UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

WILLIAM A. LINK, et al.,

Plaintiffs,

v.

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

Defendants.

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

ORAL ARGUMENT REQUESTED

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT

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BOE	Board of Education, Defendant (together with BOG, the "Boards" or "Defendants")
BOG	Board of Governors, Defendant (together with BOE, the "Boards" or "Defendants")
DOE	Florida Department of Education
Faculty Plaintiffs	William Link, Barry Edwards, Jack Fiorito, Robin Goodman, David Price
FAMU	Florida Agricultural & Mechanical University
FAU	Florida Atlantic University
FCS	Florida College System
FSU	Florida State University
MFOL	March for Our Lives Action Fund, Plaintiff
Student Plaintiffs	Julie Adams, Blake Edwards
SUS	State University System
UCF	University of Central Florida
UF	University of Florida
UFF	United Faculty of Florida, Plaintiff

INTRODUCTION

Florida's post-secondary institutions rank among the nation's best, including for free speech. Ex. 1, at 27-28.[1] There was no speech crisis before HB233. HB233 *is* the problem: as the undisputed facts prove, its challenged provisions work together to intentionally mute left-leaning viewpoints. The vague and overbroad Anti-Shielding Provisions impede Plaintiffs' freedom to—or not to—speak, threatening them and their institutions with retribution if they violate this befuddling restriction. The Recording and Survey Provisions monitor Plaintiffs and are pretextual tools to obtain "evidence" to justify these and similar attacks on free-speech rights. Effectively, Florida seeks to create smoke so it can claim there is a fire. "But the concept that government may restrict the speech of some elements of our society ... to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976). And "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). The Court should resolve all claims in Plaintiffs' favor and enjoin the challenged provisions.

[1] All exhibits cited are attached to Plaintiffs' Notice of Filing Exhibits, ECF No. 166, which identifies each exhibit and sub-exhibit. Pincites refer to ECF pagination for all exhibits except transcripts, which use transcript page-and-line citations.

STATEMENT OF UNDISPUTED FACTS

Plaintiffs are UFF, a union representing more than 25,000 faculty and graduate employees at Florida's state universities and colleges, Ex. 2, 25:8-25, 124:6-18; MFOL, a youth-focused gun violence prevention organization, Ex. 3, 27:13-16; and individual faculty and students.[2] They challenge three provisions of HB233 that work together to chill disfavored speech.[3]

I. Anti-Shielding Provisions.

The Anti-Shielding Provisions prohibit the Boards and public post-secondary institutions from "shield[ing] students, faculty, or staff from expressive activities." Fla. Stat. § 1004.097(3)(f); *see also* §§ 1001.03(19)(c), 1001.706(13)(c). "Shielding" is broadly defined as "limit[ing] students', faculty members', or staff members' access to, or observation of, ideas and opinions that they may find uncomfortable, unwelcome, disagreeable, or offensive." *Id*. §§ 1004.097(2)(f), 1001.03(19)(a), 1001.706(13)(a). The law defines "[e]xpressive activities protected

[2] Faculty Plaintiffs are William Link (UF, recently-retired history professor); Barry Edwards (UCF, political science lecturer); Jack Fiorito (FSU, management professor); Robin Goodman (FSU, English professor); and David Price (Santa Fe College, history and political science professor). Student Plaintiffs are Julie Adams (FSU) and Blake Simpson (FAMU, 2022 graduate).

[3] Under HB233's text, legislative history, and state law, Defendants are obligated to enforce the challenged provisions. *See, e.g.*, ECF No. 65, Pls.' Supp. Br. 8-16; *see also* Ex. 4, at 2-3 (citing Fla. Const. art. IX, §§ 7(c), 8(c)); Ex. 5, 56:20-63:15; Ex. 6, 111:1-114:19, 118:17-119:19.

under the First Amendment" to include "any lawful oral or written communication of ideas, ... [and] faculty research, lectures, writings, and commentary, whether published or unpublished." *Id*. § 1004.097(3)(a).

The Provisions' reach is unclear, with government officials, including Defendants, offering differing interpretations. *See, e.g.*, Ex. 7, 38:7-18; Ex. 5, 143:10-144:20, 145:23-148:4; Ex. 6, 101:3-102:4, 106:22-107:14. The Boards could not say whether certain scenarios constitute "shielding," claiming application is highly contextual. *See, e.g.*, Ex. 5, 167:8-168:25; Ex. 6, 106:22-107:14. The Higher Education Practice at the firm that now represents Defendants flagged vagueness concerns before HB233's passage. Ex. 8, at 3 ("Does shield provision put an affirmative duty on faculty to actively promote diversity of viewpoints in their classrooms? Is failing to have guest lecturers on both sides of a controversial issue 'limiting' access to unwelcome ideas?"). Even the Legislature knew it was vague. When Representative Hardy noted that "uncomfortable, unwelcome, disagreeable, offensive" may mean different things to different people, bill sponsor Representative Roach responded: "I think that's kind of the beauty of the thing." Ex. 9, 17:17-19:1.

Dr. Matthew Woessner, Professor of Institutional Research at the U.S. Army War College, identified several scenarios he regularly encounters in teaching that could be "shielding." Ex. 10, at 43-49, 74-76. He concluded, "In practice [these Provisions] will tend to impede intellectual freedom and viewpoint diversity rather

than encourage, support, or protect it." *Id.* at 39; *see also* Ex. 11, 105:15-109:17. Dr. Michael Berube of Pennsylvania State University opined almost *anything* can be "shielding," "even the most justifiable ways that professors manage and promote classroom discussion." Ex. 12, at 62. The result will be less speech: professors will stop offering controversial propositions for pedagogical purposes, Ex. 13, 142:24-143:21, or even courses that "run counter to" State leadership's political convictions." Ex. 12, at 62-63.[4] Florida faculty, too, are confused. *E.g.*, Ex. 15, 36:7-19 ("[W]hat does it mean that you are shielding somebody from learning about that controversial topic. ... Am I shielding, you know, Holocaust deniers?"); *see also* Ex. 16, 16:17-22; Ex. 17, 62:9-11, 64:25-66:9; *infra* Section V.

II. Survey Provisions.

The Survey Provisions mandate the Boards to require each public post-secondary institution to "conduct an annual assessment of the intellectual freedom and viewpoint diversity at that institution." Fla. Stat. §§ 1001.03(19)(b), 1001.706(13)(b). "Intellectual Freedom and Viewpoint Diversity" is defined as "the exposure of students, faculty, and staff to, and the encouragement of their

[4] Plaintiffs' expert reports (from Dr. Woessner, Dr. Berube, Dr. Sylvia Hurtado, and Dr. Allan Lichtman) are unrebutted. Defendants' lone expert, Dr. Wilfred McClay, did not attempt to refute their arguments or engage with their reports. *See* Ex. 14, 30:22-31:11; 108:4-10; 117:4-22; 119:8-12; 124:11-25; 137:11-14; 139:11-18; 142:6-17; 149:3-150:14; 151:13-152:4.

exploration of, a variety of ideological and political perspectives." *Id.* §§ 1001.03(19)(a)(1), 1001.706(13)(a)(1). The Boards must "select or create an objective, nonpartisan, and statistically valid survey to be used by each [institution] which considers the extent to which competing ideas and perspectives are presented and members of the community … feel free to express their beliefs and viewpoints on campus and in the classroom." *Id.* §§ 1001.03(19)(b), 1001.706(13)(b). They must "compile and publish the assessments by September 1" annually, beginning in 2022.

The Survey Provisions do not define "objective, nonpartisan, [or] statistically valid," or include means to ensure surveys meet those requirements (or challenge those that don't). The surveys need not be voluntary or anonymous (the Legislature rejected amendments to that effect, Ex. 18, 8:1-24). There are no protections for response data or restrictions on how "results" may be used—including to protect against retribution. BOG understood survey data *must* be accessible through public records requests, concluding it could not use a survey developed by FSU because (in part) "FSU would be in a position to protect/restrict access to the underlying data." Ex. 6, 145:4-6; 153:7-17. And legislators admitted HB233 was *meant* to gather information for future action. *See* Ex. 19, 13:3-8; Ex. 20, 8:9-16; Ex. 9, 7:23-8:1.

Although the surveys the Legislature cited as inspiration used independent experts to craft and implement them, *see* Ex. 18, 7:11-15; 32:8-20—protecting

against bias and misuse—HB233 gives the Boards unfettered discretion to select or develop whatever survey they wish. *See* Ex. 18, 32:7-8; *see also* Ex. 21, at 71-72. It does not require consultation with students or faculty. *But see* Ex. 20, 37:11-15 ("[S]ome of the better surveys" were facilitated by working with students); Ex. 18, 10:8-11 ("In each of the other states that have done this, the faculty have participated in the compilation of the survey questions."). Unrebutted expert testimony explains that these and other features doomed HB233 from the start. *See, e.g.*, Ex. 24, at 9-10; Ex. 10, at 26-27.[5]

And Defendants did not treat HB233 as a serious exercise. In developing the 2022 surveys (one for students, Ex. 22; one for faculty and staff, Ex. 23), the Boards did not consult independent experts, students, or faculty. Ex. 6, 163:13-165:9.[6] Their only external assistance came from the Governor's Deputy Chief of Staff, J. Alex

[5] Dr. Hurtado is a UCLA Professor of Education and former director of UCLA's Higher Education Research Institute (HERI), the gold standard in student and faculty surveys. Ex. 24, at 6-7; *see also* Ex. 10, at 26.

