IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

WILLIAM A. LINK, *et al*.,

Plaintiffs,

v. Case No.: 4:21cv271-MW/MAF

MANNY DIAZ JR., *et al*.,

Defendants.
_____/

DEFENDANTS' MOTION FOR FINAL SUMMARY JUDGMENT

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Defendants respectfully request final summary judgment on all counts of Plaintiffs' Second Amended Complaint (ECF No. 101).

INTRODUCTION

This case presents pure questions of law that do not require a trial to resolve. Chief among them is whether Plaintiffs, who concede HB233 has not tangibly harmed them, have standing to challenge the law in federal court. The answer is no, and the time has expired on Plaintiffs' quest for veto-through-litigation. Nothing has changed since the preliminary injunction stage. Plaintiffs' claims are still cloaked in speculation and wrapped in criticisms of laws enacted after HB233. With no injury-in-fact from HB233, Plaintiffs lack standing to pursue their claims a moment further. HB233 has never been enforced against Plaintiffs, and Plaintiffs face no imminent threat of enforcement. The record reveals no cognizable injury traceable to Defendants that could be remedied by a judgment in Plaintiffs' favor.

To be sure, Plaintiffs disapprove of HB233 as policy. But a policy disagreement is not an injury redressable in federal court, nor is it a violation of the First Amendment. Plaintiffs cannot manufacture standing through doomsday prophecy, or by treating HB233 as interchangeable with subsequent legislation they dislike. If this Court's jurisdiction can be invoked on this paltry factual record, then any person can fabricate standing by simply proclaiming their disdain for a law, and hypothesizing about tangential consequences that might befall them one day. But

Article III is not a game of dominoes; it requires Plaintiffs to prove they have *actually* suffered harm at Defendants' hands under the auspices of HB233. Plaintiffs cling to speculation and "maybe someday" conjecture, but at the summary judgment stage, this is insufficient. *Bischoff v. Osceola Cnty., Fla.*, 222 F. 3d 874, 878 (11th Cir. 2000).

The lack of redressable injury reflected in the record cannot be understated:

- No Plaintiff has been disciplined or threatened with consequences under HB233;
- No Plaintiff completed the voluntary, anonymous survey—nor faced a threat of discipline—and UFF encouraged its members to *not* take the survey;
- No Plaintiff has been coerced to engage in *any* speech as a result of HB233—nor threatened with discipline for not doing so—eliminating Plaintiffs' compelled speech claim;[1]
- No Plaintiff has been required to disclose their associations or political affiliations;
- No Plaintiff has resigned from or declined an organization as a result of HB233;
- No Plaintiff has identified any instance recording or improper publication of a recording—with some conceding the Recording Provisions have not harmed them, or that they recorded their own lectures pre-HB233;
- No Plaintiff is aware of any actual or threatened funding cut; and

[1] Moreover, the Anti-Shielding Provisions are not enforceable against Plaintiffs, and do not require anyone to say anything. Rather, they prevent colleges, universities, and Defendants from restricting First Amendment-protected expression.

- Neither UFF nor MFOL—both of which improperly invoke the First Amendment privilege at every turn to stymie Defendants' discovery efforts—has established any tangible harm to their membership or their resources traceable to Defendants or HB233.

The dearth of record facts indicating Plaintiffs' hypotheses occurred—or are imminent—is unsurprising. All of Plaintiffs' alleged harms either teeter upon pyramiding inferences, or are predicated on a misreading of HB233. Facing no credible threat of prosecution, Plaintiffs cannot rely on a "chilling effect" to establish standing. The "chilling" Plaintiffs allege is objectively unreasonable because it is based on speculation and a blatant misreading of the law.

Finally, apart from lack of standing, Plaintiffs' claims fail because HB233 is a content-neutral statute that does not regulate speech at all, let alone discriminate against certain types of speech. Each count of Plaintiffs' Second Amended Complaint fails to state a claim, and finds no support in the record evidence after nearly a year of extensive discovery.

Plaintiffs' solace in the forgiving dismissal standard has expired, and Defendants are entitled to final summary judgment on all counts.

STATEMENT OF FACTS ("SOF")

1. On April 7, 2021, the Florida Legislature passed House Bill 233 ("HB233"). **ECF 164- 1**; **ECF 164-2**. The Governor signed HB233 into law on June 23, 2021, and the law became effective on July 1, 2021. *See* **ECF 164-3**. HB233

amends sections 1001.03, 1001.706, 1004.097, 1004.26, and 1006.60, Florida Statutes. *Id.*

2. HB233 contains five provisions, three of which Plaintiffs challenge in this lawsuit, ECF No. 101: the Survey Provisions, the Anti-Shielding Provisions, and the Recording Provisions. *Id.*

3. During legislative proceedings on HB233, the bill's sponsor, Representative Spencer Roach, thoroughly explained the purpose of the bill as assessing and promoting viewpoint diversity and intellectual freedom on campuses, and preventing censorship of constitutionally-protected speech. *See, e.g.,* **ECF 164-34** 6:5-14, 13:2-14:5, 16:15-17:4, 18:3-23:19; **ECF 164-4** 5:11-8:16, 19:2-21:21, 34:8-35:17; *accord* **ECF 164-9** (articulating state interest in academic freedom and viewpoint diversity).

4. During proceedings on the Senate's counterpart to HB233, SB264, the bill's sponsor, Senator Ray Rodrigues, explained the purpose of SB264 in similar terms. *See, e.g.,* **ECF 164-37** 2:2-15, 9:4-23, 27:15-28:3, 29:14-30:18; **ECF 164-5** 2:6-6:14, 7:8-10:21, 22:1-23:8, 24:9-25:4; **ECF 164-35** 2:14-3:17; **ECF 164-36** 26:3-27:6.

5. Prior to enacting HB233, in 2018, the Florida Legislature enacted the Campus Free Expression Act. **ECF 164-6**; **ECF 164-36** 12:17-13:18.

6. Prior to HB233's enactment, the Board of Governors began a Civil Discourse Initiative aimed at promoting respectful discussions of differing viewpoints on campuses. **ECF 164-7** 59:5-68:19. The Board of Governors also developed a statement on free expression, signed by universities and the Board, with a similar goal. *Id.* 52:12-56:17, 58:18-22; **ECF 164-4** 32:1-33:6; **ECF 164-37** 29:14-30:18.

* * *

7. No Plaintiff has taken the survey, and none has been punished, disciplined, retaliated against, or threatened for not taking the survey. **ECF 164-11** 18:3-5, 27:10-16; **ECF 164-12**, 75:20-22, 75:25-76:5, 80:13-15 **ECF 164-13** 54:17-55:5, 61:22-62:8; **ECF 164-14** 34:21-23, 35:6-11, 46:15-19; **ECF 164-16** 106:1-107:1, 20:25-21:12, 45:12-13; **Ex. 17**, 10:3-15, 15:9-11; **ECF 164-20** 28:4-6, 28:13-15, 28:16-18.

8. The survey administered in April 2022 was voluntary and anonymous. **ECF 164-8**; **ECF 164-7** 197:18-198:12; **ECF 164-38** 32:14-11, 34:3-37:18; **ECF 164-9** 251:12-252:16; *accord* **ECF 164-10** 30:10-20, 34:2-4; **ECF 164-11** 20:9-10, 21:19-23, 25:21-24, 28:16-21; **ECF 164-12** 75:25-76:5, 81:15-19; **ECF 164-13** 53:11-54:12, 57:18-58:11; **ECF 164-14** 35:2-5 **ECF 164-15** 84:10-15, 181:18-182:10; **ECF 164-16**, 21:13-18, 38:14-39:3, 46:14-15; **ECF 164-17**, 15:6-8; **ECF 164-20** 28:10-12, 34:9-12; *see also* **ECF 164-34** 6:5-7:4.

9. Plaintiffs offer no facts suggesting if or when future surveys will be involuntary or non-anonymous. *E.g.,* **ECF 164-15** 171:21–24; **ECF 164-20** 34:13-21.

10. UFF advised its members to not take the survey. **ECF 164-14** 90:23-25; **ECF 164-15** 29:7–30:7; **ECF 164-11** 17:24–18:2; **ECF 164-20** 51:9-23.

11. Plaintiffs claim to fear future budget cuts to their institutions as a result of HB233, **ECF 164-21–28, 39** (Interrog. 4), but no budget cuts or fiscal penalties have been threatened, proposed, or implemented as a result of HB233. *E.g.,* **ECF 164-11** 30:8-14, 32:7-33:1; **ECF 164-12** 74:17-75:6, 78:8-18, 87:5-22; **ECF 164-14** 16:22-20:8, **ECF 164-16** 34:16-35:20, 59:14-63:5, 63:9-67:14 **ECF 164-20** 32:8-33:11, 34:22-35:23, 36:19-37:8, 37:25-38:22, 98:2-12.

