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' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Defendants respond in opposition to Plaintiffs' Motion For Summary Judgment (ECF No. 167) ("Motion"), and respectfully request the Court deny Plaintiffs' Motion.

INTRODUCTION

Plaintiffs' Motion barely articulates a single undisputed fact, relying instead on unreliable, irrelevant expert opinions, disputed legal conclusions, and improper summary-judgment evidence that is not admissible at trial. Plaintiffs' Motion recites Federal Rule 56, but otherwise bears no resemblance to a proper motion for summary judgment based on undisputed facts and questions of law. This Court should deny Plaintiffs' Motion without hesitation.

Continuing with their theme of favoring narrative over reality, Plaintiffs' argument that HB233 is "content-based" and was passed with a "discriminatory purpose" finds no support in the text of the law, or in the purported facts Plaintiffs recite. Plaintiffs' Motion distorts HB233's plain text, steering clear of its legislative record and clinging instead to inadmissible statements made by non-parties and non-legislators outside the legislative process, asynchronous with HB233's passage, and often unrelated to HB233 entirely. In reality, HB233 is content-neutral on its face and does not regulate speech, which should end the Court's inquiry under binding Eleventh Circuit precedent. Nevertheless, nothing in the proper sources of legislative intent changes the inevitable, dispositive conclusion that HB233 was not enacted to discriminate against or suppress speech based on the viewpoints expressed or the associations of *any* speaker, let alone Plaintiffs.

Plaintiffs' Motion likewise fails to establish that any Plaintiff has reasonably "chilled" his or her speech as a result of HB233—nor can Plaintiffs seem to agree on which provision might cause such chilling. But as a matter of law, even if Plaintiffs *in fact* altered their speech, that reaction is objectively unreasonable. As explained in Defendants' Motion for Summary Judgment, the Anti-Shielding Provisions are not enforceable against individual students or professors, and Plaintiffs' misinterpretation of the Anti-Shielding Provisions runs contrary to the

law's plain language. These immutable legal realities also eliminate the basis of Plaintiffs' void-for-vagueness claim.

Finally, Plaintiffs' indefensible description of the Survey Provisions is not a product of the law's text or the record evidence. Plaintiffs insist the Survey Provisions mandate the disclosure of privately-held political beliefs and associations. Yet HB233 requires no such thing, and as a factual matter, the 2022 surveys were voluntary—a feature Plaintiffs took advantage of in declining to complete the surveys, and in advocating for others not to take it. Plaintiffs offer no admissible facts to contradict the overwhelming evidence showing the surveys were also anonymous, and concede they have never been required to disclose their political beliefs or associations to Defendants or the Legislature.

Defendants respectfully request that this Court deny Plaintiffs' policy paper masquerading as a motion for summary judgment.

MEMORANDUM OF LAW

I. Plaintiffs' Inaptly-Described Statement of "Undisputed Facts" is Founded on Inadmissible Evidence, Legal Conclusions, and Blatant Misrepresentations of the Record.

Plaintiffs' "Statement of Undisputed Facts" is nothing of the sort, and this Court should disregard it.

a. Plaintiffs' Statement of "Undisputed Facts" Perverts the Meaning of Both "Undisputed" and "Facts."

Plaintiffs present one-sided legal conclusions, disputed expert opinions, and mischaracterizations of the record to this Court as "undisputed facts." Plaintiffs are apparently unbothered by the strictures of Rule 56, or this Court's admonition that it will "review the cited portions of the record," that "[d]iscrepancies between factual assertions in the parties' memoranda and the actual record do not go unnoticed," and that the parties must "distinguish between record evidence" and "inferences" drawn from the evidence. ECF No. 41 at 11, ¶ 10(d).[1]

The discrepancies between Plaintiffs' factual assertions and the cited source material range from editorialized to blatantly misrepresented. The following sample of these shortcomings illustrates Plaintiffs' overreach, and how little attention this Court should pay Plaintiffs' arguments based on their "facts" as a result:

- Plaintiffs assert with certainty that "[t]he result [of the Anti-Shielding Provisions] *will* be less speech: professors *will stop* offering controversial propositions . . . or even courses that 'run counter to' State leadership's political convictions." Motion at 11 (emphases supplied). It should go without saying that this "fact" is not one with which Defendants agree, and Plaintiffs' evidence—speculative testimony from an expert witness who did not speak to

[1] Plaintiffs also failed to adhere to this Court's Initial Order, ECF No. 41, which requires a specific citation convention for summary-judgment exhibits.

a single Florida professor or student, and who intends to opine on how to interpret HB233—is neither probative nor admissible.

- Plaintiffs next claim that the Legislature rejected an amendment to make the surveys voluntary and anonymous, *id.* at 12. However, the cited source is a quote from Senator Rodrigues indicating he did not expect to make changes to the bill at that time; it does not show that any amendment making the survey voluntary or anonymous was ever proposed or voted on by either chamber.
- Plaintiffs assert that "unrebutted expert testimony" shows that HB233 was "doomed . . . from the start." *Id.* at 13. Of course, whether HB233 was "doomed from the start" is not a fact, and is certainly not undisputed. Additionally, as explained further below, Plaintiffs' expert opinions are by no means unrebutted.
- In the next sentence, Plaintiffs declare, without citation, that "Defendants did not treat HB233 as serious exercise." *Id.* Again, this editorialized remark is neither undisputed nor supported by record evidence.
- Plaintiffs brazenly claim that Defendants "admit they chose to collect IP addresses, which could be used to identify [survey] respondents." *Id.* at 15. Defendants said no such thing. To the contrary, the testimony Plaintiffs cite makes plain that Defendants collected *public* IP addresses, which do *not* identify individuals, and that it would be "*impossible*" to identify any

individual respondent without the assistance of law enforcement and a warrant. *See id.* (citing ECF Nos. 166-31, 166-32).

- Plaintiffs claim the Recording Provisions will, as a matter of undisputed fact, "risk[] exposing professors to harassment, hate mail, and death threats." *Id.* at 16 (citing ECF No. 166-12). This proposition is far from undisputed, borrowed entirely from an expert's abject speculation, and lacks support from a single fact in the record.
- In the next breath, Plaintiffs present their ultimate legal theory as undisputed fact: "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." Motion at 16. In support, Plaintiffs direct this Court to 17 pages of inadmissible hearsay-within-hearsay buried within an expert report, covering everything from the Bolsheviks to the Johns Committee to Donald Trump's campaign to Charles Koch to critical race theory to Fox News.
- Plaintiffs next purport to quote bills from 2019 and 2020, which they claim "feature prominently" "the idea that 'woke' faculty are 'pushing ideology' or 'indoctrinating' students." Motion at 17. Despite using quotation marks, these quoted terms appear nowhere in the cited source.

- Rather than accurately represent legislative history through admissible evidence, Plaintiffs claim that, at time HB233 passed, the bill's sponsor "emphasized HB233 was intended to combat 'Marxist professors and students.'" *Id.* at 19. Plaintiffs' source of this claim is half of a Tweet cited in the footnote of an expert report—in other words, unauthenticated hearsay-within-hearsay. Tweets are not legislative history, nor do they establish undisputed facts, nor are they proper summary-judgment evidence under Rule 56.
- Next, according to Plaintiffs, "HB1557 . . . restricts discussion of sexual orientation and gender identity in schools and targets queer students." *Id.* at 21. This statement inaccurately editorializes HB1557 at best, and has no place in a statement of undisputed facts—or in a lawsuit challenging a separate bill addressing a different topic enacted a year earlier.
- Plaintiffs allege that HB233 "compel[s] faculty to censor their speech, lest they be accused of liberal bias and threatened with personal, professional, or institutional harm," and to "give voice to ideas with which they disagree." Motion at 22. Again, Plaintiffs' only source for this "undisputed fact" is the conjecture of a literature professor from Pennsylvania with no ties to Florida and no knowledge of Plaintiffs. *Id*. (citing ECF No. 166-12); *see also* ECF No. 166-13. Plaintiffs themselves testified that they have never been forced to

give voice to ideas with which they disagree, and have never been threatened or punished under the auspices of HB233. ECF No. 165 at 8–19.

