge Walker cared
24 about that. So I'm going to try to do this throughout so that
25 you're not caught off guard or surprised ultimately when you get

1 my order.

2 In fact, what we may do is I may have you submit
3 written closing statements, and then I may have a brief hearing
4 after that to ask y'all questions because, again, I -- it's
5 helpful to have a lawyer be able to respond to something before
6 I issue my order because, quite frankly, when I practiced law, I
7 was sometimes shocked at what a judge would come up with and
8 said, Judge, had I known you cared about, that we would have
9 talked about it more.

10 In any event, you can proceed.

11 MR. HANCOCK: Thank you, Your Honor.

12 Can we show Plaintiffs' Exhibit 3 -- let's do -- no,
13 let's do Plaintiffs' Exhibit 487.

14 BY MR. HANCOCK:

15 Q. If we zoom in at the top, do you recognize this,
16 Dr. Lichtman?

17 A. Yes, I do. This is the memo I've been alluding to several
18 times during my testimony. It's the memo from the Office of the
19 Governor, specifically the Director of the Office of Policy and
20 Budget, dated, gosh, just a couple of weeks ago or less,
21 December 28, 2022, and the subject is "Higher Education Program
22 and Activity Survey."

23 MR. HANCOCK: Can we zoom in on the body of this memo?

24 THE WITNESS: I'm sorry. Yeah. Right, I see the body
25 of the memo here. What's your question?

1 BY MR. HANCOCK:

2 Q. What is your understanding of what this memo instructs?

3 A. This memo instructs that all of the institutions of higher
4 learning that are public in the state of Florida need to pass on
5 to the Office of the Governor information -- and it's quite
6 explicit here -- regarding the expenditure of state resources on
7 programs and initiatives related to diversity, equity,
8 inclusion, and critical race theory within our colleges and
9 universities.

10 And in addition, if you look up above, it calls the
11 attention of recipients to -- what it says, that state law
12 requires dutiful attention to curriculum content at our higher
13 education systems, as specified by Sections 1000.05 and 1007.25
14 of the Florida Statutes. Not only does it request information,
15 it says state law requires attention to curriculum content and
16 we're following that law.

17 Q. And, Dr. Lichtman, what is the significance of this memo?

18 A. It's got quite a number of significance.

19 One, again, this isn't just a statement, it's an action,
20 official action, by the Governor. It calls attention to
21 Sections 1000.05, which includes the content elements of HB 7
22 that this Court has enjoined.

23 And I'm no lawyer, but -- and the Court can correct me if
24 I'm wrong, but I think those elements are still enjoined under
25 Section 1000.05, and yet the memo uses as a club the

1 justification for controlling curricular content under a section
2 that has been enjoined by this Court.

3 The second thing of significance is that it relates this
4 information to expenditure of state resources. The budget's the
5 lifeblood of any institution of higher learning, and I think in
6 discussing HB 233, one of the things I had indicated that could
7 have a -- and would have a real chilling effect on free speech
8 and association is the overlying threat that information
9 garnered under the survey could be used to influence budgets.

10 And not just institutions overall. As I explained, because
11 of the information provided in the staff survey, you could
12 actually specify which areas of the university clash with the
13 predilections of those in power in the state and which don't.
14 So humanities and social science might be targeted but not
15 public safety or business.

16 The other thing that's important here is once again we
17 raise the specter of critical race theory, that somehow the
18 implication here is that it is illegitimate to teach about
19 systematic discrimination embedded in our society, and you also
20 have to deal with initiatives related to diversity, equity and
21 inclusion. It's pretty vague. I'm not exactly sure what that
22 means.

23 If I speak in my class on history about how we become an
24 increasingly diverse society and an increasingly inclusive
25 society, although there are still issues about inclusion and

1 equity in our society, does that fall under the rubric of what
2 is being asked for? It's so broad and vague that, you know, it
3 can cover such a wide swath of instruction in history, political
4 science, economics, sociology and lots of other fields.

5 Further, insight into this is provided by the email from
6 Vice-President Cousins which further indicates how institutions
7 have to respond.

8 Q. Before we look at the email, Dr. Lichtman, does this memo
9 say that any funding is going to be cut?

10 A. No, but it certainly raises that issue. If you weren't
11 considering funding issues, why, in fact, would you have this
12 memo from the director of budget and speak specifically about
13 the relationship between curriculum content and the expenditure
14 of state resources?

15 You know, one of the things I've noted in my testimony is
16 you can chill speech by having these threats overhanging without
17 necessarily effectuating the threats. We don't know what the
18 result of this is going to be, but certainly there is the
19 threat, otherwise why ask for this and tie it to state
20 resources, that there could be budgetary implications,
21 particularly here? Because this is the most specific thing, the
22 teaching of critical race theory as, you know, distorted and
23 understood by the powers that control Florida politics and that
24 recognize Christopher Rufo, you know, as the architect of their
25 understanding of critical race theory.

1 MR. HANCOCK: Your Honor, at this time I'll move to
2 admit Plaintiffs' Exhibit 487 into evidence.

3 MR. LEVESQUE: Same objections, Your Honor, and this
4 is one of the late -- the late-disclosed exhibits that obviously
5 by its nature just came out. Again, there's no indication that
6 this has anything related to House Bill 233. The nature of the
7 memo --

8 THE COURT: Except for the fact -- what was the date
9 of the document where the Governor said, We're not going to
10 spend one red cent of taxpayer dollars on teaching garbage like
11 critical race theory? What was the date of that document?

12 MR. HANCOCK: That was in March of 2021.

13 THE COURT: So that was contemporaneous. And then
14 when we argue there's no -- and I'm not suggesting this is a
15 direct line, but when we argue that there's no chilling effect;
16 nobody's going to act on this; you misapprehend what everybody's
17 going to say -- for example, in the professor case, board of
18 trustee chairman who's saying he said, When I said, We going to
19 go after you and get rid of you slothful, lazy professors, it
20 wasn't a threat to go after them.

21 When you make those kind of statements, subsequent
22 actions that corroborate the view that we do intend to take
23 financial punitive measures potentially or go after you could be
24 relevant. I'm not ruling it is now because the pieces -- the
25 lines have to be drawn, but it could be relevant, if for nothing

1 else standing as it relates to -- well, I'm not going to go
2 further, but as it relates to the standing inquiry, and so on
3 that basis, at the very least, it may have marginal relevance
4 and it's on that basis that I'll allow it.

5 But I would agree, absolutely 100 percent, it's both
6 the Governor and it's long after the fact, this is not being
7 admitted, and I will not consider it for purposes of what the
8 intent behind the passage of HB 233 was as it relates to the
9 *Arlington Heights* analysis.

10 So on that basis, I absolutely agree with you.

11 MR. LEVESQUE: And, well, to the extent that
12 Dr. Lichtman has offered his opinions about what that memo says,
13 what it means, we would seriously disagree with -- strenuously
14 disagree with some of the characterizations and the way that --
15 the way he's framed that memo, and to the extent that this memo,
16 which isn't his memo, is coming in through him as a witness, we
17 would just at least ask that the Court keep that in mind as --

18 THE COURT: Absolutely. And you can either make that
19 argument to me, or you can cross-examine him, either way, but I
20 understand, certainly.

21 The point is, is it may have relevance for a limited
22 purpose that wasn't directly testified to by the witness, and it
23 was for that reason that I was allowing it. But it would --
24 there's still dots that would have to be connected for even that
25 finding to -- but it's -- I'm going to let it in. Again, if it

1 was being shown to a jury, I'd worry about it, but I can say
2 when, if the dots are not connected at the end, Well, now I'm
3 not assigning any weight to it and here's why; okay?

4 Counsel, you may continue.

5 MR. HANCOCK: Thank you, Your Honor.

6 Can we zoom in on the top of this memorandum?

7 THE WITNESS: I'm sorry. What's your question?

8 BY MR. HANCOCK:

9 Q. Dr. Lichtman, can you see this?

10 A. I do see this.

11 Q. Who is this memorandum directed to?

12 A. To Commissioner of Education Manny Diaz, and to the
13 Chancellor Ray Rodrigues. These are the two officials, both
14 former Republican members of the Florida State Legislature, who
15 are essentially the top officials in charge of public colleges
16 and universities.

17 THE COURT: But, more importantly, you previously
18 testified it's Rodrigues that was the proponent of HB 233 and
19 he's now implementing it; correct?

20 THE WITNESS: That's correct. He was the main
21 sponsor. I've said this many times, you're absolutely right, of
22 HB 233, and the one who led the discussion through -- of HB 233
23 and made a lot of statements that we've interrogated from at the
24 time that HB 233 was adopted.

25 THE COURT: So as I understand it, just in layman's

1 terms, Judge, the reason why you should care is because if the
2 suggestion is that when you read the statements by
3 then-Legislator Rodrigues, now chancellor, about the passage of
4 HB 233, and the suggestion is nobody could possibly think that
5 anything's going to happen to any professor, university or any
6 funding if you don't do what we want you to do as it relates to
7 HB 233 and don't yield, and it's all nonsense -- there's
8 absolutely no basis to have any chilling effect, this is an
9 example of where they've continued the long march towards
10 passing additional laws and taking further actions that would be
11 consistent with what people were scared they were going to do
12 when they passed HB 233.

13 That's how I understood your testimony. If I've got
14 it wrong, you can correct me, Doctor.

15 THE WITNESS: You have it exactly correct. And I
16 would just add to that, you know, of all the things that they
17 could have looked at, you know, there were so many issues
18 involved in programs, curricular and activities. Again, zero in
19 on the very things that way back at the time of the passage of
20 HB 233 they were claiming were tainting and undermining higher
21 education in the state of Florida, albeit part of the evidence.

22 And now they're coming right back, including the
23 former sponsor who is now chancellor, to those very matters that
24 they were stressing previously and that, you know, the Florida
25 council -- the Council of Florida Senates, the university

1 faculty senates were all worried about. This is, you know, what
2 we're worried about, they're cracking down on our teaching
3 about -- particularly about these sensitive race issues, and
4 here it's come exactly full circle with one of the key players,
5 as well -- and the Governor.

6 And I testify and stand by it, HB 233 would never have
7 passed without the support of Governor DeSantis who holds such
8 sway over the legislature. The authorities in Florida even said
9 he's shattered any balance of power between the legislature and
10 the Governor. He is the dominant force. So you got the
11 Governor here and you got the bill sponsor.

12 MR. HANCOCK: Can we show the witness
13 Plaintiffs' Exhibit 489?

14 BY MR. HANCOCK:

15 Q. Can you see this, Dr. Lichtman?

16 A. I do.

17 Q. And do you recognize this email?

18 A. I do.

19 Q. And what is this email?

20 A. This is an email from Karen Cousins, who is the vice
21 president of -- in the Office of the Provost with the University
22 of North Florida. It was sent, I guess, the day after or maybe
23 the day of -- I don't know when she got the memo dated
24 December 28th, but very proximate to that, and it's to
25 various -- I guess these must be administrators in UNF. And

1 it's marked "urgent" and very specifically "New requirement from
2 the Governor," not new suggestion, but this is something that
3 the Governor has mandated that you must do and the importance is
4 "High," and then she goes on to say some other important things.

5 MR. HANCOCK: And can we look at the bottom of this
6 email?

7 BY MR. HANCOCK:

8 Q. What kinds of information is the school providing pursuant
9 to this memo?

10 A. Oh, quite a lot of detailed information. Up above, you
11 kind of pass by it, but if you go a little up above it says, *The*
12 *request pertains to all programs and initiatives, including*
13 *academic instruction.* So there is no doubt that this memo is
14 directly related to the content of instruction in Florida's
15 public colleges and universities.

16 And then with respect to instruction, she goes on to
17 indicate that the following information should be provided -- if
18 you go down a little bit -- I can't quite see it.

19 I see it now. So the course number and name.

20 I'm not sure what CRN is. Maybe someone can enlighten me.

21 But number of credit hours, I know what that is. You know,
22 is it three? Is it six? Is it five?

23 The name of instructor, and she notes: *This is for our*
24 *purposes only and will, underline, not be included on the survey*
25 *form.* That's something worth commenting on, but I won't comment

1 now.

2 The rank of the instructor of record.

3 Whether the course is a general education course that is
4 required generally of students to fulfill general education
5 requirements and whether it's required for the major in which
6 the student is enrolled.

7 Q. And, Dr. Lichtman, what is the significance of the name of
8 the instructor being omitted from the survey form?

9 A. Well, obviously there is some trepidation on the part of
10 the vice president here that the professors need to be
11 protected. You should not be exposing their individual
12 identity, and she underlines "not" be included.

13 However, this is a protection without any protection. That
14 is, there is more than enough information provided -- course
15 number and name, credit hours, rank of the instructor -- so that
16 anyone with access to the website of any institution can easily
17 discover who the individual instructor is.

18 I can speak to my course listings. It will have my course
19 number and name. It will also have my identity right there for
20 anyone to see, because students need to know not just what the
21 course is, but who's teaching the course. So there is no
22 protection here whatsoever for individual faculty.

23 Plus there is certainly no protection for programmatic
24 areas. The course number would identify the program in which
25 the course was offered, and just by compiling course numbers,

1 you can identify individual programs and departments within an
2 institution, which could then be the subject of budgetary
3 targeting.

4 As I said, maybe the officials will decide CRT is present
5 in the history department but not present in the chemistry
6 department, and so any budgetary action we're going to be taking
7 will be specifically directed to the history department.

8 Q. Dr. Lichtman, do you see the last line of the email?

9 A. Yes.

10 Q. What do you understand to be communicated there?

11 A. I mentioned this in my report, that this memo requires all
12 of this information from the institutions with warp speed. She
13 indicates -- this is a December 29th memo, and the list has to
14 get to her by January 5th. They just have a week to decide what
15 programs and courses and activities involve equity, inclusion,
16 diversity and critical election theory, and get all that
17 information to college administrators and then get that on to
18 the office of the Governor, and all this is being done just warp
19 speed during winter break for the institutions.

20 And she stresses that timely compliance is not optional.
21 This is not just a statement by the Governor. This is not an
22 indication of preference by the Governor. We've got plenty of
23 that. This is an official mandatory action taken by the
24 Governor that singles out the same kinds of so-called left-wing
25 faction that takes us right back to HB 233.

1 And also the vagueness of the mandate, you know, what is
2 meant by all these things, takes us right back to the vague and
3 broad mandate of HB 233, and the fear of some kind of
4 retaliation takes us right back to the kinds of things that the
5 Council of Faculty Senates and the faculty union were very
6 worried about, the weaponization of information under HB 233.
7 This is a piece with that. There is a reason to worry here
8 about the weaponization of information.

9 MR. HANCOCK: Can we go back to the first paragraph of
10 this email?

11 BY MR. HANCOCK:

12 Q. Dr. Lichtman, who did this request come from?

13 A. It came from, as I understand it, the office of the
14 Governor and then through the chancellor, Rodrigues, to the
15 president of the University of North Florida.

16 MR. HANCOCK: Your Honor, at this time I'll move to
17 admit Plaintiffs' Exhibit 489 into evidence.

18 THE COURT: With the same limitations that I've
19 previously made, that I'm not going to consider this type of
20 post-enactment action and/or statements for purpose of divining
21 the intent under *Arlington Heights* to the legislators that
22 passed HB 233. However, it may have marginal relevance for
23 other issues before this Court depending on whether or not the
24 dots are connected later on.

25 Although, let me say that it seems to me not to be

1 this case, it seems to me to be in direct response to my order
2 on HB 7, which is currently on appeal, such that the Governor's
3 office, combined with Chancellor Rodrigues, are preparing that
4 if, in fact, rank viewpoint discrimination is not permitted and
5 you can't say -- you can criticize something; you can discuss
6 it, you just can't say anything positive about it, but you can
7 control curriculum. It sounds to me like what this is is an
8 effort -- and I believe the Doctor alluded to it earlier -- that
9 it may have something to do with my case in which I entered an
10 injunction as it relates to HB 7 -- it's probably in direct
11 response to that order -- waiting to see what the
12 Eleventh Circuit does, and then depending on what they do, doing
13 an end-run around that decision. So it is what it is.

14 But it seems pretty far afield to what we're
15 discussing here, but go ahead.

16 BY MR. HANCOCK:

17 Q. Dr. Lichtman, between the memo and the email, how do these
18 developments inform your opinion on the intent behind House
19 Bill 233?

20 A. I think His Honor put it very well, although I would
21 stress, again, these are not just statements, these are official
22 actions. I also cited quite a number of legislative enactments
23 which, yes, did occur after HB 233, but were pretty proximate to
24 it and were official legislative enactments by the same
25 legislature and governor that adopted HB 233.

1 And here we have the same officials that were advocates for
2 HB 233, the Senate sponsor, Rodrigues, the powerful influential
3 Governor DeSantis, and this shows that, as I think Your Honor
4 put it very well, that their statements indicated that their
5 intent was not to create balance or diversity but to stop what
6 they see as left-wing indoctrination, particularly on issues of
7 race.

8 And here now is the chief House sponsor and the Governor
9 returning to that very same issues. Again, they could have
10 selected any aspect of curricular, but they went right back to
11 the same things, the same sensitive racial issues that they
12 believe -- like through -- critical race theory is being
13 developed through a biased, left-wing indoctrination
14 perspective, the same issues that they cited a year earlier, or
15 maybe more than that, since this is a very recent memo, year and
16 a half earlier in the adoption of HB 233.

17 So while, if this was standing alone, in my view as a
18 historian who analyzes these things all the time, I think His
19 Honor is right, it's not -- it's at best marginal indication of
20 intent, but when you take it into the context of what Rodrigues
21 and DeSantis were saying about the purpose behind HB 233, it
22 sustains and validates my analysis that the purpose was, in
23 fact, to chill and restrict and regulate speech, particularly on
24 sensitive racial issues that clashed with the values and the
25 interests of the dominant political forces in the state of

1 Florida.

2 I would also say this also has to be put in the context of
3 a dozen or so other official acts and legislative enactments
4 which are consistent with the avowed purpose by decision-makers
5 for the passage of HB 233.

6 MR. HANCOCK: Your Honor, I don't have any other
7 questions for Dr. Lichtman at this time.

8 THE COURT: All right. Thank you, everyone.

9 I will see everybody back at 8:30.

10 Mr. Levesque, as I understand my list, you're going to
11 do the cross-examination of Dr. Lichtman; is that correct?

12 MR. LEVESQUE: That is correct, Your Honor.

13 THE COURT: All right. And I get these lists are
14 updated. All I need to know is who's doing it so I don't
15 embarrass myself and call on the wrong person. I don't really
16 care who does the cross-examination, so -- but -- so if
17 something changes the point from the list, and y'all decide I'm
18 going to pass it off to so-and-so, just let me know at the start
19 of day. But, again, there's no magic. I'm not going to -- I'm
20 not going to say, Well, you said the first day you're going to
21 cross-examine the witness, you've got to do it. Just if you'll
22 let me know if it changes; okay?

23 MR. LEVESQUE: We'll do that, sir.

24 THE COURT: Doctor, we'll see you back at 8:30
25 tomorrow morning. You have a pleasant evening.

1 Anything else we need to do for purposes of
2 housekeeping this evening? I'll go with you, Mr. Hancock,
3 because you're precise and to the point.

4 MR. HANCOCK: Just one housekeeping item, Your Honor.
5 The video -- there have been a lot of discussion of Florida
6 Channel videos, and we have those video files that we would like
7 to admit into the record for completeness.

8 THE COURT: All right. We'll talk about that in the
9 morning.

10 And, Mr. Levesque, anything else?

11 MR. LEVESQUE: No, Your Honor.

12 THE COURT: All right. I'll see y'all back at 8:30 in
13 the morning. Thank you.

14 Y'all have a good evening.

15 (Proceedings concluded at 6:12 PM on Monday, January 09,
16 2023.)

17 * * * * *

18 I certify that the foregoing is a correct transcript
19 from the record of proceedings in the above-entitled matter.
20 Any redaction of personal data identifiers pursuant to the
21 Judicial Conference Policy on Privacy is noted within the
22 transcript.

23 /s/ Megan A. Hague

24 11/12/2023

25 Megan A. Hague, RPR, FCRR, CSR
 Official U.S. Court Reporter

 Date

I N D E XPLAINTIFFS' WITNESSES PAGEALLAN LICHTMAN

Direct Examination By Mr. Hancock 30

E X H I B I T SJOINT EXHIBITS OFFERED RECEIVED

ECF NO 242 7 7

The joint exhibits,
 plaintiffs' unobjected-to
 exhibits, and the defense's
 unobjected-to exhibits as
 reflected in ECF Document
 242

PLAINTIFFS' EXHIBITS OFFERED RECEIVED

11C 250 250

12 32 32

41 177 177

120 167 167

136 180 180

139 218 218

170, 172, 174, 176, 178 9 9

180, 182, 184, 186, 188 9 9

190, 192, 194, 196, 199A 9 9

201, 203, 206 9 9

205 107 107

222, 224, 226, 228 9 9

233, 235, 237, AND 332 9 9

1	<u>PLAINTIFFS' EXHIBITS (cont'd.)</u>	<u>OFFERED</u>	<u>RECEIVED</u>
2	237	230	230
3	354	66	66
4	367	224	224
5	368	247	247
6	375	180	180
7	384	99	99
8	388	193	193
9	487	262	262
10	489	269	269
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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION**

WILLIAM A. LINK, et al.,)	
)	
Plaintiffs,	)	Case No: 4:21cv271
)	
v.	)	Tallahassee, Florida
	)	January 10, 2023
RICHARD CORCORAN, et al.,)	
	)	8:26 AM
Defendants.	)	VOLUME II
)	

**TRANSCRIPT OF *EXPEDITED* BENCH TRIAL PROCEEDINGS
BEFORE THE HONORABLE MARK E. WALKER
UNITED STATES CHIEF DISTRICT JUDGE
(Pages 276 through 564)**

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*Proceedings reported by stenotype reporter.
Transcript produced by Computer-Aided Transcription.*

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P R O C E E D I N G S

(Call to Order of the Court at 8:26 AM on Tuesday,
January 10, 2023.)

THE COURT: All right. We are back on the record in
Case No. 4:21cv271, day two of the bench trial.

Yesterday evening I got an updated exhibit list from
my courtroom deputy that it's my understanding the parties both
looked at and agreed those are the exhibits that have been
admitted to date.

Mr. Wermuth, did somebody from your team consult and
review the exhibit list prepared by the courtroom deputy?

MR. WERMUTH: Yes, we did, and it's accurate.

THE COURT: Mr. Levesque?

MR. LEVESQUE: Yes, we did, and it's accurate.

THE COURT: All right.

If y'all just do that throughout, I just want -- I'm
going to -- and at the very end I'll make sure, Mr. Levesque,
you and Mr. Wermuth have time to circle back and make sure that
everything you wanted in the record is in the record.

So, please, monitor that. But then as we approach the
end of the proceedings before everybody rests and y'all go home
and begin your closing -- written closing statements, we ought
to take a pause and make sure y'all verify that everything you
wanted is on the exhibit list, okay, assuming I admitted it.

MR. LEVESQUE: Sounds good.

1 THE COURT: All right.

2 MS. KRAMER: We have two additions that we wanted to
3 make on the record for Ms. Milton McGee.

4 So you admitted Exhibits 206 and 332, but those had
5 subparts, just to the transcript and video. So it's actually
6 206A and 206B and then 332A and 332B that were admitted.

7 THE COURT: Mr. Levesque?

8 MR. LEVESQUE: I think they were admitted over my
9 objection, so to the extent that the same objection applies to
10 the videos, yes, sir.

11 THE COURT: They were, and your objections stand.

12 Let me make plain -- and I can go ahead later and
13 clarify on the record. I want to make plain that I find the
14 contemporary -- and I don't think you disagree with this part --
15 that the contemporaneous statements, that is, contemporaneous to
16 the passage of the bill, made by legislators, A, are relevant
17 under *Arlington Heights*; and, B, are -- to the extent *Arlington*
18 *Heights* applies; and, B, is not hearsay because it's -- well,
19 not hearsay; and, C, we already ascertained there was no
20 authenticity issue.

21 To the extent there are other iterations of the same
22 exhibit, so we have got a transcript and an audio, for the same
23 reasons I permitted in the transcript, I'd permit in the audio.

24 I want to make plain, as to the other statements, I've
25 indicated they're not -- they are not relevant for purposes of

1 intent, but they may come in for some other purpose.

2 And, by the way, when I said they weren't -- when I
3 said they weren't on hearsay, I found that they were being
4 offered not for the truth of the matter asserted but for the
5 statements made and imputed to the intent of the speakers is
6 what I meant by that. I think I made that clear on the record
7 before.

8 As for the other statements that were made after the
9 fact, I've already indicated, Mr. Levesque, I agree with you.
10 Absent some extraordinary circumstances which the plaintiffs
11 would have to articulate in their closing arguments, I would not
12 be considering statements -- postlegislative statements as part
13 of the legislative history. And I cited the case law why that's
14 so.

15 However, there were other limited purposes that it
16 would be. Some of the other things you offered would be, one,
17 to the extent there is any confusion or ambiguity with the
18 statement, to corroborate the understanding of what a prior
19 statement was; or, B, in some instances, some of it would be
20 relevant, things that happened afterwards, because it would go
21 to whether or not, for purposes of standing, the fear was
22 reasonable.

23 Whether or not there's weight put on it, whether or
24 not it's determinative or dispositive is an entirely different
25 question. But I found that it had marginal relevance for those

1 purposes only and not the intent of the legislators that passed
2 HB 233.

3 I think I made that plain before.

4 And if at any point either side ever wants or believes
5 we should have more of a clarification on the record as to my
6 ruling, I'm happy to do that. I'm not -- I don't say, Overruled
7 and sustained and say, Eleventh Circuit, you just figure it out.
8 I'm happy to explain my reasoning. So if anybody needs any
9 further clarification later, you can; okay.

10 MR. LEVESQUE: Thank you, Your Honor.

11 THE COURT: All right. So I think I addressed
12 Mr. Hancock's concern at the end of yesterday, which is we need
13 to go back because we said, Judge, there were other iterations
14 of the same exhibits that we needed you to address. And I just
15 addressed that. So when y'all clean up the exhibit list for
16 today, consistent with what I just said, y'all can add those in,
17 of course, conferring with Mr. Levesque.

18 And in so stating, Mr. Levesque -- and you know this,
19 and, fortunately, it's a pleasure to have you and Mr. Wermuth in
20 court because you don't do this. You understand that -- and I
21 would make plain -- just because the parties confer as to what
22 this Court has admitted does not mean you're suddenly waiving
23 any objections or abandoning any of your objections. It's
24 simply to confer to say, This is what the Judge ruled, right,
25 wrong, or indifferent, and this is what's in the record based on

1 his ruling.

2 So I want to make plain that nobody is waiving
3 anything. And I say that only because sometimes every time I do
4 this, a lawyer will say, Judge, we're not waiving anything. And
5 it's like, Well, of course you're not.

6 But for your benefit, I will clarify the record, since
7 you're not pounding the table and being silly like some lawyers
8 are, that you're clearly not waiving any of your objections.

9 MR. LEVESQUE: Thank you, Your Honor.

10 THE COURT: Okay. And I'm happy to say, Mr. Levesque,
11 that you and Mr. Wermuth are not silly, and it is astounding how
12 many of the lawyers that appear in my courtroom are. But, in
13 any event, I can't reform the profession as just one district
14 judge.

15 All right. Y'all ready to continue, or is there
16 something you need to take up before we get the witness on?

17 MR. WERMUTH: Just one last issue. We did file a
18 notice indicating which exhibits have been addressed. In your
19 ruling so far, we still have a pending motion that our notice
20 reflects the exhibits for which you have not yet ruled.

21 THE COURT: I have not seen that because I was
22 handling other matters in other cases this morning. But my law
23 clerk, I'm sure, will print that off for me, and then we can
24 address that later with the other -- those exhibits.

25 Just so I'll know, how voluminous, once you pared down

1 the list and taken out everything that's already been addressed?

2 MR. WERMUTH: Ms. Kramer?

3 MS. KRAMER: I believe about a dozen maybe remain to
4 be addressed.

5 THE COURT: All right. All right. You know I can
6 handle that. There's a difference between a dozen and a
7 thousand, so that's why I was asking the question. We certainly
8 can get to that and quickly.

9 I also noticed that y'all filed a motion that was
10 unopposed for another expert to testify by video because of
11 scheduling issues. I'll enter an order today to that effect,
12 but it may be a while before I enter the order. The fact that
13 you didn't get an order immediately is no signal that I'm not
14 going to grant an unopposed motion.

15 MR. WERMUTH: Thank you, Your Honor.

16 THE COURT: I will let the -- Mr. Levesque, you know,
17 and Mr. Wermuth knows this and has never suggested otherwise, I
18 know it's not a legal rule, but it's a rule of sort of equity
19 that I'm going to apply, what's good for the goose is good for
20 the gander. And I'm not suggesting you and Mr. Wermuth are the
21 goose or the gander.

22 But when y'all start putting on witnesses, if there's
23 a problem with an order of witnesses, just as y'all have
24 extended the courtesy, as has the Court, and said, Sure, call
25 people by video, the same will also apply to y'all.

1 MR. LEVESQUE: Appreciate that, Your Honor.

2 THE COURT: Okay. The point of that is y'all really
3 don't need to file motions and confer. If y'all are in
4 agreement that there's no prejudice, and consistent with
5 courtesies that have been extended to plaintiffs, the plaintiffs
6 are going to extend to the defendant, y'all don't have to keep
7 filing motions. Just notify each other. The only time you need
8 to get me involved with that is if somebody objects; okay.

9 MR. WERMUTH: Thank you, Your Honor.

10 THE COURT: Having said that, I appreciate y'all
11 trying to make sure the record is clear and doing it the correct
12 way. But I also -- y'all have a lot to do in the evenings
13 without worrying about, you know, those sort of housekeeping
14 matters we can just address on the record; okay.

15 MR. WERMUTH: Thank you.

16 THE COURT: All right. Anything else from the
17 plaintiffs?

18 MS. KRAMER: There is about two dozen that remain.

19 THE COURT: Two dozen is still not a thousand.

20 I worry that, Judge, we only have, you know, 773
21 remaining evidentiary issues. We can handle -- we can address
22 that at some point, and it shouldn't be too challenging.

23 All right. Other issues from the defense?

24 MR. LEVESQUE: No, Your Honor, not at this time.

25 THE COURT: And you're ready for your

1 cross-examination?

2 MR. LEVESQUE: Yes, sir, I am.

3 THE COURT: All right. We're going to take a
4 two-minute break.

5 (Recess taken at 8:37 AM.)

6 (Resumed at 8:39 AM.)

7 THE COURT: All right. We are back on the record.

8 One other thing, Counsel, I'm going to do -- and I
9 know yesterday it presented a problem because the witness can't
10 hear me if I do it, so just remind me. I'm telling the witness
11 to let me know if you can't hear me, raise your hand. I'm going
12 to turn off my microphone because I was coughing yesterday, and
13 I'm still sick. So I'm going to let the court reporter know and
14 the witness know that if someone needs to hear from me, let me
15 know because otherwise the microphones are going to be off.

16 So I thank you in advance for your patience. I'm
17 losing my voice which, as I noted before, may cause great joy
18 and celebration among the legal community. But in the meantime,
19 we'll do our best to get through trial.

20 If I could, since this is a new day, have the
21 courtroom deputy go ahead and place the witness back under oath
22 since it's the start of a new day.

23 And then, Mr. Levesque, you can proceed with your
24 cross-examination.

25 THE COURTROOM DEPUTY: Please raise your right hand.

1 **DR. ALLAN J. LICHTMAN, PLAINTIFFS WITNESS, DULY SWORN**

2 THE COURTROOM DEPUTY: Please state your name for the
3 record.

4 THE WITNESS: Allan J. Lichtman.

5 THE COURTROOM DEPUTY: Thank you.

6 CROSS-EXAMINATION

7 BY MR. LEVESQUE:

8 Q. Good morning, Professor Lichtman.

9 My name is George Levesque. I represent the defense. I
10 believe we had a good conversation in your deposition, if you
11 recall that.

12 A. I do. Good to see you again.

13 Q. You, too, sir.

14 In reaching your conclusions, you didn't speak to any
15 legislators or the Governor as part of your work in this case,
16 did you?

17 A. Did not.

18 Q. And as it relates to the passage of House Bill 233, it's
19 your opinion that it is the intent of the legislative
20 decision-makers and the Governor that matter most; correct?

21 A. They may not be the only ones that matter, but they matter
22 the most, yes.

23 Q. And you're a historian by profession; correct?

24 A. Correct.

25 Q. And as a historian, you agree that information created at

1 the time of an event is more desirable than information created
2 after the fact; correct?

3 A. Yes.

4 Q. Because information created at the time of the event
5 represents the events in the most immediate light; isn't that
6 true?

7 A. That's true, although events, obviously, after can be
8 relevant as well.

9 Q. But as it relates to House Bill 233 and its Senate
10 counterpart, you reviewed the legislative record thoroughly,
11 didn't you?

12 A. Yes.

13 Q. And are you aware that Florida has a part-time legislature?

14 A. Yes.

15 Q. And that its members come from all walks of life?

16 A. I don't know about all walks of life. You'd have to show
17 me information on that.

18 Q. Did you examine the background of any of the individual
19 legislators that served when House Bill 233 and Senate Bill 264
20 were adopted?

21 A. I did not go through the backgrounds of all the individual
22 legislators, no.

23 Q. Would you agree that those legislators bring their life
24 experience with them when they come?

25 A. As, you know, a purely global statement, of course,

1 everyone does.

2 Q. Were you aware that Senator Rodrigues worked at Florida
3 Gulf Coast University before he was elevated to chancellor?

4 A. I believe I was aware of that.

5 MR. LEVESQUE: If we could pull up Plaintiffs' Exhibit
6 204.

7 And I'd like to show you a clip of Senator Rodrigues
8 explaining the need and the purpose of the bill.

9 And the video should start at the 29:44 mark.

10 (Plaintiffs' Exhibit 204 played.)

11 MR. LEVESQUE: I don't see the exhibit.

12 THE WITNESS: I don't see it either.

13 THE COURTROOM DEPUTY: Dr. Lichtman, can you see the
14 exhibit?

15 Can you see the exhibit, sir?

16 THE COURT: Doctor --

17 THE WITNESS: I don't.

18 THE COURT: -- can you see the exhibit?

19 THE WITNESS: Is this just a picture of someone at a
20 podium? Is that an exhibit?

21 THE COURT: Yes.

22 THE WITNESS: I do see that.

23 THE COURTROOM DEPUTY: No. He only sees the blue
24 screen.

25 THE COURT: You don't need to report this. They can

1 figure out how to play it, and then we'll play it.

2 (Discussion was held.)

3 (Resumed at 8:49 AM.)

4 THE COURT: All right. We are back on the record.

5 We were able to correct our technical error.

6 Mr. Levesque, you may proceed.

7 MR. LEVESQUE: Thank you, Your Honor.

8 BY MR. LEVESQUE:

9 Q. Dr. Lichtman, what I would like you to --

10 THE COURTROOM DEPUTY: I think you need to mute the
11 audio.

12 Everything seems to have frozen.

13 MR. LEVESQUE: Apologize, Your Honor. This seemed to
14 be working Friday afternoon.

15 I don't think we are still getting the audio.

16 (Pause in proceedings.)

17 THE WITNESS: Your Honor, can you hear me?

18 THE COURT: I can.

19 THE WITNESS: Is there something -- I have a
20 technician here. Is there something I can do on my end to clear
21 this up?

22 MR. LEVESQUE: I don't believe so, sir.

23 THE WITNESS: All right. So I should just sit tight
24 and wait?

25 THE COURT: Do we have the transcript of this same

1 audio?

2 MR. LEVESQUE: We do, and I could reference that. I
3 think I just want to make sure we'd be able to show the
4 transcript if we need to resort to that.

5 If we need to resort to that, can you bring up the
6 transcript?

7 (Discussion was held.)

8 MR. WERMUTH: What is the transcript?

9 MR. LEVESQUE: Joint Exhibit 7.

10 (Pause in proceedings.)

11 MR. LEVESQUE: Your Honor, we'll go ahead and I think
12 switch to the hard copy transcripts, and I'll do my best not do
13 to do reader's theater.

14 THE COURT: No worries.

15 MR. LEVESQUE: And if we could go ahead and pull up
16 Joint Exhibit 7.

17 We'll be looking at page 2, line 4 through page 6,
18 line 14.

19 Joint Exhibit 7, page 2.

20 (Pause in proceedings.)

21 THE COURTROOM DEPUTY: He should be able to see that.
22 Will you ask him?

23 MR. LEVESQUE: Okay. I guess my conundrum is I can't
24 see it to know whether --

25 (Pause in proceedings.)

1 BY MR. LEVESQUE:

2 Q. Dr. Lichtman, on what -- I'm guessing that you can probably
3 see that. But you wouldn't be able to read it, would you, sir?

4 A. No. It's too small. I can grab a magnifying glass if you
5 want me to. I have one here. If you can't make it any bigger,
6 I can read it with my magnifying glass.

7 Q. Well, not yet, sir.

8 A. Okay.

9 Q. Is that readable right there?

10 A. Yes, that is readable.

11 Thank you.

12 Q. Okay. Doctor, this was the January 26th Florida Senate
13 Committee on Education meeting where Senator Rodrigues reviewed
14 what -- the need for the bill and what the bill did.

15 And I'll go ahead and kind of scroll through there for you
16 so you're able to review it.

17 A. All right. I'll look at this first part. This is the
18 beginning of his statement?

19 Q. Yes, sir.

20 A. Okay. I've read that first paragraph.

21 Okay. I've read that second paragraph.

22 Okay. I've read that paragraph.

23 I can't read this whole paragraph, if you could just --
24 yeah.

25 Okay. I've read that.

1 I've read that.

2 I've read that up to the point -- I've read that.

3 I read that.

4 You skipped a paragraph.

5 I've read that.

6 This -- can you scroll down? There's more.

7 *This bill follows the example set in University -- yeah.*

8 Okay. I got that.

9 Q. And you reviewed that.

10 When you did your study -- or when you formed your
11 opinions, that was a part of the record that you reviewed;
12 correct?

13 A. That's right. And I commented on that part of the record,
14 indicating, first of all, that the survey did not follow even
15 closely the model of these other institutions that
16 Senator Rodrigues claimed that it would follow.

17 I also indicated that this claim -- it was the very first
18 thing in my report under "Contemporary Statements" that these
19 claims that are neutral, and just trying to find out what
20 happened, are contradicted by the statements of these
21 decision-makers themselves.

22 And Senator Rodrigues has said, on page 91 of my report:
23 *What we are seeing, and what we have seen across the country,*
24 *are acts of cancel culture.* There's not a single example
25 here -- and this is another big point I made throughout my

1 report and my testimony. There's not a single example here from
2 any actual act of viewpoint suppression or cancel culture
3 involving any one of more than 700,000 students at 40
4 institutions in Florida at any time cited by Senator Rodrigues
5 or anybody else in the record or anybody defending the report.

6 If you go back up a little bit, there is one thing about
7 Florida only.

8 Keep going. Yeah.

9 This alleged evaluation by the national organization for
10 the Foundation of Individual Rights in Education found that
11 eight of eleven universities in Florida had policies on the
12 books that inhibit free expression. I'd like to -- no
13 indication of what those policies are, how they inhibit free
14 expression, or when there ever has been an example of free
15 expression, or how this survey was conducted and how it
16 claimed -- and they don't even have it correct. There were 12
17 state universities in Florida, not 11 state universities in
18 Florida.

19 So this is the only thing that relates to Florida at all.
20 It's general, unspecified, with no examples. So what you've
21 presented to me actually sustains and validates my testimony.
22 It doesn't contradict it.

23 THE COURT: If I could ask a question -- let me ask a
24 question under Rule 614.

25 Professor, help me to understand as a fact finder -- I

1 understand I'm bound by the record. But like any fact finder, I
2 also don't have to set aside common sense.

3 To what extent is it appropriate -- I'm not asking
4 legally. I'm asking from your standpoint, in terms of your
5 methodology and your training, to -- for me to take cognizance
6 of the prevailing mood in our society, right or wrong -- I
7 understand that you say, Judge, it's an unfair characterization
8 that our professors are a bunch of Marxists.

9 And I'll just say, quite frankly, that's a gross
10 statement for somebody to make and categorize our faculty as a
11 bunch of rank Marxists and lump them all in. But it seems to me
12 that you can't turn on the TV without there being an example of
13 a speaker not being allowed on a campus because of the
14 no-platform movement or a student being, based on cultural
15 appropriation, chastised because they put up cloth from India to
16 decorate the wall in their dorm room that's cultural
17 appropriation.

18 I mean, you literally cannot turn on the news -- it
19 doesn't matter -- and I'm not talking about one network or the
20 other, although I understand the Henny Penny sort of
21 presentation of this is more pronounced on some networks than
22 others. But doesn't a -- if a member of the legislature -- as
23 Mr. Levesque pointed out earlier, they, themselves, have
24 experience in the university system because that's where they
25 come from, coupled with the prevailing mood in our society that

1 cancel culture has run amuck, and we are shouting people down
2 that we don't like -- and it can run both ways.

3 To what extent, whether or not it's empirically
4 supported or not, can a legislator properly consider all that?
5 And is that something that would be considered -- given your
6 methodology, something they might rely on or consider for
7 purposes of advocating for a particular position?

8 And if any of my underlying assumptions are false, you
9 can tell me why, and you can tell me why that's not proper --

10 THE WITNESS: Yeah.

11 THE COURT: -- to consider, is what I mean.

12 THE WITNESS: With due respect, I think when it comes
13 to Florida, some of your underlying assumptions are not correct,
14 talking about, you know, the shouting down, the disinviting of
15 speakers. That doesn't happen at Florida institutions. You
16 know, I presented some considerable testimony about that in
17 response to the information presented by --

18 THE COURT: Well --

19 THE WITNESS: -- the Governor's spokesman.

20 THE COURT: -- let me ask you this follow-up question,
21 because this came up in the various iterations of various
22 election cases in front of me.

23 Does Florida have to wait until its election system
24 collapses before it makes change -- changes to try to make it
25 better? Does the Florida Legislature have to wait until the

1 wave of cancel culture hits our shores in Florida?

2 And I'm not saying -- I want to make sure this is
3 plain. This is not a value-laden question from my
4 perspective, because I don't get to decide whether it's good or
5 bad or good policy or bad policy or whether I like it or not.
6 Were it so, the world would probably be a very different place.

7 THE WITNESS: Yeah.

8 THE COURT: But I just -- if -- and I understand you
9 can look at other evidence that says it undercuts that
10 explanation. But assuming somebody says, This is what's going
11 on nationally; I've seen it from my own eyes as an educator; I
12 think this is a problem, and we need to act now to ensure -- I'm
13 wondering why is that not something the Court could rely on as
14 opposed to just, well, they didn't do empirical studies?

15 THE WITNESS: Yeah. Several things. One, the
16 political right has been denouncing and claiming cancel culture
17 has invaded our campuses for 40 to 50 years. This is not
18 something new: Oh, my God, this is starting now. We've got to
19 worry maybe it's going to hit Florida. You know, it hasn't hit
20 Florida in 40 or 50 years. It's not likely to hit at all.

21 Moreover, a lot of these studies, as I point out, are
22 simply incorrect. I looked at the most comprehensive study, the
23 100 university studies which contradicted this whole idea of
24 this liberal indoctrination and indicated that, in fact,
25 conservative professors may be more influential.

1 Moreover --

2 THE COURT: Oh, they've definitely done a much better
3 job as evidenced by the Federalist Society.

4 THE WITNESS: I get that.

5 THE COURT: But setting that aside --

6 THE WITNESS: Right.

7 THE COURT: -- what I don't --

8 THE WITNESS: Yeah. What I was going to say --

9 THE COURT: First of all, just talked about cancel
10 culture and indoctrination in the same breath. Those are not
11 necessarily the same thing; correct?

12 THE WITNESS: They're very similar. Cancel culture is
13 not a precise term. It's basically, you know, a code word for
14 suppression of conservative views for indoctrination of
15 left-wing views. You know, it can be very broadly used. Like
16 woke education can be very broadly used as well.

17 Moreover, as I explained, Florida has been doing
18 extremely well in higher education, both in terms of freedom of
19 expression, as the surveys from sources cited by defendants
20 indicate, but also reaching the top of public institutions of
21 higher learning. And as the faculty have testified, the
22 measures taken under HB 233 are not going to improve that.
23 They're going to make things much worse on our campus -- on
24 their campuses and undermine their ability to recruit the
25 outstanding faculty that maintain this kind of extremely high

1 rankings.

2 I also pointed out --

3 THE COURT: Doctor, let me ask you this.

4 With respect to your opinion, if a statistically sound
5 survey had been conducted and it turns out we had an incredibly
6 high response rate, and the subjective views of the students
7 that were self-reporting are that, yeah, there is a skewed
8 presentation, then is it okay to have passed this bill? Is the
9 idea that you didn't do enough homework, or is it -- it could
10 also be you didn't do enough homework and your explanations are
11 internally inconsistent?

12 I'm just trying to figure out --

13 THE WITNESS: Yeah. Yeah. As I said, the kind of
14 survey -- as we discussed at length, you know, the survey that
15 was developed because of the whole misconception about how
16 academics is conducted is not valid.

17 Let's assume there was some way of probing this, and
18 it did show some issue with respect to viewpoint discrimination
19 or indoctrination. The survey that's contemplated in 233 can't
20 do that. But, as I explained, there are vastly better ways of
21 dealing with that and drilling down into that than the "gotcha
22 culture," as the Foundation for Individual Rights in Education
23 termed HB 233. FIRE criticized Florida for saying, you know,
24 orthodoxy is not the way you establish informed citizenship.

25 And I outlined in my report much better, nonpunitive

1 ways of dealing with these issues, while at the same time
2 incorporating the issues that all of these other campuses, which
3 are supposedly models, thought were so important: Diversity
4 with respect to race, religion, sexual orientation, gender. You
5 do this collaboratively and consultively. You establish a clear
6 policy. You establish orientation for faculty and students.
7 You have students and faculty sit down in collaborative,
8 consultive ways. You bring together students and faculty of
9 different perspectives and different backgrounds.

10 THE COURT: Professor, let me ask you this.

11 Why -- and I'm sorry, Mr. Levesque. I promise -- but
12 I did the same thing to Mr. Hancock.

13 Doctor, help me to understand -- and I'm going to have
14 a question for Mr. Levesque, not to answer now, but later,
15 because I may have misapprehended something you said yesterday.

16 Professor -- I mean, Doctor, help me to understand the
17 antishielding provision as drafted that talks about what it
18 means to shield. For the life of me, I don't understand why it
19 doesn't do exactly what you just said; namely, if somebody is in
20 the new reconstituted New College, the new iteration six months
21 from now, and you've got a professor that's talking about a
22 political issue and a student wants to respond on topic and say,
23 I'm nonbinary and how you just characterized that excludes me,
24 and then the new student body at New College that has been
25 recruited from people that didn't get into Liberty, or

1 somewhere, go crazy because you've got somebody declaring
2 they're nonbinary in class, doesn't this antishielding provision
3 protect that nonbinary student's right to make a statement on
4 point, just like it would make -- would protect a Federalist
5 Society member at UF to make a nonsensical comment but it's on
6 point in a law class?

7 I just don't see where, as drafted, this provision
8 distinguishes one side or the other of the ideological spectrum
9 or any part of it, because it's a spectrum, as you pointed out.
10 It's not just right, left, conservative, liberal; it's a
11 spectrum.

12 So doesn't, as drafted, it -- and don't I take that
13 into account? And I gave you the example of HB 7, which was
14 crafted with surgical precision to exclude one viewpoint; hence,
15 the intent to block only one type of speech. Don't I compare
16 that juxtaposed to what they did here?

17 So multipart question: A, why isn't that the proper
18 construction of this? Why doesn't it cut both ways? And why
19 doesn't that bolster the argument that was implicit in what
20 Mr. Levesque was just showing you, that we want robust
21 discussions from all sides?

22 And we've passed this law that says you can't shield
23 anybody, whether it's a snowflake conservative that starts
24 shaking and having spasms because somebody utters the words
25 "critical race theory." But it also means that you can't block

1 a conservative from decrying, you know, this attack on the fact
2 that the United States is perfect; we're a meritocracy; and if
3 you don't succeed, it's because you are just lazy, and I'm
4 allowed to say that whether it offends minorities and
5 disadvantaged groups or not.

6 Doesn't this statute protect both groups on both
7 sides?

8 Long question, but I'm going to have that question for
9 you, Mr. Levesque, and you, Mr. Wermuth or Mr. Hancock or --
10 both teams, because it seems to me that's part of the heart of
11 what's in front of me. And you can explain to me why, Judge,
12 that just isn't so; you don't get it.

13 But go ahead.

14 There are a lot of layers there, Doctor, but have at
15 it, however you want to respond.

16 THE WITNESS: You want me to respond now?

17 Yeah, I can definitely respond to that.

18 One, this is punitive. This, you know, threatens to
19 drag professors into civil litigation. It's, you know, a gotcha
20 kind of provision. And as I said, you don't need to have that
21 kind of punitive sort of Damocles hanging over professors.

22 Secondly, there is no indication that any student has
23 ever at any institution of higher learning in Mary -- in Florida
24 not been able to say what they want to say in class. Not a
25 single complaint has ever been cited.

1 THE COURT: Doctor -- I'm sorry -- I got to push back
2 for one second.

3 I don't understand, for the life of me. It seems to
4 me to be internally inconsistent. And I'm going to have this
5 question for Mr. Hancock and Mr. Wermuth as well.

6 Sometimes people are too clever by half when they're
7 drafting legislation like this. If the goal of the legislation
8 is to stamp out woke ideology --

9 THE WITNESS: Yes.

10 THE COURT: -- it seems to me to be asinine to pass a
11 law that says you can't silence speech on campus. It seems to
12 me to be -- that sweeping and doesn't just cover one end of the
13 spec -- the ideological spectrum or the other. In this case if
14 Mr. Rucho -- I think that's who you referred to yesterday?

15 THE WITNESS: Rufo, R-u-f-o, yes.

16 THE COURT: If Mr. Rufo comes in and he wants to stamp
17 out this pernicious idea that there's something other than just
18 men and women, don't the students at New College under this
19 antishielding provisions get to push back?

20 If Mr. Rufo says, We're not going to have this speaker
21 come on campus because they're a homosexual and we should dunk
22 them in ice water so they're no longer gay and put them through
23 conversion therapy, don't the students at New College get to
24 push back?

25 So if the intent was to weaponize or give tools to go

1 after faculty and professors to stamp out the left, it seems to
2 me to be odd that they drafted a statute that gives professors
3 and students protection on the other end of the spectrum if
4 they're successful in their efforts to try to stamp out the left
5 ideology or leftist Marxist, fill-in-the-blank, on campus.

6 I'm just having a hard time reconciling that, given
7 how the statute is drafted.

8 THE WITNESS: Yeah. I'll respond, in part, you know,
9 by talking about you don't need this kind of punitive civil
10 action. But given the statements -- and we've seen multiple of
11 them -- of the preconceptions that campus is dominated by this
12 liberal indoctrination by -- even though it's seemingly neutral
13 on its face -- as I said, this is the other half of the walnut
14 of HB 7. This is to make sure that allegedly conservative
15 viewpoints also get expressed. The problem, though --

16 THE COURT: But if they did that -- but if they did
17 that, Professor, you have to look at the statute that's being
18 challenged. If they had a companion statute to HB 7 that said,
19 And if you violate HB 7, you can record people that are talking
20 about these eight concepts; you can sue if you try to push back
21 or stop them -- if they -- if the punitive sanctions here were
22 tied to HB 7, I could understand the punitive argument, because
23 the river would only go one way. But because the punitive
24 sanctions -- I don't understand. Is it the idea that students
25 on the left are going to be less likely to assert their rights,

1 and only the students on the right are going to be organized
2 like they are in the Federalist Society in our law schools, and
3 so they're going to be more effective at pushing their agenda?

4 Surely that's not what renders the statute
5 unconstitutional, if one group is more adept at using it than
6 the other. I mean, if students at New College can use this and
7 go after their administration who's tried to change the very
8 nature of the school -- I just don't understand why is the
9 antishielding provisions, the recording provisions, and the --
10 those two provisions taken in concert, why is that not a weapon
11 and a gift to the students at New College whose university is
12 now being changed?

13 If that is true, they've been handed a weapon. I
14 don't understand how it can be viewed as limiting speech if it
15 universally can be applied. Help me to understand that.

16 THE WITNESS: Yeah. As I indicated, this statute
17 is -- and I want to focus for a moment on the professors,
18 because I think if there were going to be any kind of civil
19 action, it's going to be directed against professors, not
20 directed against students here.

21 THE COURT: Well, let me ask you this. But it's also
22 professors, administrators, because it extends to everyone,
23 right, doesn't it?

24 THE WITNESS: Yes. But it's the professors who do the
25 instruction, or administrators who --

1 THE COURT: But it's the administrators that say --
2 but isn't it Mr. Rufo that says, We can't have any of them gay
3 people speaking at New College now? And the second he does
4 that, he just -- he's now subjected himself -- he's been hoisted
5 on his own petard because he pushed this legislation that can be
6 used against him. Why is that not so?

7 THE WITNESS: I think that probably is so, that this
8 could be used in two ways.

9 But, as I said, the presumption behind this is that it
10 is the predominant left-wing ideology that pervades colleges as
11 being used to indoctrinate students. So we want to make sure
12 that this is -- as I said, the counterpart is very different
13 from HB 7. We want to make sure that professors also express,
14 you know, again, based on this misconception that it's all
15 conservative and liberal -- that professors also express the
16 conservative point of view.

17 And the problem is that it's written so vaguely and so
18 broadly that it -- and it's not just me who said this. I cited
19 others in the institutions, including even in the sciences --
20 that it may compel professors to express ideas, theories,
21 propositions that they know are false. But if they don't
22 express them, they are going to be subject to the penalties
23 under this particular piece of legislation.

24 So do I have to express that the election of 2020 was
25 stolen? Do I have to express that there was no racial

1 discrimination in America? And if I don't do that, am I then
2 subject to, you know, being hauled into court? I know I'm not
3 the one who has to pay, but I'm the one who is, you know, going
4 to have his reputation smeared and be hauled into court and be
5 involved in all kinds of civil actions.

6 So that I see as the underlying motivation and the
7 problem with this piece of legislation that's also been
8 recognized by the faculty themselves.

9 THE COURT: Thank you. And I -- one, let me
10 apologize, Dr. Lichtman. I know that I've asked you a lot of
11 questions. I don't have to do this with everybody. Hopefully
12 the lawyers get the point. I'm asking some of these questions
13 because I want both sides to know what's on my mind.

14 And as you can probably know by reading some of my
15 prior orders, you can't necessarily read into anything from my
16 questions that I've made up my mind one way or the other,
17 because oftentimes -- probably one of the orders I was -- or
18 hearings I was pilloried for the most in the press that I was
19 destroying American democracy, the people that attacked me
20 actually won the next day, and I issued an order in their favor.
21 So there's not necessarily -- I'm not telegraphing anything, but
22 I want both sides to know what my concerns are.

23 Let me pause there, though, Mr. Levesque, to ask,
24 since you did read -- or have the witness read that section of
25 the statements in the committee, because I may have

1 misapprehended what you said yesterday.

2 There's no doubt that this -- these provisions go
3 beyond the classroom. It talks about faculty and I -- it
4 would -- and you can correct me if I'm wrong, but it seems to
5 even extend to if you had two faculty members arguing with each
6 other at a department meeting or something. It seems to me that
7 it's much broader than just the classroom.

8 MR. LEVESQUE: Absolutely. In fact, I think it's
9 probably still an open question about whether it applies to the
10 classroom and how -- to what extent.

11 THE COURT: Well, and that's what I was going to ask
12 you, since you just read -- since it says "students" and you
13 just read a section, and this key sponsor talks specifically
14 about it being in the classroom. That's what -- and you don't
15 have to answer now, but I am perplexed as to why it doesn't
16 apply to the classroom since even the sponsor said, We're trying
17 to make sure students can be heard and not silenced in the
18 classroom. So --

19 MR. LEVESQUE: I --

20 THE COURT: -- you don't have to address that now --

21 MR. LEVESQUE: Okay.

22 THE COURT: -- but that's what perplexed me. Wasn't
23 the idea that it was broader and extended much broader, but the
24 fact that -- the idea that it didn't apply in the classroom,
25 I've got to say completely -- I'm flummoxed by that.

1 MR. LEVESQUE: I think it actually would apply to if
2 you had, like, a discussion-based class, but if you had, like, a
3 pure lecture class where the professor gets up and --

4 THE COURT: Doesn't it define expressive activities to
5 include faculty lectures?

6 MR. LEVESQUE: But for -- in that scenario, I think
7 the professor would be protected for their lecturing, but it
8 wouldn't be a situation where the student had the ability to
9 challenge the professor in the middle of his lecture and
10 interrupt his lecture, because that's not the open forum.

11 THE COURT: Is that what you meant by time, place and
12 manner --

13 MR. LEVESQUE: Yes, sir.

14 THE COURT: -- that you can't silence people? Because
15 I -- and I'm going to want to hear from the plaintiffs why that
16 isn't so.

17 Sure. I understand you can't have -- although they're
18 called gunners in law school, and I found they were annoying and
19 ruined much of my law school experience -- and, by the way,
20 generally did very poorly in the classes, I found -- but you
21 don't want somebody to hijack a classroom, and I don't -- and
22 I'm interested in the plaintiffs' belief that this suggests you
23 can talk and there's no limitation and this provides that a
24 student can hijack the classroom.

25 But what I read it -- and maybe you and I aren't

1 saying two different things. I just want to make sure. As I
2 read it, if you have a class where you're permitting students to
3 speak and engage, you can't pick and choose which views get to
4 be expressed if you're the professor. And you can't in a
5 classroom say, Well, hold on. You just said that you're getting
6 ready to talk about meritocracy, and you're going to make it
7 sound like, you know, people aren't succeeding in this
8 marginalized community because they're lazy or something and
9 you're going to upset the -- we're not going to hear that.
10 We're not going there.

11 As I understood this, that if you're allowing folks to
12 talk, that would be a classic example. This shield says you
13 can't stop the one student who you don't want talking you think
14 is going to upset somebody, or in the case of -- and it's got to
15 be on topic, and you qualify that before -- you've got Mr. Rufo
16 decides to be a guest lecturer at New College, and he can't --
17 oh, one of the people I guess he doesn't like, Ms. Angelou, poet
18 laureate. So somebody wants to offer that they think the way
19 they'd analyze this was the way Ms. Angelou wrote something, and
20 it's in a literature class that he's teaching: No, no, we don't
21 want to hear about her because she's a whatever.

22 As I understood it, if it's on point and they're
23 allowing people to speak, this provision absolutely applies to
24 them?

25 MR. LEVESQUE: I think that generally that would be

1 true, I mean, all other things being equal.

2 THE COURT: But it doesn't mean, Judge, it's -- you've
3 got carte blanche to say whatever you want, wherever you want,
4 in whatever context you want, and that's how I understood your
5 papers about time, place and manner.

6 MR. LEVESQUE: Yes, Your Honor.

7 THE COURT: I've got it. So it's --

8 THE WITNESS: Can I respond to this notion that it
9 doesn't apply to lectures? Because that's just not true.

10 First of all, students always in lectures -- I've been
11 lecturing for 50 years -- have opportunities to ask questions,
12 to comment. I've never seen a class that prohibits students
13 from responding to a lecture.

14 Moreover, students could afterwards complain that,
15 This lecture shields me from the view that the election of 2020
16 was stolen. Nothing to stop any student, particularly with the
17 recording provision, from objecting to a lecture and shielding
18 them from certain views, opinions, and propositions.

19 So, from my experience in the classroom, from my
20 knowledge about higher education takes place, this absolutely
21 applies to everything that goes on in the classroom.

22 BY MR. LEVESQUE:

23 Q. Thank you, Doctor.

24 If I could ask you to look back at the exhibit that we are
25 looking at in this one particular paragraph.

1 A. Certainly.

2 Q. The one that you referenced that referenced Florida.

3 THE COURT: And while he's looking -- you're pulling
4 that up, I need the lawyers on both sides at some point to pull
5 Section 1004.097 which preceded the passage of HB 7 and HB 233.
6 And I'm interested, during the debate, did anybody discuss that
7 there was already a provision on point that addressed the very
8 evils that are now -- we're being told that this statute was
9 designed to address? I don't need y'all to tell me that now,
10 but if I overlook that in your papers, let me know.

11 I'm sorry. Counsel, go ahead.

12 BY MR. LEVESQUE:

13 Q. Okay. Doctor, this was the -- this was the -- I think the
14 one Florida reference in Senator Rodrigues' comments that you
15 cited, and you were critical of the information provided by the
16 Foundation for Individual Rights and Education. Do you recall
17 that?

18 A. I wasn't necessarily critical of the information. What I
19 said, there really isn't any information here. Without knowing
20 what these policies that allegedly inhibit free expression are,
21 there's no way to judge whether this is meaningful at all.

22 Notice there are no quotations, no citations from this
23 study, no reference to it. It's just kind of a generalization.
24 And, you know, as I said, I'm not casting aspersions on anyone,
25 but we know politicians very often shade the truth, including

1 Senator Rodrigues, you know, with respect to claiming that
2 there's been no faculty input criticizing the bill or that the
3 bill is based on these other institutions. So I take this with
4 a huge grain of salt.

5 You'd have to show me the study. You'd have to show me
6 what the policies are, because I'm not familiar with any
7 policies at any institution in the state of Florida that
8 inhibits free expression.

9 Q. You're familiar with the Foundation for Individual Rights
10 in Education, and you cited them favorably yesterday related to
11 their rankings for some of Florida colleges being in the top of
12 their class related to free speech; correct?

13 A. Right. Which seems to be contradictory to what is being
14 claimed here without specification or citation.

15 Q. But you recognize --

16 A. This is not a quote -- let me finish. This is not a
17 quotation from the foundation. As I said, it doesn't even
18 correctly indicate the number of state universities in Florida.

19 So I would need to see the alleged policies and the study
20 that claims that these policies inhibit free expression, because
21 it's utterly contradictory to what the foundation found about
22 freedom of expression in Florida institutions.

23 THE COURT: Mr. Levesque, what's the date of this?

24 MR. LEVESQUE: January 26th, 2021.

25 THE COURT: January 26 -- I'm sorry -- 2021?

1 MR. LEVESQUE: Yes, sir.

2 THE COURT: And that was where he made the statement
3 that he hadn't gotten -- Rodrigues hadn't gotten input from the
4 faculty; correct?

5 MR. LEVESQUE: I don't believe it was necessarily at
6 that particular committee meeting. I think that might have been
7 at a subsequent one, but --

8 THE COURT: One thing y'all can help me with is I --
9 Plaintiffs, I need to know the exhibit number where we have the
10 email with the attachment from the educational group that said,
11 Here's our concerns. I need to know what that exhibit number
12 is, who it went to and the date of it.

13 And then I also want somebody to tell me later what's
14 the date where Rodrigues announced, I'm unaware, haven't had any
15 input from faculty.

16 And let me -- I actually messed up earlier. I have
17 the two provisions, HB 7 and HB 233, up, and I had them -- I was
18 looking at one and thought I was looking at the other, a portion
19 of it. It's actually HB 233 that included the language I was
20 just asking about that predated HB 7. So I had them actually
21 reversed, so y'all won't need to answer that question.

22 The language that was already addressing the concern
23 was in HB 233, which came out before HB 7, and it was based on
24 my prior case that I had them flipped, so I identified my own
25 error. But if plaintiffs can let me know that exhibit number.

1 Thank you.

2 MR. LEVESQUE: Will do.

3 BY MR. LEVESQUE:

4 Q. Professor, as it relates to Senator Rodrigues, he also
5 referenced some national surveys that he relied upon as well;
6 correct?

7 A. I do not rely on any national surveys. I simply indicated
8 that when the defendants' representatives were presenting
9 surveys, they ignored the larger survey which contradicted their
10 findings. I relied on findings specifically for Florida
11 institutions.

12 Q. Professor, did you -- and to be clear, I wasn't asking
13 about what you relied on. I was asking what Senator Rodrigues
14 told his fellow Senators he relied on. He did indicate that he
15 referenced a national survey, and he also referenced one that
16 was performed by FIRE as well; correct?

17 A. I think that was also a national survey.

18 Q. And in reviewing the legislative record, did you review the
19 bill analysis for Senate Bill 264?

20 A. I don't recall. You'd have to show it to me.

21 THE COURT: That's Joint Exhibit 5; correct?

22 MR. LEVESQUE: Yes, Your Honor.

23 BY MR. LEVESQUE:

24 Q. And so if any of those surveys were cited in those bill
25 analyses, certainly the legislature would have had that

1 information before them at the time?

2 A. Oh, I have no doubt that it's possible that these national
3 surveys were before the legislature, at least some of the
4 cherry-picked ones, yeah.

5 Q. Thank you, sir.

6 MR. LEVESQUE: If we could bring up Joint Exhibit 8.
7 And I believe Mr. Varnell has the ability to share screen, so --
8 to lighten my load.

9 THE COURT: And, Counsel for the Plaintiffs, I
10 answered my own question. It was Exhibit 41,
11 Plaintiffs' Exhibit 41. That was the email that was dated March
12 9, 2021, sent to Chancellor Criser.

13 But if somebody could find the Joint Exhibit that had
14 the discussion where Rodrigues said he hadn't gotten any input.

15 But, go ahead.

16 BY MR. LEVESQUE:

17 Q. Are you able to see that highlighted information there,
18 sir?

19 A. I do.

20 Q. Now, this was a statement made by Representative Juan
21 Fernandez-Barquin in the Florida House Post-Secondary Education
22 & Lifelong Learning Subcommittee.

23 A. Yes.

24 Q. And do you see there that he's taught at Miami-Dade College
25 and he was relying on his personal experience when he was making

1 up his mind whether to support or oppose House Bill 233?

2 A. That's correct.

3 Q. And that's certainly not a statement that you credited in
4 reaching your opinions, is it?

5 A. Well, again, it's not specific, it's general, you know,
6 saying, They weren't as welcoming as I was of different
7 viewpoints. No specific examples of any viewpoint suppression.
8 It's, again, the kind of general statements that we've seen
9 without any specificity.

10 MR. LEVESQUE: If we could also flip to Plaintiffs' --
11 I'm sorry -- joint Exhibit 6, page 35, line 3.

12 We may need to scroll a little bit on this one for the
13 professor.

14 THE WITNESS: You want me to read this?

15 BY MR. LEVESQUE:

16 Q. Yes, sir.

17 A. Okay.

18 MR. LEVESQUE: And we'll go from, for the record,
19 page 35, line 3 through page 36, line 9.

20 THE WITNESS: It's a little hard to read, but I think
21 I can, yeah.

22 MR. LEVESQUE: Can you make it a little larger?

23 THE WITNESS: I can read it. Just give me a minute.

24 That's better. Thank you.

25 Okay. I've read the first paragraph.

1 I've read the second paragraph.

2 I've read this.

3 Is there more?

4 BY MR. LEVESQUE:

5 Q. Yes, sir, just a little bit more.

6 A. Okay.

7 Okay.

8 Q. Now, earlier you referenced that all politicians stretch
9 the truth -- those are my words, but if you want to correct me
10 or recharacterize, please feel free.

11 Do you feel that Representative Mariano was shading the
12 truth when she was talking to her fellow House members on the
13 House floor about her own personal experiences and what she
14 witnessed?

15 A. Can you back up?

16 As I said, all politicians, you know, do shade the truth.
17 It's just the nature of the profession, the nature of the
18 operation, and that's why you need to interrogate what they say.
19 If you back up -- and these are Republican politicians trying to
20 muster support and justification for the bill; but, again, if
21 you back up to the meat of what is being said here --

22 MR. LEVESQUE: Can you scroll back up?

23 THE WITNESS: -- I'll tell you where to stop.

24 From my own experience, that paragraph.

25 This is typical of previous statements you showed me

1 and statements that I've cited in my report and testified about
2 that there's no specificity to this. *I have stories...* Well,
3 they don't -- this politician doesn't tell you any stories.
4 They just claim, you know, that there are these biases.

5 Nothing that I've looked at, and nothing that you've
6 showed me, has given any single specific example of any kind of
7 viewpoint suppression or indoctrination at any one of the 40
8 institutions of public higher education. We just get, you know,
9 from these politicians, you know, I've heard this, I've
10 experienced this, but never, ever anything specific to justify
11 this kind of legislation with the gotcha reporting provision
12 that FIRE pointed out with punitive measures, when it could have
13 been done in a totally different nongotcha, nonpunitive way.

14 BY MR. LEVESQUE:

15 Q. Well, Professor, when Representative Mariano is speaking on
16 the floor of the House, where her fellow House colleagues are
17 able to ask her questions or challenge her statements, wouldn't
18 you agree that that's a slightly different scenario and she's
19 likely to be more straightforward and more honest about what
20 she's saying versus at a campaign speech or on Facebook?

21 A. I wish that were true, but it's not. We saw that with
22 Senator Rodrigues, the prime sponsor, claiming there had been no
23 contact from faculty one way or another about this bill, when,
24 in fact, there had been this big resolution from the Council of
25 Faculty Senates.

1 They had met with an aid to Senator Rodrigues himself.
2 They had met with the chair of the House Higher Education
3 Committee. They had met with the chancellor.

4 We also saw that with respect to Senator Rodrigues claiming
5 that the survey was modeled on the survey at places like Chapel
6 Hill, University of Colorado, University of Nebraska, when it
7 could not have been more different from the surveys at those
8 other institutions.

9 So I wish what you said was correct, but it's not.

10 Q. Okay. And let's assume for the record that you are
11 correct. It's not possible that Senator Rodrigues maybe just
12 misspoke or was confused?

13 A. No. These were extended statements that Senator Rodrigues
14 made. This was not just a flippant, offhand statement. These
15 were lengthy statements that I quoted in the record in direct
16 response to questions being asked of them, and with -- that's
17 with respect to this idea that "no one has contacted me."
18 There's a lengthy discussion. He talks about having sponsored
19 bills for a long time. It was not an offhand, flippant
20 statement, you know, that he made a mistake on.

21 And with respect to his claims about modeling other
22 institutions, it was very detailed. He specified the
23 institutions on which it would be based which enabled me, in my
24 report, to go to the actual survey developed and implemented at
25 those other institutions to show there was no comparability to

1 what was being done here in Florida, which had, you know, a very
2 different approach.

3 Q. And so your recollection, and your testimony here this
4 morning, is that he testified that nobody had contacted him. It
5 wasn't -- no university presidents had contacted him about the
6 bill?

7 A. I think I have the actual statement here, and we can go
8 over it rather than just go through recollection.

9 Well, I don't have it right in front of me. I'd have to
10 find it. We can find it during the break, but it went beyond
11 just university presidents. He was asked specifically whether
12 you were contacted by, I think, anyone at these institutions,
13 and he said no.

14 Q. Okay. And in reviewing the legislative record, you also
15 looked at the legislative statements of purpose and intent that
16 were articulated by Senator Rodrigues and Senator Roach,
17 correct -- I'm sorry -- Representative Roach; correct?

18 A. Yes. And all those statements indicated their perceptions
19 that there is this liberal bias and indoctrination and they want
20 to stop it.

21 MR. LEVESQUE: Okay. If we could pull up Joint
22 Exhibit 10, lines 2 -- I'm sorry -- page 2, line 14 through
23 page 3, line 17.

24 BY MR. LEVESQUE:

25 Q. Are you able to see that, Professor?

1 A. Yes, I can now.

2 You want me to read it?

3 Q. Yes, sir.

4 A. Thank you.

5 Okay. I've read that part.

6 Q. Okay. And I think that'll actually be sufficient for my
7 questions.

8 At least in explaining the purpose of the bill there, you
9 see where he talks about the purpose of Senate Bill 264 is: *To*
10 *encourage intellectual freedom and viewpoint diversity in our*
11 *Florida College System and our state university system?*

12 Do you see that?

13 A. I see that. But as I said, you have to interrogate that,
14 and when I interrogated that, I found that Senator Rodrigues,
15 Senator -- excuse me -- Representative Roach, Governor DeSantis,
16 the Senate president, the speaker of the House, all began with
17 this preconception that Florida public institutions are rife
18 with liberal bias and liberal indoctrination and that's
19 something that we need to stop.

20 So, of course, they're going to justify the bill as
21 promoting these generally accepted values. That's why you got
22 to interrogate what politicians say.

23 Q. We'll get to that as well.

24 MR. LEVESQUE: If we could go to Joint Exhibit 8,
25 page 92, line 20.

1 THE WITNESS: This looks like the same thing we
2 discussed earlier.

3 Oh, okay. You got something else.

4 BY MR. LEVESQUE:

5 Q. Yes, sir, just give it one moment.

6 This is Representative Roach on February 17th in the
7 Florida House Post-Secondary Education & Lifelong Learning
8 Subcommittee closing on his bill.

9 MR. LEVESQUE: If we could center that so the
10 professor could read it.

11 THE WITNESS: You want me to read the part that's --

12 BY MR. LEVESQUE:

13 Q. Just one second. I think we're trying to get the part that
14 we wanted highlighted, highlighted for you.

15 A. Certainly.

16 Q. Are you able to read the highlighted text?

17 A. Starting with "Chair Mariano"?

18 Q. Yes, sir. On line 19.

19 A. I can.

20 Give me a moment.

21 Okay.

22 Q. If we go to the next page, page 93.

23 A. Okay.

24 Q. Okay. And do you see there where Representative Roach
25 talks about his purpose for the bill?

1 A. Yes. And, in fact, I think I quote a piece of that in my
2 report saying, you know, this is what, you know, the ostensible
3 justification was. But when you interrogate that and look at
4 what Representative Roach was actually expressing with his
5 viewpoint, I quoted, saying "to stem the tide of Marxist
6 indoctrination on university campuses."

7 And that's not the only time he said things like that.
8 Also, on page 90 of my report: *Freedom of speech is an*
9 *unalienable right, despite what Marxist professors and students*
10 *think. Students -- another quotation -- Students with more*
11 *conservative-leaning views feel like the overwhelming majority*
12 *of academia are left or far left, particularly the faculty. And*
13 *they've been penalized for this.*

14 So when you interrogate these statements, you see that
15 Representative Roach, as well as all of these other key
16 decision-makers, in fact, are not really starting from this
17 point, we're open-minded; we have preconceptions; we want to
18 conduct the survey to see what's valid. That's just not the
19 case.

20 Moreover, as I pointed out, if you wanted the survey to be
21 truly statistically valid, truly objective and truly
22 nonpartisan, you would have done like the other institutions did
23 and put into the requirements of the survey mechanisms for
24 ensuring that. Instead, this was to be formulated by
25 politically appointed bodies filled with Republicans and

1 conservative loyalists with no guidelines on how they do that.

2 And, not surprisingly, none of this was achieved.

3 Q. Thank you, sir.

4 I think we could agree that both -- I think we both agree
5 that Representative Roach disagrees with Marxists. What does it
6 mean "stem the tide"?

7 A. I think in light of not just that statement, but the
8 several other statements that he --

9 Q. I'm only asking -- I'm only asking about the phrase "stem
10 the tide."

11 What does that mean?

12 A. It means to stop what he believes is this domination and
13 indoctrination by Marxist professors. Now, it's not clear, of
14 course, what he means by Marxist, but, of course, that is a very
15 hot button code word.

16 Q. Professor --

17 A. Let me finish.

18 Q. Well, I only asked about stem the tide, and you answered my
19 question on that.

20 A. Well --

21 Q. It doesn't mean obliterate, does it?

22 A. It means stop it, absolutely. And you can't separate it
23 from the whole phrase. You said, "What does it mean to stem the
24 tide of Marxists?"

25 Q. Well, it's -- "stem the tide" is an expression, is it not?

1 A. And I think it's a pretty clear expression. When you stem
2 the tide, you stop it.

3 Q. You don't obliterate the ocean, do you? The ocean is still
4 there. You just shift the direction; correct?

5 A. No. You -- no. I think it's pretty -- I don't know what
6 you mean by how you would shift the direction of Marxist
7 indoctrination. He wants to stop it. And it's consistent with
8 everything else that he is saying.

9 And as I indicated, you know, Marxism, Marxist is this, you
10 know, very hot button words which implies that these professors
11 are communists, but --

12 THE COURT: Y'all can move on beyond the semantics.
13 You're both right. Stem the tide can mean to attempt to stop or
14 avoid a prevailing trend. It could actually mean both things.
15 You'd have to look at it in context.

16 So I don't mean to cut people off, but y'all can argue
17 about semantics on your own time. I know what stem the tide can
18 mean, and it has multiple meanings.

19 MR. LEVESQUE: Thank you, Your Honor.

20 THE COURT: And I believe Webster's agrees with me.

21 MR. LEVESQUE: If we could pull up Joint Exhibit 14,
22 page 16, line 18.

23 BY MR. LEVESQUE:

24 Q. Professor, what I'm going to show you is the March 10th
25 Florida House Education and Employment Committee transcript.

1 A. Okay.

2 THE COURT: One second. Before I forget, Doctor, who
3 was it that used the phrase -- and I'm not talking about Joseph
4 Goebbels. I'm talking about in this record. Who was it that
5 used the word "infestation"?

6 THE WITNESS: I'm not sure the word -- let me look.

7 There have been lots and lots of --

8 THE COURT: What exhibit was it?

9 MR. HANCOCK: It's reflected in Exhibit 11C, and it's
10 a statement by former Commissioner Richard Corcoran.

11 THE COURT: We answered the question -- oh, that must
12 be Plaintiffs' 11C, not Joint 11C?

13 MR. HANCOCK: Exactly, Your Honor.

14 THE COURT: I've got it.

15 You don't need to look it up, Professor. We found it.

16 THE WITNESS: Okay.

17 THE COURT: You were able to phone a friend, and
18 Mr. Hancock responded.

19 THE WITNESS: Thank you.

20 All right. You're asking me to read something here?

21 THE COURT: Hold on.

22 It's been an hour and a half. Tell him what you want
23 him to read, and he can read it while we're on break.

24 BY MR. LEVESQUE:

25 Q. Professor, if you could look at Joint Exhibit 14, line

1 16 -- I'm sorry -- page 16, line 18 through page 18, line 4.

2 A. You've got something in front. Are we on break or are we
3 still --

4 THE COURT: You're going to get it in front of you,
5 and then we're going to take a break.

6 THE WITNESS: All right. So I'm going to respond to
7 this exhibit, and then we'll take a break? Fine.

8 MR. LEVESQUE: Professor, I think what the Court would
9 like to do is for you to read it while we're on break.

10 THE WITNESS: That's fine, whatever the Court wants.

11 THE COURT: And you can take a break, too, sir.

12 So right after you take your break, come back, you can
13 read it, and we'll go back on the record.

14 THE WITNESS: How long a break?

15 MR. LEVESQUE: Yes, sir.

16 THE COURT: Ten minutes.

17 MR. LEVESQUE: We will break now.

18 I don't know if your mic is on, sir.

19 THE COURT: Ten minutes.

20 THE WITNESS: How long is the break?

21 MR. LEVESQUE: Ten minutes.

22 THE COURT: Mr. Hancock, did you say 11C?

23 MR. HANCOCK: Yeah, Plaintiffs' Exhibit 11C.

24 THE COURT: That's a table.

25 MR. HANCOCK: Yeah. I believe Row 5 references it.

1 This is when it was discussed yesterday.

2 THE COURT: Oh, oh, oh, oh.

3 MR. HANCOCK: And --

4 THE COURT: And it was infested, not infestation.

5 Although "infested with" would, by any definition, equate to
6 infestation.

7 I've got it. We don't need to argue over the
8 semantics with that.

9 MR. HANCOCK: Thank you, Your Honor.

10 THE COURT: Either way, it's a racial trope.

11 Court is in recess.

12 (Recess taken at 10:08 AM.)

13 (Resumed at 10:22 AM.)

14 THE COURT: Yes, sir.

15 MR. HANCOCK: I wanted to provide the information
16 Your Honor requested previously.

17 I know we were looking at Plaintiffs' Exhibit 41,
18 which is a March 9th email attaching the Advisory Council of
19 Faculty Senates' resolution. And then there is a statement
20 we've been discussing today and yesterday in the legislative
21 history. This is Joint Exhibit 15, which is the Senate session
22 on people first, 2021. And this statement in particular starts
23 at page 12 --

24 THE COURT: Hold on one second.

25 MR. HANCOCK: Sure.

1 THE COURT: I'm sorry. It's 41; correct?

2 MR. HANCOCK: Plaintiffs' Exhibit 41.

3 THE COURT: I'm just trying to mark it all together.
4 So it's page what?

5 MR. HANCOCK: And then from the transcript, that would
6 be Joint Exhibit 15, page 12.

7 THE COURT: And what lines?

8 MR. HANCOCK: It starts at line 12 and runs onto the
9 next page to line 6.

10 THE COURT: *So all of our colleges, all of our*
11 *universities here in the state of Florida, not one of them have*
12 *chimed in to say this is a great idea, or this is an awful idea?*
13 *Not one of them?*

14 *Thank you, Mr. President.*

15 *And the answer to that would be no, but in order to*
16 *provide some context, I've been running higher education bills*
17 *for the last eight years. Many of the bills, things that they*
18 *wanted and supported such as the increase of Bright Futures,*
19 *et cetera --*

20 THE WITNESS: I'm back.

21 THE COURT: *-- the individual presidents reached out*
22 *to me and asked me to do that in legislation. So the fact they*
23 *have not reached out to me on this legislation from my*
24 *perspective is no different than any of the other higher*
25 *education I've run in the past.*

1 MR. HANCOCK: Yes, Your Honor.

2 And one of the critical details in that timeline is in
3 between March 9th and April 1st, the Advisory Council of Faculty
4 Senates held a meeting on March 26th, and their public agenda,
5 which they're all posted on the Board of Governors' website,
6 reflects the attendance of staffers from Senator Rodrigues's
7 office and Representative Asencio and specifically identifies
8 that concerns regarding Senate Bill 264, the counterpart to
9 House Bill 233, were discussed with those legislative
10 representatives.

11 THE COURT: Y'all can -- and Mr. Levesque will have a
12 different view of it, arguably, but we can address that later.
13 But you did what I asked, which is identify the exhibit.

14 Thank you.

15 One moment, please.

16 (Pause in proceedings.)

17 THE WITNESS: Are you asking me questions now about --

18 THE COURT: Not yet. One second.

19 Before we go back on with the witness, let me ask
20 counsel, Mr. Hancock, where did you believe we would be at in
21 terms of the process at this point? And, in other words, are
22 we -- how far behind are we running?

23 MR. HANCOCK: In terms of time, Your Honor?

24 THE COURT: Yeah.

25 MR. HANCOCK: It's difficult to say. I think we

1 expected that the remainder of Dr. Lichtman's time would take
2 up, if not all the way to lunch, within an hour of lunch.

3 THE COURT: Well, I meant before we started yesterday,
4 did you expect him to be on all day yesterday?

5 MR. HANCOCK: It was a possibility. The schedule
6 shifted a bit, but we'll manage.

7 THE COURT: All right. Just trying to do housekeeping
8 and find out.

9 All right. Thank you.

10 Mr. Levesque, you may proceed.

11 Doctor, you are still under oath.

12 THE WITNESS: Yes. Were we going back to this
13 statement that I quoted from Senator Rodrigues about being
14 contacted? I had heard some --

15 (Indiscernible crosstalk.)

16 BY MR. LEVESQUE:

17 Q. No, sir. No, sir. Where we are going is we are going back
18 to the statement that is on the screen --

19 A. Oh.

20 Q. -- by Representative Roach in the Florida House Education
21 and Employment Committee on March 10, 2021.

22 A. Oh, I thought I'd heard something about -- the comment
23 about being contacted in response to Senator -- to the question,
24 but we're not. We're going to this; okay.

25 Q. Yes, sir.

1 A. No problem.

2 Q. So you had the ability to review that statement. And do
3 you recall in that statement Representative Roach indicating
4 that the survey in the bill was not about encouraging or
5 discouraging any particular viewpoint?

6 A. Yes. And we've been through this many, many times. Of
7 course, that's, you know, the claim that's being made, but
8 through at least now three quotations from Spencer Roach,
9 quotations from all the other key decision-makers, that's not
10 the approach that they were taking. The approach that they were
11 taking was that there is this indoctrination that needs to be --
12 however you want to put it; stem the tide, roll it back, combat
13 it, stop it. That's what their concern was, not open-mindedly
14 to find out what is going on.

15 Q. But you would agree that those are statements that are made
16 contemporaneous with the event and maybe a little more probative
17 on the issue of what they meant at that particular time?

18 A. Absolutely not. The other statements that I've cited were
19 also made contemporaneously and contradict, you know, what
20 obviously they are going to present as a public face here.

21 Q. And do you recall Representative Roach indicating that he's
22 not asking any member to make a policy statement at this time in
23 passing House Bill 233?

24 A. Let me see.

25 Q. Scroll down a little bit.

1 A. It should -- I don't recall that exactly. I don't know
2 what he means by that: *I'm not asking you to make a policy*
3 *decision*. Of course he is. He's asking them to adopt this
4 policy. I don't quite understand what the significance of that
5 is. And, of course, they're making a policy decision.

6 Q. But from the standpoint of changing things in higher
7 education to battle Marxism or right the wrongs that they might
8 perceive, they're not doing that in House Bill 233, are they?

9 A. Absolutely, they are. Of course, he's saying they're not.
10 You know, he's going to say -- and, you know, I start my whole
11 section of my report on contemporary statements by saying -- you
12 know, citing this claim that, you know, it's all open-minded;
13 we're not asking you to go one way or the other, which is
14 contradicted by seven or eight, you know, at least statements by
15 key decision-makers what they're really all about.

16 And, you know, I understand by itself all of these
17 subsequent, not just statements, but actions of these same
18 Republicans in the legislature, you know -- and I went through a
19 whole litany of them -- also confirms what they were saying
20 contemporaneously, that we believe that the institutions are
21 dominated by Marxists or leftists.

22 President Senator Wilton Simpson called them socialism
23 factories. Republican House Speaker Christopher Sprowls talked
24 about a roving band of Twitter Robespierre who scours social
25 media looking to ruin the careers and livelihoods of people.

1 He goes on to say they are aided and abetted by weak
2 university administrators and cowardly corporate executives who
3 lack the moral courage to push back against a mob or distinguish
4 right from wrong.

5 I mean, we can go on and on and on with all of these
6 statements. These -- our key legislators are not approaching
7 this in this supposed open-minded fashion. They have very, very
8 powerfully stated views on this, which are then validated by all
9 the things these same legislators do subsequent to HB 233.

10 Q. Thank you, sir.

11 MR. LEVESQUE: And we'll pull up Joint Exhibit 7,
12 page 7, line 8 through page 10, line 21.

13 THE COURT: Before you move on, Doctor, just out of
14 interest -- because it may just show a lack of education or it
15 may have been a specific statement -- who, rather than talking
16 about racists, and so forth, decried Robespierre as being --

17 THE WITNESS: I'm sorry. You kind of blipped out.
18 Are you asking me who decried --

19 THE COURT: Which of the speakers was complaining
20 about -- I thought you just said they also talk not just about
21 communists and socialists, but Robespierre who, of course, was a
22 French revolutionary. Did you say that, or did I mishear you?

23 THE WITNESS: Yes, that was stated by Republican House
24 Speaker Christopher Sprowls and Republican State President
25 Wilton Simpson called "University Socialism Factories."

1 And, of course --

2 THE COURT: Was there any elaboration on Robespierre,
3 why he didn't like him, other than the fact that he was an
4 advocate for inclusion of people of color in the Caribbean and
5 French Colonies? Was there any explanation about what it meant
6 to be a Robespierre?

7 THE WITNESS: Yeah. I think he also alludes to
8 Robespierre because Robespierre was this rigid ideologue who --

9 THE COURT: I've got it. No problem. I just was
10 confused. I thought it might have been his position on
11 inclusion of people of color in the Caribbean.

12 But go ahead.

13 THE WITNESS: Well, that could be part of it, too, but
14 I think it's really his -- you know, what I just said.

15 THE COURT: Counsel, you may proceed.

16 MR. LEVESQUE: Thank you.

17 BY MR. LEVESQUE:

18 Q. Professor, I'd like you to look at what Senator Rodrigues
19 said in the January 26th Florida Senate Committee on Education
20 meeting when he was describing the survey, starting on page 7,
21 line 8.

22 A. That's a little small, but I can read it.

23 MR. LEVESQUE: Can you make it bigger?

24 THE WITNESS: I can read it. It's all right.

25 I've read to this point, if you want to scroll down

1 more.

2 I've already seen this part, but there seems to be
3 more to it that you highlighted.

4 MR. LEVESQUE: Scroll to page 8, line 19.

5 THE WITNESS: Do you want me to comment?

6 MR. LEVESQUE: Not quite yet.

7 If we can go to page 9 up through line 8.

8 THE WITNESS: Is this where he asks -- I only see a
9 little piece of it. Okay. Can you scroll up, because it looks
10 like I see a half sentence on page 9 that started on page 8?

11 I don't see anything now.

12 THE COURT: While he's doing that, Mr. Levesque, I was
13 reviewing the record. And you probably have been more precise
14 than I have in terms of reading every sentence at this juncture.
15 So I focused on what y'all have pointed out.

16 But does anybody -- I'm aware of what goes on in this
17 courthouse and lawsuits, but since -- in 2000 -- the fall,
18 immediately before the legislative session that generated
19 HB 233, the Senate student -- I believe it was an FSU Senate
20 president was ousted because he offended Black Lives Matter and
21 the ACLU and other groups.

22 Was that -- since that, then, was being settled and
23 litigated during the middle of this session, was that something
24 that came up as part of this discussion about there being an
25 issue of people being silenced. Because it was so

1 contemporaneous and it was going on here at the capitol, I
2 wondered if it came up in the legislative record.

3 MR. LEVESQUE: There was not a discussion in the
4 legislative record that I can recall on that particular point.
5 The bill analyses for the House and the Senate, I believe, both
6 sort of make reference to that case and --

7 THE COURT: And you said the analysis, because I asked
8 that earlier. I think it was -- no.

9 THE WITNESS: I don't recall any reference in the
10 legislative record either, other than just a citation in the
11 bill analysis.

12 THE COURT: That's No. 5; correct?

13 MR. LEVESQUE: It may be. We've also, I believe -- I
14 think the bill analysis might be in Exhibits 42 and 43 as well.

15 THE COURT: Okay.

16 MR. LEVESQUE: Joint Exhibits 42 and 43.

17 THE COURT: If you could let me know later where it's
18 at, because that's something that's presented and prepared in
19 all the -- and I think it's -- everybody would agree that's
20 something that all the legislators have access to; correct?

21 MR. LEVESQUE: Correct.

22 THE COURT: If you could point that out to me, because
23 I was just shocked it wasn't mentioned since it was such a
24 high-profile issue at the time.

25 MR. LEVESQUE: Well, and -- from the framework of a

1 shielding analysis, we didn't see that as being appropriate. We
2 certainly saw it as being, you know, an operation of cancel
3 culture. And there are the other provisions in House Bill 233
4 that deal with both student groups and beef up the
5 administration's ability to check a student government run
6 amuck.

7 THE COURT: I understand it's not directly related,
8 but it's responsive to my question about were the legislators
9 voting on HB 233 completely divorced from what was going on in
10 the broader context. That's why I asked that question. And
11 you're saying, Judge, no, they weren't, as evidenced by
12 references to that type of thing in the analysis?

13 MR. LEVESQUE: Yes, Your Honor.

14 THE COURT: I understand.

15 THE WITNESS: I don't see anything. Whatever you were
16 showing me is no longer on the screen. I'm just seeing a blank.

17 BY MR. LEVESQUE:

18 Q. Yes, sir, just one moment.

19 A. No problem. I'm not going anywhere.

20 Q. To expedite things while my associate is recovering his
21 laptop, let me show you what we've got here.

22 I believe this was the question --

23 A. Ah, there it is. I can see it. Senator Thurston?

24 Q. Yes, sir.

25 A. All right. I'll start reading from there. I think I

1 actually quote this exchange in my report, so I think I'm
2 familiar with it. But I want to read it to refresh.

3 Okay. You can move on.

4 How far do you want me to read?

5 Q. Just Senator Rodrigues' response to the question.

6 A. Yeah, I quote this and comment on it in my report. Sure,
7 I'm ready to answer questions about it, although I can't see it
8 anymore.

9 Q. You would agree that the legislature asking for more
10 information before they make policies is a good thing, is it
11 not?

12 A. You know, as a generic rule. But as I explained in my
13 report and I think I testified about yesterday, the survey
14 doesn't do that. The survey cannot come up with any individual
15 examples of -- whatever it is -- suppressing conservative or
16 limiting conservative thoughts because it just asked these
17 general generic questions about, you know, conservative or
18 liberal, you know, based on the fundamental fallacy that I
19 pointed out.

20 If you actually want to find out what's actually going on
21 in the classroom or elsewhere, then you have my alternative
22 plan, much less discriminatory, much less punitive, where you
23 actually talk to students, talk to faculty, talk to
24 administrators, actually find out what's going on in the
25 classroom and in the institution. The survey does none of that,

1 even if you presume, which it isn't, it's nonpartisan,
2 objective, and statistically valid.

3 Q. Professor, let me see if I can save us a little bit of time
4 here.

5 Would it be fair to say that those statements explaining
6 why the members were doing the bill when they were made in the
7 legislative process -- that you did not credit those statements,
8 and you relied on all of the other statements as the basis for
9 your opinion?

10 So where they -- for example, where they explain that:
11 *We're not trying to push any particular type of view; we want*
12 *all viewpoints to be presented*, that's not a statement you
13 credit, whether it was made by Representative Roach, whether it
14 was made by Senator Rodrigues, or whether it was made by any
15 other member voting on the floor of the House or the Senate;
16 correct?

17 A. I'll have to say it in my own words because you didn't
18 quite get me correctly.

19 What I said was what a historian does or political
20 analysts -- and I do both -- when -- we know, you know, every
21 politician is self-serving, you know; whether they outright lie,
22 they certainly present things in the most favorable way, stretch
23 and shade the truth.

24 So when you have a statement being made, particularly in a
25 self-serving context like this -- we're trying to get a bill

1 passed and get approval -- you've got to interrogate it; you've
2 got to look at whether it is, in fact, pretextual, misleading,
3 disingenuous. That's why you have to go beyond the surface.

4 And I looked at other statements made by these same
5 individuals at the same time. It's not like I, you know, went
6 five years later to see what they were doing. And then I also
7 looked at what these same legislators were doing with respect to
8 education and free speech in a great variety of contexts that
9 also contradicted the surface claims of what they were saying.
10 This is absolutely standard practice in my profession.

11 Q. Thank you, sir.

12 Did I understand your testimony to be that the Republican
13 legislature did not receive any input from the public on House
14 Bill 233?

15 A. No, I don't think I said it didn't receive any input from
16 the public. I think what I said -- and you can look at my
17 report on that -- was they didn't draw upon expertise, academics
18 to validate not just their ideas about what's about going on in
19 colleges and universities, but the whole design of the bill.

20 Q. But they did receive input from stakeholders; correct?

21 A. Yes, which roundly criticized the bill. And as I said,
22 Senator Rodrigues kind of dodged around that question when he
23 was asked whether they received any input from any of the
24 colleges or universities. They had, and it was a very negative.

25 Q. Do you recall if Senator Rodrigues or Representative Roach

1 made changes to the bill as a result of the feedback they got
2 from stakeholders in the university system?

3 A. I don't recall. You'd have to show me.

4 Q. So, at least, as you sit here today and offering your
5 opinions, you don't recall the testimony of Matthew Lata from
6 the FSU Chapter of the United Faculty of Florida testifying to
7 the Florida State Committee on Education on January 26th, do
8 you?

9 A. I do recall Matthew Lata -- I think I quote from him --
10 questioning the -- questioning the purpose and design of the
11 survey, you know: How is it going to be developed and
12 implemented? What is it going to be used for? And I don't see
13 any of those issues being responded to in the way that the
14 survey was set up. And, you know, we've been over that many
15 times.

16 Q. Do you recall Yale Olenick with the FEA, Florida Education
17 Association, also testifying to that same committee?

18 A. I don't recall the details of that testimony. I do the
19 latter testimony. But if you show it to me, I can respond.

20 Q. Sure. What about -- and I'm just looking to understand
21 whether that was information that was considered in your
22 opinions.

23 Benjamin Serber with the FSU Graduate Assistants United, do
24 you recall his testimony?

25 A. I don't.

1 Q. And that was nothing that you cited in any of your papers,
2 is it?

3 A. That's correct. I cite a lot of information from faculty,
4 including the Council of Faculty Senates which represents the
5 faculty across all of the universities, which I think is
6 probably the most representative. I did quote Professor Lata.
7 I quoted other professors as well. But I don't recall -- I
8 didn't cite every single commentary, no.

9 Q. Do you recall Krystal Williams with the United Faculty of
10 Florida, FAMU, Graduates Assistants United testifying to that
11 same Florida State committee?

12 A. I don't recall.

13 Q. And as to the House, the House also heard from Mr. Lata,
14 Mr. Olenick, and Ms. Williams at the February 17th House
15 Post-Secondary Education & Lifelong Learning Subcommittee?

16 A. Yeah. I recall the latter testimony. I don't recall the
17 others.

18 Q. Were you aware that this is not the first year that
19 Senator Rodrigues filed this bill?

20 A. Yes. And I talk about that in the sequence of events, that
21 I explained why it wasn't -- didn't get through the Senate in
22 2019. But what changed was the election of Governor DeSantis,
23 who's already on record as criticizing the academia for
24 left-wing bias and indoctrination and indicating if taxpayer
25 money is being devoted, we can do something about it, and then

1 the new composition of the Senate and the retirement of
2 Senator Bradley.

3 Q. Do you recall when Governor DeSantis was elected?

4 A. 2018.

5 Q. And so his first session would have been 2019; correct?

6 A. That is correct.

7 Q. If Governor DeSantis was such a big supporter of the bill,
8 how come that bill didn't pass in 2019?

9 A. I think because of the composition of the legislature,
10 which was less amenable than later on to the views of
11 Governor DeSantis. Plus, he had just become governor. His
12 power and his influence, of course, would extend over time.

13 Q. Well, in 2020, the bill didn't pass either, did it?

14 A. It only passed in 2021.

15 Q. In 2019 and 2020, what legislative chamber was
16 Mr. Rodrigues in?

17 A. Senate.

18 Q. And so in 2019 and 2020, Senator Rodrigues was in the
19 Senate?

20 A. Oh, I think -- I think that may not be correct. I'm trying
21 to recall. He may have become a Senator in 2020. That's very
22 possible. You know, it's a matter of public record, but I think
23 that's right.

24 Q. So in 2021, that would have been the first year that the
25 primary advocate for this idea was no longer in the House but in

1 the Senate; correct?

2 A. If that's correct -- and I think it is; that's my
3 recollection -- I'm not going to argue with you.

4 Q. Couldn't that also be a significant motivating factor into
5 why that bill passed in 2021?

6 A. I'd have to look at it. As a freshman senator, it's not
7 clear that that freshman senator would necessarily be key to the
8 passage of the bill. The evidence that I've looked at,
9 including two statements from decision-makers, indicates that
10 the critical thing was the change in the composition of the
11 Senate and the retirement of Senator Bradley.

12 Q. Were you aware that Senator Rob Bradley was succeeded by
13 his wife, Senator Jennifer Bradley?

14 A. Yes, I'm well aware of that. I think she's still in the
15 Senate.

16 Q. She is.

17 Do you think his presence or influence in the Senate was
18 completely erased when he left office?

19 A. I wouldn't say completely erase. But, you know, a veteran
20 senator, chairman of the Appropriations Committee, certainly has
21 a lot more influence and clout than a newly elected freshman
22 senator.

23 Q. And she was the one lone vote on the bill that Senator Rob
24 Bradley had managed to never have come up for a vote in the
25 Senate; correct?

1 A. I didn't see a question there.

2 What was the question?

3 Q. Were you aware that Senator Jennifer Bradley was the lone
4 Republican vote on HB 233 that voted no?

5 A. That's quite possible. I don't recall who it was, but,
6 yeah, I won't argue with that.

7 Q. And it's your understanding that the prior versions of
8 House Bill 233, its predecessors, never actually came up for a
9 vote on the floor of the Senate; correct?

10 A. I think that was blocked. I think that's right.

11 MR. LEVESQUE: If we could pull up Plaintiffs' Exhibit
12 375?

13 If we can make that a little bit bigger and scroll to
14 the --

15 BY MR. LEVESQUE:

16 Q. Professor, are you able to see that email?

17 A. Yes.

18 Q. And do you recognize that email as an exhibit that was
19 shown to you yesterday?

20 A. Yes.

21 Q. And in that first email, you see where it indicates that:
22 *The House bill had already passed?* Do you see that?

23 I'll try to highlight it there.

24 A. Yes, I see it.

25 Q. So at least in relation to the House, the House had already

1 passed that bill and was no longer in a position to make any
2 changes to it; correct?

3 A. I'm not familiar enough with the rules to know whether
4 there could have been any modifications. You could have had,
5 for example, a companion bill come up to the Senate -- from the
6 Senate. It then goes to the Conference Committee, and you do
7 make modifications. So I don't think it's quite true that it's
8 hermetically sealed off from any possible modifications.

9 Q. But at that time the House had already passed the House
10 bill over. I'm not suggesting they that wouldn't be able to
11 make changes to it at the Senate and send it back. But the
12 House can't do anything more with it because they've given it to
13 the Senate to do with as they will; correct?

14 A. At the moment, yes, but certainly there would be opening to
15 changing it later.

16 MR. LEVESQUE: Okay. If we could scroll to the top?

17 BY MR. LEVESQUE:

18 Q. Now, this email from Joshua Smith was sent to
19 Senator Rodrigues and his staff.

20 Are you aware of any indication that this email was
21 actually shared -- or the article that is linked was actually
22 shared with Representative Roach?

23 A. Representative Roach? This was directed to
24 Senator Rodrigues.

25 Q. Yes, but --

1 A. I don't -- yeah. I don't know about this particular email,
2 but I do know that FIRE very publicly criticized aspects of
3 HB 233 during the process. Whether this particular criticism
4 was shared with specifically Representative Roach I can't say.

5 Q. And that answered -- that answered my question.

6 So we're not aware one way or another whether the House
7 ever had access to FIRE's concerns about House Bill 233, are we?

8 A. Well, they publicly issued statements critical of HB 233 in
9 several contexts that I quote in my report during the process.
10 I can't guarantee to you that -- we know the Senate had access
11 here because of this email. I can't guarantee to you that the
12 House did. But as we saw -- I forget who it was -- but the
13 rep -- the advocates for HB 233 drew upon FIRE's surveys and --
14 so it would be reasonable that they would be attuned to what
15 FIRE has to say.

16 And, by the way, I was able to check up on that so-called
17 analysis by FIRE of free speech policies at Florida public
18 institutions, Florida universities, and I --

19 Q. I don't have -- I don't have a question on that right
20 now --

21 A. Oh, okay.

22 Q. -- sir.

23 A. Fine. No problem. I'm done then.

24 Q. You were aware, though, that FIRE had actually thought that
25 the survey provision was a good thing; correct?

1 A. I think their main objections, and they were very strong,
2 were to the shielding and recording provisions. I don't think
3 they criticized the survey per se. I think that's right. But I
4 don't think they went into depth in analyzing the survey
5 provision, as I recall.

6 Q. Do you recall them also speaking favorably about other
7 provisions of House Bill 233 such as the provisions that created
8 stronger due process rights for student groups?

9 A. That may be so. I don't recall that, but that may be so.
10 So you'd have to show it to me.

11 Q. Okay.

12 MR. LEVESQUE: If we could bring up FIRE's website
13 where they do the surveys.

14 THE COURT: And, Counsel, you're talking about the
15 provisions in Section 1004.26, which I believe was what you were
16 saying where they were addressing student government and so
17 forth in response to the case I referenced? That's an example
18 of what you were just talking about?

19 MR. LEVESQUE: Yes. I know it by Section 4 and
20 Section 5 of the bill, but that, I believe, would be the
21 provisions that were amended.

22 THE COURT: The one I was alluding to was sub (d) of
23 one of the provisions of House Bill 233.

24 MR. LEVESQUE: That sounds correct.

25 THE COURT: Okay. Fair enough.

1 THE WITNESS: I think that's right, too.

2 Yeah, I don't dispute that.

3 THE COURT: Section 4, I believe, of House Bill 233,
4 sub (d). It doesn't matter, but I think -- that's why I asked
5 you earlier, because that was my memory in reviewing the record.

6 MR. LEVESQUE: One moment, Your Honor.

7 (Pause in proceedings.)

8 BY MR. LEVESQUE:

9 Q. Professor, while that's coming up, you saw the initial
10 page.

11 Do you recognize that website?

12 A. Yes.

13 Q. And FIRE is one of those that -- one of those organizations
14 that you referenced yesterday that cited favorably several
15 Florida University institutions; correct?

16 A. Correct. They had them ranked -- I think I looked at two
17 FIRE surveys that had at least one of the institutions ranked
18 within the top ten or even the top five.

19 Q. If you'll give us just one moment.

20 A. Sure.

21 Q. Okay. Professor, can you see that on your screen?

22 A. Yes. What year is this?

23 Q. This is 2023.

24 A. Yeah. I didn't look at 2023. I looked at the surveys at
25 the time that HB 233 was adopted.

1 Q. Okay. In terms of what you see there, Florida State is
2 doing a pretty good job, aren't they, according to FIRE?

3 A. How many universities have they looked at here?

4 Q. We can scroll down because I don't believe every university
5 in Florida is included, but --

6 A. No, no. I don't want to ask that. I want to know how many
7 universities they have actually surveyed.

8 MR. LEVESQUE: We can scroll up to the top.

9 BY MR. LEVESQUE:

10 Q. What they've described is --

11 MR. LEVESQUE: If we can scroll to the top.

12 BY MR. LEVESQUE:

13 Q. They've described it as a survey of top-ranking
14 universities.

15 A. Right. But how many?

16 Q. 203.

17 A. Okay. And you can see these on the bottom, including, you
18 know, some have poor rankings; right?

19 Q. Yes, sir.

20 A. I see that.

21 Q. And --

22 A. It's 203 total.

23 Q. Correct.

24 MR. LEVESQUE: And if we can scroll to just the
25 Florida universities.

1 If we can make Florida State a little bit smaller so
2 we can see the rest of them.

3 BY MR. LEVESQUE:

4 Q. And those are the six universities from Florida that they
5 looked at as top ranking universities of the 203.

6 And you can see --

7 A. Correct.

8 Q. -- there's quite a --

9 A. One of the -- hold on.

10 Of the six, one of them is private, so there are only
11 five --

12 Q. Public universities, that's correct.

13 A. -- public universities.

14 Q. So you can see there's quite a spread from Florida State
15 University, a public university, with an overall ranking of
16 65.54 and an above-average score on speech climate as compared
17 to University of Central Florida that has a below-average
18 ranking and only ranks 33.64 with an overall score according to
19 FIRE; correct?

20 A. In 2023, and that's the only public institution below
21 average.

22 Q. And the others are just average, though, except for FIU
23 that is slightly above average; correct?

24 A. Incorrect.

25 Q. What is incorrect about that statement?

1 A. You left out Florida State, which is not slightly above
2 average, but is above average and in the top very few percent of
3 the 203 institutions.

4 Q. Fair point well made, Professor.

5 But FIRE is an organization that you relied on; correct?

6 A. Yes and no.

7 What I said was that this was an institution cited by the
8 Office of the Governor and by your expert, and neither had
9 actually looked at, at the time of the adoption, where
10 institutions ranked in Florida on FIRE, and I found that both
11 the University of Florida and Florida State at that time were
12 ranked much higher.

13 So it wasn't that this was something I affirmatively did.
14 This was a response to what defendants were doing, and at the
15 time of the adoption, University of Florida and Florida State
16 were very highly ranked.

17 Q. But you did reference the fact that FIRE had ranked several
18 universities high on free speech rankings as a favorable thing
19 and a justification for why the legislature shouldn't take any
20 action; correct?

21 A. Yes and no.

22 What I did was I said the defendants had cited general
23 national results, but they did look at Florida results, and when
24 you looked at Florida results, at the time of the adoption --
25 and I don't know whether -- you know, how they analyze this has

1 changed -- the two universities they looked at, the flagship and
2 Florida State, were ranked, at least on one survey or the other
3 survey, very, very highly.

4 THE COURT: Doctor, did they rank higher at the time
5 it was passed or vis-a-vis the one that's currently displayed?

6 THE WITNESS: At the time they were passed. I did not
7 look at --

8 THE COURT: No, where were they ranked? Now they're
9 ranked 15 and 104th, the University of Florida. Do you know
10 where they were ranked at the time?

11 THE WITNESS: At least in one of the other surveys
12 they were ranked 7th, 5th and 2nd.

13 THE COURT: Okay. According to this survey, I guess
14 FIRE interviewed 251 students at UF to determine the climate of
15 free speech at UF.

16 Do you know how many students were there? It may have
17 shrunk since I was there. There were about 50,000 when I
18 graduated. Do you know how big it is?

19 THE WITNESS: I'm sorry. I couldn't hear that.

20 THE COURT: I apparently failed in modeling statistics
21 and surveying and didn't get the kind of education I should have
22 gotten at UF.

23 If there's 50,000-plus students at UF and they
24 interviewed 251 to get this ranking, based on what you do for a
25 living and numbers, should I care that that's what 251 people

1 said? Is there any value in that?

2 THE WITNESS: No value whatsoever if that's the case.
3 The -- what we call the standard error is going to be so large
4 as to invalid -- if you notice, the difference between above
5 average and slightly below average is, you know, 20-some-odd
6 points. The standard error could easily explain any of these
7 variations.

8 And, remember, I was not affirmatively, you know,
9 citing these studies. Rather, I was saying if you are going to
10 use these studies as justification -- which defendants were
11 doing -- national results are not applicable to Florida. You
12 got to look at what Florida -- what they're saying about
13 Florida, and Florida is ranking very highly.

14 I've not looked at this 2003 study, but if you're
15 right, if they're only looking at 250 students out of 50,000,
16 there is no statistical validity to it whatsoever.

17 THE COURT: Although, Mr. Levesque, I don't think -- I
18 want to be -- I don't think that was your point. I think your
19 point was that, Judge, if you're saying we're listening to these
20 groups, and these groups are saying that, yes, you've done well,
21 but it also shows a wide gap, that's one of the things the
22 legislators were looking at and would explain why they think,
23 well, we have an issue to address, because there's a wide
24 variation, or is that not what you were --

25 MR. LEVESQUE: No. I think that's correct. I

1 think -- I don't think you're going to say -- see anywhere in
2 the legislative record this idea that there's a bunch of bad
3 stuff going on out there. I think there certainly is the
4 implication that there might be some bad stuff going on out
5 there based upon the anecdotes that we hear.

6 But to say that, you know, every institution -- nobody
7 said every institution is failing on this issue. I think what
8 they were looking to do is put in place a framework so that
9 everybody knew what they were supposed to do.

10 THE COURT: And I understand that. I guess what I
11 meant, from my perspective as a fact finder, if this is
12 something I'm looking at that the legislators who voted on
13 HB 233 looked at, I would be thinking, Well, if we've got such a
14 gap in rankings in our school, we're doing things differently,
15 why is that, and that would justify, potentially, my belief that
16 we need to be proactive in taking action if there's such a wide
17 range.

18 And when -- assuming they credit this organization,
19 FIRE -- there's such a wide range in how our schools are pairing
20 out, you know, it isn't Shangri-La. It isn't perfect. We
21 aren't doing as good a job as we should on free speech, as
22 evidenced by the wide range in our rankings of the schools.

23 So to the extent this is something as the fact finder,
24 Judge, you believe that was before the legislature that they
25 could have looked at and considered, that would support the idea

1 that maybe this is something we need to look at. It's not as if
2 Florida, for example, in these rankings were the top five
3 consistently year after year after year and FIRE was praising UF
4 as the model for the nation on open and free speech. If there
5 is a range, that would support your view about why they would be
6 proactive; correct?

7 MR. LEVESQUE: Not just if there was a range but also
8 if you had universities that were in the bottom.

9 THE COURT: I understand.

10 THE WITNESS: But the legislature would not have seen
11 this. This is a 2023 --

12 THE COURT: This was after the fact. That's why I
13 asked him. Y'all can direct me later to what was presented.

14 MR. LEVESQUE: Sure.

15 THE COURT: Okay.

16 MR. LEVESQUE: Will do.

17 THE COURT: I just --

18 (Indiscernible crosstalk.)

19 THE WITNESS: -- my testimony what was available at
20 the time and it gave a very different picture.

21 BY MR. LEVESQUE:

22 Q. Professor Lichtman, yesterday you referenced several
23 different alternatives to make the bill, House Bill 233, less
24 restrictive.

25 Do you know if any of those were ever presented as an

1 amendment that the legislature could consider?

2 A. I didn't say "less restrictive." I said less
3 discriminatory, and I did not see my less discriminatory
4 alternatives specifically presented as an amendment, no.

5 MR. LEVESQUE: If we could pull up Plaintiffs' Exhibit
6 222.

7 Pull up the first page there. If we could zoom in.

8 BY MR. LEVESQUE:

9 Q. Professor, you were shown this document yesterday. Do you
10 recognize this document?

11 A. Yes.

12 Q. This is a transcript of Governor DeSantis's bill signing
13 for House Bill 233.

14 Was that the only bill that he was signing that day?

15 A. Probably not --

16 Q. If --

17 A. -- but I don't recall exactly.

18 Q. If we could --

19 A. Often they sign lots of bills on the same day.

20 MR. LEVESQUE: If we could scroll to page 6, line 18
21 through page 7, line 16.

22 BY MR. LEVESQUE:

23 Q. Are you able to see that, Professor?

24 A. Yes.

25 Give me a moment here.

1 All right. It looks like you got a half sentence there.
2 Can you scroll up?

3 MR. LEVESQUE: Yeah. If we could go up to the top
4 again.

5 There we go.

6 THE WITNESS: I got it now.

7 Yeah. So you want me to read that?

8 BY MR. LEVESQUE:

9 Q. Yes, sir.

10 A. Okay.

11 Okay.

12 All right. Is there more?

13 Q. I don't believe so, no.

14 Now, Professor, you see where the Governor is saying this
15 isn't about pushing a particular viewpoint, but they want a true
16 contest of ideas and that, based upon the Governor's perception,
17 sometimes some of those ideas might have orthodoxies that
18 suppress those ideas that challenge them.

19 And so what the Governor, in signing House Bill 233, was
20 looking for was something that would help students develop the
21 critical thinking that they need to be successful in society.

22 Those were statements that the Governor made that you
23 completely discredited in terms of your personal analysis;
24 correct?

25 A. Those are statements that I said are fundamentally

1 contradicted by a host of other statements that
2 Governor DeSantis has made, which indicates that he is not
3 interested in multiple viewpoints but is interested in blocking,
4 suppressing -- however you may say it -- what he believes are
5 left-wing views.

6 For example, I quoted him as saying: *Our schools are*
7 *supposed to give people a foundation of knowledge, not supposed*
8 *to be indoctrination centers where you're trying to push*
9 *specific ideologies.*

10 Sounds pretty clear, but then he goes on: *Let me be clear.*
11 *There is no room in our classrooms for things like critical race*
12 *theory. Teaching kids to hate their country and to hate each*
13 *other is not worth one red cent of taxpayer money. Many*
14 *universities across the country engage in these politicized*
15 *academic fads and offer courses that reflect really what is*
16 *ideology, not actual facts.*

17 He goes on to say: *You now have orthodoxies that are*
18 *promoted and other viewpoints that are shunned or even*
19 *suppressed. So, clearly, he wants to actually stop legitimate*
20 *teaching, for example, of the well-established proposition that*
21 *there remains racial discrimination embedded in our society. He*
22 *has no interest in a diverse point of view. He has an interest*
23 *in a Republican orthodoxy, and as FIRE criticized Republicans in*
24 *Florida saying, Orthodoxy is not the way you create informed*
25 *citizens.*

1 Q. But you would agree that at least as it relates to House
2 Bill 233 that he was signing that day, no provision of that bill
3 references critical race theory? No provision of that bill does
4 anything to critical race theory; does it?

5 A. No, but I explained --

6 Q. Thank you.

7 A. -- how the bill advances their ideological agenda without,
8 you know, making those specifications.

9 Q. Thank you, Professor.

10 Earlier you referenced a statement by Speaker Sprowls.
11 Let's look at what he said at the same bill signing ceremony.

12 MR. LEVESQUE: We could flip to page 13, line 20
13 through page 14, line 17.

14 THE WITNESS: All right.

15 BY MR. LEVESQUE:

16 Q. Are you able to read that, Professor?

17 A. There's more, I guess.

18 No, I haven't read it all. I'm sorry. I thought you were
19 done.

20 THE COURT: While he's reading that, Counsel for both
21 plaintiffs and the defense, at some point y'all are going to
22 have to answer a question for me regarding the language of
23 "uncomfortable, unwelcomed, disagreeable or offensive." This
24 witness has repeatedly said -- and I think rightly so -- there
25 certain -- as evidenced by the statement he attributed to the

1 Governor, does not believe critical race theory is a legitimate
2 analytical construct to look at our nation's history.

3 So I'm interested to find out, if I'm a professor and
4 I have an open dialogue with students, if I say creationism is
5 not a legitimate scientific approach, can I stop that response
6 when we're talking about evolution? Or how does this work since
7 it's not -- it seems to me that if you just label something as
8 not a legitimate discourse, you do an end-run around
9 uncomfortable, unwelcomed, disagreeable or offensive.

10 At some point I'm going to have to have somebody tell
11 me what that means, because offensive could be you're talking
12 too loudly; offensive could be you're making an antisemitic
13 remark; offensive could be I don't like the ideology that you're
14 promoting. But I'm not sure where those concepts start and
15 where that's just not a legitimate -- for example, analytical
16 construct would begin if that ends.

17 So I -- for me I'm not really sure because -- and the
18 reason that comes up, Mr. Levesque, a number of times you said,
19 Well, Judge, I'm not really sure, and I understood part of that
20 was when I was using New College as an example, because I think
21 it's helpful to use examples.

22 Judge, we're not saying anything in the classroom, and
23 I now understand your qualification, because you don't get to
24 just stop a straight lecture when we're not inviting comment and
25 stop a professor from teaching and then talk for 45 minutes.

1 And you don't get to talk about creationism in a class on, you
2 know, economics. You know, there are constraints and limits. I
3 understood that.

4 But for the vagueness argument, there still has to be
5 some notice about what I can and can't do, and so y'all are
6 going to have to help me out with that.

7 MR. LEVESQUE: Yes, sir.

8 THE COURT: Okay. All right.

9 Thank you.

10 BY MR. LEVESQUE:

11 Q. Now, Professor --

12 A. Yes.

13 Q. -- in reading that quote, Speaker Sprowls referenced *The*
14 *Coddling of the American Mind*.

15 Are you familiar with that book?

16 A. Not really. Can you enlighten me a bit about it?

17 I kind of recall it, but I don't think I've read it.

18 Q. Okay. Well, that'll save me a few questions then,
19 Professor.

20 A. Sorry about that.

21 Q. From the standpoint of Speaker Sprowls' comments, though,
22 it's pretty clear that he supports the idea or the intent is
23 that they want to see the debate on different ideas, not
24 suppress them; correct?

25 A. Incorrect. I mean, we've been through this now a dozen

1 times. This is all of a piece. This is the benign face.

2 (Indiscernible crosstalk.)

3 Q. Okay. You've indicated incorrect, and you've answered my
4 question.

5 But my question isn't about all of the other statements,
6 but would that be a fair characterization of what Speaker
7 Sprowls is saying right there today --

8 A. Yeah.

9 Q. -- I'm sorry -- right there at that time?

10 A. That's what he's saying, but, of course, that's got to be
11 interrogated.

12 Q. Fair enough.

13 And yesterday you referenced the investigations into the
14 NAACP and the Johns Committee.

15 A. I did.

16 Q. You'd agree that Governor DeSantis who's 44, Spencer Roach
17 who's 44 and Chris Sprowls who's 38 weren't even born when those
18 significant events were going on, were they?

19 A. Of course not. I never claimed that anyone in the current
20 legislature is specifically tainted by those events, of course,
21 because they weren't around.

22 As I explained, I looked at those events because *Arlington*
23 *Heights* and historical methodology directs you to look at
24 historical events that are discriminatory and resonate with what
25 is going on with respect to the current legislation or

1 initiative under scrutiny. I noted, the stories go back a lot
2 farther back than that in casting light on the present.

3 And I could have cited all kinds of other discriminatory
4 action, such as the whole history of voting discrimination in
5 Florida, but I picked these two specifically because they
6 involve what's called invidious discrimination. They involve
7 freedom of expression and association. They involve education,
8 and they also involve whether or not there is a substantial
9 basis for restraints and restrictions on freedom of expression
10 and association.

11 And they also harken to the fact that both then and now the
12 powers that control politics in Florida are dealing with
13 individuals and ideas that they find repugnant or disagreeable
14 or clash with their values and their interest, thus there is
15 enlightenment to be gained by looking at those events.

16 Q. But you would certainly agree that nowhere in your report
17 do you cite Governor DeSantis, Representative Roach,
18 Chancellor Rodrigues or Speaker Sprowls or Wilton Simpson or any
19 of the other Republicans that you identify in your report as
20 endorsing those investigations, lauding those investigations,
21 wanting to continue those investigations? There's nothing like
22 that in your report, is there?

23 A. No, of course not.

24 Q. Now, you've never spoken to --

25 THE COURT: Professor, let me ask you a question,

1 because I want to make sure. As I understand it -- and you tell
2 me if I'm wrong -- the limited purpose for which we look at that
3 is when we're placing things in context, have similar tools or
4 efforts been made in the past, for example, to restrict speech,
5 so it helps -- informs us about why people may be doing what
6 they're doing and how they're doing it, because at some point if
7 we look and you consistently have taken this tact when there's a
8 backlash against speech, for example, it's not determinative;
9 it's not the only factor; it's not the most important factor,
10 but it's something we can look to that may shed some light on
11 why this is happening.

12 So it's just one piece of the pie, not the main piece,
13 not the only piece, but something that suggests why folks may be
14 acting the way they do; is that correct?

15 THE WITNESS: That's exactly correct. I never
16 suggested that, you know, any current member of the legislature
17 or the government was around for those things, but they do help
18 explain the patterns in the present by looking at similar
19 patterns in the past that resonate; this is the kind of thing
20 they did before and now they're doing it again.

21 THE COURT: By the same token, can you agree that if
22 that's what somebody has to go to, that alone would not inform
23 us about why things were being done, and that alone, or as a
24 substantial factor, would not suggest why somebody today was or
25 wasn't doing what they were doing based on what others did at a

1 different time in the either near distant or distant past?

2 THE WITNESS: That's exactly correct. That's why it's
3 only one of the many *Arlington Heights* factors, which I've also
4 enhanced and expanded in this analysis.

5 THE COURT: I'm sorry --

6 (Indiscernible crosstalk.)

7 THE WITNESS: -- the puzzle.

8 THE COURT: It's an *Arlington Heights* factor to look
9 at history, even if it's not recent history?

10 THE WITNESS: It doesn't specify whether recent or
11 not. It just says historical background, particularly examples
12 of past invidious discrimination.

13 THE COURT: I was being sarcastic since there was a
14 suggestion recently, notwithstanding there's case after case
15 where that's done as background information, that that would not
16 be a legitimate part of the analysis, but anyway.

17 Counsel, you may proceed.

18 MR. LEVESQUE: Thank you, Your Honor.

19 BY MR. LEVESQUE:

20 Q. Just following up on that, the Johns Committee or the
21 individuals who were investigating the NAACP that resulted in
22 litigation, none of those entities were doing voluntary
23 anonymous surveys, were they?

24 A. That's a good question.

25 I don't recall them doing anonymous surveys, no, but they

1 were doing recording surreptitiously.

2 Q. And just for the record, you've never spoken to any of the
3 commissioners of education who have been the commissioner of
4 education during the tenure of this lawsuit, have you?

5 A. Correct.

6 Q. You haven't spoken to any --

7 THE COURT: Let me ask you a question there.

8 What weight should I put on the fact that an expert
9 hadn't talked to people they can't talk to? So it's an
10 interesting concept to me that Corcoran says, Won't talk to you,
11 can't talk to me, can't bring me into the hearing. Legislators,
12 you can't talk to me, legislative privilege. Run to court,
13 we'll take an interlocutory appeal to the Eleventh Circuit if
14 Judge Walker says otherwise, yet somehow I'm supposed to factor
15 that into what weight, if any, I should give an expert's opinion
16 when he can't talk to them?

17 That sounds like one of those questions like, Was last
18 night the first time you beat you wife? I mean, I just -- for
19 the life of me, I don't understand why I should care since I
20 certainly didn't just fall off the turnip truck. Y'all blocked
21 them from talking to these people. Mr. Wermuth couldn't take
22 their depositions if he wanted to. Why should I assign any
23 weight to that in determining -- I mean, we are left with the
24 tools we are left.

25 And, by the way, I don't think legislative history

1 tells us a whole lot anyway. There's a reason why there's been
2 all manner of attacks on legislative history generally. Some
3 people exclude it entirely because of the idea that few people
4 speak, and the few that do have an agenda so they can tailor it
5 however they want. So whether it sheds some light or not is an
6 open question, I guess.

7 But what I don't understand is why I'm supposed to
8 think, Yeah, Doc, you didn't do your job because you didn't talk
9 to people you can't talk to.

10 MR. LEVESQUE: This would be my response to that,
11 Your Honor. First, we believe that at least House Bill 233 is
12 cloaked with a presumption of correctness that any actions by
13 the board are, I think, presumed regular I believe is the
14 expression, and that -- so there's a burden shift that goes on
15 there. And to the extent --

16 THE COURT: Absolutely.

17 MR. LEVESQUE: To the extent that you're talking about
18 something to override the burden and you're looking at
19 subsequent statements or you're looking at statements that are
20 directly on point and then trying to reevaluate them, he's made
21 statements on the record about the credibility of
22 Senator Rodrigues.

23 THE COURT: All that is appropriate. All that is
24 appropriate. I just don't know how I can, in terms of -- I
25 followed your argument, and you can't take -- and I've asked him

1 some questions that you can't just throw out -- consider the bad
2 and throw out the good. So you can't scum the survey but ignore
3 the fact that it has, for example, I pointed out guardrails that
4 protects people's anonymity and stuff. So I absolutely followed
5 that argument.

6 I'm just trying to figure out how I weigh or should
7 consider or factor in that somebody didn't talk to somebody when
8 they can't talk to them. It seems to me that's a different
9 issue than did you cherry-pick statements and exclude other
10 statements which undercuts your position.

11 MR. LEVESQUE: And so -- well, to the extent that --
12 what I would probably point to is, in reaching his opinions,
13 he's not -- he doesn't have guardrails for him related to
14 presumptions or things like that. He's just calling it the way
15 he sees it.

16 THE COURT: All right. And one of y'all can -- and I
17 know this would be completely ignored by some appellate judges.
18 But somebody, at some point, also have to let me know when we
19 talk about presumption of good faith in legislation, I thought
20 that's what *Arlington Heights* was. I thought it was a legal
21 analysis that you go through these factors to overcome that
22 presumption.

23 And so be prepared at the end of the proceedings, to
24 the extent that's even the appropriate analytical framework, to
25 help me to understand why that's not so. It doesn't mean you

1 win. It doesn't mean one factor -- if you can show something
2 under *Arlington Heights*, you win. You overcome and establish
3 that it wasn't done in good faith, but it was for an invidious
4 purpose.

5 But I thought the whole reason why we have the
6 *Arlington Heights* factors was because this is legislation. You
7 presume it was passed in good faith without an unconstitutional
8 intent. But how you can decide or how a judge could get there
9 is by going through this analytical framework that the U.S.
10 Supreme Court -- not Judge Walker, not one of the Judge Walker's
11 law clerks, but the U.S. Supreme Court because -- I've got that
12 right? *Arlington Heights* came from the Supreme Court; right?

13 MR. LEVESQUE: Yes.

14 THE COURT: They told us this is what I'm supposed to
15 look to. So y'all just be prepared at the end, because for the
16 life of me I don't -- it seems to me you say it's good faith,
17 but *Arlington Heights* doesn't matter because it's in good faith.
18 I thought that was the whole point of the exercise of going
19 through the *Arlington Heights* factors.

20 But, again, I just went to a state school, which
21 apparently is a hotbed of liberalism and not very good.

22 (Indiscernible crosstalk.)

23 THE COURT: But that's what I thought the exercise
24 was.

25 But, Counsel, you may proceed.

1 And, by the way, how much more time do you have? I'm
2 not in any way limiting you. I'm just trying to plan our
3 afternoon.

4 MR. LEVESQUE: I would probably ballpark, taking into
5 account the witness and prevailing winds, maybe an hour and a
6 half.

7 THE COURT: All right. Me being the prevailing wind.
8 Why don't we go ahead and go to -- but, in fairness, I don't
9 think I've interrupted any more or less than I did with
10 Mr. Hancock.

11 But we've got -- why don't we go until noon-ish. But
12 you can go to 12:10, Mr. Levesque, or 12:15 if you're -- like,
13 something you're trying to finish. You can also finish at five
14 of. I'm going to leave it up to you where you're comfortable
15 within your outline.

16 MR. LEVESQUE: Yes, Your Honor.

17 THE COURT: All right. You may proceed.

18 BY MR. LEVESQUE:

19 Q. Now, Professor Lichtman, as part of your analysis, you made
20 reference to the fact that many members of the board were
21 political appointees. And when I say "the board," I'm referring
22 to both the Board of Governors and the Board of Education.

23 Is that correct?

24 A. That's not what I said, no.

25 Q. Okay. Can you --

1 A. That's not what I said.

2 Q. Can you clarify your reference to the political appointees
3 of --

4 A. Yeah.

5 Q. -- the Board of Education and the Board of Governors and
6 why that was significant?

7 A. Yeah. It wasn't just that they were political appointees,
8 but I have extended tables demonstrating that, in fact, these
9 boards were stacked with Republican donors and Republican
10 loyalists. You could look at, for example -- I have several of
11 them -- Table 4 and Table 5 on page 70 and 71 of my original
12 report.

13 Q. Okay. Now, since you did your original report, do you know
14 if there have been any changes in the Board of Governors?

15 A. It's possible. They do change.

16 Q. Do you know if there have been a significant number of
17 changes from either board?

18 A. Since May of 2022?

19 Q. Yes, sir.

20 A. It's possible. It's possible, you know. If you want to
21 show me something, I'm happy to look at it.

22 Q. Well, let's -- you've got your tables there; correct?

23 A. Yes.

24 Q. Well, let's go through your list of original board members.

25 A. Okay.

1 Q. Richard Corcoran, he was an original board member, and he
2 was the commissioner of education; correct?

3 A. Right.

4 Q. And I'm talking for the Board of Governors, for clarity.

5 A. Right. And I believe now Manny Diaz is the new
6 commissioner, who is also a former Republican member of the
7 State Legislature.

8 So while the identity may change, my analysis of the board
9 as being stacked with Republican loyalists wouldn't change from
10 that.

11 Q. Well, I guess you didn't do any analysis on who Manny Diaz
12 Jr. was, did you? I didn't recall it in your report or any of
13 your supplemental reports, including the one that was just filed
14 last week.

15 A. I did. I think I testified that Manny Diaz was a former
16 member of the legislature. I'm quite sure I testified to that
17 yesterday.

18 Q. I know you testified to that, but did you do any analysis
19 on who he was and his background?

20 A. Beyond his being a former Republican member of the State
21 Legislature, no.

22 Q. Does being a former Republican member of the State
23 Legislature mean that you're not qualified to be on the Board of
24 Governors?

25 A. Never said you weren't qualified.

1 Q. Does it mean that you're --

2 A. Let me finish. Let me finish.

3 There is distinction between qualifications and your
4 political loyalties, and I'm not arguing about qualifications
5 here. I am, rather, demonstrating that these political
6 appointees are former legislators, conservative activists,
7 Republican donors. And we saw Commissioner Diaz acceding to the
8 request of -- in my testimony in that last report acceding to
9 the request of the Governor to during the break, within two
10 weeks, demand mandatorily this information from colleges and
11 universities.

12 THE COURT: Mr. Levesque, if you can do a more
13 efficient job than I can at this.

14 I'm stumped as to why -- it comes as no surprise to me
15 that in partisan politics you'd appoint partisans to boards.
16 And I'm not sure I quite follow why having partisans on these
17 boards appointed through a partisan process by partisans sheds
18 any light under *Arlington Heights* as to why this legislation
19 does or does not intentionally run afoul of the First Amendment.

20 THE WITNESS: Yeah. This has to do very directly with
21 discriminatory effect and intent, because these are the boards
22 that are going to be formulating the survey, that are going to
23 be enforcing and interpreting the survey. You know, I talked
24 about this in my report and testified to it.

25 And the -- this is another kind of contradiction of

1 the notion that all of this is nonpartisan; it's objective; it
2 has nothing to do with Republican politics. But the way it's
3 set up, because there isn't any independent input, this all
4 remains within the control of Republican loyalists.

5 I'm not questioning per se the appointment process,
6 although, you know, you could have ways of appointing these
7 boards that --

8 THE COURT: Doctor, I understand. You've responded.

9 And, Mr. Levesque, this will be argument at the end
10 you can argue. I think I can anticipate your response --

11 THE WITNESS: Sure.

12 THE COURT: -- to that, but we can move on. I didn't
13 want to hijack it.

14 MR. LEVESQUE: Okay.

15 THE WITNESS: Sure, yeah.

16 MR. LEVESQUE: Well, Your Honor, if I could have a
17 follow-up?

18 THE COURT: You can. I was just saying you didn't
19 have to feel like you had to --

20 MR. LEVESQUE: Okay. I appreciate that.

21 THE COURT: -- because my question was answered. But
22 you can certainly follow up as you may. I just meant I didn't
23 want to force you to stop what you were doing, leave your
24 outline and chase my rabbit.

25 MR. LEVESQUE: Fair enough. And I --

1 THE COURT: Unless you choose to chase the rabbit, in
2 which case, knock yourself out.

3 MR. LEVESQUE: I will -- that's kind of where I was
4 going. I will do my best to try to get that at least laid out
5 from our perspective.

6 BY MR. LEVESQUE:

7 Q. Professor, you were not aware that Commissioner Diaz has a
8 history as an administrator for a private college, were you?

9 A. I think I might have known that, but that's not the point
10 of what I'm looking at this for.

11 Q. And so on the original board the next member that I'd like
12 to look at is Tim Cerio.

13 You've identified him as being Republican; correct?

14 A. I don't see that. I see Grady, Gibson, Berg, Krissy, York,
15 and Petty.

16 Q. You're looking at the Board of Education, and I'm talking
17 about the Board of Governors.

18 A. Oh, you're now switching to a different table. You're now
19 switching to Table 5; is that right?

20 Q. I apologize. I thought that might have been the table I
21 was on the entire time. If I was not, that's the table that I'm
22 talking about.

23 A. No. You were on Table 4 because you were talking about the
24 switch from Richard Corcoran to Manny Diaz.

25 So now you're on Table 5; am I right?

1 Q. Correct. But I don't believe Richard Corcoran is a member
2 of the Board of Education.

3 A. He was the former education commissioner, which would put
4 him on the board.

5 Q. Well, the Board of Education or the Board of Governors?

6 A. Education.

7 Q. Okay. I believe Commissioner Corcoran is the mandatory
8 appointment for the Board of Governors.

9 A. Oh, you're right. I have him in the Board of Governors.
10 Sorry about that. You're correct.

11 All right. So, yeah, we're on Table 5.

12 Q. Okay. Good.

13 And so the next commissioner that you identified was Tim
14 Cerio, and he was on there because of his --

15 A. Sorry. It looks like the next one I identified was Eric
16 Silagy.

17 Q. In Table 5?

18 A. Yes.

19 Q. Okay.

20 A. Richard Corcoran, Eric Silagy, Kent Stermon, et cetera.

21 Q. Okay. What did you have to say about Mr. Silagy?

22 A. That the syphon votes for Democrats routed dark money funds
23 to third-party ghost candidates in three of Florida's
24 legislative elections, all of which were won by Republicans.

25 Q. And what did you have to say about -- I might have them

1 listed a little bit differently. In fact, I believe I have them
2 in alphabetical order.

3 Did you have anything to say about Aubrey Edge?

4 A. Yes; contributed some \$60,000 to Republican candidates and
5 organizations, including DeSantis.

6 Q. Did you have anything to say about Patricia Frost?

7 A. Patricia Frost? I don't see that name on this list. Maybe
8 that was someone who was earlier or came in later, but -- maybe
9 you can enlighten me a little bit more, but I don't see that
10 name on the list. Was she the Senate chair?

11 Q. She is still -- she is not. She is still a board member.

12 A. She is what?

13 Q. She was not the Faculty Senate chair. She is still a board
14 member, though.

15 A. I'm sorry. I don't see her on this list.

16 Q. Okay. And so that would be one person of a 17-member
17 board.

18 Ken Jones?

19 A. Former chief legal counsel and deputy chief of staff for
20 former U.S. Republican Senate Majority Leader Trent Lott.

21 Q. And that's mentioned in your report in Table 5?

22 A. All I'm doing is reading what's on Table 5.

23 Q. Darlene Luccio Jordan?

24 A. National finance co-chair for Mitt Romney for President in
25 2008 and 2012; in 2014, state finance chair for Governor Rick

1 Scott's gubernatorial reelection campaign, and raised
2 101 million in 2018, finance chair for Rick Scott's successful
3 Senate campaign.

4 Q. And Brian Lamb, vice chair at the time the complaint was
5 filed?

6 A. I don't have Brian Lamb on this list here that I can see.

7 Q. Okay. And were you aware that Mr. Lamb is now the chair of
8 the Board of Governors?

9 A. That's very likely. I think that's right, but I don't have
10 him on the board at the time that I looked at this.

11 Q. Okay. Alan Levine?

12 A. Louisiana Republican Governor Bobby Jindal's Secretary of
13 Health and Hospitals, deputy chief of staff, Governor Jeb Bush,
14 appointed as Bush's Secretary of the Agency for Health Care
15 Administration.

16 Q. Charles H. Lydecker?

17 A. Contributed 50,000 to DeSantis.

18 Q. Were you aware that Mr. Lydecker is also a graduate of
19 American University?

20 A. I think that's right. I don't recall him in one of my
21 classes, but it's very possible since I've been there for 50
22 years.

23 Q. Deanna Michael?

24 A. Deanna Michael? I don't see that name on my list here.

25 Q. And she would be the Faculty Senate representative.

1 A. Oh. So she wouldn't be a political appointee and wouldn't
2 be on the list.

3 Q. Jose Oliva?

4 A. Jose Oliva. I don't see him on the list.

5 Q. Okay. He is a current appointee. He wasn't on the
6 original list.

7 You've not done any analysis on him, have you?

8 A. No. I haven't done any analysis of the subsequent
9 appointees, and I don't think your expert looked at that either
10 and questioned what I found here.

11 Q. All right. I don't believe our expert actually opined on
12 any of these matters, so --

13 A. Probably not.

14 Q. Mr. Wayne Huizenga Jr.?

15 A. Yep; contributed \$100,000 to DeSantis.

16 Q. But he's no longer on the commission. Were you aware of
17 that?

18 A. As I said, that's quite possible. But as you can see, a
19 lot of these are still on the commission, and we saw the
20 replacement for Corcoran was another former legislator who's
21 Republican.

22 Q. Nastassia Janvier? I may have butchered her name, but is
23 she on her list?

24 A. I'm sorry. What was the name?

25 Q. Nastassia Janvier, J-a-n-v-i-e-r.

1 A. Not on my list.

2 Q. And she's no longer on the commission.

3 Sydney Kitson who was the chair at the original -- at the
4 time the original complaint was filed?

5 A. What was the name?

6 Q. Sydney Kitson.

7 A. Spell it, please.

8 Q. K-i-t-s-o-n.

9 A. I don't see that name on the list.

10 Q. What about William Self?

11 A. I don't see that name on the list.

12 Q. What about Nimna Gabadage, G-a-b-a-d-a-g-e?

13 A. I don't see that name on the list.

14 Q. Ms. Gabadage, I believe, is the student representative.

15 A. Yeah. I wouldn't have -- that's not a political appointee;
16 right?

17 Q. Edward Haddock?

18 A. I don't see that name on the list.

19 Q. Craig Mateer?

20 A. Yeah; contributed 200,000 to DeSantis.

21 Q. Okay.

22 From the operation of the board, though, it appears that
23 you have at least two members that you would identify as
24 nonpolitical appointees and --

25 A. Correct.

1 Q. -- five members that would not necessarily constitute
2 people that you've identified as being Republican controlled,
3 for lack of a better way to express this?

4 A. No, I wouldn't express it that way at all. I would say
5 people that may have been before or after that I just haven't
6 looked at, but, you know, I -- as a political analyst who has
7 looked at these things for decades, the most plausible
8 explanation is, you know, things are not going to change. If
9 they're consistently appointing Republican loyalists, it's the
10 same Governor, DeSantis, the very partisan, very aggressive
11 Governor, it is incredibly unlikely that he would suddenly shift
12 away from appointing conservative activists and Republican
13 loyalists who he also appointed to the University of Florida
14 Board of Trustees.

15 So the fact that, you know, there may be some names I
16 haven't looked at does not imply that somehow the Governor has
17 changed everything that the Governor has stood for and
18 represented over the last few years.

19 Q. From the standpoint of the membership, though, not every
20 person is a political appointee; correct?

21 A. Oh, I never said that. Of course not. But the vast
22 majority are. What did you say, there was 17? So it's 15 of
23 17.

24 Q. Well, and to be clear, the Governor doesn't pick the
25 commissioner of education. The Board of Education picks the

1 commissioner of education; correct?

2 A. I'm not certain about that. You'll have to show me the
3 document. I'm not so sure.

4 Q. So we'll go with your number, two. You've at least got two
5 voices that, if they feel differently, they are not going to be
6 political appointees. There's a democratic process there that
7 will allow them to advocate for the policies or oppose the
8 different policies that they have; correct?

9 A. Yeah. 12 percent, 11.8 percent.

10 Q. But they still have a voice?

11 A. Of course. And, you know, so do the Democrats in the
12 legislature, but, you know, they're consistently outvoted, and
13 they have far more representation than 11.8 percent.

14 Q. And that's because, at the end of the day, elections
15 matter?

16 A. Of course, they do. And that's my point about when you
17 have a partisan governor, these educational boards reflect the
18 partisan priorities of the Governor which directly impact the
19 design, implementation and enforcement of provisions of HB 233.

20 MR. LEVESQUE: Your Honor, I am just at about a good
21 spot to stop.

22 THE COURT: You're a much better judge of that than I
23 am.

24 Doctor, we're going to go ahead and break for lunch.

25 THE WITNESS: Okay.

1 THE COURT: And when we come back, I'm confident the
2 lawyers will land this plane. If not, I may require immediate
3 emergency landing.

4 In any event, we thank you for your patience. We'll
5 see you back at 1 o'clock.

6 THE WITNESS: Thank you, Your Honor.

7 THE COURT: Court is in recess. I don't want to eat
8 into the lawyers's time. Y'all take your lunch.

9 (Recess taken 11:55 AM.)

10 (Resumed at 1:03 PM.)

11 THE COURT: We are back on the record in
12 Case No. 4:21cv271 for the second day of the bench trial,
13 afternoon proceedings.

14 I have the witness on the stand.

15 Mr. Levesque, are you ready to proceed?

16 MR. LEVESQUE: Yes, Your Honor. At this point in
17 time, we'd have no further questions of Dr. Lichtman.

18 THE COURT: And, Mr. Hancock, do you have any
19 redirect?

20 MR. HANCOCK: No, Your Honor.

21 THE COURT: We'll, I'm sorry you're not going to be at
22 the party anymore, Dr. Lichtman, but thank you for joining us.
23 I know you probably thought it was a little bit like Groundhog
24 Day this morning when you woke up and came back. But thank you
25 for your patience with us and your work in this case. So you

1 are free to go, sir.

2 THE WITNESS: Thank you, Your Honor. It's been very
3 interesting and enjoyable.

4 MS. FROST: Your Honor, at this point we would call
5 Dr. Michael Bérubé.

6 (Dr. Michael Bérubé entered the courtroom.)

7 THE COURT: Sir, if you'll remain standing.

8 **DR. MICHAEL BÉRUBÉ, PLAINTIFFS WITNESS, DULY SWORN**

9 THE COURTROOM DEPUTY: Please state your name for the
10 record and then spell your last name.

11 THE WITNESS: Michael Bérubé, B-e-r-u-b-e.

12 THE COURTROOM DEPUTY: Thank you.

13 THE COURT: Please take your seat, sir.

14 THE WITNESS: Thank you, Your Honor.

15 THE COURT: Ms. Frost, you may proceed.

16 MS. FROST: Thank you, Your Honor.

17 DIRECT EXAMINATION

18 BY MS. FROST:

19 Q. Good afternoon, Dr. Bérubé. Please introduce yourself to
20 the Court.

21 A. My name is Michael Bérubé. I'm a professor of English at
22 Penn State University. My official title is Edwin Erle Sparks
23 Professor of Literature.

24 Q. Were you retained by the plaintiffs as an expert witness in
25 this case?

1 A. I was.

2 Q. Were you asked to offer an opinion as to whether or how
3 House Bill 233 fits into a history of attacks on academic
4 freedom in higher education in the United States?

5 A. Yes, I was.

6 Q. Did you do that analysis?

7 A. Yes.

8 Q. And are you prepared today to discuss that analysis in your
9 resulting opinion?

10 A. Very prepared.

11 Q. Great. Let's begin with your experience.

12 How did you first become interested in the topic of
13 academic freedom in higher education?

14 A. Well, that goes back almost as long as my career goes back.

15 I got my Ph.D. from the University of Virginia in 1989. It
16 did not escape my notice when I was in graduate school that
17 there was mounting attacks on higher education from the right.

18 I actually read magazines like *The New Criterion* and
19 *Commentary*. And then in 1987, of course, Allan Bloom's *Closing*
20 *of the American Mind* came out. And before I knew it, when I
21 took my first job at the University of Illinois at
22 Urbana-Champaign, within a year or two we had the political
23 correctness mania. And although it didn't look exactly like
24 this, it rehearsed many of the same themes, and it did
25 constitute an attack on institutions of higher education.

1 Q. So at this point how long have you been studying issues of
2 academic freedom in higher education?

3 A. Pretty much my entire professional life for about 37 years.

4 Q. Have you written anything that's been published on the
5 topic of academic freedom?

6 A. Four books:

7 The first would go all the way back to a book I coedited
8 with my then-colleague at Illinois Cary Nelson. It was called
9 *Higher Education Under Fire*. So now that's still relevant
10 today. That was an edited book. That was a collection of
11 essays.

12 And then in 2006, a book titled *What's Liberal about the*
13 *Liberal Arts? Classroom Politics and "Bias,"* in quotes, in
14 *Higher Education*.

15 In 2015, a book with Jennifer Ruth of Portland State
16 University called -- excuse me -- *Higher Education, the*
17 *Humanities, and Academic Freedom: Three Necessary Arguments*
18 [sic]. That's really tangential to what we are discussing
19 today.

20 And then most recently, last year, something directly on
21 point, a book titled *It's Not Free Speech: Race, Democracy, and*
22 *the Future of Academic Freedom*.

23 Q. And have you also written some articles on the topic?

24 A. More than a dozen.

25 Q. Did you also serve on the American Association of

1 University Professors' Committee A on Academic Freedom and
2 Tenure?

3 A. Yes, I did, for three terms, from 2009 to 2018.

4 Q. Is it okay if I refer to the American Association of
5 University Professors has the AAUP?

6 A. Yes, it is customary.

7 Q. What is the AAUP?

8 A. Well, it's an organization formed in 1915, precisely to
9 define and defend academic freedom.

10 Q. And what is Committee A?

11 A. Committee A was pretty much the first thing they did as an
12 organization. They created a committee to investigate
13 capricious firings of professors.

14 Q. Can somebody serve on Committee A without a deep
15 understanding of the history of academic freedom in the
16 United States?

17 A. It's not really possible. New members came onto Committee
18 A all the time, and there might be a steep learning curve. But
19 by the end of a couple of months, you are well versed in almost
20 every academic freedom controversy across the country. Even if
21 Committee A doesn't take them up, you are apprised of these
22 issues and, in many cases, expected to weigh in on them.

23 Q. And you served three terms. How many years is that?

24 A. That's nine years. I should make clear that that's a
25 little unusual, as the staff told me on my way out, that usually

1 there's a two-term limit. But they thought my work was valuable
2 enough to extend me to a third term.

3 Q. Is the AAUP distinct from the ACTA?

4 A. So the ACTA would be the American Council of Trustees and
5 Alumni, which would be pretty much on the other side of the --
6 it's a cultural war organization. It was founded by Lynne
7 Cheney in 1995. The idea was to sort of run an end around
8 professors. They considered the professorship too overwhelmingly
9 liberal and left to change. And so they decided -- Cheney
10 decided to try to put -- get trustees and sometimes alumni to
11 put pressure on universities to change policies.

12 They -- when I say they're a cultural organization, they
13 put out a number of publications that are regarded as either
14 silly or scurrilous. The silly one I'm thinking of is a
15 brochure they publish almost every four or five years claiming
16 that universities no longer teach Shakespeare. And the
17 scurrilous one was a thing in 2006 called "How Many Ward
18 Churchills" which argued that there were literally thousands of
19 professors who, like Ward Churchill, expressed pleasure that
20 America got what was coming on 9/11. I consider that scurrilous.

21 Q. How long have you taught in higher education?

22 A. Since 1989 in Illinois, but I also taught for four years as
23 a graduate student at the University of Virginia, so 37 years
24 now.

25 Q. And have you ever served in institutional governance?

1 A. Oh, yes. I served in the Faculty Senate at Penn State for
2 eight years and three years in the leadership, which meant that
3 I was elected to chair. I chaired in 2018-19, and then I served
4 sort of bookend years as incoming and outgoing chair. So that's
5 three years with meeting with top leadership on a regular basis
6 and helping write policy.

7 Q. Is there a specific form of governance that is standard
8 practice at American universities?

9 A. I'm going to say I wish it were more the norm, but there
10 is, in fact, a widely agreed upon standard of governance called
11 shared governance. I want to explain it because it's kind of
12 anomalous in the world. The idea is that practically they're
13 not, strictly speaking, employees, and they are not simply
14 employed; they are partners in the enterprise.

15 Actually, the earliest founding document of the AAUP likens
16 them to federal judges. They are not responsible -- they are
17 supposed to be independent of their appointment and not beholden
18 to terms of their appointment. They are supposed to exercise
19 independent judgment, basically, in the running of the
20 institution.

21 Now, every decent, respectable university will have in some
22 ordinance handbook the clause that faculty have the primary
23 responsibility for the curriculum. That is the bedrock on which
24 everything else is founded. Most universities will allocate
25 budgetary matters, you know, housing and dining things to

1 administration. But, ideally, the faculty are supposed to be
2 advisory and constitutive on all matters other than the
3 curriculum. The curriculum is ours, but we can weigh in on
4 other matters, including, for example, say, a sexual harassment
5 policy or an outside speakers policy.

6 So the idea is that, again, we're not just employees. This
7 is a shared governance model that doesn't pertain to too many
8 workplaces.

9 Q. You mentioned you're a professor of literature. That's
10 your title at Penn State.

11 Do you teach anything else at Penn State?

12 A. Over the last couple of decades, I've also taught something
13 called "Disabilities Studies."

14 Q. And what is disability studies?

15 A. Well, disability studies in the humanities is something
16 that originates in the mid-1990s. I'm not being too
17 self-aggrandizing to say that I inadvertently had a hand in
18 helping to establish it with a book in 1996 about my son who has
19 Down Syndrome called *Life as We Know It*. But disability had
20 already been studied in sort of a medical or political and
21 policy way in other areas of the university. And then in
22 literature, philosophy, and history -- philosophy came on
23 late -- we were interested -- became interested in the
24 representation of disability, ideas about disability, the
25 changing definition of disability, and realized that this was

1 and should be central to the humanities as well.

2 Q. Are you ever asked to give talks or presentations on
3 academic freedom in higher education?

4 A. Pretty much all the time.

5 Q. Have you ever presented or given talks on Florida college
6 or university campuses?

7 A. Six times, yes.

8 MS. FROST: Andy, can you pull up the document that's
9 been premarked as Plaintiffs' Exhibit 2, please?

10 THE WITNESS: May I tilt this?

11 THE COURT: You may.

12 BY MS. FROST:

13 Q. Dr. Bérubé, are you familiar with this document?

14 A. I am.

15 Q. What is it?

16 A. It's my CV, my curriculum vitae.

17 Q. Does that CV summarize your educational background and
18 professional experience?

19 A. Yes, it does.

20 Q. And do you regularly update that document?

21 A. Oh, every couple months.

22 MS. FROST: Your Honor, at this point I'd like to move
23 Plaintiffs' Exhibit 2 into evidence.

24 THE COURT: Ms. Lukis?

25 MS. LUKIS: No objection.

1 THE COURT: Without objection, Plaintiffs' 2 is
2 admitted.

3 (PLAINTIFFS EXHIBIT 2: Received in evidence.)

4 MS. FROST: And, Your Honor, at this point, pursuant
5 to Federal Rule 702, I'd like to proffer Dr. Bérubé as an expert
6 in academic freedom in higher education in the United States.

7 THE COURT: Ms. Lukis, do you wish to voir dire the
8 witness?

9 MS. LUKIS: No, Your Honor. No objection from the
10 defendants.

11 THE COURT: Without objection, you may proceed.

12 BY MS. FROST:

13 Q. Okay. Dr. Bérubé, let's turn now to the work you did in
14 the case.

15 What did you do to conduct your analysis in this case?

16 A. Well, first I read the bill, and then I read through all
17 the legislative hearings.

18 Q. Did you also read statements surrounding House Bill 233's
19 passage?

20 A. I did. Although I have to say, given what I've heard over
21 the last day and a half, those were less relevant to me than the
22 text of the bill itself -- excuse me -- and certain salient
23 remarks in the hearings, but I really, I guess, tried to stay
24 mostly with the bill.

25 Q. In preparing that analysis, did you also rely on your

1 experience that we've been discussing here?

2 A. I do always, yes.

3 Q. How did the methodology that you used here compare to the
4 methodology you used in your published work?

5 A. It didn't differ at all. It's the same methodology. It's
6 putting utterances into context, trying to read their -- and
7 read, as much as you can, intention and context together.

8 Q. And did you write a report in this case?

9 A. I wrote two.

10 Q. Let's start with the concept of academic freedom itself.

11 What has that term meant in the context of higher education
12 in the United States?

13 A. Well, it's meant many things. Let me start where it
14 starts. It's actually in the academic context a German import.
15 It originated in German universities in the 19th Century.

16 I'll slow down here. It's composed of two things,
17 *lehrfreiheit*, l-e-h-r-f-r-e-i-h-e-i-t, the right to teach, and
18 *lernfreiheit*, l-e-r-n-freiheit, the right to learn.

19 Now, a student's right to learn is very much at issue in
20 this case, but it's not where -- what we speak of is that they
21 don't have academic freedom. Academic freedom, they go,
22 *lehrfreiheit*, for example, Thomas Jefferson's words when he
23 founded the University of Virginia: *This institution will be*
24 *devoted to the -- paraphrasing -- illimitable freedom of the*
25 *human mind. For here we are not afraid to follow truth wherever*

1 *it may lead, nor to tolerate any error so long as reason is free*
2 *to combat it.*

3 Basically, that is the core enlightened belief that the
4 pursuit of knowledge should be independent of church or state.
5 That's really it.

6 Now, what complicates that in a university setting is that
7 that's a corporate right. That's the right of the body of the
8 faculty as a whole as sort of the class of scholars.

9 What individual right -- what is academic freedom as an
10 individual right? And, you know, the Courts are all over the
11 case -- all over on this. So, for example, do I have the
12 academic freedom to -- not to recognize students' pronouns?
13 That's a live issue.

14 But the AAUP came up with a sort of codified definition in
15 1940 that tries to set out the parameters of academic freedom
16 for individual faculty.

17 Q. So it sounds like when you're telling me what academic
18 freedom means you're not just reading the words and interpreting
19 the text; is that correct?

20 A. No. This is basically settled canon. I'm drawing on a
21 whole body of work.

22 Q. So these are sources that scholars of academic freedom
23 would reasonably rely upon for this purpose?

24 A. Almost always, yeah.

25 Q. What import does the concept of academic freedom play in

1 American higher education?

2 A. It's basically the oxygen we breathe. I think those words
3 are Stanley Fish's, but they could be anyone's. It's the sine
4 qua non of the whole enterprise. Without that, you don't have a
5 university.

6 Q. And why is that?

7 A. Well, because obligation and the calling to pursue truth,
8 wherever it may lead, and the idea that this pursuit is not
9 beholdng to trustees, to elected officials, to clerics, to
10 plebiscites -- I mean, we don't have -- we shouldn't have a
11 world in which we take a poll and say, well, you know,
12 60 percent of the people of Pennsylvania do believe in
13 astrology, so Penn State really should have an astrology
14 program. It has to do with the independence of the
15 professoriate.

16 Q. When did concepts of academic freedom -- I know you say it
17 originally was sort of imported from Germany. When did they
18 start to form in the United States?

19 A. Well, a little bit after that. So the first university to
20 take anything from the German model is Johns Hopkins, the idea
21 of a research university, because for most of -- you know, from
22 the founding of Harvard forward, universities were overwhelming
23 just basically training the clergy.

24 And then toward the late 19th Century, early 20th Century,
25 the idea that you need academic freedom and an understanding --

1 a sort of corporate understanding of academic freedom in order
2 to have a system of higher education begins to take hold.

3 Q. Was there any precipitating incident that comes to mind?

4 A. There were a bunch, but the canonical one, the one that
5 everyone goes to, and with good reason, was the firing of Edward
6 Ross at Stanford in 1901. Ross had, A, supported William
7 Jennings Bryan for president in 1896 -- obviously a fireable
8 offense right there -- and he argued -- he was an interesting
9 figure.

10 He was economically progressive and also a racist and an
11 immigration xenophobe and so invade against the use of Chinese
12 labor to build railroads. Well, the Stanfords were railroad
13 people, and Leland Stanford's widow Jane was the only trustee of
14 Stanford, and Ross found himself out of a job.

15 It was a cause celeb, at the time led to resignations of
16 other faculty at Stanford, had a sort of cascading effect
17 outside Stanford. Stanford for a while could hire no economists
18 to replace him, and there was a 14-year gap right between that
19 and the founding of the AAUP in 1915.

20 And there's one other precipitating event, professor in
21 Lafayette College in Pennsylvania, fired by his president for
22 teaching evolution who then wrote to Edward Ross, because Ross
23 is iconic at this point and that sort of finally was the tipping
24 point, and a number of faculty got together across the country
25 to say we need an organization to try to write a constitution

1 for higher education.

2 Q. I think you said this, but I just want to make sure I
3 understood. That lead ultimately to the founding of the AAUP?

4 A. Basically. You know, I mean, there's a little lag time
5 between Ross's firing, but he remained active. He didn't teach.
6 He remained active as an economist and as an intellectual, and
7 the AAUP finally declares itself, founds itself and issues a
8 declaration in 1915.

9 Q. In 1915; is that correct?

10 A. (Nods head up and down.)

11 Q. Does the AAUP get right to work in trying to define a
12 principle of academic freedom?

13 A. Weirdly, you know, there's a book about this by Hans-Joerg,
14 J-o-e-r-g, Tiede, T-i-e-d-e, about the founding of AAUP.
15 Originally their idea -- this is Arthur Lovejoy of Princeton,
16 Edwin Seligman at Columbia, James Cattell at Penn, and a handful
17 of other people. Everyone thinks John Dewey was the mover and
18 shaker. He was kind of actually peripheral.

19 The idea was we need a standard for how universities are
20 going to be governed. We can't have capricious firings and
21 carryings-on by either trustees or administrators. We need a
22 sense of what it is to be the faculty, and they found, really
23 within a very short order, that you can't do that without an
24 idea of academic freedom. So it's kind of cart before horse.
25 It was first in the governance and then academic freedom and

1 then they realized, no, the central question really is academic
2 freedom.

3 Q. At what point is Committee A formed?

4 A. Really right from the get-go.

5 The 1915 declaration even mentions it, so it kind of
6 precedes the formal foundation. Lovejoy created a committee of
7 15 people to investigate capricious firings. That was the -- it
8 was called the Committee on Academic Freedom and Academic
9 Tenure, and then eventually --

10 (Reporter requested clarification.)

11 THE WITNESS: You know, why those two should go
12 together is another question, but it was founded as a committee
13 of 15 people. Now it's called Committee A.

14 BY MS. FROST:

15 Q. So does the AAUP come up with a Declaration of Academic
16 Freedom in or around 1915?

17 A. It is exactly 1915, and it was called a Declaration of
18 Principles.

19 Q. And does that declaration stay static?

20 A. No, not at all.

21 It stayed where it was for 25 years, and it has been
22 effectively superseded by the 1940 Statement of Principles,
23 which is much more constitution-like. It's much more bullet
24 point. It's much more succinct. The original declaration runs
25 about 11, 12 printed pages. It's more like a manifesto than a

1 founding document.

2 Q. And in those ensuing years before the 1940 Statement, does
3 the 1915 Statement find traction in institutions of higher
4 education?

5 A. Kind of spottily. It wasn't the gold standard that the
6 1940 Statement is. In fact, I think one of the reasons --
7 again, it was a chatty document; hard to sign onto every aspect
8 of it.

9 And so the idea was that we need something more succinct,
10 more streamlined, more a statement of principles, and so the
11 AAUP worked together with the American Association of Colleges
12 which is the American Association of Colleges and Universities,
13 to try to get universal buy-in among all institutions so this
14 would be, like I say, the gold standard.

15 THE COURT: Doctor, let me ask you a question. During
16 this entire period was there not a push-pull in terms of between
17 individual faculty members and having autonomy over the
18 curriculum in their classrooms or the departments having that
19 control versus the board of trustees of universities? That was
20 an ongoing --

21 THE WITNESS: Absolutely.

22 THE COURT: -- and very real struggle, where this
23 wasn't some uniformly accepted principles, that the board of
24 trustees needed to keep their pie hole shut and do what
25 professors say. There was a -- in fact, there was a famous

1 incident that a thoughtful judge recently noted after --
2 during -- immediately after World War I where Professor Beard
3 was -- resigned his position at Columbia over that very thing,
4 that it was the board of trustees that was directing things, not
5 the professors; correct?

6 THE WITNESS: Absolutely, correct. And the rationale
7 was, look, the trustees are the fiduciaries. They're the ones
8 who are entrusted with the running of the organization. Why
9 shouldn't they be in charge of everything, including curriculum?
10 The public version of that, always is and still is, that the
11 public is paying the piper. It should be able, to some extent,
12 to call the tune.

13 So, yeah, this was fraught territory, and I don't --
14 what I said earlier about shared governance, and for that matter
15 tenure, doesn't really start to have traction in a
16 coast-to-coast way until after 1940 and then, of course, other
17 things happened after that.

18 THE COURT: Which is what you were just saying, that
19 it was in the '40s where it really took root --

20 THE WITNESS: Yeah.

21 THE COURT: -- to be uniformly generally accepted?

22 THE WITNESS: Now, the AAUP regard the 1915's
23 declaration as the founding document, but kind of an antiquated
24 and superseded thing that, again, was only adopted fitfully.

25 THE COURT: Does the AAUP distinguish between private

1 versus public entities in terms of the degree to which the
2 professors have academic freedom, not as a -- both as
3 potentially a matter of policy and as a practical matter
4 distinguishing between them? I know that the goal would be it
5 shouldn't make a difference --

6 THE WITNESS: Right.

7 THE COURT: -- but do they -- does the AAUP recognize
8 a distinction between private and public universities?

9 THE WITNESS: Yes and no. As a matter of private and
10 public, no; but for denominational colleges, yes. They would
11 make an exception for religiously affiliated institutions, and
12 then by 1970, went back on that and said, Look, most
13 denominational colleges now do not require an exception. But it
14 is that classic conundrum for pluralism: How do you incorporate
15 in a pluralist society people who are not entirely okay with
16 pluralism? And so if --

17 THE COURT: Is that idea -- and I don't want to
18 oversimplify it, but many schools were formed as religious
19 schools but over time -- for example, I think Swarthmore was a
20 Quaker university.

21 THE WITNESS: Right.

22 THE COURT: I may have that wrong --

23 THE WITNESS: It was pretty open anyway --

24 THE COURT: -- but different schools were formed by
25 different --

1 THE WITNESS: -- right.

2 THE COURT: -- religious subsets and so forth and that
3 over time they no longer were, quote, a Methodist school or a
4 Presbyterian school; they became a general school where the
5 population was mixed and varied, and so sort of the
6 denominational versus nondenominational in most instances lost
7 its meaning.

8 THE WITNESS: In most instances. So when John Mecklin
9 lost his job at Lafayette in 1913, it was because the president
10 decided that the teaching of evolution was inconsistent with
11 Presbyterianism. You're not going to hear that today.

12 Really, for most denominational colleges, you're down
13 to, you know, Bob Jones University. BYU fired someone for not
14 having gospel insights in their work.

15 The last time someone really tried to cross this line
16 in the way that raised the AAUP's hackles was 2006, Norman
17 Finkelstein came up for tenure at DePaul and he sailed through
18 every level, department, college, university and then was fired
19 by his president -- whose name I don't remember -- for not
20 having Vincentian values in his work.

21 And the AAUP cried foul and said, If you want him to
22 have Vincentian values in his work, you had to say that in
23 writing at the time of appointment, but Finkelstein settled with
24 the university and so it never became a case.

25 But, yes, the short answer is yes. The denominational

1 character of most colleges and universities gradually faded from
2 most institutions such that there really isn't any difference --
3 or shouldn't be any difference (indiscernible) there in the
4 academic freedom of their faculty.

5 THE COURT: I guess a follow-up question to that would
6 be does the AAUP -- while it recognizes a role of the board of
7 trustees, whether it's a private or a public university, they're
8 not -- don't suggest that there's any, then, additional
9 distinction based on the fact that the funding is coming from
10 and it's being directed by the state because it's public? In
11 other words, that's not an additional modifier, or is it an
12 additional modifier?

13 THE WITNESS: So that goes to a 1966 document called
14 Statement of Governances -- sorry -- Statement of Governance on
15 Colleges and Universities, which got even more universal buy-in.
16 It brought in the American Council on Education, which has an
17 administration group, the American College of -- ACOJ.
18 Basically, every player in higher education has signed onto the
19 1966 Statement on Governance, and there's a whole passage about
20 the role of trustees, which has gone ever since without saying
21 until -- there's always something that's going to trip a wire,
22 right -- in 2014, the University of Illinois hired Steven
23 Salaita from Virginia Tech.

24 And Salaita was -- is a Palestinian-American scholar.
25 He had written about Israel and Palestine -- not very friendly

1 toward Israel, I must say -- and then in the summer of 2014, the
2 incursion into Gaza happens, and Salaita unleashes a tweet storm
3 that's quite something even for Twitter, including a couple of
4 tweets that were arguably antisemitic, a couple that were
5 absolutely incendiary.

6 And at this point he's in Urbana-Champaign. He's been
7 assigned courses, and he's signed a contract. And usually
8 trustee approval is pro forma. And the chancellor, Phyllis
9 Wise, decided she had second thoughts about his hiring. It is
10 now called the de hiring of Steven Salaita, so the trustees
11 voted, I believe, either seven or eight to one to dehire him.

12 That's the last time anyone can think that a board of
13 trustees got involved in a hiring decision. It's really
14 anomalous. Usually trustees approve the budget; trustees will
15 confer with the president and the provost on policy, but they do
16 not get involved with matters of the faculty.

17 THE COURT: What is the -- and if they don't, fair
18 enough. Does the AAUP have a position in one of its statements
19 that would address the issue of whether there's a distinction
20 between academic freedom as it relates to setting curriculum
21 versus what is or is not said or expressed in the classroom
22 itself?

23 THE WITNESS: Oh, yes. Yes, indeed. That's the 1940
24 Statement. That's the second clause about the freedom to teach.

25 Excuse me.

1 If I can do this from memory: *Teachers are --*

2 MS. FROST: I can help.

3 Andy, you want to pull up Slide 1?

4 THE WITNESS: Okay. Because I've got it tattooed on
5 my arm.

6 Yes.

7 *Teachers -- No. 2 -- are entitled to freedom in the*
8 *classroom in discussing their subject.*

9 Again, that last bit about limitations because of religious
10 or other aims, that was effectively repealed. But the crucial
11 thing here is the "but" clause: *They should be careful not to*
12 *introduce into their teaching controversial matter which has no*
13 *relation to their subject.*

14 By the way, I should footnote that. The idea here is that
15 academic freedom is distinct from free speech because it rests
16 on an idea of scholarly expertise, and free speech obviously
17 does not. So this "in discussing their subject" presumes that
18 they have a subject, that they are experts in it, that they know
19 what they're talking about, and, even more crucially, this is
20 not just a matter of what degrees they hold.

21 To go back to an earlier question, I don't have a degree in
22 disability studies because disability studies didn't exist in
23 1989. It's an emergent field, and we sort of built the ship as
24 it was sailing.

25 Now there is an established body of work. If you Google me

1 and disability studies, you'll see I'm usually considered one of
2 the founders, and it now constitutes part of my disciplinary
3 expertise. But the entire idea of freedom in the classroom in
4 discussing the subject depends on an idea that the scholarly
5 expertise does not pertain to First Amendment issues.

6 BY MS. FROST:

7 Q. And, Dr. Bérubé --

8 MS. FROST: Andy, can we pull up Slide 2?

9 BY MS. FROST:

10 Q. Did that statement about what is controversial or
11 introduction of controversial statements -- was that then
12 clarified by the AAUP later?

13 A. Right there you can see also on No. 5 the walking back the
14 church-related institution, the religious exception -- but look
15 at the date, right? 1970 -- what had been happening over the
16 last five, six years on American campuses, starting with the
17 Berkeley free speech movement.

18 So there were two clarifications. One, we are not walking
19 away from controversy. *Controversy is at the heart of the free*
20 *academic inquiry which the entire statement is designed to*
21 *foster.* And -- deep breath -- *The passage serves to underscore*
22 *the need for teachers to avoid persistently intruding material*
23 *which has no relation to their subject,* and the keyword there
24 should be in italics is "persistently."

25 You know, there's your example of someone using a class in

1 art history to invade against trade with China, something
2 completely irrelevant to the course. This is a very clear
3 signpost that academic freedom is not carte blanche. You should
4 stay in your lane, however wide your lane is, in a disciplinary
5 sense, and the material in the class might go off topic here or
6 there, but persistent intrusion is not legitimate.

7 MS. FROST: Okay. We can take that down.

8 THE COURT: Let me ask a follow-up question, because I
9 want to make sure I understand from the perspective of the
10 witness and the AAUP.

11 There's a -- and I'm not asking you to opine as to the
12 law --

13 THE WITNESS: Okay.

14 THE COURT: -- but there's a body of cases that talk
15 about the difference between, again, expressing a viewpoint
16 versus policymaking at academic institutions. And so what I'm
17 not crystal clear on in terms of the AAUP and what you'd put
18 under the label of academic freedom, where does policymaking end
19 or overlap with setting the curriculum? That is, we're going to
20 have classes that cover these topics versus, once you've decided
21 that a particular topic is going to be taught, suddenly
22 intruding and requiring the professor to either say something,
23 compelled speech, or like in a recent case I had, HB 7, not
24 allowing the professors to say certain things.

25 So it seems to me on one end of the spectrum you have

1 what I would call -- and I think fairly so -- rank viewpoint
2 discrimination -- you can't say X -- versus, as the governing
3 body -- in cases where the State is directing the governing body
4 can say these are classes that are going to be taught, these
5 are -- so where does policymaking governance -- I understand,
6 like, how are we going to fund things? Are we going to build
7 these building? That's easy. That's not the type -- when I say
8 "easy," that's not typically the type of thing you have a
9 professor, necessarily -- although I guess there's folks that
10 say it would be logical to have professors involved in those
11 types of thing, but I'm not talking about that type of
12 governance.

13 When does governance also include setting the
14 curriculum? And if I'm misusing the word or the phrase "setting
15 curriculum," you can let me know. I'm just trying to figure out
16 where y'all draw the line so I can consider that in your
17 testimony in light of what my understanding of the case law is.

18 THE WITNESS: Great question, Your Honor. My concern
19 is not with the word "setting" but with the word "policy." So I
20 didn't know whether you meant public policy or university
21 policy.

22 THE COURT: University policy in the sense of this
23 university, either through its board of trustees or as directed
24 by the State, is thou shalt not --

25 THE WITNESS: Got it.

1 THE COURT: We're only going to teach -- we've decided
2 we're going to turn this university into STEM classes only
3 because we think we have -- and certainly not something I agree
4 with as a Latin American history major with a -- focusing on
5 Brazilian history -- that we don't want any more of these folks
6 that are -- with those types of classes; we're only going to
7 have STEM classes. To me, that would be the ultimate example of
8 we're going to cut out 90 percent of the liberal arts -- not
9 suggesting it's a good thing --

10 THE WITNESS: Right.

11 THE COURT: -- but we -- we're going to focus and use
12 all of our resources because we've got to produce as many
13 engineers and biologists as possible. We made that
14 determination that's what we're going to do.

15 Where does that sort of -- sort of 30,000-foot-up
16 control of what's going to be taught a governance issue as
17 opposed to an academic freedom issue in terms of what -- now
18 that we've said you can teach it, what you can or can't teach in
19 the classroom?

20 If my question doesn't make sense, you will not offend
21 me.

22 THE WITNESS: No. That's a question -- as a former
23 faculty senate chair, it literally kept me up at night, so let
24 me start from 30,000 feet.

25 Academic freedom, as laid out by the AAUP, consists of

1 research, teaching, and extramural speech. The extramural
2 speech is the hard one. That's where I mouth off on Twitter or
3 TikTok or whatever, or I go out from this courtroom onto the
4 street and start talking about the lizard people that control
5 our society.

6 That's hard enough. But the fourth -- there's like a
7 shadow fourth part which is governance itself. This is what
8 happens when I serve as faculty senate chair or serve on a
9 committee, or -- the reason I was smiling about policy is easy.
10 The first policy we had to rewrite when I was faculty senate
11 chair, the policy on consensual relationships. Talk about a
12 minefield.

13 It used to be a subset of sexual and gender harassment
14 and you thought, okay, well, at least there's consensual
15 relationships. It took all year and took a very -- it took some
16 real diplomacy in seating that committee and getting that policy
17 written.

18 So there is a sense in which writing policy, or
19 working with administration on policy, is itself an aspect of
20 academic freedom. I have to be able to speak my mind about
21 consensual relationships in the university, and I have pretty
22 strong feelings; professors, students, I'm against that.

23 Okay. It's more complicated than that, but I would
24 love -- you can't enforce a ban --

25 THE COURT: I'm asking a slightly different question.

1 THE WITNESS: Okay.

2 THE COURT: You voicing your opinion or seeking input
3 is one thing. There's an entirely different issue of who gets
4 to decide we're going to hire 40 new biology and engineering
5 professors, but we're not going to add one more professor to --

6 THE WITNESS: French?

7 THE COURT: Yeah, that's an easy target, I guess,
8 depending on who you are.

9 THE WITNESS: My last name is French.

10 THE COURT: My child's now fluent in French.

11 THE WITNESS: (Speaking in French.)

12 I do have an answer. I'm sorry. I was getting to
13 that.

14 THE COURT: Sure.

15 THE WITNESS: So first I wanted to say shared
16 governance is actually part of academic freedom.

17 Now what you're talking about falls under -- the AAUP
18 deals with under program closures and reorganization. And we
19 have a really hard line on this that I'm sorry to say is honored
20 chiefly in the breach, that the faculty should make that call.

21 So the reason I single out French partly is because
22 SUNY-Albany notoriously closed French, Italian, Russian theater
23 and classics in 2010, with no faculty consultation whatsoever;
24 caused international outcry. But if the faculty themselves had
25 decided, you know what, French and Italian enrollments, they're

1 just, you know, petering out, whereas we've got increased
2 interest in Chinese and Arabic, that makes sense geopolitically.

3 So if we decide we're going to divert resources from
4 the European modern languages to East Asian and Southwest Asian
5 languages, that's okay, but it has to be done by a faculty body.
6 That's the AAUP's position.

7 And often it is done instead by administrative fiat.
8 I chaired two investigations when I was on Committee A., one at
9 the University of Northern Iowa, one at the University of
10 Southern Maine. And in Northern Iowa I learned something I
11 didn't expect to learn.

12 You never heard of the Northern Iowa case because we
13 got them to back down. They never closed the programs they
14 threatened to close down, and they weren't doing it for
15 intellectual reasons; they weren't doing it for politic reasons;
16 they were doing it for ostensibly budgetary reasons, and they
17 were going to close physics. You don't see that every day;
18 usually you see French and Italian.

19 And you, instead, have a bachelor -- a BA in the
20 teaching of physics, so they could still have high school
21 physics teachers in the state of Iowa. And no one in the
22 administration stopped to think that all the other science
23 majors need physics. They don't major in it, but it's a kind of
24 fundamental science, and that's when the light bulb went off for
25 me and I said, This isn't a budgetary decision. This is a

1 curricular decision. This should have been made by faculty.

2 They were thinking of it just in terms of how to save
3 \$8 million. We're thinking of it in terms of what do you need
4 to know about physics to be a chemist, and that's why the
5 faculty should make those calls.

6 THE COURT: I want to make plain, because I'm going to
7 have a question for counsel later, there's a distinction between
8 the position the AAUP takes versus what they may think or I may
9 think is good or bad policy -- and those two things may
10 overlap -- versus what has the law defined as academic freedom.

11 More specifically, what does binding case law in this
12 circuit say about academic freedom? And in so stating, I'm not
13 being dismissive. It's helpful, and certainly relevant and
14 pertinent to hear, but I'm going to need y'all to address that
15 because there's not necessarily a direct overlay of all those
16 things; okay?

17 MS. FROST: Absolutely, Your Honor. Understood,
18 Your Honor. And I think you'll find that some of this testimony
19 is also quite relevant to the *Arlington Heights* framework as
20 well.

21 BY MS. FROST:

22 Q. Stepping back to the 25 years that ensued --

23 A. The interregnum, yes.

24 Q. -- between 1915 and 1940, when the AAUP is working with the
25 American Association of Colleges to obtain buy-in, do these

1 discussions inform the language that becomes the 1940 Statement?

2 A. Yes, largely in terms of streamlining and trying to pare
3 down really what are the principles; teaching -- research,
4 teaching, and extramural speech. The AAUP did not get around to
5 addressing shared governance, that fourth thing, until 1994.

6 Q. Does the 1940 Statement find traction with higher education
7 institutions?

8 A. Yes, it does. It is now, like I said, the gold standard.
9 Language from that statement will appear in almost every faculty
10 handbook in one way or another throughout the country.

11 Q. So with some clarifications, which we touched on a little,
12 and we'll touch on a little more, for 80 years now it sounds
13 like we've had a broad consensus about the basic concepts of
14 academic freedom and their centrality to American higher
15 education; is that correct?

16 A. I would say so, yes.

17 MS. FROST: Okay. Andy, can you pull up Slide 1,
18 again?

19 Thank you.

20 THE COURT: But I think you also said there has not
21 been consistency or uniformity in -- from a legal perspective.
22 And, again, I'm not asking you from a legal perspective but as
23 an academic that studied the issue, would you -- could you
24 fairly characterize or has there been no uniform view about what
25 does or does not constitute academic freedom or the scope of

1 academic freedom?

2 THE WITNESS: Yes, I would. I would say it's usually
3 understood to have some relation to the First Amendment, but
4 what that relation is, both as in the corporate sense and an
5 individual sense, has been interpreted variously.

6 BY MS. FROST:

7 Q. Dr. Bérubé, is this the 1940 Statement that we've been
8 discussing?

9 A. It is.

10 Q. And the statement also -- I'm just going to briefly touch
11 on this -- mentions tenure; is that right?

12 A. Yes, it does. And that was -- again, the original
13 committee was Academic Freedom and Academic Tenure, and I can
14 explain why they should go together.

15 Q. Yeah, just briefly. I think that would be helpful.

16 A. Well, the idea -- a lot of people think that tenure is a
17 lifetime guarantee of employment; it is not. It is simply an
18 exception to the at-will employment doctrine.

19 Basically you still can be fired for failure to perform,
20 moral turpitude. I myself presided over such a case at
21 Penn State. They are excruciatingly difficult, but the idea is
22 that the employer -- even though they're not an employer -- a
23 university has the burden of proof; whereas, in almost every
24 other workplace, you can be fired for any reason at all. And,
25 in fact, faculty without tenure can be fired today without any

1 reason at all.

2 So the idea was that the only secure way to ensure that
3 intellectual freedom would be a property of the faculty was to
4 make sure they wouldn't be at-will employees. They would non
5 at-will, and they would be not employees.

6 So that's what tenure really is. We believe it's
7 continuous employment with termination for cause.

8 Q. There's an ellipsis at the end of this slide. Do you know
9 what the rest of this statement is about?

10 A. That's the provisions about tenure itself and how they came
11 up with a six-year probationary period. Not really relevant
12 here.

13 Q. Okay. Then focusing on the language about academic freedom
14 in front of you, are there aspects of the statement that you
15 think are particularly important to highlight?

16 A. The first highlighted one is the big one; right.
17 *Institutions of higher education are conducted for the common*
18 *good and not to further the interest of either the individual*
19 *teacher or the institution as a whole.*

20 By the way, this goes to, in debates about academic labor
21 today, people who think that tenure is some sort of individual
22 merit badge. It is not. The idea is that academic freedom, the
23 common good depends upon the free search for truth and its free
24 exposition; kind of echoes of Jefferson there.

25 The idea is if you let the professorship determine what

1 knowledge is and pursue it wherever it goes, ultimately that's
2 for the common good. But even if you don't get -- even if you
3 don't always agree what the common good is -- and good luck with
4 that -- the other antiquated idea is that this is the sine qua
5 non of the open society.

6 (Reporter requested clarification.)

7 A. Sine qua non, s-i-n-e q-u-a n-o-n, without which not, of
8 the free society. If you don't have this, you don't have a free
9 society. You have something else.

10 BY MS. FROST:

11 Q. Is there anything else in this statement that you think is
12 worth talking about?

13 A. The second thing highlighted here actually goes -- this is
14 like the preamble to the three points; right. So academic
15 freedom and its teaching aspect is fundamental for the
16 protection of the rights of the teacher in teaching and of the
17 student to freedom in learning. And that's the only time the
18 statement mentions that other aspect of freedom, the freedom to
19 learn.

20 And, therefore, it says: *It carries with the duties*
21 *correlative with rights.* And that would be explained a little
22 bit further down about how the professor has the duty not to be
23 introducing irrelevant material into a classroom that deviates
24 from a subject.

25 Q. And I know you touched on this before, but there -- are

1 there aspects of this statement that the AAUP has since
2 clarified?

3 A. Yes. I touched on that a little earlier, the explanation
4 of that controversial matter, which has no relation to their
5 subject. By the end of the '60s, it was felt clearly by the
6 association that they needed to make sure that what's really at
7 issue in that clause is not controversy. Controversy are us;
8 right. That should be also the lifeblood of the enterprise.
9 The question is the intrusion of irrelevant material.

10 And the reason why I think they added the word
11 "persistently" is that occasionally you'll get a one-off remark
12 about whatever. And it could be political. It could be what I
13 had for lunch today. It would be anything in the course of give
14 and take with students.

15 I'll give you an example that just happened to me a couple
16 weeks ago. I was teaching Cixin Liu - sorry -- C-i-x-i-n L-i-u.
17 He's a Chinese science fiction writer. And in his book
18 *Three-Body Problem*, plugged by no less than Barack Obama
19 himself, there's a character, Ye, Y-e, Wenjie. She's a Chinese
20 astrophysicist. Wenjie is W-e-i -- or W-e-i-n-j-i-e [sic].

21 And I kept seeing the word "Ye," Ye, Ye. And I kept
22 thinking -- this was the week that Kanye West, Ye, blew up with
23 his sort of Hitler-friendly remarks. And I just sort of did,
24 you know, a face palm. I can't believe I'm reading Ye all the
25 time. And -- okay. That had no bearing on the class. It was

1 me having that moment.

2 That's not a violation of academic freedom. If I started
3 throwing in remarks about Kanye West every week, then somebody
4 should be talking to my department head or my dean.

5 Q. Controversy, does that include political discussions?

6 A. Absolutely.

7 Q. And sometimes as a faculty member, does that include
8 discussing your own political beliefs?

9 A. It depends. So it's almost never -- in my own teaching, I
10 guess where it comes up most often is in disability studies,
11 because almost no one takes a class in disability studies
12 thinking, Now how am I going to get rid of these people with
13 disabilities? I mean, the premises overwhelmingly let us study
14 the history and meaning of disability. And that's why I asked
15 about policy also, Does this touch on public policy regarding
16 disability? because, yeah, eventually it does.

17 So -- but if you ask me -- for example, we spent about two
18 weeks last spring on the incredibly thorny question of what's
19 called selective abortion for fetuses with disabilities.

20 And this is not an issue where you can talk about both
21 sides. There are 18 sides. I am on record with a full chapter
22 in life as we know it as to where I am on that. I am
23 pro-choice, pro-creative screening, but deeply skeptical of any
24 quality of life consideration that would make it automatic or a
25 default position to abort, say, a fetus with Down syndrome. So,

1 in the Down syndrome community, not everyone likes my position
2 because not everyone likes the idea of prenatal screening.

3 It's an incredibly, you know, complex terrain, but in
4 there, of course, my own position is relevant. It's, again, on
5 record. Anyone who wants to see what I've said can do so. It
6 isn't very hard. But it doesn't constrain the debate at all.

7 It may help, or may not, for a student to know Professor
8 Bérubé actually has weighed in on this. And you don't even have
9 to go to my book. There's a two-page thing in *The Canadian*
10 *Globe and Mail* from about 15 years ago in which I voice some
11 skepticism -- I'm extremely skeptical about screening for
12 autism, because we don't know what autism is, and it's not
13 detectable in utero.

14 So the entire premise of screening for autism I found just,
15 you know, fraudulent. But, like I say, I have a long paper
16 trail on this. So if it comes up and students want to bat ideas
17 off me, bring it on. That's what I'm here for.

18 And other -- in other disciplines, you know, does it really
19 matter if you're a political science professor who studies
20 elections, has done work on voter suppression or has a record of
21 voting Republican? I think that's up to individual discretion.
22 I think if it helps pedagogically and does not shut down
23 classroom discussion, great.

24 It can sometimes -- I think often, but not always -- help
25 to orient students. Okay. Here's where I -- what my work has

1 done on this. It's not scripture. It is the thing I was hired
2 for. That's why I think it's perfectly all right for professors
3 to advocate a thing in the classroom or to espouse a thing, but
4 not if it becomes coercive or not if it becomes a thing from
5 which people can't dissent.

6 But, yeah. The short answer again is yes. The longer
7 answer is it's very complicated and really depends on the
8 subject and sometimes even depends on the subject within the
9 subject.

10 Q. And is it important to be able to examine concerns about
11 whether a line has been crossed in context?

12 A. I missed the verb. Sorry.

13 Q. Sorry. Is it important to be able to examine --

14 A. Oh, yeah.

15 Q. -- concerns about whether lines have been crossed in their
16 specific context?

17 A. Absolutely and always. Again, you toss off a remark about
18 Ye, I don't know see as -- maybe a student did object to it and
19 I don't know. But, again, what was the context of the
20 discussion? Outside from that, what was the context of the
21 things going on in class that day? What was on tap on the
22 syllabus? What was the orientation of the course?

23 You can go all the way out to alluding to the so-called
24 Individual Freedom Act. You have got an act there that not
25 only, you know, criminalizes certain kinds of speech, but makes

1 the entire Department of African-American studies, you know, all
2 of a sudden, you know, under suspicion.

3 So, really, did this occur in a metallurgy course? Did it
4 occur in a disability studies course? And was it part of
5 discussion? Was it lecture? It all depends on context, yes.

6 Q. When do --

7 THE COURT: Let me ask you this. What would the AAUP,
8 in terms of its vision of academic freedom, say as it relates to
9 the -- and I know you said we're focusing on the professor and
10 not the student -- but the professor controlling class
11 discussions such that the professor is going to exclude
12 statements or comments or positions by students as part of that
13 free exchange if he believes one student's statements could
14 offend or upset another student?

15 THE WITNESS: The AAUP doesn't have a statement about
16 that. It does have a statement about the rights of students,
17 but -- what can I say, Your Honor? This is a tough one.

18 Not only if a student -- so I thought the question was
19 going to go someplace else because it did have -- I think
20 Professor Lichtman has been living a charmed life teaching 50
21 years without a student that he had to deal with.

22 I had a student 20 years ago who, apropos of Richard
23 Powers' novel *Prisoner's Dilemma*, defended the Japanese
24 internment camps -- Japanese-American internment camps in World
25 War II. And the other 16 students in the class wanted to yell

1 him right out of the room, and for a while I had to settle
2 things down.

3 So there's two things at issue here. He just didn't
4 offend other students; he said something that was factually
5 wrong. I mean, in this case I had to say, Look, this has been
6 settled. Ronald Reagan, himself, when president --

7 THE COURT: Where do you draw the line, though?

8 THE WITNESS: I drew the line there.

9 THE COURT: Where do we draw the line? So, for
10 example, more than half the leadership of Florida and our
11 elected officials say that critical race theory is not a
12 legitimate --

13 THE WITNESS: Right.

14 THE COURT: So if the line is drawn by whether or not
15 the professor does or does not believe something is a legitimate
16 inquiry --

17 THE WITNESS: Yeah.

18 THE COURT: -- as opposed to you're talking off topic,
19 you're being abusive, you're being rude, you're talking over
20 people --

21 THE WITNESS: Right.

22 THE COURT: -- you're taking too long, you hijack the
23 class -- I understand all those limitations.

24 THE WITNESS: Right.

25 THE COURT: Because you have to control your

1 classroom, just like I've got to control my courtroom. It's a
2 little bit easier to control the courtroom because I have some
3 other tools at my disposal that you don't.

4 But it seems to me that if academic freedom as it
5 relates to classroom discussion is so defined, it seems to me --
6 and you may respectfully disagree with this -- but what some of
7 us think, which is becoming more readily apparent in our
8 society, but some people think are facts --

9 THE WITNESS: Yeah.

10 THE COURT: -- are no longer -- I mean, we can't even
11 agree that global warming is a problem.

12 So if you can't agree on even issues like that, is it
13 really that simple? And what does it say about academic freedom
14 if we're going to leave it up to individual states, individual
15 universities, governing boards, and individual professors to
16 ascertain that they've got a lock on the truth and facts and,
17 therefore, we're free to eliminate anything that we put on the
18 other side of the line that's not a fact? Doesn't that turn
19 academic freedom, in fact, what we'd want to see as a matter of
20 policy, on its head?

21 THE WITNESS: The short answer, again, is yes. I
22 think the longer answer might be more interesting.

23 I use the example of the student defending the
24 Japanese internment camps because I wrote about it. It opens my
25 book *What's Liberal About the Liberal Arts*. And in my

1 deposition Ms. Lukis asked me about it and asked a really great
2 question: *In the end, wasn't that pedagogically useful to go*
3 *over Korematsu to go over with the apology in Congress, signed*
4 *by Reagan in, I believe, 1988.*

5 And I said -- again, deep breathe -- *Yeah, it was,*
6 *but, man, that took a lot of time.*

7 And it made me think half facetiously, going back to
8 Jefferson, you can tolerate any error so long as reason is free
9 to combat it. But how long do we have to tolerate it for? And
10 I say that because you alluded to the post-fact world. And we
11 live in a country where millions of people get their medical
12 advice from Joe Rogan. So what counts as expertise and what
13 counts as knowledge is very much under duress.

14 And so my answer to that question would be if, in
15 fact, this is a class not on whether climate change is
16 occurring, but what kinds of emission standards, what kinds of
17 policies we can enact -- if that's the class, if it's a sort of
18 hands-on, practical class about global warming, then the voices
19 of skeptics are just trolls.

20 If, on the other hand, you want to have a class -- and
21 this would be great -- about how scientific consensus is --

22 THE COURT: Here's the rub, Professor, because I can
23 see this happening.

24 They're restructuring the leadership at New College,
25 which has historically been lauded as a great liberal arts

1 school here in Florida. And so they reorient the school in
2 terms of their focus on things, and they decide that talking
3 about systemic racism is simply trolling. We've got a class
4 talking about American exceptionalism and us entering in this
5 new phase of Pax Americana and you're just trolling --

6 THE WITNESS: Right.

7 THE COURT: -- by pulling out -- I mean, isn't that
8 the rub?

9 THE WITNESS: It is the rub.

10 Although I think Professor Lichtman alluded to this --
11 and I don't want to repeat too much of what he said -- but even
12 the controversy over the 1619 Project was initiated by two
13 historians, by Sean Wilentz and Gordon Wood, who took exception
14 to the idea that the American Revolution was fought primarily to
15 defend slavery. You know what? A lot of historians would take
16 issue with that, especially with the word "primarily."

17 But this has been a real scholarly debate for decades,
18 and the best account I've read -- and this is actually in my
19 book, *It's Not Free Speech*. Basically the best account I've
20 read took Wilentz to task for pretending that journalists had
21 gotten it wrong and that historians have well established this.

22 The whole question -- and there were any number of
23 slaveholders in the American Revolution, but they didn't want to
24 advertise that. It wasn't a good selling point. And the
25 British were using this for propaganda as well. But the point

1 is that is an established body of knowledge.

2 I'm going a little deeper into the weeds than
3 Professor Lichtman did only to say that I can tell it's not
4 trolling, because it wasn't just Nikole Hannah-Jones, and it
5 wasn't just *The New York Times*. This was the --

6 THE COURT: Oh, I wasn't suggesting that --

7 THE WITNESS: No, I know you weren't.

8 THE COURT: But the problem is --

9 THE WITNESS: According to Chris Rufo, it is.

10 THE COURT: Exactly. And is not -- just like the rest
11 of the country, is not the academic community, while maybe not
12 as divided and divided the way the rest of our country is -- is
13 there not divisions growing there as well?

14 THE WITNESS: Yes. Well, there is going to be almost
15 no divisions as to whether there was such a thing as systemic
16 racism. That's what slavery and Jim Crow were. That really
17 shouldn't be up for debate.

18 THE COURT: You might have wanted to give a trigger
19 warning before you said that, but okay.

20 THE WITNESS: I think trigger warnings might come up.
21 And, in fact, one of my students just asked me for one.

22 But that's why I think the importance of resting
23 academic freedom on academic expertise is so important,
24 especially for emergent fields, because if you don't have --

25 THE COURT: That's sort of why I asked the questions.

1 THE WITNESS: Yeah.

2 THE COURT: Your definition of academic freedom and
3 why professors should be involved in governance and you
4 shouldn't have others that that is not their expertise or their
5 bailiwick taking over and opining and structuring is it leads to
6 the very problem that I just identified.

7 THE WITNESS: Exactly.

8 By the way --

9 THE COURT: When you take nonexperts to tell experts
10 about what they can and can't talk about, that's what creates
11 the problem and the rub. I'm not saying that's my finding. I'm
12 not saying that's my ruling.

13 THE WITNESS: No, but that's a good question.

14 THE COURT: I'm just asking if that's essentially the
15 response to my question about that's -- the first set of
16 questions relates to the second set of questions in that way.

17 THE WITNESS: No, that's exactly right. And I just
18 want to give credit where credit is due.

19 Robert Post, the law professor from Yale, wrote a book
20 distinguishing democratic legitimation from democratic
21 expertise. And the benefit -- anyway, the point is that the
22 democratic legitimation rests on the First Amendment. Without
23 that, without the ability to criticize the government without
24 fear of being imprisoned or tortured or punished, you don't have
25 a free society.

1 But within that there is an idea of expertise, which
2 it rests on the broader First Amendment concept but is distinct
3 from it. So that's Robert Post really. I'm just giving you
4 basically his answer as to what role can expertise play in a
5 democratic society.

6 I think the tensions are ridiculously intense. That's
7 why I was doing it in shorthand by saying there's no Department
8 of Astrology. But I've taught in public institutions all my
9 life: Virginia, Illinois, Penn State. I always feel -- these
10 things in their charter say they are answerable to the public.
11 But does that mean that expertise has no value when it comes to
12 determining the actual content -- intellectual content of those
13 universities? And that's the thing you have to -- I think you
14 have to balance, how to respect the intellectual autonomy of the
15 enterprise while also acknowledging its public mission. Even in
16 private institutions, they're still supposed to serve the common
17 good.

18 MS. FROST: Your Honor, I'm going to turn to a
19 different topic. Mindful of the court reporter, is this a good
20 time for a short break?

21 THE COURT: Sure. We can take a break.

22 Do you need a break?

23 THE COURT REPORTER: Yes.

24 THE WITNESS: Can I just say this comes up in my
25 student evaluations all the time. I come from New York.

1 MS. FROST: I'll try not to elicit several different
2 languages.

3 THE COURT: All right. We'll take a ten-minute break.

4 (Recess at 2:10 PM.)

5 (Resumed at 2:20 PM.)

6 THE COURT: We are back on the record.

7 One thing, Counsel, before I forget -- and both sides
8 are going to need to address -- I'm not suggesting this is the
9 only case; I'm not suggesting it's determinative of the issue,
10 but I think it's helpful to begin a discussion about the scope
11 of academic freedom under the law, where it begins and where it
12 ends, the *Minnesota State Board v. Knight* [sic], which is 465
13 U.S. 271, specifically start at and focus on pages 287 to 288.

14 Again, it's not the end of the inquiry, but it would
15 be helpful if y'all would look at that case to begin your
16 discussion with me of the scope under the law of what is or is
17 not academic freedom. Okay?

18 MS. FROST: Absolutely, Your Honor.

19 BY MS. FROST:

20 Q. Dr. Bérubé, when do attacks on academic freedom begin in
21 higher education in the United States?

22 A. Almost as soon as the concept was formulated. As we were
23 mentioning earlier, what kicked things off were a series of
24 capricious firings of faculty at the turn of the century, but
25 organized attacks don't start happening until after World War

1 II.

2 Q. And, very briefly, can you just tell us about that era?

3 A. Well, there have been whole books written about it, but
4 we're talking about McCarthyism. We're talking about the
5 realization at the end of the war that we're going to be living
6 in a two-superpower world, that the other superpower was going
7 to be anticapitalist and antagonistic and antitotalitarian.

8 And so the concern, the worry -- I mean, it turned into a
9 panic. But let's just say the concern that there might be
10 Soviet infiltrators, Soviet spies, communist sympathizers was
11 not ungrounded. The deal with McCarthyism -- and this is,
12 obviously, not just my opinion -- is that it did not simply go
13 after communists. It cast a much, much wider net, encompassing
14 a whole swath of the left that had once, you know, signed a
15 petition or was sympathetic to collectivism or -- this is the
16 big one -- simply took the Fifth and would not name names to the
17 House on American Affairs Committee.

18 This also, of course, affected Hollywood famously. It
19 affected the K-12 system.

20 So for the AAUP -- just to go back to them for a moment --
21 this was the first real challenge, and I have to admit for a
22 long time it failed. Academia, by and large, went along with
23 this. They instituted loyalty deals. They acceded to the
24 firing of faculty on the grounds that they were communist
25 sympathizers. And it's not until 1956 that the AAUP issues a

1 long report. I mean, they sort of recovered part of the sense
2 of their purpose and wrote a report on academic freedom and the
3 search for national security. But the McCarthy era is, I think,
4 widely regarded as a dark, dark period for academic freedom. It
5 was a period in which academic freedom was set aside in the
6 midst of a moral panic.

7 Q. What's the first major publication that we see mounting an
8 attack on academic freedom and higher education?

9 A. That one, I think, everyone would answer with the same
10 answer. That's William Buckley's *God and Man at Yale*. The
11 subtitle of which is *The Superstitions of "Academic Freedom."*
12 It has been called the Bible of the conservative movement. It
13 has been called the origin of the conservative movement in the
14 United States, and I think with good reason.

15 Q. What is the hypothesis of that book?

16 A. I'm going to paraphrase. I hope -- I wish I could do this
17 word for word, but: *I believe that the duel -- this is Buckley.*
18 *I believe that the duel between atheism and Christianity is the*
19 *most important of our lifetimes. I believe also that the*
20 *struggle between individualism and collectivism is the same*
21 *struggle on another level.*

22 I got a couple of words wrong, but that's it.

23 Buckley later claimed that a faculty adviser put those
24 words in there, but still that is the point of the book, that
25 Yale is supposed to be a Christian individualist institution in

1 a Christian individualist society, and yet its faculty are full
2 of atheists and collectivists who are, guess what,
3 indoctrinating students into atheism and collectivism. That's
4 the argument.

5 It's got some really odd tales to it that most people don't
6 know or remember. One is the amazing hubris of this 24-year-old
7 kid, young man, upbraiding a professor of ultimate testament,
8 scholarship, for not having enough respect for Christianity.
9 And the other -- and this is the tail end of the book that drew
10 condemnation from everybody at Yale -- was that neither the
11 administration or the faculty of Yale should be running Yale; it
12 should be the alumni.

13 Q. Has academia embraced this book?

14 A. Not at all. It is the considered sort of eyebrow-raising
15 outlier and even was at the time. Again, Yale itself was
16 outraged. And no one has taken it seriously, especially that
17 last proposition. As much as we may love our alumni, pleased
18 that they finished their degrees, we don't think that attending
19 the place for four years gives them the right to set the
20 curriculum.

21 Q. Does the book and its premise still have an audience?

22 A. I think it's in its one-thousandth printing. I mean, yes,
23 yes, it is still glowingly cited. Whether or not it's still
24 widely read is another matter, but it is, I think, rightly
25 iconic.

1 Q. And do we hear the same premise repeated?

2 A. I've seen almost the same words in the last couple of years
3 come out of this state. It's really striking. I think we see
4 Marxist indoctrination instead of collectivism, but it's
5 precisely the same concern, the concern about secularism, the
6 concern about communism, Marxism, leftism, critical race theory.
7 Sometimes the words change, but they are exactly the same
8 obsessions for exactly the same reasons.

9 Q. So before this area, is this not a subject of widespread
10 public concern?

11 A. You know, almost nothing in higher education was a subject
12 of widespread public concern before the war. And for a while
13 that puzzled me. Then I realized fewer than 5 percent of
14 Americans were going to college. It just wasn't -- it was a
15 different world altogether. To take one odd measure, college
16 football was an elite sport. It was dominated by Princeton and
17 Yale. It was just another world. And the idea that you would
18 have sort of widespread public interest in universities was just
19 unheard of.

20 Then you get the GI Bill. Then you get the idea that maybe
21 women don't have to go to women colleges. Then you get the very
22 fitful desegregation of the universities. And by the time we
23 get to the '60s, we are embarked on the world's only experiment
24 in mass higher education. It's a different beast altogether.

25 Q. Let's turn to more recent attacks on academic freedom.

1 But before we do -- and I think you alluded to this, but
2 are there any themes that emerge in these attacks on higher
3 education?

4 A. Sure. I mean, the big one -- let's break these into --
5 let's do themes, like a musical score, right -- the sense that
6 individuals who are in Christianity are being overridden or
7 undermined by atheism, secularism, Marxism, communism, but the
8 thing that I didn't realize until very recently has been -- oh,
9 by the way, I have another -- this is a musical term, basso
10 continuo. It means the lower thing -- the obsession with
11 homosexuality, it was there in the '40s and '50s. It's still
12 there. It's just -- it's gotten louder and softer over the
13 years, but it's been the secondary thing.

14 Q. And before you mentioned the term "indoctrination." Is
15 this also a theme that you hear?

16 A. Absolutely. It's not just a complaint that the faculty are
17 atheist and secular. A lot of us are. It's the claim that we
18 are actually indoctrinating and imposing this on students and
19 doing it successfully.

20 Q. In this theme of indoctrination, is there anything from the
21 AAUP that tends to get cited?

22 A. Oh, yes, there is. It goes back -- actually, it goes back
23 to the 1915 Statement. There's a whole couple paragraphs -- in
24 the 1915 declaration, there's a whole couple paragraphs about
25 basically being very circumspect around immature students. It's

1 really extraordinary language. And I only learned about, say,
2 15 or so years ago that on the right this is the language they
3 like.

4 MS. FROST: Andy, can you pull up Slide 3?

5 BY MS. FROST:

6 Q. Is this what you are referring to, Dr. Bérubé?

7 A. It is. There are a couple other passages, and I cite them
8 in my report. But this is a big one.

9 Q. Can you tell the Court what you're referring to
10 specifically in this statement?

11 A. So take the first -- well, all the highlighted sections
12 right there: *There is one case in which the academic teacher is*
13 *under an obligation to observe certain special restraints;*
14 *namely, the instruction of immature students* -- I'm going to
15 stop there for a second, though, because, of course, in between
16 the time I was first asked to write a report and now, I went
17 back and reread the 1915 declaration. Like I say, I don't
18 commit it to memory. Much of it is irrelevant.

19 But there's an earlier passage in which the declaration
20 says that: *The average student is a discerning observer who*
21 *soon takes the measure of his instructor.* I think this is one
22 of the reasons we abandoned the declarations. They're kind of
23 all over the map.

24 But this is speaking about a different kind of student,
25 right, the immature student: *In many of our American colleges,*

1 *and especially in the first two years of the course, the*
2 *student's character is not fully formed. His mind is still*
3 *relatively immature.*

4 And I find all those terribly infantilizing. And I asked
5 around, when I was more active in the AAUP leadership, what kind
6 of debates there were about this, and I was told -- and then I
7 checked this out in the various histories of the AAUP -- the key
8 is really the next sentence: *In these circumstances, it may*
9 *reasonably be expected that the instructor will present*
10 *scientific truth with discretion.* If you hold that up to the
11 light, it means watch out about evolution. And I think it has
12 to be informed by that firing of John Mecklin at Lafayette for
13 teaching evolution.