12. No plaintiff quit or declined to join an organization as a result of HB233, or had to disclose their associations or political beliefs. **ECF 164-11** 28:16-21, 81:15-25, 82:1-9; **ECF 164-12** 104:14-17, **ECF 164-13** 34:13-17, 34:18-23, 35:1-12, **ECF 164-14** 37:7-10, 37:11-14; **ECF 164-15** 216:24-217:22, 267:23-269:1; **ECF 164-16,** 38:14-39:3, 34:6-15, 72:13-19; **ECF 164-20** 50:3-5; 85:23-86:2, 86:3-14, 87:8-11; **ECF 164-21–28, 39–40** (Interrog. 6).

13. UFF and MFOL has not identified anyone who quit or declined to join as a result of HB233. **ECF 164-10** 39:8-11, 40:9-41:9, 65:24-68:15; **ECF 164-15** 267:3–269:1; **ECF 164-18** 22:14-25.

* * *

14. **Blake Simpson**: (**ECF 164-17)**

a. Simpson has graduated from FAMU, *id*. 7:11-19, and moved out of state, *id*. 5:23-7:6, with no plans to return to Florida or FAMU. *Id*. 7:20-8:9, 12:15-17.

b. None of Simpson's concerns about HB233 have occurred. *Id*. 16:15-17:24.

c. During the pandemic, Simpson recorded somes classes on Zoom. *Id*. 14:2-15, 15:12-9.

16. **Julie Adams**: (**ECF 164-16)**

a. Adams became a plaintiff after learning this lawsuit would pursue "progressive issues." *Id*. 15:25-16:14; 17:12-18:2. Adams did not learn about HB233 until becoming a plaintiff. *Id*. 15:13-20. The basis for Adams' understanding that HB233 will "tamp down" progressive views, and that HB233's purpose is to expand conservative views (which Adams believes is a "bad thing"), is based solely on reading the Complaint and discussions with

counsel, 43:14-43:20, 35:21-36:4, as is Adams' understanding of all three provisions she challenges. *Id*. 20:21-24, 22:11-14, 23:5-17, 30:1-3.

b. The survey has not harmed or impacted Adams, *id*. 106:1-107:1, 20:25-21:12, 45:12-13, nor have the Anti-Shielding or Recording Provisions, *id*. 107:2-13,110:1-10. Adams acknowledges that HB233 does not require the expression of any viewpoints. *Id*. 57:19-58:13. Adams is unaware of any speech that has been chilled and acknowledges these concerns are speculative. *Id*. 39:4-41:19, 42:1-43:13.

c. None of the harms Adams is concerned about, including those alleged in interrogatory answers, have occurred. *Id*. 47:24-48:9, 69:5-73:5; **ECF 164-25**.

d. Adams is concerned with the potential expression of disfavored ideas, such as climate change denial, opposition to abortion and contraception, and views founded on religious beliefs. **ECF 164-16** 22:20-25:20, 27:17-28:10, 54:15-20. While Adams has not yet seen such "harmful" discussion occur in the classroom, *id*. 29:5-13, such comments should be "shut down" and HB233 prevents that. *Id*. 26:2-27:6, 57:19-58:13.

17. **William A. Link**: **(ECF 164-11)**

a. Professor Link retired from the University of Florida on August 15, 2022. *Id*. 6:12-7:3.

b. Before retirement, he was not targeted by HB233, *id*. 49:5-6, was not required to espouse views he did not promote, *id*. 79:10-14, did not include any ideas in his curriculum that he otherwise would not have, and was not sanctioned for not doing so. *Id*. 78:7-17.

c. Link agrees the language of HB233 does not protect one viewpoint over another or target viewpoints, *id*. 67:13-18, 46:10-47:19, nor prohibit him from teaching on viewpoints he regularly taught, including issues of gender and sexuality that he believes some in "Florida government" would oppose. *Id*. 54:1-56:17.

d. Regarding the Anti-Shielding Provision, he did not change his syllabi, *id*. 38:2-5; and made an effort not to change the content of his courses, *id*. 39:8-13.

e. No administrator from the University or the Board of Governors has threatened discipline against him. *Id*. 40:22-41:5.

f. He does not know what will happen after the survey is completed. *id*. 29:3-9, 68:1-16, 68:23-69:3. The harms he is concerned of have not happened yet, *id*. 70:3-6, 72:5-8, nor does he know when they will. *Id*. 68:23-71:11.

g. Previously, he regularly recorded his lectures for students. *Id*. 44:15-21. To his knowledge, no student recorded his class after the passage of HB233, or improperly published a recording. *Id*. 45:7-14.

18. **Jack Fiorito**: (**ECF 164-14)**

a. Professor Fiorito has not faced retribution or been targeted under HB233, *id*. 89:8-15, and is not sure how he would be. *Id*. 95:10-20.

b. He does not believe the Anti-Shielding Provisions have harmed him. *Id*. 33:21-23. Fiorito agrees that HB233 gives him the right to talk about controversial topics in his classroom. *Id*. 64:11-19. He has not been asked or required to express anything because of these provisions, nor is he aware of anyone else being so required, *id*. 32:18-33:6, nor has he been threatened or disciplined under the Anti-Shielding Provisions. *Id*. 33:10-13.

c. The Recording Provisions have not harmed Fiorito, *id*. 55:18-56:1, 59:18-21; no one has recorded his class since the passage of HB233, *id*. 65:16-19; and no one has used a recording of one of his class lectures in a grievance or proceeding against him, nor is he aware of this happening to anyone else. *Id*. 65:20-66:9. Fiorito acknowledges that without HB233, students could make a complaint against him and misrepresent his statements. *Id*. 65:8-15.

d. Before the passage of HB233, Fiorito recorded class lectures and made them available to students. *Id*. 66:10-67:3.

e. Fiorito requires students to complete a mandatory questionnaire on the first day of class. that inquires about students' family members'

associations—like union membership—and other information about their personal life. *Id*. 71:12-19, 72:18-24; 73:19-21, 76:17-21, 83:5-19.

f. He has conducted research through the university that asked survey participants for their political beliefs. *Id*. 79:11-25.

19. **David Price: (ECF 164-20)**

a. Professor Price has not changed his instruction because of any survey results. *Id*. 96:15-21. He just does not like the idea of a survey. *Id*. 30:13-16. In order to know whether Santa Fe College's funding will be cut, he would have to speculate and make "all manner of assumptions" based on "so many variables." Id. 32:8-33:11, 35:12-23, 36:19-37:8.

b. His concerns related to the Anti-Shielding Provisions have not occurred. *Id*. 75:19-24. He has not been disciplined as a result of the Anti-Shielding Provisions. *Id*. 70:16-18. He has not been induced to include certain ideas in his curriculum that he would otherwise not have, id. 84:22-85:9, nor threatened with retribution for not included certain viewpoints in curriculum. *Id*. 83:21-84:6. Nor can he say when—if ever—he will be threatened with retribution. *Id*. 84:7-14, 85:10-15.

c. He has not changed the way he teaches because of the Recording Provisions, *id*. 82:9-15, has not noticed students recording, nor have his concerns with the recording provision materialized. *Id*. 82:9-15.

20. **Robin Goodman (ECF 164-13)**

a. Professor Goodman has not been required to espouse views she does not promote. *Id*. 32:6-14. She has not been told to include certain viewpoints in her curriculum as a result of HB233, 33:18-24, and she agrees HB233 does not require her to say anything, *id*. 44:2-7, nor does it require her to present a syllabus that balances various viewpoints. *Id*. 52:11-16, 52:24-53:3.

b. Goodman has not had to change anything in her curriculum as a result of HB233. *Id*. 89:4-7, 90:23-91:4, nor has anyone threatened her with consequences if she did not change her curriculum. *Id*. 91:6-14.

c. To her knowledge, her classes have not been recorded. *Id*. 12:5-7.

d. Goodman prohibits others from expressing certain viewpoints in her classroom. *Id*. 17:7-18:9, 28:18-30:15, 38:21-39:9, 40:10-18, 65:11-20, 66:14-25.

e. Goodman believes the intention of HB233 was to prevent students from shouting down someone who was expressing ideas that were uncomfortable, unwelcome, disagreeable, or offensive. *Id*. 42:4-10. She agrees the law applies to liberal and conservative ideas alike. *Id*. 62:10-63:4.