- Plaintiffs allege that "[m]any" members of UFF "have been affected by HB233 but fear coming forward." Motion at 27–28. In support, Plaintiffs cite UFF's deposition (during which Plaintiffs invoked the First Amendment privilege); an unauthenticated, hearsay report that cannot be reduced to admissible evidence at trial (citing ECF No. 166-63); and testimony from an expert witness who speculates about what unnamed faculty members may or may not do in response to HB233 (citing ECF No. 166-37). Plaintiffs refused to allow written discovery or deposition testimony about asserted injuries to UFF members, *see* ECF No. 165 at 38. Now, Plaintiffs present these alleged injuries to unnamed UFF members as the factual basis of their claims, in clear violation of the sword-and-shield doctrine. *See* ECF No. 133.
- Plaintiffs next assert that the "antagonism" caused by HB233 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.'" Motion at 28 (citing ECF No. 166-37). In support, Plaintiffs again cite only to the conjecture of an expert witness. *Id.* Plaintiffs certainly cannot cite their own testimony, since Plaintiffs all testified they have not taken the survey, have observed no instances of recording, and have faced no punishment or

threats. *See* ECF No. 165 at 8–19. Needless to say, Defendants disagree that the record supports Plaintiffs' statement.

The foregoing are merely examples of the extreme liberties Plaintiffs took with the record and the rules of evidence in presenting the "facts" on which their Motion is based. Summary judgment is intended for the limited purpose of resolving claims and defenses "as a matter of law" when "there is no genuine dispute as to any material fact[.]" Fed. R. Civ. P. 56(a). Plaintiffs' disrespect for the appropriate use of Rule 56 warrants denial of their Motion out-of-hand.

b. Nearly Two Dozen of Plaintiffs' Exhibits Consist of Improper Summary Judgment Evidence that this Court Cannot Consider.

No fewer than 22 of Plaintiffs' 76 exhibits—nearly 30%—are either wholly inadmissible or inadmissible in large part on hearsay and authenticity grounds.[2] Summary judgment evidence that a Court can properly consider is limited to evidence that can be produced in admissible form at trial. Fed. R. Civ. P. 56(c); *Rowell v. BellSouth Corp.*, 433 F. 3d 794, 800 (11th Cir. 2005) ("On motions for summary judgment, we may consider only evidence which can be reduced to an

[2] A much larger number of Plaintiffs' exhibits—including most of those identified in this Response—are also inadmissible because they are not relevant under Federal Rule of Evidence 401.

admissible form."). Much of Plaintiffs' proffered summary-judgment evidence fails to meet this well-established threshold.

At a minimum, all or part of the following exhibits cannot be reduced to an admissible form at trial, and should be disregarded along with the propositions they are offered to support:

Exhibit No.	Description of Exhibit	Citation in Motion[3] (ECF No. 167)	Reason for Inadmissibility
1	Website, "2021 Free Speech Rankings Report"	1	Hearsay; unauthenticated; not admissible through witnesses identified on Rule 26 disclosures
8	Memo from Scott Cole (non-party), Defendants_003863	3, 16 p. 4 *infra* Section V p. 30 *supra* Section V p. 31 *supra* Section V p. 33 *supra* Section V p. 37 *supra* Section V	Hearsay; unauthenticated; not admissible through witnesses identified on Rule 26 disclosures
10	Expert Declaration and Reports of M. Woessner	3, 6, 7, 9 38, 39, 40 p. 30 *supra* Section II p. 36 *supra* Section II p. 40 *supra* Section II p. 44 *supra* Section II.E.	Portions of report are unauthenticated hearsay-within-hearsay; opinions and sources subject to exclusion under *Daubert*
12	Expert Declaration and Reports of M. Berube	4, 9 15, 21 34, 38, 39 p. 30 *supra* Section V p. 31 *supra* Section V p. 33 *supra* Section V p. 37 *supra* Section V p. 44 *supra* Section II.E.	Significant portion of report consists of unauthenticated hearsay-within-hearsay offered for its own sake rather than incidentally disclosed as part of expert opinion; opinions and sources subject to exclusion under *Daubert*

[3] The page numbers in this table correspond to the page in the Motion, rather than the ECF page number.

Exhibit No.	Description of Exhibit	Citation in Motion[3] (ECF No. 167)	Reason for Inadmissibility
21	Expert Declaration and Reports of A. Lichtman	6, 9, 10 12, 13, 14 30, 31 p. 30 *supra* Section II p. 36 *supra* Section II p. 40 *supra* Section II	Significant portion of report consists of unauthenticated hearsay-within-hearsay offered for its own sake rather than incidentally disclosed as part of expert opinion; opinions and sources subject to exclusion under *Daubert*
24	Expert Declaration and Reports of S. Hurtado	6, 7 39, 40 p. 30 *supra* Section II p. 36 *supra* Section II p. 40 *supra* Section II	Portions of report are unauthenticated hearsay-within-hearsay; several opinions and sources subject to exclusion under *Daubert*
28	Multiple emails authored by non-parties purporting to be survey respondents	6, 7 p. 30 *supra* Section II p. 36 *supra* Section II p. 40 *supra* Section II	Hearsay; unauthenticated; not admissible through witnesses identified on Rule 26 disclosures
34	Email and attachment from non-party Advisory Council of Faculty Senates, Defendants_02160	11 p. 30 *supra* Section IV p. 31 *supra* Section IV.B p. 37 *supra* Section IV p. 39 *supra* Section IV	Hearsay; unauthenticated; not admissible through witnesses identified on Rule 26 disclosures
38	Screenshot purporting to come from Desantis campaign website	9	Hearsay; unauthenticated; not admissible through witnesses identified on Plaintiffs' Rule 26 disclosures
39	Transcript of June 6, 2021 Board of Education Meeting	10	Hearsay-within-hearsay; statements by individuals other than Board of Education members are not party statements
43	Email chain between non-parties produced by Florida Senate	11 p. 30 *supra* Section IV p. 31 *supra* Section IV.B p. 37 *supra* Section IV p. 39 *supra* Section IV	Hearsay; unauthenticated; not admissible through witnesses identified on Rule 26 disclosures

Exhibit No.	Description of Exhibit	Citation in Motion[3] (ECF No. 167)	Reason for Inadmissibility
44	Email chain between non-parties produced by Florida Senate	11 p. 30 *supra* Section IV p. 31 *supra* Section IV.B p. 37 *supra* Section IV p. 39 *supra* Section IV	Hearsay; unauthenticated; not admissible through witnesses identified on Rule 26 disclosures
45	Email chain between non-parties produced by Florida Senate	11 p. 30 *supra* Section IV p. 31 *supra* Section IV.B p. 37 *supra* Section IV p. 39 *supra* Section IV	Hearsay; unauthenticated; not admissible through witnesses identified on Rule 26 disclosures
46	Email chain between non-parties produced by Florida Senate	12 p. 30 *supra* Section IV p. 31 *supra* Section IV.B p. 37 *supra* Section IV p. 39 *supra* Section IV	Hearsay; unauthenticated; not admissible through witnesses identified on Rule 26 disclosures
47	Article from FIRE website	12 p. 30 *supra* Section IV p. 31 *supra* Section IV.B p. 37 *supra* Section IV p. 39 *supra* Section IV	Hearsay; unauthenticated; not admissible through witnesses identified on Rule 26 disclosures; opines on legal conclusions
48	Article from FIRE website	12 p. 30 *supra* Section IV p. 31 *supra* Section IV.B p. 37 *supra* Section IV p. 39 *supra* Section IV	Hearsay; unauthenticated; not admissible through witnesses identified on Rule 26 disclosures; opines on legal conclusions
49	Document titled "FIRE suggested edits to SB 264," no author identified, produced by Florida Senate	Not cited; FIRE referenced at 18–19	Hearsay; unauthenticated; not admissible through witnesses identified on Plaintiffs' Rule 26 disclosures; opines on legal conclusions
51	Excerpted transcript of June 22, 2021 bill signing ceremony	12, 30	Hearsay-within-hearsay; unauthenticated; not admissible through witnesses identified on Rule 26 disclosures

Exhibit No.	Description of Exhibit	Citation in Motion[3] (ECF No. 167)	Reason for Inadmissibility
55	January 2022 email and attachment exchanged between non-parties after HB233's passage	15 p. 30 *supra* Section IV p. 37 *supra* Section IV p. 39 *supra* Section IV	Hearsay-within-hearsay; unauthenticated; not admissible through witnesses identified on Rule 26 disclosures
63	Document titled "Report of the Faculty Senate Ad Hoc Committee on Academic Freedom," authored by non-parties	14, 21, 33 p. 4 *infra* Section V p. 30 *supra* Sections IV, V p. 31 *supra* Section V p. 33 *supra* Section V p. 37 *supra* Sections IV, V p. 39 *supra* Section IV	Hearsay; unauthenticated; not admissible through witnesses identified on Rule 26 disclosures
75	Email attaching website article	44	Attached article is hearsay, contains additional hearsay, is unauthenticated, and not admissible through witnesses identified on Rule 26 disclosures
76	Email chain, Defendants_051016	7 p. 30 *supra* Section II p. 36 *supra* Section II p. 40 *supra* Section II	Links in email chain contain unauthenticated hearsay

c. Plaintiffs' Unreliable Expert Opinions Cannot Establish Undisputed Facts.