[6] This type of survey is ordinarily subject to IRB review, a federally-mandated ethics board that protects subjects of survey science. *See, e.g.*, Ex. 24, at 8; Ex. 28 at 14-15, 28-29, 35. But, when FSU indicated the survey would likely not satisfy IRB protocol—including because it would survey under-18 students about sensitive political topics without parental permission, *see generally* Ex. 72—the Boards stopped working with FSU. Ex. 25, at 5-6; Ex. 6, 144:4-145:16; *but see* Ex. 26, 118:20-24 (acknowledging that Governor cared deeply about parental views in other situations).

Kelly. *See* Ex. 25, at 4-6.[7] Defendants knew that creating a statistically valid survey would take time, Ex. 76 at 2, yet the 2022 surveys were developed in just a few weeks, then dropped on institutions with little notice and instructions to implement them for four days in April. *See* Ex. 27, at 4-6.

Emails to Defendants from survey respondents reflect surprise, confusion, and dismay. *See* Ex. 28. Response rates were abysmally low: 2.4% of university students responded and only 0.5% of college students; employee response rates were 9.4% (universities) and 10.8% (instructional employees at colleges). Ex. 29, at 6, 18; Ex. 30, at 6; *see also* Ex. 10, at 86-88; Ex. 24, at 53. At FAMU, only 53 students (0.6%) responded. Ex. 29, at 6, 18. At the state's largest university, UCF, only 1,215 (1.6%) of the over 80,000 surveyed responded. *Id.* Of the more than 800,000 former and current students sent the survey at Broward College—the state's largest—0.1% responded. *Id.*; Ex. 31, 118:19-23. At Gulf Coast State College, three students (.01%) responded.[8] Ex. 29 at 6. The Boards cannot confirm even these paltry responses are from legitimate respondents. Ex. 32, 47:3-48:2; Ex. 31, 116:19-117:1.

[7] Kelly and BOG confirmed Kelly wrote the student survey, with only a few word changes before it was finalized and distributed. Ex. 26, 88:18-89:10; Ex. 6, 156:17-158:9. BOG testified Kelly also wrote the employee survey. Ex. 6, 161:8-19.

[8] The Legislature acknowledged selection-bias would likely be an issue. Ex. 20, 37:4-9.

The Boards also admit they chose to collect IP addresses, which could be used to identify respondents. Ex. 32, 34:8-35:3; Ex. 31, 102:19-25.

The Boards' approach was notably different for other free speech initiatives. In 2019, SUS, FCS, and all post-secondary institutions signed a "Statement on Free Expression," which BOG developed in conjunction with university leadership, stakeholders, and experts from across the political spectrum. Ex. 6, 53:6-59:3; 62:16-63:8. And, in early 2021, BOG launched the "Civil Discourse Initiative" to "establish, maintain, and support a full and open discourse and the robust exchange of ideas and perspectives on all university campuses," Ex. 33, at 2; this, too, was developed in close consultation with bipartisan experts and university leadership, Ex. 6, 62:16-63:21. The reception to both has been "positive." *Id.* at 58:18-22; 65:12-66:15.

III. Recording Provision.

The Recording Provision allows students to record faculty without consent to obtain evidence to support legal proceedings or institution-level complaints, including to enforce the Anti-Shielding Provisions. Fla. Stat. § 1004.097(3)(g). BOG's General Counsel has acknowledged this Provision chills speech. Ex. 35; Ex. 6, 79:10-80:7. Senator Broxson, Education Committee Chair and an HB233 proponent, similarly admitted the Recording Provision would "temper [] conversation" in the classroom. Ex. 36, 23:5. Unrebutted expert testimony concludes

the same. *See* Ex. 11, 121:14-19; Ex. 10, at 47-49, 76-77; Ex. 21, at 81-83; Ex. 37, 107:9-108:21, 114:3-115:17; Ex. 12, at 9, 67. Not only do Plaintiffs reasonably fear retribution from their institutions and Defendants (and the Governor and Legislature), there is a "national network" of "right-wing student groups" and media where such decontextualized content is regularly published. *Id.* at 61. Thus, these recordings are all but guaranteed an audience, risking exposing professors to "harassment, hate mail, and death threats." *Id*.

IV. HB233 was enacted to intentionally discriminate based on viewpoint.

HB233 is an important piece of a larger campaign to impose Florida's current political majority's partisan orthodoxy as the only true acceptable view of history, civics, and issues surrounding discrimination. *See* Ex. 21, at 16-33.

A. Governor DeSantis's Education Agenda

Governor DeSantis has long viewed college professors, whom he describes as "overwhelmingly ... on the left," as "pushing ideology," claiming purported left-wing indoctrination may merit "government involve[ment]." Ex. 21, at 29-30. The DeSantis Education Agenda is focused on "combatting the woke agenda from infiltrating public schools." Ex. 38; *see also id*. (listing among key pillars: "Educate, Don't Indoctrinate"). One of his first acts as Governor was issuing an executive order calling for a "comprehensive[] review" of K-12 academic standards. *See* Ex. 21, at 19-20. The Legislature passed HB807 that same year, requiring review of civics

education courses in consultation with Hillsdale College—a conservative, private Christian college in Michigan. *Id.* at 20-21; *see also* Ex. 21 at 231 (Governor DeSantis remarking "[Hillsdale graduates] have the foundations necessary to be able to be helpful in pursuing conservative policies").[9] After HB233 was enacted, but before the signing ceremony, the Governor spoke at a BOE meeting, claiming educators were "using critical race theory to bring ideology and political activism to the forefront of education," describing this as "indoctrinat[ing] … with ideology." Ex. 39, at 3. Chancellor Oliva, too, claimed "we may have somebody presents some false truths as a narrative in a classroom." *Id.* at 32.

B. HB233's Introduction, Consideration, and Passage

The Legislature first considered HB233 predecessors in 2019 and 2020, in which the idea that "woke" faculty are "pushing ideology" or "indoctrinating" students featured prominently. Ex. 40, at 3; Ex. 41, at 2, 4-5. Although those bills failed to pass, nearly identical provisions were introduced in 2021 as HB233 and SB264. Legislative leaders publicly acknowledged reception for HB233 was expected to be better because the Legislature had shifted to the right. Ex. 21, at 33.

The bill sponsors did not consult the Boards, students, faculty, or administration in developing the legislation. Ex. 18, 11:15-14:7. A BOE bill analysis

[9] Defendants' expert teaches at Hillsdale, and his history textbook is the only non-primary source that has been approved by BOE. Ex. 14, 155:13-157:7; Ex. 14, at 971.

listed several stakeholders opposed to the legislation, and none in favor. Ex. 42, at 4; Ex. 5, 105:9-18. The box on the BOE analysis that asks whether the legislation was "consistent with the agency's core mission" was left blank. Ex. 42 at 4. The Advisory Council of Faculty Senate was strongly against the bill, passing a resolution which was sent to the Legislature. Ex. 34, at 2-3.

While legislators claimed the law was necessary to "contribute" to campus free speech, Ex. 9, 15:25-16:24; Ex. 18, 14:10-17, they also claimed it simply codified the Statement on Free Expression that university presidents signed two years earlier (admitting they could not say whether those presidents supported the bill, because they had "not had conversations with any of them" or "solicited their input"). Ex. 19, 37:4-15. There was no evidence that that Statement—or any other pre-existing protections for free speech in higher education—were failing. The sponsors admitted the concerns that gave rise to the bill were "borne of anecdotal stories." Ex. 9, 13:17; Ex. 19, 8:22-12:1.

Public testimony was overwhelmingly against the bill. Faculty, students, and faculty unions appeared to testify against it. *See, e.g.*, Ex. 20, 64:1-16, 66:21-70:5, 42:8-56:3, 56:6-63:22. Although Senator Rodrigues touted studies by the Foundation for Individual Rights in Education ("FIRE") in support of HB233, FIRE lobbied *against* the bill, Exs. 43, 44, warning it would be "disastrous for campus free speech and academic freedom" absent substantial changes, Ex. 45. FIRE also

publicly condemned HB233 in multiple articles. Exs. 46, 47, and 48.[10] Legislators, too, expressed serious concerns about each of the Provisions. *See, e.g.*, Ex. 9, 25:19-21; 34:13-25; Ex. 20, 86:2-11; Ex. 36, 20:14-16; Ex. 50, 20:19-22:23.