21. **Barry Edwards**: **(ECF 164-12)**

a. Professor Edwards was contacted by Plaintiffs' counsel about becoming a Plaintiff, and agreed to do so in part because he believed that

working with the Plaintiffs' counsel would benefit him professionally. *Id*. 31:20-32:12.

b. According to Edwards, funding cuts are a continual source of worry for universities, *id*. 74:7-10, and existed before HB233. *Id*. 78:8-18.

c. No one from the Board of Governors has told him he needs to express any viewpoint. *Id*. 44:8-45:1.

d. No one threatened discipline against him if he did not change his course content. *Id*. 64:19-65:17.

e. In some instances, UCF already records classes, *id*. 94:5-11; Edwards has posted recordings in his online courses, *id*. 100:6-8, and has allowed recording of his lectures before HB233. *Id*. 100:9-101:12.

f. Edwards acknowledges that he teaches classes to students who might take notes, and then share their notes and impressions with others. *Id*. 97:17-98:7.

22. **United Faculty of Florida (ECF 164-15)**

a. No UFF members have been identified or retaliated against based on the survey. *Id*. 160:22-163:7, 230:2-235:16.

b. UFF did not disclose facts about any instances of recording. *Id*. 137:14-140:10.

c. UFF advised its members abstain from survey, which was voluntary and did not collect respondent's names. 26:7-30:7, 59:11-17, 84:10-15, 171:24.

d. UFF (with some financial and personnel support from FEA) engages in routine lobbying and member education. 40:141:1, 50:14-54:24, 63:18-25, 103:9-105:7, 270:11-20, 271:5-25, 273:12-274:25, 275:7-277:12, 279:14-3. For example, UFF tracks legislation, lobbies the Legislature, maintains a government relations committee, endorses candidates, and operates a political committee. 50:14-54:24, 63:18-25, 236:10-238:10, 240:18-241:12, 246:10-247:24, 249:4-24, 273:12-274:25, 275:7-277:12.

e. UFF has never challenged Diversity, Equity, & Inclusion surveys administered on campuses. *Id*. 220:17-221:21; *see also id*. 88:17-20.

f. UFF acknowledges that its UF chapter administered intellectual freedom surveys to faculty. 23:324:14, 195:2-196:7.

23. **March for Our Lives (ECF 164-10)**

a. MFOL membership is not limited to college and university students or professors; MFOL also operates city chapters and high school chapters. *Id.* 24:14-26:12.

b. MFOL contends HB233 applies to it because the law calls for a survey to be distributed to students, some of whom are members of MFOL. *Id.* 29:20-

30:20. MFOL agrees the 2022 survey was voluntary and anonymous. *Id.* 30:10-12, 34:2-4.

c. No MFOL member has been punished by Defendants or the Legislature for expressing their views, *id.* 55:18-56:24, been forced to disclose their associations, or been unable to host mission-oriented events because of HB233, *id*. 64:5–65:6.

d. MFOL's corporate representative only spoke to four people, who are current or former UCF students. 13:10-16:22; *but see* **ECF 164-18** 14:20-16:11.

e. MFOL started a new UCF chapter after HB233 was passed. **ECF 164-18** 18:1-9.

f. MFOL has not specifically identified any resources diverted away from other priorities as a result of HB233. **ECF 164-10** 72:3-22, 77:17-79:2, 95:7-13; **ECF 164-40** (Interrog. 12).

g. MFOL did not identify anyone who has declined to join MFOL or resigned from MFOL as a result of HB233. **ECF 164-10** 39:8-11, 40:9-41:9, 65:24-68:15.

h. MFOL is not aware of any funding reduction to a university due to HB233, and MFOL is still able to recruit on all Florida campuses. *Id.* 82:15-83:4.

i. MFOL's alleged harm is potential harm to the "environment" on campus, and the potential allowance of disfavored speech that could cause emotional discomfort for its members; the effects "remain to be seen." *Id.* 34:13-20, 43:5-21, 47:12-16, 53:22-54:2, 57:1-58:1, 88:16-89:17.

LEGAL STANDARD

I. SUMMARY JUDGMENT STANDARD.

Federal Rule 56 mandates "summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff . . . by a preponderance of the evidence[.]" *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). "A party opposing summary judgment may not rest upon the mere allegations or denials in its pleadings. . . . [It] must set forth specific facts showing that there is a genuine issue for trial." *Walker v. Darby*, 911 F.2d 1573, 1576–77 (11th Cir. 1990).

II. ARTICLE III STANDING.

"[T]he irreducible constitutional minimum of standing contains three elements. ***First***, the plaintiff must have suffered an 'injury in fact'—an invasion of

a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, *not conjectural or hypothetical*. . . . ***Second***, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly . . . trace[able] to the challenged action *of the defendant*. . . . ***Third***, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defendants of Wildlife*, 504 U.S. 555, 560–61 (1992) (citations omitted) (emphases supplied). An "imminent" injury sufficient to confer standing is one that will "proceed with a high degree of immediacy." *Id.* at 563 n.2; *31 Foster Children v. Bush*, 329 F.3d 1255, 1266–67 (11th Cir. 2003) (same). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan*, 504 U.S. at 561.

LEGAL ARGUMENT

I. THE CHALLENGED PROVISIONS.

This Court need not look beyond the face of HB233 to reject Plaintiffs' claims. By their terms, the Survey, Anti-Shielding, and Recording Provisions are unenforceable against Plaintiffs. Nor have Plaintiffs alleged these provisions have been enforced—or will imminently be enforced—against them, eliminating the viability of Plaintiffs' as-applied challenges.

a. Survey Provisions.

The Survey Provisions direct Defendants to administer an annual survey to assess intellectual freedom and viewpoint diversity at public colleges and universities, and to publish the results by September 1st. **ECF 164-3; ECF 164-7** 207:22-208:2, 218:2-7. They do *not* require anyone to answer a survey, do not require action beyond publishing the survey results, and do not require anyone to "register" their political beliefs—a central feature of Plaintiffs' claims. *E.g.*, ECF No. 101 ¶¶ 12, 75; **ECF 164-21–28, 39** (*see* Plts. Ans. to Interrog. No. 3); **ECF 164-8**.

The only survey administered under the Survey Provisions was voluntary and anonymous. *See* SOF ¶ 8. No Plaintiff took the survey or faced consequences for not taking the survey. *Id.* ¶ 7. Plaintiffs insist that nothing in the statute prevents a future survey from not being voluntary or anonymous, but offer zero facts to suggest if or when a mandatory, non-anonymous survey might be administered.

Finally, the Survey Provisions contemplate no consequences based on the survey results, and include no mechanism for cutting funding to any institution or program. **ECF 164-3**.

As HB233's sponsor articulated, the Survey Provisions' purpose is to move beyond anecdotes to empirically assess freedom of expression and viewpoint diversity on Florida's public campuses. **ECF 164-4** 5:11–6:9; **ECF 164-34** 7:1-8:1;

SOF ¶¶ 3–4; *accord id.* ¶¶ 5–6. This is a perfectly legitimate end for the State to pursue. Like a thermometer, the surveys are meant to be a diagnostic tool designed to take the temperature of taxpayer-funded campuses. The Survey Provisions presuppose no diagnosis, prescribe no course of treatment, and predict no future action or consequence.

Plaintiffs' fixation on the technical quality of the survey questions and administration is a red herring. As this Court recognized, whether Defendants drafted a good or a "bad" survey is simply not a relevant issue. Prelim. Inj. Hrg. Tr. at 31–32. Plaintiffs did not sue to force Defendants to draft a statistically-valid survey, or to otherwise force compliance with the Survey Provisions. Rather, Plaintiffs claim the Survey Provisions and the voluntary surveys violate their constitutional rights—a claim they have not proven and cannot prove, especially not through "expert" criticism of survey questions no Plaintiff answered.

b. Anti-Shielding Provisions.

The Anti-Shielding Provisions prohibit specific state actors—the Board of Education, the Board of Governors, and public colleges and universities—from restricting constitutionally-protected expression on the grounds that someone might find the expression unwelcome, uncomfortable, disagreeable, or offensive. **ECF 164-3**. This is consistent with the explicit purpose of the First Amendment. *Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, 141 S.Ct. 2038, 2046–47 (2021); *Snyder*

v. Phelps, 562 U.S. 433, 458 (2011); *Coates v. City of Cincinnati*, 402 U.S. 611, 615–16 (1971). The Anti-Shielding Provisions do not require anyone to utter a word, to endorse any viewpoint, or give equal floor time for all conceivable ideas.[2] The law simply prohibits specific state actors from restricting constitutionally-protected speech on the grounds someone might find it offensive or disagreeable. Additionally, nothing in the text of HB233 suggests that the Anti-Shielding Provisions eliminate institutions', or Defendants', or even Plaintiffs, authority to enact reasonable time, place, and manner restrictions. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (permitting tailored time, place, and manner restrictions on protected speech); *see* **ECF 164-34** 21:20-23:19; **ECF 164-4** 24:19-25:8; **ECF 164-5** 28:9-30:12, 31:22-33:9; **ECF 164-36** 12:17-13:18.