Plaintiffs' heavy reliance on expert opinion is inappropriate at the summary-judgment stage. Expert opinions are not facts at all, and Plaintiffs attempt to prove their First Amendment claims using expert opinion as a substitute for actual facts. Unlike a case requiring expert testimony to establish an element of a claim (as in medical negligence or products liability cases, for example), Plaintiffs' expert conclusions do not establish facts or elements, but instead gratuitously bolster Plaintiffs' legal argument and subvert the rule against hearsay.

Plaintiffs characterize their expert's conclusions as "unrebutted" simply because Defendants did not needlessly retain a half-dozen experts to opine on legal conclusions and irrelevant topics. But Plaintiffs' experts are far from unrebutted. First, Plaintiffs' experts rebut themselves, as their deposition transcripts make plain. And second, Plaintiffs' experts have yet to be tested through Defendants' forthcoming motions in limine.[4]

The Southern District of Florida has twice recently rejected the argument that Plaintiffs advance here, denying summary judgment despite a moving party's characterization of its own expert testimony as unrebutted. In *Hicks v. United States*, Case No. 20-CIV-61241, 2021 WL 5359724, at *2 (S.D. Fla. Nov. 16, 2021), the Court found that some causes of action simply do not require expert testimony—in contrast, for example, to a case in which a standard of care must be established by expert testimony. The Court in *Hicks* concluded that granting summary judgment based on superfluous expert testimony is not appropriate, regardless of "[h]owever helpful" the movant believes "an expert may be to [its] case." *Id.*; *cf. Arias v. DynCorp*, 752 F. 3d 1011, 1017 (D.C. Cir. 2014) (confirming that expert testimony is not necessary to prove certain claims, and reversing dismissal on the basis of failure to produce expert testimony).

[4] The motion in limine deadline is "no later than 15 days prior to the pretrial conference," specifically November 30, 2022 (15 days before December 15, 2022). *See* ECF No. 150 at 8.

Las Originales Pizza, Inc. v. Batabano Group, Inc., Case No. 19-22553-CIV, 2022 WL 4369615, *8–9 (S.D. Fla. July 18, 2022), *report and recommendation adopted*, 2022 WL 4366952 (Sept. 1, 2022), cites *Hicks* for the same proposition, and explained further why a battle-of-the-experts is not a prerequisite for cross-examination or surviving summary judgment. *See id.* at *9 ("To the extent [movant] is suggesting that retaining a competing or rebuttal expert is the price of admission for cross-examining [an expert's] opinion, that argument is not well-taken. . . . [The movant] cited no cases which stand for the proposition that in order to be able to cross-examine an expert, a party must hire its own corresponding expert."). The Court acknowledged that the non-moving party in *Las Originales Pizza* disputed the "assumptions" and "theories" underlying the movant's expert's opinions, and was thus entitled to present its own fact evidence and cross-examination testing the expert—all of which could lead to the factfinder to reject the expert's opinions. *Id.* *9–10.

The same is true here: Plaintiffs' unnecessary retention of an army of experts does not require Defendants to do the same. Plaintiffs' experts' conclusions are already doomed on their own, and destined for further damage through contradictory factual evidence, motions in limine, and cross-examination.

Next, all of Plaintiffs' experts are subject to exclusion at trial, or at a minimum should be severely limited in presenting their opinions, for reasons that will be fully

briefed in Defendants' motions in limine. As those motions will show, Plaintiffs' experts failed to follow any reliable methodology, lack a factual basis for their opinions, in some instances lack qualifications to present their opinions, and inappropriately offer opinions on ultimate legal issues.

For example, Plaintiffs' experts did not speak to a single professor or student in Florida—yet opine *with alleged "certainty"* as to exactly how HB233 will affect those groups. Professor Berube holds himself out as an expert in interpreting legal texts, and opines on the legislative intent behind and correct interpretation of HB233—subjects with which this Court requires no assistance. ECF No. 166-12 at 5, 6, 15; *accord* ECF No. 166-13 at 48:6–13, 91:6–17, 92:13–22. Professor Woessner describes his conclusions as "common sense" based on his reading of the statute's text, negating the necessity of his "expert" testimony altogether. ECF No. 166-11 at 70:23–72:13. Professor Hurtado holds herself out as expert in survey design, yet opines about data security (while admitting she has no expertise in this area), 35:1–38:24, and about the Legislature's intent, both in enacting HB233 and as to its plans for future legislation, *id.* 60:22–23, 73:6–78:7, 85:20–87:12. And Professor Lichtman opines in no uncertain terms on the legal question of legislative intent, while acting as a conduit for hearsay-within-hearsay that could never be admitted on its own (including Twitter postings and dozens of articles). *See infra*

Part II. This is only a preview of the vulnerabilities in Plaintiffs' experts' opinions, which this Court should not accept as facts at all, let alone undisputed facts.

II. Plaintiffs Fail to Show that HB233 was Passed with a Discriminatory Purpose.

In addition to its inadmissibility, Plaintiffs' evidence falls short of showing that the Florida Legislature enacted HB233 "because of, and not merely in spite of, its adverse effects upon an identifiable group." *Personnel Adm'r of Mass v. Feeney*, 442 U.S. 256, 279 (1979) (marks omitted). Especially when balanced against the presumption of good faith afforded to the Legislature, *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018), no reasonable factfinder could find that Plaintiffs' evidence establishes that in passing HB233, the Legislature intended to discriminate against individuals or viewpoints "deemed too liberal or progressive," or to "prioritize speech favored by the conservative majority." Motion at 29.

Plaintiffs' Motion asks this Court to do exactly what the Eleventh Circuit foreclosed in *NetChoice, LLC v. Attorney General, Florida*, 34 F. 4th 1196, 1224–25 (11th Cir. 2022). In *NetChoice*, the Court explained it has "held—many times—that when a statute is facially constitutional, a plaintiff cannot bring a free-speech challenge by claiming that the lawmakers who passed it acted with a constitutionally impermissible purpose." *Id.* at 1224 (citing *In re Hubbard*, 803 F. 3d 1298, 1312 (11th Cir. 2015) (marks omitted). The Eleventh Circuit observed that no "Supreme Court or Eleventh Circuit decision . . . [has] relied on legislative history or statements

by proponents to characterize as viewpoint-based a law challenged on *free speech* grounds." (*Id.* at 1225 (emphasis in original). The Court instead reaffirmed the Supreme Court's decision in *United States v. O'Brien*, 391 U.S. 367 at 382–83 (1968), noted the "absence of clear precedent enabling [the Court] to find a viewpoint-discriminatory purpose based on legislative history," and "determined that [it] cannot use the Act's chief proponents' statements as a basis to invalidate" the challenged law. *Id* at 1226.