14 The idea also is that, even though it's infantilizing, it's
15 1915. There is no Internet. Students who are -- I still think
16 it's terribly infantilizing to speak of 19 and 20 year olds this
17 way, but if, in fact, they are first hearing about evolution
18 when they come to college, it's a shock. And it may be, like,
19 the gateway to ways of thinking that are not their folks' ways,
20 that are not their parents' ways, that are not their hometown
21 standard ways of thinking, and so the idea is tread carefully.

22 Then, further on: *The teacher ought to be especially on*
23 *his guard against taking unfair advantage of the student's*
24 *immaturity by indoctrinating.* That's the key for most
25 conservative commentators. They think the AAUP has abandoned

1 that and has opened the door to indoctrination instead of
2 putting up that guardrail.

3 Q. None of this language appears in the 1940 Statement that
4 was adopted by institutions; correct?

5 A. 1940 Statement says teachers are free to teach their
6 subject. There is nothing about immature or mature students.
7 There is nothing about proceeding with discretion. It was
8 all -- in the words of one of the historians, Walter Metzger --
9 I wish I had said this, but he said it. It was decided by 1940
10 not to peg the freedom of the instructor to the innocence
11 quotient of the student.

12 Q. And this last highlighted phrase, can you tell the Court a
13 little bit about that one?

14 A. So it's sort of -- like I said, this is kind of chatty.
15 It's a tagalong to the previous highlighted passage: *It is not*
16 *the least service to habituate students to looking not only*
17 *patiently but methodically on both sides before adopting any*
18 *conclusion about controverted issues.*

19 My objection to that -- I think I've already mentioned
20 there's some things where there's not -- that's a both sides'
21 formulation, as if -- as if classroom instruction is
22 point-counterpoint, as if it's liberal-conservative, when, in
23 fact, most of the questions I take up, most of the questions my
24 colleagues take up are not both sides' questions.

25 So that is just, I think, a completely unfortunate passage,

1 quite apart from anything it says about students.

2 Q. And that passage as well did not make it into the 1940
3 Statement?

4 A. No, all of this is gone and, I think, rightly so.

5 MS. FROST: Okay. We can take that down. Thank you.

6 BY MS. FROST:

7 Q. You reference that your interest in academic freedom was
8 sparked by some attacks that occurred during or around your grad
9 school years.

10 Was there something specific that sticks out?

11 A. I'm sorry. I think I mentioned the *Closing of the American*
12 *Mind*. That was a blockbuster, but I wouldn't put too much
13 weight on it here or ever because it's not -- it's a much
14 stranger book than people think. It's not so much an attack on
15 the professorate as an attack on *students who are shallow*
16 *relativists who come in without any convictions and who are also*
17 *listening to this orgiastic or rock and roll*. Those are
18 actually Allan Bloom's words.

19 So it became sort of a bestseller despite itself. It's
20 kind of one of those things, like with what they once did with
21 Steven Hawking's *A Brief History of Time*, where you want to put
22 a ten-dollar bill two-thirds of the way through and find out if
23 anyone gets to it.

24 Nevertheless, it shows there was a real market for attacks
25 on American academia. So that's the mother of all battles right

1 there. But then in quick succession you get Charles Sykes' 1988
2 book *ProfScam*; Roger Kimball's 1990 book *Tenured Radicals*;
3 Dinesh D'Souza's 1991 book *A liberal Education*.

4 And now -- these are -- I mean, Sykes' book is toxic.
5 Dinesh D'Souza we know by now is, if it please the Court, a
6 serial liar. I got in an exchange with him earlier and that has
7 poisoned my view of him ever since. But now you've got a
8 tryptic of really poisonous attacks on specifically professors.

9 Q. And do they all echo this theme of a liberal professorate
10 indoctrinating students?

11 A. Yeah. Different attacks on this. In my discipline,
12 literary theory had started to become a thing. And so one of
13 the things you don't see -- that you see there but you don't see
14 before this is attacks on deconstruction and postmodern
15 relativism and stuff like that. Those are still alive today. I
16 believe Jordan Peterson is making a killing attacking these
17 things. There are still bugbears, but that's pretty much the
18 idea, that this -- now what's undermining American ideals is
19 atheism, collectivism, and deconstruction.

20 Q. So any of these attacks manifest in efforts to push
21 legislation to regulate academic speech?

22 A. Not a one, and that is what I feared at the time. I was,
23 like, most people take those to the statehouse, but, instead,
24 what happened -- I alluded to this earlier when you asked about
25 the American Council of Trustees and Alumni -- Lynne Cheney

1 decides, Let's put pressure on the trustees. And that's 1995.

2 But, no, no attempts to enact legislation.

3 Q. Does that change in the early 2000s?

4 A. Completely, 180 degrees, because by then along comes the
5 former left-radical-turned-conservative activist David Horowitz,
6 and it's his idea to go to statehouses.

7 Q. When did you -- tell me, did Horowitz have a writing that
8 sort of drove this?

9 A. Oh, yeah, the Academic Bill of Rights, yes.

10 Q. And when did you first learn about Horowitz's Academic Bill
11 of Rights?

12 A. When he sent me a draft of it. It was either 2002 or 2003.
13 He considered me an honest interlocutor, I mean, not only
14 because I supported a military response to 911 and Afghanistan,
15 but because I was willing to criticize some of the members of
16 the antiwar, in quotes, left who did not. And he thought I was
17 ripe for recruitment. And then we got on the topic -- in fact,
18 I -- he also -- I said, Where is the parallel regrets on the
19 right for opposing Nelson Mandela? And he said, You have a
20 point. And I thought, Okay, this is a real conversation now.

21 Well, he decided to send me and Stanley Fish and Todd
22 Gitlin this draft of the Academic Bill of Rights to see what we
23 had to say about it.

24 Q. And was there anything in it that you objected to?

25 A. The thing that jumped out as being just weird was the

1 requirement -- the suggestion that all tenured deliberations and
2 all highering decisions be taped. And I found out, because I
3 was in very frequent conversation with him at time, that what
4 this was about was Peter Berkowitz being denied tenure at
5 Harvard. And I remember writing back to him and saying, David,
6 you're out of your mind. Nobody gets tenured at Harvard to
7 begin with. And Berkowitz is just fine. Now he's at the Hoover
8 Institution, and he landed on his feet.

9 You have to understand, if you start taping confidential
10 deliberations, the deliberations are going to take place
11 someplace else. This has no bearing on how a university works.
12 And he took it out.

13 Q. Was there anything else about Horowitz's Academic Bill of
14 Rights that gave you pause?

15 A. Two things, yeah. One was he didn't use the phrase
16 "viewpoint diversity," but he started to put that into play.
17 And I could see this could cause real mischief.

18 The other thing, and this has -- that has, I think, direct
19 bearing on HB 233. The other thing that has no bearing at all
20 is that he didn't -- he wanted -- he left in a stipulation that
21 disciplinary organizations should remain neutral on political
22 matters.

23 And, again, I knew him well enough at the time to get him
24 to reverse-engineer that, and what he was thinking was the
25 American Historical Association refusing to denounce the war in

1 Vietnam in the late '60s because of my prejudiced future
2 historians against the merits or demerits of the war.

3 Q. Does the term "viewpoint diversity" have a particular
4 meaning in discussions of academic freedom?

5 A. Yeah, now it does. I wouldn't say it's exactly a dog
6 whistle, but it's a coded term, and the key word, of course,
7 being "diversity."

8 So I'm pretty sure I don't need to tell the Court where
9 diversity comes from after *Bakke*. Since we can't testify to
10 affirmative action by way of past discrimination, we defended,
11 instead, in terms of workplace or student or faculty diversity.
12 So now we're working on, what, 45 years of diversity being a
13 watchword for racially diverse hiring.

14 And so in response -- this is a sort of a knee-jerk
15 reaction to affirmative action on the right -- someone came up
16 with the phrase that: *American universities tolerate every kind*
17 *of diversity except ideological diversity or viewpoint*
18 *diversity*. So it kind of goes hand in hand with the attacks you
19 see on diversity, equity, and inclusion. That kind of
20 diversity, which has to do with race and it has to do with -- it
21 cannot deal with past discrimination, but clearly follows from
22 it, is being played off against this idea of viewpoint diversity
23 as if they are both obviously benign and good things.

24 Q. You mentioned Horowitz tried to make some of his principles
25 law. Can you tell the Court a little bit about that?

1 A. Yeah. And I got to lead with the happy fact that he
2 failed.

3 I don't remember exactly how many state legislatures
4 entertained the Academic Bill of Rights. By some counts it's
5 26, 28. Let's call it, ballpark, high mid-20s. He went 0 for
6 whatever. Not a single legislature thought this was worth
7 enacting. The closest he came to anything was, sorry to say, in
8 Pennsylvania.

9 Q. What happened in Pennsylvania?

10 A. Well, effectively a clown show. No, that's the way it
11 played out. I mean, again, the question as to whether there is
12 systemic bias in universities is not an illegitimate question.
13 I don't mean to be dismissing that.

14 What happened was that basically the Pennsylvania House
15 equivalent of the Freedom Caucus did some horse trading over the
16 budget and one was a concession. I'm thinking partly because
17 this happened to Kevin McCarthy. The concession they got was
18 you get to have a House subcommittee to investigate bias at the
19 14 public universities and colleges and the four state-related
20 ones, of which Penn State is one. We have two tiers in
21 Pennsylvania: Fourteen schools in the Pennsylvania state system
22 and then four others: Pitt, Penn State, Temple, and the
23 historically black college Lincoln.

24 So this subcommittee got to investigate all 18 institutions
25 for bias. They had four hearings throughout the year 2005-2006

1 in various places around the state: Pittsburgh, Harrisburg,
2 Millersville, Pennsylvania. And they had hearings, and they
3 issued a report.

4 Q. Did they indulge in any evidence gathering in advance of
5 these hearings?

6 A. They purported to. Horowitz was sort of an anecdote
7 generator.

8 And if you look back at the hearings now at this distance,
9 I think what's really striking is that there is basically a
10 lineup of various culture warriors. David French testified. He
11 was at the time the executive director of FIRE. FIRE has a
12 complicated history, but at that point French was very much a
13 sort of Christian activist for it. Steven Bosch of the National
14 Association of Scholars testified. Faculty testified.
15 Administrators testified. Even a couple of students testified.

16 But for me the real takeaway was that Penn State was
17 asked -- Penn State, by the way, has 24 campuses. A lot of
18 people know that. The full student enrollment is almost 100,000
19 students.

20 We were asked to come up with incidences of student
21 complaints over the previous five years. Enormous headache for
22 everybody. I mean, important, but you had every department head
23 combing through their files looking for student complaints over
24 the previous five years. The total number of complaints, 13.
25 That's what we had, and so that's what we presented to the

1 subcommittee. Here's these 13 complaints over five years from
2 100,000 students a year.

3 Q. Did those 13 complaints follow any noticeable pattern?

4 A. By no means. I mean, the ones that jump out at me were the
5 student who complained that her professor was too conservative,
6 which is not what they were looking for, and the student who
7 complained that his professor was too disrespectful of Islam.
8 But no pattern, no -- not only no atheist or individual
9 collectivist indoctrination, but no pattern at all.

10 Q. Did the hearings uncover any evidence that liberal bias was
11 infringing on the academic freedom of students?

12 A. So, decisively no, that when it came time to write the
13 report and conclude their work, the subcommittee -- basically,
14 it turned into an exercise in saving face and trying to convince
15 the then-governor and the press that they had not, in fact,
16 wasted their time.

17 Q. Can you think of a single attack on academic freedom in
18 higher education over the past 80 years where concerns that
19 liberal professors were indoctrinating students actually turned
20 out to be supported by evidence?

21 A. Not a one. You know, what you see is sort of hydraulic
22 goalpost moving, where that starts out as the claim, and then
23 you move, instead, to a guest speaker who was treated badly or
24 shouted down, completely different subject. And they didn't
25 even find that in Pennsylvania. They found nothing at all.

1 Q. Let's turn now to the opinions that you offered about
2 HB 233 in this case.

3 Were you asked to render an opinion as to whether House
4 Bill 233 resembles prior attacks on academic freedom?

5 A. I was.

6 Q. Did you come to an opinion on that?

7 A. I certainly did.

8 Q. And what's that opinion based on?

9 A. That opinion is based on what we've just gone over. I
10 mean, I think if you go back 70, 80 years, the echoes gets a
11 little fainter. You know, it's still there, *God and Man at*
12 *Yale*. But when I read HB 233, my first response was, my
13 goodness, this is the Academic Bill of Rights all over again. A
14 few changes here and there, but it's the same stuff.

15 Q. Let's start with your -- I think you said at the top that
16 you reviewed the legislative history and some of the political
17 commentary.

18 Was any of it in any way similar to the prior attacks on
19 academic freedom that you've discussed?

20 A. Well, the big one, you know, that jumped out was viewpoint
21 diversity. That's really a through line.

22 Q. Were you able to identify any triggering event for this
23 legislation, any incident in higher education in Florida that
24 seemed to prompt the legislation?

25 A. So I'm shaking my head, and the answer is no. But I didn't

1 follow every -- every newsworthy event in higher education. I
2 thought maybe I missed something. Maybe there is something --
3 maybe someone called the victims of 911 little Eichmanns, or
4 someone taught a class on White supremacy or something. And I
5 couldn't find a thing.

6 MS. FROST: Andy, can you pull up Joint Exhibit 1,
7 please?

8 BY MS. FROST:

9 Q. And is this the language -- when you mentioned that you
10 noticed the viewpoint diversity language, is this the language
11 in the bill you were referring to?

12 A. Yeah, this is the definition, right.

13 Q. And you talked a little bit about this, but have you heard
14 the term "viewpoint diversity" before?

15 A. Well, I wouldn't say it's a watchword. It's not there in
16 the Academic Bill of Rights, but if you go to -- for that
17 matter, the Heterodox Academy speaks of viewpoint diversity.
18 FIRE speaks of viewpoint diversity. It's kind of coin of the
19 realm. Yeah, so it was very familiar.

20 Q. And is there anything in particular about this definition
21 that made you think that House Bill 233 is using the term in the
22 same way that you'd heard in the past?

23 A. Well, two things. I mean, in my report I spent some time
24 trying to disentangle the term "viewpoint diversity" from
25 "intellectual freedom," because I -- pardon -- smelled a rat

1 right there. They are not the same thing at all. And the
2 attempt to yoke the latter to the former basically set off my
3 spider sense.

4 So I thought, okay, there's something going on there, where
5 viewpoint diversity is being smuggled in under the cover of
6 intellectual freedom. But then I got to the end of the sentence
7 and I said, Okay. Wait a minute. This is not viewpoint
8 diversity on, like, dark matter and the nature of the universe.
9 This is not viewpoint diversity in STEM fields. This is
10 about -- this is about politics. This is about viewpoint
11 diversity, a variety of ideological and political perspectives,
12 and I think that kind of gives the game away.

13 The whole premise of the idea of viewpoint diversity is
14 that the professorship is overwhelmingly left and liberal which is
15 in most fields conservative; in my wing, in arts and humanities,
16 largely true. And that yet this needs to be remedied somehow.
17 There needs to be ideological and political diversity imported
18 somehow.

19 Q. Was there anything about the survey provision's
20 evidence-gathering that resembled to you prior attacks on
21 academic freedom?

22 A. I'm sorry?

23 Q. Was there anything about House Bill 233's evidence
24 gathering provisions that reminded you of prior attacks on
25 academic freedom?

1 A. Yeah. I mean, I think Professor Lichtman touched on this
2 also, that it was notably devoid of things in Florida. It
3 seemed to be the same anecdotes about Charles Murray being
4 shouted down at Middlebury and, you know, snowflake students
5 here and -- excuse me -- woke cancel cultural there. It seemed
6 to be boilerplate.

7 Q. If you were legitimately concerned about bias in the
8 classroom, are there more effective ways you could address it?

9 A. Oh, yeah. They're called student evaluations.

10 Q. And why, in your opinion, is that a more effective way to
11 address it?

12 A. Well, first of all, because even though the student
13 evaluations aren't ideal, they have -- I mean, start with the --
14 I benefit in any number of ways from being the old, cis white
15 guy with a salt-and-pepper beard. I'm like the default position
16 for professor.

17 People who are not, especially women of color, tend to do
18 less well in evaluations. That's it. Student evaluations are
19 specific responses to specific courses. Sometimes they will
20 name specific exchanges or specific readings, and they can give
21 you a wealth of detail of the actual content of a course that
22 the survey can't even touch.

23 Q. If you are legitimately concerned about viewpoint
24 diversity, are there more effective and less intrusive ways you
25 could do it?

1 A. Well, you know, yeah. I mean, not only can you sponsor -- a
2 number of universities who have deliberately sponsored
3 university-wide speaker series -- I actually don't think that's
4 as effective as sponsoring debate speaker series.

5 You can also -- I think what you have here, right, is
6 everyone in Florida colleges and universities has adopted the
7 so-called Chicago Statement of Principles and then created a
8 civil discourse initiative to try to operationalize in some way
9 the practice of deliberating and disagreeing without tearing
10 people apart or mobbing them on social media, or, you know, just
11 tearing at the fabric of a decent society.

12 That seems to me standard practice and it should be
13 standard practice.

14 Q. Let's move to the recording provisions.

15 What do you understand them to do?

16 A. Well, you know, in a word, I looked at the recording
17 provision and said, This basically destroys my classroom.

18 Q. And why is that?

19 A. Imagine -- go back to that moment of "Ye." Imagine a
20 student who just caught me saying that, all right. Ah, I can't
21 believe I have to keep reading the word "Ye." Apropos of
22 nothing, and what is this doing in a science fiction class, this
23 comment on a unfortunately Hitler-friendly pop culture figure?

24 Next thing I know, I'm on TikTok, and this is done without
25 my consent, without my knowledge. It's a segment of a thing in

1 a class with no context whatsoever, and personally I'd feel
2 personally violated, and I also think that the kind of contact I
3 had with my students is violated.

4 Q. Is there anything about the language of the recording
5 provision that indicates to you that it, too, is an attack on
6 academic freedom?

7 A. Well, if we look at the highlighted -- I mean, that jumped
8 out at me again. You know, like "persistently," this should be
9 in italics; right: *As evidence in, or in preparation for, a*
10 *criminal or civil proceeding*, which is so different from saying
11 so that the student can play back the thing later and learn
12 more. It's not a pedagogical enterprise here.

13 And I say that because sometimes recording in the
14 classroom -- Professor Lichtman touched on this, but he did not
15 bring up the disability angle -- it can be a matter of
16 disability access, and if that's the question, it's not only a
17 matter of federal law, I think it's also a matter of common
18 courtesy of course I would let a student record.

19 And especially in the last couple of years when so many of
20 us were on Zoom or hybrid, of course I'd let them record, but
21 with the idea that you'd play it back later, or if you have
22 attention deficit disorder, or you're very COVID shy and don't
23 want to be in person. That's all fine.

24 This says, I'm going to do this in preparation to sue you
25 or to sue your institution. This fosters and promotes and

1 assumes an adversarial relationship. That's why I say it
2 poisons my classroom.

3 Q. Doesn't the bill give protection to professors, so saying a
4 recorded lecture may not be published without their consent, and
5 they can sue if someone violates it?

6 A. Good luck with that.

7 Q. Why do you say that?

8 A. I think -- and I say this in my report -- I didn't know
9 whether it was too cheeky or not -- I find it hard to imagine
10 that anyone who drafted that provision has any experience with
11 social media. Once the horses are out of barn and on TikTok,
12 there's no recalling them.

13 And often, more often than not, when you try to call back
14 something like -- I think this imagines this sort of James
15 O'Keefe/Project Veritas gotcha, capturing what a professor is
16 saying, this purportedly outrageous thing, you try to undo the
17 damage, and you get the Barbra Streisand effect. You just make
18 it worse. You make it worse.

19 And the fact that you have legal redress means nothing
20 ultimately. Your reputation is gone and seeking legal redress
21 may cause you financial distress or harm.

22 So that clause giving professors a right to sue if, in
23 fact, something has been posted without their consent, yeah,
24 well, the best I can say is it's well meaning, but it bears no
25 relationship to any reality I know.

1 Q. A little while back we were talking about the 1970
2 interpretive comments, and specifically the language noting
3 professors should avoid persistently intruding material which
4 has no relation to the subject.

5 Do you have any view of the recording provisions in
6 connection with that?

7 A. It's like the "Ye" moment, right, I mean, where this -- any
8 sort of off the cuff -- or something you say in response to a
9 student comment. In my report I said if this were law in
10 Pennsylvania, I would shut down classroom discussion altogether.

11 Certainly I would never ever again play devil's advocate,
12 and I do it all the time. It's -- again, I don't imagine I have
13 to be telling this to people that went to law school. It is one
14 of the ways you draw out contrary opinions. It goes back to,
15 you know, John Stuart Mill believing you don't really know what
16 you believe until you've argued against something -- a competing
17 belief of competing merit.

18 But I wouldn't go there knowing that some de-contextualized
19 snippet of something I say could go viral. It would just be
20 unimaginable.

21 Q. Lastly, let's turn to the antishielding provisions.

22 Do they resemble anything you've seen before in studying
23 academic freedom in the United States?

24 A. You know, at first I thought not and then I realized, oh,
25 no, it's the Chicago Statement. It's the so-called Chicago

1 Statement from 2015, one snippet of which says it's not the
2 university's business to shield students from controversial
3 ideas, something like that.

4 Q. What is the Chicago Statement?

5 A. So it was adopted by, in fact, a committee of faculty in
6 2015, and -- do you want to know the context? Is that --

7 Q. Just sort of broadly what it is.

8 A. It's a statement issued at the beginning of the school year
9 in 2015-'16 saying that, Here in Chicago we will issue no
10 trigger warnings, so I don't -- that didn't come up.

11 And the argument was at that point -- like I say 2014,
12 2015 -- 2015 is also the year that Greg Lukianoff and Jonathan
13 Haidt published the seminal article in *The Atlantic*, *The*
14 *Coddling of the American Mind*, with the obvious echo of Allan
15 Bloom's *Closing of the American Mind*, and it became a book, and
16 three years later -- and there was all of this discourse that
17 you -- these kids today are a bunch of coddled snowflakes who
18 cannot leave their comfort zones, who only want their identities
19 affirmed, who don't want to be challenged by strange ideas or
20 things they might consider offensive or hurtful. And there's
21 just a barrage of anecdotes all put together in sort of a
22 blender about that.

23 One involved students of Oberlin allegedly, you know, hurt
24 by the fact that the campus cafeteria bánh mì was not really
25 bánh mì. I don't think we need to go into the weeds about this,

1 but if someone wants to take me up on it, I'd be happy to, but
2 that was one of the most garbled stories ever written about
3 American higher education. Nothing like that happened at
4 Oberlin. The students did not complain that their Vietnamese
5 sensibilities were hurt.

6 There were students at Wellesley who were freaked out
7 about -- there was a statue, which admittedly was pretty creepy,
8 of a sleepwalking man, and a few female students were alarmed by
9 that. Again, what does this all add up to?

10 And then there were students that complained that
11 such-and-such a text was triggering for various reasons. I know
12 where trigger warnings came from. I used to be a blogger. They
13 were a staple of the feminist blogosphere back in the aughts and
14 usually they had to do with sexual assault. So you'd have a
15 story, and then there'd be a click to see more with a trigger
16 warning, The following will deal with sexual assault. If you
17 have PTSD from sexual assault, you just don't click.

18 And this, too, was widely mocked, which is -- which struck
19 me as very strange, and I will not help -- I will not refrain
20 from noting that people started taking trigger warnings a little
21 more seriously when they came from Vets returning from Iraq and
22 Afghanistan saying, I can't read about this. It's triggering
23 the time I got hit by an IED. The point is that PTSD is real.
24 Trauma is real, and people who are triggered by those triggering
25 events, that's all real.

1 To say that I can't read Chinua Achebe's *Things Fall Apart*
2 because it triggers me because it's about colonialism is not
3 real, and I'm not sure anyone actually ever said that. But
4 Oberlin actually passed -- the administration made trigger
5 warnings mandatory, and the faculty pushed back. The AAUP
6 pushed back.

7 Our attitude was under no circumstances should these things
8 be mandatory. They should be negotiated with students. If the
9 student needs a heads-up on something, or if there is material
10 that might actually shut them down and prevent them from
11 learning, that's something you work out individually. That's
12 part of what pedagogy is.

13 Anyway, Chicago decided it was going to make a statement
14 and it was going to take a firm stand against trigger warnings
15 because the purpose of the university is not to shield, et
16 cetera.

17 MS. FROST: Andy, can you pull up Slide 4?

18 Thank you.

19 And go ahead and highlight some of this language.

20 BY MS. FROST:

21 Q. Dr. Bérubé, is this the language you're referring to from
22 the Chicago Statement?

23 A. It is.

24 And, like I said, I had forgotten that it uses the word
25 "shield," but it does.

1 Q. Can you -- was the Chicago Statement binding on faculty?

2 A. Oh, not at all. This is an aspirational statement, and it
3 was a sort of a -- you know, the joke -- not that it's funny or
4 anything -- was that this is a trigger warning against trigger
5 warnings. It was just a sort of notice to faculty, incoming
6 students, parents, that sort of thing.

7 Q. And did the Chicago statement envision any kind of
8 enforcement mechanism?

9 A. Not at all. No. This was just a committee statement.

10 Q. Are there important differences between House Bill 233's
11 antishielding provisions and the Chicago Statement?

12 A. Yeah, pretty much everything except that one first
13 highlighted sentence. Honestly, the second highlighted part is
14 still -- has the same tenor. If you go back up to: *Concerns*
15 *about civility and mutual respect can never be used as a*
16 *justification for closing off discussion of ideas*, that, I think
17 is also part of the spirit of HB 233.

18 But everything after that is gone.

19 Q. So what's different?

20 A. What's different is that -- let me find -- sorry. I'm
21 laughing because this has been -- this has been everywhere the
22 last three, four years, even in the *New York Times*: *The freedom*
23 *to debate and discuss the merits of competing ideas does not, of*
24 *course, mean that individuals may say whatever they wish,*
25 *wherever they wish.*

1 I'm just going to stop on that for a minute because the
2 reason I mention -- the *New York Times* was an absurd editorial
3 about how Americans are losing the fundamental right to speak
4 their minds without fear of shaming or shunning. That's not in
5 the Constitution. That's not a fundamental right. And
6 shunning, for that matter, is a silent mode of disagreement and
7 doesn't -- shaming can be awful, especially in social media.
8 It's -- mobbing can be terrible.

9 Q. Dr. Bérubé, before -- it looks like you're going to go on.

10 Can I ask you that line you just read, is that in House
11 Bill 233 --

12 A. No, no, no.

13 Q. -- the antishielding provision?

14 A. It's not. And for that matter, it's not even in the -- all
15 the surveys that have been cited so far, the FIRE survey and so
16 forth, where, you know, students are self-censoring, 80 percent
17 of them sometimes self-censor. Whoever said the idea of a
18 university education or of a civil society is that you can say
19 whatever you wish, whenever you wish, where did that come from?

20 So there's some -- all kinds of guardrails here: *The*
21 *university may restrict expression that violates the law, that*
22 *falsely defames a specific individual, that constitutes a*
23 *genuine threat or harassment, that unjustifiably invades*
24 *substantial privacy or confidentiality interests, or that --*
25 *this is crucial to HB 233 -- is otherwise directly incompatible*

1 *with the functioning of the university.*

2 This goes back to Your Honor's question about dealing with
3 classroom discussion, either obstreperous or irrelevant remarks
4 in a classroom. The Chicago Statement has all these kinds of
5 acknowledgments that's it's not a free-for-all. HB 233 is a
6 free-for-all.

7 Q. Did you come to an opinion as to whether House Bill 233
8 constitutes an attack on academic freedom similar to the attacks
9 we've been discussing today?

10 A. I did.

11 Q. What's your opinion?

12 A. My opinion is yes, it does.

13 It breasts its cards more effectively than most, but it is
14 part and parcel of everything we have just talked about. But
15 especially -- I mean, it's amalgam, right, of the Academic Bill
16 of Rights, the Chicago Statement, de-contextualized and
17 de-guardrailed -- if that's a word -- and then to cap it all
18 off, a secret videotaping provision that is just poison.

19 MS. FROST: Thank you, Dr. Bérubé.

20 I have no further questions at this time.

21 THE COURT: Ms. Lukis, if -- are you ready to proceed
22 or do you need a minute? You certainly -- if you want to gather
23 your thoughts and review your notes then -- I'm going to ask
24 this every time. It's totally up to y'all. I'm not insisting.
25 I just always extend that courtesy because sometimes people want

1 to look at their notes.

2 MS. LUKIS: May I defer to Megan's comfort?

3 THE COURT REPORTER: I could use a five-minute break.

4 THE COURT: We'll take a five-minute break.

5 I'm not going to ask every time, but that goes to
6 everybody on cross. If y'all would -- if you look at me and
7 say, Judge, I want to go now, that's fine, but if you say,
8 Judge, I'd like a few minutes to review my notes. That would be
9 helpful, then I'll always do that.

10 Court is in recess for five minutes.

11 (Recess taken at 3:07 PM.)

12 (Resumed at 3:20 PM.)

13 THE COURT: We are on the record in 4:21cv271.

14 Counsel, you may proceed with your cross-examination.

15 Thank you.

16 MS. LUKIS: Thank you, Your Honor.

17 CROSS-EXAMINATION

18 BY MS. LUKIS:

19 Q. Dr. Bérubé, it's nice to see you in person this time.

20 A. Ms. Lukis, nice to see you.

21 Q. You're a professor of literature; correct?

22 A. I am.

23 Q. And you're an expert in the subject area of academic
24 freedom?

25 A. I became one, yes.

1 Q. And you still are as you sit here today?

2 A. Sorry?

3 Q. And you are as you sit here today?

4 A. I'm missing --

5 Q. And you are as you sit here today?

6 A. Yes. Yes, I am.

7 Q. You've never lived in Florida, have you?

8 A. Have I never been to Florida?

9 Q. Never lived in Florida?

10 A. No. I've never lived here, no.

11 Q. You've never had a faculty appointment in Florida?

12 A. No. I was a visiting scholar at the University of South
13 Florida for a week, but that's not the same thing.

14 Q. Do you perform research in the course of your work?

15 A. Certainly.

16 Q. Okay. But not quantitative research; right?

17 A. No, never.

18 Q. You've never designed a survey or administered a survey?

19 A. No, never.

20 Q. Okay. So fair to say that you're not making any sort of
21 empirical claims in this case?

22 A. I don't think a single one, no.

23 Q. Okay. And so you're not offering an opinion, then, about
24 what's actually going on in Florida's classrooms as a result of
25 House Bill 233?

1 A. Hum, I have not. And when we last spoke in September for
2 my deposition, I did not. And in the four month since then, I'm
3 sure like a lot of you, I have been inundated with reports about
4 what is happening to faculty in Florida. But I -- it was not
5 part of any opinion or my deposition.

6 THE COURT: So as I understand it, you're saying, Yes,
7 I have some views, but I'm not offering them because I didn't
8 include them in my report is what I --

9 THE WITNESS: Kind of, although I still have those
10 views. And if it please the Court --

11 THE COURT: No, no. I'm not asking you to --

12 THE WITNESS: Okay.

13 THE COURT: I was just --

14 THE WITNESS: But I could.

15 THE COURT: I understand your response is that if you
16 said you didn't have an opinion, you would be lying; you have an
17 opinion, but, I understand I can't talk about what I didn't put
18 in my report?

19 THE WITNESS: There's that, and there's also the fact
20 that some of these reports didn't come out until fairly
21 recently.

22 BY MS. LUKIS:

23 Q. Okay. Well, I'm not aware of what you may have developed
24 in terms of opinions since I deposed you in September, so I'm
25 just going to ask you some questions based on what we previously

1 talked about.

2 A. Okay.

3 Q. Okay. So you cannot identify any professors who have
4 changed the course of the conduct of their classroom in response
5 to House Bill 233; correct?

6 A. Here we go. No. Just three or four days ago I read an
7 article in ProPublica by Daniel Gordon about a young Black
8 scholar of the University of Central Florida, Jonathan Cox, who
9 pulled two courses and left students completely stranded, not as
10 a result of HB 233, but because of HB 7, Race and Ethnicity, and
11 I think the other was called Race in Social Media.

12 So when we last spoke, I said I hadn't seen any effects yet
13 either of 233 or the other pieces of legislation recently
14 enacted. And now I wonder whether the evidence isn't starting
15 to come in. I don't have enough to go on, but I want -- I don't
16 want to say no simply.

17 Q. I'll ask it this way. Could you please identify for me the
18 professors in Florida who have changed the conduct of their
19 classroom in response to House Bill 233?

20 A. No, I don't think so.

21 Q. Okay. In the course of developing your opinions in this
22 case, you didn't speak to any professors in Florida; correct?

23 A. No, I did not.

24 Q. And you didn't speak to any students in Florida; correct?

25 A. No; correct -- yes, correct.

1 Q. Okay.

2 Is it fair to characterize the testimony that you gave
3 during your direct examination as how you anticipate faculty to
4 react to House Bill 233?

5 A. Yes, I think it is. I mean, I tried to keep my report and
6 I tried to keep my responses on direct examination as a matter
7 of principle: This is how I understand academic freedom; this
8 is how I understand HB 233 to violate academic freedom.

9 Again, as you said earlier, it's not an empirical claim.
10 It's a matter of what I understand academic freedom to be.

11 Q. Okay.

12 But at the risk of beating a dead horse, you can't identify
13 anyone who has actually reacted in the way that you predicted?

14 A. I don't think so, no.

15 Q. Do you agree with me that House Bill 233 does not dictate
16 the contents of any professor's curriculum?

17 A. Yes.

18 Q. Would you agree with me that House Bill 233 doesn't say
19 anything about critical race theory?

20 A. It does not, though I'm going to qualify that by saying two
21 things. One, you just used the word "predicted," and I didn't
22 catch that. I'm not sure -- excuse me.

23 My report did make one prediction but otherwise was not
24 about prediction.

25 As for critical race theory, I would contend that it would

1 be practically impossible for a faculty member in Florida or
2 thinking about taking a job in Florida not to hear the two
3 things together.

4 HB 233 wouldn't be in isolation. It would be, I can't say
5 critical race theory -- I can't say critical and race in the
6 same sentence, and students might have a legal cause of action
7 against me under HB 233 as well.

8 Q. All right. A couple of things.

9 Can we agree that House Bill 7 is not being challenged in
10 this lawsuit?

11 A. Absolutely.

12 Q. Okay. And then from your last answer, did I hear you say
13 something about a professor thinking that a student might have a
14 cause of action against them?

15 A. Under the video recording provision they would, yes, in
16 preparation for a civil or criminal proceeding. And, of course,
17 it would be against the institution, but it would be
18 precipitated by a specific faculty member.

19 Q. So you would agree with me that House Bill 233 does not
20 contain a cause of action against any individual professor;
21 right?

22 A. Right. But it would be -- pardon the word -- triggered by
23 possible remarks of an individual professor. And, again, since
24 you asked what I think faculty in Florida might be thinking,
25 that's my best guess. They would -- they would see this bill as

1 having all kinds of dire implications with regard to
2 antishielding and with regard to video recording given the prior
3 bill, the so-called Individual Freedom Act.

4 Q. None of those lawsuits that you envision have occurred;
5 right?

6 A. Not yet.

7 Q. Okay.

8 So you mentioned, I believe, during your direct examination
9 the book that you wrote last year, *It's Not Free Speech*.

10 Is it accurate to say that that book discusses the concept
11 of academic freedom on one hand and free speech on the other
12 hand?

13 A. It is, although much more of the former.

14 Q. Okay.

15 A. Again, to disentangle the one from the other, not only
16 because we think organizations like FIRE, whatever their other
17 merits, confuse the two all the time, but I can't think of a
18 university administrator's statement about free speech issues,
19 including one at my own institution at Penn State in October
20 involving the founder of the Proud Boys, Gavin McInnes, where my
21 university president Neeli Bendapudi said, Your tolerance of
22 others' views is crucial to academic freedom and free speech.

23 So I sent her a copy of my book with a nice note: These
24 are not the same things. Please don't yoke them. They're
25 related. One depends on the other. Academic freedom depends on

1 a broader context of free speech, but, please, please don't
2 equate them.

3 Q. Okay.

4 A. So that's the point.

5 Q. Okay. And that's -- I understand that.

6 And the reason I ask is I believe that you are familiar
7 with -- whether you want to call it concerns or academic
8 debate -- about the state of free speech on college and
9 university campuses. You're familiar with that; correct?

10 A. Absolutely, yes.

11 Q. Okay. And you'd agree with me that some of those concerns
12 are legitimate?

13 A. I've agreed -- I would agree with you, and I've agreed with
14 others in the past. Yes, some are legitimate.

15 Q. One that comes to mind is that shout down of Charles Murray
16 at Middlebury College. I think you mentioned that one earlier.

17 A. I did. It's always Exhibit A. It's the worst one. That's
18 the case where I think -- well, in that case the faculty
19 moderator of the event wound up suffering a concussion, and in
20 no universe is that okay.

21 Q. So I think earlier you also used the word "boilerplate" to
22 describe the express justifications leading to the enactment of
23 House Bill 233.

24 Is that accurate?

25 A. Yeah. It's usually the same incidents retold and repeated,

1 yeah.

2 Q. Okay. And so by using the term "boilerplate" and then your
3 qualification here that it's been retold and repeated, that
4 suggests there's some number of people who believe that those
5 are actual justifications?

6 A. There are. There certainly are. And, again, some of them
7 in that canon of where students or faculty are behaving badly,
8 and, oddly, it's often students, which is not really -- it
9 shouldn't be at issue in HB 233.

10 Some turn up real incidents. I'd be happy to discuss one
11 or two that I think where students crossed the line and behaved
12 in a way that was inimical to free and open inquiry.

13 Whether they amount to something that requires legislation,
14 that crosses the line that I thought was established in the
15 enlightened, where suddenly the intellectual operations of the
16 university are answerable to the State now, I can't think of
17 anything that warrants that.

18 Q. So are you offering an opinion on whether or not House Bill
19 233 is good policy?

20 A. Well, insofar as I think it violates academic freedom, I
21 can't possibly endorse it as good policy.

22 Q. Okay. But you're certainly not offering an opinion on
23 whether or not the legislature was empowered to enact it?

24 A. Oh, certainly did.

25 And to go back to the Academic Bill of Rights, I believe

1 this is something I noted in my reply report. This is very --
2 my summary is very similar to what the Florida Legislature
3 looked at in 2005, 2006, and roundly rejected. And now here we
4 are instead and it is law.

5 And I hardly think you can agree, even if you don't agree
6 about specific things, like the students at Oberlin complaining
7 about the báhn mì or about the students at Middlebury
8 complaining about Charles Murray, or the students at Reed --
9 this is the one that actually gets me -- protesting filmmaker
10 Kim Peirce coming to their campus because she's not trans and
11 she made a movie, *Boys Don't Cry*, that didn't have a trans star.
12 That seemed to me -- I've actually criticized that in print.

13 You can agree with all of that and still say it's really a
14 mistake to have the university answerable to the State and
15 answerable to legislators in this way. I would say the same if
16 Florida were a deep blue state with Bernie Sanders as Governor.
17 I really would.

18 THE COURT: That would be interesting.

19 THE WITNESS: It would be weird.

20 THE COURT: Sorry.

21 THE WITNESS: He doesn't even live here.

22 BY MS. LUKIS:

23 Q. And you're not offering an opinion on what, in fact,
24 motivated the Florida Legislature to enact House Bill 233?

25 A. We talked about this in the deposition.

1 Q. Right.

2 A. And what I said there, I'll probably say again. I felt
3 this way also as the Senate chair. I am really loathe to
4 ascribe individual intent of intentions to a corporately
5 authored and jointly passed statement. I try to read the
6 statement on its face and try to get at what is behind the
7 statement, as Professor Lichtman said, to interrogate it and
8 what its effect might be.

9 But I don't want to go around ascribing mental contents to
10 Representative Roach or Senator Rodrigues or anyone.

11 Q. Okay. So your discussion is simply about -- or your
12 opinions are simply giving us some historical background?

13 A. Some historical background and, again, some principle as to
14 why these -- even the most legitimate concerns should be dealt
15 with by internal university structures and governance, yeah.

16 Q. You mentioned David Horowitz and the Academic Bill of
17 Rights earlier; right?

18 A. (Witness nods head.)

19 Q. Okay. These should be easy ones.

20 But is David Horowitz a member of the Florida Legislature?

21 A. Yeah. I believe -- I believed he testified in favor of it
22 himself, though I'm not sure.

23 Q. I'm sorry? David Horowitz --

24 A. David Horowitz.

25 Q. -- testified?

1 So is David Horowitz a member of the Florida Legislature?

2 A. Never has been.

3 Q. That was my question. Okay.

4 The Academic Bill of Rights was not mentioned during
5 legislative proceedings on House Bill 233; correct?

6 A. I don't really think it had to be. No one had to cite it.
7 It's not -- it wasn't like a scholarly enterprise to prepare
8 HB 233. They didn't have to say, Well, to be honest, we got a
9 lot of these ideas from this other thing.

10 But I think my report and my testimony here today tries to
11 make the argument that these are part of an abiding set of
12 concerns that underlay a certain ring of the cultural war right
13 for decades, and they don't really need to be footnoted.

14 THE COURT: If I may, Counsel. Under Rule 614 let me
15 ask a quick question.

16 I understand there's a difference between what's said
17 in a classroom versus speakers on campus, and so forth. But I'm
18 having a hard time wrapping my head around this notion that
19 there's no basis for reaction by the Florida Legislature such
20 that this law just came out of nowhere.

21 And let me ask you specifically and you can respond.

22 I'm not asking whether it was good or bad policy. I
23 don't get to decide whether it's good or bad policy. Under
24 *Arlington Heights*, I get -- and I don't get to define academic
25 freedom. That's defined by the contours of the case law.

1 To a certain degree, if there is no basis to support
2 something, if there's better ways to accomplish the goal, and so
3 forth, that's baked into the *Arlington Heights* analysis. But I
4 don't want to be completely dismissive if there's no basis for a
5 law.

6 But if you, yourself, say -- and we've all read about
7 them -- the schools that -- we don't want Condoleezza Rice
8 speaking, even though she's an incredibly important figure in
9 recent American history, because we oppose the Iraq War. We
10 don't want somebody -- a filmmaker coming to Reed, and the list
11 goes on and on and on.

12 Why is it that the Florida Legislature -- whether I
13 agree with your solution or not, whether I think they are
14 overstating it or not, why do I get to say, you know,
15 notwithstanding all the noise that I hear and we all hear, you
16 hear the same thing. Your constituents are screaming, Why is
17 it, you know, that X, Y, and Z is happening? We believe that
18 we -- and I understand there is an origin, there is a basis.
19 And, Judge, this follows a trend of reacting and attacking
20 academia, and it follows a pattern. I understood that
21 testimony, and I get that.

22 But I'm stuck on this idea that even you express
23 outrage that they go too far, students, and so forth, yet the
24 Florida Legislature doesn't get to say, You know what, dosta.
25 We've had enough. And we're going to ensure that, you know,

1 there are safeguards -- and that doesn't mean they get to do
2 whatever they want, and you still can review things. They can
3 still be void for vagueness. There are still all kinds of
4 potential problems. I mean, it's a free-for-all.

5 But I just -- I couldn't help when you gave the Reed
6 example, you know, think to myself -- I couldn't help but recall
7 sitting when President Bollinger at Columbia had convocation --
8 and my oldest went there seven years ago -- talking about we're
9 not going to -- it seems to me -- and maybe you can correct me
10 if I'm wrong. I didn't think President Bollinger was some sort
11 of enlightened Horowitz follower. So even he said, Enough is
12 enough. We can't -- we can't be stopping them. And I want
13 every parent sitting here, if you think I'm going to protect
14 your children, much of the language that we've been decrying
15 here, Bollinger, who I thought was a First Amendment standard
16 bearer, looked out at all the parents, including me -- didn't
17 know who I was, didn't care, still doesn't, still doesn't
18 care -- and said, We're not going to allow that.

19 And so I just -- it's hard for me to grasp that we can
20 say it's done in a complete vacuum and there's no basis for what
21 the Florida Legislature did. And I'll pause there, just as an
22 aside, to say, I get it. We live in a society where both sides
23 overreact, and rather than having a rational response to an
24 overt reaction, we then overcorrect. There must be something --
25 I certainly wouldn't object to the notion of American

1 exceptionalism because I don't want to impeached. But accepting
2 that, there is something in your DNA that suggests we have to
3 overcorrect every time.

4 But help me to understand. I don't strike down a law
5 because the Florida Legislature arguably overcorrected.

6 THE WITNESS: Right.

7 THE COURT: But I've had a number of witnesses urge me
8 that when you go through all the examples, there is no reason
9 for them to do anything. And I just don't get it in light of
10 your own recognition of examples like Reed where --

11 THE WITNESS: Yeah.

12 THE COURT: -- they all hear him. And so that was a
13 long statement. But, in fairness, I'm sick, and it's almost
14 4 o'clock, so -- but --

15 THE WITNESS: Your Honor, do you want me to answer?

16 THE COURT: Sure.

17 THE WITNESS: Okay. First of all, you can see why
18 people in the right, intellectual conservatives sometimes hail
19 me as an interlocutor. I'm perfectly willing to admit what
20 happened at Reed was horrible and involved language I will not
21 repeat in court about this cis bitch. Kim Peirce was undone by
22 it. Kim Peirce, the director of *Boys Don't Cry*, who is also
23 nonconforming -- these students had no idea what they were
24 doing. And, you know, I wound up writing about this. It was in
25 the journal called *Democracy*. And I also realized if I came to

1 as the old tenured cis heterosexual White guy, I had precisely
2 zero chance of being hurt, whereas trans scholar Jack Halberstam
3 criticized them, and that maybe had more traction.

4 Now, of course, in saying that, I've just reinforced
5 identity politics. But guess what? Who you are and where you
6 stand in the social world does have some effect on who will
7 listen to you and why.

8 Now, that said, I've been happy to debate just last
9 month Jonathan Marks, and he is a professor of politics at
10 Ursinus College, a principled conservative and a person who
11 really didn't like my book and wrote a negative review in the
12 bulwark, which is why we had this further exchange. It was a
13 good negative review. It was honest and an honest disagreement.

14 So I -- all this is preface to my saying I have very
15 low tolerance for people shouting down no platforming speakers.

16 Charles Murray is on the cuff. Charles Murray comes
17 very close to replaying the beliefs of eugenics that I find
18 absolutely poisonous and intellectually illegitimate.

19 Where I do draw the line is Milo Yiannopoulos because
20 he actually put up a picture of a trans student at Wisconsin and
21 invited attacks on them. And there is no sense under status,
22 protected speech, time, place, or manner, or anything.

23 And when I debated Nico Perrino of the Foundation --

24 THE COURT: Doctor, I don't mean to cut you off.

25 THE WITNESS: -- he said he only did it once, so I do

1 think --

2 (Indiscernible crosstalk.)

3 THE COURT: Your description that you just gave me,
4 though, if that's the national debate that we're having now --
5 again, I may disagree, disagree vehemently with what the Florida
6 Legislature did to address it. But, quite frankly, it doesn't
7 matter whether I agree or disagree with what the Florida
8 Legislature did. The question is is it constitutional or not?

9 But when we're talking about is there a reason why the
10 Florida Legislature did what they did, it seems the very people
11 that are decrying what they did -- not in all instances. In
12 some instances the very people that generated this public debate
13 that resulted in a reaction --

14 THE WITNESS: What I would do if I were a legislator,
15 I would convene those university presidents that signed the
16 Chicago statement that created the civil discourse initiative
17 and say, All right. You know what we should do here? We should
18 create a sort of joint House committee, together with university
19 leadership, and we should have -- basically encourage the civil
20 discourse initiative.

21 What I would not do is pass a law that crosses that
22 rubicon, that makes the university -- the intellectual content
23 of the university, the actual content of my courses answerable
24 to the State. That's what I would not do.

25 THE COURT: I understand the answer.

1 And y'all can talk about what the law says, what I can
2 and can't do about that, later.

3 Okay. Thank you.

4 MS. LUKIS: I have no further questions.

5 Thank you so much for your time.

6 THE WITNESS: Thank you.

7 THE COURT: If you need a minute to go over your
8 notes --

9 MS. FROST: I got it.

10 THE COURT: -- confer with your colleagues, phone a
11 friend.

12 MS. FROST: I may regret not phoning a friend.

13 (Discussion held.)

14 REDIRECT EXAMINATION

15 BY MS. FROST:

16 Q. Dr. Bérubé, can I draw your attention to C here?

17 A. Sure.

18 Q. I'll represent to you that this is statutory language from
19 Florida's Campus Free Expression Act.

20 Does this language appear to protect speech rights of guest
21 speakers?

22 A. It certainly does. To use the term again, it seems to be
23 boilerplate. It's restrictions that are reasonable and content
24 neutral on time, place, and manner of expression and narrowly
25 tailored to a significant institutional interest. So, yeah,

1 looks good.

2 Q. Do you understand the plaintiffs to be challenging this
3 language in this case?

4 A. I thought I just heard that.

5 Q. Does this language appear to apply to the classroom?

6 A. No. It's the outdoor areas of campus. It's a completely
7 different arena all together.

8 Q. Did you see --

9 THE COURT: Hold on, Counsel. Let me -- I can't let
10 that pass.

11 I'm slow, but not that slow. I understand there is a
12 difference between talking about what speakers can and can't say
13 on campus and the no platform movement. But the no platform
14 movement could also -- can be extended, although using other
15 words, to the classroom as well; right? We're not going to
16 allow a student to offer -- well, let's just not use that
17 phrase. If we are going to cabin it that way, I just -- for the
18 life of me, I don't understand, if I'm a member of the Florida
19 Legislature, why I have to take on the platform movement,
20 classroom discussion, governance generally and put them in all
21 of these little pidgeon holes and suggest that they're
22 completely unrelated.

23 So is it -- and more what the plaintiffs' position is,
24 but is it also your testimony that, Judge, the fact that the
25 Florida Legislature may know that students on campus are

1 shouting down speakers, trying to stop people from speaking,
2 protesting folks like the director of the film, that's
3 completely divorced -- while not identical, it's completely
4 divorced from a conversation about when we had a problem
5 generally on campuses with limiting speech? Because, for the
6 life of me -- and maybe, you know, I'm just a simple state
7 university graduate -- it doesn't seem to me that those two
8 things are completely divorced from one another.

9 THE WITNESS: They're not, Your Honor.

10 But I -- if I may.

11 THE COURT: Sure.

12 THE WITNESS: I have some thoughts about this.

13 One of the things I have become very skeptical of in
14 the debates about campus cancel culture and what have you is the
15 way that the guest speaker question then gets transposed onto
16 the classroom, which I think it has here. They argue different
17 things with two different expectations, and the AAUP statement
18 on HB 233 says this. It confuses the intellectual parameters of
19 the classroom with the broader campus climate.

20 And so what you get are these anecdotes about Charles
21 Murray or Kim Peirce or whatever as if they are evidence of what
22 goes on in the classroom, which they are not. And this
23 legislation reaches into my classroom. It really does. It
24 reaches into the antishielding provision, and it reaches in with
25 the video recording provision. And the fact that there may be a

1 generalized concern as to whether speakers in outdoor areas of
2 campus are treated fairly, I think you're right; they're not
3 siloed, but they are not the same thing either.

4 This has --

5 THE COURT: Then the issue becomes, though, whether or
6 not I find, based on all the evidence in front of me, that's
7 used as an excuse to justify a nefarious purpose; namely, trying
8 to either silence or limit the speech of those that they don't
9 agree with; namely, quote, "the Marxists that have festered on
10 campus."

11 But that's really the inquiry; right? I mean, you
12 could have somebody that makes a decision for the wrong reason,
13 but it's not necessarily unconstitutional. So the question
14 becomes is it done to cover the real motivation? Because I'm
15 here for purposes -- and plaintiffs' counsel can tell me if I'm
16 wrong. Under *Arlington Heights*, the question isn't are you
17 goombahs and made a dumb decision or relied on something you
18 shouldn't have relied on? The question is is did you, with a
19 nefarious purpose, pass a law with the intent to chill speech
20 because you're going after the leftist professors; right?

21 MS. FROST: Well, that's the question on the attempt
22 piece, but we are in the First Amendment space. And in the
23 First Amendment space, I would submit to you, Your Honor, that
24 these laws suppressing speech are always passed because someone
25 is afraid of something.

1 And our concern -- you know, the laws that were
2 requiring teachers to report on their associations was passed
3 because people were afraid of communists.

4 So in the First Amendment space, once there is a
5 showing that this speech is impeded upon, the burden does shift
6 to some degree to the State to show they have some evidence for
7 it and that it is narrowly tailored to actually do what --
8 address what they said they are concerned about.

9 THE COURT: The point is it's a little bit more
10 complicated. I understand.

11 THE WITNESS: Is that a question to me as well?
12 Because I do have an answer.

13 THE COURT: You can answer.

14 THE WITNESS: Because, look, every part -- you know,
15 every part of your opinion about the Individual Freedom Act --
16 and there, of course, you have a case where people said, You
17 know what, we want to ban an entire -- criminalize an entire
18 body of thought. It was naked and it was open and it was
19 flagrant and outrageous.

20 This is not the same thing at all. This is a
21 different kind of thing. I do think, to go back to Ms. Lukis'
22 question, that Florida faculty will see them in tandem for the
23 reason they have to teach here with both those laws in effect.
24 But what I'm objecting to here is that sometimes legitimate
25 concerns about generalized campus climate or people being

1 deplatformed are being used as a pretext to shoehorn the State
2 into my classroom to tell me what I can and can't -- and the
3 antishielding provision is a mess. It is a free-for-all. Omari
4 Hardy -- Representative Hardy is no longer in the legislature --
5 put it best during the hearings: Anything can be construed as
6 shielding, and there are no guardrails. And the video recording
7 provision is unprecedented and just --

8 THE COURT: Which sounds a lot like it may just be a
9 cover for another reason, which you are not allowed to do, which
10 is limit speech.

11 THE WITNESS: It will have that effect without
12 actually saying so. HB 7 says so. 233 comes in quiet as cat's
13 feet. But that's my argument. My argument is that --

14 THE COURT: I understand.

15 THE WITNESS: -- whatever is going on with guest
16 speakers is one thing. That is no reason to impose on me an
17 antishielding provision and a video recording provision. It's
18 just -- it's just we have a duck problem sort of running after
19 the horses. It doesn't make sense on its face, and that is why
20 we look for others.

21 THE COURT: Or it's not the real reason.

22 THE WITNESS: Not the real reason, exactly.

23 THE COURT: I understand.

24 THE WITNESS: Or it's not --

25 THE COURT: So if you read my HB 7, maybe you should

1 also read my election order where I put Florida back under
2 pre-enforcement because I recognized that your stated purpose is
3 not the purpose I necessarily have to accept.

4 But go ahead.

5 MS. FROST: No further questions.

6 THE COURT: I'm not saying I'm doing that here. I'm
7 just suggesting I understand the analytical framework.

8 MS. FROST: I have no further questions, Your Honor.

9 THE COURT: Thank you. Anything else?

10 MS. LUKIS: No, sir.

11 THE COURT: Thank you, sir. It was fascinating, and
12 you can come back and speak in another language for the benefit
13 of the court reporter.

14 (Dr. Michael Bérubé exited the courtroom.)

15 THE COURT: Mr. Wermuth, the next person I know we are
16 going to get to, but let me ask -- and you don't have to tell me
17 now, but as I'm sitting here things are percolating -- with
18 respect to standing and the recording provision, I may be
19 missing a link, and I'm going to want y'all to -- maybe somebody
20 tomorrow morning can tell me so I can start thinking about it.

21 I understand, for example -- and I'll use the example
22 because it just came out in the Anti-Riot Bill -- if I say you
23 can't -- this definition is vague, and you can't arrest based on
24 this definition, and you've got people with the power to order
25 people to be arrested, in that case the Governor, because there

1 is a special provision, or the sheriff, because they have the
2 power to arrest under the statute -- if I say you can't use this
3 definition, then these two authorities that would arrest, I
4 can -- it doesn't have to be a complete remedy, but we have a
5 partial remedy to the problem.

6 I'm trying to figure out here -- as I understand the
7 recording provision, students can record, but it's not tied to
8 any other structural framework requiring the Board of Governors
9 to have them do X. I mean, I just had this in HB 7 where you've
10 got different people linked. I'm just trying to figure out --
11 and I understand it doesn't have to be a complete remedy to get
12 an injunction, notwithstanding -- and Mr. Levesque has never
13 argued this, but some of his friends have -- notwithstanding the
14 100 cases that say to the contrary. I understand you don't have
15 to have a complete remedy. So the fact that students could
16 still sue doesn't undo the fact that you may have standing to go
17 after part of that law because you don't have a complete remedy.
18 But I'm having a real hard time connecting the dots between
19 these defendants and the recording provision.

20 So if somebody can walk me through that tomorrow
21 morning.

22 MR. WERMUTH: We'll be ready to do that.

23 THE COURT: Or you can do it now. I just didn't want
24 to interrupt the next witness.

25 MR. WERMUTH: Well, I think we'll work on that, and

1 we'll talk to you in the morning. But I can give you an answer
2 if you would like.

3 THE COURT: Mr. Hancock looks like he wants to answer
4 the question. He was nodding his head vigorously.

5 MR. WERMUTH: It all goes back to the Board of
6 Governors, the Board of Education being the entities that assure
7 that the universities are following the law, and so --

8 THE COURT: Yeah, but when I read it -- and that's
9 what I definitely want you to address, because even in instances
10 where you can put every dog race entity out of business in
11 Florida, but you don't have any enforcement authority -- you've
12 got -- the attorney general is charged with enforcing laws in
13 the state of Florida. But the Eleventh Circuit has said, You
14 know what, it's tough to lose your business; it's tough to fire
15 hundreds of employees, but, you know, we've held that the
16 general authority to ensure compliance with the law is not
17 enough for standing. And we understand that there's really
18 nobody, since the legislature is waiting until you go out of
19 business to create the enforcement mechanism -- you know, it's
20 really crummy being you, but there is no standing.

21 So I just -- y'all are going to also have to help me
22 to understand, in light of that case law, if the attorney
23 general you can't sue; if the Secretary of State who, depending
24 on the day, does or doesn't tell the supervisors what to do; if
25 they like the results, they have the authority to tell them and

1 enforce it, but if they don't like it, then why order it, and
2 they don't.

3 But setting that anomaly aside, but that's going to be
4 the second hurdle of that. If the theory is they just have the
5 general authority to make sure compliance, you've got to
6 distinguish that other case law and to tell me how you can
7 distinguish it.

8 MR. WERMUTH: We'll do that, Your Honor.

9 THE COURT: I think it was pretty clear I'm not a big
10 fan of where that line of cases went, but I'm obliged to follow
11 the Eleventh Circuit --

12 MR. WERMUTH: We'll --

13 THE COURT: -- good, bad, or indifferent.

14 MR. WERMUTH: -- we'll have an answer for you.

15 THE COURT: All right. And we now have Dr. Kamola?

16 MR. WERMUTH: Actually, to ensure that we can get
17 through Dr. Link, we are going to go with Dr. Link first.

18 THE COURT: Okay.

19 MR. WERMUTH: So plaintiffs' next witness is William
20 Link.

21 (Dr. William Link entered the courtroom.)

22 THE COURT: If you'll raise your right hand.

23 **DR. WILLIAM LINK, PLAINTIFFS WITNESS, DULY SWORN**

24 THE COURTROOM DEPUTY: Please state your name for the
25 record.

1 THE WITNESS: William A. Link.

2 THE COURTROOM DEPUTY: And spell your last name.

3 THE WITNESS: L-i-n-k.

4 THE COURTROOM DEPUTY: Thank you.

5 DIRECT EXAMINATION

6 BY MR. WERMUTH:

7 Q. Dr. Link, where do you live?

8 A. Gainesville, Florida.

9 Q. And are you a plaintiff in this case?

10 A. Yes, I am.

11 Q. What is your occupation?

12 A. I'm a now-retired college professor, historian.

13 Q. About how long were you a college professor in all?

14 A. 41 years.

15 Q. Okay. And how long -- where were you last employed?

16 A. At the University of Florida.

17 Q. And how long were you employed at the University of
18 Florida?

19 A. 18 years.

20 Q. And what was your position at the University of Florida?

21 A. I held the Richard J. Milbauer Professorship in Southern
22 History.

23 Q. And are you a member of United Faculty of Florida?

24 A. Yes, I am.

25 Q. And where did you work before you were professor at the

1 University of Florida?

2 A. I taught for 23 years at the University of North Carolina
3 at Greensboro.

4 Q. And what academic projects, if any, are you working on
5 these days?

6 A. I have a book that's sort of in the gestation period, I
7 guess you'd say, that revolves around the career of Jesse Helms
8 who was a five-term United States Senator from 1972 to the early
9 2000s. And Helms was also a veteran opponent of civil rights
10 and of gay rights as well in the 1980s and 1990s. So this is a
11 book -- I did a longer book on Helms in 2008. This would be a
12 shorter book that would be a thematic. It would focus on the
13 connections between particularly race and sexuality -- issues of
14 race and issues of sexuality.

15 Helms had an interesting career. He was a -- before he was
16 a Senator, he was TV commentator. And he held daily -- well,
17 five days a week TV editorials between 1960 and 1972, about
18 2,700 of them. We have transcripts of those -- of those
19 editorials.

20 One of the major themes of Helms in these editorials was
21 attacks on the University of North Carolina, which he called at
22 one point the University of Negroes and communists. In
23 addition, Helms is quoted as saying that the state of
24 North Carolina didn't need a state zoo because all they needed
25 to do was to put a fence around Chapel Hill to include its

1 occupants.

2 So these are sort of themes, I think, in Helms' career:
3 Higher education, the attack on UNC, combined with his whole
4 critique of the 1960s, particularly civil rights activists. He
5 drew connections between people like Martin Luther King, Bayard
6 Rustin for what he saw as connections between their subversive
7 activities and their sexual deviance -- what he saw as their
8 sexual deviance.

9 Q. In a book like this, who would your audience be for this
10 book?

11 A. Well, primarily I think it would be -- it would be
12 students, so enrolled students. This book would be short. I
13 mean, by comparison with -- the full biography was nearly 500
14 pages. This would be something along the lines of 100 pages,
15 and it would be more accessible for students. And the idea as
16 well would be to make it thematic, so it's a little easier to
17 deal with in terms of the teaching environment.

18 Q. How, if at all, would you expect to market or publicize
19 this book yourself?

20 A. Well, the usual way you do it is to give talks. So you go
21 from campus to campus and generate interest, sort of try to spur
22 interest among instructors, as well as students, potentially.
23 It gets kind of road-tested, but you also generate interest,
24 generate buzz in how this book might work and in courses.

25 Q. And how big a market is Florida for work like this?

1 A. Well, Florida is one of the biggest markets in the country,
2 you know, behind maybe Texas and California in terms of
3 enrollment. Several hundred thousand students in the university
4 system of Florida.

5 Q. Other than your work on Jesse Helms, what fields of
6 research and publication have you pursued at the University of
7 Florida?

8 A. Primarily the history of the American South; I've worked a
9 lot in the history of higher education; 19th Century race and
10 power is certainly themes of my work; to some extent, civil
11 rights history and the civil rights movement; the ways in which
12 these all kind of came together to some extent in higher
13 education as well. Those are all themes.

14 Q. And how many published books do you have?

15 A. Eleven.

16 Q. What range of courses did you teach at the University of
17 Florida?

18 A. Well, I was hired to teach the history of the South, so,
19 you know --

20 THE COURT: Can I just ask quickly? Did you overlap
21 with Wyatt-Brown?

22 THE WITNESS: I did. In fact, I succeeded him. That
23 was -- he was in Milbauer.

24 THE COURT: He left in 2004?

25 THE WITNESS: Yeah. That's the year I came in.

1 BY MR. WERMUTH:

2 Q. So you said you published ten books; right?

3 A. Eleven.

4 Q. Okay. And what range of courses have you taught at UF?

5 A. I've taught pretty regularly introductory courses in what's
6 called "The U.S. Survey." So most institutions divide American
7 history -- the introductory course in American history into two
8 parts. I taught the second part fairly regularly. So that's
9 what would be called a lower-level class.

10 In addition, I've taught advanced courses in Southern
11 history, undergraduate -- advanced undergraduate courses. I've
12 taught a number of times capstone courses that were required for
13 majors. Those are small classes of about 15 that prepare the
14 students to write -- to interrogate the evidence and to write --
15 and to write a primary source paper.

16 And then, finally, I've taught graduate courses. So I've
17 taught seminars and colloquia and the dreams courses related to
18 the history of the South primarily.

19 Q. Have you organized any symposia at UF?

20 A. Yes. That was part of what I tried to do as the Milbauer
21 professor at UF was to expand the vistas of the program by
22 inviting scholars from around the country to come speak at the
23 University of Florida. I did five of these and they -- they
24 all, I think, were successful. But, again, the point is to
25 bring the very best scholars from around the country to the

1 University of Florida to interact with students and faculty.

2 Q. What was the topic of the last Milbauer symposium?

3 A. Black Power.

4 Q. And how would you describe the panelist speakers for that?

5 A. We had five scholars from -- these were all scholars of
6 color who came from California, Ohio, Tennessee, and New York,
7 various places. These are the top young scholars researching
8 the history of the Black Power movement. This would be the
9 aftermath of the formal civil rights movement when you began to
10 have frustration and you began to have more militant language
11 coming from civil rights activists. It's a much misunderstood
12 topic, and the point of this was to try to open it up into
13 further discussion to try to understand it historically.

14 Q. When did that Milbauer symposium on Black Power occur in
15 relation to the passage of HB 233?

16 A. Well, at that point we had to hold it virtually, but it was
17 during March and April of 2021.

18 Q. Okay. So just before HB 233 passed?

19 A. Correct, yes.

20 Q. Okay. And how would -- are you familiar with HB 233?

21 A. Yes.

22 Q. Okay. How would HB 233 affect presenting a topic like
23 Black Power at the next Milbauer symposium?

24 A. I think it would have been impossible -- well, on several
25 levels it would have been impossible to have it. The

1 outstanding question would be whether the University would
2 permit it, whether it would run into some sort of intervention
3 on the part of the administration. So there's that.

4 And then, secondly, I think we'd have a terrible time
5 recruiting people to do -- particularly scholars of color to
6 participate. Why would they want to come to a place where their
7 presentations might be disrupted or where they might have to
8 deal with alternative points of view about the history of civil
9 rights. So there are two basic problems there that would make
10 it, in my view, nearly impossible to have had this symposium.

11 Q. Now, let's move on to your classroom experience.

12 What impact has HB 233's recording provision had on the
13 atmosphere in your classrooms?

14 A. Well, my last year at UF was '21-'22. And I noticed in
15 both classes that I taught that there was something of a chill
16 that had come over the class in terms of how the class is
17 organized and how students interacted with faculty. So that was
18 my experience. Subtle, it wasn't outright, but there was a
19 great deal of hesitation, caution, things that might restrain
20 both faculty and students in terms of how they perform in class.

21 Q. Okay. And I guess you teach different types of courses, so
22 let's take your lower division course first.

23 Is that understood to be a survey course?

24 A. Yes, that's what it's called, a survey.

25 Q. Not to be confused with the Intellectual Freedom and

1 Viewpoint Diversity survey. It's just a survey of an historical
2 field; correct?

3 A. Right.

4 Q. Please describe your typical survey course at the
5 University of Florida.

6 A. The typical course is a student -- a student enrollment of
7 around 100 to 300, these days especially. Just recently the
8 legislature enacted a civics requirement that has greatly
9 expanded demand for the U.S. History survey course, especially
10 the second half. It doesn't pertain to the first half.

11 So there's a great deal of enrollment pressure, in other
12 words, more and more seats to have to be accommodated in order
13 to accommodate this new requirement. So it's a large class.
14 It's almost always lecture based in the large setting. And then
15 you might have two sections a week that are lecture, and then a
16 third section is taught by a teaching assistant in a small
17 discussion group.

18 So you get -- the other thing I mentioned about the --
19 about the survey -- U.S. History survey is that you get all
20 kinds of students. Many of them have never had U.S. History
21 before. We have a lot of students at UF that have AP credit.
22 So the ones that come in and don't have it typically are ones
23 that are not the best informed in terms of American history.

24 Q. And have you taught a survey course since HB 233's
25 enactment?

1 A. Yes, in the spring of 2022.

2 Q. And what course was that?

3 A. That was the AMH 2020, which is the second half of the
4 American history survey.

5 Q. And how has HB 233's recording provision caused you to
6 change how you teach that course?

7 A. Well, I think it's made -- just right off the bat, it's
8 made faculty, and certainly in my case, much more cautious about
9 recording, how you record, what you record. Previously I had
10 recorded classes on Zoom for the convenience of students. So I
11 could -- you could simply record the class and then post them to
12 the course in the course management portal. I discontinued
13 that.

14 So there's a great deal -- I think there's a great deal of
15 anxiety among faculty what this means, to begin with. And then
16 also it's a matter of, you know, trust, I think, between the
17 students and the faculty and the erosion of that trust as a
18 result of the intrusion of the possibility of recording. And
19 you don't know whether the recording is going to take place or
20 not also as well. That's another factor. I mean, it could be a
21 secret recording, and you have no knowledge that you're being
22 recorded. They don't have to inform you.

23 I have had in the past a policy of allowing students with
24 learning disabilities to record. And if somebody has a special
25 request, sure, you can record. But this -- this sort of

1 atmosphere of uncertainty is a different matter, I think, in
2 terms of secret recording or recording that's done without your
3 knowledge.

4 Q. And did HB 233's recording provision have any affect on,
5 you know, how -- the content of your teaching in terms of the
6 language you used or the topics you covered?

7 A. Yeah. I mean, it sort of made me cautious about what sort
8 of things that might be construed as code words. So I avoided
9 using those code words, for example, institutionalized racism,
10 critical race theory. These are all kind of boogeymen that are
11 magnets maybe for what would be construed as biased
12 presentation.

13 So avoid those terms, but I also attempted not to diminish
14 the content I was presenting.

15 Q. How do your upper level courses compare to your survey
16 courses?

17 A. Well, they're smaller. So they would include both
18 undergraduate -- upper level undergraduate and graduate
19 seminars. So they're smaller. The upper level undergraduate
20 courses are about 40, typically a good bit of lecture, but also
21 a good bit of interaction with students. So I might teach it
22 Socratically or certainly provide either organized breaks where
23 we can go into discussion mode or stop the class in order to
24 make a point or to reach out to students to see what kinds of
25 feedback they might provide.

1 The graduate classes are entirely discussion, and they are
2 the largest size, maybe 12 students. And they're based on a
3 good deal of reading usually, and they are based on -- well, the
4 courses I taught were thematically related to matters of --
5 central matters in Southern history, which would be, in many
6 respects, race and the exercise of power in the South.

7 Q. How, if at all, did HB 233's recording provision impact
8 your teaching of that course, or did you teach an upper division
9 course --

10 A. I did.

11 Q. -- since the enactment of HB 233?

12 A. Yes, I taught a graduate course in 19th Century America,
13 and the theme of the course was race and power in America.

14 Right off the bat it made me more cautious because there's
15 a great deal more exchange at that level between students and
16 faculty. I didn't have any particular episode, but right off
17 the bat there's a great deal -- I exercised a great deal of
18 caution, again, in terms of what was said, in terms of how you
19 approach students, what your relationship is with students.
20 That's a very much a part of the story too, I think.

21 Q. How did the recording provision affect the relationship
22 between you and the students?

23 A. Well, it should be -- ideally, I think, in teaching it's a
24 relationship of trust, especially at that level where you have
25 small groups of students and especially graduate students where

1 you're dealing with them very often one on one as well as in the
2 classroom environment. And it depends on trust, I think. It's
3 essential to a good, effective classroom management that the
4 students understand what they're supposed to do, what the
5 requirements of the class are, and they're supposed -- they
6 should understand as well what your standards are.

7 The recording provision disrupts that. I think it
8 undermines the feeling of trust between students and faculty, or
9 can. But in my case it did, I think, to some extent.

10 Q. Have you ever had students inquire about how to improve
11 their grade or do anything to suggest you should change their
12 grade?

13 A. Oh, yeah. That's pretty frequent, actually. It's a --
14 that's another constant kind of negotiation going on with
15 students. Obviously they all want to get As. They all have to
16 go to law school or med school, and they need that grade.

17 So there's a great deal of negotiation going on in which
18 you're trying to keep the bar high so that they can excel but at
19 the same time be fair to the other students in the class.

20 So there is a lot of kind of wrangling that goes on with
21 students. It depends on the personality, but it's not atypical
22 at all. Students are always looking for leverage, in other
23 words, and they find it -- you know, it's easier when they're
24 dealing with someone who might be female, for example, or who
25 might be a person of color; old guy like me, it's maybe a little

1 more difficult.

2 Q. Have you noticed more student participation in class since
3 the passage of HB 233?

4 A. No, I'd say quite the opposite. I think there's less.
5 There was less, certainly, in both the U.S. history survey class
6 and the graduate seminar.

7 Q. I'd like to show you Joint Exhibit 1, which is in evidence.
8 And if you could turn to page 3.

9 So do you recognize this provision here?

10 A. Yes.

11 Q. And this is the recording provision we were just talking
12 about?

13 A. Right.

14 Q. Okay. And let's pull back from this.

15 And let's talk about the next provision, the survey
16 provision, which is subsection (f).

17 Do you recognize this as being the antishielding provision?

18 A. Antishielding, yes, I do.

19 Q. What impact has the antishielding provision had on your
20 courses at UF?

21 A. Well, it's part of the same thing, I think, the same sort
22 of erosion of trust and climate of, to some extent, fear that
23 accompanies this sort of thing, accompanies the recording
24 provision as well.

25 In this case it becomes a matter of what it means in the

1 classroom. How is that going to affect the way you teach?
2 How's it going to affect the content of what you teach? All
3 these are things that are threatened, I think, by the sword of
4 Damocles kind of hanging over the faculty member in terms of how
5 they teach and what they teach.

6 Who's to say what -- you know, whether expressive attitudes
7 are being suppressed or not or what exactly you're obliged to do
8 as a faculty member in terms of not -- not spending class time
9 on certain topics that don't relate really to the course or
10 aren't historically substantiated.

11 Q. So to continue teaching your courses, what would you have
12 to do to comply with HB 233, do you think?

13 A. I don't know how I'd teach them, actually. I mean, I think
14 this -- this law goes to the heart of what I teach. It goes to
15 the heart of my ability to teach the content as content that's
16 recognized as up-to-date scholarship, historical scholarship on
17 the history of the American South.

18 So it sort of cuts a hole, really, in the whole Milbauer
19 program; what we're trying to do and how we're trying to do it.

20 Q. How, if at all, did HB 233's antishielding provision factor
21 into your decision to retire?

22 A. It was a major factor. I mean, I had other -- there was a
23 collection of reasons, but I am 68 years old, so plenty of
24 faculty members go into their 70s, rightly or wrongly. And the
25 reasons to retire, the reasons not to retire, this law, to me,

1 made it -- my position there untenable, so it made it difficult
2 to teach -- not only difficult but almost impossible to satisfy
3 what the law wants to do and also teach what I think ought to be
4 taught.

5 Q. I'm going to show you what has been marked as
6 Plaintiffs' Exhibit 466.

7 Do you recognize this document?

8 A. Yes.

9 Q. What is it?

10 A. It's a syllabus for my -- for my survey class in spring
11 2017.

12 Q. And what purpose does a document like this serve?

13 A. The syllabus sort of is like a contract, and this has
14 increasingly become -- when I first started teaching in 1981,
15 syllabi were typically one page. They've expanded because of
16 the need to have a contractual sort of document that can very
17 specifically identify what is required in the class.

18 So, short answer is it's a contractual sort of description
19 of what the course is doing and how it's going to be taught;
20 what the requirements are as well.

21 MR. WERMUTH: At this time I'd like to offer into
22 evidence Plaintiffs' Exhibit No. 466.

23 MR. MOORE: Your Honor, the defendants object on
24 untimely disclosure. We asked for any syllabus that was
25 impacted by House Bill 233. This document was not produced.

1 MR. WERMUTH: This document was timely produced more
2 than 30 days before the end of -- the end of discovery, I think
3 more than 30 days before the Rule 26(a)(3) deadline.

4 THE COURT: So through some sort of supplemental
5 disclosure is a later tranche of documents or something?

6 MR. MOORE: Your Honor, we saw this document for the
7 first time in response to the summary judgment.

8 MR. WERMUTH: Oh, actually it was in -- it was in the
9 summary judgment pleadings.

10 THE COURT: So it was -- summary judgment deadline
11 normally is after discovery.

12 MR. WERMUTH: But before the -- more than 30 days
13 before the final pretrial disclosure.

14 MR. MOORE: We stand by our objection. It's untimely
15 and was not disclosed in discovery.

16 THE COURT: What does the rule say about -- I
17 thought -- and maybe y'all can correct me if I'm wrong -- that
18 you're required to turn over stuff in discovery; you're required
19 to supplement under Rule 26(e). If something comes up later,
20 there can be an explanation for it, if it's on -- if it doesn't
21 have to be turned over during the course of discovery. Absent
22 some explanation, I'm going to let the witness talk about what
23 he did, so this is really --

24 (Indiscernible crosstalk.)

25 THE COURT: I'm going to sustain the objection,

1 although, the witness is going to be able to talk about it, and
2 so it's --

3 MR. WERMUTH: Yes.

4 BY MR. WERMUTH:

5 Q. How would HB 233's antishielding provision impact your
6 ability to teach this course?

7 A. Well --

8 THE COURT: You can use that as also -- he can refer
9 to it. You can refresh his recollection with anything, and you
10 can use it as a demonstrative aid.

11 MR. WERMUTH: Can we keep it up as a demonstrative
12 aid?

13 THE WITNESS: Okay.

14 BY MR. WERMUTH:

15 Q. How would HB 233's antishielding provision impact your
16 ability to teach this course, if at all?

17 A. Well, the first thing I want to say is that teaching the
18 American history, you know, survey class, you have a huge amount
19 of material to cover. So if you miss a stop along the way, the
20 train's left the station. I mean, you can't -- it's hard to
21 catch up. So you have to make certain kind of decisions in
22 terms of what you're going to cover, what topics are you going
23 to cover.

24 And my approach here is comprehensive, but also to have
25 thematic and analytical organizations that make history

1 understandable and more concrete. So it's taught --

2 THE COURT: I'm sorry. Let me ask you one question.
3 I thought about another rule that applies here.

4 If you list something and there's no objection, then
5 you waive the objection. Is this listed with or without an
6 objection on the exhibit list?

7 MR. MOORE: It was listed with hearsay and relevance
8 and untimely disclosure.

9 THE COURT: All right. So you preserved the
10 objection. I just wanted to make -- I just recalled there was
11 an extra layer to the inquiry.

12 Go ahead.

13 BY MR. WERMUTH:

14 Q. So as you were saying, Professor Link.

15 A. Yeah. So in this course a big portion of this course was
16 related to the history of slavery, that is, the destruction of
17 slavery, the freedom, the emancipation of 4 million
18 African-Americans, the period that followed slavery, Jim Crow,
19 and then finally the civil rights movement and what that -- what
20 the implications of that were for American history. So a big
21 portion of the class deals with subjects of race and the
22 importance of race in a variety of ways.

23 Q. Okay. So when you're teaching a course like this, how
24 would HB 233's antishielding provision affect your ability to
25 teach that content?

1 A. Here again, I think it could -- the danger is that it would
2 cut the heart out of what this course -- how the course is
3 organized and what the content is of the course.

4 If I have to exclude content for fear of recording or
5 exposure, it's going to make -- make me less -- it's going to
6 make me more reluctant not -- to include things like race, which
7 is a big piece of what, to my mind, American history is about
8 since 1877.

9 Q. Let me show you what has been marked as Plaintiffs' Exhibit
10 466 -- I'm sorry.

11 MR. WERMUTH: Actually, could I have a minute?

12 (Discussion was held.)

13 BY MR. WERMUTH:

14 Q. I am now going to show you Plaintiffs' Exhibit 461, and is
15 this syllabus of a similar character as what you said the
16 purpose of the syllabus in your other survey course was?

17 A. Yes --

18 Q. Okay.

19 A. -- pretty much so.

20 MR. WERMUTH: At this time, Your Honor, I'd like to
21 offer into evidence Plaintiffs' 461.

22 MR. MOORE: No objection.

23 THE COURT: Without objection, 461 is admitted.

24 (PLAINTIFFS EXHIBIT 461: Received in evidence.)

25

1 BY MR. WERMUTH:

2 Q. Now, this is one of your upper division courses; correct?

3 A. Yes.

4 Q. Okay. And how would HB 233's antishielding provision
5 impact your ability to teach this course, if at all?

6 A. Well, here, again, I think it would make it very difficult,
7 if not impossible, to because the central theme of this course,
8 which was a graduate course -- was a graduate course -- is the
9 ways in which race and power played out in the South
10 historically.

11 Q. And so how does HB 233's antishielding provision, to your
12 understanding, affect your ability to select the contents for a
13 course like this?

14 A. Well, I think it hampers it because it would force me to
15 exclude topics and content that I consider essential to the
16 study of this topic. In good conscience I'm not sure I would --
17 I wouldn't be comfortable with teaching a course that's sort of
18 whitewashed in terms of the excising of materials based on
19 political considerations rather than intellectual
20 considerations.

21 Q. Is the converse true as well? What would you -- would
22 HB 233 have any -- its antishielding provision have any impact
23 in terms of what you might have to discuss?

24 A. Well, that, too, I think. You mean in terms of actual
25 classroom activities?

1 Q. Yeah.

2 A. Yeah. Same thing. I mean, especially so, because the
3 recording provision as well as the antishielding sort of
4 presents a threat in terms of how you organize a class and how
5 you teach a class.

6 Q. What sort of topic do you think you'd have to -- that you
7 think you may have to cover in order not to shield students from
8 ideas that are offensive, uncomfortable, unwelcomed?

9 A. Well, I think if you take a topic like reconstruction, the
10 aftermath of the Civil War, you'd basically have to return to a
11 period when -- when reconstruction was, I think, seriously
12 misinterpreted. So you'd have to go to old notions about what
13 reconstruction meant that no longer hold credence among the
14 leading scholars on the topic.

15 So I think you'd have to sort of remove topics. At the
16 same time you'd have to adjust the emphasis of the class in a
17 way that would avoid the possibility of the exercise of the
18 recording and antishielding provisions.

19 Q. Why couldn't you merely --

20 THE COURT: You can just go back and teach the Dunning
21 School again? That wouldn't be a solution?

22 THE WITNESS: That's probably not. That's what I was
23 thinking of, yeah. Dunning --

24 THE COURT: Sort of a Gone With the Wind version of
25 reconstruction?

1 THE WITNESS: Exactly; birth of a nation, too, yep.

2 BY MR. WERMUTH:

3 Q. Why couldn't you merely mention such views as the
4 Dunningite interpretation, then direct the lecture back to
5 assigned readings?

6 A. Why couldn't I do that?

7 Q. Yeah.

8 A. Depends on the class. I think if you're dealing with the
9 survey, it's difficult timewise to deal with varying
10 interpretations to begin with.

11 And then, in addition, that level of analysis is difficult
12 for undergraduates to get ahold of. So historiography, for
13 example, is not something you typically deal with in the U.S.
14 history survey.

15 Does that answer your question?

16 Q. In this instance we're talking about the upper division
17 course --

18 A. Okay.

19 Q. -- so what impact -- you know --

20 A. Right.

21 Q. -- why couldn't you just mention the Dunningite
22 interpretation of reconstruction --

23 A. Right.

24 Q. -- and then kind of move on to a new topic?

25 A. Well, it seems to me under the recording and antishielding

1 provisions you're obliged to present -- you'd be obliged to
2 present Dunning as a legitimate way to interpret the period.
3 You'd have to give it equal time, and you'd have to elevate it
4 in a way that doesn't deserve to be elevated.

5 I do teach about Dunning but try to do it in a way that
6 sort of emphasizes the critiques over time that eroded the
7 importance of the Dunning School and the prevalence of the
8 Dunning School, which happened kind of over time.

9 Q. Before --

10 A. But, again, I think the difference would be -- in the
11 seminar setting would be that you have to elevate Dunning to a
12 position of equal or equivalence to what current interpretation
13 about reconstruction is about.

14 Q. Before HB 233, when you selected course materials, how did
15 your expectation of student reactions influence your choices, if
16 at all?

17 A. Well, here again, caution. We have to get our book orders
18 in early at the University of Florida with the possibility of
19 punitive action if you don't get them in, so the book orders for
20 the fall were taught -- I mean, were selected before the law was
21 passed.

22 But certainly in the spring, the spring course, which would
23 be the U.S. history survey, I also exercised caution. I tried
24 to maintain the intellectual respectability of the class but at
25 the same time caution in terms of the kinds of things I could

1 use.

2 The other thing that's sort of important that I
3 mentioned -- I'm going down to the survey class again -- is the
4 use of visual media. So in that class particularly I use a lot
5 of video, small clips of video that are historically validated.
6 So we have a whole world of documentary -- historical
7 documentaries now that go through a rigorous vetting process and
8 go through a rigorous process of validation.

9 Under the recording and antishielding provisions, I think
10 there'd be a great deal of difficulty excluding things that
11 don't deserve to be included in terms of video and visual media.

12 Q. So since HB 233, what consideration can you safely give to
13 student reactions in selecting materials?

14 A. I think -- well, down the road I think, again, you'd have
15 to be -- one would be cautious because this is, you know, in
16 print. It's a syllabus. It has your readings identified, and
17 it becomes a kind of public document.

18 The history department posts the syllabi online, so they're
19 public documents; they're published, I guess. And the fear
20 would be -- there's a great deal of fear associated with this, I
21 think, that, you know, what's going to happen to you if you --
22 what's going to happen to your course if you use materials that
23 appear to be objectionable, politically objectionable.

24 Q. Okay. But I mean from the standpoint of the antishielding
25 provision, doesn't it tell you that you're not allowed to shield

1 students from uncomfortable, unwelcomed, disagreeable or
2 offensive things?

3 Right?

4 A. Yes.

5 Q. And so --

6 A. So you'd be obliged -- I think that means you'd be obliged
7 to elevate a variety of things, a variety of interpretations or
8 a variety of things that aren't even -- aren't facts, I guess,
9 or didn't really happen. It's chaotic to begin with, but it's
10 also extremely disruptive in terms of how the class is organized
11 and managed.

12 MR. WERMUTH: Let's bring up page 3 of Joint Exhibit 1
13 again.

14 So if we go into the middle of the page and just kind
15 of zoom in on that area.

16 Sorry. Down, please.

17 Sorry. Up, please.

18 BY MR. WERMUTH:

19 Q. So shield: *"Shield" means to limit students', faculty or*
20 *staff members' access to, or observation of, ideas or opinions*
21 *that they may find uncomfortable, unwelcome, disagreeable or*
22 *offensive.*

23 And let's look at subsection (f) on the page.

24 A. Are you on page 3?

25 Q. Oh, sorry. It's the other subsection (f) under (3).

1 Sorry. (3)(f), so it's down the page.

2 So the (2)(f) provision there says: *A Florida College*
3 *System institution or a state university may not shield*
4 *students, faculty or staff from expressive activities; correct?*

5 Do you see that?

6 A. Uh-hum.

7 Q. So the "shielding" means the uncomfortable, unwelcome,
8 disagreeable or offensive language; correct?

9 A. Right.

10 Q. The shield portion of that refers to this definition of
11 unwelcomed, disagreeable, offensive materials.

12 And then let's look to the expressive rights provision
13 which is (3)(a).

14 Expressive activities. Do you see where that changes:
15 *Faculty, research, lectures, writings and commentary, whether*
16 *published or unpublished?*

17 A. Yes.

18 Q. So the content that you put in your course and in your
19 syllabi, how do you curate that material?

20 A. Well, the basic thing you try to curate is that it's
21 historically validated. So the most common way of doing that is
22 to -- for peer review, so to use materials that have gone
23 through scrutiny by experts in the field, and it can be
24 validated. This includes a variety of things that the
25 antishielding provision seems to push you to use that aren't

1 verified, that aren't validated and have not experienced peer
2 review.

3 So it's very much -- it's very much at odds with the other
4 source -- the materials I'd like to use in my class and the
5 content of the class.

6 Q. In evaluating the types of source materials referenced in
7 class, how do you believe HB 233 changes what you have to do?

8 A. I think there's a -- I mention uncertainty. I think
9 there's a great deal of uncertainty about what this means to
10 begin with. If you're excluding material, what are you
11 excluding? Do you have to anticipate all the possible things
12 that you could be excluding, all the possible ideas about a
13 given topic, historical topic, validated or not validated?

14 Again, it's chaotic, but it also undermines your ability to
15 guide students and help students analyze how to distinguish
16 between things that are true and not true; how they can evaluate
17 evidence; how they can evaluate historical arguments. These all
18 follow practice, professional practice, among historians which
19 is that we deal with things that happened, actually occurred.
20 We don't make things up.

21 And the black hole here, it seems me, is a whole variety of
22 things, especially with the Internet, that are out there that
23 aren't validated and haven't gone through rigorous scrutiny and
24 peer review.

25 Q. Since HB 233 was enacted, have you observed students

1 participating in class more?

2 A. No. I think, if anything, less. Again, I think there's
3 uncertainty -- undergraduates don't necessarily know about the
4 law yet, or they didn't when I taught. Graduate students maybe
5 are more likely, but in both cases, the classes -- it didn't
6 help. It certainly didn't increase participation. It, to some
7 extent, cast a chill on the course and the students and
8 certainly faculty teaching in my case.

9 Q. Now, if the Court were to determine that the antishielding
10 provision only applies to the institution, University of
11 Florida, would that remove any impediment that the provision has
12 on your speech?

13 A. No. Well, I don't think it would help. I mean, it
14 still -- the law would still be in effect at the University of
15 Florida in Gainesville. And carving out UF as a separate
16 category or separate sort of realm I don't think helps --
17 certainly doesn't help the people teaching there, you know.
18 They're here facing a law that in many ways is very vague and a
19 law that makes teaching for many people, myself included, very,
20 very difficult.

21 Q. Let's move on to the survey provisions.

22 What impact, if any, has HB 233's survey provisions had on
23 the campus environment in your experience?

24 A. Well, I think it's part of a declining faculty morale. It's
25 created, to some extent, an atmosphere of fear about what this

1 might mean, what this surveillance system might mean in terms of
2 departments, how departments function; fears about the anonymity
3 of the survey, which is voluntary, I understand, but also is
4 a -- is an exposure, potentially, of departments that might be
5 identified as politically problematic. And this is particularly
6 true in humanities, I think, where -- and much of the attack on
7 higher education has been focused on the humanities, by the way.

8 So short answer, again, I think would be dismay among
9 faculty, fear, uncertainty. There's also the whole matter of
10 relationships between administrators trying to enforce the law
11 and faculty members trying to deal with it, which creates
12 another sort of dynamic, I think.

13 Q. Did you take the survey last year?

14 A. No.

15 Q. Did anyone threaten you not to take the survey?

16 A. No.

17 Q. Did anybody threaten you to take the survey?

18 A. No.

19 Q. Why wasn't it enough that you could simply choose not to
20 take the survey?

21 A. I think, again, the problem is if you have a department --
22 let's say like the history department, which is my department --
23 or was my department -- if the history department at the
24 University of Florida has a response rate of 2 percent, that's
25 going to be a problem from the point of view of an

1 administrator.

2 So the possibility would be that scrutiny would focus on
3 those departments that don't have good response rates. How do
4 you increase the response rate? That's an important piece as
5 well.

6 MR. MOORE: Your Honor, I'd object on speculation at
7 this point and outside of his personal knowledge.

8 THE COURT: Well, as I understood, you're saying when
9 you were still there, after the law was passed, even though you
10 didn't take the survey, you were explaining why you still didn't
11 think if you had stayed at the University you were scot-free
12 because of how it would be perceived if you had a low response
13 rate; is that correct?

14 THE WITNESS: Yes, that's correct.

15 THE COURT: I'll overrule it, and he's speaking
16 with -- with that limitation, he's talking about what he did and
17 why he still didn't feel like it was enough.

18 BY MR. WERMUTH:

19 Q. So why didn't you feel that it was enough that you just
20 couldn't take the survey, that you just refused to take it and
21 went on?

22 A. Well, again, I think -- well, to begin with, the union
23 advised us not to take the survey, so that as a union member, I
24 was abiding by what they thought should be done.

25 But I think the -- well, overall, the survey, very clearly

1 to me, helped forest an atmosphere of distrust. That was my
2 experience. And from my colleagues in the department, that also
3 seems to be their experience, what I've heard, conversation,
4 hearsay.

5 MR. MOORE: Objection.

6 BY MR. WERMUTH:

7 Q. What do you believe is the --

8 THE COURT: I'm sorry?

9 MR. MOORE: Objection. Hearsay.

10 THE WITNESS: Hearsay, yeah.

11 THE COURT: Sustained as to hearsay.

12 THE WITNESS: Right.

13 BY MR. WERMUTH:

14 Q. What do you understand HB 233 is designed to do in terms of
15 teaching on UF campuses?

16 A. I think it's -- I mean, my understanding is that the law is
17 trying to rectify a lack of viewpoint diversity at higher -- in
18 higher education in Florida. So the legislature is attempting,
19 I think, to shape the politics or the political viewpoints of
20 student -- maybe students to some extent, faculty certainly.

21 So there is an assumption here -- I think the premise is
22 that there is a problem that -- as we've been hearing all day
23 long, that there was -- that, you know, universities are
24 populated by faculty who are left leaning, and the assumption is
25 that that's a problem. In my experience, it hasn't been a

1 problem. I haven't seen that in my 41 years of teaching, that
2 kind of thing occurring.

3 But the point of the law, it seems to me, is political
4 interference and political interference that extends to content
5 that's at the ground level, you know, content that's actually
6 part of a class curriculum. So this is reaching fairly deeply
7 into the university community. It's fairly deeply into
8 traditions and practice that prevail in American higher
9 education. Political interference I think is basically what
10 this law represents.

11 Q. Do you see HB 233 as having any historical analogues in
12 your research?

13 A. Oh, certainly. Two of my books -- most recently a book on
14 Frank Graham -- Frank Porter Graham, who was president of the
15 University of North Carolina from 1930 to 1949. Graham then
16 became a United States Senator from North Carolina and then was
17 attacked viciously on issues of anticommunism and race in the
18 primary of 1950.

19 So Graham is a person -- a very interesting example, I
20 think, of the evolution of academic freedom. He was one of the
21 leading advocates of academic freedom. He tried to make UNC a
22 place where any idea could be spoken, right wing or left wing.
23 But all through his career he experienced constant attack based
24 on their suspicion that Graham was too liberal or even a
25 communist sympathizer, that Graham was a sympathizer with civil

1 rights activists, that Graham was an evolutionist, a variety of
2 things, and his career is entirely dominated by this struggle in
3 the state.

4 I mean, North Carolina in the 1930s and 1940s was a poor
5 state, and it was a place with a very conservative constituency,
6 and it's a hard act to pull off. How you pull it off -- how
7 could this person pull off doing what he did in a state which is
8 very conservative and politically doesn't agree with him. So
9 that's the story of Frank Graham.

10 Secondly, I did a book on William Friday -- William C.
11 Friday, who was president of the University of North Carolina
12 from 1956 to 1986. One of the biggest moments in the career of
13 Bill Friday was the Speaker Ban law enacted in 1963.
14 Interesting margins of that law, the law, much of it, reflected
15 the legislators' perception that UNC faculty were civil rights
16 advocates, that they were riling up the African-American
17 population.

18 So the Speaker Ban in 1963, which was passed in record time
19 and it went through all the legislative hoops in record time,
20 prohibited any so-called known communist or anyone who had taken
21 the Fifth Amendment from speaking at a publicly supported
22 campus.

23 So this was a huge challenge to Friday. Friday, like
24 Graham, tried to insulate the campus from political
25 interference. Friday had to pull off in the 1960s, which is a

1 very difficult time -- had to pull off how to get this law
2 reversed. So that's the story of the Speaker Ban. In many
3 ways, that's kind of the heart of what Bill Friday's story was
4 about, and in many ways Graham was extending -- excuse me --
5 Friday was extending the Graham legacy.

6 That's a long-winded answer, but, you know --

7 Q. So what experiences have you had working in administration
8 of universities?

9 A. Well, at UNCG I was an associate dean of arts and sciences
10 for three years, and I served as head of the history department
11 for six years.

12 Q. That was at the University of North Carolina Greensboro?

13 A. University of North Carolina Greensboro, correct.

14 Q. Okay. And how much have you observed of the University
15 administration at the University of Florida?

16 A. A good bit, certainly in departmental activities. I've
17 been on University committees. I've was on, for example, the
18 University promotion committee, which is a big assignment. But
19 you get a good idea, and I got a good idea, on that committee
20 about how things work at a high level, a level of provost or
21 higher. So big picture -- you get a better big picture, I
22 think, when you are on a committee like that. It's very
23 valuable for that.

24 Q. In your experience, how did you expect the University of
25 Florida's administrators to respond to HB 233's annual survey

1 requirement?

2 MR. MOORE: Speculation.

3 THE COURT: Response?

4 MR. WERMUTH: I'm asking for his experience based on
5 his lay opinion of knowing from his own experience how
6 university administration operates.

7 THE COURT: I'm going to allow him in terms of
8 reasonable fear to explain why -- A, just ask the predicate
9 question: Are you fearful the administration will respond
10 negatively? If so, why? And he can explain the basis for his
11 fear; okay.

12 That's really the important question, it seems to me,
13 for purpose of standing; right?

14 MR. WERMUTH: Yes.

15 BY MR. WERMUTH:

16 Q. Do you have fear for how the University administration
17 would respond to HB 233?

18 A. Yes. I think the -- this is -- it's a public university,
19 so the obligation of the University is to serve the state.
20 That's true. That's very much a part of what a public
21 university does.

22 But at the same time, there's -- there's a possibility
23 that -- maybe not -- stronger than a possibility. I've seen
24 administrators try to head off problems. They try to avoid the
25 possibility of reducing funds, for example, budget cuts. The

1 University of Florida has been the recipient of lots of budget
2 largesse in the last ten years, performance funding, and
3 preeminence funding, and these all are things that could be cut
4 if administration -- if the administrators don't do the right
5 thing from the point of view of legislators.

6 So I think there's kind of a dynamic there in which
7 administrators are going to be proactive and are going to try to
8 head off problems before they occur, and a fear or anxiety about
9 what a bad look, like critical race theory, so-called, or
10 institutional racism or the study of race or the study of racial
11 oppression -- what that might mean and how that would be
12 penalized by political forces.

13 Q. I'm going to show you what's been marked as
14 Plaintiffs' Exhibit 144.

15 Do you recognize this document?

16 A. Yes.

17 Q. And what is this document?

18 A. This is a report of a task force, basically, in the Faculty
19 Senate, University of Florida, dealing with the -- with the case
20 of the three expert witnesses at the University of Florida who
21 were set to testify in a voting rights case and were denied the
22 ability to testify by the University.

23 Q. Let's go to page 2 of this document.

24 Do you see the paragraph that starts "More problematic"?
25 *More problematic than the individual examples of pressure that*

1 *stifle unpopular viewpoints or restrict research was the*
2 *palpable reticence and even fear on the part of faculty to speak*
3 *up on these issues.*

4 Do you see that?

5 A. Yes.

6 Q. Is that an experience that you're familiar with at UF?

7 A. Well, as I mentioned, I think faculty morale is at a low
8 point, in my experience, and much of it related to this fear of
9 what HB 233, and a cluster of other laws as well, HB 7 -- what
10 that might mean for how they teach and even the security of
11 their position.

12 So that's -- in my mind, this pretty much confirms what my
13 take is on faculty morale and faculty regarding the law. There
14 is a great deal of consternation, but I'd say also a great deal
15 of anxiety and fear about this particular law and the whole host
16 of other laws that are being introduced now.

17 Q. Were the events of this -- covered in this report well
18 publicized on college campus among faculty?

19 A. Yes. You mean the case of the three expert witnesses?

20 Q. Yes.

21 A. Oh, yeah. It was national news. I mean -- well, as you
22 know, it was widely covered, read and widely known in the
23 profession as well, historical profession.

24 Q. And were the findings of this work widely circulated around
25 campus?

1 A. They were. They were sent to all faculty members.

2 MR. WERMUTH: I'd like to enter -- I'd like to offer
3 this into evidence, Your Honor.

4 MR. MOORE: Hearsay and relevance.

5 THE COURT: I'll overrule it as to relevance. What
6 says you to hearsay?

7 MR. WERMUTH: This is about the effect on the listener
8 of -- or the individuals who received this seeing the concerns
9 of the University, legitimate concerns of the Faculty Senate,
10 and the affect it would have on them for --

11 THE COURT: Well, let me identify -- help me -- chart
12 for me -- we've got Dr. Link.

13 Who else do we have as plaintiffs?

14 MR. WERMUTH: Who else do we have as the plaintiffs?

15 THE COURT: Yes.

16 MR. WERMUTH: We have other faculty members at
17 universities across the state.

18 THE COURT: Are they going -- are the other -- because
19 I believe you just testified you were in receipt of this.

20 And what was the date of this?

21 MR. WERMUTH: The date on --

22 THE COURT: Here, I can pull it up. I've got it.

23 It's the --

24 MR. WERMUTH: This was during the SB 90 case.

25 THE COURT: I'm sorry?

1 MR. WERMUTH: This was during the SB 90 case, so it
2 must have been in 2021, right around the time of --

3 THE COURT: In any event, you said that you -- in
4 fact, this is something you reviewed and you considered before
5 you retired in thinking about what you would or would not do in
6 your classes because it was reflective of what others were
7 saying the concerns were; is that correct?

8 THE WITNESS: Correct. That's correct.

9 THE COURT: On that limited basis I'll permit it in,
10 that it's -- I don't know about the other people, but this
11 speaker has said he relied on it, and it helped shape and
12 explains why he thinks his fears are reasonable, and he's not --
13 so on that basis I'll allow it.

14 THE WITNESS: Could I say one other thing about this?

15 THE COURT: Sure.

16 BY MR. WERMUTH:

17 Q. Sure.

18 A. In my entire career, I've never seen a report that is as
19 bracing as this one. I mean, it's -- it's really quite unusual.
20 The frankness and the -- the rather clear condemnation and -- as
21 well as -- of -- of decisions that were made, but as well as an
22 honest portrayal of what the feeling is on campus and what the
23 state of morale is, in any experience.

24 Q. Do you know whether the University of Florida has hired
25 anyone to fill the position of Richard J. Milbauer, professor in

1 Southern history?

2 A. My understanding is that there's a search underway, and
3 it -- hiring at this level is very complicated, so it certainly
4 will take all year. But -- so the job has been advertised, and
5 presumably there is a search committee and presumably they're --
6 I'm not sure what state -- I've tried to stay out of it. I
7 think that's appropriate. But from what I have learned, it's
8 moving along and that they intend to hire a new Milbauer
9 professor this spring.

10 Q. And what's complicated about filling a position like the
11 Richard J. Milbauer professorship?

12 A. I think anytime you hire a senior historian, it's very
13 difficult. Usually most senior scholars have a set of
14 interests, they have graduate students, they have personal
15 considerations. It's just much more difficult for them to move.
16 They have -- may well have issues of spousal accommodation. So
17 right off the bat it's difficult.

18 Secondly, I think the --

19 THE COURT: Doctor, let me ask you a question.

20 THE WITNESS: Yes, sir.

21 THE COURT: And you can tell me if this is not fair,
22 because I also don't want you to be falsely modest.

23 This is one of the key positions in the history
24 department in the University of Florida --

25 THE WITNESS: Yeah.

1 THE COURT: -- Florida's flagship university; correct?

2 THE WITNESS: Yes.

3 THE COURT: And as I understand it, you may be able to
4 get a -- somebody to play in the baseball teams, you know, that
5 are three or four levels down from professional baseball teams,
6 but finding a pitcher for the -- one of the major league teams
7 is a bigger deal.

8 Isn't this roughly equivalent? There is a limited
9 pool of --

10 THE WITNESS: Correct.

11 THE COURT: It's not just that -- because every
12 professor has spouses and stuff. There is a limited pool of
13 people that you would hire to fill the eminent scholar positions
14 such as this at a major university; correct?

15 THE WITNESS: Yes, that's correct.

16 THE COURT: Okay. I understand.

17 THE WITNESS: I think the -- we are talking about 15
18 people maybe. I could -- you know, I could probably write a
19 list out, and they would be the ones that would be applying.
20 So, yeah, small pool.

21 THE COURT: Because it's not just everybody in
22 history, Asian history --

23 THE WITNESS: No.

24 THE COURT: -- Latin American history. It's
25 specifically to fill this chair that deals with Southern

1 history.

2 THE WITNESS: Exactly.

3 THE COURT: I understand. Limited university people.

4 THE WITNESS: Right, small number of -- small group of
5 senior scholars.

6 BY MR. WERMUTH:

7 Q. Does the Richard J. Milbauer position need to be filled
8 with a professor of Southern history?

9 A. Well, it always has been. Yeah, I think it does need to
10 be. If you're going to have a Southern -- a top-rated Southern
11 history program at the University of Florida, you have to have
12 this position.

13 Q. Yeah. Of course, if you're going to have a Southern
14 history program, you're going to have a top-level one. You want
15 to fill that position with a Southern history professor;
16 correct?

17 A. Right.

18 Q. But does the -- is the funding for that position tied to
19 HB 233 -- is it tied to Southern history?

20 A. Right.

21 Q. Does the topic of Southern history have to be taught by the
22 Richard J. Milbauer professor?

23 A. No. The way hiring goes these days is that once someone
24 retires, the position goes back to the dean. So this would be
25 true of any position. And they can decide what to do with it.

1 So they may think history department enrollments are down, we
2 are going to shift the position over to political science or to
3 sociology.

4 So very easily -- it happens all the time. Once you --
5 someone leaves or somebody retires, the position goes away. So
6 there's no assurance that this would be tied to Southern
7 history, to answer to your question.

8 Q. What plans, if any, do you have to teach at UF in the
9 future?

10 A. Well, I am teaching right now. I mean, I have -- I still
11 have graduate students. I'm chairing -- chairing a dissertation
12 for one student, and I'm on two other committees. So that's
13 teaching. That's hard work. I may well come back. I would
14 hope I'd be able to come back and speak to classes, possibly
15 engage in that kind of teaching. These are all kinds of things
16 that, you know, I would hope I'd be able to return to the
17 University of Florida and do.

18 Q. How about coming back to promote your book?

19 A. That too, yeah.

20 Q. Okay.

21 A. Which might take place in a class. That happens sometimes,
22 where you give a talk to a class and the book is a part of it.

23 Q. And how do you expect HB 233 may impact those plans, if at
24 all?

25 A. Again, make it very difficult, I think.

1 Well, there is the whole matter of the graduate students.
2 How are they going to write dissertations that deal with
3 subjects of race or the history of race? One -- my -- the last
4 student I'm directing is doing a dissertation on the Fifteenth
5 Amendment. That's all about race, obviously. I'm on a
6 committee of another student who is working on Black jurors in
7 the 19th Century.

8 Now, can these people actually pursue their research? I
9 mean, is it possible to do that? What kinds of limits are
10 placed over their ability to do that? So I see that as a real
11 problem. And graduate students are particularly exposed. You
12 know, they have no power, and they're at the mercy of things
13 that they don't have any control over to an extraordinary
14 extent, I think.

15 Does that go to your question? I may not have --
16 Q. It does.

17 In terms of -- how would you get your -- if you were going
18 to sell your book or have your book read in classes at the
19 University of Florida, how would you go about doing that? How
20 would you get your book in as part of a course?

21 A. Well, part of it might be done by the press. Very often
22 they send copies out to potential faculty members. You might do
23 a mailing, those kinds of things. I think most effective,
24 again, is personal contact, if you can be on campus and actually
25 speak directly to faculty and students, generate -- again, what

1 I said earlier, kind of generate a little bit of buzz about the
2 book.

3 Q. But to have it be part of a syllabus for a course, what
4 would it take to become part of a syllabus? Would you -- it
5 would presumably require the cooperation of the teacher; right?

6 A. Yeah. Well, they'd have to adopt it.

7 Q. Uh-huh.

8 A. And I don't know -- I mean, the topic of a book on Jessie
9 Helms and race and sexuality and the connections therein might
10 not be one that they'd want to use because of the political
11 implications or the political dangers associated with those
12 topics.

13 Q. What other topics or what other ideas might that professor
14 have to teach if they were teaching your book?

15 A. Good question. I mean, they'd have to -- well, they'd have
16 to teach topics in American history that avoid what's now
17 regarded as a centrally -- a centrally important topic, the
18 study of race, African-American history.

19 Q. How would it benefit you if defendants were barred from
20 enforcing the recording provision at UF?

21 A. Well, going forward, I think it would make my life easier,
22 you know, in my relationship with the University of Florida
23 certainly. Returning to campus would be easier, participating
24 in activities on campus. I'm an emeritus professor. To some
25 extent, you can do that already. And then dealing with

1 students. Those are all things that would be affected, clearly,
2 by the law and I think would affect my ability to interact in a
3 teaching environment at the University.

4 Q. And how would it benefit you if defendants were barred from
5 enforcing the antishielding provision against you?

6 A. Similarly. So I think in terms of engagement -- again, if
7 there was, for example, a book talk or a talk that -- in which I
8 might talk about the book in a classroom setting, the fear,
9 again, might be that my book doesn't present alternative points
10 of view or viewpoint diversity and, therefore, you know, could
11 be -- they wouldn't invite me as a result, if that makes sense.

12 Q. And how would it benefit you if defendants were barred from
13 fielding the survey or using past results of the survey?

14 A. Well, similarly, I think, you know, in terms of
15 atmospherics in terms of the relationships going forward that I
16 might have as a retired faculty member with the rest of the
17 university. Those would all be affected by that, I think.

18 Q. Is it true that your involvement on campus is going to be
19 largely dependent on your relationships and the willingness of
20 professors on campus to invite you back?

21 A. Yes, correct.

22 Q. And how is your -- in your experience, how is your topic of
23 research, the core of the work you've done for the past 41
24 years, now considered in, I guess, the popular view of culture
25 and the politics of this state?

1 A. Well, I think it would be problematic, I mean, because the
2 core of what I've talked about is the history -- in the history
3 of the South has been the centrality of race, and that applies
4 to all my books one way or another.

5 So it sort of cuts the heart out of my research I think
6 would be a way to sort of describe it, because so much of it is
7 sort of tied to what the meaning of race is, how race is played
8 out, the experience of African-Americans in America and the
9 American South.

10 MR. WERMUTH: That's all my questions for right now.

11 THE COURT: Before we go home, because I'm going to
12 give the court reporter a brief break --

13 MR. LEVESQUE: 30 minutes.

14 THE COURT: All right. How long do you need, Megan?

15 THE COURT REPORTER: Maybe five minutes.

16 THE COURT: All right. We'll take a break. We'll
17 come back, and we'll move forward.

18 So court is in recess for five minutes. Thank you.

19 (Recess taken at 5:15 PM.)

20 (Resumed at 5:25 PM.)

21 THE COURT: Dr. Link, you are still under oath.

22 Mr. Moore, you may proceed.

23 (Pause in proceedings.)

24 THE COURT: Oh, I'm sorry. My throat is so bad. I
25 said you could proceed.

1 MR. MOORE: I'm sorry.

2 THE COURT: I'm having a real hard time talking. My
3 apologies. I was speaking softly.

4 CROSS-EXAMINATION

5 BY MR. MOORE:

6 Q. Doctor, thank you for your time today.

7 A. Sure.

8 Q. You had a lot of testimony on direct about the changes to
9 your teaching as a result of House Bill 233.

10 Is this a fair characterization of what you testified to?

11 A. Yep.

12 Q. So you certainly did more than not use the term
13 "institutionalized racism"; is that correct?

14 A. Well, my point was I was trying to avoid using code words
15 that would trigger a reaction.

16 Q. So then if someone asked you, other than not using the term
17 "institutionalized racism," how have you changed the way you
18 taught your classes -- if somebody asked you that question,
19 would you say, Well, that's probably about it. That's about all
20 I've done?

21 A. It's a little bit more than that. I think it had the
22 effect of stimulating me to be more cautious to not just
23 specifically those terms, but also how you handle the subject
24 matter, the content.

25 Q. Do you remember being deposed on May 23, 2022?

1 A. Yes.

2 Q. Do you recall being asked: *Other than not using the term*
3 *"institutionalized racism," how have you changed the way you*
4 *talked to your class as a result of House Bill 233?*

5 Do you recall being asked that?

6 A. Yes, I do.

7 Q. And did you say: *That's probably about it?*

8 A. I think I did.

9 Q. And you were under oath then, weren't you?

10 A. Yes.

11 Q. Okay. And you told the truth?

12 A. Yes.

13 Q. Okay.

14 A. I was -- I mean, I was -- the point I think was that I --
15 in the meantime, since the deposition, I've thought about these
16 things, certainly, and there is different --

17 Q. So when did House Bill 233 go into effect?

18 A. The 2021 -- '21-'22 year.

19 Q. Okay. And when did you decide to sue the defendants, to be
20 a named plaintiff?

21 A. July of '21.

22 Q. Okay. And when were you deposed?

23 A. May of 2022.

24 Q. Okay. So in almost that one-year period you didn't think
25 about anything else about how you'd changed as a result of House

1 Bill 233?

2 A. I'm not sure I understand the question.

3 Q. Yeah. So you were under oath. You sued the Board of
4 Governors, and a year later you're sitting for a deposition, and
5 someone has asked you: *Other than not using the term*
6 *"institutionalized racism," how have you changed the way you*
7 *teach as a result of House Bill 233?*

8 And you said: *That's probably about it.*

9 You agree with that, that's the case?

10 A. I've sort of thought about it more in the meantime, and,
11 you know, the question -- the answer has gotten refined. And so
12 that's how I'd answer that.

13 Q. All right. And you didn't refine your answer before you
14 decided to sue the board?

15 A. I hadn't thought about it, I guess, before -- I mean, it
16 hadn't occurred to me until the deposition.

17 Q. Well --

18 A. Your specific question, that is, how -- to what extent I
19 changed, what things I changed specifically in the way I taught.

20 Q. So is it your testimony that before filing suit you hadn't
21 thought through how you would change as a result of House Bill
22 233?

23 A. Not completely, certainly, I don't think.

24 Q. Okay. Because all you could identify is that you don't use
25 the term "institutionalized racism"; correct?

1 A. I think I identified critical race theory. Wasn't that
2 part of it as well in the deposition?

3 Q. But I don't think -- you don't subscribe to that theory, do
4 you?

5 A. No.

6 Q. So you didn't change that, then?

7 A. No. But the term is kind of a hot-button issue, I think,
8 out there in terms of what people think of it and what they
9 think it represents.

10 Q. But Professor Link did not use that term because of House
11 Bill 233. Professor Link didn't use that term because he
12 doesn't subscribe to that theory; correct?

13 A. Right.

14 Q. And I guess more broadly, there was a lot of discussion
15 about House Bill 233 protecting some views or promoting some
16 views over others.

17 But you agree that -- it's your understanding that the text
18 of House Bill 233 does not contain language that protects one
19 viewpoint over another; correct?

20 A. Yeah. In the language of the law, that would be correct, I
21 think.

22 Q. So we agree that -- the Dunning interpretation came up, and
23 you had concerns about giving equal time to certain viewpoints,
24 so you don't think you could teach in that area. But didn't we
25 agree in your deposition that House Bill 233 does not include an

1 equivalency standard?

2 A. I don't recall. Is that what I said?

3 Q. I'm asking you. Does House Bill 233 contain an equivalency
4 standard? And by equivalency, I mean if you teach a point, you
5 must teach the counterpoint.

6 A. I think there's a -- to me it's very vague what that means,
7 what -- you know, if it does mean equivalence or it means
8 elevate. What things are you supposed to -- what things are you
9 supposed to avoid shielding students from? What ideas? What
10 kinds of standards can you use to apply to how viewpoints are
11 assessed and used in the classroom activity?

12 So that's, you know, part and parcel, I think, of the
13 uncertainty of the law and maybe the lack of certainty about
14 what the law means and how it can be implemented.

15 Q. So isn't it your understanding that as a result of House
16 Bill 233, if you teach one point, you must give equal time to
17 the counterpoint?

18 A. Yeah.

19 Q. Okay.

20 A. I mean, I think you would have to -- the law, it's
21 antishielding, so you can't shield students from exposure to
22 different viewpoints. That's clear, it seems to me, in the law.
23 You can't shield. And the question becomes what does that mean
24 and what things are you not supposed to shield people from? To
25 me that might mean -- very clearly that means the -- any sort of

1 viewpoint or any sort of interpretation that doesn't have
2 substantial basis in fact or doesn't reach and satisfy the
3 standards of the profession.

4 Q. But you understand that the text of House Bill 233 does not
5 have an equivalency standard in it, meaning if you teach a
6 point, you must teach the counterpoint? You agree with that;
7 correct?

8 A. Well, again, I just repeat myself. I think it's vague, and
9 the -- it would be easy to reach the conclusion that you would
10 have to counterpoint interpretation with another interpretation
11 that may or may not be historically validated or may not be, in
12 fact, even true.

13 Q. Do you recall being deposed May 23, 2022?

14 A. Yes.

15 Q. And did you tell the truth that day?

16 A. Yes.

17 Q. Okay. You were asked: *The equivalency standard is not the*
18 *House Bill 233; correct?*

19 A. Yeah.

20 Q. Okay. And your answer was: *No. That standard is not.*
21 *You said that; correct?*

22 A. Yeah.

23 Q. And you're truthful; correct?

24 A. Yeah.

25 I think -- that's not my point, though. You're sort of

1 missing the point, which is the uncertainty of the law
2 creates -- creates a great deal of confusion about what sort of
3 different viewpoints you're supposed to present. I mean, it's
4 not explicitly written into the law, but it's an implication of
5 the law.

6 Q. So how many syllabuses did you change as a result of House
7 Bill 233?

8 A. I didn't change the syllabuses.

9 Q. Okay.

10 A. Yeah.

11 Q. And isn't it true, though, that not only did you not change
12 a syllabus, that you did not exclude any topics from your course
13 content because of House Bill 233?

14 A. Well, that's not entirely true, I don't think.

15 Q. Okay. Are there topics that you would have discussed that
16 you did not discuss because of House Bill 233?

17 A. No, I'd say -- I mean, it's a very strange position to be
18 in, which is, you know, you're entering into this world where
19 you don't know what the law means and how it's going to affect
20 your teaching. It creates a dynamic, a sort of an atmosphere
21 that can be negative.

22 At the same time, you want -- for me, at least, as a
23 scholar and a teacher, I want to be true to what the standards
24 of the professional are and what I consider any own professional
25 standards.

1 So in that sense, I'm not going to -- that side of me is
2 not going to want to change the way I teach. I mean, I just
3 want to plow on through and do it the way I've always done it.

4 Q. And, in fact, you did not exclude any topics because of
5 House Bill 233, did you, in your teachings?

6 A. Tried not to, no.

7 Q. Tried not to or did not?

8 A. I'd say did not, yeah.

9 Q. We've heard a lot of talk about slavery and your research
10 and writing and your concern about that. But you'd agree that
11 you've not been prohibited from teaching, researching or writing
12 about slavery; correct?

13 A. Correct.

14 Q. Okay. And House Bill 233 does not prohibit you from
15 teaching on that topic, does it?

16 A. Not specifically, no.

17 Q. And no one has told you not to teach on that topic, have
18 they?

19 A. No.

20 Q. The president of the University of Florida has not told you
21 not to teach on that topic, has he?

22 A. No.

23 Q. And on the concept of antishielding, no one at UF
24 threatened you with discipline as a result of the antishielding
25 provision, did they?

1 A. Well, no. I mean, the threat might come from the chair,
2 and the chair -- the chair was unenthusiastic about the law
3 and -- I mean, about HB 233. So if I were to teach, you know,
4 three or four years more, I think we deal with the situation and
5 it's going to get worse than it is already.

6 Q. Well, we can cross that bridge in three to four years.

7 But no one from the administration at any level, the
8 administration at the University of Florida, has threatened
9 discipline against you as a result of the antishielding
10 provision --

11 A. No.

12 Q. -- right, Professor?

13 A. No, no, certainly not.

14 Q. And certainly no one from the Board of Governors; correct?

15 A. No.

16 Q. And is the University of Florida a defendant in this case?

17 A. No.

18 Q. And you agree with me kind of more broadly that you can't
19 identify any instances where House Bill 233 has required you to
20 espouse views that you do not promote; correct?

21 A. That would be correct then.

22 Q. On the Milbauer Symposium, you've not tried -- or no one
23 has tried to hold that symposium after the passage of House Bill
24 233; correct?

25 A. That's correct.

1 Q. And you've not held any administrative positions in the
2 state of Florida in connection with higher education; correct?

3 A. That's correct.

4 Q. On the topic of your retirement, you'd agree that when you
5 made that decision, you had a number of other considerations,
6 including personal considerations, in addition to House Bill
7 233; correct?

8 A. Yeah.

9 Q. House Bill 233 is merely the icing on the cake?

10 A. Right.

11 Q. All right. And it pushed you over the edge?

12 A. Correct.

13 Q. All right. But you were already close to the edge?

14 A. I'm not sure how close I was to the edge, but, you know, it
15 was in play, let's put it that way, in terms of the way I was
16 thinking about it.

17 Q. All right. And I guess House Bill 233 hasn't prevented you
18 from mentoring graduate students, has it?

19 A. Not yet.

20 Q. Because you still do it; correct?

21 A. Yeah, uh-huh.

22 Q. Okay.

23 MR. MOORE: Mr. Varnell, can we go down to -- on Joint
24 Exhibit No. 1, go to page 3, please.

25

1 BY MR. MOORE:

2 Q. Professor Link, Mr. Wermuth asked you, paraphrasing, would
3 it be beneficial to you if the Court were to enjoin the
4 defendants from enforcing the recording provision?

5 Can you show me in the bill where it says the Board of
6 Governors can enforce that provision.

7 MR. WERMUTH: Objection to form. Objection.
8 Speculation.

9 THE COURT: The question calls for a legal conclusion,
10 I guess, is the objection.

11 And, Counsel, isn't that really a legal argument? You
12 can say if they can't enforce it against you, why. I mean, I'll
13 let you ask the question that way. Just ask it more directly.

14 MR. MOORE: Yeah.

15 BY MR. MOORE:

16 Q. Does the Board of Governors -- can the Board of -- is it
17 your understanding that the Board of Governors can enforce the
18 recording provision?

19 A. I don't think they -- I mean, it doesn't come from the
20 Board -- it's not being enforced by the Board of Governors.
21 It's being enforced by this process that the Board of Governors
22 have established.

23 Q. What process has the Board of Governors established that
24 you're referring to?

25 A. The antishielding provision, the recording provision.

1 These have to be implemented somehow; right. So it throws it in
2 the lap of the administration to make it work.

3 Q. The university administration?

4 A. Yep.

5 Q. Okay. You discussed your perception about the impact of
6 class participation as a result of the recording provision.

7 Did I mischaracterize that?

8 A. No, that's correct.

9 Q. Okay. And you observed that for -- what -- one year?

10 A. Yes.

11 Q. Okay. And you'd disagree with me that the undergraduate
12 students weren't even aware of House Bill 233 during that
13 one-year period; correct?

14 A. Yeah. Most -- well, some were, actually. I take that
15 back, correct myself. But for the most part, no.

16 We're talking about the introductory level class; is that
17 correct?

18 Q. Yes, sir.

19 And on the topic of the introductory level classes, how
20 many students are in those classes usually?

21 A. Well, as I said earlier, it's somewhere between 100 and
22 300.

23 Q. Okay. There was a dialogue with you and counsel on direct
24 about students trying to leverage things to get a better grade.

25 Do you recall something along those lines?

1 A. Yeah.

2 Q. What did you mean by leverage?

3 A. To gain some sort of advantage to obtain a better grade.

4 Q. Okay.

5 A. So in terms of how pressure, some sort of leverage, really,
6 that they can try in this relationship that you have with
7 students.

8 Q. And you agree with me that you're not aware of any student
9 who has threatened any professor with their recording in order
10 to achieve a better grade, are you?

11 A. No.

12 Q. Nor are you aware of a student who's threatened to file a
13 complaint in order to achieve a better grade, are you?

14 A. No, not yet.

15 Q. And you'd agree that in your one year teaching with House
16 Bill 233 on the books that you've not seen students using House
17 Bill 233 to disrupt your teaching; correct?

18 A. I didn't have anything -- any such incident, no.

19 Q. Okay. And nor were you aware of any student who has
20 recorded your class since House Bill 233 went into effect;
21 correct?

22 A. That's correct.

23 Q. And I guess this flows from that, but just to make sure.
24 You're also not aware of anyone who has improperly published a
25 lecture of yours; correct?

1 A. Correct.

2 Q. And fair to say that students could file a complaint with
3 the department chair or university before House Bill 233 came
4 into effect?

5 A. Yeah, that would be the procedure. The complaint goes to
6 the chair, and then it can go up to the dean and even higher if
7 necessary.

8 Q. And, again, predating House Bill 233, you used to record
9 your lectures on Zoom pretty regularly?

10 A. Yep.

11 Q. Isn't that correct?

12 A. That's correct.

13 Q. Counsel last year confirmed that you did not take the
14 survey and nor did anyone make a threat to you to take the
15 survey.

16 I want to ask on the back end. You agree that you were not
17 disciplined for not taking the survey; correct?

18 A. That's correct.

19 Q. You alluded to performance funding on direct examination?

20 A. Yes.

21 Q. You agree that defendants have not used performance funding
22 in connection with the surveys; correct?

23 A. That's correct, yeah. I mean, I think the question
24 really -- the important issue here is the perception of what it
25 might mean, how they can head it off, you know, how an

1 administrator can head off the possibility that there could be
2 problems.

3 Q. So I guess my question for you is that -- well, just, I
4 guess, to confirm -- is you cannot tell me which one of the
5 performance metrics you think would be in play to encourage
6 survey participation, can you?

7 A. Well, I think it's certainly a moving target. I think, as
8 I understand the performance funding, it changes from -- it can
9 change from year to year. So the possibility is that it could
10 be explicitly tied to this sort of thing. I mean, that's a
11 possibility.

12 But, no. I mean, there's -- right now it's not being used
13 as a tool or as a weapon against people who don't take the
14 survey.

15 Q. Okay. How many metrics are there?

16 A. A number of them. I don't know the details of it. It's a
17 pretty complicated schema.

18 Q. And are they by statute or rule?

19 A. I can't say. I mean, it's not really an area of expertise
20 on my part. I do know that, you know, it's a constant fear on
21 the part of the administration.

22 I would mention I was on the editorial board of the
23 University Press of Florida, and that was chaired by a rotating
24 series of provosts. And what I heard from the provosts outside
25 of the University of Florida was a great deal of fear associated

1 with performance funding.

2 Now, the details of performance funding, I can't really
3 recite what those are. I would say the University of Florida
4 has been the biggest beneficiary of performance funding over the
5 years. The money has been flowing.

6 Q. When's the last time the performance funding metrics
7 changed?

8 A. Again, I can't -- I know they do change, though. That's --
9 but this is outside of my area of expertise, so --

10 Q. You're speculating?

11 A. That would be speculating, yeah. I admitted that.

12 So I can't provide the details of the performance funding,
13 but I know that performance founding is a huge issue in terms of
14 how administrators perceive themselves and how they perceive
15 their relationship with the legislature.

16 Q. And you agree that you have not resigned from any
17 associations because of House Bill 233; correct?

18 A. Right.

19 Q. And nor have you not joined any associations because of
20 House Bill 233; correct?

21 A. Right.

22 Q. And, obviously, you agree that you've not been required to
23 disclose your associations; correct?

24 A. Right.

25 Q. Going back to performance funding, on the larger topic of

1 budgets, you would agree that you're not aware of any budget
2 cuts as a result of House Bill 233?

3 A. No.

4 I mean, an important point, the product is the prospect of
5 budget cuts, the prospect of punitive actions associated with
6 budget.

7 Q. When will the defendants do that?

8 A. I'm sorry?

9 Q. When will the defendants make those budget cuts?

10 A. Oh. Well, usually annually.

11 Q. Okay. So just coming up, they're going to do it?

12 A. Well, usually the cycle is over the summer, yeah, the new
13 budget, fiscal year.

14 Q. But you could be wrong, correct, that the budgets will be
15 gone --

16 A. No, I'm quite certain about that.

17 Q. You're quite certain about the timing, or that the budget
18 will --

19 A. Yeah, how budgets work. They work according to fiscal
20 year; right. Fiscal year ends the end of June. That's how
21 budgets work.

22 THE COURT: As I understood your testimony, though,
23 I'm not saying definitively they're going to cut it. It's the
24 fear that's being (indiscernible).

25 (Reporter requested clarification.)

1 THE COURT: Did I get that wrong?

2 THE WITNESS: Yeah, no, that's right.

3 THE COURT: Could you repeat back for the court
4 reporter, because I'm having a hard time talking?

5 THE WITNESS: Yeah. The important point is the fear,
6 perception of what might happen if -- if the law isn't fully
7 implemented, so the fear that there might be a connection
8 between the possibility of budget cuts and the failure to
9 implement, for example, the survey.

10 THE COURT: To answer Mr. Moore's question, Judge, I'm
11 not telling you definitively it's going to be cut now, next
12 year, six weeks from now. It's the fear and the intimidation.
13 It's not that I'm telling you with certainty it will happen.

14 THE WITNESS: Right.

15 THE COURT: I understand.

16 BY MR. MOORE:

17 Q. Shifting gears to your prospective book, you touched on a
18 bit of a road show to test out your book. Did I get that right?

19 A. Uh-huh.

20 Q. Do those take place on college campuses, university
21 campuses?

22 A. Yes.

23 Q. And how large of a crowd are you anticipating speaking to?

24 A. Well, I think a good crowd would be 75 to 100, but, you
25 know, it all depends on timing and interest and publicity.

1 There are a variety of things that are sort of out of your
2 control.

3 Q. Sure. But do you have any of those dates in stone yet?

4 A. I don't have a book written yet. I have to have a book
5 first.

6 Q. How about other lectures? Are you scheduled presently on
7 any university campus to give a lecture separate from the book?

8 A. No. Again, this -- as I said earlier, it's sort of in a
9 gestational period. This is what I'm looking forward to working
10 on, you know, as the next book I write. It's not -- it's not
11 been written. I haven't even drafted a sentence, but it's in my
12 head, and I have a pretty clear idea how I want to approach it.

13 THE COURT: Let me ask a question, because maybe I
14 misapprehended part of the testimony. I thought your prior
15 testimony involved both future prospects, as well as stuff
16 you've already written.

17 THE WITNESS: Yeah.

18 THE COURT: Because books you've already written could
19 also, for example, be picked up and be on the reading list of
20 existing professors; correct?

21 THE WITNESS: Correct.

22 THE COURT: For example, your predecessor
23 Wyatt-Brown's *Southern Honor: Ethics and Behavior in the Old*
24 *South* was probably read by half the UF history students --

25 THE WITNESS: Right.

1 THE COURT: -- for 20 years; right?

2 THE WITNESS: Yes, exactly.

3 THE COURT: So that's -- when you were talking about
4 maintaining your relationships and having people assign your
5 books and involving you, that would have been an example
6 where --

7 THE WITNESS: Yep.

8 THE COURT: -- even though he may have stopped
9 teaching, Wyatt-Brown's books were sold and used and part of the
10 curriculum for decades after he left.

11 THE WITNESS: Exactly.

12 THE COURT: I understand.

13 MR. MOORE: No further questions.

14 THE COURT: Thank you.

15 Just a fun fact. Yes, I was forced to read that book
16 when I was an undergraduate.

17 Go ahead.

18 MR. WERMUTH: I just have a few questions.

19 REDIRECT EXAMINATION

20 BY MR. WERMUTH:

21 Q. So we had a little discussion of your syllabus in
22 Mr. Moore's cross-examination, and -- so you're aware, are you
23 not, that HB 233 was signed into law in June of 2021; correct?

24 A. Yes.

25 Q. And at that point what was the state of your syllabi for

1 the fall semester, so was going to come in the next school year?

2 A. Well, as I mentioned, for the fall semester the book orders
3 were already in. So the -- as I mentioned earlier, I think it's
4 in April that you're required to get the book orders in, and if
5 you don't, the way it works at UF is that the provost can take
6 money away from the department. I've never heard of a thing
7 like this occurring, but that's true at the University of
8 Florida. So, in other words, I had already picked the core
9 readings through the book orders by probably April of 2021.

10 This would be for the fall course, the seminar that I taught.

11 Q. So were you free at that point to rip up the syllabus and
12 decide to use new material for the class?

13 A. I could have, I guess.

14 Q. Would there have been penalties involved in doing that?

15 A. No, it would have been -- it was a problem with the book
16 orders, I guess, certainly.

17 Q. And then did you teach any courses in the following spring
18 after that?

19 A. Yes, the survey class, U.S. History survey, U.S. since
20 1877.

21 Q. By that time you decided to retire; right?

22 A. Yes.

23 Q. Okay. And we spoke about -- well, Mr. Moore asked you
24 about leverage, and we spoke about it on your direct
25 examination.

1 Before HB 233 was in place, what leverage did the student
2 have to get you to change their grade?

3 A. Well, I think primarily lobbying and primarily -- sometimes
4 pressure. In my experience, I've seen different types. This is
5 not by any means the typical student. I mean, it's -- but there
6 are enough of them that you always have to deal with them every
7 semester. So that -- yeah, that would be my answer, I guess, if
8 that makes sense.

9 Q. Before HB 233, did you have any understanding of a cause of
10 action or recording that a student could do to gain leverage
11 against you?

12 A. No, certainly not.

13 Q. And Mr. Moore asked you about your new book. Now, your new
14 book is on Jessie Helms; correct?

15 A. Correct.

16 Q. We've talked about that.

17 And you've already written a book on Jessie Helms; correct?

18 A. Yes.

19 Q. So there's no big piece of speculation that you're going to
20 write this book?

21 A. Right. And I have all the -- I mean, I have all the
22 material, really, because Helms was a person who generated a lot
23 of words, and there's an enormous body of evidence related to
24 him. So I would anticipate being able to write it -- I wouldn't
25 have to go to the archives. I think I've got everything I need

1 really to do the book.

2 Q. And this new book, I think you referenced, is making the
3 subject more accessible; correct?

4 A. Right.

5 Q. And do you have any hope or expectation that people might
6 want to do additional research, perhaps read your longer book if
7 they read your shorter version?

8 A. Yeah, yeah. And I -- well, I still get inquiries about it.
9 Actually, people are still reading the book out there, you know.
10 But, as I mentioned, it's a 500-page book. So it's a little --
11 I found it difficult to write a book shorter than that about the
12 man to do a full biography.

13 But it's hard -- you can't use a book that long in class.
14 It just doesn't work. It's too long. And publishers hate long
15 books to start with because they're expensive to produce.

16 So, yeah, so I think there's a -- there would be a clear
17 need for this kind of book that would try to understand Helms,
18 properly contextualize him, but also look at him in a kind of
19 thematic way, the central themes of his career and really, in
20 many ways, the central themes of the modern conservative
21 movement. Part of my argument about Helms is he was a central
22 figure in the emergence of what we call modern conservatism,
23 conservatism, say, post-Ronald Reagan.

24 Q. And based on your experience and since the passage of
25 HB 233, how likely do you think it is that a professor of

1 history would adopt a book like yours to teach in a course on
2 Florida campuses?

3 A. It probably would be a flashing red light there. I mean, I
4 think in terms of the thematic emphases of the book, it would be
5 moving into territory that would be considered controversial,
6 maybe would cause problems for an instructor to use the book.
7 They might be called out on the carpet.

8 So short answer again would be that it's not going to help
9 the use of the book in classes at the University of Florida with
10 this kind of threat that hangs over teaching and hangs over
11 material that you might use in class like my book.

12 MR. WERMUTH: Those are all the questions I have,
13 Your Honor.

14 THE COURT: Thank you. You can step down.

15 THE WITNESS: Thanks.

16 (Dr. Link exited the witness stand.)

17 THE COURT: We're going to wrap things up quickly.

18 Let me just say to counsel, I mentioned before that I
19 wanted to at some point tomorrow discuss standing as it relates
20 to the recording provision. Of course, the case I was referring
21 to -- and I should have just given you the case cite at the
22 time -- was *Support Working Animals*. I talked about greyhounds,
23 and that's what -- which was the *Support Working Animals*, which
24 is found at 8 F.4th 1198, Eleventh Circuit, 2021, which suggests
25 that, at the very least, a plaintiff must show that the official

1 has the authority, if you're suing the official for the purpose
2 of standing, to enforce the particular provision that he has
3 challenged, such as the injunction prohibiting enforcement, to
4 be effectual.

5 I'll note, just as an example, to give y'all something
6 to think about, in the recent case of *Pernell*, I pointed out
7 that the IFA requires the Board of Governors to pass
8 implementing regulations which led to the passage of 10.005, and
9 that provision mandates that each state university pass its own
10 regulation establishing a grievance and discipline procedure for
11 professors who promote or compel belief in the eight concepts
12 under that act that was at issue in that case. I feel that the
13 Board of Governors calling for the university -- it's BOG
14 regulation 10.005. If I misspoke, my apologies. And so that's
15 the enforcement mechanism. If you stop, then it would -- that's
16 the traceability issue in that case.

17 The question is, is there -- beyond the general
18 authority to enforce the law, is there anything specific like
19 that? I mean, I'm familiar with the state university system, of
20 Florida's website that deals with OIGC, that is the Office of
21 Inspector General and Director of Compliance that talks about
22 how you file a complaint and so forth. But y'all would have to
23 explain to me how you thread that needle to get there, because
24 it seems to me that there's some real -- very real issues as it
25 relates to the recording provision, especially if all you've got

1 is there's the general authority to enforce in light of the case
2 that I cited before, namely, the *Support Working Animals* case.
3 Y'all may have already gotten that earlier. I didn't want to
4 make it more complicated than it needed to be, but I wanted to
5 give everybody some guidance.

6 All right. Tomorrow morning y'all are going to have a
7 new list of witnesses for us. At some point y'all are going to
8 go over your exhibit list and update it, confer with each other,
9 and get with my courtroom deputy. It does not have to be done
10 this evening, but let's just do it every 24 hours or so.

11 Anything additional we need to take up before we break
12 this evening?

13 MR. WERMUTH: Your Honor, I spoke to my friend on the
14 defense about Professor Kamola. He's our next -- he was going
15 to be our next witness. Unfortunately, because of the timing
16 issues, he's going to have to travel back to his home in
17 Connecticut, and we are going to be putting him on by remote
18 means, and Mr. Levesque is gracious to consent to that.

19 THE COURT: Certainly. I'm sorry Dr. Kamola has been
20 here for multiple days.

21 MR. WERMUTH: We'll attempt to just put him into the
22 schedule after tomorrow.

23 THE COURT: All right. And my understanding, based on
24 that, Mr. Levesque, you are in agreement that he can testify by
25 video and you have no objection?

1 MR. LEVESQUE: Yes, we are, sir.

2 THE COURT: All right. Very good. All right. We'll
3 do that.

4 Anything additional we need to take up?

5 MR. WERMUTH: Not at this time.

6 THE COURT: Where in Connecticut?

7 MR. WERMUTH: Hartford.

8 THE COURT: Fair enough. I've got a kid in New Haven.
9 That's why I'm asking.

10 Thank you.

11 Court is in recess.

12 (Proceedings recessed at 6:04 PM.)

13 * * * * *

14 I certify that the foregoing is a correct transcript
15 from the record of proceedings in the above-entitled matter.
16 Any redaction of personal data identifiers pursuant to the
17 Judicial Conference Policy on Privacy is noted within the
18 transcript.

18 /s/ Megan A. Hague date

19 Megan A. Hague, RPR, FCRR, CSR Date
20 Official U.S. Court Reporter

20 **I N D E X**

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION**

WILLIAM A. LINK, et al.,)	
)	
Plaintiffs,	)	Case No: 4:21cv271
)	
v.	)	Tallahassee, Florida
	)	January 11, 2023
RICHARD CORCORAN, et al.,)	
	)	8:36 AM
Defendants.	)	VOLUME III
)	

**TRANSCRIPT OF *EXPEDITED* BENCH TRIAL PROCEEDINGS
BEFORE THE HONORABLE MARK E. WALKER
UNITED STATES CHIEF DISTRICT JUDGE
(Pages 565 through 883)**

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P R O C E E D I N G S

(Call to Order of the Court at 8:36 AM on Wednesday,
January 11, 2023.)

THE COURT: All right. We are on the record in Case
No. 4:21cv271 for the third day of the bench trial.

I've got a new list with four witnesses, all being
called live today; is that correct?

MR. WERMUTH: That's correct, Your Honor.

THE COURT: All right. Is the plaintiff ready to
proceed?

MR. WERMUTH: We're ready to proceed. We also are
prepared to address the issue you raised yesterday about
enforcement under the --

THE COURT: We'll do that at some point where we need
a break. I know I said we could do it this morning. Thank you
for getting ready to address it. It will be helpful to sort of
put the defense on notice and also so I can start thinking about
where we're at, but we're not going to resolve the issue. We're
just going to sort of lay the groundwork so we can have a
meaningful discussion later.

The one thing I do want y'all to do -- and I know we
talked about dates at one point. I'm not wed to a particular
timeline to get paperwork from you after this proceeding. I
know we tentatively talked about that before.

But, Mr. Wermuth, if you and Mr. Levesque would talk

1 about it and if -- because, again, I don't know what your other
2 commitments are and so forth, and I don't want to drag it out
3 ridiculously. But I've got plenty on my plate, so if somebody
4 needs an extra week to do something, that's fine.

5 I also -- I think I told you, because I don't want
6 anybody to be surprised, there is a decent chance that I'm going
7 to bring y'all back -- or we can do it by Zoom, whatever your
8 preference is -- for argument.

9 So the other thing I thought about is do y'all want to
10 set a -- not only a time for you to file your closing arguments,
11 but then a week after that if you want to file limited replies
12 to the other person so that when we have it at OA, it's not --
13 everybody has had a chance to hear everybody's replies back and
14 forth so we can have a meaningful discussion without introducing
15 new topics or new responses? So that may be beneficial both in
16 terms of being more efficient when we have the oral argument, as
17 well as giving me what I need so I can have a meaningful set of
18 questions for you.

19 And then, finally, what your preference is. I'm happy
20 to have y'all here in person. That's, obviously, easier on the
21 court reporter, but I also understand we have folks from out of
22 town. So if it's going to be a hardship to do it in person and
23 you wish to do it by Zoom, we can do that as well. So if you'll
24 discuss that.

25 And I'm pretty much -- if y'all agree to a time frame,

1 I'm going to adopt it. I will tell you that I've got a five- or
2 six-week trial starting, but both for the benefit of the Court,
3 which I've not done for ten years, and for the benefit of the
4 court reporter and so forth -- although, I guess it doesn't help
5 the court reporter in this case -- I may take a half a day a
6 couple of times during that six weeks and let the jury go handle
7 their personal business and -- so I can set hearings like this
8 and so forth.

9 So I can't imagine we'd need more than a couple of
10 hours for oral argument anyway. So I -- the point is I can work
11 with y'all even if it falls within the extended trial that's
12 going to start.

13 But if y'all will just let me know by the -- say, the
14 end of Tuesday what your proposed timeline is. And, obviously,
15 if I need to intervene and resolve a conflict between y'all, I
16 will. I mean, that is if y'all don't agree on the timeline.
17 I'm happy to set it if y'all can't agree; all right?

18 MR. WERMUTH: Thank you, Your Honor.

19 MR. LEVESQUE: That's good.

20 THE COURT: Any questions about that protocol?

21 MR. LEVESQUE: No.

22 THE COURT: And let me just ask, do you think it's
23 beneficial -- I don't want to have people going back and forth,
24 back and forth, because it then drags it out forever. But it
25 just seemed like it would be helpful to give y'all an

1 opportunity to reply to each other's closing arguments in
2 writing.

3 Does that --

4 MR. LEVESQUE: I think a reply makes sense to us,
5 Your Honor.

6 MR. WERMUTH: It makes sense to us.

7 THE COURT: Okay. All right.

8 All righty. Well, then my understanding is Gothard is
9 first?

10 MR. WERMUTH: That's correct.

11 THE COURT: All right.

12 You can call your first witness.

13 MS. VELEZ: Okay.

14 Dr. Gothard, if you can go up to the stand.

15 (Dr. Andrew Gothard entered the witness stand.)

16 THE COURTROOM DEPUTY: Please raise your right hand.

17 **DR. ANDREW GOTHARD, PLAINTIFFS WITNESS, DULY SWORN**

18 THE COURTROOM DEPUTY: Please state your name for the
19 record and spell your last name for the record.

20 THE WITNESS: My name is Dr. Andrew Gothard,
21 A-n-d-r-e-w G-o-t-h-a-r-d.

22 THE COURTROOM DEPUTY: Thank you.

23 THE COURT: You can take your seat, sir.

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Q. Good morning, Dr. Gothard.

Q. Where do you work?

Q. How did you become the president of United Faculty of Florida, or UFF?

Q. How did UFF become a party to this lawsuit?

Q. What is UFF?

A. It's the United Faculty of Florida. We are the higher-education branch of the Florida Education Association. We represent roughly 25,000 higher-education faculty and

1 graduate assistants across the state in all 12 state public
2 universities and 16 state and community colleges. We also
3 represent four K-12 lab schools which are connected to the state
4 universities. We have four Graduate Assistants United chapters
5 that are also connected to four universities, and we have a
6 retired chapter.

7 So just about anybody you can think of who teaches a class
8 in higher education in the state of Florida, we represent that
9 category of individual.

10 Q. And you mentioned the Graduate Assistants United chapters.
11 If you recall, where are those located?

12 A. So those are located at the University of South Florida,
13 the University of Florida, Florida State University, and Florida
14 Agricultural and -- Agricultural and Mechanical University.

15 Q. And the members of those chapters are graduate teaching
16 assistants?

17 A. They are graduate assistants, so some -- some -- most do
18 teaching assistant work; some do research work. But, yes, the
19 vast majority are teaching assistants.

20 Q. What can you tell the Court about the organizational
21 structure of UFF?

22 A. So with all those groups I was just mentioning, United
23 Faculty of Florida has 34 chapters, 33 of which are bargaining
24 units. The 34th, our retired chapter, doesn't have a contract
25 as a bargaining unit because they are sort of retired faculty

1 from all over the state.

2 But we are composed of all of these individual local
3 chapters. Those local chapters elect their own local officers.
4 They negotiate and ratify their own collective bargaining
5 agreements. They handle their own grievance processes, you
6 know, things of that nature.

7 And then we have the statewide office where I am the
8 statewide president, and from that position, we gather all of
9 the dues from all the local chapters. So local chapters do not
10 collect dues. We collect those dues at the state office, and
11 then we sort of distribute them to our national affiliates and
12 partners through our various agreements as a union organization.

13 We employ staff, so we have what are known as service unit
14 directors who specialize in labor relations or organizing
15 activities. We employ and supervise all of those staff and then
16 assign them to the various local chapters to assist in
17 representational activities for enforcing and negotiating the
18 contract, organizing new membership or -- drives or things of
19 that nature.

20 And we handle the membership rosters as well. So we keep
21 up with our full membership as a statewide organization and use
22 that as part of our other agreements related to dues and, you
23 know, everything else that we as a union deal with.

24 Q. And are members of all of the 34 bargaining and retired
25 chapters also members of the statewide chapter?

1 A. Yes. So when an individual member joins at a local
2 chapter -- so if we use my home chapter as an example -- if you
3 join UFF-FAU -- and that's how all of our chapters are
4 identified. They are UFF first and then the designation of
5 whatever their local chapter is -- they automatically join UFF
6 as a statewide organization.

7 They then join our statewide affiliate automatically, the
8 Florida Education Association; and then they join our national
9 and international affiliates, which would be the NEA, the
10 National Education Association; the AFT, the American Federation
11 of Teachers; as well as the AFL-CIO, the American Federation of
12 Labor and Congress of Industrial Organizations.

13 And I'm well aware that in the union, we're comfortable
14 with these acronyms. So if I need to slow down or spell any of
15 that out again, I would be happy to do that.

16 Q. And you mentioned the four Graduate Assistants United
17 chapters. Do those members also take classes as students?

18 A. They do, yes. So most, if not all, graduate teaching
19 assistants, unless they're on some sort of very special
20 fellowship, will teach classes and take classes at the same
21 time.

22 Q. And I believe you mentioned that UFF has a chapter on every
23 public university in Florida; is that correct?

24 A. That's correct, every public state university.

25 Q. And does UFF have chapters on public college campuses in

1 Florida?

2 A. We do. We don't have all of them yet, but we do have 16.

3 Q. And I believe you mentioned that you're also a professor
4 yourself; correct?

5 A. I am. I'm an instructor in the English department at
6 Florida Atlantic University in Boca Raton where I teach
7 composition and literature, primarily to freshman and sophomore
8 students.

9 Q. When did you first begin teaching at FAU?

10 A. I began at FAU in August of 2017.

11 Q. Have you resigned from your teaching duties to serve as
12 president of UFF?

13 A. I have not. I have taken what is known as union leave,
14 which is allowed for in our collective bargaining agreement. So
15 while I'm serving as UFF president, I'm on leave from all duties
16 at the institution. I'm not evaluated. I'm not given a
17 teaching assignment or anything of that nature. I am, you know,
18 fully committed to working on contractual, political, and other
19 issues related to United Faculty of Florida.

20 Q. And is FAU, or Florida Atlantic University, a public or a
21 private institution?

22 A. Is it a public institution.

23 Q. Is it part of the state university system?

24 A. Yes, it is.

25 Q. What is your understanding of the role that the Florida

1 Board of Governors has with regard to the state university
2 system?

3 A. So the Florida Board of Governors oversees the state
4 university system, and they have broad rulemaking authority to
5 establish policies, enforce rules and restrictions, to navigate
6 the difficult legislation that has been put out by the Florida
7 Legislature, and to direct and guide the institutions that make
8 up the state university system across Florida.

9 Q. How did you first become involved with UFF?

10 A. So I joined UFF immediately upon starting at Florida
11 Atlantic University back in 2017. You know, my first year I was
12 still kind of getting my feet under me, figuring out, you know,
13 what all the expectations of my job were and how, you know, life
14 and work culture works at FAU.

15 And then at my second year, I became involved with a
16 membership drive that was going on to get us over 50 percent
17 membership for the first time in our chapter's history, and we
18 were successful in reaching that goal, after which I became our
19 membership chair and then our statewide membership committee
20 chair. And after, you know, a year or so of that, I ran and was
21 elected as the statewide president.

22 Q. And just for the clarity of our record, UFF is a union;
23 correct?

24 A. Yes, 100 percent.

25 Q. Why is union membership important to you personally?

1 A. Gosh. I mean, I don't know if we have time for me to go
2 through all of it, but what I would say is union membership is
3 important to me personally because, you know, if we know the --
4 often people who remember this phrase remember it incorrectly,
5 right, and they say that absolute power corrupts. But the
6 phrase is actually that power corrupts, and absolute power
7 corrupts absolutely. And this is very true no matter what level
8 of authority or governance we're talking about.

9 And what I've seen repeatedly in my time as an employee,
10 not just in the state university system but just in higher
11 education as a whole, is that our institutions work best when
12 there's a check and balance in place, and where faculty have the
13 ability to speak with a collective voice about their working
14 conditions, because we know that the working conditions of our
15 faculty are also the learning conditions of the students. So we
16 can't separate these two issues.

17 If we have strong working conditions for faculty that will
18 attract and retain the best qualified people from around the
19 country to do the work of the state university system, that is
20 something that helps the students of Florida. It helps the
21 families of Florida. It helps the communities of Florida.

22 So we see our role as protecting and supporting the public
23 good in the state, and that's why I'm a member of the United
24 Faculty of Florida, because that is where I exercise those
25 duties and those desires and those values.

1 Q. Shifting gears a bit, how would you describe the current
2 political climate in Florida regarding public perceptions of and
3 rhetoric around higher education?

4 A. Abysmal, abysmal. And it hasn't always been that way. You
5 know, I moved to Florida in 2012 to do -- to begin my Ph.D. at
6 the University of Miami in Miami, Florida -- not the one in
7 Ohio -- and I -- at that time the rhetoric around higher
8 education was very much what you would expect, right. We all --
9 it seemed like everyone in the state respected higher education.
10 We recognized that Florida has a world-class higher-education
11 system and that there's value and importance in supporting
12 education for the public good.

13 There were arguments about how much funding there should be
14 and, you know, sort of like usual bread and butter of how do we
15 run a good higher-education system. But, specifically, since
16 Governor Ron DeSantis took office, that narrative has shifted,
17 and we hear consistently in the press from both the Governor,
18 his supporters, and --

19 MR. LEVESQUE: Your Honor, now he's testifying about
20 what other people are saying in the press, and at this point I
21 think it would be hearsay.

22 MS. VELEZ: And, Your Honor, our response to that is
23 that this is not offered for the truth of the matter asserted.
24 What has been stated in the press about faculty we take the
25 position is absolutely false, but it is, instead, for the effect

1 on the listener, the members of United Faculty of Florida.

2 THE COURT: Overruled in part and sustained in part,
3 and let me explain the role.

4 That doesn't -- just because it's -- just because it's
5 relevant, sort of the atmosphere and why you -- I mean, one of
6 the issues is fear and what's being -- for purpose of standing
7 and so forth, and so to that extent it comes in, but that
8 doesn't mean you can backdoor through that every statement
9 everybody has made ad infinitum.

10 And so when I say "sustained in part and overruled in
11 part," yes, I recognize for a limited purpose it can come in.
12 That's why it's sustained in part and overruled in part. But
13 also through -- it's got to be within reason.

14 So he can explain generally why he believes those that
15 are in positions will act on, believe people when they say they
16 are going to come after you, and that's why we are responding
17 the way we are to HB 233. For that limited purpose,
18 articulating that -- because I believe he's both a member,
19 you've already said, as well as a representative of the entity
20 which is a plaintiff; correct?

21 MS. VELEZ: Yes, that's correct, Your Honor.

22 THE COURT: And so on that basis, I'll allow it.

23 MS. VELEZ: Thank you, Your Honor.

24 BY MS. VELEZ:

25 Q. Dr. Gothard, I believe you we were testifying to some of

1 the rhetoric specific to attacks on higher education that have
2 colored yours and other members' fear of retaliation.

3 A. Absolutely. I think where I left off was that
4 Governor DeSantis, his supporters in the legislature and some of
5 the individuals named in this lawsuit have consistently made
6 clear statements about how faculty are supposedly indoctrinating
7 students, that faculty as a whole are, you know, left-leaning
8 Marxists, these very broad, sweeping, universal generalizations
9 that are patently false. And the more that narrative gets out
10 there, the more our faculty are intimidated, and the more they
11 feel they cannot teach and speak with the freedom that they are
12 guaranteed under the Constitution.

13 And this is not something that has just happened in the
14 past. I mean, most recently, during his second inaugural
15 address, Governor DeSantis again repeated that these faculty
16 indoctrinators needed to be brought under control. So this is
17 an ongoing narrative that continues even up to this point.

18 Q. And how have you personally understood the objective of
19 bringing faculty under control?

20 A. So I've understood that, in my personal and professional
21 capacity, to be -- based on the comments that have been made,
22 that any viewpoint that would disagree with the Governor's
23 position as a conservative politician is not welcome in the
24 higher-education system and, in fact, will be punished; and
25 institutions that have faculty who express any of those

1 positions, who research that subject matter or teach in any of
2 those areas, will also be punished both on the individual level
3 and on the institutional level. That could be, you know, a
4 disciplinary action against the individual faculty member that
5 could be based on this sort of allowed activities under HB 233,
6 or it could be a reduction of funding to either an entire
7 institution or a targeted program.

8 Q. And I believe you've mentioned the Governor and some of the
9 named defendants.

10 Have you heard the same rhetoric about stopping liberal
11 faculty anywhere else?

12 MR. LEVESQUE: Objection, Your Honor. Hearsay.

13 THE COURT: Well, has he heard it anywhere else
14 doesn't call for what they've -- subject to my same ruling, you
15 can answer.

16 THE WITNESS: Thank you.

17 So outside of Governor DeSantis, we have certainly
18 heard it from the former Commissioner of Education,
19 Richard Corcoran, and we have heard it from the current
20 Commissioner of Education, Manny Diaz, as well as members of the
21 Board of Governors and the Board of Education.

22 BY MS. VELEZ::

23 Q. Have you ever heard --

24 MR. LEVESQUE: Your Honor, I -- that was nonresponsive
25 to the question. The question, to Your Honor's original

1 statement, was have you heard any statements, which is a yes or
2 no answer.

3 THE COURT: I understand. And he's now said that
4 consistent with the rhetoric you've heard from other named
5 defendants -- and you were identifying them -- rather than going
6 through every statement, you're saying, We've heard that from
7 the other players with the Board of Governors and so forth, and
8 it's on that basis that I'm offering my general view both as an
9 individual and in my capacity as the head of UFF that there's
10 this climate of fear.

11 THE WITNESS: That's correct.

12 THE COURT: I understood.

13 And for that purpose, I'll allow it.

14 BY MS. VELEZ:

15 Q. And, Dr. Gothard, have you heard any similar statements
16 from members of the Florida Legislature?

17 A. Yes. Yes, we have.

18 Q. And have you heard any similar statements in the specific
19 context of HB 233?

20 A. Yes, we have.

21 Q. How has the political climate that you just described
22 affected the importance of UFF for its members, if at all?

23 A. I think it's made UFF more important than ever. When
24 faculty are having their rights to freedom of speech chilled by
25 not just legislation and policy that is being passed, but also

1 by statements of intent by the Governor and his supporters in
2 the legislature, the individuals who have the power and can
3 exert the authority to defund institutions, to exert pressure on
4 institutions to get rid of faculty of particular viewpoints,
5 individual faculty are looking for groups that will protect
6 them, that will protect their rights under tenure, that will
7 protect their academic freedom, and that will assure -- not just
8 in the case where liberal viewpoints are being targeted, but
9 conservative faculty come to us as well, because they recognize
10 the sort of door this opens for, you know, in the future a
11 progressive or liberal governor or legislator to potentially
12 target conservative viewpoints.

13 So we have faculty from all points of the political
14 spectrum coming to us and recognizing the dire situation that
15 faces higher education and the role that a faculty union can
16 play to protect the fundamental rights of faculty members,
17 students, and staff in our higher-education system.

18 Q. And does the political climate affect any rhetoric
19 regarding unions more generally?

20 A. Absolutely, yes.

21 Q. And has any of that rhetoric been targeted at UFF or
22 higher-education unions?

23 A. Yes, yes, it has. We have -- I mean, as you can see in the
24 filing, we have been called by former Commissioner of Education
25 Richard Corcoran, who is now a member of the Board of

1 Governors -- we've been called evil people.

2 THE COURT: One moment, please. Let me interject one
3 thing.

4 Setting -- in addition to my ruling as it related to
5 the statements of the Governor, the statements of Diaz and
6 Corcoran -- they're both party opponents, and so their
7 statements are, by definition, when introduced by the
8 plaintiffs, not hearsay. So I should have clarified that
9 earlier. It depends on also who we're talking about.

10 So, for example, the Governor -- I'm sorry. I forget
11 from case to case.

12 The Governor is a defendant in this case?

13 MS. VELEZ: He is not, your Honor.

14 THE COURT: He is not. Sometimes he's brought in;
15 sometimes he isn't. Sometimes I dismiss him early; sometimes we
16 reach this stage and I haven't addressed that yet.

17 So, obviously, by -- statements about -- not offered
18 for the truth of the matter asserted -- because, clearly, this
19 witness disagrees and thinks the statements that, You're a bunch
20 of leftist lunatics grooming people is nonsense; correct?

21 THE WITNESS: That's correct.

22 THE COURT: So it's clearly not being offered for the
23 truth of the matter asserted, and I found it was otherwise
24 relevant.

25 But for purposes of others, such as any of the people

1 that are parts of the Board of Governors and so forth, it's a
2 statement of parties, and it's on that basis I'll allow those
3 statements to come in over hearsay objection, because it's not
4 hearsay. It's a statement of a party.

5 You may proceed.

6 MS. VELEZ: Thank you.

7 BY MS. VELEZ:

8 Q. Dr. Gothard, I believe you referred to a filing. For the
9 sake of the record, would that be the amended complaint in this
10 matter?

11 A. That's correct.

12 Q. As well as the second amended complaint?

13 A. That's correct.

14 Q. And I believe you were testifying as to what defendant
15 commissioner -- former Commissioner Richard Corcoran had said
16 about unions.

17 What was it that he had said?

18 A. He had said that we were evil people and that we were -- I
19 believe at various times said we were not acting in the best
20 interests of the state, we were not acting in the best interests
21 of the institutions. Yeah.

22 Q. And I believe you testified that you don't agree with any
23 of this rhetoric regarding what educators in Florida are doing.

24 How would you describe the way you approach your job as an
25 educator in Florida?

1 A. So, the way I approach my job as an educator in Florida is
2 very simple. You know, I have a duty to advance knowledge, to
3 train students, to meet the requirements of whatever course I am
4 teaching, and to, you know -- and I think this is true of most
5 faculty -- faculty that you would talk to across the state.

6 You know, my job is not to insert my own politics or my own
7 beliefs into the classroom. My job is actually to make sure
8 that the content that we're teaching is foregrounded, and I
9 actually consider it a success if I make it to the end of the
10 semester and students don't actually know what my personal
11 politics are, because that means I've done a very good job of
12 being able to play devil's advocate with ideas that students
13 might present but I don't necessarily agree with. But I'm
14 asking them questions to teach them to think critically, to
15 defend whatever idea they've presented.

16 And it also means that if a student has presented something
17 particularly controversial in the class, I've done a good job of
18 letting the students debate and discuss that without being the
19 person who has to insert myself and try to control that
20 discussion.

21 Q. I believe you testified that you became president around
22 the same time that HB 233 came into effect; is that correct?

23 A. That's correct.

24 Q. So you did not teach personally under HB 233?

25 A. I did not.

1 Q. But in your classroom were controversial ideas something
2 often discussed?

3 A. Absolutely. You know, whether we're talking about -- so
4 the classes I would teach most often would be freshman
5 composition where we're teaching students how to, you know,
6 analyze complex text and to construct complex arguments based on
7 research and, you know, to approach subject matter objectively,
8 to try to find truth, as opposed to just presenting whatever,
9 you know, is most convenient given the context.

10 And, also, in my poetry and fiction courses, we would often
11 read challenging text that explore complex ideas about race,
12 culture, class, identity, right, because this is what art is
13 about. Art is a reflection of the human experience. And so we
14 would often discuss, you know, complex, could be controversial
15 ideas, and it takes a very deft hand to be able to do that in an
16 effective way but allow students to express themselves while
17 also ensuring that all students feel welcome in the classroom
18 and that they have equal access to the educational opportunity
19 they've been provided.

20 Q. In your teaching experience before HB 233, did you ever
21 silence or shut down a student based on a viewpoint they were
22 expressing?

23 A. Absolutely not.

24 Q. What was your philosophy with regard to navigating teaching
25 controversial subjects?

1 A. So my philosophy -- and this is a pretty standard
2 pedagogical practice, I would say. The philosophy starts
3 with -- de-escalation is important. So it's one of those
4 things -- like, a student is often as -- you know, as stressed
5 and frightened as you might be when they bring up something that
6 they feel very emotionally agitated or compelled about. So the
7 first goal is to sort of de-escalate, allow the room to calm
8 down. Instead of sort of arguing with that student directly, I
9 would often, you know, open up for class discussion and say,
10 Well, how does everyone else in the room feel? Do we all agree
11 with that? Do we disagree? And we would discuss those. But
12 there were limits to that, right.

13 As a faculty member, I do have a responsibility to ensure
14 that the subject matter we are discussing is actually the
15 subject matter that was laid out in the syllabus, it's the
16 course content we need to cover. So I have to balance the
17 desire of the student to talk about this issue that they feel
18 very strongly about with the needs of the course and also the
19 needs of the other students to receive a full education of
20 whatever the subject matter is.

21 So, for example, I remember my first semester teaching we
22 were discussing, you know, 17th Century cavalier poetry. I
23 think we were talking about Andrew Marvell's "To His Coy
24 Mistress" or something like that. And a student, who, you know,
25 I think was maybe, you know, being cheeky more than anything

1 else decided he wanted to discuss Flat Earth theory.

2 And in that moment, I had to say, like, No, we're not going
3 to go down that road right now, because it was completely
4 irrelevant to the subject matter under discussion. The other
5 students clearly were not interested in having that debate or
6 that discussion. And then I was able to say, Okay, if you want
7 to talk about that, you can hang out after class, and we'll talk
8 about it as we move to our next courses, or you can come by
9 office hours. And I was able to sort of navigate those issues.

10 But under HB 233 -- and I think about this myself as a
11 professional educator and I hear this from other faculty around
12 the state -- there's a real fear that I actually could not do
13 that, because then that student would have the ability to claim
14 that the class -- or they had been shielded from the discussion
15 of a particular subject, which drastically undermines the
16 faculty member's ability not just to do their job effectively,
17 but to really be able to effectively interpret the law as it is
18 written.

19 Q. Thank you, Dr. Gothard. And we'll come back to some of
20 that in a moment.

21 Shifting gears a bit, do all of UFF's members hold the same
22 political beliefs?

23 A. Absolutely not. Despite what the Governor and some of the
24 individuals named in this lawsuit would say, UFF is composed of
25 a variety of political viewpoints. And, you know, if you've

1 spent much time around higher-education faculty, something to
2 recognize is that folks who work in higher education are very,
3 very precise and specific about what they believe and why they
4 believe it, and how it is distinctly different from things
5 that -- or beliefs that, you know, the greater public would
6 think of as just one large group.

7 Sort of as a brief aside, an example I could give was with
8 the current post-tenure review regulation that is up before the
9 Florida Board of Governors, many of our faculty wrote in public
10 comment in preparation for when the Board of Governors will hear
11 this regulation. And the one that stands out in my mind is the
12 one that begins: *I believe this post-tenure review is unlawful*
13 *and unethical, and here are the 32 reasons why.* And it went on
14 to elaborate all of them.

15 So the way that applies here, is, you know, even the
16 categories of sort of liberal and conservative don't make sense
17 in the context of higher education, because our people are the
18 kinds of people who will say, Well, I'm this version of
19 libertarian, not that version of libertarian. I'm, you know,
20 eight-tenths conservative and two-tenths, you know, progressive
21 socialist, whatever. They know sort of where they fit all
22 across the political spectrum.

23 And, in fact, because of my experience, you know, where I
24 first got started in UFF -- door knocking, talking to members,
25 and serving as the statewide membership chair where I

1 coordinated local membership chairs who were talking to
2 members -- I feel very well positioned to say that, number one,
3 the political views of our faculty are really determined by
4 where they are in the state.

5 So if you go to a rural state or community college in
6 Florida and you start talking to the faculty, you will find that
7 the majority of them tend to lean conservative because that's
8 what the community does, right; that's the voting patterns of
9 the large community they belong to. Whereas, if you go to a
10 large Research 1 institution in an urban area, you'll find that
11 maybe the majority of those faculty lean a little bit more to
12 the left, because, again, those are the voting patterns that you
13 see in those areas.

14 And these are not hard-and-fast rules, because when you get
15 back down into an individual campus, you will also see clusters
16 of belief, sometimes based on subject matter, that are really
17 self-selection more than anything else.

18 So if you go to the --

19 THE COURT: But, also, it doesn't uniformly apply
20 because our state's flagship, first and finest university,
21 University of Florida, is in a rural community; right?

22 THE WITNESS: That's true.

23 THE COURT: It's not necessarily just based on the
24 locality; correct?

25 THE WITNESS: Absolutely. Absolutely.

1 THE COURT: And I guess reasonable minds could dispute
2 which university is Florida's first and finest.

3 Let me ask you a quick question, because I want to
4 circle back to what you were talking about earlier, and I want
5 to make sure I'm not assuming something that's incorrect.

6 As I understood your response, you were saying, Judge,
7 I'm not being -- this is consistent, not inconsistent. I'm
8 telling you I've not had a problem with sort of a heckler's veto
9 in my classroom where people were being shouted down or I
10 permitted it. We've had free discussions.

11 And if there was a rule that said so long as it's on
12 topic and within reason and the time, place, and manner of what
13 you're saying is not only relevant, on point, it's reasonable in
14 how much you want to talk -- with those limitations, I would
15 agree that there should be an open discussion on point about
16 whatever is being covered in the class; correct?

17 THE WITNESS: Absolutely.

18 THE COURT: And as I understood it, you said, That's
19 what happened before, and that was my experience when I was
20 teaching; correct?

21 THE WITNESS: That's correct.

22 THE COURT: Fast-forwarding to HB 233, as I understood
23 your testimony, what's different now is not that if HB 233 said
24 simply that in classroom discussions you have to, within reason,
25 allow alternative viewpoints on topic and not shut people down,

1 A, that's what I did; and, B, I'd have no problem with that.

2 Am I following you so far?

3 THE WITNESS: That's correct.

4 THE COURT: Judge, what I'm telling you is that's not
5 what I view the language is -- as doing, which is why I
6 expressed that there's this fear, because I don't know what
7 shield means. Does it mean just allowing somebody to talk?
8 Does it mean I have to do something affirmatively? Does it
9 mean -- since it doesn't say this, does it mean it has to be on
10 topic? Who decides that it's on topic?

11 Since I don't know what it means, and I'm going to
12 have some bureaucrat enforce it against me, I have no idea
13 whether they're going to say something that I would say is
14 wildly off topic was on topic such that I'm going to be subject
15 to -- you know, even though I'm not being sued directly, I'm
16 going to be subject to complaints and so forth by a student.

17 Is that -- did I understand your testimony correctly?

18 THE WITNESS: Absolutely. And I would add to that.
19 That's really one of the very practical issues with HB 233's
20 application to how a faculty member runs a classroom, right.

21 When you look at the -- or when we look at the
22 antishielding language, right, where it says, you know, a
23 faculty member of an institution cannot -- it says
24 "institution," but, you know, the faculty members are the ones
25 dealing with this, who it would be applied to -- cannot shield a

1 student, faculty, or staff member from an idea that they would
2 find unwelcomed, disagreeable, or uncomfortable.

3 Number one, how does a faculty member even know if a
4 student is going to have that sort of emotional reaction to a
5 particular idea?

6 Beforehand, thinking about it, you're essentially
7 being asked to mind read the student's reaction, which you --
8 there's really no reasonable way you can do that. A student may
9 come up to you afterward and say, Well, you know --

10 THE COURT: It would also suggest that you've got to
11 set the bar at the most sensitive snowflake in your classroom --

12 THE WITNESS: Absolutely.

13 THE COURT: -- because if you don't, then you
14 potentially run afoul of the law.

15 THE WITNESS: Absolutely. So faculty don't know how
16 to interpret it on that level, but also the practical reality of
17 a faculty member's responsibility to keep order in the
18 classroom, to make sure that the subject matter is being
19 covered.

20 Under this antishielding restriction and the fact that
21 they know that at any time a student could be secretly recording
22 what it is they're saying to use in a complaint against the
23 university, faculty feel they can no longer reasonably navigate
24 class discussion.

25 So, now, if I were to use that same example of a

1 student bringing up Flat Earth theory while we're talking about
2 poetry that doesn't relate to that subject matter, I would have
3 significant pause as a faculty member of whether I could even
4 tell that student, We can't talk about this, or, Let's discuss
5 it later, or try to move it into another avenue, because then
6 I'm sitting there thinking, Am I being recorded right now? Is
7 that recording going to be used in a civil or disciplinary
8 action or criminal action against me? And am I going to get a
9 shielding complaint because that student is going to say all the
10 students in this classroom found my commentary about Flat Earth
11 theory unwelcome? The faculty member said I couldn't talk about
12 it; they shielded all the students from my ideas, and that is
13 not allowed under HB 233.

14 THE COURT: What says you to the response that, Well,
15 it's off topic, so, of course, you don't have to talk about it?

16 THE WITNESS: Well, I would say that is how things
17 worked before HB 233 was in place. But when we talk to our
18 faculty, they can't navigate that distinction, right. The
19 language about antishielding does not have exceptions for the
20 faculty member just enforcing standard decorum or trying to
21 ensure that all the students are receiving the education they
22 are supposed to.

23 That antishielding language, because of the
24 description that it has, it's very difficult for a faculty
25 member to define what does count as unwelcomed, disagreeable, or

1 uncomfortable. It sounds like it would also cover ideas that
2 are off topic or ideas that other students don't want their time
3 wasted on. It could even go down to, you know, a student asking
4 for the fourth time in the same class, What was the due date on
5 that assignment, or, What was the thesis of this piece of
6 reading? Right.

7 That's unwelcomed, that's disagreeable, that's
8 uncomfortable to the other students in the room. But if the
9 faculty member doesn't allow it, the student can make a
10 complaint about shielding.

11 And I would also add, you know, one thing that we know
12 as a faculty union is that part of the chilling effect here is
13 that even the investigation of a student complaint on this front
14 can be very damaging for a faculty member, partly because of how
15 uncomfortable that kind of investigation can be, the way that it
16 can cling to a faculty member long term. But also because of
17 all the extremely heightened political rhetoric around this
18 subject, a faculty member could find that they are worried about
19 finding themselves on the news. They are worried about finding
20 themselves the focus of further political rhetoric.

21 So what they do is they -- you know, they sensor
22 themselves. They chill. They don't assign subject matter.

23 MR. LEVESQUE: Objection, Your Honor.

24 THE COURT: Narrative. Sustained.

25 MR. LEVESQUE: Thank you.

1 THE COURT: We can break it up.

2 Let me ask you the follow-up question to that, and
3 then your lawyer can get back to it.

4 If shield meant to limit students, faculty members, or
5 staff -- if it read -- the definition of shield meant to limit
6 student, faculty members', or staff members' access or
7 observation of ideas, opinions, or viewpoints with which they
8 disagree, does that fix your concern, if it simply said you
9 can't shield the class from viewpoints with which others
10 disagree?

11 THE WITNESS: I think it would be better than what
12 HB 233 currently says, but I don't think it would fully fix the
13 issue, because if we stick with the --

14 THE COURT: What if it said -- let's -- before --
15 let's see if this fixes it.

16 If it said shield meant that you can't block
17 viewpoints with people with which they disagree so long as it's
18 time, manner appropriate, et cetera -- time, place, manner
19 appropriate; in other words, it's on topic -- it says something
20 along the lines it's, you know, on -- related to the topic being
21 discussed, you know, and it adds other qualifiers that gives you
22 flexibility if somebody is talking too long and hijacking the
23 class, et cetera?

24 THE WITNESS: Potentially, though I still think the
25 whole idea of structuring what can and can't happen in a

1 classroom based on what someone agrees or disagrees with is
2 deeply problematic for how a faculty member actually has to
3 navigate the day-to-day realities of dealing with, you know, 200
4 18-year-olds in a room, some of which who have read, some of
5 which have not and, you know, may some have wildly differing
6 opinions about what's happening.

7 When you base -- or when the State bases requirements
8 of what a faculty member can and can't do based on whether a
9 student agrees or disagrees and how they feel about content in
10 that regard, it's really putting faculty in an untenable
11 position.

12 THE COURT: Help me to reconcile the response you just
13 gave with the -- I already, so long as it was on topic and
14 appropriate and limited to time and so forth, would allow a
15 viewpoint even if it was controversial and not generally
16 accepted.

17 How does that response square with that's what you
18 were already doing?

19 THE WITNESS: The way I would square that is to say
20 that before HB 233, the number one concern of a faculty member
21 about how much time got spent on a certain subject was not about
22 whether students agreed or disagreed or whether it was
23 controversial subject matter. It was about what are the -- what
24 are the goals of the course? What do we need to cover today?
25 And how much time can I designate to this? They were all about

1 practical realities and just making sure that the course stayed
2 on track.

3 And one of the reasons for that is, you know, despite
4 what I think we often hear in sort of larger discourse about
5 higher education, a semester where students meet three days a
6 week for 50 minutes at a time or twice a week for an hour and 15
7 minutes at time is actually not a lot of time to cover
8 everything that you indeed to do. So every decision in a class
9 period about what we talk about versus what we don't is a
10 zero-sum game, right. If we put more time into this discussion,
11 it takes away time from another discussion.

12 And while we want to allow students to explore ideas
13 in a critical fashion and kind of let the conversation go where
14 it needs to go, at some point you do, as a faculty member, kind
15 of have to cut things off and say, Okay, we need to return to
16 this subject matter because I have to teach you X so that we can
17 do Y next time and then A, B, and C the following time.

18 So that -- the practicalities have to be the number
19 one focus, completely separate from questions of are people
20 going to feel the ideas are unwelcomed or disagreeable, are they
21 going to feel that someone disagrees or doesn't disagree and
22 whether it's being allowed on those standards and requirements,
23 rather than on these very practical realities of course
24 instruction.

25 THE COURT: You've responded.

1 Counsel, you may proceed.

2 BY MS. VELEZ:

3 Q. Going back to one point that you made a bit earlier, I
4 believe you testified that UFF members have a variety of
5 different political viewpoints; is that correct?

6 A. That's correct. And actually, there was one more thing I
7 was going to say on that, and that was you often see clusters of
8 viewpoints, depending on the subject matter, and those are often
9 defined by self-selection. So if you go to, for instance, a
10 business school on a campus where they're teaching the sort of
11 tenets and values of capitalism, you will find a much larger
12 cluster of conservative rather than liberal faculty there.

13 It's not a hard-and-fast rule. There are always
14 exceptions, but generally that's what you would find. This is
15 generally true across the hard sciences, mathematics, sort of
16 those kinds of areas tend to -- you know, criminal justice --
17 those areas tend to lean more conservative.

18 But if you go talk to the arts and humanities, for
19 instance, you will find more liberal faculty clustered there,
20 but not always the case. You know, I have worked in English
21 departments where there are a number of very far right-leaning
22 conservative faculty.

23 So these are not sort of universal truths and constants,
24 but what I think it points to is that these sort of broader
25 narratives about all faculty are liberal and, even so, they are

1 all Marxists, so, like, that sort of type of liberal, is just
2 absolutely untrue and can be disproven, you know, with a 10- to
3 15-minute walk around any higher-education campus in Florida.

4 Q. And in consideration of what you've just testified to,
5 let's say, for example, we have a liberal-leaning anthropology
6 department. Is there ever a difference of viewpoint within that
7 department that might be politically aligned?

8 A. Oh, absolutely, yeah.

9 Q. They have diverse viewpoints even within a liberal
10 department?

11 A. Absolutely.

12 Q. And you were just discussing with Your Honor what language
13 might ensure that faculty could still control their classroom.
14 Do you recall that?

15 A. I do.

16 Q. Okay. HB 233's antishielding provision does not create any
17 carve-out that ensures that a faculty member may create and
18 enforce restrictions that are reasonable and content neutral to
19 promote pedagogical interests based on time, place, and manner
20 of expression, does it?

21 MR. LEVESQUE: Objection.

22 THE WITNESS: It does not. And --

23 THE COURT: Hold on one second.

24 I sustain the objection as it relates to a legal
25 conclusion which ultimately I have to make, but I overrule the

1 objection as it relates to --

2 MR. LEVESQUE: Leading.

3 THE COURT: -- from his perspective, he doesn't know
4 what it means and here's why I'm confused by the language.

5 MR. LEVESQUE: Well, I was also going to suggest that
6 it was a leading question, Your Honor.

7 BY MS. VELEZ:

8 Q. Is there any language in the antishielding provisions of
9 HB 233 that affords faculty members an opportunity to -- an
10 explicit opportunity to control their classroom and in a
11 content-neutral way manage speech?

12 A. No, there is not. And we would argue that HB -- the
13 antishielding provision of HB 233 actually forbids a faculty
14 member from engaging in that kind of necessary behavior.

15 Q. Shifting gears --

16 THE COURT: Let me ask you this, because this may come
17 up, and so I'd rather have you answer the question now rather
18 than come up in front of some other court at some other level.

19 Why can't a -- to address your concerns under HB 233,
20 why can't you just do what I do in the black robe every day,
21 which is, if the concern is that this parade of horrors is
22 going to happen, because I'm not exactly sure how it's going to
23 be enforced or who is going to enforce it -- why can't you just
24 look at the student and say, We may talk about that later, but
25 we're not talking about whether the earth is flat right now; we

1 are talking about whether or not this particular poem, you
2 know -- some theme in it or something, or, you know, I've let
3 you express your view, but we've now got to move on to another
4 topic. I've given you a couple of minutes, but we've got to
5 move on and hear from somebody else?

6 Why is it not that simple that, in order to assuage
7 any concerns and consistent with the language of the statute,
8 all you have to do -- especially if somebody is recording you --
9 it seems in that instance recording you would protect you if you
10 just say and make plain and create a record that, You just
11 talked for three minutes, or, You are talking about apples and
12 we were just talking about oranges?

13 I'm not saying that fixes it. I'm just giving you an
14 opportunity to respond to that.

15 THE WITNESS: So what we would say -- and this is what
16 I hear from faculty in our union pretty consistently is that the
17 problem is the antishielding provision of HB 233 doesn't provide
18 any information about what sort of intensity of response the
19 faculty member can give does or does not count as shielding. So
20 any faculty member looking at and trying to interpret HB 233
21 doesn't have a sense of, Can I actually set a reasonable
22 requirement there that, okay, we're going to discuss this for
23 three minutes and that should meet my requirement under the
24 antishielding law?

25 Under there, at least, you know, any reasonable

1 faculty member would look at that and say 30 seconds would count
2 as shielding; five minutes would count as shielding; ten
3 minutes. All it takes is the student to say, I had an idea that
4 I know the class felt and the faculty member felt was
5 unwelcomed, and I was not allowed to express it to the full
6 extent that I wanted to. And because I was not, they were
7 shielded from those ideas. Here's my recording. This is my
8 complaint.

9 BY MS. VELEZ:

10 Q. Thank you, Dr. Gothard.

11 We've talked a lot about faculty's interpretation of the
12 text of the statute.

13 In your experience has anything else shaped the way that
14 your members understand HB 233's antishielding provision?

15 A. Absolutely.

16 I've said this several times, and I still believe it.
17 HB 233 at its core is the enforcement mechanism. It is the hub
18 that connects all the other spokes of the attacks that have come
19 down on higher education since HB 233 was passed.

20 So the most obvious is HB 7, or the Stop WOKE Act, because
21 now faculty are in a space of trying to determine where HB 7
22 says, You cannot shield students from any of these ideas. And
23 then HB 7 says, Actually, no, you are required to shield
24 students from ideas X, Y, and Z. And then how does a faculty
25 member reasonably navigate the requirement to shield and not

1 shield at all times?

2 And both laws come with pretty intense penalties for the
3 institution and for the individual faculty member if they run
4 afoul. So the only response that a reasonable faculty member
5 has is to pull far back from any of this subject matter that is
6 restricted in HB 7 in order to also try to comply with the
7 requirements of HB 233.

8 Q. And you use the words "enforcement mechanism," but I'm not
9 sure I understood how HB 233 impacts the enforcement of other
10 laws.

11 A. So, again, if we use HB 7 as an example, the restrictions
12 in HB 7 are about ways of teaching certain subject matter that
13 relate to race, gender, sexuality, and other issues that I won't
14 belabor here, but there is a restriction here in place. And if
15 an institution is found to have a substantiated violation of
16 teaching that certain subject matter in the way that is
17 prohibited and then the substantiated violation can be
18 determined by the Florida court system, the Board of Governors,
19 or a standing committee of the legislature, then that
20 institution can have their entire performance funding for the
21 following year fully revoked as sort of punishment for that.

22 And what we saw, previous to the injunction that was placed
23 on HB 7's enforcement back in late November, is that
24 institutions were putting out guidance and reporting mechanisms
25 for violations of HB 7. And my understanding from our local

1 members is that all of them included opportunities for
2 individuals to upload recordings, particularly audio or video
3 recordings of classrooms, to prove that faculty were doing this
4 heinous thing.

5 So the secret recording provision of HB 233 is what
6 empowers the enforcement of HB 7 in that context.

7 Q. Understood.

8 You've spoken a lot about the antishielding provisions
9 already, but I'm going to ask Andy to please pull up Joint
10 Exhibit 1 at page 3.

11 A. That would be here on the --

12 Q. Yes, that's correct, Dr. Gothard.

13 A. Here. Okay.

14 Q. And take a moment to review these provisions, if you would.

15 (Pause in the proceedings.)

16 Q. And are these provisions highlighted on your screen the
17 provisions you've been referring to as the antishielding
18 provisions?

19 A. Yes, that's correct.

20 Q. And are there separate provisions that apply to the state
21 university system versus the state college system?

22 A. Yes.

23 Q. And are those both reflected on the screen?

24 A. Yes.

25 Q. And do you understand these provisions to apply to faculty

1 members in addition to defendants in this case?

2 A. Yes, absolutely. Because if we're talking about, you know,
3 the Florida College System, you know, which is -- which is
4 overseen by the State Board of Education or the Board of
5 Governors, which oversees the state university system, at some
6 point sort of down the line, you know, these institutions are
7 forbidden -- but at some point down the line, it's an individual
8 who makes this decision. And because HB 233 is so clearly
9 directed at and aimed toward classroom discussion, lectures, and
10 experience, because of the language in the law, it is clear that
11 that would come down to an individual faculty member the vast
12 majority of the time.

13 Q. And you said that the law is clearly aimed at classroom
14 discussion; correct?

15 A. That's correct.

16 Q. What are you basing that on?

17 A. I'm basing that on the reference to lectures, right. So in
18 the recording provision there are references to being able to
19 record specific lectures.

20 And then, you know, more often than not, if we look at the
21 language on the screen, if you're shielding anyone from free
22 speech, if you're shielding anyone from ideas and opinions,
23 there are spaces on campus where those are going to be, you
24 know, expressed. There are invited speakers who can participate
25 in that. But the comparison of the number of times that occurs

1 on a higher-education campus, let's say on a weekly basis, to
2 the number of classes that higher-education institution offers
3 on a weekly basis -- I mean, I haven't done the math, but it's
4 got to be like 90 to 10 percent as a comparison point. So the
5 overwhelming majority of opportunities that students, faculty,
6 or staff are going to have to engage with free speech, protected
7 speech, or opinions and ideas is going to be in the classroom
8 setting.

9 Q. In that case, what do you understand the role of defendants
10 to be with regard to these provisions?

11 A. They are the enforcement mechanism. The Board of Governors
12 and the State Board of Education create the policies and rules
13 that govern these institutions. And then it is up to the local
14 institutions often to interpret those in some way. But very
15 often, especially when it comes to politically charged issues
16 and laws such as this, we find that the directives coming down
17 are very restrictive. And the reports for these types of
18 infractions often end up going back up to these governing bodies
19 in one way or another.

20 MS. VELEZ: Thank you, Andy. You can take Exhibit 1
21 down.

22 BY MS. VELEZ:

23 Q. Are you aware of whether there were already any protections
24 in Florida law for guest speakers or student protesters on
25 campus?

1 MR. LEVESQUE: I understand the question as just, "Are
2 you aware?" But to the extent that the answer goes on, we would
3 assert our objection.

4 THE COURT: All right. Well, let's first -- are you
5 aware of other protections? Yes or no.

6 THE WITNESS: Yes.

7 THE COURT: And then you can ask your next question,
8 and then Mr. Levesque can object if he has an objection.

9 MS. VELEZ: Understood.

10 BY MS. VELEZ:

11 Q. And are you aware of controversial speakers having appeared
12 on Florida's public college, and university campuses before
13 HB 233 went into effect?

14 A. Yes, I am.

15 Q. And in any instance were those speakers disinvited based on
16 a viewpoint?

17 A. I'm trying to remember the exact circumstances. The
18 example I'm thinking of is Richard Spencer at the University of
19 Florida, and I'm trying to remember if he was -- I know he was
20 protested very aggressively by the students. I'm trying to
21 remember if the institution actually disinvited him. I believe
22 they may have.

23 Q. Got it.

24 THE COURT: And just that so everybody will know, I'm
25 aware of the case. The case was assigned to me. That matter

1 was settled, and he was permitted to speak.

2 MS. VELEZ: Thank you, Your Honor.

3 BY MS. VELEZ:

4 Q. We talked a little bit about your understanding of the
5 antishielding provision already.

6 THE COURT: Notwithstanding my constant reference to
7 these cases that y'all are mentioning having been in front of
8 me, there are other judges in the district.

9 But go ahead.

10 MS. VELEZ: Yes, Your Honor.

11 BY MS. VELEZ:

12 Q. And I apologize, Dr. Gothard, if you think we have already
13 covered this. But you testified to your understanding of the
14 text of the antishielding provision; correct?

15 A. Yes, that's correct.

16 Q. And you testified that it was difficult to understand that
17 text; correct?

18 A. Absolutely.

19 Q. Have you been -- have you made any attempt to understand
20 that provision in the context of the political rhetoric we've
21 been talking about?

22 A. Yes. And I think that contributes to the -- you know, not
23 only my own perspective, but the consistent perspective of our
24 members across the state that what the antishielding provision
25 is actually doing is it's discriminating against viewpoints that

1 the Governor and members of the legislature as well as
2 individuals named in this litigation disagree with.

3 Q. And what ideas are those in particular?

4 A. So based on the comments of these individuals, some of whom
5 are still currently in the Florida Legislature, some whom are
6 not, they would be ideas that are liberal, ideas that -- and I
7 guess it just would be sort of like the broad categorization of
8 liberalism, though it's not always easy to define how the
9 politicians and other leaders and questions are defining that
10 specifically, but it does seem to be that anything that
11 disagrees with the agenda of Governor DeSantis and his
12 supporters.

13 THE COURT: Let me interject a question.

14 Is it your -- are you telling me you think that's why
15 they did it, how it's going to be enforced, or that's what it
16 does? Because it seems to me those can be three different
17 things and answered in three different ways.

18 And my follow-up question for you would be -- it just
19 seems to me that if the new folks that have taken over New
20 College -- and I'm just using that as an example because it
21 works -- and they start shutting down liberal students that push
22 back and want to make comments in class on topic because it's
23 going to offend potentially new conservative students they are
24 recruiting, doesn't the antishielding protection protect that
25 student?

1 And I guess the answer would be, but not if the people
2 that are enforcing say, Well, we accept your view that you are
3 doing it because it was off topic, and we're not going to accept
4 the view that it was off topic, if it was a liberal professor
5 saying that to a student.

6 So I'm trying to figure out is the concern that's the
7 way it works and is written? Or maybe the answer may be yes to
8 all of those.

9 THE WITNESS: It's yes to all of those, actually.
10 And, you know, what we would add, too, is one of the things we
11 watch for as a union when we're trying to protect the working
12 conditions of faculty across the state is we look for
13 administrative overreach in response to a law that is written in
14 a vague manner and then has all of these very problematic
15 narratives behind it that have been stated by the sponsors of
16 the bill and, you know, political leaders around the state.

17 We are very concerned about something known as
18 anticipatory obedience, right, the idea that because individual
19 faculty and individual administrators who have been assigned
20 with enforcing these codes and policies know what the narrative
21 is behind it, they will then sort of take extra action to follow
22 up with what they know to be the intent of that law because
23 they're having trouble navigating the sort of vague text of the
24 law as it is written. So they look at those narratives. They
25 listen to those statements. They see what the discussion has

1 been in a broader context and then they enforce it in that way.

2 THE COURT: Who runs the -- and I'm not -- and it may
3 be the same for all universities, but it may differ, so let me
4 start with your university. If a student -- long before HB 233,
5 they could complain about a professor. So if a professor
6 shouted at them and said, Your comments are not relevant. We're
7 not going to listen to you, you could go and complain long
8 before HB 233; right?

9 THE WITNESS: Absolutely.

10 THE COURT: All right. Does the process vary from
11 university to university or is there a uniform rule about that
12 that relates to that process to file such a student complaint?

13 THE WITNESS: And we're still talking about
14 pre-HB 233?

15 THE COURT: Right.

16 THE WITNESS: So typically it would be the same across
17 all universities. There's always some sort of administrative
18 variation in those, but generally it would be the student could
19 go to the faculty member's immediate supervisor, which they
20 often did, to communicate to the chair. But they would also
21 have opportunities to go to the dean. They could even contact
22 the provost, and then there would be sort of investigations and
23 disciplinary procedures that could come from that.

24 THE COURT: So there were folks in that process that
25 were actual other academics as opposed to pure administrators?

1 THE WITNESS: That's correct.

2 THE COURT: Okay. You qualified that by saying
3 pre-HB 233. Has that changed?

4 THE WITNESS: So the process has certainly changed.
5 With the ability for students to secretly record faculty
6 lectures during class, there -- and because of that carve-out
7 for two-party consent, it would be less of a -- you know, it
8 would be less of a "This is my perspective of what happened in
9 the class; this is your perspective of what happened in the
10 class." There's a recording there that is part of it.

11 And then there is also now the fear that envelops our
12 universities, envelops our faculty and our administrators about
13 if this is not handled in the appropriate way, if we run afoul
14 of these antishielding provisions, then there are going to be
15 consequences for not just the individual faculty but for the
16 institution.

17 So what we see is there can be a more intense response
18 to a student complaint than there would have been pre-HB 233.

19 MS. VELEZ: Thank you, Your Honor.

20 BY MS. VELEZ:

21 Q. Is there anything in the text of HB 233 that leads you to
22 believe that it is designed to promote one ideology over
23 another?

24 A. Yes. Yes, there is. And I would point to the actual
25 descriptor of what students are not to be shielded from, like

1 those -- those -- I always remember it as unwelcomed,
2 disagreeable and uncomfortable. I know there's four in there,
3 so -- and I always forget one -- but it's that sort of
4 description of ideas.

5 The only way a rational person can identify that sort of
6 way of understanding an idea is to recognize that one
7 perspective is going to feel that way, right? It's got to come
8 from some angle. And then how do you as a faculty member
9 navigate which perspective is being used to identify if an idea
10 is unwelcomed, disagreeable or uncomfortable?

11 Well, then you go to the intent of the lawmakers who passed
12 the law, and higher-education faculty are some of the most
13 highly educated people in the world. They read the news. They
14 read the articles. They do the research. I mean, they're paid
15 to be professional researchers, so they look at that information
16 and that's how they interpret the law, and that's how we
17 consider our administrators also interpret the law at these
18 institutions.

19 Q. And you have been speaking to consequences. Are those
20 consequences coming from defendants?

21 A. They would be coming from defendants, yes.

22 Q. And how did you -- how would you -- strike that, please.

23 What consequences are you concerned of?

24 A. Well, it depends on which provision we're talking about,
25 whether we're talking about the student recordings and the

1 antishieldings or we're talking about the survey.

2 You know, as I've said before, the Board of Governors and
3 the State Board of Education has rulemaking authority for these
4 institutions so they can create those policies, and they can
5 also determine the kinds of punishments that can come down. And
6 punishments can be leveled at the institution, at the level of
7 the entire institution, or they can be leveled at the individual
8 faculty member.

9 So that could be, you know, disciplinary action for a
10 faculty member, whether we're talking about, you know,
11 suspension, termination, those kinds of things. It could be a
12 reduction of funding or support for an institution that's
13 seen -- that is seen to be, you know, let's say, supporting the
14 wrong ideas as compared to those that those in power would want,
15 as I think we could see from, you know, what has occurred to New
16 College just as of the last week.

17 It could also be, you know, these institutions -- or these
18 governing bodies work very closely with the Florida Legislature,
19 so it could be an effort to trim funding entirely to those
20 institutions, which we've seen in the last two weeks with the
21 Governor's memorandum to request funding for DEI and CRT
22 initiatives from institutions.

23 (Reporter requested clarification.)

24 THE WITNESS: CRT, critical race theory, initiatives
25 on higher-education campuses, with the implied threat being that

1 the -- you know, the Florida Legislature will reduce funding
2 commensurate with those reports in the upcoming session.

3 BY MS. VELEZ:

4 Q. And just to be clear, are those consequences explicit in
5 HB 233 itself?

6 A. Are they explicit, like are they explicitly outlined?

7 Q. That's my question, yes.

8 A. No, I don't think so.

9 Q. So what are you basing these consequences on?

10 A. I'm basing these consequences on the threats that various
11 defendants have made over time, as well as statements from, you
12 know, sponsors of the bill when it was passed in the 2021
13 legislative session, as well as the ongoing statements of
14 Governor DeSantis about how the State needs to get these liberal
15 universities and colleges in line and under control.

16 Q. Are you aware of whether defendants have any investigatory
17 or investigating powers with regard to institutions and faculty
18 members' compliance with the law?

19 A. Yes, they do.

20 Q. Can you describe what you understand of those powers?

21 A. Well, I would use the proposals of the enforcement
22 mechanism for HB 7 as an example. So many of the policies that
23 were created about enforcing HB 7 on these campuses required
24 institutions to gather reports of violations of HB 7 and to
25 report those directly to the Board of Governors, and the Board

1 of Governors would follow up on those reports. And as one of
2 the, you know, three entities that could substantiate a
3 violation of HB 7, they would be, then, as we understand it,
4 investigating and handling disciplinary action as a result.

5 Q. And are you aware of whether those powers have any
6 limitation to exclude HB 233?

7 A. To make sure I understand your question, can they choose
8 not to enforce HB 233?

9 Q. Let me rephrase. It was a confusing question.

10 A. Okay. Sorry.

11 Q. Do you understand that they could investigate an
12 HB 233-related claim under those powers?

13 A. Yes, they could.

14 Q. Have the antishielding provisions caused UFF's members to
15 do anything differently?

16 A. Absolutely. What we're hearing more and more often is that
17 faculty when -- well, there's a couple of ways in which I'm
18 hearing reports of how faculty are behaving differently.

19 On the one hand, we're having the problem that I've already
20 laid out at length about faculty just being unable to
21 practically navigate their classrooms anymore and being afraid
22 of running afoul of contradictory laws and laws that are vaguely
23 worded that they have difficulty interpreting when they're just
24 trying to do their jobs and ensure that all students are getting
25 the quality of education that they've paid for and signed up

1 for.

2 But, on the other hand, what they're doing is they are --
3 where before HB 233 they would have willingly taught a
4 controversial subject and tried to reasonably and responsibly
5 navigate a complex discussion in that moment, now I'm hearing
6 that they just avoid controversial assignments altogether.

7 So texts that they would have assigned before HB 233, they
8 don't assign now because of their belief that, you know -- if
9 you're looking at how to interpret HB 233, one of the things we
10 have to establish is that faculty speech is not just what they
11 say out loud. It's the syllabi that they write; it's the
12 assignments that they produce. It's -- anything related to
13 their class that they are using to teach is faculty speech.

14 And so when they are looking at, for instance, putting
15 together a reading list for their course, and they're thinking
16 of the books they might assign, many of them are in a space
17 where they're now going, Well, if I assign this book which I
18 know is, you know, valid, has a good reputation, the research is
19 strong, all those kinds of things, they're now worried that they
20 have to assign this other book that covers subject matter from a
21 completely different way that would not be acceptable in
22 higher-education classroom, not because of its viewpoint, but
23 because of its lack of scholarly credentials.

24 So examples that I'm hearing are faculty who would normally
25 teach a text --

1 MR. LEVESQUE: Objection, Your Honor. Hearsay.

2 None of -- at least in his deposition he never
3 testified about any of these matters, wasn't aware of any of
4 these types of things going on. And to come in now and start
5 talking in the abstract -- or not even in the abstract --
6 referencing all of these other people that are censoring
7 themselves or censoring their curriculum I think would be
8 inappropriate.

9 THE COURT: There's a couple of layers there. One is
10 hearsay, then the next issue is whether or not your objection
11 that he's testifying -- although he's not testifying as an
12 expert, he's testifying as a representative of one of the
13 plaintiffs; correct?

14 MS. VELEZ: That's correct, and on behalf of his
15 members.

16 THE COURT: So then the question becomes was he
17 designated -- well, the second layer was that he somehow is
18 constrained to whatever he said in his deposition, which, in
19 some instances, would be cross-examination and impeachment; in
20 some cases it's prohibited. Like an expert obviously cannot --
21 in other instances, can't go beyond the scope of their
22 testimony, but you can address both layers to the objections.

23 MS. VELEZ: First, Your Honor, I'll say that it's not
24 my recollection that Dr. Gothard did not speak to the effect on
25 his members in his deposition, and, at the next break, I'd be

1 happy to review that deposition and pull out some examples of
2 that testimony if Your Honor would like me to come back to this.

3 THE COURT: But you think he's bound by what he said
4 before? I understand you can cross-examine somebody. So if I
5 say, Tell me everything you saw at the traffic accident, and
6 then you start at trial talking about other things you saw or
7 heard, then it's not, Objection, Judge, he's saying something he
8 didn't say before. It's you cross-examine him and say, You
9 didn't say this and this before, so as a fact witness.

10 So the question becomes, what's the legal principle
11 that binds him or limits him such as it would limit an expert
12 and so forth?

13 MR. LEVESQUE: If I may, Your Honor, I think at least
14 related to finding the information, we attempted to do that and
15 I think that's the purpose of the 30(b)(6). I'm not aware --

16 THE COURT: That's why I ask how he was designated. I
17 didn't use 30(b)(6), but I said for what purpose was he deposed?

18 MR. LEVESQUE: But I don't -- I don't think that he
19 can come in now as the representative of the organization. They
20 asserted First Amendment privilege when I asked for the identity
21 of some of those individuals to verify it.

22 Now he's coming in talking about -- as a
23 representative of the organization talking about people that
24 we've never been able to test their evidence. We've not been --
25 so he's talking about --

1 THE COURT: Well, that's yet another layer that I've
2 addressed in a prior order, but the issue before you got there
3 was, Judge, what makes this different than a fact witness like
4 you were discussing -- because I was trying to get y'all to make
5 the arguments, not me making both sides of the argument -- was
6 that, Judge, with a 30(b)(6), you can't then change what you've
7 offered up. That would completely undermine the point of having
8 a designee if you can just change it, and that's why this is
9 different than a pure fact witness, which is the example you
10 gave, Judge, which is what I was waiting for.

11 So why don't we -- and you agree he was designated as
12 a 30(b)(6)?

13 MS. VELEZ: Absolutely. And what I will clarify and
14 what I'm understanding now is that it is certainly true that
15 Dr. Gothard did not name the names of his members, and he
16 doesn't intend to do so today.

17 THE COURT: That not -- that was the -- let's shoot
18 one target at a time.

19 MS. VELEZ: Of course.

20 THE COURT: And that's why I was trying to get away
21 from that. I think the issue about -- as I think I explained in
22 an order, the issue about there's a difference between saying
23 you've got to disclose your individual members and why I didn't
24 require that versus you can opine as a 30(b)(6) witness on these
25 topics -- I think those are two different things, but --

1 MS. VELEZ: Right.

2 THE COURT: -- that doesn't mean you can come in as a
3 30(b)(6) witness and change your testimony, which is a different
4 issue.

5 So let's stick with that, and if you think you need to
6 go look, let's take a break; you can go get your deposition, and
7 if this is something that was covered, you can say, He's wrong,
8 it was covered, and then we can address any other layer or
9 permutation to the argument.

10 MS. VELEZ: And I would even say that if the assertion
11 is that Dr. Gothard testified that none of his members were
12 affected by the antishielding provision, I would ask defendants
13 to point to that, because I --

14 THE COURT: No. I think what he's saying is, Judge,
15 we tried to get him to identify any and all ways that he was
16 claiming X as the representative. And if you say, Now, is there
17 anything else? at the deposition, and you say, I'm going to list
18 three things and suddenly at trial you come in and list 72, that
19 would completely undermine the point of having a 30(b)(6)
20 deposition, as one layer of the objection, and there were
21 others.

22 But, Mr. Levesque, did I misapprehend your objection?

23 MR. LEVESQUE: No, I think that's part of it, but
24 there's the other aspect of it. When I asked him the question
25 of, Have you personally? it's, No, I haven't.

1 But then if he goes on to talk about the other
2 members, I am completely unable to test that because I don't
3 know their identity. And I'm not even necessarily looking for
4 their identity, but I think what you'll find is you'll find that
5 maybe one plaintiff changed their curriculum.

6 We hear about this, we're not able to verify it, and
7 if that evidence is being used against us, and they're hiding
8 behind the First Amendment privilege --

9 THE COURT: You mean like every legislator, the
10 Governor and every public official in every case that's recently
11 been in front of me and Judge Hinkle?

12 MR. LEVESQUE: But, Your Honor, I can't --

13 THE COURT: I understand the road -- I understand the
14 road only goes --

15 MR. LEVESQUE: I can't bring those people in to
16 explain or justify their statements or give them context either.

17 THE COURT: No. The idea being, Judge, if privilege
18 only protects state officials, and privilege not only protects
19 them, but gives them the absolute right to then challenge the
20 quantum of proof, but the privilege that might attach to
21 individual members, say, students of an organization, that
22 privilege really means nothing because you could absolutely
23 invade it, because if you don't, it undermines our ability to
24 gather or confront evidence.

25 I understand the -- also, the question is if he has

1 personal knowledge about what others are doing. But I'm going
2 to overrule it in part, and we can address this later. I don't
3 want to break it down, and we'll discuss whether or not I should
4 even consider it later; okay?

5 MS. VELEZ: Thank you, Your Honor. And unless the
6 court reporter would like a break, we're happy to proceed, but I
7 would like to defer to the court reporter.

8 THE COURT: It's been an hour and a half. We'll take
9 a break.

10 MS. VELEZ: Okay. Thank you.

11 THE COURT: Thank you.

12 (Recess taken at 9:57 AM.)

13 (Resumed at 10:09 AM.)

14 THE COURT: Please take your seats.

15 And I'm going to try to slow down because I'm sick and
16 can barely talk and my court reporter just told me I was
17 clocking at 412 words a minute.

18 So my apologies, because it's -- not just to her but
19 everybody here.

20 Let me pause here and say I heard the witness's
21 testimony, but plaintiffs' counsel at some point is going to
22 have to explain to me the link between the regulations in
23 HB 233 -- the way they relate to HB 7.

24 I mean, I wrote in the *Pernell* case and in detail
25 explained that there's a direct link, they're incorporated by

1 reference, and here's why they do.