HB233 was passed almost exactly along party lines on April 7, 2021. Ex. 21, at 33. That same day, Representative Roach emphasized HB233 was intended to combat "Marxist professors and students." *Id.* at 90. At HB233's signing ceremony, Governor DeSantis echoed this theme: "It used to be thought that a university campus was a place where you would be exposed to a lot of different ideas. Unfortunately, now, the norm now is really these are more intellectually repressive environments. You have orthodoxies that are promoted, and other viewpoints are shunned or even suppressed." Ex. 51; *see also* Ex. 21, at 94, 210 (Governor DeSantis reiterating in August 2022: "This 'woke' ideology is a really destructive mind virus. We can't just stand idly by while woke ideology ravages every institution in our society. I'll tell you this: the state of Florida is where woke goes to die.").

[10] FIRE was particularly and vigorously opposed to the Anti-Shielding and Recording Provisions, warning the latter would chill speech because of a "near certainty" it would be "misused by students to record disfavored statements by other students or faculty in order to shame them online, often on political or ideological grounds." Across the political spectrum, witnesses agreed. *See* Ex. 36, 12:4-7 (Kathy Bain, FEA: "[A]llowing non-consensual recordings of classroom discussions … will stifle the very free speech you wish to promote.").

C. Contemporaneous actions further evidence intent by Defendants and the political majority to discriminate based on viewpoint

In July 2021, the month after HB233's enactment, Defendant Richard Corcoran—then Commissioner of Education—withheld salaries of school board members who failed to enforce the Governor's executive order prohibiting mask mandates. Ex. 26, 220:4-221:4.

A month later, DOE promulgated Rule 6A-109124, declaring K-12 schools may not "suppress or distort significant historical events," including by teaching "Critical Race Theory" or "material from the 1619 Project." Ex. 52.

In April 2022, DOE banned 54 math textbooks from use in K-12 schools based on purported "references to Critical Race Theory (CRT), inclusion of Common Core, and the unsolicited addition of Social Emotional Learning (SEL) in mathematics." Ex. 21, at 41.

In March 2022, Florida enacted HB7, which defines as "discrimination" "subject[ing] any student or employee to training or instruction that espouses" specific concepts, including: "status as either privileged or oppressed is necessarily determined by his or her race" or that a person "by virtue of his or her race, color, sex, or national origin, bears responsibility for … actions, in which the person played no part, committed in the past." *E,g.*, Ex. 53 at 6.

The Governor also championed—and the Legislature enacted—HB1557 (2022), which restricts discussion of sexual orientation and gender identity in schools and targets queer students. Ex. 54.

As part of this campaign against a supposed "effort to impose a sexual ideology on Florida schools," Defendant Diaz informed schools in July 2022 they may not follow federal guidance related to the treatment of LGBTQ students—or even display U.S. Department of Agriculture "Justice for All" posters. Ex 73, at 3.

In 2022, the Legislature also passed SB7044, drastically reforming the tenure process at Florida universities, mandating review every five years based on an evaluation established by BOG, and requiring universities to obtain different accreditors every so often. Ex. 21, at 63-64. Governor DeSantis said the bill combats "ideological activists and political organizations" who he contended were "determining what [students] should learn." *Id*.[11]

The BOG is currently considering a draft rule that would require post-tenure faculty review to specifically consider whether a faculty member is engaged in "biased teaching, instruction, or indoctrination." Ex 56, at 3.

Governor DeSantis, meanwhile, has made clear his willingness to pull state

[11] This came after UF's conflict of interest office denied approval for professors to provide expert testimony against the state in litigation, which prompted an investigation into its respect for academic freedom by its accreditation organization. Ex. 63, at 3, 248, 250.

funding from entities that dare to express viewpoints with which he disagrees. For example, in June 2022, he vetoed $35 million in funding for a training complex in response to the Tampa Bay Ray's anti-gun violence statement. Ex. 26, 200:21-201:5.

The Governor's office has also developed draft legislation that would make certain college and university funding contingent on complying with HB233. Ex. 55, at 3, 4, 38-39

V. HB233 impedes faculty speech rights.

HB233's challenged provisions compel faculty to censor their speech, lest they be accused of liberal bias and threatened with personal, professional, or institutional harm. *See, e.g.*, Ex. 12, at 17, 23. The Anti-Shielding Provisions also compel faculty to give voice to ideas with which they disagree. *Id*. HB233 has already had a significant impact on faculty speech.

Professor Price teaches history and political science, but because of HB233 now avoids teaching some topics altogether, as the Anti-Shielding Provisions might require him to cover "every position including non-mainstream [ideas]," diverting valuable class time. Ex. 17, 71:16-20; 71:21-73:22 (testifying he limited discussion of gun violence during Spring 2022 to "what the Second Amendment says" because he lacks class time "to broaden that out into a broader range of [positions]"). Because of HB233, Professor Price also feels trapped to teach material once he "know[s] something makes people uncomfortable." *Id.* 62:9-11; 64:25-66:9 (testifying he

"would have to include [triggering] material" about sexual assault that he previously removed); *see also* Ex. 8 at 3 (identifying potential issue of "reconcil[ing] shielding with trigger warnings"). Professor Price is concerned about his ability to continue teaching Critical Race Theory, because students might report "there is a liberal bias in the instruction provided" in responding to the Survey. Ex. 17, 92:1-5; *see also* Ex. 57, at 7.

Professor Goodman felt forced to remove from her syllabus "a prohibition against neo-Nazi and white supremacists and hate speech." Ex. 58, 65:11-16. Due to HB233, she feels she must indulge any student's viewpoint, "restrict[ing] [her] ability to present the materials [she] think[s] are necessary." *Id.* 44:7-14; *cf.* Ex. 2, 132:16-133:24 (discussing harm to her career from even unfounded complaints). Because the Anti-Shielding Provisions' scope is unclear, their chilling effect is extensive. Ex. 58, 52:1-3 ("I don't think I'm shielding anyone. I'm glad you don't think I'm shielding anyone. But you're not the student that might sue the university for this."). The threat of recording is not ameliorated by the fact that "[HB233] says [faculty] can countersue a student for publishing material" because after it's been published on the internet," a faculty member's "career is over." *Id.* 63:14-64:3.

Because of HB233, Professor Edwards is censoring himself, removing certain viewpoints from his teaching, and feels compelled to engage in classroom speech in which he would not have otherwise engaged. *E.g.*, Ex. 59, 50:19-23 (agreeing he

"modified course content and ha[s] shared viewpoints that [he] would not have shared" due to HB233). He now avoids "any kind of political slant or perceived political slant," *id.* 51:20-25, including by omitting sources that *could be* perceived as left-of-center, not wanting to risk students "misconstru[ing] it and tak[ing] it as [him] attempting to indoctrinate them." *id.* 54:4-7, 53:3-6. He is also now particularly careful about what he does—and does not—say, recognizing that, because of HB233, any student "might be recording what [he's] saying and ... looking for something that they can report that they find objectionable or complain about or who knows what with." *Id.* 91:13-18. This threat makes him "speak differently ... than [he] would otherwise." *Id.* 93:21-23.

Professor Fiorito has also substantially altered his teaching because of HB233. He is "more careful" when he talks about "things that might make some students uncomfortable." Ex. 60, 63:2-6; *see also id.* 57:7-12. "[T]he threat of using recordings or excerpts of recordings to support complaints to the university" or legal actions "is ... in the back of [his] mind when [he] is trying to talk about things that might be controversial." *Id.* 64:3-10. This includes any material that might be painted as "socialist" or "communist," such as the "Marxist or critical industrial relations conception" of labor relations (concepts he normally covers in his labor relations courses). *Id.* 56:2-16; *see also* Ex. 61, at 18-20. He worries addressing such topics might cause a student to sue the university. Ex. 60, 57:2-12.

Professor Link retired after a decorated 41 years of teaching (18 at UF), to escape the oppressive environment HB233 has created. Ex. 15, 90:2-14 (explaining HB233 "pushed me toward retirement"). HB233 made continuing to teach controversial subjects, as he regularly does as an American history professor, exceedingly difficult. *See id.* 36:7-19. Together, the provisions of HB233 "ha[ve] … an insidious effect that creates doubt, and undermines the trust" necessary to teach. *Id.* 36:16-19.

Other professors have quit because of HB233. *See* Ex. 16, 32:9-15 (discussing colleagues who "left very recently, one I know explicitly because – big part was because of what was coming out of Tallahassee"); *id*. 32:25-33:17 ("[HB233] is not alone in the reason [a colleague] left, but it is alone in the cause of that, yes, the chill."); Ex. 62, ¶ 9 (noting colleagues started search for employment outside Florida, citing political atmosphere, within month of HB233's enactment). Some institutions have observed a significant downturn in faculty applicants since HB233's enactment. *See id*. ¶ 8.