The Eleventh Circuit has unambiguously rejected Plaintiffs' theory of their case twice in the last seven years—once fewer than six months ago. Plaintiffs nevertheless ask this Court to turn a blind eye to the holdings *O'Brien*, *NetChoice*, and *Hubbard*, and find that stray remarks can be weaponized to manufacture a First Amendment challenge against an otherwise neutral statute—even when the remarks are made post-passage, outside the legislative process, regard laws not at issue, or are made by non-legislators.[5]

In their next invitation to contradict binding precedent, Plaintiffs ask this Court to ignore *Greater Birmingham Ministries v. Secretary of State for Alabama*,

[5] *Reed v. Town of Gilbert* 576 U.S. 155, 163–64 (2015), is not inconsistent and does not change the result—and of course, the Eleventh Circuit was aware of *Reed* when it decided *NetChoice*. First, *Reed* involved a facially content-based law. And second, like *O'Brien*, *Reed* only advised that looking to the justification of a law might reveal that the law is content-based; it did not sanction the use of legislative history or miscellaneous remarks to manufacture the basis for a First-Amendment claim. Here, the justification for HB233 is not content-based, nor is the face of the statute.

992 F.3d 1299, 1325 (11th Cir. 2021), which condemned attempts to discern the "historical background" of a law through an "unlimited look-back to past discrimination." Plaintiffs direct this Court to statements from past legislative sessions about bills not challenged here, and their experts invoke irrelevant relics of the past including the Johns Committee, the McCarthy Era, the Bolsheviks, and a two-decade old document produced by a think-tank with no nexus to HB233's passage. *E.g.,* ECF No. 137 at 30; ECF No. 166-12 at 18–24; ECF No. 166-13 at 12:15–13:13; ECF No. 166-21 at 25–27.

Relying on hearsay buried within an expert report, *see* Motion at 30 (citing ECF No. 166-21 at 29–30), Plaintiffs also declare HB233 was passed with a discriminatory purpose because "the sequence of events leading to [its] enactment is *consistent with partisan intent*." *Id.* (emphasis supplied). Of course, every law from every legislature is passed by elected officials affiliated with a political party. Despite Plaintiffs' obvious conviction, "passed by a Republican majority" is not synonymous with "passed with unlawful discriminatory intent."

The sources Plaintiffs cobble together to prop up their "discriminatory purpose" theory are a telling admission of Plaintiffs' inability to prove that claim—not to mention their inability to overcome *O'Brien*, *NetChoice*, and *Hubbard*. Because the legislative record and text of HB233 evince no discriminatory purpose, Plaintiffs rely almost exclusively on the expert report of Dr. Lichtman (ECF No.

166-21) to craft their narrative. But Dr. Lichtman's report is an inadmissible tool for smuggling equally inadmissible hearsay before this Court, and opines on the ultimate legal conclusion of legislative intent—an opinion the Southern District recently forbid Dr. Lichtman from offering, *see City of S. Miami v. Desantis*, Case No. 19-cv-22927, 2020 WL 7074644, at *14 (S.D. Fla. Dec. 3, 2020) ("Dr. Lichtman's . . . opinion [is] that SB 168 was adopted with the intent to discriminate against minorities in Florida. . . . Dr. Lichtman's opinion on the legislature's discriminatory intent improperly invades the province of the trier of fact by opinion on the ultimate legal question in this case.") (citing *Quevedo v. Iberia, Lineas Aereas De Espana S.A. Operadora Unipersonal*, No. 17-21168-CIV, 2018 WL 4932097 at *4 (S.D. Fla. Oct. 11, 2018) ("Inferences about the intent or motive of parties or others lie outside the bounds of expert testimony . . . .")); *see also U.S. v. Long*, 300 F. App'x 804, 814 (11th Cir. 2008) (expert witnesses are prohibited from offering opinions on ultimate legal conclusions, and "courts must remain vigilant against the admission of legal conclusions").

Dr. Lichtman's opinions are nothing more than a conduit for hearsay and legal conclusions, and his report is therefore not a proper source of summary-judgment evidence. *In re 3M Combat Arms Earplus Products Liability Litigation*, Case No. 3:19md2885, 2021 WL 684183, at * 2 (N.D. Fla. Feb. 11, 2021) ("[A] party cannot call an expert simply as a conduit for introducing hearsay under the guise that the

testifying expert used the hearsay as the basis of his testimony." (quoting *Marvel Characters Inc. v. Kirby*, 726 F.3d 119, 136 (2d Cir. 2013))). "If an expert simply parrots [an] out-of-court statement, rather than conveying an independent judgment that only incidentally discloses the statement to assist the jury in evaluating the expert's opinion, then . . . the expert thereby becomes little more than a backdoor conduit for an otherwise inadmissible statement." *Id.* (quoting *United States v. Pablo*, 696 F.3d 1280, 1288 (10th Cir. 2012)); *Schoen v. State Farm Casualty Co.*, Civil Action No. 21-00265-JB-N, 2022 WL 16586689 at *7–*8 (S.D. Ala. Nov. 1, 2022) (same).

For starters, Plaintiffs rely on Dr. Lichtman's report in a futile attempt to establish *every* factor in the *Arlington Heights* analysis.[6] Motion at 37–38. But Plaintiffs' misuse of Dr. Lichtman's report does not end there. For example, Plaintiffs' cite Dr. Lichtman's report for the following improper purposes:

- To demonstrate legislative intent based on Tweets buried in footnotes; *see* ECF No. 166-21 at 93 n.195; or Tweets buried in articles cited in footnotes, *id.* at 73 n.147.
- To admit countless statements from the Governor, former legislators, current legislators, and professors outside of Florida, borrowed from

[6] As discussed throughout, this Court need not reach the *Arlington Heights* analysis. *NetChoice*, 34 F. 4th at 1224–26 (citing *Hubbard*, 803 F.3d at 1312, and *O'Brien*, 391 U.S. at 382–83).

website postings, books, and articles—all of which are improperly offered for their own sake without analysis, and present clear authenticity and hearsay problems, to say nothing of the relevance; *see, e.g., id.* at 29–35, 63–64, 77–80, 109–11.

- To admit articles offered to support the author's reporting and conclusions (including articles about legislation *other than* HB233), and presenting those conclusions as facts; *e.g., id.* at 27 n.38–39; 38 n.66; 37 n.64; 62–64, n.119, 120, 121, 123.
- To admit miscellaneous statements allegedly made by Defendants' Board members, culled from hearsay sources (including Tweets, articles, and websites), which Plaintiffs offer to criticize First Amendment-protected expressions—like political contributions and the expression of opinions—in an attempt to establish that the Legislature enacted HB233 with discriminatory intent, *id.* at 72–74.[7]
- To improperly bolster conclusions about legislative intent and chilling effects borrowed from Professor Berube's expert report, which are subsumed within layers of hearsay, *see id.* at 76, 81–82.

[7] To be clear, Plaintiffs' argument, through Dr. Lichtman, is that this Court should strike down a law because the individuals who sit on the governing boards of executive-branch entities have voted for Republicans and have engaged in protected speech. *See id.* This is a dangerous invitation, and the Court should not accept it.

To be sure, the foregoing are merely examples; Dr. Lichtman's improper regurgitation of unauthenticated statements, concealed under multiple layers of hearsay, pervades his entire report, and his ultimate opinions are unabashed legal conclusions. Over and over, Plaintiffs present "facts" plucked from Dr. Lichtman's report, which are in turn plucked from inadmissible sources, for the sole purpose of admitting the facts themselves into evidence—not because the cited facts are incidentally disclosed in the course of explaining Dr. Lichtman's "actual[] opinions," but because "they are merely an attempt to focus on, and emphasize, certain facts." *Companhia Energetica Potiguar v. Caterpillar Inc.*, No. 14-24277, 2017 WL 10775768, at *30 (S.D. Fla. June 12, 2017) *report and recommendation adopted*, 2017 WL 10775767 (S.D. Fla. Dec. 14, 2017); *Bowe v. Pub. Storage*, No. 1:14-cv-21559, 2015 WL 10857339, at *8 (S.D. Fla. June 2, 2015) (excluding expert's opinions that were "not based on his expertise and instead constitute a presentation of other evidence in the guise of an expert opinion" and were therefore "an improper presentation of hearsay evidence").