2 The direct link between those same regulations in
3 HB 233 is lost on me. So I just wanted to bookmark that so that
4 y'all can come back to that, because I'm not quite sure I follow
5 that legal argument.

6 Let me circle back to the prior objection by
7 Mr. Levesque briefly. There are a number of layers here, and
8 that's why I was trying to break it down.

9 That doesn't necessarily mean, Mr. Levesque, you're
10 wrong, and in some ways I think everybody was slightly talking
11 past each other.

12 My reference to "just because somebody asserts
13 privilege" doesn't mean, for example, a 30(b)(6) person can't
14 talk about anything related to those people collectively within
15 the scope of the 30(b)(6) testimony, but that doesn't
16 necessarily mean that they can import whatever hearsay they want
17 in, because the 30(b)(6), especially for an organization like
18 this -- I have witnesses that testify like this all the time,
19 plaintiffs, and you can testify, for example, as a 30(b)(6)
20 witness for -- in terms of standing and association, that I'm an
21 individual member, so I both might have standing as an
22 individual as -- and that I'm speaking because I'm a member of
23 the organization, can come in if one of its members -- and so
24 forth. I understand that concept.

25 I understand testifying about, Here are funds being

1 diverted and so forth -- which I don't understand to be here --
2 to create standing, so I'm speaking on that behalf.

3 But you also could have a 30(b)(6) witness -- like any
4 company, you've got -- somebody can speak for the policies,
5 organization, and structure. And so this witness can certainly
6 talk about his organization, sort of that 30,000-foot-up-type
7 testimony, because you have company -- the organization can't
8 speak for itself.

9 It seems to me that the real rub is, one -- although
10 I'm not sure this is a topic -- one, are you covering -- are you
11 adding in information about a topic you didn't previously
12 disclose? So if you designate somebody for six topics and
13 Mr. Levesque questions them for 30 minutes about Topic 2, and
14 then they show up at trial and suddenly they are adding in all
15 kinds of information about Topic 2, that's a problem because
16 that's why we take depositions, and you can limit them. That
17 may not be happening here, but that's one limitation.

18 Another limitation is -- and this would be for
19 plaintiffs' counsel. I never understood a 30(b)(6) designation
20 meant that you then could bring in every -- you could have
21 personal knowledge, certainly, of something. So, like, I'm
22 chair of a department, and I know these ten people in my
23 department. We all change all of our syllabuses to delete X
24 from American History classes. You'd have personal knowledge
25 about that.

1 That's different from simply coming in and -- as a
2 conduit for hearsay to tell us what all these individuals have
3 said, which could be a separate issue and problem. And I'm not
4 aware that 30(b)(6) -- while you get to speak for the
5 organization, I don't believe that means you get to serve as a
6 conduit for anything anybody has ever said.

7 Now, a certain amount of that -- and it's different
8 between saying somebody said X versus you gathering information.
9 So if you've asked for the topic and we want you to speak for
10 the organization how many people in the organization have done X
11 and you answer that question, well, then the defendant that's
12 asked the question, they're the ones that have asked for the
13 designee to gather information. So a company is gathering
14 business records to talk about, you know, some part of the
15 operations or whatever may, by definition, mean that the
16 30(b)(6) witness had to go secure information from others.

17 But I haven't read this witness's deposition. I
18 didn't see the 30(b)(6) designation, so it's a little -- in
19 terms of topics, so it's a little bit hard for me to know how to
20 cabin what this witness is or is not going to say. So it's
21 however y'all think the most efficient way is. We can pause,
22 and you can walk me through all of that.

23 Or, Mr. Levesque, you can say, once you've heard his
24 testimony, Judge, I don't want to cross on what these ten
25 individuals said. I think it should be excluded, and I think it

1 should be excluded because it doesn't fall within the ambit of
2 any of the contours of a 30(b)(6) witness, and here's why. And
3 I can rule on that and recognize if I agree with you, I'm
4 striking it. I'm not sure what the most efficient way to do
5 this is.

6 MR. LEVESQUE: Okay. Your Honor, I did find the spot
7 in the deposition that -- where this issue came up. It's --
8 page 124, line 23, is where I asked the question.

9 And I said: *Okay. Are you aware of any instances*
10 *where someone was compelled by the University authority to*
11 *change their curriculum as a direct result of House Bill 233?*

12 The answer was: *Yes.*

13 I said: *What are their names?*

14 And that's where they asserted First Amendment
15 privilege, and then at that point he identified Chris Busey from
16 the University of Florida, who had been disclosed in their
17 interrogatories.

18 THE COURT: Didn't I address this, though, in one of
19 my prior orders and say, But you could have asked, while you're
20 are not telling me your names, how many people are they and what
21 did they do and they didn't? I mean, wasn't that part of my
22 prior order?

23 MS. VELEZ: Yes, Your Honor, on a motion to compel,
24 Your Honor.

25 MR. LEVESQUE: Yes, Your Honor. And while that

1 testimony would have been, I guess, binding on them as a
2 practical matter to the extent they were the corporate
3 representative, the way we understand that 30(b)(6) process to
4 work is that's a discovery tool to allow the opposing party to
5 gather information in a more efficient manner.

6 But that doesn't waive the requirements of Rule 602
7 when they're at trial so that -- their statements we can use
8 against them, but when it comes to trial, you still have that
9 personal knowledge, and a 30(b)(6) witness doesn't need personal
10 knowledge when they're testifying and binding the entity that
11 they are testifying on behalf of. They can go to other
12 departments that they don't know anything about and become
13 educated by talking to those other people and getting that
14 hearsay. And for the purposes of discovery, it works, but for
15 the purposes of trial, they can't then come in and testify about
16 all of those things that they learned while they were a
17 corporate representative but have no personal knowledge of.

18 THE COURT: Which, again, is a slightly different
19 issue than we're -- because I think I talked about he can talk
20 about what his personal knowledge was and distinguish that from
21 hearsay. I think that's what I said --

22 MR. LEVESQUE: Correct.

23 THE COURT: -- about five minutes ago.

24 MR. LEVESQUE: Yes, sir.

25 THE COURT: Response, Counsel?

1 MS. VELEZ: First, I'll say that I don't believe that
2 Dr. Gothard was testifying that anybody had been compelled -- or
3 he wasn't testifying about someone being compelled to change
4 their curriculum. So I'm not sure why this citation is
5 applicable in the first instance.

6 THE COURT: It's been so long, I don't even remember
7 what the question was. Refresh my recollection. What did you
8 ask him?

9 MS. VELEZ: I believe I asked him about the impact
10 that the antishielding provisions have had on UFF's members, and
11 he started talking about the way professors have been navigating
12 this.

13 But it's certainly not foreclosed by the question that
14 we just heard read from the deposition. To the extent that it
15 was, of course, my friend would be able to impeach potentially
16 on that ground, but I don't understand it to be. And I do
17 actually see quite a lot of testimony in the deposition about
18 the effect of the antishielding provisions on UFF's members.

19 We did name one member, Dr. Busey, because he came
20 forward in the press, but we withheld other communications
21 between Dr. Gothard and his members of the union under the First
22 Amendment privilege, for them to express their concerns to him
23 without -- quite frankly, the folks that were --

24 THE COURT: So let's --

25 MS. VELEZ: -- afraid of knowing their names.

1 THE COURT: So let's -- and I'm oversimplifying this
2 because I'd like to move on. Y'all can tell me why it's not
3 this simple.

4 Isn't what he's really saying is, I talked to this one
5 person. I've offered them the example, and consistent with
6 that, this appears to be a problem, without anecdotally going
7 through and giving votes from ten other people that talked to
8 him consistent with what the one person did?

9 MS. VELEZ: Yeah. I don't anticipate eliciting
10 specific quotes in that context, and I don't believe that
11 Dr. Gothard --

12 THE COURT: So why don't we talk about the one person
13 that we talked about, that y'all knew about, and using that as
14 an example, and that's a concern that we have, and that's why
15 we're here?

16 MR. LEVESQUE: I probably wouldn't have a problem with
17 that if he actually spoke to Mr. Busey about it.

18 MS. VELEZ: And my position would be that -- I think
19 of course Dr. Gothard can speak to what occurred in Mr. Busey's
20 public grievance, but, in addition, that he should be permitted,
21 without speaking to specific out-of-court statements, to the
22 aggregate effect that the antishielding provisions are having on
23 his members, because, Your Honor, of course, we are asserting
24 associational standing on behalf of Mr. Gothard. He's standing
25 in the place of about 25,000 professors, and he's vocalizing

1 aggregate concerns.

2 MR. LEVESQUE: But --

3 THE COURT: Which is often done when you, yourself --
4 when you're saying, I'm -- for that aspect of an association,
5 that I've had these issues, and these are the issues that would
6 be pervasive and would be consistent with the organization.

7 But here's what I'm going to do. I'm going to allow
8 it as a general topic -- is -- I'm speaking for my organization.
9 Here are the concerns of -- and as the representative of -- I'm
10 sorry --

11 MS. VELEZ: UFF, Your Honor.

12 THE COURT: -- UFF, here are the concerns I have with
13 the application of HB 233.

14 Which I believe he did testify to; right?

15 MS. VELEZ: I believe that he started before the
16 objection, Your Honor.

17 And I will also say, to the extent that his vocalizing
18 aggregate concerns raises a hearsay concern, we are not offering
19 it for the truth, but offering it for the impact state of mind
20 of the members, the fear, and the reasonableness of their --

21 THE COURT: I'm going to allow him to talk about
22 aggregate concerns without testifying -- which I believe is what
23 Mr. Levesque is saying -- I spoke to this unidentified person,
24 and he told me, Here are the three things I've done. I think
25 that's where I would draw the line.

1 MR. LEVESQUE: Yes, Your Honor. If all he's saying
2 is, We're concerned about the impact it has on a curriculum,
3 that's one thing, and that's -- I'm not objecting to that. It's
4 the, And as a demonstrative of that, I know ten people that have
5 changed their curriculum -- that's the issue that I have.

6 THE COURT: Counsel.

7 MS. VELEZ: I'm not sure we have that testimony.

8 THE COURT: I didn't think we did either, so I'm going
9 to sustain in part and overrule in part.

10 But let me say, Mr. Levesque, I absolutely understand
11 why you stood up. That was not -- I'm not sure we had gotten
12 there yet either, but I also understand, Judge, I don't want to
13 have waived something because I waited until somebody talked for
14 20 minutes. So I understand why you stood up.

15 That's my ruling. We can move on.

16 MS. VELEZ: Thank you, Your Honor. Understood.

17 BY MS. VELEZ:

18 Q. Dr. Gothard, before we broke, I understood that you were
19 testifying as to UFF's concerns as to what the antishielding
20 provision might do to its members.

21 Were you finished with that testimony?

22 A. I -- I don't know. Honestly, I'm not sure what I'm allowed
23 to say now.

24 THE COURT: You can just try again. You can just talk
25 about the aggregate concerns of the organization without giving

1 anecdotal examples of what somebody told you.

2 THE WITNESS: Okay.

3 THE COURT: Does that make sense?

4 THE WITNESS: I think so, but please stop me if I
5 accidentally mention the wrong thing.

6 THE COURT: I'm not shy. Believe me, I will.

7 THE WITNESS: So, you know, in my capacity as UFF
8 president, I often hear from lots of our members, and the
9 concerns that I have heard raised are about -- are about the
10 chilling of speech that we've talked about and when it comes to,
11 you know, assigning text for classes or determining curriculum
12 or --

13 THE COURT: Let me interject here.

14 THE WITNESS: Okay.

15 THE COURT: Is this testimony any different from what
16 you told me before, which is, Here are all the problems with
17 HB 233 and its ambiguities, and how it makes it impossible to
18 know what you can and can't do in the classroom?

19 And I'm not cutting anybody off, but I thought I
20 already heard the aggregate concerns as expressed through this
21 witness articulating the problems with the statute and how it
22 makes it almost impossible to navigate what you can and can't do
23 in the courtroom [sic].

24 Did I misapprehend what you were telling me before, or
25 is this something different, or is that the same information you

1 previously provided me under oath?

2 THE WITNESS: I think I was planning to add that the
3 difficulty of interpretation also extends to the types of texts
4 that faculty members feel they can assign and when they don't
5 feel that they can navigate the requirements of the law.

6 THE COURT: For example, you told me earlier, Judge, I
7 thought, we could have a text that we normally assign or
8 something in writing we normally assign, but we don't think this
9 countervailing viewpoint is a legitimate viewpoint. In fact,
10 it's not. And so I'm caught between does this require me to
11 affirmatively present this counterpoint, which I don't think is
12 a legitimate counterpoint.

13 And so when you're putting your reading list together,
14 you're in the impossible position of not knowing do you have to
15 add to it with the added layer of you may be doing something
16 that as an academic is completely contrary to your -- what you
17 do as a professional, which is a debunked theory, for example,
18 that's absolutely false and rejected by whatever subset of
19 academia you are in. You're not going to present it. So you
20 are not going to present theories or science, for example, that
21 has been completely -- if you're in a science class, that's been
22 completely rejected and we now know is not true.

23 But the question is -- what I thought you testified
24 earlier about writing is, We don't know what we do or don't have
25 to include in terms of writings or books because we're not sure

1 how far that extends to providing information so it doesn't
2 appear we're shielding folks from stuff.

3 Where does the line between shielding them from
4 legitimate versus illegitimate counterpoints begin and end is
5 how I understood your prior testimony.

6 THE WITNESS: That is what I was saying.

7 And I apologize. I'm not entirely sure where we left
8 off in the question, but I do think what I was intending to add
9 to that was that the response, then, from faculty that I'm
10 hearing is to not assign that subject matter at all, which is
11 where the chilling effect comes in on their speech, and then
12 hope that a student doesn't bring up that issue in class so that
13 the other students in the classroom are exposed to the side of
14 this that is not the side that has scholarly consensus and
15 verifiable research and things like that; that they then can't,
16 as a faculty member, say, Well, no, we're not going to talk
17 about that because that's not academically valid. So they can't
18 control that.

19 THE COURT: So the concern is -- and I think you
20 alluded to this with HB 7 -- you avoid the -- A, we're in a
21 trick bag because one is shielding and one is antishielding, and
22 so not only are you put in a trick bag, the solution is just not
23 to discuss it at all, and that's the sort of follow-up that you
24 were just adding?

25 THE WITNESS: Yes, that's correct.

1 THE COURT: I understand.

2 MS. VELEZ: Perfect. Thank you, Your Honor. I'm
3 happy to move on.

4 BY MS. VELEZ:

5 Q. Shifting gears again Dr. Gothard, what is academic freedom?

6 A. So academic freedom is the right of faculty to pursue
7 research, to teach subject matter, and to advance human
8 knowledge in a way that is for the best interest of society,
9 best interest of the students, the communities, the
10 higher-education system as a whole, free from undue political
11 influence, pressure from donors or pressure from other outside
12 forces, resources, or, you know, entities that would try to
13 change the subject matter that faculty deem is best in their
14 professional opinion for, you know, any number of what we would
15 consider unethical reasons.

16 Q. And is academic freedom relevant to UFF's mission?

17 A. Absolutely. The defense of academic freedom is one of our
18 core values, one of our core reasons for existence, and many, if
19 not all, of our collective bargaining agreements contain
20 language about the protection of academic freedom.

21 Q. And do attacks on academic freedom undermine or otherwise
22 harm UFF's core mission?

23 A. Absolutely.

24 Q. Have you ever heard or are you aware of any UFF member ever
25 punishing a student for expressing a relevant viewpoint in

1 class?

2 A. No, I am not.

3 Q. Do you feel -- and if you feel like you've covered this,
4 please let us know.

5 Do you feel as though the contours of what speech is
6 permitted versus prohibited versus required under HB 233 is
7 clear?

8 A. No, and for the reasons I've already laid out.

9 Q. Are all of UFF's members tenured?

10 A. No. In fact, not all of our members are even on the tenure
11 track.

12 So, you know, without getting into the long historical
13 analysis, just sort of, like, the crib notes here, the number of
14 available tenure-line positions has been decreasing over time,
15 over the last 20 to 30 years, and many of those positions have
16 been replaced with nontenure-earning positions.

17 So an example would be myself. I'm an instructor in the
18 English department, which means I'm on year-to-year contracts,
19 and I have almost entirely a teaching assignment. So that
20 would -- I use that as an example because different institutions
21 call them different things. For instance, I think at FSU they
22 are called specialized faculty. So there are different names
23 for them, but the broad categories would be tenure-line faculty,
24 meaning faculty who can earn tenure or may be tenured.

25 And those are not the same thing. You know, some people

1 are moving toward tenure and some people already have tenure.
2 So those are -- that's the sort of breakup within that one
3 category.

4 There are nontenure-earning faculty who are on contracts
5 that do not lead them to tenure and typically do not have a
6 research assignment.

7 And then, obviously, we represent graduate assistants who
8 are on neither of those tracks right there. They are part
9 employee/part student, and their assignment is balanced between
10 teaching and research and taking classes or some sort of
11 combination of those factors.

12 Q. Are UFF members without tenure even more vulnerable under
13 HB 233?

14 A. Absolutely. And I can speak to this from, you know, my
15 personal experience as an instructor on those kinds of
16 contracts.

17 MR. LEVESQUE: Your Honor, if he can't speak to the
18 personal experience -- from personal experience or personal
19 knowledge, we would assert the objection and ask the --

20 THE COURT: I'm sorry? I thought that was his answer.
21 I thought he said he can speak --

22 MR. LEVESQUE: And I think he was going on to talk
23 about other examples, I guess, or examples where he is -- people
24 have shared information with him.

25 THE WITNESS: I was saying I can, c-a-n, speak, and I

1 was going to speak from my own experience.

2 THE COURT: Going to speak from your own experience.

3 MR. LEVESQUE: I apologize. I misheard, Your Honor.

4 THE WITNESS: And so I can speak from my own
5 experience, but this is also representative of how an instructor
6 is employed in the state of Florida at all of the state
7 universities and colleges.

8 So, you know, Florida, as we all know, is a
9 right-to-work state, which means that, you know, you do not have
10 to be given a reason for termination if you're outside of
11 tenure. Tenure ensures due process, so it's a different animal.
12 But as a nontenure-earning faculty, you are up for annual
13 renewal of your contract, and the institution does not have to
14 give you a reason for not renewing your contract.

15 So our members who are not tenured or on the tenure
16 line are much more vulnerable and are much more likely to
17 overtly censor themselves before getting into any sort of
18 difficult situation because the institution doesn't actually
19 have to go through a disciplinary process for a
20 nontenure-earning faculty. They can just wait out your contract
21 until the end of the academic year and not renew you. So they
22 don't even have to go to the trouble of firing you or putting
23 you on leave or doing any of the sort of typical workplace
24 disciplinary measures that would be in response to a violation
25 of HB 233.

1 BY MS. VELEZ:

2 Q. And does UFF have concerns for its tenured members as well
3 under the antishielding provisions of HB 233?

4 A. Absolutely. And part of those concerns are connected to --
5 I think the number is Regulation 10.003, before the Board of
6 Governors' post-tenure faculty review, and which, you know, last
7 I heard is supposed to be heard at the upcoming Board of
8 Governors' meeting this month at Florida International
9 University, which we have been responding to. And -- what was I
10 saying?

11 Oh, yes. And in that regulation there -- what that
12 regulation will allow is for every five years a tenured faculty
13 member to be reviewed, and one of the punishments of that is
14 immediate termination. One of the required evaluation metrics
15 in that post-tenure -- proposed post-tenure review system is
16 adherence to state law, which would include HB 233. There's a
17 very specific reference to HB 7 in there, but HB 233 would be
18 captured in the adherence to state law. And, you know,
19 violations of HB 233 through this proposed regulation could be
20 used to revoke tenure of a tenured faculty member.

21 Q. And even outside of post-tenure review, does tenure assure
22 a faculty member a job for life?

23 A. No. That is one of the most common misconceptions of what
24 tenure is. Tenure is not a job for life. Tenure ensures due
25 process, and it ensures that if you are going to, you know, be

1 disciplined or fired or any of the kinds of things that can
2 happen for, you know, bad practice on the job, that that can't
3 be done for political reasons, and it can't be done by pressure
4 from donors or other, you know, outside entities or
5 organizations. It would have to be done due to a violation of
6 some sort of university or institutional policy or code.

7 Q. Do you have any reason to believe that a faculty member
8 with tenure could not be terminated for violating HB 233?

9 A. No, I do not.

10 Q. Is UFF concerned about the impact of the antishielding
11 provisions on UFF as an entity?

12 A. Yes.

13 Q. Can you tell me about that?

14 A. So when you are saying "UFF as an entity," you mean as --
15 like, as a union as a whole?

16 Q. That's correct.

17 A. Yes. So we're concerned about that impact, particularly
18 with, again, the sort of vagueness of the language around what
19 individuals might find unwelcomed, disagreeable, or
20 uncomfortable connects to attacks on unionism and whether
21 members should or can be allowed to be members of unions in the
22 state of Florida more broadly.

23 Q. Do you have any concerns that HB 233 will result in fewer
24 faculty wanting to work in the state of Florida?

25 A. Absolutely.

1 Q. Does that harm UFF's recruitment efforts in any way?

2 A. Yes, it does.

3 Q. Have the antishielding provisions required UFF to divert
4 any of its resources?

5 A. Yes, they have.

6 Q. Can you tell me about that?

7 A. Yes. So because HB 233 is such a direct threat to our
8 members, to our values, to our mission, to really every
9 institution that we represent across the state, we have had to
10 divert resources, and those resources include my time and
11 effort.

12 So I -- as the statewide president, I am on full release.
13 My full salary and benefits are paid by the United Faculty of
14 Florida. You know, one portion of that is a reimbursement to
15 Florida Atlantic University for what they pay me, and then there
16 is a stipend or salary supplement that goes with that, but UFF
17 is paying the entirety of it at the sort of end of the process.

18 I would say -- in 2021 going into the 2022 academic year, I
19 would say about 40 percent of my time was dedicated to a number
20 of activities related to responding to HB 233. Those included
21 developing classroom and legal guidance for our members across
22 the state, communicating with members, local leadership about
23 issues related to it, holding town halls for members so that
24 they could ask questions and try to understand and interpret
25 this law, as well as proposing and trying to get moved through

1 the legislature a piece of legislation that would revoke the
2 three provisions of HB 233 that are -- that are sort of in
3 question in this litigation.

4 We also have had to divert staff time, and if you look at
5 the sort of budgetary documents that were provided in discovery,
6 you see that the largest expenditure in our budget is staff
7 time, which includes salary, benefits, travel, all of those
8 kinds of things. So we've had to divert quite a bit of staff
9 time to, you know, handling many of the same issues or
10 supporting many of the same issues I mentioned for my own
11 activities and efforts.

12 Q. Thank you, Dr. Gothard.

13 Earlier you have heard the colloquy with counsel about
14 Dr. Christopher Busey. Do you recall that?

15 A. I do, yes.

16 Q. Who is Dr. Christopher Busey?

17 A. Dr. Busey is a faculty member at the University of Florida.
18 I believe he's in the School of Education, and he's a member of
19 the United Faculty of Florida.

20 Q. Are grievances normally made public?

21 A. Not normally. There can be exceptions, but typically those
22 are kept private because they deal with personnel matters and,
23 you know, can be dealing with sensitive subjects that neither
24 the faculty nor the administration want to, you know, make a
25 public kerfuffle about.

1 Q. Has UFF ever represented Dr. Busey in a grievance?

2 A. We did represent Dr. Busey in a grievance against the
3 University of Florida administration.

4 Q. And did Dr. Busey decide to go public with that grievance?

5 A. He did.

6 Q. What can you tell me about Dr. Busey's grievance?

7 MR. LEVESQUE: Objection, Your Honor. Foundation. At
8 this point I'm not sure how he knows exactly about -- how he
9 knows about Dr. Busey's grievance process.

10 MS. VELEZ: Your Honor, I believe that there was
11 testimony that UFF represented Dr. Busey in his grievance.

12 MR. LEVESQUE: I don't think that's sufficient. I
13 mean, he's the president, but that doesn't necessarily mean that
14 he was involved or represented Dr. Busey in that process.

15 THE COURT: Counsel.

16 MS. VELEZ: You are asking me, Your Honor?

17 THE COURT: How does that mean he has personal
18 knowledge of it?

19 BY MS. VELEZ:

20 Q. Dr. Gothard, are you personally aware of the details of
21 Dr. Busey's grievance?

22 A. I am. So when --

23 THE COURT: Hold on.

24 And Mr. Levesque thinks he should say how.

25 MS. VELEZ: Sure.

1 BY MS. VELEZ:

2 Q. And how did you become aware of Dr. Busey's grievance?

3 A. So when the situation with Dr. Busey came up, I
4 communicated with him directly as part of sort of a larger email
5 chain about his situation, what was occurring, what the next
6 steps might be.

7 I consulted with our staff members and received regular
8 updates on what the process was. I read the relevant documents
9 as this was moving through because, obviously, this was a very
10 important issue for our union.

11 Q. And with that foundation, what can you tell me about --

12 MR. LEVESQUE: Your Honor, I'd argue that that's an
13 insufficient foundation because all the knowledge he just
14 indicated either came from Dr. Busey, who is not a witness in
15 this proceeding, and his staff who was providing him updates.

16 THE COURT: Before we get too much further, do a
17 proffer to me.

18 What are we -- what's the grievance about and why are
19 we even talking about it?

20 MS. VELEZ: Sure. Dr. Busey alleged that he was told
21 by administrators at UF to remove "critical" and "race" from
22 course titles, to not teach a course on antiracism. That advice
23 from his administrators came before HB 7, Your Honor --

24 THE COURT: Are the documents which could be
25 introduced as records under a number of theories -- are those

1 documents part of the exhibits that are before me?

2 MS. VELEZ: I'm not certain that we have Dr. Busey's
3 legal filing or his grievance --

4 THE COURT: Not his legal file, but the grievances or
5 any -- is there anything that outlines it that's already part of
6 the record is what I'm trying to find out?

7 MS. VELEZ: Yes. Dr. Gothard testified to it at
8 length in his deposition.

9 THE COURT: Well, his deposition is not before me.

10 MS. VELEZ: And I believe that we also in discovery
11 responses have mentioned Dr. -- now, if you're asking me if
12 there's a document, you know, that particularly speaks to this,
13 I'm not certain.

14 THE COURT: I guess I was asking very directly. I
15 think I know the answer, which is the only way this information
16 is going to come in is through this witness talking about what
17 others told him or what he read in a document that's not before
18 you.

19 So if his -- all of his knowledge is based on hearsay,
20 wouldn't that undo the hearsay rule unless there is some
21 exception if you simply can come in and talk about what you read
22 or what somebody else said?

23 MS. VELEZ: Yes, Your Honor. I think that there are
24 exceptions for the multiple layers here. The first is the
25 administrators told Dr. Busey that when only HB 233 was at

1 issue, he needed to remove "critical" and "race" from his
2 teaching. Effect on the listener is an exception to the
3 prohibition on hearsay.

4 I would also say that the effect on Dr. Busey and UFF
5 in hearing about this instruction is relevant to show the effect
6 on the listener, the credibility of their fear of recourse, and
7 enforcement of HB 233's provisions.

8 THE COURT: So the idea is he's going to say, I became
9 aware of it, and it was universally discussed that a member was
10 told, and our fear is that we may be the next one told to delete
11 something?

12 MS. VELEZ: Right. And it also speaks to the
13 institutional understanding of HB 233, we would suggest to the
14 Court.

15 THE COURT: Is the institution itself a defendant?

16 MS. VELEZ: It is not. They are interpreting HB 233,
17 and we think that that's relevant because of the enforcement
18 power over the institutions by the Board of Governors, by the
19 defendant, Commissioner --

20 THE COURT: What you're saying to me, Judge, I'm not
21 offering it for the truth of the matter asserted. I'm not
22 offering it to say that UF said this. I'm offering it to prove
23 that --

24 MS. VELEZ: I'm offering it to prove the way UF
25 understood HB 233.

1 THE COURT: That's the truth of the matter asserted,
2 isn't it?

3 MS. VELEZ: Your Honor, I think it goes to their state
4 of mind.

5 THE COURT: It seems to me that if you said, Judge, I
6 don't know if UF did this or not -- I'm not sure to what extent
7 that then really moves the ball for the plaintiffs -- but I'm
8 not sure if they did it or not. This is something that's been
9 widely discussed, and we all assumed this anecdote is true, and
10 that's why we're more conscious of what buzz words we use. Then
11 maybe the general idea that somebody was told something and then
12 we're reacting to it because we think that is something we're
13 going to have do is all for not, that it was actually said,
14 We're not really sure or not.

15 But it sounds to me that's not what you're trying to
16 do. What you're trying to introduce to me is to show that UF
17 has already taken punitive actions by directing something would
18 or would not be done. And that could have been brought in
19 through documents. It could have been brought in by somebody
20 from UF that delivered the message. It could have been brought
21 in from the witness.

22 But I don't understand how this witness, simply
23 because he's head of the union, gets to tell me specific
24 instances of things that happened to him. I mean, if he was
25 part of the review board and had to deliver the message, then I

1 can envision other exceptions.

2 But, Mr. Levesque, did I misapprehend what you're
3 pointing out is the problem?

4 MR. LEVESQUE: Yes, Your Honor.

5 And I think, even going further, to the extent they
6 are making the link to House Bill 233 -- I might be wrong, but I
7 believe the issue related to Dr. Busey came up before passage --
8 before House Bill 233 became law, and that it was largely a
9 result of what was seen as the political climate around race
10 issue -- the CRT and race issues and had nothing to do actually
11 with House Bill 233 specifically.

12 MS. VELEZ: I can certainly ask the witness about when
13 it came to pass and clarify that, Your Honor.

14 Two things in response to your question. The first,
15 absolutely, the effect on the listener as faculty of --

16 THE COURT: Well, they're not speaking to the -- I
17 mean, effect on the listener then would mean we can bring
18 anything anybody ever said, passed down through nine layers,
19 because then we don't even know who said it to who, because if
20 you have multiple layers of hearsay, you've got to address each
21 level of hearsay.

22 So if this witness is told something, whether it's
23 true or not, directly by the other witness, he's relaying an
24 out-of-court statement saying that it affected how he viewed
25 things, and it could be relevant to how he viewed things,

1 potentially, if he was altering behavior based on that.

2 There's a variety of reasons. I'm going to sustain
3 the objection. I don't find this witness can be a summary
4 witness about what others communicated to him about problems
5 they were having.

6 MS. VELEZ: Your Honor, I would request that I still
7 be permitted to ask the witness whether or not he has any
8 understanding that there was a grievance filed.

9 THE COURT: Give me one moment, please.

10 (Pause in proceedings.)

11 THE COURT: Again -- and Mr. Levesque had said this
12 before, perhaps more directly than I did. While Rule 30(b)(6)
13 permits this witness's deposition testimony to be based on
14 matters outside of his personal knowledge, Rule 602 limits his
15 trial testimony to matters that are within his personal
16 knowledge. And personal knowledge doesn't -- I mean, the rules
17 of hearsay still apply. Personal knowledge doesn't mean that
18 you can -- I mean, for example, I was at the meeting where this
19 doctor was tossed out. I was part of the panel where he was
20 fired. He's testifying about -- he's not simply testifying,
21 This is what somebody told me happened at that meeting. And
22 that's the difference.

23 But you've got one more try, and then we need to move
24 on.

25 MS. VELEZ: Yes, Your Honor.

1 THE COURT: But I meant -- do you have something else
2 you want to say?

3 MR. LEVESQUE: No, Your Honor.

4 THE COURT: I meant, not you. I've ruled and said I
5 agree with Mr. Levesque.

6 Do you have anything else you want to offer?

7 MS. VELEZ: Yes, Your Honor, I do. I understand that
8 you would like me to move on from the topic of Dr. Busey
9 entirely?

10 THE COURT: Unless you've got some response to what I
11 just said.

12 MS. VELEZ: My response would be, Your Honor, without
13 speaking to what the complaint said, if we can just add for the
14 record the fact that Dr. Busey was involved in a grievance
15 involving academic freedom and the timeline. I believe it's
16 relevant to *Arlington Heights*, Your Honor. I believe that
17 the --

18 THE COURT: I think it's -- let me -- I don't want
19 to -- Mr. Levesque, if you're telling me it ain't relevant, you
20 lose. It's relevant. But I didn't hear the word "relevant."
21 So it's relevant.

22 MS. VELEZ: Right.

23 THE COURT: So then the question becomes not is it
24 relevant or not, the question becomes what do you do with the
25 objection; hearsay, lack of personal knowledge.

1 MS. VELEZ: Right. Without a list -- well, first,
2 also, that he did testify to personal knowledge, I believe.
3 But, as to hearsay, I'd like to explore this line of questioning
4 without asking him what anybody said to him directly.

5 THE COURT: Yeah, that's called indirect hearsay. You
6 can't say, Oh, don't tell me what the victim told you. Tell me
7 what your understanding is what happened at the crime scene.
8 It's hearsay by implication which is still hearsay.

9 MS. VELEZ: Thank you, Your Honor. We'll come back to
10 this.

11 THE COURT: Fair enough.

12 As an aside, I use that as an example because -- y'all
13 are not in criminal cases, but there is no victim exception to
14 the hearsay rule, notwithstanding the fact that every prosecutor
15 on the planet thinks that's an exception.

16 But go ahead.

17 MS. VELEZ: And I will just say, Your Honor, that it's
18 not the testimony as to the fact of what occurred, but testimony
19 within his personal knowledge of the fact that there was a
20 grievance I think would be relevant with regard to the time
21 frame.

22 But I'd love to come back to that later and just move
23 on for the sake of --

24 THE COURT: He's already said there was a grievance.
25 And the fact that there were -- he can certainly testify, I'm

1 aware there was a grievance, and I was aware that I assigned and
2 authorized somebody to assist in his defense of the grievance.
3 That's separate and apart from, When you talked to the doctor,
4 tell me everything he said about it and what was going on.
5 Those are two different animals.

6 MS. VELEZ: Understood, Your Honor.

7 THE COURT: One is a giraffe and one is a tiger. The
8 tiger may be a problem; the giraffe isn't.

9 MS. VELEZ: Thank you, Your Honor. Understood.

10 BY MS. VELEZ:

11 Q. Let's shift gears, Dr. Gothard, and turn to the recording
12 provision.

13 What is your understanding of the recording provision?

14 A. So my understanding of the recording provision is that it
15 carves out two-party consent for recordings in the state of
16 Florida to exclude classroom lectures and that it allows
17 students to record classroom lectures for their own personal use
18 or for use in a disciplinary civil or criminal action against a
19 faculty member.

20 MS. VELEZ: Andy, would you please show Dr. Gothard
21 what has been admitted as Joint Exhibit 1 at page 3.

22 BY MS. VELEZ:

23 Q. And take a moment to look that over.

24 A. Okay.

25 Q. Is this the provision that you were just speaking to?

1 A. Yes, it is.

2 Q. Does the language of the recording provision say anything
3 about lectures?

4 A. It does.

5 Q. Does HB 233 define the term "lecture"?

6 A. It does not.

7 Q. In your experience as an educator yourself, is it typical
8 to instruct by lecture today?

9 A. No, no, it is not.

10 Q. Can you tell me a little bit more about that?

11 A. Absolutely. So I think there's a sort of common
12 misunderstanding of how higher-education courses work today,
13 similar to, like, you know, the classic scene from *Ferris*
14 *Bueller's Day Off* where Ben Stein is sort of droning on at the
15 front of the room and no one is really paying attention. And
16 that's just not how higher education works anymore.

17 In fact, if I were to apply for a job at a higher-education
18 institution in Florida and in my teaching philosophy were to
19 write that I teach by lecture, it's highly unlikely I would get
20 the job, particularly if it is a teaching-focused appointment
21 like a nontenured-earning position like I mentioned before.

22 Q. Do you think that there is a universal understanding as to
23 what constitutes a lecture versus what constitutes some other
24 teaching style?

25 A. No, I don't think there is, and for a couple of reasons.

1 So, you know, modern teaching has moved away from the sort
2 of long, intensive lecture, particularly for undergraduate
3 courses, which would be the majority of classes that are offered
4 at our institutions, and have moved to a more interactive model
5 of instruction. And it's very discussion based; it's very
6 engaged; it's very much about practicing lessons as you learn
7 them; it's about interrogating ideas, all of that, all of which
8 is pointed toward teaching students more about how to think
9 critically, right, and how to explore subject matter critically.

10 So one of the difficulties of a faculty member's ability to
11 navigate this provision is where do you sort of draw the line of
12 when a lecture is happening in class and when it is not? I know
13 that, you know, there were -- multiple institutions got together
14 after this -- after this law was passed, and there were -- you
15 know, there was guidance put out to individual faculty about
16 when students could record and when they couldn't in response to
17 FERPA and protections of student identity, as well as the fact
18 that because of, as I mentioned earlier, those K-12 lab schools
19 that are attached to our universities, faculty will often have
20 students who are minors in the classroom.

21 So there was an attempt to navigate that, but the real
22 difficulty lies in -- again, to use myself as an example, my own
23 class instruction style is multimodal. It's interactive. It's
24 differentiated instruction. It's all the things that we do
25 today -- it's all the practices that we do today for, you know,

1 what good teaching looks like.

2 There's very rarely any time that I, as a faculty member,
3 am up there talking where a student is not then also engaging.
4 So I might, you know, have a poem on the board and say, Okay,
5 let's look at this line. What does this line mean? You over
6 here, what does that mean? What does this word mean? Can
7 someone look it up? Okay, come write it on the board. So it's
8 very engaged.

9 So how -- the difficulty is that the instructions that
10 institutions have provided is that students should not record
11 classes -- or record portions of classes where other students
12 are speaking. It should only be when the faculty member is
13 speaking.

14 But a faculty member does not actually have any ability to
15 enforce that. So if the faculty member sees a student recording
16 the entire class and calling that the lecture portion, they
17 actually can't then say, No, you are not allowed to record,
18 because the understanding of recording a class lecture,
19 according to HB 233, is very unclear.

20 Q. And do you believe that students are aware that they have a
21 right to record their faculty, either openly or in a concealed
22 way, under HB 233?

23 A. Yes, I do.

24 Q. What are you basing that on?

25 A. I'm basing that on two things. One is, as is the case any

1 time, you know, complex higher-education legislation comes out,
2 we, as UFF, put out guidance to our members that included some
3 recommended language for syllabi to include to protect
4 themselves in, you know, the case of a student's right to record
5 a class lecture. And then very shortly after that, many, if not
6 all, of the higher-education institutions in Florida made a
7 similar recommendation. The language is not, you know, exactly
8 the same, but there's quite a bit of overlap in what was
9 recommended there.

10 So every undergraduate and graduate student in the state of
11 Florida, you know, barring a few exceptions, will or should have
12 seen language in their course syllabi that references their
13 right to record the class and what particular limitations there
14 might be on that.

15 Q. And in the event of a student who is recording covertly,
16 perhaps, is it up to them to determine what constitutes lecture
17 versus what constitutes something else?

18 A. I mean, in the moment, yes, they would be the one to have
19 to determine that.

20 Q. Do you have any reason to believe that students all agree
21 on what constitutes a lecture versus something else?

22 A. No.

23 Q. Is UFF concerned about the impact of the recording
24 provision on its members?

25 A. Absolutely.

1 Q. Does the guidance that you mentioned alleviate those
2 concerns?

3 A. I think it gives a little bit more structure to them and
4 tries to help members understand them, but it doesn't take away
5 the concern that a student could be recording -- recording a
6 portion of a class that could be taken out of context and then
7 used as part of an investigation or a complaint at the
8 university or within the court system.

9 Q. Has the recording provision caused you to -- or, rather,
10 let me rephrase.

11 Has the recording provision caused any of UFF's members to
12 change their expression in the classroom?

13 A. I thought he was standing up. I'm sorry.

14 My understanding is, yes, it has.

15 Q. In what ways is UFF concerned that the recording provision
16 might affect its members' ability to express themselves in their
17 classrooms?

18 A. I think it's very similar to the impact that the
19 antishielding provisions are having. Our concern is that it is
20 and will lead to instances of self-censorship, chilled freedom
21 of speech in the classroom and on campus on the part of faculty
22 and students. So, you know, it is UFF members, but it's also
23 the higher-education system as a whole that is affected by this
24 because the classroom has now become a space where everyone is
25 wondering all time, Am I being recorded? Is this recording

1 going to capture the entirety of what I have to say? And is
2 this going to be used in a way that will harass or intimidate me
3 at a later date?

4 Because, again, as we know as a faculty union, simply the
5 investigation, just the accusation can be detrimental to a
6 person's career, their mental and emotional health and
7 well-being.

8 It also leaves problems for faculty who teach in more of a
9 Socratic method, right, where the thing that you are saying as a
10 faculty member might not actually be the thing that you believe,
11 but you're using it as a way to further interrogate the subject
12 matter and have the student think about the idea in a complex
13 fashion. But when you're wondering if you're being secretly
14 recorded without your knowledge, you're thinking, If I say this
15 as a way to spark discussion and engagement and increase
16 critical thought, is this piece of the recording what's going to
17 be, you know, used against me in court or, you know, used
18 against me with the administration? And how am I going to have
19 any recourse to say, No, no, that's not what I meant when the
20 student and the recording are saying it is?

21 Q. Have any UFF members been targeted pursuant to the
22 recording provisions?

23 A. I don't believe so.

24 Q. Has UFF heard any complaint -- let me rephrase.

25 Has UFF ever had to provide support to any members with

1 regard to the recording provisions?

2 A. When you say "with regard to the recording provisions," are
3 you referring to, like, a case where a class lecture has been
4 recorded, and there has been a complaint and a process?

5 Q. And let's not get into the complaint, but has UFF ever
6 received any information about the recording provision --

7 THE COURT: Why don't you ask this question, which I
8 think is a pertinent question?

9 Not what did or not, just have you been involved --
10 you've already told us that you were involved to the extent you
11 tried to educate; correct?

12 THE WITNESS: Correct.

13 THE COURT: Separate and apart from that, since HB 233
14 has become law, have y'all had to use resources or become
15 involved in any cases related to the subprovision that deals
16 with recording?

17 THE WITNESS: We have not in specific cases, but we
18 have received information about outside organizations, such as
19 groups like Campus Reform and others, that have been active in
20 promoting the idea that faculty should be recorded and that
21 those recordings should be used to get left-leaning faculty in
22 line.

23 THE COURT: So as I understand it, you're saying,
24 Judge, I'm trying to put some meat on the bones to explain why
25 it's not fanciful that this provision is going to be weaponized,

1 because there's different groups that are promoting it to be
2 weaponized to go after faculty members?

3 THE WITNESS: Absolutely.

4 THE COURT: I understand.

5 For that limited testimony, I'll allow it.

6 BY MS. VELEZ:

7 Q. What is your understanding of the defendants' role in
8 enforcing the recording provisions, if any?

9 A. So the defendants being the Board of Governors, the State
10 Board of Education, they would be instrumental in enforcing the
11 policies around class lectures. And my understanding is that
12 once HB 233 was passed, the Council of Provost, which is
13 essentially the sort of state university system provost, in
14 their efforts communicated with the Board of Governors and the
15 State Board of Education to try to create the language that was
16 distributed to institutions for faculty to put in their syllabi.
17 So they would be the interpreter and the enforcer.

18 Q. And I believe that you just provided some testimony about
19 guidance.

20 What's your understanding of what that enforcement might
21 entail?

22 A. So my understanding is that institutions and faculty were
23 instructed that they are not to limit a student's right to
24 record in any fashion, and that even if they see a student
25 recording in a fashion that they think is not supported by the

1 law, they are not to interfere.

2 Q. And you attribute that guidance as in some way involving
3 defendants; correct?

4 A. Yes.

5 Q. Got it.

6 Let's turn now to the survey provisions.

7 What can you tell me about the survey provisions?

8 A. So the survey provisions require the State Board of
9 Governors and the Board of Education to annually survey the
10 ideological viewpoints of the students, faculty, and staff of
11 the state university and Florida College System, to do so in an
12 objective manner, a valid manner, and to report those results by
13 September 1st of each year to the legislature.

14 Q. Have HB 233's survey provisions impacted UFF's members?

15 A. Yes, they have.

16 Q. In what ways?

17 A. Well, the existence of the survey itself is obviously very
18 concerning to our members. Based on the comments that have been
19 made by Governor DeSantis, former Commissioner of Education
20 Richard Corcoran, former legislators, as well as sponsors of the
21 bill, the intention was clear that if the results that came out
22 of those surveys did not match the appropriate ideology that
23 these individuals were looking for, that there would be bad --
24 there would be consequences for these institutions, including,
25 and mainly, defunding, but also sort of the implication of

1 harassment and other actions if an institution was found to be
2 left leaning, indoctrinating all of these sort of false
3 characterizations that we've heard about how higher education
4 works. And I think we've seen that reinforced recently with
5 statements that were made about New College of Florida, in
6 particular.

7 Q. Did UFF recommend that its members not participate in the
8 2022 survey?

9 A. We did.

10 Q. Can you tell me why?

11 A. Absolutely.

12 So the law does not state that that the faculty member --
13 faculty members are required to respond. And when the survey
14 finally came out -- though we had been seeking it for some time
15 when it did finally come out kind of as a surprise in late March
16 of 2022, it was clear that the survey was voluntary. And once
17 we saw that the survey was voluntary, because of the reasons
18 that we've outlined in this lawsuit and our belief that the
19 survey is unconstitutional, we encouraged our members not to
20 participate for a number of reasons that we laid out in a press
21 release to our members.

22 Q. And just to break that down a little bit, you said that the
23 2022 survey was voluntary; correct?

24 A. That's correct.

25 Q. Does HB 233 require that the survey be voluntary?

1 A. It does not. And there were efforts during the legislative
2 session to make the survey voluntary -- or -- I'm sorry -- the
3 2021 legislative session where HB 233 was passed, there are were
4 efforts to make the survey voluntary, to require that it be
5 anonymous, to take those sorts of steps that would protect
6 faculty and students and their identities and their privacy and
7 all those kinds of things. And those were denied.

8 So it is our belief that, you know, if this litigation
9 fails, the next survey will be required.

10 Q. Did you personally take the survey?

11 A. I recall clicking through it to see what the questions
12 were, but I don't recall submitting an answer.

13 Q. Do you know whether any UFF members took the survey?

14 A. I am sure some did. You know, higher education folks are
15 very headstrong, and they don't do what they're told. And even
16 so, I don't really tell them what to do in these cases. We just
17 called for a boycott. So I'm sure there are some UFF members
18 who participated.

19 Q. And I believe you testified much earlier today that there
20 are some college campuses where UFF does not have a presence;
21 correct?

22 A. That is correct. We're not yet at all of the Florida
23 College System campuses.

24 Q. Did you review the survey's results in this case, the
25 published results?

1 A. I did. I briefly reviewed the results from the Board of
2 Governors, which, you know, they surveyed the state university
3 system, and I reviewed the results from the Florida College
4 System.

5 Q. Did you notice anything about the response rates in
6 particular?

7 A. I noticed that the --

8 MR. LEVESQUE: Objection, Your Honor --

9 THE WITNESS: Oh, I'm sorry.

10 MR. LEVESQUE: -- hearsay, and, I mean, the results
11 speak for themselves at this point.

12 I'm not sure what he's going to add by opining on the
13 results. He's not an expert on surveys, or at least they
14 haven't laid that foundation.

15 MS. VELEZ: Your Honor, the published results are
16 statements of a party opponent, and I would suggest that
17 Dr. Gothard should be able to testify regardless to these
18 results for two reasons.

19 THE COURT: Well, he can publish the results if they
20 are already in evidence. But there's a difference between them
21 being reviewed versus him opining as to them, as he -- I mean,
22 for what purpose is he offering -- he's not offering expert
23 opinions about the value of it statistically, or is he?

24 MS. VELEZ: He is not, Your Honor. I think the point
25 that we would like to make is that even where there's no UFF

1 presence, we see some consistent trends that any layperson could
2 speak to.

3 THE COURT: So he wants to offer a lay opinion about
4 what he perceives from the -- his review of the survey; correct?

5 MS. VELEZ: That's correct, Your Honor.

6 THE COURT: Mr. Levesque?

7 MR. LEVESQUE: I asked him about this in his
8 deposition. He, I believe, may have taken a statistics course
9 several years ago, but to the extent that you're talking about
10 making comparisons or drawing conclusions based upon the survey
11 results, I -- if a layperson can do it, then Your Honor doesn't
12 necessarily need the testimony for that purpose and the
13 attorneys can argue about the significance of that, but we've
14 got other experts --

15 THE COURT: It's only if it's, firstly, rationally
16 based on his perception, certainly could under 701, and
17 helpful -- and it's not based on some scientific, technical or
18 other specialized knowledge, which I'm told it's not, so A and C
19 are satisfied.

20 It seems to me the real query is is it helpful to
21 clearly understanding the witness's testimony or determining a
22 fact at issue. So that would be my question then to counsel for
23 the plaintiff. How is him opining helpful to my understanding
24 of his testimony, or what's -- how's it helpful to determining
25 one of the facts at issue in this case; if so, what is the fact

1 and why?

2 MS. VELEZ: Your Honor, I think it's -- the relevance
3 and the fact at issue is whether UFF's recommendation to its
4 members impacted or appears to have impacted response rates
5 amongst faculty, and I believe that Dr. Gothard can testify that
6 only employees that are members of UFF received his
7 recommendation.

8 THE COURT: All right. Well, that doesn't really --
9 he's not really -- he can just testify to that. That's not
10 opining as to the -- he's saying that he -- his recommendation
11 only went out to his membership, and he's already said his
12 membership doesn't include every faculty member, so some of the
13 folks that responded wouldn't be -- have necessarily gotten his
14 directive because he didn't send it out to them directly.

15 MS. VELEZ: Exactly right, Your Honor. There are a
16 number of colleges where UFF does not yet have a presence.

17 THE COURT: Yeah, those are all statements of fact, as
18 opposed to, Once you reviewed it what does this tell you? which
19 is what Mr. Levesque was -- so if you're going to elicit that,
20 that's not what Mr. Levesque was objecting to.

21 So just ask those questions, and if something comes
22 up, Mr. Levesque, you can object. But what you're proposing to
23 ask doesn't fall within the ambit of Mr. Levesque's objection.

24 MS. VELEZ: Understood.

25 BY MS. VELEZ:

1 Q. And did you notice anything about response rates in those
2 reports generally?

3 MR. LEVESQUE: Your Honor, that's, I think, the
4 specific objection that I had was that he's talking about
5 differences in response rates and drawing that conclusion.

6 THE COURT: What he can testify to -- and let's --
7 look. This is not hard.

8 UFF, we have about 50 percent of our -- I think he
9 previously said, but maybe it's increased, I don't know. I
10 thought you said that, whatever.

11 He can testify about what percentages are, and he can
12 explain -- and we already know, so you could ask him -- it's in
13 evidence, a document -- Well, what was the response rate?
14 10 percent. How does that relate to the membership of UFF?
15 Those are the questions you can ask because then you're asking
16 him to tell you a number that then relates to a number that's
17 already in the record. So you can certainly do that, so just
18 ask him those.

19 MS. VELEZ: Thank you.

20 BY MS. VELEZ:

21 Q. I believe it's in the record, Dr. Gothard --

22 THE COURT: No. It's definitely in the record. It's
23 a Joint Exhibit, I believe.

24 BY MS. VELEZ:

25 Q. Yes -- that the response rates were relatively low from all

1 Florida college institutions. Are you aware of that?

2 A. Yes.

3 Q. And based on your own personal understanding, do you
4 understand that to apply to those institutions where UFF does
5 not have a presence?

6 A. Yes.

7 Q. Thank you. That's all.

8 Does UFF have any concerns about the 2022 survey responses?

9 A. Yes. I mean, the fact that the response rates were so low
10 is indicative that they are not representative. And one thing
11 we did notice about the results, particularly among the
12 students, was that, you know, based on the narrative that has
13 been constructed about faculty as these left-leaning Marxists
14 who are indoctrinating students, if that were really happening,
15 this was the opportunity for all of those students to let people
16 know that this horrible thing is going on. And instead what we
17 saw is that the overwhelming majority of students were not
18 interested or compelled enough to even respond.

19 Q. Nevertheless, does UFF have any concerns about how these
20 results from the 2022 survey might be used?

21 A. Yes. Even though our understanding is that they are -- you
22 know, the results are not valid and that they did not have a
23 high enough response rate or selection process to be valid, that
24 the results will be used during the upcoming legislative session
25 as examples and as fodder for lowering -- I'm trying to think.

1 I blanked on the word -- lowering the budgetary allocations for
2 the various higher-education institutions across the state.

3 Q. And does UFF also have concerns about the way future HB 233
4 survey results will be used?

5 A. Absolutely. Our concern is that because there was such a
6 low response rate this year, that future -- future surveys,
7 particularly if this litigation fails, will be much more
8 invasive, they will be required, and that the survey results
9 will be published in a way to further intimidate and harm
10 faculty and students in the state.

11 Q. And I'm not asking you to repeat any testimony you've
12 already said, but what is your understanding of the purpose
13 behind the survey provisions?

14 A. My understanding of the purpose behind the survey
15 provisions, based on, you know, the statements from those
16 individuals who sponsored the bill and have talked about the
17 bill repeatedly since then, whom I have named in, you know,
18 previous testimony so far, is that the survey results will not
19 be used in a positive fashion.

20 There's no sense of how an institution would be rewarded
21 based on good results of the survey, however those are
22 determined, but that institutions will be actively harmed based
23 on the results of the survey.

24 Q. And you spoke previously about New College. Do you recall
25 that?

1 A. I do.

2 Q. And what was your testimony about what has happened at New
3 College?

4 A. Well, it appears that what is going on at New College right
5 now, where UFF does have a chapter, is exactly what was
6 threatened based on the results of the survey.

7 MR. LEVESQUE: Objection, Your Honor.

8 He teaches at FAU. I'd at least like to understand
9 the foundation for his testimony of what's going on at New
10 College.

11 THE COURT: Sustained. You can lay the foundation.

12 MS. VELEZ: Sure.

13 BY MS. VELEZ:

14 Q. Dr. Gothard, I believe you testified previously about
15 something happening at New College; is that correct?

16 A. That's correct.

17 Q. How did you become aware of whatever it is that you heard
18 about New College?

19 A. Through several avenues, one being, you know, the press
20 coverage that immediately came out from publications like the
21 *National Review* and other places that had clearly been sort of
22 prepped with quotes and background information and all those
23 kinds of things, with the names of the Board of Trustees
24 members, and then also through direct conversations with local
25 faculty who teach at NCF, including our local UFF chapter

1 president.

2 Q. And to be clear, UFF has a chapter at New College; correct?

3 A. We do. We do.

4 Q. And all of the members of the New College chapter are also
5 your members at the statewide affiliate; correct?

6 A. That's correct.

7 Q. Okay. Does UFF have any interest in the composition or
8 appointment of boards of trustees at the institutions where they
9 have members?

10 A. Absolutely.

11 Q. And has anything happened with regard to the Board of
12 Trustees at New College?

13 A. Yes. Six Board of Trustees members were recently appointed
14 by Governor DeSantis.

15 MR. LEVESQUE: Objection, Your Honor.

16 I'll withdraw the objection, Your Honor.

17 THE COURT: Okay.

18 BY MS. VELEZ:

19 Q. I'm sorry. I didn't get your answer.

20 A. I said six boards of trustees members were recently
21 appointed at New College by Governor Ron DeSantis.

22 THE COURT: And let me say, I understand,
23 Mr. Levesque, so it's clear, you understand that there's
24 certainly sources they could ask me to take judicial notice of,
25 for example --

1 MR. LEVESQUE: Yes, sir.

2 THE COURT: -- and so as I understood it -- and I saw
3 your response -- Judge, I'm not suggesting to you this is the
4 way it should be done, but I'm also not going to object because
5 I understand it could be done in a different way is how I
6 perceived you withdrawing your objection.

7 I just want to make plain, I didn't yell at you or
8 shake my head or anything at you. I saw you making the
9 calculation that it can be introduced in another way, so I'm not
10 going to waste time.

11 MR. LEVESQUE: Well, and his answer stopped there,
12 so --

13 THE COURT: All right. Thank you.

14 Go ahead.

15 BY MS. VELEZ:

16 Q. Do you know who Julie Adams is, Dr. Gothard?

17 A. Yes. I do.

18 Q. Who is Julie Adams?

19 A. Julie Adams is a -- or they are a plaintiff in this case,
20 and they're one of the student plaintiffs in the case.

21 Q. Did you review a list of professors that Julie Adams will
22 be studying under in the spring 2023 semester?

23 A. Yes, I did.

24 Q. Were you able to confirm that at least some of Julie Adams'
25 spring 2023 professors are members of UFF?

1 A. Yes, I was.

2 Q. Do you know who Olivia Solomon is?

3 A. I do.

4 Q. Who is Olivia Solomon?

5 A. Olivia Solomon is a student member of March for Our Lives
6 and is a witness in this case.

7 Q. Did you review the list of professors that Olivia Solomon
8 will be studying under in the spring 2023 semester?

9 A. Yes, I did.

10 Q. Were you able to confirm that at least some of Olivia
11 Solomon's spring 2023 professors are members of UFF?

12 A. Yes, I was.

13 Q. We've heard some testimony from you already about the
14 political climate in the legislature and the Governor's office.

15 Does UFF understand the challenged provisions to be
16 attempting to further any political agenda?

17 A. Yes. Yes, we do.

18 Q. Can you explain that to me?

19 A. Yes, I can.

20 So, you know, as I've mentioned several times about the
21 narratives that have been constructed around higher education,
22 there appears to be a growing effort to eradicate viewpoints
23 that would be considered liberal or to the left and to
24 prioritize or privilege viewpoints that would be considered
25 conservative or to the right.

1 Q. And I believe you've testified already that you're basing
2 that on -- I'm sorry. What was it?

3 A. Statements by defendants in this case, as well as
4 Governor DeSantis and legislators who sponsored the bill.

5 Q. Are you aware of any professor being terminated as of yet
6 under HB 233?

7 A. I am not.

8 Q. Why do you believe this rhetoric then?

9 A. You know, we tend to believe you should listen to people
10 when they tell you who you are, and the individuals who I've
11 just referenced have shown over the last couple of years that
12 when they make threats about organizations and punishing
13 organizations, they follow through.

14 I mean, we could use the punishment of the Tampa Bay Rays
15 for their work for gun control. We could use the punishment of
16 Disney for its efforts against the "Don't Say Gay" bill.

17 MR. LEVESQUE: Objection, Your Honor. I don't believe
18 he's got personal knowledge of any of these examples, or at
19 least that foundation hasn't been laid.

20 THE COURT: Well, I think he's saying, Why are you in
21 fear? And he's saying that, These are things I'm aware of, and
22 it's on that basis that I'll allow it.

23 THE WITNESS: And then --

24 THE COURT: I mean, you don't have to -- I mean, if
25 the question, for purpose of standing, is, Do I think that

1 Mr. Wermuth is going to harm me again, I don't have to have been
2 physically present when he beat the two people sitting next to
3 him or when he told them, Don't look at me that way or I'm going
4 to beat you. And so when I'm expressing why I have a fear of
5 Mr. Wermuth is it's -- my understanding is that he's previously
6 beat people. It explains why I'm asserting a fear and it's
7 based on something.

8 MR. LEVESQUE: But it assumes that Mr. Wermuth beat
9 the other people as well, and the details of that are not
10 necessarily fleshed out, and there's a lot of conjecture.

11 THE COURT: Then you argue whether it's reasonable or
12 not; right? But it doesn't -- I mean, for the life of me, I
13 don't understand, how can somebody whose entire job is to
14 manage, direct, and coordinate with thousands of professors and
15 monitors Florida -- monitors legislation in Florida, and part of
16 the legislation is -- or the case law and so forth -- he's aware
17 of my order where you're testifying UF professors against the
18 State's, quote, interest, and, therefore, they were told they
19 couldn't serve as expert witnesses and so forth. I don't
20 understand the rule that says I've got to have verified it or
21 have personal knowledge of it to say that that's -- it's those
22 instances of why I'm apprehensive about somebody taking action
23 against me.

24 So it's not being offered for the truth of the matter
25 asserted. He can't say that Governor DeSantis did what he did

1 with Reedy Creek because he's just trying to punish Disney over
2 their position on one thing, because it can be a lot more
3 involved than that. It can be that we just think it's a bad
4 idea to have a private corporation effectively acting as
5 self-government, and it's more complicated than that.

6 But the question is which -- the state of mind of the
7 individual plaintiffs it seems to me is germane when we're
8 talking about standing and fear. And the question is going to
9 be -- you're going to raise for standing is this is just all
10 hypothetical and you can't possibly, you know -- and under that
11 theory of standing, the only way you would have standing is
12 there can't be any pre-enforcement. It can't be based on fear
13 because it would have to be something that personally happened
14 to you before you could articulate that's why you're scared, so
15 it's on that basis that I'm going to allow it.

16 MR. LEVESQUE: Thank you. I understand your ruling.

17 THE WITNESS: So I'll just continue.

18 Your Honor, you read my mind. I was actually also --

19 THE COURT: I understood your testimony, and you were
20 giving a couple of examples. The very folks, Judge, that I've
21 already told you that I'm worried about and that have made
22 statements about professors and about our school system, and the
23 people that are pushing this legislation are the people that
24 I've identified a number of examples where those same
25 individuals have taken punitive measures against people they

1 don't agree with that didn't yield to their will.

2 THE WITNESS: That's correct.

3 THE COURT: I understood your testimony.

4 BY MS. VELEZ:

5 Q. Dr. Gothard, did UFF respond to HB 233 while it was making
6 its way through the legislature?

7 A. We did. We opposed HB 233 in the legislature. We had
8 members and leaders testify before the legislature, yeah. And
9 we had members meeting with legislators who were connected to or
10 sponsors of the bill to attempt to get amendments into that bill
11 to make it less egregious.

12 Q. Did any representatives of UFF meet with defendants or any
13 agents of the defendants?

14 A. Yes.

15 Q. Can you tell me about that?

16 A. So we had a member at FGCU who met with then -- I believe
17 he was Senator Rodrigues at the time to discuss protection of
18 faculty lectures, publications and things of that nature.

19 MR. LEVESQUE: Objection, Your Honor. Hearsay.

20 Unless the member from FAU was Dr. Gothard, I think that would
21 be hearsay.

22 THE COURT: Well, he said, "So we had." He didn't
23 say, Here's what took place. He said -- for the life of me, I
24 don't understand, how does he not -- if he personally, in his
25 capacity as UFF, directed a member -- "so we had" -- he's

1 directing, We need to have somebody go and talk, and I did that.

2 Now, I agree that it's problematic for him to say who
3 showed up at the meeting and who said what.

4 But how is it not within his personal knowledge that,
5 As an organization we were concerned, and as an organization we
6 recruited somebody to go talk? That's -- that doesn't go to
7 hearsay. That goes to, I have personal knowledge that I
8 recruited somebody to go talk to Senator Rodrigues.

9 MR. LEVESQUE: I think he testified that he became UFF
10 president in June or July of 2021, and at the time this passed
11 he was not the UFF president.

12 THE COURT: All right. So you're going to ask him
13 when he said "we" -- he may have been on the board. I don't
14 know so -- he said "we," so you can have him clarify that.

15 BY MS. VELEZ:

16 Q. Were you a member of UFF leadership when this occurred?

17 A. I was. I was not UFF president at that time. I was a
18 member of the UFF steering committee in my capacity as the
19 statewide membership chair, and I was --

20 THE COURT: Hold on. All I heard from you before is
21 the leadership of which you were a part determined this was an
22 important issue, and we wanted a member to talk to
23 Senator Rodrigues and we found somebody and sent them?

24 THE WITNESS: That's correct.

25 THE COURT: All right. That doesn't call for hearsay.

1 That calls for actions you took of which you have personal
2 knowledge, so I overrule the objection otherwise.

3 BY MS. VELEZ:

4 Q. Did UFF update its members on HB 233 when it was still
5 pending in the legislature?

6 A. Yes. We consistently update our members on legislation
7 that affects higher education as it moves through committees and
8 eventually through the chambers.

9 Q. Are you aware of whether any UFF members have concerns, or
10 had concerns at that time, that the challenged provisions would
11 make it difficult for them to do their jobs?

12 A. Yes.

13 Q. Does UFF -- changing gears again -- monitor the statements
14 made by Florida's political leaders on social media?

15 A. Yes, we do.

16 Q. Why?

17 A. Well, these are the individuals who are writing and passing
18 and advocating for policy. They are the individuals that we
19 will need to have conversations with to explain the concerns
20 that their constituents have all over -- you know, all over the
21 state but also in their district, and they are the individuals
22 that we will go back to if there are questions of, you know,
23 local interpretation that need to be sorted out.

24 Q. Thank you.

25 Do you know who Spencer Roach is?

1 A. I do.

2 Q. Who is he?

3 A. He is a member of the Florida House of Representatives and
4 was an original sponsor of HB 233.

5 Q. Do you know whether Representative Roach keeps a public
6 Facebook account?

7 A. I believe he does.

8 Q. Does UFF ever monitor that account?

9 A. We do.

10 Q. Do you know whether Representative Roach keeps a public
11 Twitter account?

12 A. I believe he does.

13 Q. Does UFF ever monitor that account?

14 A. We do.

15 Q. Do you know whether Representative Roach's campaign website
16 includes links to his personal Facebook and Twitter accounts?

17 A. I believe it does.

18 Q. Does UFF have any members that live in
19 Representative Roach's district?

20 A. We do.

21 Q. Are you aware of whether any UFF members read or review
22 Representative Roach's statements on social media?

23 A. Yes, they do.

24 MS. VELEZ: Andy, would you please show Dr. Gothard
25 what has been premarked as Plaintiffs' Exhibit 350.

1 And would you be able to zoom in on the text of the
2 top? It's a bit hard to see.

3 BY MS. VELEZ:

4 Q. Do you know what this is, Dr. Gothard?

5 A. This appears to be a Twitter post from January 7th from
6 State Representative Spencer Roach that says: *There's no place*
7 *for critical race theory in any of our schools. No child should*
8 *feel guilty for the color of their skin.*

9 And there's a background that says: *Spencer Roach for*
10 *State House*, and then written on a chalkboard is: *No Critical*
11 *Race Theory In Florida.*

12 Q. And does the picture and title appear to be
13 Representative Roach's personal Facebook?

14 A. It does.

15 Q. What do you understand this post to mean?

16 A. I understand it to mean that critical race theory is not
17 welcome at any level of public education in Florida.

18 Q. Do you believe that this post may have had any effect on
19 UFF's members?

20 A. Absolutely.

21 MR. LEVESQUE: Objection, Your Honor. Calls for
22 speculation.

23 MS. VELEZ: Your Honor, his belief is not --

24 MR. LEVESQUE: If I --

25 THE COURT: You can rephrase the question. Why are

1 they monitoring it, and why does UFF monitor it, and why does it
2 care, and what kind of information does it disseminate to its
3 members in light of, you know, posts that it's monitoring?

4 He can talk about processes and why they're doing what
5 they're doing, but Mr. Levesque's point is well-taken that if
6 you're asking were people bothered by this, then you're
7 basically saying, What did people tell you? which is -- unless
8 there's an exception to hearsay -- is hearsay.

9 BY MS. VELEZ:

10 Q. Dr. Gothard, how did you interpret this statement?

11 A. So as president of UFF I interpret this statement to mean
12 that critical race theory is not welcomed, as I said before, at
13 any level of public education in Florida. And that is
14 particularly concerning for higher education, because, unlike
15 K-12 where critical race theory is not taught as part of the
16 curriculum, in higher education critical race theory is taught
17 as one of many lenses and ways of understanding how we, you
18 know, analyze the systems and structures that make up our given
19 society, and we have faculty who specialize in critical race
20 theory or teach it as part of other specializations.

21 THE COURT: Let me ask a couple of follow-up
22 questions. You've shown him this exhibit. Do we know a year on
23 it?

24 MS. VELEZ: I believe it's 2021, but hold on one
25 second.

1 Andy, would you zoom out for a moment?

2 I can ask.

3 BY MS. VELEZ:

4 Q. Dr. Gothard, do you know what year this tweet was
5 published?

6 A. In my recollection, it was 2021.

7 MS. VELEZ: Your Honor, at this time I would move to
8 have Plaintiffs' Exhibit 350 admitted into evidence,
9 understanding that there's likely a forthcoming hearsay
10 objection. We would be offering it not for the truth of the
11 matter asserted but the effect on Dr. Gothard as a member of
12 UFF.

13 MR. LEVESQUE: Your Honor, to the extent that you've
14 identified pre- and post-enactment statements, I would say that
15 this document is not properly authenticated. The belief of the
16 witness that it might have been in 2021, I don't think is enough
17 to authentic it for our purposes. And I'll confess I don't
18 know.

19 THE COURT: I'm concerned -- the reason why I'm
20 concerned is it would not surprise me -- I guess the only thing
21 that would surprise me, if it was on a witness list, if it had
22 been from -- I mean, if it's been on an exhibit list previously,
23 it couldn't have been four days ago.

24 But it also wouldn't have surprised me that if it was
25 last year, in 2022, because it's a constant drumbeat.

1 Actually -- and the fact that, first of all, we have other
2 statements that have come in through Roach in the record;
3 correct?

4 MS. VELEZ: That's correct, Your Honor.

5 THE COURT: So it's -- in determining whether or not
6 I'm satisfied with the low threshold for authenticity, it's -- I
7 think it is what it is. I think it's authentic.

8 The question becomes do I admit it over the objection,
9 and I've already, as Mr. Levesque said, articulated post- versus
10 pre-enactment, and if -- the relevancy concern I have is if this
11 is in 2022, it suddenly becomes marginally, if at all, relevant.
12 And so it's on that basis -- and I said normally relevance is a
13 low threshold -- I'm going to exclude it.

14 I'm just not going to jumble in pre- and
15 post-enactment statements, especially when I don't know whether
16 it was pre or post. So while normally I wouldn't have done the
17 relevancy, and I said I'd have -- it had marginal relevance or
18 could be linked up for other reasons if it was post-enactment,
19 since I don't know, I'm --

20 MS. VELEZ: And, Your Honor, I will say that my
21 brilliant colleague has advised me that this is actually 2022,
22 so I will withdraw the exhibit.

23 THE COURT: No problem.

24 And I'll also note, and I'll ask the witness -- well,
25 leave that back up.

1 Things are sometimes more complicated than they might
2 seem. I have no doubt, based on the legislative history
3 pre-enactment, that State Representative Roach probably truly
4 believes that our universities and colleges are in the control
5 of left-wing folks. I also have no doubt that he doesn't like
6 critical race theory.

7 My concern is is when I see a document, I just caution
8 everybody to be careful because I'm listening and reading what I
9 see. To say that when we see this we're really concerned about
10 it as it relates to university, when it says: *No child should*
11 *feel guilty for the color of their skin*, quite frankly, my kids,
12 my children -- who I call children because they're my
13 children -- would walk out of the house if I called them a child
14 when they were attending a university.

15 So while I understand the witness's statement that
16 it's borderline silly to suggest that they're teaching critical
17 race theory in kindergarten, just like I don't think y'all have
18 folks in your schools in your -- I understand you're at the
19 university level -- using the restroom in litter boxes, but this
20 may well be what the witness suggests, just a theme that's being
21 repeated over and over.

22 But it's hard for me to construe this as a statement
23 about universities and what university students are being
24 taught, because most people don't refer to college kids as a
25 child, a college student as a child, particularly graduate-level

1 students that are working on their Ph.D., which -- if we're
2 going to hear testimony over and over that critical race theory
3 is really only taught -- originated in law schools and then
4 started being taught primarily to graduate students, and to a
5 lesser extent college, it sort of undercuts it to then -- where
6 somebody's saying, Don't teach our children.

7 Because it seems pretty apparent, even though he may
8 be wrong, that Senator -- State Representative Roach -- I may
9 have called him Senator -- was talking about K through 12 and
10 not universities on the face of the posting.

11 MS. VELEZ: Andy, I'll ask that you please pull up
12 Exhibit 354 and show that to the witness.

13 And before you do, would you please zoom in on the
14 date?

15 BY MS. VELEZ:

16 Q. Dr. Gothard, what's the -- first of all, what does this
17 appear to be?

18 A. This appears to be a social media post, again from Facebook
19 from State Representative Spencer Roach.

20 THE COURT: Didn't I admit this on the first day?

21 MS. VELEZ: Not 354, Your Honor.

22 THE COURT: I'm pretty sure I admitted 354 on the
23 first day of testimony.

24 MS. VELEZ: My note is that it was 388 that was
25 admitted.

1 THE COURT: Nope. On page 3 of my notes wrote:
2 *Sponsor statement tied to Marxist indoctrination, introduced*
3 *through Allan Lichtman.*

4 BY MS. VELEZ:

5 Q. Okay. Then what has already been admitted, what's your
6 understanding of this post, Dr. Gothard?

7 A. Well, it says: *The First Amendment is not up for*
8 *negotiation. Thank you to my House colleagues for passing this*
9 *bill to protect our Right to Free Speech and stem the tide of*
10 *Marxist indoctrination on university campuses.*

11 So my understanding is this is part of the larger narrative
12 we've been discussing about identifying higher-education faculty
13 as Marxist indoctrinators.

14 Q. Do you know when HB 233 passed out of the House?

15 A. I believe it was -- I don't remember the exact date, but I
16 believe it was in April of 2021, and went into effect July 1st
17 of that year.

18 Q. Could it have been March 19th of 2021?

19 A. Oh, for coming out of the House, yes.

20 Q. Do you understand --

21 THE COURT: I understood your answer, and you were
22 right. It ultimately was passed in April, and that's part of
23 the record, and it's undisputed.

24 And go ahead.

25

1 BY MS. VELEZ:

2 Q. Do you understand this post to be pertaining to HB 233?

3 A. Yes, I do.

4 MS. VELEZ: Your Honor, this is already admitted, so I
5 won't move it in.

6 I'll ask that Andy please show Dr. Gothard what has
7 been, I believe, only been premarked as Plaintiffs' Exhibit 356,
8 356.

9 BY MS. VELEZ:

10 Q. And, Dr. Gothard, please take a moment to review this.

11 And, Dr. Gothard, what do you understand this to be?

12 A. So this is another Facebook post from the State
13 Representative Spencer Roach from May 27th of 2021, and it says:
14 *Critical Race Theory is rooted in Marxism, poisonous to our*
15 *democracy, racist by design, and has no place in our public*
16 *schools!*

17 Q. And did this post get published while HB 233 was moving its
18 way through the process of enactment?

19 A. Well, this would have been after it formally passed but
20 before it went into effect on July 1st of that year.

21 Q. Thank you.

22 MS. VELEZ: At this time, Your Honor, I would ask to
23 move Plaintiffs' Exhibit 356 into evidence under the same theory
24 that we've discussed, for effect on the listener, much like
25 Your Honor ruled with Exhibit 354.

1 MR. LEVESQUE: Your Honor, some of the same objections
2 that I had before, but particularly with respect to this, to the
3 extent that it doesn't appear on its face related to HB 233, on
4 a relevance basis or even with necessarily higher education.

5 THE COURT: I'm going to sustain the objection. I
6 mean, it's close in time to the passage. It shows his views
7 generally, but it's -- look, the legislative history coupled
8 with statements made prior to are what I need to focus on.
9 That's why I allowed 354 in.

10 I sustain your objection. I find that this is
11 targeting a different issue, which is, albeit related, critical
12 race theory, as opposed to -- which is the subject of other
13 bills, as opposed to this case, which is related but targeted at
14 a different problem that was identified.

15 Look, just to put everybody on notice, when I'm
16 looking at intent, my exercise for purposes of intent is what --
17 is there evidence in this report to suggest that you're not --
18 and y'all have identified this problem before -- you're not
19 trying to pass HB 233 because you want an open dialogue. You're
20 passing it with the intent to stifle not critical race theory,
21 but anything that's -- you consider leftist and your views of
22 our leftist universities and colleges.

23 I haven't said that's what I find happened. I'm just
24 suggesting that's the inquiry, and the farther we get away from
25 that, the less relevant it becomes, the bigger 403 issue it

1 becomes. And it's on that basis that I'm cabining the universe
2 of information that I believe is properly before me.

3 MS. VELEZ: And, Your Honor, I'll just state for the
4 record that we also don't believe that this is relevant only to
5 intent, but it also is relevant for the impact and the
6 reasonableness of the chill on faculty to see the statements --
7 the ideological-based and viewpoint-based statement made by
8 proponents of the bill.

9 THE COURT: Here's the problem with the picture. It
10 also has a picture of our governor, and so it is implying that
11 that's a statement that's been adopted by our governor. Now, I
12 understand that the Governor has made -- there's a variety of
13 reasons why I'm excluding this document. I've ruled it's out.
14 You can move on to your next document.

15 MS. VELEZ: Got it.

16 Andy, would you please show Dr. Gothard
17 Plaintiffs' Exhibit 388, which was admitted into evidence on
18 Monday?

19 BY MS. VELEZ:

20 Q. And, Dr. Gothard, what does this appear to be?

21 A. This appears --

22 THE COURT: Let me just say the better argument for
23 the last exhibit was, Judge, it's relevant because it shows that
24 these folks that are sponsors are walking hand in hand with the
25 Governor and is posting a newspaper article about the Governor

1 echoing his statements, which is reflective of they are doing
2 the Governor's bidding during the session. I've already had
3 that testimony through the first witness in this case.

4 But, arguably, those types of things would be relevant
5 to show there's no daylight at all between the legislation
6 that's being passed and the people that are pushing it such that
7 testimony regarding what the Governor is or is not saying
8 becomes more germane in this context.

9 I've excluded it. I'm not arguing for its admission
10 on an alternative basis, but as we move forward, I would suggest
11 to you that that probably would have been the better argument.

12 But go ahead.

13 MS. VELEZ: Understood, Your Honor.

14 BY MS. VELEZ:

15 Q. Dr. Gothard -- I'm sorry -- what is Exhibit 388?

16 A. So this appears to be a post from Spencer -- Representative
17 Spencer Roach's Twitter page from April 7th of 2021 stating:
18 *Our bill to protect intellectual diversity on college campuses,*
19 *which I would interpret as HB 233, is getting closer to the*
20 *Governor's desk. Freedom of speech is an unalienable right,*
21 *despite what Marxist professors and students think.*

22 Q. I believe you testified earlier the date that HB 233 passed
23 out of both chambers of the legislature; is that correct?

24 A. It was in April of 2021.

25 Q. And based on this tweet, do you understand this to be prior

1 to the full approval of 233 by the legislature?

2 A. I think April 7th was before the full approval.

3 Q. And what effect, if any, does this statement have on you
4 with regard to your understanding of the intent behind HB 233?

5 A. Well, it seems to be continuing in that narrative of
6 claiming that faculty at universities, and in this case students
7 as well, are Marxists who don't appreciate or support freedom of
8 speech.

9 Q. Thank you, Dr. Gothard.

10 A. I apologize, but I really have to use the restroom.

11 Q. I'm not sure what time it is. We lose all track of that up
12 here.

13 THE COURT: How much more do you have?

14 MS. VELEZ: Very little, but not enough that I'd ask
15 that the witness --

16 THE COURT: Well, I'm thinking we're going to go ahead
17 and break for lunch. I don't want to break, come back. We're
18 not going to start the cross in ten minutes, so we'll just go
19 ahead and break for lunch now.

20 We'll come back at 1:00; okay.

21 MS. VELEZ: Thank you, Your Honor.

22 (Recess taken at 11:49 AM.)

23 (Resumed at 1:07 PM.)

24 THE COURT: We are back on the record.

25 Counsel, you may proceed.

1 MS. VELEZ: Thank you.

2 BY MS. VELEZ:

3 Q. Dr. Gothard, without speaking to what you may have heard or
4 anyone has told you, does UFF have any concerns about students
5 overtly holding up cell phones and recording professors under
6 the recording provision?

7 A. Yes.

8 Q. Do most students have cell phones?

9 A. Yes.

10 Q. Can you necessarily tell what a student is doing when they
11 are holding their cell phone?

12 A. No.

13 Q. Does UFF have any concerns that students overtly holding up
14 their cell phones while in their class might chill faculty
15 speech?

16 A. Yes.

17 Q. Can you explain why?

18 A. Well, because of the recording provision of HB 233,
19 students do not have to ask permission to record class, and so a
20 faculty member's assumption when a cell phone is up and pointing
21 at them will most likely be that they are being recorded, and
22 so, as a result, they will self-sensor in anticipation of that.

23 Q. And did you testify earlier that faculty were advised not
24 to interfere with student recording of classes?

25 A. That's correct.

1 Q. Are students also able to record on cell phones without
2 holding them up?

3 A. Yes.

4 Q. Shifting gears, do you know whether the Florida Department
5 of Education posts official press releases on its website?

6 A. Yes.

7 Q. Does UFF review those press releases as they relate to
8 higher education?

9 A. Yes.

10 MS. VELEZ: Andy, will you please show Dr. Gothard
11 what has been premarked as Plaintiffs' Exhibit 308?

12 BY MS. VELEZ::

13 Q. I'd like to give you a moment just to view that,
14 Dr. Gothard, so please let Andy know if you need us to scroll
15 down.

16 A. Yes, you can scroll down.

17 If there is more, you can scroll down.

18 Okay.

19 Q. Dr. Gothard, did this post -- or, rather, what is this?

20 A. So this is a press release from the Florida Department of
21 Education from April of this year specifically referring to a
22 number of textbooks that were rejected for Florida's K-12 system
23 based on claims that they contain CRT, as well as the argument
24 that SEL, or social and emotional learning, is somehow
25 problematic or damaging to students.

1 Q. And did this press release include any quotes from
2 defendants?

3 A. It did. It contains quotes from then-Commissioner of
4 Education Richard Corcoran, who now serves on the Florida Board
5 of Governors.

6 Q. And what is it that former Commissioner Corcoran said?

7 A. Well -- I mean, you can see right here on the screen, you
8 know: *We're going to ensure that Florida has the*
9 *highest-quality instructional materials aligned to our*
10 *nationally recognized standards.*

11 And that: *Florida has become a national leader in*
12 *education under the vision and leadership of Governor DeSantis.*
13 *When it comes to education, other states continue to follow*
14 *Florida's lead as we continue to reinforce parents' rights by*
15 *focusing on providing their children with a world-class*
16 *education without the fear of indoctrination or exposure to*
17 *dangerous and divisive concepts in our classrooms.*

18 Q. Did this quote have any effect on UFF and its members?

19 A. Yes, it did.

20 Q. What effect was that?

21 A. Well, although this, you know, issue of rejecting textbooks
22 was on the -- you know, relating more to K-12, many of our
23 members are in education programs that train the next generation
24 of teachers for the state of Florida, and many of them were
25 looking at these statements and seeing the same language about

1 indoctrination, divisive concepts, accusations of CRT, and the
2 idea that somehow SEL, or social and emotional learning, was
3 somehow also connected to indoctrination. It certainly had an
4 impact on UFF and our members.

5 Q. And does this press release also contain a quote from
6 Governor Ron DeSantis?

7 A. It does.

8 Q. What does that quote say?

9 A. That quote says: *It seems that some publishers attempted*
10 *to slap a coat of paint on an old house built on the foundation*
11 *of Common Core and indoctrinating concepts like race*
12 *essentialism, especially, bizarrely, for elementary school*
13 *students. And then he continues: I'm grateful that*
14 *Commissioner Corcoran and his team at the Department have*
15 *conducted such a thorough vetting of these textbooks to ensure*
16 *they comply with the law.*

17 Q. And to be clear, Dr. Gothard, at least to some extent,
18 Governor DeSantis is talking about primary education here?

19 A. Yes, yes.

20 Q. Did this have any effect on UFF and its members with regard
21 to their understanding of the Governor's position on higher
22 education?

23 A. Yes, it did. The impact is that it sort of joins the
24 larger narrative about education and public education in the
25 state of Florida, and the assumption is that these comments also

1 apply to higher education.

2 MS. VELEZ: And, Andy, would you mind scrolling up to
3 the top for us?

4 At this time, Your Honor, I would move to have
5 Plaintiffs' Exhibit -- this is 308 -- admitted into evidence.

6 MR. LEVESQUE: Your Honor, we believe we've got both
7 relevancy objections that go to this particular exhibit. It's
8 clearly related to textbooks for K-12 schools.

9 Additionally, while we understand that Commissioner
10 Corcoran is at the time the Commissioner of Education, they sued
11 him in his capacity as the Commissioner of Education, then as a
12 member of the Board of Governors because that's his role. He's
13 now on the Board, so we understand that there's that party
14 statement aspect.

15 But this is a press statement by the Department of
16 Education that addresses a whole variety of other areas that are
17 not at issue and, frankly, are not a part of the Board of
18 Education and are not a part of the Board of Governors. The
19 Department of Education touches on several different areas.
20 They've sued all of the individuals that are on the Boards, but
21 they haven't actually named the Department of Education as a
22 defendant in this litigation.

23 THE COURT: Response.

24 MS. VELEZ: Your Honor, first, I'm not sure if I
25 understand that objection, but to the extent that it includes a

1 hearsay objection, I will note that Plaintiffs' Exhibit 308 does
2 not have, at least per my notes, a hearsay objection preserved.
3 I only see the relevance and another objection, but not hearsay.

4 THE COURT: What was the objection other than
5 relevance?

6 MR. LEVESQUE: I'm sorry?

7 THE COURT: What was the other objection on the
8 exhibit list other than relevance?

9 MR. LEVESQUE: Other than relevance, it's untimely
10 disclosure. This was never disclosed in discovery.

11 MS. VELEZ: And, Your Honor, we would represent that
12 defendants, the Board of Education, is under the Florida --

13 THE COURT: All right. Let me -- excuse me a minute.
14 We're going to do two things, the timely and the relevance since
15 those were the two objections.

16 As to relevance, it's marginally relevant as it
17 relates to the efforts to go after them in force because one of
18 the individuals involved. So it's marginally relevant, and I'll
19 admit it.

20 As to the untimely disclosed, this was not covered in
21 my prior order with respect to timeliness?

22 MS. VELEZ: Your Honor, I'm not sure that it was. But
23 what I will say about this press release is it's, we believe, by
24 extension a statement of the Board of Education and the
25 Department of Education.

1 THE COURT: Well, it still had to be timely disclosed.

2 MS. VELEZ: Oh, yes, Your Honor. And we disclosed it
3 on our exhibit list and noted in our discovery responses that we
4 did not have an obligation to disclose things that were in the
5 public record or in defendants' custody and control. And we
6 didn't have an affirmative duty to disclose this statement prior
7 to that during discovery. We did add it to our exhibit list. I
8 believe that that was circulated in early November, Your Honor.

9 MR. LEVESQUE: Your Honor, with the breadth of
10 potentially relevant topics that seem to be on the table as
11 potentially relevant, to say that we had notice of this because
12 it was our document, our discovery, I believe, was asking them,
13 What are the things that you're going to be relying on? And the
14 idea that this wasn't something that was necessarily brought
15 forward to give us adequate opportunity to respond to, to
16 identify witnesses for --

17 THE COURT: If this were an initiative or something
18 else, I would agree with you. But it's simply limited to a --
19 and it's admitted for the limited purpose of something that
20 Corcoran said. And based on the prior exchanges in this case,
21 you were clearly on notice that Mr. Corcoran was a defendant.
22 His statements relative to matters, either directly related or
23 tangentially related, that's going to be fair game. He's a
24 central figure, a defendant in this case.

25 And for those reasons, I'm going to allow it for that

1 limited purpose. But that's the only, quite frankly, relevance
2 to the case is what Corcoran said.

3 THE WITNESS: Thank you, sir.

4 THE COURT: I can assure you I'm not going to be
5 quoting otherwise from this document. I'm not even suggesting I
6 would quote that statement. But for that limited purpose, his
7 statements and examples of, where one of the defendants has
8 continued to beat the drumbeat and suggest they're going to
9 aggressively go after folks that they disagree with that aren't
10 going to back down and stop that type of -- those examples, A,
11 support the fear that supports the standing argument and is
12 relevant for and admissible for that reason.

13 Counsel, you may proceed.

14 MS. VELEZ: Thank you, Your Honor.

15 BY MS. VELEZ:

16 Q. Dr. Gothard, do you know whether the Governor's office
17 posts official press releases on the Governor's website?

18 A. Yes.

19 Q. Does UFF review those press releases, particularly as they
20 relate to higher education?

21 A. Yes, we do.

22 MS. VELEZ: Andy, will you please show Dr. Gothard
23 what has been premarked as Plaintiffs' Exhibit 460?

24 THE COURT: Let me also say, because counsel just
25 cabined it somewhat, Mr. Levesque, I'm also not considering

1 these statements to necessarily have been heard and to be
2 considered by every other plaintiff for purpose of the standing
3 analysis. It would be pertinent for the standing analysis
4 potentially -- I'm not ruling -- as it relates to this
5 plaintiff.

6 The fact that folks at UFF, including this witness,
7 are familiar with, reviewing, and privy to these things doesn't
8 mean everybody on the planet is that might otherwise express
9 some sort of fear; okay.

10 BY MS. VELEZ:

11 Q. Dr. Gothard, do you see the -- I think the right word for
12 this is the banner at the top of this exhibit?

13 A. I do.

14 Q. Does that appear to be the banner of Governor DeSantis's
15 website?

16 A. It does.

17 Q. And do you see the URL that's above that?

18 A. Yes, I do.

19 Q. And does that appear to be a URL that corresponds to a
20 Florida government website?

21 A. It does.

22 Q. And I want to give you a moment to take a look at this
23 before I ask any other questions. So please let Andy know if
24 you need to scroll.

25 A. You can scroll down.

1 You can scroll down again, please.

2 Okay. I don't know if there is more or if that's the end.

3 Q. That's the end of the exhibit.

4 A. Okay.

5 Q. Do you know what this is?

6 A. This appears to be a press releases from the office of
7 Governor DeSantis about the signing of HB 7, otherwise known as
8 the Stop WOKE Act.

9 Q. And the date of this press release is after the enactment
10 of HB 233; correct?

11 A. That's correct.

12 Q. What effect, if any, did this press releases have on UFF
13 and its members?

14 A. So the announcement not only of the signing of HB 7 into
15 law, but the statements by Governor DeSantis and then
16 Commissioner of Education Richard Corcoran, solidified the
17 concept that, you know -- well, HB 7 applies to not just K-12
18 but K-20, so it has a direct application to higher education.

19 So the statements about indoctrination, wokeness, Marxism,
20 you know, critical race theory, these are all being directly
21 applied to higher education, and the intention is to signal that
22 these theories, which the Governor and his supporters do not
23 agree with, are not welcome in a higher-education context.

24 Q. And, Dr. Gothard, do you have any reason to believe that
25 this press release is inauthentic or not the Governor's press

1 release?

2 A. I do not have any reason to believe that.

3 MS. VELEZ: Your Honor, at this time I would move to
4 admit Plaintiffs' Exhibit 460 into evidence in accordance with
5 Your Honor's prior rulings. Again, of course, this is subject
6 to the enactment that goes to standing, as Your Honor has
7 already articulated.

8 THE COURT: Mr. Levesque?

9 MR. LEVESQUE: Your Honor, similar to some of the
10 objections that we had with Dr. Lichtman, this has nothing to do
11 with House Bill 233.

12 Additionally, to the extent that it's a press
13 statement from the Governor, the Governor is not a party in this
14 litigation. And we do not believe it would be subject to a
15 hearsay objection or at least those portions that do not reflect
16 the Governor's statements, President Simpson's statements. I
17 believe Speaker Sprowls might be quoted in there as well, but I
18 do recognize that Commissioner Corcoran is quoted in there.

19 THE COURT: All right. I find that the threshold for
20 authenticity as it relates to hearsay, I'm going to admit the
21 statements by Corcoran who was a party.

22 (PLAINTIFFS EXHIBIT 460: Received in evidence.)

23 MS. VELEZ: And, Your Honor, with regard to the other
24 statements, plaintiffs would argue at least that this document
25 and the other statements herein are subject to the hearsay

1 exception under Rule 803(6). That's for records of a regularly
2 conducted activity; here the signing of the press release on the
3 passage of a bill.

4 THE COURT: Have you laid the predicate for the
5 business record exception? I mean, that --

6 MS. VELEZ: I believe so, Your Honor, through --

7 THE COURT: You've laid it as it appears to be what it
8 is. And let me -- I tried to make this plain in my prior order.
9 The threshold for authenticity exists. I'm not suggesting it's
10 nonexistent, but it's much lower. So this does appear to be a
11 press release.

12 But as a general rule, there's two ways: You can have
13 a notice, and you can go through the written process of
14 establishing something is a business record, separate and apart
15 from authenticating it. Secondly, you can call a witness.

16 But I'm not aware of the principle that you can have
17 somebody that reviewed a document who had nothing to do -- does
18 not work for the entity, does not produce the document, that can
19 lay the foundation for it being a business record.

20 Do you have any authority that would support the
21 proposition? Because, otherwise, I could just -- I mean, I
22 understand you can have anybody come in and say, I pulled it off
23 the website; this is when I did it; I got it off the official
24 website; I wasn't -- didn't get it three layers removed as
25 only -- but I think it has to be somebody with the knowledge, as

1 I noted, and the procedures used to create the business record
2 must testify.

3 But, again, there's also a rule that permits it to be
4 done, which I know y'all are familiar with, laying foundation
5 for a business record prior to trial as well.

6 MS. VELEZ: So I believe that under Rule 901, first,
7 that --

8 THE COURT: That's authenticity.

9 MS. VELEZ: Yes.

10 THE COURT: You crossed the threshold.

11 MS. VELEZ: I'm good. Fabulous, Your Honor.

12 THE COURT: You authenticated it.

13 MS. VELEZ: Focusing instead just on 803.6, subsection
14 (d) says that the conditions are shown by the testimony of the
15 custodian, of course, as Your Honor alluded to, or another
16 qualified witness or by certification that complies --

17 THE COURT: That's the certification that I was just
18 talking about, that you can do it by writing beforehand.

19 MS. VELEZ: Right. Exactly right.

20 But we believe that because of Dr. Gothard's testimony
21 that UFF reviews the Governor's website, press releases --

22 THE COURT: No, no.

23 MS. VELEZ: Okay.

24 THE COURT: Just because -- I review all kinds of
25 documents every day from this bench, but that doesn't mean, just

1 because I review them and I'm familiar with them, I can lay the
2 foundation for them being the business record.

3 You have to -- the rule itself specifically
4 requires -- it doesn't have to be the record custodian or other
5 qualified individual who can explain the recordkeeping procedure
6 utilized. And this maybe sounds, Counsel -- and I know this
7 isn't a CLE -- like slicing the bread so thin. But the reason
8 why we have that rule is because hearsay can come in if it falls
9 within the exception, because then we don't question its
10 veracity or where it came from, and so forth.

11 So the reason why we go through the business record
12 process of either a custodian or otherwise qualified individual
13 with knowledge of the recordkeeping procedure is because that
14 person then can assure me that this is not just come garbage
15 somebody has put together that misrepresents, for example, the
16 statements of Corcoran.

17 Corcoran's statement can come in as a statement of a
18 party --

19 MS. VELEZ: Right.

20 THE COURT: -- subject to other objections, relevancy,
21 et cetera. But the document that it's in, this is hearsay
22 within hearsay. It's a statement within a document. So you got
23 to authentic the document.

24 And I'm sorry, Counsel. I pull up stuff on the
25 Internet all the time that's just patently false. I mean, I

1 encourage you to read -- because I won't and would not, but
2 occasionally share through my law clerks -- the tweets by the
3 sad and, quite frankly, silly people that review my orders that
4 post things on Twitter about what I ruled, and it couldn't be
5 farther from the truth.

6 So they can quote me, but just because I regularly
7 review Twitter doesn't mean it's an accurate quote of something
8 I said.

9 But if you have something that suggests that somebody
10 who's just familiar and generally reviews a document can explain
11 the recordkeeping procedure and how it's created, generated and
12 done, then --

13 MS. VELEZ: And, Your Honor, I would ask, if we could
14 make a proffer on that later, that would be helpful. And I also
15 want --

16 THE COURT: I'm not admitting it for -- so that's why
17 I'm rejecting that it's a business record. What's in is a
18 statement of Corcoran over the hearsay objection.

19 MS. VELEZ: Understood, Your Honor.

20 And one other thing that I will note is that Rule
21 803(3) also allows for an exception for statements that suggest
22 then-existing mental, emotional and physical condition. The
23 rule specifically says that includes intent. We think that the
24 Governor's intent is relevant here for many of the reasons that
25 Dr. Lichtman testified to.

1 So I would just like the record to reflect that basis
2 as well.

3 THE COURT: You're going to have to get me some case
4 law that suggests that 803(3) has been viewed and applied that
5 expansively.

6 MS. VELEZ: Understood, Your Honor.

7 THE COURT: The idea -- the reason of the
8 then-existing, you're generally not going to lie: I'm in agony;
9 I can't move; I can't join you because I think I've blown out my
10 knee. While people could lie about that, it's unlikely that
11 you're going to lie about that and make it up on the spot.
12 That's why we've got certain exceptions.

13 It seems to me having a document that includes a quote
14 that we don't know who put it in the document, how it got there,
15 and whether it's a real quote, is the exact opposite of a then
16 existing, because that means -- nobody is testifying that heard
17 them say that.

18 So let's assume that we are going to intent -- I agree
19 with you, why I'm going to do something. I heard
20 Governor DeSantis say X. But here's the problem. You've got a
21 document that we don't otherwise have in as a business record
22 that doesn't have the prep foundation laid that it's an accurate
23 document prepared such that it wasn't, you know, manipulated,
24 et cetera.

25 So I'm supposed to then assume that everything within

1 the business record, nonbusiness record record that hasn't been
2 introduced is, therefore, an accurate authentic statement. And
3 I'm not trying to create unreasonable hurdles, but --

4 MS. VELEZ: And thank you, Your Honor. We welcome the
5 opportunity to find some case law and submit on it. We
6 understand that this has been admitted now.

7 THE COURT: We can revisit later.

8 MS. VELEZ: And admitted just for Corcoran at the
9 moment. Understood, your Honor.

10 Thank you so much.

11 BY MS. VELEZ:

12 Q. Dr. Gothard, are you confident that HB 233 --

13 THE COURT: And let me say, we addressed this earlier
14 differently than Mr. Levesque made in his motion. It's
15 different than if you've authenticated, This is my website, and
16 there's statements on my website in quotes because either I've
17 made the statement or I've allowed it to be on there and adopted
18 it because I'm a State representative. I find that much
19 different than somebody else randomly puts a statement of mine
20 that I'm not regulating and otherwise potentially adopting in
21 any article.

22 That means anything that's ever reported in any source
23 of the news automatically comes in evidence, and that's just --
24 that would turn the hearsay rule and exceptions on its head.

25 MS. VELEZ: Understood, Your Honor.

1 BY MS. VELEZ:

2 Q. Dr. Gothard, with regard to just those two quotes from
3 former Commissioner Corcoran, did they cause any fear or concern
4 on the part of UFF?

5 A. Absolutely. Because they indicated what his intention was
6 regarding concepts that the Governor and his supporters disagree
7 with and how anyone who teaches or researches or discusses those
8 concepts on a higher-education campus may be targeted and
9 retaliated against.

10 Q. Dr. Gothard, are you confident that HB 233 was designed to
11 target and suppress certain viewpoints amongst UFF's members?

12 A. Yes.

13 Q. How confident are you?

14 A. Very confident.

15 Q. Do you believe the State, when and if they claim at this
16 trial, that HB 233 is actually about protecting everyone's
17 rights under the First Amendment, regardless of their
18 viewpoints?

19 A. No.

20 Q. And what are you basing that on?

21 THE COURT: Let me also add one other qualification.
22 I'm sorry. There is a bunch of layers here, and it's the way
23 y'all are doing this as well.

24 There's a difference between when you ask him what he
25 personally -- if he sees something and it had an effect on him,

1 that's different because then it's not being -- well, then it's
2 he can offer it, its effect, potentially, on him, and why he's
3 taking actions, whether the statement is true or not.

4 But bringing in the evidence as substantive evidence
5 otherwise is why I'm going through this process.

6 But go ahead.

7 BY MS. VELEZ:

8 Q. On what basis do you disagree with that assertion of
9 HB 233's purpose?

10 A. What was the assertion again? I lost the --

11 Q. That HB 233 is purported to actually be about protecting
12 everyone's rights under the First Amendment, regardless of
13 viewpoints.

14 A. So, no, I don't agree with that. And the reason is because
15 of both the statements that have been made around HB 233 and the
16 intention of both the Governor, the sponsors of the bill, and
17 those who support it, but also because of the structure of
18 HB 233, particularly in the antishielding portion where it's
19 talking about ideas that you would find unwelcomed, disagreeable
20 or uncomfortable.

21 There's clearly a targeting of some type there. And for
22 that reason, it's clear that some viewpoints are welcomed and
23 other viewpoints are not. And this is exacerbated by
24 legislation that has followed since then that is connected to
25 and builds upon the provisions that we are challenging within

1 HB 233.

2 MS. VELEZ: Thank you very much, Doctor.

3 THE COURT: Help me to understand. I've asked some of
4 the other witnesses this.

5 For the life of me, unless you're talking about I
6 think there is going to be selective enforcement because of the
7 motivation of those that are enforcing it or selective
8 enforcement because of the ambiguity or the vagueness of the
9 provision, I don't understand how that a liberal student at New
10 College could not avail themselves of this provision.

11 So I think it's a different question, but we think
12 it's going to be weaponized, and we think -- and you've already
13 talked about anticipatory obedience and other examples of that.
14 Familiar with the concept, familiar with the German concept,
15 but -- and I will not use the German phrase for the benefit of
16 the court reporter at this time.

17 THE COURT REPORTER: Thank you.

18 THE COURT: But I don't -- and so I understand that
19 there's this other layer to it. But help me to understand why
20 a, quote, liberal, if we are going to use these sort of
21 descriptors, student couldn't record a conservative professor
22 that they just -- the new faculty hired at New College, or why a
23 liberal student can't initiate the complaint process against a
24 conservative professor that shuts them down when they're talking
25 on point about the topic being discussed in an appropriate

1 manner.

2 I don't understand how this somehow -- a law can --
3 you can hope that it's only used, and your wish can be, by
4 somebody -- that it will only be used by one side. But if the
5 law permits both sides to use it, I just don't understand why
6 this can't be used both ways. It doesn't mean they make it
7 constitutional. But what I don't get is how it's a written --
8 is written as a one-sided provision.

9 THE WITNESS: So I think what we would say is that,
10 theoretically, it could be used in the fashion that you're
11 describing. But we do believe there would be selective
12 enforcement, as the enforcement mechanisms for these go back to
13 appointees directly from Governor DeSantis and individuals who
14 have made statements of how they intend for the law to be used.

15 THE COURT: So the answer isn't that as written it
16 only applies one way. It's that as structured and as the
17 structure of the system, Judge, which I've previously explained
18 works, that's why we think it's only going to be a one-way
19 street?

20 THE WITNESS: Yes.

21 THE COURT: I understand.

22 MS. VELEZ: I don't have anything further for
23 Dr. Gothard at this time. I'll pass the witness.

24 THE COURT: Mr. Levesque?

25 Let me pause here and ask the lawyers -- and you can

1 tell me later -- it's my understanding that the Board of
2 Governors -- which is a defendant in this case; correct?

3 MR. LEVESQUE: It is.

4 MR. WERMUTH: Yes.

5 THE COURT: -- deals with substantiated student
6 complaints, and it's up to the Board of Trustees and the Board
7 of Governors to determine whether complaints under these
8 provisions ultimately are substantiated or not; is that not
9 correct?

10 And you can address that later. That was not
11 requiring an immediate response, but --

12 MR. LEVESQUE: I'm happy to address it now or later.

13 THE COURT: Sure.

14 MR. LEVESQUE: My understanding is on those particular
15 issues that deal with individual professors and individual
16 students that those -- that authority to take on that
17 responsibility has all been delegated down to the universities,
18 and it's the universities that deal with those issues.

19 I believe it's the -- one of the first rules in the
20 Board of Governors 1.0 something. But we could -- to the extent
21 that Your Honor has requested, we can provide a more fulsome
22 response on that particular issue.

23 THE COURT: Y'all just need to be prepared, both
24 sides, to identify, because I've read something -- obviously,
25 the record is voluminous -- that seems to suggest something to

1 the contrary. So that's why I asked, but...

2 CROSS-EXAMINATION

3 BY MR. LEVESQUE:

4 Q. Dr. Gothard, good afternoon.

5 A. Good afternoon.

6 Q. Good to see you again.

7 You're an English professor; correct?

8 A. English instructor, yes.

9 Q. And you're employed by Florida Atlantic University?

10 A. I am.

11 Q. And you're not here as the representative for Florida
12 Atlantic University, are you?

13 A. No, I'm not.

14 Q. You are here as the president of the United Faculty of
15 Florida; correct?

16 A. That's correct.

17 Q. And United Faculty of Florida is part of the Florida
18 Education Association; isn't that true?

19 A. That's true.

20 Q. And as president of UFF, your primary duties are to
21 represent UFF's interests as a statewide organization to elected
22 members of the Florida Legislature; correct?

23 A. That is one of my duties, yes.

24 Q. Is that one of your primary duties?

25 A. It's one of my most important duties.

1 Q. And in 2019, UFF opposed legislation to create the survey;
2 correct?

3 A. That is correct.

4 Q. And they also opposed similar legislation in 2020; isn't
5 that true?

6 A. That's true.

7 Q. I'd like to talk a little bit about the shielding
8 provisions first.

9 You would agree that House Bill 233 imposes a duty on the
10 Board of Governors and their universities and the Board of
11 Education and their colleges not to shield students from ideas
12 that make them uncomfortable, unwelcomed, disagreeable, or
13 offensive; correct?

14 A. When you say "them," you mean the students, the ideas?

15 Q. Whoever might find those -- whether it's the students,
16 whether it's the faculty, whether it's the staff, whoever
17 might -- whoever is a part of that university community or
18 college community that might find the ideas uncomfortable,
19 unwelcomed, disagreeable, or offensive.

20 A. Yes.

21 Q. And you also agree that individual higher-education
22 institutions may adopt policies on shielding; correct?

23 A. Yes.

24 Q. And some of those institutions have adopted policies on
25 shielding, have they not?

1 A. I believe so.

2 Q. And I want to be clear, at the time of your deposition, no
3 one had instructed you that you need to include material in your
4 curriculum as a result of House Bill 233; isn't that true?

5 A. That is true.

6 Q. And did I understand that some of your concerns with House
7 Bill 233 was that it did not provide guidance on the
8 antishielding provisions?

9 A. Yes.

10 Q. But certainly that's not guidance that has to come from the
11 Board of Governors or has to come from the Board of Education.
12 That could come from the individual institutions; isn't that
13 true?

14 A. It could, though typically I would say it would come from a
15 higher level since the legislation applies to the entire system.
16 So individual interpretation across different institutions that
17 are not commonplace would probably be problematic.

18 Q. And you're not employed by the Board of Governors, are you?

19 A. I am not.

20 Q. Okay. And, of course, because you work at the university,
21 you're definitely not employed by the Board of Education;
22 correct?

23 A. That's correct. Although, I guess, by that distinction, I
24 am employed at a university. So I'm not directly employed by
25 the Board of Governors, but I am in the state university system.

1 Q. But you've actually got a separate Board of Trustees that
2 acts as -- of the Board of Trustees for Florida Atlantic
3 University that acts as your employer; correct?

4 A. Yes. That is correct, yes.

5 Q. And if a student has a complaint against you -- and I can't
6 imagine why they would; but if they did, that is a complaint
7 that would work its way up through Florida Atlantic University's
8 administrative processes; correct?

9 A. Typically, yes.

10 Q. And if a student were to try to bring that complaint to the
11 Board of Governors, they're likely to send that back to Florida
12 Atlantic and say, Here, you deal with it; isn't that correct?

13 A. I think it would depend on what the nature of the complaint
14 is.

15 Q. But you would agree that nothing in the text of House Bill
16 233 changes that complaint process at all, does it?

17 A. I'm not sure if I would agree with that just because the
18 language around the antishielding in particular does name that
19 the Board of Governors and the Board of Education also cannot
20 shield.

21 So if a student were to bring a complaint to the Board of
22 Governors because of that language, I think it's theoretically
23 possible that they may want to handle it directly.

24 Q. The Board of Governors and the Board of Education adopt
25 broad policies that govern the entire university system;

1 correct?

2 A. Typically, yes.

3 Q. They generally don't involve themselves in the day-to-day
4 minutiae of a professor's behavior in a classroom on a
5 day-to-day basis; wouldn't you agree with that?

6 A. I would agree that they generally don't, but I'm not sure
7 that they're forbidden from doing so or limited in doing so.

8 Q. At this point in time nobody has -- nobody from the Board
9 of Governors has attempted to discipline you for a violation of
10 House Bill 233; correct?

11 A. No, they have not.

12 Q. And you're not aware of the Board of Governors or the Board
13 of Education attempting to discipline anyone for a violation of
14 House Bill 233 at this time; are you?

15 A. No, I'm not. Not directly, no.

16 Q. Now, one of the things that you reference -- and I'm going
17 to shift gears now, and we're going to talk a little bit about
18 the recording provision.

19 One of the things that you referenced was a secret
20 recording. Nothing in House Bill 233 expressly says that the
21 student has a right to secretly record, does it?

22 A. No. It does not.

23 The "secret" term is what we have used to differentiate,
24 especially for our faculty, the idea that there has been a
25 carve-out from two-party consent and to distinguish from past

1 practice where, historically, if a student wanted to record the
2 course, they would need to come ask for the permission of the
3 professor and they would need to discuss the sort of best
4 practices for doing that.

5 Q. And when you talk about a carve-out from the two-party
6 consent statute, are you aware that at least Representative
7 Roach, in discussing that particular provision, said that the
8 law is unsettled on whether a student has a right of privacy in
9 a classroom?

10 A. I am vaguely aware that the representative said that, yes.

11 Q. And you certainly agree that institutions can adopt
12 policies that govern the recording provisions; correct?

13 A. Yes.

14 MR. LEVESQUE: If we could pull up Plaintiffs' Exhibit
15 83.

16 And if we could scroll down.

17 There. Go back up.

18 There. And if we can blow up the paragraph that has
19 "a class lecture."

20 BY MR. LEVESQUE:

21 Q. Are you able to read that, Professor?

22 A. This one in the middle?

23 Q. Yes, sir.

24 A. Yes, I am able to read it.

25 Q. And there -- one of the criticisms of House Bill 233 that

1 you had was "class lecture" was not defined.

2 Did I understand that correctly?

3 A. That's correct, yes. I was saying that a class lecture is
4 not defined in the text of the law.

5 MR. LEVESQUE: And I'm getting ahead of myself a
6 little bit. If we can go back to the original email.

7 BY MR. LEVESQUE:

8 Q. Do you know who Bill Mallowney is?

9 A. Not personally, but, I mean, I can read on the screen what
10 it says he is.

11 Q. And based upon your ability to read a document, who do you
12 understand Mr. Mallowney to be?

13 A. Well, this says he is the vice president for policy and
14 general counsel at Valencia College.

15 MR. LEVESQUE: And if we could scroll down a little
16 bit.

17 BY MR. LEVESQUE:

18 Q. I think earlier you indicated that you were aware that some
19 of the colleges or some of the institutions had got together and
20 talked about putting together a model policy or developing some
21 sort of policy to help guide on the recording provisions.

22 Did I understand that correctly?

23 A. Yes, you did.

24 Q. Have you seen this guidance that is presented here before?

25 A. I believe I have, yes.

1 MR. LEVESQUE: And then if we could go back to that
2 middle section of class -- that starts off with "a class
3 lecture."

4 BY MR. LEVESQUE:

5 Q. And there they provide a definition of class lecture; do
6 they not.

7 A. They do in this paragraph, yes.

8 Q. And then if you skip down two sentences, they also define
9 what a class lecture is not.

10 Do you see that?

11 A. The -- okay. Yes.

12 Q. And so a class lecture excludes: *Lab sessions, student*
13 *presentations, class discussions, except when incidental to or*
14 *incorporated within a class lecture, clinical presentations such*
15 *as patient history, academic exercises involving student*
16 *participation, test or examination administrations, field trips,*
17 *private conversations between students.*

18 Those are all things that are excluded from the definition
19 of class lecture; correct?

20 A. According to this document, yes.

21 Q. And I think one of the --

22 THE COURT: Well, let me ask just so I understand,
23 because I don't think I misapprehend what either one of you are
24 saying.

25 Neither one of you are saying that this is the

1 definition that somehow I'm bound by or anybody is bound by.
2 This is what one university -- one community college, Valencia,
3 has said, This is the definition we're going to go with; right?

4 MR. LEVESQUE: Yes, Your Honor, but to the extent that
5 there's an argument that the statute is vague, I think you will
6 hear other testimony that it's not just Valencia College that is
7 adopting some of these policies. There are lots of institutions
8 that are providing guidance to their professors on the recording
9 provision.

10 THE COURT: So because I try to come up with a way to
11 comply with something that doesn't define anything, because
12 we've got to give our teachers some guidance, that renders
13 something not vague if we feel like we can define it, even if
14 our definition may not be what was envisioned by the legislature
15 or what -- I understand how the Board of Governors and its
16 responsibilities -- if they delegate to somebody else, here's
17 what we need you to do, put meat on the bones, and I
18 understand -- we have administrative rules, for example; right?

19 I understand how that works, but -- and this is not
20 now -- you don't have to tell me. You got to explain to me
21 legally why the fact that somebody says, I got to figure out
22 what to do with it, so I'm going to provide a definition -- why
23 does the fact that I'm going to create a definition that others
24 may disagree with, or the Florida Legislature may disagree with,
25 Board of Governors may disagree with, why does that make

1 something any less vague? I was --

2 MR. LEVESQUE: We'll be happy to address that in our
3 papers or in argument.

4 THE COURT: Okay. And while you're doing that, also I
5 wanted to give y'all what I was referring to earlier.

6 Whether or not I've read it here, it's just because if
7 we read the regulations, the Board of Governors and these --
8 this law says it doesn't have to be an exhibit, as Mr. Levesque
9 has thoughtfully pointed out before.

10 Regulation 1.001 contemplates student complaints with
11 failure to comply with state law, which would certainly include
12 HB 233, which talks about not complying with state law, which is
13 why we're going to allow you to take audio recordings and so
14 forth, that you can present this to the Board of Governors if
15 you're -- if you've gone through the process on campus --

16 And if you click on the state university system for
17 Florida, the Board of Governors assistance for solving problems
18 it reads, quote: *Students may also submit a complaint form to*
19 *the Office of the Board of Governors if the university is not*
20 *complying with the state law* is the directive.

21 So we don't have to flesh this out now, but this idea
22 that the Board of Governors is not involved in or is completely
23 disconnected from ensuring that a student complaint that the
24 university is not complying with the state law, that there's
25 some disconnect, that ain't what their own regulation says, so

1 y'all are going to have to tell me why that doesn't apply; okay?

2 MR. LEVESQUE: Will do.

3 BY MR. LEVESQUE:

4 Q. And I believe you mentioned some challenges that the
5 shielding provision presents for professors who use the Socratic
6 method. But the Socratic method, as you're probably familiar
7 with, is a question-and-answer-type format. It's not a -- so it
8 would be more like a discussion format, which is clearly
9 excepted from the definition of class lecture here. Wouldn't
10 you agree?

11 A. I -- if I'm understanding your question correctly, I
12 believe I was referring to problems with the Socratic method as
13 they relate to the recording provision and not necessarily to
14 the shielding provision. But did I misunderstand?

15 Q. And I may have misspoke.

16 A. Okay.

17 Q. As it relates to the recording provision and what
18 constitutes a class lecture, the Socratic method would clearly,
19 based upon this definition that's proffered, clearly be excluded
20 from the definition of class lecture, wouldn't it?

21 A. It would, though I think one of the questions we consider
22 at UFF is an institutional complaint is only one way a recording
23 could be used. A recording can also be used in civil and
24 criminal action against a faculty member. And we're not
25 entirely sure if this definition would hold up or have a valid

1 application in another context.

2 Q. But if -- if it's not a recording of the class lecture, it
3 would violate -- at least it would not comport with this rule
4 that says this is what's permitted; correct?

5 A. With this rule and this definition, that seems accurate,
6 yes.

7 Q. And then I'm going to draw your attention to the last
8 sentence in that paragraph where it says: *A recording that*
9 *personally identifies a student who has not consented to being*
10 *recorded will not be recognized as a class lecture for these*
11 *purposes and may be subject to other institutional policies.*

12 Are you aware that all of the institutions, both colleges
13 and universities, adopt student codes of conduct?

14 A. I am aware of that, yes.

15 Q. And haven't some those institutions also adopted policies
16 that give guidance to students on what their rights and their
17 obligations are if they do record?

18 A. My understanding is, yes, but I certainly -- I have not
19 personally seen all of those policies.

20 Q. But, certainly, if a student violates the recording policy,
21 there's a mechanism for the university to discipline that
22 student, isn't there?

23 A. I would assume so, yes.

24 THE COURT: While you're looking at your next
25 question, I want to correct something. I had two -- I'm trying

1 to have split screens. 1.001 is the delegation provision that
2 y'all were talking about.

3 The other language that I was talking about,
4 exhaustion, comes directly from the complaint form issued by the
5 Board of Governors. So I was conflating two different documents
6 because I had them both up on my screen at the same time, and I
7 apologize. So when I -- I just wanted to correct my own
8 mistake.

9 MR. LEVESQUE: I appreciate that correction,
10 Your Honor, because when you said the rule, I was thinking, Oh,
11 man, that's the one that I was thinking of, and I don't remember
12 that in the rules, so I appreciate that.

13 THE COURT: And that's -- that rule is posted next to
14 the complaint form in the hyperlink to the complaint form and
15 the language that's on the complaint form. But the language
16 that I was referring to is actually the language directly off
17 the student complaint form issued by the state university system
18 of the Florida Board of Governors.

19 Separate which says the -- give me a second.

20 Anyway, there's language connected -- oh, I'm sorry.
21 Yeah, it says, in the middle of the complaint form issued by the
22 Board of Governors: *However, after students exhausted all*
23 *internal university processes, you can file this with the Board*
24 *of Governors.*

25 But those are two different things. So, anyway, I

1 wanted to correct that. I didn't want y'all hunting for
2 something that didn't exist.

3 MR. LEVESQUE: I appreciate that.

4 BY MR. LEVESQUE:

5 Q. Dr. Gothard, you identified several of the harms that
6 result from the passage of House Bill 233, and I wanted to make
7 sure I understand the harms that you link to that.

8 One of them is the uncertainty for professors from the
9 antishielding provisions as to whether -- how they're supposed
10 to conduct themselves in the classroom so that they don't run
11 afoul of that provision.

12 Is that one of the harms that you identified?

13 A. Yes. And also, you know, selection of reading materials,
14 assignments, things of that nature would -- we would lump into,
15 you know, the category of how they conduct themselves in a
16 classroom.

17 Q. And then when we're talking about the harms that result, I
18 mean, that creates some anxiety of not knowing if you're going
19 to comply with the law, but the real harm that you're worried
20 about is whether the professor's going to be punished, whether
21 the institution's going to be punished, or whether there's going
22 to be cuts in funding or cuts in programs based upon the actions
23 of the Governor and the legislature; correct?

24 A. Correct. And then the chilling effect that comes from
25 those anxieties.

1 Q. Okay. And to be clear, cuts in funding, cuts in programs,
2 those aren't in the text of House Bill 233? Those are contained
3 in the statements of the Governor that you referenced and some
4 of the legislators that you referenced and some of the members
5 of the Board of Governors that you've referenced; correct?

6 A. Yes, that would be correct.

7 Q. Now, in your deposition -- well, strike that.

8 One of the members of the Board of Governors that you have
9 identified is Mr. Corcoran, Commissioner Corcoran.

10 You recognize that he's not in the legislature anymore;
11 correct?

12 A. That is correct.

13 Q. And at the time House Bill 233 passed, he wasn't in the
14 legislature at all; correct?

15 A. That's correct. He was the Commissioner of Education.

16 Q. And so, at least as it relates to the legislature, having
17 to enact another law, that's not something that he actually has
18 any authority to do or any role in in terms of the legislature's
19 adoption of a budget?

20 A. I guess that depends on how you define "any role." I mean,
21 he -- Mr. Corcoran is a member of the Board of Governors, and
22 the Board of Governors does communicate regularly with the
23 legislature about budgetary allocations for institutions, so I
24 wouldn't say he has no role, but he is -- you know, I recognize
25 he is not an elected legislator at this time who would be

1 involved at that level of the process.

2 Q. When you say the Board of Governors communicates regularly
3 with the legislature related to those budgetary processes, I
4 guess who -- who in the Board of Governors -- I mean, what is
5 your basis for making that statement?

6 A. Well, there are a number of ways that we get information
7 about what the Board of Governors is doing. One of those that
8 I'm thinking of right now is reports that come to faculty
9 senates around the state where there will be a report, you know,
10 whether from the institutional president, vice president,
11 provost, board of trustees, you know, various reports that come
12 through there saying what the Board of Governors is working for
13 and what they're advocating for.

14 So our understanding is that when it comes to conversations
15 about budgetary allocations for the institutions that are under
16 the Board of Governors' supervision, that they have direct
17 conversations with members of the legislature about what those
18 allocations should look like, what the spending priorities are
19 for various programs and initiatives that the Board of Governors
20 would like to see funded, and that those conversations also
21 include local leaders of institutions who are asking for funding
22 for either ongoing or new initiatives.

23 Q. But you're not aware whether Commissioner Corcoran is
24 having those -- I'm sorry -- Board Member Corcoran is having
25 those conversations; are you?

1 A. I'm not aware of him specifically having those
2 conversations, but I feel like it's reasonable to assume that he
3 is a part of those discussions in his official capacity as a
4 Board of Governors member.

5 Q. And how many members of the Board of Governors are there?

6 A. I believe it's 12. Is that right?

7 Q. I'll offer to you that there are 17.

8 A. Seventeen. Okay.

9 Q. Do you know if Mr. Corcoran is the chair of the Board of
10 Governors?

11 A. He is not the chair.

12 Q. Wouldn't it make sense for the chair to be the one having
13 those conversations?

14 A. It would, though not necessarily by himself. I mean, I
15 don't -- I don't think it would be fair to call Board of
16 Governors Member Corcoran only a Board of Governors member
17 because of his previous role as the Commissioner of Education.

18 Q. And the Board of Governors also has, for lack of a better
19 term, a chief administrative officer in the form of a
20 chancellor, does it not?

21 A. That's correct.

22 Q. And who's the current chancellor?

23 A. Former Senator Rodrigues.

24 Q. And Senator Rodrigues is certainly a member of the
25 legislature, both in the House and the Senate; correct?

1 A. Yes.

2 Q. And that's actually his job. He's compensated by the Board
3 of Governors. Wouldn't it make more sense that he's probably
4 the one having those conversations?

5 MS. VELEZ: Objection.

6 I'm sorry. Objection, Your Honor. I think this is
7 calling for rank speculation on the part of Dr. Gothard.

8 MR. LEVESQUE: Your Honor, I'll accept the objection
9 as to rank speculation if they'll make the same objection for
10 his statement about Commissioner Corcoran having conversations.

11 THE COURT: Overruled.

12 THE WITNESS: So what was the question again? I'm
13 sorry.

14 BY MR. LEVESQUE:

15 Q. Wouldn't it make more sense for Chancellor Rodrigues, who
16 plays that role of the chancellor, is, for lack of a better
17 term, the president the Board of Governors -- and I'm
18 introducing corporate terms to the academic world, which I know
19 is dangerous, but wouldn't it make more sense for him to be the
20 one having those instead of an individual board member that's
21 just one of 17 members?

22 A. I think it makes sense that he would be having those
23 conversations, but I don't see why any other member of the Board
24 of Governors, particularly with commissioner -- or former
25 Commissioner Corcoran's background and influence, that he would

1 not also be part of those conversations.

2 Q. Now, I believe you had indicated that Representative Roach
3 was one of the -- the sponsor of the bill was one of the members
4 whose statements you were concerned with that caused you and
5 your members to have some fear about potential effects; is that
6 correct?

7 A. Yes. He's one of them.

8 Q. Are there any other members in the legislature that you've
9 disclosed in this litigation that you can identify that are
10 currently serving in the legislature, other than
11 Representative Roach, that you would say their statement has
12 caused me fear?

13 And to be clear, I'm not asking for the statement. I'm
14 just asking if there are any other members.

15 A. I'm trying to think. Because the other statement I'm
16 thinking of is someone who's no longer in the legislature,
17 though I fear is not gone forever.

18 I would say that's correct. There's -- I can't think of
19 anyone else currently serving in the legislature.

20 Q. And related to the use of -- or related to targeting
21 programs, you believe that could result from complaints arising
22 from the antishielding or the recording provisions, but you
23 also, if I understood correctly, believe that that could come up
24 in the context of use of the survey provision; is that correct?

25 A. That's correct.

1 Q. But you would agree that for that to happen, the
2 legislature, if they're going to reduce funding to a program or
3 cut the university's budget, that can only come through the
4 budgetary process and the legislature would have to pass a law
5 to get to that point; correct?

6 A. For the overall budget, yes.

7 My understanding is that for other funding initiatives, for
8 example, like -- trying to remember the exact name of this one,
9 but, for instance, like establishing a certain school or program
10 that would be outside of the main budget, my understanding is
11 Governor DeSantis could choose to veto those particular
12 projects.

13 Q. At the time of your deposition, you were not aware of any
14 examples of where a faculty member being accused of violating
15 someone's First Amendment rights and having their reputation
16 destroyed, but still successfully defended against that type of
17 complaint -- you weren't aware of any circumstances where that
18 had occurred?

19 A. That's correct.

20 Q. Dr. Gothard, one of the areas -- and I'd like to transition
21 to discussion of the survey now.

22 One of the areas that you -- or one of the things that I
23 believe you testified to is that UFF had informed its members
24 that they should not take the survey.

25 Did I understand that testimony correctly?

1 A. That's correct. We encouraged our members to boycott the
2 survey.

3 Q. And did I understand that you indicated that that was only
4 emailed to your members?

5 A. It was first emailed to our members, and then we released
6 it as a press release.

7 Q. So to the extent that it was released as a press release,
8 in the press release, do you recall if you advocated that not
9 just faculty, but faculty and students should not take the
10 survey?

11 A. I believe we mentioned that it was our position that no one
12 in the higher-education community should participate in the
13 survey.

14 Q. And to the extent that you released that to media outlets,
15 that was one of those news stories that got widely reported, was
16 it not?

17 A. I believe it was pretty widely reported, yes.

18 Q. So even in those areas where you don't have a presence,
19 those faculty, those students in those areas probably still were
20 able to, you know, be aware of UFF's position on that issue,
21 weren't they?

22 A. Potentially.

23 Q. And you agree that House Bill 233 does not require you, as
24 you sit here today, to take a survey?

25 A. I would agree with that, yes.

1 Q. And you agree that the survey that was administered in 2022
2 was voluntary; correct?

3 A. That particular survey was voluntary, yes.

4 Q. And it was anonymous as well; correct?

5 A. It was claimed to be anonymous, though we have concerns
6 about the security of the survey.

7 Q. Are you aware of any instance where the security of the
8 survey was pierced and someone was able to identify an
9 individual who completed the survey?

10 A. I am not, but I'm not sure how I would be aware of that
11 either.

12 Q. When someone was completing the survey, I believe you
13 indicated that you had clicked on it but may not have submitted.

14 Did you have to enter in your name at all when you were
15 taking the survey?

16 A. You did not, though the survey link did come through
17 university email addresses.

18 Q. Did you have to enter an employee ID number or a student ID
19 number?

20 A. Not that I'm aware of.

21 Q. When you were looking through the survey, did you see any
22 questions that asked about Republicans and Democrats?

23 A. I believe there were questions in the earlier drafts that
24 we saw that did ask that. I would need to see the survey again
25 to be certain if the final questions asked that or not.

1 Q. And going back to UFF's advocacy for not completing the
2 survey, one of the stated reasons was that Florida's government
3 has no right to know the thoughts, feelings or political or
4 religious beliefs of anyone, including the higher-education
5 community.

6 Isn't that one of the things that was included in your
7 statement to your members and to the press?

8 A. I believe that's correct, yes.

9 Q. You also agree that if people want to tell their government
10 how they feel, they should be able to do so; correct?

11 A. That's correct.

12 Q. Now, Dr. Gothard, are you aware that several of the
13 universities conduct diversity, equity and inclusion surveys?

14 A. I'm aware that universities do engage in diversity, equity
15 and inclusion surveys, though I could not name any off the top
16 of my head.

17 MR. LEVESQUE: If we could pull up Defendants' Exhibit
18 21.

19 BY MR. LEVESQUE:

20 Q. And while we're waiting for that exhibit to come up, do you
21 believe it's appropriate for a university to ask a student about
22 their campus experience?

23 A. Could you define "campus experience"?

24 Q. How they're enjoying their experience in higher education,
25 just sort of broadly.

1 A. In general, I -- without seeing a specific example,
2 generally I would say that's probably reasonable.

3 Q. Do you think it's appropriate for a university to ask the
4 students how they feel about university housing?

5 A. Yeah. Again, in general, sure.

6 Q. You feel it's appropriate for a university to ask about
7 whether the students feel included in the university community?

8 A. Sure.

9 Q. And as a basis for that inclusion, do you think it's
10 appropriate for the university to ask if they feel included or
11 excluded in that community based upon matters of race?

12 A. How would you define appropriate in that case?

13 Q. Well, they're offering a voluntary anonymous survey and
14 asking students, you know, is -- based upon your experience, do
15 you feel that you're being included or excluded in the
16 activities based upon race?

17 A. I'm going to say potentially. And part of that is because
18 when you start talking to students or faculty about their race
19 and the impact their race can have on their experience,
20 especially given the current climate around higher education, I
21 think it would depend on the relationship that students have
22 with their administration, what sort of tensions might be there,
23 what sorts of assurances the administration has made about, you
24 know, how the information will be used, or how, you know,
25 student privacy would be protected.

1 You know, to avoid belaboring this too much, in an ideal
2 situation, where everybody is getting along and everybody trusts
3 each other and, you know, these other factors that we've been
4 discussing around HB 233 don't exist, I would say that's
5 probably okay. But it all gets down to the specifics.

6 Q. Understood. And we'll look at specifics.

7 MR. LEVESQUE: And I believe I had said the wrong
8 number.

9 Can we pull up Defendants' Exhibit 20?

10 When we pull it up, if we can scroll to Question 3.

11 MS. VELEZ: Your Honor, while this is being pulled up,
12 I will note that with regard to Defendants' Exhibit 20,
13 plaintiffs have standing objections as to not only relevance and
14 hearsay, but also to authenticity, Your Honor, under Rule
15 901(f).

16 MR. LEVESQUE: And, Your Honor, I'm not going to ask
17 to admit it at this time.

18 THE COURT: I understand.

19 MS. VELEZ: And, Your Honor, I would say that our
20 objections as to relevance will also go to any questions
21 contained on this survey.

22 THE COURT: I don't know what his question is going to
23 be about the document yet, so --

24 MS. VELEZ: Understood, Your Honor.

25 THE COURT: -- hold your fire.

1 MR. LEVESQUE: Actually, if we can scroll to
2 Question 4.

3 There we go.

4 BY MR. LEVESQUE:

5 Q. Dr. Gothard, I'll represent to you this was a survey that
6 was conducted by the Florida International University to their
7 students recently, in the last two years.

8 So from the standpoint of Question 4, it asks: *How*
9 *comfortable are you interacting with the following people?*

10 And then it asks the survey respondents -- and this was a
11 survey, so you understand, that was given to both faculty,
12 staff, and students. They asked how comfortable they were
13 interacting with the following people: *Based upon racial and*
14 *ethnic identity, socioeconomic background, sexual orientation,*
15 *gender, English not as their native language, religious*
16 *background, disability, undocumented immigrants, countries other*
17 *than your own, people with a different political affiliation,*
18 *philosophy, or view, or who are significantly older or younger*
19 *than you.*

20 Are there any of those questions that you believe are
21 inappropriate for a university to ask?

22 A. So when was this survey given?

23 Q. I believe this particular survey -- and I apologize. It
24 would have been in the last two years. I believe it was
25 administered in 2021.

1 A. So I'll have to admit I've never seen this survey. I don't
2 know any of the context around it. So the caveats that I gave
3 before about all the details I don't have. So I don't know the
4 circumstances. I don't know how this was developed. I don't
5 know who was involved. I don't know if this was, you know, in
6 collaboration with faculty who work in DEI, or how these survey
7 results were going to be used. So I really -- I don't know how
8 much of value I can share in response to this survey.

9 But I suppose I would say, you know -- yeah. I don't know
10 how to answer that without knowing how the results were going to
11 be used and what sort of assurances faculty and students were
12 given about whether this would be anonymous or what the outcomes
13 would be. Like, is this -- was this related to a program? Or,
14 as you were saying before, is this about, like, living on
15 campus? Is there any further information you can provide?

16 Q. Well, let me offer this. What if there was no -- what if
17 they gave assurances that it would be voluntary and anonymous;
18 they gave assurances that they would publish the results, but
19 they didn't say, This is what we are going to do with the
20 survey? What if that's -- that's the framework that we're in?

21 A. Did all students receive this or just students of color or
22 a particular --

23 Q. This was --

24 A. -- orientation --

25 Q. -- went to the entire student body for Florida

1 International University, the entire faculty and the entire
2 staff.

3 A. Personally, with what I know now, I would be uncomfortable
4 distributing this to the student body or to faculty, just based
5 on what I know currently.

6 Q. But as a member of UFF, I'll represent to you that this is
7 not the only diversity, equity, and inclusion survey and that
8 there were others that asked similar questions that went out and
9 some even more intrusive.

10 As a member of UFF, you have never objected to a university
11 based upon their diversity, equity, and inclusion survey, have
12 you?

13 A. I have not, though I am not typically aware of those
14 surveys in the way that I'm aware of HB 233 and that mandated
15 survey.

16 Typically a local chapter would take that on. And if they
17 had a concern, and they wanted support from UFF as a statewide
18 organization, they would then communicate with me about it.

19 Q. Has any local chapter every approached UFF about these
20 diversity, equity, and inclusion surveys?

21 A. Not that I'm currently aware of.

22 MR. LEVESQUE: If I could have one moment, Your Honor?

23 THE COURT: Sure.

24 (Pause in proceedings.)

25 MR. LEVESQUE: May I resume, Your Honor?

1 THE COURT: Yes.

2 BY MR. LEVESQUE:

3 Q. Just one or two more questions, sir.

4 THE COURT: Are you moving on to another topic?

5 MR. LEVESQUE: Pardon?

6 THE COURT: Are you moving on to another --

7 MR. LEVESQUE: Yes. We're moving off of the DEI
8 survey. We are still on the topic of surveys and topic of
9 surveys in the legislative process.

10 BY MR. LEVESQUE:

11 Q. I believe you testified in the legislative process that
12 there was an effort to amend House Bill 233 to address concerns
13 related to this survey and its voluntary, anonymous nature.

14 Did I understand that testimony correctly?

15 A. Yes, that is what I recall.

16 Q. To the best of your recollection, do you know if an
17 amendment was ever actually filed in the system that the members
18 would have even had the opportunity to vote on as part of that
19 process?

20 A. So it is my understanding that an amendment was not filed.
21 However, that does not mean that members did not also hear about
22 a potential amendment and participate in that process.

23 Q. But at least as far as the concerns of the members, they
24 never rose to the level of such that they felt it was good to
25 propose that idea to the body; correct?

1 A. I believe that's correct, because there was a discussion on
2 the floor about whether an amendment would be considered
3 friendly or unfriendly. And when it was stated that the
4 amendment would be unfriendly, the senator chose not to propose
5 it.

6 Q. And let me transition to another topic.

7 Do I understand correctly that the local chapters for UFF
8 often do surveys of faculty?

9 A. Define "often."

10 Q. Every two to three years.

11 A. I think it changes chapter by chapter. Sometimes they will
12 survey their members about, you know, bargaining issues if
13 collective bargaining is going on. Or, you know, they may
14 survey members about, you know, their feelings about a
15 particular piece of legislation that's moving through the
16 legislature and how they would like the union to react to that.

17 But it would be hard for me to say sort of across the board
18 that they all do the same thing at, you know, the same times.
19 And often those are not, you know, directly reported to me.

20 Q. And one of the things I believe you testified -- and I'm
21 shifting gears again. This is the cleanup phase. I apologize
22 for jumping around.

23 One of the things that you indicated was you had to divert
24 resources based upon House Bill 233's passage. Did I understand
25 that correctly?

1 A. That's correct.

2 Q. And the resources that you had to divert were, essentially,
3 if I understood, your time?

4 A. I didn't think the question was finished. Yes, I said it
5 was my time and staff time.

6 Q. Now, UFF benefits from being a part of the Florida
7 Education Association; correct?

8 A. Benefits in what way?

9 Q. They provide resources when you need resources?

10 A. They do in specific circumstances and agreed-upon fashions.
11 We can't necessarily just call them and get whatever we want
12 whenever we want. But there are benefits that come from that
13 association.

14 Q. And the Florida Education Association did provide you
15 resources as it related to House Bill 233 in the form of staff,
16 did they not?

17 A. Yes. They provided -- the Florida Education Association
18 has a public policy advocacy department, and their -- you know,
19 those staff respond to all of the FEA locals of which UFF is
20 only one, but there are some staff that we were able to
21 communicate and work with there to assist us.

22 Q. And those were staff that provided assistance and support
23 in your lobbying efforts to get House Bill 233 repealed; isn't
24 that true?

25 A. With the bill that we filed to have it repealed, yes --

1 Q. Yes, sir.

2 A. -- they have assisted us with that.

3 Q. And I might have jumped ahead of myself there.

4 It's my understanding that UFF was able to convince
5 Senator Polsky to file legislation to repeal House Bill 233; is
6 that correct?

7 A. Yes, Senator Polsky agreed to file that legislation.

8 Q. And at least at the time of your deposition, you were not
9 able to quantify the value in dollars of resources that were
10 diverted to efforts to address House Bill 233. Do I understand
11 that correctly?

12 A. Yes, I would say that's correct, because we're talking
13 about time. You know, we did try to get -- you know, roughly
14 40 percent of my time had been dedicated and then obviously
15 staff time. But these are -- you know, these are salaried
16 individuals, so it's hard to quantify a specific cost as it
17 relates.

18 And, also, these are sort of ongoing efforts that, you
19 know, pop up consistently in the midst of other issues.

20 I would also add it's not just about -- when we talk about
21 time, it's not just, like, the expenditure of money that I'm
22 paid for my efforts or staff are paid for their efforts, but
23 it's also about distraction. So at the same time that we were
24 trying to handle and get a grip on what was happening with
25 HB 233, we were similarly dealing with fights at local campuses

1 about health and safety requirements. We were dealing with
2 collective bargaining issues and sort of other major activities
3 that we were not able to focus our full efforts on because we
4 were dealing with the fallout and the application and the
5 interpretation of HB 233.

6 Q. Let me ask, because -- I thought I heard you testify
7 earlier that the local UFF chapters are the bargaining agents
8 for the individual institution. Did I understand that
9 correctly?

10 A. In most cases, yes.

11 Q. And what instances are -- is UFF, a statewide chapter, the
12 bargaining entity?

13 A. In some contracts and some collective bargaining
14 agreements, UFF, as the statewide organization, is listed as the
15 bargaining entity. But we will -- in almost all of those
16 situations, we will delegate that authority back to the local
17 chapter.

18 Q. Okay. And wouldn't -- isn't it true that advocacy to state
19 government is one of the primary roles -- I understand it's not
20 the only role, but one of the primary roles of the statewide
21 organization of UFF?

22 A. Yes, though I would clarify it's not that the local
23 chapters don't do anything. Local chapters communicate with
24 their specific local-elected legislators who are in their
25 districts who have their institutions in their districts and

1 talk to them as their local constituents. And then the
2 statewide office will often coordinate, you know, activities at
3 the legislature itself, so testifying before committees, you
4 know, coming to Tallahassee and visiting legislators' offices
5 about important legislative activity.

6 So it's more of a balance of responsibilities where
7 different people have different roles based on their geographic
8 location and, yeah, resources, I guess.

9 Q. And those -- those local chapters -- I think you testified
10 earlier those members, they are also members of UFF. So they're
11 sort of wearing two hats when they go in, the UFF state and the
12 UFF local; correct?

13 A. Kind of. Yeah, that would be a way to think about it,
14 though I think many legislators who are from those areas know
15 the distinction when they see a member who shows up and says,
16 Oh, I'm a faculty member at Lake-Sumter State College, and I
17 would love an opportunity to talk with you about this bill
18 that's going to affect my working and my students' learning
19 conditions.

20 MR. LEVESQUE: Thank you.

21 No further questions, Your Honor.

22 THE COURT: And you may have a follow-up, but here's
23 the question that would actually be helpful to me.

24 Ordinarily, I spend a fraction of my time on my
25 criminal docket. Pretty soon I'm going to spend 95 percent of

1 my time on the criminal docket.

2 So what would help me, from your perspective you
3 testified that you were spending about 40 percent of your time
4 during this extended period of HB 233. How much time did you
5 ordinarily devote to state laws and state initiatives, such as
6 HB 233, prior to its passage? In other words, how did that
7 change your allocation of time?

8 THE WITNESS: So I became UFF president in July of
9 2021.

10 THE COURT: As it was going into effect?

11 THE WITNESS: Right, as it was going into effect. So
12 I was not president for previous legislative sessions.

13 But what I can say is sort of while this was going on,
14 I put as much time into HB 233 by itself as I put into all other
15 legislation combined.

16 THE COURT: So to quantify it, it was a significant
17 diversion as it related to one piece of legislation?

18 THE WITNESS: That's correct.

19 THE COURT: I understand.

20 MR. LEVESQUE: No follow-up questions, Your Honor.

21 MS. VELEZ: Your Honor, I have just two questions.

22 REDIRECT EXAMINATION

23 BY MS. VELEZ:

24 Q. Dr. Gothard, I believe you testified about certain surveys
25 conducted by UFF chapters on campuses. Is that correct?

1 A. Just now?

2 Q. A few moments ago.

3 A. A few moments ago, yes.

4 Q. And just to be clear, those surveys were not conducted by
5 any agent of the State; is that correct?

6 A. That would be correct, yes.

7 Q. And those survey results were not reported to the State?

8 A. The State of Florida?

9 Q. As far as you know?

10 A. As far as I know, no, they were not.

11 Q. And as far as you know, did those surveys pertain in any
12 way to the political ideologies of the members?

13 A. As far as I know, they did not.

14 MS. VELEZ: I don't have anything further, Your Honor.

15 THE COURT: Oh, come on. You've got one follow-up
16 question beyond that; right?

17 I'll ask it.

18 Were any of the surveys that you're aware of
19 accompanied with any threats of punitive action or anti-right
20 rhetoric?

21 THE WITNESS: From UFF?

22 THE COURT: Yes.

23 THE WITNESS: No.

24 THE COURT: In other words, when you disseminated it,
25 were you lambasting people that were intolerant on campus and

1 suggest you were going to start to cut scholarships if we didn't
2 get our act together and be kinder to one another on campus?

3 THE WITNESS: No, absolutely not.

4 THE COURT: Thank you.

5 All right. Let's go ahead and take a -- I'm sorry,
6 yes, sir. You are getting ready to rise.

7 For what purpose does the gentleman from Orlando rise?

8 MR. WERMUTH: I was going to offer our next witness.

9 THE COURT: It's been about an hour and a half. Let's
10 take a quick break for the benefit of the court reporter. We'll
11 do that every hour and a half.

12 Thank you.

13 (Dr. Andrew Gothard exited the courtroom.)

14 (Recess taken at 2:36 PM.)

15 (Resumed at 2:54 PM.)

16 THE COURT: And we've got Mr. Price coming next?

17 MR. WERMUTH: Dr. Price is our next witness, but I
18 have a minor housekeeping issue. I've already discussed it with
19 counsel for the defendants. It's a matter of we have documents
20 where the transcripts are in evidence -- or the videos are in
21 evidence, but the --

22 THE COURT: Consistent with my prior rulings, both
23 come in.

24 MR. WERMUTH: Okay. Both come in. I was going to
25 read off the list.

1 THE COURT: With the limitations and so forth. And
2 y'all just agree on those numbers because at the end we are
3 going to agree on the exhibits consistent with this Court's
4 ruling, so I've just done that so that will be -- you can
5 announce it tomorrow morning if you want, but make sure y'all
6 are on the same page.

7 MR. WERMUTH: Okay. Thank you, Your Honor.

8 So Dr. Price.

9 THE COURT: Dr. Price, come on down.

10 (Dr. David Price entered the witness stand.)

11 THE COURTROOM DEPUTY: Please raise your right hand.

12 **DR. DAVID PRICE, PLAINTIFFS WITNESS, DULY SWORN**

13 THE COURTROOM DEPUTY: Please state your name for the
14 record. Then spell your last name for the record.

15 THE WITNESS: David Price, P-r-i-c-e.

16 THE COURTROOM DEPUTY: Thank you.

17 DIRECT EXAMINATION

18 BY MS. JASRASARIA::

19 Q. Good afternoon, Dr. Price.

20 Can you please introduce yourself to the Court?

21 A. My name is David Price. I teach history and political
22 science at Santa Fe College.

23 Q. Where is Santa Fe College?

24 A. Gainesville, Florida.

25 Q. Is Santa Fe a public or a private college?

1 A. It's a public, largely two-year school, part of the Florida
2 college system.

3 Q. How long have you been a professor of political science and
4 history at Santa Fe College?

5 A. 22 years.

6 Q. Have you also taught at other public Florida institutions?

7 A. I taught for about four years part time early in my career
8 at the University of Florida.

9 Q. Are you a plaintiff in this lawsuit?

10 A. Yes.

11 Q. What do you understand to be the purpose of this
12 litigation?

13 A. The purpose of this litigation is to overturn several
14 provisions of HB 233.

15 Q. Are you familiar with HB 233?

16 A. Yes.

17 Q. How did you first become familiar with the bill?

18 A. As a political science professor and as long-time president
19 of Santa Fe's version of the Faculty Senate, I keep up with
20 state politics quite a bit, and I subscribe to various
21 newsletters about it, and I saw it in those and began to ask
22 questions of our lobbyist and college president. That was how I
23 became aware of it at first.

24 Q. What did you think of the law?

25 A. I dislike any legislative or nonfaculty-driven intrusion

1 into how higher education is conducted. This seemed to be a
2 really big attempt at regulating all manner of interactions
3 between faculty, students, and other university and college
4 employees and students. So it really struck me as something
5 that was inappropriate, and the provisions that are being
6 challenged I felt were completely unnecessary to accomplish any
7 positive good for higher education in Florida.

8 Q. How many courses do you teach each semester, Dr. Price?

9 A. Five, unless I have a release for some kind of
10 administrative duty or I do an overload.

11 Q. Can you give me some examples of courses that you regularly
12 teach?

13 A. I teach American government and the second half of American
14 History, international relations, World History surveys. Those
15 are the courses that I've taught within the last five years.

16 Q. Are there aspects of your courses that could be considered
17 controversial?

18 A. Yes.

19 Q. How so?

20 A. Well, it's hard to teach American government without
21 touching on some of the really hot-button, flashpoint issues in
22 American politics. Other issues of economic development and
23 political ideology, race relations and things like that permeate
24 various history survey courses. I mean, there's something that
25 will strike someone as controversial in pretty much all of the

1 courses that I teach, multiple times -- multiple things.

2 Q. You mentioned that it's nearly impossible to teach those
3 subjects without teaching those types of divisive or hot-button
4 issues.

5 How long have you been teaching those types of issues?

6 A. Ever since I began teaching, and the first semester that I
7 taught a course on my own, not discussion groups as a TA, was
8 1991.

9 Q. And have you ever been concerned about teaching -- that
10 teaching those topics could get you or your school in trouble
11 with the State?

12 A. It was not until HB 233 that I was concerned that teaching
13 topics such as that would get me in trouble with the State.
14 Obviously, some people may not like some of the perspectives
15 that they may be exposed to in the course and it might get me
16 in -- I might, you know, get on their nasty list, but it was
17 really HB 233 that made me fear the State.

18 Q. Do you think that the political majority in Tallahassee
19 approves of teaching the topics that you just mentioned?

20 A. I mean, especially in the wake of the passage of HB 7 and
21 the rhetoric that was used to support the passage of HB 233
22 seemed very much to not like anything that criticized kind of
23 the Norman Rockwell view of America and was incredibly
24 procapitalist. If you weren't teaching that, the legislature
25 seemed to want to rein you in and force you to teach those

1 things.

2 Q. And what do you base that opinion on?

3 A. Well, for example, the ultra procapitalist sentiment. I
4 mean, the fact that whenever they seem to be trying to criticize
5 or state passions about anti-higher-education sentiment among
6 the population, the sponsors of the bill and their supporters
7 use the word "Marxist," which is an ideology opposed to
8 capitalism.

9 Q. HB 233 doesn't explicitly say not to teach the kinds of
10 topics that you're concerned about; is that right?

11 A. There are no specific topics listed in HB 233 that I
12 recall.

13 Q. Let's turn to the specific provisions. Let's talk first
14 about the antishielding provision.

15 When I say "antishielding provisions," do you know what I'm
16 referring to?

17 A. Yes.

18 Q. Is that one of the provisions that you're challenging in
19 this case?

20 A. Yes.

21 MS. JASRASARIA: Andy, could we pull up Joint
22 Exhibit 1 and highlight the antishielding provision language on
23 page 3?

24 BY MS. JASRASARIA::

25 Q. Is this the language you are referring to, Dr. Price?

1 A. Yes.

2 Q. What do you understand this provision to mean?

3 A. My understanding is that it means students can't be
4 protected from ideas or expression that makes them uncomfortable
5 or they find offensive.

6 Q. Do you feel as though the contours of what speech is
7 permitted versus prohibited is -- under HB 233 is clear under
8 this provision of HB 233?

9 A. Not at all. I don't necessarily know, unless a student
10 tells me, what makes them uncomfortable, unwelcome, or that they
11 find offensive or disagreeable.

12 Q. Do you understand these provisions to only apply to the --
13 in your case, Board of Education and your college?

14 A. No. They seem to apply -- they seem to permeate every type
15 of activity that the college does to try to facilitate learning,
16 whether that be a cocurricular activity from the student affairs
17 area or a classroom lecture.

18 Q. Is it possible that these provisions do not apply to
19 faculty or to classrooms?

20 A. I don't see how that's possible. Students are part of the
21 category of person that is supposed to be protected, and what
22 they are supposed to be protected from is not being shielded
23 from uncomfortable, et cetera, offensive expressive activity,
24 and expressive activity is defined in the law here to be -- or
25 to include lecture, which is a classroom technique.

1 Q. Have you ever had a student come to you to tell you that
2 they found something to be uncomfortable, offensive,
3 disagreeable, or unwelcome?

4 A. Yes.

5 Q. Can you say more about that?

6 A. Yes. I used to teach -- when I was covering the Tet
7 Offensive in an American History survey class, I used to show
8 the video clip of the police chief of Saigon putting a gun to
9 the head of a Viet Cong prisoner with his arms behind his back
10 and him blowing him away and the prisoner falling down and the
11 blood spurting up. My point in showing that was to demonstrate
12 how media coverage of the Vietnam War began to show -- began to
13 affect popular opinion of the Vietnam War.

14 After showing that in class one day, I ran into one of the
15 students later in the day, and they asked why I had shown that
16 particularly graphic clip. We talked about it, and it actually
17 really disturbed her to see that execution. So I began to
18 think, Could I make the point with other video that might be
19 less potentially traumatizing? And I eventually did find some.

20 THE COURT: Just out of curiosity -- and it has
21 nothing do with this case -- was it completely lost on the
22 student that the public at the same time had the same reaction,
23 which was kind of the point you were making?

24 THE WITNESS: The student, because she was so
25 disturbed by it, which is why I quit doing it, it blocked her

1 ability to kind of grasp the larger point that I was making,
2 which is, you know, what you're talking about.

3 And if I'm trying to -- even though I think that's the
4 most effective video clip to use to show that, if showing that
5 clip causes the student to miss the point, then --

6 THE COURT: That's why you rethought it.

7 THE WITNESS: Yeah, then it's counterproductive to the
8 goal.

9 THE COURT: That's the same video clip -- there's
10 actually a still image that was --

11 THE WITNESS: Yes, the still is more famous. However,
12 I noticed years ago that *Vietnam: A Television History* actually
13 had the -- about a minute and a half of the video, of them
14 leading the guy up, and after doing some research, I found that
15 at least ABC News aired the last several seconds of that on the
16 nightly news.

17 THE COURT: I'm sorry.

18 MS. JASRASARIA: No.

19 THE COURT: I was interested, and I get to ask.

20 MS. JASRASARIA: It's a good question.

21 THE WITNESS: It's good to be the judge.

22 BY MS. JASRASARIA:

23 Q. Have you recently thought about reintroducing the video?

24 A. You know, one of the first things when it became clearer
25 that the Governor was going to sign HB 233, which, I guess, was

1 never in doubt, that that's something that offended and
2 disturbed students. Will I be out of compliance with this law
3 if I don't start showing that again?

4 Q. And have you actually reintroduced the video?

5 A. The hurricane prevented me from actually showing it.
6 However, I did go dig up access to *Vietnam: A Television*
7 *History*. It was on the PowerPoint slide. The hurricane comes.
8 We close. I have to adjust my material, and I ended up cutting
9 the entirety of the Vietnam War because we had less time to
10 teach, and that seemed to be -- we'd already talked about
11 American interventionism and some problems that it had caused,
12 so I went on to other topics.

13 I regret not teaching the Vietnam War. I'm not sure that I
14 regret not being able necessarily to show that to students
15 because I have very mixed feelings about it, and it speaks, I
16 think, to the confusion of what exactly it means to shield or
17 not shield students.

18 Q. Are you planning to show that video the next time that you
19 have to teach on the Vietnam War?

20 A. Yeah. I've got the PowerPoint. I've got the Netflix
21 password defaulted into the PowerPoint slide. So, yeah, I have
22 two sections of American History this semester. Assuming we
23 don't have hurricanes in April, I -- or, you know, if this law
24 is overturned, I wouldn't do it, but my understanding is to
25 comply with the law that's what I need to do.

1 Q. Besides the example of showing the video, have the
2 antishielding provisions affected your approach to teaching
3 certain topics?

4 A. It's a constant struggle to know what is going to be
5 offensive, and it seems to me the wording of the law is I have
6 to do my best to not shield them from those ideas.

7 When I discuss the Second Amendment, for example, which I'm
8 required to do by other Florida Statutes, I do a really, really
9 bare bones, basic coverage of it -- the Second Amendment is the
10 one about the right to bear arms -- the Supreme Court case
11 *Miller versus the U.S.* and *McDonald versus Chicago* tried to
12 clarify it in these ways, and then I move on, whereas in
13 previous semesters, I would often get into the logic behind the
14 rulings in these cases and how that ties to the exact phrasing
15 in the amendment and get the students to discuss that in a
16 robust way, trying to meet the general education learning
17 outcome of the course, also mandated by the State Legislature,
18 of critical thinking.

19 Q. Why are you limiting your discussion of the Second
20 Amendment?

21 A. There are just so many angles of it from both the left of
22 the political spectrum and the right of the political spectrum
23 that are uncomfortable, unwelcome, disagreeable, or offensive
24 that I'm sure going beyond the barebones would violate the
25 antishielding provision. I suppose that someone could say not

1 getting into that at all violates the antishielding provision.

2 I mean, it's a real quandary because if a student wants to
3 say I have shielded them from something controversial, that's
4 really hard. But there are only 2,250 minutes, assuming there
5 are no holidays in a semester, that we have to present content,
6 and I can't cover everything that's going to be uncomfortable,
7 unwelcome, disagreeable, or offensive. But I see no out in the
8 phrasing of the law.

9 Q. Is limiting your discussion of --

10 THE COURT: Let me ask a question.

11 As I understand it, the way that you're saying you
12 respond as a teacher to the law is it's easier -- since I have
13 this what I view as a minefield, I'm not sure of the exact
14 parameters, it's either better to have a quick, sanitized --
15 sanitized, rather, presentation or not discuss the topic at all
16 to avoid the minefield because I don't know where the lines are,
17 and if I don't know where the lines are, I'm just going to avoid
18 it altogether?

19 THE WITNESS: Yes. And I would probably avoid the
20 Second Amendment altogether if Florida Statutes for civics
21 literacy did not require that we teach founding documents like
22 the Constitution.

23 BY MS. JASRASARIA:

24 Q. Is limiting your discussion of topics like the Second
25 Amendment helpful to your teaching goals?

1 A. No. Because it is something that certain segments of
2 students, both on the left and the right, feel really passionate
3 about; it is something that could engage students and get them
4 to really think about things critically. You know, my own
5 research is in trade policy. Protectionism versus liberal trade
6 doesn't really engage the 18 to 22-year-old nearly as much as
7 gun control.

8 Q. Let's turn to a different provision of HB 233. Are you
9 familiar with the survey provisions?

10 A. Yes.

11 Q. And are you challenging the survey provisions in this
12 action?

13 A. Yes.

14 MS. JASRASARIA: Andy, let's pull up Joint Exhibit 1
15 and highlight the survey language on page 2.

16 BY MS. JASRASARIA::

17 Q. Dr. Price, is this the language to which you are referring?

18 A. Yes.

19 Q. What do you understand the survey provisions to do?

20 A. The survey provisions require that the Board of Education,
21 at least for us, sends out a survey that the college must
22 distribute to all employees and all students every year about
23 how intellectually diverse the college campus climate is and
24 about how they personally feel their experience in expressing
25 ideas has been.

1 Q. Did you receive the survey last year?

2 A. Yes, I -- there was an email message that had a link to the
3 survey in it.

4 Q. And did you take the survey?

5 A. No.

6 Q. Why not?

7 A. I was a plaintiff in a lawsuit to overturn it, and I
8 thought it would be hypocritical to participate in it if I was
9 so against it that I was suing to have it overturned.

10 Q. Do you think that your students could accurately report on
11 your ideology if they were asked whether you were more liberal
12 or more conservative?

13 A. Most of them could not. I know this because one of the
14 extra-credit assignments that I give at the end of the class is,
15 Where do you think I fall on the political spectrum based on how
16 I've presented material in this course to you?

17 And they're not correct most of the time. And even perhaps
18 more disheartening to me, even though we cover the political
19 spectrum -- what liberal is, what conservative is, what
20 socialist is, you know, where they fall -- the responses of the
21 students are often not consistent with an understanding of how
22 we covered that material in class.

23 They don't -- the examples of things that we talked about
24 that they use to say I'm liberal or I'm conservative or I'm
25 moderate aren't necessarily liberal, conservative, or moderate

1 ideas in the way that they're presenting them in their essay.

2 Q. Beyond potentially taking the survey, have the survey
3 provisions affected your instruction?

4 A. I think that the -- yes. I believe that the survey is
5 going to be used to punish institutions that the legislature and
6 politically appointed members of the State Board of Education
7 feel are too liberal. Any of the statements made in support of
8 HB 233 by its supporters, by the legislators who introduced it,
9 by executive branch officials who supported it, all say it's to
10 keep those evil Marxists from indoctrinating our students. They
11 seem to be looking for places to punish in the way they've done
12 this.

13 This follows up other actions, and other actions since have
14 kind of reconfirmed that idea. The fact, for example, that in
15 December institutions were asked to generate a list of resources
16 spent on diversity, equity, and inclusion, critical race theory
17 initiatives and, you know, assign a specific cost to them seems
18 very clearly to be setting up for the legislature to subtract
19 those amounts from the baseline budgeting that is done in the
20 legislature appropriations for higher education.

21 So if I'm not helping the college appear not to antagonize
22 the legislature, our budget could get cut is how I interpret the
23 law.

24 Q. Are there things that you're doing to try to not appear
25 biased in the way that you're mentioning?

1 A. I think this kind of goes hand in glove with the
2 antishielding provisions. I have reduced what some semesters
3 have been very robust discussions that I'm sure created
4 important intellectual memories for students to much more bland
5 topics. So that's definitely changed.

6 Q. Have you had to introduce examples that you think may cater
7 to certain types of students?

8 A. Yes. One of the other things that I do, at least in my
9 political science classes, is I give current events quizzes
10 every week. And I wanted to make sure that I don't appear as if
11 I'm leaning one way or the other in the questions that I put on
12 the quiz. Because in these responses that I get at the end of
13 the semester about, you know, where I stand politically,
14 students sometimes refer to the makeup of questions on the
15 current events quizzes.

16 And, you know, the students who are, say, right of center,
17 if there aren't questions critical of left-of-center figures
18 will interpret questions critical of right-of-center figures to
19 mean that I'm too liberal, when what may be the case is the
20 questions about the right-of-center people might be relevant to
21 course material. Questions about level of center people aren't.

22 For example, there was a point during the Trump
23 administration when Kellyanne Conway was criticized as a
24 government employee for essentially helping Ivanka Trump promote
25 part of her clothes line, or something like that, which violates

1 some federal laws about conflict of interest.

2 I felt -- you know, when I began to think about things like
3 that last semester and I was putting questions on the quiz about
4 the Mar-a-Lago document search and things like that, and I came
5 across calls to investigate, you know, by, you know, kind of
6 right of center, FOX News media, nighttime talk show
7 personalities, to investigate Hunter Biden, I felt compelled to
8 put that question on there even though, strictly speaking, it's
9 not really relevant to the issue of government officials being
10 corrupt or having a conflict of interest. Hunter Biden is not a
11 government official. Kellyanne Conway was a government
12 official.

13 So it really made me change kind of how I'm thinking about
14 the questions to pick, not am I picking the question that is
15 most appropriate to gauge how well the students are able to
16 follow news about American government as much as I'm picking
17 questions so that the college doesn't look bad in the survey if
18 my students fill out the survey.

19 Q. And you mentioned earlier that one of the things you're
20 concerned about is potential funding cuts from the survey
21 results.

22 Have you ever heard anything from college leadership or
23 advocacy organizations about funding cuts?

24 A. Yes. There's an organization called the Association of
25 Florida Colleges, which is -- it does two things. It provides

1 professional development opportunities, largely not for faculty,
2 but for other college system employees, as well as it's our
3 lobbying organization.

4 And I challenged AFC leadership at a meeting over the
5 summer about why AFC did not come out and take a strong stand
6 against HB 233 and HB 7, given that I have yet to meet a faculty
7 member that thought those were positive laws. I was told by the
8 interim president of AFC at the time, We do not want to anger
9 the legislature --

10 MS. LUKIS: Your Honor, this is hearsay.

11 MS. JASRASARIA: So Dr. Price is offering this
12 testimony not for the truth of the matter but to explain why he
13 believes that his university's resources might be threatened.
14 And this is a conversation that he had directly, and clearly --

15 THE COURT: He just said he had conversations with
16 others that would lead me to believe it could be cut without --
17 it just seems to me that what you're really trying to do is --
18 anyway, I'm going to sustain in part and overrule in part. He's
19 answered it. He's talked to others, and they told him the funds
20 were going to be cut; correct?

21 MS. JASRASARIA: Correct.

22 THE COURT: That's the basis for him believing it. So
23 he's explained the basis without saying, Here's specifically
24 what I was told. But he's also satisfied the requirement to say
25 that, I didn't just guess at this or speculate. It's based

1 on...

2 So I think it's relevant for you to say not what was
3 said, but who told me they were -- who talked to me about this,
4 what role did they serve in, not what did they say. Because
5 then the question becomes, So if his yardman told him that
6 funding will be -- could be cut generally, without getting into
7 specifics, then it doesn't serve the purpose. It's not being
8 offered to prove that it's a reasonable belief. But if the head
9 of his university says, true or not, that funding could be cut,
10 it maybe a false statement, it's a reason why he is tailoring
11 his behavior because he's been told that by someone in a senior
12 position.

13 So that's where I'm going to draw the line; okay.

14 MS. JASRASARIA: Yep.

15 THE COURT: We're not going to get -- the actual
16 details of what he was told doesn't matter. And I also
17 understand the hearsay by implication, but you're also not going
18 to do an end run around hearsay objections by saying it's not
19 being offered for the truth of the matter asserted to get into
20 the specific details of what was said, because that's not really
21 relevant.

22 What's relevant is somebody in a senior position told
23 him, If you keep running your mouth and keep doing it the same
24 old way, we could lose money. And it's on that basis that he's
25 suggesting his behavior. That's what I'll allow and why I'll

1 allow it; okay.

2 MS. JASRASARIA: Thank you.

3 BY MS. JASRASARIA:

4 Q. Are there any other conversations or materials that you're
5 aware of that have informed that belief?

6 And as the Court just mentioned, you know, sticking to who
7 the -- who you may have heard these things from or where you may
8 have seen it.

9 A. Certainly the way that the December memo about diversity,
10 inclusion -- or diversity, equity, and inclusion and CRT
11 supports the notion that this is a valid belief, it's
12 specifically asking for the resources used on those things.

13 I can't possibly imagine another reason why the resources
14 used in a quantified manner would be particularly relevant for
15 reasons other than a funding cut.

16 I also noticed that it was interesting that the report, if
17 I understood the memo correctly, was to come from the college's
18 chief financial officer rather than the provost or some other
19 person who actually would oversee those kinds of initiatives.

20 There have been all kinds of threats made by individual
21 legislators in speeches, including some, I think, in the
22 complaint, that have threatened funding cuts to places that are
23 too liberal or too Marxist.

24 Q. And just to clarify, who is the December memo from?

25 A. The December memo came to our college from the chancellor

1 of the Florida College System, if I recall.

2 Q. Let's turn our attention to the recording provision of
3 HB 233.

4 Are you familiar with that provision, Dr. Price?

5 A. Yes.

6 Q. And are you challenging that provision of this action?

7 A. Yes.

8 MS. JASRASARIA: Andy, can we pull up Joint Exhibit 1
9 and highlight the recording provision?

10 BY MS. JASRASARIA:

11 Q. Is this the language to which you are referring?

12 A. Yes.

13 Q. What do you understand the recording provision to do?

14 A. My understanding is that it allows students to record
15 classroom lectures without the consent or knowledge of others,
16 including the professor.

17 Q. And does the recording provision have any impact on your
18 teaching style?

19 A. I noticed that, really, in the last couple of years that
20 discussions have become much more bland, that students really
21 kind of want more to agree with one another than debate one
22 another.

23 That would seem consistent with fear that their classmates
24 are recording them and might post recordings of things that they
25 say to social media accounts. And that could have whatever

1 potentially negative effect that it might have.

2 Q. Have you responded to that concern that you've seen from
3 your students in any way?

4 A. Because discussion is no longer seeming to be an effective
5 teaching tool, I have resorted to it somewhat less frequently.
6 And when I try it and I don't really get much response from
7 students, in the past I would have tried to probe a little and
8 elicit more of a response. But now I just kind of give up in
9 the sense of, well, they're not going to say anything; why
10 should I keep trying? You know, I'll move on and try again on
11 another topic another day.

12 Q. Why are you concerned about student conversations being
13 recorded when the provision says class lectures?

14 A. I don't think students have a clear understanding of that.
15 Also, the provision and other parts of the bill seem to be
16 written from the perspective of how higher education was
17 conducted decades ago, like when I was an undergraduate.

18 Classrooms are a lot more dynamic now, especially
19 classrooms in the Florida College System where we really try to
20 engage our students and we have smaller class sizes than the
21 traditional lecture format at the University level where the old
22 kind of chalk-and-talk dynamic was what was supposed to be
23 expected.

24 We're expected to keep our students on their toes, thinking
25 by asking them questions, building lecture points off of their

1 responses and things like that. And there isn't this fine line
2 definition of this is the lecture portion of the class, this is
3 the discussion portion of the class that would make it easy for
4 students to kind of get the difference. You know, they will
5 wear out their poor little texting thumbs hitting the pause
6 button on whatever device they are recording on. And I just
7 don't they think that they're particularly willing to do that
8 and --

9 MS. LUKIS: Your Honor, I would object that the
10 witness is speculating about what students may or may not think
11 and how they may or may not be able to understand this provision
12 involved.

13 THE COURT: I'll overrule it. He's talking about his
14 perspective and his interaction with students. He can't even
15 identify the most basic principles, like the difference between
16 liberal and conservative. So based on his interaction with his
17 students, he can say -- I'm going to allow him to express why he
18 believes this would sow confusion in the courtroom -- I mean, in
19 the classroom.

20 Overruled.

21 A. Yes. I -- and not to disparage students totally en mass,
22 but some students at that age have little impulse control, and
23 the students know their age cohort. They also know the
24 ubiquitousness of social media and how if somebody has a
25 recording of something, and they've had a few beers, and it's a

1 recording of someone saying something that could be
2 embarrassing, and they have some beef with that person, it's --
3 what I think the legal term is -- attractive nuisance, that they
4 might end up posting that on Instagram. And students kind of
5 think like that, in my estimation.

6 BY MS. JASRASARIA:

7 Q. Are you concerned about that, even though the last sentence
8 of what we have highlighted up there is that a recorded lecture
9 may not be published without the consent of the lecturer?

10 A. Again, I think that -- I think that at 2 in the morning on
11 a Friday night, after several beers, that's not in the mind of
12 the particular student.

13 MS. LUKIS: Your Honor, object. That's speculation.

14 THE COURT: Overruled.

15 Here's what -- why I'm going to allow it. The witness
16 isn't really asked to telegraph to us what students are or are
17 not going to do or how they do or do not think. What he's being
18 asked is -- the original leading question from counsel was, What
19 are your concerns, and how is this going to affect you?

20 And that's why I qualified it. I'm allowing him to
21 testify about it, from his perspective of interacting with
22 students, what is he going to think happens. Because he's
23 explaining his basis, which you may argue is not reasonable --
24 and the Eleventh Circuit may find is not reasonable and there's
25 no standing.

1 But when you start talking about fear, I'm not going
2 to cut off a witness in explaining their basis. Because one
3 thing I know for sure, it doesn't matter if the Pope swore under
4 oath to tell the truth and said he was fearful of retributions,
5 the Eleventh Circuit would say, That's not enough, unless he
6 explained his basis.

7 The case is called *Jacobson*. It doesn't matter that
8 you say, I'm going to divert funds. It doesn't matter -- you
9 can say, It's going to be thousands of dollars. If you don't
10 get into some granular level, that's not enough to confer
11 standing.

12 So it cannot be heads, you lose; tails, you lose for
13 plaintiffs in establishing standing on the record.

14 So I'm not going to allow -- he's not testifying that,
15 in fact, this is what students are going to do. He's testifying
16 about, This is my fear, based on my experiences, and why I'm
17 troubled, and we'll have to modify my behavior as a result of
18 the recording privileged information.

19 Do I have why you're offering it? Am I confused?

20 MS. JASRASARIA: No, that's correct.

21 Thank you.

22 THE COURT: All right. So then on that basis, I'll
23 allow it.

24 BY MS. JASRASARIA:

25 Q. Dr. Price, you mentioned your students potentially being

1 concerned about being recorded.

2 Are you, yourself, concerned about being recorded?

3 A. To the extent that the recordings can be taken out of
4 context, yes, I'm concerned about that.

5 Q. And has that changed your behavior in the classroom at all?

6 A. You know, it's kind of hard to separate my -- the
7 behavioral changes that have been caused by the recording
8 provision, the antishielding provision, and the survey
9 provision. All three have cumulatively caused me to make the
10 courses more bland and, in so doing, have made it more difficult
11 to achieve the general education learning outcome mandated by
12 the State of critical thinking.

13 Q. Overall, how would you describe the impact that HB 233 has
14 had on your campus, from your experience?

15 A. I guess, first and foremost, it's very, very confusing.
16 People don't know what it means to shield people from offensive
17 ideas. People are worried that if the college doesn't appear a
18 certain way in the surveys that funding could be cut.

19 So it's created a climate of confusion first and then fear
20 about what the future may hold for especially funding levels,
21 because we're poorly funded as it is.

22 MR. JASRASARIA: Thank you.

23 No further questions from me.

24 THE COURT: Counsel, are you ready?

25 MS. LUKIS: Yes, Your Honor.

1 THE COURT: You can proceed.

2 CROSS-EXAMINATION

3 BY MS. LUKIS:

4 Q. Good afternoon, Dr. Price. It's nice to see you again.

5 A. Nice to see you.

6 Q. You mentioned during your direct examination that December
7 memo from the Executive Office of the Governor.

8 Do you recall that testimony?

9 A. Yes.

10 Q. Okay. Have you seen that memo?

11 A. Yes.

12 Q. Okay.

13 A. Well, I've seen an electronic copy of it. I haven't seen a
14 physical hard copy, but I assume that the electronic copy was --

15 Q. I'll take it.

16 From whom did you receive an electronic copy of the memo?

17 A. Either an administrator at the college or a link from a
18 news article. It may have been someone sent me a link to a news
19 article.

20 Q. That memo doesn't say anything about House Bill 233, does
21 it?

22 A. No. It's asking for certain resources.

23 Q. Okay. I want to make sure I have this right. I have that
24 you teach American Government, the second half of American
25 History, a World History Survey -- and was there another one

1 that I'm --

2 THE COURT: International Relations.

3 A. International Relations.

4 MS. LUKIS: Thank you, Your Honor.

5 BY MS. LUKIS:

6 Q. Okay. On average how large is your American Government
7 class?

8 A. 34.

9 Q. Okay. And how about the second half of American History?

10 A. Also 34.

11 Q. And the World History Surveys?

12 A. They have smaller enrollments because American Government
13 and American History meet the civics literacy requirement.
14 Those are high teens, low 20s. It depends on the semester.

15 Q. What about International Relations?

16 A. That class is capped at 24. And, again, because of the
17 civics literacy requirement, enrollment in that course has
18 dropped off because people only have to take one political
19 course, and the State has said that's got to be -- you've got to
20 take American Government. So that enrollment has been more in
21 the teens.

22 Q. Okay. Do you ever lecture at any point during your
23 classes?

24 A. Yes.

25 Q. Okay. In your classes do students take notes on what you

1 say?

2 A. Increasingly fewer of them do, but, yes.

3 Q. I'd imagine that you want students to remember what you're
4 teaching in class; right?

5 A. Yes.

6 Q. I believe you testified you haven't taken the 2022 employee
7 survey; is that right?

8 A. Yes.

9 Q. Okay. You haven't seen it either, have you?

10 A. Some people posted screenshots on social media that they
11 said were of the survey, and I saw some of those, whether they
12 were the survey or not.

13 Q. So you're not sure?

14 A. I'm not sure.

15 Q. Okay. You haven't seen the student survey either?

16 A. No.

17 Q. Okay. So you don't know what specific questions the survey
18 asked?

19 A. That is correct.

20 Q. You don't know what questions are going to be asked on
21 future surveys; right?

22 A. That is correct, because it is a survey that can change
23 from survey period to survey period.

24 Q. You haven't been punished in any way for not taking the
25 survey?

1 A. Nope. I have not been punished, yes.

2 Q. You aren't aware of anyone else who has been punished for
3 not taking the survey; correct?

4 A. No, but there was great fear among assistant professors,
5 people who have not yet been granted continuing contract, that
6 they would be somehow punished if they did not do it.

7 Q. You said people who have not yet been granted continuing
8 contracts. Is that --

9 A. Yes.

10 Q. Okay. And people who have not --

11 A. Let me --

12 Q. I'm sorry. I did not mean to interrupt you.

13 A. The only faculty members at my institution that I know took
14 the survey or who told me they took the survey were in that
15 class.

16 Q. Folks who haven't been granted continuing contracts, they
17 have to do annual evaluations; right?

18 A. Correct.

19 Q. And as part of that evaluation, someone will sit in and
20 observe the class; right?

21 A. Yes.

22 Q. And based on what someone observes in the class or what's
23 in that annual evaluation, you may not be granted a continuing
24 contract; right?

25 A. Correct.

1 Q. You've not been forced to disclose your political beliefs
2 to anyone as a result of HB 233; correct?

3 A. Correct, as of now.

4 Q. Are you aware that the survey results have been published?

5 A. I tried to find Santa Fe's, and I was not able to. I've
6 seen cumulative results of the state university systems, but my
7 understanding is they're published. They just seem to be
8 somewhat difficult for me to find in what I thought were
9 appropriate keywords to enter into, you know, a search engine
10 like Google.

11 I've looked. I would like to see it, but I have yet to
12 have that luxury.

13 Q. You haven't changed your instruction in your classroom
14 based on the survey results then; right?

15 A. Not the survey results, the survey existence.

16 Q. And there's nothing in the survey provision that tells you
17 what you can and can't teach; correct?

18 A. There's not -- nothing specifically in the provisions of
19 HB 233 that say that. However, the rhetoric used by the
20 sponsors and by supporters definitely suggest that it's looking
21 for people going too far to the left. There -- no one has ever
22 said, We're looking to see if there's too much of an evangelical
23 fundamentalism in our institutions that is silencing Marxist
24 discussions.

25 Q. And the rhetoric that you're talking about, where have

1 you -- from what source did you become aware of that rhetoric?

2 A. Various sources, news coverage other than these
3 newsletters, media, sound bytes.

4 Q. So I take from your earlier testimony, then -- or the
5 answer you just gave previously that you haven't changed your
6 classroom instruction based on the survey provision, but what
7 you've read about the survey provision in the news and in
8 newsletters; correct?

9 MS. JASRASARIA: Objection. Misstates testimony.

10 THE COURT: He can reanswer. I heard his prior
11 testimony that he changed it because of the mere existence of
12 the survey.

13 But you can respond.

14 THE WITNESS: Yes. I've not changed because of the
15 results of the survey, which I haven't seen. I've changed
16 because the survey exists.

17 And it is unclear in the legislation what might be
18 done with the survey results, and there are no limitations on
19 what this survey can ask from semester to semester. You know,
20 the survey's implemented in spring semesters that would cover
21 the prior fall.

22 You know, the survey for a particular year probably
23 isn't designed and settled on while I'm teaching in the fall,
24 yet the students are going to be responding to the survey based
25 on how I taught in the fall. Maybe it will become mandatory in

1 the early spring and, you know, so I have to kind of assume
2 that -- I kind of feel that I have to assume the worst.

3 BY MS. LUKIS:

4 Q. When is the survey going to be mandatory?

5 A. When the legislature or the Board of Education so desire?

6 Q. When is that?

7 A. Which could be at any time. Nothing precludes it, and the
8 fact -- this is something that really disturbs me. The fact
9 that the legislature had an entire session to answer objections
10 raised in this lawsuit, like the survey should be voluntary,
11 that it should not be particularly pejorative in its phrasing
12 and things like that -- the legislature had an entire session to
13 address those concerns and its leadership made the deliberate
14 and conscious choice not to do so. Therefore, I can only
15 conclude at some point in the future they've preserved the
16 flexibility to do those things.

17 Q. But you can't tell me when they're going to exercise that
18 flexibility; correct?

19 A. Nor can I say that they will not exercise that flexibility.

20 Q. Santa Fe College lost any -- Santa Fe College has not lost
21 any funding as a result of the survey; correct?

22 A. The funding for fiscal year '22-'23 was voted on by the
23 legislature and approved before the survey was even distributed.

24 Q. Santa Fe College has not lost any funding as a result of
25 the survey, has it?

1 A. We won't know until this legislature has passed the budget
2 for fiscal year '23-'24. I mean, it can't have lost money based
3 on the first survey because the money was already appropriated.

4 Q. Sounds a lot like a no, Dr. Price.

5 Has Santa Fe College lost any money as a result of the
6 survey?

7 A. It could not have because the funding for this fiscal year
8 was already allocated before the survey results -- before the
9 survey was really even released, certainly before results were
10 collected and analyzed. You can't lose something because of
11 something if you're given it before the thing that might cause
12 you to lose it occurs.

13 Q. Okay. Do you remember when I took your deposition on
14 May 23, 2022?

15 A. Yep.

16 Q. Do you remember when I asked you: *You are not aware, are*
17 *you, of any funding that has been withheld from Santa Fe College*
18 *as a result of House Bill 233?*

19 Do you remember that question?

20 A. Yes. And I think I answered it kind of like I have now,
21 that --

22 Q. Do you recall answering: *Not yet?*

23 A. That sounds like something I would say.

24 Q. Lord, have mercy.

25 I want to shift to the recording provision.

1 Has anybody unlawfully published a recording of your
2 classes?

3 A. Not that I'm aware of.

4 Q. Okay. You haven't actually changed the manner in which you
5 conduct your class because of the recording provisions, have
6 you?

7 A. As I said earlier, I've changed my classes because of
8 aspects of the bill. It's hard to isolate whether -- you know,
9 it's hard to say I changed this thing because of this provision.
10 It's the cumulative effect and the interaction of the provisions
11 and the cumulative, you know, unity of how class is conducted.
12 It's hard to isolate one thing solely as caused by another
13 thing.

14 Q. When did this difficulty to distinguish between the
15 provisions develop?

16 A. To distinguish between the effects of the provisions?

17 Q. Let me just ask you. Do you remember when I took your
18 deposition on May 23, 2022?

19 A. Yep.

20 Q. You were under oath?

21 A. Yep.

22 Q. You told the truth?

23 A. Yep.

24 Q. Okay. Do you remember when I asked: *Have you, in fact,*
25 *changed the manner in which you conduct your class because of*

1 *the concerns you just identified about the recording provision?*

2 Do you remember me asking you that question?

3 A. I don't remember necessarily that specific answer.

4 Q. Do you remember the question?

5 A. I mean, it sounds like a question that would have been
6 asked, but, you know --

7 MS. LUKIS: May I grab something, Your Honor? May I
8 grab something?

9 THE COURT: Certainly.

10 BY MS. LUKIS:

11 Q. Well, before we have to flip through a bunch of papers, do
12 you remember telling me during your deposition that you haven't
13 changed the manner in which you conduct your class because of
14 the recording provision?

15 A. I don't remember phrasing it like that, but --

16 Q. Could you do me a favor and look at the binder -- you
17 should have a binder with a yellow cover up there.

18 A. Yep, two of them.

19 Q. Okay. There should be one that says Defendants' Exhibit
20 Volume II.

21 A. Yes.

22 Q. I would ask that you turn to Exhibit 33 with the tab
23 labeled 33.

24 A. Uh-huh.

25 Q. And turn to page 82.

1 Are you there yet?

2 A. Yep.

3 Q. Okay. And I welcome you to look above where I'm about to
4 ask you to confirm that we were talking about the recording
5 provision.

6 But do you see at line 9 I ask the question: *Have you, in*
7 *fact, changed the manner in which you conduct your class because*
8 *of the concerns that you just identified?*

9 Answer, line 12: *I haven't. I haven't necessarily noticed*
10 *that any of them are recording. It's one of those situations*
11 *that has not come up yet -- necessarily come up yet.*

12 Did I read that correctly?

13 A. Yep.

14 Q. During your direct testimony you were talking about an
15 example -- I think you said it was a current events quiz that
16 included something about Kellyanne Conway and Hunter Biden.

17 Did I get that right or did I butcher it?

18 A. You got the substance of it right. However, those weren't
19 on the same quiz.

20 Q. Okay. I understand.

21 A. You know, an example of something that -- I was using a
22 Kellyanne Conway question as an example of something that a
23 student with a right-of-center perspective might say indicates
24 I'm a liberal because I put that question on there.

25 A way that I would counter that now would be to put

1 questions about some person that the right attacks, regardless
2 of whether it's necessarily relevant given the topics that I
3 tell students I'm going to quiz them on.

4 I would be doing it not because it's sound pedagogy and
5 would be doing it -- I would be including that question to
6 appear to be more balanced in a way that I wouldn't have done
7 prior to the bill.

8 Q. What semester was it that you used those examples?

9 A. Well, the Kellyanne Conway question would have been when
10 she was working for the Trump Administration and had the
11 criticism from various people because she as a government
12 official was endorsing Ivanka Trump's clothing line.

13 The Hunter Biden issue came up this past fall semester.

14 Q. Past fall semester.

15 Okay. But you didn't -- so you didn't make any changes to
16 your curriculum during the fall of the 2021 semester, though,
17 did you?

18 A. In that regard, I mean, I -- I don't think so.

19 Q. In the spring of '22, you didn't make any changes to your
20 curriculum -- I sound like Tim -- to your curriculum based on
21 House Bill 233; right?

22 A. I'm trying to remember what I taught in the spring of '22.

23 Certainly the gun control example that I've used that -- my
24 coverage of that was truncated in the spring of 2022.

25 Q. That wasn't because of House Bill 233, was it, the

1 truncated discussion --

2 A. The antishielding --

3 Q. -- about the Second Amendment?

4 A. The antishielding provision.

5 Q. You don't always get through all the topics that you're
6 intending to teach during the semester, do you?

7 A. No.

8 Q. You have to rush through the topics that are at the end
9 sometimes?

10 A. Definitely.

11 Q. You taught Second Amendment at the end of the spring '22
12 semester?

13 A. That's -- yeah.

14 Q. You've never been subjected to any discipline of any kind
15 as a result of House Bill 233; is that right?

16 A. Not up to this point.

17 Q. And nobody from Santa Fe College has forced you to include
18 any topics in your curriculum because of House Bill 233;
19 correct?

20 A. Yeah.

21 Q. Nobody from the Board of Education has required you to
22 teach anything because of House Bill 233; correct?

23 A. Correct.

24 Q. And you haven't faced any discipline or retaliation for
25 failing to include some sort of topic in your curriculum; right?

1 A. Not up to this point.

2 Q. Okay. You testified that House Bill 233 doesn't explicitly
3 list any topics that have to be included in your curriculum;
4 right?

5 A. Yep.

6 Q. No students have filed complaints against you based on the
7 antishielding provision; correct?

8 A. If they have, I was not told about it.

9 Q. You're not a member of United Faculty of Florida, are you?

10 A. No.

11 Q. You were aware that UFF encouraged its members to not take
12 the survey though; right?

13 A. Yes.

14 Q. Was it because they posted it on social media?

15 A. Members of UFF posted it on social media. I don't know
16 whether or not it was -- I don't know whether UFF posted it on
17 their particular social media feed, but, you know, Gainesville's
18 a small town. Higher education's a small industry --

19 Q. Understood.

20 A. -- relatively speaking. I have lots of friends that are
21 employees of the University of Florida and members of UFF. My
22 memory is I saw the memo on one of their Facebook accounts.

23 Q. Okay. You have not resigned from any associations due to
24 House Bill 233; is that right?

25 A. That's correct.

1 Q. And you haven't declined to join any associations as a
2 result of House Bill 233; correct?

3 A. I guess, yeah, that's true.

4 Q. I want to make sure I understand some of your earlier
5 testimony.

6 You were talking about the Vietnam -- the execution video.
7 So that I understand correctly, is your position that you have
8 to teach something, some topic, because anytime someone
9 expresses discomfort, disagreement, offense at some topic, you
10 are then compelled to teach that topic going forward?

11 A. That's how I read the law.

12 Q. Okay. Has anybody from the Board of Education told you
13 that you've got it right, that interpretation is correct?

14 A. Nobody from the Board of Education has given me input
15 either way.

16 Q. And it was lost, I think, in some discussion about a
17 hurricane, but you have not, in fact, taught or shown that video
18 since House Bill 233 passed; right?

19 A. Yeah. I lost a day because of the hurricane last November.

20 Q. The PowerPoint that you mentioned that has slides about
21 that on it, did you produce that in discovery?

22 A. Would something that I made in November of '22 been covered
23 by discovery?

24 Q. I'm just asking if you produced it in discovery.

25 A. I didn't produce a slide that I created in November of '22

1 in discovery.

2 Q. Okay.

3 A. And probably wouldn't have earlier since I didn't actually
4 show it.

5 Q. You agree that open discussion of ideas in your classroom
6 is a valuable learning tool; right?

7 A. Yes.

8 Q. Okay. That includes discussion of multiple viewpoints
9 sometimes; right?

10 A. Yes.

11 Q. You advise your students in your classroom to be respectful
12 to one another; right?

13 A. Yes.

14 Q. Beyond that, you don't really place any substantive
15 limitations on what people can express and say in your
16 classroom; is that correct?

17 A. Germaneness.

18 Q. Sure.

19 A. I mean, you have to be talking about something that we're
20 talking about.

21 Q. And you don't impose any additional restrictions because
22 you think it's important for students to feel comfortable
23 expressing themselves in the classroom; correct?

24 A. Yeah. I mean -- yeah.

25 Q. And do you agree that it's an important part of the

1 educational experience for students from different walks of life
2 to feel free to discuss their perspectives in class?

3 A. Yes.

4 Q. You're familiar with the phrase "deliberative dialogue"?

5 A. Yes.

6 Q. And you've implemented a deliberative dialogue element into
7 your classes; correct?

8 A. Yes, some semesters. I mean, I was working on a grant
9 project involving the technique of deliberative dialogue in the
10 mid and late teens.

11 Q. Am I correct that exercise involves small groups of
12 students being presented with a complex issue -- I believe you
13 said it's called a wicked problem -- and then discussing the
14 merits of different potential solutions to that problem?

15 A. Yes.

16 Q. Okay. Students don't always agree on the best solution
17 during that exercise; correct?

18 A. Correct.

19 Q. And one of the goals in going through that deliberative
20 dialogue exercise is to help students discuss the merits of
21 different solutions in a respectful manner; right?

22 A. Yes, and to see the perspective of others.

23 Q. So you'd agree with me, then, that it's important for
24 students to be able to respectfully disagree and debate and hear
25 other perspectives in the classroom; correct?

1 A. Yes.

2 MS. LUKIS: Okay. Just a moment, Dr. Price.

3 (Pause in proceedings.)

4 MS. LUKIS: Dr. Price, I don't have any more questions
5 for you on cross. I'm sorry that these are the circumstances
6 under which we had to meet, but I appreciate your time.

7 THE WITNESS: Thank you.

8 THE COURT: I have a quick question because I want to
9 make sure I didn't misapprehend your answer.

10 If I misunderstood, you can tell me if I'm wrong.

11 I didn't understand you to say that HB 233 explicitly
12 required you to show the execution of the prisoner during the
13 Tet Offensive in 1968. What I understood you to say is, Because
14 of the way the statute reads, I don't -- I feel like I may need
15 to add it back in because somebody could complain that I
16 sanitized my Vietnam section to address hurting somebody's
17 feelings, and I don't want to be on the hook for somebody
18 complaining about me, so it's in that way that I might have to
19 put it back in.

20 Not that it explicitly says thou shalt teach this
21 particular episode or video. You were just using that as an
22 example of, I'm not sure if I got to put stuff back in because I
23 could be in a trick bag if I am seen as yielding to the concerns
24 of somebody's hurt feelings and changing what I teach.

25 Did I misapprehend that?

1 THE WITNESS: No, that's basically the idea, although,
2 I removed it because I thought, you know, this person is
3 probably not the only person who is kind of so grossed out by
4 the video that they're missing the larger point I'm trying to
5 make.

6 I feel that while that might have been the objection
7 that people raised, someone who's very antiwar could accuse me
8 of sanitizing American interventionism because I don't show
9 that. That would be shielding them kind of along the political
10 reasons that I -- the political dynamics that I feel the law is
11 trying to get at. Someone on the left would say, You're
12 sanitizing.

13 THE COURT: I understood. The main question I had is
14 I didn't understand you to say -- were you saying that HB 233
15 requires you to show a particular video, a particular picture,
16 or teach a particular topic in a particular way, or were you
17 offering that as an example of by removing it you may have run
18 afoul of the intent of the bill?

19 THE WITNESS: Yes, by removing it I've --

20 THE COURT: The latter?

21 THE WITNESS: Yeah.

22 THE COURT: I got it.

23 MS. LUKIS: Your Honor, may I ask a few follow-ups?

24 THE COURT: Sure.

25

1 BY MS. LUKIS:

2 Q. When did this exchange with the student who was upset by
3 the video that resulted in your pulling it from your class --
4 when did that occur?

5 A. A really long time ago because it was a UF student, and I
6 only taught at UF from 2002 to 2006.

7 Q. From 2002 to 2006?

8 A. Yeah. It was probably toward the end of that period, but I
9 couldn't tell you which semester.

10 Q. Okay. And your testimony was that you thought that the
11 student missed the point of why you were showing it; is that
12 right?

13 A. I felt that the student -- yeah, that they -- the point
14 that I was trying to make with the video was when Americans
15 began to see live footage of the Vietnam War, rather than kind
16 of the scripted footage that the military had provided prior to
17 the Tet Offensive, when the fighting was actually outside news
18 reporters' hotels, that that really had an impact. And I think
19 that student didn't grasp that larger point because they were so
20 turned off by that particular video.

21 Q. So it wasn't an effective instructional tool to convey the
22 material in the way that you wished; is that accurate?

23 A. I felt that if this student is having this reaction,
24 probably other students are having this reaction, so that's not
25 effective, yeah.

1 MS. LUKIS: Okay. All right. That's really all I
2 have on cross.

3 Thank you.

4 THE COURT: Thank you.

5 And did I get it right. '68?

6 THE WITNESS: Yeah, January of 68.

7 THE COURT: Anything additional, about the Tet
8 Offensive?

9 REDIRECT EXAMINATION

10 BY MS. JASRASARIA:

11 Q. I just have a few questions.

12 Dr. Price, you were speaking with Ms. Lukis about -- about
13 deliberative dialogue; is that right?

14 A. Yes.

15 Q. Does deliberative dialogue include ground rules.

16 A. Yes, very much so.

17 Q. And does it require a mediator?

18 A. Yes. I think they may use the term facilitator, but, yes,
19 there's a -- students are divided up into groups of ten, and one
20 of the ten is kind of a mediator/facilitator to kind of make
21 sure that people are following the rules of both being
22 respectful and sticking to the topics.

23 The way that the process works is students are given three
24 sets of policy options to choose from to address what's called a
25 wicked problem. And that's a different matter than including

1 every possible perspective on an issue.

2 Q. Who puts the parameters on that kind of conversation?

3 A. I was following the guidance of the Kettering Foundation
4 and the National Issues Forum. They have kind of preset rules
5 and techniques for how to conduct a deliberative dialogue.

6 Q. Is there any language in the antishielding provisions that
7 allows you to shut down speech because it might be
8 disrespectful?

9 A. I'm not aware of any such provisions.

10 MS. JASRASARIA: No further questions.

11 Thanks, Dr. Price.

12 THE COURT: Thank you, Doctor. You can step down.

13 THE WITNESS: Thank you.

14 (Dr. David Price exited the courtroom.)

15 THE COURT: All right. It looks like we can get one
16 more witness in for today. Which witness are we going to do?

17 MR. WERMUTH: Yes, Your Honor. We have Dr. Woessner
18 or Woessner.

19 THE COURT: And the reason I was asking is I just
20 didn't want -- do we also have the last witness? I didn't
21 feel -- they're certainly free to stay here, but also it seems
22 unlikely we're going to get through two witnesses in the next --

23 MR. WERMUTH: That's a fair assessment.

24 THE COURT: Just out of courtesy, we may want to let
25 them know they can go is the point.

1 MR. WERMUTH: Yes, we will do that.

2 THE COURT: Why don't we do this. Since we have one
3 last witness and it's been an hour and 20 minutes, why don't we
4 take a ten-minute break. We'll come back, finish that witness,
5 and then we'll break for the evening.

6 Thank you.

7 (Recess taken at 4:16 PM.)

8 (Resumed at 4:38 PM.)

9 THE COURT: We are ready.

10 Call your next witness.

11 MR. WERMUTH: Dr. Woessner is our next witness.

12 (Dr. Matthew Woessner entered the courtroom.)

13 THE COURTROOM DEPUTY: Please raise your right hand.

14 **DR. MATTHEW WOESSNER, PLAINTIFFS WITNESS, DULY SWORN**

15 THE COURTROOM DEPUTY: Please state your name and
16 spell your last name for the record.

17 THE WITNESS: Matthew Woessner, W-o-e-s-s-n-e-r.

18 THE COURTROOM DEPUTY: Thank you.

19 THE COURT: Counsel, you may proceed.

20 DIRECT EXAMINATION

21 BY MS. JASRASARIA:

22 Q. Dr. Woessner, could you please introduce yourself to the
23 Court.

24 A. My name is Matthew Woessner. I'm a political science
25 professor who specializes, among other things, in ideology and

1 higher education.

2 Q. Are you currently employed?

3 A. I am.

4 Q. Where are you employed?

5 A. At the United States Army War College in Carlisle,
6 Pennsylvania.

7 And if I can add parenthetically, I had to take time off
8 today since I'm not here as part of my duties, and I'm not
9 speaking for the War College or the Department of Defense.

10 Q. Were you engaged as an expert in this matter?

11 A. I was.

12 Q. By who?

13 A. By plaintiffs.

14 Q. And for what purpose?

15 A. To bring to bear my expertise in ideology and higher
16 education as well as research methodology on some of the
17 questions posed in this litigation.

18 Q. Are you prepared today to discuss your findings and
19 opinions and the reasons for them?

20 A. I am.

21 Q. Before we get into the specifics of the work you did in
22 this case, let's talk a little bit about your background.

23 MR. JASRASARIA: Andy, could you please pull up the
24 exhibit that has been premarked as Plaintiffs' Exhibit 16.

25

1 BY MR. JASRASARIA:

2 Q. Do you recognize this document, Dr. Woessner?

3 A. I do.

4 Q. What is?

5 A. It's my curriculum vitae.

6 Q. Do you maintain this curriculum vitae as part of your
7 professional work?

8 A. I do.

9 Q. For how long have you maintained it?

10 A. Probably since I left graduate school in 2001.

11 Q. And do you update your CV regularly?

12 A. Fairly regularly.

13 Q. Is this still accurate and correct as we sit here today?

14 A. Yes.

15 MR. JASRASARIA: Your Honor, I move to admit
16 Plaintiffs' Exhibit 16 into evidence.

17 MS. LUKIS: No objection.

18 THE COURT: Without objection, Plaintiffs' 16 is
19 admitted.

20 (PLAINTIFFS EXHIBIT 16: Received in evidence.)

21 BY MR. JASRASARIA:

22 Q. Do you have any degrees in political science, Dr. Woessner?

23 A. I do. I have a bachelor's degree from UCLA in political
24 science and a masters and Ph.D. from the Ohio State University.

25 Q. Did your political science education have any particular

1 focus?

2 A. It did. My speciality was in public opinion, political
3 psychology, survey research methodology, and econometrics.

4 Q. In your experience as a political scientist, have you had
5 occasion to study politics in higher education?

6 A. I have.

7 Q. Can you briefly explain your experience in that area?

8 A. My priority of research looks at different aspects of
9 ideology in higher education, both how the predominantly left
10 faculty affects students, how it affects promotion of tenure
11 process for faculty as well as how in some ways it affects
12 society. So it's been a lot of different research which focuses
13 on the overall ideological imbalance in the higher-education
14 system.

15 Q. How would you describe your own politics?

16 A. I'm out of step with most professors. I'm a Republican,
17 and I would say most of the time a conservative Republican. So
18 it's -- I'm different than most of the faculty typically leaning
19 left.

20 Q. Have you collaborated or published with any right-leaning
21 organizations or entities?

22 A. I have. I did some research with the American Enterprise
23 Institute. I received two grants from the Koch Foundation and
24 the Prager University Foundation. I've done two videos for
25 their organization based on my research.

1 Q. Have you published any peer-reviewed papers related to
2 politics in higher education?

3 A. I have.

4 Q. About how many?

5 A. Related to ideology, probably about ten, not counting my
6 book and two book chapters.

7 Q. What methods have you used to research questions of
8 political ideology in higher education?

9 A. Primarily we use large-scale surveys. We were trying to
10 get away from the common practice of using anecdotes or just
11 pure theory to find out what happens in the classroom. So most
12 of the work that I've done, it involved large-scale surveys to
13 find out how ideology impacts the classroom, students, and
14 sometimes the faculty themselves.

15 Q. Is that method typically used in the field of political
16 science?

17 A. It's used more often -- well, certainly outside of this
18 speciality, it's very common. And that was my specialty in
19 graduate school. I think what we brought that was unique, my
20 coauthors and I, was to start applying this method to the
21 specific question of ideology in the classroom.

22 Q. You mentioned that you used survey research in your study
23 of politics in higher education?

24 A. I do.

25 Q. Are you familiar with best practices for survey

1 administration generally?

2 A. Yes.

3 Q. And what about in the higher-education context
4 specifically?

5 A. They're very similar. There are a few caveats because
6 faculty are -- if you're in a survey faculty, they are a very
7 unique group of people, but the practices are very much the same
8 in most respects.

9 Q. Have you taught in the higher education context yourself?

10 A. I have.

11 Q. For how long?

12 A. I've been at the Army War College for three years. I've
13 taught national security courses for them for the last two
14 years. Prior to that I was at Penn State University in
15 Harrisburg where I taught for 18 years.

16 Q. What did you teach at Penn State?

17 A. A number of courses. I taught the Introduction to American
18 Government course. I taught a course on survey research --
19 well, on research methodology and statistics. I taught the
20 Constitutional History course as well the undergraduate law
21 series, which includes institutions and powers and civil
22 liberties.

23 Q. And you mentioned that you teach national security strategy
24 at the U.S. Army War College; is that right?

25 A. I do.

1 Q. Do you have any other responsibilities at the War College?

2 A. Yes. Teaching is not my primary responsibility. I work
3 for the Office of the Provost, so I work as one of the chief
4 analysts for the provost and deputy provost. We have a mountain
5 of data, and part of what I do is try to help make databasing
6 decisions on how to best use the curriculum and for strategic
7 planning purposes.

8 Teaching is just something I do sometimes. They ask me to
9 fill in when somebody is unavailable, and I'm able to teach
10 national security in a pinch.

11 Q. Have you ever served in any type of institutional
12 governance capacity?

13 A. I have. I served on the Penn State University Faculty
14 Senate, where I served as chair from, I think it was, 2017 to
15 2018.

16 Q. The Court yesterday heard from Dr. Michael Bérubé about his
17 service on the Penn State Faculty Senate. So I wanted to ask
18 you if you know Dr. Bérubé?

19 A. Yes, I do know Dr. Bérubé.

20 Q. How do you know him?

21 A. We worked together in the Senate, but we were both elected
22 in leadership about the same time. I was elected to the chair
23 for 2017-2018. I believe he was elected 2018-2019. So he
24 immediately followed me in the leadership post of the Senate.

25 Q. Have the two of you ever spoken about this case?

1 A. Well, we've talked about not talking about this case. As
2 much as I'd like know what he thinks of it, we've been rather
3 cautious to not discuss the specifics until this is complete.

4 Q. Is the chair of the Penn State Faculty Senate an elected
5 position?

6 A. It is, yes.

7 Q. And were the faculty at Penn State aware of your politics?

8 A. It's funny. I know at the Harrisburg campus where I was
9 resident it was quite well known. Most faculty -- if they
10 Googled my name, it would come up pretty quickly because of all
11 my research and some of the videos I've done.

12 But I do know that when I came up for the secretary of the
13 senate fairly early in my senate career and people were giving
14 nice speeches about the various candidates, one of my colleagues
15 said what a wonderful person I was, but I had one flaw; I was a
16 Republican, which elicited laughter from the gallery.

17 So I think it was put on the record pretty early, but the
18 laughter was mostly because they knew how aggressive I was in
19 fighting for faculty. And I think the idea that my politics in
20 that context would matter seemed kind of ridiculous.

21 Q. Can you briefly describe your work on the Penn State
22 Faculty Senate?

23 A. The Faculty Senate at Penn State, I guess like most faculty
24 senates, has two major components. The first is it oversees the
25 curriculum. It has sovereign control over creating departments,

1 classes, graduation requirements.

2 But the secondary function, which is perhaps as important,
3 is an advisory consultative function. So the Senate had, I
4 believe it was, 15 committees when I was there. And the Senate
5 itself is massive. It's 6,500 faculty on 23 campuses, and they
6 come, at least 200 faculty, about every six weeks to meet in
7 session.

8 And although most of what the Penn State Senate does is not
9 areas where it has specific control, it acts in an advisory
10 capacity to help the administration make good decisions on
11 everything from benefits to enrollment to issues like academic
12 freedom. So it's very much involved in the day-to-day
13 operations of the administration.

14 Q. What's an example of something that you worked on in an
15 advisory consultative capacity while you were on the Penn State
16 Faculty Senate?

17 A. One of the more interesting examples is when the
18 administration drafted regulations about what constituted
19 partisan activity in the classroom. And I think I had just
20 taken the position of senate chair, and Michael Bérubé was the
21 incoming chair. And we were very concerned that the language
22 was overly vague and would cause confusion in the classroom, and
23 we were particularly concerned because it was coming up on an
24 election, as I recall. And we were concerned that the faculty
25 wouldn't know what to make of it.

1 So although, technically, we had no authority whatsoever in
2 this matter -- this was an advisory matter -- Dr. Bérubé and I
3 met with the general counsel at Penn State for quite some time,
4 and we went through the language of the new regulations point by
5 point to try to clarify it in a way that would make it more
6 intelligible to the faculty and make sure that everyone
7 understood that the rules of academic freedom still applied.

8 So this is an area where, technically, we had no formal
9 jurisdiction, but because we could cooperate very well with the
10 administration, we were able to make a difference on that
11 regulation.

12 Q. Has your experience in faculty governance influenced your
13 academic work?

14 A. It has. I actually authored a piece. It's the first
15 quantitative study of faculty governance and structure ever
16 done, which looks at how the different components of a faculty
17 senate constitution are related to faculty administrative
18 relationships, which includes how they get along, how much power
19 each has.

20 So it's not the focus of my research, but because I've been
21 studying ideal structures and ways to improve
22 faculty-administrative relations, we thought we would take the
23 quantitative approach, which had never been done before, to see
24 if it would reveal something about best practices in shared
25 governance.

1 MR. JASRASARIA: Your Honor, at this time plaintiffs
2 offer Dr. Woessner as an expert in the fields of politics and
3 ideology in higher education as well as survey, research, and
4 design.

5 MS. LUKIS: No objection.

6 THE COURT: Without any desire to voir dire the
7 witness, you may proceed.

8 BY MR. JASRASARIA:

9 Q. Dr. Woessner, let's turn next to what you did in this case.
10 Were you asked to offer an opinion on whether faculty
11 influenced their students' political views?

12 A. I was.

13 Q. And did you form an opinion on that question?

14 A. I did.

15 Q. What did you review in forming that opinion?

16 A. Well, this is a problem, or I should say, an issue that
17 I've been looking at for much of my career. So I can't say it
18 was something that suddenly came to me. It was an opinion I
19 already had some knowledge of before.