By their terms, the Anti-Shielding Provisions are unenforceable against Plaintiffs, or any other student or professor, and predictably, have not been enforced against Plaintiffs. Similarly, the cause of action in section 1004.097(4)(a), Florida Statutes, applies distinctly to colleges and universities—not students, not professors, not unions, not advocacy organizations—and is enforced by private plaintiffs, not Defendants. *See* ECF No. 66 (Def.'s Supp. Brief re: *Whole Woman's Health v. Jackson*, 142 S.Ct. 522 (2021)). No Plaintiff could ever be sued under this provision,

[2] Even if the Anti-Shielding Provisions did regulate curricula, the Professor Plaintiffs would lack standing because the government can regulate public employees' employment-related speech. *See* Part V.c. below.

which in substance predates HB233, and only contemplates the vindication of violations to an individual's own expressive rights. § 1004.097(4)(a), Fla. Stat. Plaintiffs have not been sued or threatened with suit under the auspices of this statute or HB233, and are unaware of anyone who has.

c. Recording Provisions.

The Recording Provisions codify a right to record lectures for personal use, limit other uses of recorded lectures to defined circumstances, prohibit unauthorized publication of lectures, and provide a cause of action for unauthorized publication. **ECF 164-3**. The Recording Provisions contain no enforcement mechanism against students or professors such that any Plaintiff could be held liable for their violation (unless they unlawfully publish a recorded lecture). No Plaintiff claims to have been charged with violating these provisions or subjected to or threatened with discipline under the Recording Provisions. Plaintiffs have not identified any instance of a class being recorded since HB233 was enacted. SOF ¶¶ 17(g), 18(c), 19(c), 20(c), 22(b).

Plaintiffs dislike like HB233—but they have not been harmed by it. Only the latter confers standing in federal court. *Lujan*, 504 U.S. at 461; *City of Los Angeles v. Lyons*, 461 U.S. 95, 105–07 (1983). HB233 has not been enforced against them, and Plaintiffs have no evidence that it will imminently be enforced.

II. PLAINTIFFS HAVE NOT ESTABLISHED ANY CONCRETE INJURY TRACEABLE TO DEFENDANTS AND HB233.

Plaintiffs' asserted "injuries" are not concrete and particularized, and indeed, have not yet materialized. Nor are their injuries traceable to Defendants. *Collins v. Yellen*, 141 S.Ct. 1761, 1779 (2021) ("[F]or purposes of traceability, the relevant inquiry is whether the plaintiffs' injury can be traced to . . . *the defendant*, not to the provision of law that is challenged." (emphasis supplied)). Plaintiffs' "alleged harm is not plausibly tied to [HB233's] enforcement so much as the law's very existence." *Equality Fla. v. State Bd. of Ed.*, 4:22-cv-134-AW/MJF, ECF No. 120 at 3 (Sept. 29, 2022).

Plaintiffs do not allege they have been charged with violating any provision of HB233 or faced any consequence. Rather, Plaintiffs speculate about what may or may not happen in the future under HB233—but worst-case-scenario guesswork and inference-stacking is no substitute for Article III standing. *Falls v. DeSantis*, No. 4:22cv166-MW/MJF, 2022 WL 2303949, *6–*7 (N.D. Fla. June 27, 2022). Because Plaintiffs have failed to prove they have suffered an injury-in-fact that is "actual or imminent, not conjectural or hypothetical," Plaintiffs lack standing. *Elend v. Basham*, 471 F.3d 1109, 1207 (11th Cir. 2006).

a. Hypothetical Future Actions Cannot Confer Standing.

"A claim resting upon contingent future events that may not occur as anticipated, or indeed may not occur at all, is not fit for adjudication." *Texas v.*

United States, 523 U.S. 296, 296 (1998). "[I]n order to establish a justiciable Article III case, the plaintiffs here must establish (1) that they were injured (2) by the actions of the [Defendants] (3) because [they] can enforce [HB233] against them and has either done so or threatened to do so." *Support Working Animals, Inc. v. Governor of Fla.*, 8 F.4th 1198, 1202 (11th Cir. 2021). Plaintiffs must provide evidence of a "concrete, particularized, non-hypothetical injury to a legally protected interest." *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1351 (11th Cir. 2009); *accord Lyons*, 461 U.S. 95, 101–02, 106–09 (plaintiff's alleged "abstract injury" that may occur in the future did not establish standing).

Plaintiffs cannot invoke this Court's jurisdiction through speculation about what a future legislature *might* do with survey results, or what might materialize if a lecture is *someday* recorded or published without authorization. Plaintiffs' claimed injuries have no demonstrable basis in facts that have occurred, or will imminently occur, *see Lujan*, 504 U.S. at 461, and constitute impermissible inference-stacking, *see Falls*, 2022 WL 2303949 at *7.

In unison, Plaintiffs cite concerns over future funding reductions to their institutions as their injury. *See, e.g.,* SOF ¶ 11; ECF No. 101 ¶¶ 6, 14, 83, 109–110, 116, 129, 151 134; **ECF 164-21–28, 39**. However, no Plaintiff is aware of any proposed or actual funding cuts to any institution based on HB233. SOF ¶ 11. As this Court intimated, the Legislature does not need HB233 to exercise appropriations

authority, Prelim In. Hrg. Tr. 28:23–29:13, and Defendants have no appropriations authority over funding for colleges and universities. Moreover, any injunction purporting to dictate the non-party Florida Legislature's future appropriations or enactments would be improper. *See Jacobson*, 974 F.2d at 1255 (federal courts can enjoin state officials from enforcing *current* laws). And of course, Plaintiffs are not colleges or universities, and have no legally-protected interest in the budgets of colleges and universities. Plaintiffs' speculative, trickle-down injury allegations do not confer standing.

Plaintiffs' speculation here is farther afield than plaintiffs in *Elend*, 471 F.3d at 1207–10, whose standing was rejected at the dismissal stage. In *Elend*, plaintiffs alleged that the defendant previously violated their First Amendment rights by relegating their expressive activities to a protest zone, and that this injury was likely to recur because they intended to protest in the future "in concert with presidential appearances at the USF Sun Dome and other locations around the country." *Id.* at 1207–08.

Describing this harm as "wholly inchoate," the Eleventh Circuit reasoned that plaintiffs failed to "provide any limitation on the universe of possibilities of when or where or how such a protest might occur," and "to find that this somehow constitutes 'real and immediate' injury sufficient to confer standing would eviscerate the meaning of both words." *Id.* at 1209. Like in *Elend*, Plaintiffs' alleged threat of

future injury remains "wholly inchoate" and insufficient to confer standing. *Id.*; *cf. Bischoff*, 222 F.3d at 877, 884 (plaintiffs had standing when they were threatened with arrest for handbilling, their colleagues had been arrested for the same conduct, and plaintiffs intended to return to the same intersection to handbill but did not for fear of arrest).

Plaintiffs face no imminent threat of injury. Because vague generalizations about potential future consequences is not an injury-in-fact, Defendants are entitled to summary judgment. *Anderson*, 477 U.S. at 252; *Celotex*, 477 U.S. at 322–23.

b. Plaintiffs' Allegations Related to HB233's Purported Chilling Effect Are Objectively Unreasonable.

Subjective allegations that a plaintiff's speech will be chilled is an insufficient substitute under Article III for a specific, objective injury or threat of injury. *Laird v. Tatum*, 408 U.S. 1, 13–14 (1972). A subjective fear that speech will be chilled is not objectively reasonable when it depends on speculation and conjecture. *Fla. Fam. Pol'y Council v. Freeman*, 561 F.3d 1246, 1255 (11th Cir. 2009).

Plaintiffs insist that HB233 will chill speech, but these assertions are not founded on events that have occurred, or that are reasonably feared. HB233 is simply not enforceable against individual students or professors, and Plaintiffs' chilling allegations are therefore unreasonable. *See Pittman v. Cole*, 267 F.3d 1269, 1283–84 (11th Cir. 2001) ("[I]n order for a plaintiff alleging that his speech was chilled to have standing, he or she must show that either (1) he was threatened with

prosecution; (2) prosecution is likely; or (3) there is a credible threat of prosecution." (marks omitted)). "[I]f no credible threat of prosecution looms, the chill is insufficient to sustain the burden that Article III imposes. A party's subjective fear that she may be prosecuted for engaging in expressive activity will not be held to constitute an injury for standing purposes unless that fear is objectively reasonable." *Wilson v. State Bar of Ga.*, 132 F.3d 1422, 1428 (11th Cir. 1998) (citation and marks omitted). "[P]ersons having no fears of state prosecution except those that are imaginary or speculative" lack standing, and are not ... appropriate plaintiffs." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979).