At FAU, Professor Nicole Morse—a UFF member and professor of Cinema Studies and Women, Gender, and Sexuality Studies—has substantially altered the way they approach their courses.[12] Knowing students might be recording them and

[12] Professor Morse is nonbinary and uses they/them pronouns. Ex. 62, ¶ 2.

could take their remarks out of context, Professor Morse feels forced to avoid the topic of queerness even in gender and sexuality courses. Ex. 62, ¶ 16. They lecture more and allow less in-class discussion, lest they have to navigate between the Scylla of the Recording Provision—needing to provide explanations that could be recorded and taken out of context—and the Charybdis of the Anti-Shielding Provisions—by cutting off class discussion on controversial topics. Without the ability to moderate discussion and unsure of what may constitute "shielding," they feel compelled to cover some subjects in less detail because it would be impossible to cover every perspective, as HB233 may require. Professor Morse no longer feels able to set ground rules—including regarding the use of appropriate gender pronouns and avoiding slurs. *Id.* ¶ 13. These ground rules are crucial for fostering an effective learning environment. Instead, Professor Morse now only says what *they* will do, e.g., informing the class, "*I* will not use slurs." *Id.* ¶ 14. Still, they worry even this may run afoul of the law, or cause them to be reported as biased. *Id*.

HB7 has further exacerbated the threat of being "reported" for disfavored speech using HB233's monitoring mechanisms. During a recent town hall on HB7, FAU administration instructed Professor Morse and other faculty that they should teach objective truth, that they should ensure their students do not know what their opinion is, and that if they present one perspective on an issue they should teach "the other perspective." *Id.* ¶ 20. FAU suggested faculty should comply because HB233's

Recording Provision permits students to monitor their behavior. *Id*. ¶ 25. But of course, it is not always obvious what counts as "objective truth." *Id*. ¶ 23. Moreover, Professor Morse is concerned that as an openly non-binary faculty member, it is *impossible* to hide their opinion on queer issues from students. *Id*. ¶ 22. Their existence as an "out" non-binary person telegraphs, at minimum, the opinion that they are deserving of respect and supportive of queer civil rights. *Id*. For similar reasons, students may also *perceive* Professor Morse as biased, and on that basis file a complaint, regardless of the reality. *Id*. ¶ 23.

James Maggio is a professor of political science at St. Johns River State College and UFF member. Ex. 16, 14:3-6. Because of HB233, he no longer presents material in what he "believe[s] is the factual way," but rather "offer[s] up a thing [he] believe[s] is false but is some person's theory of what was reality." *Id*. 16:17-22, 22:1-5. This is not just *self*-censorship; his college administration has *directed* him to alter how he teaches the Civil War, *id*. 18:18-24, citing "the, quote, political climate in Tallahassee," *id.* 19:14-17. Professor Maggio's administration also questioned him about an assignment he gave, because a parent felt it suggested that former President Trump is racist. *Id*. 43:1-44:2. Though he has been a professor for over 20 years, *id*. 51:25-52:1, before HB233 he was *never* "reprimanded" regarding the content of his instruction. *Id*. 45:13-46:15.

These examples are only the tip of the iceberg. Many other UFF members—

and faculty in Florida—have been affected by HB233 but fear coming forward. *See*, *e.g.*, Ex. 2, 123:2-124:18, 124:23-125:21; Ex. 63, at 4, 122, 128-129, 135; Ex. 37, 79:3-12 ("[O]ne of the insidious effects of legislation like [HB233] is the chilling effect … [which] takes place under the radar. Faculty is not going to come out and say we're worried about going up against the powers that control higher education as a result of what we see as the discriminatory features of HB233"). HB233 has created an atmosphere of antagonism—and intimidation—in the classroom; UFF's President has "received reports ... of students sitting at the front of the room with their phone up, recording the faculty member and asking them aggressive questions." Ex. 2, 137:17-138:5.

That antagonism is backed by a real threat: the Survey and Recording Provisions "provide[] a basis for retaliatory action for those who have already said they intend to retaliate." Ex. 37, 82:4-10, 82:12-22 ("[W]hen you combine the legislation [HB233] with the stated intent of decision makers and enforcers, that has a chilling effect."); Ex. 62 ¶ 11. As a result, faculty are no longer able to create an effective learning environment or foster rigorous classroom discussion. Ex. 64, 42:15-43:5; Ex. 12, at 62.

VI. HB233 chills student speech and association and compels them to engage in speech they otherwise would not engage in.

As FSU student, Plaintiff Julie Adams, testified, HB233's provisions work "together to chill more progressive ideas on campus," and the Survey Provisions

"ha[ve] students feeling like they're going to be monitored ... in terms of their political activity and their political views." Ex. 65, 43:1-4. Blake Simpson testified that HB233 affects the classroom environment in ways that make it harder to learn. Ex. 66, 11:3-14:1. Professors have observed this impact, too. *See, e.g.*, Ex. 64, 42:15-42:5 (students are "self-silencing and distancing themselves from how they speak with each other in class settings"). It was inevitable. *E.g.*, Ex. 11, 81:21-23 (noting Recording Provision makes students "less likely to engage in a free and open debate" because recording of "something they say could be brought out five and ten years later[.]"); *see also id*. 82:6-83:4 (similar).

MFOL's Transition Director testified HB233 has created an "environment that […] has sparked fears" that MFOL members "will be targeted for their [beliefs]... . they feel a very tangible fear of [antagonistic] opinions being much more emboldened than theirs that could lead to harm to them." Ex. 3, 34:13-20. Olivia Solomon, MFOL member and UCF chapter president, testified that she and other students worry about facing retaliation as a result of HB233, "especially in terms of getting involved in organizations such as" MFOL UCF. Ex. 67, 9:1-9, 19-25, 28:17-20; *see also* Ex. 68, at 7.

Solomon also testified about other ways HB233 has impacted her freedom of expression. She previously wore t-shirts saying "Bans Off My Body" or "March for Our Lives," but HB233 and similar bills have given her pause: "Am I going to be

called out by professors or students for wearing this shirt? Is it going to affect how people perceive me, how professors grade my material?" Ex. 67, 28:7-17. She testified, "[HB233] has ... made professors and students … feel a sense of panic and [] hypervigilance over what they're saying and what they're teaching in classes [such that they are] leaving out certain information or not phrasing it in a certain way that may help us understand the concept but because they're afraid of how it will be perceived and a potential lawsuit." *Id.* 34:23-36:1, 29:15-22 (LGBTQ Policy and Politics class Solomon took year prior no longer offered); 29:23-30:14 (Solomon's civil rights professor informed class "we would only be using sources and information from the government and governmental associated organizations"). Solomon recognizes HB233 for what it is: a weapon in the "culture war and attack on how information is spread, what is taught in the classroom and what is allowed to be taught." *Id*. 33:20-25.

LEGAL STANDARD

"[T]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

ARGUMENT

I. The First and Fourteenth Amendments protect Plaintiffs' rights to free expression and association.

The Supreme Court recognized 65 years ago:

> The essentiality of freedom in the community of American universities is almost self-evident … Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957). Accordingly, "safeguarding academic freedom ... is [] a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967). Governmental inquiry into the contents of lectures at a public institution is "unquestionably [] an invasion of [] liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread." *Sweezy*, 354 U.S. at 250. Moreover, the First Amendment protects not only the "right to distribute" information but the corresponding "right to receive it." *Martin v. Struthers*, 319 U.S. 141, 143 (1943), both critical to protect against "chill[ing] that free play of the spirit which all teachers ought especially to cultivate and practice." *Shelton*, 364 U.S. at 251; *see also Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1128 (11th Cir. 2022).

Thus, the Supreme Court has found that forcing teachers to disclose their political affiliations violates the First Amendment. *Shelton*, 364 U.S. at 485-86; *Keyishian*, 385 U.S. at 589, 683-8. And multiple courts of appeals have readily found the First Amendment extends to speech of professors engaged in core academic functions in and outside the classroom. *See Meriwether v. Hartop*, 992 F.3d 492 (6th

Cir. 2021); *Buchanan v. Alexander*, 919 F.3d 847, 852-53 (5th Cir. 2019); *Demers v. Austin*, 746 F.3d 402, 411 (9th Cir. 2014); *Adams v. Trs. of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 563 (4th Cir. 2011).[13]

Defendants previously cited *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991), to argue that, even if HB233 dictates curricula, Plaintiffs' injuries are not cognizable under the First Amendment. *See* Defs.' Mot. to Dismiss, ECF No. 40. at n.10. Not so. *Bishop* involved the response of a single university—not the State—to a single professor's "particular conduct." 926 F.2d at 1069-71. HB233 is an indiscriminatory statewide speech code untethered from *any* evidence, let alone specific complaints, forced upon all Florida public post-secondary institutions.