20 But I did go back and review some of the more recent
21 literature in -- the academic literature, that is, about what
22 specific influence faculty had over students in their political
23 development. But much of the research that I reviewed was
24 research that I was involved in creating. There are certainly
25 others who are doing this work as well, but we did a number of

1 studies early on to help set the parameters for this study when
2 it was still very new.

3 So it was a combination of looking at the work that I had
4 done, reviewing other individuals' works, and thinking about why
5 that might bring some light to the questions before the Court in
6 this matter.

7 Q. When did you start researching that question?

8 A. I'm not sure I remember exactly when. It was very early in
9 my career, probably around 2003, 2004. Originally, I wrote a
10 doctoral dissertation on presidential approval, presidential
11 scandal, and its effect on impeachments. Well, that seemed like
12 a dead end, so I moved on to something else.

13 So ultimately a colleague of mine, my former spouse,
14 indicated -- she said, What effect does the professor's politics
15 have on the students' evaluation -- the course evaluations? And
16 I remember thinking at the time, instinctively, All good
17 questions have already been taken. I thought, Well, surely
18 that's been done, and it's probably been done to death.

19 But when we did some research, we realized no one had ever
20 investigated the question of whether the professor's politics
21 played a role, and whether the students thought they had done
22 well, in the course evaluation. So that began what would be our
23 first of many studies in the area.

24 Q. Did you have a hypothesis going into your research about
25 faculty influence on student political views?

1 A. I assume that faculty did influence or, I would say,
2 indoctrinate their students. It just seemed logical. Faculty
3 are very much on the left. We've known for 75 years that
4 faculty are far to the left of the public in general.

5 And higher education is an educational process. The whole
6 point of it is to transmit knowledge. So to me it seemed very
7 logical that if the faculty were very much on the left and they
8 were teaching students, they would then transmit some of these
9 views to the students over the course of time.

10 Q. Did your research prove that hypothesis to be true?

11 A. One study after another raised questions about that
12 hypothesis, and I've since revisited my original theory. But,
13 no, I would say that very little of what I found bolstered that
14 initial opinion.

15 That having been said, it's actually a very complicated
16 question, and I didn't appreciate when we started the different
17 variables that played a part in making students change
18 politically or stay the same.

19 Q. Let's consider that research a little bit more
20 specifically.

21 Have you researched whether students are aware of their
22 professor's political leanings?

23 A. Yes. The first study we did in the *Journal of PS:*
24 *Political Science & Politics*, was an article called "My
25 Professor is a Partisan Hack." And it was a review of whether

1 faculty were -- whether students were aware of their faculty's
2 politics and to see to what extent did that correlate with
3 whether they thought the faculty member did a good job in the
4 classroom.

5 And this was not a study of what the professor's politics
6 actually were. It was only perception. But we were wondering,
7 is there a link between what the students perceive and the way
8 in which they rate the course?

9 Q. And what did you find?

10 A. We found there was a correlation, that the further the
11 student believed they were from the professor, the lower they
12 tended to give the professor's score overall in the student
13 evaluations. So we couldn't say for sure that these perceptions
14 were accurate, but we did notice that they had an opinion, and
15 the opinion seemed to have some bearing on whether or not they
16 approved the professor's handling of the course.

17 So this was the first indication that students were both
18 aware of -- there aware of something with respect to the
19 professor's politics. But, importantly, as we would find out
20 later, it provided us evidence that students can resist the
21 professor's message, because if they have an idea of what the
22 professor believes, they are capable of putting up, let's say,
23 ideological barriers. They become resistant to a message if
24 they believe the professor has a bias.

25 And this was the first indication that that knowledge might

1 make them more -- I wouldn't say immune, but I would say more
2 resistant to being persuaded by professors with different
3 political points of view.

4 Q. What was the response to that first study?

5 A. We began getting responses even before it was published.
6 Pennsylvania had convened -- a statehouse had set up a special
7 commission on ideology in higher education, I think specifically
8 the accusation that faculty were indoctrinating students.

9 And so after we watched this on television, we realized
10 that we had something to offer. So I contacted the chair of the
11 committee. I believe it was Representative Gib Armstrong who
12 was the chair of this committee. I probably contacted his
13 staff, to be clear, and let them know that we had research which
14 was potentially relevant to the hearings. And then we were
15 invited to the next hearings which took place, I think, a month
16 later.

17 Q. What was the -- what was the reaction to your testimony
18 there?

19 A. It's really interesting in that the data was preliminary,
20 but we were pretty clear at that point that the narrative from
21 the two sides -- conservatives were convinced that
22 Republicans -- that students were being indoctrinated, and the
23 Democrats on the committee were convinced that politics played
24 absolutely no role in the classroom. And so there were two
25 competing narratives.

1 And we began to realize that, in fact, the fact that
2 students were aware of their professors' politics seemed to
3 undercut the idea that politics played no role in the classroom.
4 The data didn't allow us to speak to the question of
5 indoctrination. That would come in later studies. But we got
6 somewhat of a chilly reception from the Democrats on the
7 committee because we seemed to be contradicting a narrative that
8 they were much wedded to as they went through this debate over
9 how to handle ideology in the classroom in the Commonwealth of
10 Pennsylvania.

11 Q. What was the next question that you researched after that
12 initial study?

13 A. Well, the initial study received a lot of positive
14 publicity when it came out, but we realized there were some
15 defects -- I shouldn't say "defects." There were shortcomings
16 in the study. We wanted to know more.

17 So students have an opinion about their professor's
18 politics. Is the opinion grounded in reality? That's the first
19 question.

20 The second was, well, what effect does that have to the
21 student's ideological development over time?

22 The first study was just a snapshot in time. We couldn't
23 see the students move. And, also, we didn't know what the
24 professor's politics were.

25 So in the follow-up study we used the same methodology

1 where we randomly sampled classrooms in political science. But
2 this time we had two major changes. We added a survey where the
3 faculty were willing to disclose to us their own political
4 views, their ideology, their partisanship, so we would have an
5 actual marker of what the professors actually thought and
6 believed.

7 And then we had a two-part survey where at the beginning of
8 the semester and the end of the semester we would ask students
9 to evaluate the professor's politics as well as give a sense for
10 whether or not they approved of the professor's overall class
11 performance.

12 But the real key to the study was that we had now two
13 points in time. We had a before and an after. So we could
14 track changes over the course of a semester to find out -- and
15 the important part of the survey was it wasn't just the overall
16 composition of the students' politics. We could track
17 individuals.

18 We designed what I call a demographic fingerprint where we
19 could sew together a series of different questions that they
20 answered to uniquely identify students at Point A and Point B,
21 match them together, and it would allow us to see changes that
22 occurred over time.

23 And on the occasion when we couldn't perfectly match them
24 up, we did ask one question. We asked the students, Who was the
25 first president? And, thankfully, they knew it was George

1 Washington, and they would write Washington on both surveys and
2 then give us a handwriting sample which we could use to validate
3 to make sure that the surveys linked up.

4 So this allowed us to track movement over time. And what
5 we found was that there was some movement. In fact, movement
6 was leftward, but it was relatively small. And, as importantly,
7 the movement we tracked, most of the changes we saw were random.
8 Students would move left and right, back and forth, in a way
9 that was just a cloud of confusion. Most of them would stay on
10 the point where they began, but to the extent that there was
11 movement, it was pretty random. There was a slight movement to
12 the left by the average student.

13 Now, what complicated our survey was, unfortunately, when
14 it went into the field, George W. Bush's popularity was dropping
15 precipitously because of the second Iraq War, and society as a
16 whole was moving slightly leftward. And it was hard at first to
17 separate out is the movement we're seeing a result of the
18 faculty influence, or is it simply a societal shift.

19 What we did then is we measured the professors' politics
20 against the students' politics and found that it didn't matter
21 whether the professor was on the right or the left or Republican
22 or Democrat; the movement was always left. And so this -- made
23 this -- it was a small change, but it made -- it was an
24 interesting question. If there was indoctrination occurring,
25 why were the students drifting leftward but even when the

1 professor was Republican?

2 The other thing we found was that students were pretty good
3 at guessing the professors' politics, and I'm not surprised by
4 this, because in the many years I've been teaching, about
5 halfway through the semester -- I do my very best to keep my
6 politics to myself -- but I ask students, What do you think I
7 am? And usually they can pick up very subtle cues.

8 And in this paper we discovered that not only did they
9 figure out their professors' politics, but they do it very
10 quickly, which was another indication leading back to the first
11 survey. The fact that they can identify a professor's bias
12 means they are less likely to adopt their beliefs wholesale.

13 Q. In addition to the study that you just mentioned, have you
14 conducted any further research on how students' views change
15 over the college years?

16 A. We did. In our book project -- the book is called *The*
17 *Still Divided Academy* -- my coauthors and I examined what were
18 called cohort studies. Rather than looking just at political
19 science classes, we had a data set that had large-scale data
20 from faculty, students, and college administrators.

21 And when we focused on the students, and we compared the
22 cohorts from the first year to the fourth year, it allowed us to
23 make an estimate as to how their political views may have
24 changed over the course of four years. But what was different
25 about this approach to what we had done before, you know, we

1 weren't just asking about ideology or politics; we were asking
2 about their individual issue positions.

3 And here we found evidence that students on issue
4 positions, on social issues, seemed to be drifting left over the
5 course of four years, not a big change, but a noticeable one.
6 Most surprisingly, on economic issues they were drifting right.
7 And this was totally unexpected.

8 And so this was not the same as the previous studies
9 because we weren't tracking individuals. They were overall
10 cohorts. But it did provide a little more detail because our
11 findings with respect to political science appeared to have some
12 application to academia as a whole.

13 Q. What was the data that you used to conduct this research?

14 A. It was a national -- the NAA study, North American Academic
15 Survey was conducted by the Angus Reid research group. I
16 believe they've since changed their name.

17 But it was a large-scale survey, originally designed by
18 Stanley Rothman, who passed away who is our coauthor, and the
19 late Seymour Mark Lipset. It was his last major project before
20 he passed away. And so they worked with Angus Reid research
21 group to design this rather elaborate survey instrument and then
22 had them randomly sample college professors, administrators, and
23 students in order to get a clearer picture of what were the
24 competing views in the university.

25 So we looked at much more than just politics. We looked at

1 the purpose of higher education, views of diversity. But it was
2 a way of looking at these different constituencies and seeing
3 where they differed and why.

4 THE COURT: Let me ask you a question.

5 How do you account for -- a good example would be me.
6 I grew up in a town of 6,000 people very much like me. Suddenly
7 I go to college, and the folks I go to school with are much
8 different, different socioeconomic groups, different races,
9 different religions, much more varied.

10 To the extent there is a -- because you said you
11 distinguished between economics versus other issues. How do you
12 account for or discount, whatever the proper term would be, a
13 student's shifting views just based on not classroom, but
14 out-of-classroom social interactions and so forth?

15 And I could be wrong, but I would assume that that
16 would be a significant factor, particularly as it relates to
17 ideas about social issues.

18 THE WITNESS: It is, in fact, one of the issues we
19 grapple with in all our research, because the fact that we can
20 see students changing doesn't mean we necessarily know why.

21 So one of the things we've done in our more recent
22 paper is we would look at things like peer effects. So what is
23 the overall ideological disposition of that college, and does
24 that correlate with the way in which the student changes from
25 their first year to their last year?

1 THE COURT: Like whether somebody goes to Oberlin may
2 change in a different way than somebody who goes to Liberty?

3 THE WITNESS: Yes, exactly. And so that's one of the
4 ways we try to tease out these differences is to find out what
5 are the other corollaries which are predictive of a student's
6 movement, and one of them is peer group.

7 We also try to look at things like are they at an
8 elite university. We examine variables like -- one of the
9 things that's a very good predictor is how extreme are they when
10 they start, because students tend to gravitate toward the mean.
11 And so a lot of movement we see is just kind of the average
12 oscillations you would expect for people kind of figuring
13 themselves how.

14 But even as we found evidence that students moved
15 left, the question of why is always kind of rather vexing, and
16 it's one that we have tried to get at indirectly. It's very
17 difficult to know for sure without a randomized experiment, and
18 that wouldn't be permissible.

19 BY MR. JASRASARIA:

20 Q. You just mentioned your most recent study. What were you
21 studying there?

22 A. Well, we've done a number of studies where it seemed to, I
23 would say, downplay the changes that students made. It called
24 into question the concept of indoctrination for any number of
25 reasons, which I've described. But we weren't satisfied with --

1 we didn't want to, like, just brush our hands and say, We're
2 done; we found the answer, because one of the things that we
3 observed was that we saw changes on issue positions more than on
4 overall ideological or partisan disposition.

5 So we used data from the Higher Education Research
6 Institute of UCLA. It's a very large, very well-respected
7 data-gathering operation. And they had panel studies which did
8 allow us to track student beliefs over time.

9 And what we found was that on individual issue positions we
10 saw evidence of movement, but it was very peculiar in that some
11 of the movement was very predictable. So students would move
12 left on gay marriage, but the population at that time was also
13 moving left. So that didn't tell us anything. But we saw that
14 individual students were moving left on abortion at a time when
15 the population's overall views on abortion were static. And
16 surprisingly, on issues like affirmative action and the
17 prevalence of racism in America, there was no movement.
18 Students were just completely static.

19 And so we were trying to unpack why is it that on some
20 issues there's movement and on other issues there are not. And
21 it does challenge the notion. So the students may not be
22 indoctrinated. We're not seeing major shifts over time, but we
23 do see subtle ways in which their views change. And, again, it
24 comes back to the same problem: Why? Is it the faculty?

25 And one of the theories --

1 THE COURT: Can I ask --

2 THE WITNESS: Sure.

3 THE COURT: -- because intuitively it would seem to me
4 that I could be totally wrong.

5 But if you've got a sampling of students that all move
6 slightly to the left on social issues, and I've got -- half
7 those students are engineering, math students, and majors where
8 it's really hard for me to believe there's a whole lot of
9 politics being taught in class, and then you've got all the
10 liberal arts folks -- when you compare those two, if they are
11 both roughly shifting the same degree to the left at the same
12 university, accounting for the fact there's differences in
13 schools -- probably not as simple as this, but it seems to me
14 that that would suggest maybe it's not as complicated as it's
15 the teacher. It may be some of these other things that are
16 influencing the shift.

17 THE WITNESS: Yes. And, in fact, your instincts are
18 good.

19 One of the things we've tried to do in several studies
20 is to look at the majors and find out -- presumably, if someone
21 is social scientist or they're in the humanities, the faculty
22 are much more left in those fields, but there would be a much
23 greater shift in their ideological views. And we see some
24 evidence of that.

25 So it does vary in predictable ways, which might

1 suggest some faculty transmission. But we come back to the
2 double problem: The students in the humanities tend to be much
3 more liberal.

4 THE COURT: Self-selective --

5 THE WITNESS: Yes.

6 THE COURT: -- you choose that because that's the way
7 you are?

8 THE WITNESS: Or, you know, the person might not know
9 who they were. If you go into a major which is flooded with
10 people who are very much on the left, that almost magnetic
11 attraction of the peer group might have an influence in the way
12 that would be hard to separate from faculty influence.

13 So I think the key point in kind of all of these were
14 that the shifts we were seeing were not dramatic. They were
15 small. And when we tried to identify or isolate what were the
16 variables causing them, especially the second study -- the fact
17 that the students moved left even when the professors were
18 Republicans made us wonder if there was something about the
19 overall college experience, not necessarily the faculty, that
20 was primarily responsible for the shifts that we had observed.

21 BY MR. JASRASARIA:

22 Q. How do students' shift on specific issues that you've been
23 talking about affect their overall ideological identifications?

24 A. Well, students may shift on individual issues, but one of
25 the things we found in our last study was that they remained

1 rather stable in terms of their self-identification. So they
2 see themselves as liberal or conservative. Even if their issue
3 positions change, their self-identification is largely frozen.

4 And so that's why we encourage researchers in the future to
5 focus more on the issue positions, rather than whether they
6 think of themselves as Republicans or Democrats, because those
7 are frozen in time in ways that may not represent true
8 persuasion.

9 Q. Have you studied the experience of conservative students in
10 academia specifically?

11 A. I have. The work that we did for the American Enterprise
12 Institute was titled *Left Pipeline: Why conservatives don't get*
13 *Ph.D.s* [sic].

14 And it was an examination of a phenomenon that had long
15 been known, which is that people who are on the right are much
16 less likely to get a Ph.D. than someone on the left. And the
17 AEI asked us to examine this question with a number of
18 hypotheses in mind. And we used data from the Higher Education
19 Research Institute at UCLA, and one of the things we found is
20 that, almost surprisingly, the left and the right students had
21 very similar positive experiences in college.

22 So the idea that the right-leaning students were maybe
23 being oppressed or were having a hard time didn't bear out, at
24 least in proportion to students who were on the left.

25 Now, again, a lot of this is complicated. We can get into

1 the weeds if we want to. But what was most striking was that we
2 were theorizing that maybe conservative students had trouble
3 finding mentors that would encourage them to go into graduate
4 school. So lots of different measures for what might constitute
5 finding a mentor that is provided in the HERI data set.

6 And what we found was that conservative and liberal
7 students had about an equally good opportunity to make friends
8 with faculty and find mentors. It was the moderate students who
9 lagged behind. And the moderate students had a worse experience
10 in college; their grades were lower; and they had less mentors.

11 Now, again, this is another issue. We can go into detail
12 about why this is happening, but these are the kind of
13 counterintuitive findings that allowed us to set aside some of
14 the common pet theories about what was driving that ideological
15 gap.

16 Again, I'm happy to go into details about what the article
17 found, but the very fact that we go into this research with
18 certain ideas and we look at the data, the data simply
19 contradicts them. Time and again we've been kind of led down
20 different paths because the data doesn't comport with what we
21 expected, and so we refine our data and we refine our theories.

22 THE COURT: I'm just going to ask.

23 Does the Ph.D. -- intuitively I would have thought
24 that -- because I've got two kids that chose two different
25 paths. The one that's more conservative is more interested in

1 their vocation and job at the end to earn a living, and the
2 other one is just more interested in education for education's
3 sake, and they're the one that's getting the Ph.D.

4 That may just be --

5 THE WITNESS: That is spot on. There were two major
6 things that we found in the study. One was that students who
7 are conservative are much more likely to go into a discipline
8 where they can immediately get a job: Criminal justice,
9 business. They don't need the advanced degree. So there were
10 better opportunities for them to move out into the workforce.

11 But even among two students, let's say two political
12 scientists, there is in the HERI data set a list of what do you
13 want out of life, and there is a series of questions about the
14 types of things that one values. And on every dimension the
15 liberal student wanted things which were more aligned with being
16 an academic. So the conservative student was more interested in
17 making money and raising a family and having a structured life
18 and a structured workforce, and the liberal student was more
19 interested in having a meaningful philosophy of life and
20 pursuing original research.

21 So even within a major, that personality difference
22 splits the students off, causing them to move in different
23 directions, as you suggest.

24 You could have saved me a year's worth of work if you
25 had suggested that earlier.

1 BY MR. JASRASARIA:

2 Q. So we just spoke about a series of studies. Were all of
3 them published?

4 A. Yes, they've all been published, most of them in the
5 *Journal of PS: Political Science & Politics*. That's, in fact,
6 the premier journal for this topic in the American Political
7 Association.

8 Q. What was your overall assessment from where you started to
9 where you ended up on this research?

10 A. Well, I had an overly simplistic view of it: That faculty
11 were predominantly on the left; they were teaching students.
12 Therefore, they surely were transmitting those views. And what
13 we came to realize was that it was far more subtle and
14 complicated because, as my coauthors used to say, students
15 aren't sponges. By the time they're 18 or 19 years old, they've
16 already developed a certain world view, and it's not that they
17 aren't susceptible to some influence, but that that influence
18 comes in a much more subtle way than I would have anticipated.

19 And so in a way we concluded that both the left and the
20 right were wrong in what they believed about how faculty
21 ideology affects the classroom. So the left were wrong in their
22 sense that it had no impact whatsoever, that faculty were
23 perfectly objective and students took nothing away, but we think
24 the right were overstating the extent to which faculty or even
25 college itself was influencing their ideological development.

1 And so we came away with a story which was much more
2 nuanced than we started with, and, as a result, we've been
3 criticized by both the left and the right for our work.

4 Q. Have you considered other research aside from your own in
5 this area?

6 A. I have.

7 Q. Are your conclusions consistent with that research?

8 A. They are. This is what's interesting. There are some
9 research -- there's some debate about how predominant the
10 faculty role is, and I cite one in my report where they looked
11 at Christian colleges and found that students typically moved
12 more leftward if the faculty are more liberal. But that doesn't
13 surprise me, because if you start with a very conservative
14 group, the probability that they move left is much higher. It
15 even bears out in their own research.

16 Other work by -- well, there's a number of them listed in
17 the report, and I'd scared to rattle them off the top of my
18 head -- come to a very kind of similar conclusion. There is
19 some movement, ideology matters, but the extent to which it
20 matters appears to be less than what had been assumed when we
21 started this research 20 years ago.

22 Q. So just to summarize, for this case have you formed an
23 opinion on whether faculty indoctrinate their students?

24 A. Yes.

25 Q. What is that opinion?

1 A. As I understand indoctrination, which means that the
2 faculty have a very strong effect on the students' ideological
3 beliefs or development, I don't -- I would think definitively
4 they do not indoctrinate their students overall.

5 Now, I'm not taking away from a possibility that there are
6 definitely individual cases we would identify, and that's
7 something, again, researches will continue to look at. But on
8 the aggregate, the large-scale surveys have told us time and
9 again from different directions that the movement is relatively
10 small, and it's not clear why it occurs in the first place.

11 Q. Are you confident in that opinion?

12 A. Yes.

13 Q. How confident?

14 A. Fairly confident, because when we ourselves have done
15 studies with very different methodologies and very different
16 questions and it all comes down to a very similar set of
17 conclusions -- so in a scientific endeavor when your different
18 data sets are kind of leading you down to the same conclusions,
19 that's a good sign that you're onto something.

20 I also say I'm confident because I didn't come into this
21 with this opinion. My views changed over time, and so it's not
22 like I'm simply defending some position I had originally held.
23 It was something that was changed by the data over time.

24 Q. Great. Let's move on to --

25 THE COURT: I have a question. I'm sorry. I can't

1 help it.

2 I could see somebody asking you on a talk show, Well,
3 why is it that college kids vote so disproportionately in favor
4 of the left rather than the right? To which I then would ask
5 the follow-up question, Well, have they done studies strictly
6 evaluating people the day they enter college? So since
7 there's -- you suggested there's only a slight movement -- if it
8 is, it's to the left -- that the folks that show up identify as
9 a much larger percentage that start college that way.

10 So what -- how would you respond to the question, and
11 does my assumption as it relates to my second point --

12 THE WITNESS: One of the --

13 THE COURT: -- hold true?

14 THE WITNESS: One of the things that we've grappled
15 with is the studies that we've done have looked at college
16 students, and there are students -- people who don't go into
17 college, and they go a different pathway.

18 The fact that students start off liberal is not
19 entirely new -- that's something we've observed for
20 generations -- and that may speak to something else, which is
21 that students have a lot of pressures on them as they develop
22 ideologically even before they get to college. And so it almost
23 appears as though there's a marginal difference, that college
24 might apply some pressure to them, but compared to what they had
25 in the preceding 18 years, it may not be enough to move the

1 needle much.

2 And so, ultimately, we can say more definitively
3 college doesn't appear to be driving them one way or the
4 other -- doesn't appear to be driving them for the most part,
5 but that doesn't --

6 THE COURT: You said there were studies at the
7 university level. Did y'all do studies in terms of to what
8 extent does primary and secondary education --

9 THE WITNESS: That is definitely out of the scope of
10 our work, so that's --

11 THE COURT: Not have you done it, but as part of what
12 you've done, are you familiar -- because you said you were
13 shocked that so little work had been done at the university
14 level, and I'm assuming, and maybe wrongly so, if there's very
15 little work done at the university level, there was probably
16 even less done for primary -- none at primary and little at
17 secondary.

18 But are you aware of such studies?

19 THE WITNESS: I am. As a matter of fact, we studied
20 this in graduate school, and, in fact, I think my -- one of my
21 dissertation committee members was one of the ones involved in
22 the early work.

23 The work hasn't moved forward very much, at least the
24 last time I checked, because it's so hard to do studies of
25 minors because the rules are so different when you do surveys.

1 Some of the early work was literally interviewing
2 kindergarteners and asking them, Who runs the country? Like,
3 they would ask real open-ended questions, and the children would
4 describe their view of the world.

5 But as far as tracking them over time -- panel studies
6 are very difficult to do with adults, and with children, it's
7 even more so. So I haven't gone back and looked at the K-12
8 lately, but I do remember our frustration in graduate school
9 that because the rules had so tightened up on looking at
10 children, it was much harder to do the research than it was 20
11 years before.

12 THE COURT: And this may tell us nothing, but I am
13 familiar with the reports that suggest -- where they do voting
14 at schools, that there's almost a complete overlay between what
15 the numbers show in the actual votes of the parents in that
16 community and the schools, especially when you break it down by
17 precinct. I have seen -- I believe I've seen --

18 THE WITNESS: Yes.

19 THE COURT: -- that type of work that suggests there's
20 a strong correlation between parents and children.

21 THE WITNESS: There is, and, in fact -- and, again,
22 I'm going back to my graduate school days. What I remember was
23 that the stronger the -- this was an aggregate of the father and
24 the mother, and if they both have strong political beliefs and
25 they were one in one direction, the kid is doomed. He's almost

1 inevitably going to inherit that, at least at first. When the
2 parents are split, the probability of change goes up more.

3 But it's not just is it a registered Republican or
4 registered Democrat. For children, it is how much is politics
5 discussed in the home. And so if the mother is a Democrat but
6 never says a word about it, then that has almost no effect on
7 the child as they are getting older. But parenting is a big
8 component of how people form a political identity, and they
9 carry that with them when they start college.

10 THE COURT: You may continue, Ms. Jasrasaria.

11 BY MS. JASRASARIA:

12 Q. Let's turn to, you know, whether you were asked to render
13 an opinion about the survey provisions in this case.

14 Were you asked to do that?

15 A. I was.

16 Q. And did you come to an opinion -- did you come to an
17 opinion on the survey provisions?

18 A. I did.

19 Q. What did you review in forming your opinion about the
20 survey provisions?

21 A. I reviewed the statute itself. When it became available, I
22 reviewed the survey instruments that were distributed, and, to
23 some extent, I reviewed the preliminary results on the surveys
24 when they came back.

25 Q. Did you also look at the administration of the survey?

1 A. I did. I examined the -- I'm trying to remember if they
2 were documents that described it or if this came out in the
3 depositions, but I do know the way in which the surveys were
4 done and how they were conducted with SurveyMonkey and how they
5 sent out common links.

6 So in the May document I reviewed, I did get a pretty good
7 picture of the methods that were used to distribute and get data
8 back on the faculty. I should say it's the faculty/staff survey
9 and on the student survey.

10 Q. Let's start with the provision itself.

11 MS. JASRASARIA: Andy, could you please pull up Joint
12 Exhibit 1 and the survey provision?

13 BY MS. JASRASARIA:

14 Q. Is this the language that you're referring to,
15 Dr. Woessner?

16 A. It is.

17 Q. And before we get into the other things that you reviewed,
18 how did the text of the provisions themselves inform your
19 opinion?

20 A. The first time I saw the statute, I was struck by the
21 wording: *The State Board of Education shall select or create an*
22 *objective, nonpartisan, and statistically valid survey to be*
23 *used by each institution which considers the extent to which*
24 *competing ideas and perspectives are presented and members of*
25 *the college community, including students, faculty, and staff,*

1 *feel free to express their beliefs and viewpoints on campus and*
2 *in the classroom.*

3 I think as an English professor, Dr. Bérubé should probably
4 edit that sentence a little bit.

5 I would suggest -- what was interesting to me was it was --
6 the notion that it had to be a "statistically valid survey." I
7 don't know if there is any reason why the legislature had to
8 impose that burden on them, but as a researcher, I was delighted
9 to see it, because it meant that they weren't just content to
10 send out any old survey. They were imposing certain minimum
11 requirements that the data that came back had to be
12 scientifically useful, if I were to use the more cavalier term.
13 So that was the part that stuck out to me most.

14 Now, "objective," that's very hard to define.

15 "Nonpartisan," we just don't mention politics -- or we
16 don't mention political parties. That part is easy.

17 But "statistically valid" implies a certain degree of
18 quality, which means the data that comes back will be useful.

19 Q. Are you aware of surveys in higher education outside of
20 those that are required by the survey provisions of HB 233?

21 A. Yes.

22 Q. And who typically administers those types of surveys?

23 A. Well, surveys -- my favorite example is the Higher
24 Education Research Institute at UCLA. They do -- every year
25 they do thousands -- tens of thousands of surveys of students,

1 as well as faculty, and they are administered by individuals who
2 are -- they're not state entities. The HERI Center is private,
3 although they're affiliated with UCLA. And they are done for
4 the benefit of the college in that the college has an
5 opportunity to take the data and use it to hopefully improve the
6 quality of life on campus and learn about professors' overall
7 satisfaction with their jobs.

8 Most importantly, I'm not aware that anyone thinks that
9 HERI is a -- has a political ax to grind. They generate data;
10 they present the data. And, frankly, they are very zealous in
11 guarding their data because they want to make sure that the data
12 is not going to be used by someone who could identify
13 individuals or use it in some way which is harmful to the
14 enterprise that drafted -- or that requested the survey.

15 Q. How do you compare the methodology of HERI surveys to
16 HB 233 surveys?

17 A. There's some pretty big differences and important
18 differences, and the first I mentioned was that the HERI survey
19 is administered by survey professionals. I mean, these are
20 individuals with decades of experience in doing surveys. They
21 have special experience in doing surveys within the academic
22 context, so it seems that they were staffed by individuals who
23 had much more experience in this type of work.

24 The survey itself, because it's not politically loaded,
25 there aren't the same pressures that I think were experienced in

1 Florida, where components of the faculty or, to some extent, the
2 students felt pressure to opt out. And this pressure to opt
3 out, because it is not a random pressure, because this opt-out
4 occurs primarily on one side of the political spectrum, creates
5 something -- it's a sampling error. It's a bias in the survey,
6 which makes it difficult and quite possibly impossible to get a
7 valid random sample.

8 And so HERI doesn't operate under this political cloud, so
9 the data they get back resembles what people actually think.
10 And in this case, I speculated early on that because of the
11 political controversy the survey methodology would be hopelessly
12 bogged down and biased, which would render the data meaningless.

13 Finally, if I could add one more point, the surveys
14 themselves were very different. I was appalled by the survey
15 construction in both the faculty and the staff survey because I
16 felt the questions to be muddled, unclear, biased.

17 And, again, no survey is perfect. I've made mistakes too.
18 But it's very clear when you compare HERI and the survey that
19 was distributed last year, there's a difference in quality
20 which, even setting aside the difference in their sampling
21 methodologies, makes a very big difference in making the HERI
22 survey statistically meaningful.

23 Q. Let's turn to the 2022 survey.

24 MS. JASRASARIA: Andy, can we pull up what's been
25 marked Joint Exhibit 3?

1 BY MS. JASRASARIA::

2 Q. Is this the student survey that you looked at,
3 Dr. Woessner?

4 A. Yes, it is.

5 MS. JASRASARIA: And, Andy, can we pull up Joint
6 Exhibit 4?

7 BY MS. JASRASARIA:

8 Q. And is this the employee survey that you looked at,
9 Dr. Woessner?

10 A. Yes.

11 Q. So let's start by taking a look at the first question on
12 each survey.

13 MS. JASRASARIA: And if we could start with Joint
14 Exhibit 4 and highlight that.

15 BY MS. JASRASARIA::

16 Q. Dr. Woessner, can you read that question, please?

17 A. Number one: *My institution provides an environment for*
18 *free expression of ideas, opinions, and beliefs.*

19 Q. What do you think of that question?

20 A. I think it's a perfectly good question. It asks a question
21 whose answer we don't know. It would give the employees an
22 opportunity to weigh in on whether or not they think this is an
23 area where they can freely express their ideas. So it's both a
24 reasonable question because it's clear and it elicits meaningful
25 information.

1 Q. Let's turn to the first question on the student survey.

2 Could you read that one for us, Dr. Woessner?

3 A. *I feel that it is important to be able to express my*
4 *political viewpoints without fear of negative consequences.*

5 Q. And what do you think of that question?

6 A. This is an awful question --

7 Q. Why?

8 A. -- for a couple of reasons.

9 First of all, it's problematic to have the students begin
10 with a question which is completely different than the faculty
11 survey, particularly because this question, in essence, raises
12 people's fears and anxieties. It calls attention to a point of
13 controversy in a way which is going to affect the way they
14 answer the questions which follow.

15 In my report I put it this way: If you are asking a
16 question about, let's say, President Joe Biden and how he
17 handled the economy, you wouldn't want to open with a question
18 that said, Do you believe it is important to be able to fill up
19 your tank without being charged exorbitant gas prices?

20 The question, first of all, would be meaningless because
21 nobody wants to pay exorbitant gas prices, but, more
22 importantly, that question sets a tone. It's a primer which
23 forces them to think about the questions that follow through a
24 particular lens.

25 So when I saw this question, I didn't know if this was just

1 inexperience on the part of the survey folks that they would put
2 a primer question in or if this was deliberate, this was just an
3 effort to skew the survey to start off by getting the students
4 to think about the worst possible things that could happen in
5 higher education.

6 Q. Do you have concerns about the difference between the two
7 first questions?

8 A. Well, I certainly do in that it would almost have been
9 better if that -- my opinion -- poorly-constructed question had
10 been in both surveys. It would have evened them out a little
11 bit. But because the students were primed to think about
12 something negative and the faculty and staff were not, it
13 immediately puts them on a different footing.

14 Q. When it comes to that first question in the student survey,
15 given your experience, can you think of a reason to include it?

16 A. Not a good reason.

17 Q. Let's turn to the question-and-answer choices specifically
18 about ideology.

19 MS. JASRASARIA: Andy, can you pull up Question 13 in
20 Joint Exhibit 3, which is on page 3 of that?

21 BY MS. JASRASARIA:

22 Q. Dr. Woessner, can you please read the question and the
23 answer choices?

24 A. *My professors or course instructors are generally more:*
25 *Conservative, liberal, other, don't know.*

1 Q. What do you think of those answer choices?

2 A. It's a poor -- it's a poor list of options for several
3 reasons. First of all, typically -- and the Higher Education
4 Research Institute is a good example -- when you ask an
5 ideological question, you usually have more than two dimensions.
6 It usually goes from the far left to the far right, but usually
7 it's a five-point scale. So it gives a little more variation.

8 But, more importantly, the Higher Education Research
9 Institute's study characterizes "other" as middle of the road.
10 So on the one hand, you have far right, conservative, middle of
11 the road, liberal, and far left. So they're anchored, and it's
12 clear what they mean. This one throws "other" in there, and I
13 don't know what that means. Would communist be other? Would
14 libertarian be other?

15 And so, again, I don't think this is malicious. I just
16 think this is an amateur mistake where they provide options
17 which don't allow us to confidently place them in a row, which
18 allows us to draw more definitive conclusions about what they
19 mean. That's just confusing and will make it harder to
20 interpret the results.

21 THE COURT: Quick question. You had opined as to the
22 one question was it incompetence or was it purposeful the way
23 the question was phrased with a final clause that suggested how
24 you are supposed to view the question.

25 In this case, Question 13, based on a ton of data

1 related to voting and primacy, it would seem to me if you were
2 trying to skew this purposefully to suggest a liberal bias, you
3 would have put liberal first.

4 THE WITNESS: Possibly. I don't -- you're correct in
5 that question, order effect sometimes makes a difference, and
6 that if given a random choice, people are a little more apt to
7 select the first one first. I don't know if that effect is a
8 big effect, but you're correct in that if I were diabolical and
9 I was trying to skew it, that would be one way of doing it.

10 One of my concerns about the way this is structured
11 even beyond the three-point scale option was it isn't clear that
12 students have a good understanding of what liberal and
13 conservative means, which is why in most of the -- all the
14 surveys I've ever done -- and I know HERI does this -- there are
15 validation questions. And there's different ways of doing this
16 where you can test whether the students have a handle on the
17 meaning of liberal and conservative, and this survey doesn't
18 have that. So it throws out these categories which to students
19 are very abstract, and then there's no way of being able to sort
20 out do the students answering the question have a good handle on
21 what they actually mean.

22 THE COURT: I guess -- my question I asked the way I
23 did because when I looked at the surveys, I was trying to figure
24 out was there anything I could glean from the surveys that would
25 suggest they were, A, drafted to produce a certain result, or,

1 B, which is related to the first question, did they appear to be
2 just -- were they done poorly because they were done poorly?
3 Were they done poorly to arrive at a specific result? Or does
4 it appear through -- by balance -- and that's why I asked the
5 question I did about Question 13 is it's -- they may have been
6 well-meaning. I don't know because I don't know the people.
7 But it overall appears to be haphazard and reckless the way it
8 was structured as a survey as opposed to some suggestion by
9 whatever you -- evidence you saw that it was purposely done.

10 THE WITNESS: Yeah, it's very difficult to know the
11 motives, and there isn't a lot of evidence to make that judgment
12 one way or the other. The very first question is so bad that,
13 you know, maybe that was just a mistake.

14 THE COURT: So, Judge, I can't tell you, but what I
15 can tell you is it does not -- in terms of methodologies and
16 surveys in academics, it doesn't pass muster in terms of how you
17 draft a survey if you want a statistically valid survey.

18 THE WITNESS: Yes.

19 THE COURT: Okay.

20 THE WITNESS: And then that's before we even get to
21 the sampling problems. The construction of the survey itself
22 doesn't lend itself to a statistically valid result.

23 THE COURT: I understand.

24 BY MR. JASRASARIA:

25 Q. Let's just quickly compare the answer choices on the

1 student survey to the answer choices on the employee survey.

2 MS. JASRASARIA: Andy, can I have you pull up Question
3 24, which is the last question in Joint Exhibit 4?

4 BY MS. JASRASARIA:

5 Q. Dr. Woessner, can you read those question -- that question
6 and the answer choices?

7 A. *Where would you place yourself on the following scale?*

8 *This is question 24. Conservative, moderate, liberal, none of*
9 *the above.*

10 Q. And what do you think of those answer choices?

11 A. This is a little better. It's a little better because
12 moderate at least implies that it's a middle category. That's a
13 little helpful. I'm -- I always want to see more variation. I
14 think that liberal, moderate, conservative is a little bit
15 tight, and typically I like five-point scales. But this is
16 certainly an improvement over what we saw in the student version
17 of this question, although this question doesn't appear on the
18 student survey.

19 Q. And do you have concerns about the inconsistency between
20 the sets of answers?

21 A. Well, I think it's difficult if you want to compare from
22 one survey to other. You want to use roughly the same -- you
23 want to use the same scale, if at all possible. So that alone
24 is just -- it's just something that I think individuals who have
25 done this for a while are more fixated on making those scales

1 match effectively.

2 But even when there are differences in the way in which the
3 two surveys are constructed, there better be a good reason for
4 it, and I don't see any evidence that there were reasons why
5 they were constructed differently in the way that they were.

6 Q. And you mentioned that there is no comparable question in
7 the student survey. What are your thoughts on that?

8 A. This is astonishing. I have to say I was just -- I kept
9 looking back at the student survey when I first got a chance to
10 look at these because whereas the faculty and staff are asked
11 about their own ideological disposition, the students are not.

12 Well, as a researcher who works in this field, one of the
13 most important things I need to know if I find that students
14 report that they are afraid to express themselves or they have
15 some apprehension about expressing views in class was, what's
16 the difference between liberal and conservative students?

17 Because if all the students equally -- liberal, moderate,
18 conservative -- are apprehensive about speaking out in class,
19 that says something very different than if it's only the
20 conservative students. And so here an absolutely essential
21 piece of information which would help them to put this data into
22 context, presuming the data were valid, was simply omitted.
23 And, again, I don't know if it was malicious, but it raises
24 questions because it really makes the first survey, even under
25 the best of conditions, less effective.

1 Q. What would you -- what did you find with respect to the
2 quality of the survey instruments?

3 A. I thought they were rather poor. They could certainly have
4 been improved, and I -- it really is confusing why they were
5 constructed in the way that they were.

6 Q. You also noted that you looked at the methodology of the
7 surveys in 2022. What did you find with respect to the sampling
8 methodology?

9 A. Well, sampling under the best of conditions is challenging,
10 because in order for a sample to be meaningful, it has to
11 roughly mirror the population that we want to study. And in all
12 kinds -- for all kinds of reasons, in my field there are
13 sometimes pressures which make surveys look different than what
14 happened -- what actually exists in real life.

15 Now, HERI probably doesn't have much of a problem with this
16 because they will send off a large number of surveys. They have
17 a fairly high response rate, and they get back surveys which, I
18 think by a number of measurements, roughly resemble what exists
19 in the overall population.

20 Because of the political backdrop behind this entire bill,
21 there was a lot of controversy about what was the purpose of the
22 survey, why was it being used. I predicted in my initial report
23 that this would cause downward pressure on the number of liberal
24 and left faculty who would participate in the survey and that
25 would create an overrepresentation for faculty who were middle

1 or on the right and that would provide a portrait -- a very
2 distorted portrait of what people actually felt on the faculty
3 side -- I should say the faculty/staff side -- and that would
4 render -- I predicted it would render the results statistically
5 invalid.

6 Q. Did you have an opportunity to test that prediction?

7 A. I did.

8 Q. And how did you do that?

9 A. Well, when the data came back, there wasn't a lot I could
10 do. We had a relatively short window. But one of the first
11 things I did was to look through and find out how did the
12 faculty self-identification line up with what we know about
13 faculty ideology in higher education in general.

14 And so we have a mountain of evidence the faculty in every
15 discipline, every region of the country are much more on the
16 left than on the right. And there's different estimates, and
17 there's different ways of quantifying it, but it certainly -- if
18 you had a survey that showed more than 20 percent of the faculty
19 were Republican, it would raise questions.

20 And I should be more precise. Dan Klein (phonetic), I
21 believe, estimates -- he has various estimates for majors and
22 shows that political science is one of the more diverse majors
23 because the liberals outnumber the conservatives by only five to
24 one. In the humanities it's, like, 20 to 1. So we're talking
25 about a pretty big and a pretty normal difference between the

1 left and the right in any normal survey of faculty.

2 Q. What did you ultimately find in the results of the 2022
3 survey?

4 A. Well, the data appeared to show that there were as many
5 conservative or right-leaning faculty as liberal faculty. It
6 was truly astonishing. I mean, I thought it would be skewed,
7 but I didn't expect it would be so skewed that individuals who
8 were on the right would outnumber the individuals who identified
9 on the left.

10 Now, again, it's all complicated because there's a lot of
11 middle-of-the-road categories and I examined faculty and
12 students -- faculty and staff differently, but everything we
13 know about higher education tells us that faculty lean left by a
14 great deal, and according to the data they produced, the
15 conservatives were roughly equal in number to liberals.

16 Q. So to summarize, what's the opinion you formed about the
17 survey under HB 233 for this case?

18 A. The survey instrument was badly designed, the
19 implementation was plagued by bias, which ultimately made the
20 statistical results invalid, and it was -- it would be -- you
21 cannot statistically correct for this sort of bias. There's no
22 statistical method to apply. You can't even increase the sample
23 size because what that does is it measures -- the survey error
24 measures in proportion to the increase in the sample size. So
25 what they produced was, in my view, meaningless and certainly

1 doesn't meet the standards set in the statute for a
2 statistically valid test.

3 Q. How confident are you in that opinion?

4 A. Very confident.

5 Q. Why is that?

6 A. The cross tab showing the breakout of liberal/conservative
7 faculty in the survey is just devastating. It's so far off that
8 I don't know how anyone could argue that it is valid, and the
9 atmosphere surrounding the survey is so charged, which is very
10 unusual. Usually in studies you don't have a charged atmosphere
11 where people are afraid or not afraid to take the study. But in
12 this instance, it's so charged I can't even imagine how you
13 could replicate the faculty survey to correct for these errors.
14 It would be essentially embedded in the research even moving
15 forward.

16 Q. So just to confirm, is your opinion limited to the 2022
17 survey?

18 A. It's a bit nuanced. On the faculty side, I think any
19 attempt to do this again with a better survey instrument is
20 doomed to failure because of the politically charged atmosphere.
21 I don't see how that can be overcome.

22 In my report I tried to reserve judgment on whether a
23 student survey could be replicated, if it were cleaned up and
24 done properly, in part because students are so politically
25 disconnected that in a year or two they might not be aware of

1 the controversy. And so it might be possible to conduct a
2 student survey, but as to the faculty survey, I think that's
3 simply hopeless.

4 Q. Were you also asked to offer an opinion on the likely
5 impact of the antishielding provisions?

6 A. I was.

7 Q. And did you form an opinion on that?

8 A. I did.

9 Q. What did you base your opinion on?

10 A. It's a combination of a rather disparate expertise that I
11 think I bring to bear to this problem.

12 One, I'm a faculty -- aside from the fact I've studied
13 political science and political psychology, I've been a faculty
14 leader who has dealt with faculty on things like regulations of
15 free speech throughout the last part of my career.

16 So, in addition to having a background where I can
17 understand something about incentive structures and what makes
18 individuals participate, this is an issue I've actually dealt
19 with in my own work. And so I was able to compare what I saw in
20 the statute with the type of concerns that were brought to me
21 when I was Faculty Senate chair and, in fact, something that we
22 dealt with -- Michael Bérubé and I dealt with together when we
23 met with general counsel a few years ago.

24 Q. What opinion have you reached on the antishielding
25 provisions' effects on speech?

1 A. I came to the conclusion that the statute is hopelessly
2 vague. And I come at this from a couple of different
3 perspectives, one of which is I didn't have to come up with
4 outlandish hypotheticals to conclude that I didn't know when the
5 survey -- when the shielding provision might or might not apply.

6 And in my report I laid out some pretty straightforward
7 hypotheticals, things that happened all the time in class, and I
8 realized that I just simply don't know if normal classroom
9 interactions, just a management of classroom as I've seen it,
10 could be done without potentially violating the shielding
11 provision.

12 So it's not that it's too restrictive. I don't really know
13 what it means, because in some very common everyday occurrences
14 I'm not sure how it would be applied.

15 But the second component of it is because it gives students
16 the private cause of action, that they're allowed to bring suit
17 against the college or the university if they believe this has
18 been violated, it's not merely that the faculty member is
19 worried that in the management of their day-to-day classroom
20 they might break the rule, they might break the law by engaging
21 in shielding, they have to worry about potentially very
22 sensitive students who might see a violation of shielding where
23 one may not exist.

24 And so it's a standard that's so low -- it's based,
25 essentially, on whether a student perceives that it's been

1 violated -- that it would -- because if I were operating under
2 these provisions, it would tie me in knots. I wouldn't know how
3 to conduct a normal classroom without either violating the
4 shielding provision or certainly violating the shielding
5 provision with respect to a sensitive student.

6 Q. What are some of the normal classroom interactions you just
7 mentioned that would be hampered by this provision?

8 A. Well, I provided four examples where -- things that
9 happened all time when I taught my undergraduate law series, and
10 questions, for example, where I have a discussion of *Griswold v.*
11 *Connecticut*, the Supreme Court establishing the right to
12 privacy. And I imagine that we have -- we have three students
13 in a row who talk about why *Griswold* is a wonderfully decided
14 opinion, and the student raises his hand and wants to
15 contribute, but I run out of time, and I want to move on.

16 Is not counting -- is not picking that student because
17 we've run out of time a violation of the shielding provision?
18 Am I required to let somebody else weigh in on a point of
19 controversy?

20 In the next hypothetical, we have a student who is dominant
21 in class discussion, and so speaks on every point and is
22 beginning to make his presence so felt that it's interfering
23 with the normal interactions in class. If he wants to say
24 something about *Griswold*, at that moment is refusing to call on
25 the student a violation of the shielding provision? It might

1 be.

2 If a student wants to opine on -- let's say they wanted to
3 claim that the use of birth control was immoral in a law class,
4 and I tried to redirect the student and say, Let's talk about
5 the legal aspects. Let's set aside the moral issue. We can
6 talk about that after class. Would preventing a student from
7 making a moral objection in a law class be a violation of
8 shielding?

9 And, finally, if the student just wants to go off on wild
10 conspiracy theories, is it -- am I permitted -- is it
11 permissible for me, if I were operating under this statute, to
12 simply cut the student off and say, I'm not going to entertain
13 wild conspiracy theories?

14 So these are the type of things I dealt with all the time
15 when I taught my undergraduate law series. And I think I would
16 be really apprehensive about how to deal with those situations,
17 because I think each of those students could make a plausible or
18 maybe an implausible claim that I had violated their rights
19 because the statute is not clear as to whether or not it applies
20 to the classroom.

21 Q. Could the antishielding provisions have been written in a
22 way that would make you more comfortable as a professor?

23 A. Yes. If it had been limited in such a way, if it had
24 opened with, you know, as it pertains to inviting speakers to
25 campus, it would have immediately cut out or carved out an

1 exception for the classroom, which would allow faculty to engage
2 in their normal classroom interactions. But it seems to be so
3 sweeping, I don't know where the line is, and I think that a
4 faculty member would reasonably worry that it encompasses their
5 day-to-day interactions with students, not just who gets invited
6 to campus.

7 Q. And how confident are you in the opinion that you reached
8 about the antishielding provisions?

9 A. Fairly confident. I mean, these are issues that not only
10 have I worried about after being in the classroom for 20 years,
11 but these are much the same issues that we raised with general
12 counsel at Penn State. And we were able to persuade them to
13 moderate the language a bit so it was a little more clear in our
14 case what was considered partisan activity in the classroom.

15 So I've dealt with this before. I can't say I -- we have a
16 very clear definition. But the very fact that I probably have
17 more experience reading and interpreting statutes than a typical
18 college professor who is not a lawyer and the fact that I'm so
19 confused by what this could mean and how it could be applied
20 suggests that most faculty would probably be in a worse pickle.

21 Q. Finally, Dr. Woessner, were you asked to offer an opinion
22 on the likely impact of the recording provision on speech in the
23 classroom?

24 A. I did. I did offer -- I formed an opinion.

25 Q. And what did you base that opinion on?

1 A. Part of it is my experience, 20 years in the classroom, but
2 part of it is my background in political psychology. I mean,
3 one of the things that we studied in public opinion political
4 psychology is participation.

5 Now, participation is normally defined as involvement in
6 voting, protesting. But a form of participation is to engage in
7 a political discussion, and one of things that's a predictor of
8 participation is the incentive structures around which
9 individuals operate.

10 And so I noticed in the last few years it's been harder --
11 or at least when I was at Penn State, it was harder to get
12 students to talk about politics. They were very shy about it.
13 They were nervous. And so it was kind of hard to tease them out
14 to create -- and God forbid I should say it -- a safe space
15 where they would be able to talk about politics and not fear
16 being judged and be able to interrelate with people with
17 different views.

18 If I were to say to the students, All right, every time a
19 student speaks, I'll give you \$5, I absolutely guarantee, as a
20 thought experiment, that more people would participate. Now,
21 the quality probably wouldn't go up, but there would be more
22 interaction. And if we back that off and say, All right, if you
23 want to speak, you've got to pay \$5, again, as a thought
24 experiment, we would expect less participation.

25 So anytime in a classroom setting we change the structure

1 of incentives and disincentives, it's going to cause more and
2 less participation. In this instance we're not charging them;
3 we're putting them in some risk. And if they know that
4 everything they say could be recorded and can be kept for all
5 time, I would think a rational student would simply be less
6 likely to want to take the risk of being involved in a
7 contemptuous discussion.

8 So, you know, if it was a physics class, maybe it wouldn't
9 make a difference. But for what I teach and the type of
10 difficult discussions that I would engage young people in, I
11 think they would be rather concerned about how potentially
12 recording what they say could become a problem for them in the
13 future.

14 Q. What was the overall opinion that you reached with regard
15 to the recording provision?

16 A. Well, it was -- primarily I thought it would make it less
17 likely the students would be willing to engage in difficult and
18 contentious discussions in the classroom.

19 Q. And how confident are you in that opinion?

20 A. Fairly confident.

21 Q. Why is that?

22 A. Having worked in the classroom as long as I have and having
23 studied participation as I have, it strikes me that -- I simply
24 don't see how the recording provision creates anything but a
25 disincentive for students to be engaged in contentious

1 discussions.

2 Now, you know, maybe I could be talked out of that opinion,
3 but there doesn't seem to be an upside to it for a student. And
4 so I'm fairly confident that if this is put into effect and,
5 more importantly, if there are even one or two examples where a
6 student, even within the law, sends this up because of a civil
7 complaint, it will really have a chilling effect. Because once
8 it becomes clear that more students are aware that this is
9 possible, the less likely they are to participate in contentious
10 discussions.

11 Q. Do you have reason to believe that the legislature was
12 simply unaware of this chilling effect on students?

13 A. I think some of the legislators were quite aware of it.

14 Q. Why do you say that?

15 A. In some of the debates over HB 233, there were references
16 to how this visibility might change individuals' behavior in a
17 way very similar to what I've described. And the fact that
18 legislators themselves when they were debating this were aware
19 that this might have a chilling effect on speech certainly
20 raises a concern that, even if it wasn't in all of the
21 legislators' minds, some were certainly aware of the fact it
22 might have.

23 MS. JASRASARIA: Andy, could you please pull up
24 Plaintiffs' Exhibit 208?

25

1 BY MS. JASRASARIA:

2 Q. Is this the hearing that you were referring to,
3 Dr. Woessner?

4 A. I'm waiting for it to go to the right page.

5 Oh, yes, this is the hearing to which I was referring.

6 MS. JASRASARIA: Could we move to pages 22 to 23 of
7 that exhibit?

8 Great.

9 BY MS. JASRASARIA:

10 Q. Dr. Woessner, is this the passage that you were referring
11 to?

12 A. Yes.

13 Q. And could you read the relevant piece of it?

14 A. I will start on line 20: *Let me tell you, Senator, I am*
15 *very excited about your bill. Fact is, we have very little*
16 *access into the classroom, we don't know what's being taught,*
17 *and now we'll get a chance to know. The people of this state*
18 *spend billions of dollars for our colleges and universities.*
19 *And I know that the people in my district want to know what's*
20 *being taught. I think it's fair. I don't think it's a lack of*
21 *academic freedom. I think it's the same thing we go through in*
22 *Sunshine. We acknowledge the whole world -- we allow the whole*
23 *world to see this meeting today, and, frankly, it does appear to*
24 *temper our conversations.*

25 I want to stop there for a minute.

1 This is an extraordinary admission, because they're
2 comparing the Sunshine Laws, to which legislators are subject
3 to, to students having conversations about controversial issues
4 in the classroom. And the fact that they acknowledge that the
5 Sunshine Law has tempered their conversation to me tells me that
6 they recognize that being observed will change student behavior.

7 Now, in this case I think they think tempered conversations
8 is a positive thing. It makes them more simple; makes them more
9 polite. But, clearly, the idea that the recording provision
10 will, one, give them insight into what's happening in the
11 classroom, which is a strange passage unto itself, because
12 presumably we would only know what was happening when there was
13 a complaint, so the insight would be extremely distorted because
14 it would only be negative things. But, secondly, the fact that
15 that type of oversight would change the tenor of the classroom
16 discussions, and I think that's troubling.

17 MS. JASRASARIA: You can pull down the exhibit, Andy.

18 BY MS. JASRASARIA:

19 Q. Dr. Woessner, you, yourself, believe in the ideals of
20 viewpoint diversity; is that right?

21 A. I do.

22 Q. So what's the problem with HB 233?

23 A. I may be in the minority in higher education, but I think
24 it's important to have viewpoint diversity, to have students
25 exposed to different viewpoints and not just to the ideology,

1 different viewpoints about history and politics. And this is
2 about exploring new worlds when one goes off to college. And so
3 I am perhaps a strange critic of HB 233 because I subscribe to
4 some of the goals that seem to be set by the legislature.

5 But my concern is that if this is a badly constructed law
6 and it places burdens on free speech, if it makes students less
7 likely to participate, if it makes faculty afraid to speak, then
8 it's tampering with academic freedom. And in an effort to
9 promote viewpoint diversity, it's, in fact, clamping down on
10 free speech rather than encouraging more free speech.

11 Q. What would you say about a way to achieve the goals of
12 viewpoint diversity would be?

13 A. It's really tricky within the bounds of the First Amendment
14 because presumably the government can't be putting its thumb on
15 the scale to change the outcome of an ideological debate. But I
16 would see room for something as simple as providing resources to
17 colleges and universities that want to bring in outside speakers
18 to have a prominent debate.

19 One problem the higher ed has is it's so far shifted to the
20 left that they often don't have local speakers who are willing
21 to come out on an issue that's controversial to represent a
22 right-wing position. And we could imagine the same thing in
23 reverse. I mean, Liberty University might have trouble finding
24 someone who is on the left.

25 And so to the extent that the State can provide support

1 which would allow them to bring in outsiders to have these
2 public debates would be a great way of voluntarily giving
3 resources to say, Look, if you have trouble identifying a
4 liberal or even a conservative, you can bring them in and have
5 these public discussions. And that brings more discussion to
6 the classroom in a way that doesn't make faculty afraid to teach
7 their lessons the way they have all this time.

8 THE COURT: An example would be in the '80s the
9 University of Florida brought in William F. Buckley to debate
10 George McGovern and had a two-and-a-half-hour debate in the
11 O'Connell Center between two larger-than-life personalities
12 representing far extreme ends of the ideological spectrum.
13 That's the type of thing you think would promote diversity on
14 campus in terms of viewpoint diversity without in any way
15 chilling speech?

16 THE WITNESS: Yeah. I have argued in some of my
17 articles that the academic -- the right does not have to be
18 equally represented in a department to have a really profound
19 effect on creating a free exchange of ideas.

20 Sometimes I was the only conservative person in a
21 department, and because I would sit on a panel with four other
22 people on the left, there would still be a very robust exchange
23 of ideas. But a lot of departments have no one who is
24 conservative or no one who is willing to speak out on issues.
25 And so, as you describe, if they had resources to bring in

1 people from the outside, you could have some tremendous debates
2 that would expose students to new ideas, and it wouldn't be
3 forcing the faculty to take a pretty good position. It would
4 just allow the university to reach out to conservatives wherever
5 they may be or, if we were to turn this on its head --

6 THE COURT: Liberal.

7 THE WITNESS: -- a liberal university, they could
8 reach out and find a conservative. So there are neutral ways of
9 promoting this discussion that don't potentially trample on
10 academic freedom.

11 MS. JASRASARIA: Thank you.

12 I have no further questions for Dr. Woessner at this
13 time, so I pass the witness.

14 THE COURT: Let me find out -- I'm not cutting anybody
15 off. I'm going to give the court reporter a five-minute break.
16 And I want to make plain, Counsel, I'm not limiting you one
17 second, and that is not the purpose of the question; just for
18 planning purposes.

19 MS. LUKIS: Sure. I would say maybe 30 minutes.

20 THE COURT: Okay.

21 All right. We're going to take a five-minute break.

22 Thank you.

23 (Recess at 6:03 PM.)

24 (Resumed at 6:13 PM.)

25 THE COURT: We are back on the record.

1 Counsel, you may proceed.

2 CROSS-EXAMINATION

3 BY MS. LUKIS:

4 Q. Dr. Woessner, it's nice to see you again.

5 A. It's nice to see you again, too.

6 Q. I believe you opined during your direct examination that in
7 your research students are pretty good about accurately
8 detecting their professor's political leanings.

9 Is that right?

10 A. It is.

11 I would say on balance. There are certainly student
12 faculty who are really good at hiding it. Apparently I'm not.

13 Q. Okay. Your research on this question of whether faculty
14 are indoctrinating students in the class, that's not specific to
15 Florida; correct?

16 A. Is it not specific to Florida, although I should add that
17 most of my research for national samples -- so, for example,
18 from my book, I have no doubt that Florida was part of that
19 sample --

20 Q. Sure.

21 A. -- but it wasn't directed for Florida specifically.

22 Q. All right. You've never taught in Florida, have you?

23 A. I have not.

24 Q. Okay.

25 Oh, I also believe -- correct me if I'm wrong -- one of the

1 research studies you did, it tracked students' political beliefs
2 over time; is that correct?

3 A. A couple of them did that, yes.

4 Q. Okay. In order to do that, do you have to collect some
5 sort of identifying information to connect the respondent to the
6 response?

7 A. Well, normally, yes.

8 But I'm very proud of this particular study, the second
9 study. The way we figured out how to do this -- and I described
10 this ever so briefly -- was we collected a bunch of rather
11 innocuous pieces of information which would not change from
12 Point A to Point B and then combined them into a unique
13 identifier. And then we used the word "Washington" in the
14 before and after survey to validate wherever there was any
15 ambiguities.

16 But the challenge in that survey was we wanted to preserve
17 their anonymity, but we had to do it in a way that allowed us to
18 match surveys.

19 Q. Okay. Did you do that research while you were at
20 Penn State?

21 A. We did, yes.

22 Q. Do you know what Heterodox Academy is?

23 A. I do.

24 Q. Are you among one of the founding members of the Heterodox
25 Academy?

1 A. Yes, I am one of the founding members of Heterodox Academy.

2 Q. So that means you're familiar with Heterodox Academy's
3 mission?

4 A. I am.

5 Q. Am I correct that the Heterodox Academy's mission is to
6 bring together divergent intellectual perspectives and foster
7 respectful and productive discussions?

8 A. That sounds about right.

9 Q. And you're a proponent of that mission?

10 A. I am.

11 Q. And are you familiar with the Heterodox Academy's research
12 into the state of intellectual freedom on college campuses?

13 A. I am.

14 Q. Okay. I can't read my chicken scratch.

15 Would you agree that the questions that that line of
16 research is trying to answer is valuable?

17 A. I would. In fact, I've done some of the work myself, so
18 yes -- not for the Heterodox Academy, but I do agree that that
19 is useful.

20 Q. I think you testified about this quite a bit, but we can
21 agree that in your opinion and in your research higher-education
22 faculty is predominantly to the left?

23 A. Yes, absolutely.

24 Q. And research data has shown that for at least 70 years?

25 A. Yes.

1 Q. How long have you been in academia?

2 A. If you -- well, I completed my Ph.D. in 2001. So I was in
3 academia before then as a graduate student, but I've been a
4 professor since 2001.

5 Q. Okay. And you touched on this earlier, but in that time
6 you developed an opinion that some academic fields are more
7 receptive to conservative ideas than others; correct?

8 A. Yes, that's some of the work I've done. We have evidence
9 that the degree to which the fields are on the left varies, and
10 we inferred from that some of the disciplines -- and we call it
11 political science, as an example -- are probably more open to
12 conservative ideas, if only because a large minority of
13 political scientists are Republicans.

14 Q. And related to that -- and I think this might touch on your
15 discussion earlier about the difficulty in maybe students
16 finding mentors. In your opinion, some faculty -- or faculty in
17 some academic fields might be reluctant to work with
18 conservative students; is that right?

19 A. Yes, that's always a risk.

20 Q. If a conservative individual wanted to break into academia,
21 in your opinion it could be a professional liability for them to
22 establish a research agenda that hints at their conservative
23 worldview; is that right?

24 A. Yes. There's special challenges that conservatives face
25 who want to get into academia. In fact, I've written about how

1 important it is that conservatives continue to engage in
2 academia. And so we have offered advice based on the research
3 that we've done which provides a path that makes it more likely
4 that a conservative would be able to find mentors, establish
5 research agenda, and ultimately succeed.

6 Q. Would you agree that burgeoning scholars with conservative
7 worldviews would be wise to wait until later in their careers
8 when they're more established to examine any questions that have
9 ideological implications?

10 A. I would, although I would go a step further to say that
11 advice is good advice for any ideological minority. So it
12 certainly applies for Republicans, or conservatives.

13 But anytime someone is a scholar in a field that is
14 dominated by people with a different point of view, there are
15 special challenges in trying to break into that field because
16 publications are ultimately peer -- they are reviewed by peers.
17 And so it's always helpful to be cognizant of the degree to
18 which one is in the minority and to establish a research agenda
19 that will allow you to succeed.

20 Q. I understand your opinion applies to any political
21 minority.

22 You've written about this phenomenon --

23 A. I have.

24 Q. -- with a target audience of conservatives; right?

25 A. Yes.

1 Q. You've never written about this with a target audience of
2 liberal students, have you?

3 A. That's correct.

4 Q. Okay. And you mentioned the peer-review process. You've
5 experienced firsthand difficulties with getting your own work
6 published?

7 A. Well, I'll phrase it a little more precisely. I have noted
8 in articles that I've written about that when I write something
9 that tends to benefit the left, it flies to publication. It's
10 much easier than if it happens to benefit a right-wing
11 perspective -- or I should say a right-leaning perspective. It
12 is more difficult to move through the peer-review process.

13 And so I have examples where sometimes I'm successful,
14 sometimes unsuccessful, where I think the ideological tenor of
15 the research is making it more difficult to move it through the
16 peer-review process.

17 Q. I'm going to switch gears a little bit.

18 In your direct examination you talked a little bit about,
19 in your opinion, ways that would be maybe positive ways to try
20 and foster viewpoint diversity on campuses. Do you remember
21 that testimony?

22 A. I do.

23 Q. Okay. So is it fair to say that you don't take any -- you
24 aren't opposed to the goal of viewpoint diversity -- of trying
25 to achieve viewpoint diversity on campuses; you just maybe have

1 some opinions about what it means?

2 A. Well, it's important to define -- viewpoint diversity
3 doesn't necessary mean viewpoint parity.

4 Q. Sure.

5 A. And it is -- there are special challenges from a cultural
6 perspective that conservatives face that makes it very hard for
7 them to ever achieve parity in academia, for example. So when I
8 talk about viewpoint diversity, I'm not even talking about equal
9 representation, but to have at least a voice and a foothold.
10 Positive things can come from that, provided it's done in a way
11 that doesn't endanger academic freedom or burden the First
12 Amendment.

13 Q. And I take from that answer that you'd agree that in the
14 context of higher education, ideological uniformity would
15 negatively impact the educational environment?

16 A. Yes. And I have argued that in both directions. I think
17 if the higher education were predominantly right or left, it
18 would be bad for the work product, but having some debate
19 between persons of different ideas is ultimately good for
20 society.

21 Q. Is that, in part, because students and faculty will grow
22 intellectually by confronting new ideas and considering the
23 world from different points of view?

24 A. That's part of it, but another part of it is even the
25 research that comes out. If research is stove-piped and only

1 comes at the world from one perspective, it doesn't give society
2 the same opportunities to explore different options in matters,
3 let's say, of public policy. So it has multifaceted benefits.

4 Q. Do you believe that intellectual diversity promotes civil
5 discourse in higher education?

6 A. It can. I wouldn't say it does, because one could impose
7 intellectual diversity in a way that would make people angry and
8 resentful. And so, if done properly, it can certainly help
9 promote civility, but I think that the two have to be approached
10 cautiously and with an eye toward doing it in a way which makes
11 everyone feel included.

12 Q. Do you feel that your position on the value of intellectual
13 diversity is a minority position in academia?

14 A. I suspect it is.

15 Q. So earlier you testified a little bit about your experience
16 in Pennsylvania when you were presenting some of your research
17 on this concept of indoctrination. Do you recall that
18 testimony?

19 A. Yes.

20 Q. Okay. So based on that testimony, it sounds to me like
21 this discussion about -- with the relationship between faculty
22 political views and student influence is not a new concept?

23 A. It's been around for some time.

24 Q. Okay.

25 A. I would argue that it has intensified in the last 20 years

1 and that this is --

2 Q. 20 --

3 A. -- part of what is good timing in my research agenda. And
4 that at the time we began doing studies on this, it really was
5 not as significant as it is today.

6 So it has been around for a long time. You can find
7 discussions about this going back a generation, but there's been
8 a lot more work done on it in the last 10 to 15 years. And
9 that's why we have a better understanding of it than we did when
10 I started this work.

11 Q. Okay. When you were privy to this sort of debate going on
12 in Pennsylvania in the state legislative body there and you
13 provided this research you were doing, you don't contend that
14 either side of that discussion was operating in bad faith, do
15 you?

16 A. No. In fact, there was so little information out there
17 that I think both sides were coming at this with a sincere point
18 of view. I think as time has gone on, the research has provided
19 more guidance on what's happening. So I don't -- I don't
20 propose that either side had bad faith. And I try to be
21 open-minded about people who I disagree with, what their motives
22 are.

23 Q. Sure. And I think you testified earlier about why part of
24 the question is still somewhat vexing, I think you said?

25 A. Yes, it is.

1 Q. I want to talk about surveys a little bit.

2 The statistically valid requirement in House Bill 233, am I
3 correct that you characterize that as something of a heightened
4 standard or an additional burden that the legislature placed on
5 the boards in charging them with creating a survey?

6 A. As a nonattorney, that's how I would read that language,
7 yes.

8 Q. Okay. I believe you said that as a researcher you were
9 delighted to see that requirement?

10 A. Yes. Yes.

11 Q. Okay. You may have said this earlier, but you are aware
12 that the 2022 surveys were voluntary?

13 A. I am aware, yes.

14 Q. Would you agree with me that the collection of data and
15 information about student and faculty members' experience and
16 views on intellectual freedom on college campuses is not unique?

17 A. Other researchers are pursuing a similar question in
18 different contexts.

19 Q. Is HERI one of those?

20 A. I believe HERI has questions about intellectual freedom. I
21 honestly don't remember.

22 Q. Okay.

23 A. I haven't looked at their surveys in a long time. But they
24 have such a good survey and there are so many questions, I would
25 be surprised if that weren't somewhere on the survey. But at

1 the moment I can't remember.

2 Q. HERI is part of UCLA?

3 A. I don't -- they are on the UCLA campus. I don't know if
4 they're a part of UCLA or if they're a private foundation.

5 Q. Okay. Is it -- I want to talk about the recording
6 provision now.

7 Is it your understanding that the recording provision
8 allows the recording of student discussions in class?

9 A. I think this is a point of some controversy because -- and
10 I address this in one of my reports. If recording lectures is
11 defined strictly as the professor speaking and providing a long,
12 rhetorical discussion or providing deliberate instruction to the
13 students outside of the context of a discussion, that would be a
14 peculiar -- as a faculty member, that would be peculiar to
15 create an artificial distinction between lecture and discussion,
16 because in most of my courses, which would include statistics --
17 I mean, statistics is the course where I would do the most
18 talking, and I would walk them through the equations and through
19 the theories. But there were plenty of times when they would
20 raise their hand, and we would have a back-and-forth discussion
21 about the implications of a particular type of sampling error,
22 for example.

23 And so this notion that there is a lecture period and there
24 is a discussion period strikes me as artificial because in most
25 courses -- although faculty, I would believe, are less likely to

1 engage in strict lecture, I personally have blended the two so
2 seamlessly that I would have a very hard time identifying what
3 part of my discussion was lecture and what part was, shall we
4 say, discussion.

5 Q. Understood.

6 You didn't perform any analysis of how the recording
7 provisions have actually, in fact, impacted classrooms in
8 Florida, have you?

9 A. I have not. Beyond the thought experiments which I have
10 proposed, I have not.

11 Q. And in the course of developing your opinions in this case,
12 you didn't speak to any professors in Florida?

13 A. I did not.

14 Q. You didn't speak to any students in Florida?

15 A. I did not.

16 Q. You conduct, and you said, large-scale surveys as part of
17 your research regularly; is that right?

18 A. Yes.

19 Q. You didn't conduct any type of survey to reach your
20 conclusions in this case, did you?

21 A. Well, I'm not sure how you are defining that. The work
22 that I've done in the large-scale surveys I've performed up to
23 this point were, I think, very relevant to the questions at
24 hand.

25 Q. That's fair.

1 THE COURT: As I understood the question, the answer
2 is qualified: No, I did not conduct surveys as part of my work
3 as an expert in this case, that is, new surveys; however, I did,
4 in fact, rely on surveys I had previously conducted to form the
5 opinions. Is that --

6 THE WITNESS: Yes, Your Honor, that's a good --

7 THE COURT: I understand.

8 BY MS. LUKIS:

9 Q. Bad question.

10 Is it fair to say that you didn't reach any quantitative or
11 empirical conclusions in this case?

12 A. I wouldn't agree with that. The analysis which I did at
13 the end where I looked at the slanted results, where there was
14 as many conservatives as liberals, was definitely quantitative
15 in nature. And I would argue that that was definitive in
16 demonstrating that the results of that survey were invalid.

17 Q. Is that the only conclusion you reached in this case that
18 you would qualify as quantitative or empirical?

19 A. Yes.

20 Q. Okay. Are you aware of any professors in Florida who have
21 changed their instruction as a result of House Bill 233?

22 A. I have not spoken to any professors, so I am not aware of
23 any.

24 Q. And you -- I think you mentioned the potential for lawsuits
25 in your direct, so I have to ask.

1 Are you aware -- you're not aware of any professors or
2 institutions facing lawsuits --

3 A. I'm not.

4 Q. -- because of House Bill 233?

5 A. I'm certainly not, although if I were a strategist -- and I
6 do teach military strategy -- I would wait until this were
7 resolved by the courts before I would move forward on such an
8 endeavor. So I'm not surprised that nothing has happened yet.
9 I think that that -- if it will happen, it may happen in time.

10 Q. Okay.

11 MS. LUKIS: Your Honor, can I have 60 seconds?

12 THE COURT: Certainly.

13 (Discussion was held.)

14 MS. LUKIS: I don't have anything further for you,
15 Dr. Woessner.

16 THE WITNESS: Thank you very much.

17 MS. JASRASARIA: I just have two quick questions.

18 THE COURT: And 37 subparts.

19 REDIRECT EXAMINATION

20 BY MR. JASRASARIA:

21 Q. Dr. Woessner, is HB 233's survey provision comparable to
22 the kind of research that the Heterodox Academy does on academic
23 freedom?

24 A. No, it's quite different. In particular, the Heterodox
25 Academy's surveys -- I've looked at them -- I think they are

1 written in a rather skilled and thoughtful way. They're -- I
2 don't know a lot about their sampling procedures, so I can't
3 speak to that. But I suspect because their work is not under
4 the same ideological cloud that they don't have the same
5 obstacles to surveying faculty that, let's say, the State of
6 Florida would have at this point.

7 Q. And along those lines, you testified that others are
8 exploring viewpoint diversity in survey research; is that right?

9 A. Yes.

10 Q. Are any of those other entities state entities?

11 A. I don't remember. I know there are surveys which are done
12 which mention politics, but viewpoint diversity, I don't believe
13 any of those surveys are conducted by states. FIRE, the
14 Foundation for Individual Rights and Expression I think it's
15 called, does a pretty extensive viewpoint diversity survey,
16 students' willingness to accept different viewpoints, their
17 willingness to accept protest, various other things.

18 But, to my knowledge, all the examples I can think of are
19 done by private or quasiprivate organizations.

20 Q. Does that matter?

21 A. It matters in terms of trust.

22 One of the reasons that my coauthors and I were so
23 successful in conducting studies was that I think there was an
24 appreciation that we didn't have an agenda one way or another,
25 that we really were trying to conduct good research, and we

1 didn't know how it would turn out.

2 And so the very fact that we managed to get so many
3 professors to disclose so much to us was a reflection of that
4 trust which existed between myself and those who were being
5 studied. I think it's more difficult for a state entity to have
6 that sort of trust which is important in establishing a
7 representative sample.

8 MS. JASRASARIA: No further questions.

9 THE COURT: Thank you.

10 MS. JASRASARIA: Thank you.

11 THE COURT: Anything else from this witness?

12 MS. LUKIS: No, Your Honor.

13 THE COURT: All right. Thank you.

14 And I stand corrected. Rodney Dangerfield was asked a
15 question with 27 subparts, not 37 subparts, in the film *Back to*
16 *School*, so I misquoted.

17 MR. WERMUTH: Your Honor, I believe it was one
18 question with 27 subparts.

19 THE COURT: One question with 27 subparts as opposed
20 to one question with 37, which is what I said earlier.

21 Anyway, anything further from the plaintiffs this
22 afternoon?

23 MR. WERMUTH: Not this afternoon, no.

24 THE COURT: Defense?

25 MR. LEVESQUE: No, Your Honor.

THE COURT: We'll break for the evening. I'll see everybody back at 8:30.

I thank you for your patience and hard work this week.
And you have a pleasant trip home.

THE WITNESS: Thank you, sir.

THE COURT: Court is in recess.

(Proceedings recessed at 6:39 PM on Wednesday, January 11, 2023.)

* * * * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. Any redaction of personal data identifiers pursuant to the Judicial Conference Policy on Privacy is noted within the transcript.

/s/ Megan A. Hague

1/13/2023

Megan A. Hague, RPR, FCRR, CSR
Official U.S. Court Reporter

Date

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION**

WILLIAM A. LINK, et al.,)	
)	
Plaintiffs,	)	Case No: 4:21cv271
)	
v.	)	Tallahassee, Florida
	)	January 12, 2023
RICHARD CORCORAN, et al.,)	
	)	8:35 AM
Defendants.	)	VOLUME IV
)	

**TRANSCRIPT OF *EXPEDITED* BENCH TRIAL PROCEEDINGS
BEFORE THE HONORABLE MARK E. WALKER
UNITED STATES CHIEF DISTRICT JUDGE
(Pages 884 through 1139)**

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P R O C E E D I N G S

(Call to Order of the Court at 8:35 AM on Thursday,
January 12, 2023.)

All right. We are back on the record.

My apologies for starting five minutes late. As I
indicated off the record, I had a family issue I had to address.
And, obviously, if any of you have some reason you need to take
a break, I'd extend the same courtesy to counsel.

THE COURT: My understanding is we have a lineup of
five witnesses, starting with Julie Adams; is that correct?

MR. WERMUTH: That's correct. Your Honor.

THE COURT: All right. And, Mr. Levesque, you and
your team have the list of witnesses as well?

MR. LEVESQUE: Starting today, sir?

THE COURT: Yes.

MR. LEVESQUE: Yes. Yes, we do. Well, we've got
assignments, yes, sir.

THE COURT: All right. No, I've got your assignments.
I just meant that -- and I think you all have been all along --
and let me say it's been an absolute pleasure to have you and
Mr. Wermuth because, while you disagree about things and clearly
absolutely disagree about what the evidence shows, y'all have
been incredibly respectful to each other. And I appreciate your
professionalism. We ought to make the law students come in and
sit in and watch.

1 But I just was assuming that each day y'all are
2 talking about changes in the lineup of witnesses. I was just
3 verifying that's happening.

4 MR. LEVESQUE: We are, yes, sir.

5 THE COURT: Perfect.

6 I'm going to try to do less of the bookmark thing, A,
7 not to delay things, and B, because I don't want to say, This an
8 issue; maybe you need to ask questions about X.

9 So far the questions I've been asking about what's the
10 law, what are the statutes doesn't do that. It wouldn't be an
11 evidentiary issue; it would be a legal issue, so -- but I had a
12 lengthy discussion this morning about questions I've got, quite
13 frankly, for both sides.

14 So what I'm going to start doing is typing some bullet
15 points, and what I will do at the end of these proceedings --
16 it's not going to be a question-and-answer session, but I'm
17 going to try to give you a list of some concerns I have about
18 legal issues, so that when you're drafting your closing
19 statements, you can be directly responsive, both sides, to those
20 concerns. Because I don't really think the conversation I had
21 this morning would in any way alter the presentation of either
22 side. I really think it's a legal issue. But to avoid any
23 potential pitfalls of me giving either side a chance to fix
24 something in terms of the evidentiary record, I'll wait until
25 the end.

1 Have y'all had a chance to talk about a schedule for
2 post-trial briefing? If you haven't, we can do that later.

3 MR. LEVESQUE: We've started the discussion,
4 Your Honor.

5 THE COURT: No problem. I'll ask again Tuesday or
6 something, and y'all can tell me as well.

7 Final question before we call the first witness.

8 Mr. Wermuth, part of it is me because I ask questions
9 and I'm engaged, although I'm not going to apologize for being
10 engaged from the bench. Where are you at in terms of where you
11 thought you would be in terms of us trying to get the
12 plaintiffs' evidence put on by close of business on Friday?

13 MR. WERMUTH: Well, I'll put it this way. We thought
14 our first witness was going to go four hours, and he went a day
15 and a half. So we're probably about at least a day beyond where
16 we expected to be. So we imagine that our case will close
17 sometime on Tuesday, if not -- sometime on Tuesday.

18 THE COURT: And, Mr. Levesque, as I've said before,
19 I'm not in any way -- this is for planning purposes only. I'm
20 in no way pressuring you or trying to get you to push through
21 your evidence. How long do you realistically need to put on
22 your case? When I say "realistically," building in some, you
23 know, extra time for yourself.

24 MR. LEVESQUE: I would say probably, realistically, a
25 day and a half, maybe two days. And from that standpoint, some

1 of that might be pared down or kind of go up and down depending
2 on where we end up after the plaintiffs present their case.
3 We're sort of assessing that daily. And we may actually have
4 more of an update, you know, tomorrow because we're --

5 THE COURT: All right. We'll do this. If you'll
6 update me tomorrow, because I actually have a criminal trial I
7 didn't think was going to go, but it's now scheduled to go on --

8 THE COURTROOM DEPUTY: The 19th.

9 THE COURT: I'm sorry?

10 THE COURTROOM DEPUTY: The 19th.

11 THE COURT: -- the 19th, which is Thursday. And it
12 sounds like y'all may need the 19th as well if the plaintiff is
13 still talking on Tuesday, the 17th.

14 So that -- I will do what I need to do. I'm not going
15 to rush either side. I'm going to give y'all all the time you
16 need. I'm just letting you know, not to hurry you along or not
17 to browbeat you or anything, that's just what I'm dealing with,
18 because I'm supposed to pick a jury in a criminal case Monday,
19 on the 19th -- I mean, Thursday, on the 19th.

20 MR. LEVESQUE: Your Honor, I think in the original
21 scheduling conference we had discussed the 17th and 18th as
22 being in play. In that interim, my spouse has a procedure that
23 got rescheduled on her to the 18th that will create some
24 hardships, I think, for me if we're going on the 18th. But if
25 that's -- we can work around that if that's the case.

1 THE COURT: So would the idea be, Judge, we're not
2 going to probably interfere with the 19th and 20th. What we
3 need to -- we may not be able to go on the 18th. We may need to
4 come back and put the defense case on the next week or
5 something?

6 MR. LEVESQUE: Potentially.

7 THE COURT: All right. I can -- let me tell y'all now
8 for your planning purpose -- I'm glad we're having this
9 conversation because that way the two of y'all can meet and
10 talk. When I say "the two of y'all," Mr. Wermuth and
11 Mr. Levesque. Right now I don't have anything really set much
12 on the week of the 23rd. I have a couple of criminal matters
13 and -- because they're replacing the carpet in the hallways
14 outside this courtroom, I certainly could potentially borrow
15 Judge Hinkle's courtroom, or since this is a bench trial and
16 I've already come -- since I don't really have access to the
17 fifth floor since they put me down where the mushrooms grow, my
18 office, I can come in and out of the courtroom through the main
19 doors here.

20 So it would not create an enormous scheduling burden,
21 other than moving a couple of criminal matters, if y'all need to
22 go next week -- not next week -- the week of the 23rd. But if
23 y'all will let me know what your availability is, Mr. Wermuth and
24 Mr. Levesque, if y'all figure it out, because I will have to
25 move some stuff. And, in fairness, sometimes I've got witnesses

1 in criminal matters that are coming from out of state. I
2 recently I had four family members flying in from California,
3 and I had to take that testimony because I wasn't going to have
4 the family eat thousands of dollars in plane tickets.

5 But if I have some notice, I can move around the few
6 things I had for the week of the 23rd.

7 MR. WERMUTH: Just for planning purposes -- we,
8 obviously, haven't been able to talk about this. But would it
9 be possible to have this continuation of the trial maybe be
10 remote for that portion of it?

11 THE COURT: I don't have any -- I mean, I had an
12 entire -- as, Mr. Wermuth, you're well aware, I had an entire
13 trial by Zoom. And the line that I drew is that I did not have
14 a couple of things during COVID by Zoom where, for example, I
15 had a damages claim and a Federal Tort Claims Act, and I was
16 uncomfortable evaluating a witness and them describing their
17 pain and suffering over a postage stamp video on my computer at
18 my desk in my office. So where I was concerned about that, I
19 let the lawyers know.

20 Quite frankly, whether I see an expert -- and,
21 Mr. Levesque, I'm not sure how many witnesses you're calling and
22 who you're calling. But based on the type of witnesses that are
23 being called in this case, I don't -- I'm comfortable -- if it
24 makes it easier, I'm comfortable doing it by Zoom.

25 And I say what I said before to let y'all know, I

1 would absolutely tell you, based on the subject matter, and so
2 forth, if I thought as a fact finder it was going to matter to
3 me whether it was in person or by Zoom. I haven't heard anybody
4 in this proceeding yet testify that it would have mattered to me
5 whether it was by video or in person. It's just the nature of
6 the type of information that I'm hearing.

7 So I'm not requiring y'all to do it by Zoom, but I'm
8 just letting you know that, A, you certainly can, and, B, unlike
9 the example I gave, I'm not particularly concerned in this case
10 about how it could impact how I viewed the witnesses.

11 We could also do, which is a problem with not only --
12 sometimes with judges, but with our society as a whole, that we
13 view everything as a binary choice; it's not necessarily all or
14 nothing. So, for example, Mr. Levesque, I would totally
15 understand if y'all said, Judge, we've got six witnesses. Five
16 of them we agree, but we really want this one witness to be
17 live. And we could stick that person in, and we could take them
18 out of order. This is not a jury trial. So if, Mr. Levesque,
19 you have one witness, Judge, I just really think this person
20 needs to be live, you could work with Mr. Wermuth about next
21 Tuesday, which may be our last day because of a family issue,
22 which I absolutely will work with you with, as I told you I
23 would.

24 MR. LEVESQUE: And I raise that because at this point
25 in time I haven't had the discussions. We've got good family

1 support, so I might be able to work around that.

2 THE COURT: No worries. But I told you -- this came
3 up when, I think, we were talking about dates, I thought, to
4 begin with -- not this particular date, but that you -- when we
5 were talking about availability, and so forth. But I'm also
6 going to work with lawyers, and your family should come first.

7 But the thought process was, Mr. Wermuth, if
8 Mr. Levesque has somebody, Judge, we really think they need to
9 be live. We don't care -- or these two people, we don't really
10 care if these other people are by Zoom, then, potentially, we
11 could finish somebody of yours by Zoom and plug in.

12 So I'm not demanding that. I'm not requiring that.
13 There may not be anybody that falls in that category for
14 Mr. Levesque. Y'all haven't really had time to think about it
15 or discuss it. I'm just telling you, A, I will be flexible,
16 yes; B, we can do it that way; and, C, it doesn't have to be all
17 or nothing. I was just trying to give an example of where we
18 can get creative to accommodate -- when y'all are discussing
19 it -- to accommodate any concerns you might have.

20 So I'm not -- we can take people out of order. We can
21 do a hybrid next Tuesday, or we can do it all by Zoom, because
22 I'm not suggesting there is anybody, Mr. Levesque, that you are
23 uncomfortable calling by Zoom. I'm just recognizing potential
24 issues and saying it seems to me that we probably can work that
25 out; okay.

1 MR. LEVESQUE: Okay. Appreciate it.

2 THE COURT: All right.

3 I do, though, want to get it done, and my
4 preference -- the one thing I will tell you is I really would
5 like to get the evidence on, hear it all, have a schedule for
6 briefing, and get through the testimony the week of the 23rd. I
7 just -- for me, I'd like to be able to get through all the
8 testimony, do my debriefing with my law clerks, give them
9 assignments, because before we get y'all's closing arguments, I
10 go back through -- in light of what I've heard, I go back
11 through, for example, the depos that y'all have submitted
12 designations. I get a rough draft before you do of the
13 transcript. I start going back through that and hunting things.
14 So I don't wait until I get your closing arguments to start
15 going through the record and stuff. I sort of do a -- with
16 assistance, do a once-through again.

17 And so -- and it's helpful for me not to break it up
18 too much. I mean, if I have to, I can. But I'd just as soon
19 not have a month gap between witnesses. It makes it
20 extraordinarily hard for me to sort of do things the way I like
21 to do it efficiently. But that would -- and nobody has
22 suggested, Judge, we need to put it off for 45 days. So that
23 would be my only hesitation.

24 All right. So does that give y'all the guidance y'all
25 need? And I know we've just spent ten minutes, but it may save

1 a lot of angst and heartburn if y'all can meet and figure out
2 what we're going to do.

3 Any other questions, Mr. Wermuth?

4 MR. WERMUTH: No. I think I just need to talk to
5 George about this, and we'll work it out and figure out a
6 proposal for you.

7 THE COURT: Mr. Levesque, anything else?

8 MR. LEVESQUE: No, sir.

9 THE COURT: All right. Why don't y'all do that --
10 today is Thursday. I really think we probably should know
11 sometime tomorrow what we're going to do. So maybe by lunch
12 tomorrow y'all can tell me, Judge, this is what we're thinking.
13 That also gives me a heads-up so I can rearrange my calendar;
14 okay.

15 MR. LEVESQUE: Sounds good.

16 THE COURT: All right. Thank you.

17 MR. WERMUTH: I just have one more matter of
18 housekeeping, if I could?

19 THE COURT: Yes, sir.

20 MR. WERMUTH: All right. Yesterday I mentioned that
21 we had this issue with transcripts and videos and the admission
22 of those documents. My assistant Melissa for me has filed ECF
23 No. 251, which is an unopposed notice of filing exhibits for
24 admission in evidence, and that reflects the list of documents
25 that I would have read on the record.

1 THE COURT: And my understanding is, Mr. Levesque,
2 without waiving any of your objections, but consistent with this
3 Court's prior rulings, you're in agreement that those exhibits
4 come in for the limited purpose and subject to you not waiving
5 any objections for which I've already ruled?

6 MR. LEVESQUE: Yes, Your Honor.

7 THE COURT: All right. So if y'all will make sure,
8 since that's now done, so that the -- that's -- the motion to
9 admit those exhibits is granted with those qualifications. And
10 then if I could have somebody, whoever is doing it with your
11 team, Mr. Wermuth, will get with my courtroom deputy and make
12 sure we update the exhibit list and it's reflective of the
13 ruling that I just made.

14 And then whoever you're coordinating with on the defense
15 team, the lead person on the plaintiffs that's handling the
16 exhibits will get with them and make sure we're on the same page
17 and that everything is on the list that should be on the list;
18 okay.

19 (EXHIBITS LISTED IN ECF NO. 251: Received in evidence.)

20 MR. WERMUTH: Okay.

21 THE COURT: All right. Thank you.

22 And Ms. Velez is calling Julie Adams; correct?

23 MR. WERMUTH: That's correct.

24 THE COURT: All right. Let's do this. Let's start at
25 9 o'clock. I know we burned a half an hour on stuff, but I'm

1 going to -- I want to talk to one of my law clerks, and I'm
2 trying to get something out real quick. And I'll be with you in
3 five minutes.

4 Thank you.

5 (Recess taken at 8:52 AM.)

6 (Resumed at 9:02 AM.)

7 THE COURT: We are back on the record.

8 My apologies for the delay, although, I guess,
9 9 o'clock is a normal starting time for most judges.

10 If plaintiff will call your next witness.

11 MS. VELEZ: Plaintiffs call Julie Adams.

12 (Julie Adams entered the witness stand.)

13 **JULIE ADAMS, PLAINTIFFS WITNESS, DULY SWORN**

14 THE COURTROOM DEPUTY: Please state your name for the
15 record and spell your last name.

16 THE WITNESS: Julie Adams, A-d-a-m-s.

17 THE COURTROOM DEPUTY: Thank you.

18 THE COURT: And my apologies. If counsel and
19 everybody is -- my understanding is your preference is
20 they/them; correct?

21 THE WITNESS: Yes.

22 THE COURT: If everybody will please respect the
23 witness, and I'll be mindful of that as well.

24 THE WITNESS: Thank you.

25 MS. VELEZ: Thank you, Your Honor.

1 THE COURT: Counsel, you may proceed.

2 DIRECT EXAMINATION

3 BY MS. VELEZ:

4 Q. Good morning, Julie.

5 A. Good morning.

6 Q. I'm going to ask that you speak up just a little bit for
7 the benefit of our court reporter and be mindful that those two
8 black bars in front of you are microphones so that everybody
9 hear you.

10 May I call you Julie?

11 A. Yes.

12 Q. Are you a plaintiff in this case?

13 A. Yes.

14 Q. And Your Honor just mentioned, but you use they/them
15 pronouns; correct?

16 A. Yes.

17 Q. Why do you use they/them pronouns?

18 A. I just feel more comfortable with them, and using she/her
19 pronouns makes me feel a bit uncomfortable.

20 Q. How old are you, Julie?

21 A. I'm 20.

22 Q. When did you turn 20?

23 A. In July of 2022.

24 Q. And where are you from?

25 A. Brevard County, Florida.

1 Q. Are you a student?

2 A. Yes.

3 Q. Where do you go to school?

4 A. I attend Florida State University.

5 Q. And if I refer to FSU, will you know what I'm talking
6 about?

7 A. Yes.

8 Q. Is FSU public or private?

9 A. It's a public university.

10 Q. And what is your current class year?

11 A. I'm a third-year student.

12 Q. And you plan to graduate next year?

13 A. Yes.

14 Q. Do you go to school full time?

15 A. Yes.

16 Q. What is your major?

17 A. I'm a theater major.

18 Q. And do you have any focus or concentration within that
19 major?

20 A. I'm on the design and production track, and within that
21 track I focus on lighting.

22 Q. During your three years at FSU, have you ever felt that
23 your professors have indoctrinated you with any particular
24 beliefs?

25 A. No.

1 Q. How does it feel to hear your professors be accused of
2 indoctrinating you with particular beliefs?

3 A. It's not great. I am an independent person, and I am
4 capable of thinking for myself. And I have had strong-held
5 opinions that I came to of my own volition for a long time now.

6 Q. What are some of those beliefs that you hold dear?

7 A. I believe in reproductive justice. Climate change, I do
8 think it's happening. I also believe in climate justice. I
9 think that we should reform the justice system. Sorry.

10 THE COURT: No need to apologize. I'd be right there
11 with you, although we may not agree on what the reform should
12 be.

13 THE WITNESS: I think that the government would help
14 provide for its people and that there shouldn't be more homeless
15 people than, like -- there should be more empty houses than
16 there are homeless people.

17 BY MS. VELEZ:

18 Q. And have you held those beliefs since before you started
19 college, for the most part?

20 A. Yes.

21 Q. Have your beliefs changed at all since you've been in
22 college?

23 A. I would say, like, they have grown as I've learned more
24 information, but that's not directly resultant on being in
25 college. Some of it is just, like, reading articles and, like,

1 learning for myself.

2 Q. Changing topics a bit, do you ever discuss controversial
3 pieces of theater in your classes?

4 A. Yes.

5 Q. Can you give me an example?

6 A. I think our best example is probably from this past fall
7 semester. It's a show called *Keely and Du*. We went over it in
8 my sound design class. Essentially it's Keely is this woman.
9 She's pregnant. She's kidnapped by a pro-life organization and
10 held in a basement. And it's the relationship between her and
11 Du, and Du is, like, watching over her while she's captured.
12 And they're kind of bonding because they're stuck together.
13 Keely ends up giving herself, like, a coat hanger abortion, and
14 Du stays with her to make sure that she doesn't pass away
15 before, like, the ambulance can arrive, which subsequently leads
16 to Du getting arrested.

17 And then later you see Keely go visit Du while she's in
18 prison, and they have a conversation about that capture, where
19 it's left up to the actors' discretion, the director's
20 discretion over how they want the ending to play, whether or not
21 Keely is upset with Du for capturing her and forcing her to come
22 to terms with, like, potentially having this child and, like,
23 maybe wanting to have it or whether she's upset and, like, never
24 wanted the kid in the first place. It can end either way.

25 THE COURT: One moment, please.

1 For the benefit of the court reporter, do you know the
2 spelling of the two names?

3 THE WITNESS: K-e-e-l-y and Du, D-u.

4 THE COURT: Thank you.

5 MS. VELEZ: Thank you, Your Honor.

6 BY MS. VELEZ:

7 Q. What about that particular piece of theater might some
8 people consider controversial?

9 A. Well, it discusses, like, abortion very, very in-depth.
10 That's one of the main -- that's the main point of the show.

11 And, I mean, you also have, like, spousal rape, because
12 Keely is raped by her husband at the time, and that's where --
13 that's how she got pregnant. And she's trying to come to terms
14 with whether or not she wants, like, to keep the kid, which she
15 says she's not ready to because she's also taking care of her
16 elderly father and trying to support herself.

17 And so then you kind of have to, like -- like, Keely
18 doesn't want to have the baby, but the organization wants her to
19 have the baby. And it's her trying to figure out, like, what's
20 going to happen with her life moving forward.

21 Q. Did you discuss some of these themes and issues that you
22 just mentioned in your sound design class?

23 A. Yeah. We went over how the show can be played, like, how
24 your design can help contribute to whether it's going to be more
25 of a pro-choice or a pro-life message and also, like, how the

1 show is able to be viewed from different perspectives while
2 still maintaining the integrity of the script.

3 Q. And if you were personally to put on *Keely and Du*, which of
4 the two possible messages would you choose to convey?

5 A. I would like to convey it as more of a pro-choice show,
6 although my first reading of the show I did see the ending as
7 more pro-life.

8 Q. Did you and your classmates receive a trigger warning on
9 your syllabus before discussing *Keely and Du*?

10 A. It wasn't on our syllabus, but we were warned, like, in
11 advance, before we even had the script distributed to us, about
12 the contents of it. And we were checked with by our professor
13 to make sure that it was okay with everybody.

14 Q. Did anybody abstain from discussing *Keely and Du*?

15 A. No.

16 Q. Do you think that your professor providing that trigger
17 warning was helpful to you as a student and your ability to
18 learn the material?

19 A. I think it was, because you kind of, like, knew what you
20 were going into with it. And on top of that, like, you were
21 able to make sure you're not uncomfortable with the material
22 because an alternative script, like, will be provided if you
23 were.

24 Q. And have you ever been provided with an alternative script
25 or piece?

1 A. In my freshman year design class, we were asked to analyze
2 the costume design of a clip, and that clip was *Springtime for*
3 *Hitler* from the producers. And I chose not to analyze the clip
4 and asked for an alternate, and I was given -- I'm pretty sure
5 it was *Memory* from *Cats*.

6 Q. And did that accommodation help you in your ability to
7 learn the material?

8 A. Yes. I was, like, able to actually analyze the clip and,
9 like, actually talk about the design, whereas before I didn't
10 really want to deal with it because you had to discuss, like,
11 the positive aspects of Hitler's costume design, which I didn't
12 want to do.

13 Q. Did some of your classmates share their personal beliefs
14 about the issue of abortion when discussing Keely and Du?

15 A. Yes.

16 Q. Assuming that one of your classmates had said that they
17 were pro-life during that discussion, would you have objected to
18 that student sharing those beliefs?

19 A. No.

20 Q. Can you tell me a little bit more about that?

21 A. Like, if someone had been pro-life talking about the show,
22 it would have been totally fine. The script really supports
23 both ideas. It just depends on what pieces of information you
24 want to pull and what you want, like, the tone to suggest.

25 But it would have been fine. They would have presented

1 their ideas, I'm assuming, in a respectful manner to everybody
2 else in the room. And so long as it was, discussion would have
3 continued.

4 Q. And it would have been on topic in the context of *Keely and*
5 *Du*?

6 A. Yes.

7 Q. And you don't personally agree with the pro-life position,
8 do you?

9 A. No.

10 Q. Have you ever discussed a play called *The Arkansaw Bear* in
11 your theater classes?

12 And I'll stop to note that the spelling is unusual and has
13 been provided to the court reporter.

14 A. Yes.

15 Q. Would you tell me a little bit about that piece of theater?

16 A. So *The Arkansaw Bear*, it's a children's show. The
17 overarching theme is to kind of, like, teach children about
18 death and how it's a natural part of life.

19 So you have the main character, who pretty sure it's his
20 grandfather who's dieing, and, you know, he doesn't want him to
21 die. And he can't really see how this is, like, kind of the
22 next step in what has to happen. So he is taken to this
23 fantastical land where he meets this bear, who is also aging,
24 who was a circus bear who knew many tricks, and he was very
25 famous for his dancing, I believe.

1 They are then dodging this character called the ringmaster
2 who's supposed to be the embodiment of death in this situation,
3 but he's not supposed to be portrayed as intimidating or scary,
4 like, especially because it's a kids show, and they're not
5 trying to get kids to, like, be scared of the concept. They're
6 trying to get them to accept it.

7 So the bear and the child, like, meet this other bear, and
8 he decides, I can just teach -- I think it was the Arkansaw Bear
9 is the smaller -- if I can just teach him my tricks, then, you
10 know, I'll live on through that, and my legacy will be secure,
11 and I'll still be able to help make the world better in that
12 respect.

13 And so they spend from sundown to dawn teaching the smaller
14 bear the dance. And once he learns it, the ringmaster comes and
15 takes the bear away, and he talks to the child and says, This is
16 a natural part. This is -- I'm ready to go now. Like, I've,
17 you know, preserved myself. The things that I'm proud of are
18 going to continue on. I've made my impact in the world, and I'm
19 okay to leave.

20 And then they walk off into the sunset.

21 Q. And do you think some people might consider *The Arkansaw*
22 *Bear* a controversial piece of theater?

23 A. I can see how some people might be upset with it,
24 especially because it's geared towards children and there's no
25 mention of, like, an afterlife really or, like, any kind of,

1 like, God or higher power isn't really brought up into it.

2 Q. And have you ever discussed a play by Tennessee Williams
3 called *27 Wagons Full of Cotton* in your theory classes?

4 A. Yes.

5 Q. And without giving us the entire background, can you tell
6 us whether anything about that particular piece of theater might
7 be considered controversial?

8 A. Yes, a great deal about it would be considered
9 controversial.

10 Q. What are some of the issues that are controversial in that
11 Tennessee Williams play?

12 A. So there's definitely sexual abuse, definitely domestic
13 violence. There's the allusion to, but it's a very, very strong
14 allusion, to a rape taking place. And then on a lower level,
15 like, there is also a very strong allusion to arson.

16 Q. And, lastly, did you ever have a course where a professor
17 proposed considering a play called *The Best of Enemies*?

18 A. Yes.

19 Q. And did any student ask to be excused or not to focus on
20 that particular material?

21 A. Yes, so we were given a choice between *27 Wagons Full of*
22 *Cotton* and the *Best of Enemies*, and one of the students in our
23 class made his opinion known that he would rather do *27 Wagons*
24 *Full of Cotton* because of some of the language in *Best of*
25 *Enemies* he didn't feel comfortable reading on a semi-regular

1 basis to get the design for the show done.

2 Q. Was that language that made that student uncomfortable the
3 repeated use of what I'll refer to as the N-word?

4 A. Yes.

5 Q. Do you think it helped learning objectives to allow
6 students to make the choice between these two pieces of theater?

7 A. Yeah, I do, because people were a lot more committed to the
8 design that they were doing because we got to pick between
9 different shows and we got to decide, like, this is what we
10 wanted to work on.

11 Q. Great. We'll come back to some of this.

12 What are you hoping to accomplish with this lawsuit, Julie?

13 A. I'd like it if professors were able to fully and completely
14 teach to the best of their abilities without having to worry
15 about, like, maybe something that they don't consider to be a
16 lecture but is considered to be a lecture by a student is
17 recorded and used against them and that they don't have to
18 entertain maybe more bigoted beliefs than would typically be
19 allowed in the classroom, especially around certain topics.

20 Q. Are you hoping that the Court overturns any provisions of
21 any law?

22 A. I think, especially, like, the antishielding provision of
23 this law and, like, the recording provision which really, really
24 work together would be great if they were overturned. Also, the
25 survey provision of this law is -- has been -- it was said that

1 it was going to kind of be used to determine funding for schools
2 at one point, which wouldn't -- would be bad.

3 Q. And when you refer to "this law," are you talking about
4 House Bill 233?

5 A. I am talking about House Bill 233.

6 Q. Okay. Let's talk about the antishielding provisions first.

7 What is your understanding of what the antishielding
8 provisions are?

9 A. That in instances where a professor would quote/unquote
10 "shield" students, they are no longer allowed to do that, and,
11 instead, speech that's considered unwelcome, uncomfortable, and
12 I think it's just, like, offensive is now allowed in the
13 classroom.

14 And, like, they are not really allowed to shut down
15 conversations that they would have otherwise shut down to either
16 keep the class on topic or maintain peace.

17 MS. VELEZ: Andy, would you please show Julie what has
18 been admitted as Joint Exhibit 1 at page 3?

19 BY MS. VELEZ:

20 Q. And, Julie, take a second to read this before I ask my next
21 question, please.

22 (Pause in the proceeding.)

23 Q. Is this the language to which you were just referring?

24 A. Yes.

25 Q. And looking at this language, does the antishielding

1 provision mention professors directly?

2 A. No. But it talks about faculty members or staff members,
3 and I feel like professors would definitely be quantified
4 underneath that. I don't know if that's the right word.

5 Q. And in terms of the places on campus where you are exposed
6 to the most information, would classrooms at least be higher up
7 on your list?

8 A. Definitely, yes.

9 Q. And you talked about professors not being able to shut down
10 what you referred to as potentially bigoted speech; is that
11 right?

12 A. Yes.

13 Q. Can you tell me what part of this statute protects against
14 that -- or does not allow them to protect against that?

15 A. So I think it's really the definition of shield that's
16 given in conjunction with the actual statement. So saying that,
17 like, they can't shield students, faculty, or staff at
18 universities from free speech protected and then saying that
19 shield means to limit their access to observation of ideas and
20 opinions that they might find uncomfortable, unwelcome,
21 disagreeable or offensive, that definition, I think, really
22 works in conjunction with the statement to say that they are no
23 longer allowed to stop uncomfortable, unwelcome, disagreeable,
24 or offensive ideas from being shared.

25 Q. Besides not stopping other students from sharing

1 uncomfortable, offensive, disagreeable, or unwelcomed ideas, is
2 there anything else that you think these provisions require your
3 faculty to do?

4 A. I think that they, like, require the faculty to not -- to,
5 like, not shut these ideas down, as well as potentially some
6 faculty members might feel that they even require the actual,
7 like, professors to present those ideas, the other side of the
8 debate that wouldn't necessarily be presented or be considered
9 relevant otherwise.

10 Q. Do you have any concern that because of these provisions
11 your professors might not continue teaching material that some
12 people might see as controversial?

13 A. Yeah, I think it could be a definite problem, especially
14 in, like, the theater program, because, like, doing shows that
15 people are kind of uncomfortable with is, like, a big part of
16 theater, and, like, trying to learn how to design things that,
17 like, you might not always be the most comfortable with but can
18 still, like, work with is also very important.

19 Q. And that said, the several plays that we've discussed so
20 far, you learned about them after the antishielding provision?

21 A. Yes.

22 Q. And some professors might still continue to teach
23 controversial topics --

24 A. Yes.

25 Q. -- in spite of this?

1 A. Yeah.

2 Q. Are you worried about repercussions for professors that
3 might still teach controversial topics while managing the
4 conversation in the classroom?

5 A. Yeah. I think -- because, like, you know, anyone can join
6 a class. If, like, there's a student that goes looking for a
7 fight, like, I don't think it would be very difficult to find
8 one. But I do think that it would be -- like, it is important
9 to continue to teach plays like this.

10 Q. Did you learn anything from working on *Keely and Du* in your
11 design class?

12 A. Yeah. So a big section in that show -- I mean, like a
13 couple minutes long, but it's very impactful is that Keely and
14 Du sit in the basement in silence because they've been together
15 for, like, a month and a half-ish, and they are just trapped in
16 this room together. And a big part of that is, like, learning
17 how to tell time through your sound design without relying on,
18 like, the use of a ticking clock or something, like a sound that
19 you can show, like, to the audience that can follow the story
20 that fits in with the setting that will show the passage of
21 time.

22 Q. Would it have been harmful to your education if your
23 professor in that class decided not to teach *Keely and Du*
24 because of the risk of a controversial or potentially animated
25 discussion in the classroom?

1 A. Yeah. We definitely learned a lot about -- like, about
2 different methods on how to have, like, a repetition kind of
3 noise to show the passage of time and how your sound design can
4 help to, like, support the ideas behind a show.

5 Q. And would the same be true if your professors were to
6 decide not to teach the *Arkansaw Bear* or *27 Wagons Full of*
7 *Cotton*?

8 A. Yes.

9 Q. Do you also have any concerns that the antishielding
10 provisions might affect the classroom dynamic or your
11 relationship with your professors?

12 A. I think it's, like, very, very definitely, like, an option,
13 because there might be professors who are, like, much less
14 willing to engage in any kind of debate just because of, like,
15 what the students might say or, like, what they might have to
16 give a voice to if they don't feel, like, it's properly been
17 given a side.

18 Q. And I believe you testified to this, but do you believe
19 that the antishielding provision permits a student, if they
20 wanted to, to hijack a class to share what other students might
21 mind offensive, uncomfortable, unwelcome, or disagreeable?

22 A. Yes.

23 Q. And is your understanding that that is true even if the
24 material is not relevant to what you are discussing in class?

25 A. Yes. I don't think there is any mention that the material

1 has to be specifically relevant to the actual class in the law.

2 Q. Do you think that this language is clear and easy to
3 understand?

4 A. Not specifically just because it's, like, the definition
5 has to work with the statement, and it's not, like, very
6 obviously laid out that there -- like, I think it would have
7 been difficult to just kind of, like, pick it up and read it
8 once and be, like, Oh, I know exactly what's going on.

9 Q. And based on your identity as a person that uses they/them
10 pronouns and potentially other aspects of your identity, do you
11 have particular concerns about how other students might abuse
12 the language in the antishielding provision?

13 A. Yeah. It definitely leaves, like, a lot open for someone
14 to come in with, honestly, offensive ideas as is specifically
15 laid out in the definition and then be able to give a voice to
16 those ideas in an academic setting where they wouldn't
17 otherwise, honestly, be welcome saying the definition which lets
18 you use unwelcomed ideas.

19 Q. And before HB 233 started -- and I believe you were a
20 freshman at this time. But before HB 233 started, did a
21 classmate ever disparage you, use slurs, or hateful language
22 towards you?

23 A. No.

24 Q. And to be clear for the Court, it hasn't happened since; is
25 that correct?

1 A. Yes.

2 Q. But your concerns are that it could happen under this
3 provision?

4 A. It could, and it would be allowed in the classroom.

5 Q. And that your professor would not be able to protect you
6 from that?

7 A. Yes.

8 Q. You also mentioned a recording provision; is that right?

9 A. Yes.

10 Q. What is your understanding of the recording provision?

11 A. That anything that's seen as a class lecture is able to be
12 recorded by a student. I think it's specifically a student. It
13 might be someone in attendance of that lecture. And then that
14 is able to be used against the professor or person speaking in
15 the lecture to provide evidence, I think, for a complaint
16 against them.

17 Q. And do you know if that antishielding language contains the
18 word -- or -- I'm sorry -- that recording provision language
19 contains the word "lectures"?

20 A. I am reasonably certain that it does.

21 Q. Thank you.

22 And do you understand the reference to lectures to be a
23 reference to class time and what happens in the classroom?

24 A. Yes.

25 Q. Why?

1 A. Because, like, I've had classes where we start with the
2 lecture and it transitions into, like, maybe a class discussion
3 or you're doing, like, a lecture and, like, a PowerPoint and
4 switching between, like, doing something hands-on and then
5 talking about what's going on, like the theory or the science
6 behind it if it's an electrics class.

7 Q. As a student, do you ever provide a lecture to your
8 classmates?

9 A. I would say, yeah, you provide lectures during
10 presentations. I've taken two different arts classes, and in
11 both of them, you are required to give a 15-minute presentation
12 to the entire class, which -- about an artist that they're not
13 currently aware -- like, aware of typically. So I think that
14 could be construed as a lecture because you are standing up and,
15 like, lecturing your class for 15 minutes.

16 Q. Is it always perfectly clear when a lecture stops or begins
17 in your classes?

18 A. No.

19 Q. And even when a class might be considered a lecture, do
20 your professors typically allow students to interject and ask
21 questions?

22 A. Yes.

23 Q. Has the threat of other students recording in your
24 classroom affected the way you participate in class?

25 A. I don't -- like, I don't like participating that much in,

1 like, general -- more general classes, especially, like,
2 classes, like, in the -- when I used to take poli sci classes,
3 it wasn't as great because, like, you don't know who is going to
4 start recording or if they're going to spark a debate or
5 something. And you don't know anyone's politics going into the
6 class.

7 Q. And has the fact that you could be recorded in sharing your
8 politics affected the way you participate at all?

9 A. I think it has.

10 Q. Do you believe that it may have affected the way some of
11 your classmates participate?

12 A. I would say, like, potentially. I can't fully speak for my
13 classmates and their opinions because I'm not fully aware of
14 them.

15 Q. And do you believe that the threat of being recorded in
16 class may have affected the way any of your professors express
17 themselves in class?

18 A. I would say that there's, like, a really good chance that
19 it has so far and that they've maybe adjusted their lesson plans
20 or something around it, but I'm not aware of any actual changes
21 that have been made because they haven't explicitly told us.

22 Q. And if a professor were to change the way they were
23 teaching because of the recording provision, might that affect
24 your ability to learn from that professor?

25 A. It would definitely hinder my ability to learn from the

1 professor. It also would just hinder my education in general
2 because I wouldn't be getting the full breadth of their
3 knowledge that they would otherwise be giving.

4 Q. And I think you took some classes over Zoom, given your
5 class year; is that correct?

6 A. Yes.

7 Q. Were any of those classes recorded?

8 A. I think some of them might have been recorded.

9 Q. Is recording in the context of HB 233 any different than
10 recording a Zoom class?

11 A. Yes. Because when it was recording a Zoom class, everybody
12 was fully aware that it was being recorded. Everybody's screens
13 has a little thing in the corner that says that it's recording
14 the whole Zoom call. And most of the times the -- like, anytime
15 it did, our professors would let us know either at the beginning
16 of the class if they were recording their lectures for the whole
17 semester or at the beginning of, like, a certain period that
18 they were turning on the recording.

19 Q. And I think you mentioned a survey as well.

20 A. Yes.

21 Q. What is your understanding of HB 233's survey requirement?

22 A. That a survey is supposed to be sent out to -- I think it's
23 the student body of Florida universities, public universities,
24 to gauge their demographics, like political leanings. And I
25 think there was conversation about having the information

1 collected from there could potentially impact the funding that
2 these schools might receive.

3 Q. And you said that you understand that the survey is to be
4 sent to all students; is that correct?

5 A. Yes.

6 Q. I'm sorry?

7 A. I said it's supposed to be.

8 Q. And you referred to conversation about budget cuts. Can
9 you tell me a little bit more what you mean about that?

10 A. So I know that -- well, I heard that they were using the
11 results from those surveys to try to penalize universities with
12 a more progressive student populous.

13 Q. Do you know if that's happened yet?

14 A. I'm not aware of the monetary funding that goes into, like,
15 the specific numbers that go into our university.

16 Q. Nevertheless, are you concerned that a survey's result
17 might be used to affect your school's funding?

18 A. I think it can definitely be a problem. The school of
19 theater is really progressive, from everyone that I've met, and
20 we are also, like, pretty small, and we don't have the biggest
21 budget to start with. So there is definitely a chance that if
22 there was, like, an issue, like, we could lose even more of our
23 funding.

24 Q. And why do you think the survey is intended to measure
25 students' political leanings?

1 A. Like, if you look at the context, kind of what the -- the
2 state of Florida and the way that it's been governed recently,
3 you can see that we've had, like, a more concerted effort to try
4 to defund progressive universities and then, like, stop, like,
5 progressive speech on campus, as well as I'm pretty sure there
6 were comments made, right, by, like, the Governor to chill --
7 about chilling progressive speech on campus and how it's,
8 like -- how people go to school and get, like, indoctrinated
9 with these, like, progressive ideals.

10 Q. And do you remember hearing any of those comments?

11 A. From the professors -- from the Governor?

12 Q. Right.

13 A. Yeah, I'm pretty sure, like, I saw them in the news. I
14 don't think I could give you a direct quote, though.

15 Q. That's fine.

16 Do you remember taking the survey last spring semester?

17 A. I don't think I ever received the survey.

18 Q. Did you ever go back to check if you may have received the
19 survey?

20 A. I went through my email for all the times -- like, for the
21 time period that I thought I was supposed to get it, and I
22 just -- like, I couldn't find it in my school email account. So
23 I -- I really don't think I received it.

24 Q. If you had received the survey, would you have taken it?

25 A. Yeah, I would have taken the survey.

1 Q. And despite not having taken the survey last year, are you
2 still concerned that the survey that did happen might impact FSU
3 and, by extension, you as a student?

4 A. Yeah. Because it's still -- like, the results are still
5 supposed to be used to impact funding or, like, just have that
6 data. And, you know, I wasn't able to be a part of it. I have
7 no idea what percentage of our student body was able to be a
8 part of it or what students it was sent to or if there was a
9 certain group that was "targeted," quote/unquote, for it. I
10 don't really know.

11 Q. Do you believe that colleges and universities should foster
12 an environment that is welcoming to different viewpoints and
13 ideas?

14 A. Yes.

15 Q. Even if you really don't like those ideas?

16 A. Yes.

17 Q. Can you tell me why?

18 A. Because it's where people go to, like, learn about
19 different viewpoints, learn about the world to get a broader
20 understanding of, like, society, and how things work and to
21 figure out what they want to do and how they want to, like, move
22 forward in their life. And I think sheltering people from ideas
23 that are being presented in a respectful manner, especially
24 through, like, a healthy debate, is not beneficial for anybody
25 involved.

1 Q. Does that necessarily mean that you would like to have more
2 conservative professors yourself?

3 A. No, I wouldn't prefer to have more conservative professors.
4 But I also wouldn't specifically not take, like, a class that
5 was important to me just because the professor might have
6 expressed some, like, conservative-leaning ideals.

7 Q. And do you believe that students with views that are
8 different than your own, as long as they are being respectful,
9 should be allowed during class time?

10 A. Yes.

11 Q. And what does it mean -- what do you mean by being
12 respectful?

13 A. I just think you should treat everybody well. You
14 shouldn't disparage somebody based on their, like, identity, and
15 you shouldn't use any kind of, like, hate speech or slurs within
16 your speech.

17 Q. And is there a rule of theater about how to treat people?

18 A. Yeah. You are supposed to treat people -- like, you're
19 supposed to treat people kindly, and you're supposed to be
20 really friendly to everybody. It's one of the big things that
21 we do when we work on productions, because one of the -- the
22 theater is a very collaborative art, and you don't want to,
23 like, alienate the people around you because you are all going
24 to be working together. So fostering a collaborative
25 environment where everybody is able to speak and, like, have

1 their ideas heard is really important, especially moving forward
2 professionally, especially if you want to go into design,
3 because you have to be able to articulately share your ideas
4 about a script and about your process.

5 Q. Julie, what do you understand the purpose behind the
6 challenged provisions of HB 233 to be?

7 A. I believe them to be targeting students and faculty members
8 who hold and share progressive ideals on campus and to try to
9 chill progressive speech on campus and provide some kind of
10 arbitrary penalization process for that speech, should it be
11 given.

12 Q. And do you -- have you recently heard any additional
13 threats in the media with regard to liberal presence on campus?

14 A. Yes.

15 Q. Can you --

16 A. Umm --

17 Q. Go ahead.

18 A. I would say the two big things that I've heard about
19 recently are there was a professor at UCF who canceled a bunch
20 of his classes because he was worried about students -- or the
21 government/students saying that he was teaching critical race
22 theory, and that was not going to be allowed, and he didn't want
23 to get pushback for his curriculum.

24 And then also the replacement of the Board of Trustees at
25 New College in Florida with a very progressive board set on

1 changing the university's structure and values and ideas.

2 Q. And how did you learn about this UCF professor that you
3 just mentioned?

4 A. I saw something about it through Twitter, and then I
5 found -- like, I found an article about it to read more.

6 Q. And did you send that to me?

7 A. I did send the article to you.

8 Q. And how did you learn about New College?

9 A. I saw that in the news. Like, it was big. It was really
10 big.

11 Q. And then how did hearing about these two stories affect
12 you?

13 A. It definitely -- like, it made everything seem, like, way,
14 way more serious. Like, they were actively having our
15 university systems, like, attempting to be dismantled, were
16 actively having people trying to put members on these boards
17 with, like, very skewed viewpoints who aren't interested in the
18 welfare of the students, necessarily, and aren't interested in
19 the furthering of education or research and are, instead, more
20 interested in just the specific furthering of conservative
21 ideals.

22 Q. And do you think what's happening now, those things that
23 you just mentioned, relate in any way to HB 233?

24 A. I definitely think HB 233 is, like, a very good starting
25 point for all of these things. It gives people on campus the

1 ability to, like, report faculty members, report staff members
2 that they don't agree with, who aren't giving, like, proper
3 voice to both sides of the argument, however, like, relevant the
4 other side may or may not be.

5 And I think the recording provision goes hand in hand with
6 that.

7 Q. Thank you so much, Julie. I don't have anything else at
8 this time, but I'll ask that you please answer the questions of
9 Ms. Lukis.

10 THE COURT: Cross-examination?

11 CROSS-EXAMINATION

12 BY MS. LUKIS:

13 Q. Good morning.

14 A. Good morning.

15 Q. I will follow your counsel's lead. Is it all right if I
16 call you Julie, or would you prefer something else?

17 A. No, Julie is good. Thank you.

18 Q. What year did you start at FSU?

19 A. My first semester was fall of 2020.

20 Q. Okay. You didn't physically attend classes in Tallahassee
21 until 2021; is that right?

22 A. Yes.

23 Q. This probably goes without saying, but you're familiar with
24 House Bill 233, it sounds like?

25 A. I'm pretty familiar with it.

1 Q. You only learned about House Bill 233 through your
2 participation as a plaintiff, though; is that right?

3 A. I was vaguely aware of it, but I really learned much more
4 in detail about it and, like, how it's going to have, like, a
5 very detrimental effect on our university system through my
6 participation in this case.

7 Q. Has your brother previously worked with Ms. Velez?

8 A. Yes.

9 Q. Okay. And you got Ms. Velez's contact information from
10 your brother?

11 A. Yes.

12 Q. Okay. He was a plaintiff in a previous lawsuit; is that
13 right?

14 A. Yes.

15 Q. Okay. And then you reached out to Ms. Velez at your
16 brother's suggestion; is that right?

17 A. Yes.

18 Q. Okay. And at the time you reached out to Ms. Velez to
19 participate in this lawsuit, you didn't know what the lawsuit
20 was about; right?

21 A. Yes.

22 Q. Okay. And your understanding of the meaning of House Bill
23 233, we can agree that you talked quite a bit about that on your
24 direct examination?

25 A. Yes.

1 Q. But your understanding of what House Bill 233 means, that
2 comes from reading the complaint and talking to your lawyers;
3 right?

4 A. And reading the bill, law now.

5 Q. And when did you read the bill for the first time?

6 A. When I was -- like actually the text of the bill? Probably
7 when I was presented with the case initially.

8 Q. Say that last part again. I'm sorry.

9 A. Initially when I was presented with the case.

10 THE COURT: If you could clarify that for me because
11 that's a little confusing for me.

12 Julie, does that mean that as you're trying to decide
13 if I'm going to be a plaintiff, you're talking about it -- the
14 case before you filed the lawsuit, or does it mean after the
15 lawsuit was filed?

16 THE WITNESS: I'm not sure when it was in comparison
17 to when the lawsuit was filed. I read the text of the bill when
18 I was asked whether or not I was going to join the case.

19 THE COURT: All right. So it's before you agreed to
20 join the case?

21 THE WITNESS: Yes.

22 THE COURT: I understand.

23 MS. LUKIS: And I can go through some -- a more broken
24 down set of questions to try and clarify the questions,
25 Your Honor.

1 THE COURT: Thank you.

2 BY MS. LUKIS:

3 Q. Your understanding of the survey provisions are based on
4 the text of the complaint that you filed; correct?

5 A. Yes, mostly.

6 Q. And you didn't take the survey?

7 A. I don't think I received it.

8 Q. Do you have an fsu.edu email address?

9 A. Yes.

10 Q. For the antishielding provisions, your understanding of
11 what the antishielding provisions mean, that comes from
12 conversations with your lawyers; right?

13 A. Mostly, yeah.

14 Q. And the recording provision, your understanding of what the
15 recording provision means, that also comes on -- comes from your
16 conversations with your lawyers; right?

17 A. Also mostly.

18 Q. Your understanding of House Bill 233's purpose, did you
19 give some testimony about that as well in your direct
20 examination?

21 A. Yes.

22 Q. Okay. And your understanding of the purpose of House Bill
23 233, that comes from reading the complaint and discussions with
24 your lawyers; right?

25 A. That also comes from context, like, especially about what

1 the Governor has been doing recently.

2 Q. Does any of it come from comments made by legislators?

3 A. Yeah.

4 Q. Okay. But the comments from legislators that you've seen,
5 those are -- all come from the complaint; right?

6 A. I think for the legislators they do, but I definitely have
7 heard things from the Governor, like, especially in the news,
8 that I don't think were listed in the complaint.

9 Q. Okay. Did anybody tell you that the survey in 2020 was
10 mandatory?

11 A. No.

12 Q. And just to be clear, you haven't been disciplined for not
13 taking it?

14 A. No.

15 Q. Okay. Good.

16 Florida State University has never forced you to disclose
17 your political beliefs; correct?

18 A. Yes.

19 Q. The Florida Legislature has never forced you to disclose
20 your political beliefs; correct?

21 A. Yes.

22 Q. And the Florida Board of Governors has never forced you to
23 disclose your political beliefs; correct?

24 A. Yes.

25 Q. You went through this a little bit during your direct. I

1 think you testified that professors should be able to decline to
2 entertain bigoted beliefs on campus. Is that accurate?

3 A. Yes.

4 Q. Okay. Could you give me an example of a bigoted belief
5 that a professor should be free to not entertain?

6 A. A belief rooted in racism or sexism, xenophobia. I don't
7 think they should have to entertain those ideals in your class.

8 Q. Who gets to decide whether an idea is racist or sexist or
9 xenophobic?

10 A. I think the professor leading the class, especially if it's
11 a class like a political science class or like a women's studies
12 class where they are legitimately an expert in the field.

13 Q. I think you talked a little bit towards the end of your
14 direct examination about the presentation of different
15 perspectives in college and whether that's a good thing in the
16 college environment. Do you recall that testimony?

17 A. Yes.

18 Q. There are some perspectives you think should never be
19 expressed in the classroom though; right?

20 A. There are -- yeah. Yes. There are some perspectives I
21 don't think have any place in the classroom.

22 Q. So, for example, you don't think anyone should ever be able
23 to say that climate change is not real in the classroom; right?

24 A. I mean, there's scientific evidence to prove that it is
25 real, and if someone does have an issue with the fact of its

1 existence, I think that they could bring that up in the
2 classroom so long as they're welcomed to have a new professor
3 tell them that it is real, it is happening and here are the
4 facts and statistics that we have that can definitively show you
5 that it is real and happening.

6 Q. So as long as someone is willing to change their mind?

7 A. As long as someone's willing to talk to them and they're
8 willing to speak respectfully and it's relevant to the class as
9 well.

10 Q. Do you remember we spoke during your first deposition in
11 May --

12 A. Yes.

13 Q. -- of last year?

14 Do you remember during that deposition I asked you: *Is*
15 *there ever a situation if it's -- when it's appropriate for*
16 *someone to deny climate change in the classroom?*

17 Do you remember that question?

18 A. No. I mean, I believe that you said it.

19 Q. Okay. Do you have any recollection of saying: *No, I don't*
20 *believe so?*

21 A. No. But I also believe that I would have said that.

22 Q. Okay. Are you able to define the term "hate speech"?

23 A. Probably not in a very specific academic way, but I can
24 tell you what I consider to be hate speech.

25 Q. Sure.

1 A. I think hate speech is anything that is specifically
2 attacking, like, the identity of somebody in a very inflammatory
3 way. I think it's anything that includes slurs and just
4 anything that's being completely disrespectful and, like, cruel
5 to another person.

6 Q. And that has no place in the college campus in your
7 opinion?

8 A. Yeah, I don't think you should be able to use hate speech
9 on campus.

10 Q. You had -- I want to talk a little bit about the
11 antishielding provisions.

12 You'd agree with me that the antishielding provision allows
13 progressive students to express their views in the classroom;
14 right?

15 A. Yes.

16 Q. Okay. And you would agree with me that the antishielding
17 provision does not explicitly promote a specific viewpoint?

18 A. Yes. It does make space, however, specifically for the
19 unwelcome, uncomfortable and offensive ideas.

20 Q. You personally have not been required to express any views
21 that you don't agree with since House Bill 233 passed; correct?

22 A. Yes.

23 Q. You have not observed House Bill 233 causing any disruption
24 to the classroom environment yet; correct?

25 A. Yes.

1 Q. And I guess this is sort of a subpart of that question, but
2 I think you expressed earlier some concerns about the
3 antishielding provision fostering negative or harmful
4 discussions. Is that accurate?

5 A. Yes.

6 Q. Okay. But that hasn't -- you haven't seen that happening
7 yet; right?

8 A. No.

9 Q. Okay.

10 A. But the bill does leave it open for it to happen -- law,
11 sorry.

12 Q. You'd agree that House Bill 233 has not detracted from the
13 quality of your education at this point; correct?

14 A. Not in a way that I've been made aware of.

15 Q. Okay. And am I correct that you don't have any personal
16 knowledge of a professor facing any sort of retaliation or
17 retribution based on the antishielding provision?

18 A. No, I don't have any personal knowledge of that.

19 Q. Oh, you, I think -- let's talk about now the recording
20 provisions.

21 A recording of you has never been unlawfully published
22 since House Bill 233 was passed; correct?

23 A. To the best of my knowledge.

24 Q. Sure. That's fair.

25 I think one of the concerns that you expressed about the

1 recording provision during your direct examination, I believe,
2 is that you don't know people's politics when you go into the
3 classroom. Is that accurate?

4 A. Yes.

5 Q. Why does it matter if you know people's politics when you
6 go into the classroom?

7 A. I don't think you have to know people's politics when you
8 go into the classroom. I mean, I think now with House Bill 233
9 it's a little bit more uncertain now that you don't know
10 people's views, because if you are going into a class that
11 encourages, like, a healthy debate, especially on controversial
12 issues, it could be a problem if you have someone who's just
13 kind of, like, not been talking in the class, who's, like,
14 sitting. You know, you don't know what they think, and maybe
15 you want to share something but you don't know, maybe they're
16 going to record you and share it. You have no idea.

17 Q. Would you agree with me that your concerns about the three
18 challenged provisions in House Bill 233, those are concerns you
19 have about things that are going to happen some day in the
20 future?

21 A. Yes.

22 Q. And does that same answer hold true with your concerns over
23 potential for budget cuts to your institution and your program?

24 A. Yeah. Yes.

25 Q. You haven't -- well -- okay.

1 So just before we move on from the recording provision.

2 You'd agree with me that the recording provision has not

3 actually harmed you yet?

4 A. Not specifically, not directly.

5 Q. You haven't quit any organizations because of House Bill

6 233; right?

7 A. Yes.

8 Q. And you haven't declined to join any organizations because

9 of House Bill 233; right?

10 A. It's definitely not, like, helped try -- like, made me

11 consider being politically active, but I wouldn't say it's,

12 like, the main overarching reason.

13 Q. What organization did you not join because of House Bill

14 233?

15 A. It wasn't specifically just because of House Bill 233. I

16 would say that that helps as one of the factors. Another big

17 factor is, like, my schedule and my focus in life, but I was

18 considering joining like, the College Democrats and, like, Next

19 Gen when I got to campus, and I ended up not doing that and just

20 focusing completely on theater.

21 Q. Do you remember serving interrogatory answers as part of

22 the written discovery in this case?

23 A. Yes. Yeah. It's been awhile.

24 Q. Sure. The deposition that we were talking about earlier,

25 do you remember that in the course of that deposition we walked

1 through some of the written questions and answers that were
2 exchanged between the plaintiffs and the defendants in this
3 case?

4 A. Yes.

5 Q. Okay. Do you remember that I specifically asked about one
6 interrogatory answer.

7 I asked: *Plaintiff has not declined to join or resign from*
8 *any association due to House Bill 233*, and asked you: *Is that*
9 *still true?*

10 Do you remember that?

11 A. I don't remember it, but I do believe it probably happened.

12 Q. So would you also believe that it probably happened that
13 you said: *Yes, that is accurate?*

14 A. Yeah, I do believe I would have said that.

15 Q. Give me just one moment, Julie. I apologize.

16 THE COURT: Take your time.

17 MS. LUKIS: Thank you, Julie. I have nothing else for
18 you.

19 THE WITNESS: Thank you.

20 MS. VELEZ: Very quick redirect, Your Honor.

21 REDIRECT EXAMINATION

22 BY MS. VELEZ:

23 Q. Julie, I believe that Ms. Lukis just asked you about
24 conversations you had with your brother; is that correct?

25 A. Yes.

1 Q. And your brother's name is Alex Adams?

2 A. Yes.

3 Q. Did he tell you that that case was about targeting liberal
4 or progressive ideas on campus?

5 A. I think so, yeah.

6 Q. What do you remember about what he told you?

7 A. He told me that they were -- they wanted college students
8 who were currently enrolled, like, in a Florida public
9 university -- which I check that box -- and who had progressive
10 ideas and that it was going to be about, like -- I think it
11 was -- he said it was going to be about free speech and being
12 able to, like, express, like, progressive ideas on campus.
13 Like, I think he said that, but it was over the phone and it
14 was, like, two-ish years ago and it was, like, a minute
15 conversation.

16 Q. Do you remember your brother telling you anything about the
17 attacks on academic freedom in Florida?

18 A. We definitely, like, have spoken about stuff like that
19 before.

20 Q. And do you remember if that came up when he was telling you
21 about this lawsuit?

22 A. Probably it did. I mean, we have, like, a lot of
23 conversations -- we have a lot of conversations about politics.

24 Q. And Ms. Lukis asked you if I represented your brother in a
25 prior case; is that right?

1 A. Yes.

2 Q. Do you know what case I represented your brother in?

3 A. It was about early voting polling places on college
4 campuses.

5 Q. And do you know whether I also ever taught a class that
6 your brother attended at Georgetown?

7 A. Yes. I think you either taught a class or gave a speech or
8 something and he did go.

9 Q. And before you talked to your -- or I'm sorry.

10 After you talked to your brother, did you know that this
11 case was about a law that passed targeting progressive ideas?

12 A. After I talked to him did I know if it was about a law?

13 I don't -- I don't think I knew that. I think I just knew
14 that it was -- like, I should just reach out to you and you
15 would talk to me about what was going on.

16 MS. VELEZ: That's fair.

17 Thank you very much, Julie.

18 MS. LUKIS: I have a few more, if that's okay.

19 THE COURT: Well, let me ask you a question.

20 I understand why it's relevant potentially. What did
21 you know -- were you in -- did you have fears at the time the
22 lawsuit was filed, et cetera, but I'm not sure -- why do I care
23 that she has a brother that had another lawsuit or that her
24 brother -- even if he encouraged her and recruited her to be a
25 plaintiff, why do I care?

1 MS. LUKIS: Your Honor, I was trying to set Julie up
2 to understand the conversations I was asking about. I don't
3 think -- defendants don't believe that it's relevant that --

4 THE COURT: I mean, I understand why you were asking
5 your -- I understood why you were asking your questions about,
6 When did you read the bill and when did you know?

7 MS. LUKIS: Correct.

8 THE COURT: Did you sue because you had -- you were
9 apprehensive? I understood all those questions, but I just --
10 quite frankly, I'm lost as to -- but you can go ahead and ask
11 your --

12 MS. LUKIS: Sure.

13 And just to briefly respond a little bit further, I
14 think it's relevant that at the time -- it goes to both
15 reasonableness of fear and credibility of the witness that at
16 the time the witness decided to participate in the lawsuit it
17 was only then, you know, after reading a complaint and finding
18 out from her lawyers what the bill actually said and means -- I
19 think it goes to both reasonableness of fear and goes to
20 credibility of the witness.

21 THE COURT: And I think I said that -- I'm not sure
22 why it goes to credibility, but I said -- I acknowledge why you
23 asked the questions about timing, and I understood the fact she
24 spoke to her brother and got some information who potentially
25 she thought was a good source of information -- I'm sorry --

1 they.

2 THE WITNESS: Yeah.

3 THE COURT: My apologies.

4 They spoke to their brother, potentially because her
5 brother won a lawsuit as a plaintiff and tens of thousands of
6 students got to vote on campus because of what her brother did,
7 so she thought he was a good source of information and knew what
8 he was talking about. But aside from that, I understand your
9 point.

10 You can ask your questions.

11 MS. LUKIS: Defendants' position is certainly not that
12 Julie should not be taking her brother's advice, and I don't
13 think that that's part of the relevance position of defendants.
14 But based on this exchange, I think I understand the Court's
15 understanding and position on the questions that I asked, so I
16 don't think I need cross-examination further. Thank you.

17 Thank you, Julie.

18 THE COURT: And my apologies for not using the proper
19 pronouns quickly. I do not mean to be offensive, okay?

20 THE WITNESS: Thank you.

21 THE COURT: All right. Thank you.

22 (Julie Adams exited the courtroom.)

23 THE COURT: Let me find out something, Mr. Wermuth,
24 quickly, since I've heard a lot of questions about this. I
25 didn't read your complaint or anything you filed in front of me

1 to suggest anybody's claiming an actual injury: I've had a
2 complaint; I've been disciplined, et cetera. I understood from
3 your complaint that this is a First Amendment pre-enforcement
4 action.

5 Do I misapprehend -- because given the volume of
6 questions I've heard about, Have you been fired? Have you been
7 censured? Have you been reprimanded? et cetera, I may have
8 misread your complaint. I thought it was a First Amendment
9 pre-enforcement action.

10 Do I misapprehend the nature of the plaintiffs' claim?

11 MR. WERMUTH: You don't misapprehend the nature of the
12 plaintiffs' claim. Chill was a central feature of the case.

13 THE COURT: All right. Let's do this. It's been a
14 little over an hour. We're going to take more five-minute
15 breaks, and we'll come back in five minutes.

16 Thank you.

17 (Recess taken 10:01 AM.)

18 (Resumed at 10:17 AM.)

19 THE COURT: We're back on the record.

20 It's my understanding the next witness is going to be
21 video -- y'all can take your seats. Thank you, but y'all don't
22 have to stand.

23 My understanding, the next witness is Dr. Edwards by
24 video. Is that correct?

25 MR. WERMUTH: It is. But plaintiffs have a brief

1 matter to raise, if possible.

2 THE COURT: Certainly.

3 MR. WERMUTH: It's regarding an ore tenus motion to
4 supplement our exhibit list. I've conferred with my friend
5 George Levesque, and we haven't been able to agree on this
6 issue. It's a minor issue.

7 It's one letter from August the 10th, 2021, the
8 plaintiffs would like to add to their exhibit list. It goes to
9 the issue that Your Honor raised on Tuesday -- or actually
10 Monday -- regarding standing, specifically redressability and
11 the enforcement powers of the Board of Education and Board of
12 Governors. It's a public record.

13 THE COURT: Is this witness going to talk about it?

14 MR. WERMUTH: He will not talk about it, but this
15 issue is before the Court, and we wanted to make sure at the --
16 in light of your pretrial order that we brought the matter to
17 your attention as quickly as possible.

18 THE COURT: You brought the matter to my attention as
19 quickly as possible. Give me a copy of the letter. Give it to
20 the courtroom deputy, and we'll take this up later. There's no
21 reason to slow down the train at this juncture.

22 MR. WERMUTH: All right. Thank you, Your Honor.

23 THE COURT: Counsel, you may proceed.

24 If the courtroom deputy will please swear in
25 Dr. Edwards.

1 **DR. BARRY CLAYTON EDWARDS, PLAINTIFFS WITNESS, DULY SWORN**

2 THE COURT: Please state your name then spell your
3 last name for the record.

4 THE WITNESS: Barry Clayton Edwards, E-d-w-a-r-d-s.

5 MR. JASRASARIA: Dr. Edwards, can you please put on
6 your headset. The court reporter is having a little bit of
7 trouble hearing.

8 THE WITNESS: I had a fan running in the background.
9 Is it better now or still need the headset?

10 THE COURT REPORTER: We can try it without it.

11 MS. JASRASARIA: We can try it without the headset and
12 then we'll let you know if we need to use it.

13 THE WITNESS: Okay. Thank you.

14 DIRECT EXAMINATION

15 BY MS. JASRASARIA:

16 Q. Good morning, Dr. Edwards. Can you please introduce
17 yourself to the Court.

18 A. Good morning.

19 My name is Barry Edwards. I'm an associate lecturer at the
20 University of Central Florida.

21 Q. And are you a plaintiff in this lawsuit, Dr. Edwards?

22 A. Yes, I am.

23 Q. What do you -- sorry.

24 You mentioned that you are at the University of Central
25 Florida; is that correct?

1 A. That is correct.

2 Q. And if I say UCF, will you understand that to mean the
3 University of Central Florida?

4 A. I sure will.

5 Q. Is UCF a public or a private university?

6 A. A public university.

7 Q. Where is it?

8 A. The main campus is in Orlando, Florida.

9 Q. And is UCF part of the Florida State University system?

10 A. It is.

11 Q. Could you briefly describe your educational background for
12 the Court?

13 A. Sure. I went to college at Stanford University where I was
14 a political science and economics double major.

15 After that I went to law school at NYU. I had some
16 practice experience after that, then went back to school at the
17 University of Georgia to complete a Ph.D. in political science.
18 Obtained my Ph.D. at the University of Georgia and then after
19 started working at UCF.

20 Q. When did you get hired at UCF?

21 A. 2014, I believe.

22 Q. And what were your initial impressions of UCF when you were
23 going through the job application process?

24 A. Well, my initial impressions is it's a very large and
25 modern university. The scale of the buildings surprised me.

1 Seen a lot of students zip around on skateboards. It was
2 something that I had not really seen before.

3 Those are my just initial impressions, sort of like getting
4 off the plane and going on tour. I don't know if you want me to
5 speak more about the department or teaching, but those were my
6 initial impressions.

7 Q. Sure. Yeah. I mean, what were your initial impressions of
8 the academic programs in political science and the teaching?

9 A. Well, some of it was familiar to me because it was similar
10 to the political science program and international studies
11 program at the University of Georgia that I was familiar with.

12 I think the main difference that stood out to me was UCF
13 being very innovative in terms of the mode of offering classes,
14 its willingness to start new programs and start new classes, to
15 experiment with programs and a real intent on growth and intent
16 on reaching diverse students, not traditional students.

17 And, to me, my feeling was that I felt that it was very
18 exciting to see a school that wanted to reach a lot of people,
19 affect a lot of lives and do so in an innovative manner.

20 Q. Have you taught anywhere else besides UCF, Dr. Edwards?

21 A. Yes. Well, during graduate school I was a -- a graduate
22 teaching assistant so some teacher responsibilities, not
23 instructor of record.

24 And currently I teach on a part-time basis one class at --
25 for the University of Georgia.

1 You might have seen our football team the other night.

2 Q. Are you familiar with an organization called the United
3 Faculty of Florida?

4 THE COURT: I'll just note there's certain statements
5 that could be sanctionable by the Court, and that came close,
6 but we'll let it pass.

7 THE WITNESS: I hear you.

8 BY MS. JASRASARIA:

9 Q. Dr. Edwards, are you familiar with an organization called
10 United Faculty of Florida, or UFF?

11 A. I am.

12 Q. What is it?

13 A. It's the umbrella organization for faculty unions at
14 Florida public schools.

15 Q. Are you a dues-paying member of UFF?

16 A. I am.

17 Q. Going back to your experience at UCF, do you have tenure
18 there?

19 A. No, I do not.

20 Q. Do you have any concerns about being a plaintiff in this
21 case?

22 A. I have some personal reservations insofar as the time
23 commitment and giving up a good amount of time to try to do this
24 service, although I think it's important to do.

25 And then, you know, I have some reservations about

1 repercussions of the lawsuit and participation in the lawsuit,
2 as far as my employment goes, which is for one reason I'm glad
3 to be a union member. They -- you know, so they offer some
4 protection against retaliation, so I appreciate that.

5 Q. Could you describe what some of those concerns that are
6 employment related might be?

7 A. Well, I mean --

8 (Reporter requested clarification.)

9 THE WITNESS: Can we do this and test the system and
10 then go back on the record? Is that possible?

11 THE COURT: Certainly.

12 (Discussion was held.)

13 THE COURT: Counsel. Let me ask you a quick question
14 so we can move things along -- actually, it may slow it down.

15 I understand why it's pertinent about his fears
16 relative to HB 233.

17 MS. JASRASARIA: Uh-huh.

18 THE COURT: What's the relevance of -- I mean, I guess
19 it's maybe bolstering his credibility, which isn't really
20 permissible at this juncture until it's attacked, that, you
21 know, I'm doing this as a public service even though there could
22 be blowback.

23 But what's the relevance of a plaintiff -- what fact
24 in this case, or how does it impact on credibility that your --
25 is that the position that it goes to his credibility because

1 he's risking something by being a plaintiff?

2 MS. JASRASARIA: I think it certainly goes to his
3 credibility. I also think that given how connected some of
4 these issues are with regard to just fear of retaliation --

5 THE COURT: But is fear of retaliation from being a
6 plaintiff -- I can assure everyone -- will not appear anywhere
7 in an order from Judge Walker as it relates to whether or not he
8 has -- there's a chilling effect by the statute.

9 The chilling effect by being a plaintiff -- I
10 understand how that puts a double target, potentially, on his
11 back, but that double target would not serve as a basis to
12 justify a finding that there was a pre-enforcement chilling
13 effect that would give -- support a finding by this Court that
14 he has standing.

15 I'll give you a little bit, but I can tell you that I
16 get that every time a plaintiff puts themselves out there,
17 there's a -- there's a risk, especially when folks have control
18 over you, and I get that. I got that when you said he has
19 tenure, but I guess that's a nice, polite way of saying you
20 might want to burn your time on something else.

21 MS. JASRASARIA: No, I'm happy to move on and will do.

22 Okay. So -- are we back on the record?

23 THE COURT REPORTER: We've been on.

24 MS. JASRASARIA: Great. I figured. I just wanted to
25 make sure before I started asking questions.

1 BY MS. JASRASARIA:

2 Q. Dr. Edwards, can you give me some examples of courses that
3 you regularly teach at UCF?

4 A. Sure. I regularly teach Scope and Methods of Political
5 Science, a political science research methods course. I teach
6 American Constitutional Law I and II; a course called Judicial
7 Process and Politics. I've taught the American Presidency.
8 Teaching Introduction to American Government, and I recently
9 taught a graduate-level class on Survey Research and Design, and
10 I've taught a class on the Politics of Gun Control. I think
11 that's all of them.

12 Q. Is there anything about the courses that you teach that
13 could be considered controversial?

14 A. Well, certainly. I mean, these classes -- most of the
15 classes I teach are substantively about politics and the
16 political process and laws in this country, and those are
17 certainly controversial.

18 I'll go through specific examples from courses, but I would
19 say all the courses are replete with controversies.

20 Q. Is teaching controversial topics central to teaching the
21 courses that you teach?

22 A. Certainly. I mean, I would say it varies somewhat from
23 course to course. Of course, like political science research
24 methods is probably less controversial than a course like
25 American Constitutional Law II which addresses civil rights and

1 civil liberties.

2 And in a course like Constitutional Law II, civil rights
3 and civil liberties, I mean, the entire syllabus is -- covers
4 controversial topics, you know; freedom of religion, the
5 establishment clause, privacy, freedom of speech, equal
6 protection.

7 So I'm sure I don't need to educate this Court on those
8 controversies, but it is a class that can be seen as very
9 controversial.

10 THE COURT: Doctor, I am interested -- and I just -- I
11 promise I'll only interrupt for a minute.

12 Judicial Process in Politics, what's the quick
13 description of that -- I'm just interested, what's the nature of
14 the class? What do you teach in that class?

15 THE WITNESS: It's a class that offers students an
16 overview of the major contours of the judicial system in the
17 United States; the state courts, the federal courts, some of the
18 players within the judicial system, including interest groups,
19 lawyers, law schools, you know, the process of passing the bar
20 and going to law school.

21 It covers some of the features of different trials;
22 criminal trials, civil trials, appeals, and introduces some of
23 the functions of the U.S. Supreme Court, how the Supreme Court
24 picks topics or picks cases to hear and how it's thought to
25 decide cases.

1 THE COURT: So it's not -- since it was Judicial
2 Process in Politics, it's not focused on politics specifically
3 in the judicial system or how it does or doesn't impact the
4 judicial system, meaning political partisanship? That's not the
5 focus of the class?

6 It's more of a survey class on the court system?

7 THE WITNESS: I'd say it's not a focus of the class
8 per se, but it's a recurring theme within the course. For
9 example, in studying the state courts, a feature of many state
10 courts is elected judges, and some are partisan elections, some
11 are nonpartisan elections and that becomes a theme.

12 With federal judges, they're appointed through a
13 political process, nominated through -- and confirmed through a
14 political process -- I'm sure you know that -- and so that
15 becomes a theme in the class, and the influence of public
16 opinion on the judiciary. So it's not a topic per se, but it
17 really is a theme that goes through a lot of the class.

18 THE COURT: Thank you. Sorry. Just interested.

19 THE WITNESS: You're welcome.

20 BY MS. JASRASARIA:

21 Q. What's your understanding of the purpose of this
22 litigation, Dr. Edwards?

23 A. The purpose of this litigation is to obtain an injunction
24 against the enforcement of the law -- a bill known as HB 233,
25 which is now a law.

1 Q. Okay. Let's start talking about some of the specific
2 provisions of HB 233.

3 Are you familiar with HB 233's antishielding provisions?

4 A. Yes. I am.

5 MS. JASRASARIA: Andy, could we pull up Joint
6 Exhibit 1 and highlight the antishielding provisions on page 3.

7 BY MS. JASRASARIA:

8 Q. Dr. Edwards, is this the language that you're referring to
9 when you talk about the shielding -- antishielding provisions?

10 A. Yes. That's part of it. That's the definition of shield.
11 I believe there's another term in the bill that applies the word
12 "shield" to faculty.

13 Q. Yes, I think the bottom section there which talks about how
14 institutions cannot shield.

15 A. Correct.

16 Q. What do the antishielding provisions mean?

17 A. I've read it many times but still struggle to understand
18 what it means. I find it fairly confusing and, frankly, I'm not
19 certain what conduct is prohibited and what conduct is
20 encouraged or required by the law.

21 To the best of my understanding, it is an attempt to remove
22 or -- my ability to limit or control classroom material and
23 classroom ideas. I sort of read it to take the meaning that
24 anything -- anything should be allowed to go in a classroom, and
25 I shouldn't attempt to reign in discussion or direct discussion

1 to the extent that it's uncomfortable, unwelcome, disagreeable
2 or offensive.

3 That's the -- that is the best of my understanding of the
4 law.

5 Q. Have you ever asked for guidance on the meaning of the
6 antishielding provisions?

7 A. I have. I've -- at my university, at UCF, they proposed a
8 policy to implement this law as well as a law known as -- from
9 HB 7, the Stop WOKE Act. And when they proposed it, they gave a
10 comment period and I submitted a brief letter to the policy
11 department seeking guidance and a better understanding of what
12 the policy did, so, yes, I have sought guidance on what it
13 means. That is one instance.

14 Q. Did you ever receive a response to your letter?

15 A. No, I did not.

16 MS. JASRASARIA: Andy, could we pull up
17 Plaintiffs' Exhibit -- what's been premarked as
18 Plaintiffs' Exhibit 481?

19 BY MS. JASRASARIA:

20 Q. Dr. Edwards, do you recognize this document?

21 A. I do. Is it possible to -- yeah. Yes, I do. That appears
22 to be the proposed regulation that I commented on to the
23 regulations administrator.

24 MS. JASRASARIA: And, Andy, could we pull up
25 Plaintiffs' Exhibit 480?

1 BY MS. JASRASARIA:

2 Q. Do you recognize this document, Dr. Edwards?

3 A. Yes. It looks like a letter that I wrote and sent to the
4 regulations administrator commenting on the proposed policy for
5 nondiscrimination in university training and instruction.

6 MS. JASRASARIA: Could we scroll down and see the body
7 of the letter?

8 BY MS. JASRASARIA:

9 Q. Can you explain why you wrote this letter and what
10 clarification you were seeking?

11 A. Well, it's like writing a letter. You know, I was writing
12 to ask the regulations administrator some questions about what
13 the policy would require and/or prohibit and was hoping that
14 they would clarify what it means for someone like myself as a
15 UCF instructor.

16 And I suppose partly I also wanted our regulations
17 administrator to think about what they were doing and what it
18 would mean and maybe pause to develop some understanding of what
19 they were doing.

20 MS. JASRASARIA: Your Honor, I'd like to move to admit
21 Plaintiffs' Exhibit 480 into evidence.

22 MR. MOORE: Is 480 the one that we're looking at right
23 now --

24 MS. JASRASARIA: Yes.

25 MR. MOORE: -- the letter authored by Dr. Edwards?

1 We'd object on hearsay and relevance, Your Honor. We
2 think it's clear that the purpose of this letter is to
3 articulate that he is confused and he has some concerns about
4 it. I mean, that's what's in the letter itself. If we believe
5 that, that's hearsay; and, moreover, this regulation pertains
6 directly to House Bill 7 and -- which is not at issue here.

7 MS. JASRASARIA: So the letter speaks to Dr. Edwards's
8 state of mind upon seeing the regulation, the proposed
9 regulation, that he's responding to.

10 And in terms of relevance, the regulation does
11 specifically reference the shielding language, and part of the
12 reason that Dr. Edwards wrote this letter is that there -- is
13 that he saw a conflict between HB 7 and the antishielding
14 provisions, both of which were being implemented in this one
15 regulation.

16 THE COURT: I don't -- here's what I don't understand.
17 The witness has already testified to this. I mean, I don't --
18 you now want to enter an exhibit that says, Judge, this exhibit
19 corroborates what he's saying. And so if Mr. Moore suggests,
20 for example, There's no confusion; you're making this up; you'll
21 say anything as a plaintiff, then you can potentially argue that
22 it falls within the exception, Here it's not. It's a prior
23 consistent statement, and there's ways in which you can get that
24 in.

25 But I'm not sure -- how is it not -- I mean, we've

1 done a lot of the state of mind, and I understand the state of
2 mind of somebody of why they're fearful is germane because
3 that's -- that goes to a judicative fact as it relates to
4 standing; namely, is there a chilling effect, if that's your
5 theory of standing, under a pre-enforcement.

6 But how is his state of mind at issue as to whether or
7 not -- he can testify that he's confused. I'm -- I just don't
8 know, how is this document -- that's my question. I just don't
9 understand.

10 MS. JASRASARIA: Sure. And I'm happy to move on from
11 the document.

12 THE COURT: It's also created, you know, post, you
13 know, litigation and so forth. I -- anyway, I'm going to
14 sustain the objection.

15 If I thought it added anything or was a critical
16 issue, then I would worry about it more, but it's hearsay. You
17 can't introduce your own statements unless there's a reason why
18 you introduce your own statements. And when y'all talk about
19 something coming in as state of mind, that's the most -- not
20 y'all, but generally that's the most abused exception to
21 hearsay.

22 It's got to be -- the state of mind has to be
23 something that I've got to rule on such that it's -- that's
24 pertinent, so like the intent of the decision-makers in this
25 case on the other side, or the fear of a particular plaintiff,

1 That's all fair game because it's in front of me and something I
2 got to resolve, but I'm not going to ever resolve the question
3 of whether this witness is or is not confused by the statute.

4 That's not an issue that I'm going to -- a factual
5 issue that I'm going to resolve as the fact finder in this case,
6 and so the fact that he committed his thoughts to writing on
7 that point -- unless, again, Mr. Moore comes in and says, This
8 is the first time we've ever heard of this; you're just making
9 this up to make you sound better, then there could be some legal
10 basis that it comes in.

11 But, anyway, that's more of an explanation than you
12 needed. So I sustained the objection.

13 MS. JASRASARIA: Andy, you can take that exhibit down.

14 BY MS. JASRASARIA:

15 Q. Dr. Edwards, do you understand that -- sorry. Let me
16 rephrase.

17 Is it possible that the antishielding provisions do not
18 apply to faculty or to classrooms?

19 A. Well, my understanding is that it does apply to me and
20 applies to my classroom instruction because I'm a public
21 employee teaching for the University of Central Florida, and my
22 university has implemented it as a policy.

23 I don't know what their mindset was, but I assume that they
24 were thinking that the law applies to us and we need to enforce
25 it in our classroom instruction.

1 Q. Have the antishielding provisions caused you to do anything
2 differently as a lecturer at a Florida university?

3 A. Yes. The antishielding provisions, because my
4 understanding is that it limits my ability to guide or direct,
5 redirect a classroom conversation or discussion, has made me
6 more tentative to broach certain topics or introduce certain
7 materials that students might have strong opinions on.

8 I guess maybe a way to explain it would be I feel like
9 it's -- I'm being asked to drive a car that doesn't have
10 effective steering. It doesn't have brakes. Like, I can't
11 redirect the direction of the car away from the guardrail or the
12 cliff if I need to.

13 So I feel like, you know, if you're asked to drive a car
14 that doesn't have steering and brakes, how would you do it? You
15 would do it very slowly and very cautiously and try as much as
16 possible to stay in the middle of the road and hope that the car
17 doesn't drift to one side or the other. That's how I feel like
18 I've integrated it into my teaching and my approach in the
19 classroom.

20 Q. Let's talk about some of your courses specifically.

21 Has the -- have the antishielding provisions changed your
22 approach to teaching the American Government course that you
23 teach?

24 A. It's changed the approach that I teach the course compared
25 to how I would have taught it or how I teach my other courses.

1 I developed an online Introduction to America Government course
2 to start teaching last summer. And I found myself making that
3 calculation and thought about, you know, could this material
4 spark a discussion that could become controversial or offensive
5 or students, you know, engaged in some battle, you know, like, I
6 could get some material that could lead us to one guardrail or
7 the other.

8 And I found myself looking for material that serves some of
9 the course objectives, but it was -- how should I put it -- fun
10 material as opposed to thoughtful material and, of course,
11 material that students wouldn't find critically engaging so as
12 to avoid controversy or starting a controversy that I would need
13 to redirect.

14 I can give you some specific examples, but that's sort of
15 the general approach to how this changed my class, particularly
16 that Introduction to American Government class.

17 THE COURT: Doctor, let me ask a question under
18 Rule 614, plus, as a civil proceeding, I'm the fact finder. So
19 I would have given myself, as I would give the jury,
20 potentially, permission to ask questions in any event.

21 I want to make sure I don't misapprehend your
22 testimony, and this has kind of been a theme in this case. I
23 didn't hear you say anything to suggest that there shouldn't be
24 diverse viewpoints explored and expressed in your class. That's
25 something you would promote; is that correct?

1 THE WITNESS: In general, I think that's true. I
2 would promote a diverse viewpoint and exchange of ideas,
3 although in light of the current policy and antishielding
4 provision, I'm more cautious in doing that.

5 THE COURT: And that's what I was going to ask. It
6 seems to me that they're two different things.

7 As I understood your testimony about the -- and I like
8 the analogy, and it will probably appear in a written order at
9 some point, about the car. As I understood it, you were saying
10 this is confusing about what we're required to do and not do.
11 And if the goal is to have varied and thoughtful and insightful
12 discussions and debates, because I don't know what the
13 parameters are and it's confusing and it could subject me, the
14 school, et cetera, to penalties, rather than resulting in a more
15 robust discussion, because of the nature of the way it's drafted
16 and without any guardrails and it's not clearly delineated, how
17 I've been forced to respond is actually contracting or limiting
18 robust discussion as opposed to expanding it. And that's in
19 direct relation to the statute that you were describing, and I'm
20 not sure what it does or doesn't require me to do.

21 Did I get that wrong? And you will not hurt my
22 feelings. But did I get it wrong? And if I did or it's more
23 nuanced than that, you let me know.

24 THE WITNESS: No, sir. I believe that's -- that's
25 fairly accurate of my thoughts about teaching and my approach to

1 the -- that course, in particular, was that given the current,
2 you know, lack of guard -- you know, control, I'm kind of afraid
3 to introduce topics and material that would provoke exchange
4 of -- you know, a rigorous exchange of ideas. Because if that
5 rigorous exchange of ideas becomes something that's unwelcomed
6 and offensive and hurtful, the law says I can't try to protect
7 students or shield any student from that. So, in that
8 environment, I'm not, like I say, introducing material or ideas
9 that could start an exchange of ideas.

10 THE COURT: You did a better and more concise way of
11 describing it than I did, but you answered my question.

12 Thank you.

13 Counsel, you can move forward.

14 THE WITNESS: You're welcome.

15 BY MS. JASRASARIA:

16 Q. Dr. Edwards, let's move on to talking about your Politics
17 of Gun Control class that you mentioned.

18 How do you describe that class to students who might be
19 interested in taking it?

20 A. Well, there's a syllabus that I make and I submit that
21 describes the class, the purpose of the class, the learning
22 objectives and outlines the materials I use. Generally it's
23 meant to be a look at the politics of gun control in the
24 United States, the history of guns and gun control in the
25 country, the constitutional revisions, some of the legal issues,

1 public opinion, quite a bit of the data that would go into
2 policymaking with gun control legislation.

3 Yeah, that's it in summary.

4 Q. Have you ever posted a statement on your course website
5 about whether students should take your class?

6 A. I have. I might say that on the syllabus the class -- or
7 it may be something I'd say on, like, a course announcement or a
8 page that goes within a module of the online class, but I do try
9 to let students know what the class is about, what it's not
10 about, so they can make a decision about whether, you know, the
11 class is what they're seeking and if it's right for them and
12 they're going to think it's useful, so they -- you know, I'd
13 like students to pick classes that they're happy with and that
14 they enjoy. And if that's not going to be my class, I would
15 just assume them -- you know, encourage them to take a different
16 class.

17 Q. Do you recall what kind of guidance you give students in
18 that kind of a post?

19 A. Well, I do recall in the Politics of Gun Control course,
20 you know, letting students know a bit about the material that
21 I'm choosing and that I select for the class. Basically I want
22 students -- to let them know that it's a political science
23 class; that as a social science class, there's certain kind of
24 material that we use and that, you know, I'm trying to,
25 especially like in the policy orientation material, convey the

1 consensus of the research and the consensus of research findings
2 and a little bit of, like -- let them know, like, the consensus
3 of the research findings is what it is. If you're unhappy with
4 that and you want to see a nonconsensus or nonscientific view
5 presented, you may be unhappy with the class because I'm not
6 emphasizing, you know, a nonscientific view of the material, you
7 know.

8 And some people say, like in the -- basically the gun
9 rights and gun control debate, there are two sides of the
10 debate. I'm not sure if I agree with that. But I'm trying to
11 let them know, you know, I'm not always going to try to give
12 equal time to each side of the debate because it's a political
13 science class and social science class, and I'm trying to
14 present the consensus of the research.

15 And if the research and the consensus of the research is
16 on -- happens to be on one side of the issue, I'm not going to
17 give equal time to both sides. I always like to present the
18 side that is the consensus of research.

19 And, yeah, I guess I just try to let them know not to
20 expect that. And then if they would -- if they're expecting me
21 to do that, that they may be disappointed because I'm not, you
22 know, just going to give equal time to both sides just to make
23 people happy. I wanted to, like I said, present the consensus
24 of the social science research on the issues.

25 Q. Would you post a similar statement about the fact that the

1 course doesn't consider both sides? Would you post a similar
2 statement now?

3 A. Well, it's a difficult thing to answer. You know, I feel
4 like the law puts me kind of in a difficult situation where I
5 feel like that -- that statement does reflect my thoughts about
6 teaching and how I think the course should be taught. I mean,
7 it's a political science class in the College of Sciences, and
8 we are a social science. And I would like the students to know
9 what social science research has found and presents on different
10 topics.

11 But given the law, I could see how my statement could be
12 seen as an attempt to shield students from material that
13 presents one side -- or presents a side of the debate that I
14 don't happen to take or I don't find valid.

15 So I don't know. I don't know the next time I'm scheduled
16 to teach that class. I don't think it's this summer. But I'm
17 going to have to think long and hard about whether I want to
18 make that statement or not. I mean, I believe in the statement,
19 and I would like students to have a good experience in my class
20 and know what they're getting into. But at the same time, you
21 know, I'm an employee at the university. I want to follow the
22 instructions of my employer and do a good job. So I'm going
23 have to think long and hard about that particular statement or
24 making statements like that.

25 Q. How do students who are very pro-gun tend to do in your

1 class, notwithstanding what you just mentioned about your
2 teaching philosophy there?

3 A. Well, my impression in that particular class is that
4 students with strong pro-gun rights opinions do very well in the
5 class. They seem to have an unusually strong interest in the
6 topic, a strong interest in, you know, dissecting the
7 literature, closely reading the studies, debating and engaging
8 with other students.

9 And I'll tell you there's one assignment that I use in the
10 class. I try to use it to illustrate the politics of gun
11 control, and it's an assignment where students are asked to pick
12 a mass shooting incident in the United States and then trace the
13 coverage of that mass shooting incident in the newspapers to
14 see, like, when it peaks and how many stories and how many
15 pictures and then how long it takes for the news cycle to end.
16 And it really is an interesting way to show, you know, how the
17 politics of gun control enters our consciousness after these
18 mass shooting events.

19 And it's funny this -- at least anecdotally, the students
20 who are very pro guns and are interested in guns, they go above
21 and beyond on the assignment. I mean, some of those students --
22 most students will maybe introduce a picture. But then students
23 with strong pro-gun rights opinion and real interest in guns
24 will, like, you know, create an appendix and a gallery of
25 different -- you know, of the different weapons used and then

1 dissect them and illustrate them and submit, you know, papers
2 that are three times as long as the requirement because they're
3 so interested in guns and shooting and gun laws.

4 So, yeah, those students -- yeah, just in general those
5 students, given their interest in the topic, do very well.

6 Q. And is the fact that those students with pro-gun views do
7 very well -- is that something that you post on your course
8 website as well?

9 A. Well, yeah. I think, yeah -- I don't know the exact
10 language, but I think I've let students know that. I want to
11 speak to a student that, you know, perhaps has gun rights views
12 and let them know that, you know, I'm not going to grade them
13 more harshly or negatively because they have that opinion. In
14 fact, I kind of welcome those students in the class. They're
15 really interested in the topic, and they do quite well and
16 are -- yeah, they're highly motivated students.

17 And, you know, I appreciate that, and I try to let them
18 know that just because the -- you know, on some facets of the
19 topic the consensus of social science research doesn't support
20 your viewpoint or what I would associate with your viewpoint
21 doesn't mean I don't want you in the class. In fact, I do want
22 you in the class, and you're welcome in the class.

23 And students with those opinions, like I said, tend to do
24 very well.

25 Q. Have the antishielding provisions, in your experience,

1 helped encourage more diversity viewpoints in your courses?

2 A. No, that has not been my experience. In fact, my
3 experience would be the opposite. It has discouraged me, at
4 least, from introducing material and topics that could provoke a
5 variety of viewpoints.

6 So I'd say, like, to fight the perception that I may be
7 ideologically biased, I, you know, tend to call this as more
8 neutral and not, like, entering into areas of controversy to
9 avoid that perception or to avoid, you know, an exchange of
10 ideas in the classroom that could get out of control if I don't
11 have the ability to shield students from the consequences of
12 that kind of classroom discussion or debate.

13 Q. Let's turn to the recording provision.

14 Are you familiar with HB 233's recording provision?

15 A. I am, yes.

16 Q. What do you understand that provision to do?

17 A. My understanding is that it is a very general permission
18 for students to record, without notification or my consent, my
19 classroom lectures for a variety of different purposes.

20 Q. Before HB 233 went into effect, did students ever record
21 your classes?

22 A. Yes, it happens occasionally. You know, UCF follows, you
23 know, the law with, you know, just the access for students with
24 disabilities, so if a reasonable accommodation is needed that
25 includes a classroom recording for a student who may not be able

1 to note-take efficiently or can't hear or perhaps can't attend
2 all the classes, there is a process to allow recording.

3 In addition to that, just on a -- I can recall at least one
4 instance just on a case -- just kind of, like, an individual
5 case-by-case basis, a student came to me and asked if he could
6 record the lectures. And I -- as I recall, I said that was --
7 we talked about it a bit, and I gave him permission to do that.

8 Q. What's different about those situations and the situations
9 that could occur under the recording provision now?

10 A. Well, in those situations, either the disability
11 accommodation or, you know, the case-by-case basis, I'm notified
12 and I know, you know, who is recording, what classes they're
13 recording. You know, I have an idea of why they are doing it.

14 And even with the disability accommodation, you know, the
15 fact that they're giving notice of it and -- you know, most of
16 the time I think faculty just accept it because, you know, you
17 want to give reasonable accommodations to students. But even in
18 that process, there should be an opportunity to discuss it and
19 modify it or make it work more effectively.

20 So, yeah, it is different now because the recording could
21 happen without my knowledge, without my permission. It feels
22 very different from the recording provisions and -- you know,
23 recording terms that I've been used to.

24 Q. Has the recording provision caused you to change your
25 in-class expression in any way?

1 A. Well, yeah. It makes me, you know, extra cautious about
2 what I say in class or how things I say in class could be
3 recorded and taken out of context or interpreted. I mean, in
4 this state, in Florida, it's ordinarily a crime to record
5 someone without their permission or okay. But the law changes
6 that and says that because I'm a teacher giving lectures, that,
7 you know, what was once a crime is okay to do to me and that,
8 you know, anything that I say in class can be used against me in
9 a complaint or in a litigation.

10 And it feels a bit like being treated like a criminal under
11 suspicion and being recorded or having, you know, an
12 eavesdropping or surveillance of what I'm saying in the
13 classroom when -- I mean, I just feel kind of hurt, like it's
14 unfair to do that, because I'm trying hard to educate students
15 and do a good job. And I haven't done anything, you know, that
16 should allow me to be treated kind of like a criminal when I'm
17 giving classroom lectures. It feels, like, very invasive and,
18 like, creepy and frightening.

19 Q. Has the recording provision changed how you choose to share
20 information with your students?

21 A. Yeah. I would say that it's made me more cautious about
22 sharing material. I know, for example, I recently -- in this
23 past semester, the fall semester, I taught a face-to-face
24 American Constitutional Law I class. You know, I kind of made
25 the decision before the class started not to, you know, create

1 PowerPoint presentations, which I've done in the past, you know,
2 not to use them in class, not to post them online, not to share
3 them. You know, I kind of limited the amount.

4 Sometimes in the past I've recorded videos of myself
5 explaining something and then, like, shared -- posted the videos
6 or shared the videos with the class. I felt more cautious about
7 doing that. You know, not that I was going to say anything in a
8 PowerPoint slide that was particularly controversial, but not
9 knowing the students ahead of time, not knowing the context that
10 it would appear, I almost felt like if I'm under this cloud of
11 suspicion, it's better for me not to create a paper trail that
12 could follow me in what I say and that -- it seems kind of
13 paranoid when you say it, but that is the way that I feel I'm
14 being treated.

15 So I thought better not create that paper trail, produce
16 less material, share less in hope of -- kind of to protect
17 myself. Especially before I got to know the students in the
18 class and feel comfortable with them, you know, I didn't go into
19 the class sharing as much as I usually would with them.

20 Q. Why are you concerned about students recording your class?

21 A. Well, I mean, not normally -- I mean, my students are -- I
22 mean, 99 percent of them are thoughtful and kind and good
23 people, and I like them, you know.

24 And like the student who just came to me and said he wanted
25 to record my lecture because it was going too fast and if that

1 would be okay, and, yeah, I thought that was okay. In fact, I,
2 like, talked to him about where he would put the recording to
3 make sure he could capture it effectively and use it for the
4 educational purpose.

5 But this provision, it just seemed so broad to have
6 students recording lectures. And, you know, there's things --
7 there have been instances where, you know, a snippet of what a
8 faculty member says on a Zoom call gets, you know, clipped out
9 of the call and shared online and becomes some viral moment.
10 You know, I recall in the pandemic when a lot of faculty turned
11 to Zoom and started doing Zoom recordings, there were a bunch of
12 those stories that came out. You know, a faculty said something
13 on a Zoom call, and it got clipped and passed to a blog or a
14 media outlet and spiraled out of control.

15 I mean, I remember one instance in particular, you know, a
16 faculty member and the class were talking about -- I believe it
17 was about police officers and the relationship between police
18 and civilians. And there were some statements -- and I would
19 disagree with the statements by the faculty member. But the
20 faculty member said some things in that Zoom call, and all of a
21 sudden that Zoom call got clipped out, passed to a media outlet
22 and became a nationwide news story. I mean, it was just a Zoom
23 call between faculty and students, but I know of it now.

24 My understanding is that, you know, that instructor not
25 only got fired, but, you know, got a lot of negative attention

1 and even death threats from what was said.

2 And so, yeah, the prospect of something like that is
3 definitely very, very frightening and scary. I mean, it seems
4 kind of remote, but I teach a lot of students, and I don't know
5 them all ahead of time. And that stuff happens and can happen
6 to people. And it is frightening because -- I'm not a public
7 figure. I certainly do not want to get death threats from
8 something I say in class taken out of context and dropped into
9 this difficult political environment we live in. I don't have a
10 real recourse for something like that. And once that kind of
11 thing happens to someone, I don't think there's any way to
12 really walk it back for that person.

13 THE COURT: Yes, sir.

14 MR. MOORE: Narrative, Your Honor. And to the extent
15 he's implying that the death threats actually happened, we would
16 object on hearsay.

17 THE COURT: I think he's suggesting he has a
18 reasonable apprehension of the death threats. And as I
19 understand his testimony, he said he was being treated like a
20 criminal -- I guess it was he was being treated worse than a
21 criminal because they -- if you want to surreptitiously record a
22 drug dealer, you have to get a wiretap and go through a judge.
23 Here the State is empowering students to record professors to
24 enforce the new state law they passed.

25 So I understood his testimony, and I overrule the

1 objection.

2 BY MS. JASRASARIA:

3 Q. Are you concerned that students from outside your classes
4 could record your lectures?

5 A. Yes, because the way that the law is written -- I mean,
6 maybe we could look at it, but it just says that students may
7 record classroom lectures. It doesn't say that -- it doesn't
8 say that it has to be a college or university student or a
9 college -- at that school, as I read it. It could be, you know,
10 a college -- you know, a student from FSU that could record my
11 lecture for their educational purposes or other purposes.

12 Q. Are there other ways that a student could complain about
13 your lectures outside of HB 233's causes of action?

14 A. Yes, I think there are. I mean, in my university, and
15 probably most public universities, you know, there's a system by
16 which after -- at the end of the class, you know, students are
17 asked to evaluate the class and submit comments on the class.
18 And we've produced a lot of those kind of student perception of
19 instructor measures and comments in the litigation.

20 So, yeah, they will often complain about, you know, their
21 professors, teachers, many different things in those
22 evaluations. And also there's -- well, that's one. So those
23 get out, and those get reviewed, and they complain through that
24 system.

25 And also, I mean, I have a -- there's a chair of my

1 department that students have sometimes complained, even with me
2 and with some other faculty, to the chair of the department
3 about how a classroom is -- how a class is conducted or graded.
4 And students even have a -- and there's a formal, like, grade
5 complaint process. It's different than, like, the equity office
6 discrimination process. It's a different process.

7 But there's a grade complaint process. Like, if a student
8 feels that they've been unfairly graded by a professor, if they
9 felt the professor knocked their grade down because, you know,
10 they're liberal and the professor is conservative, or vice
11 versa, there's a process for that that could be heard and
12 assessed and overruled.

13 So I think all those mechanisms give students a chance to,
14 you know, complain if I am biased in the classroom or not
15 allowing them to speak their views. I think they have a number
16 of avenues to complain about that and have those complaints
17 heard.

18 Q. Are there other ways, outside of HB 233, that the
19 university or other administrators are aware of what you're
20 teaching?

21 A. Well, that's generally true. I mean, we, obviously, follow
22 a -- you know, create a schedule ahead of time so, you know, the
23 university and my department know what I'm scheduled to teach
24 and what the description of the class is. You know, I'm
25 required to create a syllabus ahead of time and submit that

1 syllabus, and we even archive those syllabi of our classes.

2 So they know what I teach, what, you know, the subtopics of
3 how its organized are, what readings I assign, what textbook
4 values. You know, my textbook orders have to be submitted to
5 the bookstore ahead of time. So, you know, if someone wants to
6 know whether I'm using a leftist textbook or a rightest textbook
7 or a mainstream textbook, that information is out there and
8 accessible.

9 And we also just have like -- it's sort of like a general,
10 you know, annual review process where we submit our syllabi. We
11 talk about our pedagogy of the class, and it's submitted and
12 evaluated by our department chair. There's also a -- I mean,
13 there's a peer evaluation committee past that so my peers can,
14 you know, evaluate my teaching.

15 And, you know, there's other mechanisms -- you know, if an
16 administrator, for example, or a department chair is interested
17 in observing my classroom or what I say in the classroom and how
18 I conduct it, there's a process for them to, you know, do a peer
19 evaluation or observation. I don't think that any of them have,
20 but they could. And, you know, in some ways, I would welcome
21 it.

22 Q. Let's switch gears a little bit and talk about the survey
23 provisions.

24 A. Okay.

25 Q. Are you familiar with the survey provisions?

1 A. I am, yes.

2 Q. What do you understand those provisions to require?

3 A. My understanding, it's the requirement that the university
4 attempt to measure, I guess, the ideological climate on an
5 annual basis, to evaluate or measure the faculty ideology and
6 the students' perception of the faculty of political ideology.

7 Q. Did you take the survey last year?

8 A. No, I did not.

9 Q. Why not?

10 A. Well, it was presented to us as voluntary, and I didn't
11 really like the idea of it, so I guess I didn't want to do it.
12 They said I didn't have to do it, so I didn't do it.

13 Q. Why didn't you like the idea of it?

14 A. Well, I mean, just as a social scientist, there are things
15 in that that I just feel like it's an obvious selection bias and
16 an obvious mismeasurement. So I sort of feel, you know, as a
17 survey instrument, it's kind of garbage. More than that, I just
18 felt like asking me about my -- asking the faculty about, like,
19 their political affiliations and personal ideology, it didn't
20 seem very directly relevant to our ability to teach, our
21 capacity to teach, or our classroom instruction.

22 I mean, I'm not saying that we can't be measured or that
23 we're not accountable, but I didn't really see how that was
24 something that could be measured.

25 And, you know, in other times in the country or, I guess,

1 in the political climate of this state, I mean, it felt like it
2 was, like, kind of an innocuous sort of survey. And if they
3 wanted to get to know faculty a little bit better, so be it.

4 But in our current environment and in, you know, presenting
5 this along with the antishielding law and the recording law and
6 the Stop WOKE law and all these other -- end of tenure and all
7 these other things, it's not -- everyone knows it's not, like,
8 just some innocuous question where, you know, the government or
9 the university is just trying to get to know their faculty
10 better. It seems to me it's clearly a weaponized question to
11 determine whether, you know, faculty are in political agreement
12 with the State and to, I guess, evaluate our political
13 correctness from the government's viewpoint.

14 And for that reason, I really don't -- I don't -- that's --
15 I don't like it, and because I didn't have to take it, I didn't
16 take it for those reasons.

17 Q. You mentioned that the climate -- the political climate was
18 one of the reasons that you didn't take the survey; correct?

19 A. Correct.

20 Q. In your experience as a Florida faculty member, do you feel
21 like there's currently a culture of trust between the Florida
22 University faculty and the state government?

23 A. No, not at all. I mean, it just seems like every day
24 there's a new story out or a new measure being taken, you know,
25 where this state government is trying to attack its university

1 faculty and, you know, eliminate what they say and their tenure
2 and more review. It's unfortunate, but I feel often that
3 Florida University faculty have got ensnared into a political
4 culture war, and it's being used to, more or less, score points
5 with the national media pushing these culture war issues, which
6 just -- and they seem so untrue. I mean, I just feel like it's
7 unfair, and, yeah, I do feel like we are being unfairly targeted
8 and distrusted by the government.

9 Q. You mentioned that you were also teaching a class at the
10 University of Georgia currently; is that right?

11 A. That's correct.

12 Q. Is that a public university?

13 A. Yes, it is.

14 Q. Have you noticed the same kind of culture of distrust in
15 that environment?

16 A. No. My impression is that the environment is more -- it
17 seems more collegial and cooperative and supportive between,
18 like, the administration and the government and the university.
19 And it seems that -- you know, my impression is that
20 administration and that government celebrate -- seem to
21 celebrate the success of the faculty and the university more so
22 than is done at UCF -- or, yeah, more than is done at UCF.

23 Q. Have the survey provisions caused you to change your
24 in-class teaching or sources in any way?

25 A. Well, perhaps in subtle ways. You know, I'm cautious about

1 being perceived incorrectly by students or misperceived by
2 students, I suppose, just even discussing my political
3 affiliation or my personal ideology to the extent it could be
4 used against me by students.

5 And I do feel kind of sensitive to it now about how we're
6 perceived by students, especially -- I mean, there's that
7 question, I think, that was put on the survey about how -- you
8 know, for students, how they perceive their faculty members.
9 And that's giving me pause, I guess, for how I would be
10 perceived by my students for my affiliations and political
11 ideologies. So it's made me cautious about that.

12 Just as a general matter, I mean, my department -- you
13 know, my department discusses, you know, the different metrics
14 that are used to evaluate teaching, to evaluate departments.
15 And so when there are, you know, measures that come out, we're
16 certainly sensitive to it, because a public university does rely
17 on the support of the state government and feel like they're
18 signaling what they want to hear, and they want views they want
19 represented.

20 And I am, I guess, cautious. I think my colleagues are
21 cautious, too, you know, that you don't want to give the wrong
22 signals to the state government about our political beliefs and
23 political ideology for fear of what the consequences could be
24 for our teaching, for our department, for our budgeting for our
25 university.

1 Q. Do you think your students could answer questions about
2 your ideological affiliation accurately?

3 A. I think some of them could, you know, given some good
4 definitions of the terms. But I think for the most part, no.
5 It would be difficult for them to assess my political ideology.
6 I mean, I know that, you know, when someone's asked their
7 perception of another's political ideology, it's often very
8 inaccurate, and people tend to exaggerate the differences of
9 people that are unlike them and, you know, think that they are
10 different than they really are.

11 And, you know, it's just such kind of a relative question.
12 I think that, you know, I may be perceived as conservative by
13 some students and moderate by others and liberal by still
14 others. Even though I'm just who I am, they could perceive it
15 very differently, depending on who they are.

16 So in the aggregate, there may be some information in that
17 from students, but I think it's really a very noisy signal, and
18 I would not read too much into it.

19 And I'd like to kind of add to that, too, like, given the
20 environment and the way, you know, these other -- the
21 antishielding provision and the recording provision and the
22 survey provision have affected me, I am kind of consciously less
23 political in class or consciously less -- maybe deterred and a
24 little scared from presenting a viewpoint. And to the extent I
25 do that and I don't present, like, political viewpoints or

1 critical ideas, I think that would make it more difficult for
2 them to assess my actual political ideology if I just kind of
3 refrain from those topics altogether.

4 Q. So I guess on that point of trying to express less of a
5 political affiliation, have you ever changed a source or a video
6 that you were assigning to your class because you were worried
7 about appearing biased?

8 A. I can recall at least one instance of doing that, yes.

9 Q. Could you explain that?

10 A. Sure. Well, it was -- as I recall, it was a video I had
11 used to explain a background based on, like, debtor-creditor
12 relations in the country, and I had a video background about
13 Shays' Rebellion. And the video I had been using was -- you
14 know, had a critical viewpoint in perspective because it was
15 *Mother Jones* and, you know, it could be characterized as on the
16 area of the debtor's side against -- maybe against the creditors
17 in the country.

18 And it expired, and I wanted to replace it with something
19 that would still give students some background on, like,
20 debtor-creditor relations in American political history, you
21 know, searching for a video to replace it, something that would
22 be, you know, somewhat comparable and choose something
23 objective. I was kind of scanning who they came from and if
24 they could be read as political. And I just said, You know, if
25 I put another, like, *Mother Jones*-type video, they're just going

1 to think -- you know, students are just going to think, Oh,
2 that's another liberal source, and some of them are going to
3 kind of have a knee-jerk reaction and shut their minds off at
4 that point. I said, I don't want to do that, so I just
5 consciously searched for one. I think I used, like, ABC News or
6 NBC News-type clip that didn't have much criterial bite, but
7 gave, you know, some pertinent facts on the history and used
8 that instead of a more political viewpoint-oriented material.

9 Q. Have you been concerned that your teaching would get you or
10 your school in trouble with the legislature or the Governor?

11 A. Well, sure, yeah.

12 I mean, when I'm teaching, I want to do a good job, and I
13 want to reflect well on myself and my department and my
14 university and do fear that, you know, my viewpoints, you know,
15 could be out of step with what the government's viewpoints are.
16 My political affiliation, you know, is out of step with what the
17 political affiliation of this government -- the government is,
18 and I don't want to be targeted for that.

19 And you just have that general fear, too, you know, where
20 some incident in class is clipped out and, you know, 10 seconds
21 of a Zoom recording or a classroom recording, you know,
22 become -- all the people know about you. And that can be taken
23 out of context. You can't control that. And that could reflect
24 really badly, unfortunately, and unfairly, but it could reflect
25 very badly on myself, my department, my university quickly.

1 And so that is -- that is a fear I have.

2 Q. If the challenged provisions of HB 233 were enjoined, what
3 impact would that have on your teaching?

4 A. Well, I would feel like maybe a sense of relief and an
5 ability to, I think, teach more authentically the way that I
6 think that I should teach and the way that is most effective.
7 I'd feel a little bit more comfortable having difficult
8 classroom conversations knowing that, you know, if we broach a
9 difficult subject and, you know, the discussion gets kind of
10 hot, I can rein it back or steer it and, you know, drift back to
11 the social sciences and to, you know, the course material and
12 less on just offensive personal viewpoints or sort of unwelcomed
13 personal opinions.

14 Yeah. It felt good, you know. And -- I mean -- you know,
15 I just feel like sometimes it's an ongoing thing because you
16 don't know what comes next or what would happen in the future or
17 later in an appeals process or future legislation. So there is
18 always going to be some fear about how, you know, my teaching
19 could be perceived.

20 But it would be, yeah, definitely a sense of relief.

21 Q. Thank you, very much, Dr. Edwards.

22 MS. JASRASARIA: Pass the witness.

23 THE WITNESS: Thank you.

24 THE COURT: Counsel, do you need a minute, or are you
25 ready?

1 MR. MOORE: I'm ready.

2 THE COURT: Mr. Moore, I'm going to -- as I've done
3 with other lawyers in the past, I'm going to defer to you. It's
4 11:30. If you get to the point you think you're going to be
5 able to wrap it up, I'm happy to go to 12:15 or something. But
6 that's sort of the -- I don't want to go much more beyond 12:15.
7 So if you're going to need more time, that's fine, but if you'll
8 try to figure out a stopping point around that time if you are
9 still going; okay?

10 MR. MOORE: Yes, Your Honor.

11 CROSS-EXAMINATION

12 BY MR. MOORE:

13 Q. Hello, Doctor.

14 A. Good morning. Nice seeing you.

15 Q. It's good to see you again.

16 Are the Governor and the legislature -- are they defendants
17 in this matter?

18 A. No, I believe they're not.

19 Q. Okay. And as far as adopting policies concerning House
20 Bill 233, you'd agree that UCF can adopt policies, correct, to
21 implement House Bill 233?

22 A. Yes, I believe we have.

23 Q. Okay. And a student can file a university complaint
24 arising out of the provisions of House Bill 233, correct, with
25 the university?

1 A. Well, I believe that's true with the university. I don't
2 know if there are -- I mean, there are other avenues of
3 complaint they can file, but, yes, I think they can file that
4 with the university.

5 Q. And then UCF could resolve that complaint; correct?

6 A. Well, I think there are multiple avenues of complaints. So
7 I think a university -- similar to a grade complaint, I mean,
8 that would be, I think, resolved just within the university, but
9 other complaints, like litigation, would not be resolved by the
10 university.

11 Q. Correct. So setting aside litigation like with the court
12 system, those -- the other complaints would be resolved with
13 ECF; correct?

14 A. I believe so, although I just hesitate to say yes,
15 absolutely, because I think, keeping it in the grade complaint
16 context, there may be -- there are levels of appeal in a grade
17 complaint, and there may be some level of appeal in a grade
18 complaint that goes beyond the university level, but I'm not
19 sure about it.

20 Q. Okay. And on the Guns Freedom and Citizenship, that's the
21 course that I believe you testified to on direct examination
22 about how you might change the FAQ, or whatever you post on your
23 website, in the future; correct?

24 A. What was the question?

25 Q. Yes. On direct examination you were asked questions about

1 a disclaimer or a statement that you put on your website or on
2 the syllabus concerning the Guns Freedom and Citizenship course:
3 Should I Take This Class?

4 A. That's correct. I was asked questions about that.

5 Q. Are you scheduled to teach that class in the summer of
6 2023?

7 A. No, I don't think I am.

8 Q. The fall of 2023?

9 A. I don't think so, but right now we are kind of fine-tuning
10 my fall 2023 schedule, just based on my schedule and personal
11 circumstances. So it's not fully set, but I don't think it's
12 currently scheduled.

13 Q. Sure. And during direct examination, you referenced a
14 letter that you'd sent to UCF concerning a draft regulation that
15 they were considering. Do you recall that testimony?

16 A. Yes, sir.

17 Q. And I believe you testified that you had not received a
18 response; is that correct?

19 A. That's correct. I did not receive a response from, like,
20 the UCF regulations administrator.

21 Q. You would agree, though, that the University has suspended
22 the implementation of that rule; correct?

23 A. I'm not exactly sure. I mean, there was a mass email that
24 was sent out by Provost Johnson to the university that said, In
25 light of the judge's order halting the Stop WOKE Act, we are

1 halting our policy or temporarily suspending our policy.

2 I was kind of confused by that. I know what he said, but
3 whether his statement by email is the way that UCF would
4 actually effect a suspension of policy -- I mean, because I
5 imagine we have a real process to suspend policy, and it's not
6 the provost writing an email.

7 And, also, it wasn't clear -- I mean, I kind of read it
8 that -- I'm not sure -- I think he may be referring to the Stop
9 WOKE part of the policy, and it wasn't really clear whether he
10 was addressing other parts of the policy that the judge's order
11 on the Stop WOKE case did not address.

12 So I'm not sure if he was talking about the whole thing or
13 just part of the thing or even if he was the person to do that.

14 Q. At UCF is there a website that you go to to look at draft
15 regulations or draft policies that the university is
16 considering?

17 A. They have -- yeah, they have a website where they, you
18 know, like, post pdfs of draft policies and sometimes notices go
19 out universitywide of policies that they proposed or drafts that
20 we can comment on if we'd like to.

21 Q. And have you gone to check that website after this Court's
22 order to see if there is any indication about the university's
23 plans concerning the implementation of the policy that you had
24 questions about?

25 A. I don't recall doing that. I recall -- I don't know. I

1 recall at some point checking to see the status of the policy
2 and seeing that the policy was enacted, but I don't -- I don't
3 recall if I checked it subsequent to the provost's email that
4 the policy was suspended or some parts of the policy were
5 suspended.

6 Q. Okay. If UCF suspended going forward with that policy,
7 might that response -- might that be a reason why you did not
8 receive a response to your letter?

9 A. No, I don't think it was, because my response -- I mean, my
10 letter was sent out when the draft proposal, you know, was open
11 to comments and being considered. And I really expected to
12 receive some kind of reply or at least acknowledgment of my
13 letter by the time that the policy was enacted.

14 After the policy was enacted, I'm not sure -- yeah, after
15 the policy was enacted, I didn't really see a purpose to
16 responding to my letter to clarify the policy.

17 Q. Let's talk about the recording provision.

18 Some of your face-to-face classes, they are held in larger
19 classrooms, would you agree with that?

20 A. Correct, classrooms that can hold, like, upwards of 70 to
21 100 students.

22 Q. And your classes usually fill up all the way, don't they?

23 A. Generally they do.

24 Q. And so you'd agree that the things you say in front of 70
25 to 100 people when you're lecturing can be heard by those people

1 in the classroom; correct?

2 A. Yeah, by the people in the classroom. I hope so.

3 Q. And the students that are in that classroom, they can share
4 their impressions of what you say in the class with other people
5 outside the class; correct?

6 A. You mean things like did they like the class or don't like
7 the class or I was funny or not, that kind of -- yeah, they can
8 share that -- say those impressions with other students.

9 Q. And they can take notes of what you said or what they
10 perceived you to say, and they can share those notes with
11 others; correct?

12 A. Well, they can certainly take notes, and I encourage them
13 to take notes. I mean, there's some instances where the
14 notes -- I would not want them to share with others. So maybe
15 the note sharing, maybe.

16 I mean, there's some instances, you know, where I want them
17 to share notes. Like if a student missed a class and is absent,
18 it would be great if classmates would share notes with them.

19 THE COURT: Doctor, Doctor, I don't think --

20 THE WITNESS: I'm sorry.

21 THE COURT: -- I don't think Mr. Moore is asking you
22 about do you always want students, for purposes of doing their
23 own work, sharing notes. He's just asking, You can take notes
24 in your class and post on Facebook: Dr. Edwards is a left-wing
25 fanatic that wants to take all of our guns away, and today in

1 class he said he hates all guns.

2 He's talking, I don't think, about that type of
3 sharing. I think we all understand you want students to do
4 their own work and don't want one person to show up and take all
5 the notes and everybody else use their notes.

6 Did I get that right, Mr. Moore?

7 MR. MOORE: Yes, Your Honor. Thank you.

8 THE COURT: With that question rephrased, with that
9 limitation, I think he's just asking whether they videotape you
10 or not -- I mean, audiotape you, they can post things on the
11 Internet about you and what you say and comment on it; correct?

12 That's a question.

13 THE WITNESS: That is -- that is correct. And
14 students do post comments like that.

15 BY MR. MOORE:

16 Q. You shared with us during direct that there have been
17 occasions when you have permitted students before House Bill 233
18 to record your lectures; correct?

19 A. That's correct.

20 Q. And in those instances when you have allowed students
21 before House Bill 233 to record your lectures, you'd agree that
22 you cannot tell us that you've noticed any decrease in class
23 participation when those students recorded the class; correct?

24 A. Yeah, I think that's true. I mean, the one I'm thinking of
25 where I -- the student asked me if they could record my Scope

1 and Methods of Political Science lecture, I said, That's fine.
2 And they just kind of had some, you know, electronic recording
3 device, you know, set up at the podium -- or near the front of
4 the room. Yeah, I was fine with that and comfortable with that.
5 It was kind of a one-off situation, but I didn't notice any drop
6 in classroom discussion because of it.

7 Q. And in those times before House Bill 233 when you allowed
8 recording, you can't recall whether or not you informed the
9 other students in the class that the class was being recorded;
10 isn't that right?

11 A. Your question is did I inform other students that the
12 class --

13 Q. Correct.

14 A. -- was being recorded by a student?

15 Q. Correct.

16 A. I can't -- well, I can't recall very specifically. I may
17 have or I may not have let other students know. But I recall in
18 that instance, I mean, the student had a recording device, like
19 little tape recorder-type thing, digital but like a tape
20 recorder, and put it out, like, on the first row of tables. So,
21 it was -- I mean, I don't know if other students knew what it
22 was, but it wasn't hidden, so they could see it.

23 Q. In terms of --

24 A. If I may add, I do recall also, too, like, asking the
25 student about the scope of what he was recording to kind of make

1 sure it was my classroom lecture, what I was saying, and that he
2 wasn't recording, like, just a freeform discussion or lab
3 session day as opposed to a lecture day. So I do recall being a
4 bit cautious about, like, him not recording other students and
5 just recording me.

6 Q. And you agree that you've not resigned from any
7 associations that you were in because of House Bill 233; is that
8 correct?

9 A. Yes, I agree I have not resigned from any associations
10 because of the bill.

11 Q. On the topic of *Mother Jones*, did I understand correctly
12 that once the link to *Mother Jones* went down and the time came
13 that you had to find a new clip, that you didn't use *Mother*
14 *Jones* because you didn't want students to have a knee-jerk
15 reaction to the source and stop considering it. Is that
16 correct?

17 A. That was one of my considerations, correct.

18 Q. I think -- but you would acknowledge that the students
19 might have that reaction to seeing something from that source,
20 regardless of whether House Bill 233 was on the books; correct?

21 A. I think that's accurate; they could have that reaction
22 regardless of the bill. I think the bill encourages them to
23 have that reaction, but they could have it independently.

24 Q. You testified, I think in part, that you did not want to
25 participate in the survey because you didn't want to -- you

1 didn't think it was appropriate for the government to be
2 inquiring about your political affiliations. Is that a fair
3 characterization?

4 A. That's generally a fair characterization, I think.

5 Q. But you agree that you've already disclosed your
6 political -- at least your party affiliations to the State in
7 registering to vote; correct?

8 A. Well, yeah. Well, I'm a registered Democrat. I think
9 that's in the state a matter of public record.

10 Q. And now, as opposed to sometime 5, 10, 15 years ago, you'd
11 agree there is a, quote, certain correlation between political
12 ideologies and party affiliation; correct?

13 A. Yes, that's correct.

14 Q. Let's talk about in the context of your constitutional law
15 class.

16 When your students see a fellow classmate incorrectly
17 analyzing a problem, you like to let them know that it's okay to
18 disagree with a classmate on that topic; correct?

19 A. Yes, correct. And I recall doing that in the past, yes.

20 Q. And you think it's actually helpful for students to
21 disagree with each other because it helps the students to
22 analyze the -- analyze the coursework more appropriately; is
23 that a fair statement?

24 A. I think that's -- it is generally true, but, you know, that
25 exchange of ideas and that disagreement, that adversarial

1 process, if you will, there are limits to it and ways that you
2 need to, I think, channel it for it to be effective.

3 So I wouldn't say that exchange of ideas or that
4 disagreement is always helpful. And generally I think it is
5 helpful, but it's a tool, and, you know, all tools need to be
6 used appropriately.

7 Q. Sure. It can be helpful in some instances. It's just part
8 and parcel of the learning process; correct?

9 A. Yes, it can be. Yeah, I agree with that. It can be very
10 helpful in some instances, and it is part of the learning
11 process.

12 Q. And as for associations, am I also correct that you have
13 not refrained from joining any associations because of House
14 Bill 233?

15 A. Yes. I can't recall any instances where I'd refrained from
16 joining an association because of the bill.

17 If I could add to that?

18 Q. Yes, Doctor.

19 A. I'm not -- I'm -- depending -- I don't know what exactly
20 you mean by, like, an association. I was thinking like a formal
21 organization, like, you know, a league of partisan voters or
22 whatnot.

23 But, yeah -- but I do recall one instance where I refrained
24 from joining a task force created by the College of Sciences
25 kind of because of the bill and the climate created by the bill

1 and similar bills. I talk about that, but I don't know if that
2 is the kind of association you're talking about. It was like a
3 university task force on diversity and inclusion.

4 Q. I think --

5 A. I'm sorry. College --

6 (Indiscernible crosstalk.)

7 A. -- task force on diversity and inclusion.

8 Q. Okay. And you'd agree that you didn't join that task force
9 because you didn't think the task force would be effective, that
10 it didn't have the courage it needed to do what it wanted to do
11 with it; correct?

12 A. Yeah. That's correct. Unless it's -- it's something I
13 talked with you about at the deposition, but, yeah, that was the
14 instance where that task force was kind of neutered and so why
15 join it.

16 MR. MOORE: Mr. Varnell, would you please pull up
17 Joint Exhibit 1.

18 BY MR. MOORE:

19 Q. And, Doctor, this is an exhibit that you and counsel were
20 discussing earlier.

21 Do you recognize it?

22 A. Yes, sir. It looks like a PDF copy of the bill.

23 MR. MOORE: And, Mr. Varnell, if we could please go to
24 page 3.

25 And if we could zoom in on paragraph (3) (a).

1 BY MR. MOORE:

2 Q. Doctor, you agree that House Bill 233 added lectures as
3 expressive activities protected under the First Amendment;
4 correct?

5 A. Can you restate that question -- or just say that question
6 again?

7 Q. Yes, sir.

8 You agree that House Bill 233 added lectures as expressive
9 activities protected under the First Amendment; correct?

10 A. Well -- no. I mean, I think lectures were protected under
11 the First Amendment prior to the enactment of the bill. I don't
12 think the bill made them covered under the First Amendment.

13 MR. MOORE: No further questions.

14 MS. JASRASARIA: Nothing from me.

15 THE COURT: All right. Thank you, Doctor. And thank
16 you for your patience with us today. We hope you have a
17 pleasant afternoon. You're free to go, sir.

18 THE WITNESS: Thank you.

19 (Dr. Barry Edwards exited the courtroom.)

20 THE COURT: Let me just clarify one thing, because
21 with most of the exhibits y'all have talked about there's a --
22 there's layers to things. At one point I was talking about the
23 letter at issue with this witness, and I said something around
24 the -- about the timing and when it was generated.

25 I want to make plain that just because something's

1 generated during the course of the litigation doesn't,
2 obviously, automatically exclude it. It was to the extent
3 somebody's going to try to bring it in as a business record,
4 then the issue becomes was it truly part of the regular business
5 activities or was it prepared in anticipation or as part of
6 litigation.

7 So, like most things, it's more complicated than that,
8 but that cryptic reference to the timing of when it was prepared
9 was to the extent somebody was going to chat about it being a
10 business record.

11 I received Plaintiffs' second motion for the admission
12 of trial exhibits, ECF Document 252.

13 Is this the motion with the revised list of this is
14 still what hasn't been admitted yet, or this is a new set of
15 documents?

16 MR. WERMUTH: This is a new set of documents.

17 THE COURT: Okay.

18 MR. WERMUTH: Well, they overlap.

19 THE COURT: Well, I was going to say, 12 grew to 40,
20 but -- which is fine, but I'm just trying to figure out -- let
21 me just be direct.

22 I'd like to do this once. I'd like to do it in an
23 orderly way, and I'd like to give everybody a full and fair
24 opportunity to be heard is the goal. And so this is actually
25 helpful if this is, These are the exhibits we hadn't already

1 addressed and other issues we think are coming up so, Judge,
2 we're trying to gather everything together in one place.

3 I see someone shaking their head, so that's where
4 we're at? Is that correct, Mr. Wermuth?

5 MS. FROST: Yes, Your Honor. That's correct. This is
6 to streamline, These are things that either have been addressed
7 by testimony, you know, in the testimony we've heard so far or
8 coming up.

9 THE COURT: Fair enough.

10 So what I want y'all to do is get with the other side,
11 find out when y'all want to respond.

12 Is there any reason why I really need to rule on this
13 before Tuesday?

14 MS. FROST: The only thing, Your Honor, is if you were
15 to exclude some of the stuff, we'd like to know before we rest
16 in the event -- because I think some of the stuff can come in --
17 should be able to come in just on the documents, as opposed to
18 having more witnesses come in to talk about certain issues.

19 THE COURT: I'm not going to jam you up. If I rule on
20 something, and you need to call another witness, and we're
21 already messed up with our timeline next week, I'll let you
22 recall somebody. I can fix that.

23 Mr. Levesque, if y'all will figure out, Judge, this is
24 the time when we'll need -- we'd like to have -- to me it's just
25 helpful to have it crystallized in writing. It doesn't have to

1 be a tome. I'm not suggesting that you order Mr. Moore to leave
2 the courtroom now and come back with an 80-page memo by
3 midnight -- although that'd be nice -- but figure out a time.

4 And what I'm really looking for is not a definitive
5 full exploration -- exploration of all the issues. What I'm
6 more contemplating is, Judge, these are our general positions --
7 sort of categories, big picture -- so I can read the motion,
8 read the response, and then we can in a more thoughtful, quicker
9 way have an argument on it.

10 So I'm not going to rule on it. What I'm going to
11 do -- and I was letting y'all know that's why, because I didn't
12 want y'all to think, Well, Judge, if you're just going to rule
13 on what we file, then we might want to be able to add more. So
14 what I'm really looking for is framing the issue so we can get
15 through it quicker; okay?

16 MR. LEVESQUE: Yes, sir.

17 THE COURT: With that said, you can tell me when we
18 come back from lunch, Judge, here's when we'd like to file the
19 response.

20 MR. LEVESQUE: Thank you, Your Honor.

21 MS. FROST: Your Honor, I'll just add we tried in this
22 motion to categorize things in that kind of buckets.

23 THE COURT: And you did, and I was trying to listen
24 and do everything at once, and I saw it, but I just didn't want
25 to stop and read it, otherwise, I might be asking some more

1 pointed questions now.

2 And the longer I do this, I decided me trying to read
3 and edit orders while I'm listening to testimony is probably a
4 bad idea so -- but thank you.

5 We're going to come back at 1 o'clock.

6 And as I understand it, the next witness is a former
7 representative; is that correct?

8 MR. WERMUTH: That's correct, Carlos Guillermo-Smith.

9 THE COURT: And that'll be you, Mr. Wermuth, and your
10 friend on the other side of the isle, Mr. Levesque?

11 MR. WERMUTH: Yes.

12 THE COURT: I'm sorry we don't have Mr. Jazil here.

13 MR. WERMUTH: I'm playing the part.

14 THE COURT: If it was a drinking game with "my
15 friend," we would all be intoxicated after the first witness if
16 he was here doing that.

17 But, in any event, thank you. I'll see y'all back at
18 1 o'clock.

19 (Recess taken at 11:53 AM.)

20 (Resumed at 1:06 PM.)

21 THE COURT: We are on the record.

22 We're trying to set a deadline for a response to ECF
23 Document 252. And I go back and forth, back and forth from the
24 courthouse to my home on the weekends. But can you tell me by X
25 time on Sunday? That way I know that if I've left and gone home

1 to come back.