After more than a year, Plaintiffs still offer no concrete evidence that they have reasonably chilled their speech as a result of HB233—or that any future self-censorship would be objectively reasonable. *E.g.,* SOF ¶¶ 16(b)–(c), 17(d)–(f), 19(b), 19(a)–(c), 20(b), 21(c)–(f); *see generally* ECF No. 101 (alleging chilling throughout). Even beyond its speculative nature, any alleged self-censorship is not objectively reasonable as a matter of law because Plaintiffs do not face "a realistic danger of sustaining direct injury as a result of the statute's operation or enforcement" if they do not self-censor. *Am. Civil Liberties Union v. The Fla. Bar*, 999 F.2d 1486, 1492 (11th Cir. 1993) (marks omitted). HB233 does not dictate or regulate the content of any speech, so any actual or future self-censorship is necessarily based on Plaintiffs' improper, subjective assumptions—not the law's

text. *Digital Props., Inc. v. City of Plantation*, 121 F.3d 586, 590–91 (11th Cir. 1997) ("[N]o explicit delineation . . . exists in the Code of Ordinances. Digital's challenge, therefore, is founded upon its anticipated belief that Plantation would interpret the P.C.O. in such a way as to violate Digital's First Amendment rights.").

Plaintiffs' chilling theory features an additional misreading of the law: the cause of action set forth in 1004.097(4)(a), Florida Statutes, which HB233 amended, but did not create. This cause of action is available only to individuals, and only against institutions—not students, not professors, not faculty unions, and not advocacy organizations—to vindicate violations of someone's *own* "expressive rights." No Plaintiff could ever be sued or held liable for damages under this statute, nor can Defendants ever enforce it. Plaintiffs' allegations of future self-censorship based on this cause of action are objectively unreasonable not only because they are speculative, but also because section 1004.097(4)(a) existed in substance before HB233 and is not enforceable against Plaintiffs. *Laird*, 408 U.S. at 12–14; *Babbitt*, 442 U.S. at 298.

By contrast, in *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1121 (11th Cir. 2022), the alleged chilling effect was objectively reasonable because the challenged "discriminatory-harassment policy" explicitly "prohibited a broad swath of expressive activity." In addition to banning speech, the policy banned "conduct that may be humiliating," the "encourag[ement]" of banned speech, and the "failure

to intervene" to stop banned speech. *Id.* Here, HB233 does not prohibit any speech or subject speech to consequences. To the contrary, it preserves the individual's right to speak, and prohibits Defendants and public institutions from restricting protected expression.

Plaintiffs' chilling allegations are also unreasonable because the 2022 surveys were voluntary, there is no evidence that future surveys will *not* be voluntary, and other surveys on similar topics already exist. UFF's local chapters administer them. SOF ¶ 22(f). Colleges and universities across Florida administer Diversity, Equity, & Inclusion surveys.[3] *Id.* ¶ 22(e). Plaintiffs' expert, Dr. Sylvia Hurtado, acknowledged that public universities frequently administer "useful" campus-climate surveys (covering topics including race, religion, gender, and political views). *See* **ECF 164-30** 39:4-42:6, 102:18-103:23. No facts in the record suggest HB233's voluntary survey will now uniquely chill speech, when pre-existing surveys did not.

Finally, Plaintiffs' chilling allegations are inextricably tied to laws and parties not at issue in this case, and are thus not traceable to Defendants' enforcement of HB233, or redressable by HB233's invalidation. *See, e.g.,* ECF No. 101 ¶¶ 8–10; **ECF 164-15** 43:17-23, 109:19-112:11; **ECF 164-20** 42:11-44:25; **ECF 164-19**

[3] UFF has never challenged DEI surveys, despite their administration by state schools. SOF ¶ 22(e).

19:6-20, 31:6-32:3, 52:11-53:11; **ECF 164-18** 13:6-14:1, 33:16-34:10, 36:2-6; **ECF 164-11** 46:10-48:1, 54:1-56:17, 62:4-25.

c. The Student Plaintiffs Failed to Establish an Injury-in-Fact.

Blake Simpson does not live in Florida, is not a student in Florida, and has no plans to return to Florida. He did not take the survey. He is not presently subject to HB233, and no facts in the record suggest that he could be subject to HB233 in the future. *See* SOF ¶ 14. Plaintiff Newsome lacks standing to challenge a law that does not apply to him. *A.R. v. Dudek*, No. 12-60460-Civ, 2016 WL 11783303, *2–*3 (S.D. Fla. June 4, 2016) (Hunt, Mag.).

Julie Adams has not taken the survey, concedes the Survey Provisions have not impacted her, has not declined to join or resigned from any organizations, concedes the Recording Provision have not harmed her, and concedes the harms she fears have not yet occurred. SOF ¶ 16.

The Student Plaintiffs lack standing because neither has suffered or will imminently suffer a concrete injury from HB233. Defendants are entitled to summary judgment against the Student Plaintiffs. *Celotex*, 477 U.S. at 322–23; *Anderson*, 477 U.S. at 252.

d. The Professor Plaintiffs Failed to Establish an Injury-in-Fact.

The Professor Plaintiffs allege fear of future funding cuts, and amorphous, intangible impacts to the "atmosphere" on campus. These conjectural concerns are not injuries-in-fact sufficient to invoke this Court's jurisdiction.

The Professor Plaintiffs have not been disciplined or threatened with discipline for any alleged violations of HB233. They have not taken the survey, have not been accused of shielding, and cannot point to a single instance of recording other than their own. The Anti-Shielding Provisions are not enforceable against professors, nor is the cause of action set forth in section 1004.097(4)(a).

The chilling effect the Professor Plaintiffs allege is based on conjecture and a misreading of the law, and is objectively unreasonable for the reasons set forth in subpart (b) above.

Tellingly, the Professor Plaintiffs and non-party witnesses have difficulty articulating their alleged injuries, including alleged chilling, without resort to other laws enacted *after* HB233, and not at issue in this lawsuit (i.e., HB 7, SB 7044, and HB 1557). *See supra* p. 32. Plaintiffs cannot manufacture standing to challenge HB233 through a patchwork of nebulous grievances stemming from other, later-enacted legislation.

Finally, Professor Link recently retired, and has no present plans to return to teaching. SOF ¶ 17(a). Professor Link lacks standing on this basis alone, because HB233 does not apply to him and will not apply to him in the future.

Because they failed to adduce even a "scintilla of evidence" of an injury-in-fact that is traceable to Defendants and redressable by HB233's invalidation, Defendants are entitled to final summary judgment against the Professor Plaintiffs. *Anderson*, 477 U.S. at 252; *Celotex*, 477 U.S. at 322–23.

e. UFF Failed to Establish an Injury-in-Fact.

i. The Record Does Not Establish an Injury to UFF's Interests.

UFF alleges that it is "directly harmed" by HB233 because it has had to "divert limited resources to combat the discriminatory and chilling effects of the law." ECF No. 101 ¶ 25. UFF's evidence of this alleged diversion of resources does not establish an injury under Article III.

"Under the diversion-of-resources theory, an organization has standing to sue when a defendant's illegal acts impair the organization's ability to engage in its own projects by forcing the organization to divert resources in response." *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1341 (11th Cir. 2014); *accord Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) (organization must prove "that it has indeed suffered impairment in its role of facilitating open housing before it will be entitled to judicial relief" based on diversion-of resources-theory of standing). UFF does not

meet this standard because the evidence shows no departure from UFF's "own projects," *see id.*, which include political advocacy and educating members as a matter of course. Broad generalizations and conjecture cannot establish an injury-in-fact at the summary judgment stage. *Lujan*, 504 U.S. at 561.

UFF has proven no harm to its ability to collectively bargain or advocate for its members. UFF's evidence shows nothing more than its ordinary educational and advocacy activities. UFF acknowledges, for example, that one of its significant functions is tracking legislation and advocating for and against legislation. SOF ¶ 22(d). UFF has a standing governmental relations committee, operates a political committee, and works hand-in-hand with FEA's governmental relations team to pursue or oppose priority legislation and endorse candidates for office. *Id*.

UFF's generically-described efforts to educate members about HB233 or support legislation to repeal HB233 represent run-of-the-mill advocacy work that UFF performs on a daily basis, often with financial support from FEA. Indeed, UFF expended more time and energy last session on priorities *other than* repealing HB233. **ECF 164-15** 273:12-274:6. Like plaintiffs in *Jacobson* who testified only they expended "additional resources" in response to a law, UFF has offered no specific proof that it diverted resources "away *from*" its other priorities "in order to spend additional resources on combating" HB233, or "what activities, if any, might be impaired by" UFF's time spent on HB233. 974 F.3d at 1250.