Bishop also illustrates how one of Defendants' explanations for HB233—its purported codification of the First Amendment, *see* ECF No. 40 at 29—is false. As *Bishop* demonstrates, the First Amendment allows for nuanced decisions about speech in the university setting where there is *actual* evidence of a violation of students' rights; it does not require that in all instances everyone must be exposed to speech that is uncomfortable, unwelcome, disagreeable, or offensive. *See, e.g.*,

[13] Any argument that Plaintiffs' claims are barred by *Garcetti v. Ceballos* is without merit. 547 U.S. 410, 425 (2006) (making clear it was not addressing cases "related to scholarship or teaching").

Bishop, 926 F.2d at 1072.[14] Indeed, earlier this year, the Supreme Court made clear in *Kennedy v. Bremerton School District*, that "in no world may a government entity's concerns about phantom constitutional violations justify actual violations of an individual's First Amendment rights." 142 S. Ct. 2407, 2432 (2022).

II. HB233 is an unconstitutional content-based restriction.

"Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Viewpoint discrimination is a more egregious form of content-based discrimination, *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) (citation omitted), likely prohibited "as a *per se* matter," *Speech First*, 32 F.4th at 1126.

A law may be content-based on its face, "draw[ing] distinctions based on the message a speaker conveys." *Reed*, 576 U.S. at 163. But even a facially neutral law is content-based and presumptively unconstitutional if it (1) "cannot be justified without reference to the content of the regulated speech," (2) was "adopted by the

[14] The memo in *Bishop* also did not suffer from the same narrow tailoring problems that HB233 does, "prescrib[ing] particular conduct of Dr. Bishop so that he can know what the University does not want him to do." 926 F.2d at 1078.

government because of disagreement with the message [the speech] conveys," *id.* at 164 (quotation marks omitted), or (3) alters the content of speech by requiring a speaker to carry a different message than the one they would otherwise convey, *see Nat'l Inst. of Family & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371 (2018). HB233 is content-based under every applicable test.

A. HB233 is facially viewpoint-based

On its face, HB233's Anti-Shielding Provisions (which operate in conjunction with the Survey and Recording Provisions) are viewpoint-based, privileging speech that may make others "uncomfortable, unwelcome, disagreeable, or offensive" over all other. Fla. Stat. § 1004.097(2)(f). *See Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) ("Giving offense is a viewpoint."); *Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019) (finding law that discriminated against "immoral" and "scandalous" speech "viewpoint- based"). Just as the First Amendment prohibits discriminating *against* offensive speech, *see id.* at 1751, it prohibits *prioritizing* it over other speech. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) (a law may run afoul of the Constitution based on "agreement or disagreement with the message" certain speech "conveys"); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992) (government may not show "hostility—or favoritism—towards" expression) (cleaned up).

HB233 does precisely this, *mandating* that students, faculty, and staff *must* be exposed to the speech it privileges. As such, "the statute, on its face, distinguishes

between two opposed sets of ideas: … those inducing societal nods of approval and those provoking offense and condemnation." *Iancu*, 139 S. Ct. at 2300; *cf. Honeyfund.com, Inc. v. DeSantis*, No. 4:22cv227-MW/MAF, 2022 WL 3486962, at *7 (N.D. Fla. Aug. 18, 2022) (noting the act at issue did not apply to all mandatory employee trainings, "only … trainings that endorse covered concepts").

The fact that the plain text of HB233 is triggered based on *the viewpoint of the regulated speech* is enough for it to fail as a *per se* matter; no showing of discriminatory intent is required. *Speech First*, 32 F.4th at 1126.

B. HB233 can only be justified based on the content of the speech it regulates

HB233 is independently a content-based restriction because it can only be justified by reference to the content of the regulated speech. *Boos v. Barry*, 485 U.S. 312, 320-21. Defendants represent that, "[t]he Anti-Shielding Provisions [] serve the State's interest by preventing censorship or marginalization of expressive activities that may involve ideas and opinions that some may find uncomfortable, unwelcome, disagreeable, or offensive, by discouraging self-censorship, ... [and] ensuring university students are confronted with difficult ideas that foster their growth and development." Ex. 69, at 17-18 (emphasis added); *see also* Ex. 70, at 17-18 (same). If there were any doubt remaining that the restriction is "focuse[d] *only* on the content of the speech and the direct impact that speech has on its listeners," *Boos*, 485 U.S. at 314, the Survey and Recording Provisions dispel it: their very function

is to surveil the content and impact of speech targeted by the Anti-Shielding Provisions. *See supra* Section IV. HB233's "target[ing of] the direct impact of a particular category of speech ... leads readily to the conclusion that the [challenged law] is content-based." *Boos*, 485 U.S. at 321.

C. HB233 was passed with discriminatory purpose

HB233 is also content based because it was intended to prioritize speech favored by the *conservative* majority at the expense of speech deemed too *liberal* or *progressive*. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 578-79 (2011) ("The State may not burden the speech of others in order to tilt public debate in a preferred direction.").[15] There is ample *direct* evidence that HB233 was passed with the intent to elevate certain viewpoints and chill others. *See supra* Section IV. But each of the *Arlington Heights* factors further evidence it was enacted "because of … disagreement with" specific messages. *Turner Broad. Sys.*, 512 U.S. at 642; *see supra* Section IV.[16]

[15] Even Defendants' expert admitted HB233 "tilts" the conversation "away from the kind of ideal of faculty autonomy that a lot of us in the professoriate would like." Ex. 14, McClay Tr. at 92:1-25.

[16] These factors include: (1) historical background, (2) discriminatory impact, (3) the sequence of events leading up to the decision, (4) procedural or substantive deviations from the normal decision-making process, and (5) legislative history, including contemporaneous viewpoints expressed by the decision-makers. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977). Courts also consider: (6) whether the discriminatory effects of the challenged law were

First, Florida has a history of discriminating against views with which it disagrees, particularly in education. *See supra* Section IV. This includes the Johns Committee investigations, as well as the immediate backdrop against which HB233 was enacted. Ex. 21, at 11-16 ; *see also supra* Section IV.A; *see also* Ex. 21, at 19-33. *Second*, in the short time it has been law, HB233 has had a palpably discriminatory impact on disfavored speech. *See supra* Sections IV, V; *see also* Ex. 21, at 71-91. *Third*, the sequence of events leading to HB233's enactment is consistent with partisan intent. *Id.* at 29-30; *supra* Section IV. *Fourth*, the lack of consultation with experts and academics in developing HB233 betrays a deviation from standard practice, Ex. 21, at 65-68, including for recent free speech-related initiatives and the other surveys upon which the Legislature claimed to rely, *see supra* Section II. *Fifth*, the public record is replete with evidence that legislators were motivated by the view that campuses were too "left" and that HB233 is an "ideologically driven attempt[] to suppress a particular point of view." *Rosenberger*, 515 U.S. at 830; *see supra* Section IV. Even at the signing ceremony, Governor DeSantis lauded HB233 as an effort to prevent universities from becoming "hotbeds for stale ideology" stating such institutions are "not worth tax dollars." Ex. 51, 7:19-

foreseeable, (7) whether the discriminatory effects were known to decision-makers, and (8) whether less discriminatory alternatives were available to decision-makers. *Jean v. Nelson*, 711 F.2d 1455, 1485, 1486 (11th Cir. 1983), *aff'd*, 472 U.S. 846 (1985).

23. The bill's House Sponsor derided university instruction as "Marxist indoctrination" and traced the purpose of HB233 to concerns about "Marxist professors and students" and "students with more conservative-leaning views" feeling alienated by campuses with large populations of left students and professors. Ex. 21, at 93. Senator Rodrigues complained about "acts of cancel culture" as his motivation for co-sponsoring the bill. *See id*. at 94. *Sixth* and *seventh*, the discriminatory effects of HB233 were foreseeable and known to decision-makers: legislators in the minority, faculty members, and stakeholders all directly raised warnings about the First Amendment issues while the bill was still being considered. Ex. 21, at 85-91; *see also supra* Section IV.B. *Eighth*, there were countless less discriminatory alternatives available, including approaches already developed by the Boards, like the Civil Discourse Initiative. Ex. 21, at 109-11.

Finally, one cannot ignore how HB233 interacts with other recent legislative enactments. *See Shelton*, 364 U.S. at 482, 487 n.7 (considering contextual evidence in analysis of challenged statute); *see also Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2397 (2021) (Sotomayor, J., dissenting) (noting *Shelton* relied on legislation passed a year *after* the statute at issue there to support intent finding). It is impossible to comply with both HB233 and HB7. *See supra* Section V; Ex. 6, 102:22-106:15. And their text and intent are sharply dissonant. While HB7 prevents instruction that makes a person "feel guilt, anguish, or other forms of psychological

distress because of actions, in which the person played no part, committed in the past by other members of the same race, color, national origin, or sex," Fla. Stat. § 1000.05(4)(a)(7), Representative Roach stated HB233's Anti-Shielding Provisions address a "broader assumption about fragility that … can be disempowering …. [W]e need to push back hard against this sort of culture and this belief that our college students are somehow fragile and we need to protect them from views they don't agree with." Ex 20, 34:15-21; *see also id*. at 35:13-17 (explaining intent of HB233 "is to remove these shields that seem to imply that these students are fragile and need to be protected from these bad ideas. Let's expose them to these bad ideas and teach them to combat them."). The fact that effectively the same Legislature passed HB7 to shield students from speech that is disfavored by the conservative majority, but enacted HB233 in which it stridently affirmed students may not be shielded in any other context, is strong evidence HB233 is content-based.