2 MR. LEVESQUE: Is there a time that works better that
3 day than others?

4 THE COURT: I have no life, Mr. Levesque. Just pick a
5 time, and I'll -- that way I know to come look for it after that
6 time.

7 MR. LEVESQUE: 5 o'clock, sir?

8 THE COURT: That's fine. That way if I go home and
9 it's still not here by 3 o'clock, I know that I can come back in
10 a couple of hours.

11 So very good. The deadline is 5 p.m. on Sunday.

12 MR. LEVESQUE: And if we can get it filed earlier, we
13 will do that, sir.

14 THE COURT: No worries. And I monitor the docket,
15 obviously, so --

16 All right. So my understanding is the plaintiff has
17 their next witness?

18 MR. WERMUTH: Yes. Plaintiffs call former
19 Representative Carlos Guillermo-Smith.

20 (Mr. Smith entered the witness stand.)

21 THE COURTROOM DEPUTY: Please raise your right hand.

22 **CARLOS GUILLERMO-SMITH, PLAINTIFFS WITNESS, DULY SWORN**

23 THE COURTROOM DEPUTY: Please state your name for the
24 record and then spell your last name.

25 THE WITNESS: Carlos Guillermo-Smith. Last name

Direct Examination - Representative Smith

1 S-m-i-t-h.

2 THE COURT: Thank you.

3 Take your seat, sir.

4 THE WITNESS: Thank you.

5 DIRECT EXAMINATION

6 BY MR. WERMUTH:

7 Q. Good afternoon, Representative Smith.

8 What elected office did you recently hold?

9 A. I served in the Florida House of Representatives beginning
10 in 2016, and I served three consecutive two-year terms.

11 Q. What district did you represent?

12 A. I represented House District No. 49, which is in East
13 Orange County, the east Orlando area of Florida.

14 Q. And how many legislative sessions have you worked in
15 Florida legislative affairs?

16 A. Consecutively, I've worked 11 legislative sessions back to
17 back where I had multiple roles and wore different hats,
18 certainly six consecutive sessions as a member of the Florida
19 House.

20 Before that, for two consecutive sessions, I was the
21 registered lobbyist for Equality Florida, a nonprofit civil
22 rights organization, and worked in Tallahassee in the
23 legislative process.

24 And then for sessions before that, I was the legislative
25 assistant for two former members of the Florida House.

1 So I served 11 consecutive sessions up here in the state
2 capital.

3 Q. Please give us a brief description of the area and people
4 you represented in House District 49.

5 A. So the East Orlando area that I represented for six years
6 in the State House, after it was redistricted in 2012, it was
7 generally referred to as the UCF seat in the Florida House
8 because the University of Central Florida was pretty much at the
9 central of the district; UCF, of course, being the largest state
10 university by student population in Florida. And it's also one
11 of the largest universities -- public universities by student
12 population in the nation as well.

13 Q. And what other public institutions of higher learning are
14 located in District 49?

15 A. So we had five institutions of higher learning that were --
16 and they were both public institutions and private institutions:
17 Of course, the main campus of UCF, as I mentioned; also the east
18 campus of Valencia College. We also had Polytechnic of
19 Puerto Rico, as well as Barry College of Law, and also a Full
20 Sail University, which, of course, is a private institution.

21 Q. Can you give us a rough estimate of the number of your
22 constituents who were involved in campus life in your district?

23 A. I think it would be accurate to say that pretty much every
24 constituent within House District 49 was in some way impacted by
25 the University of Central Florida because it has a very large

1 footprint, not just in the number of students that attend the
2 university, which is more than 60,000, but also because of the,
3 you know, number of faculty, number of staff, number of
4 contractors who work with the university. There's a very large
5 economic footprint in all of Central Florida. And I would be
6 hard-pressed to find any constituent, whether -- I would be
7 hard-pressed to find any constituent that wasn't in some way
8 impacted by UCF, either directly or indirectly.

9 Q. What legislative assignments did you have that dealt with
10 institutions of higher learning in the Florida Legislature?

11 A. So, in my first two terms, I was assigned to all of the
12 committees in the Florida House that had oversight over our
13 higher-education institutions. There's only two. There was the
14 Higher Education and Career Readiness Subcommittee, which is the
15 policy committee, and also the Higher Education Appropriations
16 Subcommittee.

17 I served on both of those subcommittees for my first two
18 terms, and in my second term I served as the ranking Democratic
19 member, also known as really just the top Democrat, on the
20 Higher Education and Career Readiness Subcommittee.

21 Q. Okay. As a legislator, how much time did you spend on
22 issues concerning Florida universities and colleges?

23 A. Well, I spent a substantial amount of time for a number of
24 reasons. First, just because of my committee assignments, I was
25 assigned to four committees overall, half of those being

1 higher-education committees. So I spent a lot of time hearing
2 bills and debating and amending bills that were directly related
3 to higher education.

4 And then, also, because of my committee assignments and
5 because of the fact that I represented UCF and other
6 higher-education institutions in the district that I served, I
7 received a number of requests from university administrators,
8 faculty, staff, students related to, of course, issues in the
9 higher-education category, not only because of the committees I
10 served on, but because of the district that I represented which
11 was so focused on higher education.

12 Q. And as a legislator, throughout all those communications
13 you had with individuals on college campuses, what concerns did
14 you most often hear from members of the university and college
15 community?

16 A. Funding was always a top concern. And when I say funding
17 was a top concern, you've got to think about just the role that
18 state government, the legislature, and the Governor play in
19 funding these institutions. I mean, certainly they receive
20 revenue from student tuition. But every legislative session we
21 see the legislature typically appropriates upwards of \$4 billion
22 to our state universities and colleges. So there's a tremendous
23 amount of funding that comes from state government, that comes
24 from the legislature and is ultimately approved by the Governor.

25 So when I would interact with stakeholders who had concerns

1 related to higher education, concerns related to funding, really
2 the funding concerns didn't come from just one place. For
3 example, it wasn't just university administrators that I was
4 hearing requests for funding from.

5 Certainly I did hear from university administrators who
6 would often be pitching more performance funding, pitching more
7 funding for, obviously, important projects that are priorities
8 for the institution. But I would also hear from faculty and
9 staff who perhaps were really interested and really concerned
10 about making sure that they got funding for research that they
11 were engaged in, funding for projects that affected their role
12 as professors and as faculty in the university.

13 And I also heard funding concerns from students themselves
14 who would often lobby me either as individuals or I would get
15 lobbied from, for example, members of student government in our
16 colleges and universities who said that they wanted funding from
17 the legislature for mental health services and social services
18 on their campus.

19 So funding was always a top concern from those university
20 stakeholders, regardless of whether it was a student, faculty,
21 staff, or administrator.

22 THE COURT: Mr. Wermuth, if you could give me just one
23 moment.

24 What would help me, Representative, is just to put
25 things in perspective because I don't know -- and if it's in the

1 record, I apologize to Mr. Wermuth and Mr. Levesque, and you can
2 point me back to where it is.

3 I know the answer is it depends on the school, because
4 some research universities get a lot more money through
5 trademarks and research grants, and so forth, so it can vary.
6 But to put things in perspective for me, if the State of Florida
7 is allocating 4 billion a year for universities and colleges, do
8 you have any idea what the total amount spent collectively, so
9 what percentage -- and, again, I understand for some schools it
10 may be more or less depending on other sources of revenues and
11 grants and alumni, et cetera.

12 But do you any idea -- and this may be an unfair
13 question. But do you have any idea -- if it's 4 billion from
14 the State, what's the total budget, for example, for all
15 universities and colleges collectively?

16 THE WITNESS: I think I understand the clarification,
17 Your Honor.

18 As far as -- I don't know that I can give you a
19 percentage, like, for example, what percentage on average of
20 funding for public universities --

21 THE COURT: I just meant global. I was qualifying it
22 by saying it couldn't be a complete extrapolation.

23 If the total amount spent by colleges and universities
24 is 10 billion and it's 44 billion -- I understand that it can
25 vary from university to university.

1 THE WITNESS: Sure.

2 THE COURT: That was my qualifier. But do you have
3 any idea what the total cost is?

4 THE WITNESS: I think to put it in context,
5 Your Honor, I would say that, if it's helpful, usually the
6 amount of funding that comes from the legislature and from state
7 government for these institutions is often two times as much as
8 they receive in student tuition revenue, if that makes any
9 sense.

10 THE COURT: And so, for some schools that's primarily
11 going to be it; tuition and State. And then for some of the
12 schools, they have a lot of other sources of income.

13 THE WITNESS: And if I may, Your Honor, just to help
14 further contextualize it, when the State of Florida has
15 generally -- both sides of the aisle have been very supportive
16 of freezing tuition, for example, we understand the policy and
17 budgetary implications of that. When we the freeze tuition, it
18 means that more funding has to come from the State to make up
19 for that, if that's relevant in the context of this
20 conversation.

21 THE COURT: I guess another question I would ask for
22 you.

23 So, again, it can vary somewhat from university to
24 university, but a huge chunk of the revenue is coming from state
25 allocated funds?

1 THE WITNESS: Absolutely, absolutely.

2 And the way the state funds our higher-education
3 institutions, whether it's a state college or a state
4 university, it can come in the form of special projects; for
5 example, line items in the budget that would, let's say, for
6 example, fund construction of a new building, or it can come in
7 the form of what we call performance funding, which is a formula
8 that the legislature and the Board of Governors comes up with
9 based on academic standards that rewards universities for
10 academic performance and provides funding based off of that.

11 So even in a year where more than \$4 billion overall
12 was allocated to our state universities and state colleges,
13 which was last year, you see that approximately just under, I
14 believe, 600 million of that was just from performance funding
15 alone. But performance funding is not for our Florida College
16 System. Performance funding is something that's specific to the
17 state university system.

18 It's -- to boil it down, it's complicated, Your Honor.

19 THE COURT: I understand. That gives me a general
20 overview.

21 Thank you.

22 BY MR. WERMUTH:

23 Q. In your experience, what level of influence does the
24 legislature have over the organization of Florida universities
25 and colleges?

1 A. The influence that the legislature has over the
2 organization of these institutions is pretty direct. Right now
3 we have 12 public universities, for example. And in the last
4 decade the legislature created a public university based on a
5 budget bill that was passed that allocated funding for that
6 public university and basically created it as a brand-new
7 institution. That was Florida Polytechnic University, which I
8 believe was created in 2012, if I am not mistaken. But it was a
9 university that was -- a public university that was created by
10 the Florida Legislature and, of course, confirmed when the
11 Governor signed that bill into law.

12 The legislature and Governor can also do the same in
13 reverse. They can create an institution, but they can also
14 abolish an institution or fold it within another institution.

15 As a member of the Florida House, I saw legislation, for
16 example, that proposed folding New College, which is a liberal
17 arts university and a public university in Sarasota -- folding
18 New College into FSU and also folding Florida Polytechnic
19 University into the University of Florida.

20 The way that the proposal was written, for all intents and
21 purposes, would have, essentially, abolished New College and
22 Florida Polytechnic as it relates to their core mission, their
23 core curriculum, their administration. Those institutions, if
24 that proposal would have passed, would have lost their
25 identities as institutions, their culture entirely. And New

1 College would have really just been the south campus of FSU.

2 Q. In your experience, what level of influence does the
3 legislature have over the management of Florida universities and
4 colleges?

5 MR. LEVESQUE: Objection, Your Honor. I would posit
6 this calls for speculation.

7 THE COURT: I guess it depends on how granular a level
8 he's asking. I think he's asking generally what's the
9 connection.

10 I'm going to allow it within that spirit,
11 understanding the restraints of the witness's ability to how far
12 they get down in the weeds.

13 But you can answer. And if you could, what would be
14 helpful to me is to tell me what you're telling me and what
15 you're not telling me, which you kind of did with your prior
16 response to my questions. And it's on that basis that I'm
17 allowing it.

18 THE WITNESS: Thank you, Your Honor.

19 So when I think about just the overall management of
20 our state universities and state colleges, the legislature
21 passes policies on a broad spectrum of issues that directly
22 impact the way that these universities and colleges operate and
23 are managed. So they can pass laws, for example, to require
24 tenure review of tenured faculty or to revise what the state
25 accreditation standards are in Florida. They can pass

1 legislation to -- to move the search for university presidents
2 or university provosts out of the Sunshine Law and actually out
3 of the -- out of public records. They can pass laws that
4 regulate tuition, as I mentioned before, and scholarships. They
5 can also pass legislation that regulates what is being taught in
6 the classroom and what is -- what is happening in those
7 university classrooms and what is not being discussed -- what is
8 and is not being discussed.

9 These are all examples of bills that have passed
10 recently in the last few years that affect the management of the
11 institutions, for better or worse. You know, certainly tenure
12 review is opening up the potential for tenured teachers to be
13 accountable for, perhaps, controversial research. Legislation
14 that impacts what is allowed to be taught in classrooms
15 obviously has an impact on curriculum and what types of material
16 is allowed to be discussed in college classrooms.

17 So there's really a broad spectrum of issues that can
18 be introduced in the Florida Legislature that can impact the
19 management of these institutions.

20 BY MR. WERMUTH:

21 Q. And I think you mentioned before this notion of performance
22 funding. Is that one of the maybe indirect ways of leading the
23 management of schools?

24 A. Correct. So when the legislature --

25 THE COURT: Let me ask you a question.

1 As I understood that, if you're the entity that sets
2 the benchmarks and you control the benchmarks and you have
3 hundreds of millions of dollars going to reward schools, who
4 gets the money not only depends on what they do, it depends on
5 the folks up front defining what the benchmarks are. So if the
6 benchmarks are the most -- the school that has the most students
7 that graduate and then go to Liberty to graduate school, then
8 that's going to be a different benchmark that would result in a
9 very different allocation of funds; correct?

10 THE WITNESS: Correct, Your Honor. That's why we, you
11 know, have always looked really closely, for example, at
12 performance funding and what the intended and unintended
13 consequences of the performance funding is.

14 You know, for example, a very well-intentioned metric
15 that has often been included in performance funding is the
16 percentage of students that graduate within four years. That's
17 a very well-intended metric, but the implementation also has
18 unintended consequences, like, for example, many low-income
19 students and many students who are ethnic minorities often have
20 longer graduation rates compared to White students.

21 And so we --

22 THE COURT: Correct me if I'm wrong, another
23 unintended consequence would be is that we tout -- we beat the
24 drum of leading STEM -- focusing on, you know, engineering and
25 science and so forth. And last time I checked -- but maybe it's

1 a different experience -- the hardest degrees to get a degree in
2 four years are the very degrees we're saying we need everybody
3 in: Aero science, you know, mechanical engineering. Those are
4 the degrees that generally take longer at flagship universities
5 to get.

6 So the very degrees we're saying is critical to the
7 success of our states are the degrees that take longer than
8 four years oftentimes to get.

9 So that would be an example of an unintended
10 consequence directly contrary to another stated interest, which
11 is to move as many students as we could into STEM?

12 THE WITNESS: Yeah, I would agree with that
13 assessment, Your Honor.

14 THE COURT: All right.

15 Go ahead.

16 BY MR. WERMUTH:

17 Q. Shifting gears a little, in your experience, what level of
18 influence does the Governor have over the funding of Florida
19 universities and colleges?

20 A. Well, the Governor has what I would call a lot of soft
21 power and a lot of hard power over these institutions.

22 Of course, we all know how a bill becomes a law. It's got
23 to pass both chambers and then the bill is sent to the Governor
24 and the Governor has the ability to sign into law or veto
25 legislative proposals that affect the management of the

1 institutions.

2 But what our Governor also has the power to do is the
3 Governor has the power to sort of line-item veto in the budget.
4 So basically what we see is the hard power that the Governor
5 wields over these institutions to be able, with the stroke of a
6 pen, eliminate tens of millions, sometimes hundreds of millions
7 of dollars in funding from an institution which the Governor has
8 the power to do. That's, as it relates to funding, a good
9 primary example.

10 As it relates to the direct oversight of these
11 institutions, when you look at the state universities, the
12 Governor has the hard power to appoint up to six members of a
13 Board of Trustees at a public university. There are a total of
14 13 members maximum that serve on the Board of Trustees.

15 Again, the Board of Trustees is pretty much the oversight
16 of each public university. And so just to use a recent example,
17 when the Governor in the last couple of weeks appointed six new
18 members of the Board of Trustees at New College, which is a
19 public university, he was able to essentially transform that
20 institution through that appointment process. And those
21 appointees then immediately declared that their goal was going
22 to be to create a new mission statement at the institution, that
23 they were going to create a new administration, that they were
24 going to create a new core curriculum.

25 And basically, for all intents and purposes, what that

1 means is that the Governor's new appointees are now going to
2 completely transform that institution, which the Governor said
3 had been captured by a political ideology.

4 MR. LEVESQUE: And, Your Honor, we would object. I
5 didn't want to interrupt the Representative, but we would object
6 to the answer as it relates to his conjecture about what the
7 university board is going to do in terms of transformation of
8 the university.

9 THE COURT: I'll also say -- let me say, the
10 motivations of folks, I'm not relying on that testimony. The
11 witness has done what I was allowing, subject to that
12 clarification, Mr. Levesque.

13 He hasn't up to this point suggested, Here are the
14 internal machinations, and describing them in detail. What he's
15 doing is explaining how structurally in a very real way the
16 Governor has both an indirect and direct say in how the
17 universities are managed, how the legislature interacts in
18 various ways that are more complicated and certainly based on
19 his own personal knowledge and both his involvement in the
20 legislature as a representative and before that and his
21 involvement, coupled with his service on the committees and so
22 forth. It's not only helpful to the Court, but it's certainly
23 within the ken of this witness to describe things generally.

24 To the extent, when he gives an example, he offers his
25 view about somebody's motivation, then that's not something that

1 I'm going to rely on.

2 And, Mr. Levesque, your point is well-taken.

3 Although I'll also note that the witness wasn't --
4 that was not the feature of his testimony. He was just using it
5 as an example and why it could matter, and it was in that spirit
6 that I accepted the testimony.

7 MR. LEVESQUE: Thank you, Your Honor.

8 BY MR. LEVESQUE:

9 Q. And in your experience, what level of influence does the
10 Governor have over higher-education policy at universities and
11 colleges?

12 A. Well, the Governor holds substantial influence over policy
13 because of not only his executive power and executive authority,
14 but also because of how aligned the legislature is with the
15 Governor's administration and with the Governor's point of view.

16 I'll give another example, the example of HB 7 of the
17 Governor having a press conference and saying -- without
18 actually presenting a proposal and presenting any language or
19 presenting a bill, said that he wanted to see a new law in
20 Florida that he called Stop WOKE that would suppress discussions
21 about race, for example, in college classrooms.

22 Just a few weeks later, then, the legislature, after being
23 prompted by the Governor, produced a legislative proposal with
24 full details and full text that matched that.

25 So, again, I would answer your question about the

1 Governor's influence over policy to say that it's substantial
2 just in seeing how legislators typically respond to those policy
3 interests.

4 Q. In your years as a legislator, what changes --

5 THE COURT: And I'll just note, in terms of that, that
6 carries over into cause and effect. This Court in its -- I
7 think it may be Footnote 2 or 3 of the *Pernell* order traces both
8 the language proposed by the Governor as well as ultimately the
9 legislation. And it's part of a footnote explaining how the
10 name went from Stop WOKE to Individual Freedom Act, and it's in
11 that spirit.

12 So the legislative history and what this witness is
13 talking about, separate and apart from anybody opining as to
14 anything, this -- those various laws and so forth are properly
15 before this Court.

16 But, go ahead.

17 MR. WERMUTH: Thank you, Your Honor.

18 BY MR. WERMUTH:

19 Q. In your years as a legislator, what changes have you seen
20 in the relative influence of the Governor and the legislature in
21 higher-education policy?

22 A. Well, we've seen a lot of changes and we've seen a higher
23 level of involvement in higher-education policy by the Governor
24 and by the legislature compared to what we've seen before.

25 We've now seen that higher education is a top priority, for

1 better or for worse. I would argue higher education is
2 certainly an important priority for Floridians. But we've seen
3 a very, very intense focus on the management of these
4 institutions, whether it be our state colleges or our state
5 universities, compared to what we saw previously.

6 Q. From your experience, how much deference do administrators
7 at public universities and colleges in Florida typically give
8 legislative leaders?

9 MR. LEVESQUE: Objection, Your Honor. It would be one
10 thing if he's talking about the legislature, but now he's --

11 THE COURT: Sure, I understand. And I'd say you need
12 to lay some foundation in terms of what he's basing his opinion
13 on. I mean, he was a student at UCF. To the extent he was --
14 anyway, so I sustain --

15 BY MR. WERMUTH:

16 Q. How -- how much interaction have you had with
17 administrators at public colleges and universities in the state
18 of Florida in relation to their management of these
19 organizations?

20 A. So as a lawmaker, I was regularly in communication with
21 administrators, with faculty, and with students. I don't think
22 it would be a surprise to anyone that I'm regularly engaged with
23 students. I'm a younger lawmaker. UCF, for example, which is
24 in the district that I represent, is my alma mater as well, so
25 I'm constantly interacting with students from that institution

1 and from others and also faculty.

2 But as it relates to the university administrators, as a
3 lawmaker I took a very hands-on approach. You know, I was
4 always active and involved not only in the law-making process,
5 but in the community that I represent, which means that I was
6 always on campus. I was always being invited to go speak to
7 university presidents and university leadership. I was always
8 on calls with folks where if I saw -- if I saw something that
9 was a problem or a perceived problem happening in one of our
10 higher-education institutions, I would be able to call key
11 administrators and key members of the leadership teams at these
12 institutions to be able to get answers. Of course, these were
13 private conversations, and they weren't necessarily official
14 meetings.

15 But I was certainly interacting with them a lot.

16 THE COURT: Representative, thank you.

17 So I'm going to overrule the objection to the extent
18 this witness is allowed to talk about generally the
19 30,000-foot-up view. From my perspective, as a legislator
20 assigned to education committees and working on topics of
21 education when we're passing legislation or doing things, he can
22 talk about he had a lot of interaction with or they were
23 responsive -- it's not a granular level of this particular
24 policy -- and was opposed and so forth, but, rather, I'll allow
25 the generalized testimony regarding the fact that he's

1 contacted -- not what they said, but the degree to which there's
2 a lot of interaction.

3 It seems to me that's within his personal knowledge to
4 talk about the frequency and quantity and the number of times as
5 opposed to what people are saying.

6 MR. LEVESQUE: Understand your ruling, Your Honor.
7 Thank you.

8 THE COURT: Thank you.

9 BY MR. WERMUTH:

10 Q. Without getting into details of discussions with
11 administrators, what I'm interested in is seeing how -- the
12 relationship between actions, political positions taken by the
13 legislature and universities, and how they responded to
14 initiatives of the legislature, you know, proposals and things
15 of that nature at the administration level of universities.

16 MR. LEVESQUE: Your Honor, that sounds a lot like the
17 granular aspect of the question that I think would be
18 objectionable.

19 THE COURT: Well, it depends on how the question -- I
20 had already limited it, and I think the Representative
21 understood what I was saying.

22 He's not being asked, Can you give me an example of
23 the particular policy that they changed? I thought the question
24 was, Laws were passed and you've suddenly got a large volume --
25 because the question was, Without getting into details of the

1 discussion, what I'm interested in is kind of seeing the
2 relationship between actions and political positions and
3 universities and how they responded. And he can certainly
4 answer that question generally.

5 The legislature is passing something. Suddenly I'm
6 flooded with calls before the passage, after the passage.
7 That's what I was permitting.

8 MR. LEVESQUE: Okay.

9 THE COURT: Does that make sense?

10 MR. WERMUTH: Yes.

11 THE COURT: Just -- let's start there. Just tell us
12 that, you know -- and you can give an example, not what people
13 were saying or what they were doing, but as soon as they're
14 proposing changing X, suddenly I'm flooded with phone calls.
15 And I'm getting it not just from my alma mater, but I'm getting
16 it from others because people know I'm a point man on education
17 and people are responsive. And then after it's passed, the type
18 of -- that we're also having folks trying to interact with us
19 and address things. Sort of the 30,000-foot-up view.

20 And then Mr. Wermuth can ask follow-up questions. If
21 there is objections, Mr. Levesque can raise them; okay?

22 THE WITNESS: Thank you, Your Honor.

23 And I think that the question was also just in the
24 context of what deference do university leaders often give to
25 the legislature. In this context just --

1 THE COURT: Well, are you asking does the University
2 of Florida follow Florida law if it's passed?

3 MR. WERMUTH: No, just how they respond to legislative
4 proposals and things of that nature. I mean, obviously these
5 organizations have lobbying arms. They have --

6 THE COURT: That's fine. They have input and stuff.
7 That's what I'm allowing, the input and stuff. I assumed you
8 weren't asking him, Are they generally violating Florida law
9 once it's passed if they don't agree with it?

10 But go ahead.

11 THE WITNESS: Yeah. I think I understood that
12 question to mean, you know, how do -- how do these
13 universities -- what is the nature of their relationship with
14 the legislature, the nature of their relationship with the
15 Governor? How much deference do they give? I mean, of course
16 they give a lot of deference because of all the power that the
17 executive branch and the legislative branch have over the
18 institutions.

19 So, you know, they -- they come to Tallahassee when
20 they come here to give presentations, and they come to ask for
21 funding. They come hat in hand because of the position that
22 these -- that these universities have in the whole political
23 ecosystem.

24 And as far as how do they respond to legislation, you
25 know, I mean, obviously universities need to be compliant with

1 state laws that are passed. But, also, what we're beginning to
2 see a lot of is overreaction to lots of laws that are being
3 passed out of fear for what the consequences can be not if a law
4 is violated, but if an idea behind the law is perceived to be
5 violated by someone in the administration or a powerful
6 lawmaker.

7 BY MR. WERMUTH:

8 Q. Do you have any examples of this?

9 A. So after HB 7 passed, for example, I was really alarmed to
10 see that the University of Central Florida's English department
11 had removed and taken down from the website their anti-racist
12 statement that was crafted after the murder of George Floyd.
13 And on the website of the English department, there was a
14 disclaimer that said, We're removing this statement --

15 THE COURT: Hold on a second. Is there an objection?

16 MR. LEVESQUE: Yeah, objection, Your Honor. This
17 would be hearsay to the extent that he's talking about what
18 the -- what the disclaimer said. To the extent that he's
19 recounting the specific circumstances, I think we would at least
20 be entitled to have the foundation for how he knows this
21 information.

22 THE COURT: He's not offering it for the truth of the
23 matter asserted. He's offering it for, Legislation passed, and
24 then I saw they took it down from my own personal knowledge. I
25 looked on the website, and they no longer had it.

1 A witness -- he's not talking about the contents of
2 the statement or whether the statements on the website were true
3 or correct or House bill -- he's talking about the sequence of
4 events. That doesn't mean I have to accept his view that he
5 believes the two are causally related. But he certainly, as a
6 fact witness, can testify that after HB 7 was passed his alma
7 mater removed a statement about diversity from its website that
8 he personally saw.

9 Whether or not -- what weight, if any, I should give
10 and whether there is a causal connection or not is a different
11 thing. But I'm going to allow him to testify to those facts;
12 after it was passed, he looked on the website and something was
13 taken down.

14 BY MR. WERMUTH:

15 Q. And that's exactly the spirit in which I asked the
16 question, not for the truth of the matter asserted, but what
17 happened.

18 A. What happened was the statement was taken down. A
19 disclaimer was added that, We're taking this down because we
20 don't believe that this anti-racist statement is in compliance
21 with HB 7.

22 The university leadership then was, you know, asked, you
23 know, what is the university's rationale for this. And while
24 they said that they didn't direct the English department to take
25 down that statement, they subsequently took down a number of

1 statements from other departments saying that they needed to
2 review them to make sure they were -- to make sure that they
3 didn't violate any -- any commitment that they had made to
4 having a welcoming and opening -- welcoming and open campus for
5 all individuals, which, you know, I saw that and saw what was
6 publicly reported.

7 And as I said, I have relationships with these
8 administrators, and I call them as well and say, you know, Why
9 is this happening? And I just --

10 THE COURT: Well, that's the part that we're -- I
11 sustained the objection as to what other people were saying.

12 What I'm allowing is that after it was passed, he
13 noticed a bunch of changes on the website and public
14 statements -- I mean, disclosures that were no longer on the
15 website for UCF, which is all fair game.

16 MR. LEVESQUE: Thank you, Your Honor.

17 MR. WERMUTH: We can move on then.

18 THE COURT: I will only note that I am a fact finder
19 in addition to being a judge, and so I am allowed to consider
20 facts, not opinions, but facts and all reasonable inferences
21 that can be drawn from those facts. As any juror would be able
22 to do, I'm allowed to do the same thing. And just as we tell
23 jurors in every set of closing -- every set of jury instructions
24 I ever read, they don't have to set aside their common sense.
25 Neither does this Court.

1 You may ask your next question.

2 BY MR. WERMUTH:

3 Q. So are you aware of a common perception of the political
4 views of faculty at Florida colleges and universities?

5 MR. LEVESQUE: Objection, Your Honor. At the very
6 least, vague. I'm not sure what he's talking about, common
7 perceptions. What I've realized is what's common may not be as
8 common as we think.

9 THE COURT: Let me just ask both lawyers a question,
10 because sometimes it just becomes so silly.

11 Your own expert yesterday ended his testimony -- or
12 didn't end his testimony -- ended the day with saying, Of
13 course, very conservative professors are in the distinct
14 minority generally.

15 Obviously, there are some universities -- and I'll use
16 another example -- I'll use Mr. Levesque's alma mater as opposed
17 to Liberty. There are some schools that probably are more
18 conservative, but as a general rule, is there any real --
19 there's a difference between indoctrination, which is definitely
20 a disputed issue -- but is there any real issue that
21 universities, students, and faculty tend to be more farther
22 leaning left, left of center? Is that really in dispute in
23 front of me?

24 MR. WERMUTH: Well, I certainly think that the
25 perception of them being liberal is -- is well established.

1 THE COURT: The issue that's being questioned is
2 whether there is indoctrination; right?

3 MR. WERMUTH: Uh-huh, you are correct about that.

4 THE COURT: Mr. Levesque?

5 MR. LEVESQUE: Well, a couple of things there,
6 Your Honor. First, Dr. Lichtman refused to concede that
7 certainly in his deposition and I think he was saying the exact
8 opposite in some of his testimony. I think the --

9 THE COURT: Well, that's the point the defense would
10 make, that that's a given and that was a reasonable perception
11 of the university; right?

12 MR. LEVESQUE: Yes, Your Honor.

13 THE COURT: I mean -- I'm sorry -- the legislature,
14 rather.

15 MR. LEVESQUE: Yeah.

16 THE COURT: So if Mr. Wermuth has just conceded to it,
17 do you not want to accept his concession?

18 MR. LEVESQUE: I'm happily accepting his concession.

19 THE COURT: The point is let's move on and worry about
20 facts that are disputed. You can talk about indoctrination.
21 That's a totally different thing. But the fact that -- I mean,
22 even the plaintiffs' own experts have acknowledged that you
23 generally have more left-of-center folks as professors. That
24 doesn't mean this law is constitutional. It doesn't mean that
25 they are indoctrinating people.

1 But if y'all aren't challenging that, then we don't
2 need to ask a bunch of extra questions about it.

3 BY MR. WERMUTH:

4 Q. How have the political leanings of college faculty come up
5 in your legislative experience?

6 A. So they've come up in the context of -- well, we can all
7 agree that there's a lot of liberal professors, but it came up
8 in the context by my Republican colleagues as a problem that
9 needed to be solved legislatively, that problem being there's
10 too many liberals on college and university campuses.

11 Q. What do you know of how Florida legislators view the
12 political leanings of faculty?

13 MR. LEVESQUE: Your Honor, I believe -- he can
14 certainly speak to his perspective, but to the extent that he's
15 testifying on behalf of the 119 other members that he served
16 with, I believe that would be hearsay. And to the extent --
17 they've got legislative privileges as to their perspective,
18 their motives, their intent.

19 THE COURT: They have legislative privilege where they
20 can't be asked, but if I -- if somebody -- the bill sponsor told
21 this Representative of HB 233, I hate every professor at UF
22 because they are a bunch of Marxists, how does the legislative
23 privilege keep him from testifying that he was told that by the
24 bill sponsor?

25 MR. LEVESQUE: Well, as I understand the legislative

1 privilege to work, their statements are their statements. He
2 can talk about his intent. At the very least, we would argue
3 that there would be a hearsay objection there.

4 MR. WERMUTH: Your Honor, I would just say, to the
5 extent the witness has seen outward manifestations of the
6 intent --

7 THE COURT: This also falls under the category of
8 we're talking about something I don't need to really resolve. I
9 think you were just asking the witness to talk about his general
10 experience and what was going on, the debates that he was
11 involved in and that he himself was pushing back against certain
12 views. And he's not saying this legislator said this or did
13 this. He's just talking in his general experience. Correct?

14 MR. WERMUTH: General experience and what they said on
15 the legislative record as well.

16 THE COURT: Well, what they said on the legislative
17 record if he was present is different.

18 What says you with that limitation?

19 MR. LEVESQUE: Well, the legislative record will speak
20 for itself. I think the issue is he's presenting
21 characterizations of what they've said, and because of the
22 legislative privilege, I can't bring any of those witnesses in.

23 MR. WERMUTH: You can, but you chose not to.

24 MR. LEVESQUE: It's not my choice, Your Honor. I
25 represent the Board of Governors and the Board of Ed. I also

1 happen to represent some of the legislators. It's their
2 prerogative. Some legislators decided to assert the legislative
3 privilege. That's not -- I'm just the person who's carrying out
4 their wishes.

5 THE COURT: Sure. Give me one second, please.

6 Actually, you know what, we're going to take a
7 five-minute break, and I'll be right back.

8 Thank you.

9 (Recess taken at 1:53 PM.)

10 (Resumed at 1:58 PM.)

11 THE COURT: All right. I'm going to talk, and I'll
12 try to speak slowly.

13 I was just looking for the cite. *Legislative*
14 *privilege is certainly an important privilege that has deep*
15 *roots in federal common law. The privilege is best understood*
16 *in conjunction with a parallel concept of legislative immunity.*
17 *Legislative immunity provides broad immunity to legislators from*
18 *arrests or civil process for what they do or say in legislative*
19 *proceedings.*

20 *And legislative privilege furthers the policy goals*
21 *behind legislative immunity by preventing parties from using*
22 *third-party discovery as an end run around legislative immunity;*
23 *that is, harassing legislators through burdensome discovery*
24 *requests. Put another way, legislative immunity shields*
25 *legislators from direct liability for actions taken during*

1 legislative proceedings. Legislative privilege shields
2 legislators from indirect liability through the cost of
3 litigation.

4 The Courts have explained that legislative privilege
5 recognizes that litigation costs do not fall on the named
6 parties alone.

7 When we start talking about the scope of legislative
8 immunity or executive immunity, the maintenance of
9 confidentiality is not the fundamental concern of the
10 legislative privilege. Instead, the privilege serves to prevent
11 parties from harassing legislators, or the Governor, meaning the
12 executive privilege, or can also extend to the Governor, for
13 actions those legislators take in their legislative capacity.

14 Meeting with persons outside the legislature is
15 routine and a legitimate part of the modern-day legislative
16 process. In short, consistent with what I've said before,
17 because confidentiality is not the legislative privilege's
18 animated concern, the privilege would not prevent plaintiffs
19 from asking third parties with which legislators communicated
20 about their communications.

21 I understand that's talking about third parties. I
22 don't know in what capacity he's speaking to people and when
23 he's speaking to people. But the point is simply because
24 there's legislative immunity doesn't mean nothing said outside
25 the floor of the legislature to anybody about anything related

1 to the legislation is somehow covered by legislative immunity.
2 That is -- casts the net way, way too far.

3 And so with that in mind and that giving you those
4 contours, that's my view of legislative immunity. And moving
5 forward through these proceedings, that's how I'm going to apply
6 legislative immunity in terms of questions about who said what
7 to whom.

8 MR. WERMUTH: Thank you, Your Honor.

9 BY MR. WERMUTH:

10 Q. And maybe just to lay a little foundation to understand
11 kind of where I'm coming from with my questions, you were in the
12 legislature for six years; correct?

13 A. Yes.

14 Q. And you interacted regularly with other legislators;
15 correct?

16 A. Of course.

17 Q. And during the course of those interactions, you had
18 opportunities to make thousands of observations, probably;
19 right?

20 A. Yes.

21 Q. And you talked to other legislators on a regular basis?

22 A. Yes.

23 Q. You saw their facial gestures, their conduct on the floor,
24 their temperaments?

25 A. Yes, sir.

1 Q. Okay.

2 And with that, you know, background of sensory experience
3 that you have, what do you know of other Florida legislators'
4 view of the political leanings of faculty?

5 A. Well, they think that there's a lot of liberal professors
6 and a lot of liberal members of faculty in our state
7 universities and state colleges. It's not only a view that was
8 articulated privately and just from my sensory perspective, as
9 you put it, in my observation, but these were also viewpoints
10 that were expressed on the record in legislative committee,
11 again, as something that was a problem to be solved.

12 Q. Are you familiar with House Bill 233?

13 A. Yes.

14 Q. And have administrators, faculty, or students at Florida
15 universities ever raised concerns to you about a lack of
16 intellectual freedom or viewpoint diversity on Florida campuses?

17 A. No.

18 Q. Who, if anyone, have you heard ever express concerns about
19 the lack of intellectual freedom and viewpoint diversity on
20 college campuses?

21 A. Well, the only individuals who I heard from who expressed
22 this as a problem was -- were my Republican colleagues in the
23 legislature.

24 Q. And what concern about viewpoint diversity have you heard
25 Florida legislators express?

1 A. Well, I've heard from members of the legislature that they
2 believe that students in our colleges and universities were
3 being indoctrinated and that the indoctrination was a problem.

4 Q. I'd like to show you Joint Exhibit 1.

5 THE COURT: It will be on that screen, sir.

6 You can certainly look at the hard exhibits too,
7 whichever you're more comfortable with.

8 BY MR. WERMUTH:

9 Q. Do you recognize this document?

10 A. Yes. It's House Bill 233.

11 Q. Okay. And what do you know about the -- I guess if we turn
12 to page 2 of this document -- and I'm -- you understand that
13 there's a survey provision that applies to the Board of
14 Education and one that applies to the Board of Governors; right?

15 A. Correct.

16 Q. And so we'll look at the one at the bottom of the page here
17 because it's all on the same page.

18 What do you know about what the survey provisions require?

19 A. Well, the survey provision basically requires that each one
20 of our public universities creates a statistically valid survey
21 that considers the extent where competing ideas and perspectives
22 are presented. And members of the university community,
23 including students, faculty, and staff, feel free to express
24 their beliefs and viewpoints on campus and in the classroom.

25 So basically the Board of Governors was being told by the

1 legislature that they needed to conduct this survey at all of
2 our public universities under their purview and that it should
3 match the parameters that I just read out loud.

4 Q. When did you first become aware of the legislative effort
5 to require a survey like this?

6 A. It was not in this bill, House Bill 233. It actually was
7 in a previous legislation. I was in a House subcommittee in
8 2018, when the idea of the Intellectual Freedom and Viewpoint
9 Diversity survey was first introduced as an amendment to
10 legislation in the committee by then-State Representative
11 Ray Rodrigues, who is now the chancellor of the Board of
12 Governors.

13 Q. Okay. And, you know, from that period in 2018 through
14 2021, what is your understanding of the reasoning behind the
15 Intellectual Freedom and Viewpoint Diversity survey as it was
16 proposed?

17 A. Well, the reasoning behind it from those who were
18 supporting it was that we had a problem on college and
19 university campuses. That problem was that conservative
20 students, Republican students didn't feel comfortable or safe
21 expressing their viewpoint or their political perspectives and
22 that we needed the survey to prove it with data.

23 Q. And do you see the definition of intellectual freedom and
24 viewpoint diversity on the first page -- on that page right
25 there? Sorry. Not the first page. Well, I guess, we can look

1 at that one, yes.

2 So this is: *"Intellectual freedom and viewpoint diversity"*
3 *means the exposure of students, faculty, and staff to, and the*
4 *encouragement of their exploration of, a variety of ideological*
5 *and political perspectives.*

6 A. Yes, I see it.

7 Q. When, if ever, have you heard of this concept outside the
8 legislative context?

9 A. Well, I've never heard of it in any context outside of the
10 legislature as it was presented to me.

11 MR. WERMUTH: Okay. If we turn to the second page of
12 Joint Exhibit 2.

13 BY MR. WERMUTH:

14 Q. Obviously, you read this provision about the -- the survey
15 just a few minutes ago.

16 What is your understanding of this phrase "the extent to
17 which competing ideas and perspectives are presented on college
18 campuses?"

19 What competing ideas and perspectives do you understand
20 this to be?

21 A. Well, in the context of this proposal, when they say
22 "competing ideas and perspectives," they're talking about
23 conservative ideas and perspectives and Republican ideas and
24 perspectives, in the context of there are liberal and Democratic
25 ideas that are being presented and that Republican ideas are

1 not.

2 THE COURT: Representative, let me -- before
3 Mr. Wermuth goes on, let me ask you this.

4 Are you telling me that if, in fact, students with
5 conservative views -- pro-life, opposed to gun control, favoring
6 open carry, and those types of views -- were being shut down by
7 professors or shouted down in class by their fellow students, is
8 it your position that it would be not an appropriate concern of
9 the Florida Legislature or not -- that is, a legitimate concern
10 that would warrant exploration?

11 THE WITNESS: Your Honor, I don't dispute that it
12 would be a legitimate concern. Up to this point what I'm saying
13 is that examples of such incidents were not presented in the
14 legislative committees.

15 THE COURT: To what extent -- because you were in some
16 of these committee meetings; correct?

17 THE WITNESS: Yes.

18 THE COURT: To what extent was there a pushback in
19 that regard? To quote the old Wendy's commercial, Where's the
20 beef? Were people on your side of the aisle shouting, Where's
21 the beef? Obviously, not literally, but -- or I would hope
22 not -- but something in the spirit of, Where's the beef?

23 THE WITNESS: Your Honor, I don't think "Where's the
24 beef?" would have been my choice of words. But as far as
25 expressing a disappointment that examples were not being brought

1 forward that justify this conclusion that had been made by my
2 Republican colleagues that conservative ideas were being
3 suppressed on university and college campuses, that was not --
4 that was not presented to me.

5 The immediate connection is there's too many liberals
6 on campus. Therefore, the reason there's not enough
7 conservative ideas on campus is because students are being
8 shielded and their free speech is being taken away.

9 These are a lot of conclusions that are being made and
10 opined upon by legislators, but we were not presented with
11 evidence that demonstrated that.

12 THE COURT: Here's my conundrum. On one hand, I'm
13 being told the intent is to suppress liberal views on campus
14 with this full-throated effort and this -- through various bills
15 that were passed, including the three provisions at issue here.
16 And that one of the things, Judge, you should rely on is that
17 there's no real evidence to support the basis for what's being
18 done.

19 Yet, at the same time, one of the provisions that's
20 challenged before me now is the survey provision trying to
21 collect the very data that you're saying that the folks on the
22 other side of the aisle should have.

23 So is the view -- I'm struck by how the survey idea --
24 I'm not talking about the execution of the survey; I'm talking
25 about the survey idea generally -- is an effort to chill speech

1 by doing the survey, but at the same time -- and it could be a
2 legitimate concern, that speech on one side of the political
3 ideological spectrum is being suppressed, but at the same time
4 you can't gather the data.

5 So as a general rule -- and it's not a rule of law
6 articulated in case law. It's sort of -- I don't generally
7 believe in heads, you lose; tails, you lose. It just --
8 intuitively it doesn't make sense that's how the law works.

9 But I'm having a hard time grappling with this idea
10 that you both can't collect the data, but you also can't do
11 anything about a perceived concern unless you collect the data.
12 That will be a legal issue for your lawyers. But from the
13 perspective of what was going on in the legislature, I am
14 interested in your perspective on that. And separate and apart
15 from that, the lawyers can address that concern.

16 And my idea that there's a -- I'm not comparing myself
17 to Justice Holmes who had the puke test, but it's sort of the
18 Judge Walker heads, you lose; tails, you lose just strikes me as
19 running contrary to principles of law that probably would lead
20 you to wonder whether or not the argument is internally flawed.

21 But you don't need to comment on the Walker heads, you
22 lose; tails, you lose rule. But if you'll tell me, from your
23 perspective a legislator, how does that work? You can't have
24 the data, but if you don't have the data, you can't address what
25 you believe is a problem.

1 THE WITNESS: Thank you, Your Honor.

2 I think that in my recollection of how I responded to
3 the proposal as written, it was less about we cannot do an
4 assessment, we cannot do a survey under no circumstances. It
5 was more, first, what are you going to do with the results of
6 the survey? What is the legislative plan? And what is the
7 course of action that will come legislatively as a result of the
8 survey?

9 And, also, where are there guardrails on the
10 assessment and survey to ensure that the survey is not
11 weaponized or is an effective tool to chill speech on campuses?
12 For example, where are there guarantees that the assessment is
13 one that will not reveal personally identifying information
14 about the person filling it out to ensure that they are not
15 retaliated against?

16 Where are guardrails that protect those who are
17 participating in the survey from the data being used in a way
18 that is not appropriate?

19 Where -- where are the provisions that would say that
20 political actors with partisan interest are prohibited from
21 playing a role in designing the assessment and designing the
22 survey?

23 These are some examples of --

24 THE COURT: My follow-up question to that, though --
25 and I was never in the Florida Legislature and won't be.

1 THE WITNESS: You're very lucky, Your Honor.

2 THE COURT: I meant that in the sense that I would
3 not -- couldn't get elected to anything, certainly not after the
4 last ten years on the federal bench.

5 But I have seen other statutes where the Florida
6 Legislature is asking for something to be done. And here
7 they're directing an entity to create an objective, nonpartisan,
8 statistically valid survey. Is the delegation of authority with
9 guardrails, that it has to be statistically valid and
10 nonpartisan, is that really that unusual? I mean, it seems to
11 me I've seen that the Florida -- I've seen various provisions,
12 both as a lawyer and a state court judge and now as a federal
13 judge, of -- for example, in this case, Board of Governors
14 rules. You've got the Administrative Code. There's all manner
15 in which the legislature says, We want X done. And then it's
16 fleshed out by others consistent with their directive.

17 Is the -- from your time in the legislature, both as
18 an elected representative for six years, I think you said before
19 that 11 years as a lobbyist -- I may have that off.

20 MR. WERMUTH: It's 11 years total.

21 THE COURT: I'm sorry?

22 MR. WERMUTH: It's 11 years total, 6 years --

23 THE COURT: Eleven total. I'm sorry.

24 Is it really that unusual for the legislature to give
25 a mandate that says, We want X, and delegating somebody else to

1 fine tune it within the bounds of it's statistically valid and
2 nonpartisan? And if it is, that's -- if you can give me some --
3 if that's unusual, then I'm interested in your response to that,
4 because I don't pretend to be an expert on Florida legislation
5 and delegating responsibility to others.

6 THE WITNESS: Your Honor, I don't know.

7 THE COURT: Although it does sound like the deep
8 state, meaning the deep federal state, the deep state of
9 Florida, but -- if you're delegating others to do things, but
10 apparently it's fine at the state level, just not at the federal
11 level.

12 But go ahead.

13 THE WITNESS: I don't know if I would go as far as to
14 say it's unusual to delegate things to other agencies, other
15 departments, and entities, in this case, the Board of Governors.
16 But it's problematic to do so without guardrails that are
17 necessary to ensure that it's done in a way that does not have
18 unintended consequences and that is not used to retaliate
19 against stakeholders that are participating.

20 THE COURT: This is a really unfair question for you,
21 but I'm going to ask you. And if you can't answer -- I suspect
22 you couldn't, but I am going to ask counsel -- but I am
23 interested in some examples. And it's not a question of -- it's
24 not on the exhibit list because Florida law is properly before
25 me.

1 But can you think of an example where there's been
2 such a designation where the legislature has gotten into the
3 weeds and set out the mechanics of how the mission is supposed
4 to be published? In other words, the mission is a statistically
5 valid, objective, nonpartisan survey. Can you think of an
6 example in your time in the legislature where the legislature
7 has embedded very detailed instructions on how to accomplish a
8 task? And I understand it can be something wildly different
9 than a survey or survey of educational institutions.

10 THE WITNESS: Your Honor, I can't think of a survey,
11 but I can think of, perhaps, a parallel example where
12 well-meaning objectives, like nonpartisan, also come with
13 subsequent specific direction and guardrails to ensure
14 nonpartisan -- to assure the nonpartisan stated goal.

15 When we look at congressional redistricting and we
16 look at the Fair Districts Amendment that basically prohibits
17 partisan gerrymandering to prefer and give favor to one party
18 over another, subsequent provisions and guardrails underneath
19 that say --

20 THE COURT: How to accomplish that?

21 THE WITNESS: -- to accomplish that. There's a
22 prohibition that partisan and political operatives cannot be
23 involved in the drafting of congressional maps, for example,
24 so --

25 THE COURT: What happened with that? I'm sorry. You

1 don't have to answer that.

2 But I understand. That's an example of --

3 THE WITNESS: So I think about it in this context.

4 When I read this language and they say, Well, we want it to be
5 nonpartisan, I thought as a lawmaker, Well, okay, where are the
6 guardrails to ensure it's nonpartisan? Because basically we may
7 receive a survey that claims to be nonpartisan that --

8 THE COURT: Fair enough. You gave me an example.
9 Judge, we do it. That's one example. I'm not prepared to give
10 you a summary of other examples.

11 But I get it. The point is it happens. And so,
12 Judge, the idea that you would -- the legislature provides in
13 more guidance and more guardrails is not uncommon, and that's
14 the first example that comes to mind. And it's related because
15 it's dealing with related concepts; that is, making something
16 nonpartisan.

17 THE WITNESS: Uh-huh.

18 THE COURT: I understand.

19 Counsel, you may proceed.

20 MR. WERMUTH: You anticipated my question before, but
21 I'm not sure that you -- let's try it again.

22 BY MR. WERMUTH:

23 Q. So how did you respond, if at all, to the proposed
24 legislation when it was presented?

25 A. Well, I opposed it, but my first question right out of the

1 gate was, What is going to be done with the survey? How is the
2 survey going to be used?

3 Because what went through my thought process immediately
4 the first time I saw the survey provision as it was presented in
5 2018, which is very similar to ultimately how it was worded and
6 written in 2021, was, What are they going to use this survey
7 for? What are they going to do when the results come back and,
8 let's say, allegedly prove the presumption that was already made
9 that there's too many liberals on campuses or conservative
10 students can't -- they don't feel comfortable sharing their
11 ideas? What is going to happen with those results? Will
12 schools be defunded? Will new Boards of Trustees be appointed
13 to transform the school and create a hostile takeover? Like,
14 what are the litany of legislative remedies that will come as a
15 result of the survey?

16 And I asked those questions in legislative committee right
17 out of the gate the first time.

18 Q. Why did you ask those questions? What was the prompting?

19 A. I asked them because those -- I mean, that was my concern.
20 And before I gave the green light to a proposal that I perceived
21 as problematic, I wanted answers on what was going to be done
22 with the results of the survey. And I was told that there's no
23 legislative -- no legislatively prescribed plan of action at
24 this time.

25 Q. What, if anything, did your house -- the Florida House of

1 Representatives' colleagues say in support of such survey
2 provision proposals before HB 233?

3 A. Well, they were overwhelmingly supportive. And I remember
4 hearing some of my Republican colleagues, particularly
5 chairman -- then-Chairman Cord Byrd, who is now Secretary of
6 State, say in favor of the legislation and the proposal he
7 believed that students were being indoctrinated and that one of
8 his professors from when he was a college student was a
9 card-carrying communist and that these were problems that needed
10 to be solved and that this survey was the solution.

11 MR. WERMUTH: All right. Let's bring up
12 Plaintiffs' Exhibit 186.

13 BY MR. WERMUTH:

14 Q. And do you see this document? It says: *Higher Education*
15 *and Career Readiness Subcommittee, HB 839, Audio Transcription,*
16 *March 13, 2019.*

17 Did you attend this -- this meeting?

18 A. Yes.

19 MR. WERMUTH: Let's turn to page 63.

20 BY MR. WERMUTH:

21 Q. Is this the comment you were talking about on page 63?

22 Thank you.

23 So line 12, Chair Byrd, it starts: *Anyone else? All*
24 *right.*

25 Do you see where it says -- is this the -- what you were

1 talking about?

2 A. Yes. I see on line 23 it starts with: *There is a concern*
3 *that there is more indoctrination than education taking place.*

4 Q. Okay. And it goes on to say: *Just last night I spoke to a*
5 *student from Florida State University in preparation for this*
6 *committee who is a committed, devoted Christian. And she says*
7 *she does not feel she can express her ideas comfortably on*
8 *campus at Florida State University, which is unfortunate.*

9 *The Young America's Foundation just recently came out with*
10 *a survey called "Their Comedy and Tragedy Report." You can see*
11 *it online. And there were four courses identified at the*
12 *University of Florida which appeared to be much more in the*
13 *realm of indoctrination than education.*

14 *I hear repeatedly from students that I've spoken with to*
15 *say that they don't feel comfortable expressing their viewpoints*
16 *in class. When I ask them why they don't comfortable -- why*
17 *they don't confront their professor about it, they say, I just*
18 *want to get the grade. I don't want to make waves. I just want*
19 *to get through it without being harassing and harangued.*

20 *And I, myself, when I was at the university, had a*
21 *professor who was a card-carrying member of the Communist Party.*
22 *He was a political science professor and a political science*
23 *major -- and I was a political science major. I took every*
24 *class he taught, but he had the habit of calling students Nazis*
25 *in class. If you disagreed with him, he accused you of being on*

1 *drugs. He would call students at home and harass them.*

2 *Go to the next page.*

3 *So these things are not -- they're real concerns. I think*
4 *it only got worse. There's a lawsuit now against the University*
5 *of Florida for their discrimination against conservative*
6 *students. So whether or not the survey is the right way to go,*
7 *I think this is an important conversation,*
8 *Representative Rodrigues, that you've started and are*
9 *continuing.*

10 *Is this -- was this -- how did this strike you when*
11 *Mr. Bryd said that?*

12 A. *I wasn't surprised because it aligned with many of the*
13 *things that I've heard my Republican colleagues say in my*
14 *experience as a legislator generally. In this case it was*
15 *articulated on the record as debate in favor of this*
16 *legislation.*

17 Q. *And did you hear any of your Republican colleagues, you*
18 *know, dispute what he was saying or dispute anything about his*
19 *characterization of events?*

20 A. *No, but they all voted for the legislation.*

21 Q. *Okay.*

22 THE COURT: *Just out of interest, did it ever come up*
23 *during the debates regarding this legislation that FSU and the*
24 *University of Florida continue to go up on an annual basis in*
25 *rankings, that they continue to get all kinds of grants and*

1 funding as it relates to cutting-edge technology?

2 I'm just -- I'm interested. Did anyone ever discuss
3 the fact that if the universities are so abysmal and are,
4 essentially -- you know, UF is a Karl Marx institute for the
5 advancement of communist by any other name -- did anybody ever
6 square that with the statements they were also making about what
7 great advances we were making at the universities?

8 Because I believe also in this record, or maybe
9 another one, I've seen all kinds of statements about how great
10 the university system is in Florida and that we're the envy of
11 the world, and we have people from all over the world coming
12 here.

13 Did anybody ever discuss those two what would be
14 seemingly irreconcilable positions?

15 THE WITNESS: Thank you, Your Honor.

16 I don't recall whether I, myself, may have stated it
17 on the record or off the record, but I definitely remember
18 hearing discussed just this dichotomy of -- and these committees
19 rightfully celebrating, as we did, when *U.S. News & World*
20 *Report*, which is basically the organization that likes to issue
21 these comprehensive lists of what are the best public
22 universities in the country, here's the rankings; what are the
23 best university systems in the country, here are the rankings --
24 we would celebrate Florida being at the top of the list, even,
25 in many years and many cases, Florida being ranked by *U.S. News*

1 & *World Report* the number one state university system in the
2 country based on a number of different metrics.

3 And it was very difficult to square that reality and
4 those facts with this other alternate reality that was being
5 pushed on us by Republican lawmakers who said, Oh, my God, our
6 students are being indoctrinated. There's too many liberals.
7 We have all these card-carrying communists. This is a problem
8 that we need to solve.

9 It was -- there was a lot of cognitive dissonance,
10 Your Honor.

11 THE COURT: You can ask your next question.

12 BY MR. WERMUTH:

13 Q. I'd like to show you what's been marked as
14 Plaintiffs' Exhibit 188. Actually, it's in evidence, I believe.

15 This is the transcript of the audio recording of the House
16 Higher Education Appropriations Subcommittee meeting on
17 March 26, 2019.

18 Do you know if you attended that event?

19 A. Yes, I did.

20 Q. If we could turn to page 37, middle of the page, do you see
21 where it says: *Chairman: Fine.* And he recognizes
22 Representative Overdorf?

23 Do you see that?

24 A. Yes, I see it.

25 Q. Okay. And let's turn to the next page, 14. Do you see

1 where it says: *As far as also the survey -- now, in this*
2 *instance we are talking about the Intellectual Freedom and*
3 *Viewpoint Diversity survey; correct?*

4 A. Yes, that's the context of this transcript.

5 Q. Okay. And Representative Overdorf goes on to say -- and
6 says: *Chair Rodrigues, I think it's something that is needed.*
7 *My daughter having gone through college and gone through some*
8 *systems where she didn't feel it was appropriate for her to*
9 *express her actual beliefs is an area that she didn't feel safe*
10 *in expressing that. And she was at a major university. So I*
11 *think it's something that I am proud that you have included, and*
12 *I will be supporting that bill today.*

13 Now, in this example, I guess he's not referencing, at
14 least explicitly, a Florida university.

15 Did you hear explicit concerns from legislators about
16 specific Florida students -- university students in Florida
17 expressing conservative concerns of indoctrination?

18 A. Well, we heard it previously in the transcript that was
19 read from Chairman Byrd anecdotally. Here I was similarly not
20 sure whether the experience that Representative Overdorf was
21 recounting from his daughter was an experience in a Florida
22 state college or a Florida state university.

23 Does that answer your question?

24 Q. Yeah.

25 Did you hear about any specific complaints, you know, like

1 lawsuits, complaints being given to universities, some
2 compilation of report produced by any organization showing that
3 there was a big problem of intellectual freedom and viewpoint
4 diversity on Florida campuses?

5 A. We had heard in 2017, a presentation -- in the Higher
6 Education & Career Readiness Subcommittee a presentation from
7 what I believe was called the Goldwater Institute that was a
8 conservative think tank that was pushing this idea that this was
9 happening on our college campuses. And that was a presentation
10 in the committee.

11 Q. They didn't show you any analysis of Florida schools,
12 though, did they?

13 A. No, not that I recall.

14 THE COURT: Let me ask a question. This may be a
15 crazy question, but since I've heard a lot about the new
16 provisions that permit you to record so you can file a
17 complaint, as I also understand from this record before me, the
18 ability of the student to complain about somebody in a classroom
19 is not something new that happened as part of HB 233. There's
20 always been the ability to file a complaint against a professor,
21 for example. There's also been student feedback where they've
22 reviewed professors even way back when I was school and we were
23 writing on stone tablets.

24 So my question is did -- at any of the committees you
25 were on, both in prior years when they were pushing the survey

1 or in the year that HB 233 passed, in 2021, did anybody present
2 any data about or make a collection of complaints for either a
3 university or a college or collectively college universities of
4 student-filed complaints or gathered student evaluations of
5 professors and submitted and gave -- for example, in the
6 political science department, one of these reoccurring themes of
7 complaints and student evaluations is that the professors are
8 idealogues? Anything along those lines discussed, presented, or
9 asked for?

10 THE WITNESS: Not that I recall, Your Honor, as far as
11 exhibits that were presented. I don't know whether or not it
12 was asked for. I believe that it's quite possible that someone
13 could have asked for it because these are -- these are
14 reasonable requests to ask for data to back up the presumption
15 that the proposal was based on. But I do not recall any --

16 THE COURT: You don't recall seeing it or specifically
17 being asked for?

18 THE WITNESS: I don't recall seeing it.

19 THE COURT: Okay.

20 THE WITNESS: But the idea of being asked for is
21 something that sounds familiar. And I apologize that I don't
22 recall which lawmaker may have asked for this type of data. I
23 can say that I might not have asked for the data.

24 THE COURT: Counsel, you may proceed.

25 Actually, it's been an hour and a half, I believe.

Direct Examination - Representative Smith

1 How are you doing?

2 THE COURT REPORTER: I could use a break.

3 THE COURT: All right. We're going to take a break
4 for the benefit of Madame Court Reporter, and I'll see everybody
5 back in ten minutes.

6 Thank you.

7 (Recess taken at 2:39 PM.)

8 (Resumed at 3:06 PM.)

9 THE COURT: All right. We're back on the record.

10 Counsel, you may continue your examination.

11 MR. WERMUTH: All right. I'd like to bring up
12 Plaintiffs' Exhibit 188.

13 BY MR. WERMUTH:

14 Q. Going throughout these various meetings that you attended
15 regarding the survey provisions, did you attend this meeting?
16 It's a meeting of the Higher Education Appropriations
17 Subcommittee from March 26, 2019.

18 A. Yes.

19 MR. WERMUTH: All right. I'd like to go to page 44 of
20 this meeting.

21 Let's go to the top of the page.

22 Actually, can you go to the previous page? I'm sorry.

23 BY MR. WERMUTH:

24 Q. Do you recognize -- well, Randy Fine was the chairman of
25 this committee; correct?

1 A. Yes.

2 Q. Okay.

3 MR. WERMUTH: And if we go to the next page.

4 BY MR. WERMUTH:

5 Q. So he's asking if there's any more debate. Do you see
6 that?

7 And he goes on to say: *I've got a couple of comments I'd*
8 *like to add.*

9 *As somebody who graduated from college in four years and*
10 *worked full time while doing so -- that's not really what I*
11 *wanted to share, but 27 years ago as a freshman I was targeted,*
12 *because of my viewpoint for disciplinary action.*

13 *And, by the way, for my Democratic friends, it made me a*
14 *lot more conservative as a result. It didn't work. Twenty-five*
15 *years ago as a junior, I was given a grade on something because*
16 *of my political viewpoint. That person did not end up working*
17 *at the university for very long. I was sort of like this back*
18 *then.*

19 *While I understand the desire, perhaps on the part of some,*
20 *to have a group-think where everybody believes the same thing on*
21 *a university campus, there's absolutely nothing wrong with*
22 *testing to find out whether that is the case.*

23 *I look at the bill again. It says nothing about safety.*
24 *It's simply trying to find out information. And we should never*
25 *be afraid of learning the answer to a survey -- do we have*

1 intellectual freedom on our campuses? Because I can tell you
2 from firsthand experience, we don't always.

3 I'm not generalizing to any schools in Florida, but I'm
4 telling you my own personal experience. And that was a long
5 time ago. I can only imagine it's gotten worse.

6 So when Chairman Fine said this, what were you thinking at
7 this point during the committee events? Was this something that
8 was -- did anybody comment on this, for instance?

9 A. No. Chairman Fine was bringing up his own personal
10 experience that he claims that he was bullied by a liberal
11 professor and that the professor was retaliating against him
12 because of his conservative viewpoint.

13 I'm not aware that he had this experience at any Florida
14 institution of higher learning, but that was the -- that was his
15 justification.

16 THE COURT: I'm confused. Didn't he go to Harvard?

17 THE WITNESS: I believe -- I believe so. I'm pretty
18 sure.

19 THE COURT: So what's happening at Harvard is the
20 basis for what we're going to do in Florida?

21 THE WITNESS: And he's the Chairman of the Higher
22 Education Appropriations Committee and that was the anecdote
23 that he shared in his debate in favor of the proposal.

24 BY MR. WERMUTH:

25 Q. Is Randy Fine an influential legislator, in your view?

1 A. Yes, he's very influential and has a very close
2 relationship with the Governor.

3 Q. Okay.

4 And I think you said this, but I'm not sure.

5 Did anybody speak out against these views of there being a
6 problem, other than -- I mean, among his Republican colleagues,
7 did anybody express concern or consternation about what he was
8 saying?

9 A. No, but they did vote for the legislation.

10 Q. Okay.

11 Regarding the HB 233 and its survey provision, in earlier
12 years, what amendments, if any, were proposed to try to address
13 the survey provision and try to, I guess, make it different or
14 take it away?

15 A. Well, the survey provision was very controversial and
16 continued to get a lot of pushback and a lot of attention. So
17 one of my Democrat colleagues, Representative Jennifer Webb, did
18 propose an amendment on the House floor to remove all of the
19 language related to the survey and the assessment, but the
20 amendment failed.

21 Q. Okay.

22 And, obviously, this survey provision didn't pass in years
23 before 2021.

24 Do you know why it didn't pass in years before 2021?

25 A. It didn't pass because -- even in the Republican-controlled

1 legislature. It was very controversial in the Florida Senate as
2 well. So I saw the proposal version, a very similar version of
3 this proposal in 2018 and 2019 and in 2020, and I believe all
4 three years that assessment and that proposal did pass the
5 Florida House chamber, but it always got stuck in the Florida
6 Senate which, of course, is the upper chamber that is more
7 moderate.

8 And there were key Republican Senators in the Florida
9 Senate who would always push back on the assessment, and they
10 had concerns; they would strip it out. They were successful in
11 their efforts to strip it out until 2021.

12 After the 2020 election, we saw the ideological makeup of
13 the Florida Senate was transformed to be even more conservative
14 and more aligned with the Governor, and that was ultimately when
15 the survey provision ended up passing the Florida Senate and the
16 Florida House, along with a number of other alarming provisions
17 as well that came along with it in 2021.

18 Q. Now, in 2018, you were involved in reviewing as a
19 legislator legislation that concerned campus free speech in
20 Florida; correct?

21 A. Yes. The campus free speech act, I think it was called.

22 Q. And in the course of those -- the debates over the Campus
23 Free Expression Act --

24 A. Free Expression Act. I'm sorry. Yes.

25 Q. -- SB 4, does that ring a bell?

1 A. Yes.

2 Q. How did the -- how did the debate process of that bill, and
3 the trajectory it took through the legislation process in 2018,
4 compare with how HB 233 went through the process in 2021?

5 A. Well, in the context of the Campus Free Expression Act,
6 what was being proposed was a package, and the package included
7 the very problematic and controversial survey and assessment
8 provisions.

9 But there were other provisions that were addressing the
10 question of whether or not students felt comfortable being able
11 to express their freedom of speech and express, let's say, their
12 conservative ideas. So with the Campus Free Expression Act, we
13 had a proposal that helped achieve that objective because we saw
14 the elimination in that proposal of the so-called free speech
15 zones which were contained sections of public universities and
16 state colleges where university administrators would say, Oh, if
17 you want to rally, oh, if you want to demonstrate, you've got to
18 do it in this -- in this free speech zone.

19 In this proposal, these free speech zones were eliminated
20 which helped address the concerns that students were not able to
21 freely express their views and that was -- that was addressed
22 before 2021, in this act that you're referencing.

23 So when the legislature then came back in 2021 and repeated
24 the claim that students were not comfortable being able to
25 express their viewpoints freely or exercise their freedom of

1 speech, that was in the context of them just passing the Campus
2 Free Expression Act which I believe addressed that concern.

3 Q. Do you recall any terms of the Campus Free Expression Act
4 that were, I guess, watered down, lessened in the process of
5 debate in 2018?

6 A. Yes. We saw a cause of action, and that was included in
7 the proposal, that basically would have opened up our
8 universities and colleges to lots of litigation but also lots of
9 costs, that there would be hundreds of thousands of dollars in
10 damages that could be awarded to a plaintiff that would need to
11 be paid by the state university or state college if they were
12 found to have violated those provisions in that law.

13 Ultimately, that the -- the fees, the compensation, the
14 litigation cost and the damages were watered down substantially
15 to address those -- to address the concerns that were brought
16 forward until, of course, some of that was added back in in
17 2021.

18 Q. So over the course of time, from 2018 when the Campus Free
19 Expression Act was passed and HB 233 was passed in 2021, did the
20 backdrop of discussion around the need for this new legislation,
21 HB 233, change? Did you hear new justifications, new evidence
22 to support the passage of a new law?

23 A. No. It was the beating of the same drum, repeating the
24 same claim that students didn't feel comfortable expressing
25 their viewpoints and their political perspective, even though we

1 had just passed legislation in the previous year to address it.

2 Q. What impact, if any, do you expect the survey would have on
3 faculty on college campuses based on your experience?

4 A. Well, because I never got any answers on what the survey
5 was going to be used for, I was very fearful of what would
6 happen when the survey was implemented and how the survey could
7 have a chilling effect on the free speech of the professors and
8 the faculty themselves.

9 The survey, again, is a government-written survey that is
10 being put out there in the colleges and universities as a
11 mechanism for where students can, you know -- the type of person
12 that's filling out the survey is likely going to be someone who
13 potentially has an axe to grind, who wants to report something
14 that they think is not appropriate or a professor that is too
15 liberal to the State.

16 And what that can have is a chilling effect on how the
17 professor conducts themselves and what they inject into the
18 classroom out of fear of retaliation, fear that they could lose
19 their job if they say the wrong thing. Because, again, part of
20 the provisions that are in the assessment, as far as how it's
21 defined, is it uses phrases and key terms like that viewpoints
22 need to be presented.

23 So faculty would feel obligated to now present and insert
24 ideas into their teaching and into their curriculum, not because
25 they need to be presented, but out of fear that if they don't

1 present these conservative viewpoints, or Republican viewpoints,
2 that it could cost them their job.

3 Q. Returning to Joint Exhibit 1, looking at the -- page 2.

4 Do you see the definition of "shield" at the top?

5 A. Yes.

6 Q. And: *"Shield" means to limit students', faculty members',
7 or staff members' access to, or observation, of ideas and
8 opinions that they may find uncomfortable, unwelcome,
9 disagreeable or offensive.*

10 Do you see that?

11 A. Yes, uh-huh. Yes.

12 Q. What does HB 233 require regarding shielding?

13 A. Well, it's saying that this is an antishielding provision
14 where they're saying universities, colleges, faculty members,
15 staff, that they cannot shield students from ideas and opinions
16 that they find uncomfortable, unwelcome, disagreeable or
17 offensive.

18 And in the context of this presentation -- or actually in
19 the context of this law as presented, and in the context of how
20 Republican lawmakers were justifying the need to pass this
21 provision, what it really means is that universities, faculty,
22 and staff can't shield students from Republican ideas,
23 conservative ideas and opinions. That's the purpose of the
24 shielding provision.

25 MR. LEVESQUE: Objection, Your Honor. If he's

1 testifying about his interpretation --

2 THE COURT: And I want to make plain that it's for
3 that purpose, and that purpose alone, that I accept it.
4 Ultimately, we start with the language of the provision and then
5 from there go to -- if necessary, to --

6 MR. LEVESQUE: Thank you.

7 THE COURT: -- what the case law suggests we look at.

8 But I understood the witness to be talking about his
9 interpretation and not -- the Representative has been in my
10 courtroom before. He's not telling me how I have to read the
11 statute. I didn't take that as what he was doing; okay?

12 MR. WERMUTH: And I guess --

13 THE COURT: The objection is properly made,
14 Mr. Levesque, that it's being considered for that purpose and no
15 other.

16 BY MR. WERMUTH:

17 Q. And, again, where do you get the understanding for how
18 you're reading this -- this statute?

19 A. Well, I get the understanding based on my sensory
20 perspective and experience as a lawmaker on what the intent of
21 the legislation was as expressed by my Republican colleagues.
22 What they're -- what they're doing here is they are making
23 an argument that there's too many liberals on campus, students
24 are being indoctrinated, and the way to correct -- course
25 correct that is to put this antishielding provision in here that

1 says that students can't be shielded from conservative ideas and
2 conservative opinions or Republican ideas and opinions.

3 Q. And looking to page 3 in Joint Exhibit 1, do you see the
4 cause of action provision in Section 4?

5 A. Yes.

6 Q. In your legislative experience, what impacts, if any, would
7 you expect this provision to have on Florida institutions of
8 higher education?

9 A. Well, this will have a real chilling effect because state
10 universities and state colleges -- I mean, they have limited
11 budgets. And when you insert a cause of action that includes
12 one-way attorney's fees, as is presented here, what you have is
13 you have a situation where universities and colleges will be
14 fearful of litigation, much of the litigation probably -- maybe
15 being frivolous. And when the litigation is filed, when a
16 university and college prevails because they've committed no
17 wrongdoing, they have no way to recoup those costs.

18 And we're seeing more and more legislation that's passing
19 in the Florida Legislature that includes these one-way attorney
20 fees because it -- the intended outcome and consequence of those
21 one-way attorney fees is that those targeted in this case, the
22 state universities and state colleges, will have a more
23 conservative implementation of the law as presented out of fear
24 that they will be sued and they will be entangled in costly
25 litigation, even if they remain compliant with the law.

1 Q. On page 3 of Joint Exhibit 1, as we were just looking at,
2 do you see this -- do you see Section (3)(g)?

3 A. Yes.

4 Q. Okay. And do you see where, after some qualifications, it
5 says: *A student may record video or audio of class lectures for*
6 *their own personal educational use, or in connection with a*
7 *complaint to a public institution of higher education where the*
8 *recording was made, or as evidence in, or in preparation for, a*
9 *criminal or civil proceeding.*

10 Do you see that?

11 A. Yes, I see that.

12 Q. What concerns, if any, do you have regarding this provision
13 as a legislator?

14 A. Well, my concern is that this appears to be a setup, a
15 gotcha, where we have a -- we have a standard in Florida for
16 recording individuals that requires -- always requires both
17 parties' consent to record a conversation or record an
18 individual.

19 And this proposal, as written, creates one major exception:
20 If you're faculty or staff in a public college or a public
21 university, students can record you without your permission.
22 And what that means in this context is you're going to have
23 students who are trying to get professors or faculty in a gotcha
24 moment where they can record them without their consent. They
25 can post a video clip, as students often do, on social media out

1 of context that goes viral that presents a narrative that may or
2 may not be accurate. And it can not only cost the university,
3 potentially, litigation, but it can also cost that member of
4 faculty or staff their professional career. They can face
5 professional ruin as a result of this provision.

6 MR. WERMUTH: I appreciate your time today.

7 THE WITNESS: Thank you.

8 MR. WERMUTH: I'll pass the witness.

9 THE COURT: Mr. Levesque, are you ready, or do you
10 need a minute?

11 MR. LEVESQUE: Yes, Your Honor, I'm ready to proceed.

12 THE WITNESS: Your Honor, would I be able to take the
13 shortest of short breaks?

14 THE COURT: Certainly. We'll take a five-minute
15 break, and everybody can use the --

16 THE WITNESS: Thank you, Your Honor.

17 THE COURT: -- take a comfort break.

18 (Recess taken at 3:28 PM.)

19 (Resumed at 3:31 PM.)

20 THE COURT: We are back on the record.

21 Counsel, you can proceed with your cross-examination.

22 CROSS-EXAMINATION

23 BY MR. LEVESQUE:

24 Q. Good afternoon, Representative. Good to see you back in
25 Tallahassee again.

1 A. Thank you.

2 Q. My name is George Levesque. I represent the Board of
3 Governors and Board of Education. We spoke in your deposition.

4 To be clear, you opposed and voted against the
5 legislation -- every piece of legislation that proposed the
6 survey that was considered by you in 2018, 2019, 2020, and 2021;
7 correct?

8 A. Actually, no, I do not believe that is correct.

9 Q. Okay. Was there ever -- I guess at what point in time did
10 you ever support the legislation?

11 A. So I believe it would have been 2019 -- I'm trying to
12 remember the year. But as we've discussed here in this
13 courtroom, this assessment and survey proposal was rolled into a
14 number of proposals over the years that included a number of
15 provisions, including a lot of provisions that were overall, in
16 my opinion, having a positive impact on the state university
17 system.

18 So there were versions of the proposal that were wrapped up
19 in omnibus higher-education packages that I ultimately voted
20 for.

21 Q. Okay. To be clear, though, when Representative Rodrigues
22 proposed the amendment in that first committee that added the
23 survey provision, you voted against that amendment; correct?

24 A. Correct.

25 Q. And then against that bill based upon the addition of the

1 amendment and some of the other provisions in the bill; correct?

2 A. I believe that to be correct.

3 Q. And then in 2021, when House Bill 233 came to the floor,
4 you voted against it at that time as well; correct?

5 A. I believe so.

6 Q. Now, you talked a little bit about how the universities and
7 the colleges had concerns with funding as a result of House Bill
8 233.

9 Wouldn't it be fair to say that any group that relies on
10 the legislature for funding when they come to the legislature
11 always has concerns about the level of funding they are going to
12 get?

13 A. It depends. Some institutions and some entities are more
14 reliant on the legislature for funding than others. In the case
15 of the state university system and the Florida College System,
16 they are very much reliant on state funding.

17 Q. But anybody who's got a legislative appropriation, they're
18 always concerned and they're always fighting to keep that
19 appropriation; aren't they?

20 A. Sure.

21 Q. And so in terms of -- to the extent that that creates a
22 level of deference to the legislature, that's just the nature of
23 those are the people that control the spending, and that's
24 something that's true of every area of government -- or every
25 area that relies on government for funding; true?

1 A. I think that's common sense.

2 Q. Now, you talked a little bit about the Governor's hard
3 powers and soft powers. But at least as it relates to House
4 Bill 233, House Bill 233 doesn't have anything specifically to
5 do with funding of the higher-education system, does it?

6 A. There were -- there was not text in the proposal that I
7 recall that specifically says violations of the act would result
8 in a defunding of an institution. No, I don't remember seeing
9 that there.

10 Q. And so it also doesn't change the makeup or change the way
11 boards are appointed or do anything related to that to the other
12 policies that would affect the higher-education institutions
13 either, does it?

14 A. No. And it doesn't need to in order for that power and
15 that threat to still be there.

16 Q. Now, when you were relating your experience related to
17 House Bill 7 and the passage of House Bill 7, you were a member
18 of the minority party; correct?

19 A. Painfully so, yes.

20 Q. And from your perspective -- and I think you just
21 answered -- almost answered my next question. From your
22 perspective, how was the minority party treated?

23 A. Not great, sir.

24 Q. One of the things that you testified to was related to
25 Representative Bird's comments about concerns of indoctrination.

1 In your mind, is there a difference between concern about
2 indoctrination and an allegation of actual indoctrination?

3 A. Yes.

4 Q. And isn't it true that Representative Bird described
5 everything that he was talking about as a concern? He wasn't
6 saying absolutely, 100 percent indoctrination is going on in the
7 university system?

8 A. I'm not sure that I would agree that he wasn't making that
9 blanket assessment of our institutions.

10 Q. But certainly the text that's there in the statute, we're
11 able to read it, and everybody can kind of take what they mean
12 from the words that he said on the -- in committee; correct?
13 That would be fair?

14 A. I think oftentimes the impact of legislation goes well
15 beyond the words on the page.

16 Q. Now, at different times you talked about that you were
17 hearing from your Republican colleagues that students were, in
18 fact, being indoctrinated.

19 Was that in private conversations, or was that in public
20 meetings that were recorded?

21 A. I'm sure that it was mentioned in private conversations, as
22 well as on the legislative record as we reviewed earlier.

23 MR. LEVESQUE: If we could pull up Plaintiffs' Exhibit
24 172.

25

1 BY MR. LEVESQUE:

2 Q. And before we scroll, do you recognize that exhibit?

3 A. Yes. I see it's a transcript from the Post-Secondary
4 Education Subcommittee.

5 Q. And this, I believe, was the first committee of reference
6 where Representative Rodrigues introduced the amendment.

7 MR. LEVESQUE: And if we can go to page 10.

8 BY MR. LEVESQUE:

9 Q. And on lines 4 through 16, you can see that you've been
10 given the floor to ask him a question.

11 And starting on line 6, you ask Representative Rodrigues:
12 *Are they compelled to take any sort of action as a result of the*
13 *surveys that are conducted?*

14 And Representative Rodrigues responds: *Not at this time.*
15 *It would be our hope that the survey would reveal that we have*
16 *intellectual diversity and that we are providing a safe culture*
17 *for our students and faculty to express their viewpoints. If*
18 *the survey reveals that is indeed the case, there would be no*
19 *need for action. If it were to reveal otherwise, then as we*
20 *reviewed the results of the survey together as a body, we would*
21 *determine what actions we should take.*

22 Isn't it true that, at least by that statement,
23 Representative Rodrigues was hopeful that the survey would come
24 back with a positive response?

25 A. I think what he was telling us there is that he would like

1 for the survey to come back and confirm that students are
2 comfortable expressing their viewpoint. I think we would all
3 like for that to be the case.

4 I don't -- I can't really say whether or not he believed it
5 was more likely than not that the survey would come back with
6 that result.

7 Q. Okay.

8 MR. LEVESQUE: And if we could pull up Joint Exhibit 1
9 and flip to page 2.

10 And this was an exhibit that Mr. Wermuth had shown
11 you.

12 And if we could zoom in on paragraph (b).

13 BY MR. LEVESQUE:

14 Q. And if I understood your testimony, it was your belief that
15 competing ideas and perspectives referred to Republican or
16 conservative ideas or perspectives.

17 Did I understand that correctly?

18 A. What I was saying is that the ideas competing with one
19 another are, first, the liberal idea that everyone agreed was
20 present in the Florida College System and the Florida University
21 System. And the competing idea which Republican members argued
22 was not present and was being suppressed, that's the Republican
23 for conservative idea.

24 Q. But you would agree, at least in academia, sometimes things
25 don't always break down with conservative and liberal,

1 Republican, Democrat? Sometimes there are variations, and
2 sometimes they go off in completely strange directions that
3 don't really break down along partisan or political
4 philosophical lines; correct?

5 A. Yes, I believe that to be the case. But I also know that
6 in 2023, ideas -- controversial ideas, especially ones related
7 to race and gender, for example, have been overpoliticized
8 specifically in the context of the political system and as it's
9 been presented in this legislation and other legislation.

10 MR. LEVESQUE: If we could pull up Exhibit 42.

11 BY MR. LEVESQUE:

12 Q. And what I will represent to you is Exhibit 42 is the
13 legislative history for House Bill 233. And if I remember your
14 testimony, at least originally, you indicated that the
15 Republicans who were presenting the bill provided no examples of
16 instances where this type of indoctrination was going on.

17 Did I understand that correctly?

18 A. I don't recall examples in my committees.

19 Q. But, certainly, at least in some of the legislative
20 transcripts that were shown to you, there were several anecdotal
21 examples; correct?

22 A. They were anecdotal, but they were not firsthand examples
23 from testimony from the public.

24 Q. So the one representative that was talking about his
25 daughter wouldn't have been a firsthand example because he

1 wasn't there, but he's at least relaying the experience of his
2 daughter?

3 A. Well, I think by definition it's a firsthand example.
4 However, I don't even know where his daughter went and whether
5 or not she went to an institution in the state of Florida.

6 Q. Are you familiar with Representative Mariano?

7 A. Yes.

8 Q. And are you aware that, at least in the legislative history
9 in House Bill 233, that she shared her personal example of
10 experience in the university system?

11 A. I don't recall her testimony specifically, no.

12 Q. But certainly if that's reflected in the legislative
13 record, you'd have no reason to disagree?

14 A. I wouldn't challenge it if it's in the transcript.

15 MR. LEVESQUE: And if we could flip to page --

16 THE COURT: As I recall from the record, she went to
17 your alma mater; right?

18 THE WITNESS: Yes.

19 THE COURT: That's what I thought.

20 MR. LEVESQUE: If we could flip to page 26.

21 And zoom out just a little bit.

22 26, please.

23 First page.

24 There.

25

1 BY MR. LEVESQUE:

2 Q. Representative, do you recognize that document?

3 A. It looks like the staff analysis for House Bill 233.

4 Q. And for the staff analysis, for the benefit of the Court,
5 who drafts those?

6 A. Staff in the Florida House, committee staff.

7 Q. And that would be the professional staff in the House?

8 A. Correct.

9 MR. LEVESQUE: And if we could flip to page 29.

10 BY MR. LEVESQUE:

11 Q. And in terms of your reliance on the staff analysis, when
12 you would be doing your work as a legislator, would you read the
13 staff analysis closely?

14 A. Oftentimes I would, yes.

15 Q. And in this particular analysis, they included a lot of
16 footnotes. Do you recall if you ever clicked on any of these
17 footnotes?

18 A. I don't recall if I ever clicked on them. This is a
19 committee that I did not serve on in 2021.

20 Q. But at least as a member who's voting on legislation when
21 it came to the floor, this staff analysis would have been
22 available to you if you wanted to do research on the -- in
23 anticipation of your floor vote; correct?

24 A. It's one of many tools that would be made available to me
25 to do research, yes.

1 MR. LEVESQUE: Okay. If we could click on the link
2 for link 31.

3 And this was a report -- if we can go back real quick.

4 This is a report from the James Madison Institute:
5 *Combatting "Idea Suppression." How Florida Universities Can*
6 *Continue their Rise to National Prominence* put out in 2020.

7 And then let us go back to the webpage.

8 And if we can scroll down some to page 3.

9 There.

10 BY MR. LEVESQUE:

11 Q. Do you see in that table that they're doing a comparison of
12 free speech ratings from the Foundation for Individual Rights
13 and Education? Are you familiar with the group FIRE?

14 A. No.

15 MR. LEVESQUE: If we could scroll back into that
16 Table 1.

17 BY MR. LEVESQUE:

18 Q. Now, in looking at that, you have a number of universities.
19 And they show the rankings from 2013, 2017, and 2020.

20 And if you look at those rankings, there are some schools
21 that made progress, and then there are some schools that pretty
22 much stayed the same. But at least according to that
23 organization, in 2020, there were several Florida state -- or
24 Florida universities that received yellow.

25 Do you see that?

1 A. Yes.

2 Q. And then at least one university that was receiving a red
3 in terms of its free speech rankings.

4 And that would have been something that would have been
5 available and presented to legislators as they were considering
6 the text of House Bill 233 and what might have been before it;
7 correct?

8 A. It appears that this survey was included in the staff -- or
9 that this report was included in the staff analysis in 2020. It
10 does not appear that this was available in any of the previous
11 years that the legislation was proposed.

12 Q. But, at least in the year that it passed, this is something
13 that would have been available to the legislature; correct?

14 A. I see that it's something that's buried in a pile of
15 documents that we are normally given in order to prepare for
16 legislation that's going to be voted on in the floor, yes.

17 Q. Okay.

18 THE COURT: Just so it's clear and it's what I
19 understand, so it's given in 2020 prior to the 2021 legislative
20 session? Is that the --

21 MR. LEVESQUE: No, Your Honor.

22 If we can go back to the bill analysis, the first
23 page.

24 This would have been the bill analysis for House Bill
25 233.

1 THE COURT: No, I know. That's why I asked the
2 question I asked, because I'm looking at the realtime
3 transcript, and I -- and you didn't correct the witness. The
4 witness said this was a staff analysis in 2020 --

5 MR. LEVESQUE: Well, I think the point that the
6 witness was making -- and, Representative, correct me if I'm
7 wrong -- I think he was making the point that the report was
8 from 2020, and we would not have had the report in 2018, 2019,
9 or the 2020 session.

10 THE COURT: Okay.

11 Fair enough. I thought that's what everybody meant,
12 but the way the statement is is ambiguous. And I just wanted to
13 clarify. I could see the document, what it was labeled, and it
14 appeared that this was something that was provided to everybody
15 before HB 233 was -- when I say "everybody," the legislators --
16 in April of 2021 before it was passed; correct?

17 MR. LEVESQUE: Yes.

18 THE COURT: Okay.

19 MR. LEVESQUE: And what I will tell you is we've got
20 several versions of the bill analysis in the legislative history
21 because at every step the bill analysis gets --

22 THE COURT: It changes. I've seen --

23 MR. LEVESQUE: Sure.

24 THE COURT: -- bill analyses before.

25 The question is it's available. People have access to

1 it. Whether they look at it or not is an entirely different
2 thing.

3 MR. LEVESQUE: Yes, Your Honor.

4 THE COURT: But the point is it's there; correct?

5 MR. LEVESQUE: Yes, Your Honor.

6 THE COURT: I understand.

7 BY MR. LEVESQUE:

8 Q. Would you agree that we can have a high-performing
9 university system and still have areas that need improvement?

10 A. Sure.

11 Q. And at least in terms of legislative action, the
12 legislature doesn't need to wait for a problem to arise before
13 it takes action; correct?

14 A. Yes. I have certainly seen that happen.

15 Q. But the legislature can be looking down the road. They
16 don't need to wait for an official report. They can say, Hey,
17 that's -- that happened in another state, and we don't want it
18 to happen here, so we're going to do what we can to prevent that
19 bad thing from happening here; correct?

20 A. That happens all the time when legislators pull an example
21 out of a state somewhere else in the country and say, Oh, we
22 have to prevent this from happening here in Florida. That
23 certainly happens on a number of issues all the time.

24 Q. Now, one of the things that you mentioned was that
25 Representative Webb provided a floor amendment that attempted to

1 take the survey out.

2 Do you recall which legislative session that was?

3 A. Forgive me. I believe it was 2019.

4 Q. Okay. As it relates to the 2021 legislative session, you
5 would agree that no one had proposed an amendment to remove the
6 survey completely in the House?

7 A. I don't recall if they did or didn't. I know I didn't, but
8 it was not for lack of opposition to the proposal. There's only
9 so many amendments that I can file before people tune me out,
10 sir.

11 Q. And that was going to be my next question.

12 You've not exactly been shy sometimes about filing
13 amendments; is that fair?

14 A. This is correct.

15 Q. Now, one of the things that you mentioned was -- as a
16 justification for the passage of House Bill 233 is the makeup of
17 the Senate changed.

18 Do you know what the Republican-Democrat makeup in the
19 Senate was in 2020?

20 A. I do not want to state a number and get it wrong, sir. But
21 we were not in the majority.

22 Q. Would it be -- and when you say "we" --

23 A. We -- I apologize -- the Democratic caucus was not in the
24 majority, sir.

25 Q. If I were to toss out the number of 23 Republicans and 17

1 Democrats, would that sound correct?

2 A. If you are stating it, then I believe it to be true.

3 Q. Okay. And then in 2021, there were 24 Republicans and 16
4 Democrats; is that correct?

5 A. Sure, I believe so.

6 Q. Well, would you agree with that at least?

7 A. Yes.

8 Q. And so from the standpoint of the make-up of the Senate, we
9 had one more Republican vote. Did the makeup of the body change
10 in terms of who the Senators were, I guess, other than that one
11 additional Republican?

12 A. Yes. But since you're asking the question, I think that
13 the net gain of one Republican seat in the Florida Senate can be
14 quite deceiving. And what I mean by that is is that the upper
15 chamber for many years had a reputation for being the cooling
16 dish for the House, not only because they were -- not only
17 because there was a Republican majority, because both chambers
18 are controlled by Republicans, but because the Senate was the
19 more sophisticated, thoughtful, moderate chamber.

20 What happened between 2020 and 2021 was more than just a
21 net gain of one Republican senator in the Senate chamber. What
22 we saw was -- and forgive me for using slang -- we saw that the
23 Senate had become Houseified on the level of extremism that was
24 being exhibited in the upper chamber with many members of the
25 House being elected to the Florida Senate.

1 Q. And one of those House members was Senator Rodrigues who
2 championed the survey issue in the House; correct?

3 A. Yes.

4 Q. And at least in terms of -- and I'd like it to sort of be
5 clear for the record.

6 At least in terms of that makeup, that going from 23
7 Republicans to 24 Republicans, that was based upon a map that
8 had been drawn by the League of Woman Voters and imposed on the
9 Senate by the Florida Supreme Court; correct?

10 A. Yes.

11 Q. One of the things that you asserted that you were fearful
12 of with House Bill 233 and the survey provision was that it was
13 a government-written survey.

14 Were you aware that the universities regularly conduct
15 surveys of their faculty, staff and students?

16 A. Sure.

17 Q. Is -- and the public universities are government
18 institutions; correct?

19 A. Yes.

20 Q. Is -- do you have the same concerns with those government
21 institutions conducting the survey as opposed to the legislature
22 telling those government institutions to conduct the survey?

23 A. No, sir, I don't.

24 Q. You're also aware that professors often conduct surveys at
25 the end of their courses; correct?

1 A. Of course.

2 Q. And some of the fears of students might be that if they
3 give them a bad review, and they still have to take the
4 professor, there might be consequences; correct?

5 A. Uh-huh.

6 Q. And there's always concern with how that anonymity might
7 work; correct?

8 A. Sure.

9 Q. Now, you've presented your views as to what you think the
10 language says about the effect of the legislation.

11 Would it be fair to say that your Republican colleagues
12 disagree with your views?

13 A. I think that would be fair to say.

14 MR. LEVESQUE: One moment, Your Honor.

15 (Pause in proceedings.)

16 MR. LEVESQUE: No further questions, Your Honor.

17 THE COURT: Redirect?

18 REDIRECT EXAMINATION

19 BY MR. WERMUTH:

20 Q. I just have a few more questions for you.

21 I'll take you back to Plaintiffs' Exhibit 72 and
22 specifically page -- 172, page 10. Mr. Levesque was showing you
23 this.

24 Now, this is where Leader Rodrigues was talking about the
25 survey; correct? And you looked at this a few minutes ago;

1 right?

2 A. Uh-huh, yes.

3 Q. And you were asking, you know, whether -- *Are they*
4 *compelled to take any sort of action as a result of the survey*
5 *that are -- surveys that are conducted?*

6 And Leader Rodrigues says: *Not at this time.*

7 Do you see that?

8 A. Yes.

9 Q. What was your expectation if the survey came back showing
10 that liberal views were predominant on college campuses?

11 A. My expectation is -- was -- my expectation was that if the
12 surveys came back and Republican lawmakers interpreted them as
13 proving their case, that conservative students didn't feel
14 comfortable expressing their viewpoints, that they would pass
15 legislation to try to correct it in a number of different ways,
16 I'm sure.

17 Q. Okay. And this is in the context of, you know, this
18 perception that college professors are liberal; correct?

19 A. Correct.

20 Q. And, again, that wasn't a doubted thing among your
21 Republican colleagues; correct?

22 A. It wasn't a doubted thing, but, you know, there was
23 constantly the assertion that if there are lots of liberal
24 professors, then, therefore, conservative viewpoints are being
25 suppressed and students are being indoctrinated. That was the

1 entire line of thinking behind all of this bill.

2 Q. Okay. And I might have misunderstood this, but the next
3 point I'd like to cover is in Plaintiffs' Exhibit 188 on
4 page 39.

5 I believe Mr. Levesque was referencing Mr. --

6 MR. WERMUTH: This is 188?

7 38. Sorry.

8 Page 38.

9 BY MR. WERMUTH:

10 Q. So this comment, starting at page -- line 14, we had looked
11 at this before. This is comments by Representative Overdorf.

12 Do you remember this?

13 A. Yes.

14 Q. Okay. And I think what we see here is a discussion about
15 his daughter feeling uncomfortable to express her beliefs in an
16 area that she didn't feel safe in expressing them; right?

17 A. Yes.

18 Q. I think this was brought up in our last -- the last
19 questions in the context of indoctrination.

20 There's no statement of indoctrination here; correct?

21 A. No.

22 Q. Do you understand -- do your Republican colleagues in the
23 House conflate indoctrination with feeling unable to express
24 views on campus?

25 A. Absolutely.

1 Q. Now, let's look to Exhibit 42 and, specifically, the House
2 of Representatives final staff bill analysis.

3 A. Uh-huh.

4 Q. Now, obviously, because of the date on here, we're talking
5 about a staff analysis that occurred after the legislation
6 passed?

7 A. The staff analysis I'm looking at is for House Bill 233. I
8 would need to scroll down further in the document to see the
9 dates.

10 Q. Let's look at the first line under "Summary Analysis."

11 A. Okay.

12 Q. I think what we see here is that this analysis is
13 referencing a past event, the passage of SB -- sorry -- HB 233;
14 correct?

15 A. So to provide some context, yes. Staff analysis can be
16 written at all points in the legislative process, but they're
17 most frequently written right before a bill is proposed in
18 committee and then right after the bill passes a committee
19 because there are often amendments that change the bill, so they
20 write a new staff analysis.

21 They will repeat that staff analysis process for every
22 committee until the floor, and if a bill passes into law, or
23 passes a chamber, then another staff analysis will be written on
24 the final product after it has passed off the floor and all
25 votes have been cast.

1 It appears that this staff analysis that we're looking at,
2 based on the first sentence, is a staff analysis that was
3 written after the bill passed the floor of the House --

4 Q. Okay.

5 A. -- and the floor of the Senate.

6 Q. And Mr. Levesque took you to look at a footnote somewhere
7 down in here, and I think you referenced it as information being
8 buried in a staff analysis?

9 A. Yes.

10 Q. Do you know -- have you ever heard of the James Madison
11 Institute before?

12 A. Yes, sir.

13 Q. And what is the James Madison Institute?

14 A. The James Madison Institute is a conservative think tank
15 that definitely has a reputation for printing lots of documents
16 and leaving them on lawmakers' desks.

17 Q. Okay. And I believe Mr. Levesque asked you questions about
18 universities doing surveys; correct?

19 A. Yes.

20 Q. Now, are you familiar with what's called the IRB process,
21 Institutional Review Board process?

22 A. I'm not familiar with it, sir.

23 Q. Okay. Do you know how the university surveys were
24 constructed that Mr. Levesque was referencing?

25 A. I'm not familiar with how those surveys were put together,

1 no.

2 Q. So you weren't testifying that they went through any
3 process like an IRB process?

4 A. No.

5 Q. And you weren't saying that they weren't -- that they
6 didn't go through an IRB process?

7 A. No. And I think it's also worth clarifying that the
8 surveys and assessments as presented even at one time were
9 characterized by Representative Spencer Roach, who was one of
10 many sponsors of this legislation, who said that universities
11 would be able to partner and have input in how the surveys and
12 assessments were put together.

13 Well, oftentimes I found in my experience as a lawmaker
14 what a bill sponsor will say at the podium in front of a
15 legislative committee is nice, but if it's not backed up by text
16 in the proposal, then it's not really the same thing.

17 So what I'm saying is, like, for example, with the
18 university and the Florida college assessments and surveys that
19 were presented, we were told in the legislative committee that
20 universities would be able to have input and help write the
21 survey and assessment, but that was not reflected anywhere in
22 the proposal as it was passed. None of that was described in
23 text as it was proposed in the legislature.

24 Q. Okay. And are you aware of whether the surveys that
25 Mr. Levesque was talking about earlier that were done at

1 universities -- were they intellectual -- Intellectual Freedom
2 and Viewpoint Diversity Surveys?

3 A. No, not that I'm aware. We were talking about a totally
4 different group of surveys.

5 MR. WERMUTH: Okay. No further questions.

6 THE COURT: Thank you, Representative. You may step
7 down. Have a pleasant afternoon.

8 THE WITNESS: Thank you. You, too.

9 (Representative Guillermo-Smith exited the courtroom.)

10 THE COURT: For scheduling purposes, let me find out
11 where we're at.

12 Who's being called next?

13 MR. WERMUTH: Dr. Kamola is --

14 THE COURT: And how long do you expect Dr. Kamola's
15 testimony?

16 MR. WERMUTH: I'm hopeful that we can get through it
17 all today, but my hopes and dreams are not the same as reality
18 sometimes.

19 THE COURT: Well, the reason why I'm asking is I just
20 can't have the court reporter go to six every night --

21 MR. WERMUTH: Okay.

22 THE COURT: -- and I've been trying to break it up a
23 little bit more today because the court reporter -- and I don't
24 want to say in my experience -- as a state court judge, I
25 actually had a tag team. I'd have one court reporter for the

1 morning and a different one in the afternoon, but the -- I don't
2 have that luxury in the federal system.

3 So we can go for about an hour. How long do you think
4 your direct will be?

5 MR. WERMUTH: I think I'll be through a very
6 substantial portion of the direct. This is no Dr. Lichtman.

7 THE COURT: All right.

8 So it sounds like, Mr. Levesque, we're not going to --
9 oh, it's not -- I'm sorry. It's not Mr. Levesque. It's
10 Ms. Lukis.

11 It sounds like we're probably not going to get to your
12 cross today.

13 MS. LUKIS: Which I don't anticipate being very long,
14 for what that's worth, but I understand.

15 THE COURT: All right. No problem.

16 And Dr. Kamola, that's the gentleman that went back to
17 Connecticut?

18 MR. WERMUTH: Yeah. And then he got FAA grounding in
19 Atlanta so it took him forever to get home.

20 THE COURT: We're going to take a five-minute break,
21 and when we come back, we'll get as far as we can, and that's
22 what we'll do. We'll come back in five minutes.

23 Thank you.

24 (Recess taken at 4:08 PM.)

25 (Resumed at 4:21 PM.)

1 THE COURT: All right. We're on the record in -- back
2 on the record for 4:21cv271.

3 It's my understanding that we have Dr. Kamola. He's
4 present. He's now on Zoom.

5 Sir, can you hear me?

6 DR. KAMOLA: I can.

7 THE COURT: Will you raise your right hand.

8 **DR. ISAAC KAMOLA, PLAINTIFFS WITNESS, DULY SWORN**

9 THE COURT: All right. You can put your hand down.
10 Counsel, you can proceed with your examination.

11 THE WITNESS: I can't see the Court. I just have a
12 black box. Is that --

13 THE COURT: One moment, please.

14 I understand why you want to see Mr. Wermuth.

15 THE WITNESS: That's better.

16 DIRECT EXAMINATION

17 BY MR. WERMUTH:

18 Q. Can you see me now?

19 A. Yep.

20 Q. Good afternoon, Dr. Kamola.

21 Please introduce yourself to the Court.

22 A. My name is Isaac Kamola.

23 Q. And have plaintiffs engaged you as an expert witness in
24 this case?

25 A. Yes, they have.

1 Q. Before this case, had you researched targeted harassment of
2 college faculty in the United States?

3 A. Yes, I have.

4 Q. Okay. And did plaintiffs engage you to analyze HB 233 in
5 the context of your past research?

6 A. They did, yes.

7 Q. And did you analyze HB 233?

8 A. Indeed, I did.

9 Q. Are you prepared to discuss your findings, opinions and
10 reasons for them today?

11 A. I am.

12 Q. What topics are you here to testify about today?

13 A. I'm here to testify first about the political
14 organizations, media organizations and student groups that I've
15 identified in my research as being -- generating much of the
16 targeted harassment against faculty members.

17 I'm also here to discuss how -- I'm getting a buzzing in my
18 headphones. I don't know.

19 I'm also here to discuss how HB 233 seems like it will feed
20 into that targeted harassment and outrage machine that
21 identifies left-wing bias, so-called left-wing bias, as a crisis
22 in American higher education and how House Bill 233 seems
23 designed to -- to advance the interests of those political
24 organizations.

25 And then, finally, I'm here to discuss what I see as a

1 likely chilling effects that will result from House Bill 233.

2 Q. What do you do for a living, Dr. Kamola?

3 A. I am an associate professor of political science at Trinity
4 College in Hartford, Connecticut, snowy Hartford, Connecticut.

5 Q. I'd like to show you what's been marked as
6 Plaintiffs' Exhibit 8.

7 A. Great. I can see that.

8 Q. What is that document?

9 A. This is my CV, my curriculum vitae.

10 Q. Okay. Is it complete and accurate as of the date that it
11 was prepared?

12 A. Yeah, it was.

13 Q. Why do you keep this document?

14 A. This CV is a list of my accomplishments, my educational
15 background, my professional jobs and positions that I've held,
16 as well as my publications. It's a way of keeping track of my
17 accomplishments, and I use it when I go up for promotion, tenure
18 and applying for grants, et cetera.

19 Q. And how often do you update this document?

20 A. On a regular basis.

21 MR. WERMUTH: Okay. At this time, Your Honor, I'd
22 like to offer into evidence Plaintiffs' Exhibit 8.

23 THE COURT: Any objection?

24 MS. LUKIS: No objection, Your Honor.

25 I would note, I think, that in earlier Zoom testimony

1 the exhibits were displayed on the screen, and it's not
2 happening now.

3 (PLAINTIFFS' EXHIBIT 8: Received in evidence.)

4 MR. WERMUTH: Yes, it's strange. I can't see it
5 myself.

6 THE COURT: We're working on it.

7 MS. LUKIS: Okay. No objection, in any event.

8 THE COURT: No objection.

9 Let's fix it. Are you going to be showing another
10 document?

11 MR. WERMUTH: I will be.

12 THE COURT: Let's see if we can fix the screen real
13 quick so we get documents.

14 (Pause in proceedings.)

15 (Resumed at 4:30 PM.)

16 THE COURT: We are back on the record.

17 You can proceed with your questions.

18 BY MR. WERMUTH:

19 Q. All right. Dr. Kamola, what higher-education degrees have
20 you earned?

21 A. I have a BA in politics from Whitman College in Walla
22 Walla, Washington, and an MA and Ph.D. in political science at
23 the University of Minnesota.

24 Q. And where have you worked since earning your doctoral
25 degree?

1 A. I had a Mellon postdoctoral fellowship at Wesleyan
2 University and spent two years at the Department of Political
3 Science at Johns Hopkins University before getting an assistant
4 professor position here at Trinity College.

5 Q. Okay. And what's your present position?

6 A. I'm an associate professor, so I'm tenured.

7 Q. Okay. What field of research has been the focus of your
8 career?

9 A. So I have -- I've been focused on the political economy of
10 higher education, so examining kind of how institutions of
11 higher education are engaged in political and economic pressures
12 in parts of the world.

13 Q. Okay. How long have you studied the field of political
14 economy in higher education?

15 A. I was a -- I mean, it was a topic of my dissertation
16 research. So it's hard to pin exactly when this became my idea,
17 but I defended my dissertation in 2010. So, you know -- and I
18 started working on it in mid-2000, so, you know, 17 years, 16
19 years.

20 Q. Okay. And how many books have you published regarding the
21 political economy of higher education?

22 A. So I have two books that are -- that I've written and
23 another book that's coedited.

24 Q. And how many peer-reviewed journal articles have you
25 published in the field of political science?

1 A. In political science, about a dozen.

2 Q. Okay. And how --

3 (Indiscernible.)

4 THE COURT REPORTER: I'm sorry. That was
5 indiscernible.

6 MR. WERMUTH: Go ahead.

7 THE WITNESS: Oh, and also a list of book chapters and
8 other publications as well.

9 BY MR. WERMUTH:

10 Q. Okay. And how else do you spend your professional time?

11 A. In addition to research, I'm engaged in teaching. I'm at a
12 liberal arts school, so I spend a lot of time in the classroom
13 and advising and teaching students, and also work in service
14 positions in the university or in the college and in the
15 profession at large.

16 Q. And how many years have you taught at the collegiate level?

17 A. I have been teaching since -- since graduate school, so
18 probably -- I've been the instructor of record since 2008-ish.

19 Q. Okay. You mentioned you had done research on targeted
20 harassment of college faculty.

21 How did you get involved in studying that topic?

22 A. Yeah. So I was really focusing on -- I was working on a
23 book that -- on -- that was political economy of higher
24 education. And I was in my office in the summer of 2017,
25 June 21st of 2017, and I was writing my book, and I got -- my

1 phone starting lighting up. My office phone started lighting
2 up. I started getting emails from the school telling us that we
3 had to evacuate campus, that there was a warning that we had to
4 evacuate campus.

5 My children were in the daycare center that was on the
6 other side of campus, so I walked across campus, really having
7 no idea what was going on, being profoundly confused, concerned.
8 I got my kids from the childcare center and went home and
9 started emailing and texting around and trying to figure out
10 what was going on.

11 And a few people -- a few colleagues sent me to this
12 article that had been written by *Campus Reform* that basically
13 said that my colleague in sociology had called for the death of
14 White people and that -- we would later find out over the next
15 few days and months that the threat -- that the article had
16 circulated, and a number of people had called in to campus
17 credible threats of violence. Those threats were so credible
18 that law enforcement was investigating them, and that explained
19 why campus was evacuated.

20 So after -- that kind of left me in the sense of what is
21 going on? What is this phenomenon? What just happened, you
22 know?

23 So that was my introduction.

24 Q. Okay. And what work did you do regarding targeted
25 harassment of faculty in the aftermath of that event?

1 A. Yeah. So I wrote a piece in the *Chronical of Higher*
2 *Education* that basically talked about that experience and tried
3 to process it. And in that piece I was especially concerned
4 that -- what happened was I had read the piece from *Campus*
5 *Reform* and jumped to the conclusion that the conclusions being
6 made in the article were an accurate representation of what my
7 colleague had said and that -- the article examined -- or talks
8 about how I went through the process of realizing that that's
9 not, in fact, what my faculty -- my colleague had said and that
10 it was -- I felt really disconcerted that I had taken the word
11 of this kind of website that I had not heard anything about over
12 the expertise of my colleague, who's a specialist in race and
13 American politics and sociology.

14 So that piece kind of examined that phenomenon, and the
15 phenomenon was really deeply disturbing on campus that -- the
16 school went on and sanctioned my colleague. And I was the
17 president of the AAUP chapter at the time and was actively
18 engaged in arguing that he should not be sanctioned.

19 Professor Williams had to -- received so much hate mail and
20 attacks that not only were the switchboards and offices on
21 campus receiving these deluges of hate mail, but Johnny
22 Williams' home address was doxed. And after that doxing, he
23 left the state with his family for fears of personal -- his
24 personal safety.

25 And so this was a really kind of destabilizing event for

1 myself, for my colleague, and for our campus community. And the
2 wounds of that event are still very much real on campus. And so
3 that chronical -- my first piece on this in the chronical was an
4 effort to kind of process what had happened.

5 And then I got to thinking that this is a phenomenon that I
6 didn't know much about, and I looked around in the media,
7 especially the media pertaining to higher education, and
8 identified a bunch of different article -- or different examples
9 of similar kinds of targeted harassment, where faculty members
10 had lost their jobs or been attacked by hate mail or accused of
11 something outlandish, kind of treated as these kind of crazy
12 figures who had said something that was, you know, off the wall,
13 crazy, dubious.

14 And so knowing what I learned from this experience at
15 Trinity, I was, like, I need to investigate these other stories
16 and these other examples. And so I wrote this piece that
17 eventually was peer-reviewed and published in the *Journal of*
18 *Academic Freedom*.

19 And in that piece I took ten examples of targeted
20 harassment of faculty that were prominent at the time and did
21 kind of a deep dive. I followed through kind of where those
22 stories started, where they were first published, how those
23 storied moved from outlet to outlet to outlet oftentimes,
24 getting from *Campus Reform* or *The College Fix* to larger outlets
25 with larger audiences and oftentimes up into FOX News and

1 oftentimes with faculty members purporting that they had been
2 the subjects of targeted harassment.

3 So in that piece I layed out what I called the common
4 script of how these attacks worked and kind of identified kind
5 of the different elements that went into play, and I made some
6 suggestions for faculty and administrators about how to respond
7 to targeted harassment.

8 Q. In the process of your answer, you mentioned the term
9 "doxing."

10 A. Yeah.

11 Q. What is that?

12 A. Doxing is where you make an address public. It's
13 frequently -- I mean, it's particularly disturbing when your
14 home address becomes public. And that's -- I talked to a number
15 of faculty members for whom that's -- they've had that
16 experience and faculty members who've had to -- bought security
17 systems, for example, precisely because their home address was
18 made public as a result of a story about them and their
19 activities in the classroom or on campus on social media.

20 Q. So after those initial publications in the *Chronical of*
21 *Higher Education* and *Journal of Academic Freedom*, what project
22 did you pursue to study targeted harassment?

23 A. So I wrote the piece in the *Journal of Academic Freedom*,
24 and I kind of saw and analyzed the stories that had kind of made
25 the news that I was able to identify kind of through looking at

1 the *Chronicle* and other kinds of news outlets.

2 But it was becoming increasingly clear to me that there was
3 many more stories that didn't break into those news outlets that
4 were happening to a graduate student friend of mine, colleagues
5 that I knew and just kind of increasingly aware that this was a
6 real phenomenon that a lot of faculty members were experiencing.

7 It got me to think that I have this expertise and
8 understanding in terms of how this phenomenon works and how it
9 spreads, that that kind of information might be helpful in terms
10 of helping address and deal with these kinds of instances.

11 So in January of 2020, I started a project called Faculty
12 First Responders. And what I did was monitor the *Campus Reform*
13 website and identified examples of where they named -- where the
14 outlet -- where *Campus Reform* named a faculty member by name and
15 accused them of some sort of liberal bias.

16 So *Campus Reform* claims that its goal is to identify
17 liberal bias in higher education, so I just looked through, and
18 I kind of coded *Campus Reform* articles identifying the -- where
19 they named a faculty member by name and made some sort of
20 accusation of liberal bias.

21 And then I reached out to those faculty members as best I
22 could by email, just saying, Hey, I saw that *Campus Reform*
23 published this story about you. Here's some things that, you
24 know, you -- here's some information about who they are and how
25 you might respond, and, you know, providing -- you know, as

1 gained more and more experience and met more people who had this
2 experience of targeted harassment, I was able to put faculty
3 members in contact with other faculty members who had
4 experienced targeted harassment in order to kind of support each
5 other.

6 I was being asked by administrators and other faculty
7 members how to design policies that would help protect faculty
8 members from targeted harassment.

9 Q. What pattern did you find in this project?

10 A. Yeah. So I found that there's a -- you know, that
11 oftentimes targeted harassment could be experienced very
12 individually; right. So a faculty member has this experience,
13 and it's oftentimes quite a harrowing experience, not always,
14 but that sometimes, you know -- more often, you know, the story
15 in *Campus Reform* or *The College Fix* doesn't just stay at that
16 outlet but, instead, moves through this broader media ecosystem
17 and that oftentimes those stories are picked up almost verbatim
18 and kind of repeated back and forth, right, sometimes, you know,
19 and oftentimes, you know, becoming more and more salacious as
20 the story goes by -- goes on.

21 I've seen that oftentimes the stories become
22 decontextualized, right, and they tend to focus on, you know,
23 this particular thing that was said by a faculty member was said
24 on social media, said in the classroom, or research -- a piece
25 of research, and that those stories that become kind of

1 decontextualized can oftentimes lead to targeted harassment or
2 can lead to, you know, faculty members feeling threatened, being
3 doxed, being sanctioned by their institution, right, either, in
4 the most extreme cases, being fired or having the class canceled
5 or any number of other forms of sanction.

6 Q. In follow-up to your Faculty First Responders project, what
7 else did you do to study targeted harassment and why?

8 A. Sure. So following the Faculty First Responders, I was
9 kind of in -- you know, it was in November of 2020, and I was on
10 a webinar that was put on by PEN America. PEN America is a
11 national organization that advocates for writers, for academics,
12 novelists, journalists, and advocates for academic -- or for
13 free speech rights and for the rights of writers, you know, to
14 be protected from attacks on their rights.

15 At this PEN America webinar was included two faculty
16 members, one of whom had lost their job because of a story
17 written about them. And this conversation about the experience
18 of targeted harassment, their experiences -- in the conversation
19 or in the course of that discussion, one thing that came up was
20 that there wasn't any kind of data about kind of how the
21 experience of targeted harassment is experienced kind of in
22 general. There's a lot of kind of anecdotal examples and kind
23 of example here, example here, and you can kind of put together
24 a pattern across different faculty members. But there wasn't a
25 kind of coherent overview picture of what that experience looked

1 like.

2 So drawing on that discussion, I went to Hans-Joerg Tiede,
3 who's the research director at the American Association of
4 University Professors, the AAUP. And I told Joerg that I was
5 sitting on top of this dataset that included the -- you know,
6 all *Campus Reform* stories through 2020, including the names of
7 all faculty members who'd been named in those articles.

8 So we decided to put out a survey and to survey faculty
9 members who had experienced either targeted harassment or -- no.
10 Excuse me -- who had been written about by name in *Campus Reform*
11 in 2020, and accused of some sort of liberal bias to kind of see
12 what the ramifications of those stories were.

13 So we fielded that survey, and we published those survey
14 results in the AAUP's journal *Academe*, as well as I wrote a
15 piece called *Sensationalized Surveillance* that was published in
16 a peer-reviewed journal article in *New Political Science*. And
17 that argument -- or that paper drew together a bunch of
18 different kinds of evidence that included the survey results, as
19 well as interviews of faculty members who had been targeted, had
20 interviews with two campus correspondents who had written for
21 *Campus Reform*, an examination of archived web pages to kind of
22 get a sense of how *Campus Reform* had evolved as an organization,
23 drew upon journalistic work, as well as secondary and primary
24 sources, in order to create a kind of comprehensive view and
25 argument that *Campus Reform* operates according to what we call

1 sensational surveillance or kind of specializing in keeping tabs
2 on higher education and then producing articles that are
3 inflammatory and provocative that then lead to this kind of
4 outrage.

5 Q. Okay. Let me see if I have the sequence of events right.

6 So as part of -- when you went to this webinar put on by
7 PEN America, by that point what had you done in terms of
8 collecting data of targeted harassment incidents?

9 A. Yeah. So we had started in January 2020, and we had coded
10 all the stories of *Campus Reform* up to that point and then
11 including in that coding process, if they had included -- you
12 know, if they had named a professor by name and accused them of
13 liberal bias.

14 And then we started the communications with Joerg and then
15 fielded the survey, I think, in late January or February -- or
16 maybe in January, February 2021. At that point what we did is
17 we went through and, you know, filled out the full year of
18 *Campus Reform* stories, yeah.

19 Q. Has your -- so then you published *Sensationalized*
20 *Surveillance*?

21 A. Yeah. And then following that, I published another -- I
22 published a book, a coauthored book, called -- on the funding
23 behind these particular organizations, as well as kind of
24 looking at what is the free speech, the -- what's the so-called
25 campus free speech crisis; right.

1 So in -- the book really focuses on looking at this period
2 of 2016, 2017, 2018, 2019, when there was a lot of incredibly
3 provocative campus speakers that were coming to college
4 campuses. This is kind of Milo Yiannopoulos, Ben Shapiro, but
5 also Charles Murray, I mean, like two very -- all three very
6 prominent examples of the kinds of highly provocative campus
7 speakers that were being brought to campus.

8 And in that book we identified how many of the speakers,
9 provocateurs who were being brought to campus, as well as the
10 student groups that brought them to campus, as well as the media
11 outlets that kind of raised outrage that they had been protested
12 or that somebody found their work offensive, as well as the
13 legal groups that sued colleges when they restricted access to
14 campus, were all funded by very -- by wealthy political donors
15 and were deeply integrated together. We talked about kind of an
16 integrated network of organizations that would, you know, kind
17 of create outrage to manufacture a narrative that there was a
18 crisis of free speech in higher education.

19 Q. Okay. Now -- so at the point that we left off, you had
20 done your work in the Faculty First Responders project and
21 published *Sensationalized Surveillance*.

22 How has that academic -- how has the academic community
23 responded to that work?

24 A. Yeah. It's been -- it's been responded to very favorably.
25 I am -- I mean, I've given -- I've been quoted, and the survey

1 results, for example, have been written about in the top
2 publications of our profession, the *Chronical of Higher*
3 *Education*, as well as *Inside Higher Education*.

4 I've been invited to ten or more talks to discuss my
5 findings on attacks -- targeted harassment of faculty, including
6 being invited by the provost at the University of Oregon to
7 give -- to participate in a national webinar about the topic,
8 being invited by the AAUP to host a webinar kind of about the
9 issue of targeted harassment alongside somebody who herself had
10 experienced harassment and a dean who is developing policies to
11 address it.

12 I've been -- you know, I've been -- the work of Faculty
13 First Responders has been written about in a number of
14 publications, including the *Chronicle*, the *Intercept*, elsewhere.
15 And the research itself has been peer-reviewed.

16 I'm -- I'm constantly hearing back from people that the
17 tools that I've developed have been helpful in helping them
18 address and think about the issue; that it rings true to the
19 experiences that they've had.

20 And, I mean, the fact that it has a high-profile research
21 and has not been critiqued or criticized in a significant way,
22 I'm comforted by that.

23 Q. Okay. What grants, if any, have you received to support
24 your work on targeted harassment of faculty?

25 A. So the AAUP has granted me an Academic Freedom grant,

1 the -- the AAUP foundation has a grant for academic freedom, and
2 I've received one for this -- on this current academic year and
3 the previous academic year.

4 Q. Okay. How does your work regarding targeted harassment of
5 college faculty fit into your field of academic research, if at
6 all?

7 A. Sure. As I mentioned before, I examine the political
8 economy of higher education, and I'm trained as a political
9 economist. And unlike an economist who kind of starts with
10 thinking about the markets as a kind of autonomous force and
11 that political intervention into markets is often seen as an
12 anomaly, a political economist starts from the understanding of
13 political and economic forces are always kind of deeply
14 implicated with each other.

15 And so I use that analysis to examine higher education,
16 which I think is really a helpful framework for thinking about
17 higher education, because there's a tendency in society and in
18 the academy at large, even in the academic literature on higher
19 education, to think about universities as kind of removed. You
20 can think of the ivory tower metaphor, that universities are
21 kind of outside of political and economic forces and kind of
22 think about the world abstractly and teach about the world
23 abstractly.

24 But my work on political economy of higher education has
25 really kind of made that argument that we need to think about

1 what goes on in higher education is deeply informed by political
2 pressures, economic pressures, and that these shape what the
3 university is, and, likewise, what goes on within higher
4 education affects what goes on in the broader world as well.

5 Q. What methods have you used to analyze targeted harassment
6 of faculty in higher education?

7 A. Sure. I mean, there's very few of us who are working on
8 this, so there's no singular method. I think the method that is
9 common among the scholars in this area is kind of a mixed-method
10 approach, just thinking about trying to understand a phenomenon
11 and having and trying to access as many different kinds of
12 evidence in order to understand that phenomenon.

13 So I've looked at everything from primary sources, so the
14 reports that are written by organizations like *The College Fix*
15 or varying student groups, as well as the articles themselves do
16 kind of a critical analysis of the texts that are being produced
17 by these organizations.

18 I also, you know, look at other kinds of primary documents,
19 tax documents, et cetera.

20 I've also, as I mentioned, fielded the survey, done
21 interviews, and -- or used interview data and then also have
22 engaged in, you know, drawing upon the journalistic accounts
23 that I find most credible as well as the academic accounts and
24 kind of identifying what systems and patterns can be identified
25 across those different kind of patterns.

1 And then all of this is also supported by my unique work
2 with Faculty First Responders where I'm able to kind of see how
3 I made -- the kinds of analyses that I developed kind of -- from
4 the literature and the analysis of particular data, does that
5 follow with how -- what's being experienced, the kinds of very
6 particular experiences that are happening to individual faculty.

7 So it's a form of what social scientists will oftentimes
8 call triangulation, but instead of using one method that can
9 describe or one source of data that can describe everything, to
10 think about all the different kinds of evidence that you can
11 draw upon.

12 And the purpose of drawing upon all of these different
13 sources of data is to kind of understand how this network works,
14 right, to think about the kind of -- the other relationships
15 between different organizations and the effects that they have
16 and how they produce this phenomenon of targeted harassment that
17 I'm interested in studying.

18 Q. What do you use to ensure the validity of your findings?

19 A. Yeah. So, I mean, that triangulation method I think is a
20 helpful way to think about it and that I'm looking for and
21 analyzing the different patterns that I'm seeing kind of -- and
22 looking for how, you know -- and to make sure that -- that
23 different ways of -- different entryways into the question that
24 I'm -- that there's -- you know, that the different kinds of
25 evidence are -- seem to be describing the same type -- or the

1 phenomenon that I'm studying.

2 I've -- you know, I also present this work and receive
3 feedback in conversation with other scholars and ultimately have
4 subjected it to the peer-review process.

5 Q. Has anybody discredited your research or findings on
6 targeted harassment?

7 A. Not that I'm aware of, no.

8 MR. WERMUTH: At this time, Your Honor, I'd like to
9 offer Dr. Isaac Kamola as an expert in the political economy of
10 higher education, the phenomenon of targeted harassment of
11 faculty for perceived liberal bias, and the consequences of
12 targeted harassment.

13 THE COURT: Do you wish to voir dire the witness?

14 MS. LUKIS: No.

15 THE COURT: You may proceed, Counsel.

16 BY MR. WERMUTH:

17 Q. In your research, what campus groups did you identify as
18 involved in prompting targeted harassment?

19 A. Yeah. So, as I mentioned, I'm interested in kind of, like,
20 the networks of organizations. So there's two kind of main
21 kinds of organizations. There's media groups and, in
22 particular, I look at two: *Campus Reform* and *The College Fix*.
23 And then there's a series of student groups. These are -- I've
24 identified as being both well-funded organizations. They
25 oftentimes have very political projects that they are carrying

1 out on campus.

2 Q. What is *Campus Reform*?

3 A. Yeah. Is it possible to see a slide?

4 Q. Yes.

5 MR. WERMUTH: Please put up Plaintiffs' Demonstrative
6 Exhibit 4.2.

7 BY MR. WERMUTH:

8 Q. So what is *Campus Reform*?

9 A. Is that -- so *Campus Reform* is a project of the Leadership
10 Institute. The Leadership Institute -- and it claims to be
11 America's leading site for college news. The Leadership
12 Institute is an organization that was created by Morton
13 Blackwell in the late 1970s as a way of creating campus
14 activists -- conservative campus activists on college campuses.
15 The idea was that you could recruit college students --
16 conservative college students and arm them with certain skilled
17 strategies, and then those activists then become the -- can go
18 into the political process, right.

19 So the mission is to increase and train, you know, the --
20 to increase the number and effectiveness of conservative
21 activists and leaders and to train them and place them in
22 various political organizations.

23 I think it's really interesting that when Morton Blackwell
24 created the Leadership Institute, he was a really interested in
25 this question of political technology. He was basically

1 saying -- or his analysis was that, you know, the right had good
2 ideas, but it didn't have good techniques at kind of turning
3 those ideas into practical, on-the-ground politics. He was
4 thinking about at the time like Saul Alinsky and others on the
5 left who had kind of developed these strategies, these political
6 strategies, and he was saying the conservative movement lacked
7 similar types of political strategies and lacked kind of a way
8 of training generations of activists in those strategies.

9 And then in that piece, which is really interesting, he
10 described, like, political technology is made up of
11 organizational technology and communications technology, and he
12 argues that these two things are deeply connected with each
13 other and in many ways are not disaggregateable.

14 So in that way I think that it's helpful to think of the
15 Leadership Institute as this incredibly successful training
16 ground for conservative activists. They've trained tens of
17 thousands of conservative activists, including Mitch McConnell.
18 Mike Pence, O'Keefe from Project Veritas and many, many others.

19 Q. How does Leadership Institute hold itself out?

20 A. Well, the Leadership Institute holds itself out as kind of
21 an activist training (indiscernible) --

22 Q. Sorry. Activist training what?

23 A. So the Leadership Institute holds itself out as an
24 organization for training activists, conservative activists.

25 And it's interesting that the Leadership Institute is a

1 project of *Campus Reform*, and it created *Campus Reform* in 2009.
2 And originally *Campus Reform* was thought of as -- or was
3 designed as an extension of this project of the Leadership
4 Institute. It was conceptualized and created as a kind of way
5 for conservative campus activists to meet each other on campus
6 and to organize on particular campuses. So instead of going to
7 the Leadership Institute headquarters and being trained there,
8 there would be nodes for conservative activists on college
9 campuses. And that's why *Campus Reform* was originally created
10 as an extension of that project.

11 Q. I'd like to show you Plaintiffs' Demonstrative Exhibit 4.2.

12 How did *Campus Reform* describe itself before 2013?

13 A. Before 2013 it was very much -- it explained itself, as I
14 just mentioned, as a conservative campus activist group. It
15 very explicitly said that it was committed to fighting back
16 against the liberal administrators and that the leftists were
17 controlling the administration and culture of the campuses and
18 that it requires an organized plan in order to fight back and
19 that it was necessary to kind of identify the weaknesses on your
20 campus and to focus your attack there.

21 In its training materials on this material that we found in
22 archived websites of *Campus Reform*, they give very clear steps
23 about how to engage in such actions, the kinds of provocative
24 activities that students can take, suggests that students
25 videotape those events -- those kind of provocative events, and

1 then can use those in litigation and other types of political
2 mobilization.

3 Q. And what was the apparent target of this activism?

4 A. Yeah. The apparent topic was both -- was, like, liberal
5 academia in general, right, but also what it calls a leftist
6 faculty. In developing the strategy to what would become
7 increasingly more used, it created faculty -- what it called the
8 faculty tracker which listed professors as kind of -- and talked
9 about the kinds of kind of crazy leftist things they were saying
10 as a way of kind of allowing students to kind of write profiles
11 about leftist faculty on college campuses.

12 Q. I am going to take you to Plaintiffs' Demonstrative
13 Exhibit 4.4.

14 A. Yeah.

15 Q. Currently what is *Campus Reform*'s basic mission?

16 A. We identified around 2013, the *Campus Reform* website
17 changes, and *Campus Reform* begins to present itself as a media
18 organization. It calls itself a conservative watchdog that is
19 to expose liberal bias and abuse on the nation's college
20 campuses. So it presents itself as a media organization.

21 And kind of the -- in 2013, there was this kind of branding
22 shift away from this kind of activist network and towards this
23 kind of, like, the presentation as a media organization. By
24 following up with links on the website, you could see that it
25 would still take you back to the resources on how to conduct

1 campus activism. But it was increasingly presenting itself as a
2 media organization, and that penetration has only become more
3 solidified over the years.

4 But I think it's really important to note that its goal has
5 always been to expose liberal bias, so-called liberal bias, on
6 college campuses. In fact, during the course of our research,
7 one of the former *Campus Reform* correspondents that was
8 interviewed gave a contract that they would sign with *Campus*
9 *Reform*, and that contract said that they agreed to expose and
10 report on examples of liberal bias and abuse occurring on U.S.
11 college campuses. And that's what they were signing up to do is
12 to identify liberal bias and views.

13 Q. And so how did *Campus Reform* get contact from campus
14 correspondents?

15 A. It was during this time that it was transitioning from an
16 explicitly activist organization to a seemingly media
17 organization, but it started the campus correspondent project.

18 But basically what it is is it hires college students and
19 then pays them between 50 and \$100 per story. So it gives
20 college students money in order to write stories that expose
21 liberal bias and abuse.

22 It has kind of -- and then it keeps -- on the website, it
23 lists all of their correspondents from various -- across the
24 country from the states that they're in. And these -- and --
25 and, yeah, these students generate much of the content that's on

1 the website.

2 Q. What type of evidence does *Campus Reform* solicit to support
3 its claims of liberal bias?

4 A. So it has -- for example, it has a tip line on its website
5 and that tip line --

6 (Reporter requested clarification.)

7 THE COURT: Tip line.

8 BY MR. WERMUTH:

9 Q. Sorry to interrupt. If you can continue with your answer.

10 A. Sure.

11 It has a tip line on its website in which it solicits tips.
12 It offers a \$50 bounty for tips that then turn into stories.
13 And on that tip line it includes a space for students to upload
14 video content, audio content, or other sources of documentation
15 that it can then turn into stories.

16 Q. And what does it offer to do for people who add video
17 content to its website?

18 A. Under it's tip line -- if you click on the tip line link,
19 it includes language that says that they can offer anonymity to
20 those who provide content.

21 Q. About how many correspondents has *Campus Reform* had in
22 recent years?

23 A. Yeah. So between 20 -- 2020 and 2022, we identified 289
24 campus correspondents, 38 of which claim to be in the state of
25 Florida.

1 Q. How many of those -- what level of financial resources are
2 behind *Campus Reform*?

3 A. Yeah. So *Campus Reform* -- the Leadership Institute, the
4 parent organization, has a budget of about \$32 million. And
5 *Campus Reform* itself on the Leadership Institute tax document is
6 listed as an expense of a little more than \$2 million. So about
7 \$2 million to fund this website that identifies examples of
8 liberal biases.

9 Q. And about how many *Campus Reform* articles about college
10 professors have you identified?

11 A. Yeah. So, I mean, there's quite a number -- there's
12 hundreds of stories about college -- about college professors.
13 And so just to -- just as an example, in 2020, where we had the
14 full data set, we found that there was more than 250 -- I think
15 it's 270 or so stories, and that within those stories, they
16 named 338 faculty members. So 38 -- 338 faculty members, more
17 or less, were kind of described as having -- or we coded as
18 expressing some sort of liberal bias.

19 Q. That was just in one year, in 2020; is that correct?

20 A. That was in 2020, yeah.

21 Q. You had mentioned that *Campus Reform* has published
22 outrageous articles or sensationalized articles. What do you
23 mean by that?

24 A. Yeah. So in the process of spending so much time analyzing
25 stories on *Campus Reform*, we've been able to identify just a

1 number of really clear trends that happen from story to story to
2 story. I was just on the website today and still see exactly
3 the same kind of stories being written.

4 But there's -- the stories are about 600 words, so they are
5 short. They oftentimes have kind of an inflammatory, catchy,
6 kind of clickbaity type of title. In general what they do is
7 they overplay the evidence of, quote/unquote, "liberal bias and
8 abuse." They identify, you know, one tweet that a faculty
9 member makes and turns it into evidence that this is some sort
10 of outrageous misstep and some gross miscarriage of, you know,
11 academic pursuit in this particular instance. And they
12 oftentimes underplay or don't mention things that could be
13 understood as critical of conservative speakers.

14 And there's oftentimes in general -- I think that the --
15 kind of the thing that I noticed most is just a reduction of the
16 complexity of the story. Like, for an organization that's set
17 up explicitly to expose liberal bias and abuse, you see that
18 very clearly in the way that it writes its story is that there's
19 a kind of overplaying, you know, exaggerated kind of account
20 that oftentimes misses the complexity in the Faculty First
21 Responders project, following up with a lot of these faculty
22 members and getting more details about what actually happened on
23 their college campuses and what actually kind of transpired.
24 And seeing the kind of gulf between the supposed headline in the
25 *Campus Reform* story and what actually happened or what my -- the

1 faculty described to me as having happened can be quite stark,
2 right.

3 And there's a number of -- and then -- and then the other
4 goal is to -- or the effect is to create this kind of outraged,
5 sensationalized story where it fits into this kind of mankie of
6 good versus evil/liberal versus conservative dichotomy: Can you
7 believe this outrageous thing that this faculty member said?
8 Or, can you believe these students who are protesting this
9 conservative professor? Or, can you believe this diversity,
10 equity, and inclusion initiative that does this crazy thing?

11 You know, again, kind of overplaying and almost always
12 avoiding the complexity of the issues and kind of engaging with
13 the content in a way that would appreciate the complexities of
14 the issue and also do the work with that kind of understanding.

15 So a lot of the stories that *Campus Reform* writes are about
16 race and racism, right. So, for example, within the discussions
17 of race and racism, there's a concept of whiteness. And
18 whiteness used by sociologists and academics, and increasingly,
19 I think, the broader public has very specific meanings. But as
20 a trend over these stories, there's a failure to explain what
21 the concept of whiteness means. And it gets kind of morphed
22 into this professor said whiteness; therefore, they hate White
23 people, right. And that conflation happens kind of over and
24 over again without really any effort to say, Well, how is this
25 sociologist or how is this professor using this specific term?

1 And that's kind of the trends that I've seen on *Campus*
2 *Reform*.

3 Q. Have you identified examples of that in Florida?

4 A. Yeah, sure. If you can just switch to the next slide.

5 (Technical difficulties.)

6 (Pause in proceedings.)

7 MR. WERMUTH: If it's all right with you, we can just
8 go along with the paper.

9 MS. LUKIS: I love paper.

10 MR. WERMUTH: Just show the witness and --

11 THE COURT: And I've got a copy of it. Is this a new
12 set?

13 MR. WERMUTH: It's the same one.

14 THE COURT: I have mine.

15 MR. WERMUTH: Okay. Is there a way to switch it out
16 so we can see the witness instead of the demonstrative?

17 THE COURTROOM DEPUTY: It says you are sharing. So if
18 you unshare it, it would go back.

19 THE COURT: And, Mr. Wermuth, we're going to go to
20 around 5:30.

21 MR. WERMUTH: Okay. I will at least try to get
22 through these examples.

23 THE COURT: I'm sorry?

24 MR. WERMUTH: I'll at least try to get through these
25 examples for you.

1 THE COURT: Okay.

2 MS. LUKIS: Your Honor, may I place an objection on
3 the record just quickly?

4 I don't think we've heard the word "House Bill 233"
5 yet. So defendants would object on relevance grounds. I don't
6 know what this has to do with the suit.

7 THE COURT: I'll let you respond. I can anticipate
8 your response, but --

9 MR. WERMUTH: Your Honor, in the background of my
10 questioning, I asked about House Bill 233 and his analysis.

11 THE COURT: By the way, let me -- just because this
12 case is about HB -- there are all kinds of subissues. And,
13 quite frankly, I don't want to hear this witness's, necessarily,
14 view on the antishielding provision stuff and interpreting and
15 telling me what it means. Just because you don't mention the
16 House bill doesn't mean it's not relevant.

17 So different question is what's the relevance -- and I
18 think I know. What's the relevance of talking about the fact
19 that there is this, A, movement, which comes as a surprise to no
20 one, to create an issue and exaggerate the issue as a basis to
21 then promote legislation to fix a nonexistent issue?

22 I understand that. It's part of the testimony. I
23 also understand the real danger -- just like when Lou Dobbs lied
24 about one of the orders I did and tweeted out my phone number to
25 everybody on the planet and I got death threats, I understand

1 the dangers of demonizing people. Apparently that's lost on a
2 lot of folks, especially those that aren't on the receiving end
3 of the death threats like I've been.

4 So I understand that I would --

5 MR. WERMUTH: Yes.

6 THE COURT: -- take it that the relevance is there's
7 easier ways to do this, for example, and there's a cost to the
8 recording provision, for example, because you've already said,
9 Goody, goody, Judge, you can sue an empty-pocket student, but
10 that's like getting blood out of a turnip, so who cares. That's
11 really no teeth. That's a toothless dog that's not going to be
12 able to bite. So once you post it -- and we already heard from
13 the last witness about how it goes viral and people lose their
14 jobs and get death threats and everything else.

15 I realize if it's a conservative justice, we can worry
16 about threats to them; but if it's a professor getting death
17 threats, no harm, no foul because they're liberal ideologues.

18 But as I understood it, this is all relevant because
19 it goes to the dangers, there's other ways to do it, and shows
20 the reasonableness of the fear that has been expressed by the
21 plaintiffs.

22 MR. WERMUTH: Yeah, the reasonableness of the fear.

23 THE COURT: Overruled. Relevant.

24 Move on.

25

1 BY MR. WERMUTH:

2 Q. So we are looking at Plaintiffs' Demonstrative 4.5.

3 Professor, can you describe for us this example of an
4 article from *Campus Reform*?

5 A. Yeah, this article from *Campus Reform* in March of 2021 has
6 to do with a class that was being proposed at Florida State
7 University called "The History of Karen." It was taking place
8 kind of in the context of a racial reckoning and some of the
9 examples of White women in parks, you know, and, you know,
10 threatening Black males who are (indiscernible) -- et cetera.

11 There was a number of stories in which this language of
12 Karen was becoming kind of something that people were talking
13 about, and this class was proposed as a summer class in order to
14 kind of address this conversation.

15 So I just want to walk you through a few things and kind of
16 how -- in my expertise reading *Campus Reform* stories, what I
17 notice in this article that is part of the pattern -- a broader
18 pattern that I see.

19 So if you look at the masthead there, it's really small. I
20 apologize. But right under the "m" in reform, it says: *Send a*
21 *tip*. And that was the tip line that I was mentioning before.

22 So you could click that button right at the front -- at the
23 top of the page --

24 THE COURT: Doctor, let me interject and find out,
25 because I think I'm following the testimony as a predicate,

1 because you've also -- or have read and are familiar with the
2 provisions of HB 233; right?

3 THE WITNESS: Yes.

4 THE COURT: All right. As I understand this and why
5 you're going through these examples and these backgrounds is the
6 Florida Legislature has passed a law where they encourage
7 students to be active culture warriors, give them a means to do
8 it by recording professors --

9 THE WITNESS: Yes.

10 THE COURT: -- encourage them to sue their professors.
11 And then on top of that, you are testifying, Judge, this is the
12 real-world consequences --

13 THE WITNESS: Yes.

14 THE COURT: -- if you disseminate all this
15 information, because you have organizations, such as the one
16 you're testifying about, that will jump on it, disseminate it,
17 and has very real-world consequences that can result in harm to
18 individuals, best-case scenario hurting their reputation
19 falsely, damaging them, ruining their professional reputation,
20 worst-case scenario resulting in physical harm to them?

21 Do I understand the -- I'm not -- not sue the
22 professors, sue the universities. My apologies.

23 I'm talking fast because it's 5:25.

24 I was trying to figure out -- do I understand the
25 general gist of these are the pieces that you're going through,

1 because ultimately that's how it fits into the bigger puzzle,
2 that you want to relay information to the Court through creating
3 that puzzle -- or putting the puzzle together?

4 THE WITNESS: Yeah. The -- what I'm interested in and
5 what my research is is examining kind of the ways in which these
6 organizations have developed to specialize in getting
7 information that could include recordings and how that
8 information gets turned into stories that I've identified as
9 generating targeted harassment against faculty.

10 THE COURT: I went one step too far. That's the
11 facts.

12 And then, Mr. Wermuth, Judge, I'm then going to take
13 those facts, and what's -- part of what you just said, Judge, is
14 the legal argument that I'm going to base on those facts?

15 MR. WERMUTH: Yes.

16 THE COURT: All right.

17 My apologies, Professor. I actually did what I
18 accused the lawyers of doing, which is going one step beyond
19 what you're doing. But I've got it. I understand why we are
20 here, and I understand why we're talking about this.

21 And I just spent three of your minutes, so you've got
22 five to ten minutes left.

23 BY MR. WERMUTH:

24 Q. Take us through the elements of this article and explain
25 how this operates in practice.

1 A. Sure. As I mentioned, this is kind of a typical story. So
2 if you look at -- first of all, so there's the tip line.
3 There's a -- in the title, right, there's oftentimes, in many of
4 these stories, the use of quotation marks in order to undermine
5 the authenticity or to undermine or question or to cast, like,
6 deviant intent to these kinds of headlines, to make the
7 headlines more salacious and to undermine the credibility of the
8 professor.

9 I think it's really interesting that in the right-hand
10 column right above the picture there's a quote by Charles Blow
11 who, as you know, is an opinion editor at the *New York Times*.

12 And the quote says: *We like to masculinize White supremacy*
13 *to presume it reeks of testosterone, when, in fact, it is just*
14 *as likely to be spirited [sic] by perfume.*

15 So, again, this is taken from the poster that was used to
16 advertise this story. If you -- or, excuse me -- to advertise
17 the class.

18 If you look down to the author of the story, Wyatt
19 Eichholz, he is a vice president of his chapters of Young
20 Americans for Freedom, and I'll talk -- we can talk about what
21 that means later, but I just want to flag that right now.

22 And then if we go to the next page, or the pull-out, here
23 it says -- it has that quote by Charles Blow, and it says, "The
24 poster reads," right, as opposed to saying a quote that the
25 author used in introducing the class, right?

1 So, again, I see this quite often where there's kind of a
2 conflation of who says what and kind of attributing words to
3 other people not being clear about what the content is.

4 I think that if you look, then, at the next paragraph, what
5 you see is just a list of books, right, that the author of this
6 piece is just listing -- just drawing from the poster or the
7 course description kind of what -- the books that are going to
8 be taught and assuming that the fact that they're being taught
9 is some sort of outrage, right, you know, assuming that the
10 title -- that there's something about this that is newsworthy,
11 right?

12 Like, there's no reason why a professor's syllabus and the
13 three books that they choose to teach for a semester is in any
14 way newsworthy, but the fact that it ends up in a news story
15 like this, a so-called news story, is indicating that there's
16 something questionable or uncouth that's going on.

17 And then you'll notice that the last book is by Brittney
18 Cooper, and then the article says, "On whom *Campus Reform*
19 previously reported," right? And this is kind of constant where
20 there's a kind of -- there's a number of faculty members who get
21 published, get written about over and over again, and Brittney
22 Cooper is a Black scholar of African-American studies at Rutgers
23 University, highly regarded.

24 And the idea that there's something devious about her,
25 again, because *Campus Reform* once wrote a story about something

1 that she tweeted, right? And, again, this is another trope
2 where what takes place on social media becomes conflated with
3 what goes on in the classroom. Like, Can you believe this
4 faculty member sent out this tweet? They're clearly
5 indoctrinating our students within the classroom, and kind of
6 making that as a self-evident claim about common sense.

7 And then if you look at the next paragraph, it says,
8 "According to her profile" -- and then there's a link, right? A
9 lot of *Campus Reform* stories, they include the link of the
10 professor that goes to their professional page as if to say, you
11 know please -- you know, Here's all the contact information that
12 you need.

13 When we contacted Professor Martinez, as part of the
14 Faculty First Responders project, her email was available on
15 that website. And if you look at that profile, if you click on
16 that link today, it just gives the building that she teaches in
17 and no other contact information.

18 This is something that reoccurs over and over again where
19 I've talked to a number of faculty members who, after being
20 written about by *Campus Reform*, will scrub the website of their
21 contact information, which is really detrimental because part of
22 the things that academics do is be in contact with other people:
23 Hey, I like your book. Can I invite you to campus? Can you --
24 do you want to present on this panel with me? I really
25 admire -- can we be in conversation, right?

1 So this idea of having to remove or removing your email
2 content -- contact information, you know, is a trend that I've
3 seen over and over again, and many faculty also delete social
4 media as a result.

5 So I think that those are some of the elements that I see
6 over and over again that are illustrated on this one example.

7 Q. Let's turn to Plaintiffs' Demonstrative Exhibit 4.6.

8 And please tell us, Dr. Kamola, what happened after the
9 "History of Karen" was published, this article?

10 A. Yeah. So *Campus Reform* published this article kind of
11 making this -- not an argument, just kind of putting a bunch of
12 stuff that kind of made it seem like there is something
13 nefarious that was going on in this class. And there was a
14 bunch of outrage that was expressed towards the institution, and
15 the institution ended up canceling that class.

16 This is something that reporting has talked about *Campus*
17 *Reform* declaring those victories, right, and that there's a
18 number of instances in which when they cause a policy change,
19 when they cause a faculty to be fired, when their story leads to
20 some sort of outcome, they oftentimes follow up, as indicates
21 here, with another story saying, Aha, see what we did.

22 So a personal example is when *Campus Reform* wrote about my
23 Faculty First Responders project. They said, Can you believe
24 this faculty member is looking for a summer intern? Isn't this,
25 you know, problematic or -- and then when my administration put

1 that behind a password protect wall, as opposed to in the open
2 Internet, *Campus Reform* then published a story saying, See, we
3 made it so that Professor Kamola pulled that advertise -- that
4 search for an internship.

5 So that idea of claiming -- seeing that their reporting --
6 right, quote/unquote, "a reporting" results in some sort of
7 outcome that falls in step with their broader narrative that the
8 university is full of liberal bias and -- yeah.

9 Q. What other examples do you have of articles directed at
10 specific college faculty members?

11 A. Yeah. Sure.

12 So if you turn to the next exhibit, the next example.

13 Q. Plaintiffs' Demonstrative Exhibit 4.7.

14 A. Yeah.

15 This is another example where in this case at University of
16 Central Florida there was a web design class, and the professor,
17 you know, taught some aspect of web design, and in order to
18 demonstrate what they had talked about in that class -- what
19 Rachel Winter, the professor, went to demonstrate and pulled up
20 a -- her own website, which was for the Socialism Happy Hour --
21 again in quotes -- saying there's something amiss here.

22 And even though the story doesn't say that she then got on
23 her chair and declared her love for Bernie Sanders or, you know,
24 tried to convert students to socialism, in fact, the story says,
25 you know, the website, you know, includes a definition of

1 socialism. It includes this and that, which -- none of which,
2 like, mentions any sort of effort to, quote/unquote,
3 "indoctrinate" students. But instead, this image taken from the
4 class, right, an image from the class, was then passed off to
5 *Campus Reform*.

6 And then here it says that the student who wished to remain
7 anonymous said, quote: *I believe these professors prey on the*
8 *eager minds of young students like myself, the student said.*
9 *They know what they're doing, right?*

10 So quoted a student who just asserted that what was taking
11 place in the classroom was clearly some sort of indoctrination
12 and that the professor was there to prey on their mind, and this
13 became the kind of narrative of this particular story.

14 And then the story then goes on to talk about how House
15 Bill 233 -- he says that Ron DeSantis has just signed a bill,
16 and there's a link there that brings you to the text of House
17 Bill 233 and talks about the shielding provision and how this
18 might be useful in this kind of instance.

19 THE COURT: Counsel, is this a good stopping point?

20 MR. WERMUTH: This is a good stopping point.

21 THE COURT: All right. Thank you, Doctor. You're
22 free to go.

23 I'm going to address the lawyers briefly and then
24 we're going to break for the evening. They'll be back in touch
25 with you.

1 Thank you.

2 THE WITNESS: Great. Thank you.

3 THE COURT: Let me go back and clarify -- and I was
4 trying to be quick and didn't mean to be too sharp on my ruling
5 because I was saying, Overruled, we're going to move on, because
6 I just didn't want to spend 20 minutes putting my ruling on the
7 record.

8 I'm fully aware that not all relevant evidence is
9 equally relevant. Some is really, really relevant to the heart
10 of it, and some of it is supporting evidence that's not directly
11 relevant but supports another point that may be a secondary
12 point that's being made. And 403, which it doesn't just deal
13 with prejudice, also deals with the Court regulating evidence
14 and avoiding wasting time and so forth, and so it's much broader
15 than that.

16 And so if Mr. Wermuth had suggested, Judge, we're
17 going to spend as much time as we did with the first expert
18 giving anecdotes and going through this, then I would have a
19 much different ruling. I want to make that clear. But if it
20 takes -- which almost always -- 30 or 35 minutes to put
21 somebody's qualifications on, and then they're going to talk for
22 an hour about something, in the big picture, regulating the flow
23 of evidence, that's where if it's not as relevant or as critical
24 as some evidence where you may spend a day and a half putting on
25 a witness, so that's where I was drawing the line.

1 So I -- in so stating I was not suggesting that
2 Ms. Lukis's thoughtful objection -- because I didn't give her
3 additional time to go beyond just saying it wasn't relevant or
4 respond, because I understood her argument that she didn't think
5 it was relevant at all but, at most, it had limited value, and
6 my response to that would have been, That's why this is going to
7 be a shorter witness and not a five-hour witness; okay?

8 All right. Y'all are going to meet. You're going to
9 discuss a schedule moving forward. We'll -- tomorrow's Friday,
10 so we'll have to discuss it at sometime on Friday and figure
11 where we're going to be at. We'll put on as many witnesses
12 tomorrow. You're going to send me -- not me. You're going to
13 send the courtroom deputy a new list and make sure you copy
14 opposing counsel so we know who the lineup is for tomorrow.

15 We're going to have an updated exhibit list so everybody
16 knows what's been admitted. Mr. Levesque's going to respond to
17 the latest motion with the exhibits by 5 p.m. on Sunday. I
18 mean, he doesn't have to, but somebody from his team will
19 respond by 5 p.m. on Sunday.

20 MR. WERMUTH: There's a minor wrinkle here. Tomorrow
21 morning I think we're going to have to slide in a different
22 witness.

23 THE COURT: I don't care what order we do people in.

24 MR. WERMUTH: Okay.

25 THE COURT: First of all, I'd let you do it anyway,

1 but, regardless, it's a bench trial and, again, I know I'm just
2 a simple country judge, but I probably can follow the evidence.

3 MR. WERMUTH: Okay. Our first witness tomorrow will
4 be Senator Berman, Lori Berman.

5 THE COURT: Okay. The other thing, if anybody wants
6 to -- because it makes it a lot easier in a bench trial than a
7 jury trial, which is why I'm less concerned about stopping,
8 having a lengthy sidebar, having y'all present case law and
9 stuff.

10 Mr. Levesque, if anybody wants to be heard about
11 filing something separately and saying, Judge, we think we want
12 to circle back and address the scope of the privilege and what
13 it would extend to, you can't unring a bell in front of a jury,
14 but I certainly can unring a bell and not include -- rely on --
15 I'm not suggesting I will or won't -- and I'm not sure how
16 critical any of it is, but if you want, I certainly can read
17 supplemental papers and y'all can put in writing saying, Judge,
18 we think you -- whether it's not completely limitless, you know,
19 we, with all due respect, believe that it's slightly different
20 lines than you drew, we certainly can revisit that.

21 And I'm just using that as an example. That holds
22 true for both sides. If there's some evidentiary thing that
23 I've let on or said, for example, to the plaintiffs, I'm only
24 considering it for this limited purpose, Well, Judge, we'd like
25 to present this case law that says it's not just for that

1 limited purpose, also this.

2 Or, Mr. Levesque, Judge, I don't think, respectfully,
3 you should consider this part of this witness's testimony
4 because we'd like you to revisit the scope, I can do that. I'm
5 not -- I'm not asking y'all to do it. I'm not encouraging y'all
6 to do it. I'm just saying because it's a bench trial, if
7 somebody wants to do that, I'm happy -- quite frankly, I would
8 rather you present that to me -- rather than on the fly at
9 trial -- on the fly at trial and then for the first time have a
10 full-throated presentation in front of the appellate court, it
11 would make sense to me to do it now and say, Judge, you
12 shouldn't consider it when you issue your final order and here's
13 why.

14 But I'll leave that to y'all. That's just a
15 suggestion for both sides if there's something y'all want to
16 revisit in that regard. Either I can consider something for a
17 larger purpose or not at all or a more limited purpose,
18 depending on whatever case law you want to present.

19 MR. LEVESQUE: So you want that by 7:30 tomorrow?
20 Just kidding, Your Honor. I understand.

21 THE COURT: Also, because we're going to -- we've got
22 more time to sort of finish, you know, everything -- we know
23 we're going to carry over into next week and potentially the
24 week after, so we've got time before the close of evidence for
25 us to wrap up.

1 And before not only the close of evidence, but also
2 before y'all present your closing arguments, because that's the
3 only limit I'll put on it, I want to wrap up any of these issues
4 before -- because I really don't want y'all chasing windmills
5 and then -- because then it could dramatically change your
6 closing if you're focusing on something I'm not even going to
7 consider.

8 So that would be my only qualifier. We need to
9 address those points if either side wants to bring them up
10 before y'all do your closing, written closing papers; okay?

11 All right. I hope everybody has a pleasant evening
12 and court is in recess.

13 (Proceedings recessed at 5:42 PM on Thursday, January 12,
14 2023.)

15 * * * * *

16 I certify that the foregoing is a correct transcript
17 from the record of proceedings in the above-entitled matter.
18 Any redaction of personal data identifiers pursuant to the
19 Judicial Conference Policy on Privacy is noted within the
20 transcript.

21 /s/ Megan A. Hague

22 1/14/2023

23 Megan A. Hague, RPR, FCRR, CSR
24 Official U.S. Court Reporter

25 Date

I N D E X**PLAINTIFFS' WITNESSES** **PAGE****JULIE ADAMS**

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DR. BARRY CLAYTON EDWARDS

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8	Curriculum vitae of Dr. Kamola	1095	1095
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JOINT EXHIBITS **OFFERED** **RECEIVED**

ECF NO. 251	The joint exhibits, plaintiffs' unobjected-to exhibits, and the defense's unobjected-to exhibits a	896	896
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

WILLIAM A. LINK, et al.,)
)
) Case No: 4:21cv271
)
) Tallahassee, Florida
) January 13, 2023
RICHARD CORCORAN, et al.,)
) 8:29 AM
) VOLUME V
)
_____)

TRANSCRIPT OF *EXPEDITED* BENCH TRIAL PROCEEDINGS
BEFORE THE HONORABLE MARK E. WALKER
UNITED STATES CHIEF DISTRICT JUDGE
(Pages 1140 through 1351)

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*Proceedings reported by stenotype reporter.
Transcript produced by Computer-Aided Transcription.*

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P R O C E E D I N G S

(Call to Order of the Court at 8:29 AM on Friday,
January 13, 2023.)

THE COURT: All right. We are back on the record. We
are here for the fifth day of the bench trial in 4:21cv271.

When we broke yesterday evening, we had a witness that
was in the middle of their direct, and we originally were told
that we were going to have to make adjustments because we were
going to have a different witness this morning. But it's my
understanding that there's been a change in the lineup, and we
are returning to the doctor from yesterday.

Is that correct, Mr. Wermuth?

MR. WERMUTH: That's correct.

THE COURT: And Ms. Lukis is present.

And, Ms. Lukis, you're still doing the cross?

MS. LUKIS: Yes, Your Honor.

THE COURT: All right. Thank you very much.

And we can get the witness on the line. I am going to
have him resworn since it's a new day.

THE COURTROOM DEPUTY: Doctor, can you hear me?

THE WITNESS: I can, yes.

THE COURTROOM DEPUTY: Please raise your right hand.

DR. ISAAC KAMOLA, PLAINTIFFS WITNESS, DULY SWORN

THE COURTROOM DEPUTY: Please state your name for the
record.

1 THE WITNESS: I'm Isaac Kamola.

2 THE COURTROOM DEPUTY: Thank you.

3 CONTINUED DIRECT EXAMINATION

4 BY MR. WERMUTH:

5 Q. Good morning, Dr. Kamola.

6 A. Good morning.

7 Q. Where we left off yesterday, I think we were at Plaintiffs'
8 Demonstrative Exhibit 4.7. I'd like to show that document to
9 you, again.

10 Now, you were describing this document, I believe, as an
11 example of an article directed at specific college faculty. I
12 think we were --

13 A. Uh-huh.

14 Q. -- on the last portion of the article where you were
15 discussing some of the features of this article --

16 A. Sure. Yes.

17 Q. -- specifically as it relates to HB 233?

18 A. Yes, that's right.

19 Q. And I think you mentioned that the article referenced what
20 was -- what HB 233 was useful for.

21 What did you mean by that?

22 A. That the article here seems to state that House Bill 233 --
23 and the hyperlink on legislation goes right to the bill docket.
24 And, basically, the article says -- claims that HB 233 *seeks to*
25 *improve civics education by 'shielding students, staff, and*

1 *faculty from certain speech' and permitting students to record*
2 *or publish their instructors' lectures.*

3 I think what's interesting here is that you get this
4 garbled, kind of half -- like the -- obviously, that
5 interpretation of, like, improved civics education by shielding
6 students. I mean, that's kind of a weird interpretation of
7 House Bill 233, but it also seems to be celebrating of the
8 recording provision and emphasizing that it allows students to
9 publish instructors' lectures.

10 Q. What are some examples of articles *Campus Reform* has
11 published regarding activities and events on college campuses in
12 Florida?

13 A. Sure. Before I mention that, I want to point out one thing
14 that I missed yesterday about this particular section of text
15 too.

16 If you look at -- the very first sentence is that -- in
17 that -- the sentence where it says: *Winter detailed the coding*
18 *of the page in two separate YouTube videos. Those online*
19 *tutorials can be viewed here and here.* So, again -- remember,
20 this is a web coding class. The professor, Professor Winter,
21 had created some YouTube videos that helped kind of students
22 walk through some of the things that were in class. This -- the
23 fact that they're posted as part of a story or in any way
24 assumed to be newsworthy I think assumes -- it again has that
25 assumption that there's something amiss here.

1 And then if you click on those links today, you'll find
2 that those links have been deactivated. And, again, this is
3 another example of what I pointed out in the example of
4 Professor Martinez in the History of Karen class where -- the
5 removal of access, the pulling down of content oftentimes
6 following the -- a publication in an outlet like this.

7 And so as far as other kinds of events, I guess it's really
8 important that --

9 Q. Actually -- sorry, Dr. Kamola -- I forgot -- can you tell
10 us something about the author of this article?

11 A. Oh, yeah. This author -- the article was written by a -- a
12 *Campus Reform* correspondent who -- we were able to track the
13 total number of stories that they had published, and using the
14 formula that was available in the contract, we calculated that
15 he had made more than \$20,000 publishing *Campus Reform* stories,
16 so publishing at the known pay rate. And he started midyear, so
17 in about -- in less than a year he made tens of thousands of
18 dollars publishing articles for *Campus Reform*. He was quite
19 prolific in that.

20 Q. Okay. So moving on to the next category of articles, what
21 are some examples of articles *Campus Reform* has published
22 regarding events at Florida campuses?

23 A. Yeah, so I think it's really important that *Campus Reform*
24 covers, you know, examples of what goes on in the classroom. It
25 covers examples from social media things that faculty say, but

1 it also oftentimes covers events on campus. And I think -- the
2 juxtaposition of two articles on Florida campuses at University
3 of Florida I think is particularly instructive in pointing out
4 kind of the way that *Campus Reform* kind of crafts or presents
5 its message.

6 So in 2017, um, um -- sorry. I have to get my coffee in
7 me. I'm a -- um, um -- oh, the White supremacist -- oh, excuse
8 me -- a White nationalist -- sorry. The name is escaping me
9 this morning.

10 Q. Are you referencing Richard Spencer?

11 A. Yeah, Richard Spencer. Excuse me. Thank you. But the
12 White nationalist Richard Spencer was invited to the University
13 of Florida.

14 And, you know, as many of us know, Richard Spencer has
15 called for the kind of resegregation, the creation of a White
16 ethnostate, right, has talked about the -- kind of the
17 superiority of White culture and has called for the creation of
18 a White ethnostate in the United States, which would, obviously,
19 have to be done through violence as part of his White
20 nationalist project that he's been a part of.

21 He was invited to the University of Florida. He gave a
22 talk at the University of Florida -- excuse me -- and there was
23 a number of students and protests -- and faculty who protested
24 that, and there was -- he -- the article about his visit in the
25 *Campus Reform* only focused on those students and faculty who

1 were protesting his speech, right, not talking about the reasons
2 why students, especially students of color, might be critical of
3 having somebody like Richard Spencer on campus, that there are
4 very good reasons that reasonable people could disagree as to
5 why White nationalism should or should not be allowed, right.

6 There's a free speech absolutist argument. There's a --
7 kind of an argument that acknowledges the kind of -- the harm
8 that speakers like Richard Spencer can do on campus, that
9 reasonable people can disagree and, at the very least, you have
10 to understand and take seriously who Richard Spencer is and what
11 background he is and why students and faculty might disagree or
12 raise issues about his presence on campus.

13 And then -- but, however, the *Campus Reform* story included
14 none of that context. It only focused on the ways in which
15 students and faculty were critical of -- of his -- his presence
16 on campus.

17 And then two years later, Ibram X. Kendi came to campus,
18 and Kendi is a foremost scholar of race in America. He's
19 published a number of really significant books, widely
20 acknowledged in academia and as a public intellectual as a
21 thinker of race and racism in America. He has -- you know, he's
22 a professor at Boston University, a widely regarded scholar.

23 And in the course of his talk, he made a mention of
24 liberation theology, which many scholars of race do talk about
25 liberation theology. There's nothing in any way abnormal about

1 taking liberation theology, like the religious thinking of Black
2 people, especially in the global South, as an important point of
3 analysis.

4 And, instead, the story that the *Campus Reform* -- that
5 *Campus Reform* published took that mention of -- of liberation
6 theology and turned -- and connected it to Jeremiah Wright, who
7 has brought the very controversial -- a reverend that --
8 Barack Obama attended his church -- and kind of made this
9 connection, basically saying Kendi said liberation theology,
10 Jeremiah Wright claims to be a liberation theologian, and kind
11 of blended these whole things and used that as a kind of attack
12 on Kendi, to make him seem like he is some sort of fringe figure
13 who would -- you know, the assumption was that he would -- he
14 was saying the same things as the kind of incendiary things that
15 Jeremiah Wright was recorded as having said.

16 And then I think that, you know, Kendi has been a regular
17 target of *Campus Reform* stories. They've published a dozen or
18 two dozen articles that kind of talk about him and oftentimes in
19 the same way, oftentimes without kind of engaging the content of
20 his speech and instead making -- you know, making kind of these
21 accusations about what he means -- what his argument is, without
22 demonstrating a good faith engagement with the ideas that he
23 presents.

24 Q. Is *Campus Reform* still operating today?

25 A. They are. I was on the website yesterday.

1 Q. Does it still follow the same pattern of reporting that
2 you've mentioned today?

3 A. Yeah, it's the -- the pattern that I've been following for
4 two years now, two and a half years is very much the same in
5 terms of the content that it -- the kinds of content it
6 generates.

7 Q. All right.

8 A. I guess it's two years, not two and a half.

9 Q. Okay.

10 THE COURT: Mr. Wermuth, let me ask you a brief
11 question, and maybe I didn't phrase it as well yesterday.

12 As I understand, this is -- part of the purpose of
13 this testimony is as it relates to, for example, the recording
14 provisions and the fears expressed by the plaintiffs who are
15 professors are reasonable. Is that one of the bases of --

16 MR. WERMUTH: Yes.

17 THE COURT: I mean, is that part of the relevance of
18 this testimony?

19 MR. WERMUTH: Yeah, part of the relevance of his
20 testimony is the reasonable fear felt by members of UFF, as well
21 as the other plaintiffs in this case.

22 THE COURT: The idea being that you already had this
23 organized movement afoot to distort, disseminate, and attack,
24 and that if you then give them the tools of recorded snippets
25 that they can pull out of context like -- which was the point of

1 the last statement, you run articles that misrepresent things
2 and you then misrepresent the snippets and stuff, it simply
3 would be even more explosive in terms of putting targets on
4 professors.

5 MR. WERMUTH: Yes. I mean, it's basically a cottage
6 industry of so-called media groups that are weaponizing this
7 sort of rhetoric, and HB 233 adds fuel to the fire.

8 THE COURT: I just wanted to make sure I understood
9 the -- so it primarily goes to the standing issue.

10 MR. WERMUTH: Primarily goes to standing and also, you
11 know, the expectation of what will happen in the future.

12 THE COURT: I understand. That is why my -- well, the
13 reasonableness in why it is chilling and why people would
14 respond the way they're responding.

15 MR. WERMUTH: Yes.

16 THE COURT: I understand.

17 MR. WERMUTH: Let's pull up Plaintiffs' Demonstrative
18 Exhibit 4.8.

19 BY MR. WERMUTH:

20 Q. What is *The College Fix*?

21 A. *The College Fix* is another organization that's similar to
22 *Campus Reform*. Unlike *Campus Reform*, it's not part of the
23 broader political organization, like Leadership Institute, but
24 it's kind of a standalone. It's a project of the Student Free
25 Press Association. The Student Free Press Association was

1 originally created as a -- kind of a venue for conservative
2 bloggers and journalists, a kind of professional association.

3 And then *The College Fix* is -- the publishing of *The*
4 *College Fix* followed from kind of a large injection of money
5 from conservative donors, turning it into a kind of -- an entity
6 that is much like the *Campus Reform* in terms of it focuses on
7 higher education. It is set up to identify a liberal bias --
8 so-called liberal bias in higher education.

9 On its website, it kind of appears more of like a
10 journalism -- you know, training journalism for students.
11 However, if you look at the kind of -- the perspectives, the
12 kinds of material that's presented for donors, you have them
13 claiming to not only be the nation's -- a leading conservative
14 newswire, but also that their goal is to, quote, *bear witness to*
15 *the ongoing scandal of political correctness and left-wing*
16 *orthodoxy in America's colleges and universities through our*
17 *original campus-focused journalism and*, also like Leadership
18 Institute, to *create a pipeline of talented and principled young*
19 *people* to send into a conservative media. And, again, like
20 *Campus Reform*, they explicitly say their goal is to, quote, *help*
21 *correct the bias that plagues our universities and our media.*

22 So that idea of the -- the self-description is not, We are
23 a group of student journalists who's interested in exploring
24 issues on campus and campus culture wherever the facts may lead
25 us, but are, instead, saying, We are starting from the

1 presumption that there is a bias on college campuses, and we are
2 acting in a political way when we see this entity as an entity
3 that will help advance a certain political project, which is
4 to -- you know, to shape how issues on college campuses are
5 being reported.

6 THE COURT: Doctor, I'm not suggesting there is or is
7 not a moral equivalency, but have you done any sort of analysis
8 on groups that are organized to disseminate information, for
9 example, as part of the No Platform movement, about speakers and
10 circulating -- and, again, with very one-sided characterizations
11 of the speakers, trying to block them and try to organize to
12 block folks from speaking on campus? For example, there was a
13 highly publicized effort to stop Condoleezza Rice from speaking
14 on campus and -- essentially, she was at fault for every ill
15 that happened in the Middle East and, therefore, she should not
16 be given a platform to speak.

17 THE WITNESS: Yeah.

18 THE COURT: Are there parallel groups such as *The*
19 *College Fix* and others that highlight, circulate, overstate,
20 misstate, and try to block speakers, for example, from coming?

21 THE WITNESS: Sure.

22 THE COURT: And that may not be part of what you do.

23 THE WITNESS: Yeah, there -- I have spent a lot of
24 time looking at various college controversies. Especially in
25 the book, we examine a number of college controversies, such as

1 Charles Murray at Middlebury and other kind of very high-profile
2 protests, much like the Condoleezza Rice example.

3 In a lot of the issues that I've studied -- I can't
4 say in all issues, but in many of the issues, in a number of
5 those instances, it's driven by local concerns, right, so that
6 there is a -- a group of students that feel aggrieved, who feel
7 some sort of threat because of the speaker, right. So if a
8 speaker is coming that has explicitly antitrans messages, there
9 may be trans students on campus who feel, you know, under attack
10 by that message being presented on campus, somebody who's
11 denying their personhood. They feel threatened by that kind of
12 language and organize kind of campus protests.

13 THE COURT: Doctor, I don't want to -- because I'm
14 burning up so much time of the lawyers, I just want to make
15 sure -- as I understand your response, Yes, Judge, people
16 protest. Yes -- I mean, try to block speakers. I have studied
17 that. That's part of my review. It's in my book. But in those
18 cases what's different is it's -- it's peculiar to a particular
19 locality, and there's not this sort of national effort through
20 the Internet and a paid effort to -- organized effort. It's
21 simply -- it's more from the ground up, local dispute, as
22 opposed to what I've described this phenomenon with the two
23 entities that I've already discussed, namely, the *Campus Reform*
24 and *The College Fix*. So that's why it's different in kind,
25 because it doesn't -- it's peculiar to a particular event and

1 not an organized, ongoing, paid effort to drive a narrative; is
2 that correct?

3 THE WITNESS: That's correct. There may be a few,
4 like, very minor -- so, for example, the BDS activists who are
5 advocating for the boycott of Israel, there are some kind of
6 national and international groups that may have small chapters,
7 you know, on campus.

8 So there may be some small organizations that connect
9 students, but they're oftentimes around a particular issue,
10 right, whereas the *Campus Reform* and *The College Fix* are not
11 only much better funded, but are generating a steady stream, a
12 drumbeat that has the same kind of message of liberal bias and
13 conservative persecution, and there's nothing comparable that I
14 found.

15 THE COURT: You answered my question. Thank you.

16 BY MR. WERMUTH:

17 Q. How does *The College Fix* get its content?

18 A. It has a number of paid editors. It has an editor board
19 that produces a number of -- much of the content. They also
20 have -- a number of the bylines are under *The College Fix* staff,
21 and then they also have a little shy of 150 students, much like
22 the *Campus Reform* -- much like *Campus Reform* that produce
23 content as well.

24 Q. How does *The College Fix* fit into your analysis of targeted
25 harassment of faculty?

1 A. Yeah. The content of the stories that they produce is very
2 similar in terms of, you know, the content itself, how the
3 stories are formulated, the kind of clickbaity titles, the use
4 of quotation marks, the assumption of global bias, the
5 willingness to identify and overstate some sort of liberal abuse
6 and not recognize a reasonable concern that others might have.
7 All of that is fairly consistent. Oftentimes *The College Fix*
8 and *Campus Reform* will cover the same issue and oftentimes in
9 pretty similar ways.

10 Q. What other organizations on college campuses have you
11 studied in your analysis of targeted harassment of faculty?

12 A. Another important part of the story is a number of student
13 groups that are on campus. So I've looked -- in addition to the
14 Leadership Institute, which has a number of -- has a presence on
15 campuses, there's also Young America's for Freedom, Young
16 Americans for Liberty, Students for Liberty, as well as Turning
17 Point USA, and these student groups are active on many college
18 campuses and can in various ways feed into this narrative that
19 there's a broad crisis of free speech in higher education and
20 that there is liberal bias in higher education.

21 Q. What are some of the, you know, programming that these
22 organizations do on college campuses?

23 A. So Young Americans for Freedom was created in the late
24 '70s -- or late '60s -- or in the '60s -- I think in 1960 -- by
25 William F. Buckley kind of to build off of the Goldwater

1 campaign and to kind of galvanize young conservatives into a
2 growing conservative movement. It kind of became the heart of
3 the conservative movement with close ties to Reagan, went
4 through some years of kind of mine run defunding, not very
5 active, and then in recent years, it's become very active on
6 college campuses.

7 Young Americans for Freedom, they have things like, you
8 know, trainings. They bring -- they train students in engaging
9 in campus activism, which includes training in videotaping and
10 capturing kind of these provocative interactions with
11 administrators. They have engaged in litigation around free
12 speech issues where they use kind of the controversies that they
13 generate.

14 They also, I think kind of really significantly, have
15 what's called the Speakers Bureau, and what the Speakers Bureau
16 is is if you are a Young Americans for Freedom chapter, you can
17 go to their website -- they have a list of, you know, dozens and
18 dozens of speakers, some who are credible academics and some of
19 them of who are kind of provocator podcasters, media
20 personalities who are known for making incendiary comments, you
21 know, professional provocators. And you can go to the website
22 and, you know, request to have the speaker from the Speakers
23 Bureau sent to your campus.

24 So it's kind of a channel for students to have a kind of
25 pipeline of kind of high-profile, oftentimes provocative,

1 speakers who come to college campuses, which is highly unusual
2 because, you know, oftentimes when a student wants to bring a
3 speaker to campus, they have to go around to different
4 departments; they have to beg for money; they have to, you know,
5 try to find a way to convince a faculty member to invite that
6 person to campus, and here is a way for Young Americans for
7 Freedom and those affiliated to bring these high-provocative
8 speakers to college campuses.

9 So if you look at many of the -- kind of the instances
10 of -- that have gone on in recent -- you know, in the last few
11 years of provocative speakers on campus, a lot of them are
12 coming via Young Americans for Freedom.

13 If you look at -- right now there's a big issue of Matt
14 Walsh, who is a podcaster and kind of media personality, who has
15 called trans identities to be a myth, called White supremacy a
16 myth, and he is -- *Campus Reform* and *The College Fix* have been
17 reporting on the reaction that he's getting on campus, and he
18 has been brought to campus through the Young Americans for
19 Freedom's Speakers Bureau.

20 Let's see. Young Americans for Liberty is a student group
21 that was built out of the Students for Ron Paul campaign, and
22 they do lots of things, but they include advocate around campus
23 free speech issues where they -- they are supported in violating
24 free speech -- or free speech zones and trained on how to
25 videotape those altercations, and there's been a bunch of

1 litigation that they've worked with different groups to do -- to
2 challenge colleges and universities.

3 They -- yeah. And then Students for Liberty is very
4 similar but has an international scope, where it has student
5 groups that are set up all around the world and, like Young
6 Americans for Freedom, Young Americas for Liberty have, you
7 know, been very active in the campus free speech issue and kind
8 of this idea that there is a manufacturing -- or what we call in
9 our book a manufacturing of the campus free speech crisis.

10 Q. And you mentioned Turning Point USA.

11 What does Turning Point USA promote?

12 A. Sure.

13 Q. And I think I'll put up Plaintiffs' Demonstrative
14 Exhibit 4.9.

15 A. Yeah. So Turning Point USA is the youngest of these
16 organizations and was created by Charlie Kirk when he was 18.
17 Kirk was an activist who really saw higher education as an
18 important battlefield, because his book that he published is
19 actually called *Campus Battlefield*, and he -- in that book he
20 talks about how higher education is ripe with communist
21 indoctrination, et cetera, et cetera. He was able to convince a
22 number of very wealthy donors to give him some seed money about
23 ten years ago, and in the subsequent years, this organization
24 has grown and grown and grown and become quite prominent.

25 In particular, in addition to having campus chapters, it's

1 been incredibly savvy in terms of social media, has very, like,
2 meet the (indiscernible) campaigns and kind of very -- kind of
3 gives out a kind of ultralibertarian and ultraconservative --
4 increasingly Christian nationalist kind of set of claims in this
5 kind of very mini provocative -- highly provocative way,
6 oftentimes of little content.

7 So, for example, Turning Point USA made a big splash when
8 it -- in order to accuse students of being snowflakes and being
9 babies, one of its organizers wore a diaper on campus and kind
10 of created national news. They've been behind some of the kind
11 of affirmative action bake sales and stuff like that. It's
12 highly provocative displays of -- of, you know, kind of gotcha,
13 you know, not very content rich but very kind of provocative
14 campus issues.

15 And, again, you'll see in the description there that
16 Turning Point empowers its citizen to rise up against the
17 radical left in defense of freedom, free markets, and limited
18 government, you know -- and so, again, the argument is that
19 there's this radical left and that America's freedom is kind of
20 in this existential threat against this radical left and that
21 radical left includes, in particular, on college campuses.

22 So Turning Point also has this huge budget, and they bring
23 in -- they have a number of seminars, kind of conferences where
24 they bring in students from different campuses, give them -- you
25 know, pay for their accommodations, pay for their travel, and

1 there are kind of these big parties, organizing scenes and to
2 kind of rally up a very culture warrior group of student
3 activists on college campuses.

4 Q. And what other projects does Turning Point USA do?

5 A. Yeah. So one of the things that Turning Point USA -- if
6 you go back to the slide -- no, the previous slide, but not zoom
7 in. Great.

8 If you look at that top corner, there is the "Professor
9 Watchlist" and right next to the "Professor Watchlist," you'll
10 notice they also have a "School Board Watchlist" -- I'll talk
11 about that just very quickly -- is that after the kind of
12 manufactured CRT attacks, they started this professor -- this
13 "School Board Watchlist" where they identify school board
14 members around the country who they accuse of being too liberal,
15 too radical, oftentimes again with these kind of whole -- kind
16 of scary-sounding claims of how radical this particular school
17 booted member is. So that "School Board Watchlist" is a kind of
18 variation of the "Professor Watchlist," which they've been doing
19 for many years now.

20 And if you go to the next slide, I can show you in kind of
21 greater detail what the "Professor Watchlist" looks like. So
22 the "Professor Watchlist" is a standalone website that's hosted
23 by Turning Point USA and, again, it says its goal *is to expose*
24 *and document college professors who discriminate against*
25 *conservative students and advance leftist propaganda in the*

1 *classroom, right.*

2 So, again, starting with this narrative that there is
3 liberal bias in college campuses; it's self-evidently there;
4 it's widespread, ubiquitous. And then it's necessary to empower
5 conservative students to fight against what is clearly
6 propaganda, and ideas that you might disagree with or
7 conversations that might make you feel uncomfortable should be
8 understood as mere propaganda.

9 If you go to the next slide, too, this is something that --
10 if you go on the "About Us" page, this includes much of the same
11 content, but if you look at that page under the full quote, it
12 says: *The project is comprised of published news stories*
13 *detailing instances of bias, propaganda* -- a lot of the news
14 stories that's it's talking about here it's drawing from news
15 stories that were in *Campus Reform* or *The College Fix* or --

16 (Reporter requested clarification.)

17 BY MR. WERMUTH:

18 Q. You were listing organizations -- sources, so what were
19 those sources?

20 A. *The Daily Wire, The Daily Caller*, and other kind of
21 partisan conservative news outlets.

22 Q. Okay.

23 A. Sorry. I'll slow down. The coffee, obviously, just kicked
24 in.

25 Q. So --

1 A. But then right after that sentence, it says: *While we*
2 *accept tips for new additions to the list, we only profile -- we*
3 *only publish profiles on instances that have been reported...*

4 So, again, they accept tips, and they have a tip line
5 that's similar to what I -- what *Campus Reform* has.

6 So that's a little bit about the "Professor Watchlist."

7 Q. Okay. I'd like to show you what's been marked as
8 Plaintiffs' Exhibit 7F.

9 Do you recognize this document?

10 A. Yeah, it is -- this is the top-line findings from one of
11 the appendixes in our report.

12 Q. Okay. And what have you found regarding the interaction
13 between media groups on campuses, like *Campus Reform* and *The*
14 *College Fix*, and student groups operating on campuses?

15 A. Sure. So what we did in order to compile this table is we
16 went through and identified all 289 campus correspondents listed
17 on *Campus Reform*, the website between 2020 and 2022, so looking
18 at the current website as well as archived versions of the
19 website. Over those years we identified 289 total
20 correspondents.

21 And then we noticed that in the -- on the website it has
22 these blurbs that are kind of their bios, and in those bios, a
23 large number of the correspondents list their affiliation with
24 one of these on-campus partisan organizations as part of their
25 professional bio in how they present themselves as a

1 journalist -- as a campus correspondent.

2 So here 35 percent, you know, so a third, of the campus
3 correspondents identify -- self-identify as being members of
4 Turning Point USA and 10 percent with Young Americans for
5 Freedom, as well as Young Americans for Liberty, and also
6 80 percent -- 40 percent -- excuse me -- identify as being part
7 of the College Republicans or of the GOP.

8 And so if you look at all of this, then, you know,
9 76 percent of the correspondents for *Campus Reform* describe in
10 their professional bios on their website participation in
11 political organizations or political affiliation with these
12 organizations.

13 Q. Okay. Is it common, in your experience, to see, I guess,
14 news reporters claim their partisan affiliation or their
15 involvement in activist organizations?

16 A. I think it's highly unusual. I think that -- you know, I
17 think it would be -- you know, yeah, it would be highly unusual
18 to, you know -- in -- for a journalist at a media organization
19 to list their affiliation in a group that's -- that's known to
20 be an activist organizing group or to even list their party
21 affiliation. I do find that highly unusual.

22 And I think it's interesting because what it demonstrates
23 to me is that what they're saying is that, My identity -- my
24 political identity and my journalistic identity are the same,
25 right, that there's not a distinction between my personal

1 politics and my media profession by the way that I engage in
2 journalistic work, but, instead, a conflation of those two.

3 Q. Let's move on to your prior academic work now.

4 So prior to this case, what empirical research did you do
5 regarding the effects of reporting by media groups such as
6 *Campus Reform*?

7 A. Yeah. So I have done the survey that I mentioned before
8 where I had -- I worked with the AAUP to field a survey of
9 faculty members who had been written about by *Campus Reform* in
10 2020.

11 I also, you know, wrote about those effects -- the survey
12 results, as well as the kind of -- the way that *Campus Reform*
13 functions in an academic -- a peer-reviewed academic article
14 that was published at *New Political Science*, the journal.

15 And then I also wrote a book that included in -- on one of
16 the chapters an overview of the media infrastructure that
17 included *Campus Reform* and *The College Fix* and also describes in
18 that book how *Campus Reform* and *The College Fix* produce much of
19 the material that kind of trickles into other news outlets that
20 are also paid by -- or funded by many of the same funders and
21 how they're a partisan perspective.

22 Q. I'd like to focus on your survey -- the survey work that
23 you did.

24 A. Sure.

25 Q. So what was the total body of individuals identified in the

1 survey?

2 A. Yeah. So we identified 338 faculty members that had been
3 written about in -- by College Reform [sic] in the year 2020.

4 Q. And what -- you fielded this survey with the AAUP's
5 assistance; correct?

6 A. That's right.

7 Q. What response rate did you get?

8 A. We got -- I forget the exact number, but it was 62 or
9 63 percent. It was quite a remarkable response rate that -- of
10 people who got back and answered the survey. We were really
11 gratified by that number, and I think it demonstrated that there
12 was a lot of interest in people -- you know, letting people
13 know, you know, what their experience was.

14 Q. And I'd like to show you what is Plaintiffs' Demonstrative
15 Exhibit 4.12.

16 A. Yeah.

17 Q. What were the top-line findings of your survey?

18 A. Yeah. So we received a 63 percent response rate, and the
19 kind of the shocking -- the most shocking result that we got was
20 that 40 percent of the faculty members that fielded -- that
21 responded to the survey reported receiving threats of harm as a
22 result of their -- being written about in *Campus Reform*.

23 So the very fact that they were mentioned by name in a
24 story in which they were being accused of some sort of liberal
25 bias, 40 percent received threats of harm. 89 percent of those

1 threats came via email, 57 received threats by a direct message
2 and over social media, 45 percent by phone, where somebody had
3 called their office phone number, and 11 percent -- it's a small
4 number, but just chilling in thinking about what it means --
5 actually received letters kind of -- of harassments and threats.

6 We also found that there was -- you know, that the targeted
7 harassment was not evenly distributed: That African-Americans
8 were written about disproportionately to their representation in
9 the overall profession, and about 64 percent of those
10 identifying as gay, lesbian, queer, and other sexual
11 orientations reported receiving threats.

12 So that there was -- you know, especially faculty members
13 of color, faculty members who were LGBTQ+ were -- you know, felt
14 the kind of brunt of targeted harassment quite
15 disproportionately. A number of faculty members reported
16 changing their social media usage as a result of these attacks,
17 and a smaller but not insignificant amount reported changing
18 their teaching as well.

19 Q. Okay. In light of your research, how does your teaching
20 experience inform your opinion in this case?

21 A. Yeah. I mean, I think that I was a little naive up until
22 2017 when my colleague was attacked, and since then that's been
23 something that has been an ever pressing, you know, reality.
24 It's kind of like I'm always waiting for the shoe to drop, just
25 always wondering am I going to say something? Am I going to

1 have a bad day and say something in class or, you know, am I --
2 or not have a bad day and say something in class that gets
3 interpreted in a particular way.

4 You know, if -- I mean, I always -- you know, I'm a -- you
5 know, I'm a -- you know, I -- I'm always thinking about what I'm
6 posting in ways that are, like -- it's not like is this a good
7 tweet, you know? I'm not a particularly good user of Twitter,
8 but, like -- but I'm always thinking, like, is this -- not like
9 is this a good tweet, does this convey what I want to say, but
10 how can this be interpreted by somebody, you know, for malicious
11 intent.

12 And then also just this kind of -- you know, and then
13 especially doing work in this field, I'm always kind of, you
14 know, wondering, like, when am I going to be, you know, the
15 subject of one of these stories? And, you know, that really
16 shades -- you know, it's always present in how I conduct myself
17 in the classroom and in public.

18 Q. What have you done to protect yourself or, I guess,
19 insulate yourself from that sort of liability that could arise
20 in this instance?

21 A. Yeah. So, I mean, the AAUP offers professional liability
22 insurance. So basically when I started writing on campus
23 reform, my wife kind of demanded -- and she was right -- that I
24 take out personal liability insurance. And on my website, the
25 Faculty First Responders website, I let people know about that

1 option as well, that, you know, it's not unreasonable to think
2 that something -- that something that gets said or interpreted
3 could end up in some sort of very incredibly costly court
4 proceeding. And just -- just knowing how long this -- my
5 participation in this case has taken, I can only imagine what,
6 you know, being involved in other forms of litigation just in
7 terms of expense and time would be.

8 Q. What analysis have you done specific to HB 233?

9 A. So I looked at the bill, the text of the bill, and also
10 looked at the court -- or the -- sorry -- the legislative
11 record, examined how, you know, the -- or the debate on the
12 floor looking at the legislative history. I looked at the
13 budget reporting that had been done in Florida, yeah.

14 Q. And what reports have you prepared in this case?

15 A. I had produced our initial expert report and then a
16 follow-up rebuttal report.

17 Q. And how does your work in preparing written reports compare
18 to your previous research regarding targeted harassment?

19 A. It's very similar in terms of methodology, in terms of
20 approach where kind of examining using a diverse number --
21 amount of sources and kind of identifying using a variety of
22 sources in order to try to grasp kind of how this phenomenon
23 works, kind of seeing this phenomenon of these very, very mind
24 things, like a poster for a class, becoming a national story.

25 You know, the thing that I've discovered, if nothing

1 becomes a national story, there's oftentimes an infrastructure
2 there and so kind of using the tools of primary sources,
3 secondary sources, as well as my experience through Faculty
4 First Responders has been influential in how I think about both
5 of those.

6 Q. What are some examples of additional research you did for
7 this case?

8 A. So we put together -- we were interested in that question
9 of the overlap between student groups and student organizations,
10 so we built out that table. We looked at, you know, like I
11 mentioned, the bill itself, and we looked at a number of,
12 particularly, the stories that had played out in Florida and --
13 yeah, so, yeah.

14 Q. And did your experience in research in the past line up
15 with your findings for Florida?

16 A. Yeah. It was actually, you know, quite -- it's always
17 rewarding. I mean, when you do research on a particular topic
18 and you do the research with the methods and, you know, you find
19 out that your argument just builds out robustness of the
20 argument. We found very similar patterns in Florida as we had
21 found when we were looking at kind of the issue in a kind of
22 broader national content.

23 Q. In your work in this case, what did you find regarding
24 *Campus Reform's* awareness and coverage of HB 233?

25 A. Yeah. So, *Campus Reform*, there's a number of articles that

1 demonstrated that they were aware of House Bill 233 as well as
2 the recording provision and the shielding provision. So in
3 addition to the story about the website design that I showed
4 earlier, in that piece there's a link to another story which
5 talks about how DeSantis's agenda, including House Bill 233,
6 was, quote, "rattling the profs," right, this idea of kind of
7 triggering the libs, I guess, is one way of saying it.

8 And then there was another -- there was another piece that,
9 you know, I called this a game changer, I think, was the exact
10 quote, talking about how House Bill 233 is a significant game
11 changer.

12 Q. Okay. What did you find regarding *The College Fix's*
13 awareness and coverage of HB 233?

14 A. Yeah. *The College Fix* has covered a particular story about
15 Chris -- I believe his name is Chris -- Busey is how you
16 pronounce the last name. And I believe that he was at
17 University of Florida, although I could be mistaken -- in
18 which -- and Professor Busey had attended -- had gone -- had
19 been told by his administrators that -- you know, to avoid
20 teaching classes that had "critical" and "race" in the title,
21 and *Campus Reform* was reporting on that incident and, again,
22 making reference to House Bill 233.

23 Q. Okay. What assistance, if any, did you have in preparing
24 your reports?

25 A. Yeah, so both reports were cowritten with Ralph Wilson.

1 Q. And what was his principal contribution to the work in this
2 case?

3 A. So -- yeah. So Ralph and I have collaborated before we
4 cowrote our book together, and over that -- those experiences
5 we've developed kind of a method where we both do kind of
6 primary research and kind of go out -- we'll talk about -- you
7 know, my expertise is in the targeted harassment, so I would
8 kind of take the first cut at that, and he would look at some
9 other areas.

10 And then we would bring our research together. We'd talk
11 about it, discuss, you know, kind of what we were finding, and
12 then I would go through and kind of at all points, kind of look
13 over all the evidence that Ralph had accumulated and what I had
14 accumulated and checked those others.

15 And so I'm usually the final author, right, so I go through
16 and kind of do the last, kind of, round of edits. Ralph does a
17 lot of the gathering of the kind of initial, you know -- in
18 areas of his particular expertise, and then I go through and
19 make sure and put an eye on everything that has been included in
20 the document.

21 Q. And how did the methods used to prepare your expert reports
22 compare to the methods you used in your professional work as a
23 political scientist?

24 A. Oh, yeah, it's the same. It's the -- it's a mixed-method
25 approach. It kind of looks at drawing out the networks, you

1 know. Oftentimes in my book on higher education, *Making the*
2 *World Global*, for example, I drew upon archival sources, and
3 here I'm using web archives as opposed to archives in, you know,
4 Harvard Business School and whatever, but still using archives
5 and using -- drawing upon primary and secondary sources. It's a
6 continuation of the research that I've done before.

7 Q. What portion of your testimony today relies exclusively on
8 Ralph Wilson's work?

9 A. None.

10 Q. Okay. Have you formed opinions as to the threats posed to
11 faculty at Florida universities and colleges by HB 233?

12 A. Yes, I have.

13 Q. And from the standpoint of a social scientist and college
14 faculty member, how certain are you of the objective validity of
15 your opinions?

16 A. I have a high degree of certainty.

17 Q. And what are your opinions?

18 A. I think the recording provision, especially within this
19 broader ecosystem that I've talked about, about media
20 organizations and student groups, poses a considerable threat to
21 the classroom as well as to kind of the people who are engaged
22 in the academic profession. I think that that's one of the
23 threats.

24 I think the shielding provision is entirely vague and
25 confusing for faculty members. Like, we're really smart people.

1 It's hard to make heads or tails of what that provision means
2 and what would count, especially because much of what takes
3 place in the classroom on a normal basis could be interpreted,
4 especially by those with malicious intent, as shielding. And,
5 therefore, the shielding provision is not only vague and hard to
6 understand but is also -- feeds into -- could easily feed into
7 this kind of outrage ecosystem that I talked about in my
8 research.

9 And then, finally, the survey provision is fundamentally
10 grounded on this assumption that there is this rampant liberal
11 bias in higher education and that that -- that assumption,
12 right, that's kind undergirding the survey provision itself,
13 right, is in many ways a result of the kinds of narratives that
14 are created by organizations like Campus Fix -- or *Campus Reform*
15 and *College Fix* and how they assert -- and the role they play
16 within the broader media ecosystem, but also that the results of
17 those surveys are likely to also feed into and be used by those
18 organizations. So I see lots of red flags.

19 MR. WERMUTH: I'll pass the witness at this point.

20 THE COURT: That went really quick. Do you need a
21 break?

22 THE COURT REPORTER: Yes.

23 THE COURT: If it's okay with you, the court
24 reporter -- it's -- the witness was speaking really quickly. I
25 think we're going to take like a five-minute break; okay?

1 MS. LUKIS: Defendants don't have any questions for
2 this witness.

3 THE COURT: Oh, you don't have any questions?

4 Okay. Thank you.

5 Thank you, Doctor. You have a pleasant day.

6 And we'll take a break, and when we come back you can
7 call your next witness.

8 (Dr. Kamola exited the courtroom.)

9 (Recess taken at 9:24 AM.)

10 (Resumed at 9:39 AM.)

11 THE COURT: We're back on the record.

12 Mr. Wermuth, who is your next witness?

13 MR. WERMUTH: Professor Maggio.

14 THE COURT: Before we do that, are y'all going to try
15 to circle back -- when I say y'all, you and Mr. Wermuth -- after
16 lunch to try to figure out a game plan moving forward?

17 MR. WERMUTH: I'm prepared to announce the --

18 THE COURT: I'm sorry?

19 MR. WERMUTH: I'm prepared to announce the game plan
20 or at least our proposal.

21 THE COURT: And I promise, I'm happy to accommodate
22 y'all. My concern was I'm just -- there's other moving parts,
23 other cases and lawyers, so the faster I can give my courtroom
24 deputy directions, the better it'll be.

25 MR. WERMUTH: The parties expect to be done on

1 Wednesday now, in light of the scheduling changes, so we can be
2 done on Wednesday, we believe.

3 And what we would propose to do in terms of post-trial
4 briefing is, you know, assuming we finish on Wednesday -- which
5 we expect to -- that we would file our closing statements on the
6 15th of February and file replies on the 1st of March, if that
7 works.

8 THE COURT: That will work.

9 So what I'm going to go ahead and do is do an order
10 today saying, absent something unusual with the close of
11 testimony on Wednesday the 18th, the closing statements will be
12 due on February 15th, and the March 1st for the replies.

13 Let me find out from y'all, would you prefer to do any
14 arguments by Zoom, by phone? I mean, some people like to do
15 Zoom. I don't really need to see people. I do them by phone
16 all the time, but some people prefer Zoom, so I don't really
17 care, or we can do it in person. It's however the parties wish.

18 MS. FROST: Your Honor, I expect probably it's going
19 to be me, so I'll address it. I would prefer Zoom only because
20 I have a couple other arguments travel-wise, and I find on Zoom
21 it's easier for me to see if Your Honor is done with a question
22 or what's happening; sometimes the telephone can be tough, but
23 the telephone is fine.

24 THE COURT: It's easier to schedule by Zoom, as well,
25 because then we don't have to worry about people's travel and so

1 forth.

2 What I'd like for -- and who's going to probably be
3 the lead? Mr. Levesque, are you?

4 MR. LEVESQUE: Yes, Your Honor.

5 THE COURT: Okay. If you and Ms. Frost could get with
6 my courtroom deputy at some point today and figure out your
7 availability.

8 And let me say what I'm thinking of doing, Ms. Milton
9 McGee, is picking a date on -- choosing an afternoon that we are
10 going to be -- and, actually, I'd like my law clerk to
11 coordinate as well because I know you're gone a couple of
12 Fridays -- building in some time so I can digest the materials
13 in the evening. And by that I mean, if we get the replies on
14 the 1st, I can finalize my review the weekend of the 4th and 5th
15 of March, since I guess that's what I'm going to do that
16 weekend. So anytime after the 5th, and I know we're in the
17 Anderson/Finch trial, but we can let some folks go.

18 How long -- how long do you think you need? Judge,
19 you're the one that asks all the questions, so it seems to me we
20 should probably plan, like, half a day. So what I can do is
21 just let the jurors go about their personal business. So it
22 does not have to be like a Friday or a Monday, but the faster
23 they choose a date, I want to be able to communicate to the
24 Anderson/Finch lawyers that this is going to be the afternoon
25 that everybody's going to be able to take off, regroup and do

1 stuff, and then I can pause and we can do it like at one o'clock
2 in the afternoon; okay?

3 MS. FROST: Yes, Your Honor. We'll confer and get you
4 some dates. Thank you.

5 THE COURT: So long as I've got my court reporter, my
6 law clerk, and me, I don't have a particular preference of what
7 day of the week we do it, Ms. Milton McGee.

8 And we certainly can accommodate Mr. Levesque and
9 Ms. Frost's calendars or conflicts they have; okay?

10 THE COURTROOM DEPUTY: Yes, sir.

11 THE COURT: Let me find out one last thing and, Judge,
12 if you keep talking, then we're not going to get done by next
13 Wednesday.

14 Mr. Levesque -- and I don't need any details, and I'm
15 not trying to pry -- you were able to take care of your personal
16 issue, and you're not not doing what you need to do to be here?

17 MR. LEVESQUE: Correct, yeah. That's been sorted.

18 THE COURT: Okay.

19 All right.

20 Then we're ready to go with the next witness.

21 Doctor, if you'll please stand, raise your right hand,
22 and be sworn by the courtroom deputy.

23 Either way. You can just remain seated.

24 **DR. JAMES PHILIP MAGGIO, PLAINTIFFS WITNESS, DULY SWORN**

25 THE COURTROOM DEPUTY: Please state your name for the

1 record and spell your last name for the record.

2 THE WITNESS: My name is James Philip, with one L,
3 Maggio, M-a-g-g-i-o.

4 THE COURT: Thank you.

5 MS. VELEZ: And, Your Honor, I was hoping to make a
6 quick proffer before Dr. Maggio begins his testimony.

7 THE COURT: Okay.

8 MS. VELEZ: In part to preserve what I expect he will
9 testify to, if he's permitted to do so, but also to ensure that
10 my questions are consistent with Your Honor's prior rulings
11 regarding hearsay and directives from employers.

12 First, my proffer: I expect that Dr. Maggio will
13 testify that he has received several directives from his
14 employers at St. John's River State College beginning in the
15 fall of 2021, and most recently within the last week, directing
16 him not to teach certain concepts and to remove certain things
17 from his syllabi, and to exercise more caution when discussing
18 certain topics.

19 Second, if Your Honor will allow me, I would like to
20 explain why I believe this testimony is consistent with Your
21 Honor's prior evidentiary rulings?

22 THE COURT: Certainly.

23 MS. VELEZ: In this case, Dr. Maggio will be
24 testifying to directives which the Eleventh Circuit has held are
25 not hearsay, specifically in the case *U.S. v. Cruz*, C-r-u-z.

1 The Eleventh Circuit held that a directive was not hearsay
2 because a directive is, quote, "more in the nature of an order
3 or a request and is, to a large degree, not even capable of
4 being true or false."

5 THE COURT: Let me ask you a question, though. That
6 case law -- and I'm certainly familiar with the case law that
7 says, Walk the dog. What did you do? Well, my dad told me to
8 walk the dog, so I went outside and walked the dog. Overruled
9 the hearsay objection to your dad -- the dad told him to walk
10 the dog.

11 What would be different, I believe, and what the case
12 law says, is, I want you to walk the dog because I'm upset with
13 your mother because your mother is cheating on me and blah,
14 blah, blah, blah, blah, and goes into a long monologue, and the
15 "cheating on me" and all that stuff is the subject matter of
16 something -- I don't know -- the wasting of marital resources,
17 so there's going to be a different allocation of resources in a
18 family law setting.

19 So I -- I'll hear from counsel. There can be a
20 directive that can be nonhearsay and you're also explaining why
21 you did what you did. But anything other than the simplest, I'm
22 told I can't teach X, I think any explanation for why you can't
23 teach X, any commentary related to the legislature, their
24 motivations, any commentary at all beyond a simple declarative
25 statement -- and I'm not ruling yet. I'm just saying I'm

1 absolutely already knocking out -- anything beyond a declarative
2 statement is not going to come in, so let me start there.

3 Do you disagree that other than the declarative
4 statement --

5 MS. VELEZ: Your Honor, I do not disagree.

6 THE COURT: There's also a whole body of case law that
7 says, for example -- it primarily comes up in criminal cases --
8 I got a BOLO that there was a red car driving 80 miles an hour
9 down Monroe Street, which is why I went and spotted a car and
10 pulled over the car.

11 Any other detail could go -- beyond could be hearsay,
12 but there's also -- separate and apart from the directive,
13 there's also case law that says that you -- it's not hearsay if
14 you're offering it to explain your actions.

15 So, I am no longer teaching these four subject matters
16 because I was told by my administrators I could not; anything
17 beyond that, it seems to me, is by definition hearsay and you'd
18 have to have some other exception to get in. But the directive,
19 for a couple of different reasons, may not be hearsay. That's
20 sort of another way of looking at it, but let me hear from
21 Ms. Lukis.

22 Ms. Lukis, let's start with -- and since it helps your
23 side, I would assume you agree that certainly any commentary,
24 discussion, motivation, et cetera, that's communicated would
25 absolutely fall outside the ambit of any exception; correct?

1 MS. LUKIS: Yes, Your Honor.

2 THE COURT: All right. So address the issue of if
3 somebody's told something, and they then act on it, it's not
4 being offered for the truth of the matter asserted; it's being
5 offered to explain why they did what they did, one.

6 Or, two, as counsel has said, which is a different
7 line of cases, that if you're a declare -- a declarative
8 statement, Do X, without more, is not hearsay is a second way of
9 looking at it.

10 What says you to those two different ways, why it
11 would not be hearsay, the simple statement, Don't teach X or Y.

12 MS. LUKIS: Sure. So the simple statement, Don't
13 teach X or Y, there's an infinite number of reasons why anyone
14 could be told to do that, so I don't think we would take issue
15 with that.

16 I think to the extent -- and just anticipating what
17 the testimony's going to be based on the deposition in this
18 case, I would expect that this testimony is going to be offered
19 to show that this is, in fact, the position of the institution
20 and that it's directly related to HB 233, and that that's been
21 relayed to Dr. Maggio and he's, you know, changing his behavior
22 based on that.

23 And for that purpose, I think it falls squarely within
24 the sort of exception to the exception or outside the exception
25 as Your Honor explained.

1 THE COURT: All right. Here's the line that I'm going
2 to draw. She -- it's overruled in part and sustained in part,
3 the objection, which is sort of anticipatory.

4 MS. LUKIS: Sure.

5 THE COURT: The witness is free to say -- first of
6 all, timeline as well, that's not hearsay. So this is when I
7 was approached, this is what I was told I could or could not do,
8 without any explanation, commentary or anything beyond that.

9 And then if she says, And last week I was also told by
10 the provost, the head of my department, whatever, that you can't
11 do X or Y, then those -- an order without explanation I find is
12 not hearsay, and you can introduce it with that limited -- but
13 anything beyond that, I'm going to stop the witness, and I also
14 will tell you I'm not going to consider any commentary,
15 discussion or anything else if it's blurted out.

16 MS. VELEZ: I do intend, with Your Honor's permission,
17 to ask Dr. Maggio why he did certain things or why he understood
18 he was given a directive, without going into any quotes or what
19 anyone told him directly.

20 THE COURT: That's another way of saying, Judge, they
21 don't get to say, The provost told me this is the explanation.
22 I get to tell you I assume the explanation. That's -- we're not
23 going to do that.

24 MS. VELEZ: Okay. Understood, Your Honor.

25 THE COURT: That's hearsay by implication.

1 But this is really more legal argument than anything.
2 I'm a fact finder. So if the House Bill is passed, and this
3 witness for -- you're not 5,000 years old -- for years and years
4 and years has taught a subject, for years and years and years
5 has used terms; House Bill 233 is passed in April of 2021, and
6 suddenly in June of '21 the provost comes and says, What you've
7 been doing for the last ten years you can't do, you can't teach
8 these two courses, no other commentary, but then you get -- it's
9 called argument.

10 MS. VELEZ: Yes, Your Honor.

11 THE COURT: Judge, you're the fact finder. You can
12 draw a reasonable inference based on the timing and all the
13 facts. So she can talk about -- it's not hearsay. This witness
14 can talk about, Here's what I've done for the last ten years as
15 a teacher. Here's what I taught; never a problem; nary a word;
16 we were holding hands and singing Kumbaya and everybody was
17 thrilled and I was getting great reviews. House Bill 233 is
18 passed after April of 2021, and these are the timelines what
19 happened to me and what I was told.

20 But it seems to me to go beyond that is argument not
21 we're not -- she doesn't get to assume and tell me what she
22 thinks somebody else -- what their motivations were, why they
23 were doing it or what they said.

24 So it's not only does he not get to talk about what
25 others said, and Ms. Lukis is right that she also can't

1 speculate as to what she thinks people's motivations are.

2 That's an argument for counsel based on a reasonable inference
3 that can be drawn from the facts.

4 Before you start, do you need any further
5 clarification?

6 MS. VELEZ: Not on that point, Your Honor. One other
7 point that I --

8 THE COURT: Hold on one second.

9 Ms. Lukis, do you need any further clarification or
10 want to put anything else on the record to preserve any
11 objection?