In addition to Dr. Lichtman's parroted hearsay, Plaintiffs also attempt to show discriminatory purpose through post-passage statements purportedly made by the Governor—in one instance, as reflected in an unauthenticated, hearsay transcript of an equally unauthenticated, hearsay video recording. Motion at 30–31 (citing ECF 166-51). Out-of-court statements allegedly made by a non-legislator post-passage

are inadmissible, and are irrelevant to determining the *Legislature's* intent in passing HB233. *See Ranch House, Inc. v. Amerson*, 238 F.3d 1273, 1280 (11th Cir. 2001) ("In determining whether the purpose of a law is to suppress protected speech, a court may examine a wide variety of materials, including the text of the statute, any preamble or express legislative findings associated with it, legislative history, and studies and information of which legislators were clearly aware.");[8] *see also* ECF No. 165 at 43–48.

Plaintiffs' evidence stands in stark contrast to the ample contemporaneous legislative testimony from HB233's sponsors, which consistently framed the State's non-discriminatory, non-content-based interest in passing HB233: the preservation of intellectual freedom and viewpoint diversity on Florida's campuses. ECF No. 165 at 7, 22–23, 46–47.

Plaintiffs also argue that an alleged "lack of consultation with experts and academics in developing HB233 betrays a deviation from standard practice," again relying on Dr. Lichtman's recitation of hearsay facts and legal conclusions as to the *Arlington Heights* factors. Motion at 37. Plaintiffs' argument is as misplaced as it is unsupported. The *Arlington Heights* analysis does not invalidate laws based on

[8] The Eleventh Circuit declined to extend *Ranch House* in *NetChoice*, reasoning that *Ranch House* explained how a neutral purpose could "*save* a law that facially discriminated on the basis of content[,]" but did not allow the Court to *invalidate* a facially viewpoint-neutral law on the basis of its legislative history—which is exactly what the Plaintiffs ask this Court to do. *NetChoice*, 34 F. 4th at 1225, n.19.

whether decision-makers considered Plaintiffs' preferred sources or consulted with particular experts in making a policy decision or drafting a survey. *Cf. Greater Birmingham Ministries*, 992 F.3d at 1326 (considering procedural departures in decision-making process and noting that "the use of cloture was exceedingly common" during the session in which challenged law was passed). Plaintiffs' own witnesses confirm no deviations from normal decision-making procedures occurred during HB233's passage. *See, e.g.,* ECF No. 166-21 at 68 (Republican lawmakers did not "violate any laws or chamber rules in enacting the bill"); ECF No. 176-6 at 19:10-21:5 (nothing "unique or extraordinary" or "unusual" about HB233's passage); ECF No. 176-3 at 17:4–18:20 (bill was not withdrawn from any committees and had typical number of committee referrals); ECF No. 176-4 at 14:2–13 (no knowledge of any chamber rule violations with respect to HB233 or SB264); ECF No. 176-5 at 19:12–21:8 (HB233 was debated on the House floor, and it is not irregular or out of the ordinary for a bill to be proposed multiple times and take multiple sessions to pass). Moreover, this Court is the arbiter of the *Arlington Heights* factors—not a professional expert witness.

Finally, Plaintiffs' endeavor to bring in subsequently-enacted legislation as retroactive evidence of discriminatory legislative intent fails. With no legal leg to stand on, Plaintiffs hang their hat on mischaracterizing Justice Sotomayor's dissent in *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373, 2397 (2021)

(Sotomayor, J., dissenting). Plaintiffs claim that in her dissent, Justice Sotomayor "not[ed]" that the Supreme Court's sixty-year-old decision in *Shelton v. Tucker*, 364 U.S. 479 (1960), "relied on legislation passed a year *after* the statute at issue there to support" its finding of legislative intent. Motion at 38. But *Shelton* did no such thing, nor does Justice Sotomayor's dissent suggest as much. Justice Sotomayor acknowledged that in the trial court, the plaintiffs challenged two separate enactments passed in subsequent sessions by the Arkansas Legislature: Act 10, passed in 1958, and Act 115, passed in 1959. *See Ponta*, 141 S. Ct. at 2397 (Sotomayor, J., dissenting) (citing *Shelton v. McKinley*, 174 F. Supp. 351 (E.D. Ark. 1959)). The Supreme Court's *Shelton* decision only involved Act 10, and its analysis is entirely silent as to Act 115, mentioning it a single time in a footnote as procedural background. 364 U.S. at 484 n.2. Not only is Plaintiffs' characterization of *Shelton* flat wrong, it is factually distinguishable because at the trial court level, the *Shelton* litigation challenged two separate, consecutively-passed acts. Here, only HB233 is at issue—not HB7, or any other subsequently-enacted law Plaintiffs dislike.

The Supreme Court's decision in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) is a better illustration of the proper consideration of *contemporaneously*-enacted legislation for purposes of discerning a common intent. In that case, a city passed three substantive ordinances on the same topic over the course of several weeks, all purporting to target animal killing and

cruelty. *Id.* at 525–28. A few months prior, the city passed an ordinance memorializing the city's concern over the practices of "certain religions" and the City's intent to prohibit such practices. *Id.* In total, the city passed five ordinances, and sought an Attorney General advisory opinion, within the span of four months—all on the topic of religious practices and animal killings. *Id.* This timeline and subject-matter uniformity make plain why the Court, when discerning whether the intent of the challenged ordinances was to target religion, considered these multiple, similar ordinances passed over a few month period together.[9]

A far cry from *Church of the Lukumi Babalu Aye*, Plaintiffs rely on *subsequent* legislation—passed a year after HB233, during a different legislative session, and concerning topics other than viewpoint diversity in higher education—to retroactively impute nefarious intent to HB233.

In holding HB7 out as post-passage evidence that HB233 was enacted for the purpose of engaging in content-based discrimination or suppression, Plaintiffs manage to say nothing about HB233's purported regulation of speech, nor could

[9] A critical component of the Court's intent analysis in that case was also the "adverse impact" of the ordinances, which carved most animal killings out of their definitions and therefore in practice, applied only to conduct by churches practicing Santeria sacrifices. *Id.* at 535–36. ("[A]lmost the only conduct subject to the challenged ordinances is the religious exercise of Santeria church members. The texts show that they were drafted in tandem to achieve this result."). This effect was thus "strong evidence" of the law's intent. *Id*. Plaintiffs offer no comparable evidence in this case, and HB233 applies to all viewpoints and expressions alike. ECF No. 164-3.

they. Plaintiffs simply point to HB7's purported "inconsistency" with HB233—a characterization that Defendants dispute.[10] But even if the later-passed HB7 operates as a carve-out from HB233's Anti-Shielding Provisions that Plaintiffs find inconsistent with HB233's purpose, that is a criticism of HB7—*not* a criticism of HB233. If Plaintiffs desire to challenge HB7, they should seek to intervene in the lawsuit challenging HB7. At bottom, Plaintiffs offer no evidence that the Legislature's expressed intent behind HB233 is not genuine. The fact that Plaintiffs view a later-enacted law as content-based and discriminatory does not render HB233 content-based or discriminatory, and Plaintiffs are without legal support for their contrary assertion.

To be sure, this Court need not and should not reach the issue of legislative intent. HB233 does not regulate speech, is facially content-neutral, and has been consistently justified by a desire to facilitate—not restrict—protected expression. *NetChoice*, 34 F. 4th at 1224–26 (holding that consideration of legislative intent to manufacture First Amendment challenge against facially-neutral legislation is improper). Nevertheless, the only evidence before this Court that can be properly considered as a source of legislative intent, and constitutes proper summary-

[10] Plaintiffs' claim that it is "impossible" to comply with both HB233 and HB7 is contingent on an absurd—and inaccurate—reading of those bills. *See* ECF No. 167 at 38, 56. Permitting a student group to invite a speaker on a controversial topic is one benign example that requires no great stretch of the imagination.

judgment evidence, supports Defendants' legitimate and content-neutral motivations. Everything else is inadmissible noise.

III. Plaintiffs' Characterization of HB233 as a "Content-Based" Restriction on Speech is Belied by the Law's Text and the Legislative Record.

HB233 does not restrict speech at all, and certainly does not restrict speech based on content. Plaintiffs do not argue otherwise with respect to the Recording Provisions and Survey Provisions. Motion at 27–29. Plaintiffs argue the Anti-Shielding Provisions are facially content-based, but their logic is at odds with the law's plain language. Plaintiffs' errant reading of HB233's text destroys the viability of their First Amendment claims.