In sum, UFF's communication with local chapters, development of guidance for its members, and engagement in the political process, *e.g.,* **ECF 164-15** 269:2-270:20, 271:5-25, 273:12-276:12; SOF ¶ 22(d)—which it does day, supported in part by funding from FEA—is unremarkable, and does not come close to the diversion of resources necessary to confer standing. *See Ga. Repub. Party v. Sec. & Exch. Comm'n*, 888 F.3d 1198, 1203 (11th Cir. 2018) (plaintiff lacked standing when it failed to prove diversion of resources in a manner that "impairs the [organization]"); *Dream Defs. v. DeSantis*, 553 F. Supp. 3d 1052, 1072 (N.D. Fla. 2021) (organization's "disappointment and frustration" with law, which was "simply a setback to the organization's abstract social interests," did not impair organization's ability to "fulfill [its] purpose, i.e., *advocate*" and did not confer standing).

Finally, UFF obstructed Defendants' ability to uncover the evidentiary basis of its alleged diversion of resources by asserting First Amendment privileges over probative information. UFF selectively produced a few budget documents that pre-dated HB233, but refused to produce *a single internal communication or document*. *See GAB Business Servs., Inc. v. Syndicate 627*, 809 F.2d 755, 762 (11th Cir. 1987); *Pena v. Handy Wash, Inc.*, 114 F. Supp. 3d 1239, 1244–45 (S.D. Fla. 2015) (excluding selectively-disclosed evidence).[4]

[4] UFF and MFOL's abuse of the First Amendment privilege and the resulting prejudice to Defendants is set forth in Defendants' pending Motion to Compel, ECF No. 133, which Defendants incorporate here.

UFF may dislike HB233, but an "organization's abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required by Art. III." *Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 40 (1976); *accord Jacobson*, 974 F.3d at 1250–51 ("[A] setback to . . . abstract social interests" is not a concrete injury). UFF has offered no specific factual evidence that HB233 "impedes its ability to attract members, to raise revenues, or to fulfill its purposes," or otherwise harms its interests. *Fla. Democratic Party v. Hood*, 342 F. Supp. 2d 1073, 1079 (N.D. Fla. 2004). UFF therefore lacks standing.

ii. The Record Does Not Establish an Injury to UFF's Members.

UFF lacks standing to sue on behalf of its members because its members have not suffered an injury-in-fact. An organization has standing to sue on behalf of its members when "its members would otherwise have standing to sue in their own right." *Greater Birmingham Ministries v. Sec'y of State of Ala.*, 992 F.3d 1299, 1316 (11th Cir. 2021) ("*GAB*"). This requires that "at least one identified member has suffered or will suffer harm." *Ga. Republican Party v. Sec. & Exch. Comm'n*, 888 F.3d 1198, 1203 (11th Cir. 2018) (citations omitted).

HB233 is not enforceable against UFF's members. *See* Part II.b. UFF cannot rely on the Professor Plaintiffs to establish standing through its members, as they failed to prove their own concrete injuries-in-fact.

For the same reasons, UFF cannot rely on non-party professors to establish standing, as those members fail to establish any cognizable injury: the challenged provisions are not enforceable against them, they have not taken the survey, have not identified any instances of recording, have not been compelled to engage in speech, and have not otherwise been disciplined or threatened with consequences as a result of HB233. *See, e.g.,* **ECF 164-19** 21:9-14, 22:1-15, 22:21-23:3, 28:3-6, 31:6-8, 35:24-36:25; **ECF 164-32** 19:6-20:10, 50:18-53:15, 54:21-25, 71:16-72:5, 76:11-20; **ECF 164-31** 33:6-34:2, 45:4-9, 101:19-102:2.

iii. UFF Abused the First Amendment Privilege.

Finally, when probed for the basis of their alleged injuries, UFF refused to disclose responsive facts. *E.g.,* **ECF 164-15** 137:17–140:10 (alleging a hearsay report of classroom recording that was not previously disclosed in discovery; refusing to identify the individuals involved or the content of the alleged communications); *id.* 124:23-126:6; ECF Nos. 133-1, 133-3. UFF's counsel flatly admitted they selected "the examples and the witnesses that [they] are willing to disclose," and refused to provide anything further. **ECF 164-15** 138:16–140:10; *see also* **ECF 164-10** at 65:24–68:15.

Such self-serving, selective disclosures are prohibited. *Cox v. Administrator U.S. Steel & Carnegie*, 17 F. 3d 1386, 1417 (11th Cir. 1994). Plaintiffs "affirmatively placed into the record details of" incidents and communications on

which it relies to support its claims, and Defendants have been "unfairly prejudiced" by its inability "to contest [Plaintiffs'] version of the facts, while [Plaintiffs] remained free to use" their selectively-disclosed evidence "as both a sword and a shield." *E.E.O.C. v. Am. Tool & Mold, Inc.*, Case No: 8:12–cv–2772, 2013 WL 12155446, *2–*3 (M.D. Fla. Nov. 26, 2013); *GAB Bus. Servs.,* 809 F.2d at 762.

f. MFOL Failed to Establish an Injury-in-Fact.

MFOL also failed to establish an injury-in-fact to its own interests or to its members. HB233 does not apply to MFOL or to all of MFOL's members, as MFOL membership is open to any person (not just students), and it operates chapters unaffiliated with colleges and universities (including high school chapters and city chapters). SOF ¶ 23(a). MFOL states that it is affected by HB233 because *some* of its members are college and university students with the option of taking the survey. *Id.* ¶ 23(b).

MFOL did not identify anyone who resigned from or declined to join MFOL as a result of HB233. *Id.* ¶ 23(g); **ECF 164-18** 22:14-25. MFOL actually started a *new* UCF chapter after HB233 passed. SOF ¶ 23(e). MFOL acknowledges that the 2022 survey was voluntary and anonymous. **ECF 164-10** 30:10-20, 34:2-4. MFOL cannot identify any tangible impact of HB233 on its chapters or members, and instead complains about the "environment" that HB233 could create, or the disfavored speech that it might allow. SOF ¶¶ 23(c), (f)–(i). MFOL's corporate

representative had no knowledge of its chapters or members outside of speaking to a handful UCF graduates and students. MFOL did not speak to any other university students, and did not speak to any public college students. **ECF 164-10** 13:10–22, 14:19–16:2. This represents a complete failure to adequately prepare for a corporate representative deposition, *QBE Ins. Corp. v. Jorda Enters., Inc.*, 277 F.RD. 676, 689–91 (S.D. Fla. 2012), and shows that MFOL has no actual knowledge of the facts needed to establish the harm it alleges.

Finally, MFOL alleges that it may one day divert resources in response to HB233, *see* ECF No. 101 ¶ 27, but offers no evidence that it has actually diverted resources away from its other priorities. SOF ¶ 23(f)

Like UFF, MFOL also improperly asserted the First Amendment privilege, selectively disclosing information MFOL deemed helpful, but prevented Defendants from further probing the evidentiary basis of MFOL's assertions. *See* **ECF 164-10** 67:14-68:15, 84:14-22; *see also* ECF No. 133. On summary judgment, MFOL cannot use generic allegations and privilege assertions to avoid proving its claims. MFOL has no evidence that it or its members have been injured, and therefore lacks standing.

III. PLAINTIFFS' CLAIMED INJURIES ARE NOT REDRESSABLE.

Plaintiffs' speculative alleged injuries cannot be redressed by a favorable judgment in this case. First, the Legislature controls appropriations, and the

Governor has veto authority. To be sure, there is zero record evidence suggesting that Defendants could or would make funding decisions based on HB233. Nevertheless, HB233 does not vest new authority in the Legislature or the Governor that did not exist long before the bill passed, and an injunction against Defendants addressing future legislative funding decisions is a paper tiger.

The Legislature does not need HB233 to reduce funding, and the Governor does not need HB233 to veto appropriations. *See Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1254–55 (11th Cir. 2020) ("Because [plaintiffs] failed to sue the officials who will cause any future injuries, even the most persuasive of judicial opinions would have been powerless to redress those injuries."). Plaintiffs' feared funding cuts could come to fruition irrespective of HB233, and a futile injunction against Defendants changes nothing. *See Lewis v. Gov. of Alabama*, 944 F.3d 1287, 1301 (11th Cir. 2019) ("[I]t must be the effect of the court's judgment on the defendant—not an absent third party—that redresses the plaintiff's injury[.]" (marks omitted)). "[A] plaintiff's injury isn't redressable by prospective relief where other state actors, who aren't parties to the litigation, would remain free and clear of any judgment and thus free to engage in the conduct that the plaintiffs say injures them." *Support Working Animals*, 8 F.4th at 1205.