12 MS. LUKIS: Only that if I am unclear in practice, as
13 the testimony comes out --

14 THE COURT: You should absolutely stand.

15 MS. LUKIS: Okay. Thank you.

16 THE COURT: You should absolutely stand. No worries.
17 Okay. Yes, ma'am?

18 MS. VELEZ: Thank you, Your Honor.

19 Your Honor, the second issue is related to the same
20 issue.

21 In his deposition I believe Dr. Maggio testified that
22 he would prefer not to identify administrators by name. To the
23 extent that that is required, I would like at that time to make
24 an oral motion for a protective order to ask that the courtroom
25 be cleared except for counsel and that we redact that portion of

1 the transcript.

2 THE COURT: Well, let me find out. Do we want to know
3 the people by name? If -- let's start there, because this may
4 be a nonissue. Do we want them to say something other than "a
5 provost," or "a department head," as opposed to the person's
6 name?

7 If you want the person's name, then I'll -- we'll
8 address that next. Does the defense want her -- the witness to
9 identify the people by name?

10 MS. LUKIS: No.

11 Well, I don't -- I don't anticipate needing to know
12 anybody's name --

13 THE COURT: You can always --

14 MS. LUKIS: -- based on --

15 THE COURT: This is -- this is not the game show, Is
16 that your final answer?

17 MS. LUKIS: Okay.

18 THE COURT: If the issue comes up during your cross
19 that, Judge, I've thought about it and we do need to ask about
20 name, then we'll stop and we'll address what I need to do about
21 it.

22 But if, Judge, right now I don't necessarily know
23 that's going to happen so you don't need to rule on something,
24 that may be a nonissue.

25 MS. LUKIS: I think that's consistent with, you know,

1 what we expect, Your Honor. I mean, there's not -- a chance I
2 might ask if the witness knows who certain people are, but I
3 think --

4 THE COURT: Right. Well, that's a different -- that's
5 a different issue. But I'm just making plain also to you that
6 if you change your mind after you've heard the direct and you
7 think, Judge, I do need to inquire about somebody's name, you're
8 not bound by what your sort of visceral reaction is, and you can
9 tell me and then we'll address whether I should or should not
10 seal the record or empty the courtroom, you know, have a partial
11 closure of the courtroom; okay?

12 MS. LUKIS: Understood, Your Honor.

13 THE COURT: And I'm not suggesting I will or won't,
14 because I've got some thoughts on that. I will just tell
15 everybody, in terms of closure and sealing -- and I just had
16 this in a criminal case -- there is way too much sealed on
17 federal dockets.

18 I know it's mainly done -- and I'll take some blame
19 for it -- lazy judges, but, you know, these are public
20 proceedings, and there is a very narrow set of exceptions about
21 when things are sealed or closed. And so I'll just let
22 everybody know that if at any point we want to seal or close
23 anything -- I mean, it goes without saying we're not going to
24 have social security numbers, dates of birth, home addresses. I
25 mean, personal identification information, that's a given,

1 but -- information regarding minors and minors' names and such.

2 I mean, there's certain things that it's appropriate
3 and there can certainly be good cause -- rape victims and so
4 forth -- but my default now -- and y'all don't need to hear this
5 long outline -- my default is just not to seal or close
6 everything for the convenience to move on. And we haven't
7 really had that happen here, it's really in other cases, but
8 those are my thoughts.

9 But I've given y'all as much guidance as I can, so we
10 can go ahead. The witness has been sworn, and you can ask your
11 first question.

12 MS. VELEZ: Thank you, Your Honor.

13 DIRECT EXAMINATION

14 BY MS. VELEZ:

15 Q. And I'm sorry, Doctor.

16 Would you please state your full name for the record again.

17 A. James Philip Maggio.

18 Q. Good morning, Dr. Maggio.

19 What do you do for a living?

20 A. I teach political science.

21 Q. Where?

22 A. St. John's River State College.

23 Q. Where is St. John's River College located?

24 A. We have three campuses; one in Palatka, one in

25 St. Augustine, one in Orange Park. I teach -- well, I'll let

1 you ask the question.

2 Q. What is it that you teach at St. John's River State
3 College?

4 A. I teach political science in general, but mostly --
5 especially given some changes and requirements, mostly just U.S.
6 Federal Government.

7 Q. And do you currently have tenure, Doctor?

8 A. I do.

9 Q. And is that under what's called a continuing contract?

10 A. That's correct.

11 Q. Would you explain how that works for the Court?

12 A. It's very similar to tenure, but I don't think they
13 negotiated it. They didn't have a union or anything the way the
14 universities do, so we get reviewed once every five years. And
15 then we have to do, like, a self-evaluation, but generally
16 besides that, you have your job unless you really screw up.

17 Q. When's your next evaluation under your continuing contract?

18 A. 5, 17 -- it's -- it is in -- it should be spring of 2024.

19 Q. Thank you, Doctor.

20 A. Uh-huh.

21 Q. Are you a member of United Faculty of Florida?

22 A. Yes.

23 Q. How long have you been a member?

24 A. So three years, three or four years. It's a new union.

25 Q. Did you have any role in the formation of that union?

1 A. Yeah. I was the cochair of the organizing committee of the
2 union.

3 Q. And do you have any leadership roles within the union at
4 present?

5 A. Yes. I'm secretary right now, and I'm the steward for the
6 Palatka campus.

7 Q. And have you had any prior leadership roles?

8 A. I was vice president.

9 Q. And when was that?

10 A. I want to say 2009 to -- excuse me -- 2019 to 2021.

11 Q. Thank you.

12 A. That could be wrong, but it's around that time.

13 Q. Understood.

14 Do you enjoy teaching, Dr. Maggio?

15 A. Yes, very much.

16 Q. Do you have a good rapport with your students?

17 A. I would say, yes.

18 Uh-huh.

19 Q. Do your students often come to you with personal problems
20 or seeking your advice?

21 A. Yes.

22 Q. Is your work meaningful to you?

23 A. Yes, you know. I'm lucky.

24 Q. Why is your work meaningful to you?

25 A. Well, because I think it's important to have citizens, and

1 I hope my class teaches, you know, young folks to be citizens
2 versus sort of just consumers of politics.

3 Q. What do you mean by "citizens?"

4 A. Repeat yourself, please.

5 Q. I'm sorry. What do you mean by "citizens?"

6 A. Somebody who, you know, is informed enough to participate,
7 doesn't have to be crazy and keeps up and thinks about both the
8 micro and the macro, what it means to be a Floridian, a
9 Leon County resident and then an American, whatnot. That wasn't
10 a very elegant answer. I'm sorry.

11 Q. Are you personally invested in your students' well-being?

12 A. Yes.

13 Q. Is it important to you that you are an effective educator
14 and that you teach them the material fairly?

15 A. Yes.

16 Q. Is it important to you to be able to be honest with your
17 students about historical events?

18 A. Yes.

19 Q. How long have you taught political science at St. John's
20 River State College?

21 A. So it's 11 years; 10 of it full time.

22 Q. Are you now in the twelfth year?

23 A. No, I got my tenure track job in 2012.

24 Q. And have you taught anywhere else beside St. John's River
25 State College?

1 A. Yes, several places.

2 Q. Where?

3 A. So I've taught at UF, University of Florida. I taught
4 at -- I taught law classes at Barry University and law classes
5 at Kaplan University, which is now -- it's part of Perdue. I
6 think they mixed it. They moved them together in Indiana.

7 And then Florida Gateway College which is a Lake -- it's a
8 Lake City Community College, but that's what it's called now,
9 Florida Gateway College, and then Santa Fe College, which --
10 Santa Fe Community College, and that's in Gainesville.

11 Q. And is St. John's River College a public college in
12 Florida?

13 A. Yeah.

14 Q. And is it part of the Florida College System?

15 A. Uh-huh.

16 Q. And -- I'm sorry?

17 A. Yes.

18 Q. Thank you.

19 Can you give me some examples of courses that you have
20 taught at St. John's River State College?

21 A. So the main courses are U.S. Federal Government, that is
22 the bread-and-butter course, particularly since the new
23 civility -- civility course requirement. It's only one of two,
24 and so that's the big one.

25 I usually teach at least one section of Intro to Political

1 Theory, which is basically political philosophy, so it's Plato
2 through now in political philosophy, and then rarely I teach
3 International Relations; not my expertise, but I have done it
4 before.

5 And then every once in a while they'll scoop me up to
6 teach, like, part of the Honor's program, so I taught this class
7 called Honor's Explorations for a few years, which was a great
8 class, but I couldn't tell you what the class was supposed to be
9 about except they said, Dr. Maggio makes the class.

10 Q. And what courses are you teaching this current -- which
11 just began -- Spring 2023 semester?

12 A. What course?

13 Q. What course or courses?

14 A. Just U.S. Federal Government.

15 Q. How many sections of U.S. Federal Government?

16 A. Seven.

17 Q. And I believe that you testified that U.S. Federal
18 Government is one of two required courses?

19 A. I think it's -- yeah, that and American History II, I
20 believe, are the two courses that fulfill the civics
21 requirement. So we have a ton of people, new people, in Federal
22 Government.

23 Q. How many students do you have in a typical section of your
24 U.S. Federal Government class?

25 A. It usually fills out at 30, you know; maybe the Palatka

1 class is smaller, but, yeah.

2 Q. And that's times seven different sections this semester?

3 A. That's correct.

4 Q. Understood.

5 Is there anything controversial about the courses that you
6 mentioned previously?

7 A. Like the Political Theory course?

8 Q. Let's start with the Political Theory course.

9 A. Can you elaborate a little bit what you mean by
10 "controversial?"

11 Q. Is there anything that you think others might consider
12 controversial or -- I don't want to use particular words here.

13 A. Yeah.

14 Q. -- relevant to the current political discourse, for
15 example, in the classes that you teach?

16 A. I guess I would say yes, though -- but it was not -- it
17 wasn't any deep issue. It was usually dealt with in the class.

18 Q. Do you teach about systemic racism in any of your courses?

19 A. Yes.

20 Q. Do you believe that anyone -- that a person might consider
21 the topic of systemic racism controversial?

22 A. They could.

23 Q. Do you teach about systemic sexism in any of your courses?

24 A. Yes.

25 Q. Do you teach about civil rights issues in any of your

1 courses?

2 A. Of course.

3 Q. Do you teach about issues that might inspire vigorous
4 debate, such as pertaining to economics?

5 A. Yes. We have a long section on supply-side economics or
6 Keynesian economics.

7 Q. And what course is that?

8 A. That's the sole POS, the solely intro government course.
9 It's in the -- you know, we have a domestic policy section.

10 Q. In the U.S. Federal Government course?

11 A. Yeah. That's right. I'm sorry.

12 Q. Thank you.

13 And you teach sometimes about debates within or regarding
14 health care?

15 A. Sure. Yes.

16 One of the big issues and projects is about the extent to
17 which health care should be privatized versus public.

18 Q. And this question might be fairly obvious, but do you
19 discuss issues that are political in your U.S. Federal
20 Government class?

21 A. Of course. And I lean on newer issues to get people
22 interested, so --

23 Q. Have you noticed any change over the last several years in
24 terms of what might be considered a controversial topic in the
25 courses that you teach?

1 A. Yes. Yes. Yeah.

2 Q. Can you tell me a little bit more about that?

3 A. So the way I think about it is that those -- some of the
4 topics you mentioned, critical race theory or systemic racism,
5 as I usually teach it would be -- people would go through and it
6 would be interesting and it would be the fine, and I think a lot
7 of that is the stuff -- the content of history is interesting
8 and nobody had either made the word "systemic racism," "critical
9 race theory" either a hero or a villain, so it just -- it just
10 went through, right. It was a viewpoint that wasn't
11 particularly partisan or in -- even in the current debate,
12 right, and so I thought my students really took to it well until
13 recently.

14 Q. And do you make any efforts to make these topics a hero or
15 a villain, as you just put it?

16 A. No. No.

17 Q. What would you attribute this change in what constitutes a
18 controversial or a hot topic to?

19 A. Well, I think by nature anything the Governor runs on is a
20 hot topic.

21 Q. And has the Governor run on anything that's relevant here?

22 A. Yes. All those issues and more.

23 Q. What issues are those, just for the record?

24 A. Oh, I'm sorry.

25 Well, it's really a package, right? So the Governor ran on

1 the notion that -- and I'm paraphrasing a little bit -- that,
2 you know, we don't want these Marxists in academics teaching at
3 the school, so the package of critical race theory and gender
4 theory and things that are associated with the left, but really
5 shouldn't be, have been frowned upon.

6 Q. You mentioned the Governor as a proponent of some of these
7 ideas.

8 Are there any other public figures that have espoused these
9 same ideas?

10 A. I mean, maybe Former President Trump, but -- and I'm
11 certain other -- other people running for office that were
12 helped by DeSantis's big, big win.

13 Q. Would that include state legislators in the state of
14 Florida?

15 A. I would assume so, yes.

16 Q. And have these changes in what's considered controversial
17 affected the climate on your campus?

18 A. Yeah. It deeply affected the -- deeply affected the
19 faculty; and, on one hand, you can say, well, it affected the
20 faculty before any consequences, but it really did affect the
21 faculty before any consequences because we went into that
22 semester knowing that everything was really different.

23 Q. And what semester was that?

24 A. I believe that was fall of 2021.

25 Q. And besides the statements by the Governor at least, what

1 else had changed at that time?

2 A. There were several bills coming out of Tallahassee,
3 including HB 233, which came out, I believe, in the summer it
4 was passed, right?

5 Q. Since the passage of HB 233 in the summer of 2021, have you
6 received any directives from your employers regarding your
7 teaching and your in-class speech?

8 A. Yes.

9 Q. Okay. Let's go through some of those directives, mindful
10 of the clear line that the Judge has delineated.

11 Did you receive any directives from superiors at St. John's
12 River College regarding your instruction on the Civil War?

13 A. Yes.

14 Q. What was the directive that you received?

15 A. That I needed to teach the Civil War such that slavery,
16 states' rights and slavery -- I'm trying to -- I forget and --
17 oh, and changes in the economic systems were equal causes to the
18 war.

19 Q. Did that --

20 A. My assertion was that slavery was the main cause, which I
21 think is what the historians generally say.

22 Q. And I'm sorry.

23 Your assertion was that slavery was the main cause of the
24 Civil War?

25 A. Yeah. Yeah.

1 Q. Did this directive have any impact on you?

2 A. Well, it emotionally made me upset because I've never been
3 told how to deal with my own course.

4 And then, you know, practically I changed a little bit, but
5 it was really more my -- at that point my relationship with the
6 administrators who were all my friends that became weird.

7 Q. The dynamic between yourself and the administrators became
8 weird?

9 A. Yeah. Yeah. For sure.

10 Q. Can you tell me a little bit about that?

11 A. Well, I'm friends with a bunch of them, friends with the
12 president of the college. And it just got colder. It got
13 harder to get things done. I was -- because I'm seen as the
14 most friendly union member, union leader who is friendly with
15 the administration, they come to me to get them to do things.
16 And just it hasn't been as smooth as it used to be, you know;
17 still friendly and all, but -- so...

18 Q. Have you ever received any directives not to teach certain
19 subjects, such as systemic racism, for example?

20 A. Yes.

21 Q. What was the directive that you received?

22 A. So, Your Honor -- or this is where the directive and the
23 outside subject matter are linked in the sense of, like, if I
24 just told you, This guy is next to me -- I'm just reporting this
25 gentleman is next to me, and I need to give him \$10 million, it

1 doesn't make any sense unless I also tell you that there is a
2 bomb over here, right, and that's his motive. So the...

3 THE COURT: I understand that's implicit.

4 What I just want to know is you were told, incredibly,
5 that you've got to give equal right to State rights and slavery
6 in describing the cause of the Civil War -- news to me -- but
7 that there were other subjects that you weren't supposed to
8 discuss. I need to know what subjects were you told not to
9 discuss.

10 THE WITNESS: Okay, okay.

11 MS. VELEZ: And I will rephrase in accordance with
12 Your Honor's --

13 THE COURT: No. I just asked the question.

14 What subjects were you told not -- by the way, was
15 this all -- during what time frame -- let's start with, when
16 were you told you need to change your approach to -- and I don't
17 mean a day, a date and time.

18 THE WITNESS: Yeah.

19 THE COURT: I don't need to know if it was chilly day,
20 it was 78 degrees in June.

21 THE WITNESS: Yeah.

22 THE COURT: Just generally when were you told that you
23 couldn't -- that you should alter how you teach about the cause
24 of the Civil War?

25 THE WITNESS: That happened, I would say, in February

1 of 2022, roughly.

2 THE COURT: All right. And, by the way, this is
3 not -- you just said roughly, and that's what we're asking
4 and --

5 THE WITNESS: Yeah.

6 THE COURT: -- nobody is holding you to a precise date
7 and time. So roughly February of 2022.

8 THE WITNESS: And these instances had continued up to
9 a week -- or last week.

10 THE COURT: All right. But the Civil War.

11 And now I want to talk about, did you have multiple
12 conversations about subjects that were verboten?

13 THE WITNESS: Oh, yeah.

14 THE COURT: All right. So let's -- if you could tell
15 the lawyers and the Court a general idea of when was the first
16 conversation you had regarding verboten subjects and the last
17 time you had it.

18 THE WITNESS: Okay.

19 THE COURT: Let's start with time frame, and then you
20 can tell --

21 THE WITNESS: Okay.

22 THE COURT: -- everybody what the -- let's start with
23 time frame.

24 THE WITNESS: Okay. Can she direct me to incidents,
25 because I don't have a very good memory of topics?

1 MS. VELEZ: And I believe Your Honor asked when did
2 these begin generally, not specific directives.

3 THE WITNESS: Oh, that might be the first one or close
4 to the first one.

5 THE COURT: The February --

6 THE WITNESS: Yeah.

7 THE COURT: -- of this year?

8 THE WITNESS: Yeah. There were --

9 THE COURT: Or February of last year. I'm sorry.

10 THE WITNESS: There were small things in the fall of
11 2021, but that's the -- that's the big one.

12 THE COURT: Small things fall of 2021. When you say
13 that, can you give me an example of a small thing in fall of
14 2021?

15 THE WITNESS: I think I got reprimanded for saying --
16 a parent calling in -- mind you, this is college -- and saying
17 that -- I think my joke was, If you think taxes are high, move
18 to Norway. It was just an offhand joke, but I guess it was
19 unAmerican.

20 THE COURT: All right. And so that's an example.

21 THE WITNESS: Uh-huh.

22 THE COURT: And then you said the first big
23 conversation where you were confronted by the administration and
24 told you need to alter your teaching was approximately February
25 of 2022; told you've got to --

1 (Discussion held.)

2 THE COURT: February 2022, you were told you need to
3 rethink how you're teaching the cause of the Civil War?

4 THE WITNESS: Yeah.

5 THE COURT: And then from February of 2022 to present,
6 which we now find ourselves in January of 2023, so the last
7 approximate 11 months -- and I'm not asking you for precision --
8 just approximately how many times were you then approached after
9 that regarding changing things you were teaching or saying?

10 THE WITNESS: At least once a month while -- maybe
11 twice a month. So I would say it was five to ten times. Now,
12 some of those, Your Honor, were mixed with some legitimate thing
13 I did. Like I'm very bad at doing my syllabi in the exact
14 format. So they often mixed it with a legitimate concern but
15 probably one that could have been handled by an email.

16 THE COURT: And so you've now given us the time frame.

17 When was the last time -- you said February was the
18 first big event of 2022. When is the most recent conversation
19 you had, just general ballpark?

20 THE WITNESS: A week ago today.

21 THE COURT: So last Friday?

22 THE WITNESS: Yep.

23 THE COURT: And what was your directive last Friday?

24 THE WITNESS: Stop teaching critical race theory,
25 systemic racism, I believe it was gender theory, and the living

1 constitution.

2 THE COURT: And then the final question, then your
3 lawyer. I'm just trying to move things along so that we -- can
4 you -- you said there were a number of other conversations
5 before the most recent one. Can you give some other examples --
6 I'm not asking for an exhaustive list -- of other directives you
7 were given between February of 2022 and last Friday, which would
8 have been January the 6th of 2023 -- other examples of other
9 directives you were given in between those?

10 THE WITNESS: Sure. So the -- about a week before the
11 last one, they had two different people meet with me on Zoom for
12 the same issues.

13 And so I guess they thought I wasn't convinced. On
14 Friday they sent somebody from the administration with whom I'm
15 close personal friends with, and that was the -- you know, the
16 final one last Friday. So that was, like, the big move, to send
17 my friend over.

18 THE COURT: I've got a general idea.

19 And, Counsel, you can fill anything out.

20 BY MS. VELEZ:

21 Q. And, Dr. Maggio, you testified that there were some smaller
22 directives in the fall of 2021.

23 Do you have any other examples of directives you received
24 in or around the fall semester of 2021?

25 A. Well, I can't remember any particular directive, except

1 there was -- I engaged in talk with many people who are very
2 discouraged, you know, people who teach African-American
3 literature or things that could just stop existing.

4 Q. Has the prevalence of these directives been ramping up?

5 A. Oh, yes.

6 Q. In that they are more frequent?

7 A. Uh-huh, yes.

8 Q. And there are more of them?

9 A. Yes.

10 Q. Overall what impact have these directives had on your
11 emotional state?

12 A. I mean, not good. I went through a pretty deep depression
13 after a lot of these things, and I just was really -- it's just
14 demoralizing. I love being a professor. I have a Ph.D. I'm an
15 attorney. I could certainly make more money doing something
16 else, but I like teaching.

17 And so when you take that away -- and particularly when one
18 of our great strengths of our school is our academic freedom --
19 they never messed with our courses. I mean, they were just --
20 they'd come and observe, and that was it. And so it was just
21 like, man, the one thing that everybody liked, that the union
22 would praise and all this stuff, it was slipping away, but not
23 because of our administration, of course.

24 Q. You said it's not because of your administration?

25 A. That's not the perception amongst the faculty -- or it's

1 not my perception of the faculty.

2 Q. And focusing only on your perception and not what anyone
3 else may or may not have told you, what is your perception of
4 why these things have been happening?

5 A. Why they have been happening?

6 Q. What is your personal belief as to why?

7 A. The political ambitions of the Governor of the State of
8 Florida.

9 Q. And I believe you testified earlier that before the fall of
10 2021, you had never received a directive regarding the content
11 of your teaching; is that correct?

12 A. Yes, that's correct.

13 Q. Had you received any other directives before then?

14 A. In the ten years that I've been there, my first year I
15 received a directive that my grades should have more of a curve
16 because my grades were too high, and I think maybe a couple
17 times I was given a text or a phone call that, you know, maybe
18 not use certain language in class. But that wasn't the subject
19 of it. It was about style of language, so...

20 THE COURT: Like you were being -- using slang or
21 what --

22 THE WITNESS: Slang, yes, that's correct.

23 THE COURT: You should be more formal?

24 THE WITNESS: That's right, yes, exactly, more formal,
25 yes.

1 THE COURT: So it wasn't the substance of what you
2 were saying; it how was you were saying it?

3 THE WITNESS: Yes. I'm not even sure they knew the
4 substance of what I was saying.

5 And even that was maybe one or two -- in ten years I
6 was reprimanded two times maybe, so...

7 BY MS. VELEZ:

8 Q. Have these more recent directives since the fall of 2021,
9 caused you to consider leaving St. Johns River State College?

10 A. Yes.

11 Q. What do you think your prospects are of finding a teaching
12 job elsewhere in the state of Florida?

13 A. Low.

14 Q. Can you tell us a little bit about that.

15 A. Well, so -- I mean, I was one of the main unionizers of my
16 college. Though, as another example of how the dynamics worked,
17 I was, and still am, really friendly with the president of the
18 college, and because of certain promises I made, he didn't
19 oppose the unionization. But, yeah, so that, this, you know,
20 lots of things.

21 THE COURT: When you say "this," you're saying
22 being --

23 THE WITNESS: Testifying.

24 THE COURT: Testifying.

25 THE WITNESS: Sorry.

1 BY MS. VELEZ:

2 Q. Have these directives impacted your ability to do your job
3 effectively?

4 A. Yes.

5 Q. Have these directives impacted your ability to feel
6 fulfilled by being an educator?

7 A. Yes, very much so.

8 Q. Can you tell me a little bit more about that?

9 A. Well, there's days I'll go through some of these things,
10 and there's -- there's a lot of them -- fighting over stuff that
11 really is objective, like the Southern strategy. But I would go
12 home and just be depressed. I mean, you know, my wife would
13 just find me not in a good space. In fact, I wasn't in a good
14 space all of last semester mentally, just bad, bad, bad. And,
15 obviously, I'm not blaming the lawsuit on that entire mental,
16 but it didn't help.

17 THE COURT: Let me ask a question --

18 THE WITNESS: Yes, Your Honor.

19 THE COURT: -- pertinent to why we're here.

20 You were asked about the directives. What you weren't
21 asked, although it was implicit in what you said, did you follow
22 the directives you were given and change what you were or were
23 not teaching?

24 THE WITNESS: Some -- yes, Your Honor. Sometimes it
25 would take two pushes, but, yes, I would follow them.

1 THE COURT: So you have, in fact, altered what you're
2 saying in class based on those directives?

3 THE WITNESS: Yes. And my syllabus after this last
4 one in -- last Friday, I changed my syllabus within an hour and
5 sent it to -- a new version to administration for them to send
6 to Tallahassee.

7 BY MS. VELEZ:

8 Q. What did you remove from your syllabus?

9 A. Critical race theory -- exactly what my boss told me, but
10 critical race theory, gender studies, feminism -- I might be not
11 getting the exact words right -- and the living constitution.

12 Q. And do you believe that these directives are related in any
13 way to House Bill 233?

14 A. Yes.

15 Q. Can you tell me why?

16 Not relying on any statements or what anyone has told you,
17 why do you personally believe that the directives -- the
18 frequency of directives has some relation to House Bill 233, if
19 you do?

20 A. Well, I guess there are several reasons. One, though I
21 should note this isn't the best logic, it occurred, and then
22 this stuff changed. And like I said, though that may violate a
23 Latin law of argument, it's pretty -- it's pretty tangible when
24 you feel it.

25 THE COURT: Doctor, that's fine. You don't have to

1 apologize for that. That's actually a legal concept of temporal
2 proximity that's recognized in all areas of the law.

3 THE WITNESS: Okay.

4 THE COURT: You can continue your answer.

5 BY MS. VELEZ:

6 Q. Are there --

7 A. And then there was, you know, people who were reading about
8 it or read some drafts and things like that. And then -- you
9 know, we're all professionals. Some of us -- most of us watch
10 the news. So if the issues you're being told you can't teach
11 line up with the -- line up with the bill that allows you to --
12 censorship, even if it's seen as neutral, and then a governor
13 who is talking about those issues should just sign that bill, I
14 mean, it doesn't take Columbo to figure it out.

15 Q. Shifting gears, Dr. Maggio, is it important to you that
16 your students can express themselves freely in your classes?

17 A. Very important.

18 Q. Why is that important?

19 A. Because that's the whole -- that's part of the learning
20 process. That's what I kind of mean when I talk about being a
21 citizen, you know, being a participant in democracy. Even if
22 it's just at the local level or, you know, in your PTA, it's all
23 democracy in various forms.

24 So that's very important to me. And it also can stimulate
25 debate and different ideological theories and stuff like that.

1 Q. How have you fostered that free exchange of ideas in your
2 classroom in the past?

3 A. In the past -- my classroom is rather nonhierarchical.
4 Students can kind of jump in. I have a very free-flowing
5 lecture format. I have things I have to hit. I think of it
6 like jazz. There's, like, the parts of it you have to hit, but
7 in between those things you can kind of improv with the
8 students.

9 Q. Do you enjoy having students with diverse political
10 viewpoints in your classes?

11 A. Yes. Most of my favorite students -- well, so I'm
12 generally on the left or -- no, I'm on the left. Most of my
13 students -- my favorite students are really smart, clever
14 conservatives. I even took one in as an intern recently, I
15 think a semester or so ago.

16 Q. As someone who identifies on the left, why do you enjoy
17 having these smart conservative students in your class?

18 A. Because discussions are inherently enjoyable, so -- and if
19 it's the best discussions in the class, then it's my favorite,
20 so...

21 Q. Have you ever punished a student for expressing a relevant
22 viewpoint in class? And by "relevant," I mean related to the
23 subject matter you are teaching.

24 A. No, that I know of. I'll say that.

25 Q. Are you aware of any of your fellow faculty members at

1 St. Johns River College punishing a student for expressing a
2 relevant viewpoint in class?

3 A. Not that I'm aware.

4 Q. Do you believe that HB 233 is actually intended to merely
5 protect the rights of conservative students to express their
6 viewpoints in class?

7 THE COURT: Counsel, I've just got to say, what's
8 the -- I care if we're having a dialogue over pizza. But what's
9 the relevance of any of the witness's personal view of what the
10 motivation is, and so forth? How could I possibly rely on what
11 somebody else's view of the motivation is?

12 MS. VELEZ: Your Honor, that relevance goes to
13 standing and chill and, even outside the scope of directives,
14 how our witnesses or plaintiffs may have reacted to the law.

15 I don't want his legal interpretation.

16 THE COURT: I understand you're trying to avoid
17 leading. And the real question is did you change anything
18 other -- based on other than the directives; if so, why? But
19 fair enough. So I'll overrule myself. I understand you're
20 trying not to lead.

21 BY MS. VELEZ:

22 Q. And if you'd like to respond to the Judge's question of did
23 you change your teaching for any other reason beyond the
24 directives themselves.

25 A. I changed -- no, but it's my understanding of the

1 directives. Somebody else might have taken it differently, but
2 they probably would have taken it more harshly, actually.

3 Q. And I believe you testified that you read the news; is that
4 correct?

5 A. I read the news?

6 Q. Yes.

7 A. Yeah, I do.

8 Q. As a political science professor, do you keep track of or
9 monitor state politics?

10 A. Yeah.

11 THE COURT: Let me go back to clarify, because I
12 thought I understood. As I understood your last response -- and
13 correct me if I'm wrong -- it's not just the directive. It's
14 also the other things I was talking about --

15 THE WITNESS: Yeah.

16 THE COURT: -- the timing; that I felt like, yes, I
17 had to take the stuff out of the syllabus; yes, I had to alter
18 what I was covering and how I was covering it. But I was
19 applying that directive based on my understanding of what was
20 going on in terms of the bill that was passed, et cetera.

21 I thought that's what you were --

22 THE WITNESS: Yeah, that's how I --

23 THE COURT: Because you were relating the two and I --
24 is that correct?

25 THE WITNESS: I mean -- and that's what I was trying

1 to get at before. So, like, if you need somebody to work extra
2 for some reason because there was a fire, and you just call your
3 employer and say, I need you to work extra, then that's what you
4 say here. If they said the directive was this, it doesn't take
5 into account that the fire is the reason that you have to do the
6 thing.

7 And so the stuff that comes out of Tallahassee about
8 HB 233 is part of the thing. It's the same reason -- and this
9 is just aside -- like, we can't go to PERC as a union because
10 it's Republican staff. That power structure is always there.
11 And as soon as we -- as soon as -- shoot, it's from the
12 re-inauguration speech, you know, of the Governor. So I guess
13 it's -- I think it's --

14 THE COURT: I understand. You're saying, Judge, you
15 can't separate out the two, and that's what I meant.

16 THE WITNESS: Yeah. Okay.

17 THE COURT: You said that, but when you jumped to
18 another topic --

19 THE WITNESS: Sorry about that.

20 MS. VELEZ: Thank you, Your Honor.

21 BY MS. VELEZ:

22 Q. Dr. Maggio, let's turn to HB 233's recording provision.

23 Are you aware of that provision?

24 A. Yes.

25 Q. Can you tell me what your understanding is of that

1 provision?

2 A. You are not -- you are allowed -- excuse me -- to be
3 recorded by a student without your consent.

4 Q. I'm sorry. I'm not sure I understood that.

5 A. Without the professor's consent.

6 Q. You understood the recording provision of HB 233 to require
7 your consent?

8 A. No, no, no.

9 Q. Thank you.

10 A. Without the professor's consent.

11 Q. Understood.

12 And do you understand the recording provision to require
13 students to ask you for permission at all?

14 A. No.

15 Q. Do you understand the recording provision to require
16 students to make it obvious that they are recording you?

17 A. No.

18 Q. Has the recording provision caused you to change your
19 in-class expression in any way?

20 A. Yes. It makes me more timid on certain issues. It makes
21 my language more polite and -- I'd say it makes the class a
22 little less dynamic because I'm not taking chances.

23 I can also say, to the extent that they allow me to
24 testify, that this provision terrifies other people more -- my
25 colleagues more than it does me. There are some people who this

1 is really terrible to them.

2 MS. LUKIS: I would object to the extent he's
3 testifying about what other people have told him about their
4 feelings about the recording provision.

5 THE COURT: I'll sustain in part and overrule in part.
6 He hasn't -- to the extent it's hearsay by implication, I
7 sustain it. To the extent he says that the atmosphere on campus
8 has changed post-HB 233, I allow it.

9 So I accept that. I don't accept the suggestion that
10 it's -- people are expressing a particular view, and so forth.
11 So that's how I slice that; okay.

12 BY MS. VELEZ:

13 Q. Does the recording provision relate in any way to your
14 understanding of your obligation to comply with the directives
15 we've discussed?

16 A. Oh, yeah. I mean, it's a double -- it's a sort of double
17 protection system. And it's never mentioned by
18 administration -- or I should say this: They have never
19 mentioned it to me and -- but it's always there.

20 Q. No one has ever given you a directive with regard to the
21 recording provision; is that your testimony?

22 A. No one has ever given a directive -- I believe one of the
23 complaints that we have talked about came from a recording, but
24 they didn't make a big deal that it was a recording. They
25 didn't play it back or do anything like that.

1 Q. Okay. Does the possibility that a student might record you
2 make you more cautious about the way that you speak about topics
3 of systemic racism, for example?

4 A. Yes, that topic in particular.

5 Q. Are there any other topics that the recording provision has
6 affected?

7 A. Some topics in economics.

8 Q. What topics are those?

9 A. I guess the, like, Neo-Marxist economics.

10 Q. In which class do you teach Neo-Marxist economics?

11 A. Both the Political U.S. Federal Government and Introduction
12 to Political Theory.

13 Q. Dr. Maggio, are you ever involved in hiring decisions for
14 St. Johns River State College?

15 A. Yeah. I'm basically on every hiring committee because I'm
16 the only full-time poli sci person, so they usually throw me on.

17 Q. Okay. As of late has anything changed with regard to
18 St. Johns River State College's ability to hire new faculty?

19 A. Yeah. We can't hire anybody.

20 Q. When did these difficulties in hiring begin?

21 A. Like, I would say, late -- you know, yeah, late -- or early
22 fall -- excuse me -- of 2021.

23 Q. And what specifically has changed about the applicants that
24 St. Johns River State College has received?

25 A. Well, so I would say five years ago if you put out an

1 applicant for psychology, you'd get 200 hits, like 200 resumes,
2 CVs sent to you, applications. And I think we got 11 this time,
3 and we didn't fill it. We had to go through several searches.
4 Economics, too, and history -- history, not. Sorry. Economics
5 too.

6 Q. Are you ever involved in hiring determinations with regard
7 to administration at St. Johns River State College?

8 A. No.

9 Q. Are you aware of any colleagues that may have resigned from
10 St. Johns River State College since the fall of 2021?

11 A. Yes.

12 Q. Do you have any personal opinion as to why they may have
13 retired?

14 THE COURT: Sustained.

15 MS. LUKIS: Okay.

16 MS. VELEZ: I'll move on.

17 THE COURT: And so the record will reflect, I'm not
18 playing lawyer. Counsel, Ms. Lukis, was standing up.

19 THE WITNESS: Yeah.

20 THE COURT: So she was obviously objecting.

21 BY MS. VELEZ:

22 Q. How many of your colleagues have resigned since fall of
23 2023 -- or 2021?

24 A. One close colleague in my department. In sciences, sports
25 there's been several resignations, I would say close to ten, and

1 we're a school of only 140 faculty, so...

2 Q. Have resignations increased since the fall of 2021?

3 A. Yes. I don't have the direct data, but anecdotally I would
4 say, yes.

5 MS. VELEZ: Thank you so much, Dr. Maggio.

6 I'm going to pass the witness now.

7 THE WITNESS: Okay.

8 CROSS-EXAMINATION

9 BY MS. LUKIS:

10 Q. Good morning, Dr. Maggio.

11 A. Good morning, Ms. Lukis.

12 Q. It's nice to meet you in person.

13 A. Uh-huh.

14 Q. In the beginning of your direct examination, you had
15 indicated to Ms. Velez that it had deeply affected the faculty,
16 and I want to understand, is the "it" that you're talking about
17 in that sentence the statements that you've heard coming from
18 the Governor?

19 A. Can you -- yeah, can you make it more of a question? I
20 sort of lost it for a second.

21 Q. I'm sorry. When you say things have deeply affected the
22 faculty and the environment, is what you're referring to -- are
23 you referring to statements by the Governor?

24 A. Yeah, statements by the Governor enmeshed with the -- with
25 the new legal requirements, which go beyond HB 233, but, of

1 course, that's one of them.

2 Q. I want to talk briefly about your testimony about the --
3 the change that you describe in your instruction related to the
4 Civil War.

5 Do you recall that testimony?

6 A. Yes.

7 Q. Okay. That change was precipitated by a parent complaint;
8 is that right?

9 A. That's correct, yeah.

10 Q. Okay. And you don't have any knowledge of whether that
11 parent complaint mentioned House Bill 233; right?

12 A. No, I have no knowledge.

13 Q. Okay. And when that complaint was relayed to you by your
14 administration, they also did not reference House Bill 233;
15 correct?

16 A. They didn't reference the bill.

17 Q. Okay.

18 A. They did reference -- I mean, I -- so they had a phrase --
19 they had a phrase that they said in everything that had to do
20 with that, which is, quote, "given what's coming out of
21 Tallahassee," end quote. And that was the phrase that triggered
22 us to know this had to do with the DeSantis laws, the new laws,
23 and don't mess with it.

24 So that -- they only used that so that they wouldn't link
25 up HB 233 with this -- with this stuff. I'm presuming it's --

1 some lawyer out there is very smart.

2 Q. I'm going to go out on a limb and say that you probably
3 think there are other laws that are contributing to this as
4 well; is that accurate?

5 A. Yes, but I'm not prepared to give you -- like, talk about
6 HB 7 or something like that.

7 Q. Understood.

8 THE COURT: I've just got to ask, because I'm
9 interested and it has nothing to do with this case in terms of
10 the issues before me, do you have, like, Doogie Howser in your
11 class? How old are the students you are teaching that the
12 parents are calling about classes?

13 THE WITNESS: So there's -- that's a very good
14 question, Your Honor.

15 So we have, basically, state college students, but
16 then they contract now with the high schools for dual-enrollment
17 students.

18 THE COURT: So you do have some.

19 THE WITNESS: I do have some. I have probably the
20 majority.

21 THE COURT: My high school kids would have never
22 spoken to me if I had called a teacher.

23 So it's not necessarily a 20-year-old's parents that
24 are calling?

25 THE WITNESS: No, but that does happen too.

1 BY MS. LUKIS:

2 Q. I want to talk a little bit the directive that you
3 testified you received. I think it was a week ago; is that
4 right?

5 A. Yeah.

6 Q. Okay.

7 A. Probably, yeah, a week ago today, almost this time.

8 Q. Sure. And just so I'm clear, that directive came from
9 administrators at your institution; correct?

10 A. Yes, very high up.

11 Q. Okay. That directive did not come from the Board of
12 Education; correct?

13 A. No.

14 Q. And you don't have any indication, do you, that the Board
15 of Education agrees with the directive that your administration
16 gave you, do you?

17 A. No.

18 Q. Can we agree that House Bill 233 became effective in July
19 of 2021?

20 A. So stated.

21 Q. Former lawyer.

22 You taught a unit on critical race theory during the Spring
23 2022 semester; correct?

24 A. Spring, yeah. Yes, ma'am.

25 Q. You taught about reparations during that same unit as well;

1 correct?

2 A. Most likely.

3 Q. Has your -- well, how long ago did your institution
4 unionize?

5 A. 2018, 2019.

6 Q. I believe you testified you were the cochair of the
7 organizing committee?

8 A. Yes, that's correct, ma'am.

9 Q. Okay. Is one of the reasons that you sought to unionize
10 that St. Johns River College pay compared to the lower salaries
11 than similarly-situated institutions?

12 A. Yes, it was my understanding that that's the majority of
13 the reason we were able to unionize.

14 Q. Does St. Johns River College, to your knowledge, have a
15 website?

16 A. Yes.

17 Q. Okay. Do you ever visit the website?

18 A. I have to all the time.

19 Q. Okay. Have you ever visited the page on St. Johns River
20 College's website that's dedicated to House Bill 233?

21 A. No.

22 MS. LUKIS: Stephen, can you pull up that website?

23 Thank you.

24 BY MS. LUKIS:

25 Q. I struggle with technology, so please be patient.

1 A. No problem.

2 That looks familiar.

3 Q. Okay. And does this look like -- you may have just
4 mentioned it by saying it looks familiar. But this looks like
5 the St. Johns River State College website?

6 A. It is, yeah, uh-huh.

7 Q. Okay. And do you see on the left side -- my left -- that
8 HB 233 page tab --

9 A. Yep.

10 Q. -- that's highlighted in green?

11 A. Uh-huh.

12 Q. Have you ever visited this web page before?

13 A. No. No, ma'am.

14 MS. LUKIS: Can you scroll down just a little bit,
15 Stephen?

16 Thank you.

17 BY MS. LUKIS:

18 Q. Who is Melissa Miller?

19 A. She is an attorney. She was, I believe, the staff attorney
20 for many years, until the last couple of years, at St. Johns.

21 Q. Was she in the -- was she a general counsel for the
22 college?

23 A. She was general counsel. That's correct terminology.

24 Sorry.

25 MS. LUKIS: Stephen, would you mind clicking on that

1 document?

2 Yes, thank you.

3 BY MS. LUKIS:

4 Q. And please feel free to ask Mr. Varnell to scroll.

5 But does this document look at all familiar to you?

6 A. I'm certain it's Melissa's discussion, but I have not read
7 it.

8 MS. LUKIS: Stephen, would you mind scrolling down
9 to -- a little bit more to Bullet Point 7?

10 BY MS. LUKIS:

11 Q. Okay. And would you agree with me that this document we
12 just pulled off the HB 233 page of the St. Johns River College
13 website appears to be something of a Q&A?

14 A. Yeah.

15 Q. Okay. And does it appear to be a Q&A with the answering
16 party being Melissa Miller, the general counsel?

17 A. Uh-huh.

18 Q. Okay. And I don't know how to highlight this, so I'm just
19 going to direct you to the third sentence.

20 A. What number, ma'am?

21 Q. Bullet Point 7 says: *Is discussion of critical race theory*
22 *prohibited as a topic in the social sciences?*

23 We see what we believe to be Ms. Miller's response that:
24 *If critical race theory is relevant to the curriculum and*
25 *subject matter of the class, it would be proper to include in*

1 *your course.*

2 MS. VELEZ: Your Honor, I would object on hearsay
3 grounds to the reading in of this document.

4 MS. LUKIS: It's impeachment evidence, Your Honor.

5 THE COURT: I'm sorry?

6 MS. LUKIS: It's impeachment evidence. I'm not
7 offering it to show the position of the institution. I'm
8 offering it to show whether or not --

9 THE COURT: He's never seen it, but -- fair enough.
10 You can say, Are you aware by looking at this and reviewing it
11 that there's a statement contrary to what you were told?

12 That's what you're asking; right?

13 MS. LUKIS: Yes, Your Honor.

14 THE COURT: Just ask that.

15 You said you haven't read it, but now that you read
16 it, it appears that the official statement on the website says
17 you can teach critical race theory.

18 How do you respond to that?

19 THE WITNESS: Melissa Miller wrote this, and she had
20 certain points of view similar to mine, and Melissa Miller
21 hasn't been with the college for a year and a half.

22 So the college runs on the actual power dynamics, not
23 by handbooks or rulebooks. It's all about power in politics on
24 the campus, so I assume this is not being enforced because
25 Melissa Miller isn't here as a safeguard for it.

1 BY MS. LUKIS:

2 Q. Okay. Have you -- it's fair to say that you have a
3 negative reaction to the directive that you received last week
4 from your institution?

5 A. Yes, uh-huh. Yes.

6 Q. And is there an institutional process through which you
7 could pursue some sort of remedy?

8 A. There's the grievance process. I could file it through the
9 union or through the institution, but they never made -- these
10 reprimands were off the record always to protect me, according
11 to them, and so that never really caught my mind, because it's
12 like they didn't exist.

13 MS. LUKIS: Let's go back to the -- is this the --
14 well, can we go back to the last page before you opened up
15 the -- yeah, that.

16 BY MS. LUKIS:

17 Q. Do you have any reason to believe, Dr. Maggio, that this
18 resource page related to House Bill 233 is not accessible to all
19 faculty?

20 A. Oh, I'm certain it is, and probably more dutiful faculty
21 have read Ms. Miller's Q&A.

22 Q. Okay.

23 MS. LUKIS: Stephen, could we also look at the second
24 document, "FAQ for Faculty"?
25

1 BY MS. LUKIS:

2 Q. Have you seen this document before, Dr. Maggio?

3 A. I've seen a version of it, but I don't know if it's this
4 particular document. This looks like something they also sent
5 via email.

6 Q. Is it fair to characterize this document as, to the best of
7 your knowledge, guidance from the institution on how the
8 recording provision is implemented?

9 A. One second, ma'am.

10 Q. Sure, sure. If you need to scroll, please ask.

11 MS. VELEZ: Your Honor, I just object that Dr. Maggio
12 did not testify that he has personal knowledge of this.

13 THE COURT: He doesn't have to. Ms. Lukis asked an
14 entirely appropriate question, which is: Can you please read
15 this, and is this frequently-asked-questions description
16 consistent with what you've been told you should -- what you've
17 been told about recording -- is how I understood the question.
18 Is that --

19 MS. LUKIS: Yes, Your Honor.

20 THE COURT: So is this consistent or inconsistent with
21 the oral directives you've received?

22 THE WITNESS: Can you scroll up just a little bit
23 more?

24 BY MS. LUKIS:

25 Q. Up.

1 A. Or down, the other up.

2 So I would say that this marks my understanding of it,
3 except there's an interesting exception here that says
4 "discussion isn't class." I suppose that's because you can't
5 record the other folks without their permission. So I never
6 really thought of the idea that -- I mean, a whole class is kind
7 of discussion. So that's a different reading of it than I would
8 have, but everything else looks like something we talked about
9 or were told about.

10 BY MS. LUKIS:

11 Q. Okay. So, big picture, can we agree that your institution
12 has provided some guidance to faculty on how to implement the
13 recording provision?

14 A. Oh, yes. Yeah. Sure.

15 Q. And based on the last document and website we looked at,
16 can we agree that your institution has provided some guidance to
17 faculty on how the institution views the interplay between House
18 Bill 233 and concepts of critical race theory?

19 A. I don't think the institution offered any help of the
20 realpolitik of the way it was going to go down.

21 (Reporter requested clarification.)

22 THE WITNESS: The real politics of how it would go
23 down on the ground, and they've ignored this. I mean, they told
24 me not to teach this, and they gave me all these reasons why,
25 including the Governor. Like, they said "the Governor."

1 THE COURT: Madam Court Reporter,
2 r-e-a-l-p-o-l-i-t-i-c -- t-i-k. I'm sorry.

3 BY MS. LUKIS:

4 Q. When you say --

5 MS. LUKIS: May I continue?

6 THE COURT REPORTER: Yes.

7 BY MS. LUKIS:

8 Q. When you say the administration ignored this, what is the
9 "this" that you're referring to?

10 A. Well, not this particularly. I don't think there is an
11 issue one way or the other, at least it wasn't part of my
12 situation, but the thing that Melissa wrote in response was
13 completely, completely ignored.

14 Q. You've taught at several different institutions --

15 A. Yeah.

16 Q. -- in your career; correct?

17 A. Uh-huh, yes, ma'am.

18 Q. Would it -- in your experience, would you agree that the
19 sort of politics, to use your word, on campus would differ from
20 institution to institution?

21 A. Yes, yes, though the institutions at which I've had regular
22 occurrences that are all tenure track in some form or another
23 seem to have very similar politics.

24 Q. Forgive me, Doctor. I'm trying to not ask you the same
25 questions over and over, so I'm just looking at my notes.

1 A. No, you're doing your job.

2 MS. LUKIS: One moment, please.

3 THE COURT: Certainly. Take your time.

4 MS. LUKIS: Dr. Maggio, thank you for your time. I
5 don't have any other questions for you.

6 THE WITNESS: Okay.

7 MS. LUKIS: I appreciate it.

8 THE WITNESS: Thank you.

9 MS. VELEZ: Your Honor, I don't have any further
10 questions for Dr. Maggio.

11 THE COURT: Thank you, sir, and thank you for coming
12 in. You're free to go. You have a good day, sir.

13 THE WITNESS: Thank you, Your Honor.

14 THE COURT: Take your time.

15 (Dr. Maggio exited the courtroom.)

16 THE COURT: It's been an hour and 21 minutes, I
17 believe; correct?

18 We're going to go ahead and take a five-minute break,
19 and then when we come back, we'll go with the next witness.

20 Thank you.

21 MS. VELEZ: Thank you, Your Honor.

22 (Recess taken at 11:03 AM.)

23 (Resumed at 11:18 AM.)

24 THE COURT: Yes, sir.

25 MR. WERMUTH: Our next witness is Dr. Robin Goodman.

1 (Dr. Goodman entered the courtroom.)

2 THE COURTROOM DEPUTY: Please raise your right hand.

3 **DR. ROBIN GOODMAN, PLAINTIFFS WITNESS, DULY SWORN**

4 THE COURTROOM DEPUTY: Please state your name and
5 spell your last name for the record.

6 THE WITNESS: My name is Robin Goodman. Last name is
7 G-o-o-d-m-a-n.

8 THE COURTROOM DEPUTY: Thank you.

9 DIRECT EXAMINATION

10 BY MS. VELEZ:

11 Q. Good morning, Dr. Goodman.

12 A. Hello.

13 Q. There is a bottle of water there for you should you need it
14 while you're testifying.

15 A. Thank you. I have a tiny bit -- I apologize in advance. I
16 have a tiny bit of a cough today. I don't think it's the
17 bubonic plague.

18 Q. I'm glad to hear that. If you need a cough drop or
19 anything, we can accommodate you.

20 Are you a plaintiff in this lawsuit, Dr. Goodman?

21 A. Yes, I am.

22 Q. What do you do for a living?

23 A. I'm an English professor at Florida State University.

24 Q. Where is Florida State University?

25 A. Over there (indicating), Tallahassee.

1 Q. How far is your campus from this courtroom?

2 A. Maybe three blocks.

3 Q. Is Florida State University a public or a private
4 institution?

5 A. It's a public university.

6 Q. And is it part of the Florida State University system?

7 A. Yes, it is.

8 Q. How long have you been teaching at Florida State?

9 A. For 21 years.

10 Q. Have you ever taught anywhere else?

11 A. Yes. Around. I taught at the University of New Mexico.

12 I've taught at UCLA. I've taught in Bolivia and Peru. I think
13 that's it.

14 Q. How long have you been teaching?

15 A. Oh, maybe 25 years, 26 years.

16 Q. Are you also a member of United Faculty of Florida?

17 A. Yes, I am.

18 Q. How long have you been a member of United Faculty of
19 Florida?

20 A. About 20 years.

21 Q. Have you ever held a leadership role in United Faculty of
22 Florida?

23 A. I've been a senator and I was a secretary for about
24 five years.

25 Q. And do you currently hold any leadership role with UFF?

1 A. I'm on the bargaining team.

2 Q. Why are you a member of UFF?

3 A. We're stronger together than we are alone. I know that's
4 our slogan, but it's true. And sometimes we -- our interests
5 are the same as the administration's and sometimes they're
6 different, so we have our own voice.

7 Q. Are you hoping to overturn any portion of House Bill 233
8 with this lawsuit?

9 A. I'd like to overturn all of it.

10 Q. And, in particular, are there three provisions of House
11 Bill 233 which are at issue in this lawsuit?

12 A. Yes, there are.

13 Q. What are those provisions?

14 A. There's an antishielding provision, there's a recording
15 provision, and there's an intellectual diversity survey
16 provision.

17 Q. Do you know who the named defendants are in this matter?

18 A. Yes. It's the Board of Governors, the Board of Education,
19 and the Commissioner.

20 Q. Do you know who the current Commissioner of Education is?

21 A. The one that was originally on the lawsuit was Richard
22 Corcoran, and he's been replaced by somebody else.

23 Q. Can you tell me a little bit about the current political
24 climate in Florida with regard to higher education?

25 A. Oh, it's terrifying. There's a new bill or new mandate

1 every day, it seems, about some aspect of higher education
2 that's under attack.

3 Q. And you've been teaching in Florida for about 21 years; is
4 that correct?

5 A. Yes.

6 Q. Has that always been the state of the political climate in
7 Florida for the last 20 years?

8 A. There's always been some pressure -- well, not always, but
9 in recent memory there's always been some pressure in terms of
10 the legislature. And we've always been in the legislature
11 trying to argue bills that are in our interest.

12 Q. And in the last few years has that pressure increased at
13 all?

14 A. Oh, yeah. It's become -- it's moved more towards academic
15 freedom in particular.

16 Q. What was the prior pressure regarding?

17 A. The one that comes to mind is guns on campus.

18 Q. But as of late, the pressure has been more about academic
19 freedom?

20 A. Yes.

21 Q. What does that mean?

22 A. Specific mandates about what we can and cannot say in class
23 as experts in our field.

24 Q. Speaking of expertise in a particular field, do you have
25 any specific areas of interest or expertise within the field of

1 literature?

2 A. Oh, yes.

3 Q. What are those specializations?

4 A. My Ph.D. is in comparative literature, and I study mostly
5 critical theory and feminist theory. I do some film studies and
6 some literary studies, late 20th, early 21st Century.

7 Q. And I believe you mentioned feminist theory; is that
8 correct?

9 A. Yes.

10 Q. Do you ever -- or do you have any expertise in the area of
11 postcolonial literature and theory?

12 A. Yes. I would include that in critical theory; I do.

13 Q. And what does "critical theory" mean?

14 A. Critical theory is a body of philosophical writing coming
15 out of 1930s Germany that is based in -- originally based in
16 Marxist readings of texts, and then it became much more diverse
17 and is filtered through social movements, German idealism,
18 enlightenment, post-enlightenment critique.

19 Q. And what does "feminist theory" mean?

20 A. Feminist theory is a body of theory that is -- depending on
21 how you historicize it, I would say it comes out of the 1970
22 social movements for women's liberation and has to do with a
23 lens of reading that -- where you look at things through gender
24 and how to make the world a better place for women everywhere.

25 Q. Are any of these topics you just mentioned topics that you

1 believe are controversial in Florida at present?

2 A. Yes, they are.

3 Q. Can you tell me a little bit more about that?

4 A. Well, with -- postcolonial critique became controversial
5 again after 9-11 because a lot of the writers that I was dealing
6 with are from countries that we were at war with.

7 And Marxism has always been dangerous in America. It
8 became less dangerous for a while after the Cold War ended, but
9 the right has been looking at something that they've been
10 calling cultural Marxism. It's a very vague idea to us what
11 that -- what they mean by cultural Marxism.

12 And with feminist theory, I'm teaching it this semester.
13 I'm teaching Kimberlé Crenshaw, for example, so it dovetails
14 with a lot of the interests of the Governor.

15 In fact, I would love to have him in my class, and if any
16 of you know him, you should invite him.

17 Q. When you say, Dr. Goodman, that Marxism has always been
18 dangerous, do you mean the idea of Marxism?

19 A. Marxism writings were dangerous. He wrote them to be
20 dangerous, and they influenced a lot of wars and rebellions and
21 movements for more economic equality, and those were all
22 dangerous and they continue to be dangerous.

23 Q. Do you interpret dangerous to have a negative connotation
24 in the testimony you just gave?

25 A. No. But it could, but that's not how I was intending to

1 use it that way.

2 Q. Has teaching Marxism ever been dangerous?

3 A. I've never experienced it that way.

4 Q. Has teaching Marxism ever subjected you to political
5 scrutiny?

6 A. No, not that.

7 Q. But other subjects that you -- have other subjects that you
8 teach ever subjected you to political scrutiny?

9 A. I felt so, yes. The postcolonial material I was teaching
10 for a while after 9-11, I was teaching Middle Eastern Literature
11 and Translation, which I felt had a political -- it entered into
12 a new political phase at that moment.

13 Q. Have you ever published any books on these topics we've
14 been discussing?

15 A. Yes. I've published ten books that are on these topics,
16 and you should read them. They're very good. I recommend.

17 Q. Thank you, Dr. Goodman.

18 Is it fair to say that a lot of your scholarship and
19 publications have focused on issues at the nexus of literature,
20 gender, property and social class?

21 A. Yes.

22 Q. Can you give me some examples of courses that you regularly
23 teach at Florida State University?

24 A. I've been teaching a course called Third World Cinema for
25 about -- I've done five iterations of that. It's -- I started

1 out teaching it as a 20-person class, and at this point it's a
2 70 -- enrolled 70. At one point it was 100.

3 I teach regular courses that are survey courses in theory
4 and critical theory and feminist theory. I've taught a lot of
5 different iterations of postcolonial literature, including the
6 Middle Eastern Literature and Translation. After 2016, so it
7 would have been the beginning of 2017, I taught a course in
8 literature and authoritarianism I think you would have liked,
9 Judge Walker.

10 Q. Are there any aspects of any of these courses that some
11 might consider controversial?

12 A. Some of the writers that I deal with are not -- are not
13 pro-American. It would depend -- part of the reason I don't
14 like this law is because it asks you to -- controversial is how
15 the other person is experiencing the -- whatever you're talking
16 about or reading, and that's hard to predict and it changes
17 historically.

18 So the things that might seem controversial or disturbing
19 to me, or not disturbing to me, might be disturbing to someone
20 else, and I don't know their backgrounds. I don't know enough
21 about them to know if they're going to feel disturbed.

22 Q. Assuming that someone feels disturbed by someone that you
23 teach -- something that you teach, rather -- what do you
24 understand HB 233 to require of you?

25 A. I feel like it's asking me to teach -- to not only teach

1 the point of view that are my own point of views or the point of
2 views that the students have, but also to make sure that points
3 of view that aren't voiced by me or the students are still taken
4 up somehow in terms of the antishielding.

5 Q. And would those need to be -- who would take those up
6 somehow, if the students did not?

7 A. I would have to do it.

8 Q. Do you ever ask your students to question capitalism or the
9 social constructs of property ownership in your classes?

10 A. Yes, I do.

11 The Third World Cinema class, in particular, is about
12 imperialism, so it talks about social and political power.

13 Q. Do you ever teach Karl Marx specifically in your courses?

14 A. Yes, I do.

15 Q. Do you personally agree with Karl Marx?

16 A. He got some things right.

17 Q. Do you think your courses have ever made any of your
18 students proponents of Karl Marx?

19 A. I don't know. I mean, that would make me a successful
20 teacher if they did, but you lose track of them after the
21 semester, and it's hard to know what happens after.

22 Q. And when you say "a successful teacher," you mean because
23 you expose them to the ideas of Karl Marx?

24 A. Yeah. And then they got excited about it and took it to
25 another step.

1 Q. Do you consider yourself to be a liberal?

2 A. No, I do not.

3 Q. How would you identify your own personal political beliefs?

4 A. I'm a leftist.

5 Q. What does that mean?

6 A. Well, I feel like conservatives believe that the free
7 market solves all social problems, and liberals believe that you
8 can tweak the free market to make people more equal within it
9 and that it will still solve social problems. And I don't think
10 that the free market solves social problems. It makes them
11 worse.

12 Q. Do you have disagreements, then, with both major political
13 parties?

14 A. Yes, I do.

15 Q. Do you believe in what's called radical democracy?

16 A. Yes.

17 Q. Can you tell me what that means?

18 A. More participation from people, less apathy, more sharing
19 of both wealth and access on a more equitable and fair level,
20 better education for everyone, more access to it.

21 Q. Do you believe that the concept of being a leftist is
22 universally understood?

23 A. No. I think it's mostly written out of the American
24 political scene.

25 Q. And within --

1 THE COURT: I'm interested. Do you think there
2 currently exists what you would frame as a radical democracy, by
3 way of example, in another country?

4 THE WITNESS: Oh, in another country? It comes and
5 goes. I think in Chile right now there's movements for it; in
6 Iran, quite obviously, places where the people are claiming back
7 public space.

8 BY MS. VELEZ:

9 Q. Dr. Goodman, I believe you mentioned the antishielding
10 provisions previously; is that correct?

11 A. Uh-huh.

12 Q. And you have explained to us what you understand them to
13 mean and require; correct?

14 A. Yes.

15 Q. Have those antishielding provisions caused you to do
16 anything differently as a professor?

17 A. I think so. I mean, a lot of it is in your head, right,
18 when you're pulling back. One is that I -- I reissued my class
19 as a discussion class rather than a lecture class. From our
20 perspective it doesn't make that much of a difference, but I
21 thought it was going to guard me from scrutiny, and then we
22 learned that that wasn't the case, that lecturing and discussion
23 was a practice rather than a designation by the registrar. So
24 it was all very confusing about what we should be doing, but I
25 do think I hold back on lecturing in class.

1 And, actually, one of my students complained about that
2 this past semester. She said she thought she had more to learn
3 from me and that I wasn't lecturing enough, which I'd never
4 heard that one before.

5 Q. Did you change your course syllabi in any way as a result
6 of the antishielding provisions?

7 A. Yes. I had a prohibition against neo-Nazi and fascist
8 speech that I took out.

9 Q. I'm not asking you to recite it verbatim, but, generally,
10 what did that prohibition say?

11 A. I think it said neo-Nazi speech will not be tolerated in
12 class.

13 Q. Before you included that disclaimer on your syllabus, had
14 you ever observed neo-Nazi speech in any of your classes?

15 A. No. It was in response to the events in Charlottesville in
16 the Unite the Right rally, whenever -- whatever summer that
17 was -- so that there seemed to be a revival of some of that
18 vocabulary that hadn't been in public discourse recently.

19 Q. And why did you include that in your syllabus?

20 A. I didn't want to deal with it in class. I felt it would be
21 interruptive. I didn't want students to have to think about
22 being insulted or not being insulted when we were dealing with
23 what I thought were more important issues.

24 Q. Am I understanding you correctly that you were concerned
25 that it would affect the learning environment?

1 A. Yes.

2 Q. Is it important to you that your students can express
3 themselves freely in your classroom?

4 A. Yes, it is.

5 Q. Why is that important?

6 A. Because it's how they learn. Listening to ideas isn't
7 enough. They have to start applying them.

8 Q. What have you personally done to foster the free exchange
9 of ideas in your classroom in the past?

10 A. I open questions and the students respond. I have students
11 write questions and hand them in, and then I open those
12 questions up for discussion, so they're not only my questions.
13 I have students write responses, and then I share those with
14 other students.

15 Q. In your experience, has the antishielding provision
16 contributed to or furthered free expression in your classes?

17 A. No.

18 Q. Can you tell me a little bit more about that?

19 A. I find them very confusing, so even if I wanted to follow
20 the law, I wouldn't know what to do.

21 I don't know, like, if I'm teaching something, some text
22 I'm teaching -- this week I'm teaching Sigmund Freud -- I'm
23 shielding them from a whole bunch of anti-Freudian thought,
24 from -- you know, 120 years of it. It's -- from the very
25 beginning there was anti-Freudian thought.

1 But I'm not teaching that because I'm trying to get at
2 Freud's ideas and it's not relevant, but someone could say, Oh,
3 you're not teaching these other. So the language of the law is
4 so vague and confusing to me that I wouldn't even know how to
5 follow the law.

6 Q. Have you ever punished a student for simply expressing a
7 relevant viewpoint in your classroom?

8 A. We don't really have the opportunity of punishing students.
9 But in terms of grading, I don't grade students on their
10 opinions; I grade them on the strength of their arguments, and I
11 have a statement about that in my syllabus.

12 Q. Have you read the briefs filed in this case, Dr. Goodman?

13 A. Yes, I have.

14 Q. Did defendants suggest in any of that briefing that you
15 have been engaged in the censorship of your students?

16 A. Yes. There was one point where they said I was suppressing
17 speech.

18 Q. What was your response or reaction to that argument?

19 A. I was shocked and scared and didn't know where it was
20 coming from.

21 Q. When you say "scared," why were you scared?

22 A. It seemed like the kind of thing that I could be punished
23 for or even fired for.

24 I have tenure, but that's the kind of thing that would
25 break through the tenure protections.

1 Q. In your understanding, is a violation of HB 233 a
2 sufficient cause to terminate someone with tenure?

3 A. Well, there's going to be a post-tenure review, which means
4 the end of tenure, so in terms of the broader environment, yes.

5 So I don't know in terms of what's going on now, but once
6 that passes, it'll definitely be cause for termination.

7 Q. And I believe you testified earlier that you have to guess
8 about how other people feel under HB 233.

9 Can you explain that for me?

10 A. Well, the law in HB 7 was like this, too. It asked you to
11 teach for subjectivities, like how people might respond to
12 something that you say or something that you feel, and there's
13 no way to predict that, so you're being extra cautious to try to
14 make them not feel the things that the law is saying they
15 shouldn't feel.

16 Q. Have you ever felt compelled to espouse any viewpoints that
17 you might not otherwise espouse as a result of HB 233?

18 A. I don't know about compelled, but I definitely feel like if
19 I'm saying something that's more edgy or fringe that I need to
20 make sure that those other perspectives are voiced as well.

21 Q. Have you ever had to make the case for capitalism in any of
22 your courses?

23 A. Yes. I ask my students to -- I had 70 students, and half
24 of them I thought were business majors so I thought somebody
25 there would be able to defend capitalism. And I asked, like,

1 three times, Come on, can't any of you defend it? Hasn't
2 capitalism done anything good?

3 And I got no responses, so I had to point some things out
4 to them. Like, Look at your computers. Where do you think
5 those come from?

6 Q. Do you have any reason to believe that all 70 students in
7 that classroom are communists?

8 A. No.

9 Q. Would you normally have made the case for capitalism?

10 A. No. I would have been happy to let it sit with 70 students
11 telling me that capitalism was fine with them -- I mean, was
12 terrible and that not having capitalism would be better.

13 Q. Let's still shift gears while still talking about classroom
14 discussion.

15 Are you aware of the recording provision of HB 233?

16 A. Yes, I am.

17 Q. Do you know whether the recording provision says anything
18 about lectures?

19 A. It says that it's only suppose -- that students are only
20 supposed to be recording lectures.

21 Q. In your experience, is there a clear difference or dividing
22 line between the parts of your instruction that would constitute
23 a lecture versus some other teaching style?

24 A. No. It's not very clear to me, and I don't know if it
25 would be to students either.

1 Q. What other teaching styles do you employ?

2 A. Mostly discussion. I tend to open it up by giving
3 backgrounds of the works that we're talking about and maybe
4 giving a little bit of interpretation and then opening it up to
5 questions, mostly my questions that they answer.

6 Q. When you do that, do you announce that the lecture portion
7 is over?

8 A. No. We got a directive from an administrator who said
9 that -- she used a word like incidentals -- like incidentals
10 were when a student interrupted your lecture to comment or --

11 THE COURT: Hold on a second.

12 MR. LEVESQUE: Yes, Your Honor. We would object on
13 hearsay grounds.

14 THE COURT: Sustained in part and overruled in part.
15 She can just tell -- is this the directive she received that
16 she's been acting on?

17 MS. VELEZ: That's correct, Your Honor.

18 THE COURT: She can just say that, I'm now doing
19 something different in class. What are you doing differently,
20 and why did you do it? Because I was told to do it that way.

21 MS. VELEZ: And, Your Honor, before I ask the witness
22 a question, I believe that the testimony was about a definition.
23 May I ask if there were any directives about definitions?

24 THE COURT: Sure. I was just meaning we're not going
25 to talk about it in detail in narrative form what somebody told

1 her because that would be hearsay.

2 MS. VELEZ: Yes.

3 THE COURT: But the fact -- well, she's altered -- you
4 can ask her how she changed things and what she did differently
5 and what was that based on, because even if she's -- she's
6 acting pursuant to a directive, so she's also explaining why she
7 changed her style.

8 MS. VELEZ: Yes, Your Honor.

9 BY MS. VELEZ:

10 Q. What would be -- what do you understand incidental speech
11 to be in the context of a lecture?

12 A. It was when a student interrupted for a comment or
13 question, but you were still in lecture mode, whatever that
14 meant. So it kind of blurred the boundaries between discussion
15 and lecture even more.

16 Q. Are you clear on what constitutes incidental student speech
17 during a lecture versus discussion?

18 A. I wasn't very clear -- confident that I knew that, and I
19 don't think that language was in the law.

20 Q. In what ways, if any, has the recording provision caused
21 you to change your personal in-class expression?

22 A. It's scary. I mean, the students have their phones with
23 them, and they're on their desks. So you don't know if you're
24 being -- at any particular moment, even after the semester --
25 like, from last semester there could still be recordings out

1 there of what I said. So there's no -- you don't know if you're
2 being recorded, and you have to always assume that you are being
3 recorded.

4 And the other thing it does is it makes your students --
5 they can only record you to gather evidence against you, so it
6 makes them come into class and treat you kind of like a
7 criminal, like you're being pursued for something that you've
8 done wrong. And it changes the relationship with the students
9 because it's more adversarial, or at least that's how I feel.
10 It's more adversarial because they come in treating you like you
11 did something wrong and that they have to prove it.

12 So you're always -- I feel like I'm pulling back and
13 watching myself a lot more. It makes being in class a little
14 bit scarier.

15 Q. Has this affected the trust between you and your students
16 in the classroom?

17 A. I think so, yes.

18 Q. In what ways?

19 A. Well, it makes me trust them less because they could always
20 be making a case against me that they don't have to tell me
21 about, and, therefore, I have to be constantly worrying about
22 when the axe is going to come down and when I'm going to have to
23 answer for something that I said in a more criminal way.

24 Q. In your opinion, has the recording provision done anything
25 to further free expression in your classroom?

1 A. No. It's been very chilling.

2 Q. Are you aware that there is a private cause of action under
3 HB 233 wherein you can sue your students who improperly recorded
4 your classes for any purposes other than filing a complaint
5 against you based on shielding?

6 A. Well, I think that what you're saying is that they would
7 have published it, because that's how I would know that they're
8 misusing it. And once that happens, it's too late for me to
9 actually do anything about it. So I could sue them and maybe
10 even win, but my career is over.

11 Q. Do you have any concerns about statements you make in the
12 classroom potentially being taken out of context under the
13 recording provision?

14 A. Yes, I do.

15 Q. And I believe you said it's too late once the recording has
16 been published. Can you tell me a little bit more about that?

17 A. Did you see that TV show *The Chair*? There's that one guy
18 who made a joke in class, and then he was turned into a Nazi
19 sympathizer because of the way that it was edited.

20 I don't recommend the TV show, but that's the kind of thing
21 that's very real for us.

22 Q. And do you ever play devil's advocate in your classroom?

23 A. I try not to.

24 Q. And I believe you testified that you had to make the case
25 for capitalism in one class?

1 A. Yeah, yeah. Occasionally -- I mean, in the Third World
2 Cinema class, one of the subjects that comes up is propaganda
3 and so how do you know if something is propaganda or is
4 propaganda necessarily a bad thing. And I use a film for that
5 called *The Wonderful Horrible Life of Leni Riefenstahl*, who is
6 the main filmmaker for the Third Reich.

7 THE COURT: Professor, do you mind -- do you know the
8 spelling for the court reporter? We can look it up if you
9 don't.

10 THE WITNESS: I knew you were going to ask me that.

11 THE COURT: We'll look it up. That's fine.

12 THE WITNESS: Thank you.

13 It's a good movie, and I do recommend it, but it's
14 very long, and I just show clips of it. But she made the
15 *Triumph of the Will*, which is a famous -- probably the most
16 famous propaganda movie about Hitler's first big mass rally at
17 Nuremberg.

18 So I use that. I guess that's -- I forget the
19 question now, but that's a little bit devil's advocate. I don't
20 agree with Hitler.

21 BY MS. VELEZ:

22 Q. Thank you for clarifying that, Dr. Goodman.

23 Are you aware of the survey provisions of HB 233?

24 A. Yes.

25 Q. Have the survey provisions caused you to change your

1 in-class expression in any way?

2 A. You know, those are the most difficult for me to
3 understand, because I don't know what a liberal and a
4 conservative is. It doesn't -- is it a personality type or an
5 identity, or is it like a prepackaged set of ideas and policies
6 and beliefs? It doesn't necessarily make sense what's being
7 packaged in these things, like being -- I assume that
8 conservative means being progun and pro-life. Those two things
9 don't necessarily make sense together, so you're kind of just
10 making up these personality types.

11 And then you're trying to assume that somebody else, like
12 your professor, your students, have these prepackaged sets of
13 idea issues that are -- that create a personality or a case or
14 an identity. And it never actually works out that way. Like,
15 if you're actually having a conversation with someone rather
16 than assuming what they are, then no one ever is really totally
17 pro-life or totally pro-choice. It just -- it never works out
18 that way. It's all so much more messy than the survey wants it
19 to be.

20 So I find it really confusing, and I don't know -- I would
21 like to say that I censor myself for it. But, again, I wouldn't
22 know how to censor myself in order to make that survey less
23 scary.

24 It seems arbitrary is what I'm trying to say.

25 Q. Understood.

1 Did you personally take the survey?

2 A. No, I did not.

3 Q. Have you seen any of the questions on the employee's
4 survey?

5 A. I have, yes.

6 Q. And what was -- what impression, if any, did you get from
7 those questions?

8 A. I felt they were out of touch. I didn't think that they --
9 I thought that instead of testing for intellectual diversity,
10 they were doing the opposite, of turning political thought into
11 two things.

12 Q. And what do you mean when you say "turning political
13 thought into two things"?

14 A. Well, you can either be a conservative or a liberal,
15 whereas, if you walk through FSU campus and talk to students
16 about their ideas on politics, there would be way more than two
17 things that you could be.

18 And people have very many ideas, and so I thought it was
19 actually reducing the diversity of political opinion on campus.

20 Q. And just so I'm clear, you don't understand political
21 beliefs to be a binary, then?

22 A. No.

23 Q. Did you see the questions on the student survey?

24 A. I did, yes. I studied them less carefully, though.

25 Q. Did you have any reaction to the questions on the student

1 survey?

2 A. Well, they were trying -- they were asked to guess what I
3 thought, and my students don't know what I think about anything.

4 Q. What do you mean when you say your students don't know what
5 you think about anything?

6 A. Well, they -- if I'm teaching about, you know, a film from,
7 I don't know, Senegal, they're not going to know if I support
8 Donald Trump or not. It's not going to be relevant -- it's not
9 going to be translatable into those terms.

10 Q. Do you believe that your colleagues might have some
11 understanding of your political beliefs?

12 A. I do think they think -- they have ideas about that.

13 Q. What ideas do you believe that your colleagues might have
14 about your political beliefs?

15 A. I think they think I'm active. I think most of my
16 colleagues think of themselves as political in various ways and
17 not always the same. There's disagreement. But I think that
18 they think I'm active politically, maybe more active than other
19 ones.

20 Q. Do you have any concerns that in a future survey
21 colleagues' or students' understandings of your politics might
22 affect you?

23 A. You know, I think that students care mostly about grades.
24 I hate to say that, but -- if they feel like they're not getting
25 the grade that they expect or that they want, there's all sorts

1 of recourse that they might turn to that won't have to do with
2 grades to go after the people that are hurting them.

3 So I think that there might be some displacements, people
4 going after you for your politics when, actually, they would
5 rather have an A than a B.

6 And we know how to make students happy, and we now how to
7 challenge students, and it's very rarely having to do with
8 politics.

9 Q. Do you have any concerns about what might happen to FSU if
10 survey results suggested that the institution was too liberal?

11 A. Yes. It just happened to New College. There's all sorts
12 of chatter about how the Governor is not going to stop with New
13 College; that he's going to take over all the Board of Trustees
14 and put in right-wing ideologues.

15 Q. Shifting gears a bit, do you know former Commissioner
16 Corcoran?

17 A. I had lunch with him once.

18 Q. When was that?

19 A. It would have been three or four years ago.

20 Q. What was the context of that lunch?

21 A. He was expecting -- well, we were all expecting him to be
22 the president of FSU, and he wanted to meet with union
23 leadership, or that's what we thought at the time.

24 It turned out that he wanted our endorsement, which we were
25 in no position to give, so we ended up not coming through on

1 that.

2 Q. Would you recognize former Commissioner Corcoran if you saw
3 his face?

4 A. Yes, I would.

5 Q. Would you recognize former Commissioner Corcoran's voice?

6 A. I think so, yes.

7 Q. Are you aware of anything that defendant former
8 Commissioner Corcoran may have said about faculty indoctrination
9 in higher education?

10 A. Yes. For example, he said that education was a weapon. He
11 said that they needed to take back the schools. He said that
12 the liberals were all over higher ed and that he didn't approve
13 of that.

14 Q. Have these statements had any effect on you?

15 A. Not directly, no.

16 Q. Have these statements made you concerned about complying
17 with HB 233?

18 A. More concerned about the future of higher education and
19 K-12 in Florida.

20 MS. VELEZ: Andy, would you please pull up what has
21 been premarked, and I don't believe admitted yet, as
22 Plaintiffs' Exhibit 219?

23 And if you would advance us to the 37.1 minute mark.

24 And I'll ask that you please play this clip for the
25 witness.

1 (Plaintiffs' Exhibit 219 played.)

2 BY MS. VELEZ:

3 Q. Do you recognize this person's face or voice?

4 A. Yes. That's Richard Corcoran.

5 Q. Are those statements familiar to you?

6 A. Yes. And they're terrifying.

7 Q. Are those statements consistent with the other statements
8 that you had previously testified to?

9 A. Yes. But, you know, they're not consistent with what he
10 told me at lunch. I think he -- he knows his audience. He's a
11 politician, and he knows his audience, and he knows what they
12 want to hear.

13 So he and I talked about Toni Morrison. He was like --
14 because I was arguing that -- we were talking about literacy,
15 and I was saying part of the problem with literacy is that
16 students need to be engaged with things that they know and
17 things that relate to their experience. And I said, A lot of my
18 students respond to Toni Morrison.

19 And he said, Oh, I respect that. That seems good to me.

20 So I think he -- at lunch he -- I'm not getting it totally
21 correct. It was awhile ago. But I think at lunch he was trying
22 to make himself friendly with me, and now he's trying to make
23 himself friendly to that audience.

24 Q. And did you receive any note or message from former
25 Commissioner Corcoran after that lunch?

1 A. Yes. He sent me a nice thank-you note.

2 Q. Do you still have it?

3 A. I kept it.

4 MS. VELEZ: At this time, Your Honor, I move to
5 introduce Plaintiffs' Exhibit 219 into evidence.

6 It is a statement of a party opponent, Your Honor, and
7 relevant and also not hearsay because it's being offered for the
8 purpose of effect on Dr. Goodman as the listener. Certainly
9 plaintiffs do not agree with the truth of the matter asserted in
10 these statements.

11 MR. LEVESQUE: Well, a couple of things there,
12 Your Honor.

13 One, we would argue it's not relevant. She did
14 testify that it had no effect on her or at least previously --

15 THE COURT: She actually said it was terrifying.

16 MR. LEVESQUE: Well, she said it was terrifying, but
17 earlier -- I apologize. I've got -- I've got -- my notes
18 indicate no direct effect.

19 But to the extent that what Commissioner Corcoran was
20 clearly testifying about -- or clearly talking about were K-12
21 education standards that don't have anything to do with higher
22 education.

23 THE COURT: He just said: *And we've done the same*
24 *thing; we've been more successful at the university.*

25 Part of his statement was he was lauding the fact that

1 he had been more -- did I just -- maybe I'm hearing voices.
2 Didn't that -- wasn't that in what you just played?

3 MR. LEVESQUE: I understood he referenced higher
4 education, but from the context --

5 THE COURT: Overruled.

6 The witness has said that she's worried about her job,
7 what this is going to mean to her. And we've just had somebody
8 that was saying, I should be cheered and should have a triumph
9 and, like, march through the streets of Tallahassee like I just
10 defeated the Gauls for Rome, or something, because I fired
11 people that had Black Lives banners and stuff set up in their
12 classroom.

13 It's very relevant, so it's admissible.

14 (PLAINTIFFS EXHIBIT 219: Received in evidence.)

15 THE COURT: You can ask your next -- actually, it's
16 noon. Is this a good time for a break?

17 MS. VELEZ: I'm actually going to rest, Your Honor.
18 But I would also move for Exhibit 220 to be admitted. It's a
19 transcript of this same exact video, certified.

20 THE COURT: And Mr. Levesque's objection is preserved.
21 For the same reasons, I'm admitting it for the limited purpose,
22 both of a party as well as -- even if it wasn't, then it's for
23 the state of mind of the listener.

24 And it's clear that this witness, probably more than
25 any other, absolutely doesn't believe anything that was just

1 said was the truth.

2 Am I wrong?

3 THE WITNESS: No. That's true.

4 (PLAINTIFFS EXHIBIT 220: Received in evidence.)

5 THE COURT: Okay.

6 MS. VELEZ: And I don't have any further questions at
7 this time for the witness.

8 THE COURT: I don't want to -- I'm not sure who is
9 doing this. Mr. Levesque, do you need -- because I'd just as
10 soon break for lunch if it's going to be more than ten minutes.

11 MR. LEVESQUE: I would put it closer in the 30-minute
12 category.

13 THE COURT: So why don't we break for lunch, and we'll
14 come back --

15 Before I do that, though, Professor, can you come back
16 after lunch?

17 THE WITNESS: I can.

18 THE COURT: All right. We'll do that after lunch.

19 Thank you.

20 (Recess taken at 12:03 PM.)

21 (Resumed at 1:03 PM.)

22 THE COURT: All right. We are back on the record.

23 We are here in the afternoon Friday, the fifth day of
24 trial, in Case No. 4:21cv271.

25 When we broke for lunch, the direct of Dr. Goodman had

1 been finished. I'll now call on Mr. Levesque to begin his
2 cross-examination.

3 CROSS-EXAMINATION

4 BY MR. LEVESQUE:

5 Q. Good afternoon, Dr. Goodman.

6 A. Hello.

7 Q. Hope you had a good lunch.

8 Viewpoint diversity is important in higher education;
9 wouldn't you agree with that?

10 A. Yes, I do.

11 Q. And expressive rights for faculty and students are
12 important, aren't they?

13 A. Yes.

14 Q. But you don't believe that hate speech should be protected,
15 do you?

16 A. No.

17 Q. And you would consider hate language to be any language
18 that is defamatory or discriminatory against other people on the
19 basis of the class that they belong to; correct?

20 A. Right.

21 Q. And you would not allow hate speech like that to be
22 expressed in your class; correct?

23 A. This has never come up in my class, but I think I would
24 stop it from happening.

25 Q. And so to end, you originally had language that prohibited

1 the expression of Neo-Nazi speech in your syllabus; correct?

2 A. Yes, I did.

3 Q. And that was language that you removed as a result of House
4 Bill 233?

5 A. Yes, I did.

6 Q. Did you also have language in your syllabus that prohibited
7 the expression of alt-right and fascist speech?

8 A. Yes, I did.

9 Q. And that was language that you also removed from your
10 syllabus as a result of House Bill 233?

11 A. Yes.

12 Q. At the time of your deposition, no one had come to you and
13 requested you to include particular viewpoints in your
14 curriculum, had they?

15 A. No.

16 Q. And you haven't resigned from any organization or
17 association as a result of House Bill 233, have you?

18 A. No.

19 Q. And you haven't declined to join any organization as a
20 result of the passage of House Bill 233; correct?

21 A. No.

22 MR. LEVESQUE: If we could bring up
23 Plaintiffs' Exhibit 742.

24 BY MR. LEVESQUE:

25 Q. And I believe in your direct examination, you indicated

1 that Florida State University had provided some guidance on the
2 recording provision; is that correct?

3 MS. VELEZ: Before you answer -- Mr. Levesque, what
4 was the exhibit number?

5 MR. LEVESQUE: 7 -- I'm sorry -- 472.

6 MS. VELEZ: Thank you.

7 THE WITNESS: Yes, they provided some guidance.

8 BY MR. LEVESQUE:

9 Q. If you'd give us just one moment, we'll try to get that
10 document up on the screen.

11 Do you recognize that document, Doctor?

12 A. Yes, I do.

13 Q. Is that the guidance that was provided?

14 A. Yes.

15 Q. And who is Janet Kistner?

16 A. She's the vice president for faculty development and
17 advancement.

18 Q. And in that document, they provide a definition of class
19 lecture, do they not?

20 A. Yes.

21 Q. And if we can scroll down a little bit, do they also
22 provide a definition of publish?

23 Maybe not quite so far.

24 A. *To publish means to share, transmit, circulate, distribute,*
25 *or otherwise provide access to the recording..., yes.*

1 Q. And did they also provide an FAQ for faculty to help
2 further illuminate how the recording provision can be
3 administered at Florida State University?

4 A. Yes.

5 Q. And it's your testimony that that provision -- that
6 document was still ambiguous to you; is that correct?

7 A. Yes.

8 MR. LEVESQUE: Your Honor, at this time defendants
9 would withdraw their objections to Plaintiffs' Exhibit 472 and
10 ask that it be admitted.

11 MS. VELEZ: No objection from plaintiffs.

12 THE COURT: Without objection, the exhibit is
13 admitted.

14 (PLAINTIFFS EXHIBIT 472: Received in evidence.)

15 BY MR. LEVESQUE:

16 Q. Mr. Corcoran, who we discussed earlier, is on the Board of
17 Governors; correct?

18 A. Yes.

19 Q. Do you know how many members are on the Board of Governors?

20 A. No.

21 Q. If I were to toss out the number 17, does that sound more
22 or less correct?

23 A. That sounds reasonable, yeah.

24 Q. Can you identify any of the other 16 members of the Board
25 of Governors whose statements have made you fearful?

1 A. I'm sure if I heard the statements, I would be able to tell
2 more, but right now nothing comes to my mind.

3 Q. And just to be clear, the FSU Board of Trustees, not the
4 Board of Governors, is the entity that decides tenure for you;
5 correct?

6 A. Yes.

7 Q. And no one in authority has ever told you that you can't
8 control your curriculum or your classroom as a result of House
9 Bill 233, have they?

10 A. No, they have not.

11 MR. LEVESQUE: No further questions, Your Honor.

12 THE COURT: Any redirect?

13 MS. VELEZ: No, Your Honor.

14 THE COURT: Thank you, very much. Doctor, you have a
15 pleasant afternoon, and I'm sorry we had to keep you over lunch.

16 THE WITNESS: All right.

17 THE COURT: Thank you.

18 THE WITNESS: Enjoy your pizza.

19 (Dr. Goodman exited the courtroom.)

20 THE COURT: And so we find ourselves at 1:10.

21 Mr. Wermuth, I've got two additional -- well, three
22 additional folks listed: Solomon, Ackbar, and Berman. Who do
23 y'all plan on covering this afternoon?

24 MR. WERMUTH: Olivia Solomon, Alyssa Ackbar, and Jack
25 Fiorito, if we can fit him in.

1 THE COURT: Who are you calling next?

2 MR. WERMUTH: Olivia Solomon.

3 MS. FROST: No.

4 MR. WERMUTH: Oh, Jack Fiorito.

5 THE COURT: And then after that Solomon?

6 MR. WERMUTH: Yes.

7 THE COURT: And then Ackbar?

8 MR. WERMUTH: Yes.

9 THE COURT: So you're not going to call
10 Senator Berman, but you're going to try to get through three
11 additional witnesses?

12 MR. WERMUTH: Yes.

13 MR. LEVESQUE: Your Honor, I just want to clarify. I
14 originally intended to cover a lot more information, but the
15 lunch break allowed me to pare that down.

16 THE COURT: That was not a criticism. I just wanted
17 to let her know that had we known that it was going to be five
18 minutes, I would have just gone ahead and done it. That wasn't
19 meant as a --

20 MR. LEVESQUE: Well, without the lunch, I wouldn't
21 have been able to narrow it down.

22 THE COURT: I understand.

23 And, by the way, that's consistent with what I've said
24 repeatedly about crosses. That's why I always, if you want a
25 break -- because, quite frankly, reviewing your notes and

1 figuring out where you want to go and making it a true cross as
2 opposed to essentially a discovery depo at trial is -- I
3 understand.

4 All right. So let's go ahead and get Dr. Fiorito.

5 And this is Mr. Hancock.

6 And, Mr. Moore, you are on deck for all these folk;
7 right?

8 MR. MOORE: Not for Solomon, Your Honor, but the other
9 two.

10 THE COURT: That's why I ask, because it's -- that's
11 what I have on the list I was given this morning.

12 Who is going to cross Solomon?

13 MR. MOORE: Ms. Lukis.

14 MS. LUKIS: I am.

15 THE COURT: No problem. I made that change.

16 (Dr. Fiorito entered the courtroom.)

17 THE COURT: Sir, if you'll raise your right hand,
18 please.

19 **DR. JACK FIORITO, PLAINTIFFS WITNESS, DULY SWORN**

20 THE COURTROOM DEPUTY: Please state your name for the
21 record and spell your last name for the record.

22 THE WITNESS: Jack T. Fiorito, F-i-o-r-i-t-o.

23 THE COURTROOM DEPUTY: Thank you.

24 THE COURT: You can take your seat, sir.

25 THE WITNESS: Thank you.

DIRECT EXAMINATION

1
2 BY MR. HANCOCK:

3 Q. Good afternoon, Dr. Fiorito.

4 A. Good afternoon.

5 Q. Where are you currently employed?

6 A. Florida State University.

7 Q. What is your title at Florida State?

8 A. J. Frank Dame Professor of Management.

9 Q. And are you a tenured professor?

10 A. Yes, I am.

11 Q. And where is Florida State?

12 A. The main campus is here in Tallahassee.

13 Q. And that's a public university; right?

14 A. Yes, it is.

15 Q. And for how many years have you been a professor at FSU?

16 A. A little over 32 years.

17 Q. And have you taught anywhere else?

18 A. Yes, I taught at Oklahoma State University for three years
19 and University of Iowa for eight years.

20 Q. And in total, for how many years have you worked as an
21 instructor in higher education?

22 A. About 43 years.

23 Q. And for how much of that time were you at public
24 universities?

25 A. All of it.

1 Q. Are you familiar with the organization called the United
2 Faculty of Florida, or UFF?

3 A. Yes, I am.

4 Q. And what is UFF?

5 A. It's a faculty union that represents faculty in all the
6 state universities, several colleges in the state university
7 system, possibly --

8 Q. Are you?

9 A. I'm sorry.

10 Q. No, go ahead.

11 A. And possibly some private -- a private university, but I'm
12 not sure about that.

13 Q. Are you a member of UFF?

14 A. Yes, I am.

15 Q. For how long have you been a member?

16 A. Since I got to Florida State in 1990, so 32 years.

17 Q. And can you describe your involvement with UFF over the
18 years?

19 A. Yes. For the first ten years at Florida State, I was a
20 rank-and-file member with no real involvement, although I did
21 give a talk about union organizing at one of their meetings.

22 And in 2001, I was invited to run for president of the
23 chapter at Florida State, and I agreed to do so in 2002, serving
24 as a vice president for one year and then moving up to
25 president. I served as the president for 11 years, and I've

1 been a vice president and a member of the bargaining team since
2 then, for the past nine or ten years.

3 Q. And is your membership in UFF important to you personally?

4 A. Yes.

5 Q. Why is that?

6 A. I believe that unions are a positive force in society and a
7 positive force on behalf of the faculty, both in dealing with
8 our employer, Florida State, and in dealing with the State
9 Legislature.

10 Q. And do you know if UFF is a plaintiff in this lawsuit?

11 A. It's a plaintiff, yes.

12 Q. And are you individually also a plaintiff in this lawsuit?

13 A. Yes, I am.

14 Q. Why did you become a plaintiff in this case?

15 A. There was an invitation sent out by UFF leadership to have
16 plaintiffs -- possible plaintiffs step forward, and I thought --
17 given my relative expertise in labor relation matters and
18 unions, my tenure -- the fact that I am tenured, and the fact
19 that I'm within a few years of retirement, those things together
20 made me think I probably was a good candidate to take this on.

21 Q. And why was your status as tenure relevant to that
22 decision?

23 A. In case there was any attempt to retaliate for my
24 testifying against something that the Governor or the
25 legislature had favored.

1 THE COURT: Hold on a second. He's standing.

2 MR. MOORE: At best, Your Honor, relevance objection
3 as to his reason for doing it, meaning the lack of fear. Since
4 he's tenured, it's more likely just corroborating his own
5 veracity of being a plaintiff when his credibility has not yet
6 been called into question.

7 THE COURT: I'm going to overrule the objection. He's
8 explaining his rationale for becoming a plaintiff, which I think
9 is -- to the extent it's marginally relevant, I'm going to let
10 counsel ask a few questions. He doesn't need to turn it into
11 the feature of the examination, but he certainly can explore
12 briefly why he became a plaintiff.

13 He said, One of the reasons why I became a plaintiff
14 is because I realized that others would be in a worse position
15 than me because I don't have long left before I retire, and I'm
16 tenured, and those are factors that lead me to believe that I
17 was in a better position than some to take on the role of a
18 plaintiff in this case.

19 Did I misapprehend your testimony, Professor?

20 THE WITNESS: You left out that I mentioned my
21 expertise in labor relations and unions.

22 THE COURT: With that qualification, did I accurately
23 summarize what you were trying to communicate to me?

24 THE WITNESS: Yes, Your Honor.

25 THE COURT: Thank you. I understand.

1 Counsel, move on to your next topic.

2 MR. HANCOCK: Thank you, Your Honor.

3 BY MR. HANCOCK:

4 Q. Dr. Fiorito, do you teach courses at FSU?

5 A. Yes, I do.

6 Q. About how many courses do you teach in a semester?

7 A. I usually teach one course and sometimes two a semester.

8 Q. What kinds of courses do you usually teach?

9 A. Undergraduate courses on negotiation and labor relations
10 and a doctoral seminar on data analysis.

11 Q. And have you taught those classes since House Bill 233 was
12 enacted?

13 A. Yes, I've taught the -- I've taught all three of them.

14 Q. And had you taught all three of them before House Bill 233
15 was enacted?

16 A. Yes.

17 Q. Are you teaching any classes this spring semester?

18 A. I'm teaching a labor relations class.

19 Q. And how long have you taught a labor relations class at
20 FSU?

21 A. At FSU? Probably most of the last 32 years.

22 Q. And are there aspects of your labor relations course that
23 could be considered controversial?

24 A. Possibly, yes.

25 Q. And what could possibly be considered controversial?

1 A. Well, there are various frames of reference or schools of
2 thought that are discussed in the field and the textbook that I
3 use that include mainstream economics, human resource
4 management, industrial relations, and Marxist or critical
5 industrial relations, and I imagine that some would consider the
6 Marxist or critical industrial relations framework or school of
7 thought to be controversial.

8 Q. And what makes you think that some would consider the
9 Marxist frame of reference to be controversial?

10 A. Well, we've seen public statements by state government
11 officials to the effect that our universities have become
12 factories of socialism, that they're overrun with liberal
13 ideology, things of that sort, that make me think those would be
14 positions or perspectives not favored by the state -- by the
15 Governor and legislative leaders.

16 Q. Aside from the discussion of Marxism, are there any other
17 aspects of your teaching labor relations that could be
18 considered controversial?

19 A. Yes, there are a few, I might say, smaller topics,
20 particular topics that are controversial, like right-to-work
21 laws and union shop provisions whereby people may or may not
22 have to join the union in order to keep their job.

23 There's political activity by both employers and unions in
24 regard to labor relations issues that might be considered
25 controversial.

1 Whether unions can speak on behalf of nonmembers they
2 represent, that's been a bit of a controversy. The decision
3 about the public sector recently that says there can no long be
4 any fair-share agreements, as they are called, whereby
5 nonmembers have to pay dues that are -- not dues, but they pay a
6 fee that's equivalent to dues without the political activity, I
7 suppose.

8 There are some others. Racial discrimination comes up as
9 an issue as part of the history of employers and unions, so that
10 might be controversial.

11 I'm sure there are some others I'm not able to recall right
12 now, but they're on a smaller scale, not, you know, big
13 framework issues.

14 Q. Did you teach those kinds of subjects before House Bill
15 233?

16 A. Yes.

17 Q. And do you continue to teach those subjects after House
18 Bill 233?

19 A. I do.

20 Q. And do you have any concerns about teaching those subjects?

21 A. I do.

22 Q. If you have those concerns, why do you continue to teach
23 those subjects?

24 A. As I said in discussing my tenure, I feel a bit more
25 protected than most -- well, certainly the nontenured faculty,

1 and I also am a bit more bold in the sense that with retirement
2 not far away, if something should happen to my job security, if
3 I were fired, it wouldn't be the end of the world for me.

4 Q. Do you have discussions in class with your students about
5 the value of unions?

6 A. Yes.

7 Q. And I believe, as you testified today, you think unions are
8 good for society?

9 A. I do.

10 Q. Do your students ever express contrary views about unions?

11 A. Yes, on occasion.

12 Q. And have you ever graded a student based on that viewpoint
13 expressed in class?

14 A. No.

15 Q. Have you ever graded a student based on any of the
16 viewpoints they express in class?

17 A. No. It's important that they know them, not that they
18 adhere to them.

19 Q. When you say it's important that they know them, what do
20 you mean by that?

21 A. I want them to know about the Marxist perspective and
22 industrial relations perspective and the human resource managers
23 perspective and the mainstream economics perspective.

24 Q. And if I heard that right, there were four perspectives in
25 there?

1 A. That's correct.

2 Q. Of those four perspectives, which ones would you say are
3 pro-union?

4 A. The industrial relations perspective, which is the one
5 favored by the textbook author, as -- he's forthright about
6 that. It says that there are multiple legitimate interest
7 groups in society, and unions are one of those groups. And it
8 notes that the goals of different interest groups in society may
9 conflict at times, but it supposes, correctly, I think, that
10 there are also very common interests and that the pursuit of
11 those common interests should help the parties be able to put
12 aside their differences for the sake of their common interest.

13 Q. And you've been at Florida State for 32 years; right?

14 A. Right.

15 Q. And in that time, have you ever heard about a student being
16 graded based on their political viewpoint?

17 A. No.

18 Q. Have you been involved in any faculty hiring or tenure
19 review?

20 A. Yes.

21 Q. For about how long have you been involved in those types of
22 processes?

23 A. Most of those 32 years. I've been on various committees,
24 search committees, tenure committees.

25 Q. And have you been aware of any instances where a faculty's

1 hiring or promotion decision was affected by their political
2 viewpoint?

3 A. No.

4 I'm sorry.

5 Q. Go ahead.

6 A. There was at least one instance where a faculty member said
7 they did not want to come to Florida because of the political
8 environment. So I guess that qualifies a little bit. It may
9 not be what you're looking for.

10 Q. Understood.

11 So it wasn't the decision of the hiring committee that was
12 influenced by politics?

13 A. Correct.

14 Q. But the candidate made a decision?

15 A. That's correct.

16 THE COURT: Hold on a second. He's standing.

17 MR. MOORE: Hearsay, Your Honor.

18 THE COURT: Response?

19 His statement is that it's not part of the
20 decision-making process, and that really isn't the
21 decision-making process. That's just somebody commenting why
22 they didn't want to come here. But why is that statement not
23 hearsay?

24 MR. HANCOCK: Well, he's relaying the candidate's
25 expression of their decision-making. It's the candidate's state

1 of mind, not the truth of --

2 THE COURT: Why is the candidate's state of mind
3 germane to this case? We also have the issue that recruitment
4 could be harder.

5 Sustained.

6 I've got -- I understand what's properly before me;
7 namely, which is that that's -- his involvement in terms of
8 politics. They're not asking people their ideology or hiring
9 them because of who they -- what they do or don't believe.
10 That's relevant, and he's answered that question.

11 You can ask -- go to your next topic.

12 BY MR. HANCOCK:

13 Q. Dr. Fiorito, are you familiar with House Bill 233?

14 A. Yes, in a general way.

15 Q. And do you understand what provisions of House Bill 233 are
16 being challenged in this case?

17 A. Yes.

18 Q. And what provisions are those?

19 A. The three big controversies in -- or issues in House Bill
20 233 are the shielding provision, the survey provision, and the
21 recording provision.

22 Q. And what's your understanding of what the survey provision
23 does?

24 A. It requires the state universities to conduct a survey of
25 political beliefs, among other things, among faculty, staff, and

1 students, and to report those beliefs each year.

2 Q. And are you aware of universities having conducted such a
3 survey?

4 A. Yes, I am.

5 Q. And have you seen the survey that they used?

6 A. I saw a draft of the survey before it was actually
7 finalized, and I saw the survey briefly as it was presented to
8 me in an email from our administration that said, Please
9 complete the survey. But I chose not to complete it, so I
10 didn't really see all of it. I did see some results reported
11 for Florida State. I think it was only for Florida State.

12 Q. Why did you not complete the survey?

13 A. We were encouraged by the United Faculty of Florida not to
14 participate because it would give it greater legitimacy, and
15 there was a perception on the part of UFF that it was not a
16 legitimate thing to do to ask people about their political
17 beliefs as part of -- as an employee.

18 Q. And was encouragement from the faculty union the only
19 reason you did not take the survey?

20 A. No. I objected to some of the questions that I saw as
21 well.

22 Q. And did you get in any trouble for not taking the survey?

23 A. No.

24 Q. Would you say that the survey last year was voluntary?

25 A. Yes.

1 Q. If you don't have to take the survey, why are you
2 challenging the survey provision?

3 A. I think simply asking employees about their political
4 beliefs is treading on ground that should not be tread upon.
5 The university doesn't need to know our political beliefs. It
6 seems to me that it could only be used in a way that would be
7 unfortunate.

8 Q. Did you see the results from last year's survey?

9 A. I did, but I caution that I didn't pay a lot of attention
10 to them.

11 Q. What did you think of those results?

12 A. Well, the first thing I noticed was very low response
13 rates. And I understand this was the case throughout the
14 universities -- through the university system and colleges.

15 I think at Florida State the response rates were near or
16 under 5 percent.

17 Q. And do you have an understanding of what the results are
18 going to be used for?

19 A. No, I don't, really.

20 Q. Do you have any expectations about what the results are
21 going to be used for?

22 A. I would have to talk about the political climate in the
23 state and the fact that the legislature has put forth anti-union
24 legislation bills in all or most of the last 10 or 12 years.

25 Q. What kind of anti-union bills?

1 A. The one -- the one I referred to is 50 percent or die. It
2 says that you have to have 50 percent membership in the
3 bargaining unit or you will be decertified -- the union will be
4 decertified, and the contract that it's negotiated will be
5 voided.

6 Q. And do you think there's any connection between that bill
7 and the survey results?

8 A. No, not directly.

9 Q. Do you know if they're going to do another survey this
10 year?

11 A. It's my understanding that they are required to do a survey
12 every year.

13 Q. And do you know if that survey is going to be voluntary?

14 A. No, I don't.

15 Q. Do you have any expectations about whether it's going to be
16 voluntary?

17 A. I see forces pushing in both directions, so I'm not sure.

18 Q. Dr. Fiorito, are you familiar with the antishielding
19 provisions of House Bill 233?

20 A. Yes.

21 Q. And what's your understanding of what the antishielding
22 provisions do?

23 A. The gist of those provisions is that we cannot -- we as
24 instructors -- the university and we as its agents and
25 instructors cannot shield or not provide to students viewpoints

1 that might make them uncomfortable or make them feel guilty.

2 Q. Do you have an understanding as to what it would mean to
3 shield your students from those ideas?

4 A. If there is a point of view that I should be covering but
5 for some reason I choose not to because I'm afraid of making
6 them uncomfortable or guilty, that would be shielding.

7 Q. Do you know what kinds of ideas might make your students
8 feel uncomfortable?

9 A. No, I don't.

10 Q. In your experience teaching, has a student ever expressed
11 that an idea you taught made them uncomfortable?

12 A. There was a student one time who said that a video I showed
13 in class made him or her -- I can't recall -- uncomfortable
14 because the video, a documentary, revealed some instances of
15 strikers exposing themselves to people crossing the picket line,
16 and there was a lot of foul language in the documentary.

17 Q. And how did you handle that student's complaint?

18 A. I apologized that the student felt offended by it. And I
19 think for maybe the next time around in the course -- that I
20 taught the course or two, I told students that they might find
21 some of content in this documentary offensive, and if foul
22 language or graphic descriptions of what might be obscene
23 behavior offended them, I would find some other assignment for
24 them. And no student ever took me up on that offer, so I
25 stopped offering it.

1 Q. If a student came to you with that kind of complaint today,
2 do you know whether you could provide an alternative assignment
3 to them?

4 A. No, I don't know, but I would probably try to do that.

5 Q. Why don't you know?

6 A. I don't know if there's something in the law that might
7 prevent that in HB-- well, in HB 233. I guess that would be
8 shielding.

9 Q. Do your students -- do you think your students know your
10 political beliefs?

11 A. Yes.

12 Q. And how do you know that?

13 A. Well, at the start of class, I tell them -- we do some
14 icebreakers, and I give them some examples from my experience,
15 including seeing Paul McCartney in a bar, getting shot once in a
16 hunting accident, living in Scotland for a year and that I've
17 been president of the faculty union chapter.

18 I describe the icebreakers as something that's relatively
19 unique about you, and so those are things that I think are
20 relatively unique about me.

21 Q. Have students ever expressed a concern that you were too
22 political?

23 A. I have seen a few comments on my student perceptions of
24 teaching and instruction forms at the end of the semester they
25 get. We get to see those after the grades are done, and I have

1 seen a few students say that I was very pro-union and the course
2 was very pro-union, so yes.

3 Q. Have you done anything in your teaching to address those
4 comments?

5 A. I consistently try to maintain as neutral a position as I
6 can, while not letting them know that personally -- as I said
7 with telling them about my union office, and so on -- personally
8 I think unions are a good thing, but they are not required to
9 believe that.

10 There are -- and I tell them there are opposing views. In
11 fact, maybe the mainstream economics view is the one that's most
12 hostile to unions, and we talk about that quite a bit. I have
13 quite a bit of background on economics, so I'm very comfortable
14 with that material.

15 Q. And, generally, what kind of students do you have in your
16 labor relations course?

17 A. Well, mostly seniors, some juniors. Most of them are
18 management majors, a few from other business disciplines, and
19 once in a great while somebody from outside the College of
20 Business.

21 Q. And do you have a sense of how they view unions?

22 A. They are generally pretty cool toward unions. I ask the
23 students in the labor relations class at the start of each
24 semester, as part of a student background questionnaire -- when
25 I ask them other things like their name and what they want to be

1 called -- if they have any relevant course experience. And then
2 I also include a question about what I call thermometers as a
3 way of measuring their feelings toward different organizations.
4 And the four organizations I list are management, employees,
5 government, and unions. Those are the four main actors in the
6 industrial relations framework.

7 Q. And how do they tend to respond to that questionnaire?

8 A. They are pretty consistently warm toward employees and
9 management, with scores -- it's on a zero to 100 scale, with 80
10 being -- or 100 being very positive or warm. They typically
11 score around 80 for the employees and for management and
12 typically score around 40 or 50 for government and unions.

13 Q. And do their responses to that questionnaire affect their
14 grade?

15 A. No.

16 Q. And let's talk about the recording provision.

17 Are you familiar with that part of House Bill 233?

18 A. In general terms, yes.

19 Q. And what is your understanding of what the recording
20 provision does?

21 A. Students are permitted to record lectures without
22 permission of the instructor and without informing the
23 instructor that they're doing so.

24 Q. Did you teach any courses remotely during the pandemic?

25 A. Yes, I did.

1 Q. In what form did you teach remotely?

2 A. Through Zoom sessions and using our Canvas Learning
3 Management System to do things like administer quizzes.

4 Q. Were those classes recorded?

5 A. Yes, they were.

6 Q. And are you back to in-person instruction now?

7 A. Yes, we are.

8 Q. And do you record those courses?

9 A. No.

10 Q. Do you know if any of your students are recording those
11 courses?

12 A. I don't believe they are. I haven't seen anybody
13 recording, but I don't know that they are not.

14 Q. Have any of your students told you they are recording any
15 of your courses?

16 A. No.

17 Q. Does the recording provision affect how you express
18 yourself in class in any way?

19 A. It makes me a bit self-conscious, the possibility that
20 students are recording without my knowledge. It probably --
21 well, I feel like it inhibits my spontaneity a bit.

22 Q. What do you mean by "spontaneity"?

23 A. To react to the students' comments and questions and kind
24 of waive them into the material that we're covering. If they
25 tell me about something that they think is relevant to this

1 topic, I might respond to that and that particular example, kind
2 of put it in terms that are familiar to them.

3 But with thinking about the possibility of them recording
4 the process, it makes me want to, in a sense, stick to the
5 script and not add any embellishments that might relate to their
6 story.

7 Q. Before the recording provision was in place, why did you
8 engage in that kind of spontaneous engagement with your
9 students?

10 A. Well, putting it in terms that are more familiar to them.
11 Like maybe relating it back to the story or the facts that they
12 just presented helps to make it more concrete to them and to
13 their classmates, I think. So it has a learning benefit, I
14 believe.

15 Q. And you mentioned that you had recorded some of your
16 courses when they were remote.

17 A. Yes.

18 Q. Do you feel like the recording provision is any different
19 from that?

20 A. Yes. It's -- it's going to be a much more scripted kind of
21 presentation with a remote class or online class, and so you do
22 tend to stick to the script. You don't get much participation.
23 Most of the students don't have their picture showing when
24 they're on the Zoom session. It's rather sterile and one-way
25 communication. It's not a lot of fun for the students, not a

1 lot of fun for the instructors.

2 Q. And if the recording provision were to be struck down, how
3 would that affect the way that you teach?

4 A. I think I would be more spontaneous, more willing to
5 respond to the specifics and the students' comments or
6 questions.

7 Q. Is there anything that you had previously taught that
8 you've taken out of your courses because of House Bill 233?

9 A. No.

10 Q. Is there anything that you've considered adding to your
11 courses that you've refrained from adding because of House Bill
12 233?

13 A. Yes. One good example of that is that the Labor and
14 Employment Relations Association, the largest professional
15 association in labor relations, came out with a research volume.
16 They do it every year. They came out with one last year, toward
17 the end of the year, I believe, on racial issues and the
18 workplace.

19 And I thought about trying to recommend part of that or
20 maybe even requiring some part of it for reading in my class,
21 but I'm afraid that I -- it might make some people uncomfortable
22 or feel guilty. And, on the other hand, if I don't -- if I
23 think that's a valid perspective and I don't require it, I guess
24 I'm shielding.

25 So it feels a little bit like I'm caught between two

1 conflicting forces.

2 MR. HANCOCK: Thank you, Doctor.

3 I don't have any other questions at this time.

4 THE COURT: Cross-examination.

5 CROSS-EXAMINATION

6 BY MR. MOORE:

7 Q. Good afternoon, Dr. Fiorito.

8 A. Good evening.

9 Q. I believe you told Mr. Hancock that you'd not been
10 disciplined for not taking the survey; correct?

11 A. That's correct.

12 Q. And you're unaware of anybody else being disciplined for
13 not taking the survey either; correct?

14 A. Yes.

15 Q. And I believe one of the reasons you mentioned for not
16 wanting to take the survey is that the survey should not ask you
17 about your political beliefs; correct?

18 A. Yes.

19 Q. You touched on this with Mr. Hancock, but in your course
20 where you give out a survey, that's done on the first day, the
21 student questionnaire?

22 A. Yes.

23 Q. And you agree that's -- it's mandatory for your students to
24 complete that; correct?

25 A. It's mandatory that they turn in something. I don't tell

1 them they have to answer all the questions.

2 Q. Okay. Much like the House Bill 233 survey; correct?

3 A. I suppose.

4 Q. Okay. And if a student doesn't turn in the questionnaire,
5 isn't it true that you keep track of who does and who does not
6 complete that questionnaire?

7 A. Not beyond the initial week of class.

8 I want them to complete the questionnaire so I know
9 something about them.

10 Q. Uh-huh.

11 A. If a student said, I'm uncomfortable with these questions,
12 I'd say, Well, just put your name on it. That will do.

13 Q. Okay.

14 A. We are required to take attendance the first day of class,
15 and this is a means by which I find out who's there and who's
16 not.

17 Q. So on the question where you ask the students about their
18 feelings of the various participants, those participants include
19 the government --

20 A. Uh-huh.

21 Q. -- unions, employees, management?

22 A. Right.

23 Q. And you mentioned a thermometer. So if someone gives a
24 zero, that would mean that they have an unfavorable impression
25 or feeling towards the government?

1 A. That's the intention.

2 Q. Okay.

3 And while you might not expect the correlation to be very
4 strong, you would agree that the thermometer readings could be
5 used as a proxy to identify political leanings; correct?

6 A. Yes.

7 Q. In your research that you've conducted, you've asked
8 participants about their political beliefs; correct?

9 A. Yes.

10 Q. Regarding student comments that you were -- and I don't
11 remember the exact language, but something along the lines of
12 too pro-union?

13 A. Uh-huh.

14 Q. You've been teaching at Florida State for, would you say 32
15 years?

16 A. Yes.

17 Q. And the student evaluations have been there since the very
18 beginning; correct?

19 A. In one form or another. They've changed.

20 Q. And in this 32 years, you've only had two or three students
21 write on the student evaluations that you're too pro-union;
22 correct?

23 A. It may be a larger number. I think I said I can recall at
24 least two or three students --

25 Q. Okay.

1 A. -- giving that kind of response.

2 Q. You answered a few questions on direct regarding the
3 antishielding provision.

4 No one has asked you to express anything because of the
5 antishielding provision; correct?

6 A. That's correct.

7 Q. And you've not been threatened with any kind of discipline
8 in connection with the antishielding provision; correct?

9 A. Correct.

10 Q. And you've not changed your syllabus in any way because of
11 the antishielding provision; correct?

12 A. That's correct.

13 Q. And you're not aware -- so I think you said that you've not
14 been compelled to say anything, but you're not aware of anybody
15 else who has been compelled to express anything because of the
16 antishielding provision; correct?

17 A. That's correct.

18 Q. And nor are you aware of anybody else being threatened or
19 subject to discipline as a result of the antishielding
20 provision; correct?

21 A. Correct.

22 Q. And just to sum it up, Doctor, you don't believe that the
23 antishielding provision has harmed you in any way; correct?

24 A. Well, it may be harmful in the sense of the loss of
25 spontaneity in my classroom.

1 Q. Okay. Do you remember being deposed on June 8, 2022?

2 We did it by Zoom on a nice sunny morning.

3 A. Yeah -- I don't remember the date, but yes.

4 Q. Okay.

5 Do you recall me asking you: *Do you believe the*
6 *antishielding provision has harmed you in any way?*

7 A. No, I'm sorry, I don't recall that specific question.

8 MR. MOORE: Okay.

9 Mr. Varnell, would you please pull up
10 Defendant's Exhibit 34?

11 BY MR. MOORE:

12 Q. Dr. Fiorito, have you seen your deposition before, the
13 written transcript?

14 A. I've seen something that referred to interrogatories. Is
15 that the same thing?

16 Q. This is a transcript of the deposition. There was a court
17 reporter on the Zoom, and he or she transcribed my questions and
18 your answers.

19 Have you ever seen the transcription before?

20 A. I think I have, yes.

21 MR. MOORE: Okay.

22 Mr. Varnell, would you please turn to deposition
23 page 33?

24 BY MR. MOORE:

25 Q. Okay. Dr. Fiorito, do you see the question on line 21: *Do*

1 *you believe the antishielding provision has harmed you in any*
2 *way?*

3 A. Yes. And my response: No.

4 MR. MOORE: Okay.

5 Thank you, Mr. Varnell.

6 BY MR. MOORE:

7 Q. And you testified truthfully that day; correct?

8 A. I'm sorry?

9 Q. You testified truthfully in your deposition?

10 A. Yes.

11 Q. What's the average size of your courses, enrollmentwise?

12 A. In the undergraduate courses, it's typically maybe 35.

13 Most of our classrooms can hold no more than 40 students, so
14 there is a reason, you might say.

15 Q. And am I correct that you've not declined to join any
16 association because of House Bill 233; correct?

17 A. Correct.

18 Q. Nor have you left an association because of House Bill 233;
19 correct?

20 A. Correct.

21 Q. You'd mentioned during COVID recording some classes that
22 you taught.

23 A. Yes.

24 Q. You'd agree that you were not required by any policy to
25 record those classes; correct?

1 A. I believe that's correct. I'm not positive. There were a
2 lot of changes during and after COVID. You know, now we do
3 this; now we do that, and now we have to meet remotely; now we
4 have to meet face to face.

5 So I'm not sure there was a directive that we record, but I
6 guess I did record. It seemed like a reasonable thing to do
7 because the students' lives had been disrupted, and they might
8 not be able to attend at the time the class is actually meeting
9 because they had to take a job when they were living someplace
10 else and still paying rent in Tallahassee. I don't know, but --

11 Q. Okay.

12 A. -- it seemed like a reasonable thing to do.

13 Q. Sure.

14 To your knowledge, no one has manipulated those recordings
15 and used them elsewhere; correct?

16 A. Not that I know of.

17 Q. Okay. And fast-forward to present day. Since House Bill
18 233 has been in effect, I believe you told Mr. Hancock that
19 you're not aware of anyone who has actually recorded one of your
20 classes --

21 A. Correct.

22 Q. -- to your knowledge?

23 So I guess it's fair to say, then, that no one has used the
24 record of your class as a grievance -- or in a grievance against
25 you; correct?

1 A. So far as I know, right.

2 Q. Nor as evidence in a civil or criminal proceeding?

3 A. As far as I know.

4 Q. And you're also not aware of anyone recording anyone else's
5 class and using that in a complaint against anybody else;
6 correct?

7 A. Correct.

8 Q. You mentioned some statements by -- first you said
9 government officials, and then you clarified lawmakers,
10 politicians.

11 You didn't witness those statements being made; correct?

12 A. Correct.

13 Q. Nor did you read the full transcripts of where the
14 statements came from?

15 A. No.

16 Q. And you didn't watch any of the video statements made on
17 the legislative floor?

18 A. Sometimes they're included in newsclips where I might have
19 seen them.

20 Q. But you'd agree with me that you can't tell the specifics
21 of the context in which the statement was made; correct?

22 A. Correct.

23 Q. And you'd also agree that without seeing statements in the
24 full context, sometimes statements can be taken out of context;
25 correct?

1 Q. Mr. Hancock asked you about the survey in 2023 and whether
2 or not you thought it would be voluntary.

3 And you said you kind of see it tugging both ways, or
4 something along those lines?

5 A. Pushing both ways, yeah. I think I said that.

6 Q. Is one of the reasons that you think it might not be
7 voluntary in the future is because the -- if the response rate
8 for a certain college is low, that a provost might say to that
9 that college dean, This response rate's a little low, it's lower
10 than we expected, and there'd be pressure for the college to
11 have a higher response rate?

12 A. That's a possibility, yes.

13 Q. Okay. But you agree that you don't know whether or not a
14 provost has had any conversation with any dean of any college
15 regarding what an appropriate response rate would be?

16 A. None that I know of.

17 Q. Okay. And you're not aware of the Board of Governors
18 telling the provost of FSU that funding would be decreased if
19 FSU didn't do what the Board of Governors wanted; correct?

20 A. Correct.

21 Q. Were you aware that actually the funding for FSU is going
22 down as a result of it not doing what the Board of Governors
23 asked it to do in the past; correct?

24 A. That's correct.

25 Q. And there's been some discussion regarding the fact that

1 you're tenured, but you don't know of anyone who's been fired
2 because they taught something that's contrary to the Governor's
3 or the Board of Governor's philosophy; right?

4 A. Right.

5 Q. Concerning the subjects that you teach, I believe there was
6 some testimony along the lines of you have some concern given
7 the content of the classes that you teach?

8 A. Yes.

9 Q. You agree that you've not been targeted under House Bill
10 233; correct?

11 A. Yes.

12 Q. And you agree that you've not faced retribution; correct?

13 A. Yes.

14 Q. And you agree that you don't know how you would face
15 retribution under House Bill 233; correct?

16 A. That's correct.

17 MR. MOORE: No further questions, Your Honor.

18 THE COURT: Redirect.

19 REDIRECT EXAMINATION

20 BY MR. HANCOCK:

21 Q. Dr. Fiorito, when you were talking to Mr. Moore, do you
22 remember discussing statements being taken out of context?

23 A. Today?

24 Q. Yeah.

25 A. Yes.

1 Q. When you recorded your lectures on Zoom during the
2 pandemic, did you record the full context of those lectures?

3 A. Yes.

4 Q. As you understand the recording provision, is there a
5 requirement that students record the full context of the
6 lecture?

7 A. I don't recall that.

8 Q. And do you recall discussing with Mr. Moore that you have
9 conducted survey research yourself?

10 A. Yes.

11 Q. Have you hired independent research firms when you did
12 that?

13 A. Usually.

14 Q. Have you ever conducted survey research to provide data to
15 the government?

16 A. Yes.

17 Q. And have you gotten IRB approval --

18 A. Yes.

19 Q. -- for those?

20 What is IRB approval?

21 A. The Internal Review Board -- I think that's what it stands
22 for. It's a faculty committee that tries to make sure that
23 survey researchers are doing things the way they should be doing
24 them, not mis -- not asking misleading questions and not
25 subjecting subjects of experiments to abuse.

1 Q. Have you ever sent out a survey that had not received IRB
2 approval?

3 A. No, not that I can recall.

4 Q. And have you ever sent out a survey to persons that you
5 personally employed?

6 A. Persons that I?

7 Q. Have you ever engaged in survey research of persons you
8 personally employed?

9 A. No.

10 Q. And before you sent out any of these surveys, did you
11 threaten the possibility of retaliating against survey
12 respondents?

13 A. No.

14 MR. HANCOCK: I don't have any other questions.

15 THE COURT: Thank you, sir. You can step down.

16 THE WITNESS: Thank you.

17 THE COURT: And thank you for your patience with us.
18 I know you've been waiting to testify.

19 THE WITNESS: Thank you, Your Honor.

20 (Dr. Fiorito exited the courtroom.)

21 THE COURT: The next witness, as I understand it, is
22 Solomon; is that correct?

23 MR. WERMUTH: Olivia Solomon, yes.

24 THE COURT: Do we expect the next two witnesses to be
25 about as long as this witness or longer, or what's our best

1 guess?

2 MR. WERMUTH: It could be shorter, actually.

3 THE COURT: The reason why I'm asking, it sounds like
4 these are the last two today?

5 MR. WERMUTH: Uh-huh.

6 THE COURT: So we're probably going to finish early?

7 MR. WERMUTH: Probably.

8 THE COURT: Based on that, I'm going to take a
9 five-minute break for the benefit of the court reporter.

10 Thank you.

11 Y'all can keep your seats.

12 (Recess taken at 1:57 PM.)

13 (Resumed at 2:04 PM.)

14 THE COURT: We're back on the record. My
15 understanding is we have two additional witnesses this
16 afternoon.

17 Counsel for the plaintiff, you can call your next
18 witness.

19 MR. WERMUTH: Plaintiffs call Olivia Solomon.

20 (Ms. Solomon entered the courtroom.)

21 THE COURT: I've got a lawyer; we don't have a
22 witness.

23 MS. JASRASARIA: Our witness is on Zoom.

24 THE COURT: Oh, okay. That makes a little more sense.

25 MS. JASRASARIA: Yes.

1 THE COURT: Good afternoon, ma'am.

2 Can you hear us? No.

3 THE COURTROOM DEPUTY: One minute. Go ahead.

4 THE COURT: Ma'am, can you hear us.

5 THE WITNESS: Okay. Now I can, yeah.

6 THE COURT: Good afternoon. I'm Judge Walker. If
7 you'll raise your right hand.

8 Please raise your right hand.

9 **OLIVIA SOLOMON, PLAINTIFFS WITNESS, DULY SWORN**

10 THE COURT: Thank you. If you'll put your hand down.
11 State your name for the record and spell it for the
12 court reporter.

13 THE WITNESS: Olivia Solomon, O-l-i-v-i-a
14 S-o-l-o-m-o-n.

15 THE COURT: All right.

16 Ms. Solomon, if you will, make sure you keep your
17 voice up. If somebody asks you to repeat something you've said,
18 they're not being rude. We've just got to get a good record
19 today and it's a little bit awkward to do this by Zoom.

20 The lawyers are going to finish -- let them finish
21 their questions before you answer, and they're not going to talk
22 over you, and they're going to let you answer the questions
23 fully; okay?

24 THE WITNESS: Perfect. Thank you.

25 THE COURT: All right. Thank you.

1 Counsel, you may proceed.

2 DIRECT EXAMINATION

3 BY MS. JASRASARIA:

4 Q. Good afternoon, Ms. Solomon.

5 Are you okay with me calling you Olivia?

6 A. Yes.

7 Q. Are you currently a student, Olivia?

8 A. Yes.

9 Q. Where are you studying?

10 A. University of Central Florida.

11 Q. And your university is commonly known as UCF; is that
12 right?

13 A. Yes.

14 Q. What are you studying at UCF?

15 A. I'm studying political science and writing and rhetoric.

16 Q. Did you grow up in Florida?

17 A. Yes, I grew up in Miami.

18 Q. Why did you decide to go to UCF for college?

19 A. I would say it was mainly a financial decision, instate and
20 scholarship offers, as well as distance from home.

21 Q. Did you have any awareness of what UCF's reputation was
22 before you went there?

23 A. Yes. Out of the Florida public universities, it is known
24 to be a very innovative, progressive and diverse campus. It is
25 very large with the amount of diversity and had strong programs

1 for what I was looking for.

2 Q. How long have you been a student at UCF?

3 A. This is my third year.

4 Q. So does that mean you started in fall of 2020?

5 A. I started in summer of 2020.

6 Q. And when will you graduate?

7 A. I will be graduating summer of 2023.

8 Q. Does that mean that you're graduating early?

9 A. Yes.

10 Q. Are you familiar with an organization called March For Our
11 Lives Action Fund?

12 A. Yes.

13 Q. And is March For Our Lives Action Fund a plaintiff in this
14 lawsuit?

15 A. Yes.

16 Q. What is March For Our Lives Action Fund?

17 A. They are the financial and fund behind March For Our Lives.
18 They help with funding, securing programs within our
19 organization.

20 Q. Are you affiliated with March For Our Lives?

21 A. Yes.

22 Q. In what capacity?

23 A. I have been with them since 2018 when they started. I
24 started off as a volunteer. I got more involved with leadership
25 opportunities when I started college. I was on their state

1 board. I am the lead for the UCF chapter. I also am a -- the
2 Florida spokesperson for the national team.

3 Q. How long have you been the president of the UCF campus
4 chapter of March For Our Lives?

5 A. I'd say about a year. I started in spring of last year.

6 Q. And how long have you been the Florida spokesperson for the
7 national organization?

8 A. That started at the end of the summer, so not too long.
9 That was a new position that we created for, like, the elections
10 and more information coming.

11 Q. How long have you been involved in March For Our Lives?

12 A. So I've been involved with March For Our Lives since 2018
13 when it began.

14 Q. How did March For Our Lives first begin?

15 A. So we started out of -- after the Marjory Stoneman Douglas
16 High shooting, school shooting. I was very close to that school
17 in proximity. I was about 30 minutes away. I went to a public
18 school in Florida that was very similar. I had a lot of friends
19 that went there. I had friends from sleepover camp that were
20 texting me during the shooting.

21 (Reporter requested clarification.)

22 THE WITNESS: Yeah. Sorry. I talk really fast.

23 Yeah, so 2018, we started out of the Marjory Stoneman
24 Douglas High shooting. I was very close in proximity to the
25 school, as well as I had a lot of my friends that went there.

1 It -- I grew up in an age of school shootings and gun
2 violence, but to see kids that I had known in passing and that
3 were very, very similar to me, be gunned in school, it was
4 definitely a wake-up call to get involved, and that's how I
5 began with March For Our Lives.

6 BY MS. JASRASARIA:

7 Q. Have you been involved with any student organizations at
8 UCF besides March For Our Lives?

9 A. Yes. I am involved with College Democrats of UCF as well
10 as YDSA, which is Young Democrats -- Young Democratic Socialists
11 of America and Planned Parenthood Action Fund on campus.

12 Q. Are you currently working with or volunteering with any
13 other organizations outside of UCF?

14 A. Yes. I work with Equality Florida as well as the Orlando
15 Planned Parenthood chapter and Freedom to Read Florida, as well
16 as the local representatives in my area.

17 Q. How would you characterize the various organizations that
18 you're a part of?

19 A. I would say primarily progressive, grassroots
20 organizations.

21 Q. And what kinds of issues do you advocate for as a member of
22 those organizations?

23 A. So -- sorry. I'm still a little sick.

24 Gun violence prevention is something that, you know, was
25 really important to me and probably my -- the issue I'm most

1 passionate about, but also human rights and equality, standing
2 up for the LGBTQ community and just, you know, everyone here in
3 Florida.

4 Q. Are the issues that you mentioned, including gun violence
5 prevention and LGTBQ+ rights -- are those hotly contested policy
6 issues in Florida today?

7 A. Yes.

8 Q. Does that mean that students involved in those kinds of
9 organizations can be vulnerable to harassment?

10 A. Yes.

11 Q. How do you know that?

12 A. As someone who is very vocal about their opinions and not
13 afraid to stand up for what I believe in, especially within
14 these organizations, you know, I do get a lot of pushback. When
15 we see people who don't agree with us, whether it's on campus,
16 whether it's making sure I -- that my professors -- before I
17 take classes, to make sure that I'm not putting myself in a
18 situation where a professor is going to find out I'm involved
19 with one of these organizations and grade me against that, and
20 just doing this work in Florida, it puts a target on my back.

21 Q. As a Florida citizen, do you feel like your advocacy work
22 for these types of organizations is aligned with the views of
23 the majority in the legislature?

24 A. No.

25 Q. What about the Governor?

1 A. No.

2 Q. Let's turn a little bit to talk about this litigation
3 specifically.

4 What is your understanding of why March For Our Lives is
5 involved in this litigation?

6 A. So March For Our Lives is involved in this litigation
7 because this bill is hurting our chances to get people involved
8 and it's causing students to be afraid of getting involved with
9 organizations such as March For Our Lives and silencing us in a
10 way.

11 Q. Are you familiar with House Bill 233?

12 A. Yes.

13 Q. Is that -- is March For Our Lives challenging certain
14 provisions of HB 233 in this lawsuit?

15 A. Yes.

16 Q. Have you read House Bill 233?

17 A. Yes.

18 Q. And how did you first become familiar with House Bill 233?

19 A. So about two legislative sessions ago when this bill first
20 arise -- arose, I was working with Carlos Guillermo Smith as an
21 intern, Representative Carlos Guillermo Smith, and one of my
22 jobs was to summarize the legislation for him, go over some of
23 the bills, and that's when this came up, and I started looking
24 at it and became familiar with it.

25 And, you know, as that legislative session continued and it

1 passed and we went through the last legislative session, I was
2 able to see how this bill kind of created a space for other
3 similar bills in the terms of education and higher education in
4 Florida and changing that.

5 Q. And if you could just slow down. I know that this is a
6 weird format, but we are trying to capture it, so I really
7 appreciate your time and doing this remotely, even though I know
8 you're sick.

9 So just as a clarification, the Court did hear testimony
10 from Former Representative Smith yesterday.

11 Have you spoken to Former Representative Smith about your
12 testimony?

13 A. No.

14 Q. And what about his testimony?

15 A. No.

16 Q. So let's talk a little bit about the challenged provisions.

17 Are you familiar with the antishielding provisions?

18 A. Yes.

19 MS. JASRASARIA: Andy, if I could have you share Joint
20 Exhibit 1 and pull up the antishielding provision language.

21 BY MS. JASRASARIA:

22 Q. Olivia, are you able to see the screen being shared?

23 A. Yes.

24 Q. Okay. Is that the language that you're referring to?

25 A. Yes.

1 Q. On your read, what do the antishielding provisions do?

2 A. So these provisions, they allow all speech, all opinions,
3 whether they make other people uncomfortable or find offensive
4 or if they disagree with them.

5 Q. Do you believe that a left-leaning student could use the
6 antishielding provisions to challenge a right-wing professor's
7 failure to expose them to liberal ideas?

8 A. No.

9 Q. Why not?

10 A. If who we are looking to who they would take the complaints
11 to them, that would be university administrations or the
12 government, which is extremely right leaning, and it's seeking
13 to protect people like that right-leaning professor.

14 And so while this is a very nice sentiment and idea of
15 protecting all speech and all ideas, it is not done with the
16 intentions to protect those that are progressive or seeking
17 liberal ideology.

18 Q. And why -- what basis do you have to think that?

19 A. I've actually experienced this as a freshman. My first
20 semester at UCF I took a -- I believe it was just like a
21 baseline government class. It was a -- like a pre-req kind of
22 thing to get into my major, and the professor multiple times had
23 made incredibly racist and transphobic remarks.

24 A group of us had reported this multiple times to the
25 administration and absolutely nothing was done. We never heard

1 back besides an email saying that this was submitted, and we'd
2 hear back, which we never did, and this professor still teaches
3 at UCF.

4 Q. Did that incident happen before HB 233 was passed?

5 A. Yes, I believe so.

6 Q. And have you seen any more recent examples on your
7 university of the university not supporting progressive
8 students' advocacy against right-leaning ideas?

9 A. Yes. So last year -- so this is once HB 233 was already
10 put into place -- there were a lot of antisemitic attacks, and
11 people around campus, at a shopping center about five minutes
12 away from UCF where a lot of students go, there were a group of
13 neo-Nazis that were, you know, expressing hate and also getting
14 very violent.

15 There were posters all around campus with swastikas and
16 antisemitic rhetoric, and the university didn't really say
17 anything about this. They put out a simple tweet -- I don't
18 remember the exact language, but basically saying that UCF loves
19 and accepts everyone, but they didn't address the exact issue --
20 the exact issue or condone any of this violence.

21 So a group of, you know, progressive, upset students, we
22 organized and put on a small protest on campus calling out these
23 activities and, you know, it was an anti-Nazi protest, small
24 protest, on campus. And rather than the administration or the
25 university, you know, doing anything to help us or doing

1 anything to condemn antisemitism or Naziism, they simply had the
2 leaders of this protest -- they took them, they talked to them
3 and said that if they were to do something like this again, it
4 would affect their graduation times and said that they -- and
5 said that they were in trouble for using amplified sound,
6 which --

7 THE COURT: Hold on, ma'am. You're breaking up.

8 If you could repeat your last sentence, please.

9 THE WITNESS: Yeah. Sorry.

10 So they said that they were in trouble for using
11 amplified sound and having a protest on campus that wasn't
12 properly, like, planned, which in the past we have seen people
13 from -- you know, extreme right preachers on campus spewing
14 hate. We have seen antiabortion protesters with false images of
15 dead babies on campus, and they never get in trouble. And
16 there's never anything that the university does to stop them,
17 but they were simply calling us out and, you know, threatening
18 us for having a small rally that, you know, said we weren't
19 going to tolerate hate.

20 BY MS. JASRASARIA:

21 Q. Where was that rally held that you were involved in
22 organizing?

23 A. I believe it was an area we call the free speech lawn on
24 campus, which, I mean, it's a public university so technically
25 it all is, but that's just, like, the little area that we use

1 for these kinds of things.

2 Q. Has the university's response to activities like the
3 protest that you were involved with made it more difficult for
4 you to associate with like-minded students on campus?

5 A. Yes. I would say that a lot of students agree with the
6 things that I'm fighting for, the things that these progressive
7 organizations are, but there is a constant hesitation, when you
8 see things like this, to get involved.

9 There is the fear of --

10 (Reporter requested clarification.)

11 MS. JASRASARIA: Sorry.

12 And, Andy, you can pull that exhibit down.

13 Thank you.

14 BY MS. JASRASARIA:

15 Q. Sorry. If you could just speak a little bit more slowly.
16 I know, again, this is partly because you are being amplified in
17 a courtroom.

18 A. Yeah. No worries.

19 There is a hesitation of students who agree with these
20 things and would otherwise speak up against them, that they
21 don't want to harm their academic standing, they don't want that
22 to affect their graduation times, which I totally understand.
23 And it comes to a point of wanting to protect yourselves more
24 than standing up for this, and I don't think anyone should have
25 to deal with that.

1 Q. Let's shift gears to talking about the classroom setting.

2 Have you noticed any effects of the antishielding
3 provisions in your classes?

4 A. Yes, I have noticed professors being, you know, more
5 worried and cognizant of the things they are teaching. This
6 semester I am taking an indigenous rhetorics class, and I was
7 speaking with the professor after class, and he said that he has
8 become more wary of things that he's saying in terms of talking
9 about indigenous people now and, you know --

10 THE COURT: One moment, ma'am. One moment.

11 Objection. Hearsay.

12 Response?

13 MS. JASRASARIA: Ms. Solomon is speaking about the
14 effect that that's had on --

15 THE COURT: Well, she's already said she's seen the
16 effect and she can give examples, but now she's saying what
17 somebody has told her, which is sustained. Hearsay.

18 MS. JASRASARIA: We can move on from this, sure.

19 THE COURT: Okay. But I want to -- so I don't have to
20 cut off the witness, let me -- Ms. Solomon, rather than telling
21 us what the professor said, it's my understanding -- and I want
22 to make sure that I understood and I'm not misapprehending what
23 you said -- that since July of 2021, after this law went into
24 effect, over the last -- over a year you've seen professors
25 being more reserved. I forgot what term you used. If you

1 could, explain that, because I -- because there was the
2 objection and moved on to something else, you kind of got cut
3 off.

4 So what did you mean by what you observed and how
5 things were changing?

6 THE WITNESS: So I have noticed professors become more
7 wary of what they're saying in terms of sharing their opinion,
8 and they are experts in their field. Sharing their opinion,
9 especially in a political science class, doesn't usually
10 constitute a bias but is usually talking about -- especially
11 when we're talking about different social issues in current
12 times, that have become more wary of sharing experiences or
13 different ideas on that because of objection.

14 Something that I have faced as a Jewish student is in
15 certain classes if someone was to say something like, Well, what
16 about the other side of the Holocaust -- which we have seen in
17 different, you know, state legislations being addressed, and to
18 me, there is no other side of the Holocaust, rather --
19 explaining what happened or denying it and explaining
20 antisemitic rhetoric and -- that not only puts me and my
21 community in danger but also exposes other students to
22 disinformation.

23 THE COURT: So, in short, if I was going to ask you to
24 summarize, it sounds like you were telling me that the
25 discussions in class were less robust, and the professors were

1 less engaged because they appeared to be more reserved.

2 Is that what you were communicating to me?

3 THE WITNESS: Yes.

4 THE COURT: All right. I understood. Thank you.

5 Counsel, you can ask your next question.

6 BY MS. JASRASARIA:

7 Q. How has that environment affected your experience as a
8 student?

9 A. As a student especially of political science, I want to use
10 my education to get as much value out of it as I can and to see
11 professors, you know, not explain everything or maybe chose a
12 different book because they don't know how it would be taken, if
13 they would be called into question in a situation for bias or,
14 you know, teaching something that's too woke. I want to be able
15 to get everything out of education I can, and I feel in this
16 environment I cannot.

17 Q. Olivia, you mentioned that you're graduating a year early.
18 Has HB 233 played any role in that decision?

19 A. Yes, HB 233 and some more bills following it have
20 definitely affected my decision to leave college -- to leave
21 Florida early. I don't see these progressing. I only see them
22 in terms of our legislation getting worse, and I want to be able
23 to get the most out of my education. I'm looking at things such
24 as graduate school and furthering my education in the future. I
25 do not see myself coming back to Florida to find that.

1 I also see professors that -- young professors that would
2 have tenure or very valuable to the university leaving because
3 they do not want to have to worry about teaching their expertise
4 in their subject. So we are losing valuable professors, and in
5 my education, I want to be able to get the most out of it, and
6 that is not the case in Florida.

7 Q. Let's turn to HB 233's recording provision.

8 What do you understand that provision to do?

9 A. I believe that it means a student can pull out their phone
10 or any recording device and record whatever they want without
11 asking permission or consent.

12 Q. And have you noticed any effects of the recording
13 provisions in your classes?

14 A. In terms of Zoom classes, I have seen professors stop
15 recording the Zoom sessions for students to go back. As someone
16 who likes to take very detailed notes, those were very helpful
17 to me and being able go back and see a recording. I don't know
18 if that has anything to do with, you know, less Zoom classes and
19 COVID changing the style of classes, but that is something I
20 have noticed in terms of recording.

21 Q. And let's turn to the survey provisions.

22 What do you understand the survey provisions to do?

23 A. So for the survey provision requires a survey to go out to
24 all the Florida public colleges and to gauge the ideologies of
25 the students on the campus.

1 Q. Did you receive a survey last year?

2 A. There was one presented to us on our student portal, but it
3 was not mandatory, and I did not take it.

4 Q. And why didn't you take it?

5 A. I knew what it was. I didn't want to give any more
6 ammunition for, you know, shaping UCF as a certain way and for
7 that to affect any funding or anything we were receiving.

8 Q. Why are you concerned about the school appearing a certain
9 way, I think you said?

10 A. Yeah, so, I mean, we see recent examples of -- just in the
11 past few days of New College. This is a college that I
12 considered going to. It is to high schoolers and to people
13 around it known as the liberal, hippie, very progressive, open,
14 diverse campus, which is a great thing, and seeing the Board
15 being overtaken by extreme religious and right-winged people, by
16 Governor DeSantis, you know, it leads me to think that could
17 happen to UCF if we are gauged as a too liberal, too progressive
18 college, which -- I mean, in all honesty, colleges are the place
19 where kids learn new things. We develop our own ideas, and they
20 are very often progressive places. If UCF is seen as too
21 diverse or too open, could that happen and could we lose
22 funding? Could our program shut down? Could we lose our
23 innovation because of that?

24 Q. Have the challenged provisions that we discussed today had
25 any affect on student organizing on campus?

1 A. Yes, I believe that this bill and other bills that it has
2 made room for create a sense of tension and wariness for
3 students getting involved, especially March for Our Lives. No
4 one wants that target on their back. Nobody wants to be seen as
5 the ultraliberal student when things like this are going on
6 because we have seen and we know repercussions can happen.

7 Q. Does that environment make it harder for March for Our
8 Lives to recruit members at UCF?

9 A. Yes, we have done tabling in the past when other
10 organizations, such as Turning Point USA, which is a very
11 conservative organization, has come out and put their table in
12 front of us and started calling out kids who were walking
13 towards us. That scares kids away. That shows, Oh, maybe I
14 don't want to be involved in this. I don't want to be harassed.

15 And I have spoken to students who say, you know, I support
16 what March for Our Lives is doing and I want to help, but, you
17 know, I'm just afraid. I don't want this to affect how my
18 professors, how other people see me. I don't want this to hurt
19 my education in any way.

20 And I understand that. As someone who is very outspoken
21 about their views, my parents often warn me, and my mom -- even
22 getting involved with this lawsuit was a, Be very careful. I
23 don't want it to impact your education or impact you -- put a
24 target on you.

25 THE COURT: One moment, ma'am.

1 Sustained as to what her mother said.

2 She's going to ask you another question.

3 THE WITNESS: Sure.

4 BY MS. JASRASARIA:

5 Q. So you mentioned the incident about tabling on campus, and
6 I'm curious -- if you could explain why you think HB 233 had
7 that affect.

8 A. Well, if you look at the antishielding provisions, it gives
9 a protection for this kind of behavior and, you know, all
10 opinions, all ideologies (indiscernible audio) --

11 (Reporter requested clarification.)

12 Q. You are breaking up a little bit. If you could speak more
13 slowly.

14 A. Sorry.

15 Q. Okay.

16 A. So can you repeat the question? I'm sorry.

17 Q. Yeah, absolutely.

18 How do you think that HB 233 has affected the example that
19 you just shared about the tabling incident?

20 A. Yeah. So the antishielding provision specifically has kind
21 of given a protection to these right-wing groups to basically do
22 whatever they want in the way that they're -- Oh, we are
23 protected. We are within our speech. And while I believe that
24 all speech should be protected, there needs to be a line when it
25 comes to hate speech or speech that could incite violence and

1 hurt other students.

2 Q. Is March for Our Lives taking any steps to address some of
3 the recruitment challenges and organizing challenges that you've
4 just testified to?

5 A. Yes. So we have kind of as a March for Our Lives UCF
6 chapter extended ourselves more to the Orlando and outside
7 community rather than focusing on campus events. So we extended
8 through our social media to all college students. But I focused
9 on doing things in the community around us and surrounding us,
10 focusing on Orlando as an area other than just UCF itself, on
11 campus.

12 Q. If the challenged provisions of HB 233 were enjoined, so
13 struck down, how -- how would that affect your experience as a
14 student?

15 A. I believe it would give us, you know, more confidence, more
16 freedom and -- to know that we can't be attacked or hurt or
17 targeted with what we're doing.

18 Q. Thank you very much, Olivia.

19 MS. JASRASARIA: I pass the witness. No further
20 questions.

21 THE COURT: Cross-examination.

22 CROSS-EXAMINATION

23 BY MS. LUKIS:

24 Q. Hi, Ms. Solomon. Can you hear me okay?

25 A. Yes.

1 Q. Okay. Did I hear you correctly in your early testimony
2 that you helped found the March for Our Lives UCF chapter in
3 spring of 2022? Is that right?

4 A. Yes. So March for Our Lives has always had a presence on
5 the UCF campus, but we didn't have an official registered
6 student organization with the university until last year.

7 Q. So you officially registered March for Our Lives' UCF
8 chapter after House Bill 233 passed?

9 A. Yes.

10 Q. Am I correct you're not aware of any individuals who have
11 not joined March for Our Lives because of House Bill 233?

12 A. I mean, I can't say specifically because of House Bill 233,
13 but because of the repercussions I have seen out of bills like
14 House Bill 233 and ones that followed it, there's been an
15 increased wariness and hesitation to join March for Our Lives
16 and other organizations like it. So no one has told me, I'm not
17 joining this because of House Bill 233, but I can infer it
18 because of the consequences.

19 Q. And in the same vein, you're not aware of anyone who's
20 resigned from or otherwise left membership with March for Our
21 Lives because of House Bill 233; is that right?

22 A. Similar to my other answer, they have not specifically said
23 it is because of House Bill 233, but we can see the consequences
24 of it and how that has impacted people.

25 Q. And when you say there's consequences, are you referring to

1 some of the things you talked about during your earlier
2 testimony?

3 A. Yes.

4 Q. I believe you talked a little bit about the reaction you've
5 seen from your professors.

6 Do you recall that testimony?

7 A. Yeah, I believe so. I would say that -- yes. Sorry.

8 Q. You're fine.

9 You cannot name any professor, though, who you've
10 specifically discussed House Bill 233 with; correct?

11 A. No.

12 Q. Did I hear you correctly earlier -- you mentioned that UCF
13 is a relatively progressive campus; is that right?

14 A. Yeah, it always has been known as that. Yes.

15 Q. Okay. And that's one of the reasons why you chose to go
16 there?

17 A. Yes.

18 Q. Did you also say that you feel like you have a target on
19 your back because you're progressive?

20 A. Yes, yes.

21 Q. Okay. I want to talk a little bit about an example that
22 you used -- or that you discussed earlier. I believe counsel
23 asked you if you could give an example of how House Bill 233 has
24 affected -- or has affected you after it passed, and you
25 discussed a series of antisemitic events or displays with

1 antisemitic overtones, really.

2 Do you recall that testimony?

3 A. Yes.

4 THE COURT: Counsel, let me ask before you get
5 there --

6 MS. LUKIS: Sure.

7 THE COURT: You were asked questions, ma'am, about the
8 university being progressive.

9 Did you mean the administration? The students?
10 What -- or maybe all of the above?

11 THE WITNESS: I'd say that the students are very
12 progressive and create an environment in that. The
13 administration has become -- become increasingly less
14 progressive and more conservative.

15 THE COURT: When you said "target," were you saying
16 your fellow students were going to target you, or who were you
17 referring to you would be -- have a target on your back?
18 Everyone? Students? Faculty?

19 THE WITNESS: I would say stemming from faculty, the
20 government, and administration.

21 THE COURT: All right. That's how I understood your
22 testimony, but I wanted to make sure.

23 And I understood that -- based on the example that --
24 and that's why I paused, because the example of the
25 antisemitism -- you were saying because y'all used bullhorns,

1 just like the religious folk did in the same square all the
2 time, you were reprimanded and other people weren't, and that's
3 why you viewed it as "I've got a target on my back"; is that
4 correct?

5 THE WITNESS: Yes.

6 THE COURT: All right. That's how I understood the
7 example. Thank you.

8 Counsel, you may proceed.

9 BY MS. LUKIS:

10 Q. Did you also testify that you need to -- you feel like you
11 need to vet your professors before you take classes with them?

12 A. Sometimes, yes, especially in the political science realm.
13 I'm very close with my fellow student organizers, and a lot of
14 those are also political science majors, and we will often talk
15 about, Oh, like, that this professor has -- you know, maybe med
16 feel very uncomfortable for my views, because of this maybe try
17 not to take them if you can avoid that and different things
18 likes that. We don't want to put ourselves into situations
19 where we're going to be graded based on our views other than our
20 work.

21 So I wasn't saying vet in the way that I go looking into
22 that, but if I have heard something about the professor before,
23 I make sure not to take their class.

24 Q. Going back to what we were talking about a moment ago, the
25 antisemitic event that we were -- incident, is it accurate to

1 say that you were -- you felt like the University's response to
2 that incident was inadequate?

3 A. Yes, yes.

4 Q. Okay. Did you interact with anybody from the Board of
5 Governors with regard to that incident?

6 A. No.

7 Q. Give me just a minute, Ms. Solomon. I apologize.

8 THE COURT: While she's looking at her notes, I'm
9 interested, Ms. Solomon -- you mentioned graduate school and I
10 missed it. What do you want to do in graduate school?

11 THE WITNESS: So first I want to be able to work in
12 D.C., hopefully, as a policy or speech writer for someone in
13 Congress, and then I want to go to graduate school for public
14 policy in a few years.

15 MS. LUKIS: May I proceed?

16 THE COURT: Sure. I was giving you time to go over
17 your notes.

18 BY MS. LUKIS:

19 Q. I'm going to do my best to not mispronounce this, but do
20 you know who Mr. Tej Gokhale?

21 A. Yes.

22 Q. Who is he?

23 A. He was the acting executive director of March for Our Lives
24 for some time during our transition.

25 Q. And you were aware that he was deposed earlier in this

1 litigation; right?

2 A. Yeah.

3 Q. You didn't speak to him before his deposition, did you?

4 A. No.

5 Q. Okay. That is all I have for you, Ms. Solomon. I hope you
6 feel better.

7 A. Thank you.

8 THE COURT: Anything else?

9 MS. JASRASARIA: No questions.

10 THE COURT: Ms. Solomon, thank you. I hope you feel
11 better. Thank you for your patience with us, and good luck with
12 graduation next summer, and we wish you the best. Thank you.

13 THE WITNESS: Thank you so much.

14 (Ms. Solomon exited the witness stand.)

15 THE COURT: All right. Ladies and gentlemen, since we
16 have essentially, through no fault of the last witness, just put
17 the court reporter on the rack, we are going to take a break.
18 That was -- it was hard for me. I normally can hear and read.
19 It was hard for me as well.

20 So we'll take a break, and we'll come back.

21 And I believe we have one additional witness; correct?

22 MR. WERMUTH: Yes.

23 THE COURT: So we'll take a ten-minute break.

24 Thank you.

25 (Recess taken at 2:45 PM.)

1 (Resumed at 3:00 PM.)

2 THE COURT: We are back on the record.

3 You can call your next witness.

4 MR. WERMUTH: Plaintiffs call Alyssa Ackbar.

5 (Ms. Ackbar entered the witness stand.)

6 THE COURT: Welcome, Ms. Ackbar. When you get to the
7 witness stand, please remain standing, raise your right hand and
8 be sworn in by the courtroom deputy.

9 **ALYSSA PENNA ALVES ACKBAR, PLAINTIFFS WITNESS, DULY SWORN.**

10 THE COURTROOM DEPUTY: Please state your name and
11 spell your last name for the record.

12 THE WITNESS: My name is Alyssa Penna Alves Ackbar,
13 Alyssa, A-l-y-s-s-a, Penna, P-e-n-n-a, Alves, A-l-v-e-s, Ackbar,
14 A-c-k-b-a-r.

15 THE COURT: Thank you. Take your seat.

16 DIRECT EXAMINATION

17 BY MS. JASRASARIA:

18 Q. Good afternoon, Ms. Ackbar.

19 Are you okay with me calling you Alyssa?

20 A. Yes.

21 Q. Are you currently employed, Alyssa?

22 A. Yes.

23 THE COURT: Can I ask a question just out of interest?

24 I understand with the pronouns, which I thought is why
25 we were using the first name --

1 MS. JASRASARIA: Sure.

2 THE COURT: -- and I understand why -- well, why are
3 you using first names?

4 MS. JASRASARIA: That's a good question. I mean --

5 THE COURT: Let's not.

6 MS. JASRASARIA: Okay.

7 THE COURT: I thought one of the arguments of the
8 plaintiffs in this case was that the Florida Legislature was
9 infantilizing --

10 MS. JASRASARIA: Sure.

11 THE COURT: -- our college students and treating them
12 like they were a bunch of morons and children. So let's not do
13 that in my courtroom; okay?

14 Sorry. I'm just defending you as an adult.

15 THE WITNESS: You're okay. I don't really mind either
16 way.

17 BY MS. JASRASARIA:

18 Q. Are you currently employed, Ms. Ackbar?

19 A. Yes.

20 Q. Where?

21 A. I'm employed by March For Our Lives Action Fund.

22 Q. And is March For Our Lives Action Fund a plaintiff in this
23 case?

24 A. Yes.

25 Q. What is your current job there?

1 A. I'm currently a national organizer.

2 Q. Where do you live?

3 A. I live in Tallahassee, Florida.

4 Q. And when did you move to Tallahassee?

5 A. I moved to Tallahassee in August of 2019.

6 Q. And why did you move to Tallahassee?

7 A. I moved to Tallahassee to attend FSU.

8 Q. And are you from Florida originally?

9 A. Yes. I'm from Tampa, Florida.

10 Q. When did you graduate from FSU?

11 A. I graduated in December of 2022.

12 Q. What did you study at FSU?

13 A. I studied international affairs, and I did a minor in
14 sociology.

15 Q. How long did you attend FSU?

16 A. About three and a half years. Again, I started August 2019
17 and ended December 2022.

18 Q. Let's turn back to your experience with March For Our Lives
19 Action Fund.

20 Would you understand if I called it March For Our Lives
21 going forward?

22 A. Yes.

23 Q. How would you describe March For Our Lives' mission?

24 A. March For Our Lives is a gun violence prevention
25 organization that is very unique because it has a focus in

1 supporting and empowering young people to enact the change that
2 they see is necessary in the world today.

3 Q. Does March For Our Lives have members in Florida?

4 A. Yes.

5 Q. And are any of those members college or university
6 students?

7 A. Yes, for sure. Given that March For Our Lives has, again,
8 that focus on youth empowerment, there's many, many members that
9 are either college students or high school students here in
10 Florida.

11 Q. You mentioned that you're currently a national organizer
12 with March For Our Lives; is that right?

13 A. Yes.

14 Q. How would you describe your responsibilities?

15 A. So my responsibilities as a national organizer are to help
16 oversee the various programs and initiatives that March For Our
17 Lives does. In that sense, I also help with the strategic
18 planning of figuring out what those programs are and how they
19 help to benefit and achieve our mission.

20 Q. What other roles have you held with March For Our Lives?

21 A. I've held many roles. I started working with March For Our
22 Lives back in 2018 when the organization first started, and
23 since then I've held a plethora of different names and titles.
24 But loosely I became a member with the Tampa chapter when I
25 first started. I then became the Tampa chapter lead. And then

1 when I graduated high school and decided to make the move to
2 Tallahassee, I started the FSU chapter and held the title of FSU
3 chapter lead and also at the same time became the Florida state
4 director.

5 During that time as Florida state director and working on
6 FSU's campus, I also was nominated for the organization's
7 student board or youth congress. There's a name to it. I
8 forget exactly what it was, but it was an advisory board that
9 helped the staff make important decisions. And then from there,
10 now becoming national organizer on staff.

11 Q. What were your responsibilities as the state director for
12 Florida?

13 A. So as Florida state director, I was charged with coaching
14 and shaping the mission and projects of all of our chapters in
15 Florida.

16 There's also members that don't belong to certain chapters,
17 so making sure that we were giving, like, solo volunteers
18 opportunities to organize with the organization as well.

19 Q. How did you first get involved in March For Our Lives?

20 A. I became involved back in 2018 when the organization
21 started. I was told by a peer at my high school that she was
22 going to attend an event with March For Our Lives. I think it
23 was, like, a poster-making event. She told me a bit about the
24 initiative and what March For Our Lives was about. This was
25 before the initial big-scale marches that March For Our Lives

1 had in 2018, so I was really interested in going to do that
2 larger event, and I decided to go with her.

3 And from there it's just been a snowball of becoming
4 involved and meeting new people, organizing, growing. And,
5 yeah, that's how I first got started.

6 Q. Have you ever taken a break from your involvement in March
7 For Our Lives?

8 A. Yes. I left the organization in the spring of 2021.

9 Q. And when did you return to the organization?

10 A. August of 2021 -- 2022. Sorry.

11 Q. Why did you take a break from the organization?

12 A. There was a variety of reasons. I had been with the
13 organization for quite a long time since then. I felt a need to
14 pursue different interests.

15 Like I said, during my journey with March For Our Lives, I
16 also became a college student, and I was kind of burnt out, kind
17 of tired of doing organizing and school at the same time. I
18 wanted to focus on just my academics for a while and see if I
19 could put some more effort into that.

20 Q. And you returned to March For Our Lives while you were
21 still a student at FSU; is that right?

22 A. Yes.

23 Q. And why did you decide to go back?

24 A. I -- frankly, I'm a financially independent person, and I
25 have been since I came to college. So even though I left

1 organizing to focus more on my academics, I was still working
2 part time. And after reconnecting with some of the folks that
3 had been organizing at March For Our Lives and folks that I had
4 worked with in the past, they brought me -- they told me about
5 an opportunity to join staff as a national organizer. And I
6 felt that it was -- it felt right to come back to the
7 organization in a paid capacity, especially after taking some
8 time and realizing that the organization did its best to support
9 my interest and support my growth as an organizer.

10 So, overall, it felt great being able to leave the other
11 job that I was at that I, frankly, was tired of and rejoin the
12 organization.

13 Q. Would you say that you grew as an organizer during your
14 college years?

15 A. Yes, for sure.

16 Q. Did your experience in the classroom affect your organizing
17 work?

18 A. 100 percent.

19 Q. How?

20 A. I mean, organizing in itself is a massive journey of growth
21 and learning. I started my journey with March For Our Lives as
22 a high school student. And I can confidently say that I am a
23 much different person today than I am -- than I was when I
24 graduated high school, and part of that is because of my
25 organizing experience.

1 And throughout my learning within March For Our Lives, I
2 did my best to connect my studies and everything that I was
3 learning in the classroom to my work. And, I guess, the vice
4 versa of that is that while I was pursuing my studies and doing
5 research and completing all the readings for my courses, I did
6 my best to bring the work that I was doing to my classroom
7 experience in order to enrich that learning.

8 Q. Can you give some examples of how your classroom studies
9 helped you develop as an organizer?

10 A. Uh-huh, yeah. I mean, I was an international affairs
11 major. I took a lot of different courses that had to deal with
12 social justice or sociology in general, which are things that we
13 talk a lot about in March For Our Lives. So frequently I would
14 take theories or ideas that I learned in class and apply them to
15 different conversations that I had within the organizing space
16 that I was in.

17 And then also March For Our Lives and my organizing work
18 was a way for me to connect with professors on a deeper level.
19 I had multiple experiences where I would bring up my organizing
20 work and my involvement with March For Our Lives, and that would
21 create instances where professors wanted to discuss further
22 about how my work related to the class topic or the ideas that
23 we discussed in class, or they wanted to learn more about what I
24 was doing and how their own personal interest in research
25 applied.

1 In one case even there was a professor that they had done
2 some organizing work in their life, and we developed a more
3 professional relationship because of the way we were able to
4 connect our different missions in our work.

5 Q. Were you able to form connections with other students
6 through your classes?

7 A. Yes, 100 percent. I mean, it was a really big way for me
8 to connect with folks that I later recruited to either join the
9 FSU chapter or tell them about opportunities within the
10 organizing space that I was in. Whenever I brought up my work
11 with March For Our Lives, there would often be students that
12 talked about the ways that they engage with the organization as
13 well.

14 So lots of people went to the initial 2018 marches that
15 were, frankly, really, really big protests that happened
16 nationwide. So a lot of people talked about their experience
17 going to those marches and also just talking about the issue in
18 general. So it was definitely like a conversation opener for me
19 to connect with other students.

20 Q. Given your experience as a national organizer and a former
21 state director, do other students similarly get involved with
22 March For Our Lives because of their experience in the
23 classroom?

24 A. Yeah. I mean, I think a lot of members within March For
25 Our Lives are open about their experiences and the work that

1 they're doing, and that definitely is a way that we spread our
2 mission and our goals and recruit students to either come learn
3 about the organization or join our work.

4 Q. Are you familiar with HB 233?

5 A. Yes.

6 Q. And how did you become familiar with that law?

7 A. So aside from my work with March For Our Lives, I also did
8 some lobbying work within the Florida Legislature. I've been
9 lobbying the Florida Legislature for the past two to three
10 sessions. And in the session of 2021, I remember this bill
11 being introduced and discussed in different committees.

12 I didn't necessarily lobby against or for it during that
13 time, but I heard of it in passing because I was connected with
14 other advocates that was doing similar work to what I was doing.

15 Q. And in your time as a student at FSU, have you experienced
16 any changes to your classroom experience after HB 233's passage?

17 A. Yeah. I mean, I think -- I think there's definitely been a
18 drop-off in professors being open to have political
19 conversations in class.

20 In my first couple of years, professors were really open
21 about asking you to expand on the ideas that you brought to
22 class. So when I would bring up ideas about March For Our Lives
23 and the work that I was doing, professors often asked me
24 questions or would respond in ways that enriched the
25 conversation. And I felt a drop-off in that in these last

1 couple semesters of my college experience.

2 Q. How do changes in faculty's willingness to speak about
3 political topics in the classroom affect March For Our Lives,
4 given your experience?

5 A. Yeah. Well, in my personal experience, being able to
6 discuss the work that I was doing in March For Our Lives was
7 very enriching. I was able to garner a lot of knowledge that I
8 was able to apply to my work and that I will later apply to,
9 like, my growing career. And that's something that is being
10 taken away from March For Our Lives members.

11 This ability to create community with not only your peers,
12 but professional, knowledgeable faculty and professors, is
13 something that is very enriching. And to me that's the whole
14 point of a college education is to be able to connect with folks
15 that are experts in your field and to then later take that
16 knowledge and that expertise and apply it to the career that you
17 are trying to pursue.

18 And, again, that's being taken away from March For Our
19 Lives members.

20 Q. Do you feel as though these changes have had any affect on
21 March For Our Lives' ability to fulfill its mission?

22 A. Yeah. I mean, a lot of March For Our Lives members are --
23 major in political science, major in international affairs,
24 these more social sciences. And when there's a lack of -- when
25 there's a less enriching educational environment, you get

1 organizers that are less experienced. And sometimes it will
2 mean that organizers are less willing to, like, learn about
3 different topics and ideas that come with the organizing that
4 make our work ten times better.

5 And it also may mean that March For Our Lives members,
6 people that may join March For Our Lives, pursue other interests
7 because they don't find the theories and ideas that excite them
8 in this work.

9 Q. Were you in the courtroom today for Ms. Solomon's
10 testimony?

11 A. Yes.

12 Q. And did you hear her testify about how her UCF chapter is
13 moving some of its organizing off campus?

14 A. Yes, yes. And, frankly, it made me really sad to hear
15 because I know Olivia and I know of her work -- or sorry --
16 Ms. Solomon. I know of Ms. Solomon's work.

17 I worked really closely with her when I was a state
18 director in Florida, and she -- I'm not sure how to explain this
19 in a way that brings it close to all of you, but we work in such
20 close proximity in community that we often talk about our own
21 struggles and you know, become really close.

22 And Ms. Solomon is organizing in a time where organizing is
23 not met with -- is not very welcomed on our campuses. And to be
24 able to continue to do that, even in the face of hardship, is
25 something that I admire and I've always admired about

1 Ms. Solomon. So to hear her give that testimony and talk about
2 her experience makes me actually deeply saddened for her and for
3 the state of our college educations.

4 Q. Based on your experience as an organizer and a former state
5 director, how does a campus chapter's shift to more off-campus
6 organizing affect the national organization, if at all?

7 A. Yeah. I mean, when we have chapters on college campuses,
8 oftentimes they have the ability to pull in resources from their
9 schools. So if a chapter is registered as a student
10 organization, they're allowed to ask their SGA for funding.
11 They're allowed to use resources from the library, from their
12 campuses. And when chapters start to move off campus, it
13 creates a financial burden on the organization.

14 It requires money to move off campus when it comes to
15 transportation, when it comes to renting venues. Anything
16 that's associated that you could usually get on campus, you need
17 to provide when you do off-campus events.

18 And it also makes it more inaccessible for students that
19 are on campus to have to travel off campus to attend March For
20 Our Lives events or meetings.

21 And I -- my position on staff doesn't necessarily deal with
22 the budget, but I understand that March For Our Lives does not
23 have an infinite amount of funds. And, frankly, we have
24 chapters in almost all 50 states. When the organization has to
25 give more funding to chapters in Florida because they are moving

1 off campus, it creates a deficit in being able to give funding
2 to other states, other chapters.

3 MS. JASRASARIA: Thank you very much, Ms. Ackbar.

4 I'll pass the witness, Your Honor.

5 THE COURT: Cross?

6 CROSS-EXAMINATION

7 BY MR. MOORE:

8 Q. Hello, Ms. Ackbar.

9 A. Hi.

10 Q. It's good to see you again.

11 You're aware that you're -- or you agree you're not aware
12 of any individuals who have not joined March For Our Lives
13 because of House Bill 233; correct?

14 A. Not explicitly.

15 Q. Nor are you aware of any individuals who have left March
16 For Our Lives because of House Bill 233; correct?

17 A. No. But, also, in the first couple months that this bill
18 was passed and enacted on campuses, I was not a part of the
19 organization officially.

20 Q. So you'd already left your leadership in this position in
21 the Florida chapter by the time House Bill 233 went into effect;
22 right?

23 A. Yes.

24 Q. And you left the FSU chapter, for all intents and purposes,
25 by the time the bill went into effect; correct?

1 A. Yes.

2 Q. Same for the student congress, you'd left that by the time
3 the bill went into effect; correct?

4 A. Yes.

5 Q. There was some discussion about organizing off campus,
6 moving from campus to off campus. You can't tell us how many
7 members have been deterred from organizing on campus, can you?

8 A. No.

9 Q. You can't identify anybody who's been deterred from
10 organizing on campus because of House Bill 233; can you?

11 A. No.

12 Q. You agree you're not aware of any March For Our Lives
13 events in Florida that were canceled because of House Bill 233;
14 correct?

15 A. No. And it might take some more context.

16 When I was a state director, I worked very locally with all
17 of the Florida chapters. And since I left the organization, the
18 state director position has shifted into what we call movement
19 organizers, and those folks work closely with the chapters in
20 less of a localized capacity.

21 So, as a national organizer, I don't necessarily have
22 direct contact with the Florida chapters on a day-to-day basis.

23 Q. You mentioned in your last couple of semesters professors
24 engaging less in back and forth with students in class; is that
25 correct?

1 A. Yes.

2 Q. But you'd also agree that in your final semesters the type
3 of courses you took changed from being more of a class
4 discussion course to more of a lecture-style course; correct?

5 A. Yes. And that was for my -- that was just a personal
6 decision that I decided to make. I wanted to make my last
7 couple of semesters as easy as possible as I pursued career
8 options. But that doesn't mean that classroom discussion was
9 stopped altogether. There were definitely moments where the
10 professors, like any professor, opens up with a question or asks
11 students to add to the lecture. And while there was less of
12 that or less intentional group discussion work, there was still
13 open discussion in classrooms.

14 Q. And you allowed me to take your deposition Sunday morning.

15 In preparation for that deposition, you agree that you
16 reviewed some documents; correct?

17 A. Yes.

18 Q. You read the complaint. And you agreed that was first time
19 you saw the complaint was last Thursday; is that correct?

20 A. Yes.

21 Q. And --

22 A. Or the day before. Sorry.

23 Q. I'm sorry.

24 A. Sir, I was provided the document of the complaint the
25 week -- last week, yes.

1 Q. Sure.

2 And you'd agree there's information in the complaint that
3 you didn't know about before you read it; correct?

4 A. Yes.

5 Q. And the same would be true for the transcript of Mr. Tej
6 Gokhale, the March For Our Lives corporate representative? You
7 agree that you read his deposition before being deposed, and
8 there's information in there that you learned for the first time
9 through that transcript; correct?

10 A. Yes.

11 Q. And you did not speak with Mr. Gokhale in advance of his --
12 or March For Our Lives' July 14th corporate representative
13 deposition; correct?

14 A. No. I was not a part of the organization at that point.

15 Q. So you didn't provide any documents?

16 A. No.

17 Q. And isn't it true that you learned that you would be a
18 witness as early as November or December because Mr. Gokhale had
19 moved on from the organization; is that correct?

20 A. Yes.

21 Q. And that's the first time that you were told about this
22 lawsuit; correct?

23 A. Yes.

24 MR. MOORE: No further questions.

25 Thank you for your time, ma'am.

1 THE COURT: Thank you.

2 Any redirect?

3 MS. JASRASARIA: No.

4 THE COURT: Thank you very much, and thank you for
5 your patience. You have a good day.

6 THE WITNESS: Thank you. You as well.

7 (Ms. Ackbar exited the witness stand.)

8 THE COURT: So, Mr. Wermuth, if you could give me a
9 preview of coming events on Tuesday morning, please.

10 MR. WERMUTH: Your Honor, we need a little bit of time
11 to figure out exactly the lineup on Tuesday morning, but we have
12 a couple of items to address with you, if that's all right.

13 THE COURT: Okay.

14 MR. WERMUTH: The first is that we would have called
15 Marshall Criser this afternoon as a witness in the natural
16 course of events. But, unfortunately for us, he moved out of
17 the state of Florida before the trial so we weren't able to
18 subpoena him and we --

19 THE COURT: I thought -- because you did depo
20 designations?

21 MR. WERMUTH: We did depo designations, but we wanted
22 to provide you with the video designation in static form, so
23 I've given a copy to --

24 THE COURT: Any objection?

25 MR. LEVESQUE: No, Your Honor.

1 THE COURT: Without objection, thank you.

2 If you'll hand those --

3 MR. WERMUTH: So that you could watch that.

4 And, obviously, we're providing it in order to make
5 credibility determinations on his videotaped deposition.

6 The other part is we've now filed two motions for
7 admission of exhibits. The first one was largely resolved,
8 except for a group of documents that are still pending and
9 outstanding, and that was ECF 242.

10 And then we filed a second motion that's ECF No. 252.
11 And in order to make life -- hopefully make life easier, we've
12 now assembled what's going to be basically a supplemental
13 omnibus motion that kind of joins what's remaining of the two.

14 THE COURT: And that's what Mr. Levesque or somebody
15 on his behalf is going to respond to on Sunday?

16 MR. WERMUTH: Yes.

17 THE COURT: When are you going to file the other?

18 MR. WERMUTH: Today.

19 THE COURT: So can the others -- I safely deny those
20 as moot by virtue of the fact that they're going to be subject
21 to an amended motion?

22 MR. WERMUTH: Yes.

23 THE COURT: Let's go ahead and do that and clean up
24 the record. Otherwise, it will be on my six-month list.

25 MR. WERMUTH: So 242 and 252. And this one -- this

1 new motion will consolidate what's left.

2 THE COURT: Perfect.

3 MR. WERMUTH: And there's going to be a couple of -- a
4 few -- a handful of exhibits that are new, and they will be
5 highlighted. And we are going to do our best to have a
6 checklist that has everything in one place for you to review and
7 have a clear understanding of exactly what's outstanding.

8 THE COURT: Okay.

9 Well, I will review that motion and the response
10 sometime Sunday evening or Monday.

11 And we are going to start at 8:30 on Tuesday. And I
12 wasn't asking you to say, Judge, I'm going to call Ralph
13 Simpson, and he's going to take 17 minutes, and I'm going to
14 call John Smith, and he's going to take 42 minutes. I just
15 meant, as a general idea, how many more witnesses? Or a better
16 way of doing it maybe is time.

17 Do you think you're going to need all of Tuesday? And
18 have you discussed with Mr. Levesque -- I just don't want a
19 bunch of people -- I don't want to leave in the middle of the
20 day on Tuesday and then do part of the day on Wednesday. I'd
21 rather just get it done.

22 So have y'all talked about sort of where both sides
23 are at?

24 MR. WERMUTH: Yeah. We anticipate that we're going to
25 be done on -- well, that our case-in-chief will be done Tuesday

1 and that his case-in-chief will be done on Wednesday.

2 THE COURT: I understand that. But I just want to
3 make sure y'all are coordinating, like how long you think you
4 need on Tuesday so Mr. Levesque is locked and loaded and ready
5 to go.

6 MR. LEVESQUE: And I understand their case and
7 presentation on Tuesday is a little fluid. In the discussions
8 they figured they would at least go to noon on Tuesday, so we
9 will be prepared to pick up at noon on Tuesday.

10 THE COURT: That was the main thing I was trying to
11 figure out.

12 MR. LEVESQUE: Yes, sir.

13 THE COURT: I just want to make use of the time
14 because I've moved other things that I'll have to do later;
15 okay.

16 All right. So we will put the testimony on. We've
17 got a schedule for post-trial closing statements and replies.
18 Y'all are at some point doing to talk to Ms. Milton McGee, and
19 we're going to try to figure out a time on the calendar for
20 argument after the due dates.

21 And anything else we can publish this afternoon,
22 Mr. Wermuth?

23 MR. WERMUTH: I believe that we have identified the
24 afternoon of the 9th of March.

25 THE COURT: Hold on. Let me look at it, please.

1 MS. FROST: Wait. The 7th.

2 (Discussion held.)

3 MR. WERMUTH: Okay. The 7th. Sorry.

4 THE COURT: Okay. That works?

5 THE COURTROOM DEPUTY: Yes.

6 THE COURT: Got it.

7 So we'll go ahead and put that on the calendar then.

8 And we're going to do that by Zoom?

9 MR. WERMUTH: Yes.

10 THE COURT: Okay. All right. Very good.

11 I think what I'm probably going to do -- and this is
12 less for y'all and more for the court reporter and my courtroom
13 deputy. I think we'll go ahead and do that here in the
14 courtroom. It's also a public proceeding. If somebody wants to
15 come, they can come and sit.

16 The only thing I'm not going to do is very one lawyer
17 live and one lawyer not live. That creates confusion. So if
18 the lawyers are doing it by Zoom, we'll probably go ahead and do
19 it from the courtroom because otherwise we'll get calls. And
20 while I can mute people in the courtroom by having them seized
21 by the court security officers and given private lodging
22 downstairs, I can't really quite stop people from talking on the
23 phone. So if we're going to have people listen in, it would
24 just be easier to do it in the courtroom.

25 Okay, Ms. Milton McGee?

1 THE COURTROOM DEPUTY: Yes, sir.

2 THE COURT: All right.

3 Anything additional?

4 MR. WERMUTH: I don't think so, Your Honor.

5 MR. LEVESQUE: No, sir.

6 THE COURT: This would be speak now or forever hold
7 your peace. This is the end of the --

8 MR. LEVESQUE: No, Your Honor.

9 MR. WERMUTH: No, Your Honor.

10 THE COURT: All right. Very good.

11 I hope y'all -- thank you for your hard work this week
12 and working together and being respectful of each other and the
13 Court. And I'll see everybody back next Tuesday. I hope you
14 enjoy your extended weekend.

15 Court is in recess.

16 (Proceedings recessed at 3:33 PM on Friday, January 13,
17 2023.)

18 * * * * *

19 I certify that the foregoing is a correct transcript
20 from the record of proceedings in the above-entitled matter.
21 Any redaction of personal data identifiers pursuant to the
22 Judicial Conference Policy on Privacy is noted within the
23 transcript.

23 /s/ Megan A. Hague

1/16/2023

24 Megan A. Hague, RPR, FCRR, CSR
25 Official U.S. Court Reporter

Date

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION**

WILLIAM A. LINK, et al.,)	
)	
Plaintiffs,	)	Case No: 4:21cv271
)	
v.	)	Tallahassee, Florida
	)	January 17, 2023
RICHARD CORCORAN, et al.,)	
	)	8:30 AM
Defendants.	)	VOLUME VI
)	

**TRANSCRIPT OF *EXPEDITED* BENCH TRIAL PROCEEDINGS
BEFORE THE HONORABLE MARK E. WALKER
UNITED STATES CHIEF DISTRICT JUDGE
(Pages 1352 through 1585)**

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Transcript produced by Computer-Aided Transcription.*

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P R O C E E D I N G S

(Call to Order of the Court at 8:30 AM on Tuesday,
January 17, 2023.)

THE COURT: We're on the record in Case No. 4:21cv271.
We're here for the sixth day of a bench trial. We're here on
Tuesday, January 17th. We did not meet yesterday on Monday
because it was a holiday, and the federal courthouse was closed.

Just a couple of housekeeping matters. The first
thing, Mr. Levesque -- I don't think it will affect your
presentation late this afternoon. You probably didn't expect to
go until 7 o'clock anyway, but I can't shake this cold so I had
to make a medical appointment at 7 o'clock tonight so I've got
to get out of here by 6:30.

We really haven't gone past that anyway, so, again, it
probably doesn't affect you, but just to let you know. And if
you've got somebody on, and they're from out of town, and it's
going to create a great burden on the defense, I can reschedule
for tomorrow. But -- and I'm not saying that to be a martyr.
I'm being sincere. I would rather reschedule my medical
appointment tomorrow evening at Patient First than have somebody
from out of town be inconvenienced, so -- but you can let me
know at the six o'clock, 6:15 mark; okay?

MR. LEVESQUE: Yes, sir. And everybody that we have
today is either by Zoom or here in person -- not from out of
town -- so today doesn't create any type of hardship.

1 THE COURT: Okay. Fair enough.

2 And I've got the plaintiffs' counsel -- Mr. Wermuth,
3 y'all are calling two additional witnesses; correct?

4 MR. WERMUTH: That's correct, Your Honor.

5 THE COURT: All right. I'm going to rule -- and this
6 is a bench trial so the idea of it being critical for me to rule
7 on the last evidentiary -- set of evidentiary rulings, but let
8 me just go ahead and give y'all a snapshot. I'm going to do a
9 summary order today.

10 I appreciate, Mr. Levesque, your thoughtful response,
11 which is, Judge, we want to preserve all of our objections, but
12 we realize you've addressed some of this generally.

13 I want to make clear, though, because I also -- and I
14 think it's clear to everybody -- just because something comes in
15 for a limited purpose doesn't mean it's going to be considered
16 for every purpose.

17 I think the plaintiffs in some instances overstate the
18 value of some of the evidence and, in some cases, the defense
19 suggests it has no relevance or value at all, and it may have
20 some, for a very limited purpose. And so, consistent with my
21 prior rulings, if I believe something goes -- it should be
22 admitted for the limited purpose of standing to determine
23 whether or not not only is there a chilling effect, but is it
24 reasonable? It may be limited -- introduced for that limited
25 purpose and no other.

1 So just because something comes in for that limited
2 purpose doesn't mean it has anything to do, for example, with
3 the intent of the legislators that passed the bill, and so
4 that's -- I think I've made that repeatedly clear throughout,
5 but I want to make that point.

6 I also want to make plain that if this were a jury
7 trial, Mr. Levesque, you -- and properly so -- raised 403 in
8 your objections to a bunch of records as a -- in addition to
9 other objections, relevance.

10 If this were a jury trial, I would stop and pause and
11 carefully consider evidence that may have some limited value,
12 for example, as it relates to the reasonableness of the fear for
13 purpose of standing because it's more distant, more detached and
14 is of limited value and could confuse the issues and a jury
15 wouldn't necessarily be able to parse things as -- like I've
16 been and slice the bread as thinly as I am.

17 So for any reviewing court, if this were a jury trial,
18 not a bench trial, I would have viewed all of this evidence
19 through a slightly different prism under 403. Not for the
20 prejudice outweighs the probative value, although that's part of
21 it, it's more about confusing the issues or conflating issues,
22 and that limiting instructions, for example, as to some of the
23 exhibits that are marginally relevant might not cure the
24 problem.

25 And so, consistent with that, I'm going to issue an

1 order today. So those -- consistent with my prior rulings, the
2 exhibits are coming in for the limited purposes that I've
3 admitted them, and I'll go through and have an order
4 memorializing that today.

5 Turning to the second witness y'all are calling today
6 since I perhaps was a little heavy-handed asking why we're
7 calling people by their first names on Friday after we had done
8 it a couple of times. As I alluded to before, I understood why
9 we did it for the first person if there was a pronoun issue
10 because I'm the one that was guilty of calling somebody "Miss"
11 that I shouldn't have been calling "Miss," so I'm as guilty as
12 the next person.

13 So with the second witness today, to avoid, quite
14 frankly, spending ten minutes, Do you prefer to be called -- is
15 there some title you'd like to use other than Ms., Mrs., or
16 whatever, we're just going to use the first name and that's --
17 that was a legitimate reason.

18 MS. VELEZ: Your Honor, I will note that Dr. Nicole
19 Morse is Dr. Morse, so my preference is Dr. Morse.

20 THE COURT: Well, we can call Dr. Morse then. My
21 apology. Then we'll call Dr. Morse "Dr." I was just explaining
22 why I was -- did what I did last week. It made total sense to
23 me to call somebody by their first name to avoid confusions and,
24 quite frankly, to save me from myself so I didn't -- as I'm
25 trying to shift gears and focus from thing to thing didn't

1 misspeak because I was moving too quickly. But that solves that
2 problem today for calling somebody doctor.

3 And contrary to Judge Ho in the Fifth Circuit, I don't
4 think it costs me anything to treat people with respect and use
5 their pronouns of their preference. I don't think that's a
6 legal question. I think that's just a question of common
7 decency; apparently something that's lost on some of my
8 colleagues. That probably falls under the category of more said
9 than needs to be said, but he's not shy, so I won't be either;
10 that is, shy about expressing his views, well-founded or not.

11 We've got the two witnesses. Let me find out, what do
12 y'all want to do, Mr. Levesque? It's a bench trial. Do y'all
13 want to pause there and make any general motions? Do the
14 parties by agreement want to defer to the end or, Judge, we
15 respectfully renew all of the arguments we were arguing at a
16 motion for summary judgment at earlier stages?

17 I don't want to cut anybody off, and I want to make
18 plain what I'm not doing. I'm never trying to get anybody to
19 waive any arguments. I want y'all to be able to preserve, and I
20 want to do it how y'all want to do it, but I also want to be
21 efficient about it.

22 So, Mr. Levesque, what's the best way to handle that
23 today?

24 MR. LEVESQUE: With the expectation that it's a bench
25 trial, and you're certainly not obligated and you're able, even

1 under Rule 52, to hold your ruling until the end of all of the
2 evidence, what we'd probably do is just propose a short oral
3 summary motion that Your Honor could consider at that time.

4 THE COURT: Okay. Very good. And that's what we'll
5 do then.

6 And, again, I want to make plain, I'm not rushing
7 anybody, and anything y'all believe you need to do to preserve
8 any issue, you should do that; okay?

9 MR. LEVESQUE: Yes, sir.

10 THE COURT: All right. Any other issues we need to
11 take up this morning? Mr. Wermuth, you're standing so, I
12 guess --

13 MR. WERMUTH: Yes, Your Honor.

14 THE COURT: Yes.

15 MR. WERMUTH: I have a small matter. There are some
16 additional exhibits, some stragglers after our last motion was
17 filed on Friday night, and we have a resolution on one of them.
18 That's Plaintiffs' Exhibit 48 -- I'm sorry -- 348, and
19 defendants do not oppose admission of that document into
20 evidence.

21 THE COURT: Plaintiffs' 348 is hereby admitted without
22 objection.

23 (PLAINTIFFS EXHIBIT 348: Received in evidence.)

24 MR. WERMUTH: And then there's three additional
25 documents that are emails that are subject to objection by

1 defendants. The --

2 THE COURT: Just tell me what the exhibit numbers are
3 first.

4 MR. WERMUTH: It's 329, 3 -- I'm sorry -- Exhibit 33,
5 Plaintiffs' Exhibit 33, and Plaintiffs' Exhibit 92.

6 THE COURT: So only two, 33 and 92?

7 MR. WERMUTH: Sorry, no. It's 329.

8 THE COURT: Oh. You said, No, I'm sorry, and then
9 went -- so I thought that meant you had misspoke.

10 MR. WERMUTH: I'm sorry. 329, 33, and 92.

11 THE COURT: And what -- these are emails, you said?

12 MR. WERMUTH: Yeah, these are emails.

13 THE COURT: From who? Who's speaking in them?

14 And let me pause there and also say, Mr. Levesque,
15 another objection that was well-taken in your objections, just
16 because part of a document comes in for a limited purpose
17 doesn't mean everything comes in. So, as you thoughtfully
18 pointed out, there's hearsay within hearsay in some of the
19 documents, and just because I find a statement by one person for
20 a limited purpose may be admissible and it's not being offered,
21 for example, for the truth of the matter asserted doesn't mean
22 everything else in the email or anybody else they're quoting
23 necessarily comes in; okay?

24 But with respect to 329, 33, and 92, who are the
25 emails from or to?

1 MR. WERMUTH: 329 is an email from Bethany Swonson to
2 Cheryl Etters and Katherine Hebda, and so these are Board of
3 Education employees.

4 It is -- it is -- further down the chain -- so this is
5 a June 25, 2021 email, but further down the chain on June 25th
6 is an email that involves the Governor's office -- staff of the
7 Governor's office, Christina Pushaw, and a -- I guess a
8 reporter, Isaac Schorr, of the *National Review*, as well as
9 copied to Cheryl Etters from the Board of Education.

10 And this email is -- well, the objections the
11 defendants asserted are hearsay and relevance, that this --
12 plaintiffs are not -- this email is not being introduced for the
13 truth of the matter asserted. It's to show that the Board of
14 Education received input from the Governor's office as to how
15 they were messaging HB 233, and that the Board of Education
16 turned around and said, *Great, let's make sure to be in lockstep*
17 *with their messaging*, so the Board of Education's effect on the
18 listener, the person at the Board of Education, and their
19 decision to be in lockstep with the Governor's messaging on
20 HB 233.

21 THE COURT: I understand, I guess, the idea that we
22 have this governor, or any governor, that's very involved in
23 pushing legislation is relevant for purposes of whether
24 you're -- there's going to be a reasonable fear that folks are
25 going to keep pushing something, and I understand that argument.

1 And this is being entered not for the truth of the
2 matter assert -- you're really offering it for the truth of the
3 matter asserted; namely, that we're in lockstep, as opposed to
4 we don't know whether they did or didn't; we don't know what
5 they did or didn't do.

6 We're offering it to show that the Governor's, in
7 fact, communicating with the Board of Education, so this idea
8 that he's completely detached and not involved is not true. So
9 we're offering it to show there was, in fact, communications,
10 but not the content of that communication. I understand that.
11 But help me understand, why is the state of mind -- I understand
12 it's the defendant, but help me to understand why the state of
13 mind of the defendant bureau -- Board of Education is at issue
14 other than, It's at issue, Judge, because the question is are
15 they going to take actions against us consistent with the
16 Governor's demand?

17 Is that the --

18 MR. WERMUTH: So the Governor made a number of
19 statements about, you know, the meaning and intent behind HB 233
20 or what, you know, he perceived HB 233 was for. And the Board
21 of Education is basically indicating it's going to be in
22 lockstep with the Governor's messaging on --

23 THE COURT: So you -- but, I mean, it sounds a lot
24 like -- when you say that, I'm offering it for the truth of the
25 matter asserted; namely, Judge, you haven't -- we want to

1 establish through these emails that the Board of Governors are,
2 in fact, doing X, which sounds a lot like, we're offering it for
3 the truth of the matter asserted, as opposed to for some other,
4 you know, purpose.

5 I mean, you could have called a -- or deposed a board
6 member and say, Did you receive communication -- because they're
7 defendants; right?

8 MR. WERMUTH: They are defendants.

9 THE COURT: You received communications from the
10 Governor, and isn't it true that you're being pressured to do X,
11 Y, and Z? I understand that.

12 Let me -- is there a member -- because when you sue
13 the board, you're suing the board -- the officials in their
14 official capacity, or is it the board itself, which is the
15 defendant?

16 MR. WERMUTH: It's -- the Board is the defendant, and
17 it's a statement of a party opponent, one on that --

18 THE COURT: Because these are agents in their
19 capacity?

20 MR. WERMUTH: Yes.

21 THE COURT: So, Judge, I -- but that sounds like,
22 then -- this is why I'm going through the circle that I'm going
23 through.

24 MR. WERMUTH: Okay.

25 THE COURT: Judge, I am offering it for the truth of

1 the matter asserted, but it comes in because this is a statement
2 of the Board.

3 MR. WERMUTH: Yes.

4 THE COURT: And to the extent there's hearsay within
5 hearsay, that is the statement of the Governor to them, it
6 makes -- you'd have to read in a conjunction to know what it is
7 they're agreeing to or saying that they want to do. So we're
8 not -- we're offering -- that's how you get around the second
9 part of the hearsay; correct?

10 MR. WERMUTH: That's correct.

11 THE COURT: All right. Mr. Levesque, what says you to
12 the -- it's the -- to the extent the Board has made a statement,
13 it's a statement and I only would bring in anything else to the
14 extent it explains the answer?

15 So, for example, if the answer to a question is,
16 Judge, do you like chocolate? The question "Do you like
17 chocolate?" is a -- could be hearsay if somebody else is asking
18 me, if it's not a party or something. But if I say "Yes," the
19 only way you know what "yes" means is by reading the question.
20 So to the extent there's some other layer of hearsay, it would
21 only be for that limited purpose.

22 But what says you to the statements made by an agent
23 on behalf of the Board?

24 MR. LEVESQUE: Well, the only statement made by the
25 agent of the Board, which would be Bethany Swonson, in the sense

1 "Let's make sure to be lockstep with our messaging," the concern
2 that we have is it's a reporter that had four questions and then
3 some other quotes that they included in there, and then there is
4 the press person's response, which --

5 THE COURT: Yeah, and I'm not considering all that.
6 What I'm asking is why don't I -- that's why I asked the
7 question the way I asked it.

8 Why don't I get Swonson's statements in and only to
9 the extent that you need -- lockstep and messaging, only to the
10 extent you need to see what the topic was to know lockstep and
11 messaging with what?

12 So it's to explain what -- so only -- otherwise, her
13 statement doesn't make any sense. Not everything in the entire
14 chain, but just for that limited purpose, if her statement comes
15 in, why don't you get to look at what the person is asking or
16 sending so it then places in context and explains her answer?

17 Not fully, not in the details or at a granular level,
18 but, again, that's why I said, Do you like chocolate ice cream,
19 Judge? Yes. I like -- yes, I do. You only consider it not
20 for -- say, there's a lot of other information included, but
21 just we're talking about chocolate ice cream so it explains the
22 answer and the -- why the Defendant -- what the Defendants', you
23 know, responding to.

24 MR. LEVESQUE: And the example that you give, I think
25 that works great. I think the problem is there's a lot of

1 granular information, and so if we're talking --

2 THE COURT: If I say I'm not going to consider the
3 granular information, I'm only considering it for purposes of
4 they're talking about House Bill 233 that we need to be
5 messaging, why is that not appropriate?

6 MR. LEVESQUE: I think that actually would be correct,
7 Your Honor.

8 THE COURT: And that's for the limited purpose that
9 I'm allowing it.

10 MR. LEVESQUE: Yes.

11 THE COURT: I'm allowing the statement of the party
12 and to understand the topic to which she's responding; okay?

13 MR. LEVESQUE: Yes.

14 (PLAINTIFFS EXHIBIT 329: Received in evidence.)

15 THE COURT: And, again, I appreciate everybody's
16 thoughtful efforts, and I'm not -- it's just more complicated
17 than everything comes in or nothing comes in, and so that's why
18 I'm trying to go through that. What may seem like parsing to
19 some is essential.

20 What's 33?

21 MR. WERMUTH: 33 is an email string ending with an
22 email from Lonna Atkeson at the Florida State University
23 Institute of Politics to other individuals at Florida State
24 University regarding the survey that the Institute of Politics
25 put together for -- for the Board of Governors.

1 The reason why this is a -- that we're seeking
2 admission is it's a document that shows the existence of the
3 work that the Institute of Politics was doing for the survey.
4 They were agents of the Board of Governors at the time. They
5 were operating under a contract, and so this is a statement of a
6 party opponent. These are authorized agents of the Board of
7 Governors working on a survey.

8 THE COURT: I understand that. Why is this not -- the
9 statement from the agent of the Board of Governors not a
10 statement of a party that are authorized to make it --

11 MR. WERMUTH: Yeah.

12 THE COURT: -- but the rest of the chain and
13 everything is not?

14 MR. WERMUTH: Well, the rest of the chain, is -- you
15 know, reflects what they're doing in their work.

16 THE COURT: Well, "their work" and "reflects what
17 they're doing" is one thing, but why does the answer to the
18 person responding come in?

19 MR. WERMUTH: There isn't an answer from a person
20 who's responding.

21 THE COURT: Well, I don't have it in front of me.
22 That's why I was asking.

23 MR. WERMUTH: This is between FSU employees, so Lonna
24 Atkeson --

25 THE COURT: So why is -- FSU's not a party, so why is

1 FSU's response admissible?

2 MR. WERMUTH: This is Lonna Atkeson at the Institute
3 of Politics sending an institutional --

4 THE COURT: So it's all -- I'm sorry. Let me -- it's
5 all people with the Institute, so it's all internal? It's
6 not --

7 MR. WERMUTH: Yes.

8 THE COURT: I thought what you were saying --

9 MR. WERMUTH: Okay.

10 THE COURT: -- is it's the Institute -- because you
11 can be wearing multiple hats -- emailing other people in another
12 section about FSU trying to, for example, get a completely
13 separate part of FSU, encouraging them, for example, to respond
14 to the survey as opposed to them gathering information
15 internally, wearing the hat of somebody that's an agent of the
16 Board?

17 I understand that. I thought it was broader than
18 that.

19 MR. WERMUTH: Okay. Well, to be clear, I mean, it did
20 involve an individual who's also at FSU who was part of the
21 Institutional Review Board section.

22 THE COURT: And that's what I meant, internal to this
23 subsection.

24 MR. WERMUTH: Yes.

25 THE COURT: Just because somebody in FSU may be acting

1 as an agent for the Board doesn't mean everybody at FSU and
2 every statement they make is fair game. It isn't -- can't -- it
3 would be attributable to a -- to the party as an agent, so
4 that's why I was asking. I don't have the email in front of me.

5 But, Mr. Levesque?

6 MR. LEVESQUE: Your Honor, the Board of Governors
7 contracted with FSU to create the survey. I would sort of
8 dispute -- I'm not -- I can't say that I've reviewed the
9 contract to look at whether they took on an agent relationship
10 in that regard.

11 The Board of Governors was basically purchasing a
12 survey from them and, ultimately, at the end of the day, this
13 was a survey that the Board of Governors decided not to use and
14 went in a completely different direction.

15 THE COURT: But you can have an agent that you end
16 up -- ask them to do something; they're speaking for you. I
17 hire somebody to go do polling. Just because I end up
18 disregarding the polling doesn't mean they weren't potentially
19 acting as an agent for me; correct?

20 MR. LEVESQUE: Correct.

21 THE COURT: Here's what I'm going to do. I'm going to
22 conditionally admit it, and the parties can -- if you want to
23 bring me some case law that says this is or isn't within agency,
24 I'll address it; okay?

25 MR. LEVESQUE: Yes, sir.

1 (PLAINTIFFS EXHIBIT 33: Received in evidence.

2 MR. WERMUTH: And then the last disputed exhibit at
3 this point is Plaintiffs' Exhibit 92. It is an email from June
4 of 2021 between Carrie Henderson and Hayley Spencer, who are
5 both employees of the Florida Board of Education.

6 And it is a --

7 THE COURT: You're saying it's statements of parties?

8 MR. WERMUTH: It's a statement of a party opponent.
9 It includes, as part of the chain, an email from Alex Kelly at
10 the Governor's office to Katherine Hebda and Bethany Swonson
11 at --

12 THE COURT: Why does everything uttered by an employee
13 of the Governor's office come in?

14 MR. WERMUTH: Well, in this instance it's putting --
15 it's putting the Board of Education on notice of other surveys
16 that have been done in the past. This is in June of 2021, right
17 around the time of the passage of HB 233. The Governor's office
18 is putting the Board of Education --

19 THE COURT: Well, it's actually two months after the
20 passage; correct? I thought HB 233 was passed in April.

21 MR. WERMUTH: It was signed by the Governor on the
22 22nd of June, I believe.

23 THE COURT: Well, it became law. I thought you said
24 "passed." You used the word "passed," not "signed."

25 MR. WERMUTH: Sorry. It was enacted, yes.

1 THE COURT: Part of it is -- I want to make plain that
2 I'm listening and for any reviewing court, that I'm not just
3 jumbling all the dates together.

4 So I understand that -- and I'm not suggesting that
5 somehow nothing that happens after April is irrelevant. I think
6 my rulings have been to the contrary, but, anyway, we don't need
7 to belabor the point.

8 MR. WERMUTH: Well, this is the point at which the law
9 was enacted and the Board of Education was then in a position --

10 THE COURT: Trying to figure out what do we have to do
11 to implement it?

12 MR. WERMUTH: What do we have to do to implement it?

13 THE COURT: I got it.

14 MR. WERMUTH: And Alex Kelly is providing examples of
15 surveys from other states to the Board of Education.

16 And so the email, as far as Alex Kelly's transmission
17 is concerned, just is basically on notice, notice to the Board
18 of Education of these other surveys and the characters --
19 characteristics of those surveys.

20 THE COURT: All right. Let's break this down.

21 Mr. Levesque, what says you about the actual
22 statements in the emails as it -- setting aside the
23 communication with the Governor's office between the Board of
24 Governors' employees.

25 MR. LEVESQUE: Between the Board of Governor

1 employees, there are no statements. They're just forwarded
2 emails, not even with a simple FYI. It's just a simple email
3 forward.

4 So with that regard, I'm not sure that --

5 THE COURT: Why is it not admissible for purposes of
6 acknowledging that the Board of Governors had this information
7 available but not what they were told by the Governor's office?

8 MR. LEVESQUE: I think in that context that would be
9 the limited purpose that it would be.

10 THE COURT: On that basis, I sustain in part and
11 overrule in part. It's being considered for that purpose only;
12 okay?

13 (PLAINTIFFS EXHIBIT 92: Received in evidence.)

14 MR. WERMUTH: Okay.

15 And the parties are currently discussing discovery
16 responses. There's six discovery responses and a declaration,
17 but I need to give Mr. Levesque a little longer to look at
18 those.

19 THE COURT: We have time.

20 MR. WERMUTH: Okay.

21 THE COURT: Mr. Levesque, other issues we need to take
22 up before we hear from Dr. -- the next witness?

23 MR. LEVESQUE: Not at this time, Your Honor.

24 THE COURT: All right. Are y'all ready to proceed?

25 MR. WERMUTH: We are, Your Honor.

1 THE COURT: And this is Ms. Velez?

2 MR. WERMUTH: We'll call our first witness,
3 Dr. Hurtado, Sylvia Hurtado.

4 (Dr. Hurtado entered the courtroom.)

5 MS. VELEZ: Good morning. Dr. Hurtado, can you hear
6 and see me?

7 THE COURTROOM DEPUTY: She should be able to hear you
8 now.

9 MR. WERMUTH: Good morning, Dr. Hurtado. Can you hear
10 me?

11 THE WITNESS: Yes.

12 MS. VELEZ: And can you see me as well?

13 THE WITNESS: Yes, I can.

14 THE COURTROOM DEPUTY: Please raise your right hand.

15 **DR. SYLVIA HURTADO, PLAINTIFFS WITNESS, DULY SWORN**

16 THE COURTROOM DEPUTY: Please state your name and
17 spell your last name for the record.

18 THE WITNESS: My name is Sylvia Hurtado; S-y-l-v-i-a,
19 Hurtado is H-u-r-t-a-d-o.

20 THE COURTROOM DEPUTY: Thank you.

21 DIRECT EXAMINATION

22 BY MS. VELEZ:

23 Q. Good morning, Dr. Hurtado.

24 A. Good morning.

25 Q. I understand that you are joining us from California. Is

1 that right?

2 A. Uh-huh, yes.

3 Q. Thank you for being awake at this early hour.

4 Were you engaged as an expert by the plaintiffs in this
5 matter?

6 A. Yes.

7 Q. And for what purpose were you engaged?

8 A. I was engaged with the purpose of being an expert witness,
9 particularly around the administration of higher-education
10 surveys, faculty and student surveys and my expertise in higher
11 education.

12 Q. And were you asked to analyze a portion of a statute that
13 pertained to a survey?

14 A. Yes.

15 Q. And were you also asked to analyze draft and final surveys
16 implemented and drafted in 2022?

17 A. Yes. I reviewed multiple drafts and the final survey.

18 Q. Did you also analyze the final published results of the
19 2022 surveys?

20 A. I believe what I reviewed were results that were about to
21 be released, so I could not tell you if it was the final final,
22 but it appeared to be preliminary that they were prepared to
23 release.

24 Q. Are you prepared to discuss your findings and opinions and
25 reasons for them today?

1 A. Yes.

2 Q. Before we get into the specifics of the work you did on
3 this case, I'm going to ask you a few questions about your
4 background.

5 MS. VELEZ: And I'm going to ask Andy to please show
6 you what has been premarked as Plaintiffs' Exhibit 5.

7 BY MS. VELEZ:

8 Q. Are you able to see that document, Dr. Hurtado?

9 A. Yes, I am, very clearly.

10 Q. Do you recognize this document?

11 A. Yes.

12 Q. What is it?

13 A. It's my CV.

14 Q. Does the CV accurately reflect your professional
15 experience?

16 A. Yes, it does. I keep it up to date.

17 Q. And when is the last time you updated your CV?

18 A. Well, this one was obtained when we began -- I believe it
19 must have been when I submitted my expert report, or maybe a
20 little bit before that, so it's been several months. So
21 probably there are more things to add to the CV since it's been
22 written, but it really is the one that was submitted along with
23 my expert report.

24 Q. And there is nothing -- is there anything on this CV that
25 is incorrect or would need to be removed?

1 A. No, it would not.

2 We are required to be reviewed every three years for
3 promotion, and so even full professors are reviewed every
4 three years for promotion at UC, University of California. So
5 we do keep up our CVs because they are reviewed by colleagues
6 and external review committees.

7 MS. VELEZ: Your Honor, at this time I would move to
8 admit Plaintiffs' Exhibit 5 into evidence.

9 THE COURT: Ms. Lukis?

10 MS. LUKIS: No objection.

11 THE COURT: Without objection, Plaintiffs' 5 is
12 admitted.

13 (PLAINTIFFS EXHIBIT 5: Received in evidence.)

14 BY MS. VELEZ:

15 Q. And, Dr. Hurtado, do you have a Ph.D.?

16 A. Yes, I do.

17 Q. Where did you earn your Ph.D.?

18 A. I earned it at the University of California, Los Angeles.

19 Q. And what do you do for a living?

20 A. I'm a full professor at the University of California,
21 Los Angeles.

22 Q. Okay. Are you within any particular school or college at
23 UCLA?

24 A. Yes, I'm in the Department of Education which is located in
25 the School of Education and Information Studies.

1 Q. And how long have you had this job title?

2 A. Since 2004.

3 Q. And have you ever taught anywhere besides UCLA?

4 A. Yes. I taught at the University of Michigan for 12 years
5 as a faculty member. I began my career there.

6 Q. Have you ever worked for an organization called the Higher
7 Education Research Institute, or HERI for short?

8 A. Yes, I have, first as a graduate student, and then when I
9 returned to UCLA in 2004, I was asked to be director of the
10 center, which I directed for 11 years.

11 Q. What is HERI?

12 A. The Higher Education Research Institute is a research
13 organization within the university. It originally started as a
14 501(c), but it was asked to come onto campus because they were
15 doing national research in higher education, and it -- it
16 actually is sort of a collaboration of a number of scholars that
17 are also doing work in higher education.

18 So it's primarily a research organization, and it also
19 administers surveys nationally as it began with the previous
20 director who started the surveys, the national surveys that are
21 part of the corporate -- Cooperative Institutional Research
22 Program in 1965, but it began at the American Council on
23 Education, and the surveys came with him and the research came
24 with him to University of California, Los Angeles when he was
25 hired as a faculty member.

1 Q. And for the clarity of the record, who is the "him" that
2 you're referring to?

3 A. Oh, Alexander Astin.

4 Q. And I believe you mentioned the Cooperative Institutional
5 Research Program?

6 A. Yes.

7 Q. What is that?

8 A. That is -- it is the collaboration of institutions that
9 wanted to collect data. Let's say going back to 1965, these
10 were mostly college presidents who wanted to collect data on
11 students. Of course, it was a tumultuous era and so higher
12 education was expanding. It was a good time to begin
13 assessments of higher education, so really the first surveys
14 began at HERI before the federal government was collecting any
15 data on students or faculty began at HERI, and so -- I think I
16 answered the question.