As the Supreme Court emphasized in *R.A.V.*, the mere "possibility that the [government] is seeking to handicap the expression of particular ideas" is "enough to render the [law] presumptively invalid." 505 U.S. at 394. Here, the evidence overwhelmingly "elevate[s] the possibility to a certainty." *Id*.

D. HB233 alters the content of faculty speech

Finally, HB233 is content-based because it compromises professors' "autonomy over [their] message," *Hurley v. Irish-American Gay, Lesbian &*

Bisexual Grp. of Bos., 515 U.S. 557, 576 (1995), compelling them to express ideas considered "uncomfortable, unwelcome, disagreeable, or offensive," and deterring them from expressing other opinions or ideas in their limited teaching time. The First Amendment's guarantee of free speech encompasses both the right to speak and the right not to speak. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). HB233 impermissibly creates an "atmosphere of suspicion and distrust" that is undermining "[t]eachers['] and students['] ... free[dom] to inquire, to study and to evaluate." *Sweezy*, 354 U.S. at 250; *see supra* Sections V, VI.

To make room for the speech HB233 requires, faculty must forgo covering other topics and viewpoints: there are "at best 2,250 minutes for instruction and assessment in a semester," so professors must make "choices in ways that [they] wouldn't have done previously." Ex. 17, 73:14-19; *see also* Ex. 2, 117:19-119:20. Far from encouraging or protecting speech, HB233 *silences* it, *narrowing* the range of viewpoints and opinions to which students are exposed. This is true of not only the Anti-Shielding Provisions, but the Survey and Recording Provisions, too: they are an ever-present monitoring system for evidence of shielding, any alleged bias, indoctrination, woke ideology, or other basis for a complaint. Faculty members have altered class speech as a result. *See, e.g.*, Ex. 63, at 2; Ex. 17, 92:1-5; Ex. 2, 119:2-119:20.

And HB233 narrows the discussion with a bias in favor of certain viewpoints, intentionally muting liberal and progressive voices. *See supra* Section II.A; *see also* Ex. 12, at 171. Thus, afraid it would violate the Anti-Shielding Provisions, Professor Goodman removed a statement on her syllabus admonishing classroom hate speech, Ex. 58, 65:11-16; Professor Morse excised films from their syllabus containing queer themes or subtext, Ex. 62 ¶ 16; and Professor Fiorito walks on eggshells when covering left-wing theories of labor relations. Ex. 60, 56:2-16. This is all further proof that HB233 is content-based.

E. HB233 cannot withstand strict scrutiny

HB233 is a *per se* unconstitutional viewpoint-based restriction, but even if evaluated within the slightly more forgiving "content-based" category, it cannot survive strict scrutiny. Defendants must prove all of the following: (1) HB233 is justified by a "compelling interest," *Café Erotica of Fla., Inc. v. St. Johns Cnty.*, 360 F.3d 1274, 1287 (11th Cir. 2004); (2) the legislature had strong evidence to support that justification, *Otto v. City of Boca Raton*, 981 F.3d 854, 869 n.9 (11th Cir. 2020); (3) HB233 is "narrowly tailored" to serve that compelling interest, *Café Erotica*, 360 F.3d at 1287; and (4) serving that interest was HB233's actual purpose. *See Bourgeois v. Peters*, 387 F.3d 1303, 1322 (11th Cir. 2004).

Defendants proffer two interests in support of HB233; neither is compelling. *See* Exs. 69, 70. *First*, Defendants claim HB233 ensures freedom of speech and

viewpoint expression on campus. But, as Defendants admit, those rights are already enshrined in the First Amendment. *See, e.g.*, ECF No. 40 at 6 ("The purpose of HB233 ... is to protect free speech and expressive actives that would be afforded First Amendment protections at public postsecondary institutions"). Florida also already expressly protects free expression on its public college and university campuses. *See, e.g.*, Fla. Stat. § 1004.097; *see also* Fla. Const. art. I, § 4. *Second*, Defendants claim HB233 promotes exposure to a wide variety of viewpoints and opinions. But this is either indistinguishable from the interest in promoting free speech on campus, or a constitutionally impermissible goal of "tilt[ing] public debate in a preferred direction." *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 578-79 (2011). That HB233's protections apply only to "uncomfortable, unwelcome, disagreeable, or offensive" ideas, Fla. Stat. § 1001.03(19)(a)(2), and surveils exposure to "ideological and political perspectives," *id*. § 1003.03(19)(a)(1), proves it is the latter.

There is no evidence that existing protections were inadequate or that First Amendment rights were at stake. *See Bourgeois*, 387 F.3d at 1322. Instead, HB233's proponents flipped the First Amendment on its head—justifying their intrusion on speech rights based on the *lack* of evidence of a problem. *E.g.*, Ex. 20, 17:8-14 (Rep. Roach "not alleging that" Florida universities are "falling far short of that ideal expression and commitment to the First Amendment"); *see also id*. 17:14-17; Ex 9,

7:19-23; Ex. 19, 10:11-16; *id*. 12:23-13:2. This "dramatic mismatch … between the interest that the [Legislature] seeks to promote" and the evidentiary record cannot survive strict scrutiny. *Bonta*, 141 S. Ct. at 2386 (majority op.).

Nor is HB233 "narrowly tailored" to advance Defendants' asserted interests. HB233 cannot be narrowly tailored to accomplish what is already accomplished by the First Amendment. *See McCullen*, 573 U.S. at 490-92; *Honeyfund.com*, 2022 WL 3486962, at *10. Pre-existing protections are also *less* restrictive means to reach the same objectives. Indeed, Defendants had already taken their own steps to advance the same interests they claim HB233 serves, including with the Statement on Freedom of Expression and Civil Discourse Initiative. *See supra* Section II. Together, these efforts constitute a "university-directed, a faculty-and-administration-directed response to the question of free speech on campus." Ex. 13, 74:17-22. There is no evidence either has been unsuccessful. The "existence of adequate content-neutral alternatives … 'undercuts significantly'" any defense of HB233. *R.A.V.*, 505 U.S. at 395. And both of these initiatives are far better suited to solving any free speech issue, because the remedy for speech the government dislikes is not "enforced silence" but "more speech." *Honeyfund.com*, 2022 WL 3486962, at *11 (quoting *Whitney v. California*, 274 U.S. 357 (1927) (Brandeis, J., concurring)); *see also McCullen v. Coakley*, 573 U.S. 464, 482 (2014).

Of course, HB233 does not simply codify First Amendment rights. It is designed to (and does) *undermine* free speech, intellectual freedom, and even viewpoint diversity by silencing the panoply of so-called liberal viewpoints HB233's proponents oppose. *See supra* Section IV. Ironically, HB233's proponents recognized a constitutional harm arises when people "self-censor[] because they believe that they are going to be penalized for sharing constitutionally protected viewpoints." Ex. 9, 13:22-14:5. But HB233 has this precise effect on faculty and students subject to its invasive provisions. *See supra* Sections V, VI. Since HB233 undermines, rather than advances, the supposed interest underlying it, it cannot be narrowly tailored to serve that interest. *Cf. United States v. Playboy Ent. Group, Inc.*, 529 U.S. 803, 813 (2000) ("If a statute regulates speech based on its content, it must be narrowly tailored to *promote* a compelling Government interest.") (emphasis added).

An interest in suppressing disfavored viewpoints is not legitimate, let alone compelling. *See KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006). Claims that there is an issue with "indoctrination" by left-of-center professors are also meritless. Though a well-worn conservative talking point, it "is

not supported by the research." Ex. 10, at 5-6[17]; *see also* Ex. 12, at 15. Students' viewpoints about *some* issues (not all) tend to move slightly left while in higher education, but studies have found no evidence tying it to faculty. *See* Ex. 10, at 18-19. Similarly, the fact that fewer faculty tend to be conservative appears to be due to self-selection, and conservative students do just as well as their liberal peers in higher education *Id.* at 15-17. Regardless, if the Legislature was trying to combat a perceived leftward drift once students enter college, the First Amendment *forbids* it from "quiet[ing] the speech or [] burden[ing] the messengers" of viewpoints that are objectionable because they are "too persuasive." *Sorrell*, 564 U.S. at 578.