Second, if Plaintiffs have doubts about what speech is permitted on campus or in classrooms, or have concerns regarding the types of unpopular speech the First

Amendment allows, those concerns arise from the complexity of First Amendment jurisprudence—not the operation of HB233. The First Amendment existed long before HB233, and its contours would be no different without HB233. Individuals have long held the First Amendment right to express unpopular viewpoints, along with entitlement to vindicate those rights in court. *E.g., Snyder v. Phelps*, 562 U.S. 443 (2011); *Nat'l Socialist Party of Am. v. Skokie*, 432 U.S. 43 (1977) (per curiam); *Collin v. Smith*, 578 F. 2d 1197 (7th Cir. 1978). Those rights—whether exercised by Plaintiffs or by the groups that Plaintiffs "quite justifiably reject[] and despise[]," *Collin*, 578 F. 2d at 1210—will exist no matter the outcome of this litigation. *See, e.g.,* **ECF 164-10** 38:1-39:7, 43:5-21(expressing concern that white supremacist groups will be permitted to speak); **ECF 164-16** 23:22-5, 26:15-27:1, 51:18-52:23 (same regarding Neo-nazis); **ECF 164-13** 65:11-20, 66:14-69:25 (discussing types of hate speech in classroom).

The same is true regarding the cause of action against institutions in section 1004.097(4)(a), Florida Statutes. HB233 reorganized section 1004.097(4), added a damages provision, and added a cause of action for unlawful publication of recordings, *see id*. § 1004.097(4)(b), Fla. Stat. But the cause of action for violating an individual's expressive rights existed only against institutions before HB233, and would exist only against institutions in HB233's absence. *Compare* § 1004.097(4), Fla. Stat. (2020) *with* § 1004.097(4)(a), Fla. Stat. (2021).

Third, because Plaintiffs' asserted concerns are intertwined with other laws, striking down HB233 will not assuage those concerns. By hitching their injuries, including alleged chilling, to a group of bills passed over multiple years, Plaintiffs eliminate the redressability of those alleged injuries in a challenge to the facially-neutral, first-enacted HB233. Whatever revulsion Plaintiffs feel toward the Legislature's policy choices over the past few years, striking down HB233 cannot soothe that imprecise discomfort: Plaintiffs offer multiple witnesses who fail or refuse to extricate HB233 (and its alleged purpose and effect) from the "cloud" of other legislation, demonstrating the impossibility of entering an injunction against *only* Defendants in a manner that would redress Plaintiffs' grievances. *Jacobson*, 974 F.3d at 1254–55.

IV. HB233 DOES NOT REGULATE SPEECH, AND IS CONTENT-NEUTRAL.

Moving to the substance of Plaintiffs' claims, HB233's text does not regulate or deregulate speech at all, let alone "based on its substantive content or the message it conveys"—the lynchpin concern of the First Amendment. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). HB233 regulates conduct which the First Amendment does not protect. *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 62, 65–66 (2006). The fact that the regulated conduct—for example, unlawful censorship—may be evidenced by words does not bring HB233 within the First Amendment's ambit. *Id.* at 62 (citing *Giboney v. Empire*

Storage & Ice Co., 336 U.S. 490, 502 (1949) ("[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language . . . .")).

Moreover, *O'Brien* and *Hubbard* hold when a law does not regulate speech based on content, First Amendment concerns are not implicated. *U.S. v. O'Brien*, 391 U.S. 367, 383 (1968) ("[T]he purpose of Congress . . . is not a basis for declaring this legislation unconstitutional. It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit motive."); *In re Hubbard*, 803 F.3d 1298, 13113 (11th Cir. 2015) (challenged law "d[id] not, on its face, impinge on any constitutional rights" when it "only decline[d] to promote speech, rather than abridge[e] it" and thus "d[id] not implicate any constitutionally protected conduct"); *cf. Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 165–66 (2015) (only content-based statutes are subject to heightened scrutiny).

An illustrative juxtaposition is the discriminatory-harassment policy condemned in *Speech First*, which "prohibit[ed] a broad swath of expressive activity" by students based on "any of a number of characteristics" related to the content of the speech. 32 F.4th at 1121. The policy in *Speech First* regulated speech by design, and did so by penalizing disfavored speech—a far cry from HB233, which

does not regulate private speech at all, and prevents government actors from stifling protected expression.

HB233 does not regulate speech or treat speech differently based on content; therefore, HB233 is a facially content-neutral statute. While *Reed* allows this Court to consider the Legislature's purpose to confirm content-neutrality, 576 U.S. at 165–66, *Reed* does not look to miscellaneous individual statements as a "gotcha" to invalidate otherwise-neutral laws. This misuse of *Reed* would conflict with *O'Brien*. "[T]he First Amendment does not support" a "challenge to an otherwise constitutional statute based on the subjective motivations of the lawmakers who passed it." *Hubbard*, 803 F.3d at 1312–13 (explaining that courts may not "void a statute that is . . . constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it"); *accord O'Brien*, 391 U.S. at 384 ("What motivates one legislator to make a speech about a statute is not necessarily what motives scores of others to enact it. . . .We decline to void . . . legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it.").

Under *Reed*, Plaintiffs face the insurmountable hurdle of proving that the facially content-neutral HB233 is nevertheless a content-based regulation because the Legislature's intent in enacting HB233 was to suppress and punish certain

speech, and HB233 *cannot* be justified without reference to the content of speech. 576 U.S. at 165–67. The record is devoid of such evidence.

Plaintiffs offer only scattershot statements culled from news clippings, made outside the legislative process, oftentimes regarding legislation not at issue here, and by non-legislators who did not vote on HB233. "But post-passage remarks of legislators, however explicit, cannot serve to change the legislative intent . . . expressed before the Act's passage." *Blanchette v. Conn. Gen. Ins. Corp.*, 419 U.S. 102, 032 (1974). This Court should "pay these [remarks] no heed," because "[s]tatements and thoughts that . . . did not . . . come to the attention of [the legislature] at the time do not reveal the process of deliberations," and "words written after the vote . . . were uninfluential in the process leading to the vote." *Covalt v. Carey Canada Inc.*, 860 F.2d 1434, 1438 (7th Cir. 1988); *Tinsley Media, LLC*. v. *Pickens Cnty., Ga.*, 203 F. App'x 268, 273 (11th Cir. 2006) (same, citing *Covalt*).

The Legislature and Defendants have unwaveringly articulated the State's legitimate interest in promoting free expression and viewpoint diversity on public college and university campuses. SOF ¶¶ 3–6. The legislative record reflects this motivation. *Id*. Plaintiffs' expert, Dr. Matthew Woessner, likewise advocated for the pursuit of intellectual diversity and free expression on campuses, and acknowledged present threats to that freedom, like speaker disinvitations and shout-downs. *See*

ECF 164-29. *see also Speech First*, 32 F.4th at 1125 (denouncing speech restrictions enacted at Florida university); *Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, 210 L. Ed. 2d 403 (2021) ("[S]chools have a strong interest in ensuring that future generations understand the workings in practice of the well-known aphorism, 'I disapprove of what you say, but I will defend to the death your right to say it.'"); **ECF 164-15** 237:18-20.[5]

Under *Reed*, *O'Brien*, and *Hubbard*, this legitimate legislative interest ends the Court's inquiry: HB233 is a facially content-neutral statute, and the state's legitimate interest, backed by the legislative record, is equally content-neutral, unrelated to the suppression of speech. HB233 is therefore constitutional.

This Court advised that in evaluating legislative motive, it would consider the factors enumerated in *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265 (1977). *Arlington Heights* is traditionally applied in race-discrimination cases. Even considering these factors, the record evidence does not advance Plaintiffs' cause. Plaintiffs offer inadmissible remarks by single legislators

[5] Several Plaintiffs admit their preference that disfavored speech be restricted, further demonstrating the legitimacy of the state interest Defendants assert. *E.g.,* **ECF 164-13** 28:18-30:15, 65:11-16, 66:14-25 (certain speech should be disallowed in classroom); **ECF 164-16** 23:22-25:23, 27:19-28:11, 54:15-20, 79:13-80:3, 81:8-17 (speech that denies climate change, advocates against reproductive rights, or expresses religious beliefs is not appropriate for the classroom); **ECF 164-10** 32:23-33:3, 35:7-23, 36:7-37:18, 59:23-60:3 (certain "harmful" speech should not be allowed without negative consequences).

or executive-branch officials outside the legislative process, often related to different legislation. Stray hearsay plucked from news articles does not evince legislative intent, under *Arlington Heights* or any other standard. *See id.*, 429 U.S. at 268; *GAB*, 992 F.3d at 1323–27. Plaintiffs likewise offer no evidence of disparate impact or foreseeability of such impact, or statements from "key" legislators supporting Plaintiffs' theory. *Arlington Heights*, 429 U.S. at 265–66.