17 Q. And does the Cooperative Institutional Research Program
18 administer any longitudinal programs or surveys?

19 A. Oh, yes. There are a suite of surveys. The baseline
20 survey is administered to college freshman with the full intent
21 in following them up later to understand their growth and
22 development, how they change, how their aspirations change and
23 what they do even post-college.

24 So, yes, almost all the surveys are designed so that they
25 can be matched over time in terms of questions so that there is

1 clear connection with understanding students' growth and
2 development in terms of what happens during college.

3 Q. How does HERI ensure the confidentiality of students who
4 participate in these longitudinal surveys?

5 A. It does what almost all the other survey organizations --
6 and there are many others that work with institutions of higher
7 education -- do. One is we are required to follow Institutional
8 Review Board's human subjects guidelines, regulations and rules
9 regarding confidentiality. So how do we do it?

10 First, we assure that while we may collect student IDs,
11 that those are removed from the data, in other words, scrubbed
12 from the data so that if anyone who uses it that is outside the
13 Institute or even the matching -- even the matching institutions
14 have to rely on the Higher Education Research Institute match,
15 but institutions themselves can maintain their own crosswalks of
16 identification so that they can later link the data. So one is
17 removing identifiers.

18 The second is certainly ensuring -- and this is probably
19 more -- I know National Science Foundation has really required
20 this in more and more survey institutions -- well, survey
21 vendors are doing the same in terms of if there is a particular
22 response and the cell size is extremely small, that information
23 is obscured. So, for example, if there's a Native American, the
24 only Native American who teaches in physics, for example, that
25 information might be obscured in any data reports that are

1 produced.

2 THE COURT: Doctor --

3 THE WITNESS: So that's sort of another way. So
4 anything that's certainly made public is reviewed to make sure
5 that no one can be identified.

6 THE COURT: Doctor, when you say you -- this is
7 Judge Walker. When you say you scrub the data consistent with
8 the guidelines, is that identification that's contained in, for
9 example, the responses to the survey itself, or are you talking
10 about data in the sense of metadata?

11 In other words, I want to make sure I'm following --

12 THE WITNESS: Sure. Okay.

13 THE COURT: -- because it's one thing -- if I've got a
14 document, which I do all the time in the court, and I've got a
15 medical record that's going to go in the record in a criminal
16 case, and we redact the social security number, we redact the
17 date of birth, we redact the address and so forth, and so if
18 anybody saw the document online, it would be excluded from
19 information.

20 That's a very different thing than if somebody came
21 and had access to and were able to copy and create a mirror of
22 something that was on our computers here, which would, of
23 course, include metadata. So I'm trying to figure out --

24 THE WITNESS: Right.

25 THE COURT: -- how that works.

1 THE WITNESS: Let me clarify, because our reports are
2 after that data has been -- I would say it's sort of like
3 there's only -- usually maybe one person that handles all the
4 data security, and that person is responsible also for ensuring
5 that identifiers are not in the original data set, so -- so that
6 is what typically happens is the identifiers are actually
7 removed from the data before any reports are produced, and
8 certainly the reports do not have identifiers.

9 THE COURT: But to the extent there's raw data that
10 was transmitted by the computer as -- I'm assuming that HERI
11 doesn't turn over the raw data as it was transmitted by computer
12 to anyone. So my questions about metadata wouldn't really have
13 any application in what y'all do, application of the guidelines
14 in HERI, because you'd be turning over the reports, not the
15 underlying electronic data that was collected, for example?

16 THE WITNESS: Oh, that's not correct. We do return
17 data to institutions so they can use it for analysis. Every
18 institution has an institutional research office and they
19 actually use some of the data and analyze the data for
20 accreditation, for example.

21 So we ensure that those links are obscured, but also
22 the institution themselves can -- can make those links if they
23 need to, but it's usually within a protected research office.
24 None of that goes out. It's very secure; usually, you know, is
25 extremely secure because --

1 THE COURT: Maybe I misspoke. What I meant was you're
2 not disseminating publicly the raw electronic data?

3 THE WITNESS: Oh, no -- well, no, that's not the case.

4 We don't disseminate any raw public data, but we do
5 make data sets available later, many years later. We make
6 public data sets available for people to use for research --

7 THE COURT: I understand.

8 THE WITNESS: -- and so a lot of research you see in
9 the literature is based on HERI data. So we do -- we do allow
10 them to analyze the data, but all that information has been
11 taken out that could identify any individual.

12 THE COURT: Let me hit the pause button for one
13 second, because I want to make sure I don't misunderstand the
14 positions of --

15 THE WITNESS: Okay.

16 THE COURT: -- the parties. And this is directed to
17 the parties.

18 Counsel, I understand the plaintiffs' position, I
19 don't need you to repeat it now, that, Judge, you should use
20 somebody other than the State; you should use a third party. I
21 get that. Let's set that aside.

22 What -- does anybody disagree that if the State --
23 while you don't have to compile information, and you don't have
24 to generate a new document in response to public records
25 requests, does either side disagree that under Florida law, in

1 addition to getting a document, you can actually -- and I know
2 there's limitations because there are some things that are
3 protected by statute -- that you can get -- ask for and receive
4 information off the computer such that somebody could have it
5 analyzed and look at the metadata or not? And it may be more
6 complicated than I'm asking the questions, but I just want to
7 make sure I don't misapprehend either side's position.

8 So let me start with plaintiffs' counsel.

9 And the answer, Judge, I don't know. I need to tell
10 you later is fair enough as well, because I also understand you
11 may not be an expert on Florida public records law.

12 MS. VELEZ: Yes, Your Honor. And we would disagree
13 that there is any clear exemption in Florida public records law
14 for the responses that would include IP addresses. Now, should
15 names be associated with those responses, that might be a
16 different question, but the raw data itself doesn't seem to me
17 to fit clearly under any public records law exemption, which is
18 a concern of ours, Your Honor.

19 THE COURT: What does Florida law say in terms -- I'm
20 not a public records law expert, which is interesting since my
21 wife does a lot of this work so I should be embarrassed that I
22 don't know more.

23 But what does Florida law say -- and, again, I know
24 that I don't have to necessarily have you compile information
25 and create, for example, charts and so forth, but what does

1 Florida law say if you've got metadata that includes both
2 information that is not exempt as well as exempt?

3 Does the Florida public records law require you --
4 meaning the State, or the state agency, whomever -- to go
5 through and do something with the metadata? So, for example, if
6 it included personal identifying information and names, as well
7 as other stuff you can get, what does the law require the State
8 to do?

9 MS. VELEZ: Your Honor, my understanding is that the
10 public records law would require the redaction of something that
11 is exempt, and in such a case where that might be an expensive
12 task, the public records law contemplates that the requester
13 might have to pay for that redaction.

14 THE COURT: That was going to be my next question.

15 So while it may be feasible to get something, you
16 literally would have to pay the State a fair fee if they were
17 going to have to go through hundreds of thousands of entries to
18 delete, and it was going to take an IT specialist a year to do
19 that -- I only know that because I recently saw a document that
20 suggested it would take ten IT experts almost a year to do
21 something, and it would cost, you know, a couple of million
22 dollars to do what was requested. To the extent it's -- even if
23 it was not -- to the extent there's something exempt in it such
24 as names, and so forth, then the State doesn't have to do that
25 unless you potentially pay a reasonable fee. And it may be up

1 to a Court to weigh in if there is some dispute about what's
2 reasonable or not; correct?

3 MS. VELEZ: That's my understanding, Your Honor.

4 And I would note for the record two factual points. I
5 believe that there is testimony that has already been identified
6 by designation from Marshall Criser, the 30(b)(6) witness on
7 behalf of defendants, that they would have to produce this data,
8 and I expect that other witnesses may say the same.

9 THE COURT: And I want to make plain I also understand
10 some of what I was just asking about was in the abstract, that
11 there's no relation to this case, because, as I understand it,
12 there weren't necessarily -- well, I don't know how that works
13 if you're emailing somebody. I'm assuming what we're really
14 talking about here is IP addresses if there's no other
15 identifier. So it may not have the number of layers that I was
16 just suggesting.

17 But there's a difference between me asking a question
18 generally versus what applies here, so I understand your
19 response.

20 And, Ms. Lukis, we don't need to -- you don't have to
21 provide me with a verbal treatise defining the contours of
22 public records law in Florida. I just want to make sure that I
23 understand generally what y'all's position is.

24 MS. LUKIS: Sure. I think just three quick points.

25 One is that the legal framework that Your Honor and

1 Ms. Velez laid out I think is accurate.

2 Second, I don't think defendants have ever taken a
3 position that there's anything exempt from -- new that's exempt
4 from public records laws in this case.

5 And, third, I think, at the risk of getting ahead of
6 myself, the rub is that I think we're probably going to disagree
7 about what the data actually shows, not whether or not it's
8 exempt from public records.

9 THE COURT: I've got it, what the data shows.

10 And is there -- just so I'll know what y'all's
11 disagreement is -- and I won't -- again, we're spending probably
12 more time on this than we need to.

13 But with the -- is there anything that y'all are
14 really arguing about whether there is or is not IP addresses?

15 MS. LUKIS: Whether or not there are IP addresses that
16 are in one subset of the datasets, yes. What those IP addresses
17 are, what they show, what the utility is I think is a serious
18 point of contention.

19 THE COURT: Absolutely. I get that.

20 So, Judge, just because you might have metadata that
21 would show here are all the IP addresses of everybody that
22 responded from X school, for example -- and I don't even know if
23 it comes in that form. As I understood it -- and I could be
24 totally wrong -- on here it was each individual institution sent
25 out the surveys, but then the institutions then sent that

1 information on to the State.

2 Do I misapprehend what happened? And if I do, that's
3 fine.

4 MS. LUKIS: No, Your Honor.

5 THE COURT: Okay. And so how stuff works, what was
6 transmitted gets a little bit more complicated, Judge, because
7 there's those layers is how I understood your --

8 MS. LUKIS: Yes. And I think it's more than that.
9 And, frankly, it's one of the issues that we have with
10 Dr. Hurtado eminently qualifying to her field. But there is
11 some technical aspects of the way that data security works,
12 personal identifying information is handled. That is, I don't
13 think, within the scope of the expertise of this witness and
14 I --

15 THE COURT: You're talking about IP and how it is --

16 MS. LUKIS: What they mean, what they tell you, what
17 can be done with them. And to the extent it's being used to
18 challenge the anonymity of the surveys, I think this will be
19 potentially the only testimony we hear that the surveys weren't
20 anonymous. And it's not going to be consistent with the
21 testimony from the people who actually administered the surveys
22 and have access to the data.

23 THE COURT: Y'all have -- what makes me feel good is I
24 understood the arguments of both sides before I asked that
25 question. I just wanted to make sure that I wasn't confusing

1 each other's positions.

2 MS. LUKIS: I understand.

3 THE COURT: So that was very helpful for me to make
4 sure that I wasn't chasing rabbits down a trail.

5 Okay. Thank you.

6 Doctor, sorry to interrupt your testimony.

7 Plaintiffs' Counsel, you can resume, and I'm going to
8 turn off my mic so the court reporter doesn't hear every cough
9 and click.

10 BY MS. VELEZ:

11 Q. Dr. Hurtado, you had mentioned something that you had
12 referred to as crosswalks earlier, and I was hoping you could
13 explain for the record what you meant by that.

14 A. Yes. So, for example, institutions can generate IDs. They
15 may not be original IDs, but then they also can link that with
16 data they have at the institution. So that's the crosswalk.

17 So a survey could be numbered and it's associated with a
18 particular ID, but there's nothing in the data that's produced,
19 even the raw data or even the reports, that has identifying
20 information because they develop a crosswalk.

21 So that's another way that institutions maintain anonymity
22 and make sure that they are keeping information off both the raw
23 data set and also reports is that they maintain -- a lot of
24 institutions maintain their own crosswalks.

25 Q. And those crosswalks, are those released to the public?

1 A. Of course not. Those are -- those are things that are kept
2 in a vault in an institutional research office and probably only
3 one or two people at the institution has them. And, similarly,
4 we have a data security person that handled all of that, and if
5 there was anything, make sure that the data were -- did not have
6 any identifying information, was aware of which institutions
7 were maintaining crosswalks. All of that had to stay on top of
8 to ensure both the institution could be assured and individuals
9 who were responding could be assured that it was anonymous.

10 Q. And you mentioned a suite of surveys conducted by the
11 American Council -- or I'm sorry -- the Cooperative
12 Institutional Research Program.

13 A. Yeah.

14 Q. Is one of the surveys the diverse learning environment
15 survey?

16 A. Yes. I didn't get to finish my comments on that, that
17 their -- the suite of surveys not only includes the freshmen but
18 also a follow-up after the first year, a senior survey, and also
19 a diverse learning environment survey.

20 Q. And did you have any --

21 A. And --

22 Q. Please go ahead.

23 A. No. Go ahead.

24 Q. Did you have any role in the drafting or design of the
25 diverse learning environment survey?

1 A. Yes. I got a board foundation grant, and I was studying
2 really what was happening at what we call broad access
3 institutions, those that are very diverse, have lower
4 selectivity levels and are trying to improve their retention
5 rates. We had a special project, and we created a survey for, I
6 would say, a pilot of institutions that participated, and other
7 institutions immediately wanted to be part of this survey.

8 And it assessed the environment, the learning environment,
9 in terms of diversity, also civic outcomes. Things that were
10 not on other surveys we had on this particular survey and really
11 thinking about, for example, diversity on college campuses.

12 Q. And what was the educational purpose behind this particular
13 survey?

14 A. Well, primarily institutions are interested in student
15 outcomes and how students can be successful, particularly
16 students from different racial/ethnic groups that they are
17 trying to improve completion rates. And so they wanted to know
18 more about how the environment -- how those students were
19 experiencing the environment. And the survey asked those
20 particular questions about, for example, sense of belonging and
21 the extent to which they felt they belonged, but a whole range
22 of other things that were not on the typical survey.

23 So, yes, it really is about improving the environment.
24 Many institutions have diversity strategic plans or task forces,
25 and they're trying to understand how to better create a

1 welcoming environment in every aspect. And so sometimes they
2 use the surveys to try to find out more about their students.

3 Q. And --

4 A. Yeah, yeah.

5 Q. Great. We'll come back to that.

6 In addition to the administration of these surveys, is
7 there any other work that HERI does?

8 A. Yes. For example, the surveys is only one component.
9 There are large-scale research projects, some involving the
10 actual survey data that we're talking about. For example, we
11 had a large-scale National Institutes of Health Study on
12 understanding longitudinal outcomes with students in the
13 biomedical sciences from the day they enter campus until they
14 actually graduate and go on into other -- into their fields, so
15 it was a long longitudinal study.

16 So there are several studies that are done like that that
17 are longitudinally focused and provide research for the nation,
18 actually, in terms of understanding college students and
19 outcomes that are important for national priorities, in which
20 case, grant-funded programs.

21 So the other thing is on occasion an institution will ask
22 HERI to develop a specific survey or do a particular study, and
23 so these are contracts. So, in addition to grants, there are
24 contracts. So there are contracts within institutions to do
25 diversity studies or assessments of student learning, for

1 example. There are all those kinds of things.

2 So there's national research, contracts, grants and also
3 the sales and service component, which are the surveys, that are
4 bought by institutions and used for their educational goals.

5 Q. And you've mentioned a few times longitudinal surveys. And
6 just so the record is clear, what is the difference between a
7 longitudinal survey and a one-time survey?

8 A. Yeah. So a one-time survey captures students or faculty or
9 staff at one point in time and, therefore, you don't know
10 anything about -- you can't make any assumptions or causations
11 about a one-time survey in terms of -- because you don't know
12 what happened before unless you have retrospective questions.
13 But even then, it's better to have a pre and post survey,
14 longitudinal, where you understand where individuals began, for
15 example, the beginning of the freshmen year, and where they may
16 have ended up with some of their aspirations, values, majors,
17 some of the outcomes. So a longitudinal survey follows the same
18 individuals over time.

19 So a cross-sectional or that one-time survey may be
20 administered at different time points, but the problem is they
21 are not following the same students. So there's a great deal of
22 student mobility. Students leave the institutions. Students
23 transfer in. In fact, about 30 percent of higher education
24 students that are graduating today have attended more than one
25 college. So they're really not staying at the very same

1 college. They may go to a number of colleges and end up
2 graduating someplace else.

3 So cross-sectionals, then, are just kind of, hopefully,
4 representative population surveys at different points in time,
5 but it may include completely different individuals, not the
6 same individuals. Longitudinal follows the same individual over
7 time.

8 Q. And in a longitudinal survey, to bring us full circle, you
9 would need to maintain a crosswalk which would be kept strictly
10 confidential?

11 A. Yes, yes.

12 Q. Understood.

13 Do you also teach higher education or higher education
14 administration?

15 A. Yes. That's what we're hired to do primarily -- of course,
16 do research at a research institution, but primarily we're hired
17 to teach particular areas so that we have academic programs and
18 that we are maintaining them.

19 So, yes, I teach.

20 Q. And in the course of teaching that programming, do you ever
21 teach about the concept of academic freedom in higher education?

22 A. Yes. We have a foundations course of U.S. higher education
23 that's involved -- students enrolled are those pursuing
24 doctorates, masters, and also masters of student affairs. So
25 the three-degree programs, they all take the foundations course,

1 and we address the issue of academic freedom as one of the key
2 values of American higher education.

3 Q. Why is academic freedom important to American higher
4 education?

5 A. Academic freedom is important for open and free inquiry,
6 and also it comes from the German model of research which was
7 really based on the freedom to learn and the freedom to teach.

8 And so we've adopted that model, particularly at research
9 universities. Academic freedom becomes very crucial for
10 discoveries and expanding the boundaries of different
11 disciplines for areas that actually may be currently unpopular,
12 but in the future may be quite relevant to the needs of a
13 society.

14 So academic freedom is key as institutions are a place
15 where that kind of freedom could occur. So that means that we
16 have, and we encourage, broad areas of research and also allow
17 people without retaliation to pursue areas that might be
18 unpopular currently, or controversial even, as in the pursuit of
19 knowledge and also in the pursuit of actually transferring that
20 knowledge to students in terms of understanding the world.

21 MS. VELEZ: Your Honor, at this time plaintiffs tender
22 Dr. Sylvia Hurtado as an expert in survey design, drafting,
23 administration, and higher-education teaching and
24 administration.

25 THE COURT: Ms. Lukis, do you wish to voir dire the

1 witness or have any response?

2 MS. LUKIS: No, Your Honor.

3 THE COURT: Counsel, you may proceed.

4 One thing I will say to the lawyers, though, y'all are
5 going to have to make sure in your closing arguments y'all
6 distinguish between academic freedom as discussed within the
7 academic community versus -- as lawyers are well aware, I have
8 to deal with academic freedom as defined by binding case law.
9 And as binding case law defines academic freedom, it may be very
10 different or there may be a different gloss when we're dealing
11 with public institutions versus private institutions, so there a
12 bunch of layers here.

13 So, you know, oddly enough, my order in *Pernell*, I was
14 attacked by the Governor's office and attacked by academics.
15 The Governor's office thought that anything that's said in a
16 university is a statement of the government, and academics
17 didn't like my order because it suggested that somehow I wasn't
18 bound by binding case law and should have had a more expansive
19 view of academic freedom.

20 But I'll just caution everybody that it's not helpful
21 to have everybody define it however they want to define it.
22 Y'all need to say, Judge, we believe within this context it's
23 defined, to the extent it's relevant, this way, cite case.
24 Because I'm interested in what the Eleventh Circuit and the U.S.
25 Supreme Court has said, not what I think it should be, because,

1 again, if I from on high got to decide the contours of academic
2 freedom, I suspect it would be defined much differently than it
3 has been defined by the U.S. Supreme Court, to the extent it's
4 done so, and/or the Eleventh Circuit.

5 In any event, you can ask your next question.

6 MS. VELEZ: Understood, Your Honor.

7 BY MS. VELEZ:

8 Q. Dr. Hurtado, what methods did you use to analyze HB 233
9 survey requirements in the 2022 survey?

10 A. Well, I looked at the law. I reviewed that. And then I
11 began to read the different surveys, look at the different
12 surveys to understand the extent to which they were following
13 social science methods and expectations for rigorous research.
14 So I was looking at the surveys for that.

15 We also did an extensive lit review to understand some of
16 the underlying, I would say, assumptions about both the law and
17 also the administration of the survey to see the extent to which
18 research supported any of those assumptions.

19 We also reviewed human subjects guidelines, as they
20 initially were going to use human subjects, so we wanted to make
21 sure we were up on all the current guidelines in human subjects.

22 And those were the main areas -- oh, I also did some
23 analysis. I asked someone at the Higher Education Research
24 Institute to do some analysis of our faculty survey data from
25 one of the most recent years to understand, really, the extent

1 to which political views were distributed across faculty in
2 different types of institutions. So nationally campuses have
3 been using that survey for a long time, and so that information
4 is there, so...

5 Q. And when you talk about human subjects research, will you
6 tell me a little bit more about what that means?

7 A. Yes. So institutions are required to follow human subjects
8 guidelines, and the -- it's federal. It's after violations of
9 human subjects where people were actually harmed, physically
10 harmed, died, et cetera, in various experiments. And so this is
11 to protect human subjects not just from physical harm, but also
12 mental harm or any kind of vulnerabilities. For example, minors
13 are protected. That was not protected in the past. And so
14 there are things like that that must be adhered to when anyone
15 is doing any kind of research to assure that human subjects are
16 protected.

17 The other component of that is participants are aware of
18 the harms and the benefits of participating in any research. So
19 it's required by human subjects to do that, to ensure that
20 individuals are aware of the harms and potential benefits of
21 participating before they agree to participate.

22 So I believe an institution could lose its funding --
23 federal funding if they do not follow human subjects guidelines.

24 So all institutions have a review board or rely on a review
25 board from their administrators. It's composed of

1 administrators and faculty that review all research that takes
2 place at an institution. And so it's -- they're calling -- for
3 example, even classroom activities that involve original
4 research are -- those proposals are put forward to be reviewed
5 by human subjects so that everyone is aware.

6 We also go through -- everyone goes through training, by
7 the way. They are required to do training periodically on human
8 subjects.

9 Q. And when you refer to the review board, is that an
10 Institutional Review Board, or IRB?

11 A. Yes. It's called an Institutional Review Board, yes.

12 Q. And is a survey instrument considered an experiment on
13 human subjects?

14 A. Yes, it is because it is reviewed. So let's say I'm in the
15 middle of a new project and so -- right now and we -- before we
16 can administer it to anyone, we have to develop the survey and
17 have it be reviewed, the survey we're going to administer be
18 reviewed by the Human Subjects Review Board to ensure that there
19 isn't anything that would be harmful to individuals.

20 But typically surveys are -- they're not considered as
21 dangerous as experiments, for example, but still they are
22 reviewed, and we must submit them for review.

23 Q. What are some ways in which a survey experiment could be
24 harmful to the respondent or participant?

25 A. It could ask some very damaging questions or very personal

1 questions that create emotions, and whatnot. And that's also
2 hard to know. But one of the key components of that is
3 confidentiality also, is that every individual that participated
4 is assured confidentiality.

5 And so that's part of one of the safeguards that's in place
6 for protecting from harm. And, obviously, you want to be aware
7 the extent to which anything that you administer could be
8 harmful to individuals before administering it, whether that be
9 an experiment or a survey. And so where -- we have done these
10 for many, many, years, and so we would be aware of any harms if
11 something got past and actually occurred.

12 Oh, individuals -- any individual can actually go to Human
13 Subjects and report a harm. So of the thousands of surveys
14 we've administered, we've had very few people report anything
15 that was harmful, given the thousands of surveys we've had, I
16 mean. So any individual who actually gets the name of the
17 individual to contact -- or the Human Subjects Review Board to
18 contact if they have any issues with a particular survey or
19 experiment.

20 Q. And going back to your testimony about your methods and
21 methodology, is that methodology consistent with the methodology
22 that would be employed by other researchers in your field?

23 A. For -- could you repeat the question?

24 Q. Of course.

25 A. Because I want to know the reference, the specific

1 reference.

2 Q. Yes. Going back to your methodology and your testimony
3 about the methods you used here to conduct your analysis, is
4 that methodology consistent with the typical methods of other
5 researchers in your field?

6 A. Oh, sure. I mean, our training is such that we are trained
7 in disciplinarily ways of looking at the world and also
8 employing similar methods and their quality standards within
9 those methods that are maintained. And so, of course, we abide
10 by those because that's partially our job, working within a
11 discipline and assuring that there are quality methods being
12 employed.

13 So, yes, I think if you had asked someone else to consult,
14 they probably would have done the same thing. I did -- they may
15 not have access to national data that I did, but they would
16 probably have employed the same methods, uh-huh.

17 Q. Shifting gears a bit, is survey research regarding higher
18 education relatively common?

19 A. Yes, it's extremely common. In fact, students get so many
20 surveys per year that institutions have to kind of regulate when
21 different surveys are being administered. And so not all
22 surveys are administered every year as a result for particular
23 cohorts that receive it. So they've had to coordinate it
24 because there are so many surveys, faculty surveys also. There
25 are also government ones that they fill out, and it's also to

1 produce national research in education, for example. So there
2 are national surveys that go out as well.

3 So there are different entities that are doing this.
4 Institutions use surveys for some of their outcomes, results,
5 and reports for accreditation, for example, to show, you know,
6 student satisfaction or outcomes that might not be readily able
7 to discern from just, for example, enrollment data.

8 Q. And based on those surveys which you mentioned of which you
9 are aware, are those surveys typically subject to IRB approval?

10 A. Yes. I think if you look at the hundreds of institutions
11 that we work with, we have agreements -- and one -- some
12 institutions will require that not only do we do UCLA IRB
13 approval, which is at the highest standard, any institution with
14 a medical school has very strict IRB standards, and so -- but
15 that applies to the entire institution. So we have very strict
16 ones that we must follow and guidelines we must follow, but each
17 institution also.

18 So we have agreements where a local IRB may accept UCLA's
19 IRB approval or the reverse, that we are using the IRB approval
20 of a particular institution and UCLA will accept that
21 approval -- not always, but sometimes. So, yes, sometimes there
22 are institutions that require both. We must -- we always do
23 UCLA IRB approval because we are UCLA researchers, but we also
24 many times have to go through IRB of each institution that is
25 involved in a study.

1 Q. Is it important that any of these surveys distributed to
2 faculty and students have some clear educational purpose?

3 A. Well, given the number that are out there, I would say yes,
4 because the clear educational purpose is really key. You want
5 to improve higher education. And if you're administering a
6 survey, it shouldn't be just to administer a survey. It's --
7 you're asking for people's time. You're asking for information.
8 And even individuals who participate, they may expect some
9 follow-up. They expect that something -- if they're going to
10 participate, there will be some benefit to them.

11 And so, yes, the educational purposes are key because it
12 helps the individuals, administrators, and faculty know what's
13 going on with their students, for example, and what things they
14 need to do because, as I said, enrollment data doesn't provide
15 all the information needed. You need to know more about their
16 experiences, their aspirations. And they may be different types
17 of students. So you want to know something about your different
18 kinds of students as well.

19 Q. When you say educational purpose, then, do you mean for the
20 purpose of improving the institution?

21 A. Yes, yes.

22 Q. Is it important that questions not be leading or assume a
23 particular response?

24 A. That's a standard. If you go on the Internet and you look
25 at survey development, you'll easily find they'll say, yeah --

1 it's in whatever -- survey 101 teaching is that you shouldn't be
2 leading an individual toward your own assumptions, but -- you
3 know, you can test your own assumptions, but you shouldn't be
4 leading them to a single conclusion, because generally there are
5 many causes for, you know, any kind of, you know, student
6 behavior, for example, or outcome. And so there are what we
7 call predictors. There are things that predict some of the
8 outcomes we're thinking about, so, yes.

9 Q. Is it important that the purpose of a survey be explained
10 to the respondents?

11 A. Yes. In typical IRB yes. The purpose should be explained.
12 Otherwise, individuals are -- they're not inclined to respond if
13 they don't know -- if this is purposeful -- purposeless. Why
14 would you want to spend the time answering a survey if it had no
15 purpose and it wasn't used for, you know, educational
16 improvement, I think.

17 So, yes, the -- there are IRB guidelines, and I stated in
18 my expert report that the participants have to be aware of
19 what -- the purpose and also the uses of the survey that they
20 are actually participating in, and that way they can weigh the
21 harms or benefits and decide knowledgeably whether they should
22 participate.

23 Q. Is the clarity or -- let me rephrase.

24 Is it important that the questions on a survey instrument
25 be clearly drafted and easy to understand?

1 A. Yes.

2 Q. And this might be obvious, but why is that important?

3 A. Well, there's a phenomenon where it happens because people
4 may be novices in devising a survey where they'll ask two
5 questions in one, for example. So when you get a response, you
6 can't interpret is it an answer to question one or question two
7 that was part of the question, right?

8 So what you try to do is be clear as possible to allow the
9 individual not to be confused about the question at all. And
10 so, in other words, there -- you could devise a survey and you
11 have a lot of these questions that are confusing two things,
12 right? Then the individual -- you don't -- you can't interpret
13 what the results are. It's hard to interpret what the results
14 are. First of all, it's hard for the participant to interpret
15 it, but then also hard to interpret the results.

16 Q. And you've touched on some of this already, but is it
17 important that data security protocols be strictly defined and
18 followed by the researchers?

19 A. Absolutely. Otherwise, why would anyone want to reveal
20 anything about their personal lives, their experiences, or even
21 their political views? They may not want to reveal any of that
22 if they realized that this was going to be -- they were going to
23 be identified and just publicized everywhere.

24 Q. Thinking of HERI in particular, would HERI ever provide raw
25 responses in conjunction with crosswalks to a political body?

1 A. Probably not. Probably not. I don't think we've ever --
2 no. Partially because we do think that it's not just owned by
3 HERI, it's owned by the institution. So we allow the
4 institutions to decide how to use the data -- how to use the
5 data.

6 Now, we have the national information, right, but for
7 institution specifics, we allow the institution to determine how
8 to use the data.

9 Q. And does the IRB process require providing some indication
10 of how the data will be used?

11 A. Oh, yes. Yes. And, in fact, there is -- there is -- part
12 of the regulations are that if you obscure the use of the survey
13 or experiment, that you're required to tell the respondents --
14 you have to first inform them, at the time that they're
15 consenting to participate, and then, second, tell them after the
16 administration or of the experiment or survey. You're required
17 to do that by IRB.

18 So IRB would look to see that you -- if you obscured it,
19 that you actually are able to let them know -- let the
20 participants know at a certain point in time either, one,
21 affirming -- informing them ahead of time at the consent phase
22 that there are uses of the survey that haven't been -- or the
23 uses will be revealed later, for example. You can say that in a
24 consent and then let the individual determine whether or not to
25 participate. But you're also usually required to let

1 individuals know later that use as well.

2 Q. If a researcher makes an assurance of data privacy or
3 security in disseminating a survey instrument, is it important
4 that those assurances be accurate and truthful?

5 A. Yes. Because then no one would ever answer any survey or
6 participate in any experiment if they started to find evidence
7 or even suspect that this was not -- that they were hoodwinked
8 in some way. So they wouldn't -- they wouldn't participate any
9 longer, or perhaps in any survey, because they would have some
10 level of distrust.

11 Q. And you mentioned earlier in your -- earlier in your
12 testimony that you reviewed HB 233's language itself in
13 conducting your analysis; is that right?

14 A. I looked at it, yes.

15 MS. VELEZ: Andy, would you please show Dr. Hurtado
16 what has been admitted as Joint Exhibit 1, focusing on the
17 survey language.

18 BY MS. VELEZ:

19 Q. Can you see that, Dr. Hurtado?

20 A. Yes, I can.

21 Q. Take a moment to review, and let me know when you're
22 finished, please.

23 A. Okay.

24 Q. Dr. Hurtado, is this the language that you reviewed?

25 A. Yes.

1 Q. What is the required frequency of the survey contemplated
2 by this language?

3 A. It's annual.

4 Q. Is that typical of higher-education surveys?

5 A. There are some surveys that are conducted annually, but
6 that's primarily to get new participants. It's not to continue
7 to get the same participants again and again. So there are --
8 for example, we administer the freshman survey because there are
9 new cohorts of students entering higher education each year, so
10 that's an annual survey.

11 Now, an institution may not participate annually. They
12 decide they don't need to know every single cohort; they'll know
13 every other cohort. For faculty surveys, because they're
14 long-term employees, any survey that's administered annually to
15 long-term employees doesn't make a lot of sense because
16 individuals will say -- when they see the survey, they'll say,
17 Well, I've already answered this, and I know what the purpose
18 is, so there's no reason to do it again.

19 So we do not administer, for example, our faculty surveys
20 every year. We administer it every three years, and
21 institutions opt in if they want to do it every three years.
22 But we offer surveys every three years because things do not
23 change a lot for long-term employees.

24 Q. And --

25 A. And other surveys are -- follow a similar procedure. If

1 they're administered annually, it's really to only gather new
2 participants.

3 Q. And do you have any concerns with regard to any
4 requirements that might be missing from this statute?

5 A. Well, it certainly is not clear -- yes. I think one of the
6 things is -- that concerned me probably the most was that it
7 would be published. And typically when survey -- I just kept
8 thinking, well, what do they mean by "publish"?

9 Are they going to put out all the information on all their
10 institutions to the public? Are they thinking of a report? Are
11 they thinking of putting it in an academic journal? I wasn't
12 sure what "publish" meant. And usually when assessments are
13 published, it usually requires IRB approval.

14 So that was one that -- for me there was a question about
15 what was meant by that and what did that look like, because, you
16 know, how you publish results makes a big difference. If you
17 publish it in an academic journal, it's gone through extensive
18 review in terms of methods, et cetera. So you have people
19 within a particular discipline reviewing to see that it was --
20 that it was well done and it's information the public should
21 have.

22 Now, publish might be just putting out on a website, which
23 some institutions do with surveys that they'll publish it, and
24 they'll also put dashboards where individuals can actually click
25 on things and look to see how different groups have responded to

1 the survey. And so a lot of institutions are now doing public
2 dashboards with some of their data so that individuals can see
3 and learn more. But those are for, you know, institutions that
4 are -- that are trying to be transparent about the data they
5 collect and also want to continue to collect data for
6 educational improvement.

7 So I think that was the first thing. It doesn't -- another
8 thing is it doesn't say anything about this being guaranteed
9 anonymity at all. It doesn't say that no one will be revealed.

10 Probably a third thing that was most concerning as well is
11 the use. What would be -- how would this be used by either
12 institutions, or the Board of Governors, or the Board of
13 Education, or everyone at the State? It's -- there's no clear
14 information about the use, only that they were going to publish
15 the results, though.

16 Q. And does this language require that the survey be subject
17 to IRB approval?

18 A. It does not require that, but I assumed it was. And that's
19 why I started looking at IRB, you know, getting up to date on
20 all the IRB guidelines. But it ultimately was not.

21 Q. Do you have any concerns about the survey required by this
22 statute not being subject to IRB approval?

23 A. Yes, I do. Yes, I do. Because I think it would have been
24 clearer about both the purpose and also the intent of its use,
25 the use of it. Because they would -- individuals are required

1 to understand the harms and benefits of participating in any
2 research, any kind of data collection, or even assessment. They
3 should know -- they should be aware of this. So, yeah, I think
4 that was important.

5 THE COURT: Counsel, it's been about an hour and a
6 half. For the benefit of the court reporter, why don't we go
7 ahead and take a break, and we'll come back in ten minutes.

8 Thank you.

9 MS. VELEZ: Thank you, Your Honor.

10 (Recess taken at 9:57 AM.)

11 (Resumed at 10:12 AM.)

12 THE COURT: My apologies. I know that was a longer
13 break than anticipated, but I had to get something out for the
14 jury trial I have on Thursday, so the lawyers were waiting on an
15 order.

16 I appreciate it.

17 Counsel, you may proceed.

18 BY MS. VELEZ:

19 Q. Hello, again, Dr. Hurtado.

20 A. Hi.

21 MS. VELEZ: I'm going to ask my colleague, Andy, to
22 please show you what has been premarked as Plaintiffs' Exhibit
23 88.

24 And I'm going ask Andy to focus on the three
25 paragraphs on the top of page 2.

1 BY MS. VELEZ:

2 Q. Dr. Hurtado, please take a moment to read this over and let
3 me know when you're finished.

4 A. Yes, I'm finished.

5 Q. Is this discussion reflective of the types of issues that
6 might arise during the process of obtaining IRB approval?

7 A. Oh, absolutely. It's very standard not to include minors,
8 or, if you're including minors, to make sure that you have full
9 parental consent regarding the questions that you're asking,
10 yes.

11 MS. VELEZ: And, Your Honor, at this time I would move
12 for the admission of Plaintiffs' Exhibit 88, consistent with
13 Your Honor's prior ruling this morning on Plaintiffs' Exhibit 33
14 regarding the agency relationship between the Institute of
15 Politics and defendants in this matter, also noting that some of
16 these emails on this thread come directly from employees of
17 defendants.

18 THE COURT: Ms. Lukis?

19 MS. LUKIS: No objection as to the statements by the
20 parties, and defendants would preserve their hearsay objection
21 for the FSU portions.

22 THE COURT: As I said, I've conditionally admitted the
23 statements by that to the extent the parties wish to further
24 brief the issue of agency.

25 MS. LUKIS: Understood. Thank you, Your Honor.

1 THE COURT: All right. Thank you.

2 MS. VELEZ: Thank you, Your Honor.

3 (PLAINTIFFS EXHIBIT 88: Received in evidence.)

4 BY MS. VELEZ:

5 Q. And, Doctor --

6 THE COURT: Let me make plain, a defendant can be
7 bound by their statements or agents. The question becomes
8 whether or not -- in this case what the relationship is and
9 whether or not that carve-out doesn't apply to these particular
10 individuals or this entity.

11 And to the extent defense wants me to revisit that
12 because, Judge, we believe they don't and here's why, that's why
13 I'm saying I'm conditionally admitting it and I'll allow you to
14 have further argument; okay.

15 Counsel, you may proceed.

16 MS. VELEZ: Thank you, Your Honor.

17 BY MS. VELEZ:

18 Q. Dr. Hurtado, you mentioned representational or
19 representative samples earlier; is that right?

20 A. Yes.

21 Q. Can you tell me what that means?

22 A. Typically for any study, in order to assure that you
23 make -- can make valid claims about what's represented in the
24 population, is that you want to ensure that you have
25 representation in your instrument, in your administration and

1 also in your response and that that response is reflective of
2 actually what is in the population.

3 So if you do not, then you really have a sample that's
4 biased if you cannot be representative of the population of a
5 particular campus or a population of, let's say, the students in
6 Florida, for example, college students in Florida. So you want
7 to make sure that you have that representation because it -- you
8 can't make valid claims if it's not representative of the
9 population of people who are employed there or of students who
10 study there.

11 Q. Recalling your reading of HB 233, do you have any concerns
12 as to whether or not it is possible to create an on-campus
13 climate survey that is more welcoming of diverse viewpoints
14 pursuant to the statute?

15 A. Yes, it is possible to create one. And there are many,
16 many different kinds of third parties that are creating them and
17 institutions for using them in comparing the results with other
18 similar types of institutions, so, yes.

19 Q. So your testimony is that it's possible to create an
20 on-campus climate survey --

21 A. Uh-huh.

22 Q. -- for the educational purpose of ensuring more
23 welcoming -- or ensuring more diverse viewpoints; correct?

24 A. Yes.

25 Q. But do you have any concerns about the statute, the

1 language that Andy showed you --

2 MS. VELEZ: And, Andy, if you could put that back up.

3 THE WITNESS: Uh-huh.

4 BY MS. VELEZ:

5 Q. Do you --

6 A. I -- go ahead.

7 Q. Do you have any concerns regarding this language ultimately
8 yielding a survey instrument that has an educational purpose?

9 A. Well, it doesn't state -- as I said earlier, it doesn't
10 state the uses. And while the language may seem neutral, that
11 it's just an annual assessment of intellectual freedom and
12 viewpoint diversity, but both the motivation for the law, which
13 was revealed in a number of documents, and also the use, which
14 is now being revealed by issues that are coming up now in terms
15 of how it may be used, is not relevant -- is not reflected here.

16 So it appears the -- while the language appears neutral, it
17 is not, because the main intent really is to administer a
18 political poll, not even a broad viewpoint or kind of diversity
19 instrument. It's not tentative of that. That wasn't the
20 intent. And the uses are, obviously, beginning to be revealed
21 is that understanding, trying to ferret out faculty that are,
22 you know, influencing students regarding their political views,
23 which, again, there's no research evidence, as I said in my
24 report, to say that that actually occurs, that no survey has
25 ever been able to identify that as an outcome.

1 So, you know, it appears neutral, and you think, oh, well,
2 they'll use a head survey or they'll use some other -- the ideal
3 survey or some other survey that's been doing -- that's being
4 administered nationally.

5 But, no, they were not interested in that because they had
6 a very particular, I think, assumption that they wanted to
7 support using this survey and the data that would result from
8 it.

9 Q. Does this language create or impose any guardrails that
10 would prevent somebody from utilizing this requirement to
11 administer a political poll?

12 A. No, it does not. It does not have any guardrails regarding
13 that at all. But I think they were pretty clear, because on the
14 survey they said, We want opinions. It wasn't based on actual
15 experiences, but opinions. So it was a poll, a political poll
16 in a way, and the fact that it only covered liberal and
17 conservative, didn't cover broader areas of world view and
18 viewpoint diversity, suggested that that was not a real
19 interest.

20 THE COURT: Counsel, let me ask a quick question. And
21 it may not be with this witness. It may be, Judge, we're going
22 to rely on other evidence. I'm interested -- and this goes to
23 the statute, not the as-applied challenge as it relates to the
24 actual survey that ultimately was administered. But is there --
25 is this witness going to talk about evidence she reviewed or is

1 some other witness? Or is it something, Judge, we're going
2 to -- based on documents to suggest that the legislature knew
3 that when it asked for a nonpartisan statistically valid survey
4 that they -- the folks that voted on it, not somebody in some
5 dark room somewhere else that was saying, Goody, goody, goody,
6 we can do it -- but is there some evidence that the folks that
7 voted on this knew that, in fact, they were going to ultimately
8 perform the type of -- conduct the type of survey that was
9 conducted that this witness is explaining why it's not a valid
10 survey?

11 MS. VELEZ: This witness will not be opining on that
12 Your Honor. We have other evidence that we would intend to rely
13 on to that point.

14 THE COURT: Okay. I understand.

15 As I understand it -- and I want to make sure I don't
16 mess up or I'm not -- I'm getting what you want me to be
17 following. I'm not making a finding. I'm simply asking. And
18 you answered the one question on the legislature --

19 MS. VELEZ: And, Your Honor, if I could just be clear,
20 this witness will not be opining on statements that we think
21 pertain to intent. She may be able to draw some conclusions
22 about intent based on the survey itself, which I haven't yet
23 asked about.

24 THE COURT: Well, that's a different issue to ask.

25 MS. VELEZ: Right.

1 THE COURT: I'm not asking about -- the people that
2 drafted the survey, can you assume, if they are academics and
3 they're, you know, producing trash, they had to know it was
4 trash so, therefore, they had some ulterior motive, because,
5 otherwise, you wouldn't have done it the way it's done. I get
6 that, although I think it's ultimately up to me as the fact
7 finder to make that determination.

8 But setting that aside, I'm asking a different
9 question, which is there's -- and y'all can argue at the end of
10 this case and suggest there is no daylight. But it seems to me
11 there is a difference between what did the legislature do when
12 they passed HB 233, what was their intent and what did they know
13 versus did somebody poorly execute it and how did they know it
14 was going to be poorly executed when they passed HB 233. That
15 seems to me those are two different issues.

16 But as I understood this witness is, one -- is, Judge,
17 this survey is garbage, basically, doesn't meet any standards,
18 and here are the many reasons why. And from that, you can infer
19 certain things. And that will be legal argument for you, based
20 on the witness.

21 And, secondly, if you truly wanted to gather the type
22 of information that purportedly folks wanted, you could do it in
23 a valid way that wouldn't suggest answers, wouldn't yield skewed
24 results, if there are any results you can glean from such a
25 troubling structured survey and process.

1 And, finally, you could protect the identities and
2 information of others.

3 And all those things combined suggest that if you're
4 chilling speech, you could have done it in a different way that
5 would have less impacted the speech, which is part of the
6 *Arlington Heights* analysis.

7 Do I misapprehend what sort of the two overarching
8 points are?

9 MS. VELEZ: You do not, Your Honor.

10 THE COURT: Are there other overarching points?
11 Because I want to make sure when I'm listening that I don't
12 misapprehend what the witness is being offered for.

13 MS. VELEZ: No, Your Honor.

14 THE COURT: All right.

15 I want to make plain, Ms. Lukis, I'm not making
16 findings. I'm just trying to make sure I understand what
17 folks -- why folks are presenting information and what one side
18 hopes I glean, so then I can also understand your
19 cross-examination, why you think that's not so; okay.

20 Thank you.

21 MS. LUKIS: Thank you, Your Honor.

22 THE COURT: Counsel, you may continue.

23 MS. VELEZ: Andy, would you please show Dr. Hurtado
24 what has been admitted as Joint Exhibit 3.

25

1 BY MS. VELEZ:

2 Q. And, Dr. Hurtado, is this the student survey that you
3 reviewed, the final student survey?

4 A. Yes.

5 MS. VELEZ: Andy, would you please scroll to Questions
6 5 and 6.

7 BY MS. VELEZ:

8 Q. And, Dr. Hurtado, take a moment to review these, please.

9 A. Uh-huh.

10 Q. Do you have any concerns about Questions 5 and 6 on the
11 final student survey?

12 A. Yes, I do, because at first it assumes that students can
13 discern the political beliefs from actual, let's say,
14 information that's being presented because it's part of
15 knowledge base that we know of the perspective and various
16 views. So I think that's one.

17 But I think more importantly is that -- that the -- the --
18 you know, the -- that it's only liberal or conservative that's
19 being asked about here. It's not even thinking about broader
20 views. You know, it's like sort of narrowing this, and it's
21 kind of -- the combination is kind of leading to get students to
22 sort of report on faculty that are discussing -- that are not
23 objectively discussing political beliefs.

24 But it's -- I mean, it's -- it's just -- it's just like
25 asking students to tattle-tale. It's not even -- and the issue

1 of their perspective, liberal or conservative, I mean, there's
2 so much variation now within both liberal and conservative and
3 even the -- you know, a large portion of people are moderate.
4 So it's, like -- it's just very leading. It's very leading to
5 try to get students to say something that they already assumed
6 they know the answer to; in other words, try to get some
7 evidence that would back up what they already believe. So it's
8 not an open -- a very open question at all, given the
9 combination of the two.

10 And if they were really concerned about intellectual
11 freedom and viewpoint diversity, they would also ask questions
12 about what the faculty actually does do in the classroom that
13 actually promotes a variety of perspectives, because they do
14 come up in the classroom. And faculty are interested in
15 ensuring that we hear different perspectives in the classroom.
16 So I think that it's just one-sided.

17 MS. VELEZ: Andy, would you please scroll down to
18 Questions 13 and 14.

19 BY MS. VELEZ:

20 Q. And, Dr. Hurtado, please take a moment to review.

21 A. Okay. So, first of all, this is one of those -- with the
22 lead-in, this is one of those questions that is too confusing.
23 Are they talking about the university or the college or the
24 instructors, which are part time typically, sometimes are
25 professors? It sort of puts it all in one -- you know, like

1 everyone is the same or thinks the same, and that's not the
2 case. And so you don't really know what students are really
3 reporting.

4 And then when they say their professors or course
5 instructors generally are more conservative, liberal, et cetera,
6 we know there's a high number of moderates, particularly at
7 different campuses, and that's just the way it is; same thing
8 among students, that there's a large number of students that are
9 moderate because they're trying to -- their perspectives differ
10 depending on the issue. In other words, there's more nuance
11 that's certainly missing here to really understand viewpoint
12 diversity.

13 And then to say more generally if their college is more
14 tolerant of different -- of conservative or liberal, again,
15 it's -- it's -- it's leading students to say one or the other,
16 but nothing else, not broader, or identify, as I said, the
17 multiple ways that different perspectives are integrated in the
18 classroom or even in different parts of the university.

19 Also, the thing we know is that this varies by discipline
20 in terms of, you know, the variety of political perspectives.
21 That varies by discipline, and certainly that's not part of the
22 way this information is reported either, so...

23 Q. Assuming for the moment that there was an issue with
24 conservative self-censorship on college campuses, does the
25 student survey explore any other causes for such self-censorship

1 besides professors?

2 A. No, it does not. I think they might be -- well, perhaps
3 not. The largest influence for a student's political view, we
4 know from the research that has been done over many years in
5 different surveys, has been peers. And so students feel more
6 intimidated by college peers than they feel about anything that
7 happens with the professor, because they have more contact with
8 their peers than the professors, particularly at large
9 universities. And they take many courses, and they don't stay
10 all day in the same class. They are attending multiple classes.

11 So I think that's -- that's not fully explored in terms of
12 the multiple influences. I mean, there's also external
13 influences. There are external organizations working with
14 conservative groups to ensure that their voice is heard and that
15 they get internships and they have other benefits that work with
16 particular conservative groups.

17 So there's a lot of areas where there are a lot of other
18 sources of influence that are not explored here.

19 Q. Thank you.

20 MS. VELEZ: Andy, would you please show Dr. Hurtado
21 what has been admitted as Joint Exhibit 4.

22 BY MS. VELEZ:

23 Q. And, Dr. Hurtado, is this the final employee survey that
24 you reviewed?

25 A. Yes.

1 MS. VELEZ: Andy, would you please scroll down to
2 Question 4.

3 BY MS. VELEZ:

4 Q. Dr. Hurtado, do you have any specific concerns about
5 Question 4 on the employee survey?

6 A. Yes. I think as an educator you really don't know how to
7 understand -- how to respond to this question because one --
8 first, what does shielding mean? If you are -- if you -- if
9 students, for example, are being deeply offended or even
10 discriminated against or biased, is this saying that if you say
11 that they're not shielded this is a bad environment?

12 And I would say yes, because there are federal laws against
13 harassment and discrimination that, you know, the Office of
14 Civil Rights can get involved in. So there are -- you know, you
15 can't -- so you would basically say, No, we are trying to
16 protect because of the federal law. We're trying to protect
17 students from bias and discrimination.

18 But if you are a different educator and you say, Well, you
19 should not -- students should be exposed to every single idea
20 because it helps them grow and learn and, you know, toughen up
21 and realize that the world doesn't think the way they do and,
22 therefore, this actually is part of the intellectual freedom or
23 diversity that we want to support, so it -- you know, so you
24 could be that kind of educator and you'd answer this
25 differently.

1 So, you know, I just found it very difficult to answer as
2 an educator because, you know, there's a little bit of both
3 going on in a way. And it's -- like, to push people in
4 different directions is just crazy, but I understand this is
5 somewhat aligned with a particular piece of the law on the
6 antishielding.

7 So this is just very difficult and, I think, problematic
8 for educators to answer.

9 MS. VELEZ: Andy, would you please scroll to Questions
10 7 and 8.

11 THE WITNESS: Okay.

12 BY MS. VELEZ:

13 Q. Do you have any particular concerns about Questions 7 and 8
14 on the employee survey?

15 A. Yes, because it depends on an individual's rank or how long
16 they've been at the institution that they would feel any kind of
17 intimidation about their ideas and/or their political opinions.
18 And we're not -- this -- in fact, the whole survey, both student
19 and faculty don't have any information of how -- about how long
20 a person has been at the institution.

21 So a person that's fairly new might be intimidated because
22 they're fairly new, and it didn't matter; it's their ideas and
23 political opinions. And they may have been hired because they
24 have different ones, maybe. So we don't know for sure.

25 And I think that's -- they also may not be able to

1 understand whether the institution is equally tolerant, because
2 people live in their units and their departments. They
3 typically -- they have somewhat of a sense of the entire
4 university, but most people's daily work occurs in a department
5 or a unit or a school, and they maybe are more aware of what
6 either the viewpoints are and the openness there is to diverse
7 opinions within their particular unit. So it's hard to kind of
8 encapsulize the entire institution.

9 So there are numerous problems with this.

10 Q. Can all ideas shared on a college or university campus be
11 neatly categorized as either liberal or conservative?

12 A. Of course not. We can't even agree that on whatever --
13 when you watch the television in the evening, you can't even
14 agree on some of those things.

15 Q. Does the employee survey contemplate any other type of
16 viewpoint diversity beyond political viewpoint diversity?

17 A. No, it does not. And that's why my report very clearly
18 explained that this is not a viewpoint diversity survey. This
19 is really just looking at liberal or conservative political
20 views, and that's all that the legislators were interested in or
21 a governor was interested in, so...

22 Q. Can you draw any conclusions from the fact that these final
23 surveys did not include questions about other possible sources
24 of purported student self-censorship?

25 A. Oh, absolutely. I mean, the students are -- could be

1 intimidated by faculty because of the knowledge difference.
2 They may be confronted for the first time, for example, with
3 scientific evidence that countered their previous perspective,
4 you know, coming from homes or communities or rural areas, or
5 whatever it may be, and then realize that there's actually
6 research evidence or data or science that really says opposite
7 of what they may have been -- they may have believed before
8 coming to higher education. So that's intimidation.

9 I think -- as I said, a lot of this happens among peers
10 rather than with faculty. So the source is really important.
11 But, for example, a student may not -- may feel intimidated to
12 speak up before a professor or any group because they are an
13 introvert. There's no information about that.

14 So what social science researchers do within their surveys,
15 they try to rule out -- or any good research tries to rule out
16 alternative explanations for a finding. So those are not
17 measured here. They're not considered potential explanations.

18 Q. Dr. Hurtado, do these two surveys appear to you to have an
19 educational purpose?

20 A. No. I think the purpose is its an opinion poll, and it
21 really is intended to try to ferret out faculty in terms of
22 what -- you know, if their -- if any of their political views
23 are being transferred to students. And, as I said, we've looked
24 at all the studies and have tried to test that assumption using
25 data, and we've never seen results that actually support that.

24 Q. Okay. And you're aware that this is the first year that
25 any surveys were administered pursuant to House Bill 233?

1 A. Yes.

2 Q. I think you testified earlier that you agree that it's
3 possible to design a survey to explore intellectual freedom and
4 viewpoint diversity on campus; is that right?

5 A. Yes.

6 Q. Okay. And if you were given that charge to design such a
7 survey, you would do that; right?

8 A. Yes.

9 Q. Okay. So, for example, the failure to -- I believe you
10 testified that there was a failure to rule out alternative
11 explanations for some of the responses.

12 Is that an accurate characterization of your earlier
13 testimony?

14 A. Yes.

15 Q. Those are fixes that could be implemented in the future;
16 right?

17 A. They could, but the State is not interested in those
18 alternative explanations.

19 Q. Would you also agree with me, Dr. Hurtado, that if you were
20 designing a survey that was intended to monitor people's
21 political views, you would ask them more than one question about
22 their political views? Right?

23 A. Yes. But I wouldn't use the word "monitor" because that's
24 really not what the intent would be. It would be a more broader
25 inquiry. Because monitor suggests surveillance. I'm not

1 interested in surveilling anyone. I want them do their job and
2 do it well.

3 So we do ask nationally, and we're not the only survey that
4 does ask periodically questions about a political view to
5 faculty and students and staff. So it's already done
6 nationally.

7 Q. House Bill 233 survey provisions do not use the words
8 "monitor" or "surveillance," do they?

9 A. No, they do not. It does not.

10 Q. And the 2022 student and employee surveys do not use the
11 words "monitor" or "surveillance," do they?

12 A. No, they do not.

13 Q. If you were conducting a survey designed to annually
14 identify people's political views, do you agree with me that it
15 would be a huge design flaw to not collect any individual
16 identifying information about those folks at the outset?

17 A. Oh, yeah, almost all because there -- one of the issues
18 with generally world view and viewpoint diversity is they're
19 held, like, different kinds of groups with different kinds of
20 experiences and so, yes, you would ask -- you would ask
21 questions because you'd want to understand how there's
22 variability, uh-huh.

23 Q. During your earlier testimony, I believe you touched on
24 some harms that can be associated with survey research. Do you
25 recall that testimony?

1 A. Uh-huh.

2 Q. In this case, you'd agree with me that somebody who wanted
3 to avoid any potential harm associated with the 2022 surveys
4 could just not take the survey; right?

5 A. That's correct.

6 Q. You're not aware of who drafted the final surveys that were
7 administered; correct?

8 A. I was not until, I think, more recently it -- the -- well,
9 I was aware there was a faculty member involved in the initial
10 design and that -- I was aware of also probably -- it looked
11 like potentially there were some graduate students involved, but
12 when it moved from the Institute and was scrapped, that is, they
13 just got rid of all of those questions, someone else designed
14 it. I believe I heard, but I'm not sure, that it was the
15 Governor's chief of staff that actually created this final
16 survey, which all of the other social science information that
17 was part of the initial surveys, the earlier drafts, were just
18 scrapped.

19 THE COURT: Doctor, let me ask you a question. Is
20 there a term for drafting or is part of the academic literature
21 in terms of drafting surveys or reviewing surveys to draft an
22 anonymous survey in such a way that you're going to, by
23 definition, exclude folks from participating so that it will
24 generate a skewed result?

25 In other words, you draft it in such a way that it'll

1 be self-selecting and -- I mean, is that a phenomenon or a --
2 something that's discussed in academic literature that you work
3 with as it relates to the actual drafting with the intent to
4 limit the responses?

5 THE WITNESS: Anyone can design a survey to do that,
6 yes, to limit responses and, in fact, there's -- there's a lot
7 in the literature -- and, as I said, you can go on the web --
8 about leading questions. That's -- that's considered poor
9 survey design and counter to social science rigorous research,
10 so there -- there's a number of things that are certainly
11 things -- so to be exclusionary with your design means that you
12 really are not interested in broadly diverse viewpoints or
13 intellectual freedom. You're interested in proving a particular
14 point. So, yes, one can easily design one that would try to
15 provide evidence for an assumption or a conclusion you've
16 already drawn and --

17 THE COURT: And I know you testified earlier that you
18 found there were leading questions, but were there other things
19 about the structure of this survey that suggested to you that,
20 in fact, the survey was drafted in such a way to skew the
21 results --

22 THE WITNESS: Yeah.

23 THE COURT: -- either generally or specifically with
24 limiting the pool of respondents to those that perceived there
25 being a problem, for example.

1 THE WITNESS: Well, yes. I mean, I felt that this was
2 an entirely biased survey because of its -- its drafting, the
3 way the questions were worded, the way they leaked the
4 participants. And so this is -- this is totally against every
5 single social science rigorous method.

6 THE COURT: Which is what you were talking about
7 earlier, I understand.

8 I've got it.

9 Thank you.

10 Counsel, you may proceed.

11 BY MS. LUKIS:

12 Q. I believe you testified earlier, Dr. Hurtado, that you saw
13 a report of the results that you believe was either preliminary
14 or near final reporting of the results; is that right?

15 A. Uh-huh, yes.

16 In fact, that's when I discovered that the IP addresses
17 were there, and I was shocked because I said, We don't -- we
18 don't publish reports with IP addresses or provide that
19 information.

20 I'm sorry. The published reports and the actual data, I
21 saw.

22 Q. Okay. You don't have any expertise in the IT field;
23 correct?

24 A. No. I -- I am expected to adhere by, and we're expected to
25 do IT training. We do -- there's, like, these modules we have

1 to -- are required to do to understand that, and we have experts
2 who help us on a daily basis on any of those issues, but I'm not
3 an expert myself.

4 Q. Okay. Same answer with respect to the subject area of data
5 security?

6 A. Data security I know about because I have to -- I supervise
7 someone who did the data security for the national surveys.

8 Q. You're not an expert yourself in the field of data
9 security; correct?

10 A. Not all the -- all the nuances of it. I hire someone to do
11 that, yes.

12 Q. And you would agree that you can't explain the difference
13 between a public and a private IP address or a dynamic or a
14 static IP address?

15 A. No, that -- only that IP addresses usually are traceable
16 back to the computer that generated them.

17 Q. You haven't identified any individual who responded to the
18 surveys using their IP address, have you?

19 A. No. That's -- I'm not interested in that. As a
20 researcher, you're not supposed to be interested in identifying
21 individuals. You're really interested in trends and, you know,
22 results that could be generalized.

23 Q. You can't tell us anyone whose anonymity has been
24 compromised who responded to this survey; right?

25 A. Well, I -- no. I -- I don't, but in my deposition I said

1 any -- any one of the participants can raise that issue and have
2 it investigated.

3 Q. When you conduct longitudinal surveys, you collect
4 identifying information from respondents; correct?

5 A. Yes.

6 MS. LUKIS: One moment, please.

7 THE COURT: Take all the time you need.

8 MS. LUKIS: Thank you for your time, Dr. Hurtado.

9 That's all I have.

10 THE COURT: Redirect?

11 MS. VELEZ: I do not have any redirect, Your Honor.

12 THE COURT: Thank you, Doctor, for your patience with
13 us this morning. I especially appreciate the fact that you had
14 to get up at such an early hour to make yourself available. We
15 hope you have a pleasant day.

16 THE WITNESS: Thank you. I've got a classroom to
17 teach.

18 THE COURT: Thank you.

19 (Dr. Hurtado exited the courtroom.)

20 THE COURT: All right. And I believe I saw somebody
21 pop on our screen, so the next witness is available.

22 How long of a witness is this, Ms. Velez?

23 MS. VELEZ: Comparable to our other faculty witnesses,
24 Your Honor. So I would guess that my direct will take somewhere
25 between 45 minutes and one hour.

1 THE COURT: Why don't we take a five-minute break.
2 We'll come back at 11, and we'll finish the direct and then do
3 the redirect.

4 Mr. Levesque, I guess you're doing the redirect -- I
5 mean, cross. I'm sorry.

6 MR. LEVESQUE: Yes, Your Honor.

7 THE COURT: We can do that after lunch, or, depending
8 on if you can do it in 30 minutes or less, then we'll do it
9 before lunch. I'll leave that up to you, and I'm not limiting
10 you by telling you that. I'm just -- you can tell me how you
11 wish to proceed.

12 MR. LEVESQUE: Yes, sir.

13 THE COURT: Okay. Thank you.

14 Court is in recess is for five minutes.

15 (Recess taken at 10:55 AM.)

16 (Resumed at 11:09 AM.)

17 THE COURT: Plaintiff, you can call your next witness.

18 MR. WERMUTH: Dr. Nicole Morse.

19 (Dr. Morse entered the Zoom conference.)

20 THE COURT: If my courtroom deputy will please swear
21 in the witness.

22 THE COURTROOM DEPUTY: Yes, please raise your right
23 hand.

24 **DR. NICOLE MORSE, PLAINTIFFS WITNESS, DULY SWORN**

25 THE COURTROOM DEPUTY: Please state your name, and

1 spell your last name for the record.

2 THE WITNESS: Nicole Morse, M-o-r-s-e.

3 THE COURTROOM DEPUTY: Thank you.

4 THE COURT: Ms. Velez, you can question Dr. Morse at
5 your leisure.

6 MS. VELEZ: Thank you, Your Honor.

7 DIRECT EXAMINATION

8 BY MS. VELEZ:

9 Q. Good morning, Dr. Morse.

10 A. Good morning.

11 Q. Jumping right in, do you have a Ph.D.?

12 A. I do.

13 Q. What is your Ph.D. in?

14 A. Cinema and media studies.

15 Q. What was the title of your dissertation?

16 A. As best as I can recall, it was *Selfie Aesthetics: Form,*
17 *Performance and Trans Feminist Futures in Self-Representational*
18 *Art.*

19 Q. Would you please repeat that, Dr. Morse, for the court
20 reporter?

21 A. I'm so sorry.

22 *Selfie Aesthetics: Form, Performance and Trans Feminist*
23 *Futures in Self-Representational Art.*

24 Q. Do you have any specialized area of expertise within the
25 field of media studies?

1 A. Yes. My research focuses on LGBTQ media production, so
2 media production by and about LGBTQ people -- lesbian, gay,
3 bisexual, transgender and queer people -- as well as queer and
4 transspectatorship.

5 Q. What is your current occupation?

6 A. I'm an assistant professor in the School of Communication
7 and Multimedia Studies at Florida Atlantic University where I'm
8 also the director of the Center for Women, Gender and Sexuality
9 Studies.

10 (Reporter requested clarification.)

11 BY MS. VELEZ:

12 Q. Sorry, Doctor.

13 If you would just speak a bit slower so that the court
14 reporter can hear you?

15 A. My apologies.

16 Should I restate what I said?

17 Q. Please.

18 A. I'm an assistant professor in the School of Communication
19 and Multimedia Studies at Florida Atlantic University where I'm
20 also the director of the Center for Women, Gender and Sexuality
21 Studies.

22 Q. And before we get too far along, Doctor, what is your
23 gender?

24 A. I'm gender queer, which I'd also be described as nonbinary
25 or transgender.

1 Q. And if you are comfortable doing so, would you please
2 explain what that means for the record?

3 A. Yes. For me, being gender queer means that although I was
4 assigned female at birth, I found in my 20s that I had a much
5 clearer sense of myself and a greater comfort in both my
6 embodied existence and my psychic existence once I moved away
7 from identifying as a girl or a woman and instead described
8 myself as gender queer, so neither a man nor a woman.

9 In general, that would fall under --

10 Q. Please, go ahead.

11 A. In general, that would fall under the transgender umbrella
12 or, you know, the larger kind of category of transgender
13 identity where "trans" is a prefix meaning to move across or
14 away from, and so moving away from the sex or gender assigned at
15 birth.

16 Q. What pronouns do you use, Doctor?

17 A. I use they/them pronouns.

18 Q. Do you advise your students of your pronouns?

19 A. When I introduce myself the first day of class, I introduce
20 myself by my name, tell my students that they can address me as
21 Dr. Morse, and I mention that I use they/them pronouns. Those
22 pronouns are also used on all of my faculty bios or official
23 university documents about me. Other than that, I don't really
24 address it.

25 Q. Do you believe that your students recognize you as a queer

1 person?

2 A. I believe that most students do, in part because of how I
3 present and dress and also because there are occasions,
4 especially given the content that I teach, where I will mention
5 that I am queer and situate what I'm saying from that
6 positionality.

7 Q. Why is it relevant to reveal your positionality to your
8 students?

9 A. For me, it's a really important piece of modeling for
10 students how to be self-aware of the ways that our own
11 experiences shape our ability to understand the world. So my
12 opinion and my perspective will be shaped by my own experiences.
13 And that, you know, can have advantages and also limitations.
14 And by being clear about where I'm coming from, then I'm able to
15 engage with the class material in a richer way and give my
16 students the opportunity to fully understand where I'm coming
17 from, you know, as they potentially agree or disagree with me.

18 I also find that it's important to be an out member of the
19 faculty because many of my students are grappling with their own
20 identities, and having a faculty who they can go to with
21 questions or who, you know, can serve as role models can be very
22 meaningful.

23 Q. Is it difficult to be an out member of the faculty in
24 Florida's political climate today?

25 A. Yes, it's very difficult at this time and has been becoming

1 increasingly difficult over the four years or so that I have
2 been a faculty member at FAU.

3 There are a couple of reasons for this. The political
4 discourse and political rhetoric that I am experiencing feels
5 very personal. The attacks on trans people and nonbinary
6 people, the kind of increasing description of us as dangerous,
7 as groomers, as pedophiles, you know, as mentally ill, you know,
8 all of that has an impact on me personally. And then it's
9 paired with direct attacks on the field within which I work.

10 So, for example, this fall Governor DeSantis's campaign
11 sent around a mailer that depicted a gender nonconforming person
12 on one side thanking President Biden for paying for their
13 degree, and on the reverse side it indicated that that degree
14 was potentially in gender studies.

15 THE COURT: One moment, Doctor.

16 THE WITNESS: I'm sorry.

17 THE COURT: Doctor, one moment, please.

18 Counsel is standing.

19 MR. LEVESQUE: Objection, Your Honor. Hearsay. And
20 we'd move to strike.

21 THE COURT: I'm going to overrule the objection at
22 this time. I'm going to let the witness finish their responses,
23 and then I'll ascertain what, if any, relevance it has because
24 it may be relevant beyond being offered for the truth of the
25 matter asserted. So let me see where we're going first.

1 So overruled at this time, but I'll reconsider once
2 I've heard the entire response.

3 Doctor, I'm sorry.

4 THE WITNESS: Shall I continue?

5 THE COURT: You can proceed.

6 THE WITNESS: Thank you.

7 It's things like that that make me feel that my
8 position is very tenuous, both as a person who is gender queer
9 and who is publicly out about that and known to be gender queer
10 and also, as a scholar, whose research and teaching and my
11 service in administrative work at any institution are in gender
12 studies.

13 The other reason that it has been increasingly
14 challenging to be an out member of the faculty in the current
15 political climate is because the climate affects my students
16 very intensely. So I mentioned that it can be important to me
17 to be out so that students have a role model or potentially a
18 resource. And I've been finding that the emotional burden and
19 time burden of supporting students who are really concerned
20 about their safety, their well-being within the state of Florida
21 today, given the current discourse, that is increasing. And, of
22 course, that's work that I want to do, but it is difficult work.
23 And it's very difficult for me to see students who are suffering
24 coming into my office and crying, very frightened and worried
25 about their future in this state.

1 MS. VELEZ: And, Your Honor, did you want an
2 explanation of why?

3 THE COURT: No. You can put on the testimony.

4 And then once we are done, Mr. Levesque, you'll have
5 an opportunity to say, Judge, I think you should limit this -- I
6 want to hear all the testimony; I'll hear the cross, and then we
7 can revisit, to the extent I need to, whether there's some slice
8 of the testimony I need to address, whether it should or should
9 not be considered; okay.

10 MS. VELEZ: Understood, Your Honor, yes.

11 BY MS. VELEZ:

12 Q. Dr. Morse, you testified that you teach at Florida Atlantic
13 University; is that correct?

14 A. Yes, that's correct.

15 Q. And if I refer to FAU, will you know that I'm referring to
16 Florida Atlantic University?

17 A. Yes.

18 Q. Is FAU a public or a private university?

19 A. It's a public university.

20 Q. And is it part of the state university system?

21 A. Yes.

22 Q. And I believe you testified that you are an assistant
23 professor of communication and multimedia studies; is that
24 right?

25 A. Yes.

1 Q. And that you have an additional title beyond assistant
2 professor?

3 A. Yes. I also serve as director of the Center for Women,
4 Gender, and Sexuality Studies.

5 Q. What is Women, Gender, and Sexuality Studies?

6 A. Women, Gender, and Sexuality Studies, or WGSS, is an
7 interdisciplinary field that draws on a wide range of methods
8 and theories in order to understand how gender, sexuality, and
9 related topics intersect with basically all other aspects of
10 society, life, and experience.

11 Within our center we have humanists, and we have social
12 scientists. We have scholars who study the U.S., and we have
13 scholars who work transnationally. We have scholars across the
14 entire university, from economics to literature to theater.

15 And what Women, Gender, and Sexuality Studies allows its
16 practitioners to do is to analyze how things like someone's
17 status as a woman, someone's gender, sexual orientation, or
18 related experiences, can shape their interaction with the rest
19 of the world, how those factors have played a role in history
20 and how they play a role in contemporary politics, culture,
21 et cetera.

22 And as an interdisciplinary field, it's very broad. It has
23 the opportunity to draw on a wide range of practices, and it's,
24 I think, a field that's very often poorly understood and
25 dismissed as frivolous. But we are finding -- in my research as

1 director, I've been looking at the job placement numbers. And
2 not only do our graduates have strong job placement, but overall
3 in Florida, Burning Glass reports dramatic increase in positions
4 that require some knowledge of gender, sexuality, and other
5 issues related to the diversity of experiences that people bring
6 into the workplace.

7 So those are some of the things that we do and some of the
8 things that the field can consider.

9 Q. And, just for the record, did you say Burning Glass?

10 A. Burning Glass, yes.

11 Q. What is Burning Glass?

12 A. It's a data research firm that is based at one of the SUS
13 flagship institutions. I cannot currently recall which one. I
14 apologize.

15 Q. No problem.

16 Shifting gears, how long have you been a member of the
17 faculty at FAU?

18 A. I'm in my fifth year right now.

19 Q. Are you also a member of United Faculty of Florida?

20 A. Yes.

21 Q. How long have you been a member of United Faculty of
22 Florida?

23 A. I've been a member four-some years. I joined the first day
24 of my contract with FAU.

25 (The Reporter requested clarification.)

1 BY MS. VELEZ:

2 Q. Would you mind repeating that testimony for the court
3 reporter, please?

4 A. Of course. I have been a member for four and some years.
5 I joined on the first day of my contract at FAU.

6 Q. Why are you a member of United Faculty of Florida?

7 A. I'm a member of UFF, or United Faculty of Florida, for two
8 major reasons.

9 One is that my experience has shown that collective
10 bargaining is the best way for workers to secure working
11 conditions that are beneficial to ourselves. And, as educators,
12 I believe our working conditions are our students' learning
13 conditions. So I feel that unionization is even more important
14 within higher ed. And I was a member of my graduate student
15 union before I came to Florida, so I was really delighted to
16 find out that we had an active faculty union at FAU.

17 The other reason that I joined the union is that I'm aware
18 that the work that I do can be considered controversial and that
19 that work can be threatened or attacked. And I knew that I
20 wanted the protection and solidarity that I believe a union can
21 offer.

22 Q. Do you enjoy being an educator, Dr. Morse?

23 A. I do. I love teaching, and I particularly have loved
24 teaching at FAU where my students are incredibly creative and
25 enthusiastic. They are open to taking intellectual risks in a

1 way that I had not experienced before teaching at a more
2 conservative and more elite institution, which was the
3 University of Chicago.

4 I find that my interactions with my students are incredibly
5 generative. I see it as an opportunity to learn together. I've
6 published a number of pieces that came directly out of my
7 conversations with my students, including undergraduate as well
8 as graduate students. So it's just been an incredibly rewarding
9 experience.

10 Q. Is there anything in particular about FAU that you
11 appreciate?

12 A. Yes. FAU is an Hispanic-serving institution with an
13 incredibly diverse study body, I believe the most diverse of the
14 SUS. And we are among the top schools for social mobility in
15 the nation; meaning that our students, you know, are able to
16 take their education and then go on to make their lives better
17 for themselves and their families. And I'm extremely proud to
18 be part of educating that student population.

19 Q. Do you already have tenure, Dr. Morse?

20 A. I do not.

21 Q. Are you currently up for tenure?

22 A. I am this year.

23 Q. Can you give me some examples of courses that you regularly
24 teach?

25 A. Yes. When I was hired, the course that I was hired to

1 teach, the course that had no instructor since the previous
2 instructor had retired, is titled Media and Sexual Identities.
3 So that is a course that speaks directly to my expertise in
4 LGBTQ media.

5 I also frequently teach Media Criticism. I teach a course,
6 Production Management for Film and TV, that I designed. I teach
7 the Senior Capstone.

8 And then I also have taught a variety of graduate classes,
9 all of which have been what's called a special topics class, so
10 the topic changes every semester. And those were even more
11 particularly within my research, which is customary for graduate
12 classes.

13 Q. I believe earlier that you testified that some of the
14 material you teach might be considered controversial.

15 Did I hear that right?

16 A. Yes.

17 Q. What is controversial about the material that you teach?

18 A. Because I work on LGBTQ issues, anyone who has concerns
19 with the existence of lesbian, gay, bisexual, transgender, or
20 queer people may find the topics I teach distasteful.

21 I teach LGBTQ media within the context, as I said, of a
22 course called Media and Sexual Identities. So we do discuss
23 sexuality and depictions of sexuality, frankly, that also can be
24 considered controversial.

25 And when I teach LGBTQ media, it's important to me to teach

1 it from an intersectional lens. And so that means looking at
2 the ways that lesbian, gay, bisexual, and transgender experience
3 intersects with other kinds of experience. So that could mean
4 disability, that could be the status of being incarcerated, and
5 also issues such as race or ethnicity.

6 And intersectionality itself is a concept that Kimberle
7 Crenshaw developed as part of critical race theory. And I am
8 aware that critical race theory itself is considered very
9 controversial by some people in this contemporary moment.

10 Q. And was it your testimony that the controversy includes
11 concerns over the existence of LGBTQ people?

12 A. That is my impression from the political rhetoric and then
13 also from the concerns that sometimes will be expressed to me by
14 students who dislike the topic of my class.

15 Q. Are you also a member of a working group focused on issues
16 of mass incarceration?

17 A. Yes. I've been a member of the Race and Mass Incarceration
18 Working Group that's part of the Peace, Justice, and Human
19 Rights Center at FAU for two years. Last year I was a member,
20 and this year I'm a cochair of the working group.

21 Q. What is the mission of that working group?

22 A. The mission of the working group is to bring together
23 scholars who work on issues of incarceration and criminal
24 justice for conversations and activities that further our
25 research and also allow us to connect, you know, our research

1 and our work to the broader campus community.

2 So in our first year we were looking into -- we were doing
3 research into the relationship between incarceration and college
4 admissions and the way that -- what's called the box on college
5 admissions applications, where students, prospective students,
6 have to say whether they have had contact with the criminal
7 justice system, the way that that can discourage applications.

8 This past semester, the fall semester of 2022, we were
9 looking at the interaction between substance abuse, recovery,
10 campus life, and incarceration. And this coming semester we're
11 looking at transformative justice and its relationship to sexual
12 violence.

13 Q. Is there anything about the work you just mentioned that
14 some might consider controversial?

15 A. Yes.

16 Q. What --

17 A. I think there are many -- sorry.

18 Q. Please go ahead, Doctor. I'm sorry.

19 A. I think there are many reasons that work on the topic of
20 mass incarceration can be perceived as controversial. In part
21 that is because it is so deeply intertwined with questions of
22 justice and what we think is right, which people, you know,
23 disagree about naturally. And then also it intersects quite
24 significantly with questions of race in the U.S.

25 But in my own experience, I think the most striking

1 encounter I had with the possibility that this working group
2 might be controversial was on June 8, 2021, when a Board of
3 Trustees' member specifically talked about the working group and
4 stated that we should not be doing this work.

5 Q. What effect did that have on you?

6 A. It gave new context to an earlier conversation we had had
7 when the members of the group had been asked to change the name
8 from Race and Mass Incarceration to something else that didn't
9 include the term "race." And we had said we did not want to
10 change the name, and we didn't change the name.

11 So it gave me food for thought about that, and it made me
12 question whether I wanted to -- and reflect on whether it was
13 wise to -- remain in the working group. Ultimately, I decided
14 that it was important enough to me not only to remain, but to
15 take on the cochair position when we needed a cochair, because I
16 do think it's important work that we're doing.

17 Q. Did you have any fear, based on what you just mentioned,
18 that you might suffer professional consequences for doing this
19 work?

20 A. Yes. I'm aware that the Board of Trustees' member who
21 spoke about the working group, and stated that we should not do
22 such work, has also said that she would like to end tenure at
23 FAU. So the fact that I'm going up for tenure this year, with
24 knowing that the ultimate authority at my institution, you know,
25 has made such directives about how we should and should not be

1 performing our research, is concerning to me.

2 Q. Changing gears, are you familiar with House Bill 233,
3 Doctor?

4 A. I am.

5 Q. How did you first become familiar with it?

6 A. I believe I first became familiar with it when it was being
7 considered by the legislature in 2021. At the time, I was
8 cochair of the Government Relations Committee for the United
9 Faculty of Florida's FAU chapter, and so I was meeting with
10 legislators and lobbying them about the bill because we were
11 very concerned about it.

12 Q. Are you familiar with what we have referred to in this
13 litigation as the antishielding provisions?

14 A. Yes.

15 Q. What are the antishielding provisions?

16 A. The antishielding provisions essentially bar a variety of
17 people, including professors, from shielding others and,
18 particularly for my purposes, students from material that might
19 be upsetting, offensive, or objectionable.

20 In the process of learning about the bill when it was first
21 introduced, it seemed very clear from the discourse around the
22 bill that the kinds of things that were being considered as
23 objectionable or offensive or potentially upsetting were things
24 like racial slurs or deliberate misgendering.

25 It seemed to me -- my impression was that the antishielding

1 provision was, in a sense, introducing a kind of chaotic
2 free-for-all into the classroom on the basis of saying that
3 students sort of needed to toughen up and confront whatever was
4 thrown their way.

5 Q. Do you feel the need to protect your students from slurs --
6 I'll leave it there. Do you feel the need to protect your
7 students from slurs?

8 A. That's a complicated question because, you know, I don't
9 think that I can protect my students from any sort of harmful
10 speech; right. The world is very full and wide. Within my
11 classroom, it's my understanding, based on the pedagogical
12 training I've had, that creating a space where students feel
13 safe and supported is the ideal way for them to be able to learn
14 effectively.

15 And so one of the ways that I have in the past tried to
16 maintain that space is through having open conversations with my
17 students about what kinds of language and behaviors we would
18 consider acceptable in the classroom. And so that means that
19 each class is a little different because we have these
20 conversations, or we had these conversations, and discussed, you
21 know, what worked and didn't work for that particular class.

22 But in having that kind of conversation, you know, in
23 facilitating my students' thinking through what will create a
24 safe and supportive learning environment for all of them, I need
25 to discuss what some of the options might be, including saying

1 that within this classroom we won't use particular words or we
2 won't engage in particular practices.

3 And since the antishielding provision, you know, was
4 enacted into law, I have found that I can't -- I don't feel
5 comfortable pursuing those conversations in the same way because
6 I am concerned that it will be taken as me, you know,
7 suppressing or shielding, rather than facilitating a group
8 agreement about how to create the optimal learning environment
9 for my students.

10 Q. Why have you made these adjustments to your teaching?

11 A. I've made these adjustments because of the recording
12 provision in HB 233, and the knowledge that there is always the
13 possibility that I might be recorded, and that that recording
14 could potentially be taken out of context and used, either in a
15 complaint against me or, you know, potentially published to
16 misrepresent me, does give me concern.

17 Q. You mentioned a priority of promoting infective -- an
18 effective learning environment. Sorry to the court reporter.

19 Is it important to you that your students can also express
20 themselves freely in your classroom?

21 A. Yes. And that's one of the reasons that my practice in the
22 past had been to facilitate a conversation about how we wanted
23 to manage our interactions with each other. And in those
24 conversations, at times students would come up with suggestions
25 that I had not considered myself for how to balance, you know,

1 both the desire for speech and what the class felt were
2 appropriate boundaries for speech in the classroom.

3 And it's also really important within my discipline,
4 because when it comes to LGBTQ identities and experiences,
5 there's no consensus on what terminology is respectful or
6 acceptable. Members of the community will disagree very
7 strongly. People who are not part of the community may have
8 strong opinions about what language feels comfortable or
9 uncomfortable. I've had straight students say they don't want
10 to use the word "queer" because they've heard that it's rude.
11 And I'm never going to force someone to use a term that they
12 don't want to use.

13 And so having those conversations about language and
14 discussing what language means and its possible impacts on
15 others, those are really valuable and important conversations.
16 And at this point, what I tend to do in my classes is, instead
17 of having those conversations, I simply state what my own
18 boundaries and practices will be. So I will state, like, I will
19 not be using words that I know to be slurs, and I will be using
20 the pronouns and gender terms that a character in a show,
21 perhaps, you know, uses for themselves. And I will be correctly
22 gendering my students as well.

23 But that's a very limited way of engaging with this topic
24 of language, and it's much more limited than being able to talk
25 openly about how people feel about different terms, different

1 choices, and how we want to create our class agreements.

2 THE COURT: Doctor, as I understood it, what you just
3 described is your current practice. And you tell the students
4 what you will do, but do not require your students to follow
5 your chosen parameters; is that correct?

6 THE WITNESS: That is correct.

7 THE COURT: And I understood that, and you were clear.

8 If you could, give me an example of the type of group
9 agreements you would reach before. And I understood you loud
10 and clear that it would vary because it depended on the input
11 you were getting from students, but just if you could give me an
12 example.

13 THE WITNESS: Absolutely. In general, it is a little
14 hard to remember a specific group agreement because I do teach a
15 number of -- I teach at least four, sometimes more, classes each
16 year. But, in general, the group agreements have been really
17 focused on students' desire to listen to each other and
18 students' desires to have the opportunity to speak up if they're
19 uncomfortable.

20 And most group agreements have ended up with the
21 agreement that people will not use certain slurs. In some
22 situations there were exceptions for someone who is part of a
23 particular identity group, you know, being more welcomed to use
24 particular terms that might be offensive. But in most cases the
25 students have kind of decided they don't want that exception

1 either.

2 And I just want to note, now that I'm, you know,
3 reflecting on it, that I actually have had these conversations
4 in a couple of classes since the enactment of HB 233 because it
5 is such a part of my practice, and those ended up being very
6 nerve-racking experiences for me, but really rewarding, and I'm
7 glad I had those. But I did kind of self-select which classes I
8 felt comfortable doing that in, and some of my classes I chose
9 not to and to do this new practice of just stating my own
10 boundaries, because I wasn't as sure how it would be received by
11 the students and I was nervous about the possibility of being
12 misperceived as telling students what to do.

13 THE COURT: And just because I want to know, Doctor --
14 and we don't need to belabor the point -- but I'm interested,
15 given the nature of the courses you take, do you have students
16 signing up for them that show up spoiling for a fight because
17 they disagree with the very existence of the course?

18 I say that -- so, for example, most of my classes
19 undergrad were Brazilian history classes so I had about five
20 students the last couple of years in each of my classes, and I
21 didn't really find xenophobic folks that diminished the
22 importance of studying Latin American history showed up in any
23 of those classes, if nothing else because some of the hardest
24 graders in the history department were teaching those classes.

25 But just out of interest, I wonder, is that a common

1 experience to have folks that don't even think we should have
2 gender studies take a gender studies class?

3 THE WITNESS: Thank you for that question.

4 I do regularly have students in my classes who are not
5 interested in or are antagonistic to the LGBTQ content that is
6 in the classes, and there's a couple of reasons for that. One
7 is that although I direct the Center for Woman, Gender and
8 Sexuality Studies, most of the classes I teach are in the School
9 of Communication and Multimedia Studies, so they're not overtly
10 gender studies classes.

11 THE COURT: So there's a component of what you're
12 teaching as opposed to a specific course is targeted like the
13 classes I was describing?

14 THE WITNESS: Yes. Although it does surprise me the
15 number of times -- I have had the most complaints about LGBTQ
16 content in my course Media and Sexual Identities, which says in
17 the very title what it is about.

18 THE COURT: Sexual Identities?

19 THE WITNESS: Yes.

20 THE COURT: Right. I understand.

21 Thank you. You answered my question. I was just
22 curious more than anything, quite frankly.

23 Thank you.

24 THE WITNESS: Thank you.

25

1 BY MS. VELEZ:

2 Q. Dr. Morse, do you typically correct a student if they
3 misgender you?

4 A. No.

5 Q. Do you typically correct a student if they misgender a
6 classmate?

7 A. Yes. I will generally -- depending on the situation, I
8 might say something like, you know, Oh, Jane uses she/her
9 pronouns or, you know, mention something to the student aside.
10 It would really depend on the circumstances, but it is very
11 important to me that my trans students know that I will advocate
12 for them.

13 And, I mean, occasionally, too, people misgender cisgender
14 people because they just misread their gender, so -- I can't
15 recall any specific instance of that, but, as a courtesy, yes,
16 and to create a safe learning environment --

17 THE COURT: Just out of --

18 THE WITNESS: -- I do.

19 Yes?

20 THE COURT: Just out of interest, Doctor, would you
21 let one of your students refer to another classmate as a papist
22 or use any term to disparage them based on their religious
23 belief, for example?

24 THE WITNESS: I would not.

25 THE COURT: So, as I understand it, what you're saying

1 is I try to apply general rules of civility regardless of your
2 perspective; is that right?

3 THE WITNESS: Yes. Although --

4 THE COURT: By the way, I'm not suggesting -- I want
5 to make plain, I'm not suggesting any -- there's a moral
6 equivalency between any particular label or term, et cetera. I
7 just meant that -- and given the nature of the classes and your
8 subject matter, it would even take on a more important role, the
9 issues, and it was part of the educational learning experience
10 to discuss those topics, and I understand that.

11 I just meant, separate and apart from that, in terms
12 of talking about the parameters and what you tolerate in class,
13 it wasn't just limited to those areas you previously discussed;
14 correct?

15 THE WITNESS: That's correct. I haven't had instances
16 like what you describe, but given, you know, other situations
17 where students have crossed lines or have said something that,
18 you know, is harmful to others, I guess what I would say is I'm
19 not sure that I would express it that I would not allow them to
20 say that, because in the end I'm not sure that I have that
21 power. But what I often do when students, you know --

22 THE COURT: I --

23 THE WITNESS: -- go into territory --

24 THE COURT: Forgive me. The better question in light
25 of your prior testimony was, You would prompt them just like you

1 would prompt other students?

2 THE WITNESS: Yes, exactly.

3 THE COURT: Okay. Thank you.

4 I understood.

5 Counsel, you may proceed.

6 THE WITNESS: Thank you.

7 BY MS. VELEZ:

8 Q. Doctor, do you have a clear understanding of what speech is
9 permitted versus prohibited versus required under HB 233?

10 A. I do not. I have my guesses based on the text of the law,
11 but I have found that difficult to parse, and then I have my
12 assumptions and the kind of implicit information that I've
13 gleaned from the conversations about the law, especially
14 comments made by its proponents.

15 But it is a little challenging to know whether, you know,
16 what I've just described, say -- saying the statement of, "Jane
17 uses she/her pronouns," you know, whether that would be seen as,
18 quote/unquote, "shielding."

19 Q. Do you believe that HB 233's antishielding provisions take
20 any particular aim at queerness or queer studies?

21 A. I do.

22 And not exclusively at queerness and queer studies, but I
23 do think that that's one of the targets, and I think that
24 because of the discourse and rhetoric by the proponents of the
25 bill, which seemed to kind of focus on this idea that in

1 thinking carefully about language, which is something that we do
2 in my field, that that automatically is censorship, and that
3 that comes from a place of coddling or unreasonably protecting
4 young people from the harsh realities of the world.

5 It becomes, you know, particularly difficult to navigate
6 things like the shielding provision in a field where we have to
7 have frank conversations about things that have been stigmatized
8 and have been stigmatized as being, you know, again, a form of
9 coddling or running away from the harsh realities of the world
10 from things that might be objectionable or offensive.

11 Q. Are you aware of any historical correlations between
12 attacks on the academy and allegations of queerness and
13 communism?

14 A. Yes. That's not my area of research or expertise, but
15 certainly I'm aware of the history of McCarthyism and then, here
16 in Florida, the Johns Commission.

17 And I'm aware of the long history of LGBTQ teachers being
18 stigmatized as predators and pedophiles, and it has been
19 incredibly disturbing to see that revived in the past couple of
20 years with the prevalence of this term "groomer" for especially
21 LGBTQ teachers.

22 Q. Do you see any echos of what you just mentioned in HB 233
23 or other recent legislation affecting higher education in
24 Florida?

25 A. I do.

1 And I think my perception is that there's been a series of
2 moves by politicians in power to reproduce those dynamics from
3 the historical incidents that I just mentioned, including HB 7,
4 the post-tenure review policy and then the recent memorandum to
5 make lists of all staff, programs and courses that intersect
6 with diversity, equity and inclusion and critical race theory.
7 All of these practices are very concerning, and they do seem to
8 echo these historical incidents.

9 I think when HB 233 was passed, which was the first of
10 these moves that I recall, it felt ominous because of the
11 recording provision because it felt -- it made me ask, What's
12 next? What is going to be recorded? And then subsequent
13 action, you know, has shown that this recording provision, you
14 know, is an enforcement mechanism for all of the other policy
15 and law, policy and legislative actions that have followed in
16 the past, you know, year and a half.

17 Q. As the director for the Center of Women, Gender and
18 Sexuality Studies, are you personally required to provide
19 guidance to graduate teaching assistants, subordinates or
20 colleagues on how to comply with HB 233?

21 A. Yes.

22 So as the director, I supervised our graduate teaching
23 assistants who teach undergraduate classes, and every year I do
24 an orientation where we go over all that they need to know about
25 policies related to their teaching.

1 So in the last two years, those orientations have focused
2 heavily on, first, HB 233 and now HB 233 and HB 7, you know.
3 That was in August when HB 7 was still in effect.

4 And I also meet regularly with the GTAs, the graduate
5 teaching assistants, to review their questions and to talk about
6 specific issues in pedagogy. And, once again, you know, these
7 policy changes have been incredibly important to review. I need
8 to instruct them in what to put in their syllabi and what to
9 tell their students, you know, about the policies and how to
10 handle student questions or particular types of challenges.

11 And then I also directly supervise two faculty who are core
12 faculty in the center, so I've also passed along directives to
13 them and talked through with them how they're going to handle
14 and respond to HB 233 and other policies, you know, giving them
15 the syllabus language they need to put in their syllabi, review
16 their syllabi, return their syllabi when it didn't have the
17 correct language, things like that.

18 And then, finally, as the director of the center that has
19 60-some affiliate faculty, I've also been -- I've been finding
20 myself answering questions from affiliate faculty about how they
21 should respond, especially if, you know, they're in a discipline
22 where they teach gender studies but their discipline may not be,
23 you know, as targeted as gender studies. And so then my
24 approach has been to offer, you know, some perspective about how
25 we in the center are approaching these policy and legislative

1 changes.

2 Q. Have you had any difficulties in providing guidance to
3 those folks you just mentioned regarding HB 233?

4 A. Yes. It's very challenging because it's very important to
5 me to honor what my instructors believe to be the most
6 appropriate way to teach our discipline and to never tell anyone
7 that they should not say something or they should question or
8 doubt their own, you know, choices or speech.

9 I don't want to restrict anyone's speech, but at the same
10 time, you know, while I might make choices personally that put
11 me in more risk or less risk, I don't want to be providing
12 advice that could put someone else at risk.

13 So I find myself challenged to balance the guidance, you
14 know, that I think will be the safest for the faculty that I
15 supervise and the graduate teaching assistants that I supervise
16 and my own desire to encourage them to be truthful and to
17 express themselves, you know, as they would and have otherwise
18 in line with, you know, best practices in the field. So
19 balancing, you know, those two competing commitments to free
20 expression and then also to -- trying to protect my faculty has
21 been really challenging.

22 Q. You mentioned the recording provision earlier. Has the
23 recording provision caused you to change your in-class
24 expression in any way?

25 A. Yes. The recording provision has changed my in-class

1 expression in a couple of ways. I -- although it's not
2 completely clear to me what the distinction between a lecture
3 and a discussion is, I've leaned more heavily on discussion than
4 in the past, which is not necessarily always the ideal
5 pedagogical choice.

6 There are situations where eliciting information from the
7 students through the Socratic method is less efficient and less
8 effective than just delivering information lecture style.

9 The other ways that it's impacted expression in the
10 classroom is that I've cut back on media texts that are perhaps
11 particularly sexually explicit because I am concerned about the
12 possibility that I might be recorded discussing those texts and
13 that could be taken out of context in an environment where
14 teachers, like myself, are being referred to as predators, as
15 groomers.

16 And I have also looked at classes that are not explicitly
17 about LGBTQ content and removed some of the media that was
18 incidentally LGBTQ focused. And so, you know, when I teach
19 Media Criticism, the films and television shows that I assign
20 tend to include more LGBTQ content than some of my colleagues.

21 You know, when they teach Media Criticism, the class would
22 align more with their research interests, and so my students,
23 you know -- we might be studying say, sociological media
24 criticism, but in the past, in order to study that, we watched
25 episodes of *Friends* that deal with questions of sexuality,

1 because that is my research expertise.

2 But I began replacing some of those texts with texts that
3 were not overtly or did not incidentally include LGBTQ
4 characters or issues, because I was concerned about the
5 possibility that I could be recorded and presented as someone
6 who was biased and pushing a, quote/unquote, "gay agenda,"
7 something like that.

8 Q. Do you believe that your students' learning is affected in
9 the event that you avoid your area of expertise, here being
10 LGBTQ media studies?

11 A. I'm concerned that that might be the case. You know, I do
12 my best to make sure that when I change directions that I am
13 fully prepared, of course, to deal with the new material I've
14 introduced. That takes a lot of additional time for me to prep.

15 So, for years I had opened Media Criticism with the film
16 *Silence of the Lambs*, which is a really great film for that
17 purpose because it was very controversial. There's a lot of
18 criticism from, you know, dozens of different perspectives on
19 the film, but it does include LGBTQ content.

20 And so this fall I swapped that for *Django Unchained*, which
21 is also a film that is controversial and has many widely varying
22 critical takes, and it was a wonderful experience. I learned a
23 lot, my students learned a lot, but it did mean that I had to
24 familiarize myself with an entirely new, you know, area of
25 discourse in order to be prepared, you know, to teach them how

1 *Django Unchained* had been discussed and debated.

2 THE COURT: Counsel, how much -- since we're -- if
3 you're going to have a while longer, we'll go ahead and break
4 for lunch. How much longer do you have?

5 MS. VELEZ: I would say 15 minutes, Your Honor.

6 THE COURT: Doctor, I'm sorry. We would have -- I
7 wouldn't break up your testimony except it's the noon hour, so
8 when we come back, Counsel will finish the direct examination
9 and then we'll have cross-examination.

10 Thank you for your patience with us.

11 And to quote the movie you were just talking about, we
12 all understand the "D" is silent.

13 In any event --

14 THE WITNESS: Thank you.

15 THE COURT: -- you have a --

16 THE WITNESS: How long is the lunch break?

17 THE COURT: We're going to come back at 1:15; okay.

18 Thank you.

19 MS. VELEZ: Thank you, Doctor.

20 THE COURT: Court is in recess.

21 (Recess taken at 12:04 PM.)

22 (Resumed at 1:15 PM.)

23 THE COURT: Please take your seats.

24 Counsel, you may continue your direct examination.

25

1 BY MS. VELEZ:

2 Q. Good afternoon, Dr. Morse.

3 Can you still hear me?

4 A. I can hear you. I cannot see you. I don't know if I
5 should be able to.

6 Oh, there you are.

7 Q. Great.

8 Dr. Morse, are you familiar with the survey provisions of
9 HB 233?

10 A. I am.

11 Q. Have the survey provisions caused you to change your
12 in-class expression in any way?

13 A. I don't believe they have directly caused me to change my
14 in-class expression, but they interact with the other provisions
15 to create this adversarial climate where I'm more nervous about
16 how my students might perceive me than I was previously.

17 Q. Did you take the 2022 survey?

18 A. I did not.

19 Q. Why not?

20 A. I was concerned, based on its design, that it was not
21 scientifically relevant or accurate. And I think, as a matter
22 of more kind of fundamental belief, I just don't feel that it's
23 appropriate for the government to survey people about their
24 beliefs.

25 Q. Have you seen the 2022 survey?

1 A. Yes. When I received it, I decided to see if I was able to
2 look through it without taking it, and I was, so I reviewed it
3 to learn more about what was in it.

4 Q. Did you have any concerns about what you saw?

5 A. I did. The language in the survey seemed to me to be very
6 ideologically slanted. Specifically, it appeared to be
7 targeting this perception that faculty are liberal and are
8 indoctrinating students into liberal ideology.

9 Q. Were you reprimanded in any way for not taking the 2022
10 survey?

11 A. No.

12 Q. How is it that you can be harmed by the 2022 survey if you
13 did not personally take it?

14 A. The survey contributes to a climate that is structured by
15 this idea of surveillance and the sense that our activities on
16 campus are being surveilled and monitored for speech,
17 ideological content, belief that is not pleasing to those in
18 power. And the design of the survey and its existence, like,
19 both of those pieces, contribute to this sense of speech being
20 monitored and expression being assessed, measured with potential
21 negative or disciplinary consequences. You know, while the
22 survey itself doesn't have those, as far as I recall, directly
23 tied to it, you know, this recent memorandum of lists of DEI
24 activities and, you know, the discussion of how that's tied to
25 state resources appears to further, you know, some of the

1 disciplinary language in HB 7.

2 So all together it feels like the survey is part of
3 creating a climate where faculty and students, you know, might
4 feel and do feel that our conversations are being judged,
5 measured, and evaluated by the State.

6 Q. You testified before the lunch recess that you were the
7 director of the Center for Women, Gender, and Sexuality Studies;
8 correct?

9 A. Yes.

10 Q. In that role are you involved in any way in faculty hiring
11 decisions?

12 A. Yes. Last year I ran a search for a new assistant
13 professor, who's a joint appointment, in Women, Gender, and
14 Sexuality Studies and political science.

15 (The Reporter requested clarification.)

16 BY MS. VELEZ:

17 Q. Repeat that question a bit more slowly, Doctor.

18 A. My apologies.

19 Last year I ran a search for a new hire, who is an
20 assistant professor, jointly appointed in WGSS, Women, Gender,
21 and Sexuality Studies, and political science.

22 Q. If you were a newly minted Ph.D., would you have any
23 concerns about working in Florida in light of HB 233?

24 A. Yes.

25 Q. Has HB 233 made it anymore difficult for the Center for

1 Women, Gender, and Sexuality Studies to hire new faculty?

2 A. I believe it has. I found myself during the search
3 spending a great deal of time discussing the strategies that we
4 were taking to attempt to protect faculty, the resources of the
5 union that would be available to protect faculty, and answering
6 questions about the threats to tenure, the threats to our field,
7 et cetera.

8 It was noticeably distinct from other hiring conversations
9 I've had in the past, although, to be fair, those were not
10 within WGSS.

11 Q. Have you received any directives from FAU administrators
12 regarding how to comply with HB 233?

13 A. Yes. The directive that I can recall most clearly is the
14 directive to remove any language in the syllabus that prohibited
15 recording. Myself and many of my colleagues had language in our
16 syllabus stating that recording was prohibited in class, except
17 in the case of an approved accommodation through student
18 accessibility services. And in most cases this is -- this was
19 for two reasons: To promote a space for, you know, open
20 dialogue where students could feel comfortable taking
21 intellectual risks without the fear of embarrassment or reprisal
22 and also to protect faculty from having our words taken out of
23 context and being turned into some sort of viral moment.

24 Q. What effect did that directive have on you?

25 A. It reinforced the state of affairs and the possibility of

1 being recorded and feeling that sense of ever-present
2 possibility of surveillance.

3 Q. Have you received any other directives from FAU
4 administrators regarding HB 233?

5 A. Yes. And this is in relation to HB 7. This past summer of
6 2022, there was a town hall regarding HB 7. And in, you know,
7 clarifying and providing direction for faculty on how to comply
8 with HB 7, the directive we received was that it was important
9 for us to be objective to ensure that our students didn't know
10 our opinions on topics that we were teaching. And there was a
11 reminder that, because of HB 233, the possibility of recording
12 was ever present. And this, you know, for me really linked
13 together these two laws; having them presented in that manner
14 and in that moment.

15 Q. What effect did that directive have on you?

16 A. It was very challenging to imagine how I would comply with
17 it, and that's for a number of reasons. As I've already
18 discussed, I am out and I'm not willing to closet myself in
19 order to conceal my identity at work. And, even if I did that,
20 that would not necessarily present me as neutral, because if my
21 students assume that I'm straight and cisgender, then they're
22 also assuming that I might potentially have a point of view on
23 the topic that I teach.

24 It's more likely that as an out faculty member students
25 might potentially assume that I have certain beliefs about LGBTQ

1 people; for example, that we deserve to exist. And so it would
2 be difficult for me, if not impossible, to conceal my opinion,
3 you know, on something like that.

4 It's also very difficult to conceal my opinion or
5 perspective from my students just within my broader disciplinary
6 area of the humanities where we study rhetoric. We consider
7 persuasive arguments. We evaluate evidence. And so I can't
8 present everything as if it is all equal. My goal is to support
9 my students in learning how to evaluate evidence, how to assess
10 different perspectives, different arguments.

11 And in doing so, I will reveal which arguments, you know, I
12 find to be the most compelling, what evidence provides the most
13 effective support for a particular argument. My students may or
14 may not agree with me, but I don't know how I can teach, you
15 know, the skills I'm supposed to teach, such as persuasive
16 writing, without discussing and revealing my opinion.

17 Q. Do you believe your identity has been politicized by the
18 Florida Legislature and the Governor?

19 A. Without question.

20 Q. Do you feel as though the only way for you to comply with
21 HB 233 and other subsequent laws is to hide who you are?

22 A. I feel that that is one possible route forward. But, like
23 I said, I actually think that, you know, that itself does not
24 provide a solution. Even if people might be more inclined to
25 think that a straight person is unbiased on issues of LGBTQ

1 experience, I don't think that that is, in fact, true.

2 And so I don't know a solution, because professors either
3 come into the classroom with the identities that we have, that
4 we own, or with the identities that students, you know, impart
5 to us and assume that we have. And in either case, you know,
6 that is part of the conversation.

7 MS. VELEZ: Thank you, Dr. Morse.

8 I'm finished with my questions at this time.

9 THE COURT: Cross-examination.

10 CROSS-EXAMINATION

11 BY MR. LEVESQUE:

12 Q. Good afternoon, Dr. Morse.

13 Can you hear me okay?

14 A. I can.

15 Good afternoon.

16 Q. My name is George Levesque. I'm counsel for the Board of
17 Governors in this litigation.

18 I just wanted to kind of go over a few of the things that
19 you've already talked about.

20 You mentioned you were involved in the lobbying effort
21 against House Bill 233.

22 Did I hear that correctly?

23 A. Yes.

24 Q. And I believe you also mentioned that the discourse around
25 House Bill 233, including the references to racial slurs and

1 deliberate misgendering, caused you to have concerns about the
2 bill.

3 Did I hear that correctly?

4 A. Yes.

5 Q. Was the discourse statements that you referenced made by
6 legislative members?

7 A. I can't recall who precisely made which comments. And the
8 discourse is also -- I will admit that because the discourse has
9 been pretty overwhelming in recent years, it's hard to sometimes
10 keep track of what was directly related to HB 233 and what was
11 related to other initiatives.

12 Q. And I appreciate that distinction.

13 Do you recall if that legislative discourse was made in
14 committee, or was that including statements that were made in
15 the press and other public statements?

16 A. I didn't attend any committee hearings for HB 233, so I'm
17 only familiar with statements in the press and the conversations
18 that I had, you know, with colleagues, with legislators,
19 et cetera.

20 Q. You mentioned that you work in controversial areas of
21 academic inquiry that include LGBTQ issues; is that fair?

22 A. Yes.

23 Q. And you recognize that House Bill 233 expanded the
24 statutory protections in the Campus Free Expression Act to
25 include protections for a gender queer professor like yourself;

1 correct?

2 A. I don't believe that's explicit in HB 233. And so while I
3 would like to believe that that is how it would operate in
4 practice, I'm not convinced that that was its intent or that's
5 how it would most commonly be used.

6 MR. LEVESQUE: Okay. If we could pull up Joint
7 Exhibit 1.

8 BY MR. LEVESQUE:

9 Q. And, Dr. Morse, I'll represent to you that this is the text
10 of House Bill 233.

11 Have you seen this bill before?

12 A. I have.

13 Q. And do you recognize that document as that bill?

14 A. Uh-huh, I do.

15 MR. LEVESQUE: Okay. If we could flip to page 2 --
16 I'm sorry -- page 3 and the paragraph (a).

17 And zoom in a little bit more, a little bit more.

18 BY MR. LEVESQUE:

19 Q. Are you able to read that, Doctor?

20 A. I am.

21 Q. And do you see the underlined language there in paragraph A
22 that adds "faculty research, lectures, writings, and commentary,
23 whether published or unpublished"?

24 A. I do.

25 Q. And so those are new protections that the legislature added

1 when it passed House Bill 233.

2 Do you have any indication from elsewhere in the text of
3 the bill that they didn't mean those words?

4 A. I am not sure if I can speak to, you know, what they meant.
5 I think for me, the recording and survey provisions are
6 intentioned with the suggestion of protecting faculty, research,
7 lectures, writings, and commentary because of the implication
8 that what we do needs to be surveilled.

9 Q. And the recording provisions that you mentioned, is that
10 the section in paragraph (g) there at the bottom of that page?

11 A. Yes.

12 Q. Okay. What is your understanding of what a recording may
13 be used for?

14 A. My understanding is that students are permitted, and
15 potentially encouraged, to record for the purpose of their own
16 personal educational use, or in order to file a complaint, or as
17 part of, you know, some sort of legal proceedings.

18 Q. And you said permitted, and then you also added "and
19 encouraged."

20 Is there anything in the text of the bill that mentions
21 encouraging students to do this?

22 A. No.

23 Q. And from the standpoint of what a student may record, what
24 is your understanding of what a student may record?

25 A. What is defined as a lecture, which is a little difficult

1 for me to fully parse. And it is sometimes challenging to
2 distinguish, even in my own teaching, as I shift from a lecture
3 mode to a discussion mode, when the line between those two
4 activities has been reached. So I am concerned that my students
5 may not fully understand the distinction.

6 And because of the history of certain right-wing activist
7 groups encouraging students to record professors, the recording
8 provision, you know, raises a number of questions for me that I
9 take into the classroom with me.

10 Q. You would agree that you've received guidance from the
11 general counsel for Florida Atlantic University on how to apply
12 the recording provisions; correct?

13 A. I received the directive I discussed earlier about removing
14 anti -- any bans on recording from the syllabus and permitting
15 students to record, yes.

16 MR. LEVESQUE: Okay. And if we could pull up the
17 guidance on July -- from July 13, 2021.

18 BY MR. LEVESQUE:

19 Q. And isn't it true that the Office of the General Counsel
20 also provided you a definition of lecture; didn't they?

21 A. Yes.

22 MR. LEVESQUE: And if we could zoom in on that.

23 A little bit more.

24 BY MR. LEVESQUE:

25 Q. Do you see right there where I'm highlighting (indicating)?

1 Are you able to see that on the screen?

2 A. I'm not seeing a highlight, but I see the paragraph that
3 defines class lecture.

4 Q. Okay. And you recognize that it's only class lectures that
5 are able to be recorded; correct?

6 A. Yes. Though, as I stipulated earlier, the movement between
7 those moments when I am methodically presenting information
8 orally to my students and moments when we enter into discussion
9 are sometimes much more fluid than my impression of this
10 definition, which does make it complicated to navigate in the
11 classroom.

12 Q. But you recognize that you could very easily manage your
13 classroom where you have a lecture portion and a discussion
14 portion; correct?

15 A. While that would be possible, I don't believe that would be
16 the most pedagogically effective way for me to teach. I find
17 that my students often have questions in the middle of my
18 lectures, and it's most effective for me to respond when they
19 raise their hands and to engage them in conversation to figure
20 out what they don't understand and make sure that everyone is on
21 the same page and ready to continue with the next portion of
22 information I might want to present.

23 Q. And --

24 A. In other situations I'm in a discussion, and it becomes
25 clear the students don't have some sort of key piece of

1 information that they need, and then I may present for a few
2 minutes about that information to ensure that everyone is ready
3 to continue with the discussion on the same academic footing.

4 Q. Has anybody instructed you that a guided discussion course,
5 where you're not lecturing but guiding the discussion, must be
6 recorded?

7 A. No. No one has told me that anything must be recorded.

8 Q. When you say no one has told you anything must be recorded,
9 I'm assuming you're accepting this guidance from the Office of
10 the General Counsel; correct? Because it does say that class
11 lectures may be recorded, doesn't it?

12 A. Oh, I apologize. I was distracted by your use of the word
13 "must." But, yes, indeed, class lectures may be recorded is my
14 understanding.

15 THE COURT: Mr. Levesque, let me ask a question.

16 Doctor, I guess it's a sign of my age, but perhaps you
17 can help me to understand the current state of university
18 classes and how they are structured. When I attended school, we
19 had labs. We had breakout subgroups with TAs that would lead
20 discussions, and then we just had classes. Some of them were
21 huge; some of them were small. But the professor would talk,
22 and interspersed in between the professor lecturing us,
23 professors would occasionally -- he or she or they -- take a
24 question.

25 Is there a new format at universities where there's

1 purely discussion classes? I don't even know what that means.

2 THE WITNESS: There's a wide range of formats, and
3 certainly some professors teach the way that you described. In
4 my own experience at FAU, I have not taught any classes that
5 were larger than 50 students, and so I've never had a large
6 lecture class with the kind of separate discussion sections like
7 you described.

8 THE COURT: You're talking about where you have a --
9 when you say that, you are talking about where I was describing
10 you might have a TA, where you have a graduate student meet with
11 you once a week to discuss whatever you also discussed in class?

12 THE WITNESS: Exactly.

13 THE COURT: I understand.

14 THE WITNESS: I haven't taught classes like that
15 myself, although we do offer them.

16 But most of my classes are 20 to 35 students. And in
17 my pedagogical training, one of the tools that was strongly
18 emphasized, especially in relation to, you know, contemporary
19 norms and student attention levels, which have been impacted by
20 social media, is to never have any unit of the class longer than
21 about 15 minutes. And, you know, of course, I don't always
22 succeed in that. But the goal is to break the class into
23 different units where you'll move from an activity in the class
24 to a bit of lecture to a bit of discussion. And then even the
25 lectures themselves will be broken up by moments of kind of

1 Socratic dialogue where questions are asked of the students in
2 order to elicit responses to build toward the point that the
3 lecture is aiming at.

4 And then also activities of more open discussions,
5 seminar-style discussion, especially in the classes I teach
6 which are 4000 levels. So, therefore, seniors, for the most
7 part, there's the expectation that those students are not just
8 receiving information, but actively participating in generating
9 knowledge through the learning process.

10 So those kind of seminar-style discussions are one of
11 the tools that I use and intersperse with, you know, information
12 delivery that I would characterize as lecture.

13 THE COURT: Hence, your statement before, Judge, I
14 don't know when the lecture ends and the discussion begins, or I
15 revert back to the lecture, that's not just the way -- it
16 doesn't work that way. It's not that clean; correct?

17 THE WITNESS: That's my experience. That's how I
18 teach, and I do believe others teach that way as well. That's
19 how I was taught to teach when I was in training.

20 THE COURT: I understand.

21 Mr. Levesque, you may proceed.

22 MR. LEVESQUE: If you could flip to the last page.

23 And starting with the language that is: *Is there*
24 *language that may be included in the course syllabus?*

25 There we are.

1 BY MR. LEVESQUE:

2 Q. I believe you indicated that Florida Atlantic University
3 gave you a directive to not include certain information in your
4 course syllabus. Is that correct?

5 A. Yes, to remove language that forbid recording. And they
6 did recommend, you know, as is clear here, including this
7 optional syllabus language which I have included in my syllabi.

8 Q. And that directive, though, to be clear, came from the
9 management, the administration of Florida Atlantic University.
10 It did not come from the Florida Board of Governors; correct?

11 A. That is correct. But, of course, they need to follow the
12 law, and they need to ensure that we follow the law, which I
13 presume was their intention.

14 Q. When you say -- the "they" there is Florida Atlantic
15 University; correct?

16 A. Yes.

17 Q. You also mentioned your working group on race and mass
18 incarceration and a reference to a certain member of the Florida
19 Atlantic University Board of Trustees.

20 Do you recall that?

21 A. I do.

22 Q. I want to be clear. The Board of Governors has not told
23 you that the university should not be supporting the working
24 group on race and mass incarceration, have they?

25 A. Not directly, no.

1 Q. Are you aware --

2 A. But --

3 Q. -- of anyone from the Board of Governors telling the Board
4 of Trustees that they should not be supporting the working group
5 on race and mass incarceration?

6 A. I'm not aware of that. I do take what the Board of
7 Trustees says very seriously as they are, you know, locally the
8 people who have the final say on many matters related to the
9 institution.

10 Q. And it's the Board of Trustees that oversees your tenure;
11 correct?

12 A. To some extent. At this time my understanding is that the
13 Board of Trustees at Florida Atlantic essentially rubber-stamps
14 the tenure process, although they have expressed repeatedly that
15 they have an interest in directly voting on tenure -- candidates
16 for tenure.

17 Q. But that --

18 A. At the meeting that I referenced, the June 8, 2021, meeting
19 was a meeting where this issue of whether they would directly
20 vote on tenure cases was discussed.

21 Q. But to be clear, that's going to be a decision of the Board
22 of Trustees. It's not going to be a decision of the Board of
23 Governors; correct?

24 A. Yes, that's my understanding.

25 Q. You mentioned your class conversations and the group

1 agreement about how they manage those interpersonal
2 interactions. That's something that you still do with some of
3 your classes.

4 Did I hear that correctly?

5 A. Yes.

6 Q. And no one from the Board of Governors has directed you to
7 stop doing that, have they?

8 A. No. I have no reason to believe that they know that I am
9 doing that, I guess, except for my testimony here today.

10 Q. House Bill 233, I believe you said, targets queerness and
11 queer studies.

12 Did I hear -- did I hear that correctly, that that's your
13 belief?

14 A. I believe that's one of the implications of the bill, yes.

15 Q. And that's not based upon the plain language of the bill;
16 correct?

17 A. No.

18 Q. That's based upon --

19 A. I mean, correct.

20 Q. That's based upon legislation that was passed after House
21 Bill 233 was enacted; isn't that right?

22 A. Yes, with House Bill 233, you know, as the enforcement
23 mechanism, at least in my experience and in what I have been
24 directed.

25 Q. But to be clear, the recording provision only allows you to

1 record class lectures. It's not going to allow you to record
2 every class; correct?

3 A. It -- the recording provision provides for, you know,
4 potential disciplinary and other consequences for students who
5 record aspects of the class that are not class lectures, which
6 could potentially be a remedy, you know, after some significant
7 harm has been done.

8 Q. But you recognize that there are at least provisions in the
9 Florida Atlantic University's Student Code of Conduct that, if
10 they improperly record a class, they can be disciplined for it;
11 correct?

12 A. Yes.

13 Q. And then, in addition to being disciplined and potentially
14 kicked out of school, they can also be subject to liability for
15 a cause of action that House Bill 233 also created for
16 improperly publishing a recording; correct?

17 A. That's correct. Unfortunately, it might be challenging to
18 take advantage of that opportunity to sue our students -- or for
19 me to sue my students, for a variety of reasons.

20 And, you know, the concern for me is that on these
21 occasions where faculty become the center of a kind of viral
22 video storm, the damage is done very quickly. And particularly
23 in an environment where faculty like myself, you know, are being
24 described as predators, as dangerous people, the possibility
25 that I might be recorded at any moment, whether there might be

1 remedies after the fact or not, makes my experience of teaching
2 very different and makes me question and assess what I'm saying
3 in new ways since the passage of the bill.

4 Q. You mentioned a recent memorandum asking for budget
5 information on DEI programs. Have you discussed that with
6 anyone from the Governor's office that issued that memorandum?

7 A. No. I do not have acquaintances or interlocutors in the
8 Governor's office.

9 Q. So when it comes to what they meant by DEI programs, you
10 don't have any special insight on what would be covered by that,
11 do you?

12 A. Not on what they meant in terms of personal communication
13 with them, but I think that the conversation in the press has
14 been quite clear as to what potentially is meant.

15 Q. Okay. And you mentioned the conversation in the press and,
16 I think, a keyword there. You mentioned potentially.

17 The fact is anything that is intended in terms of the
18 information that is gleaned from that memorandum, that's just
19 explanation at this point; wouldn't you agree?

20 A. Oh, I'm so sorry. I wasn't referring to what might come of
21 the information. I was referring to your question regarding
22 what they meant by DEI, diversity, equity and inclusion. And so
23 in that case I'm talking about comments like Florida is where
24 woke goes to die, where gender ideology and critical race
25 theory, you know, are -- I mean, critical race theory is

1 explicitly named in the memorandum. And gender ideology has
2 been, you know, brought up quite frequently as one of the things
3 that needs to be eliminated in higher education in Florida.

4 Q. Well, you would at least agree that nothing in the
5 memorandum references gender ideology, does it?

6 A. Not in those words, no.

7 Q. You mentioned that House Bill 233 politicized your identity
8 and that one potential way to navigate the challenges that House
9 Bill 233 has presented is to hide your identity.

10 Did I understand your testimony? And I apologize if I
11 didn't get it exactly word for word, but would that be a fair
12 characterization?

13 A. Yes.

14 Q. Now, House Bill 221 has been on the -- House Bill 233 has
15 been on the books since 2021. And, at least at this point in
16 time, you've not made any effort to hide your gender identity,
17 have you?

18 A. No. I'm very -- I'm very out and intend to continue to
19 remain so.

20 MR. LEVESQUE: Okay. No further questions,
21 Your Honor.

22 MS. VELEZ: I do not have any questions for Dr. Morse.

23 THE COURT: Thank you, Doctor.

24 And I thank you for your patience with us in having to
25 break up your examination before and after lunch.

1 I hope you had have a pleasant afternoon, and I thank
2 you for your work as an educator.

3 Thank you.

4 (Dr. Morse exited the Zoom conference.)

5 THE COURT: My mic was off, so she had no idea what I
6 just said. Okay.

7 Yes, sir.

8 MR. WERMUTH: Your Honor, we have an issue that's
9 still outstanding with regard to some exhibits, those I
10 mentioned earlier this morning about some --

11 THE COURT: I just entered an order, by the way, on
12 the motion that was pending. I then incorporated by reference
13 my rulings on the record regarding the three exhibits we
14 addressed this morning. And you said there were some additional
15 exhibits that you were discussing with opposing counsel.

16 MR. WERMUTH: Yes. And those exhibits are six
17 responses to interrogatories that were done under oath by
18 defendants and a declaration of Katherine Hebda that was filed,
19 I think, in response to the preliminary injunction motion or --

20 THE COURT: Well, those are two very different things.
21 Somebody help me to understand. If somebody responds to an
22 interrogatory under oath directed to a party, why is that not
23 properly before me, just like it would be in a jury trial and
24 read to the jury?

25 MR. WERMUTH: That -- well, the issue with this is

1 that we are designating only certain parts of this exhibit that
2 we'd like to enter into evidence.

3 THE COURT: What happened to the rule of completeness?
4 What's the rule that says if you read one interrogatory and put
5 it in the record, you have got to put in a thousand? I'm not
6 familiar with that rule. So under the rule of completeness, if
7 the answer is misleading because you're not -- the next answer
8 qualifies the question before it, I understand that argument,
9 but -- and I hate to act frustrated, but just y'all narrow it
10 down to me.

11 Let me hear from Mr. Levesque. What's the issue with
12 respect to him submitting an interrogatory that was sent to your
13 client and the response?

14 MR. LEVESQUE: Well, the issue is the way they've gone
15 through and redacted responses. So they will leave in the first
16 witness and redact portions of that same paragraph.

17 THE COURT: We're not going to do that. That's what I
18 just said. We're going to put in the -- why would you not allow
19 the question and answer to be submitted?

20 MR. WERMUTH: Our position is that we asked questions.
21 They gave factual responses to some of it in their response, but
22 then they loaded the responses up --

23 THE COURT: Well, if it's a lot of other trash, then
24 I'll ignore it. So I'm going to elect -- you don't have to
25 include every interrogatory. You can do the ones, but it's

1 going to be the complete question, the complete answer. And if
2 it's nonresponsive jibber-jabber, then I'm going to ignore the
3 nonresponsive jibber-jabber.

4 MR. WERMUTH: Then I think, Your Honor, we would
5 probably end up introducing this.

6 THE COURT: By the way, the way to respond to that is
7 if somebody's cute in responding to a request, an interrogatory,
8 and they don't just answer it, then during discovery come to me.
9 So in the future -- let me tell everybody, because I've about
10 had it with this.

11 For whatever reason, the lawyers admitted in the
12 Northern District have no concept of good faith responses to
13 admissions or interrogatories. And at some point, I'm going to
14 start sanctioning the lawyers and not just their parties when
15 they include a bunch of jibber-jabber that's nonresponsive.

16 There's no rule that permits a lawyer in conjunction
17 with their client to put in a bunch of unrelated, nonrelevant
18 garbage in response to an interrogatory. But the way to deal
19 with that is to file a motion to compel and get them to answer
20 just the question and only the question, not for me to redact it
21 at this point.

22 But, in any event, unless y'all have a rule that says
23 we can redact, and it's appropriate to redact -- or case law
24 suggesting we should redact part of it -- but what I would have
25 done is I would have compelled somebody to answer the question

1 and only the question without a bunch of gratuitous
2 commentary -- is what the remedy would have been.

3 MR. WERMUTH: Well -- and, Your Honor, we do have case
4 law, and I presented this case law to opposing counsel, that
5 permits -- I mean, that says that Rule -- it's an
6 Eleventh Circuit decision, *United States versus Santos*, from
7 2020. It's 947 Federal 3d 711. It says that, you know: *Rule*
8 *106 does not automatically make the entire document admissible*
9 *once one portion has been introduced. Rather, Rule 106 permits*
10 *introduction only of additional material that is relevant and is*
11 *necessary to qualify, explain, or place into context the portion*
12 *already introduced.*

13 THE COURT: Is that the -- one moment, please.

14 Well, that's the rule -- 106 is the rule of
15 completeness. I'm talking about a separate issue. I'm familiar
16 with the rule of completeness. That's what I was talking about
17 if you had two answers that were back to back.

18 We're talking about a separate issue, which is -- I
19 understand you can have an argument that would suggest that,
20 Judge, we shouldn't read the entire interrogatory response to
21 the jury and here's why. So let me start with the -- this is a
22 bench trial, so that falls in the category of why I said I can
23 separate the wheat from the chaff.

24 But I'm not talking about the rule of completeness.
25 What's the rule that permits you to submit a partial answer to a

1 specific interrogatory? That's a different issue than under the
2 rule of completeness would be, I'm going to read part of a
3 deposition, and 20 pages later the person qualifies an ambiguous
4 statement. So, Judge, it's misleading to the jury to allow this
5 statement in without the subsequent statement that's
6 inextricably intertwined and qualifies it. That's, in my mind,
7 how the rule of completeness operates.

8 Is there anything that says 106 applies and you -- or
9 that you don't have to read or submit the entire interrogatory
10 response?

11 MR. WERMUTH: Well, our position is that each sentence
12 in the interrogatory response is a sworn statement and so the
13 sworn statement of a party opponent in this case would be
14 something that can be introduced into evidence and doesn't have
15 to be introduced in whole with, you know, whatever jibber-jabber
16 they want to include along with that statement.

17 And so that's the basic point we're making. And, you
18 know, the case that I cited was in a situation where this -- the
19 government wanted to introduce an inculpatory statement of a
20 defendant, and the defendant wanted to include some exculpatory
21 language in the same document, and the Court said, Well, you
22 don't have to do that. It's not necessary for purposes of
23 explaining the initial --

24 THE COURT: And I absolutely agree with the statement
25 or a single document. I'm wondering does anybody have any case

1 law that deals with reading a partial -- introducing a partial
2 response to an interrogatory, which I think is a slightly
3 different animal but may, in fact, be handled the same way as a
4 statement or a document?

5 Give me one second.

6 (Pause in proceedings.)

7 THE COURT: Mr. Levesque, do you have any case law on
8 point?

9 MR. LEVESQUE: No, Your Honor, I don't. But to the
10 point of -- with what is being, I guess, objected to and
11 redacted, the interrogatory response, the interrogatory question
12 was: *State and describe your involvement in and all plans you*
13 *have related to the creation, drafting, implementation*
14 *enforcement or use of the survey. Your response should include*
15 *a detailed description of any involvement you had in the*
16 *development or passage of legislation involving this survey,*
17 *your understanding of the intended potential use of the survey,*
18 *including specifically by view of the Florida Board of*
19 *Governors...* and it goes on.

20 An example of one of the things that they referenced
21 is -- or that was redacted is: *The Board of Governors had no*
22 *role in the development or passage of the survey provision.*
23 *House Bill 233 does not direct the Board of Governors and we*
24 *talk about our view of what it does.*

25 I don't -- I don't think that was necessarily an

1 inappropriate response --

2 THE COURT: And, by the way, I didn't say there was.
3 I, of course, hadn't seen the responses.

4 MR. LEVESQUE: Understood.

5 But we felt we made a good-faith effort, and I
6 believe -- I might even be wrong on this -- I think this might
7 have been an answer that we were directed to supplement on. And
8 so, certainly, when the Court directed us to supplement, we did
9 our best to supplement it in a full and fair fashion.

10 MR. WERMUTH: So if I may respond, Your Honor?

11 THE COURT: Certainly.

12 MR. WERMUTH: So what we're -- what I'm showing you
13 here is the -- is the interrogatory -- the first example of an
14 interrogatory. It's Interrogatory No. 2 that's being --

15 THE COURT: Here's what I'm going to do. We're going
16 to -- go ahead.

17 I'm sorry.

18 MR. WERMUTH: Sorry.

19 Interrogatory No. 2 that is -- that is this question
20 regarding the statement described: *Your involvement in and all*
21 *plans you have related to creation, drafting, implementation,*
22 *enforcement or use of the survey.*

23 And so what we're -- what I'm showing you here is an
24 example of where we, you know, would just like the statement,
25 you know, regarding the role of enforcement of the survey or

1 survey provision: *All Florida universities distributed the*
2 *surveys in April 2022 and, therefore, complied with HB 233's*
3 *survey provision.*

4 We then would redact this portion beneath it that
5 talks about: "HB 233 does not provide a means to force any
6 student, faculty or staff," which is basically the legal
7 conclusion that they want to include in this statement but is
8 not necessary to explain the portion that we want to introduce.

9 THE COURT: Here's what I'm going to do to make it
10 easy. If a jury was here, then I would have to decide and parse
11 out what I am or not. I know what a legal statement is by a
12 party in response as opposed to a factual answer. I'm willing
13 to -- if you want to put in an interrogatory and response, put
14 in the interrogatory and the full response, and to the extent
15 it's a legal conclusion or somebody interpreting something, then
16 I'm not -- just as I wouldn't, through testimony of witnesses on
17 the stand, accept their characterization what the statute does
18 or does not do.

19 But I'm just going to allow -- I'm going to require
20 you to have the -- is it one or how many interrogatories are
21 there?

22 MR. WERMUTH: There are six of these.

23 THE COURT: So just introduce the six interrogatories
24 and the six interrogatory responses; okay?

25 MR. WERMUTH: At this point, I think, Your Honor, that

1 we may just use it with the witnesses at this point and just
2 talk about these topics, and I think we'll specifically do that
3 with --

4 THE COURT: Okay. And in the meantime somebody can
5 look for some case law. I was trying to pull up the case law,
6 and I understand that it's a -- what the proper mode or
7 mechanism of reading interrogatory responses -- this is
8 equivalent to reading -- you're trying to introduce it to me, so
9 it would be the equivalent of reading it to a jury.

10 And what's the -- what are the rules as construed by
11 case law of reading part of an interrogatory response, but not
12 the interrogatory response in toto? What are the contours of
13 that? And if the answer is, that's 106, a rule of completeness
14 issue, then I would agree with you. It's not necessarily
15 required under the rule of completeness, and we'll -- I'll hear
16 from Mr. Levesque why it is, if it's a rule of completeness
17 issue.

18 But separate and apart from that is what's the legal
19 basis for me to have you read part of the answer in, and I
20 understand you're saying, Judge, if it was a document where
21 somebody makes an admission, I only have to read the admission.
22 I don't have to read their admission and all commentary
23 thereafter. But if that's -- I just want to make sure -- and
24 what I'm trying to do, Mr. Wermuth, is -- since I don't think
25 this is a huge issue -- is make sure -- and I understand the

1 defendants don't get to bring in their own statements, because
2 statements of a party opponent come in as not hearsay, and I get
3 that why you don't want them just to be able to backdoor in all
4 kinds of commentary.

5 But what I also don't want to do is create reversible
6 error because I'm only -- I'm allowing you to read part of a
7 response in unless it's rule -- unless that's permitted as it
8 relates to reading an interrogatory response.

9 MR. WERMUTH: And if I confer with my co-counsel and
10 figure out how to handle this --

11 THE COURT: Certainly, you can.

12 MR. WERMUTH: Would it work maybe if we highlighted
13 the portion that we're offering it for?

14 THE COURT: That would be fine as well.

15 I guess what I'm trying to figure out is I understand
16 how you wouldn't want a jury to hear it, but I'm just trying to
17 figure out, what's the prejudice associated with having a legal
18 statement made by the defendants that probably was written by
19 their lawyers for their client stuck in response to an
20 interrogatory, for my purposes or an appellate court?

21 If there's -- if there's real prejudice to it, then
22 I'll figure out what the answer is to my question. I've just
23 never had anybody try to read a partial answer to an
24 interrogatory before, but -- and I'll get an answer, and I need
25 to know the answer anyway because it could come up. This hasn't

1 come up in 14 years.

2 But if there's a real issue with prejudice, then I'll
3 make sure I know what the answer is, but I'm just trying to
4 figure out what the prejudice is.

5 And the idea being is -- like in the case of a
6 criminal defendant, Judge, a defendant who doesn't want to
7 testify, doesn't want to be subject to cross-examination under
8 the guise of the rule of completeness doesn't get to bring in
9 every self-serving statement he's ever made because the
10 government chooses to enter an admission. That's what the case
11 you're relying on says, and I get that. I have done this long
12 enough that I understand that concept, which is why I was
13 phrasing it the way I did.

14 The mischief would be allowing Mr. Levesque to
15 back-door in statements of people that aren't testifying who
16 otherwise wouldn't be able to testify to a fact by back-dooring
17 it in through an interrogatory response. I get that prejudice.
18 But if it's simply they're regurgitating their position on the
19 law, I'm trying to figure out what the mischief associated with
20 that is before I try to write a tome on what is or is not
21 permitted with respect to an interrogatory response.

22 Yes, Counsel? Mr. Wermuth just phoned a friend.

23 MS. FROST: Your Honor, I just -- I'll address it very
24 briefly. There are also some factual statements mixed in there,
25 and our position is exactly, I think, what you just intuited,

1 which is that they are statements of a party opponent when we're
2 using them and, therefore, they -- we can use them.

3 They're not -- they can't use their prior statements.
4 They have, actually, the witness who signed these things under
5 penalty of perjury who's going to get on the stand, so our
6 position is if they want the witness to testify to these other
7 factual statements, then the witness can testify to them and
8 they can cross-examine them, but they shouldn't be allowed to
9 back-door in prior statements of fact when they're a witness.

10 THE COURT: And so the answer is, Judge, just like any
11 document, you can have under -- you can have a partial statement
12 of an interrogatory, which is a partial statement of a party and
13 admission, and it would be -- otherwise should -- you should
14 apply 106 because we're allowed to introduce an admission, and
15 we don't have to enter into all the self-serving statements that
16 come after it.

17 And there's, Judge, you're asking the wrong question,
18 which is, You're not aware of any case law that says you can do
19 this. There's no law that says we can't. Instead, that's why
20 we're relying on the general case law that construes the
21 introduction of one party of another party opponent's statement,
22 and there's nothing in the Rules of Civil Procedure itself that
23 limits us by using interrogatories in a different way, and
24 there's no case law that says that.

25 And so if Mr. Levesque doesn't have anything that says

1 that you're going to treat interrogatory answers under oath
2 different from any other admissions, we believe the general rule
3 should apply, which is why Mr. Wermuth was talking about Rule
4 106 wouldn't require the addition -- inclusion of this
5 additional -- these additional statements?

6 MS. FROST: Correct, Your Honor.

7 THE COURT: I understand your argument.

8 Mr. Levesque, do you have anything that says that they
9 are -- here, let me do this. Let me do this.

10 I'm going to go ahead -- this is why I should have
11 heard the entire argument other than -- rather than interrupting
12 because I was trying to get to Mr. Levesque's case.

13 I'm going to allow you to introduce just the
14 statements of an opposing party that you wish to introduce.
15 That's one.

16 However, for ease of reference, I'm going to allow you
17 to do it in the written document. We'd be reading it to the
18 jury and do it as a written document if it was with the jury.

19 What Mr. Levesque can do is twofold. One, Judge,
20 under the rule of completeness this is misleading to allow this
21 statement in as part of the answer and not this, and it can be
22 the rest of it or part of it, and you can argue to that later
23 and I may modify what I'm considering, one.

24 And, number two, if you can find any case law that
25 says that Ms. Forrest -- Frost, I'm sorry.

1 MS. FROST: Forrest is my husband's last name, so that
2 is freaky.

3 THE COURT: -- Ms. Frost is wrong when she said that,
4 Judge, you're going to treat it like any other admission, as is
5 Mr. Wermuth, then I'll consider that case law and revisit it.

6 But rather than hunker down and try to resolve the
7 question now, I think I'm convinced now it is a statement of a
8 party, and so it would be just subject to plain old Rule 106.

9 But any further guidance on that, Mr. Levesque?

10 MR. LEVESQUE: I don't have any at this time,
11 Your Honor.

12 THE COURT: All right.

13 But please look at it. I want to make plain, we may
14 end up with the same result. If you look at it and say, Judge,
15 under the rule of completeness, it's misleading not to have the
16 rest of this; it qualifies that one statement, then it may all
17 come in. So, number one, you can show me that; just have a copy
18 of it and tell me why.

19 Or, number two, if there's any case law from one of
20 your thoughtful associates that they can find that says
21 interrogatory responses are treated differently than any other
22 party opponent statement, then I will entertain that case law;
23 okay?

24 MR. LEVESQUE: Thank you, Your Honor.

25 THE COURT: Thank you.

1 MR. WERMUTH: And then the next issue is before we
2 rest we do have and have shown opposing counsel designations for
3 the deposition of Katherine Hebda in this matter, and by
4 agreement of the parties, we're going to be introducing those
5 designations to you.

6 THE COURT: And that's separate from the designations
7 I already have?

8 MR. WERMUTH: That's separate from the designations
9 you already have.

10 THE COURT: And so go ahead and just file that on ECF.

11 MR. WERMUTH: Yeah. But as of this point, we're
12 waiting to get confirmation they're okay with the form of the
13 notice of filing, so, once that's complete, we'll be able to
14 submit that.

15 MR. LEVESQUE: Your Honor, I haven't had the time to
16 compare the designations that we sort of agree --

17 THE COURT: I would allow you to reopen the case to
18 fix it if there's a problem, but right now I'm going to let it,
19 subject to Mr. Levesque -- conditionally, subject to
20 Mr. Levesque's objections, qualifications or
21 counter-designations, in which case, if we need to fix
22 something, we will.

23 MR. LEVESQUE: And I think the document actually
24 includes the counter-designations --

25 MR. WERMUTH: It does.

1 MR. LEVESQUE: -- that we requested.

2 THE COURT: I meant that -- this is all happening
3 quickly, so you may need to revisit and say, Judge, now that
4 we've had more time to think about it, I also want X, Y, and Z,
5 and that's what I was saying that we can fix that. If we need
6 to do an amended filing reflecting some further discussion, we
7 can.

8 MR. LEVESQUE: Thank you.

9 MR. WERMUTH: And there's a video file as well that
10 we'll be submitting to you on hard drive.

11 THE COURT: Very good.

12 All right. So we've got -- I've ruled on the
13 exhibits. I've conditionally said the interrogatory statements.
14 If Mr. Levesque wants me to address something further, or
15 qualify it, he will. The designations and counter-designations
16 of the additional depo in addition to those that were already
17 provided to me have been admitted.

18 And I've also, a couple of times, have done
19 conditional rulings and said if anybody else wants to revisit
20 it, the onus is on them to come back and readdress it before we
21 finish tomorrow.

22 Anything additional?

23 MR. WERMUTH: And as regards the -- what we've -- what
24 we were submitting as redacted discovery responses, I have a
25 thumb drive in my hand that I can hand to Ms. Milton McGee to

1 have for the record.

2 THE COURT: Okay.

3 MR. WERMUTH: Those exhibits are Exhibit 48 --
4 Plaintiffs' Exhibits 48, 71, 72, 73, 95, 145, and 146.

5 THE COURT: What did you just read off?

6 MR. WERMUTH: These are the exhibits that are
7 redacted, Plaintiffs' exhibits, that you just you ruled on
8 conditionally.

9 THE COURT: Oh, I'm sorry. Okay. Fair enough.

10 (PLAINTIFFS EXHIBITS 48, 71, 72, 73, 95, 145, 146:
11 Received in evidence.)

12 THE COURT: Let me ask -- in terms of you handing her
13 that versus -- where are we at in terms of having one place
14 where all the exhibits that have been admitted are?

15 MR. WERMUTH: We are going to submit a final version
16 of the exhibits with only the admitted exhibits on a hard drive
17 to the Court.

18 THE COURT: I would get with Mr. Levesque and make
19 sure that everybody's in agreement with that.

20 What I want y'all to do at the end of these
21 proceedings is I want to make sure that every exhibit that's
22 been admitted we have in one place for the benefit of the
23 Eleventh Circuit. When I say "one place," you can have a --
24 yours on one set of exhibits, and the defense can have theirs on
25 one as well, or Mr. Levesque can have a hard copy. I see we've

1 got hard copies of defense exhibits. Whatever it is, it doesn't
2 have to be -- it can be hard copy or on some sort of drive or
3 something.

4 Separate and apart from that, I want y'all -- so I
5 want you to announce, Judge, we have one set for plaintiffs,
6 everything that's been admitted, Mr. Levesque agrees; same thing
7 for the defense, and then I want y'all to say, Here are the ECF
8 numbers of the depo designations that have been admitted so we
9 know everybody's on the same page, not just me, but any
10 reviewing court, here's what's in evidence; okay?

11 MR. WERMUTH: Uh-huh.

12 THE COURT: So that way they're not trying to hunt
13 through -- for example, we have some things on the ECF that
14 isn't in evidence before me, and so that's what I want to make
15 sure that only what's in evidence we have in one place.

16 And you're not going to have -- we don't have hard
17 copies of depo designations; correct?

18 I do, but we don't have -- we haven't given them to
19 the --

20 MR. WERMUTH: That's correct. The latest version will
21 be filed in ECF and that is the -- as part of the notice for --

22 THE COURT: Right, which is why I'm saying we're going
23 to have a combination of both. What she has to submit to the
24 Eleventh will be on drives -- what do we call this thing again?

25 MR. WERMUTH: It's an external hard drive.

1 THE COURT: External hard drives. There's other
2 things that we store things on that people submit in addition to
3 external hard drives. Whatever the -- we want to announce what
4 the mechanism is. We're going to have it labeled "plaintiff,"
5 have it labeled "defense," and then with the depo designations,
6 I want to make sure we go through and do that tomorrow, Here are
7 all the depo designations; okay?

8 MR. WERMUTH: Okay.

9 THE COURT: All right.

10 All right. Otherwise, you rest at this time?

11 MR. WERMUTH: Yes.

12 The only other issue, I guess, did I mention we're
13 going to be submitting video?

14 THE COURT: Yes, the video of the depo designations.

15 MR. WERMUTH: The video of the depo designations, yes.

16 THE COURT: And y'all already did that, I know, for
17 example, Criser because we had that submitted early on?

18 MR. WERMUTH: Yes.

19 THE COURT: You had done a separate notice of filing.
20 It's on ECF, depo designations and cross-designations, and then
21 we got the video in addition to that.

22 MR. WERMUTH: Yes.

23 THE COURT: All right.

24 MR. WERMUTH: So with those qualifications and the
25 forthcoming designations, I believe plaintiffs rest.

1 THE COURT: All right.

2 Mr. Levesque, any motions at this time?

3 MR. LEVESQUE: Yes, Your Honor. We would under Rule
4 52(c) have an ore tenus motion. We would certainly renew at
5 this point our arguments that were asserted in ECF 40, the
6 motion to dismiss; ECF 66, the supplemental briefing on that
7 motion to dismiss; and ECF 165, which was our motion for summary
8 judgment; and 164, which is the supporting materials that backed
9 up the motion for summary judgment.

10 Additionally, beyond that, we would argue, at least at
11 this time, plaintiffs lack standing for the arguments that were
12 presented in those motions, that the Court, in interpreting
13 House Bill 233, should follow the canons of construction and the
14 constitutional avoidance canon, and certainly there -- while
15 there might be multiple ways that the law should be interpreted,
16 can interpret it in a constitutional manner, and, at least at
17 this time, based upon the evidence presented by the plaintiffs,
18 they have not demonstrated that they have standing in this case.

19 And then for the arguments that were presented in
20 those motions and the merits, we believe that they are legally
21 incorrect on the assertions that they make in those documents,
22 and I offer that at this time.

23 THE COURT: I understand.

24 Mr. Wermuth, I take it you incorporate by reference
25 your responses to their motion for summary judgment, their

1 motions to dismiss and the legal arguments contained therein?

2 MR. WERMUTH: Yes, Your Honor.

3 THE COURT: Further, you rely on the evidence that's
4 been introduced at this point, recognizing you have a heightened
5 burden as it relates to standing at the trial, as opposed to at
6 the motion to dismiss stage, for example, and you believe the --
7 and while I don't have to accept the evidence in the light most
8 favorable to you, as the fact finder, ultimately for purposes of
9 this motion, I do; correct?

10 MR. WERMUTH: Yes, Your Honor.

11 THE COURT: And in light of that, you believe for the
12 same reasons you believed their motions to dismiss and motion
13 for summary judgment should be denied, you reassert that at this
14 time; correct?

15 MR. WERMUTH: Yes, Your Honor.

16 THE COURT: All right.

17 Fair enough.

18 All right. Let me find out what we're going to do --
19 and I take that under advisement, as I'm empowered to do as
20 noted by Mr. Levesque earlier.

21 My understanding is we're going to take the witnesses
22 out of order. We have Gene Kovacs first and Alex Kelly will be
23 last; is that correct?

24 MR. LEVESQUE: Yes, Your Honor.

25 THE COURT: And we're still doing Cruess, Meyers and

1 Bowles in between?

2 MR. LEVESQUE: Yes, Your Honor.

3 THE COURT: All right.

4 Let me -- Mr. Levesque, while you're not -- these are
5 not all of them, but Kovacs, that's Ms. Lukis.

6 How long do you anticipate with these witness, each of
7 them?

8 MR. LEVESQUE: I would ballpark, maybe Mr. Kovacs 15
9 on direct, maybe a little bit longer on cross-examination.

10 Then for the DEI witness, probably 15, 20 minutes,
11 sort of tops.

12 THE COURT: I was just saying -- when I was looking at
13 the number of witnesses, given how long some of the witnesses
14 were, I'm thinking, okay, you're an optimist, but, Judge, these
15 are going to be relatively short witnesses in terms of the
16 duration of their testimony?

17 MR. LEVESQUE: Certainly the DEI witnesses, yes, sir.

18 THE COURT: Okay.

19 Here's what we're going to do. We are going to take a
20 quick, five -- quick five-minute recess.

21 Everybody's going to get -- if you need to use the
22 facilities and so forth, do so, and we're going to -- I'm going
23 to actually stay on the bench because I need everybody back at
24 2:25. But go ahead and take a comfort break quickly. If you
25 need something else to drink or something, you can bring it in

1 the courtroom.

2 Court is in recess.

3 (Recess taken at 2:21 PM.)

4 (Resumed at 2:27 PM.)

5 THE COURT: All right. We are back on the record.

6 Let me just for the parties, again so it's clear that
7 I'm trying to think it through with respect to interrogatories
8 and the rules, I mean, Rule 33(c) contemplates explicitly that
9 interrogatory responses can be used to the extent permitted by
10 the Rules of Evidence. So the Rules of Evidence then would be a
11 gloss on their admission, so I'd be able to exclude certain
12 information, and so forth, just as I would with any rules.

13 The one thing that troubles me, when you look at
14 various practice and procedure books, it talks about, like, the
15 rule of completeness doing what I said earlier, that if you
16 think you should be able to introduce another response from the
17 defense in order to explain the prior response or correct the
18 answers already introduced, then you might be able to do that.
19 It also contemplates, you know, confusing or cumulative,
20 et cetera, and I could deal with it like any other evidence.

21 The problem is all the commentators and all the cases
22 cutting and pasting language from that all talk -- contemplate a
23 party who submits an answer, the answerer, and it speaks of it
24 as an answer as a whole. So that's why I was doing that.

25 But, again, I recognize that the cases discussing

1 it -- and we found a couple of district court cases that apply
2 the rule of completeness to interrogatory responses, although
3 it's not binding authority, but go through sort of the analysis
4 that I should treat it like any other evidence. I've found
5 nothing during the break that suggests that when it says you can
6 use an answer, it means you have to use the answer in toto.

7 But, again, I'll hear anything that anybody has to
8 offer me later. But the research on break confirms what
9 plaintiffs' counsel was arguing, which is also consistent with
10 the rule itself, which says you can use it to the extent you
11 would use any other evidence, subject to the Rules of Evidence,
12 which would be in keeping with Ms. Frost's presentation and
13 Mr. Wermuth's presentation, not my visceral reaction.

14 And, quite frankly, though, in defense of the Court in
15 14 years on the bench, it would make sense, because typically
16 the interrogatory responses are short and respond to something
17 when you're reading it for a particular purpose, and it would --
18 the rule of completeness, the person offering it says, I can't
19 include part of the sentence; I got to include the entire
20 sentence. So it would make sense to me that this hasn't come up
21 before.

22 But setting that little CLE aside, defense can call
23 its first witness, which I believe is Mr. Kovacs; correct?

24 MR. LEVESQUE: Correct.

25 (Mr. Kovacs entered the witness stand.)

1 THE COURT: Mr. Kovacs, if you'll raise your right
2 hand, sir.

3 **GENE KOVACS, DEFENSE WITNESS, DULY SWORN**

4 THE COURT: You can put your hand down.
5 Counsel, you can proceed.

6 MS. LUKIS: Thank you, Your Honor.

7 DIRECT EXAMINATION

8 BY MS. LUKIS:

9 Q. Mr. Kovacs, how are you doing today?

10 A. Doing well.

11 Q. Where are you currently employed?

12 A. Currently employed at the Florida Board of Governors, the
13 university -- the governing body for the university system,
14 public universities.

15 Q. And what's your current job title?

16 A. I'm the chief information officer.

17 Q. Okay. And could you describe your role as chief
18 information officer at the Florida Board of Governors?

19 A. So I manage all of the technology for the office, also
20 coordinate with legislative bill analysis and things of that
21 nature, regulation, cybersecurity, anything dealing with
22 information technology.

23 Q. And how long have you held the role of CIO?

24 A. I've been in this position for 12 years with the Board, but
25 I have 25 years of higher-education data and data systems

1 experience.

2 Q. Could you briefly describe your educational background?

3 A. Yeah. I have a bachelor's degree in educational
4 technologies and a master's degree in instructional
5 technologies.

6 Q. Are you familiar with House Bill 233?

7 A. Yes.

8 Q. Okay. And are you familiar with the surveys that are at
9 issue in this lawsuit?

10 A. Yes.

11 Q. Did the Board of Governors administer surveys pursuant to
12 House Bill 233?

13 A. Yes, we did.

14 Q. And do you know when those surveys were administered?

15 A. The survey opened on April the 4th, 2022.

16 Q. Did you have any role in the administration of the surveys
17 administered in April of 2022?

18 A. Yes. I managed the technical distribution, and I worked on
19 creating the custom links and distributing the information. I
20 also coauthored some of the instructions for the institutions,
21 for the universities to be able to administer the survey.

22 Q. Okay. And am I correct there was an employee survey and a
23 student survey?

24 A. Yes.

25 Q. Were both the student and employee surveys administered in

1 2022 voluntary?

2 A. Yes, completely.

3 Q. And were both the student and employee surveys administered
4 in 2022 anonymous?

5 A. Yes.

6 Q. Okay. Was it important to the Board that the surveys were
7 anonymous?

8 A. Yes. And in all our meetings -- Marshall Criser was the
9 chancellor at the time -- anonymity was paramount. He actually
10 quoted one time that anonymity trumps everything in a discussion
11 I had with him about cybersecurity and some technology
12 challenges we were facing.

13 MS. JASRASARIA: Objection. Hearsay.

14 MS. LUKIS: I would say that he's offering it to show
15 that it was important to the Board that --

16 THE COURT: Yeah.

17 MS. LUKIS: -- the anonymity measures be taken in
18 administering the survey.

19 THE COURT: Sustained in part and overruled in part.
20 I'm not -- you don't get to ask -- you don't get to introduce
21 your own client's statements. But what you can do, if this
22 witness took a particular action, like he was told by X, Thou
23 shalt do Y, without any explanation, reasons or whatever, then,
24 of course, as noted before, a directive to this witness
25 explaining why he did what he did, a particular action, or

1 something he did is not hearsay. But, otherwise, it's hearsay
2 what your client did or did not tell anyone.

3 So you can reask your question, your next question.

4 BY MS. LUKIS:

5 Q. And did the Board of Governors take measures to ensure the
6 anonymity of all survey responses?

7 A. Yes. We intentionally did not collect personal
8 identifiable information or even distribute directly the surveys
9 ourselves by collecting -- we didn't collect the email addresses
10 or any information from the universities that we have in our
11 possession that would identify anyone.

12 Q. So the Board --

13 THE COURT: Can I just ask a quick question? I can.
14 I answered my own question.

15 I want to make sure I don't misapprehend. As I
16 understood -- and I said I think I asked this earlier. And if
17 I'm wrong, sir, you will not hurt my feelings. I just want to
18 kind of cut to the chase.

19 As I understood it, y'all sent the surveys to the
20 individual universities and colleges, so that was the added
21 layer. The universities or colleges emailed their own students.

22 THE WITNESS: (Nods head up and down.)

23 THE COURT: You were not the ones directly sending the
24 students anything. That's what I just understood your last
25 answer to be, and that's what I also understood the record to

1 reflect. Do I have that wrong?

2 THE WITNESS: That is absolutely correct.

3 THE COURT: All right.

4 And then, Counsel, what I also need to do is how
5 they -- and I know you're probably going to do this, but how
6 they got the information back and in what form they got it back
7 from the universities or students, how they received the
8 information back; okay.

9 BY MS. LUKIS:

10 Q. Did the Board of Governors collect any email addresses from
11 survey respondents?

12 A. No, no personal identifiable information, or what we use as
13 the acronym, PII, information was collected.

14 Q. Could you explain how the surveys were distributed to the
15 student and employee populations?

16 A. Yes. I created unique links for each survey for each
17 university, and we distributed those to an appointed
18 representative of each university. We have what we call a data
19 administrator, which is a presidentially appointed person who's
20 our point of contact for all data and information at a
21 university. We distributed instructions to them with these
22 custom links, these unique links to each data administrator at
23 each institution, and they distributed them to their student and
24 staff populations.

25 Q. When you say "unique links," do you mean unique to the

1 universities or unique to survey recipients?

2 A. Unfortunately, we didn't have the technology to do
3 unique -- let me back up.

4 To provide a unique link to each individual, you would have
5 to have some type of email address or some type of PII
6 information. We didn't do that. We created a unique survey
7 university link. So the student survey specifically for, say,
8 FSU was a link different from the student survey at UF, and the
9 same thing for the employee surveys.

10 Q. And so when a survey respondent -- when a recipient
11 receives a survey and completed it, what data did the Board of
12 Governors receive back?

13 A. So the Board of Governors got the responses from the survey
14 itself, along with the public IP address that was embedded into
15 the survey.

16 Q. And using that public IP address, is the Board able to
17 identify any individual survey respondent?

18 A. No. There is a little bit of a misnomer on IP addresses.
19 If you look up a public IP address, say, from your own home
20 computer, what you'll find is it lists your Internet provider.
21 So if you have AT&T at home and you look up your IP address from
22 your home computer that's going through the Internet, you will
23 see the registered corporation, AT&T, their address or phone
24 number. So public IP addresses do not go back to the
25 individual.

1 THE COURT: I have a quick question.

2 You said your office set up the links for the folks at
3 the university level; is that correct?

4 THE WITNESS: Yes, sir.

5 THE COURT: And that link that you set up, the
6 university would then use the email addresses of its employees
7 and its students to send out the surveys; correct?

8 THE WITNESS: Correct.

9 THE COURT: Since you're the one that constructed the
10 link, if I requested the metadata from the link that was used,
11 say, by the University of Florida, wouldn't that metadata
12 include the individual email addresses of the students, or is
13 there something special about this link that somehow scrambled
14 that information such that it wouldn't then appear?

15 THE WITNESS: So these are web links, and they're not
16 attached -- they're embedded in the email, but they're not
17 attached to the email or the information. So when you click on
18 the link, it's just like clicking on a link on your browser. It
19 will take you to a webpage where the survey was.

20 The information collected does not have the email
21 address or anything from the individual. It simply has -- it
22 takes you to a web page where you fill out the responses.

23 THE COURT: So if you had the metadata -- because of
24 the way it's done, the metadata -- we'd know that -- for
25 example, on the sending end, you'd know you sent it to all the

1 employees and all the students; correct?

2 THE WITNESS: I wouldn't from our data.

3 THE COURT: No, not from your data --

4 THE WITNESS: Yes.

5 THE COURT: -- from the school's data.

6 THE WITNESS: The school would know that they
7 distributed it through their email system.

8 THE COURT: But when they got -- the way the link was
9 set up, because of the way it was used by an individual student,
10 because the student goes to that link's site, it's not as if I
11 email it and then you get a response on that email directly
12 back, because there's this portal in between. The portal is not
13 going to -- as part of its metadata would not include the emails
14 where the information was coming from?

15 THE WITNESS: Correct, correct. The response -- the
16 information we get back is simply a public IP address. To use
17 your example of an university, FSU has a public IP address. So
18 if a student or a staff member is, you know, on campus and they
19 fill out the survey, I would get FSU's public IP address. I
20 would be able to -- I'd be able to look at the data, the
21 metadata and say, This came from FSU, which I knew that anyway
22 from the link. But I wouldn't be able to say it was professor X
23 or student X.

24 THE COURT: What about the thousands of students
25 that -- unless they've engaged in some major building project at

1 FSU and UF, the vast majority of the students don't live on
2 campus. That's more of a statement than a question.

3 It would be linked to the IP address -- well, they
4 could have done it on campus. They could have used -- done it
5 by their laptop on campus, for example. So just because you
6 don't live on campus doesn't mean you're not using the
7 university's IP address. That's, I guess, the first place to
8 start; correct?

9 THE WITNESS: Correct.

10 THE COURT: You could have done it at Starbucks. You
11 could have done it at your parents. You could have done it at
12 any number of locations, because the IP address is linked not to
13 a computer; it's linked to a residence; correct?

14 THE WITNESS: Yeah, the provider, the service
15 provider, like AT&T, Comcast. You know, there are different
16 providers. And you could look through the data and tell -- AT&T
17 has a separate IP address for their phones, for mobility -- at
18 AT&T mobility you can look at the IP address and see that some
19 people used their phones, not that -- but that's all you know.

20 THE COURT: You're not suggesting that you can't link
21 an IP address to -- because I get warrants all the time as a
22 federal judge.

23 THE WITNESS: Yeah.

24 THE COURT: You're not suggesting you can't have an IP
25 address to a particular apartment, are you?

1 THE WITNESS: You're correct, so -- and your statement
2 about the warrant, you know, is accurate.

3 I'll use an example of FSU. Again, a student on FSU's
4 campus, they fill out the survey --

5 THE COURT: I understand that. I'm talking about the
6 FSU student that lives in an apartment down the street.

7 THE WITNESS: Same situation. You would need a
8 warrant to AT&T with the information to be able to link --

9 THE COURT: I understood. You and I, we're saying the
10 same thing --

11 THE WITNESS: Yeah.

12 THE COURT: -- which is, Judge, you're right. Off
13 campus you could -- assuming a student used it at their
14 apartment, assuming they lived alone, you could link an IP
15 address with a particular apartment that's a studio apartment,
16 but you're not going to be able to do that just as any layperson
17 because you don't have access to the IP address connecting it to
18 an address unless you go through other legal means.

19 THE WITNESS: Correct. That is completely correct,
20 yeah.

21 THE COURT: I just wanted to make sure you were saying
22 you couldn't connect an address with an IP address.

23 THE WITNESS: Right.

24 THE COURT: You weren't saying it wasn't possible.
25 You were saying, As a practical matter, Judge, if you're just a

1 lawyer who wants metadata, you're not going to be able to do
2 that just for fun. You would have to go through a legal process
3 to get that.

4 THE WITNESS: Correct.

5 THE COURT: And I understood your response.

6 THE WITNESS: I believe as a judge you might be able
7 to get it.

8 Yeah. But the general public, yeah, you have to go
9 through the legal processes, correct.

10 THE COURT: I understand.

11 Thank you.

12 MS. LUKIS: That's all I have on direct, Your Honor.

13 Thank you, Mr. Kovacs.

14 THE COURT: Oh, actually, I have one other question.

15 If I click on a link, does -- not you and not the
16 Board, but does the individual school or university or
17 college -- do they have any way of knowing who hit the link?

18 THE WITNESS: They would -- if that individual was on
19 their network, they would be able to research -- if they had the
20 date, timestamp, you know, that the survey was delivered and the
21 IP address, the public IP address, their outward-facing one,
22 they would be able to go back and look through their logs, their
23 security logs and determine that that location -- you know, it
24 came from a particular port -- or, say, a dorm or a location on
25 campus.

1 THE COURT: But it wouldn't be linked -- there's no
2 fingerprint to a particular student?

3 THE WITNESS: Correct, unless the student logged into
4 the university system and used a university computer, possibly
5 you would make that link. But, again, there are cybersecurity
6 protections in Florida for that information, as well as federal
7 standards using this standard.

8 THE COURT: I get it.

9 THE WITNESS: Yeah. So it would require, again, more
10 legal action, yeah.

11 MS. LUKIS: Thank you.

12 THE COURT: Thank you, Ms. Lukis.

13 CROSS-EXAMINATION

14 BY MS. JASRASARIA:

15 Q. Good afternoon, Mr. Kovacs. It's nice to see you again.

16 A. Good to see you, too.

17 Q. Mr. Kovacs, there are ways to maintain anonymity and at the
18 same time have additional levels of security and control that
19 were not included in the 2022 survey; is that correct?

20 A. That's correct.

21 Q. And the Board used Survey Monkey; is that right?

22 A. That's correct, also.

23 Q. Survey Monkey has the ability not to collect public IP
24 addresses; correct?

25 A. That's correct, yes.

1 Q. And you turned that ability off?

2 A. I did.

3 Q. Is it true that a single data collection instance helps
4 avoid individual identification?

5 A. Can you be more specific? I'm not sure I understand your
6 question.

7 Q. Sure. So am I correct in saying that if the -- that a
8 survey that would have collected all universities's responses
9 into a single system would have avoided individual
10 identification?

11 A. Yes, I would agree with that, but it would also prevent us
12 from doing further looking. You know, I did an analysis of the
13 data, as you know, to identify some integrity issues with the
14 data from the collection. And not having that address would
15 have prevented me -- or having a single point or a single
16 collection would have prevented that, which would have created a
17 data integrity issue.

18 Q. And just to clarify, the data subsets ultimately did
19 include a university indicator; right?

20 A. Yes. And also, per the statute, the universities are
21 required, you know, to do the analysis on that subset of data.
22 We did provide each university with that subset -- their subset
23 of data. So that was -- part of our process was not just to
24 create one giant pool of data, but to provide that data back to
25 each individual university, and to do that you had to subset by

1 each university.

2 Q. And the raw survey data with the university indicator is a
3 public record; correct?

4 A. So the raw data itself does not have the university
5 indicator in it. We did create, through some of our reporting
6 process, a set with university data in it, and that is public
7 record because of the Sunshine Law.

8 Q. And, hypothetically, you could crosswalk the raw data with
9 the table that includes the university indicator to identify the
10 originating institution of each individual response?

11 A. Yes. And we did that, again, to finish our reporting
12 process.

13 Q. And you just testified that the website links that were
14 used for the survey were not unique for each student; correct?

15 A. Correct.

16 Q. And anyone who had a dual function at any university would
17 have gotten both the employee and the student survey; correct?

18 A. Correct.

19 Q. And you could have no way to identify someone who received
20 both surveys?

21 A. Correct.

22 Q. Or to isolate those responses?

23 A. That's correct.

24 Q. You would have no way of identifying someone who went to
25 their computer and filled out the survey and then went to their

1 telephone and did a second survey?

2 A. That's correct.

3 Q. And there would be no way to identify if someone sent a
4 link to a friend or a family member who wasn't actually a
5 student or an employee?

6 A. That's also correct.

7 Q. And would you agree that without authentication it's hard
8 to have anonymity and security?

9 A. I would say that there is a challenge between
10 authentication, linking -- having authentication and maintaining
11 full anonymity is a difficult situation. There are some ways to
12 do that, but time resources, requirements are much more extreme
13 than what we had -- you know, we didn't have to work with at
14 this point.

15 Q. As far as you know, surveys that were filled out with no
16 responses to questions were still included in the overall
17 response rate; is that right?

18 A. Yes. The board office was not slated with analyzing the
19 data. And if you look at the report that was provided in the
20 exhibit, you will see that the nonresponses are included as a
21 category within each response. So the data -- the nonresponses
22 weren't removed, but they were counted and they're categorized
23 in the report, if you look at the report.

24 MS. JASRASARIA: No further questions from me.

25 THE COURT: Anything else?

1 MS. LUKIS: Very briefly, Your Honor.

2 REDIRECT EXAMINATION

3 BY MS. LUKIS:

4 Q. Mr. Kovacs, you mentioned that you turned off the Survey
5 Monkey setting that would have removed public IP addresses from
6 the data.

7 Do you recall that testimony?

8 A. Yes.

9 Q. Was that setting turned off to enable the Board to identify
10 and remove software-generated responses?

11 A. Yes. I felt it was essential to be able to analyze the
12 data that came in for integrity reasons, yes.

13 Q. Okay. And the Board of Governors -- did the Board of
14 Governors, in fact, remove any software-generated responses as a
15 result of that effort?

16 A. Yes. After analyzing the public IP addresses, I discovered
17 several IP addresses that were from a -- what they call a VPN
18 service, virtual private network service, out of Miami targeting
19 three universities that also shared this information with the
20 colleges, so those same IP addresses targeted the college
21 surveys also.

22 A script was created and ran -- I believe the first one
23 started Tuesday into the survey and ran 24 hours a day, putting
24 a survey into the -- you know, the results into the survey every
25 three minutes until the end of the survey. But I was able to

1 identify all of those came from one IP address.

2 And after I did the initial analysis of the IP addresses, I
3 went into the surveys, and I did a pattern match on the
4 results -- also a timestamp analysis and then a pattern match on
5 the results. And you could see that the script was running
6 question one, answer one. The next survey was question one,
7 answer two, answer three, and it rotated through, again,
8 continuously for 24 hours a day nonstop.

9 Q. And then, finally, I believe you also mentioned that
10 there's somewhat of a trade-off between ensuring authentication
11 and ensuring anonymity.

12 Do you recall that testimony?

13 A. Yes.

14 Q. Is it fair to say that the Board chose anonymity?

15 A. Yeah. And that was the statement in our staff meeting with
16 Marshall Criser -- if that's not hearsay -- a discussion
17 specifically about -- it was this question about authentication
18 and security that I raised to him, you know, when he said that
19 we need to focus on anonymity and, you know, it's more important
20 than the security and, you know, that is a little bit of a
21 trade-off there, unfortunately.

22 MS. LUKIS: All right. Thank you so much.

23 THE COURT: Anything further?

24 MS. JASRASARIA: I just have two quick questions.

25 THE COURT: Sure.

1 And let me make plain why I'm exercising my
2 discretion. I would have allowed either side to recall a
3 witness like in rebuttal, and rather than having this potential
4 witness called back, I'm allowing -- oh, wait. This is recross.
5 So I normally wouldn't allow recross, but I'm not going to make
6 this witness come back. And certainly you can do a re-redirect.

7 MS. JASRASARIA: Okay.

8 RECROSS-EXAMINATION

9 BY MS. JASRASARIA:

10 Q. Mr. Kovacs, you're confident that the responses you
11 eliminated were auto generated or illegitimate; right?

12 A. Yes.

13 Q. But you can't say that the data that was not eliminated is
14 legitimate?

15 A. Be a little more specific.

16 Are you saying that with 100 percent accuracy -- I mean,
17 there are definitely some -- I'm not sure of what you're saying.
18 I'm not sure.

19 THE COURT: I think what she's asking is the stuff you
20 tossed out, you knew it all came from the same nonsense IP
21 address and so you discarded it because you were able to verify
22 you should; right?

23 THE WITNESS: Yeah.

24 THE COURT: And she's saying for those that you kept,
25 since multiple people could have responded to -- the same

1 student could have responded multiple times, et cetera, some of
2 the other questions, you can't guarantee that all the ones that
3 were included were one student or one educator responding one
4 time and it was somebody that should have been responding and
5 using it?

6 You can't guarantee all the ones that were counted
7 fall in the category of legitimate educators and students that
8 should have responded only once, I believe was the question;
9 correct?

10 MS. JASRASARIA: That's correct.

11 THE WITNESS: Yeah, that is correct.

12 MS. JASRASARIA: Okay. No further questions.

13 Thank you.

14 THE COURT: Anything further?

15 MS. LUKIS: No, Your Honor.

16 THE COURT: Thank you, sir. You may step down.

17 (Mr. Kovacs exited the courtroom.)

18 THE COURT: All right. Mr. Levesque, you're on deck.

19 MR. LEVESQUE: Yes, Your Honor.

20 We would call Alison Cruess, and she will be appearing
21 by Zoom, and we will just let her know that she needs to log in.

22 (Pause in proceedings.)

23 THE COURT: And, Mr. Levesque, while we're waiting for
24 the -- to get the witness on, how many witnesses do y'all have
25 tomorrow?

1 MR. LEVESQUE: I believe we will -- if we don't get to
2 Alex Kelly today, we will have three tomorrow, counting Alex,
3 and if we do get to Mr. Kelly today, we will only have two.

4 THE COURT: All right.

5 Thank you.

6 And, Mr. Wermuth, at this juncture, do you anticipate
7 any rebuttal witnesses?

8 MR. WERMUTH: Not at this point, Your Honor, but we
9 still reserve the right to do that.

10 THE COURT: I'm not cutting you off. I'm just --
11 while we're waiting to get the person on Zoom, I'm just trying
12 to plan out where we're at.

13 MR. LEVESQUE: And we did have one witness that
14 because of the -- his -- some of his obligations for the Board
15 of Governors -- I'm sorry -- Board of Education, their -- one of
16 their meetings is tomorrow, Chancellor Mack -- I've spoken with
17 counsel for plaintiffs and they've agreed to allow his
18 designations and we'll be providing them during that same Kabuki
19 dance.

20 THE COURT: Fair enough.

21 Who are the other two -- if we get through all the
22 witnesses today, who are the other two witnesses tomorrow? I
23 don't need to know their names, I just meant --

24 MR. LEVESQUE: The other two witnesses are someone
25 from the Board of Education, Chancellor Hebda, and then Bill

1 McClay, our expert.

2 THE COURT: So I take it the one witness will not be
3 as long, and the other witness will be longer?

4 MR. LEVESQUE: Probably.

5 THE COURT: Okay.

6 (Ms. Cruess entered the Zoom conference.)

7 THE COURT: There she is.

8 All right. Ma'am, can you hear us?

9 THE WITNESS: Yes, I can.

10 Can you hear me?

11 THE COURT: Yes. If you'll just please keep your
12 voice up.

13 If you'll raise your right hand.

14 **ALISON CRUESS, DEFENSE WITNESS, DULY SWORN**

15 THE COURT: All right. You can put your hand down.

16 If you'll state your name for the record and please
17 spell it for the court reporter.

18 THE WITNESS: Sure. Alison Cruess, A-l-i-s-o-n
19 C-r-u-e-s-s.

20 THE COURT: And, Ms. Cruess, in just a moment the
21 lawyers are going to begin questioning you. When they do, if
22 you don't hear a question, don't hesitate to ask them to repeat
23 it. I know that sometimes the Zoom links aren't great.

24 Likewise, if one of the lawyers or my court reporter
25 asks you to repeat something, they're not being rude. It's just

1 we need to make sure we get a good record.

2 Mr. Levesque, you may proceed.

3 MR. LEVESQUE: Thank you.

4 DIRECT EXAMINATION

5 BY MR. LEVESQUE:

6 Q. Good afternoon, Ms. Cruess.

7 Can you please tell us who your current employer is?

8 A. My current employer is the University of North Florida.

9 Q. And what is your current position and title?

10 A. My current position and title is Director of the
11 President's Office and Executive Assistant to the President.

12 Q. And what was your former position and title?

13 A. That was Director of the Commission on Diversity and
14 Inclusion.

15 Q. And what were your responsibilities in relation to that
16 position?

17 A. To the previous position?

18 Q. Yes, ma'am.

19 A. So there -- the commission was comprised of 50-plus
20 students, faculty and staff, and so I directed the activities,
21 programming, and things that -- the work that came out of that
22 office. I oversaw the strategic plan for inclusive excellence,
23 among other things.

24 Q. And how long were you employed as the director of that
25 commission?

1 A. About six years.

2 Q. Now, I'm going to show you a document, Defendants' Exhibit
3 11.

4 MR. LEVESQUE: And if we can get that on the screen.

5 BY MR. LEVESQUE:

6 Q. Are you able to see that document?

7 A. I am, yes.

8 Q. Do you recognize that document?

9 A. I do.

10 Q. What is that document?

11 A. That is the University of North Florida's Campus Climate
12 Survey for faculty and staff.

13 Q. And was this Campus Climate Survey administered by
14 University of North Florida to its faculty and staff?

15 A. Yes, it was.

16 Q. Did you lead the administration of that survey?

17 A. Yes, I did.

18 Q. And as director of that office, were you familiar with the
19 recordkeeping practices of that office?

20 A. Yes, I was.

21 Q. And as part of your past and present work at University of
22 North Florida, are you familiar with where this document is
23 maintained in the University of North Florida's information
24 management system?

25 A. Yes, I am.

1 Q. And does it appear to be a true and correct copy? And we
2 can scroll through it if you believe that's necessary.

3 A. No. It appears to be correct based on the text at the top
4 there.

5 MR. LEVESQUE: Your Honor, at this time we would move
6 to admit Defendants' Exhibit 11.

7 MS. JASRASARIA: Objection on relevance grounds.

8 THE COURT: The relevance?

9 MR. LEVESQUE: Your Honor, one of the arguments that
10 has been made -- in fact, it was made by one of the witnesses
11 earlier today -- that the government has no business asking
12 these types of questions, and it's our position that the
13 government routinely, including universities, routinely ask
14 these types of questions of faculty and students.

15 THE COURT: Well, as I recall, that was a witness's
16 statement. Has the -- and then I've also heard from other
17 witnesses on behalf of the plaintiffs you can construct a survey
18 asking questions to verify diversity of thought; it just was
19 constructed in the wrong way in this case.

20 I never understood plaintiffs' position to be you
21 can't ever ask any questions about anything of students. I
22 understood that -- the last witness from FAU -- I think that's
23 right -- said that she didn't think the government had any
24 business asking people what they thought.

25 But let me first find out, is the defense position

1 that you -- I mean, the plaintiffs' position you can never ask
2 or just that the survey how it was done was flawed and why it
3 was being done was flawed?

4 MS. JASRASARIA: No. Certainly our position is not
5 that you can never ask and is the latter, but I do think there's
6 also a question about who has access, who is actually
7 administering the survey. And so unless, you know, this witness
8 can testify to the similarities between this situation and -- or
9 the situation to which she's testifying and HB 233, we would
10 maintain our relevance objection.

11 THE COURT: All right. Let me tell you what I'm going
12 to do. Again, I don't have to worry about the 403 confusing the
13 issues and so forth because there's no jury present. I find
14 that this is really a question of legal argument: Does it
15 matter that other surveys are administered or not? and you and
16 Mr. Levesque are clearly capable in your closing papers to argue
17 about whether it does or not.

18 The -- it's marginally relevant and -- so far as it
19 suggests that this idea that it's unbelievable, not typical,
20 et cetera, to question students about information through the
21 use of survey, at the very least it's relevant for that marginal
22 purpose, and I'll allow it.

23 So I'm not finding that the survey itself sheds much
24 light on the issues that I've got to resolve, but I can imagine
25 that it certainly has some limited relevance and may have more

1 once I hear Mr. Levesque's ability in closing argument and read
2 his closing argument. So I'm -- to the extent it has marginal
3 relevance, I'm going to allow it.

4 But, again, as I noted before, even in response to
5 some of the plaintiffs -- defense objections to plaintiffs, I'd
6 be slicing the bread a lot differently if we had a jury present
7 that can't separate the wheat from the chaff. I can; I will,
8 and so I overrule the objection.

9 (DEFENDANTS EXHIBIT 11: Received in evidence.)

10 MR. LEVESQUE: Thank you, Your Honor.

11 BY MR. LEVESQUE:

12 Q. And now if I can show you Defendants' Exhibit 12.

13 And, Ms. Cruess, do you recognize that document?

14 A. Yes, I do.

15 Q. What is that document?

16 A. So that is the University of North Florida's Campus Climate
17 Survey that was distributed to students.

18 Q. And was that administered by the University of North
19 Florida to the students at University of North Florida?

20 A. Yes, it was.

21 Q. And did you lead the administration of that survey in your
22 prior role as director?

23 A. I did, yes.

24 Q. And as director of that office, did you become familiar
25 with the recordkeeping practices of that office?

1 A. Yes.

2 Q. And as part of your past and present work at the University
3 of North Florida, are you familiar with where that document is
4 maintained on the University of North Florida's information
5 management system?

6 A. Yes, I am.

7 Q. And does that appear to be a true and correct copy of the
8 survey?

9 A. Yes, it is.

10 MR. LEVESQUE: Your Honor, at this time we would move
11 Defendants' Exhibit 12 into evidence.

12 THE COURT: Same objections from plaintiffs?

13 MS. JASRASARIA: Yes.

14 THE COURT: Same response from the defendants; same
15 ruling of the Court. Since the objection is relevance, I can
16 conceive of at least it being marginally relevant and,
17 therefore, I'll admit it.

18 (DEFENDANTS EXHIBIT 12: Received in evidence.)

19 MR. LEVESQUE: Thank you, Your Honor.

20 We can go ahead and take that exhibit down.

21 BY MR. LEVESQUE:

22 Q. Ms. Cruess, how did University of North Florida come to
23 start doing surveys of its faculty, staff and students?

24 A. The -- it was to inform the Commission on Diversity and
25 Inclusion and others' perceptions on diversity and inclusion.

1 Q. And are the surveys focused on particular issues?

2 A. No, I won't say it focused on particular issues, very
3 general across the board involving all aspects of diversity and
4 inclusion.

5 Q. And can you describe the process for how surveys were
6 created in --

7 THE COURT: Let me interject one thing real quick.
8 And I was trying to come up -- find an example.

9 So Exhibit 12, for example, on -- oh, they're not --
10 they don't have page numbers, but one of the questions that the
11 survey asked was: *I am comfortable sharing my thoughts, ideas*
12 *and feelings*, talking about class. *I feel free to discuss*
13 *sociocultural differences with other students*, et cetera.

14 It's not -- the questions aren't phrased, Do you feel
15 like because you're a conservative, you're not allowed to speak?
16 much like the survey that's at issue in this case. So, if
17 anything, I'll just point out, relevance can also be for
18 purposes of me comparing how this -- these questions are
19 structured to the questions in the survey at issue.

20 Although that probably wasn't the fairest
21 characterization involving questions on the survey at issue, but
22 I was trying to point out that you -- if nothing else, it's
23 relevant for me -- we've had much discussion about questions,
24 how these questions in the survey at issue were worded and
25 phrased or leading, et cetera. And so, if nothing else, it's --

1 if there's consistent questions on these surveys versus a better
2 way to do it, it would, if for no other reason, be relevant for
3 that basis.

4 But, Mr. Levesque, you may proceed.

5 MR. LEVESQUE: Thank you.

6 BY MR. LEVESQUE:

7 Q. And can you describe the process for how the surveys were
8 created and administered?

9 A. Yes. We formed a committee that was comprised of students,
10 faculty and staff and that committee drafted the questions.
11 Then the questions were then given to our institutional research
12 office who then created the survey in Qualtrics, a survey
13 application.

14 Then they distributed it to students, faculty and staff,
15 collected the data, and then after the survey was closed, they
16 provided the data to the Commission on Diversity and Inclusion.

17 THE COURT: Ms. Cruess, what was the explanation, if
18 any, that went out to the students about the survey? Were they
19 told we're collecting this data and why, or was there any
20 explanation at all?

21 THE WITNESS: There was a little bit of explanation,
22 you know, in the email that they received and at the beginning
23 of the survey that just explained why we were conducting this
24 survey. We talked about --

25 THE COURT: And what was the explanation offered to

1 the students that were -- if they participated, was this
2 mandatory or permissive?

3 THE WITNESS: It was voluntary.

4 THE COURT: And what were the students told why this
5 was being done?

6 THE WITNESS: To inform the university on matters of
7 diversity and inclusion.

8 THE COURT: Before y'all issued the survey, was there
9 a massive uproar on campus about why is the university asking us
10 these questions and so forth? In other words, was it -- the
11 survey sent to the students and issued in the midst of a
12 political storm of the survey?

13 THE WITNESS: No. There were -- there was -- it was
14 just time for us to do a survey. There was nothing on --
15 happening on campus that caused us to move forward with the
16 survey.

17 THE COURT: In the creation of the survey, which
18 Mr. Levesque asked you about, did y'all rely on other similar
19 surveys in terms of the formation of the questions and the
20 topics covered in preparing the survey?

21 THE WITNESS: Yes, we did.

22 THE COURT: When you said you sent it through -- and I
23 don't -- I'm sorry, ma'am. I can pull up your prior testimony,
24 but you sent it through some sort of vetting process and
25 program.

1 If you could explain to me what that was and why you
2 did that.

3 THE WITNESS: So I believe you're referring to the --
4 what we call IRB, or Institutional Review Board, so one of the
5 faculty members on our committee ran that through that IRB
6 process.

7 THE COURT: I understand.

8 All right. Thank you.

9 Mr. Levesque, you may proceed.

10 MR. LEVESQUE: Thank you, Your Honor.

11 BY MR. LEVESQUE:

12 Q. And just -- just to make sure we were clear there,
13 Ms. Cruess, were the surveys anonymous?

14 A. Yes, they were. They were anonymous at least to, you know,
15 99.9 percent of the campus. They do reside on a server, and the
16 Office of Institutional Research -- or a couple of people in
17 that office -- would have had access to the data, but any data
18 that was provided to the Commission on Diversity and Inclusion
19 had any personal identification removed from it.

20 Q. And how long has the University of North Florida been
21 administering surveys like this?

22 A. We administered our first survey of this nature in 2006.

23 Q. And about how frequently since then has the University
24 conducted these surveys?

25 A. There's not been any pattern of frequency, but our last one

1 was conducted in 2019, and we have not conducted one yet, but we
2 were -- I can say the Commission on Diversity and Inclusion was
3 aiming for about every five years to do a survey of this type.

4 Q. After the surveys were conducted, did you publish the
5 results so that the students, faculty, and staff could access
6 them?

7 A. Yes, we did.

8 Q. Why did you publish them?

9 A. To inform the campus community of the information.

10 MR. LEVESQUE: And if I could bring up Defendants'
11 Exhibit No. 10.

12 BY MR. LEVESQUE:

13 Q. Ms. Cruess, do you recognize that document?

14 A. Yes, I do.

15 Q. What is that document?

16 A. This was a preliminary result of the survey, so one of --
17 actually a couple of our faculty members that were on the
18 committee that put this survey together developed this
19 preliminary summary.

20 Q. And was this preliminary summary drafted after the surveys
21 that were administered were completed in 2019?

22 A. Yes, it was.

23 Q. And did you oversee this process in your role as director
24 of the University of North Florida Commission on Diversity and
25 Inclusion?

1 A. Yes, I did.

2 Q. And as the director of that office, did you become familiar
3 with the recordkeeping practices of that office?

4 A. Yes.

5 Q. And as part of your past and present work at University of
6 North Florida, are you familiar with where this document is
7 maintained in the University of North Florida's information
8 management system?

9 A. Yes.

10 Q. And is that a true and correct copy of that survey?

11 A. Yes, it is.

12 MR. LEVESQUE: Your Honor, at this time defendants
13 would move Defendants' Exhibit 10 into evidence.

14 MS. JASRASARIA: No objection.

15 THE COURT: All right. Exhibit 10 is admitted.

16 (DEFENDANTS EXHIBIT 10: Received in evidence.)

17 MR. LEVESQUE: Your Honor, at this time no further
18 questions?

19 THE COURT: All right.

20 Cross-examination?

21 CROSS-EXAMINATION

22 BY MS. JASRASARIA:

23 Q. Good afternoon, Ms. Cruess.

24 It's nice to meet you.

25 A. Nice to meet you as well.

1 Q. My name is Jyoti Jasrasaria, and I'm counsel for plaintiffs
2 in this matter.

3 Ms. Cruess, you testified that you've been involved in
4 UNF's Climate Surveys; correct?

5 A. Yes.

6 Q. And UNF's 2019 Climate Survey, for example, was developed
7 by a committee; correct?

8 A. Yes.

9 Q. And that committee included you --

10 A. (Nods head up and down.)

11 Q. -- correct?

12 A. Yes.

13 Yes, it did.

14 Q. And it also included Dr. Elizabeth Brown and Dr. Curtis
15 Phills who are psychologists?

16 A. Yes, it did.

17 Q. And it also -- the committee also included Dr. Amanda Culp
18 who oversees UNF's program-level assessment efforts?

19 A. Uh-huh, yes.

20 Q. And, Ms. Cruess, were you also involved in the 2013 to 2014
21 Climate Survey that UNF put together?

22 A. No, I was not, except for a tiny part at the end when I
23 did -- I assisted them with some of the report -- the
24 formatting, really not much more than formatting of the report.

25 But, no, I was not involved in that survey very much at

1 all.

2 Q. Are you aware --

3 A. Not in the -- I'm sorry.

4 I was just going to say not in the distribution of that.

5 Q. Sure.

6 Are you aware that the 2013 to 2014 Climate Survey -- that
7 before it went out, the committee hosted focus group meetings
8 with more than 50 participants to develop the questions?

9 A. Yes, I'm aware of that.

10 Q. UNF's surveys have included opportunities for respondents
11 to add comments to their multiple-choice responses; is that
12 right?

13 A. Can you say that again?

14 Q. Sure.

15 UNF's surveys have sometimes -- the questions have
16 sometimes included opportunities for the respondents to add
17 comments to their multiple-choice responses?

18 A. And you're asking in general of -- in general of all the
19 surveys that our university has conducted or any specific
20 survey?

21 Q. Yes, I'm asking if you're aware that that has sometimes
22 occurred.

23 A. Yes. I have -- I have seen surveys that have multiple --
24 open-response responses, yes.

25 Q. And those open-response questions allow respondents to

1 provide context that a multiple-choice question can't sometimes?

2 A. Potentially, yes.

3 Q. In the 2019 Climate Survey, UNF asked almost all of the
4 same questions of faculty, staff and students; is that correct?

5 A. Yes.

6 Q. And was that to maintain consistency to compare responses
7 across the different groups?

8 A. I'm not -- I don't exactly recall. I know the -- the
9 difference -- I know one of the big differences in the student
10 survey was we had -- we had an open-response question whereas in
11 the faculty/staff we did not, but they were -- they were very,
12 very similar.

13 Q. The 2019 Climate Survey also asked a series of demographic
14 questions, including gender identity, race and ethnicity, sexual
15 orientation, and religious identity; is that correct?

16 A. Yes, it is.

17 Q. The 2019 UNF Climate Survey did not include any questions
18 about political affiliation or ideology identification; is that
19 right?

20 A. That's correct.

21 Q. And UNF analyzed in its findings composite measures of
22 questions that, for example, compared White students' responses
23 to nonWhite students' responses?

24 A. Yes.

25 Q. And that was to learn whether there are systemic group

1 differences at UNF?

2 A. I cannot speak for the faculty members that chose to
3 analyze it that way, so I can't say for sure.

4 MS. JASRASARIA: Can we pull Defendants' Exhibit 10
5 back up, please, Andy?

6 THE COURT: Ms. Cruess, I have a question.

7 As I understood your last answer --

8 THE WITNESS: Yeah.

9 THE COURT: This is the Judge -- you're not the one
10 that compiled and decided how to use the data or what to look
11 for; is that correct?

12 THE WITNESS: No, I did not. That was really our
13 faculty's expertise that determined that. I did have input into
14 actions that we took after the results were analyzed as far as,
15 like, programming we wanted to do and, you know, actions and
16 events and things like that that we wanted to have on the
17 campus.

18 THE COURT: Sure. I guess I was trying to verify that
19 I didn't misapprehend your last answer. As I understood your
20 last answer, it was that, I can't tell you -- in terms of the
21 summary of the findings, That wasn't my bailiwick, so I can't
22 opine as to why the data was assembled and used, for example,
23 for that purpose because that wasn't me; correct?

24 THE WITNESS: I thought the question was more along
25 why -- why the comparison of White to nonWhite was done and that

1 --

2 THE COURT: Right. And I'm looking under Summary of
3 Findings, Defendants' Exhibit 10, and there's an entire section
4 there talking about nonWhites versus Whites.

5 As I understood it, you were saying in terms of -- to
6 the extent the data revealed that and could be looked at that
7 way, you weren't the one that decided to make -- decided how to
8 frame the findings.

9 Did I misapprehend that?

10 THE WITNESS: No, you're correct.

11 THE COURT: Okay. I understood.

12 Thank you.

13 THE WITNESS: Okay. Thank you.

14 MS. JASRASARIA: We can pull that exhibit down with
15 that clarification.

16 Thank you, Your Honor.

17 BY MS. JASRASARIA:

18 Q. UNF has taken steps to ensure a significant response rate
19 for its surveys?

20 A. Yes.

21 Q. And in 2019, UNF's response rate was 15 percent for
22 students; is that right?

23 A. Yes, it is.

24 Q. And 57 percent for faculty and staff; correct?

25 A. Yes, that's correct.

1 Q. And because of these response rates, UNF had confidence in
2 the data and represented that it could present correlations and
3 t-tests with confidence, saying that these values would not
4 be -- that the survey results would not be expected to change
5 very much even if the entire UNF population was sampled?

6 A. That's correct.

7 MS. JASRASARIA: No further questions.

8 THE COURT: Redirect?

9 MR. LEVESQUE: Yes, Your Honor, a few questions.

10 REDIRECT EXAMINATION

11 BY MR. LEVESQUE:

12 Q. Ms. Cruess, in the surveys that were administered, isn't it
13 true that there were questions that were asked about the
14 political beliefs of respondents? For example, Question 5
15 asked: *How often, if ever, you have been discriminated or*
16 *excluded from activities at University of North Florida because*
17 *of your political beliefs?*

18 A. That is correct, that question was on there.

19 Q. There was another question, Question 7: *How satisfied are*
20 *you with the following aspects of University of North Florida?*

21 And one of the categories that they were inquiring about was the
22 atmosphere for political differences; correct?

23 A. That is -- yes, that is correct.

24 Q. And there were a number of other categories that include
25 questions addressing race, gender, and ethnicity; correct?

1 A. Yes.

2 Q. As well as the diversity of the staff?

3 A. Yes.

4 MR. LEVESQUE: No further questions, Your Honor.

5 THE COURT: Thank you, ma'am. Thank you for your
6 patience with us this afternoon. We hope you have a good
7 afternoon.

8 THE WITNESS: Thank you very much.

9 (Ms. Cruess exited the Zoom conference.)

10 THE COURT: We'll go ahead and take a quick break for
11 the benefit of the court reporter.

12 My understanding is that Nancy Meyers is next; is that
13 correct?

14 MR. LEVESQUE: That is correct, Your Honor, but we're
15 having a discussion about that. If we could have a few minutes
16 to nail that down?

17 THE COURT: No worries.

18 Thank you.

19 Court is in recess for ten minutes.

20 (Recess taken at 3:29 PM.)

21 (Resumed at 3:47 PM.)

22 THE COURT: We are back on the record.

23 I just wanted to give you time, Mr. Levesque, to do
24 what you needed to do.

25 Have you had enough time to confer? Because sometimes

1 it saves time to give you more time rather than rushing you to
2 figure out where you're going next.

3 MR. LEVESQUE: I appreciate that, Your Honor.

4 And at this time we would intend to call Alex Kelly,
5 and we are not calling Dr. Bowles or Dr. Meyers.

6 THE COURT: So our last witness for today will be
7 Kelly, and then you've got two additional witnesses tomorrow,
8 correct, your expert and one other?

9 MR. LEVESQUE: Yes, sir.

10 THE COURT: Fair enough.

11 And just so I'll know for planning purposes in terms
12 of taking any break, how long do you anticipate with the next
13 witness?

14 MR. LEVESQUE: Probably 15 minutes.

15 THE COURT: Okay. So we're going to finish early
16 today?

17 MR. LEVESQUE: I think that's a possibility, depending
18 on their cross.

19 THE COURT: If you spend 15 minutes and the cross
20 lasts past six o'clock, I suspect we may have an issue -- or I
21 may have an issue. But, in any event, we'll see how it goes.

22 You can go ahead and call your next witness.

23 Thank you.

24 MR. LEVESQUE: And the defense would call Alex Kelly.

25 (Mr. Kelly entered the witness stand.)

1 THE COURTROOM DEPUTY: Please raise your right hand.

2 **JAMES ALEXANDER KELLY, DEFENSE WITNESS, DULY SWORN**

3 THE COURTROOM DEPUTY: Please state your name and
4 spell your last name for the record.

5 THE WITNESS: Full name is James Alexander Kelly.
6 Last name is spelled K-e-l-l-y.

7 THE COURTROOM DEPUTY: Thank you.

8 THE WITNESS: I go by Alex.

9 THE COURT: Mr. Kelly, if you'll take your seat,
10 please, sir.

11 And while he may go by Alex, everybody needs to
12 address him as Mr. Kelly.

13 Mr. Levesque, you may proceed.

14 MR. LEVESQUE: Thank you, Your Honor.

15 DIRECT EXAMINATION

16 BY MR. LEVESQUE:

17 Q. Mr. Kelly, who is your current employer?

18 A. The Governor.

19 Q. And how long have you been employed by the Governor?

20 A. Since April of 2021.

21 Q. And what is your title in your employment for the Governor?

22 A. Deputy chief of staff.

23 Q. How long have you been in that role?

24 A. Since April 2021.

25 Q. And what are your responsibilities as deputy chief of staff

1 to the Governor?

2 A. I oversee for the Governor departments and policy related
3 to education, economic development, elections, Department of
4 State, and also, as of just recently, the Florida Lottery.

5 Q. And before you became deputy chief of staff to
6 Governor DeSantis, what was your job?

7 A. I was the chief of staff for the Florida Department of
8 Education.

9 Q. And how long were you the chief of staff for the Department
10 of Education?

11 A. Since early January 2019.

12 Q. And who did you report to as chief of staff for the
13 department?

14 A. The Commissioner of Education, Richard Corcoran.

15 Q. And as the chief of staff to the Department of Education,
16 what were your responsibilities?

17 A. As chief of staff, I was the direct report to the
18 commissioner and was really responsible for the day-to-day
19 oversight and management of the department. Almost every aspect
20 of it at some juncture would report to me, or through me, to the
21 commissioner.

22 Q. And are you familiar with House Bill 233?

23 A. Yes.

24 Q. And are you familiar with the challenges that have been
25 brought to this litigation -- or brought to House Bill 233 in

1 this litigation?

2 A. Yes.

3 Q. At the time House Bill 233 passed the legislature, where
4 were you employed?

5 A. The Governor's office.

6 Q. And are you familiar with the survey provisions of House
7 Bill 233?

8 A. Yes.

9 Q. And what did those provisions require of the survey?

10 A. Those provisions required the Board of Governors and the
11 State Board of Education to administer the survey to both
12 students and faculty of the university and college systems, a
13 statistically valid, objective, nonpartisan survey.

14 Q. When it came to the creation or the selection of that
15 survey, what is your understanding of the processes that the
16 Board of Education and Board of Governors engaged in?

17 A. The entire process?

18 Q. We'll go with the starting process.

19 THE COURT: Hold on. We have somebody standing.
20 Objection?

21 MS. FROST: Objection, Your Honor, just to the extent
22 that -- obviously, to his personal knowledge, fine. But we
23 would object to any testimony that he would be giving based on
24 statements that other people told him about that process.

25 THE COURT: Unless, of course, he -- was he a 30(b)(6)

1 witness on the formation and construction of the survey?

2 MR. LEVESQUE: No, Your Honor, but there's been
3 allegations that he made decisions related to --

4 THE COURT: Why don't we start there. Why don't you
5 just ask him what was his involvement, and then you can break it
6 down from there, as opposed to a witness giving -- if he wasn't
7 directly involved, I'm not sure how he could possibly give me an
8 overview of what did or did not happen, unless it was based
9 solely on hearsay.

10 MR. LEVESQUE: Fair enough, Your Honor.

11 THE COURT: Okay.

12 BY MR. LEVESQUE:

13 Q. We'll start with Your Honor's question.

14 What was your involvement with the survey?

15 A. Sure. So I worked with the Department of Education and the
16 Board of Governors, you know, as they had to implement the
17 survey, providing some input initially as to how that could go.
18 We were looking at -- we had looked at previously surveys from
19 other states, North Carolina, Colorado, so had some -- had some
20 prior examples.

21 I primarily for a period of time, for a few months, worked
22 with Eric Hall at the Department of Education. He was my
23 main -- he was a senior chancellor at the time, and he was my
24 primary point of contact. He was -- for the summer and
25 fall months, he was the main point of contact working with the

1 Board of Governors. I would generally stay in contact with Eric
2 as the two agencies were collaborating on the formation and
3 implementation of the survey.

4 Q. And who at the Board of Governors did you speak with about
5 the survey?

6 A. Eventually, I started working with Chancellor Criser and
7 Chair Lamb, Brian Lamb.

8 Q. And were you aware of whether the Board of Governors was
9 working with the FSU Institute of Politics to draft a survey?

10 A. Yes.

11 Q. Did you make the decision to not use the FSU Institute of
12 Politics survey?

13 A. No.

14 Q. What was your role in that decision?

15 A. I certainly advised against using it. In talking with both
16 the staff of the department and in talking with
17 Chancellor Criser and Chair Lamb, I advised against using it.
18 Ultimately, that was a decision that the Board of Governors
19 had -- had -- has a relationship with FSU. That was a decision
20 that ultimately they had to make, but I saw the flaws in the
21 process in the survey they were creating and advised against
22 using it.

23 Q. Are you familiar with the surveys that were ultimately used
24 by the Board of Governors and the Board of Education?

25 A. Yes.

1 Q. Did you design those surveys?

2 A. No.

3 Q. Did you draft those surveys?

4 A. No.

5 Q. Did you ever provide comments, suggested edits or feedback?

6 A. Yes.

7 Q. And who did you provide that feedback to?

8 A. Generally to Chancellor Criser and the Board of Governors
9 and Senior Chancellor Henry Mack with the Department of
10 Education.

11 Q. And who is Senior Chancellor Henry Mack?

12 A. Henry Mack, Senior Chancellor Mack, oversees
13 higher-education systems at the Department of Education, so the
14 division -- basically the Division of Colleges, the technical
15 college system. In addition to that, the Division of Vocational
16 Rehabilitation, the Division of Blind Services all report up
17 through Henry.

18 Q. And you mentioned Chancellor Criser.

19 Who is Chancellor Criser, for the record?

20 A. He was the Chancellor of the Board of Governors until a
21 couple of months ago.

22 MR. LEVESQUE: No further questions, Your Honor.

23 THE COURT: Cross-examination?

24

25

CROSS-EXAMINATION

BY MS. FROST:

Q. Good afternoon, Mr. Kelly.

How are you? Good to see you again.

A. Good. Likewise.

Q. Part of your job is to advance the Governor's policy choices in education; that's correct, right?

A. Yes.

Q. And related to that, part of your job is to support the Governor's vision for the state's education agencies?

A. Yes.

Q. And those agencies include the Board of Education and the Board of Governors?

A. Yes.

Q. How did you stay in contact with Eric Hall over 2021 -- is that what you said?

A. Yes.

Q. Did you stay in contact with him over email?

A. Email, phone, in-person meetings.

Q. And I believe you testified, but I just want to be sure, that was the time when the FSU survey was being developed; correct?

A. Yes.

Q. And I believe you testified, but just to be clear, the FSU survey is not the survey that was used; correct?

1 A. Correct.

2 Q. And then you checked in with Chancellor Criser about the
3 status of the surveys in late December or early January of 2022;
4 correct?

5 A. Yes.

6 Q. And then between that time and when the surveys were
7 finalized, you had at least 10 or 12 meetings with
8 Chancellor Criser about the surveys; correct?

9 A. Yes.

10 Q. And sometime after that check-in meeting with
11 Chancellor Criser, you provided a new proposed draft survey to
12 the Chancellor; correct?

13 A. I was -- we were making edits to the surveys or survey --
14 yeah, surveys.

15 Q. When you communicated with Chancellor Criser, did you
16 communicate with him over email?

17 A. Not usually, there were some instances; usually phone, in
18 person.

19 Q. Did you communicate with him using USB drives?

20 A. Yes.

21 Q. And did you communicate with him using hard copies that you
22 would hand to him?

23 A. Yes.

24 Q. And did Chancellor Criser also communicate with you using
25 hard copies?

1 A. Yes.

2 Q. And did Chancellor Criser also communicate with you using
3 ISB drives -- USB drives? Is it USB drives?

4 A. USB, I believe so.

5 Q. I apologize.

6 MS. FROST: Andy, can you pull up JX2?

7 BY MS. FROST:

8 Q. Mr. Kelly, you've seen this document before, haven't you?

9 A. Yes.

10 Q. And if you scroll down, the document attached here, these
11 are the questions that you provided to Chancellor Criser in late
12 January of 2022; is that correct?

13 A. I'm not sure based on just looking at this in itself if
14 this is what I provided him.

15 Q. Okay. I think I might have something that might help
16 refresh your recollection, if you don't mind.

17 You remember being deposed by me?

18 A. Uh-huh.

19 THE COURT: Well, Counsel, do you just have the
20 exhibit, because --

21 MS. FROST: With the stamp, I do. It's a different
22 stamp.

23 If you -- Andy, can you pull up 96, PX96?

24 THE COURT: I mean, just so the record is clear, the
25 witness was shown a small portion of one page and so I think

1 what the witness was saying is --

2 MS. FROST: Oh, I can grab a hard copy.

3 THE COURT: -- it looks like it, but I can't tell you
4 by looking at the small portion of one page.

5 Is that correct?

6 THE WITNESS: Yes, Your Honor.

7 THE COURT: All right.

8 MS. FROST: I can grab a hard copy or you can scroll
9 through.

10 THE COURT: Why don't you give him a hard copy so you
11 can -- that will actually work a lot faster.

12 MS. FROST: Okay. It's Joint 2 in the binder. There
13 should be some binders in front of you.

14 THE COURT: And take the time you need, Mr. Kelly.

15 THE WITNESS: Got it.

16 BY MS. FROST:

17 Q. Okay. Take your time. Tell me when you're ready.

18 A. I'm ready.

19 Q. Okay. The document attached to this email, these are the
20 questions that you provided to Chancellor Criser in February of
21 2022; is that correct?

22 A. Yes, this looks like the Chancellor was sending back
23 something that I provided with some edits.

24 Q. Well, why don't you look at that top email again.

25 Does it look like he's sending back something?

1 A. It looks like this was sent back to me or shared back to me
2 somehow because the Chancellor staff -- or the Chancellor -- I
3 guess the Chancellor staff are noting that they retyped -- they
4 retyped it.

5 Q. Okay. So your name is not on this email?

6 A. Correct.

7 Q. So how do you -- how did you get it back? I guess you have
8 a recollection of getting this document back?

9 A. It's familiar.

10 THE COURT: Let me do this, since I'm actually the
11 fact finder, if you can, Mr. Kelly.

12 Shannon McDermott is who? Do you know who?

13 THE WITNESS: I believe she work for the Chancellor.

14 THE COURT: But not you?

15 THE WITNESS: Not me.

16 THE COURT: All right. That would have been a better
17 way of asking the question.

18 This is not, for example, your assistant that sent
19 Marshall Criser -- it appears that somebody who you believe was
20 on his own staff sent him this email, and I understand you're
21 saying, Judge, I assume, I'm not exactly sure who she is, and
22 that's why you're saying, This doesn't appear to be an email
23 that I sent where I was forwarding something I sent to
24 Chancellor Criser because it's something that he -- in this
25 case, he actually got from Ms. McDermott; correct?

1 THE WITNESS: Yes, Your Honor.

2 MS. FROST: Your Honor, may I approach?

3 THE COURT: You may.

4 BY MS. FROST:

5 Q. So, Mr. Kelly, I'll represent to you that Exhibit 7 -- let
6 me back up.

7 Mr. Kelly, you recall I took your deposition?

8 A. Yes.

9 Q. You recall you were under oath?

10 A. Yes.

11 Q. And you recall you swore to tell the truth; correct?

12 A. Yes.

13 Q. And I'll represent to you this document we've just been
14 looking at is the one that's referred to as Kelly Exhibit 7 in
15 the deposition transcript that I just handed you.

16 And I'd ask that you flip through your deposition, starting
17 at 140 through 147, and review where you and I carefully looked
18 at the document together.

19 THE COURT: Does somebody have a copy of the
20 deposition for me?

21 MS. FROST: Yeah.

22 THE COURT: Don't worry about it. The witness can
23 hand -- I can read it quickly. He can hand it, when he's done,
24 to me, and take all the time --

25

1 BY MS. FROST:

2 Q. Mr. Kelly, have you had a chance to take a look?

3 THE COURT: Hold on. He's still reading. Give him
4 time to read it.

5 MS. FROST: Okay.

6 MR. LEVESQUE: Your Honor.

7 THE COURT: Hold on one second.

8 Yes?

9 Yes, sir?

10 MR. LEVESQUE: Plaintiffs' counsel has asked him, I
11 think, one question and then has asked him to review about six
12 or seven pages, from 140 to 147, and it's not clear to me what
13 question she's seeking to use his deposition regarding -- at
14 least in looking at the question --

15 THE COURT: Let me do this, because I -- I agree, and
16 you -- line and page number, and it would have been helpful for
17 me as well.

18 Here's what I don't understand, and, Ms. Frost, you
19 can tell me what -- I just -- it doesn't seem to me that it's
20 impeachment.

21 You can correct me if I'm wrong, Mr. Kelly. What I
22 heard you say is, I did substantial edits that I sent back.

23 Did I misapprehend that?

24 THE WITNESS: You're correct, Your Honor.

25 THE COURT: All right. And then what I've got is an

1 email from somebody that appear -- unless somebody tells me
2 differently -- and to the best of the recollection of this
3 witness -- that Ms. McDermott sent Marshall Criser an email
4 saying: *It was easier to retype so I retyped it*, which seems to
5 me to suggest that there was a heavily marked-up document, so
6 she just retyped the whole thing, and -- which seems consistent
7 with the witness's testimony that, I had input, and that the
8 marked-up version -- is that not -- I see Ms. Lukis shaking her
9 head no.