The definition of "shield" is to "limit students' faculty members', or staff members' access to, or observation of, ideas and opinions that they may find uncomfortable, unwelcome, disagreeable, or offensive." *See* ECF No. 164-3. The use of the term "shield" in the remainder of the Anti-Shielding Provisions makes the function of the term clear: the Anti-Shielding Provisions prohibit Defendants, public colleges, and public universities from "shield[ing]" students, faculty, or staff (or state universities, with respect to the Board of Governors) "from free speech protected under the First Amendment of the United States Constitution, Art. I of the State Constitution, or s. 1004.097," the latter of which in turn references "[e]xpressive activities under the First Amendment." *See* ECF No. 164-3. Thus, Defendants and institutions cannot *limit* the expression of First Amendment-

protected ideas and opinions on the grounds that someone finds the First Amendment-protected expression uncomfortable, unwelcome, disagreeable, or offensive. *See id*. In other words, HB233 confines the conduct of state institutions in restricting those protected expressive activities that an institution may be most inclined to curb, due to the expressive activities being uncomfortable, unwelcome, disagreeable, or offensive to some listeners.

On their face, the Anti-Shielding Provisions do not require or prohibit any speech, and certainly do not do so based on content. ECF No. 164-3. No Plaintiff has been compelled to speak under the auspices of HB233. ECF No. 165 at 8–18, ¶¶ 7, 12, 14(b), 16(b)–(c), 17(b)–(f), 18(b), 19(a)–(c), 20(a)–(b), 21(c)–(d). Some Plaintiffs acknowledge outright that HB233 does not apply to any particular viewpoint, *see id.* ¶¶ 17(c) (HB233 does not protect or target certain viewpoints), 20(e) (HB233 applies to liberal and conservative ideas alike), which is supported by a plain reading of HB233's text.

Plaintiffs' entire "content-based" argument is founded on a fundamental misreading of the Anti-Shielding Provisions. Plaintiffs claim that the Anti-Shielding Provisions provide favorable treatment to "uncomfortable, unwelcome, disagreeable, or offensive" speech—an untenable argument in light of the law's text. But no one is forced to engage in "uncomfortable, unwelcome, disagreeable, or offensive" speech, nor is it afforded greater protection than any other First-

Amendment protected speech.. Indeed, the Anti-Shielding Provisions itself is limited to expressive activities protected by the First Amendment. ECF No. 164-3.

Rather, the text of the Anti-Shielding Provisions simply prohibit *suppression of protected speech*—regardless of content—on the grounds that someone might find the protected speech unwelcome, disagreeable, etc. This prohibition on state-sponsored censorship applies equally to *all* protected speech, regardless of content, regardless of viewpoint, and regardless of why someone might find subjectively the speech offensive or disagreeable. Once this plain-language reading is acknowledged, Plaintiffs' argument that HB233 is content-based falls apart.[11]

Plaintiffs alternatively argue that HB233 is content-based, despite its facial neutrality, because it cannot be justified without reference to content of regulated speech. Motion at 34–35. But HB233 has never been justified based on the content of regulated speech. Plaintiffs do not point to a single instance in which Defendants or the Legislature espoused the purpose of HB233 by reference to content-based restrictions. The Board of Governors' interrogatory answer Plaintiffs cite is consistent with legislative testimony during HB233's passage, and conveys an intent to treat all speech equally, and thus protect all speech, regardless of whether it evokes

[11] It is the province of this Court, and not expert or lay witnesses, to interpret the text of HB233. *Montgomery v. Auetna Cas. & Sur. Co.*, 898 F. 2d 1537, 1541 (11th Cir. 1990); *Dahlgren v. Muldrow*, 106CV00065MPAK, 2008 WL 186641, at *5 (N.D. Fla. Jan. 18, 2008).

subjective feelings of offense or disagreement in the listener. *See* Motion at 28. The content of speech is irrelevant to this purpose.

Plaintiffs' allegation that HB233 is "triggered" by expression of a viewpoint also finds no home in the law's text. The Anti-Shielding Provisions prevent censorship regardless of content or viewpoint, and sets forth no consequence that is "triggered" by its violation. The only consequence HB233 contemplates with respect to Plaintiffs is liability for unlawfully publishing a recorded lecture. *See* ECF No. 164-3; § 1004.097, Fla. Stat.

Finally, for the reasons explained above and in Defendants' Motion for Summary Judgment, ECF No. 165, the record evidence does not support Plaintiffs' argument that HB233 was passed with the intent to discriminate against speech based on content. There is simply no admissible, contemporaneous evidence to support this theory, and ample admissible, contemporaneous evidence proving the exact opposite, *see* ECF No. 165. Moreover, under the Eleventh Circuit's decisions in *Hubbard* and *NetChoice*, this Court should not even reach this inquiry because HB233 is facially content-neutral, and allegations of illicit legislative motives cannot support a First Amendment challenge.

IV. Plaintiffs Cannot Support their Claim that HB233 "Alters the Content of Faculty Speech."

Plaintiffs' assertion that HB233 has altered faculty speech is not supported by the record or the law. Scattershot examples of unreasonable reactions or speculative

concerns by individual professors are not even sufficient to establish Article III standing, and certainly do not entitle Plaintiffs to summary judgment as to their compelled speech claim, or a claim founded on a purported chilling effect.

Plaintiffs' alleged chilled or compelled speech is objectively unreasonable because HB233 is not enforceable against individual students or professors—only against Defendants and institutions. ECF No. 164-3; *Fla. Family Policy Council v. Freeman*, 561 F.3d 1246, 1254–56 (11th Cir. 2009) (alleged chilling effect must be objectively reasonable and caused by the challenged regulation). Moreover, the Anti-Shielding Provisions do not dictate what professors can or cannot discuss in their classrooms. The *only* conduct it prohibits is the state-sponsored censorship of protected expression. It is therefore unreasonable for a professor to react to HB233 by removing content from a curriculum based on an alleged fear of reprisal for speech that is perfectly permissible under HB233.[12]

[12] Plaintiffs' arguments are also foreclosed because even if HB233 regulated speech (which it does not), Plaintiffs cannot overcome *Garcetti v. Ceballos*, 547 U.S. 410 (2006) and *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991), both of which preserve the right of educational institutions to regulate their own messages and curricula, including those of their employees. Plaintiffs quibble with the facts of *Bishop* but their attempt to distinguish it—that it involved "a single university[,] not the State" and only one professor—is unavailing. First, public universities are part of the state. And second, Plaintiffs' argument does not and cannot rebut the Eleventh Circuit's conclusion that the university was permitted to dictate its own curriculum in *Bishop*. *Id.* at 1074–76 (recognizing that to further their education mission, schools may restrict teacher's speech in classroom in a manner it could not outside the classroom, because a teacher's in-school speech might be attributed to the school, and schools can restrict the speech of their own employees more than others; concluding that a

To constitute an actionable pre-enforcement injury under the First Amendment, an alleged chilling effect must be "objectively reasonable," which includes carrying a "credible threat of prosecution." *Wilson v. State Bar of Ga.*, 132 F.3d 1422, 1428 (11th Cir. 1998) (citing *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). Plaintiffs cannot meet this standard because their allegations of chilling and self-censorship are untethered from HB233's plain language, and are thus objectively unreasonable. *See Christian Action League of Minn. v. Freeman*, 31 F.4th 1068, 1074 (8th Cir. 2022), *cert. denied sub nom. Christian Action League of MN v. Freeman*, 22-119, 2022 WL 6572165 (U.S. Oct. 11, 2022) ("We are convinced that . . . the Statute's definition of 'harassment' [does not] cover CAL's speech. As a result, nothing CAL wants to do is criminalized by the Statute. . . . Accordingly, CAL's complaint does not allege an intention to engage in a course of conduct . . . proscribed by a statute, or a credible threat of prosecution thereunder, and CAL lacks standing." (citations omitted)).