III. The Survey Provisions unconstitutionally inquire into privately held political beliefs and associations.

"When a State seeks to inquire about an individual's beliefs and associations a heavy burden lies upon it to show that the inquiry is necessary to protect a legitimate state interest." *Baird v. State Bar of Ariz.*, 401 U.S. 1, 6-7 (1971). Such invasions of privacy "discourage citizens from exercising" constitutional rights, *id.* at 6, even where "[t]he governmental action challenged may appear to be totally unrelated to protected liberties," *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 461 (1958). Indeed, the *mere* "risk of reprisals" if a person must disclose their association

[17] Much of that research was conducted by Dr. Woessner, who personally identifies as conservative. Ex. 10, at 13 (Woessner report).

threatens First Amendment rights. *Bonta*, 141 S. Ct. at 2382. Here, those risks come from the Legislature, the Governor, the institutions attempting to please both, and the public, primed to harass and threaten faculty deemed too liberal in a climate created and stoked by political actors seeking to advance their own agendas. *E.g.*, Ex. 12, at 64; Ex. 62, ¶ 12 ("As a result of HB 233, I feel that I must walk on eggshells in my own classroom, since any misstep may result in a viral video, a lawsuit, or negative survey results leading to funding cuts or adverse legislative action.").

The unrebutted evidence proves the Legislature intended to use the Survey Provisions to inquire into faculty's political affiliations. *See supra* Section IV. The first people enlisted to draft the survey understood this was its purpose. *See*, *e.g.*, ECF No. 75-1 at 203 (purpose of Survey to address "increasing concerns that university instructors, who are, on average, very liberal, instill and perhaps require their student to provide a particular political viewpoint"). And when the Legislature gave the Boards unfettered discretion to develop the surveys, they gave the Governor's Office an outsized role. *See Sweezy*, 354 U.S. at 245 (explaining when governmental entity "is invested with a broad and ill-defined jurisdiction," any "safeguard" against "encroach[ment] upon the constitutional liberties of individuals" may be "nullified"); *see also* Ex. 24, at 9-10 ; Ex. 10, at 88.

Further, the 2022 Surveys were not focused on determining whether there were specific issues that could be investigated and addressed, but in obtaining data

about faculty's political viewpoints—real and perceived. The faculty survey asked its respondents: "Where would you place yourself on the following scale?" "Conservative," "Liberal," "Moderate," or "None of the Above." Ex. 23, at 7 (Q.24). The student survey asked them to report on their professors' affiliations, asking, for example, whether "My professors or course instructors are generally more" ideologically "Liberal," "Conservative," "Other," or "Don't Know." Ex. 22 at 4 (Q.13).[18] Indeed, there does not appear to be a conceivable way to fulfill the Survey Provisions' mandate (requiring an "objective, nonpartisan, statistically valid survey" about "*ideological and political* perspectives") *without* collecting information about individual viewpoints. *See* Ex. 10, at 43; Ex. 71, 118:13-119:21.

Because the Legislature refused to require the surveys be anonymous, the Boards did not violate their mandate when they affirmatively decided to collect respondents' IP addresses, or when they took pains to ensure that all data collected would be accessible as public records. *See supra* Section II. Thus, Plaintiffs have a reasonable fear that their affiliations could be traced back to them and publicly

[18] It did not ask students how they affiliated, further ensuring the results would be statistically invalid (and not assessable for partisan bias). *See* Ex. 71, 81:24-83:14; Ex. 10, at 84-88. The mismatch between the options for political identification of faculty was also notable. *See* Ex. 24, at 54 (noting most employee respondents self-identified as "moderate," but students not given option of identifying faculty as "moderate").

disclosed—now or with a future survey. *See* Ex. 71, 34:1-34:25; *see also Bonta*, 141 S. Ct. at 2388.

The publication of the 2022 results appears designed to facilitate retribution on the basis of ideology. *See* Ex. 71, 74:10-75:21. Rather than report aggregate results, Defendants included tables effectively measuring institutions on a scale from "Liberal" or "Conservative." *See* Ex 29 at 37; Ex. 30 at 55, 62.[19]

Intellectual Freedom and Viewpoint Diversity (2022 Survey)
For the State University System of Florida

Table A.13. My professors or course instructors are generally more:

University	Students Surveyed	Survey Responses	Conservative	Liberal	Don't Know	Other	No Response
FAMU	8,393	53	5	14	24	3	7
FAU	27,523	759	60	258	329	40	72
FGCU	15,079	273	18	121	99	8	27
FIU	49,477	413	21	139	187	19	47
FPOLY	1,411	171	9	30	111	6	15
FSU	43,936	775	60	353	272	20	70
NCF	636	77	5	23	41	4	4
UCF	80,841	1,315	55	522	565	30	143
UF	64,846	2,722	170	1204	1039	64	245
UNF	15,441	410	18	192	152	13	35
USF	44,129	1,405	51	559	613	48	134
UWF	16,408	462	35	141	235	17	34
System	**368,120**	**8,835**	**507**	**3556**	**3667**	**272**	**833**

[19] This is notably different than what Defendants claimed they originally wanted to do. Ex. 32, 30:8-32:1; ECF No. 86-1, ¶ 18.

Intellectual Freedom and Viewpoint Diversity
2022 Florida College System Summary

Table B.13. My professors or course instructors are generally more:

College	Grand Total	Conservative	Don't know	Liberal	Other
Broward College	458	11.1%	56.1%	26.4%	6.3%
Chipola College	17	23.5%	47.1%	29.4%	0.0%
College of Central Florida	88	10.2%	65.9%	22.7%	1.1%
Daytona State College	294	11.6%	62.6%	20.7%	5.1%
Eastern Florida State College	226	7.1%	65.9%	23.5%	3.5%
Florida Gateway College	98	10.2%	77.6%	10.2%	2.0%
Florida SouthWestern State College	378	9.0%	60.1%	25.9%	5.0%
Florida State College at Jacksonville	160	6.3%	63.8%	25.6%	4.4%
Gulf Coast State College	3	0.0%	33.3%	33.3%	33.3%
Hillsborough Community College	300	8.0%	57.0%	28.3%	6.7%
Indian River State College	353	5.7%	66.6%	22.9%	4.8%
Lake-Sumter State College	58	6.9%	60.3%	27.6%	5.2%
Miami Dade College	1195	10.6%	60.2%	23.8%	5.4%
North Florida College	27	22.2%	66.7%	11.1%	0.0%
Northwest Florida State College	93	18.3%	59.1%	17.2%	5.4%
Palm Beach State College	180	9.4%	52.2%	30.0%	8.3%
Pasco-Hernando State College	78	6.4%	46.2%	42.3%	5.1%
Pensacola State College	152	9.2%	63.8%	20.4%	6.6%
Polk State College	148	10.1%	57.4%	30.4%	2.0%
Santa Fe College	244	4.9%	51.6%	41.4%	2.0%
Seminole State College of Florida	136	8.1%	60.3%	25.7%	5.9%
South Florida State College	124	11.3%	66.9%	14.5%	7.3%
St. Johns River State College	150	10.7%	63.3%	24.7%	1.3%
St. Petersburg College	336	9.8%	61.3%	22.0%	6.8%
State College of Florida, Manatee-Sarasota	114	8.8%	65.8%	18.4%	7.0%
Tallahassee Community College	107	4.7%	59.8%	31.8%	3.7%
The College of the Florida Keys	33	15.2%	57.6%	21.2%	6.1%
Valencia College	888	6.1%	66.2%	24.9%	2.8%

Intellectual Freedom and Viewpoint Diversity
2022 Florida College System Summary

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

College	Grand Total	Conservative	Liberal	Other
Broward College	150	18.7%	52.7%	28.7%
Chipola College	4	0.0%	75.0%	25.0%
College of Central Florida	19	31.6%	52.6%	15.8%
Daytona State College	94	33.0%	37.2%	29.8%
Eastern Florida State College	64	32.8%	45.3%	21.9%
Florida Gateway College	21	38.1%	19.0%	42.9%
Florida SouthWestern State College	139	18.7%	46.8%	34.5%
Florida State College at Jacksonville	44	18.2%	61.4%	20.5%
Gulf Coast State College	1	0.0%	100.0%	0.0%
Hillsborough Community College	91	17.6%	49.5%	33.0%
Indian River State College	90	21.1%	38.9%	40.0%
Lake-Sumter State College	13	23.1%	53.8%	23.1%
Miami Dade College	509	21.8%	46.0%	32.2%
North Florida College	8	12.5%	37.5%	50.0%
Northwest Florida State College	26	42.3%	26.9%	30.8%
Palm Beach State College	64	18.8%	56.3%	25.0%
Pasco-Hernando State College	25	12.0%	68.0%	20.0%
Pensacola State College	42	19.0%	38.1%	42.9%
Polk State College	48	20.8%	56.3%	22.9%
Santa Fe College	84	11.9%	70.2%	17.9%
Seminole State College of Florida	41	19.5%	53.7%	26.8%
South Florida State College	40	27.5%	37.5%	35.0%
St. Johns River State College	42	26.2%	54.8%	19.0%
St. Petersburg College	99	25.3%	50.5%	24.2%
State College of Florida, Manatee-Sarasota	23	21.7%	47.8%	30.4%
Tallahassee Community College	36	19.4%	55.6%	25.0%
The College of the Florida Keys	8	37.5%	50.0%	12.5%
Valencia College	309	20.7%	49.8%	29.4%

HB233's co-sponsor, former Representative Anthony Sabatini described HB233 as a tool for "defunding the radical institutions" on campuses that "we've lost ... to the radical left" and "defunding these insane professors that hate

conservatives and hate this country."[20] Other proponents of HB233 expressed similar sentiments. *See, e.g.*, Ex. 9, 38:17-39:13. This chart appears designed to facilitate those threats. Already articles have been written (which have been shared among BOG staff) purporting to rank the state's universities from most to least "politically oppressive," using the above data. Ex. 75, at 6-7.