10 It seemed like it wasn't inconsistent with anything
11 the witness said, but maybe I misapprehended his testimony.

12 MR. LEVESQUE: If I may, Your Honor, and I believe
13 this is indicated in Chancellor Criser's testimony.

14 He created a copy using his phone of a hard copy
15 document. It wasn't heavily edited, but basically what he was
16 giving was sort of -- I don't know the precise format. It could
17 have been JPEG pictures, and she couldn't convert that so she
18 retyped it.

19 THE COURT: We'll delete the "heavily edited." My
20 apologies. What I understood the witness was saying, I edited
21 it, and I believe that this was the -- I thought and maybe I'm
22 wrong -- but this was the document that reflected what the
23 original was with his edits. Is that not -- did I misapprehend?

24 MR. LEVESQUE: I don't --

25 MS. FROST: That's not right.

1 MR. LEVESQUE: Yeah, I don't --

2 THE COURT: I'll stay out of it, then.

3 Y'all ask the questions, but I do want a line and
4 page number for both the witness and the benefit of the Court,
5 and I need to know what the question he was just asked, because
6 you generally couldn't -- he didn't say seven pages worth of
7 information, so there's no way that --

8 MS. FROST: Correct, Your Honor. And I wasn't -- I
9 wanted the witness to be familiar with that for the context of
10 the questions that I'm going to ask.

11 THE COURT: Oh, if you said, Would this refresh your
12 recollection? and led him, that's fine. I thought you were --
13 so you're giving him an opportunity to refresh his recollection
14 so y'all were both on the same page?

15 MS. FROST: Correct, Your Honor.

16 THE COURT: Fair enough.

17 And did you have enough time to read --

18 THE WITNESS: I did, but that deposition looks like
19 it's from an old redistricting case, completely different court
20 case.

21 MS. FROST: Oh, shoot.

22 THE COURT: And that's what you were trying to tell
23 me?

24 THE WITNESS: Yes, Your Honor.

25 THE COURT: Got it.

1 MS. FROST: Andy, do you have it?

2 Okay. Andy, why don't you pull up -- apologies. I
3 got up too early this morning.

4 Andy, can you pull up --

5 MR. LEVESQUE: Your Honor, if I could, just out of
6 curiosity, the deposition that was handed to the witness, can we
7 find out what that was?

8 MS. FROST: Yeah, I'm not going to ask any questions
9 about it. It was an accident.

10 THE COURT: It was a redistricting case.

11 MS. FROST: It was another case. I do some
12 redistricting stuff, too.

13 MR. LEVESQUE: Okay.

14 THE COURT: Let's start here: What was the last
15 question pending?

16 MS. FROST: So the last question pending, at least the
17 question I meant to ask, is, Can you refresh your -- you know,
18 can you read this and refresh your recollection?

19 THE COURT: Before that, because I obviously did
20 not -- was not following the questions and answers, I thought
21 that the witness said, Yes, I'm providing some input; yes, I'm
22 editing some things, and, yes, some of the changes ended up in a
23 document. Maybe he said more, maybe he said less, but that's
24 what I was hearing.

25 So that gives you a chance --

1 MS. FROST: Thank you.

2 THE COURT: -- Counsel, to know what I heard and,
3 Mr. Levesque, so if you need to fix it because I misheard, you
4 can fix it.

5 MS. FROST: Yeah, I think I'm going to back up.

6 THE COURT: But I didn't hear any -- I didn't hear
7 anybody saying anything particularly explosive other than what I
8 just said.

9 MS. FROST: Understood, Your Honor.

10 Let's back up, actually, and take this down for a
11 second.

12 And let's put up PX95.

13 BY MS. FROST:

14 Q. And, Mr. Kelly, you've seen this document before; correct?

15 A. Yes.

16 Q. I showed it to you when I deposed you in July of last year;
17 is that correct?

18 A. Yes.

19 MS. FROST: Okay. And can we scroll down to, Andy,
20 the section that starts with: *Concerned that those conditions*
21 *were inconsistent with...*

22 BY MS. FROST:

23 Q. And, Mr. Kelly, do you see on the document where it says:
24 *Subsequently, Mr. Kelly offered suggestions of new survey*
25 *language for the student survey?*

1 Did I read that correctly?

2 A. Yes.

3 Q. And then it says: *Mr. Criser printed a draft of those*
4 *suggestions and forwarded them to his administrative assistant,*
5 *Shannon True, with the request that she retype the language and*
6 *correct the formatting.*

7 Do you see that?

8 A. Yes.

9 Q. And I read that correctly?

10 A. Yes.

11 MS. FROST: Okay. And you can take that down.

12 THE COURT: Well, that's not his statement. Are you
13 asking does he agree with that?

14 MS. FROST: I'm going to ask -- I'm not going to ask.

15 (Indiscernible crosstalk.)

16 MS. FROST: I'm going to ask about the conversation we
17 had when I deposed him.

18 BY MS. FROST:

19 Q. You did not dispute in your deposition that you provided
20 these suggests to Chancellor Criser, did you?

21 A. I didn't dispute it. I multiple times provided suggestions
22 to Chancellor Criser.

23 Q. And you didn't dispute that these questions that were just
24 shown to you were, in fact, the suggestions that you provided to
25 Chancellor Criser; correct?

1 A. I believe my answer was that they probably were. I didn't
2 have an opportunity to side-by-side inspect them, but I had no
3 reason to believe that that was not what I provided him.

4 THE COURT: Let me pause there and ask.

5 Mr. Kelly, did I say anything in summarizing your
6 testimony where I -- and you won't offend me.

7 Did I mishear what you said? Because I didn't hear a
8 lot of difference between what you just said and what I just
9 asked.

10 THE WITNESS: I agreed with your statements,
11 Your Honor.

12 THE COURT: Okay.

13 BY MS. FROST:

14 Q. You also worked with Chancellor Hebda and Chancellor Mack
15 at the Department of Education drafting surveys; is that
16 correct?

17 A. I did work with them, yes.

18 Q. And did Chancellor Hebda also sometimes communicate with
19 you using USB drives?

20 A. I'm trying to recall. I think -- if I met with Chancellor
21 Hebda, typically she was there with Chancellor Mack, so probably
22 the two of them together came with a USB drive.

23 Q. And you did trade some emails about the draft surveys with
24 folks at the Board of Education; correct?

25 A. Yes.

1 MS. FROST: Can we pull up PX93?

2 BY MS. FROST:

3 Q. And is this an email from you to Chancellor Mack and
4 Bethany Swonson dated January 31, 2022?

5 A. Yes.

6 Q. And are these the comments to the -- sorry.

7 MS. FROST: Let's scroll down so the witness can see
8 the whole thing.

9 And then let's also show the witness PX94 because the
10 attachment is to that.

11 And also scroll down.

12 BY MS. FROST:

13 Q. This -- these are comments that you made on a November 21,
14 draft; is that correct?

15 A. I'm not sure what the date of the draft was -- oh, I see it
16 right there.

17 I guess, yes.

18 Q. And November '21 was before the Board of Governors, the
19 Board of Education and yourself took over drafting the survey;
20 correct?

21 A. Yes.

22 Q. Lets talk briefly and discuss about what happened when the
23 survey was implemented, Mr. Kelly.

24 It was implemented for four days in April 2022; is that
25 correct?

1 A. You mean implemented as in when the survey was distributed?
2 Is that what you mean?

3 Q. Correct.

4 A. It was either a four- or five-day period. It was all in
5 the same week, if I recall correctly.

6 Q. And you were kept apprised of those activities?

7 A. Yes.

8 Q. And you asked Chancellors Criser and Hebda for the survey
9 results shortly after the survey closed; correct?

10 A. Yes.

11 Q. Did they email those results to you?

12 A. I don't recall.

13 MR. LEVESQUE: Your Honor, at this point I would
14 object. This is outside the scope of the direct. We didn't
15 discuss the survey results.

16 THE COURT: Response?

17 MS. FROST: I mean, Your Honor, he was involved in the
18 survey drafting. I think it is completely relevant to the
19 questions asked about that whether or not he saw the results.

20 THE COURT: Anything further, Mr. Levesque?

21 MR. LEVESQUE: Your Honor, they decided not to call
22 him as a witness in their case-in-chief. We put him on for the
23 limited purpose of addressing the allegations by Dr. Lichtman
24 that he drafted --

25 THE COURT: I understand.

1 Here's what I'm going to do. Within reason --
2 Counsel, how many -- how much more time do you have with this
3 witness?

4 MS. FROST: Not much longer. And I'd also say --

5 THE COURT: Hold on.

6 I probably would allow you to recall him in rebuttal
7 if there was something related to the -- outside the scope of
8 direct, but related to the information he was communicating, and
9 so on that basis, I'm going to exercise my discretion and allow
10 the witness to be asked a few more questions so we can get him
11 on and off the stand and not deal with the issue about whether
12 I'm going to permit the plaintiff to recall him; okay?

13 MR. LEVESQUE: Thank you, Your Honor.

14 THE COURT: I want to make plain, Mr. Kelly, I'm
15 primarily doing that for your convenience; okay?

16 THE WITNESS: Thank you, Your Honor.

17 BY MS. FROST:

18 Q. Do you recall Chancellor Hebda coming and briefing you in
19 person and giving you a hard copy of the survey results from the
20 college system?

21 A. That sounds right, yes.

22 Q. And that was sometime in May?

23 A. Yes.

24 Q. For the university system, Chancellor Criser also did not
25 email you the results; correct?

1 A. Correct. He brought a laptop to my office and showed me
2 the results on his laptop.

3 Q. And he scrolled through them on your computer -- or his
4 computer while you were sitting there?

5 A. Yes.

6 Q. And you took notes on those results?

7 A. Yes.

8 Q. And that was also several months before the survey became
9 public -- survey results became public?

10 A. Yes. That would have been in the May or June timeframe,
11 and the results became public around September 1, if I recall
12 correctly.

13 Q. I just have one more set of questions, and then I'll be
14 done with you, Mr. Kelly.

15 You mentioned that you had drafts of surveys done in other
16 states; is that correct?

17 A. We had the surveys, not drafts of, the actual surveys done
18 in other states. We had looked at Colorado, and we had looked
19 at North Carolina.

20 MS. FROST: Andy, can you pull up PX92?

21 BY MS. FROST:

22 Q. And, Mr. Kelly, I'd like to draw your attention to the
23 email sort of down on the bottom there.

24 Is that an email from you to Chancellor Hebda on Thursday,
25 June 24th?

1 A. Yes.

2 Q. And do you remember when the Governor signed the bill?

3 A. I believe it was right around the same time.

4 Q. And you write: *Perfect and for your records this is what I*
5 *shared with the team.*

6 Did I read that correctly?

7 A. Yes.

8 Q. And you say: *Among the materials attached, 2014 University*
9 *of Colorado survey;* is that correct?

10 A. Yes.

11 Q. And is that what you were just referring to?

12 A. Yes.

13 MS. FROST: Andy, can you scroll down to page 2 of the
14 attachment? Let's show him first -- no, no, down.

15 Let's show him first the first page of the attachment.

16 Okay. Great.

17 BY MS. FROST:

18 Q. And this is the University of Colorado Survey to which you
19 were referring?

20 A. Yes.

21 MS. FROST: And can you turn to page 2 of that
22 attachment, Andy?

23 BY MS. FROST:

24 Q. And do you see, Mr. Kelly, where it says that: *The Board*
25 *of Regents called for an objective and non-partisan evaluation*

1 *by a professional external survey company?*

2 Did I read that correctly?

3 A. Yes.

4 Q. No professional external survey company was involved in
5 developing the 2022 survey; correct?

6 A. Correct.

7 Q. And you see that there were specific requirements --

8 MS. FROST: Let's scroll down to the next section,
9 Andy.

10 Let's turn to the next page -- sorry -- the following
11 page.

12 BY MS. FROST:

13 Q. And do you see: *The survey was initially distributed on*
14 *April 2nd, 2014?*

15 Do you see that part of this document, Mr. Kelly?

16 A. Yes.

17 Q. And did I read that correctly?

18 A. Yes.

19 Q. And it says: *Shortly after its distribution, members of*
20 *the Faculty Senate expressed concern about certain aspects of*
21 *the survey, including a concern that questions within the survey*
22 *asked respondents to describe their employment units and social*
23 *identities at a level that would potentially reveal their*
24 *identities.*

25 Did I read that correctly?

1 A. Yes.

2 Q. And then do you see the next sentence explains that: *The*
3 *subcommittee considered the issues, decided to stop the survey*
4 *and further refined the survey instrument and relaunch?*

5 MR. LEVESQUE: Objection, Your Honor. Hearsay.

6 THE COURT: Well, ask him -- is this in evidence, this
7 document?

8 MS. FROST: It is.

9 THE COURT: So you're publishing it. So you can
10 publish it, and you could ask him to review it, but for ease of
11 reference, if you're asking him to comment on it -- so you can
12 either publish it or publish it and ask him a question or simply
13 publish it if it's in evidence.

14 Do you plan on asking him a question about it?

15 MS. FROST: I do, Your Honor.

16 THE COURT: All right. Fair enough.

17 You can -- you've published it, and now you can ask
18 him a question about it.

19 BY MS. FROST:

20 Q. Mr. Kelly, there was no faculty input in the survey that
21 the Boards distributed in 2022; correct?

22 A. Not that I'm aware of.

23 Q. There was no student input on the survey the Boards
24 distributed in 2022; correct?

25 A. Yeah, not that I'm aware of.

1 Q. You were certainly aware of concerns from faculty or staff
2 about the survey; correct?

3 A. Yes.

4 MS. FROST: No further questions, Your Honor.

5 THE COURT: Mr. Levesque, anything additional?

6 MR. LEVESQUE: Yes, Your Honor, just one or two.

7 REDIRECT EXAMINATION

8 BY MR. LEVESQUE:

9 Q. Mr. Kelly, I just want to clear up one issue.

10 The survey that you provided to Chancellor Criser, did you
11 personally draft that survey?

12 A. The whole survey, no. I gave feedback on it; other people
13 gave feedback; our other staff in the Governor's office gave
14 feedback to it.

15 Q. And so that was a survey that you edited, but you weren't
16 the primary drafter of that survey; correct?

17 A. Correct, yes.

18 MR. LEVESQUE: No further questions, Your Honor.

19 THE COURT: Anything additional?

20 MS. FROST: No, Your Honor.

21 THE COURT: All right. Mr. Kelly, thank you. Thank
22 you for your patience with us.

23 And I'm going to go ahead and say this because I've --
24 I'm astounded the number of times I have a high-ranking federal
25 or state person on the witness stand -- thank you for answering

1 the questions directly, not embellishing, not trying to give
2 speeches to talk about stuff that you weren't asked.

3 So I thank you for your professionalism on the stand
4 today.

5 Thank you.

6 THE WITNESS: Thank you, Your Honor.

7 (Mr. Kelly exited the courtroom.)

8 THE COURT: Mr. Levesque, are we done for the day?

9 MR. LEVESQUE: I think we're done for the day.

10 THE COURT: All right.

11 Mr. Wermuth, anything additional from the plaintiffs?

12 MR. WERMUTH: I think we're done for the day, too.

13 THE COURT: All right.

14 I appreciate everybody's hard work. I know it's been
15 a long week plus for y'all, and it's going to be even longer
16 when you have to generate your post-trial papers, but thank you
17 for your hard work.

18 Both -- Mr. Levesque, you've got two folks. What
19 order are you taking them in tomorrow?

20 MR. LEVESQUE: We will take up Bill McClay,
21 Dr. McClay, tomorrow morning first, and then it will be
22 Chancellor Hebda.

23 THE COURT: Do you realistically think we can get
24 through both witnesses tomorrow?

25 MR. LEVESQUE: Yes, sir, I do.

1 THE COURT: Okay. And, Mr. Wermuth, do you have any
2 reason to believe we're not going to get through those
3 witnesses?

4 MR. WERMUTH: I don't have a reason to believe we
5 won't.

6 THE COURT: So we're on target to get through those
7 witnesses.

8 We have a set of dates for closings and replies. We
9 have a date for oral argument set. The only other thing I'm
10 going to need from y'all is we can -- we're all at the end of
11 the day going to make sure that everybody is in agreement that
12 what exhibits have been admitted, what depo designations have
13 been admitted and that we create a record so it's easy not only
14 for me but any reviewing court to follow.

15 The other thing that I'll need to find out is a couple
16 of times I've said if anybody else wants to be heard on a few
17 evidentiary issues that you can be heard, so tomorrow is going
18 to be the speak-now-or-forever-hold-your-peace. If you want to
19 qualify or add something new, tomorrow would be the time do it
20 on any of those issues where I said I'd hear further argument,
21 okay?

22 Because what I do is I plan on finishing tomorrow with
23 the evidence, and then from there it'll be a question of
24 everybody knows what's on the record, what's in front of me, and
25 then it'll be up to y'all to make your arguments later; okay?

1 All right. Thank you again for your hard work and
2 patience. I hope everybody has a pleasant evening.

3 Court is in recess.

4 (Proceedings recessed at 4:27 PM on Tuesday, January 17,
5 2023.)

6 * * * * *

7 I certify that the foregoing is a correct transcript
8 from the record of proceedings in the above-entitled matter.
9 Any redaction of personal data identifiers pursuant to the
10 Judicial Conference Policy on Privacy is noted within the
11 transcript.

11 /s/ Megan A. Hague date
12 Megan A. Hague, RPR, FCRR, CSR Date
13 Official U.S. Court Reporter

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION**

WILLIAM A. LINK, et al.,)	
)	
Plaintiffs,	)	Case No: 4:21cv271
)	
v.	)	Tallahassee, Florida
	)	January 18, 2023
RICHARD CORCORAN, et al.,)	
	)	8:32 AM
Defendants.	)	VOLUME VII
)	

**TRANSCRIPT OF *EXPEDITED* BENCH TRIAL PROCEEDINGS
BEFORE THE HONORABLE MARK E. WALKER
UNITED STATES CHIEF DISTRICT JUDGE
(Pages 1586 through 1757)**

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P R O C E E D I N G S

(Call to Order of the Court at 8:32 AM on Wednesday,
January 18, 2023.)

THE COURT: We are back on the record for day seven of
the bench trial in 4:21cv271. I have all the parties present.

Mr. Levesque, it was my understanding yesterday -- and
if something has changed, that's fine -- that you had your
expert witness testifying first thing this morning followed by
Chancellor Hebda. Is that correct?

MR. LEVESQUE: That is correct, Your Honor.

THE COURT: All right. Any issues we need to take up
before we move forward with the testimony this morning?

MR. LEVESQUE: No, Your Honor. I would just bring to
the Court's attention the invitation related to the Rule 106
issue and the redacting of the affidavits and the issue with the
FSU Institute of Politics and whether they can be an agent.

THE COURT: Right.

MR. LEVESQUE: We'll be filing a short memorandum
to -- supplemental memorandum on that shortly.

THE COURT: Okay.

MR. LEVESQUE: So that should be coming over this
morning.

THE COURT: Certainly. And I'll review those at
lunch, and we can address it after lunch.

MR. LEVESQUE: Sounds good.

1 THE COURT: Okay.

2 All right. Anything additional, Mr. Wermuth?

3 MR. WERMUTH: Not at this time, Your Honor.

4 THE COURT: All right. You can call your next
5 witness, Mr. Levesque.

6 MR. LEVESQUE: The defense would call Dr. Bill McClay.

7 (Dr. McClay entered the witness stand.)

8 THE COURT: And while he's approaching the bench,
9 Ms. Frost, you're on deck; correct?

10 MS. FROST: Correct, Your Honor.

11 THE COURT: Doctor, if you'll please remain standing
12 and raise your right hand to be sworn by the courtroom deputy.

13 **DR. WILFRED MCCLAY, DEFENDANTS WITNESS, DULY SWORN**

14 THE COURTROOM DEPUTY: Please state your name and
15 spell your last name for the record.

16 THE WITNESS: Wilfred McClay. Last name is M-c
17 capital C-l-a-y.

18 THE COURTROOM DEPUTY: Thank you.

19 DIRECT EXAMINATION

20 BY MR. LEVESQUE:

21 Q. Good morning, Dr. McClay.

22 A. Good morning.

23 Q. Could you introduce yourself to the Court?

24 A. Yeah. I'm -- my name is Wilfred McClay. I'm currently a
25 professor of history at Hillsdale College in Michigan. I have

1 an endowed chair, the Hanson Chair in -- I always have
2 trouble -- Classical History and Western Civilization. It's a
3 long title, as these things tend to be. I've been there for a
4 year and a half.

5 Before that I had 36-some odd years of teaching in higher
6 education at other universities, which I can lay out for you if
7 need be.

8 Q. If you would.

9 A. Yeah. Okay. I started out at -- I got my doctorate from
10 Johns Hopkins, and I started out at Tulane University in New
11 Orleans where I was for 12 years, got tenure and promoted up
12 through the ranks.

13 And then after an interlude in which I was in Washington,
14 the Woodrow Wilson Center and then Georgetown as a visiting
15 professor, I took a position at the University of Tennessee in
16 Chattanooga and was there for 14 years, and then moved to the
17 University of Oklahoma in 2013 and was there for eight years,
18 with a sabbatical leave at Pepperdine University in the interim.

19 So that brought me to -- well, I should add that I actually
20 retired from Oklahoma, feeling that one should get out of the
21 way for younger people to come along. And then the president of
22 Hillsdale College made me an offer I couldn't refuse, so I went
23 there.

24 I went there for reasons that are beyond the scope of the
25 course -- of the trial, but I guess I will just say I have a

1 very strong interest in civic education and the need to renew
2 that, and that was something I was really brought in to be part
3 of at the college.

4 Q. And you mentioned interests. Can you describe your
5 academic interests?

6 A. Yeah. My field is intellectual and cultural history. I'm
7 an intellectual and cultural historian, which what does that
8 mean? That means I have an interest in ideas in history. I did
9 the genesis of ideas, the elaboration of them, the transmission
10 of them, the reception of them, which includes formal
11 educational institutions as part of its mandate, but it's by no
12 means exclusive to that.

13 So all of the ways in which ideas are generated, hashed
14 out, and effectuated -- or not effectuated in society at large,
15 these are my interests.

16 Q. And you mentioned that you're currently employed at
17 Hillsdale College. Can you describe Hillsdale College for the
18 Court?

19 A. It is a small liberal arts college with a nondenominational
20 religious identity affiliation. And it has very few graduate
21 programs. It's mainly an undergraduate institution, with a very
22 strong core curriculum, which I have always admired from afar,
23 and now I get to admire it from inside. But it's very small,
24 1,600 students, in a rather remote part of the country.

25 Q. Now, you've identified some of the universities that you've

1 taught at. Are some of those public universities?

2 A. Yeah. Most of my time in academia has been spent in public
3 universities and -- although I'm a product of my own education
4 of private universities primarily. But, yeah, the University of
5 Tennessee and the University of Oklahoma are both public
6 institutions.

7 Q. What positions did you hold at the University of Oklahoma?

8 A. I had an endowed chair in -- actually the title of the
9 chair was the History of Literature and the History of Liberty.

10 What was very nice about the job and a form of liberty was
11 that I didn't have a particular department. I was sort of what
12 they call a university professor. I was not assigned to a
13 particular department. So I could -- excuse me. I could
14 affiliate -- I had the permission to affiliate myself, formally
15 or informally, with whatever departments I wanted to in the
16 university, which was just great, and I had a wonderful
17 experience at Oklahoma. I got to teach courses of my own
18 devising. And I mainly taught, as it turned out, in the
19 Classics and Letters Department, which we were an unusual hybrid
20 of classics and sort of humanities, generally considered
21 traditional humanities courses.

22 Q. And what positions did you hold at the University of
23 Tennessee at Chattanooga?

24 A. I was what they call the Chair of Excellence in Humanities,
25 and this was something that I think really goes back to Lamar

1 Alexander when he was president of the UT before he became
2 Governor and then a Senator, that was an idea of using some
3 state funds to create these chairs that would attract
4 extraordinary talents to the UT system. And so I was a
5 beneficiary of that.

6 Q. Are there any other public institutions that you've taught
7 at?

8 A. Well, technically, I taught for part of a year at the
9 University of Rome in Italy, which is a public institution.
10 It's not an American public institution, but it is a public
11 institution. It's very much constrained by that fact in the
12 Italian environment.

13 Q. Have you authored any publications?

14 A. Oh, yes, yeah, yeah. I have books, articles. I think
15 my -- probably my best achievement in this regard is I published
16 a book called *The Masterless: Self and Society in Modern*
17 *America* is the subtitle. And it got a lot of recognition,
18 including winning the Merle Curti Award of the Organization of
19 American Historians, which is the highest honor -- in my field,
20 it's the most prestigious book award. And it's actually awarded
21 only every two years.

22 So I think a glance at the list of those who have won it --
23 anybody who knows the field, it's a very impressive list of
24 people. So I'm very happy to be part of that.

25 And *The Masterless* has remained in print. It was published

1 in 1994. It's remained in print. Periodically, I pass through
2 the University of North Carolina Press, you know, You're going
3 to keep this in print now? Oh, yes. So I'm very happy about
4 that. It's proven to be a sort of mainstay in the field.

5 And I've published a number of other books, some of which
6 are -- a book that I just recently published that is, I think,
7 having a lot of influence is a U.S. history textbook called *Land*
8 *of Hope*, which represents some of my interests in restoring a
9 more balanced sense of American history as part of understanding
10 an education in American history, a civic education.

11 So there's a number of collections that I have -- essays
12 that I've edited -- curated, edited; one called *Figures in the*
13 *Carpet, Finding the Human Person in the American Past*, which was
14 a big, long project sponsored by the Pew Charitable Trusts, in
15 which I was able to bring in a lot of top scholars to look at
16 this question of how to understand personhood in the context of
17 American history. And that was a -- if it's relevant, that was
18 a peer-reviewed publication.

19 I have a book called *Religion Returns to the Public Square*,
20 which I coedited with Hugh Heclo of Harvard, and it was kind of
21 built around my essay "Two Concepts of Secularism," which
22 originally appeared in a journal called the *Journal of Policy*
23 *History*.

24 And it deals, by with way, with some of the issues at least
25 adjacent to the things we're here to talk about; that is, what's

1 the proper way to teach about religion in a nonreligious
2 environment, for that matter, in a religious environment, how to
3 teach about other religions in a sectarian school. So how do we
4 understand secularism? Is there a way of understanding
5 secularism that encompasses all of that? That's really what the
6 essay is about. So the book that came out of it was published
7 by Johns Hopkins Press, obviously a peer-reviewed publication.

8 And, you know, I have -- I don't know whether we'll have a
9 chance to talk about this later, but I have a number of
10 publications about David Riesman whom I've been working on a
11 biography for several years. David Riesman may be known to some
12 of you as the author of a book called *The Lonely Crowd*, which
13 was the most -- the best-selling work of sociology, actually,
14 still in the history of the discipline, which is, for some of
15 us, not exactly a commendation, but it is what it is.

16 But Riesman later in his career -- he's a wonderful man. I
17 got to know him and interviewed him for about two or three hours
18 for this biography. He became interested in the sociology of
19 higher education -- of education and then of higher education
20 specifically. So I think working on that project and working
21 with him was a very important part of my own development, my
22 thinking about these issues.

23 So that's -- there are several articles in the CV, some of
24 which are for general -- there's one in *The Wilson Quarterly*
25 that's actually for general readers, and there's one in the

1 *Journal of Education* that is peer reviewed.

2 So if I may just say just in passing, that's -- I've always
3 tried to balance my scholarly identity with having a sort of
4 public role in -- I think scholars should, to the extent that
5 they can, make the results of their work available and
6 accessible to the general public, to people who are
7 nonspecialists.

8 And I do that for a couple of reasons. One is I think we
9 have an obligation -- you know, we may get into this later, I
10 hope -- that the university is a special institution. We have a
11 kind of dispensation from our society to go into ticklish,
12 difficult, uncomfortable subjects. That's part of what we're
13 here to talk about.

14 Q. We'll get to that in a moment.

15 A. Yeah. Okay. And I want to try to translate that to a
16 larger audience too.

17 Q. You mentioned peer reviewed. Can you identify just a few
18 of your articles that have been peer reviewed and published?

19 A. Oh, yeah. I mean, I have articles about John Burgess in
20 *Polity*, with an important article in *History of Ideas*, and
21 Burgess -- I don't want to go into telling you what it's about.

22 And I did a lengthy introductory essay to a reissue of
23 Walter Lippmann's book *The Phantom Public* which was peer
24 reviewed.

25 And I've written for the *Journal of Modern Intellectual*

1 *History* on a number of occasions, including an essay about
2 popular culture and the evolution of popular culture. It
3 reflects that aspect of my work, my interests, you know.

4 Q. Have you received any recognition for your pieces?

5 A. Oh, from -- you mean aside from the Curti Award?

6 Q. Yes.

7 A. Yes. I mean, I've been anthologized and that kind of thing
8 and -- not in a sense of formal prizes for articles, no. I
9 can't think of any.

10 Q. Have you served on any editorial advisory governing boards?

11 A. Oh, yeah, a long list of them: *American Quarterly*, which
12 is the standard in the field of American studies. It's the
13 journal of record, scholarly journal of record. A number of
14 other editorial boards, you know, *The New Atlantis*, the *National*
15 *Affairs*. You know, they're all in the CV.

16 Q. Were you also on the board of the National Endowment for
17 the Humanities?

18 A. Oh, yes, yes. That was a -- yeah. For 11 years I went --
19 until recently, I was the longest-serving member in the history
20 of the endowment. But, no, the board of the National Endowment
21 for the Humanities, I served two terms. And, in fact, the
22 second term was -- there's a sort of tradition that you don't
23 step down from the council until your replacement has been
24 appointed. And so I dutifully kept showing up for meetings for
25 two and a half years until after President Obama was reelected.

1 For some reason, at that point they chose to make new
2 appointments to the NEH board, and then I was able to finally
3 leave. But, yeah, I was on it for a long time, chaired a lot of
4 committees, was very involved, very committed to the work of the
5 NEH.

6 Q. And have you been the recipient of any fellowships in your
7 fields?

8 A. Yeah. I actually did -- I got a fellowship from NEH long
9 before I became a board member, and I've got a fellowship from
10 the Woodrow Wilson International Center for Scholars in
11 Washington, National Academy of Education. I was a Danforth
12 fellow. Those of you old enough to remember the Danforth
13 fellowships, which we used to be sort of on par with the Rhodes,
14 but now no one remembers them, but they were a very good
15 four-year graduate fellowship.

16 MR. LEVESQUE: Your Honor, at this time we would
17 tender Dr. McClay has an expert in intellectual and cultural
18 history in the United States, including the history of education
19 in educational institutions.

20 THE COURT: Ms. Frost, do you wish to voir dire the
21 witness?

22 MS. FROST: With the Court's permission, I'll reserve
23 for cross.

24 THE COURT: All right. Thank you.

25 Counsel, you may proceed.

1 BY MR. LEVESQUE:

2 Q. Dr. McClay, were you retained as an expert in this case?

3 A. Yes, I was.

4 Q. What was the scope of your engagement?

5 A. Really primarily concerned with the law, HB 233 and its
6 provisions, particularly regarding the survey of intellectual
7 freedom and viewpoint diversity and the antishielding provision.

8 Q. And so, at least today, you are not offering an opinion on
9 the recording provision, are you?

10 A. No.

11 Q. We'll get into it in more detail later, but will you share
12 with the Court the scope of the opinions you intend to share
13 today?

14 A. Well, I want to stress how important to the success of
15 higher education, in particular the education of undergraduates,
16 since that's one of my principal concerns, increasing concern,
17 as opposed to graduate education, the professoriate. I'm
18 concerned about all of these things, but I'm especially
19 concerned about the undergraduate education, undergraduate
20 experience.

21 So why is viewpoint diversity important? What purpose does
22 it serve in the formation -- and we don't often use that word in
23 undergraduate education, but the formation of undergraduates.

24 Why is intellectual freedom important?

25 And is there a way that we can think about getting data

1 that's helpful to us in assessing how well we are doing in those
2 areas and thinking about where we -- where we need to improve,
3 where we can improve.

4 So that's a big part of my interest here is how do you
5 create -- how do you create a better climate on campus. I think
6 that one of things that's very hard to dispute is that the
7 intellectual, emotional, moral vitality of campus life is not
8 what it should be. It certainly was not -- is not what it was
9 when I began my journey in higher education. It's not all it
10 could be. So what can we do to improve it?

11 And I was drawn to this effort, this particular effort,
12 this particular bill, because it did seem to me to begin to
13 address something that I see as a problem. As I say repeatedly
14 in my report and deposition, I do not yet see it as a crisis,
15 but I see it as a very serious problem.

16 Q. Okay.

17 A. And just to say that I think it's something we can deal
18 with.

19 MR. LEVESQUE: And if we could pull up Joint
20 Exhibit 1.

21 THE WITNESS: Is that supposed to come up on -- oh,
22 here it is, yeah. Okay.

23 BY MR. LEVESQUE:

24 Q. Do you recognize that, Doctor?

25 A. I do.

1 Q. What is that?

2 A. It's the language, the text of the bill, of House Bill 233.

3 Q. And are you familiar with how the bill defines intellectual
4 freedom and viewpoint diversity?

5 A. Well, here's the definition: It's the exposure of
6 students, faculty, and staff to, and the encouragement of their
7 exploration of, a variety of ideological and political
8 perspectives.

9 Am I talking too fast? I'm sorry. I'll try to slow down.

10 Q. Is this concept a new concept?

11 A. No. No, not at all. And I won't bore everybody by going
12 professorial and talking about the medieval university, but it's
13 always been a view that ideas -- the truth of ideas, the
14 validity of ideas is tested by the encounter with opposition,
15 with alternatives, with different explanations of the same
16 phenomenon. I mean, going back as far as Thomas Aquinas and his
17 exposition and his various treatises, it's full of this
18 contention. He would not have called it intellectual diversity
19 or viewpoint diversity. We have that term now. But it's
20 really, I think, the same kind of thing.

21 And in the earliest years of the American Association of
22 University Professors, the idea that the professor in the
23 classroom had an obligation -- did not need to conceal his own
24 or her own opinions, but needed to -- as a part of the good
25 faith responsibility, the professor, to make sure that his or

1 her class was apprised of the fact that there were opposing
2 points, respectable, or even unrespectable, opposing points of
3 view that they should be aware of; that there's not one -- one
4 solid monolithic truth to which all pay obeisance.

5 Q. You mentioned the American Association of University
6 Professors. Do they -- in their publications, do they use the
7 term "viewpoint diversity"?

8 A. I couldn't tell you whether they do now. It wouldn't
9 surprise me if they do. A lot of people use the term.

10 Q. Is that concept, though, wrapped up in their positions?

11 A. I don't think so. I don't feel comfortable pronouncing in
12 any detail on what their positions are now. I think at the time
13 of their foundation a hundred years ago, a little over a hundred
14 years ago, it was -- even though the term didn't exist, it was
15 part of their concern, that a variety of perspectives be
16 presented to students.

17 I think -- if I could make a generalization, I think the
18 AAUP is, as its title implies, mainly concerned with the
19 interests of professors and as a group, which is perfectly all
20 right, but it does mean that there's less concern about issues
21 of the -- to the curriculum, except insofar as they affect the
22 interests of professors.

23 Q. And --

24 A. As a professor, you know, we do have interests. I'm not
25 denying that. But I think -- I don't think that they have the

1 breadth of vision about higher education in general as a social
2 institution that I would like to see.

3 Q. Was the concept of viewpoint diversity present in the
4 declaration of principles that they originally put out shortly
5 after their formation?

6 A. I think it was implicit, but it was not -- it was not a
7 term. And, you know, I'm generally very fussy about language,
8 about how a particular term -- particular usage always puts a
9 particular spin on the concept. They're not interchangeable.
10 Translation from one language to another is always fraught.

11 But I think the concept that students should be made aware
12 in areas where legitimate debate exists -- this is not saying
13 that students should have -- should be presented with the theory
14 that the moon is made of green cheese or that the earth is flat,
15 or what scientific -- pseudoscientific notions that are
16 superseded. But in areas of -- dealing with most of what the
17 humanities deal with and questions -- philosophical questions of
18 morality, how to warrant truths, all of these kinds of things
19 that there are vigorous debates going on and that they -- they
20 certainly can take a position with respect to those debates and
21 in the classroom take a position, but also have a kind of
22 responsibility, fiduciary responsibility, you might almost say,
23 to students to give them as large a sense of the whole picture
24 as they can.

25 Q. Now, as defined in the bill, is intellectual freedom and

1 viewpoint diversity important in higher education?

2 A. Oh, yeah. Oh, yeah. I mean, I think you don't really have
3 a university as such, a Western-style university -- I mean, in
4 terms of the Western civilization -- if you don't have
5 intellectual freedom, the freedom to pursue subjects and engage
6 in speech as you see fit in ways that are relevant to the
7 subject at hand. That's the nature of the university.
8 Particularly, the modern university is devoted to the idea of
9 freedom of inquiry. This is a principle that's enunciated.

10 It's not just the AAUP. In the famous speech by William
11 Rainey Harper, the University of Chicago -- I think it's for the
12 tenth anniversary of the university, 1905 -- he says that, you
13 know, the right of free speech is at the heart of what we're
14 about in the university. It can't be abrogated.

15 So I think this has been around for a long time, the notion
16 that it is the freedom of the mind, the freedom of the
17 unencumbered search for truth that's at the heart of what's
18 unique and distinctive about the modern Western university. And
19 not only Western, but it's a Western model.

20 Q. And you mentioned that search for truth. Is there also a
21 benefit for students going through that process?

22 A. Yes, yes. I think -- you know, again, these are ideas that
23 are very old, you know. I don't know whether people still read
24 John Milton's *Areopagitica*, which is one of the great odes to
25 free speech, but he says in that repeatedly -- John Stuart Mills

1 says the same thing in *On Liberty*, another classic -- that you
2 come to -- a student can come to a firmer, more rational, more
3 rationally deliberated-upon understanding of their own views if
4 they have to deal with a serious challenge to them, either in
5 the form of a direct polemical challenge as in a debate, or in
6 just reading an alternative account, saying, Oh, gee, if you
7 began with different premises, would you arrive at a different
8 conclusion? Think all that through.

9 It can be discombobulating, and one of the reasons why I
10 think the notion that we can't make comfort, the comfort of
11 students, the sine qua non, the ultimate objective or the thing
12 that cannot be violated is that it is going to deprive them of
13 the -- what we believe, we in higher education believe, is the
14 improvement of their thinking by being confronted with
15 perspectives that -- they maybe don't necessarily make them
16 uncomfortable, but they might make them uncomfortable.

17 And we don't do this just for the sake of making them
18 uncomfortable out of some sadistic pleasure in upsetting
19 people's settled views. We do it to get them to think. And
20 that's the bottom line is that, you know, we have this -- say
21 this expression, liberal education. And I think a lot of people
22 think it means lots of courses in humanities or lots of courses
23 in different disciplines. No. It's really and its base is
24 about education for liberty, for the genuine exercise of our own
25 intellects, without the imprisonment and the prejudices in which

1 we are brought up, of our surrounding culture, whatever it is.
2 It is the mind set free.

3 That's what liberal education is for, to make us free, not
4 necessarily to teach us that everything we were ever taught is
5 totally wrong, and we should adopt some sort of revolutionary
6 view of the world. No. It's that we can substitute informed
7 commitments for uninformed prejudices.

8 So that's what I understand, and that's the way I operate,
9 the way I teach. That's what I understand liberal education to
10 be is an education for freedom, a freedom of thought. And I
11 think this is just as true in colleges as it is in universities
12 that have graduate programs with advanced research and all that.
13 That same principle, intellectual liberty, to come back to your
14 question, is very important.

15 Q. Now, does the public at large have an interest in ensuring
16 intellectual freedom and viewpoint diversity at colleges and
17 universities?

18 A. Yes, because they have an interest in the university being
19 what it was made to be. And sometimes the public is not
20 comfortable, if I may put it that way, with the -- one of the
21 authors I referred to in my report, Martin Crowe, a sociologist
22 who I got to know through my Riesman work, says that he thinks
23 there is a kind of treaty, a sort of mutual understanding,
24 between -- in the best of circumstances, between society and the
25 university that we do things. We do engage in research projects

1 that may seem outlandish.

2 You know, there have always been people like Senator
3 Proxmire -- and I forget who the current guy is doing it -- who
4 like to make fun of grant-giving to projects, in the social
5 sciences usually, but -- so a lot of some of what we do to the
6 outside world looks strange, threatening, whatever.

7 C. Vann Woodward in his wonderful 1975 intellectual
8 freedom -- he wrote most of it. It's a committee -- it's a
9 piece of committee work, but for Yale, because of the
10 controversies about free expression and the role of it in the
11 campus, he says the university is a place where, you know, we
12 should be able to think the unthinkable, challenge the
13 unchallengeable, and so on, you know, to do the things that
14 can't be done in society at large. That's a part of our
15 mandate.

16 But part of the deal also is that we confine what we do to
17 our world, so the intellectual -- the kind of intellectual
18 diversity that goes on in the university may be much broader
19 than the intellectual diversity -- or viewpoint diversity or
20 intellectual freedom that you see in society at large.

21 That's part of our mandate; that the university is a place
22 where you can kind of -- we can explore. We can sort of frolic
23 in the productions of the mind. It's a special place. And
24 society, I think, in the West, because we value innovation, you
25 know, the freedom of the mind in a general way, we, obviously,

1 are going to value the preservation of that institution which
2 most vividly embodies that principle. And I think that's the
3 university.

4 So this was Woodward's counter to the idea that there
5 should be restrictions. And it was the same issues. It was the
6 issues of sometimes the speech makes people uncomfortable, ideas
7 make them uncomfortable. And Woodward points out that, you
8 know, the university is a special place. It's not -- we're not
9 here to be comfortable. We're not here to -- now, universities
10 now sell a lot of their -- you know, a lot of their recruitment
11 of students is based on how wonderful their gym is and how --
12 you know. it's just like being in seventh heaven to be at the
13 "University of Cushiness."

14 But that's not really what we should be about. I'm not
15 going to dump on the admissions department for doing what they
16 have to do to fill classes, but that's not really what we're
17 about. We're about discomforting, if need be, the settled views
18 of our incoming students. And they should come out with a
19 sense -- and this is one of the things I find most disturbing --
20 me just personally find most disturbing in recent years -- is
21 that with a kind of deep civility with respect to debate and
22 discussion that recognizes the existence of others, the
23 existence of other opinions. And you may be thoroughly
24 convinced at the rectitude of your own opinions, but part of
25 being -- part of being a civilized human being is to recognize

1 that you could be wrong.

2 This was a great theme of Anthony Lewis, who was a
3 famous -- probably unknown to my students now, but a famous
4 civil libertarian of a previous generation, who wrote a book
5 with the title -- drawn from Holmes, you know -- Protecting
6 Speech That We Hate [sic].

7 So that's putting it very strongly, but I think that's part
8 of what we need to be about. And we need to be conscientious
9 about recognizing the obligations and also freedoms that special
10 status imposes on us.

11 Q. Now, does viewpoint diversity require a university or a
12 college to employ professors from every conceivable school of
13 thought?

14 A. Well, I sure don't read it that way, and I don't understand
15 it that way. And I wouldn't support a sort of -- a list of all
16 the positions: You must have a monarchist professor in the
17 political science department; you must have a radical Marxist
18 critic of evolutionary biology. You know, these people exist.
19 And the bill, I think, does not want -- wants to discourage the
20 shielding of students from exposure to those ideas, but it
21 doesn't mandate anything with regard to content. And it doesn't
22 say, Okay, you've got to get hopping and hire a monarchist or
23 whatever in the political sciences.

24 That might be nice to have -- however kooky such a person
25 might be, it might be nice to have someone on the faculty who

1 expresses in a cogent way that point of view and defends the
2 Queen and all that sort of thing.

3 But this is not a mandate to say you've got to have
4 these -- you've got to have conservative Republicans, you know,
5 dominating the political science department. No, it doesn't. I
6 think it's very hard to see the bill as saying anything like
7 that.

8 It's not -- the way I would put it -- this is not legal
9 language -- but it's not prescriptive. It doesn't prescribe
10 anything. It's -- subtractive maybe would be the opposite of --
11 scratch that. I'm not sure that's a good way to put it. But
12 its -- its intentions are negative rather than positive.

13 Q. Are you aware of movements or events in higher education
14 nationally that would threaten a student's exposure to diverse
15 viewpoints?

16 A. Oh, yeah. Oh, yeah. I think that we could -- there's
17 quite a list one can make of all the incidents on campuses. We
18 had incidents at Oklahoma when I was there, some worse ones
19 since I've left, which I'm not drawing a cause-and-effect
20 relationship there, but I keep an eye on -- I have a great
21 affection for the place, and I keep an eye on things.

22 We had a number of incidents that are probably not worth
23 recounting in detail, but there also were nationally a long list
24 of speakers, invited and disinvited, to speak on college
25 campuses. That notorious instance at Berkeley with Milo

1 Yiannopoulos -- I can never get his name -- Milo -- Milo.

2 Q. Yeah.

3 A. Milo. Milo. Milo the Greek.

4 And Heather MacDonald at Claremont, Claremont McKenna
5 College, another example. And one that, actually, I was
6 concerned about myself is Charles Murray, the sociologist,
7 controversial sociologist, although most of the controversy is
8 from 25 years ago, his book *The Bell Curve*, but --

9 (Reporter requested clarification.)

10 THE WITNESS: Twenty-five years ago, the book that he
11 published 25 years ago, *The Bell Curve*.

12 Although that had faded away, but he gave a talk at
13 Middlebury -- I'm sorry. I've really got to slow down for your
14 sake.

15 He gave a talk at Middlebury or was scheduled to give
16 a talk. He was invited by a professor named Allison Stanger,
17 S-t-a-n-g-e-r, in the Political Science Department, who was
18 going to debate him, who's a strong liberal -- still is, hasn't
19 changed her views at all -- but wanted to debate him about some
20 of the implications of his work relating to the White working
21 class, which has been the focus of a lot of his work recently,
22 and the decline of the White working class.

23 And it -- so he -- he was scheduled to give a
24 presentation. He showed up. Professor Stanger showed up. The
25 auditorium was packed with opponents of Murray who turned their

1 back to him, jeered at him. He tried to speak for, I think, 20
2 minutes -- there's actually a tape of it out there -- and
3 finally they left and went to another location, tried to do the
4 lecture and colloquy through closed-circuit TV, were not able to
5 do that.

6 So eventually the event was entirely private
7 because -- and this was not just the students at Middlebury, but
8 they had brought in -- and the exact way this happened, I don't
9 know -- but they brought in Antifa activists from Burlington
10 where the University of Vermont is, a bigger student population,
11 and they were the main culprits in this, although it was hard to
12 sort out. There were students who were punished and expelled,
13 and so on, for their participation in all this.

14 That was a -- and Allison Stanger was injured by the
15 crowds that were chasing them, and this was particularly -- I
16 just could add a personal note. I was scheduled to give a
17 lecture in Middlebury in two and a half weeks after this
18 incident. Members of my family, my son, would say, Don't go,
19 Dad. And I said, Look, nobody knows who I am.

20 Charles Murray is a celebrity, but -- so -- and I had
21 a wonderful experience, I have to say, but part of that
22 experience was I had a breakfast that lasted for four hours with
23 a group of about 20 students who wanted to talk to me about what
24 had happened and give me some complicating factors. So I
25 learned a lot more about the atmosphere at Middlebury, none of

1 which was encouraging with regard to the issues we're talking
2 about today. So, you know, this is a big problem.

3 And I think one of the things that I've seen is --
4 because I've actually had res -- I had responsibilities in both
5 Oklahoma and Tennessee for speakers bureaus. Actually, a big
6 part of my job in Tennessee was I ran public programs.

7 And people talk about chilling effect, and I -- it's a
8 little bit of a cliché at times, but there's definitely a
9 chilling effect when you think about speakers, you know,
10 interesting people that I know. The names may not mean anything
11 to people here, but -- and bringing them in to be -- I -- Mark
12 Stein, for example, is somebody I happen to know, very
13 provocative, flamboyant but interesting speaker. And I explored
14 the possibility of bringing him to Oklahoma, and everybody was
15 for it except we just -- the people felt the possibility of
16 trouble was too great.

17 And this happens again and again that you just in
18 quiet ways maybe you don't even suggest certain names after
19 awhile because you recognize that the -- that, for whatever
20 reason, the people in charge of the university can't and won't
21 guarantee the safety of the speakers or the integrity of the
22 event. And this is -- going back to our -- this is all
23 amendable, but going back to our particular interest, it's
24 amendable because it deprives students. As Mill would call it,
25 a double deprivation.

1 (Reporter requested clarification.)

2 THE WITNESS: John Stuart Mill would call it a double
3 deprivation on liberty because it's a deprivation of the speaker
4 having the right to speak, the right to that intellectual
5 liberty, but it's -- more importantly to us, it's a deprivation
6 to students. The students can't hear that perspective and
7 object to it and hone their own thoughts in relationship to it.
8 So I think -- and I was just reading -- this is something I just
9 encountered I want to throw in here.

10 BY MR. LEVESQUE:

11 Q. Let me stop you there --

12 A. Okay.

13 Q. -- and ask another question.

14 A. Okay.

15 Q. Are you aware of any literature suggesting there may be
16 trends beyond some of those anecdotes that you just shared?

17 A. Oh, sure.

18 Yeah. And I think this is where, again, our interest in
19 generating data, finding some way to measure how intellectual
20 freedom is doing on our campuses, on Florida's campuses -- I'm
21 not a Floridian -- but how is viewpoint diversity doing? How do
22 we measure those things? Can we find a way to do that? And I
23 think there's some encouraging precedents out there.

24 The Heterodoxy people have -- which I talk about in my
25 report, have devised an annual test that they administer to give

1 a sense, sort of a reading of the temperature on these issues
2 that is being used by other institutions, colleges, and
3 universities, and that I think is a good example of -- that may
4 not be perfect, and I'm not here to testify about the best way
5 to make up a public opinion survey, but a good example of not
6 only movement in this direction but the felt need among
7 institutions, other than those in this state, to get this kind
8 of data.

9 Q. And how would you describe what -- or, for the Court, can
10 you describe what Heterodox Academy is?

11 A. Oh, yeah. That's a good thing. Thank you.

12 Heterodox Academy is an organization -- I don't belong to
13 it. I'm not really sure why, because I admire them, but I'm
14 just not much of a joiner. But Heterodox Academy is an
15 organization of highly diverse, I would say mainly
16 left-of-center, individuals. Jonathan Haidt of NYU, the
17 psychologist, is one -- he's one of the founding figures in the
18 movement.

19 And they're concerned about exactly the issues we're
20 talking about, about the loss of intellectual freedom, the loss
21 of freedom of discourse, of debate, of pluralism of opinion,
22 respect and toleration -- excuse me -- of a variety of opinions
23 on campus. That's their concern, so hence Heterodox. I mean,
24 they're opposed to intellectual orthodoxies on campus, and I
25 think that's why they have that name. It communicates that very

1 well.

2 So there are conservatives in it. There are radicals.
3 There are liberals. They're all over the place, but the main
4 thing they're concerned about is I think the same thing we are
5 here in discussing this bill is what's the climate on campus?
6 It's not a question of just of individuals. It's a question of
7 culture, of what kind of intellectual culture do we have now on
8 campus, and do we have -- using the law -- which is a blunt
9 instrument very often -- but using the law to improve the
10 situation. And I think they're not directly concerned with that
11 sort of proposing and propounding legislation. They're mainly,
12 I think, interested in saying -- laying out the contours of the
13 problem, and in that sense I think they're very useful. And
14 they also, I think, suggest that you may have to experiment a
15 lot to come up with the right formula for measuring these
16 things, but we've got to try. And I think they've made a very
17 valiant and valuable effort in that direction.

18 Q. And are there institutions that are assessing intellectual
19 diversity and campus climates drawing from that Heterodox
20 Academy?

21 A. Yeah. Yeah.

22 I have some of that in my report. There's a range of
23 institutions that -- I'm trying -- George La Noue is -- has --
24 in his studies at the University of Maryland has outlined some
25 of this. I'm just drawing a blank now on some of these --

1 Q. Did his --

2 A. -- community colleges or --

3 THE COURT: You can certainly hand the witness his
4 report as well if he needs to refresh his recollection.

5 MR. LEVESQUE: Your Honor, may I approach?

6 THE COURT: Sure.

7 And, Doctor, you can have a copy of your report, and
8 if at any point you need to refer to it, you certainly can.
9 This is not a memory test.

10 THE WITNESS: Okay.

11 THE COURT: And if you'll just let us know when you
12 need to refer to the report.

13 THE WITNESS: Thank you. Thank you. Yeah.

14 Case Western Reserve -- that's the place I couldn't
15 think of -- is making use of them. Linn Benton Community
16 College. Yeah, George La Noue is studying North Carolina higher
17 education, and he uses Heterodox Academy. La Noue has a really
18 excellent book on all of this that I actually came across after
19 doing this report, but I -- so I won't go into it, but it's --

20 Yeah, ACTA, American Council of Trustees and Alumni,
21 have a report, *Building a Culture of Free Expression on the*
22 *American College Campus*, which draws on Heterodox Academy data.
23 So, yeah.

24 BY MR. LEVESQUE:

25 Q. And did you also look at reports from the American

1 Association of Colleges and Universities?

2 A. Yeah. Yeah.

3 That's -- yes, that's an organization, a membership
4 organization, that is -- that's actually primarily concerned
5 with undergraduate education. That's kind of their focus, and
6 they have mainly an institutional membership, but there are
7 individual memberships as well, just so we have a sense of what
8 it is.

9 Yeah, they've done a survey, and, you know, I think there's
10 troubling -- not necessarily dispositive -- but troubling data
11 coming out of their survey that -- to the effect that only about
12 a third of respondents feel confident about their ability to
13 speak freely in the campus context.

14 And, you know, there's another percentage that's sort of --
15 it's slightly confident, that's not in the negative side, but
16 not strong, and you'd like to see --

17 THE COURT: Doctor, let me ask you a question. Help
18 me measure. You've said that -- that this is not about comfort
19 in another context earlier. So when we have these surveys, and
20 from your perspective of reviewing this literature, how do we
21 test, how do we know, how do we construct a survey so that we --
22 the pendulum doesn't swing in the other direction? That we have
23 people that are overly sensitive saying, I don't feel like I can
24 speak, and it's not really a legitimate response as opposed to,
25 it's you're being hounded, yelled at or otherwise criticized if

1 you don't speak. So it seems to me that the comfort sort of
2 issue can go both ways.

3 Do the studies account for that, why you feel
4 uncomfortable?

5 THE WITNESS: Yeah, that's a really good question. I
6 think -- you know, I think by and large they don't. And I think
7 that's an issue that has to be -- you know, there are --

8 THE COURT: I only ask because I had classmates in
9 college or law school that if you said, Boo, they'd cringe and
10 roll into a fetal position, and so I just -- it's interesting to
11 me how we would account for that.

12 THE WITNESS: Oh, yeah. You know, it's -- this is a
13 really great question because it is -- if part of our point is
14 to downplay the issue of comfort, then what if people answer a
15 survey that they don't feel comfortable expressing their opinion
16 in a way that reflects a discomfort that they maybe ought to
17 feel or that's part of the process, and it's difficult to
18 disentangle those things.

19 I have in my -- routinely in my syllabi I have the
20 long discussion -- I'm not sure the students always read it --
21 about class participation, and I say, you know, this is really
22 important. It's a small class. I generally have had the
23 blessing of small classes, and I do at my present employment.

24 It's a small class, there's nowhere to hide, but you
25 should feel comfortable in expressing your opinions. However, I

1 do include something because I was sort of a shy student myself
2 and that I won't be -- if it's very difficult for you, come see
3 me at office hours or understand that I'm not going to judge you
4 solely and exclusively on this like some people.

5 THE COURT: In terms of solutions and pedagogical
6 solutions, it would -- and if I'm not using that term properly,
7 you can let me know -- it would seem to me that that's kind of
8 addressed in the law school setting. It's called the Socratic
9 method, which I didn't have the luxury of being shy. I didn't
10 have the luxury of --

11 THE WITNESS: No.

12 THE COURT: -- shutting down a viewpoint. The
13 professor just called directly on me, and that's done for a
14 variety of reasons, but it seems to me that that's one practical
15 way of structuring your classroom, and your discussions, that
16 not only promotes different viewpoints from different students,
17 but forces those students to speak up.

18 I know that's not necessarily a cure-all or a panacea,
19 but it would seem to me that professors do have some arrows in
20 their quiver or tools in their toolbox to address that very
21 thing, if they decide to employ those tools.

22 THE WITNESS: Yeah. And it's the old -- I mean, I
23 think people -- even if somebody has seen the movie *Paper Chase*
24 or something like that, they know that law school's not a
25 picnic. They know that -- they should know -- maybe a lot of

1 them don't, I don't know. I've had students go off to law
2 school, but I just can't think -- I hope they survived, but,
3 yeah, I think one has a sense that law school rules are
4 different, you know? That the rules are harsher because it's
5 preparing you for an occupation in which you give and get no
6 quarter.

7 THE COURT: Don't other systems and other schools -- I
8 mean, don't a number of English institutions, undergraduate, do
9 the same things in terms of how they organize their
10 undergraduate classes by focusing on pressing questioning and
11 discussions?

12 THE WITNESS: Maybe. I mean, I think more of the
13 tutorial system, which is a very intimate relationship with one
14 professor, but sure it's possible. It's possible. And there
15 are institutions that have elements, I think -- just blue sky
16 here but, for example, Swarthmore has always had for the senior
17 thesis, the big capstone project. The student has to submit to
18 a public oral examination which includes, in fact, mainly
19 includes, faculty from other institutions who have no stake at
20 all in saying, Well, we all know Gordon and he's a nice guy and
21 so we're going to kind of let him go.

22 No, it's -- so it's very tough, and I think probably
23 not as tough as it used to be because the standards have tended
24 to decline all over, but, yeah, there are -- there are
25 institutions I can think of that build in a bit of an

1 adversative element, and you can do that.

2 I think there we're talking about the kind of revision
3 of the academic enterprise that's really not the business of the
4 law, the legislature, in my opinion, to do. I -- one of the
5 things I say repeatedly in my report is I think this is pretty
6 modest and it --

7 THE COURT: Well, let me ask you this: When the
8 concept of curriculum and the unfettered right of the state of
9 Florida to control the curriculum, from your perspective, where
10 does curriculum start and stop? And where does the structure or
11 the class and the presentation of materials in the class begin
12 and stop?

13 THE WITNESS: How much does something like a general
14 education curriculum that's prescribed on the institutional
15 level, how much does that affect the way I teach my class? I
16 think that affects it if the class is part of the general ed
17 curriculum. If I'm teaching, you know, Math 101, you know, I
18 have to do what -- achieve the institutional objectives.

19 THE COURT: And I guess that's what I was asking. So
20 you would define curriculum for your purposes in academic in
21 terms of you got to teach this course material, and you've got
22 to cover these topics, and there are these benchmarks that
23 you've got to make. Whether it's math, or whatever the subject
24 is, you've got to cover these topics, and expose your students
25 to these principles, or cover this type of material. Is that --

1 THE WITNESS: Yeah. Yeah. And, I mean, there are a
2 lot of very good places or very reputable places that don't have
3 a curriculum. I mean, last I knew Brown University doesn't
4 really have a curriculum in the full sense of the term.

5 Tulane didn't have a curriculum when I was teaching
6 there. I was part of the failed effort to institute one, but I
7 thought it was something they needed.

8 THE COURT: And by that you mean, like, Brown has the
9 idea that you can create your own major and combine different
10 disciplines and you propose what your major is going to be?

11 THE WITNESS: Right.

12 THE COURT: You don't have to take a set number of
13 class -- you have to take a certain number of classes, but you
14 don't have to take -- like at UF you have to take two history
15 classes --

16 THE WITNESS: Yeah.

17 THE COURT: -- two biology classes, two chemistry
18 classes, et cetera. Brown doesn't have those sort of strict
19 requirements. You sort of create your own major, and while you
20 may have to take a certain amount of classes, they don't have to
21 be in particular -- the first two years you're not required to
22 take specific types of classes?

23 THE WITNESS: Yeah. Yeah.

24 THE COURT: I understand.

25 THE WITNESS: And -- yeah. There are majors. In

1 Tulane we had majors. I found the history department, you know,
2 my colleagues, jealously guarded the right to accept no other
3 requirements other than those they chose to impose, which were
4 pretty much just a number of courses in a sense, not even
5 required courses within that, which I found -- I found
6 unsatisfactory.

7 But the beauty of American higher-education is we have
8 a lot of institutional diversity, you know, and I -- that I
9 don't want to monkey with either. I like the mix of things we
10 have.

11 THE COURT: So there's a place for the New College as
12 it exists now, as well as Hillsdale? Those two radically
13 different institutions, there's a place for both of them?

14 THE WITNESS: I would say -- this is an abstract
15 consideration, yes, I would say so, absolutely.

16 But I don't know -- I mean, I know New College is in
17 the news, but I don't know anything more about it than that.
18 It's one of the -- actually I do know a little bit because David
19 Riesman, one of the things he was involved in was the study of
20 experimental colleges, and he wrote a book on experimental
21 colleges in which there was a chapter on New College, about
22 which he was very enthusiastic so for what that's worth.

23 But Colorado College has -- you take one course at a
24 time, and it's in this incredibly intense -- I don't know
25 whether it's a three-week period, or it's -- but you do one

1 course and one course only intensively.

2 THE COURT: Are there other schools that do where you
3 read the -- X number of books -- I know there's one college
4 particularly out in the southwest that's built around that
5 structure where you're going to read these classics.

6 THE WITNESS: Yes -- or Great Books.

7 THE COURT: Great Books.

8 THE WITNESS: Yeah. Yeah. I went to a Great Books
9 college, St. Johns, and we had no electives. That's -- that's
10 where I was thinking --

11 THE COURT: I guess "classics" is a loaded term. I
12 was using it generally, not --

13 THE WITNESS: Yeah. No, I knew what you meant. I
14 knew what you meant.

15 And we had no choices at all, and it was math,
16 science, you know, everything was quite something.

17 There's Deep Springs College, which is on the border
18 of Nevada and California, one of the most prestigious colleges
19 in the country. I mean, Harvard and Yale stand in line to get
20 their graduates, so they live on and work and run a ranch as
21 part of their studies. It's great. You wouldn't find this in
22 Switzerland. You wouldn't find this in Italy. You know, this
23 is one of the glories of American higher-education is the
24 institutional diversity.

25 THE COURT: Which is a different issue than diversity?

1 THE WITNESS: Yeah.

2 THE COURT: I understand. And I've kept you long
3 enough.

4 Mr. Levesque, you can continue.

5 BY MR. LEVESQUE:

6 Q. Yes.

7 Doctor, you've mentioned the Heterodox Academy and some of
8 their research and the AACU and some of their research.

9 Are there other organizations or interest groups that have
10 conducted research into these areas?

11 A. Well, we mentioned the AACU, and American Council of
12 Trustees and Alumni, and they're involved with that National
13 Association of Scholars.

14 Q. Are you familiar with FIRE?

15 A. Oh, yeah. FIRE, well, of course, the Foundation for
16 Individual Rights in Education. And they did a very interesting
17 survey, which if I could consult my report on this, because I
18 can't remember the details, but it's FIRE --

19 MS. FROST: Objection, Your Honor. There was no
20 discussion of the FIRE survey in his report.

21 THE COURT: Well, he's looking through his report. He
22 can tell us where he's looking and then address it.

23 Of course, I'm familiar with FIRE because they're in a
24 number of my cases oddly enough.

25 THE WITNESS: Let's see. It's FIRE and Real Clear and

1 College Pulse did this thing together. I just
2 (indiscernible) --

3 (Pause in proceedings.)

4 THE WITNESS: Well, okay.

5 MR. LEVESQUE: Actually, Your Honor, if it's okay, we
6 can go ahead and move on?

7 THE WITNESS: All right.

8 THE COURT: That's fine.

9 THE WITNESS: I don't know why I can't find it.

10 THE COURT: And you can always look on a break, too,
11 Doctor, and circle back.

12 THE WITNESS: All right. Thank you.

13 BY MR. LEVESQUE:

14 Q. If someone were to suggest that it is only a problem of
15 perception and that ideological conformity on campus is an
16 illusion, how would you respond?

17 A. Well, that person might be right, but we -- the problem of
18 data kind of cuts both ways, that it's -- it's difficult to
19 prove conclusively that there is no problem, but -- and that
20 there is a perception problem, I think there is evidence for
21 that. Whether it's a misperception, that's another matter.

22 But I think this has an importance in terms of the
23 public's -- and this is the element I wanted to introduce
24 here -- that the public's support for higher education, which is
25 always -- I won't say tenuous, but, you know, because I think

1 the public has an interest in higher education, and there's a
2 kind of respect, in an abstract way, for higher education and
3 definitely a feeling that middle class people feel their kids
4 have to go to college, you know, and that's part of their
5 initiation into adult life. But the public can become
6 frustrated with higher education, can begin to doubt its
7 legitimacy, its importance.

8 Most recently, I think there's a lot of questions arising
9 about whether college prepares people for the kinds of jobs, the
10 kind of vocations, the kind of employment that they're likely to
11 encounter, whether it's a waste of their time and money to go to
12 college.

13 And I think those of us who are comfortably ensconced in
14 the academia as we tenured full professor types are, have to be
15 conscious of that, that we need to think about, particularly in
16 public institutions -- this was always a concern of mine when I
17 was at Tennessee and then Oklahoma -- that we need to sell the
18 public on what we're doing, or if they're not sold on it, we at
19 least need to be aware that these misperceptions or perceptions,
20 as the case may be, can adversely affect the way that we're
21 seen, the way legislators see us, the way that they fund us, the
22 way the donors, who are increasingly important in public
23 universities, see us.

24 So all of those things, I think, are reasons why we need
25 to -- we should not be cavalier about the nature of this

1 problem. We should not sort of brush it off and say, Well, you
2 know, this perception that just because there are only three
3 Republicans on the entire Harvard faculty, that doesn't mean
4 there's an ideological bias there.

5 We -- I actually think that most people, even people who
6 with very strong political commitments, do try to play it fair,
7 do try to educate in the way -- I believe in higher education in
8 short. I don't think we're an entirely bankrupt enterprise, but
9 I'm very wary of those who would be complacent about that. I
10 think we need to be making the case for ourselves, that what we
11 are doing has integrity and can be trusted.

12 So I think that's one of the reasons that the question of
13 perception is at the root of the matter here with this bill. I
14 think this is a way that, particularly the survey, which is the
15 part that interests me the most of the bill, is properly
16 constructed. And I take no position on what that would
17 constitute, only that I think it can be done, and it has to be
18 done. We have to find a way to do it for the sake of assuring
19 the tax-paying public, when we are talking about public
20 institutions, that we're fulfilling our purpose and doing it
21 with integrity and energy.

22 MR. LEVESQUE: Your Honor, at this time, for the sake
23 of the court reporter, I think I'm at a good breaking point.

24 THE COURT: All right. We'll take a break.

25 Thank you very much.

1 And, sir, you can step down. And, again, we're going
2 to take about a ten-minute break.

3 THE WITNESS: I'll just leave this here, the report.

4 THE COURT: You can or you can take it with you,
5 whichever you prefer.

6 THE WITNESS: Okay.

7 THE COURT: All right. Thank you.

8 Court is in recess.

9 (Recess taken at 9:45 AM.)

10 (Resumed at 10:03 AM.)

11 THE COURT: We are back on the record.

12 Counsel, you may proceed.

13 MR. LEVESQUE: Thank you, Your Honor.

14 BY MR. LEVESQUE:

15 Q. Let's shift gears a little bit and talk about House Bill
16 233.

17 How is House Bill 233 a reasonable response to the problems
18 that you identified?

19 A. I think it's a reasonable -- it's modest is the word I use.
20 I don't think it's an earth-shattering matter. I think it
21 intrudes as little as possible on the perquisites of faculty,
22 and it doesn't require anything in terms of what goes on in the
23 classroom, what goes on in instruction. It simply -- the survey
24 portion of it is simply an effort to monitor something so that,
25 rather than argue about something that may or may not be a

1 misperception of the situation, we can begin to have some data
2 to compile that's going to help us to think about the situation
3 and then to -- and either reassure the public that needs
4 reassuring, or not, or -- and provide data, provide information.
5 That seems to be a very modest and nonintrusive way of doing
6 that.

7 And, similarly, the antishielding thing does not require --
8 that provision does not require any positive change that -- I
9 mean positive in the sense of being proactive or active. But it
10 doesn't change. It doesn't insist that certain repellant views
11 now have to be represented. It simply doesn't inhibit -- that
12 doesn't inhibit out of a desire to protect students of exposure
13 to uncomfortable ideas. It doesn't inhibit the free exchange of
14 ideas. And so, in that sense, I think it's perfectly within,
15 you know, the understanding that we all have or should have of
16 academic life.

17 Q. Let's assume that the problem is only one of perception.
18 Can House Bill 233 serve to enhance the public's confidence in
19 the system of education?

20 A. I think it can. I think it can. And I think it can do so
21 in ways that -- I mean, it -- I think there's an assumption
22 somewhere in all of this that this is -- that there's a
23 one-sided benefit, ideologically or partisanly speaking.

24 I don't see it that way. It seems to me that this
25 benefits -- can benefit everybody. It can benefit those who --

1 let's say, people of religious persuasions who are made
2 uncomfortable by speech that's stridently and militantly
3 atheistic and antireligious. It's -- and I'm not just talking
4 about imprecations and that sort of thing, but some kind of
5 reasoned opinion about it. Religious students shouldn't be
6 shielded from exposure to those opinions.

7 I don't -- and I think there's a variety of other examples
8 one could give, why one shouldn't see this, I don't think, as
9 having a necessarily ideological content to it; that it would
10 benefit everybody, in other words.

11 Q. Are the provisions in House Bill 233 novel in terms of
12 their concepts?

13 A. I don't -- I don't think so. And, in fact, I think it
14 leaves a lot of room for innovation in the devising of the
15 surveys, and it's not terribly prescriptive about the way
16 they're done, except they need to be objective and they need to
17 have it be -- the information has to be handled in a
18 statistically valid, professional way.

19 I think beyond that, I think the devising of the surveys is
20 left up to the authorities. And I think they'll be answerable
21 through the process that -- colleges are notoriously valuable
22 communities, that people who object to the structure of the
23 surveys can help to make them better by their insights. But I
24 don't think there's a novel imposition, if that's, I think, what
25 you're getting at with your question, being imposed by the bill

1 and certainly not by the antishielding. That's not novel there.

2 Q. Now, to be clear, you're not offering any opinions on the
3 final surveys that were administered, are you?

4 A. No, I'm not.

5 Q. And are you an expert in the design of surveys?

6 A. No.

7 Q. What would you say to the individuals who believe that the
8 2022 survey was not a very good survey?

9 A. They may be right. I'm not in a position to judge. They
10 may be wrong.

11 Q. Now, in your work on this matter, did you review the
12 legislative transcripts?

13 A. I did, I did.

14 Q. Did you observe any partisan intent in those transcripts?

15 A. No, I didn't. I didn't see that at all, not hardly a hint
16 of it. And I'll add the proviso that I'm not a resident of this
17 state. I don't follow its politics, its internal politics. I
18 don't follow -- I don't know any of these legislators. I know
19 that there's a lot -- a lot of that going on here.

20 I think one of things that I bring to this is precisely a
21 certain measure of detachment from all of that. I'm not a
22 political person. And so I'm not a political person within the
23 state of Florida, specifically. So I -- no, I didn't see any of
24 that.

25 THE COURT: Riddle me this, Professor. If the goal is

1 to increase public confidence in the education system, how does
2 it help to have the people passing the bill to say that our
3 professors are a bunch of radical Marxists and it's an
4 infestation, which is certainly a loaded historical term, as I'm
5 sure you're well aware --

6 THE WITNESS: Yeah.

7 THE COURT: -- if that's the goal, how do I square
8 those types of statements with the goal of improving the
9 public's confidence in our universities?

10 THE WITNESS: I don't like that kind of statement at
11 all. It wasn't the kind of tenor that I saw in the
12 legislative -- you know, in the transcripts.

13 I know there was a lot of this sort of stuff outside
14 of this. And, you know, there I think I'd have to agree with
15 you, that it's not helpful to talk that way. And there -- let's
16 just put it this way: There are some people who are always
17 going to be deeply suspicious of higher education, and you're
18 not going to bring them along, but you can at least make it
19 difficult for them to sustain outrageous statements, like I view
20 that as outrageous. That's just my opinion. But you can make
21 it harder for them to make those statements and be listening to
22 it if there's evidence to the contrary.

23 THE COURT: And as I understood your testimony -- I
24 want to make sure I followed it -- is, Judge, that's why I
25 think, whether this particular survey is flawed or not, the

1 concept generally of having a statistically valid survey is
2 good, because if you actually get people to respond to it, and
3 it's a good survey, then it may -- that would be the best way to
4 assuage any concerns that there may be about bias if you
5 regularly survey students and the surveys don't reflect that.

6 THE WITNESS: Yeah. I don't think it's a silver
7 bullet. I don't think it's a panacea. I've used the word
8 "modest" maybe too much, but I think it's a step in the right
9 direction.

10 THE COURT: And I understood your testimony.

11 THE WITNESS: Yeah.

12 THE COURT: Thank you.

13 Mr. Levesque, you may proceed.

14 BY MR. LEVESQUE:

15 Q. In reviewing those legislative transcripts, what was your
16 perception of the reason advanced for the survey in the
17 antishielding provisions?

18 A. I think they were to enhance the intellectual freedom and
19 viewpoint diversity of academic life in Florida's colleges
20 and -- public colleges and universities. I didn't -- I didn't
21 see a partisan motive, if that's what you're getting at.

22 MR. LEVESQUE: Thank you, Doctor.

23 No further questions at this time.

24 THE COURT: Cross-examination?

25

1 purpose must be very professional and very insulated from
2 political uses and political influences; is that correct?

3 A. I think it -- I'm not sure what being insulated means, but
4 I think the general tenor of what you just said I would agree
5 with.

6 Q. You are aware that empirical research has been done to
7 examine how, if at all, faculty ideology impacts the student
8 experience in higher education?

9 A. Uh-huh.

10 Q. You are not an expert on that research; correct?

11 A. No, I don't claim that.

12 Q. And you've read Dr. Matthew Woessner's report?

13 A. I did.

14 Q. But you didn't read any of the academic studies that
15 Dr. Woessner cited in his report before offering your own
16 opinions in this case; correct?

17 A. Yeah.

18 Q. You're not a political historian?

19 A. I mean, my -- I define my position as an intellectual and
20 cultural historian. I certainly deal in questions of political
21 ideology, elections, you know, both in my teaching and my
22 publications, so -- but they're not central to what I do.

23 So I wouldn't want to agree with your question without a
24 lot of caveats. Historians are -- we roam around in different
25 fields. We are poachers, and we're eclectic, so -- but I'm not

1 a political historian in the sense of being a thoroughbred
2 political historian.

3 Q. You remember testifying in a deposition in this case?

4 A. I do, yeah.

5 Q. That was in September. We met in Ann Arbor?

6 A. Uh-huh.

7 Q. And you swore to tell the truth in that deposition;
8 correct?

9 A. Uh-huh.

10 MS. FROST: Your Honor, I request permission to read
11 into the record page 143, lines 3 to 4 of the deposition of
12 Dr. McClay.

13 THE COURT: Mr. Levesque?

14 MR. LEVESQUE: No objection, Your Honor.

15 THE COURT: Without objection.

16 BY MS. FROST:

17 Q. So on 143, line 3, Question: *Are you a political*
18 *historian?*

19 Answer: No.

20 You also didn't analyze or consider the historical
21 background of House Bill 233; correct?

22 A. No, I didn't. And I can explain that, if you'd like,
23 but --

24 Q. You also do not offer any expert opinion as to House Bill
25 233's likely effects on speech or association; correct?

1 A. Yes. As I recall, I said I'm not a prophet.

2 Q. You agree that the political context of a law is important
3 in understanding the likely effects of legislation; correct?

4 A. Sure.

5 Q. You mentioned you wrote a history textbook called *Land of*
6 *Hope*; is that correct?

7 A. I did mention it.

8 Q. And I believe you testified that textbook represents some
9 of your interests in restoring a more balanced sense of American
10 history in American education; is that correct?

11 A. Yes.

12 Q. The publisher who published your textbook, was that
13 Encounter Press --

14 A. It was.

15 Q. -- Encounter Books?

16 A. Encounter Books.

17 Q. And Encounter Books never published a textbook before your
18 book; correct?

19 A. I don't think so. I'm not aware of one that they --

20 Q. And I meant you didn't have to worry about textbook
21 committees when you wrote it?

22 A. Uh-huh.

23 Q. Can you say yes or no for the court reporter?

24 A. Yes, yes, yes.

25 Q. And you don't put everything you've written, even in the

1 past few years, in your CV; is that correct?

2 A. Probably not. I'm very negligent about that, but it's not
3 out of any intent to suppress things that I've --

4 MS. FROST: Andy, can you pull up article one?

5 BY MS. FROST:

6 Q. Dr. McClay, can you see this on the screen?

7 A. Yeah.

8 Q. And this is an article that you wrote in the *Daily Mail* in
9 May of 2022; is that correct?

10 A. Right.

11 Q. The full title of that article is *Control, Coerce, and*
12 *Censor: From mobs targeting Supreme Court justices to President*
13 *Biden's Disinformation Board, the American left's tyrannical*
14 *impulse is the greatest modern threat to freedom, writes*
15 *historian Wilfred McClay.*

16 Did I read that correctly?

17 A. You did.

18 MS. FROST: And, Andy, can you go to page 4, the third
19 full paragraph?

20 BY MS. FROST:

21 Q. And that paragraph says: *What we are seeing before our*
22 *eyes is a demonstration that if we are to keep and cherish*
23 *freedom, we must defeat the tyrannical excesses of our*
24 *out-of-control left.*

25 Did I read that correctly?

1 THE COURT: Hold on. Mr. Levesque is standing.

2 Yes, Mr. Levesque.

3 MR. LEVESQUE: Your Honor, I'm not objecting. What
4 I'd like -- I've never seen the document before. Is it possible
5 to get a copy of the document?

6 MS. FROST: Absolutely.

7 (Pause in proceedings.)

8 BY MS. FROST:

9 Q. Dr. McClay --

10 THE COURT: If you gave him the copy, you can move on.

11 MS. FROST: Okay.

12 BY MS. FROST:

13 Q. Dr. McClay, earlier did I hear you refer to radical Marxist
14 critics of evolutionary biology?

15 A. Yeah.

16 Q. What is a radical Marxist critic of evolutionary biology?

17 A. There was a fellow, whose name I can't recall, at Harvard
18 who died recently, who was -- fit that description.

19 Q. Why did he fit that description?

20 A. Pardon me? Why --

21 Q. Why did he fit that description?

22 A. Because that's what -- that's how he would have described
23 himself.

24 Q. Let's talk now about some of the --

25 A. I do want to add that I didn't mention that in a

1 non-invidious way. I was -- you know, this was something -- the
2 way this individual -- some people describe themselves as
3 radicals, and they don't see that as a point of criticism or
4 deprecation of their views. They think of themselves as being
5 radical.

6 Q. Let's talk now about some of the sources you relied on in
7 reaching your opinion in this case.

8 You admit your review of sources to cite in your expert
9 report in general was very haphazard; correct?

10 A. Say that again? Ask that question again.

11 Q. Your review of sources to cite in your report, it was very
12 haphazard; correct?

13 A. I think that in the deposition what we talked about was
14 primarily my sense of the more immediate context in the stage,
15 the controversies associated with the Governor and his program
16 for educational reform. That's the way I recollect the
17 haphazard comment.

18 Q. You were asked if you were aware of any literature, on
19 direct, suggesting there may be trends beyond some of those
20 anecdotes you just shared.

21 Do you remember that question?

22 A. In the direct, you mean?

23 Q. Correct.

24 A. Yeah.

25 Q. And you cited Heterodox surveys. But you admit you aren't

1 a survey expert; correct?

2 A. Pardon me?

3 Q. You admit you're not a survey expert?

4 A. Right, right.

5 Q. And you didn't provide any analysis of the surveys in your
6 report; correct?

7 A. I did not.

8 THE COURT: Let me ask you a question.

9 What I heard you testify to, Doctor, is, I didn't
10 create the surveys. I'm not evaluating the surveys. What I'm
11 telling you is I relied, as a professor, on these surveys -- was
12 one of the things, not the only thing, not exclusive -- but this
13 is just one of the things I relied on which I believe supports
14 some of the views I've expressed here today.

15 Did I misapprehend your testimony?

16 THE WITNESS: I think the central contention that I'm
17 trying to make is that these surveys exist. They are being
18 used. It seems to me -- whatever the perfections or
19 imperfections of the existing surveys may be -- and I don't
20 claim to be qualified to judge that, to say -- specify what a
21 perfect survey that would meet all criteria would look like.
22 But the fact that they're being done and that this is becoming a
23 more and more widespread practice is to me an indication that
24 what House Bill 233 is proposing is not something novel, unique,
25 out of the ordinary. And it has, I think, a very defensible

1 motive; that is, to ascertain what's going on, to get better
2 information about what's going on.

3 So that -- I would add that.

4 THE COURT: I understand. It wasn't a trick question.
5 All I was suggesting is it's not unusual for an academic to rely
6 on empirical data, surveys, and other materials -- whether they,
7 themselves, generate such empirical data themselves -- that
8 that's not unusual in your field to rely on things, even if
9 you're not an expert --

10 THE WITNESS: Sure.

11 THE COURT: -- in that subfield; correct?

12 THE WITNESS: Oh, yeah, absolutely. We all do that,
13 you know, rely on one another.

14 BY MS. FROST:

15 Q. You testified on direct that you relied on a 2010 survey by
16 the American Association of Colleges and Universities; is that
17 correct?

18 A. Right, right.

19 MS. FROST: Andy, can you pull up McClay Deposition
20 Exhibit 12?

21 BY MS. FROST:

22 Q. Dr. McClay, you see that?

23 A. Yes, yes. It's a little hard to make out, but, yeah.

24 Q. And this is the American Association of Colleges and
25 Universities 2010 survey; correct?

1 A. I'm not -- I'm not sure. I think so.

2 Q. Okay. The AACU is not the same as the AAUP; is that
3 correct?

4 A. That is correct.

5 MS. FROST: Andy, can you turn to page 21 of this PDF?

6 BY MS. FROST:

7 Q. And this is the study that you testified had troubling
8 data; is that correct?

9 A. Right.

10 Q. And I'm looking at Finding 3: *Relatively few respondents*
11 *feel it is safe to hold unpopular opinions on campus.*

12 Did I read that correctly?

13 A. Uh-huh.

14 Q. And then directly below that it says: *A large percentage*
15 *of students generally agreed that it is safe to hold unpopular*
16 *positions on campus, with 80.6 percent either strongly agreeing*
17 *or agreeing somewhat with this item.*

18 Did I read that correctly?

19 A. Yes.

20 MS. FROST: You can take that down, Andy.

21 BY MS. FROST:

22 Q. In forming your opinion, Dr. McClay, you also relied on an
23 opinion piece from the *National Review* by Stanley Kurtz titled
24 *Shout-Down Rate Nearly Quadruples*; is that correct?

25 A. Uh-huh.

1 Q. And, Dr. McClay, Kurtz's claim that the rate of so-called
2 shout-downs had quadrupled is not based on actual incidents;
3 correct?

4 A. I don't recall.

5 MS. FROST: Andy, can you pull up McClay Deposition
6 Exhibit 13?

7 BY MS. FROST:

8 Q. And, Dr. McClay, this is the --

9 A. Yeah. Now I see what you're getting at, yeah, the
10 projection aspect, yes.

11 Q. Dr. McClay, this is the article that you relied on; is that
12 correct?

13 A. Yeah, yeah, yeah.

14 Q. And I'm looking at the highlighted language where Mr. Kurtz
15 writes: *I count 19 shout-downs so far this year. At the*
16 *current rate, that would make for 38 fall semester shout-downs.*
17 *This would nearly quadruple the 10 shout-downs of last spring, a*
18 *semester already infamous for speaker disruptions.*

19 Did I read that correctly?

20 A. Yes.

21 Q. And this opinion piece was published in 2017?

22 A. Uh-huh.

23 Q. Before offering your opinion in this case, you didn't do
24 anything to attempt to determine if Kurtz's projections turned
25 out to be accurate?

1 A. I did not.

2 Q. You also relied on a blog post from The Volokh Conspiracy
3 website as a source in your report; is that correct?

4 A. Yeah, "Volokh."

5 Q. Volokh. Thank you.

6 You agree you do not normally rely on blog posts in your
7 work as a historian?

8 A. No.

9 Q. You also relied on something called LiquiSearch as a source
10 in your report?

11 And for the benefit of the court reporter, I will spell it,
12 L-i-q-u-i-S-e-a-r-c-h.

13 Is that correct, Dr. McClay?

14 A. Yeah. If I could say a word about that?

15 Q. Please.

16 A. I believe the LiquiSearch thing was to give a source -- I
17 wish I hadn't done it this way, but I wanted to provide a point
18 of reference for the important conflict between Eugene Genovese
19 and Howard Zinn about the question of whether the American
20 Historical Association should or should not take political
21 positions; Genovese being a radical Marxist historian from, at
22 that time, Rutgers who supported the Viet Cong in the Vietnam
23 War, so I think qualifies as radical, but took the position the
24 AHA, the American Historical Association, should not take a
25 political position.

1 I used that Liqui -- whatever it is -- reference strictly
2 so that there would be a source -- easily located source -- did
3 it for you, for you and your team -- to be able to locate and
4 verify this information. But I should have done something
5 better; I agree.

6 MS. FROST: Andy, can you pull up McClay Deposition
7 Exhibit 16?

8 BY MS. FROST:

9 Q. This is the LiquiSearch page that you relied upon,
10 Dr. McClay?

11 A. Right.

12 Q. And this post doesn't have any author; correct?

13 A. No. It's entirely accurate, but I don't know who wrote it.

14 Q. You also relied on *The College Fix* in coming to your
15 opinions in this case; is that correct?

16 A. Yes, I used a citation to them.

17 Q. Let's talk briefly about the antishielding provision.

18 You agree the antishielding provisions could be written
19 with more specificity?

20 A. Yeah. I think it's a -- it's a long bill as it is, and I
21 think that there's a lot to be said for brevity whenever
22 possible, but, yeah, more could be done to specify in more and
23 more ways.

24 MS. FROST: Andy, can you pull up JX 1?

25 And let's look at page 2 and pull out the definition

1 *Shield means to limit students, down there.*

2 THE WITNESS: Right.

3 MS. FROST: There we go.

4 BY MS. FROST:

5 Q. Does the text of the antishielding provision explicitly
6 allow professors to shut down discussions that some people may
7 find uncomfortable, unwelcomed, disagreeable, or offensive
8 because the professor deems them to be pseudoscientific?

9 A. I don't see a place where it does that.

10 Q. And you also don't see any exception to allow institutions
11 or faculty to shut down speech in order to achieve institutional
12 objectives; correct?

13 A. I don't, but I'm not a lawyer. And, in a sense, what
14 you're asking me is a legal question.

15 Q. You also did not conduct any analysis to determine whether
16 there were any less restrictive alternatives available to
17 achieve what you view as the bill's laudable goal; correct?

18 A. That's correct.

19 MS. FROST: No further questions, Your Honor.

20 THE COURT: Redirect?

21 REDIRECT EXAMINATION

22 BY MR. LEVESQUE:

23 Q. Just a few questions, Doctor.

24 First, you were shown the *Daily Mail* article.

25 Do you recall this article?

1 A. Yeah, I do. Yeah, I do recall the article.

2 Q. And you were shown a snippet of one quote in there.

3 Can you at least summarize your larger point that you were
4 making in this article?

5 A. Oh, yeah. I mean, it's -- first of all, one thing that
6 everybody who writes knows, especially if you write for
7 journalistic publications at all, is that the authors never
8 write the headlines. The editors are always the ones who
9 write -- I did not write that headline. The headline is
10 designed to, yes, sort of summarize the article, but also to
11 sensationalize or, you know, sort of attract eyeballs. So, you
12 know, I wouldn't have written it in that way.

13 But I was very concerned about the -- in the way that the
14 Justices of the Supreme Court were being threatened in violation
15 of the law by protesters at their homes. I think any -- any
16 judge of whatever persuasion has to be disturbed by that kind of
17 threatening, extralegal sorts of forms of political pressure and
18 that this was being treated as sort of acceptable practice. And
19 that was one of the things -- one of the several things that I
20 called out in that essay.

21 So I think the statement that counsel for the plaintiffs
22 identified, I mean, it was there, but it was very much
23 decontextualized from all the things that led up to my saying
24 that, that I was concerned about the -- what I call the tyranny
25 of the radical left. And I stand by that concern, especially

1 that the moment. And it wasn't too long after that that we had
2 an assassination attempt on the life of one of the Supreme Court
3 Justices.

4 So I don't -- it's fair game to put it up there, but I
5 think it would have been fairer game to have given the context
6 of the article as a whole.

7 THE COURT: Just out of interest, is it just Supreme
8 Court Justices, or is it okay for public figures in government,
9 say governors and their spokesmen, to trash trial judges and the
10 trial judges to get death threats based on vitreal and attacks
11 in the public square on trial judges? Is it just Supreme Court
12 Justices or would it be all --

13 THE WITNESS: No, it's all. It's absolutely horrible
14 and destructive of our legal system. I don't mean that --

15 THE COURT: So your opinion would have been the same,
16 for example, my colleague in Hawaii who was vilified over a
17 Muslim ban, and his family had to go in hiding because --

18 THE WITNESS: Yeah, I would.

19 THE COURT: -- he was attacked by everybody, from the
20 President to members of the Congress? That, likewise, is bad;
21 right?

22 THE WITNESS: Absolutely, absolutely.

23 THE COURT: I was wondering if it was only limited to
24 that one instance.

25 THE WITNESS: No, no. There's something especially

1 terrifying about the highest court in the land, which is,
2 rightly or wrongly, seen as a supreme arbiter of our national
3 quarrels -- whether it should be or not, that's a whole other
4 question for another time, but --

5 THE COURT: I guess the difference is they have
6 protection; I don't. Fair enough.

7 THE WITNESS: And -- yeah. And there's -- yes. Well,
8 I want to live in a world where you don't need it.

9 THE COURT: I'd like to live in that world too.

10 Mr. Levesque, you may proceed.

11 MR. LEVESQUE: Thank you, Your Honor.

12 BY MR. LEVESQUE:

13 Q. Doctor, you were shown the actual study from the American
14 Association of Colleges and Universities. If I could ask you to
15 refer to your report on page 11.

16 A. Yeah.

17 Q. And can you tell the Court the point that you were trying
18 to make in citing that article?

19 A. Yeah. Well, I think maybe a way of answering your question
20 is to say that they -- "they," counsel for the plaintiffs --
21 made the point that there's a sentence in the article that
22 offers a somewhat different interpretation of data than the
23 headline in that very same article, which I think is kind of
24 interesting.

25 But, no, I was making the point I don't think that a third

1 of students and less than 20 percent of the faculty and the
2 staff feeling it's safe to hold unpopular opinions on campus --
3 I don't think these are impressive percentages, that they
4 strongly agreed. I can see a much larger percentage saying,
5 Well, yeah, having a more positive, but not quite as emphatic.
6 But I think only a third of the students and 18 percent of the
7 faculty and staff having the view that it is safe to hold
8 unpopular positions, those percentages saying that it's safe,
9 these seem to me to be worrisome low percentages. So I -- to be
10 fair, I think I read the data differently than counsel did.

11 And that's one of things that happens with data is
12 that it's always subject to interpretation. It doesn't
13 interpret itself. So I think it's actually a useful exercise in
14 what we have gone through here. But I would point out that the
15 AACU headlined that portion of the report with an emphasis
16 similar to my own.

17 Q. Doctor, if you saw the survey provisions and the shielding
18 provisions as being damaging to higher education or faculty,
19 would you have agreed to testify in this litigation?

20 A. Oh, heavens, no, absolutely not. I love higher education.
21 I've spent my life in it. I grieve at times for its
22 imperfections, which I think, you know, we all operate in
23 professionalism environments where there's imperfection. But,
24 no. And I'm very -- I jealously guard the perquisites of
25 faculty, as I think probably the plaintiffs do as well.

1 But, no, I don't see this as anything that is likely -- I'm
2 not a prophet -- but is likely to damage the standing of
3 faculty. I wouldn't support it if I did think it was likely to
4 damage. I can't, absolutely, predict the future. But, no, I
5 see these as very good things, things to open -- open matters
6 up. And that's -- I think, to come back to where I began, my
7 great concern is with the climate, the intellectual climate on
8 campus. Is this a -- is it a free climate? And part of that,
9 which I maybe could emphasize more -- I would if I were writing
10 an article about this -- is that to be able to -- to acknowledge
11 the principle that we can express ourselves freely is also to
12 acknowledge that others can express themselves freely. And I
13 have to -- and I really have to listen, not just tolerate it,
14 but to listen. That's incumbent on us as part of an
15 intellectual community, to speak freely and to listen with
16 respect. I think those two things go together.

17 I -- you might say, Well, why isn't this respect category
18 included in the bill? You can't -- that's something you can't
19 really dictate by the law. But it's implicit, I think, in an
20 environment of freedom that there be mutuality.

21 MR. LEVESQUE: Thank you, Doctor.

22 No further questions.

23 THE COURT: Mr. Levesque, before you step back, I want
24 to make sure that I got it, and I don't want to narrow it or
25 overlimit.

1 Doctor, one thing I heard from you loud and clear,
2 setting aside whether the survey that was, in fact, constructed
3 and sent out -- good, bad, or indifferent -- Judge, there's a
4 value to gathering information, both in terms of either
5 confirming or denying --

6 THE WITNESS: Yeah. Yeah.

7 THE COURT: -- exceptions. I heard that; correct?

8 THE WITNESS: Yes, absolutely. I'm glad you did.

9 THE COURT: And I also heard that testimony -- and I
10 won't go into all the subsets and nuances, but there's a reason
11 why people, right or wrong, might have that perception, which is
12 why you'd want to gather the information. And you had given us
13 examples of why there might be the perception -- again, good or
14 bad, right or wrong -- such that you'd want to gather such
15 information.

16 Did I get that component as well?

17 THE WITNESS: Yes, yes.

18 THE COURT: And then -- and, again, there's different
19 layers to your testimony about academic freedom, and so forth.
20 But in terms of the goal of the antishielding law, both placed
21 in context based on the work you do, as well as academic freedom
22 generally, constructing a law that's ensuring that all
23 viewpoints -- well, within limits.

24 THE WITNESS: Yeah. Yeah.

25 THE COURT: -- viewpoints -- you're able to express

1 viewpoints in the classroom, whether people like them or not,
2 are offended by them or not, and that's why that's critical to
3 the whole mission of the university. Historically, that's been
4 why our universities are special by engaging in those types of
5 debates. And to pass a law with the goal of doing that would be
6 consistent with your understanding, both in your role as a
7 professor as well as academically put in context over time the
8 role of academic freedom in institutions.

9 Did I get that right?

10 THE WITNESS: Yeah. Yeah.

11 THE COURT: Okay.

12 THE WITNESS: Very good.

13 THE COURT: I just -- I want to make sure I got sort
14 of the big picture. If there's another big picture point, I
15 want to make sure that we didn't -- and I'm not diminishing or
16 limiting it. I noted that each of those has sort of nuances and
17 subsets, but, Mr. Levesque, I wanted you to be able to put an
18 exclamation point on anything else after that so that I could
19 make sure that I wasn't missing anything, and if I had a
20 question I could follow up before he leaves.

21 MR. LEVESQUE: No, Your Honor. That's a fairly good
22 summation.

23 THE COURT: Okay. Thank you, Doctor.

24 THE WITNESS: Thank you.

25 THE COURT: And thank you for your patience with us

1 this morning and safe travels.

2 THE WITNESS: Thank you very much.

3 (Dr. McClay exited the witness stand.)

4 THE COURT: Mr. Levesque, your next witness is going
5 to be live or by Zoom?

6 MR. LEVESQUE: Live.

7 THE COURT: Okay.

8 MR. LEVESQUE: Chancellor Hebda.

9 THE COURT: I'm sorry?

10 MR. LEVESQUE: Chancellor Hebda.

11 THE COURT: Okay. And what's your best guess in terms
12 of the length of the testimony? And I'm not holding you to it.
13 If it takes longer or less time, that's fine.

14 MR. LEVESQUE: I would guess direct would be somewhere
15 between an hour, hour and a half.

16 THE COURT: Okay.

17 And I hate to ask because I think the witness -- was
18 she here before just -- I'm not -- I should have paid better
19 attention to who's in and out of the courtroom. I believe I've
20 seen her before.

21 MR. LEVESQUE: She's been our corporate representative
22 and has been here the entire time.

23 THE COURT: That's what I thought. I guess she was in
24 the gallery most of the --

25 MR. LEVESQUE: No --

1 THE COURT: Oh, she's always been there? Okay. I'm
2 sorry.

3 MR. LEVESQUE: -- she's always been there.

4 THE COURT: I assume whoever y'all have at your table
5 you want them there for a reason.

6 I don't want to inconvenience the witness, and if it's
7 going to inconvenience the witness -- is it Dr. Hebda?

8 MR. LEVESQUE: Dr. Hebda, Your Honor.

9 MS. HEBDA: Ms.

10 MR. LEVESQUE: Oh, I'm sorry. Ms. Hebda.

11 THE COURT: Ms. Hebda, I just didn't want to not
12 address her by her title if she has one.

13 Okay. Ms. Hebda, it would help me to be able to go
14 read what you filed and digest it now rather than do it on the
15 fly. Take an early lunch, come back, put on her testimony, and
16 then I've had time to review what y'all submitted today, because
17 I saw that it just hit the docket.

18 But if that's going to -- I'm not really worried about
19 you or Mr. Wermuth, because it's going to take us the same
20 amount of time anyway, but if it's going to inconvenience
21 Ms. Hebda, then we can go ahead and forge ahead right now.

22 MR. LEVESQUE: I think she just gave me the high sign
23 that that would be fine.

24 THE COURT: All right. And so come back at 12:30.
25 Does that give everybody plenty of time? Mr. Wermuth, you to

1 review the latest filing? I'm not suggesting you have to be the
2 one that responds to it when we -- after we finish with the
3 witness's testimony, but does that give you enough time to eat
4 lunch and digest what the defense has filed?

5 MR. WERMUTH: I haven't seen the entire extent of what
6 he filed, but I hope that will be sufficient time.

7 THE COURT: Mr. Wermuth, does that give you enough
8 time to do whatever you need to do between now and the time we
9 return -- not Mr. Wermuth. I already asked you.

10 MR. LEVESQUE: Yeah, I was going to say you said
11 Wermuth.

12 Yes, that is plenty of time for us.

13 THE COURT: And, Ms. Hebda, thank you, and I'm sorry
14 to inconvenience you. That's -- I understand you've been here a
15 long time.

16 Thank you.

17 All right. Court is in recess.

18 I'll see everybody back at 12:30.

19 (Recess taken at 10:47 AM.)

20 (Resumed at 12:30 PM.)

21 THE COURT: All right. We're back on the record after
22 an early lunch in Case No. 4:21cv271 for the seventh day of the
23 bench trial.

24 Let me -- there's two issues that we're going to
25 address quickly before we hear from the defendants' last

1 witness.

2 First -- and, Mr. Wermuth, it can be you, or whoever
3 you designate.

4 I understand that what a contract says, or how it
5 labels somebody, is not the beginning and end of the inquiry as
6 to whether there's -- somebody's acting as an agent such that --
7 and within the scope of their relationship such that the
8 statements can be introduced against a party by somebody who's
9 an agent that's relevant, but not the end of the inquiry.

10 But what is there before me, other than they hired
11 somebody to take a first stab at the surveys, that would suggest
12 that the FSU IOP is an agent such that their statements are
13 admissible against the Board of Governors under Rule 801(d)(2)?

14 MR. WERMUTH: At this point, Your Honor, I think to
15 make it easy for our issue, I think the plaintiffs are going to
16 withdraw Exhibit 33 to which that argument was raised.

17 And as to Exhibit 88, to which that argument was
18 raised by defendants, we would offer that document not for the
19 truth of the matter asserted but for the effect on the listener,
20 and I can go through that and explain it to you. So it will be
21 a separate basis.

22 THE COURT: All right. So 33 is withdrawn?

23 MR. WERMUTH: Withdrawn.

24 THE COURT: And as to 88, refresh my recollection what
25 Exhibit 88 was.

1 MR. WERMUTH: Exhibit 88 was an email from -- it's
2 from John Rogers to Marshall Criser, both Board of Governors
3 employees, forwarding an email that Tim Chapin from the FSU
4 Institute of Politics sent to John Rogers reflecting findings
5 that Tim Chapin had found out about the Institutional Review
6 Board process.

7 And so that document was notifying -- Tim Chapin was
8 notifying John Rogers of the status of the IRB approval process
9 or what would be required for IRB approval. And we're offering
10 that for the effect on the listener.

11 THE COURT: Not that the process itself is or is not
12 that process, but that the Chancellor was notified that such a
13 process existed.

14 MR. WERMUTH: Was notified of the process as well
15 as --

16 THE COURT: That may be onerous, I think.

17 MR. WERMUTH: -- as to what FSU had found out about
18 the process.

19 THE COURT: All right.

20 MR. WERMUTH: And so -- and based on this email we
21 have indications that you'll have in the designations of
22 Marshall Criser reflecting that, basically, the findings about
23 the IRB process lead them to -- lead the Board of Governors --

24 THE COURT: But he already testified to that; correct?

25 MR. WERMUTH: Yes, but this is being offered not for

1 the truth of the matter asserted but for what -- for the content
2 of the information that was transferred to the Board of
3 Governors about the IRB process.

4 THE COURT: Mr. Levesque, 33 is withdrawn.

5 What says you to 88 for that limited purpose, that he
6 was notified of what the process was, the Chancellor, as opposed
7 to this is, in fact, what the process does, in fact, require?

8 MR. LEVESQUE: I'm going to designate Ms. Lukis to --

9 THE COURT: I'm sorry. Ms. Lukis?

10 MR. LEVESQUE: -- respond on my behalf.

11 MS. LUKIS: So I think a theme of testimony from a lot
12 of the witnesses from plaintiffs' side has been that the IRB
13 process is sort of the shining example and that all of the
14 requirements are things that should have been complied with in
15 this case. And so I think it is, in fact, offered to show
16 here's all of the, you know, hurdles you have to go through, the
17 IRB process.

18 And then Tim Chapin's email transmitting that
19 information contains hearsay within hearsay from the person.

20 THE COURT: I agree. Sustained. We're going to
21 exclude it, okay?

22 All right. So 33 and 88 are out.

23 Let me turn to the other issue, which is the
24 interrogatories.

25 Mr. Wermuth -- not Mr. Wermuth -- Mr. Levesque, other

1 side, who's going to be speaking on that issue?

2 MR. LEVESQUE: Ms. Lukis will.

3 THE COURT: All right. Ms. Lukis, as I understand it,
4 Judge, we don't want to run down your rabbit trail that you
5 initially raised that there may be some -- something different
6 in kind about interrogatories such -- as you were reading the
7 rule, they are subject to the rules of evidence. And we believe
8 by the plain language of the Rule of Civil Procedure associated
9 with interrogatories, we believe that the rule of completeness
10 is the applicable rule that you should be applying. And for the
11 reasons we articulated, we believe under 106 this additional
12 information should come in; correct?

13 MS. LUKIS: That's right, Your Honor.

14 THE COURT: All right.

15 And I just want to make sure there was not some other
16 legal argument, so I understand that.

17 Rule 106 is not -- y'all can -- you can take your
18 seats.

19 Rule 106 is not necessarily as easy as some might
20 suggest to apply. I mean, there's some authority for the
21 proposition that the language of the rule itself that talks
22 about when fairness ought to require the consideration of the
23 additional information, that can either be broadly or narrowly
24 defined. Some courts have a narrower review and generally apply
25 the rule to suggest that there's a misunderstanding or

1 distortion that can be rectified.

2 The idea of fairness, you can't introduce a part of an
3 admission or an admission that was later qualified by a party or
4 a statement against a party that's contrary to their interest --
5 and I understand statement of interest. I'm not using it in
6 that sense. I'm recognizing that admission is not as narrow as,
7 I shot JR. It's something that's broader than that. It's
8 contrary to your position or would otherwise undermine your
9 position or support the person who's trying to introduce its
10 position.

11 And I only say that because courts often -- not
12 courts -- lawyers often conflate an admission with a statement
13 against interest, which is a different provision. One's not
14 hearsay; one's an exception.

15 But, in any event -- I know this isn't a CLE -- the
16 question becomes, How am I going to slice that bread?
17 Fairness -- Rule 106 under the case law gives me a lot of
18 discretion because fairness can be defined in a lot of ways.

19 I've reviewed in detail and have printed out the --
20 with the highlight and understand they were colored. It was
21 easier to look at on the computer, and I appreciate counsel
22 doing that.

23 Everything that the defense seeks to introduce is
24 certainly relevant. I certainly understand why the defense
25 would want to introduce it and, quite frankly, some of the

1 information has already come in through other sources, although
2 that's not determinative of whether 106 would suggest I should
3 or shouldn't include it with the reading of the interrogatories.

4 But here's what I found when I read them all -- and
5 they all fall under the same category -- is certainly the
6 information is related; it's certainly relevant; it's certainly
7 part of the answer. But I don't find the statements the
8 plaintiffs introduced somehow is in a vacuum, creates confusion
9 for the fact finder, distorts the statements that were taken, or
10 they were taken out of context such that you have to include the
11 additional materials the defendant seeks to introduce to explain
12 it or qualify it.

13 You know, there will be examples about, you know,
14 what's your ability to -- what are you charged with enforcing or
15 what are you enforcing? And then the response is, But we don't
16 intend to enforce. Well, that's relevant. It's on the same
17 topic. It's not necessary to or doesn't qualify the prior
18 statement. It doesn't explain the prior statement or -- and it
19 doesn't put it in context. It's simply additional pertinent
20 information that may not -- may be responsive.

21 And if that's how I was going to slice the bread under
22 106, then turning back to the example I gave the other day with
23 the criminal defendant, that would mean that anything that you
24 say, if it brings in anything that's in the same universe or
25 discussion, that it would automatically come in, and that's not

1 how 106 applies. Otherwise, that puts a -- it undermines the
2 entire purpose of sending out interrogatories or questioning a
3 witness.

4 If you are asking a party to do something, and you
5 want to enter an admission against a party, if I then have to
6 introduce all kinds of other information to get that in, that's
7 not necessary to qualify it or explain it, then you're given --
8 it puts the parties seeking to introduce the statement between a
9 rock and a hard place. I can essentially absolve the other side
10 of the need to call a witness and produce affirmative evidence.
11 They simply can put in all kinds of qualifications and answers
12 and, therefore, back-door in that information that way.

13 I think that that is a bridge too far in terms of the
14 application of Rule 106. I don't find that fairness requires
15 this additional information to be brought in in this form.
16 Quite frankly, every bit of information can be brought in
17 through a witness or on behalf of the defendant, and it's not --
18 again, it's not about clarifying, qualifying or explaining the
19 responses that plaintiff introduced. It's additional
20 information that relates to a similar point.

21 And on that basis, I find the rule of -- Rule 106 of
22 the Rules of Evidence, in fairness, do not require, so I
23 overrule the objection. I'm not going to require, under the
24 rule of completeness, the additional information to be included
25 with the submissions by plaintiff; all right?

1 MR. WERMUTH: Thank you, Your Honor.

2 THE COURT: All right. We've got one additional
3 witness. Does the plaintiff at this point believe they're going
4 to be -- just so I'll know, and I'm not -- this is not your
5 final opportunity, but at this juncture, do you anticipate
6 calling any rebuttal witnesses?

7 MR. WERMUTH: Plaintiffs do not at this point, but we
8 do have some housekeeping issues to address after the witness.

9 THE COURT: All right. Well, we can do that. We're
10 going to have a bunch of housekeeping witnesses -- issues
11 afterwards to make sure we have the right exhibits and so forth.

12 And defense can call its next witness.

13 MR. LEVESQUE: Your Honor, defense calls Chancellor
14 Kathy Hebda.

15 THE COURT: And I'm going to instruct all the lawyers
16 to refer to the witness as "Chancellor." If we're going to use
17 titles, we're going to use that title. We call people "Doctor"
18 and use other titles, so I want everybody to call her
19 Chancellor, and the Court will follow that same rule, okay?

20 MR. LEVESQUE: Yes, sir.

21 (Chancellor Hebda entered the witness stand.)

22 THE COURT: Chancellor, if you'll raise your right
23 hand and be sworn.

24 **KATHRYN HEBDA, DEFENSE WITNESS, DULY SWORN**

25 THE COURTROOM DEPUTY: Please state your name and

1 spell your last name for the record.

2 THE WITNESS: It's Kathryn Schneider Hebda, H-e-b-d-a.

3 THE COURTROOM DEPUTY: Thank you.

4 DIRECT EXAMINATION

5 BY MR. LEVESQUE:

6 Q. Chancellor Hebda, who is your current employer?

7 A. The Florida Department of Education.

8 Q. And you are currently the Chancellor of the Florida College
9 System and the Division of Florida Colleges in the Department of
10 Education; correct?

11 A. That's correct.

12 Q. And before that you were the chief of staff for Pam Stewart
13 as the Commissioner of Education for about 5 years; is that
14 correct?

15 A. That's correct.

16 Q. You have been an employee of the Department for almost 30
17 years; correct?

18 A. Actually just over 30 years.

19 Q. Just over 30 years?

20 A. Hit my anniversary last October for 30.

21 Q. And who do you report to?

22 A. I report to Senior Chancellor Henry Mack and then to the
23 Commissioner.

24 Q. And what are your responsibilities?

25 A. As Division Director for -- or Chancellor for the Division

1 of Florida Colleges then it's my responsibility to ensure that
2 our division is implementing all the activities we're
3 responsible for, not just to the College System but within the
4 Department of Education and the State Board of Education.

5 Q. Can you distinguish for the Court between the Board of
6 Education and the Department of Education?

7 A. Yes.

8 The Board of Education are members appointed by the
9 Governor to staggered terms, and they are the agency head,
10 actually, which makes us different than many of the other state
11 agencies that have a single individual as a state agency head.

12 And then they select a commissioner, appoint a commissioner
13 who then acts as essentially the CEO and runs the day-to-day
14 activities of the Department of Education.

15 Q. And how are the members of the Board of Education
16 appointed?

17 A. They're appointed by the Governor to staggered terms,
18 four-year terms. And I think there's a limit on -- of two terms
19 per member.

20 Q. And are they subject to confirmation by the Senate?

21 A. They are.

22 Q. And who does the Commissioner report to?

23 A. He reports to the Board of Education.

24 Q. As Chancellor, are you considered head of the Florida
25 College System?

1 A. Not head of the Florida College System. I coordinate the
2 Florida College System. I work for the -- as I said, the
3 Department, the Commissioner and the Board, but it's my
4 responsibility in that coordination effort to work with them to
5 implement laws that they are in compliance -- or to be compliant
6 with.

7 Q. Does the Division of Florida Colleges have jurisdiction
8 outside the Florida College System?

9 A. No.

10 Q. Can you give me a sense of the structure of the Florida
11 College System?

12 A. Yes.

13 There are 28 colleges that are either community or state
14 colleges in name, and they comprise the Florida College System.

15 The Constitution refers to them as the State College
16 System. The statute refers to them as the Florida College
17 System.

18 Q. And those individual colleges, do they have their own
19 boards?

20 A. They do. Each one is locally governed by a Board of
21 Trustees.

22 Q. And who appoints those boards?

23 A. The Governor.

24 Q. Do you know if their members are appointed by or if the
25 members of the Boards of Trustees of the individual colleges are

1 confirmed by the Senate?

2 A. I believe they are.

3 Q. Does each college have a president?

4 A. Yes.

5 Q. And who chooses the presidents of each individual college?

6 A. The individual Boards of Trustees.

7 Q. Does the Board of Education play any role in selecting
8 those presidents?

9 A. No.

10 Q. About how many students are enrolled in the Florida College
11 System?

12 A. At present it's under 600,000. We -- probably 560-,
13 -70,000 at this point.

14 Q. Do the individual college institutions have rulemaking
15 authority to govern their colleges?

16 A. Yes.

17 The Boards of Trustees are authorized in the statute under
18 the powers and duties of the Boards of Trustees to make
19 policies, or rules as they might call them, to govern the
20 college.

21 Q. And what is the role of the Board of Education as it
22 relates to the Florida College System and their institutions?

23 A. The Constitution refers to it as a supervision of the
24 Florida College System. So we don't -- we don't supervise
25 individual colleges, but we supervise the system.

1 Q. And can you describe the authority that the Board of
2 Education has to ensure that the Florida College System is in
3 compliance with the law?

4 A. Yes.

5 Section 1008.32 Florida statutes lays out that the Board of
6 Education has authority to ensure that all laws and rules are
7 implemented and that -- I think it refers to early learning,
8 K-12 public schools and the Florida College System.

9 Q. If the Board is confronted with a college that was reported
10 to have not followed the law, what would the Board typically do?

11 A. Well, the first thing we would do is -- if the complaint
12 came in or the report came in, let's say, through a citizen, for
13 example, we would review the report, review the complaint, and
14 then reach out to the college first to see if they were aware of
15 it or if they had -- or that they were dealing with it at
16 present and what the situation was. That's the first thing we
17 would do.

18 Q. Then can you provide an example of the type of complaint,
19 what that complaint would look like?

20 MR. HANCOCK: Objection. If we could establish some
21 foundation. We're discussing a statute that confers authority
22 to the Board itself, and the witness is being asked about what
23 the Board would do. The Chancellor's not a member of that
24 board.

25 THE COURT: Mr. Levesque, your response?

1 MR. LEVESQUE: Your Honor, she testified at length in
2 her deposition as the Board designee. She's certainly become
3 aware in this position of what goes on by virtue of her own
4 work.

5 THE COURT: Mr. Hancock, response?

6 MR. HANCOCK: I mean, at this point we're discussing
7 hypotheticals. I don't understand in what situation the
8 Chancellor would have personal knowledge of how hypothetically
9 the Board would behave.

10 THE COURT: Does the fact that a witness is designated
11 as a 30(b)(6) witness for purposes of binding a party -- does
12 that mean that that same party that designates them can call the
13 witness to testify in the trial itself as a 30(b)(6) witness
14 without personal knowledge?

15 MR. HANCOCK: Our understanding is no, that --

16 THE COURT: That was kind of a loaded question, but
17 that's why I was asking. So that's our objection, Judge, we get
18 to use the witness as 30(b)(6) witness; the defense does not.

19 MR. HANCOCK: Exactly.

20 THE COURT: Mr. Levesque, response?

21 MR. LEVESQUE: Your Honor, I might be wrong, but I
22 think my question was just to provide an example of the
23 complaint, the type of a complaint. I'm not --

24 THE COURT: If she doesn't receive the complaints, her
25 answer would be based on what others have told her what they do

1 with the complaint and how they respond --

2 MR. LEVESQUE: Well -- she may have -- she may have --

3 THE COURT: I'll sustain the objection at this point
4 as lack of foundation, so you can lay the predicate how she
5 would know.

6 And maybe she does know. I'm not suggesting the
7 witness could not possibly have been involved in the process.
8 That wasn't the point. It's based on what I've heard so far.

9 So sustained as to lack of foundation at this
10 juncture.

11 MR. LEVESQUE: Thank you, Your Honor.

12 BY MR. LEVESQUE:

13 Q. Chancellor Hebda, in your capacity as Chancellor of the
14 Florida College System, have you received any complaints against
15 Florida colleges?

16 A. We have.

17 Q. Can you provide a few examples of the types of complaints
18 that you've received?

19 A. Yes. The Department has a system that we use to take in
20 correspondence directed at the Department or the Commissioner,
21 and then that correspondence is then, for example, given to the
22 division that's applicable in the content area to respond to.

23 And so we have received complaints.

24 THE COURT: Chancellor, can I ask you a quick
25 question?

1 THE WITNESS: Yes, sir, please.

2 THE COURT: Because I -- I think I got this right.
3 Not everybody that contacts -- and not every complaint is going
4 to be elevated to the Board and go to the Board; some of them
5 are going to be processed as you're describing? Do I have that
6 right?

7 THE WITNESS: Yes, sir.

8 THE COURT: And so the reason why you would be getting
9 them and others would be getting them at -- separate and apart
10 from the Board is there's a chain of command and a protocol to
11 follow if what intuitively I thought was happening, but is that
12 correct?

13 THE WITNESS: Yes, Your Honor, that's correct.

14 THE COURT: Thank you.

15 Mr. Levesque, you may proceed.

16 BY MR. LEVESQUE:

17 Q. Under Section 10008.32, what are the tools that are
18 available to the Board to bring a college system that is not
19 following the law into compliance?

20 A. You can think of it as sort of progressive discipline. The
21 Commissioner is authorized to do an investigation to find
22 probable cause. If the -- he can report -- he or she can report
23 that information to the State Board.

24 The State -- the Commission could also report that
25 information to the legislature. The Board could decide to

1 withhold funding to the institution. It could decide to not
2 include them in competitive grants, those sorts of things, but
3 they're listed in sort of order of progression --

4 Q. And does --

5 A. -- in the statute.

6 Q. Is one of the things that they can also require periodic
7 reporting until the situation is remedied?

8 A. They can.

9 Q. And are all those spelled out in 1008.32(4)?

10 A. Yes, sir.

11 THE COURT: Just so I can clarify -- I think it's
12 clear, Mr. Levesque, from your question the witness's answers.

13 Consistent with my prior question to you, Chancellor,
14 as I understand, we had this progressive discipline that may go
15 to the Board, but oftentimes -- and you didn't give specific
16 examples -- it's never going to reach that level.

17 We can call somebody and find out it's not happening,
18 it's not true. We find out there's a misunderstanding and the
19 parties get together and correct the misunderstanding. There's
20 100 different ways that it can be resolved or disposed of so
21 that it may never be elevated to the Board.

22 Is that a fair characterization?

23 THE WITNESS: That's correct, Your Honor.

24 THE COURT: I just wanted to make sure I wasn't
25 assuming something that was false.

1 MR. LEVESQUE: Thank you, Your Honor.

2 BY MR. LEVESQUE:

3 Q. Does the Board have authority to withhold funds for
4 noncompliance with a law such as House Bill 233?

5 A. They do.

6 Q. Has the Board ever exercised its authority to withhold
7 funds in the higher-ed context to the extent that you're aware?

8 A. I'm not aware of any.

9 Q. Are you aware of any discussions by the Board about
10 withholding funds related to House Bill 233?

11 A. I'm not aware of any.

12 Q. I'm going to talk a little bit about the survey.

13 When the statute tasked the Board with creating or
14 selecting a survey, what did you understand that to mean?

15 A. That the Board of Education had a choice to either select
16 or create the survey.

17 Q. What did the Board ultimately elect to do?

18 A. Create the survey.

19 Q. And under House Bill 233, what are the criteria for the
20 survey?

21 A. That it's statistically valid, nonpartisan and objective.

22 Q. And how did the Board of Education come up with the survey?

23 A. The process started -- Chancellor Criser, who was
24 chancellor at the time of the Board of Governors, he and I spoke
25 a couple of times after the law passed in discussion of how the

1 survey could -- could work.

2 He indicated that they were contemplating working with the
3 Institute of Politics at Florida State University, and I talked
4 with our leadership about that and whether it would be
5 appropriate for us to work with them in that process. They
6 agreed, and so the first part of the process was the Board of
7 Governors staff working with the Institute of Politics to draft
8 a survey that we intended to then become a part of and use the
9 same survey for the colleges and the universities.

10 Q. At some point in time did that plan change to -- well, let
11 me back up.

12 At any point in time did you become involved with creating
13 a survey for the Board of Education?

14 A. Yes.

15 Q. And who did you work with from the Board of Education on
16 drafting that survey?

17 A. From the Board of Education, actually drafting the
18 questions for the survey and the instructions, Dr. Carrie
19 Henderson, Senior Chancellor Henry Mack and myself, basically.

20 Q. And who did you work with from the Board of Governors on
21 drafting some of those questions?

22 A. We worked with Chancellor Criser and members of his team.
23 The members that I'm aware of are John Rogers and Vickie Shirley
24 and Gene Kovacs.

25 And I think at one point -- his first name is Jason. I

1 can't think of his second name right now, but he's their data
2 person, the Board of Governors. I think he was in one of the
3 meetings as well. There could have been other staff in the
4 Board of Governors that reviewed and looked at things -- oh,
5 Dr. Christy England I think also was part of it.

6 Q. Did you work with anybody in the Governor's office on
7 drafting the survey?

8 A. We worked with and got feedback from Alex Kelly.

9 Q. What was the goal of your efforts in drafting the survey?

10 A. Our goal was to implement a survey that met the
11 requirements of the law. It was on the topic the law described
12 and would meet the three criteria the law laid out.

13 Q. Did you believe you accomplished that goal?

14 A. I believe we did.

15 Q. Now, you've been here this week, and you've heard some of
16 the criticism about the survey and the limitations on the number
17 of responses.

18 Is there a reason that the Board elected to limit the
19 number of responses?

20 A. If you're talking about the responses from which a student
21 or employee could select when choosing their answer, part of our
22 discussion throughout the survey drafting was -- and this was
23 true with Chancellor Criser as well -- that we wanted students
24 and employees to take the survey.

25 So part of wanting them to take the survey or having them

1 complete the survey would be to make sure that, to the best of
2 our ability, the survey was clear, the choices weren't confusing
3 or wouldn't frustrate individuals who were trying to answer to
4 the best of their ability, and so one of the things that we
5 considered was limiting the choices that individuals would
6 choose from, to the extent they were still appropriate.

7 Q. And so it sounds like that would be for the convenience of
8 the survey taker, not to predict any type of response; correct?

9 A. That's correct.

10 Q. Did the Board discuss using a survey from any other state?

11 A. We did. We looked at a couple of surveys. The Colorado
12 one was one. North Carolina was another survey that we looked
13 at.

14 Those surveys asked questions on topics beyond what the
15 statute was asking us to look at, and so we ultimately didn't
16 adopt those surveys.

17 Q. Can you describe how the Board --

18 THE COURT: Mr. Levesque, I think it's probably
19 implicit, but at one point -- you don't have to do it right now;
20 you can continue with your questioning -- but at some point you
21 asked the witness -- and I understand there's some other sources
22 for this information -- whether this witness had any contact
23 during the passage of the bill and discussed with legislators
24 what the survey would look like or during -- I think she's
25 already -- when she limited her testimony and said she only --

1 Here are the people I talked to, I think. By definition that
2 excluded that we're not now contacting legislators to draft the
3 survey, but if you could just make that explicit, I think it was
4 clear because she limited the universe of people she spoke to,
5 but I want to make sure, again, that I'm not assuming something
6 that's incorrect, but I thought was implicit in her prior
7 testimony; okay?

8 MR. LEVESQUE: Sure.

9 BY MR. LEVESQUE:

10 Q. Chancellor, did you get survey drafting advice from the
11 legislature when you were working with the Board of Governors
12 and Mr. Kelly on coming up with survey questions?

13 A. I did not.

14 Q. Did you share the survey with any legislators and get
15 feedback back in any way?

16 A. I did not.

17 THE COURT: And, actually, the follow-up question --
18 and, again, I think it was implicit -- when House Bill 233 was
19 being passed and they were coming up with the language that the
20 survey would be objective, nonpartisan, et cetera, were you or
21 anybody that you're aware of in your office in contact with the
22 legislature discussing, Just describe it that way and then
23 you'll leave it to us, or anything along those lines?

24 Is -- do you understand the spirit of the question?

25 THE WITNESS: I think I do. Thank you, Your Honor.

1 The -- and I say this because I'm trying to make sure
2 that I'm answering on my own knowledge and not -- no longer the
3 corporate witness.

4 So I personally did not ask anybody else for review,
5 but I've seen an email where someone asked -- I think it was at
6 the time Senator Rodrigues at some point a copy of the survey
7 once it was near its final.

8 THE COURT: That was after it was done?

9 THE WITNESS: Yes.

10 THE COURT: I'm talking about when they were drafting
11 the legislation --

12 THE WITNESS: Oh.

13 THE COURT: -- and they're trying to figure out, Are
14 we going to define the survey, or are we just going to talk
15 about it generally. To your knowledge, was your office, the
16 Board, the Commissioner and so forth -- were y'all in contact
17 with folks, Oh, this is coming, and we're just going to do a
18 hand-off to you and so why don't we draft it this way, or
19 anything along those lines?

20 THE WITNESS: No, Your Honor.

21 THE COURT: You got it when you got it, and this was
22 all -- took place after HB 233 was passed?

23 THE WITNESS: That's correct.

24 THE COURT: Okay. I understand.

25

1 BY MR. LEVESQUE:

2 Q. Can you describe how the Board went about administration of
3 the survey?

4 A. Yes.

5 We used -- and we did this the same way with the Board of
6 Governors. We -- because we were choosing to use the same
7 survey for university and college students, we wanted it
8 administered the same way at the same time, and so we chose
9 Survey Monkey to -- which is a platform that we used to deliver
10 the survey.

11 And because the -- it's required that the -- that we
12 require institutions to administer the survey, we sent the
13 institutions an individual link to the survey that they would
14 then give to their students or employees -- one for students,
15 separate link for employees -- that then would -- and we
16 provided them with invitation language and information and when
17 to send the instructions, when to send a prompt out during the
18 week it was open to collect as much information as we could and
19 encourage as many students and employees to complete the survey.

20 And then the survey results, though, went back directly
21 into Survey Monkey and not through the institution back to us.

22 Q. Now, does the Board have rulemaking authority over the
23 survey provision?

24 A. For the survey provision it says we may adopt rules for the
25 survey. So it allows us to, but it doesn't require us to make

1 rules with regard to the survey.

2 Q. At this point in time, has the Board adopted a rule related
3 to the administration or the creation of the survey?

4 A. No.

5 Q. What is the Board of Education obligated to do with the
6 survey results?

7 A. Publish them.

8 Q. Are they obligated to do anything else?

9 A. No.

10 Q. Other than compiling and publishing the survey results, has
11 the Board of Education analyzed the survey results?

12 A. No.

13 Q. Has the Board of Education reviewed the survey results to
14 discuss what policy changes might need to be made?

15 A. No.

16 Q. Are there any upcoming Board meetings where the survey
17 results are on the agenda for discussion?

18 A. They are not.

19 If I could make a -- just a quick clarification. When
20 you're talking about "the Board," that's actually the State
21 Board. So has the State Board themselves reviewed the results
22 to make any policy changes? No.

23 Q. Yes.

24 A. Certainly, we in the Department looked at the results when
25 they came in before we published them.

1 Q. Okay.

2 And to be clear, if I'm just referencing "the Board," I'm
3 referencing the Board of Education.

4 If it's the Board of Governors or one of the individual
5 institution boards, I'll try to be more specific.

6 Does the Board have the ability to use the survey results
7 to adjust performance funding for institutions?

8 A. Not under the performance funding statute or this statute.

9 Q. As it relates to the 2023 survey, has there been any
10 discussion about making the surveys mandatory?

11 A. No, none.

12 Q. Has there been any discussion about making the surveys
13 nonanonymous?

14 A. No.

15 Q. Are you aware of any intention of administering the survey
16 differently than it was administered in 2022?

17 A. I don't know of any intention.

18 The only conversation or meeting, if you will, that's
19 happened since I was deposed is last week Dr. Henderson and Gene
20 Kovacs had a discussion about logistics.

21 Q. I'd like to talk a little bit about the recording
22 provision.

23 THE COURT: Before you go on, I did have one question.

24 Chancellor, when there was some discussions about the
25 Board of Governors -- and I understand you're not Board of

1 Governors -- there was discussions about what occurred at the
2 university level if a student had a complaint, and you may have
3 heard me mention, Well, I know there's a -- a form on the
4 website says that if you exhaust things at one level, you can go
5 directly to the Board of Governors.

6 How does the Board with which -- the Board of
7 Education, as opposed to the Board of Governors -- I know y'all
8 have an Inspector General. I know there can be investigations
9 about misfeasance or malfeasance or -- and can -- certain things
10 regarding the institutions that fall under the ambit of the
11 Board of Education specifically, the colleges, but I didn't see
12 anything in those provisions -- I may be missing it -- that
13 talks about reviewing complaints by students.

14 Is there a parallel provision or protocols with the
15 Board of Education like there is for the Board of Governors?
16 Because I may have been looking at the wrong thing. Because
17 when I looked through the list about the Inspector General, it
18 appears to be -- that didn't appear to be under that list, but I
19 may have missed something.

20 THE WITNESS: Your Honor -- right.

21 For the Inspector General, they are generally limited
22 to fraud, waste, abuse, I think, is what they call it.

23 THE COURT: And that's the language -- I used
24 misfeasance and malfeasance as a general term, but I believe
25 that was the language that I read in the provision. But go

1 ahead.

2 THE WITNESS: Yes, sir.

3 THE COURT: What you said; not what I said.

4 THE WITNESS: And then -- so that's the Inspector
5 General. So they can receive complaints from anyone or from an
6 institution, someone at an institution, a citizen who is
7 concerned about an institution. They can handle those types of
8 complaints.

9 THE COURT: But that wouldn't be a student complaining
10 like, A professor's shouting me down in class, because I
11 wouldn't fall on the ambit of the IG's scope of their authority.

12 THE WITNESS: If they did receive it, they would send
13 it back to the college.

14 And I've personally seen where the IG's office will
15 send complaints they've received that are really college
16 authority back to the president of the institution.

17 THE COURT: Separate from the IG, does the Board of
18 Education, like the Board of Governors, have -- do they review
19 student complaints once the process at the local college has
20 been resolved -- I mean, exhausted, rather -- the complaint?

21 THE WITNESS: The Board of Education doesn't do
22 that --

23 THE COURT: Okay.

24 THE WITNESS: -- to the -- just to resolve a student
25 complaint. It's the Board of Trustees.

1 If that resulted in a report that a college wasn't
2 following a law, then that would send us into a different realm.

3 THE COURT: So the only way you get it would be it
4 being referred to you by the Board of Trustees, not somebody
5 doing an end-run around the Board of Trustees and coming
6 directly to y'all?

7 THE WITNESS: Anybody can come directly to us.

8 THE COURT: I meant, you're not going to hear it?

9 THE WITNESS: The Board of Education wouldn't take it
10 up.

11 THE COURT: The only way they're going to hear it is
12 if it's a referral from the Board of Trustees?

13 THE WITNESS: Not necessarily from the Board of
14 Trustees. If the complaint results in the Commissioner
15 determining perhaps there's probable cause for me to investigate
16 this as a violation of a law or statute, then that's where we go
17 into --

18 THE COURT: And that was going to be my next question.

19 And what appeared to me what you were talking about
20 was 1008.32(2)(a), which I believe says: *The Commissioner of*
21 *Education may investigate allegations of noncompliance with law*
22 *or State Board...*

23 THE WITNESS: That's correct, Your Honor.

24 THE COURT: And that -- and this was a long,
25 convoluted way of getting there. I was trying to circle back to

1 what you talked about before.

2 And if there was an allegation, for example, the
3 violation of HB 233, then the vehicle, for purposes of the Board
4 of Education, would be through that 1008.32(2)(a) if the
5 Commissioner -- it was presented to him and he thought there was
6 probable cause?

7 THE WITNESS: Yes, sir.

8 THE COURT: Okay. And that's the way you'd get there,
9 if somebody was going to get there?

10 THE WITNESS: If someone was going to get there.

11 THE COURT: In your time, are you familiar with or
12 have you been involved with or is there an example you can give
13 me where there's ever been an allegation of failure of a college
14 to comply with the law such that there was finding of probable
15 cause and that it was then investigated by the Commissioner?

16 THE WITNESS: I don't recall one for a college. I've
17 seen that in K-12, but I don't recall one for a College System
18 institution. It could have been just before my time perhaps.

19 THE COURT: I understand.

20 And can you give me an example of a K-12, if you can
21 recall any?

22 THE WITNESS: Certainly. The one that I recall most
23 recently was dealing with mask mandate.

24 THE COURT: Okay.

25 THE WITNESS: And that -- that actually went through

1 several of the types of progressive discipline such that
2 ultimately the Board chose to withhold the salaries of the board
3 members, the school board members, because they refused to
4 comply.

5 It wasn't a misunderstanding. It wasn't a, How can we
6 help you get there? Those steps had already been accomplished,
7 and eventually they decided that they were not going to comply,
8 and that's when the Board withheld their salaries.

9 THE COURT: And that would be an example, too, of what
10 you meant -- because you said "progressive," what you meant by
11 progressive.

12 I didn't -- the process didn't begin and end with the
13 withholding of funds. It started with consultations between the
14 pertinent school board and our Board and the Commissioner trying
15 to figure out, How do we fix this and remedy it and move on?
16 And when there was an impasse, and the school board refused to
17 comply is when at that juncture -- as you said progressive --
18 they went from talking to them to withholding funds -- or
19 salaries.

20 THE WITNESS: Yes, sir.

21 THE COURT: I got it.

22 THE WITNESS: That's right, Your Honor.

23 THE COURT: All right. Thank you.

24 MR. LEVESQUE: If I could just ask a clarifying
25 question, because it might have been clear for Your Honor, but

1 it wasn't necessarily clear for me.

2 BY MR. LEVESQUE:

3 Q. For complaints between an individual student and an
4 individual professor, are those viewed as what I'll call
5 institutional complaints that the Board would consider, or are
6 those complaints -- types of complaints that the Board of
7 Education would not entertain?

8 A. The -- typically, a complaint between a student about a
9 professor or any of those sorts of things is exactly the kind
10 of -- if we received that via email or phone call or whatever it
11 was, that's the kind that we would first contact the college.
12 The appropriate staff member would contact the college and find
13 out, Are you aware of this? What's happening? What's actually
14 going on? And if it's -- it should be resolved there,
15 particularly if it's not anything related to a violation of the
16 law.

17 For example, we will get complaints from students who don't
18 believe they got a fair grade in class. We receive calls from
19 parents who want to see their adult children's transcripts and
20 their children won't give them permission, and we can't let them
21 see them either, those kinds of things. And we -- but that's
22 not the kind of thing that would go to the State Board or even
23 come close to the 1008.32.

24 Q. In your understanding, would it be fair to say that the
25 only complaints that the Board of Education would consider are

1 institutional-level complaints?

2 A. Let me say it this way and see if this -- if this helps
3 explain it.

4 If you're talking about -- if you're going to characterize
5 a complaint that the institution should handle as an
6 institutional complaint, such as the grade example that I just
7 gave, then that would not be considered by the Board. That
8 would just be handed back to the institution, and we would
9 respond as, We don't have any authority to help you. We try to
10 work on the back end to help the student if we can or the
11 institution, but there isn't anything that we -- that the Board
12 can -- they have no role in that.

13 A complaint that could start with a complaint from a
14 student about a professor, or a professor about a student, or
15 whatever, those kinds of things that sound like it starts with
16 an institutional complaint could rise to an issue of not
17 following the law, depending on what -- what comes of it. I
18 mean, those situations are certainly all individual.

19 THE COURT: So, for example, if there was a -- and I
20 understood your -- I thought I was following your testimony and
21 that was consistent with what you just said and what you told me
22 before. But you can have student complaints regarding -- under
23 Title IX or parallel state provisions about sexual harassment of
24 coaches and students. So, while that pertains to a student and
25 a school would investigate and make -- it may be something that

1 would be done at the school level, it could also become the
2 school is not following the law in doing what they are supposed
3 to under state or federal law, so it could morph into something.
4 But it's not going to be an individual thing like grades, and so
5 forth. It would have to be something that violated state law.

6 So student complaints can morph into something that
7 relates to the violation of state law by the institution such
8 that the Commissioner could investigate it?

9 THE WITNESS: That's correct, Your Honor.

10 THE COURT: I understand.

11 THE WITNESS: In the example you gave, too, we also
12 refer students -- and we have a webpage for student
13 complaints -- where you can go to get help. We include the
14 Office of Civil Rights, for example, for those types of
15 complaints as well.

16 THE COURT: And I'm sorry. I didn't -- just because I
17 understand doesn't mean y'all can't ask follow-up -- I mean, I
18 understand doesn't mean you can't all ask follow-up questions.

19 MR. LEVESQUE: Appreciate that, Your Honor.

20 BY MR. LEVESQUE:

21 Q. Let's move on now and talk a little bit about the recording
22 provision.

23 What is your understanding of what the recording provision
24 permits?

25 A. The recording provision permits a student to record a class

1 lecture for purposes of their own educational use and/or -- and
2 in a case related to -- it's not a complaint; it's a civil or a
3 criminal action.

4 Q. And does the recording provision require the Board of
5 Education to do anything?

6 A. It does not.

7 Q. Does the Board of Education have rulemaking authority to
8 implement the recording provision?

9 A. No.

10 Q. And without rulemaking authority, can the Board define
11 statutory terms?

12 A. We can't define anything binding without going through the
13 State Board of Education rule process. We need authority do
14 that, and then we would have to go through that process to do
15 that to make it binding.

16 Q. In your understanding, who can provide guidance or
17 rulemaking on the recording provision?

18 A. The institution.

19 Q. What does the rule --

20 THE COURT: Let me ask you this question,
21 Mr. Levesque, because this -- and I want to make plain, the
22 witness is not suggesting this, and this is not meant as a
23 criticism of you, but it's slightly circular, because you've
24 just told me under 1008.32(2)(a), the Commissioner of Education
25 can investigate noncompliance with the law. And we have a law.

1 And I understand there is a difference between, Do you have
2 rulemaking authority? so you from on high tell the colleges,
3 This is how we're defining these provisions of the recording.

4 But setting that aside, which is a slightly separate
5 issue, the Commissioner may be in a position, and the Board, to
6 have to decide whether or not a school was violating that
7 provision; correct?

8 THE WITNESS: Yes, Your Honor, that's right.

9 THE COURT: All right. And so I understand that they
10 can't be engaged in rulemaking authority, but you've already
11 explained progressive discipline. So they are empowered to
12 impose discipline, progressive discipline, if they believe one
13 of the colleges is not complying with the recording provision;
14 correct?

15 THE WITNESS: Yes, sir. That's correct, Your Honor.

16 THE COURT: So while you may not be able to define it,
17 as a practical matter, both the Commissioner and the Board
18 itself may be in a position where they're going to have to
19 define it, because they're going to have to decide what the
20 parameters, were because, otherwise, it would be impossible to
21 decide whether the institution was or was not in compliance;
22 correct?

23 THE WITNESS: That is correct, Your Honor. If that
24 situation came up, and we were notified of it or reported -- it
25 was reported to us, or, like you say, through a student

1 complaint it rose to that level, then through an investigative
2 process I suppose we would have to find out was there a
3 violation of the law or not.

4 THE COURT: Which means the Board -- the
5 investigators, in conjunction with the Commissioner and in
6 conjunction with the Board, is ultimately going to have to
7 define the parameters of what, for example, a lecture means;
8 correct; potentially?

9 THE WITNESS: Potentially, Your Honor.

10 So at this point I would submit there is not a reason
11 for us to because they haven't granted us specific rulemaking
12 authority here. So we wouldn't proactively do that without that
13 specific authority.

14 THE COURT: That's what I meant by the circular part.

15 Tomorrow a bunch of students at -- pick a college or a
16 community college -- one of the professors says, My -- the
17 students are talking during this -- this is not a lecture.
18 You're not going to record it.

19 And the student goes, Wait a second. You know, you
20 just talked for 30 minutes, and the fact that two students asked
21 you a question for three minutes doesn't transform the lecture
22 into something else. I get to record it.

23 And the school says, Pound sand -- or the college
24 says, Pound sand, to the student and his parents, because,
25 apparently, we've got parents involving themselves in their

1 college student's curriculum, based on some other testimony in
2 this case. Goes to the Commissioner, files a complaint and
3 says, The school won't do anything about it. They're not
4 applying the recording provision.

5 In order for y'all to do what you do through the
6 process you previously described under 1008.32 with an
7 investigation, you're, by definition, going to have to decide
8 the contours of what falls within or without the recording
9 provision; right?

10 THE WITNESS: I completely understand what you're
11 saying, and I agree that that's true.

12 One of things I was thinking about when you were
13 talking about that, too, is -- and I don't know this because I
14 don't know the circumstances and I'm not in the general
15 counsel's office, so there could be some legal things that I
16 just don't know and would want to find out. But I also would
17 wonder whether or not we would be in a position to rule that
18 way. For example, if it is something that is determined to be
19 the purview of the institution to define what is or is not a
20 lecture, then perhaps their definition, unless -- I'm going to
21 use a word -- I'm making it up -- unless the definition is so
22 completely outrageous that it's not following the law, there
23 might a reasonable definition of a lecture that an institution
24 through their policy could implement. That's the part that I
25 don't know if we would --

1 THE COURT: I understand your response. What I'm
2 having trouble with, while I understand the institutions are, in
3 fact, trying to give their faculty some guidance -- and I'm not
4 asking for a legal conclusion.

5 THE WITNESS: Yes, sir.

6 THE COURT: But from the procedures that you're
7 describing in your role as Chancellor and the work you do with
8 the Board and the Commissioner, help me to understand, why is a
9 university empowered -- I understand you don't have the
10 rulemaking authority, and the Board of Governors doesn't have
11 the rulemaking authority under the statute; correct?

12 THE WITNESS: Yes, for this part of the statute,
13 that's right.

14 THE COURT: So what empowers the universities to each
15 have their own individual definition such that you, meaning the
16 Board of Education, or, B, the Board of Governors, or anybody
17 else is bound by that definition? That's the part that's lost
18 on me.

19 THE WITNESS: I would say it's under the powers and
20 duties of the Boards of Trustees, which is 1001.64, I think.

21 THE COURT: That just says they generally have control
22 over the administration?

23 THE WITNESS: And it does list things, like they
24 have -- they agree on policies, on academic freedom and
25 responsibility, on students, on facility, on curriculum, lots of

1 things. There's a laundry list of things in that statute that
2 the Board of Trustees are responsible for making policies on.

3 So what I would wonder --

4 THE COURT: And you've answered my question in that
5 regard.

6 And, Mr. Levesque, what I'm going to need from y'all
7 and, Mr. Wermuth, and your team, is to go through the legal
8 analysis, which is not what I was asking the witness. And I
9 understand that Florida Statutes don't weigh out every single
10 detail that relates to the administration of a college or
11 university. So they have to be empowered to put meat on the
12 bones, so to speak, when they're running either -- the
13 administration is running the college and the administration of
14 a university is running a university.

15 What I'm having a hard time getting my head around is
16 this notion that we've got a term in the statute that then each
17 university can then define it, quote, within reason, how they
18 want, such that then the professors or faculty that are subject
19 to the rule can knowingly rely on that.

20 So y'all can explain that in your papers or oral
21 argument; okay.

22 MR. LEVESQUE: Yes, Your Honor.

23 THE COURT: That's not a question for the witness.
24 I'm just --

25 MR. LEVESQUE: We previously flagged that. And what I

1 would say is that the Board of Governors is situated a little
2 bit differently than the college system with their
3 constitutional authority.

4 THE COURT: Fair enough.

5 I didn't mean -- I was trying carefully not to lump
6 them all in together.

7 MR. LEVESQUE: Sure.

8 THE COURT: That's why I asked specifically this
9 witness about the IG and their complaint process and stuff that
10 appeared to be structured differently than the Board of
11 Governors.

12 BY MR. LEVESQUE:

13 Q. Chancellor, what do you know of the college's efforts to
14 come up with guidance on the recordings?

15 A. We were made aware, and I was personally aware, that the
16 college attorneys, their general counsels, many of them had
17 gotten together. There's an attorney named Bill Mallowney,
18 M-u-l-l-o-w-n-e-y. He's a general counsel, and I think he has
19 another vice president title as well for Valencia College, who
20 has been in the system a long time. And he sent over to our
21 office a copy of what the -- those general counsels and those
22 attorneys had worked on together as perhaps some guidance, some
23 wording they could use in their own policies that would help
24 with this.

25 MR. LEVESQUE: And if we could pull up

1 Plaintiffs' Exhibit 83.

2 If we could scroll down to the attachment.

3 There we go.

4 And can you make that just a little bit bigger?

5 BY MR. LEVESQUE:

6 Q. Are you able to see that, Chancellor?

7 A. I can. Thank you.

8 Q. And is this the draft guidance that Mr. Mullooney provided
9 to you?

10 A. It is.

11 Q. And do they define class lecture?

12 A. They do.

13 Q. And do they identify things that can be included in the
14 class lecture?

15 A. They do.

16 Q. What are some of those examples?

17 A. The policy indicates, after defining what a class lecture
18 is, that a class lecture will occur most often in a course
19 identified by the college as a lecture-type course, whether
20 online or in person, as opposed to a lab course or a course
21 section identified as a discussion section.

22 Then it goes on to describe the things that lectures are
23 not, I guess, to give -- compare and contrast examples.

24 Q. Do they also define what it means to publish under that
25 statute?

1 A. Yes. They indicate that to publish means to share,
2 transmit, circulate, distribute, or otherwise provide access to
3 the recording, regardless of format or medium, to another person
4 or persons, including, but not limited to, another student in
5 the class.

6 And then it goes on to talk about different kinds of media
7 that could be included in publishing as well.

8 MR. LEVESQUE: If we could scroll back up to the top
9 of that document.

10 No -- I'm sorry -- just the attachment.

11 BY MR. LEVESQUE:

12 Q. Does it also provide the purposes that a recording can be
13 used?

14 A. Yes.

15 Q. Now, in your experience with the Board of Education, do you
16 have a pretty good idea of what a class lecture constitutes from
17 that definition?

18 A. I would say I have a pretty good idea.

19 Q. And you have a pretty good understanding of what it means
20 to publish and what you may publish and what you may not; right?

21 A. I would have a pretty good idea. I imagine, as in any
22 case, there's going to be a question about some particular
23 circumstance. But, in general, I think I can understand what
24 they're saying here.

25 Q. Are you familiar with the policies that the colleges and

1 universities have adopted to give guidance to faculty staff and
2 students?

3 A. I'm familiar with some of them.

4 MR. LEVESQUE: At this time I would like to bring up
5 Defendants' Demonstrative Exhibit 1, the FSU class recording on
6 guidance.

7 MR. HANCOCK: Your Honor, we'd object to using this
8 demonstrative. It's undisclosed. It's pure hearsay, and it's
9 also a university document over which the Chancellor has zero
10 jurisdiction.

11 MR. LEVESQUE: Not looking to admit it into evidence.
12 She's indicated that she has looked at and is familiar with the
13 guidance that has been --

14 THE COURT: A demonstrative aid is something that
15 explains the testimony. What you're doing is you're introducing
16 a document that's not in evidence. I mean, you can ask her if
17 she wants to refresh her recollection with it, but this document
18 is not a demonstrative aid to explain her testimony. It's a
19 document to suggest that what she's testifying is true, there
20 are, in fact, substantively other rules.

21 So sustained in part and overruled in part. You can
22 use it, but not how you're using it.

23 MR. LEVESQUE: Yes, sir.

24 MR. HANCOCK: Your Honor, there's one other issue,
25 which is we know the witness is aware of some guidance. We have

1 no idea which guidance or whether it's this one that's been put
2 up on the screen.

3 THE COURT: The witness can testify, just like she did
4 about the last, I'm aware of other things. And if she wants to
5 look at a document to refresh her recollection because there's a
6 provision or language she wants to refer to, that's fine. In
7 her capacity as a chancellor, she is interacting with schools
8 and communicating with them, and she's testifying as a fact
9 witness, They communicate with me. I've talked to some schools
10 and colleges. I understand FSU is not a college, so I get that.
11 But I'm aware of them. They're communicating with them. And
12 she can testify about that.

13 We're not admitting the documents. We're not showing
14 them to the fact finder, me. But Mr. Levesque can use -- she
15 can testify generally about what she's aware from her personal
16 knowledge. And, quite frankly, it would be within her kin to
17 say, For example, if a college calls and says, I know so-and-so
18 did, but I also know these other three institutions have done
19 similar things, you might want to look at those.

20 And so, from that standpoint, I'll allow that type of
21 testimony.

22 MR. HANCOCK: And I'm fully aware, I think at this
23 point we still have not even established that the witness lacks
24 a recollection of the guidance she's aware of.

25 THE COURT: I've ruled. Mr. Levesque turned it down.

1 He's a bright guy, and I think he understands the parameters of
2 what I just said, which was you can -- she can talk about it.
3 She can use it for different purposes. We're just not going to
4 essentially back-door in documents that aren't in evidence.

5 MR. LEVESQUE: Yes, Your Honor.

6 BY MR. LEVESQUE:

7 Q. Chancellor, are you aware of state colleges that have
8 adopted guidance on the recording provision that is
9 substantially similar to what we just looked at?

10 A. Yes.

11 Q. And when I say "what we just looked at," I'm referring to
12 Plaintiffs' Exhibit 83.

13 A. The attorney's document?

14 Q. The attorney's document.

15 A. Yes.

16 Q. Can you identify some of those institutions for us?

17 A. The first one that comes to mind would be St. Johns River
18 State College. I've seen Palm Beach State College information.
19 Who else did I look at?

20 Valencia College. I'm sure there are others, but those
21 come to mind at first.

22 Q. Sure. Now, you --

23 MR. LEVESQUE: I'm sorry.

24 THE COURT: And, Chancellor, just so I'll know,
25 because, again, I think it was implicit in your description of

1 what y'all do in terms of as it relates to the Commissioner and
2 ensuring compliance with state law, while y'all don't have
3 rulemaking authority and you're not drafting the rules, and so
4 forth, is this the kind of thing that if a college within
5 y'all's purview or under your umbrella called and contacted you,
6 you'd have to tell them, We can't define it, but here are
7 resources you might consider?

8 So that's the way in which you would be involved, and
9 that's why you're in part privy to some schools that have
10 promulgated definitions; correct?

11 THE WITNESS: That is correct.

12 THE COURT: All right.

13 THE WITNESS: And I would also say that I reviewed
14 some in relation to this case because I was the corporate
15 witness.

16 THE COURT: I understand.

17 BY MR. LEVESQUE:

18 Q. And you're aware of universities that have adopted similar
19 policies; correct?

20 A. I'm aware of them, yes.

21 Q. Can you identify some of those?

22 A. One is Florida State University. University of Central
23 Florida is another one that I've seen before, for example.

24 MR. LEVESQUE: Your Honor, I'm at a breaking point.
25 We can keep going or for the courtesy of the court reporter --

1 THE COURT: No, we can take a break. We are making
2 good time, and we've already ruled on the evidentiary issues.

3 One thing I will say -- and you've probably
4 anticipated this, Mr. Levesque, as has Mr. Wermuth -- I'm trying
5 to figure out the interplay between rulemaking authority and the
6 delegation to colleges' and universities' boards, and so forth.
7 And when I go through and there's the application of statutes,
8 as opposed to general things, it generally appears that there's
9 a designation of rulemaking authority as it relates to the
10 implication of specific statutes.

11 So I'm trying to figure out the sort of -- almost like
12 a Venn diagram. There's this universe of operational issues,
13 separate and apart from specific statutory mandates, that are
14 just general operational functions that aren't -- there's not a
15 specific directive by statute -- and it may not make a
16 difference -- versus specific mandates under Florida law, some
17 which have rulemaking authority connected to the particular
18 statutes and requirements, some that don't, and how those things
19 overlap. That's the part that I'm going to need some help from
20 you and the other team from; okay.

21 MR. LEVESQUE: Yes, sir.

22 THE COURT: All right. Thank you.

23 We'll take a ten-minute break.

24 Mr. Levesque, about how long do you -- and I'm not --
25 it's not your final answer. I'm just trying to figure out for

1 planning purposes.

2 MR. LEVESQUE: I would estimate maybe -- without being
3 able to predict your questions as well, I would say maybe 15, 20
4 minutes.

5 THE COURT: Okay. And, Mr. Hancock, do you have any
6 idea? And I say that -- did you take this witness's deposition?

7 MR. HANCOCK: I did. I would expect 20 minutes, half
8 an hour.

9 THE COURT: Okay. Very good. So we've got plenty of
10 time.

11 Anything else anybody is aware of we're going to need
12 to address today?

13 MR. WERMUTH: There are a number of exhibit issues
14 that we would like to address in housekeeping, but I'm not sure
15 how long that will take, maybe 30 minutes, 40 minutes.

16 THE COURT: Okay. Very good.

17 New exhibits or figuring out and clarifying what's
18 already been admitted?

19 MR. WERMUTH: Clarifying what's already been admitted.

20 THE COURT: Well, yeah, I can tell you what y'all are
21 going to do with that. You, Mr. Levesque, or whoever y'all want
22 to designate from your team, is going to get with my courtroom
23 deputy. And then if there are disagreements about what was or
24 wasn't admitted or what the scope of something is, then
25 Ms. Milton McGee will call me back in. But I have no desire to

1 see that sausage being made; okay.

2 All right.

3 MR. WERMUTH: Okay. Your Honor.

4 THE COURT: Court is in recess for ten minutes.

5 MR. LEVESQUE: Thank you.

6 (Recess taken at 1:38 PM.)

7 (Resumed at 2:00 PM.)

8 THE COURT: All right. We're back on the record.

9 Chancellor, you're still under oath.

10 And, Counsel, Mr. Levesque, you may proceed.

11 MR. LEVESQUE: Thank you. Your Honor.

12 BY MR. LEVESQUE:

13 Q. Chancellor Hebda, before we go on and talk about something
14 else, I want to go back and talk a little bit about some of the
15 complaint examples or the process that we discussed.

16 Does the Board of Education have a process for handling
17 complaints?

18 A. I would say, yes.

19 Q. And when it comes to someone making a complaint against an
20 employee of a college institution, does the Board of Education
21 require the complainant to exhaust administrative remedies with
22 the institution before it considers the complaint?

23 A. If you -- I think I understood your question to be if it's
24 one that should be handled by the institution, I would say, yes.

25 We send them back to the institutions because they have the

1 authority to deal with grade issues or whatever those other
2 kinds of things are that are institution specific.

3 THE COURT: Well, let me ask you a question as
4 qualified, because I thought I understood your testimony.

5 But if it was directly -- the institution itself was
6 not following state law, whatever the claim is, there's not
7 necessarily going to be any exhaustion, is there?

8 THE WITNESS: That's correct.

9 THE COURT: I understand.

10 BY MR. LEVESQUE:

11 Q. Well, and on that example -- let's use an example of a
12 student who complains about a professor not allowing them to
13 record a lecture.

14 A. Okay.

15 Q. If that complaint is made initially to the Board of
16 Education, you as the Chancellor, what are you going to do with
17 that complaint?

18 A. After I review it, I would contact the institution and ask
19 them if they're aware of it.

20 THE COURT: All right. Let me ask a question, because
21 that's not the question I was asking.

22 The question I was asking, if a student complains and
23 says, I've gone -- I and seven of my classmates have repeatedly
24 gone to the administration about professors that aren't allowing
25 us to record, and the university won't give us a voice or

1 discuss it with us, and they're refusing to allow -- refusing to
2 consider our challenges based on this Florida law, are you going
3 to send that back, or does that stay with y'all to investigate?

4 THE WITNESS: The first thing we would do is reach out
5 to the institution to find out more about what's happened.

6 THE COURT: Oh, gather information, but --

7 THE WITNESS: Gather information.

8 THE COURT: -- I'm saying, does the complaint
9 necessarily get bounced back for the university's review if it's
10 a challenge to what the university is or is not doing?

11 THE WITNESS: Not necessarily; I think it would depend
12 on the situation.

13 THE COURT: I understand. So "it depends" is the
14 answer.

15 THE WITNESS: It depends, yes, sir, Your Honor.

16 THE COURT: I got it.

17 BY MR. LEVESQUE:

18 Q. Okay. Chancellor, let's talk about the shielding
19 provisions.

20 What do you understand the shielding provisions of House
21 Bill 233 to require?

22 A. The shielding provision indicates that students and staff
23 at the institution may not be shielded from speech covered in
24 the First Amendment, or by the First Amendment, or ideas that
25 are unwelcome, offensive, uncomfortable -- and then there's

1 another word, too. There's a fourth thing.

2 Q. And does the Board of Education have authority to implement
3 the shielding provisions?

4 A. There's no rulemaking authority for the Board for the
5 shielding provisions.

6 Q. And that would be -- we had a good colloquy about the
7 recording provisions; the same type of analysis would apply to
8 that?

9 A. That's correct.

10 Q. Are you aware of anything in the bill that expressly
11 directs the faculty to not shield?

12 A. The bill doesn't call out faculty under the shielding
13 provision specifically. It talks about Florida College System
14 institutions, State University System institutions, Board of
15 Governors and the Board of Education, not shielding.

16 Q. As the Chancellor of the College System, do you understand
17 the shielding provisions to require the institutions to provide
18 access to ideas that may be uncomfortable, unwelcome, unwanted
19 or otherwise subject to the shielding provision?

20 A. I don't understand it to require them to present ideas of
21 any kind.

22 Q. Has the Board issued any guidance as to what
23 "uncomfortable, unwelcome or disagreeable" ideas might be?

24 A. We have not.

25 MR. LEVESQUE: Your Honor, one moment?

1 THE COURT: Sure.

2 (Pause in proceedings.)

3 MR. LEVESQUE: No further questions, Your Honor.

4 CROSS-EXAMINATION

5 BY MR. HANCOCK:

6 Q. Good afternoon, Chancellor.

7 A. Good afternoon.

8 Q. Do you recall we sat down for a deposition in August of
9 this year?

10 A. I do.

11 Q. And do you recall we remotely had another deposition in
12 December?

13 A. Yes.

14 Q. And I may have gone overboard. I don't think we'll look at
15 this whole binder today, but I have a binder of exhibits.

16 MR. HANCOCK: If I can approach the witness.

17 THE COURT: You can certainly approach.

18 BY MR. HANCOCK:

19 Q. It's just for your ease of reference if we start talking
20 about anything.

21 A. Thank you.

22 MR. LEVESQUE: Your Honor, is it possible to see a
23 copy of what was just provided to the witness?

24 MR. HANCOCK: It's all exhibits in the record and
25 if -- and Andy will also be presenting a copy of any exhibit.

1 THE COURT: Well, let's do this: If we go to a
2 particular exhibit that the witness is asked to refer to, then
3 just hand it to Mr. Levesque, a copy of that actual exhibit.

4 MR. HANCOCK: Sure.

5 So at the outset, Andy, can we pull up
6 Plaintiffs' Exhibit 74.

7 BY MR. HANCOCK:

8 Q. And, Chancellor, do you recall testifying earlier to the
9 effect of, We don't supervise the colleges, just the College
10 System?

11 A. Yes.

12 Q. And is there a separate entity that is the Florida College
13 System?

14 A. The Florida College System is comprised of the 28
15 institutions.

16 Q. Is there any entities separate from the collection of the
17 institutions themselves?

18 A. That is the Florida College System?

19 Q. Correct.

20 A. No.

21 Q. So is it fair to say that the Florida College System is a
22 label that just refers to the set of individual colleges?

23 A. That's probably fair.

24 Q. And do you recall discussing earlier this statute -- you
25 can look at it on the screen or in the binder if you'd like.

1 A. Yes.

2 Q. And do you see in that first sentence it says: *The State*
3 *Board of Education shall oversee...?*

4 A. Yes.

5 Q. And that directs the Board of Education to affirmatively
6 oversee the enforcement of all laws and rules; is that right?

7 A. Yes. Yes.

8 MR. HANCOCK: And if we can turn down to (4).

9 BY MR. HANCOCK:

10 Q. Chancellor Hebda, do you recall describing the tools that
11 the Board has for enforcement?

12 A. I do.

13 Q. And are these the tools you were referring to?

14 A. Yes.

15 Q. And am I right that you testified that you've seen the
16 Board use these tools previously in a progressive fashion?

17 A. Yes, I did say that.

18 Q. Do you see any requirement here that the Board use these
19 tools in any particular order?

20 A. No.

21 Q. So is it your understanding that they could start
22 withholding funds before they report to the legislature or
23 something like that?

24 A. The statute doesn't seem to limit them particularly.

25 Q. And do you recall testifying about an incident related to

1 masking?

2 A. Yes.

3 Q. And is it your understanding that those school districts
4 were ordered to comply and subsequently funds were withheld?

5 A. Yes. That is generally what happened.

6 Q. Do you recall how much time there was between that order to
7 comply and the decision to withhold funds?

8 A. I don't.

9 MR. HANCOCK: Andy, can we pull up Plaintiffs' Exhibit
10 309, which has already been admitted.

11 BY MR. HANCOCK:

12 Q. Do you see the date of this press release, Chancellor?

13 A. Yes.

14 Q. And that's August 30th of last -- or, I guess, 2021?

15 A. Yes.

16 MR. HANCOCK: And can we zoom in on the second-to-last
17 paragraph?

18 BY MR. HANCOCK:

19 Q. And this says: *On August 20, 2021, the State Board of*
20 *Education issued the Alachua and Broward County school districts*
21 *with an Order demanding that they comply...*

22 Did I read that right?

23 A. Yes.

24 Q. And so does this refresh your recollection there was ten
25 days between the order to comply and the decision to withhold

1 funding?

2 A. That's what it would seem.

3 MR. HANCOCK: And can we go back up to the top
4 paragraph.

5 BY MR. HANCOCK:

6 Q. Do you see that underlined portion?

7 A. Yes.

8 Q. Is it your understanding that that is the rule that the
9 Board determined was being violated?

10 A. Yes.

11 Q. And that's not a Board of Education rule; right?

12 A. It looks like it's a "Department of Health Emergency Rule."

13 MR. HANCOCK: We can take that down, Andy.

14 BY MR. HANCOCK:

15 Q. In terms of the survey provision, do you recall testifying
16 that there was some concern about the response options and
17 survey respondents being confused?

18 A. Yes.

19 Q. And my understanding is the decision was made to limit some
20 of the response options. Is that right?

21 A. Yes.

22 Q. Do you recall which response options were limited to
23 prevent confusion?

24 A. The example that comes to mind is -- without pulling up the
25 original survey that we received from -- the survey we received

1 from Florida State University through Chancellor Criser, there
2 were questions near the beginning of that survey that asked
3 students to reply with, I guess, the frequency of a certain kind
4 of occurrence.

5 And there were, I think, eight different options, for
6 example, ranging from "frequently" to "very frequently" all the
7 way down to "almost never" or "sometimes never." I'm not going
8 to get them all exactly right, but there were eight different
9 options for frequency, and that was an example to us of -- if I
10 were taking the survey, we discussed that I wouldn't be sure
11 necessarily how to categorize certain things; the difference
12 between "frequently" and "very frequently," for example.

13 Q. Do you recall any other examples where the response options
14 were narrowed?

15 A. We may have done that with regard to the reporting
16 categories when they're asked for demographic information, but I
17 would have to actually go back and compare to see if that's
18 true.

19 MR. HANCOCK: Sure.

20 Can we pull up Plaintiffs' Exhibit 93?

21 BY MR. HANCOCK:

22 Q. Do you see this email from Alex Kelly to Bethany Swanson
23 and Henry Mack?

24 A. I do.

25 Q. And if we go to the next page, do you see this attachment?

1 A. Yes.

2 Q. And do you recognize this, Chancellor?

3 A. I do.

4 MR. HANCOCK: And if we zoom out so we can see some of
5 the questions.

6 BY MR. HANCOCK:

7 Q. At the bottom, is that what you were referring to in terms
8 of the frequency scale?

9 A. Yes, it is.

10 MR. HANCOCK: And if we could turn to the last page.

11 BY MR. HANCOCK:

12 Q. These are some of the demographic questions.

13 Is that what you were referring to in terms of some options
14 being restricted?

15 A. Yes.

16 Q. And if we look at the second one, do you see the response
17 options include "conservative, moderate, and liberal"?

18 A. Yes.

19 Q. And do you recall that in the final survey students were
20 asked about the ideology of their professors?

21 A. I think that's right.

22 Q. And do you recall what the response options were for that
23 question?

24 A. I don't without looking.

25 It's going to be similar to this, but I don't -- I wouldn't

1 want to say that I do and then misspeak.

2 Q. Sure.

3 I think in your binder should be Joint Exhibit 3.

4 A. You said Exhibit 3?

5 Q. Yeah. Joint Exhibit 3.

6 So I think it should say JX 3.

7 A. Yes.

8 Q. And if you would turn to the third page.

9 A. Yes.

10 Q. Do you see Question 13?

11 A. Yes.

12 Q. And there's no "moderate" option on Question 13, right?

13 A. That's correct.

14 Q. Was there a concern that students would be confused by a
15 "moderate" option?

16 A. I don't recall discussing that, no.

17 Q. Was there a concern that in the absence of a "moderate"
18 option students might be confused with only the options of
19 "conservative" or "liberal"?

20 A. I don't recall discussing that.

21 MR. HANCOCK: If we can look back at just Plaintiffs'
22 93.

23 Can we look at the last question on there?

24 BY MR. HANCOCK:

25 Q. The final student survey included a question regarding

1 gender identity; right?

2 A. I think so, yes.

3 Yes.

4 Q. In the final survey, was there an option to respond
5 "neither best describes me"?

6 A. No.

7 Q. What were the response options on the final survey?

8 A. For Question 19: *Female, male, and prefer not to respond.*

9 Q. Why was there not a "neither best describes me" option in
10 the final survey?

11 A. I don't know.

12 Q. Chancellor Hebda, do you recall testifying that your
13 department looked at surveys in other states?

14 A. Yes.

15 Q. And you determined that -- you decided not to select one of
16 their surveys; right?

17 A. That's correct.

18 Q. And do I understand the reason is because those surveys
19 went beyond the scope of the survey that HB 233 requires?

20 A. Yes.

21 Q. What about those surveys went beyond the scope of HB 233's
22 survey?

23 A. If I recall, there were additional questions on climate and
24 other things that weren't necessarily -- or didn't seem to
25 pertain to what the statute was requesting the survey to be

1 collected on.

2 Q. And so what did the Board understand the survey to be
3 focused on collecting information on?

4 A. Intellectual diversity or viewpoint diversity as defined in
5 the statute.

6 Q. And do you recall testifying that you did not seek feedback
7 from Senator Rodrigues but you're aware that someone else in the
8 Department did?

9 A. I did see an email that did that, yes.

10 MR. HANCOCK: Can we pull up Plaintiffs' Exhibit 83.

11 And if we can just turn to the guidance on the next
12 page.

13 BY MR. HANCOCK:

14 Q. Do you recall discussing this guidance in your testimony?

15 A. Yes.

16 Q. And this was not a document drafted by the Board of
17 Education; right?

18 A. Correct.

19 Q. And the Board of Education didn't draft any guidance about
20 implementing the recording provision; right?

21 A. That's correct.

22 I should say we told institutions that they should check
23 their policies to make sure they were compliant, but we didn't
24 say what should be in the policy.

25 Q. And I guess that directive to be compliant was the extent

1 of the Board's guidance?

2 A. Yes.

3 Q. And Bill Mallowney sent this document to folks at the Board
4 of Education; right?

5 A. Yes.

6 Q. But the Board of Education does not sign off on this
7 document in any way?

8 A. That's right.

9 Q. And the Board did not distribute this document in any way?

10 A. Not to my knowledge.

11 Q. And do you recall testifying about this definition of
12 "class lecture"?

13 A. Yes.

14 Q. And do you remember you testified that with that definition
15 you had -- you would have had a good idea of what a class
16 lecture was?

17 A. I said I would have had a general idea, I think.

18 Q. If you didn't have that definition provided to you, would
19 you have a good general idea of what a class lecture was?

20 A. I would probably have my own opinion of what a class
21 lecture was.

22 Q. I guess I should say would you have a good idea of what a
23 class lecture was under House Bill 233?

24 A. I hadn't thought -- thought about that.

25 I would probably still have my own idea what a class

1 lecture was unless I asked institutions what they were thinking.

2 MR. HANCOCK: I don't have any other questions.

3 THE COURT: I have a quick question for you.

4 Step back, Mr. Hancock, and then Mr. Levesque may have
5 a question.

6 Based on one of Mr. Levesque's questions, Chancellor,
7 I just want to know not what his legal position is, but what the
8 Board has been doing with this.

9 I realize that -- the antishielding provision as it
10 relates to the State Board of Education, so: *The State Board of*
11 *Education may not shield students, faculty or staff in the*
12 *Florida College System institutions from free speech.*

13 Based on that question, do you read that to mean that
14 the colleges under your control can?

15 THE WITNESS: I'm not sure I understand the question.

16 THE COURT: So it seemed to me that you were asked the
17 antishielding provision doesn't mention specific professors,
18 correct, faculty?

19 THE WITNESS: That's right.

20 THE COURT: It also doesn't mention specific colleges,
21 does it?

22 THE WITNESS: I think it says, Florida College System
23 institutions may not...

24 THE COURT: It says: *The State Board of Education may*
25 *not shield students, faculty or staff at Florida College System*

1 *institutions.*

2 The State Board may not. Did you understand that as
3 being a limitation that this only applied to the State Board and
4 not to the colleges within the purview of the State Board?

5 THE WITNESS: I believe it does apply to the colleges,
6 and I think --

7 MR. HANCOCK: Your Honor, I can help with this.

8 There are two shielding provisions. There's a second
9 one on page 3 of Joint Exhibit 1.

10 THE COURT: Here. Let me grab it.

11 That really wasn't my ultimate question. It was going
12 to be a chain of questions, but -- I'm sorry.

13 Joint Exhibit?

14 MR. HANCOCK: 1.

15 And then on page 3 there's a "Right to Free-Speech
16 Activities" section.

17 THE COURT: Ah.

18 MR. HANCOCK: With an (f).

19 THE COURT: That is a Florida -- and you were
20 referring to 3(f), which is a college -- *A Florida College*
21 *System institution or state university may not shield students,*
22 *faculty or staff from expressive activities.*

23 That was going to be the next question. That's what
24 you were referring to earlier; correct?

25 THE WITNESS: Yes, Your Honor.

1 THE COURT: All right. So, Judge, while that one may
2 have been directed to us, we can't -- there's then -- it further
3 provides the right to free speech activities which suggest that
4 the colleges that make up the -- well, as a subset of the Board
5 of Education, they can't either; correct?

6 THE WITNESS: That's correct.

7 THE COURT: For purposes of the Board of Education, is
8 that -- are y'all construing that to mean that individual
9 faculty members are free to shield folks; it's just the
10 institution itself can't?

11 THE WITNESS: Thank you, Your Honor. That's a
12 question we discussed in my deposition, I think, too, and I'm
13 not sure.

14 We discussed it a little bit, whether they're agents
15 of the institution, and so the statute says the institution may
16 not, so I think of that as an institution adopting a policy
17 that -- that is determined to be shielding, like they're not
18 going to --

19 THE COURT: That is the -- that is a college couldn't
20 say, On our campuses we're not going to allow people to use
21 disrespectful and offensive languages, and we expect our faculty
22 and staff to adhere to that and not permit such offensive -- I'm
23 sorry -- uncomfortable, unwelcome, disagreeable -- they can't
24 stop people from speaking simply because it would result in
25 uncomfortable -- I mean, if they did it the opposite, they said

1 you could limit that, that would run afoul of it because it's
2 the institution doing it?

3 THE WITNESS: It seems that it would. It seems that
4 it would.

5 THE COURT: All right. So then the question
6 becomes -- and you're saying, Judge, I just don't know whether
7 or not from the standpoint of the Board, if we get complaints
8 about individual professors shielding -- I'm not sure whether it
9 does or does not fall within the ambit of this prohibition?

10 THE WITNESS: I'm not sure. And I explained in my
11 deposition I wasn't sure because I couldn't think of a
12 circumstance how it would happen, I think.

13 THE COURT: Of how a professor would shield?

14 THE WITNESS: Uh-huh, under this statute.

15 THE COURT: How it could fall within the ambit because
16 it's the professor doing it individually, not the college?

17 THE WITNESS: The institution doing it.

18 THE COURT: I understand.

19 MR. HANCOCK: And --

20 THE COURT: I'm not making a finding. I just want to
21 make sure I understood the logic.

22 MR. HANCOCK: Sure. And I can perhaps help clarify.

23 BY MR. HANCOCK:

24 Q. Chancellor Hebda, do you recall mentioning that on this
25 question the bill doesn't call out faculty in the shielding

1 provision.

2 A. Yes.

3 Q. And do you have the bill in front of you?

4 A. I do.

5 Q. And in subsection (f), which we were just discussing, it
6 doesn't call out any specific kind of speech or speaker; right?

7 A. It doesn't.

8 Q. It just refers to expressive activities; right?

9 A. Yes.

10 Q. And right above that is a definition of expressive
11 activities; right?

12 A. Yes.

13 Q. And you see that one of the kinds of speech identified is
14 speeches themselves?

15 A. Yes.

16 Q. And so is it your understanding that if a, you know, public
17 speaker was prevented from coming to a campus, that could
18 constitute shielding?

19 A. It could.

20 Q. Because speech is an expressive activity, and they're
21 shielded from that; correct?

22 A. It could.

23 I say "it could" just because I don't know all the
24 circumstances, but, yes, it's possible.

25 Q. Of course.

1 And you see under speeches it identifies *faculty, research,*
2 *lectures, writing and commentary, whether published or*
3 *unpublished?*

4 A. Yes.

5 Q. And so if a student was shielded from a faculty lecture
6 that they otherwise wanted to be exposed to, that could also
7 constitute shielding; right?

8 A. Could you say that again? I apologize.

9 Q. Yeah.

10 If a student wasn't exposed to a faculty lecture that they
11 felt should have happened, that could also constitute shielding
12 under the provision?

13 A. I think -- I'm not sure about that because it almost sounds
14 like that's requiring a faculty person to say something and
15 provide a lecture on a topic, so I don't know that that would
16 qualify.

17 Q. Is there anything in House Bill 233 that says professors
18 don't have to provide discussion of an uncomfortable idea?

19 A. I don't know.

20 I don't see those words anywhere, if that makes sense.

21 Q. And as you mentioned, the shielding provision doesn't --
22 subsection (f) doesn't call out faculty; right?

23 A. Right.

24 Q. So the shielding command doesn't have any special
25 exemptions for faculty; right?

1 A. I don't know if it has any special exemption for faculty.
2 There is no faculty exemption in paragraph (f) that, as you
3 mentioned and I mentioned in my deposition, paragraph (a) does
4 add explicitly *faculty research, lectures, writings and*
5 *commentary, whether published or unpublished.*

6 And I don't know if that means it's a new thing or a
7 clarification, because I'm not an attorney on free speech, but
8 it's at least a clarification that those things are protected
9 speech.

10 Q. And the shielding provision prohibits shielding students
11 from anything in subsection (a); is that right?

12 A. Yes.

13 Q. And I know we were discussing that there are some relevant
14 circumstances to determining if shielding applies, and one of
15 those is whether the idea is uncomfortable, unwelcomed,
16 disagreeable or offensive; is that right?

17 A. Yes.

18 Q. And if an idea is not uncomfortable, unwelcomed,
19 disagreeable or offensive, the shielding provision doesn't
20 apply; is that right?

21 A. I think it also applies to anything under free speech.

22 Q. So if we look up to the other section (f) above, do you see
23 that, the definition of shield?

24 A. Yes.

25 Q. So as part of that definition, it only applies to:

1 ...ideas and opinions that may be found uncomfortable,
2 unwelcome, disagreeable or offensive; is that right?

3 A. If you're asking me if that's all that's included in
4 (2)(f), that's all that's included in (2)(f).

5 I don't know that I would stop there. If I was trying to
6 implement a law, I would read all of it.

7 Q. Sure. But in terms of section (f), do you understand that
8 an inoffensive idea could fall within the definition of
9 "shield"?

10 A. As written in section (f), it talks about limiting:
11 ...students', faculty members', or staff members' access to, or
12 observation of, ideas and opinions that they may find
13 uncomfortable, unwelcome, disagreeable and offensive.

14 So I don't think that what you -- I think you just said --
15 If it's inoffensive, does it fall under section (f)? I don't
16 think it falls under section (f) if it's inoffensive. It
17 doesn't seem to.

18 Q. Understood.

19 And in terms of identifying an idea as uncomfortable, you
20 don't know what kind of ideas or opinions are uncomfortable
21 because you don't know what other people might find
22 uncomfortable; right?

23 A. That's right.

24 MR. HANCOCK: I don't have any other questions.

25 THE COURT: Anything else, Mr. Levesque?

1 MR. LEVESQUE: If you could pull up
2 Plaintiffs' Exhibit 74.

3 If we could blow up and -- blow that up to where we
4 can see the first (1) and (2).

5 There you go.

6 REDIRECT EXAMINATION

7 BY MR. LEVESQUE:

8 Q. Now, Chancellor, you were asked some questions about this.

9 In this statute, who does it indicate that the State Board
10 of Education oversees in relation to the Florida College System?

11 A. *Florida College System institution boards of trustees.*

12 Q. So under the authority that the State Board of Education
13 has, as the best that you understand it, does the Board of
14 Education have the ability to discipline an individual professor
15 at an institution?

16 A. I don't know of any authority to do that for the State
17 Board of Education.

18 Q. And in relation to the escalation when a complaint is
19 received, or a suspicion of unlawful activity is going on at an
20 institution, do you jump right in to paragraph 4, or do you
21 start in earlier with something else such as an investigation
22 like what is set forth in paragraph (2)(a)?

23 A. We start earlier.

24 MR. LEVESQUE: So if we could pull up
25 Plaintiffs' Exhibit 309.

1 BY MR. LEVESQUE:

2 Q. And you were asked a question about this particular press
3 statement, and there was a reference to the emergency rule.

4 Do you know when that emergency rule was adopted?

5 A. I don't know the date that it was adopted without looking.

6 Q. Are there other areas of law, statutes other than 1000
7 through 1012, I think, that apply to education.

8 A. Yes.

9 Q. Do guidelines from the Department of Health or
10 administrative rules from the Department of Health also apply to
11 educational institutions in Florida?

12 A. They can.

13 Q. And --

14 THE COURT: By the way, Mr. Levesque, you certainly
15 can ask me to take judicial notice of the date that the
16 emergency rule was passed so that -- and I can since it's beyond
17 dispute and we, therefore, can place your questions in context.

18 MR. LEVESQUE: Sure.

19 Your Honor, I'd like the Court to take judicial notice
20 that this was an administrative rule that was adopted on
21 August 9th.

22 THE COURT: Mr. Hancock, do you wish to be heard?

23 MR. LEVESQUE: August 9, 2021.

24 MR. HANCOCK: Not in a position to verify at this
25 time, but I don't expect we will dispute it later on.

1 THE COURT: Well, I'll find that it's not -- that's
2 the exact kind of thing you can take judicial notice of. The
3 Court can do it on its own motion -- which I sort of just did --
4 or based on the request of a party, and I can do so at any time
5 under the Rules of Evidence.

6 I, therefore, take judicial notice that that was the
7 date the emergency rule went in effect; namely, August 9, 2021.

8 BY MR. LEVESQUE:

9 Q. And am I correct that the matter at issue is whether the
10 local school boards would repeal their mask policy?

11 A. I think that's generally the issue, yes.

12 Q. And do you have any understanding of how quickly or how
13 slowly it takes a school board to repeal a mask policy?

14 A. In general, no, I don't.

15 MR. LEVESQUE: If we could pull up Plaintiffs' Exhibit
16 93.

17 If we can scroll down to the first set of questions on
18 the survey that is attached.

19 Just back up to page 1.

20 BY MR. LEVESQUE:

21 Q. Now, you were asked some questions about the number of
22 responses.

23 On this particular question, how many responses are there
24 in that initial draft survey?

25 A. I count seven.

1 MR. LEVESQUE: And if we could scroll down to the next
2 page.

3 BY MR. LEVESQUE:

4 Q. Is it generally about seven responses for many of the
5 questions that are there?

6 A. The next question has seven.

7 The third question -- they're not numbered, but the next
8 question in line starts with: *In your experience, how often do*
9 *instructors create an environment...* That has eight responses.

10 And the next question in line as eight responses.

11 MR. LEVESQUE: Okay. Let's go ahead and flip back
12 to -- I'm sorry.

13 Let's go ahead and flip to Joint Exhibit 3.

14 BY MR. LEVESQUE:

15 Q. For the questions that are there on the first page, are
16 there any questions that have more than five responses?

17 A. No, there are not.

18 MR. LEVESQUE: If we can go to the second page.

19 BY MR. LEVESQUE:

20 Q. Are there any questions that have more than five responses
21 there?

22 A. No, there are not.

23 Q. And would it be fair to say that if we were to compare the
24 faculty survey that you would see the same sort of diminishment
25 in the number of responses in terms of the initial draft and the

1 ultimate final survey?

2 A. That's a fair comparison. I don't think we got an initial
3 draft of the faculty survey but just the surveys in general.

4 MR. LEVESQUE: No further questions, Your Honor.

5 THE COURT: All right.

6 Anything additional at this time?

7 All right. Thank you very much, Chancellor. You may
8 step down.

9 And just as I said to the other witness yesterday,
10 there's been some confusion in many of the cases I and some of
11 my colleagues have where folks come in and like to quibble, give
12 speeches, exaggerate, disassemble, et cetera, so I appreciate
13 your direct responses to -- direct answers. So thank you for
14 how you've conducted yourself.

15 THE WITNESS: Thank you, Your Honor.

16 (Chancellor Hebda exited the witness stand.)

17 MR. WERMUTH: Just a few issues before -- I
18 understand --

19 THE COURT: Hold on one second.

20 And if I could -- Mr. Levesque, if somebody from your
21 team, if y'all can collect your expert exhibit books.

22 MR. LEVESQUE: Yes, sir. We will.

23 Would you like me to do that now?

24 THE COURT: Not this second, but sometime today. I've
25 just got a trial starting tomorrow.

1 Yes, Mr. Wermuth?

2 MR. WERMUTH: Thank you, Your Honor.

3 I know you mentioned that we could work through the
4 exhibits with Ms. Milton McGee, and we plan to do that. There's
5 a couple of issues up front that would be helpful getting
6 guidance on.

7 The first is you did conditionally admit some exhibits
8 on the basis that we'd have to connect the dots to show the
9 relevance of the exhibits.

10 THE COURT: And all of those -- every conditional
11 exhibit, which I haven't addressed further, is now admitted.

12 MR. WERMUTH: Okay.

13 THE COURT: I said that if people wanted to circle
14 back or wanted to argue about any points, they could, but we've
15 addressed that now, so the exhibits are the exhibits, unless I
16 qualified them.

17 MR. WERMUTH: Okay. And consistent with that same
18 notion, Your Honor has looked at Plaintiffs' Exhibit 119 before.
19 That is the -- that is a collection of complaints that were
20 raised in response to the survey.

21 And since you looked at that exhibit and referenced it
22 in your last order -- order is -- I think 262 is the order --
23 you've heard additional testimony regarding this. In your order
24 you said that you were denying it based on relevance, and since
25 then you've heard Alex Kelly reference the fact that the Board

1 of Education or Board of Governors looked at the -- was
2 presented with the Colorado surveys.

3 THE COURT: I thought that the feedback was after the
4 survey was done?

5 MR. WERMUTH: That was -- the feedback?

6 THE COURT: I thought the 119 exhibit, and that's why
7 I'm asking. I'm not stating. I'm asking.

8 I thought the reason why I said it wasn't relevant and
9 I wasn't considering it was because the student feedback or the
10 feedback of the student or otherwise to the surveys was after
11 the horse had left the barn. Is that not what 119 is?

12 MR. WERMUTH: Yes. 119 was after the survey was
13 given, but in the instance of the Colorado survey, there was --
14 this same issue arose, you know. There were complaints raised
15 in response to an initial floating of the survey, and that
16 caused the Colorado administrators of the survey to take it
17 back, rework the questions, reissue the survey to address
18 concerns raised by the public or raised by the survey group, and
19 so that's the situation we're talking about here.

20 And then today you heard Dr. McClay testify that, you
21 know, the survey's a good start, and the survey administrators
22 would be answerable to the community, you know, as part of
23 working through this process. And as you can tell, in this
24 instance, there was complaints raised and no response and, in
25 fact, you heard Chancellor Hebda now testify --

1 THE COURT: Let me do it this way.

2 MR. WERMUTH: Yeah.

3 THE COURT: Based on the issues that I have to
4 resolve, the challenges to the -- there's recording,
5 antishielding, and the survey. This relates to the survey.

6 What's the issue that I've got to decide as a judge
7 that makes the fact that they got complaints and they didn't
8 pull the survey more likely true than not true? Because that's
9 the exercise I'm going through, right? In determining whether
10 something's relevant, it has to suggest that something I've got
11 to decide in this case is more likely true than not true; right?

12 MR. WERMUTH: Yes.

13 THE COURT: So I'm just trying -- I'm trying to figure
14 out what is the fact -- I get that there would be maybe a better
15 way to do it. I get that that's what other folks have done. I
16 get that that may be a protocol, but help me understand how --
17 what's the issue that I've got to decide to any of your claims
18 that that's going to support the plaintiffs' position?

19 MR. WERMUTH: Well, the Colorado survey was given as
20 an example, both during legislative process as a survey that
21 would justify doing the survey in this matter, and also that
22 this is an ongoing process. Every year this has to be redone
23 under the statute, and the fact that they can't fix it, they
24 can't do the things like address concerns that were raised
25 during the administration process --

1 THE COURT: And this is -- I'm asking the question
2 because this is the kind of thing I was going to ask y'all at
3 the end of today's proceedings as it relates to your closing
4 arguments.

5 MR. WERMUTH: Yeah.

6 THE COURT: And, again, I don't -- I'm not being flip
7 by doing this. I'm not trying to be unpleasant by doing it.

8 But assume I'm not a federal judge, or I'm not even a
9 lawyer. Tell me, if you were talking to a third grade teacher
10 and challenging these statutes is vague, or challenging these
11 statutes as intentionally being passed to violate the First
12 Amendment, where does that fit in other than this isn't good and
13 this isn't consistent the way things should be done?

14 Because that's a fact, potentially, that this is --
15 they relied on something and they didn't follow that example and
16 that these facts are true and this is what we want to prove, and
17 this is -- these are facts that then lead to the point that
18 we're trying to make which is X. And it doesn't necessarily
19 wrap up the whole case, but it's related to which of the claims
20 and how? I'm just trying to figure that out.

21 MR. WERMUTH: Well, obviously, we're challenging the
22 survey provision saying that it causes, you know, fear among
23 professors. And in this instance, you know, you have a
24 situation that this survey is going to be implemented in this
25 matter. You heard Chancellor Hebda say that they have no

1 intention of changing the way the survey is administered, and so
2 every year these professors get to look forward to a survey. No
3 matter how much complaint is raised to this issue, it just kind
4 of keeps on rolling. And the results of this survey are going
5 to be published every year and can be used against individual
6 institutions, departments, you know, to indicate that there is a
7 lack of viewpoint diversity or intellectual --

8 THE COURT: Well, since the defendant has acknowledged
9 that they're not -- at this point, there's no -- as far as I
10 know, there's nothing on the record to suggest it's going to be
11 changed. And you've put in evidence problems with -- testimony
12 from experts to suggest why it's flawed and why it doesn't work.

13 And then if it's undisputed it doesn't change, I'm
14 still trying to figure out what is the fact that some of the
15 people that were taking it complained about it? What does that
16 add?

17 MR. WERMUTH: The fact that the Department of
18 Education, the Board of Governors was aware of complaints and
19 did nothing about them.

20 And in this instance we also have an as-applied
21 challenge to this particular -- this survey that was done. And
22 so it's relevant to the fact that they didn't change it as to
23 fix and address it.

24 THE COURT: All right. Mr. Levesque?

25 MR. LEVESQUE: Well, Your Honor, the feedback that

1 came after the horse got out of the barn, it's kind of hard to
2 change the horse that got out of the barn. They haven't done
3 anything on the next survey in large part due to this pending
4 litigation, to see if it's going to give them guidance. So the
5 idea that they haven't done anything to address these concerns I
6 think is speculative at best. And there are lots of different
7 ways, as we've argued, that the survey can be administered,
8 particularly when you're talking about a voluntary, anonymous
9 survey.

10 THE COURT: I don't know that we're ever going to get
11 beyond that, and that's going to be the big issue for the
12 as-applied challenge based on existing case law for plaintiff,
13 how you get beyond the as-applied if it's anonymous and
14 nonmandatory. But assuming I do, what I'm going to go ahead
15 and -- I find it could have some marginal relevance. And on
16 that basis, I'm going to admit it for the limited purpose of
17 that the Board was on notice that people were challenging how it
18 was being administered.

19 Having said that, this is one of those thing, folks,
20 that I just can't imagine. I mean, we have a ton of evidence in
21 this case that it's undisputed -- Mr. Levesque asked it 15
22 different ways -- that the union opposed anybody answering it.

23 And then they got the vast majority of faculty members
24 not to answer it.

25 They then were publicly saying, Don't answer it, so

1 students were also aware that the universities and faculty were
2 opposed to doing it.

3 So this idea that it's critical that they also had
4 some students complaining about the structure of it, again, it's
5 marginally relevant, but it's -- I'll allow that in for whatever
6 it's worth.

7 MR. WERMUTH: Thank you, Your Honor.

8 THE COURT: What other issues do we have?

9 THE COURT REPORTER: Was that a specific exhibit?

10 THE COURT: Yeah, that was a specific exhibit. That
11 was 119.

12 (DEFENDANTS EXHIBIT 119: Received in evidence.)

13 MR. WERMUTH: And those are just the two issues
14 upfront. We might have additional issues as we go through them.

15 THE COURT: That's fine. If y'all will go through
16 them, verify that we have the deposition -- proper deposition
17 designations, that all the depo designations are in. I want you
18 to read in the ECF numbers in the record.

19 I also want everybody to agree on the exhibit list
20 that my courtroom deputy has, unless there's some issues that I
21 need to resolve, in which case when we come back, that is you
22 notify me that you're ready for me to come back, I'll resolve
23 any of those issues; okay.

24 MR. WERMUTH: Thank you, Your Honor.

25 THE COURT: I don't know that I'm going to try --

1 because I'm not sure it would be particularly helpful. I have a
2 lot of questions for both sides in this case, but I want to make
3 plain, y'all can include whatever you want in your closing
4 arguments. You get to preserve the record and make whatever
5 record you want, not only, hopefully, to try to convince me, but
6 also to make your record if you think whatever I do ultimately
7 is wrong and needs to be appealed.

8 So, by giving you some guidance, I'm not in any way
9 suggesting to leave stuff out.

10 I would only tell y'all, because it seems to not be
11 working with lawyers, that I -- and I'll leave it up -- it's,
12 obviously, up to you. I don't think you're waiving a position
13 or an argument and stipulating to something if you argue in the
14 alternative.

15 So, for example, the plaintiff can say, Judge, we
16 don't think that these, you know, are facially okay. Here's
17 why. And because they're not, here's the analysis. You're not
18 waiving that position by saying, However, if the Court
19 determines that they're not, then here's the analysis you need
20 to go through.

21 And I would say the same thing to the defense. To the
22 extent the defense says, you know, Judge, we don't think the
23 First Amendment is implicated. Here's why. We're not
24 compelling speech, blah, blah, blah. But even if it is and even
25 if you were going to analyze it under this, the government can

1 control whatever is said in the classroom, citing the carve-out
2 from the U.S. Supreme Court case that says they weren't deciding
3 the issue. And that's fine, and I understand that's the
4 position that folks are taking on the other side of the aisle
5 from Mr. Wermuth in this and other cases.

6 But if you're going to do that, it would be very
7 helpful to say, However, if you don't accept that, then we still
8 win, and here's why we win. And I don't think that y'all are
9 waiving an argument by doing that, but -- because what happens
10 is I get two briefs where both sides overstate their position --
11 and no offense to either side here -- quite frankly, as I found
12 of late, oftentimes -- well, anyway. But they oversimplify or
13 exaggerate their positions, and then I'm left with briefs on
14 both sides that aren't particularly helpful because they take
15 one position, stop with that one position, and then, wonder of
16 wonders, you then end up with an order from me that bears no
17 resemblance to either side's motions.

18 And I'm not saying that I'm beating you into viewing
19 the world the way I do, but it would be much more helpful if you
20 do it, If this, then that; if not that, then this kind of legal
21 analysis.

22 For purposes of standing, not this case, but other
23 cases I've had, not only -- and nobody in this case was involved
24 in. I've had cases recently where the record is muddled, at
25 best. And, in any event, I would use my -- not that I'm saying

1 the conclusion was right, but I would use my *Pernell* order as a
2 template to walk through and explain at a granular level as to
3 each claim.

4 Now, you can argue you don't have to do that as the
5 plaintiff, and nothing would make me happier than if the
6 Eleventh Circuit agrees, because, quite frankly, I don't think
7 that that sort of granular analysis is required. But to the
8 extent it is, go through that.

9 Same thing with the defense. You may believe that
10 you've got a rifle shot on one part of standing, but even so,
11 it's okay -- and I don't think you're waiving anything -- to
12 say, We win because of X, but even if we didn't, we still win on
13 the standing issue because of Y and Z.

14 I just encourage both sides to do that because the
15 sort of, you know, We win on this rifle shot as a general rule
16 is oversimplifying either side in terms of, We win on this
17 issue. But y'all can write them up however you want. But if
18 you are trying to at least convince me and make a full record,
19 it might be helpful to attack it from multiple angles.

20 Give me one second.

21 (Pause in proceedings.)

22 THE COURT: All right. I think I have this right too.

23 I believe in Count One the plaintiffs allege all
24 provisions facially or alternatively as applied are
25 unconstitutional based on viewpoint diversity.

1 Count Two was freedom of association; the survey
2 provisions facially and as applied are unconstitutional.

3 Count Three was also a First Amendment claim,
4 compelled speech, antishielding provisions.

5 And I've got Count Four, Fourteenth Amendment, void
6 for vagueness, antishielding provisions.

7 I do not -- and I went back and looked because I had
8 questions about lectures, and so forth. I don't recall the
9 second amended complaint and Count Four under the Fourteenth
10 Amendment challenging the recording provision as void for
11 vagueness.

12 Do I have that wrong?

13 MS. FROST: No, Your Honor. I think that is what the
14 complaint says. I think that's correct.

15 THE COURT: All right. And the reason why I brought
16 that up is we had a great deal of discussion about what a
17 lecture was, who would know what it was, et cetera, which I'm
18 not suggesting is irrelevant for all other purposes, but it
19 smelled a lot like a void for vagueness challenge to the
20 recording provision.

21 And I don't believe such claim is in this complaint,
22 is it?

23 MR. WERMUTH: That's correct, Your Honor.

24 THE COURT: Okay. All right.

25 Fair enough. Y'all talk -- get together and talk to

1 courtroom deputy and let me know when you need me. I'm going to
2 stay on the fifth floor so you don't have to hunt me down.

3 Court is in recess.

4 (Recess taken at 2:58 PM.)

5 (Resumed at 3:28 PM.)

6 THE COURT: All right. We are on the record.

7 I have Mr. Levesque and Mr. Wermuth present for both
8 sides.

9 Mr. Wermuth, have you and Mr. Levesque been able to
10 confer? And do we have an entire list of exhibits that both
11 sides agree that were admitted?

12 MR. WERMUTH: I believe we do.

13 THE COURT: Mr. Levesque?

14 MR. LEVESQUE: Yes, Your Honor.

15 THE COURT: Also, have y'all identified and do y'all
16 agree on the list of ECF numbers where we had deposition
17 designations filed?

18 MR. LEVESQUE: Yes, Your Honor.

19 MR. WERMUTH: Yes.

20 MR. LEVESQUE: I believe those all have been filed.

21 THE COURT: The only thing I wanted to double check
22 on -- and, Mr. Levesque, I should know this. Yesterday you
23 mentioned somebody that you were going to add depo designations.
24 Did those get filed?

25 MR. LEVESQUE: Chancellor Mack, and I believe those

1 were filed this afternoon.

2 THE COURT: All right. Oh, good, because I was going
3 to say I checked this morning when I got here, and I did not --

4 MR. WERMUTH: And I have the ECF numbers for all the
5 designations here and available.

6 THE COURT: Why don't you go ahead and read those into
7 the record.

8 MR. WERMUTH: So ECF 241, ECF 246 -- or 264, and ECF
9 267 are the designations.

10 THE COURT: And 267 is the notice of filing deposition
11 designation and counter-designation of Henry Mack, and it was
12 filed today. That's why -- I haven't updated ECF on my calendar
13 since we've been here. So you, obviously, have done that while
14 I was -- it was filed after the supplemental briefing that we
15 addressed later.

16 MR. LEVESQUE: Yes, sir.

17 THE COURT: That's why I hadn't seen it yet. So we
18 now have all the depo designations as well.

19 With respect to the plaintiffs -- and I'm not ruling,
20 and I want to make plain, I haven't thought it through, but I do
21 want to give you some guidance so that you can understand my
22 concerns and address them.

23 And I think this will be helpful, Mr. Levesque, in
24 terms of you forming a response, and so forth.

25 I understand that there can be evidence that a

1 particular group or a particular individual is chilled by an
2 action taken by the Florida Legislature or a law that's passed.
3 But chill -- and y'all can correct me if I'm wrong when you are
4 drafting your papers -- that's not the claim. The chill is the
5 injury where you can allege that injury in a pre-enforcement
6 action. But just because you can have a pre-enforcement action
7 and the injury can be based on chilling speech, that's the sort
8 of end of the First Amendment analysis. It's not the beginning
9 of the analysis or it's not the complete analysis. There still
10 has to be a violation of the First Amendment.

11 So you can have a facial challenge. The law compels
12 speech or prohibits speech. You can also have a law, as my
13 understanding of the case law, where you have to look at the
14 content in order -- which is another way of challenging the
15 statute. In other words, it's necessary to look at the -- you
16 have to consider the content to apply the statute and,
17 therefore, even though it may be -- not facially limit speech or
18 compel speech, that's another way of looking at it.

19 And then a third way of looking at a statute is that
20 if you -- under *Reed*, if you pass a facially neutral statute
21 with the intent to, in this case, violate somebody's First
22 Amendment right or chill speech, then that would be another
23 alternative.

24 And so -- and if I'm wrong, Ms. Frost, you and
25 Mr. Wermuth can disabuse me of that notion. But it seems to me

1 that I get in a lot of these cases -- and I'm not saying
2 y'all -- everybody, like the little Dutch girl churning butter,
3 just mixes up these various approaches and creates one approach.
4 And I think saying a statute is facially unconstitutional
5 because it compels speech is a much different claim than the
6 it's facially neutral, but it was passed with the intent and has
7 the effect. And while I understand *Reed* didn't refer to
8 *Arlington Heights* directly, it speaks in terms of that language
9 and that analysis. And that's why it's potentially a helpful
10 analytical framework, that nonexhaustive list of factors.

11 And I guess the additional piece that I wanted to make
12 plain is, when you look at *Bishop*, *Bishop* itself dealt with the
13 violation of a professor's right to speech, and it wasn't a
14 pre-enforcement action, but it's -- and I then applied it in a
15 pre-enforcement action, though, as it relates to telling people
16 what they couldn't say.

17 I don't understand -- and you're going to have to
18 explain this, and we started this proceeding this way -- how --
19 and, by the way, none of this is like -- the Courts haven't said
20 there's only one type of free speech claim and you can only
21 analyze it under this analytical framework. I think the case
22 law has different approaches, depending on the nature of the
23 First Amendment claim.

24 But *Bishop* and the factors looking at context and
25 balancing the speech, and so forth, you're going to have to

1 explain to me why that overlaps with or is distinct with or even
2 how it would be applicable to the provisions at issue.

3 And I'm only doing this because I don't -- while I
4 said I thought *Pernell* was very helpful in terms of going
5 through sort of the granular level review of provisions and
6 plaintiff by plaintiff, claim by claim, which I think the law
7 requires me to do as it currently exists, I don't necessarily
8 think that what *Reed* says you can do and how *Bishop* was used and
9 how the looking at the content as a requirement to apply the
10 statute, I'm not sure all those overlap. They could. There
11 could be some cases that are in common and potentially could be
12 reviewed.

13 But I can just let you know, so that y'all can tell me
14 how you propose I analyze it, I'm not convinced it's just one
15 all jumbled together or that it's -- that they necessarily
16 overlap.

17 So that may have made things more confusing, not less
18 confusing, but it was -- we started off by me saying I wasn't
19 convinced when I read the pretrial stip. We suddenly are
20 talking in terms of *Bishop* as opposed to sort of the *Reed*,
21 *Arlington Heights*. And I'm not requiring either side to say
22 this needs to be analyzed because Judge Walker thinks it has to
23 be analyzed like that. I would never tell you, Mr. Levesque,
24 there's this one way this type of claim has to be analyzed, and
25 you're going to do it that way.

1 What I'm telling y'all would be helpful for y'all,
2 both sides, to say, I think we're -- the other side or, Judge,
3 whoever, you're missing the boat. This is the way to do it, and
4 this is the way it should be done. However, as an alternative,
5 if so-and-so thinks it has to be done this way, we still win and
6 here's why.

7 And I'm not even requiring you to do that. I'm just
8 suggesting that that would be helpful, but I just -- and y'all
9 have done a very good job of briefing in this case and have been
10 very thoughtful in what you've briefed. But some of the other
11 First Amendment challenges I've had from other cases when I get
12 either the oral presentation or the written presentation, it's
13 like everybody takes bits and pieces from cases that are very,
14 very -- I mean, frameworks that are very, very different, and
15 they take a sentence from this case with this framework and a
16 sentence from this case for this framework, and they just create
17 this sort of Frankenstein analytical framework.

18 And I can tell y'all right now -- this I can tell
19 you -- there's no way I'm going to do that. I'm not going to
20 pick and choose a sentence from eight different completely
21 unrelated First Amendment cases that are tackling totally
22 different claims: One's facially -- a facial challenge, one's
23 an as-applied challenge, and one's you've got to look at the
24 content and apply it challenge. And you've got to pick three
25 sentences out of those three different cases and just meld them

1 altogether.

2 I'm just absolutely not going to do that, so if that's
3 the approach you take, that's fine. You can convince the
4 Eleventh Circuit that's the way to do it. But I can assure you
5 that's not what I'm going to do.

6 So, anyway, I was trying to give y'all some guidance
7 about what would be helpful.

8 And I will also say I'm only going to make a decision
9 based on claims that were filed, which is why I said -- I went
10 through what I thought each of the four counts said and what the
11 theories were and which sections they related to. I have not
12 ruled that that's definitively what's associated with each count
13 in each claim. But if it's something other than what I read
14 off, then y'all need to point out what you're relying on and why
15 that is, because I'll let you know that I'm operating under the
16 assumption that the claims I read out for each count are what's
17 currently in front of me. And if I've got it wrong, then y'all
18 can tell me.

19 And so, again, this is not a final ruling, because I'm
20 not going to say, Well, had you brought this claim, here's what
21 I would have done, because I'm certainly not going to do that.

22 And let me say I also understand it's not so neat and
23 tidy to suggest that facts that go to the application of the
24 statute and may, for example, be pertinent for a vagueness
25 analysis are irrelevant for any other purpose. I get it that

1 it's not that -- we can't shove facts and claims into those
2 little compartments as if they're completely divorced. I
3 understand that while it may not be relevant or germane for the
4 same reasons, it still may have some part of the analysis for
5 another reason, not the least of which, even though it may not
6 be reading the language, may explain, in terms of the injury,
7 the reasonableness of the chill, for example.

8 So I get that it's not that clean, but what I'm not
9 going to do is, for example, have a void for vagueness challenge
10 against the survey, because I don't believe there's a void for
11 vagueness challenge against the survey provisions.

12 So, in any event, I've given you as much guidance as I
13 can. Y'all have your deadlines. We have oral argument, I
14 believe, set.

15 Ms. Milton McGee, before I forget, we do need to get a
16 notice to the very, very needy lawyers in the other case that we
17 are going to take a break that afternoon from that trial, so
18 if --

19 THE COURTROOM DEPUTY: Right, I will.

20 THE COURT: Because we're going to be in the middle of
21 trial, just let them know we're taking off. Notify the parties
22 that the Court has other court business, and so that the jurors
23 have time to attend to their personal needs and so the lawyers
24 can prepare for trial, that we will not be in session.

25 We chose an afternoon for this case; right?

1 THE COURTROOM DEPUTY: Yes, Your Honor.

2 THE COURT: So let's go ahead and notify them now to
3 limit the weeping and wailing and mashing of teeth in that case.

4 Anything further, Mr. Wermuth?

5 MR. WERMUTH: Not at this time, Your Honor.

6 THE COURT: Mr. Levesque?

7 MR. LEVESQUE: No, Your Honor.

8 THE COURT: And I really do appreciate y'all's hard
9 work and professionalism. Y'all have -- even though y'all
10 clearly disagree about the claims and the law and had, you know,
11 thoughtful disputes about the evidence and the application of
12 the Rules of Evidence, y'all have been incredibly respectful to
13 each other and the witnesses, and so forth. And I know that
14 should be expected of officers of the Court, but, unfortunately,
15 that's not what I'm always experiencing.

16 So thank you for your hard work and professionalism.

17 Court is in recess.

18 (Proceedings concluded at 3:42 PM on Wednesday, January 18,
19 2023.)

20 * * * * *

21 I certify that the foregoing is a correct transcript
22 from the record of proceedings in the above-entitled matter.
23 Any redaction of personal data identifiers pursuant to the
Judicial Conference Policy on Privacy is noted within the
transcript.

24 /s/ Megan A. Hague
Megan A. Hague, RPR, FCRR, CSR
25 Official U.S. Court Reporter

1/20/2023
Date

I N D E X**DEFENDANTS' WITNESSES** **PAGE****DR. WILFRED MCCLAY**

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Cross-Examination By Ms. Frost 1636

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KATHRYN HEBDA

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E X H I B I T**DEFENDANTS' EXHIBIT** **OFFERED** **RECEIVED**

119	Survey recipient comments to State University System Survey email (SUSsurvey@flbog.edu)	1743	1743
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