HB233 does not compel anyone to say anything. Plaintiffs argue that the Anti-Shielding Provisions "compel faculty to give voice to ideas with which they disagree." Motion at 22. In support, Plaintiffs cite Professor Berube's expert report. *Id.* But Professor Berube's opinion on this point is a pure legal conclusion based on

professor's "interest in academic freedom and free speech do not displace the University's interest inside the classroom").

his interpretation of the law, *e.g.,* ECF No. 166-12 at 5, 6, 15; *accord* ECF No. 166-13 at 48:6–13, 91:6–17, 92:13–22, and he has no idea whether any Florida professor or student has given voice to ideas with which they disagree, because he has not spoken to a single one, *id.* 34:5–10; *id.* 100:6–10, 132:22–25. Plaintiffs' testimony also refutes their own point, as they have not been compelled to engage in speech or express any viewpoint. *See* ECF No. 165 at 12–16.

HB233 does not mention, let alone restrict, discussion of gender identity or race, or liberal or progressive viewpoints, nor does HB233 eliminate the well-established legality of time, place, and manner restrictions. It is thus patently unreasonable, for example, for Professor Morse to stop assigning "readings in LGBTQ studies and queer theory" or stop advising her students against using "slurs" in the classroom when HB233 requires no such thing, ECF No. 166-62, or for Professor Fiorito to feel "concern" about teaching various models of labor relations, when HB233 is silent on the topic, ECF No. 166–60 at 56:2–57:15.

It is equally unreasonable for Plaintiffs to blame HB233 when they changed their behavior in large part in response to something else, and have never been charged with violating HB233 or been instructed to alter their speech or conduct due to HB233. *See, e.g.,* ECF No. 166-16 at 31:6–19, 33:6–25, 52:11–53:11, 57:25–60:4 (blaming the "climate" and "rhetoric" and "cloud" of legislation "coming out of Tallahassee"); *id.* 18:2–19:20 (changed instruction based on a parent complaint

unrelated to HB233); ECF No. 165 at 11–16 (Professor Plaintiffs have not been told to alter their speech or change their courses); ECF No. 166-15 at 53:21–57:8 (acknowledging HB233 does not require change in instruction and does not mention race, and blaming "the context of what the governor and the legislature have been doing in the last few years" and the "whole set of legislation"); ECF No. 166-17 at 41:10–43:12 (explaining that complaint allegations related to critical race theory are attributable to HB7); ECF No. 166-58 at 60:60–61:21 (expressing concern about the "post-tenure review bill" and "the way that the governor spoke about it;" agreeing that post-tenure review bill was "a subsequent enactment" and "not HB233"); ECF No. 166-62 (invoking concerns about how to comply with HB7).

To the extent Plaintiffs argue that HB233 prevents them from prohibiting disfavored speech in their classrooms, *see* Motion at 23 (noting Professor Goodman's removal of a prohibition against "Neo-Nazis," "white supremacists," and "hate speech" from her syllabus), that argument is misplaced. A public institutions' unlawful censorship or restriction of First Amendment-protected speech (no matter how unpopular) is not protected speech in the first place, and cannot form the basis of a First Amendment claim.[13] Plaintiffs cannot claim they have suffered a

[13] Professor Goodman also acknowledges that she—as opposed to the University—does not face any threat of enforcement from Defendants under the Anti-Shielding Provisions, noting in her deposition that "I'm glad you don't think I'm shielding anyone. But you're not *the student* that might *sue the university* for this." *Id.* (citing ECF No. 166-58) (emphases supplied). Professor Fiorito made a similar observation.

cognizable injury because HB233 prevents them from violating other individuals' First Amendment rights. *See, e.g., Brown v. Hartlage*, 456 U.S. 45, 55 (1982) (state may ban illegal agreements without "trenching on any right of association protected by the First Amendment" because the "fact that such agreement necessarily take the form of words does not confer upon it, or upon the underlying conduct, the constitutional immunities that the First Amendment extends to speech"); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 497–98 (1949) (First Amendment protection does not extend to speech or conduct that violates the law); *Doe v. Boland*, 698 F.3d 877, 884 (6th Cir. 2012) (publication of pornographic images caused harm which "remove[d] [Defendant's] actions from the protections of the First Amendment").

Finally, the Motion makes plain that the Student Plaintiffs have not been impacted. Plaintiffs half-heartedly cite to Plaintiff Adams' and non-party Solomon's disdain for and speculation about HB233, but both Adams and Solomon concede they have not been tangibly harmed by the law or observed their claimed concerns coming to fruition. ECF No. 165 at 9–10, 17–18; ECF No. 164–18. Plaintiff Simpson does not live in Florida and is not a college or university student, and likewise concedes that the concerns he allegedly has about HB233 have not occurred. ECF

ECF No. 166-60 at 57:5–15 (testifying that a "student" may "want to sue the university").

No. 165 at 10. The record contains no evidence that the Student Plaintiffs have been compelled to speak or suffered any consequence, or face any future possibility of consequence, under HB233.

V. Plaintiffs Cannot Support Their Characterization of the Survey Provisions, and No Plaintiff Completed the 2022 Survey.

Defendants have not required a single person to disclose their political beliefs or associations, and Plaintiffs present no evidence to the contrary. The voluntary surveys distributed in 2022 asked a limited number of questions about individual beliefs—one question about employees' own political identification, and one about students' perceptions of their professors' political identification.[14] No student or professor was required to answer these questions, and indeed, no Plaintiff answered them—or any other survey questions. Such was their discretionary right.

The "evidence" Plaintiffs cite in support of their counterfactual insistence that a voluntary, anonymous survey unconstitutionally delves into their privately-held beliefs is revealing for what it does not show. Plaintiffs' evidence does *not* show that any Plaintiff disclosed a privately-held belief or association, that anyone has faced

[14] Plaintiffs' expert Dr. Hurtado opined that if a survey is intended to monitor individuals, not collecting personal identifying information at the outset would be a "huge design flaw" in the survey, ECF No. 166-71 at 50:10–51:11, and that if she was designing a survey designed to inquire about individuals' political views, she would ask more than one question about their political views, *id.* at 103:12–23.

retribution for such non-disclosure, or that any action has been taken based on the survey results.

Plaintiffs first cite their expert Professor Berube, and non-party witness Professor Morse, in support of a proclamation bearing no relationship to reality or the record: according to Plaintiffs, the Survey Provisions impose undefined "risks" 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." Motion at 48. There is no record support for this politicized hypothesizing. The cited portion of Berube's report says no such thing, and Berube admitted he did not speak to a soul in Florida in formulating his opinions. ECF No. 166-12 at 34:5-10; *id.* 100:6-10, 132:22–25.

Plaintiffs also point to Professor Morse's declaration, which states Morse feels it necessary to "walk on eggshells . . . since any misstep may result in a viral video," (even though publication under the Recording Provisions is unlawful), "a lawsuit," (even though no cause of action exists against professors), "or negative survey results leading to funding cuts or adverse legislation action" (even though HB233 does not provide for these outcomes, nor does the record evidence show any likelihood of these future events occurring). Motion at 46. Aside from having nothing to do with the proposition it is cited to support, Morse's statements are

objectively unreasonable in light of HB233's plain language. Professor Morse's declaration also conspicuously fails to state that Morse completed the survey, or that she has faced any discipline, retaliation, or threat of the same. *See* ECF No. 166-62.

The evidence does not get any more compelling from there. Plaintiffs cite next to an FSU Institutional Review Board form that was never finalized, regarding a draft survey that was never disseminated, *see* Motion at 46 (citing ECF No. 75-1 at 203), and which constitutes unauthenticated hearsay. Individuals from the FSU Institute of Politics who were involved in drafting this form and in developing the early survey drafts testified that no one instructed them to develop survey questions from any particular viewpoint or to reach a certain result. *See* ECF No. 176-1 at 153:4–154–25; ECF No. 176-2 at 219:9–222:5 (rejecting concerns about indoctrination as the purpose of the survey; *id.* 240:10–242:14 (no instruction from Defendants to design survey intended to identify people who hold certain viewpoints or to reach certain results).