Because the Survey Provisions burden Plaintiffs' right to freely associate, they are subject to—at minimum—exacting scrutiny. *Bonta*, 141 S. Ct. at 2383. They are invalid unless Defendants demonstrate they (1) have "a substantial relation" to "a sufficiently important governmental interest," and (2) are "narrowly tailored to" that interest. *Id*. at 2385. They satisfy neither requirement. As described, the state's interest in HB233 is either redundant of existing speech protections or impermissible on its face. *See supra* Section II.E. And the Survey Provisions are not narrowly tailored to advance important government interests; if they do anything, they *undermine* the purported interest in freedom of expression. *Id*.[21]

[20] Ybeth Bruzual, *New Florida bill calls for annual evaluations of university viewpoints*, Spectrum News 13, available at https://www.mynews13.com/fl/orlando/political-connections/2021/07/16/political-connections?cid=share_fb&fbclid=IwAR3U_3FXDa2nATi2S3vRkqsTZbv_loSZMqU5hC7yAkqyJQ6489BRGN7Fgy4&wdLOR=c3B5D3506-CEDB-45C2-8DA6-A54731954A6E# (5:18 through 6:28).

[21] As in *Bonta*, a facial challenge is appropriate here because "the lack of tailoring to the State's [] goals is categorical—present in every case." 141 S. Ct. at 2387. Nevertheless, Plaintiffs also make an as-applied challenge to the 2022 Surveys and request that this Court enjoin their continued use and any reliance on their results.

IV. The Anti-Shielding Provisions are unconstitutionally vague and overbroad.

It is a "basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293, 1319 (11th Cir. 2017) (en banc) (quoting *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972)). These rights extend to a professor's "right to lecture," with the Supreme Court recognizing long ago that the "government should be extremely reticent to tread" into "the areas of academic freedom and political expression." *Sweezy*, 354 U.S. at 249-50.

Laws that regulate expression are subject to "a more stringent vagueness test," *Vill. of Hoffman Ests. v. The Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 499 (1982): they "must be narrowly drawn to meet the precise evil the legislature seeks to curb ... and ... the conduct proscribed must be defined specifically so that the person or persons affected remain secure and unrestrained in their rights to engage in activities not encompassed by the legislation," *Baggett v. Bullitt*, 377 U.S. 360, 372 n.10 (1964) (citation omitted). Otherwise, potential speakers will steer far wide of the prohibited zone, chilling a wide range of protected speech. *Wollschlaeger*, 848 F.3d at 1320 (cleaned up) (quoting *Baggett*, 377 U.S. at 372); *see also Keyishian,* 385 U.S. 589, 604 (1967) ("[W]hen one must guess what conduct or utterance may lose him his position, one necessarily will steer far wider of the [impermissible] zone.") (quotation marks omitted).

The-Anti Shielding Provisions are unconstitutional. They are not narrowly drawn, the conduct they proscribe is not specific to provide a reasonable opportunity to understand what conduct it prohibits, and it authorizes or even encourages arbitrary and discriminatory enforcement. *Wollschlaeger*, 848 F.3d at 1319 (citation omitted).

No one can agree who the Provisions prohibit from engaging in shielding. The statute states that a "[FCS] institution or a state university may not shield," with no further clarification as to who is subject to that prohibition. Senator Rodrigues did not know if it applied to the conduct of registered student groups. Ex. 19, 26:5-17. Senior Chancellor Mack, who oversees FCS, understood it to apply to instructors in classrooms. Ex. 7, 38:7-18. BOE testified it applies to school administrators, but not instructional staff—without explaining the basis for this distinction. Ex. 5, 143:10-144:20; 145:23-148:4. BOE is also at odds with BOG, whose view is that the Anti-Shielding Provisions could apply in the classroom context. Ex. 6, 106:22-107:14. Faced with these "multiple readings", persons of ordinary intelligence cannot "be sure of its real-world consequence," rendering it unconstitutionally vague. *Dream Defs. v. DeSantis*, 559 F. Supp. 3d 1238, 1281 (N.D. Fla. 2021).

The law is also vague in *what* it prohibits. First, it fails to explain what it means to "limit … access to, or observation of" certain "ideas and opinions." Fla. Stat. §§ 1001.03(19)(a), 1001.706(13)(a); *see Wollschlaeger*, 848 F.3d at 1319-21;

see also Sweezy, 354 U.S. at 247. Even Defendants are unable to identify the contours of what activity would violate the statute. BOE understands it to encompass any conduct that "causes [protected speech] to not happen." Ex. 5, 141:15-142:6. But when asked whether a college banning a book would violate the Anti-Shielding Provisions, BOE could not answer: "I'm just not positive until I actually saw all of the circumstances around it." *Id.* 167:8-168:25. BOG responded similarly when asked whether a professor's decision not to invite a controversial guest speaker to class could violate the Provisions. Ex. 6, 106:22-107:14 ("There's challenges in thinking about all the different variables that come under [the Anti-Shielding Provisions], but I don't know that I can make that determination.").

This "I know it when I see it" standard—which follows from the Anti-Shielding Provisions' vague terms—is particularly egregious in the First Amendment context. *See*, *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030, 1040 (D.C. Cir. 1980). And if the Boards—which should be intimately familiar with the Anti-Shielding Provisions, both because they bear responsibility for enforcing them and are themselves subject to them, Fla. Stat. §§ 1001.03(8), (19)(c); 1001.706(8), (13)(c)—can't tell whether particular situations would violate them, "it seems eminently fair to conclude" Plaintiffs can't either. *Speech First*, 32 F.4th at 1122.

Second, the applicability—and enforcement—of the Anti-Shielding Provisions depends on unpredictable, subjective terms: whether the ideas or opinions

at issue are ones that someone "*may* find uncomfortable, unwelcome, disagreeable, or offensive." Fla. Stat. § 1004.097(2)(f) (emphasis added). Thus, the law requires "predict[ing] individual tolerances for hearing" about particular ideas or opinions. *Wollschlaeger*, 848 F.3d at 1321-22; *see also Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (finding law that prohibited annoying passerby unconstitutionally vague because "[c]onduct that annoys some people does not annoy others"). The bill's sponsors and Defendants have all acknowledged these terms are entirely subjective. *See, e.g.*, Ex. 9, 18:5-8; Ex. 5, 154:24-157:9. This is similar to the policy found problematic in *Speech First*, where the trigger for the restriction—conduct that "unreasonably … alter[ed]" another's educational experience—was similarly "pretty amorphous" and its "application would likely vary from one student to another," with the "totality-of-known-circumstances approach to determining whether particular speech crosses the line only makes matters worse." 32 F.4th at 1121; *see also id*. at 1125 (emphasizing the policy applied to "conduct that *may* be humiliating" and "employs a gestaltish" approach to determining which speech came within its ambit). The law's imprecision, moreover, only serves to exacerbate its unconstitutional chilling effects. *Id.* at 1121.

The difficulty in complying with HB233 is compounded by the fact that it contradicts the recently-enacted HB7, with which faculty also must comply. HB7 makes it discrimination to espouse any concept from an enumerated list, unless

discussed "in an objective manner without endorsement of the concepts." Ex. 53 at 7. It is impossible not to violate HB233's prohibition on "limit[ing] access to or observation of" ideas or opinions while complying with HB7. *See* Ex. 6, 102:22-106:15 (BOG representative's answers suggesting that HB7 and HB233 may have conflicting standards). This is billiards played in the dark—where it's a foul to hit stripes under HB7 and a foul to miss solids under HB233, but the lights don't come on until it's time to enforce the rules.

Because they fail to provide clear notice of what they prohibit or require, the Anti-Shielding Provisions are unconstitutionally vague and violate due process.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for summary judgment should be granted.

REQUEST FOR ORAL ARGUMENT

Plaintiffs' request oral argument and estimate an hour for each side.

Respectfully submitted this 14 day of October, 2022.

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LOCAL RULE 7.1(F) CERTIFICATION

The undersigned, Frederick Wermuth, certifies that this motion contains 10,994 words, excluding the case style and certifications.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 14, 2022 I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel in the Service List below.

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