The Eleventh Circuit's *GAB* decision makes plain that *Arlington Heights* does not offer Plaintiffs a blank check: the Court rejected statements made about different legislation (including by the bill sponsor) and prior statements by a legislator, while accepting defendant's testimony that there were no procedural deviations in enacting the challenged law, for which the state offered "valid neutral justifications." 992 F.3d at 1322–27.

The text of HB233, contemporaneous statements from bill sponsors, and the legitimacy of the State's interest in preserving free expression on campuses handily outweigh stray hearsay from non-legislators and individual legislators post-passage. *See Blanchette*, 419 U.S. at 132; *GAB*, 992 F.3d at 1322–27; *Tinsley Media*, 206 F. App'x at 273. The record confirms what the text makes clear: HB233 is content-neutral, and Defendants are entitled to summary judgment.

V. NO GENUINE ISSUE FOR TRIAL REMAINS ON ANY OF PLAINTIFFS' CLAIMS.

Plaintiffs lack standing, and HB233 is a content-neutral law that does not regulate speech. But even considering the elements of Plaintiffs' individual counts, summary judgment is proper based on HB233's text and Plaintiffs' paltry evidence.

a. The Record Does Not Establish a Viewpoint Discrimination Claim.

Count I alleges that the Survey, Anti-Shielding, and Recording Provisions unlawfully discriminate against certain viewpoints. Neither the text of these provisions nor the record evidence comes close to establishing a viewpoint-discrimination claim.

HB233 does not reference any viewpoint, or subject certain viewpoints to differential treatment (as acknowledged by multiple Plaintiffs). Therefore no viewpoint discrimination claim can lie. *Digital Props., Inc.*, 121 F.3d at 590–91 ("[N]o explicit delineation between book and video stores and adult book and video stores exists in the Code of Ordinances. Digital's challenge, therefore, is founded upon its anticipated belief that Plantation would interpret the P.C.O. in such a way as to violate Digital's First Amendment rights. Accordingly, this action only constitutes a potential dispute, and this court has neither the power nor the inclination to resolve it.").[6]

[6] Nor does Plaintiffs' evidence establish that the legislative motivation underlying HB233 was discriminatory. *See* Part IV.

The plaint text of the Anti-Shielding Provisions provides no special treatment to "uncomfortable, unwelcome, disagreeable, or offensive" speech, and does not prevent anyone from expressing their own offense. The Anti-Shielding Provisions simply provide that constitutionally-protected expressions be treated equally, even if someone subjectively finds the expression offensive.[7] **ECF 164-3.**

The record does not establish a viewpoint discrimination claim, or Plaintiffs' standing to pursue it. Defendants are entitled to summary judgment on Count I.

b. The Record Does Not Establish a Freedom of Association Claim.

Count II alleges the Survey Provisions violate Plaintiffs' freedom of association. No coherent reading of the Survey Provisions "interferes with individuals' selection of those with whom they wish to join in a common endeavor" or "associate [with] for the purpose of engagement in . . . activities protected by the First Amendment." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617–18 (1984); *see also O'Laughlin v. Palm Beach Cnty.*, 30 F.4th 1045, 1053–54 (11th Cir. 2022) (plaintiffs "failed to allege any association conduct upon which the [defendant county] infringed," and thus plaintiffs were not "denied [the] right" to "choose [their] associates"). Nothing in HB233 constrains Plaintiffs' associational freedoms.

[7] As a result, the meaning of "uncomfortable, unwelcome, disagreeable, or offensive" is irrelevant. The import of this language is that someone's subjective feeling that speech is uncomfortable, offensive, etc., is no excuse for shutting down constitutionally-protected speech.

Count II's effort to tie the Survey Provisions to Plaintiffs' associational rights is incomprehensibly speculative. ECF No. 101 ¶¶ 152–155, 159. The evidence fares no better: the 2022 survey was voluntary and anonymous, no Plaintiff completed the survey, no Plaintiff has been forced to disclose their beliefs or associations, and no Plaintiff can identify anyone who declined to join or resigned from an association as a result of HB233. *See* SOF ¶¶ 12–13.

Plaintiffs "simply weren't denied [the] right" to associate, and have yet to articulate any imminent threat that their right to associate will be denied. *O'Laughlin*, 30 F.4th at 1053–54 ("Plaintiffs complain that they were unfairly disciplined for their social-media posts . . . not that they were punished for joining the union, collectively bargaining, or otherwise hanging around with people who share their beliefs."). Plaintiffs have not been punished, disciplined, retaliated against, or threatened in any fashion, for any reason. Defendants are entitled to summary judgment on Count II.

c. The Record Contains No Evidence of Compelled Speech.

Count III challenges the Anti-Shielding Provisions, which do not compel Plaintiffs or anyone else to speak or publish a word. These provisions prevent Defendants, public colleges, and public universities from silencing First Amendment-protected expression on the grounds that someone finds the expression "uncomfortable, unwelcome, disagreeable, or offensive." *See* Part I. This

requirement is wholly consistent with the First Amendment, which contrary to Plaintiffs' apparent preferences, prevents the "stifl[ing]" of "unpopular point[s] of view," *Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293, 1327 (11th Cir. 2017).

Plaintiffs offer no evidence that the Anti-Shielding Provisions have or will imminently be used to force their speech, to dictate curricula, or to compel equal discussion time for every conceivable idea—none of which could result from a plain-language reading of the text. Moreover, Plaintiffs could never establish a compelled-speech claim based on their course content: public institutions determine the content of the education they provide, and the government is entitled to regulate its own message and its messengers. *See* ECF No. 40 at 12 n.10; *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (public-employee speech made pursuant to official duties is not "insulate[d]" from "employer discipline" under First Amendment); *Hubbard v. Clayton Cnty. Sch. Dist.*, 756 F.3d 1264, 1268 (11th Cir. 2014) (confirming the government can "control official communications" because "[o]fficial communications have official consequences").

At bottom, the Anti-Shielding Provisions are not enforceable against Plaintiffs, and do not compel speech—they prevent its suppression. *Equality Fla.*, Case No. 4:22-cv-00134, ECF No. 120 at 6–7 ("The law is enforced against school districts—not individual teachers. . . . With or without the law, school districts direct

teachers as to what they may and may not teach."). Defendants are entitled to summary judgment on Count III.

d. Plaintiffs Cannot Establish a Void for Vagueness Claim.

Count IV alleges that the Anti-Shielding Provisions are unconstitutionally vague. ECF No. 101 ¶¶ 179–84. The Anti-Shielding Provisions are clear, and Plaintiffs' evidence does not show that these provisions could ever injure them.

Again, the Anti-Shielding Provisions are not enforceable against Plaintiffs. These provisions impose obligations on Defendants, universities, and colleges, which are therefore the only entities subject to enforcement. The Anti-Shielding Provisions are plainly understandable, *see* Part I, but regardless, it is immaterial whether Plaintiffs find the Anti-Shielding Provisions vague. With no "actual and well-founded fear that [the Anti-Shielding Provisions] will be enforced *against them*," and *by Defendants*, Plaintiffs lack standing to challenge those provisions as unconstitutionally vague. *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988) (emphasis supplied); *accord Lewis*, 944 F.3d at 1299 ("[T]he Act itself . . . doesn't require (or even contemplate) 'enforcement' by anyone, let alone [the defendant]."). Defendants are entitled to summary judgment as to Count IV.

CONCLUSION

If Plaintiffs were injured by HB233, they could easily say so. If they had been disciplined, retaliated against, or threatened, they could say so. If they had been

forced to speak or were silenced under HB233, they could say so. They have not. Rather, *none* of the adverse outcomes Plaintiffs allegedly fear have actually occurred. More than a year later, Plaintiffs still cannot establish a concrete injury-in-fact that is actual or imminent, and not conjectural or hypothetical.

Likewise, if the Legislature passed HB233 with an intent to discriminate or suppress speech, then *something* in the legislative record would suggest as much. But it does not. On its face and as applied, HB233 does not violate Plaintiffs' First Amendment rights. The evidence does not establish Plaintiffs' standing or the merits of their claims, and Defendants are entitled to final summary judgment.

Respectfully submitted on October 14, 2022.

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CERTIFICATE OF COMPLIANCE WITH
LOCAL RULE 7.1(F) AND ECF NO. 161

The undersigned certifies that this Motion contains approximately 10,983 words.

/s/ George T. Levesque
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on October 14, 2022, the foregoing document has been served by the Court's CM/ECF system which will serve a copy via email on all counsel of record.

/s/ George T. Levesque
George T. Levesque (FBN 555541)
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