Plaintiffs next complain that Defendants sought to comply with Florida's Public Records Act, *see* Motion at 47, before making the indefensible claim that Plaintiffs have a "reasonable fear that their affiliations could be traced back to them and publicly disclosed[.]" *Id*. at 47–48. Plaintiffs fail to explain how this could occur when *no Plaintiff took the survey*, and the undisputed admissible evidence shows that the surveys were also anonymous. With no facts to support their claim, Plaintiffs

cite their expert in survey design, Dr. Hurtado, who like all of Plaintiffs' experts, did not speak to anyone in Florida in developing her opinions. Yet, Dr. Hurtado somehow is able to opine that (i) Plaintiffs' affiliations will be traced back to them despite their not taking the survey (and despite having no experience in data security), and that (ii) Defendants published the survey results—as the statute requires—in a manner "designed to facilitate retribution on the basis of ideology." *See id.* at 48 (citing ECF No. 166-71). To say these "expert opinions" lack qualifications, a factual basis, or methodology is an understatement.

Plaintiffs' evidence regarding the Survey Provisions concludes with a citation to an unauthenticated, hearsay video posted to a local news channel's website, *see* Motion at 51 n.20, and an equally unauthenticated, hearsay news article that no party or witness in this case authored, *id.* (citing ECF No. 166-75).

In sum, Plaintiffs' evidence with respect to the Survey Provisions does not entitle them to summary judgment; to the contrary, their evidence is largely improper for this Court's consideration on summary judgment, and is insufficient to even survive the summary judgment stage. The record evidence shows that Plaintiffs suffered no harm from the Survey Provisions, and face no likelihood of future harm.

VI. The Anti-Shielding Provisions are Not Enforceable Against Plaintiffs, and the Anti-Shielding Provisions are Not Unconstitutionally Vague.

Far from entitlement to summary judgment on Count IV, Plaintiffs lack standing to pursue it—and every other count—altogether. The Eleventh Circuit has

made clear that only when "an individual is *subject to the threatened enforcement of a law*" do they have standing to pursue a pre-enforcement challenge to a law on vagueness grounds. *Wollschlaeger v. Governor, Florida*, 848 F. 3d 1293, 1304 (11th Cir. 2017) (finding plaintiff doctors had standing when statute targeted speech and conduct by medical professionals, and violation of the statute could result in disciplinary action by the Board of Medicine). Here, Plaintiffs have not been threatened with enforcement of the Anti-Shielding Provisions, nor could they be. Plaintiffs therefore cannot sustain a vagueness challenge to the Anti-Shielding Provisions, and the Motion should be denied.

Plaintiffs' Motion argues the Anti-Shielding Provisions are "unconstitutionally vague and overbroad." Motion at 52. Plaintiffs pleaded a void for vagueness challenge, but not an overbreadth challenge. *See* ECF No. 101. To the extent Plaintiffs attempt to state an overbreadth challenge for the first time in their Motion, they are prohibited from doing so. *See Gilmours v. Gates, McDonald & Co.*, 382 F. 3d 1312, 1314–15 (11th Cir. 2004) (new claims cannot be raised for the first time at the summary judgment stage).[15]

[15] Nevertheless, "the overbreadth doctrine [is] strong medicine that should be employed sparingly and only as a last resort. Thus, the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep. The fact that there may be some conceivable impermissible applications is not enough to render a statute overbroad." *FF Cosmetics FL, Inc. v. City of Miami Beach*, 866 F.3d 1290, 1303–04 (11th Cir. 2017) (citations and marks omitted). "For an overbreadth challenge to succeed, the law in question must

Plaintiffs' argument that the Anti-Shielding Provisions are unconstitutionally vague also fails and because the provisions are not enforceable against Plaintiffs. The Anti-Shielding Provisions are clear on their face: they prevent Defendants and public colleges and universities from restricting constitutionally-protected speech on the grounds that someone finds the speech offensive, unwelcome, or disagreeable.

Plaintiffs make much of Defendants' refusal to offer legal opinions and speculation during their depositions. *See* Motion at 46–47. Over and over, Plaintiffs posed objectionable questions to Defendants' witnesses inquiring about whether the witness believed some hypothetical situation would constitute shielding, demanding the witness concoct an example of shielding on the spot or recite the requirements of the Family Educational Rights and Privacy Act ("FERPA"),[16] or whether some hypothetical would comply with HB7. *See, e.g.,* ECF No. 166-7 at 38:7–39:7; ECF No. 106-6 at 93:6–96:4, 101:3–107:13; ECF No. 166-5 at 82:6–85:17, 128:2–129:20, 141:15–148:4, 154:24–157:2. Defendants' counsel properly objected, as Plaintiffs' questions called for legal conclusions and speculation. *See, e.g., Dunn v.*

frequently intrude into areas of protective speech." *United States v. Matusiewicz*, 84 F. Supp. 3d 363, 367 (D. Del. 2015), *aff'd sub nom. United States v. Gonzalez*, 905 F.3d 165 (3d Cir. 2018). Plaintiffs have not demonstrated *any* unconstitutional applications of the Anti-Shielding Provisions, and certainly have not demonstrated that "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010) (quoting *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449, n.6 (2008)).

[16] 20 U.S.C. § 1232g; 34 CFR Part 99.

Stewart, 791 F. App'x 879, 882 (11th Cir. 2019) ("[S]peculative opinion testimony by lay witnesses—i.e., testimony not based upon the witness's perception—is generally considered inadmissible."); *United States v. Henderson*, 409 F.3d 1293, 1300 (11th Cir. 2005) ("[T]he ability to answer hypothetical questions is '[t]he essential difference' between expert and lay witnesses."); *Dahlgren v. Muldrow*, 106CV00065MPAK, 2008 WL 186641, at *5 (N.D. Fla. Jan. 18, 2008) ("[A]ll witnesses generally are prohibited from testifying as to questions of law regarding the interpretation of a statute, the meaning of terms in a statute, or the legality of conduct. The determination of which law applies and what the law means is for the Court to decide. The determination of compliance with a law is for the jury to decide."); *cf.* Fed. R. Evidence 602 ("A witness may testify to a matter only if . . . the witness has personal knowledge of the matter.").

Parties may inquire into another party's "legal *contentions* . . . as applied to the facts of *this case*," *Ellis v. Pilot Travel Ctrs., LLC*, Case No. 4:19cv219-MW/CAS, 2019 WL 13198255, *2 (N.D. Fla. Sept. 26, 2019) (emphases supplied), but it is improper to ask fact witnesses to interpret a statute and then speculate about how that statute might apply to some future set of facts and unknown parties, none of which are before the Court. "A witness . . . may not testify to the legal implications of conduct; the court must be the [factfinder's] only source of law." *Montgomery v. Auetna Cas. & Sur. Co.*, 898 F. 2d 1537, 1541 (11th Cir. 1990).

Defendants' objections are therefore well-founded, and this Court should disregard the objected-to testimony Plaintiffs offer as a "factual" basis for their vagueness claim. It was entirely reasonable for Defendants' witnesses to express reluctance when asked to gratuitously speculate about the legal ramifications of skeletal hypotheticals. If the Anti-Shielding Provisions had been applied to Plaintiffs, or if they faced a credible threat of enforcement, then Plaintiffs would not be forced to resort to such hypotheticals to make their case.

The Anti-Shielding Provisions are clear, and in the course of litigation, it is the province of this Court—not witnesses—to interpret HB233. Defendants' position on the legal question of the Anti-Shielding Provisions' meaning has remained consistent since this suit's inception.

Finally, as explained in Part IV above and in Defendants' Motion for Summary Judgment, ECF No. 165, because the Anti-Shielding Provisions are not enforceable against Plaintiffs, Plaintiffs' subjective insistence that they do not fully grasp how the Anti-Shielding Provisions work is irrelevant. "[P]ersons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (citation omitted). Plaintiffs face no possible, and certainly no "credible," threat of enforcement under the Anti-Shielding Provisions. *Id.*

Plaintiffs are not entitled to summary judgment on a claim they have no right to pursue.

VII. Plaintiffs Lack Standing.

Plaintiffs are not entitled to summary judgment for the fundamental, jurisdictional reason that they lack standing. Plaintiffs' Motion only confirms what Defendants demonstrated in their Motion for Summary Judgment, ECF No. 165: Plaintiffs have not experienced any concrete injury traceable to Defendants—or even traceable to the language of HB233—that could be redressed in this case; nor do they face any imminent, or even plausible, risk of the same. *See id.* Plaintiffs' Motion should be denied.

Respectfully submitted on November 4, 2022.

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(F) AND ECF NO. 171

The undersigned certifies this Response contains approximately 10,977 words.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on November 4, 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
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