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' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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TABLE OF ABBREVIATIONS AND DEFINED TERMS

BOE	Board of Education, Defendant (together with BOG, "Defendants")
BOG	Board of Governors, Defendant (together with BOE, the "Boards" or "Defendants")
CDI	Civil Discourse Initiative
CFEA	Campus Free Expression Act
Faculty Plaintiffs	William Link, Barry Edwards, Jack Fiorito, Robin Goodman, David Price
FCS	Florida College System
FIRE	Foundation for Individual Rights and Expression (previously Foundation for Individual Rights in Education)
MFOL	March for Our Lives Action Fund, Plaintiff
MSJ	Motion for Summary Judgment
SOFE	Statement of Free Expression
SUS	State University System
UCF	University of Central Florida
UF	University of Florida
UFF	United Faculty of Florida, Plaintiff

INTRODUCTION

Defendants misstate the applicable legal standards and distort the record, basing their motion—which focuses almost entirely on standing—on disputed and often erroneous assertions. Plaintiffs easily satisfy Article III under directly relevant—and recent—precedent. On the merits, Defendants' illogical argument is that HB233 simultaneously codifies the First Amendment and does not concern speech at all. Both the law and overwhelming evidence refute this. Defendants fail to establish they are entitled to summary judgment on any of Plaintiffs' claims. The Court should deny Defendants' motion.

COUNTER-STATEMENT OF FACTS

Plaintiffs incorporate the statement of facts in their MSJ (ECF No. 167) by reference, Pls.' MSJ 1-23, and respond to Defendants' numbered paragraphs below.

1. Undisputed.

2. Undisputed.

3. Disputed. Defendants rely on cherry-picked (and mischaracterized) statements, ignoring other contemporaneous statements by Representative Roach. While HB233 was pending, Roach repeatedly stated it was intended to combat specific viewpoints, including of "Marxist professors and students." Pls.' MSJ 31. Roach did not state HB233's purpose was to prevent censorship of constitutionally-protected speech, ECF No. 165 ("Defs.' MSJ"), 7, but to address concerns of

conservative students' self-censorship. ECF No. 164-34, 6:5-14; *see also* Ex. 1, 93 (HB233 responds to assertions that "students with more conservative-leaning views feel like the overwhelming majority of academia are left or far-left"); Ex. 1, 69 (admitting no actual evidence of such); *id*. at 163, 201, 206-07; *see also* Pls.' MSJ 10-12, 29-32.[1] When HB233 passed the House, Roach thanked his colleagues "for passing this bill to … stem the tide of Marxist indoctrination on university campuses." Ex. 1, 92.

4. Disputed. These cherry-picked (and mischaracterized) statements do not evidence HB233's purpose—or even Senator Rodrigues's view of it. While HB233 was pending, Rodrigues stated it combated "cancel culture." Ex. 1, 94. Discussions *in the Senate* show Rodrigues understood HB233 was concerned with unsubstantiated concerns conservatives were self-censoring, *id*. at 68; ECF No. 164-5, 3:25-4:8, 4:18-20, 7:2-5, 7:17-22, 8:6-10, 9:23-10:9. Rodrigues attempted to pass similar legislation before but believed HB233 would be better received because of the state's right-ward shift. Ex. 1, 9-10, 33; Pls.' MSJ 10-12, 29-32. Rodrigues rejected an amendment to require that the Survey be anonymous, Ex. 2, 8:1-18, and language to retain faculty's ability to "establish[] classroom policies or practices to

[1] All exhibits cited are attached to Plaintiffs' Notice of Filing Exhibits, ECF No. 178, which identifies each exhibit and sub-exhibit. Pincites refer to ECF pagination for all exhibits except transcripts, which use transcript page-and-line citations, and Plaintiffs' MSJ, which uses internal pagination.

maintain order for the purpose of achieving pedagogical aims." ECF No. 166-44, 1, 6; ECF No. 166-43, 7; ECF No. 166-45, 21. Rodrigues admitted HB233's enforcement would be left to BOG's and BOE's political appointees. Ex. 1, 87-88. Rodrigues is now SUS's Chancellor-elect. Ex. 1, 202.

5. The passage of CFEA is not in dispute,[2] but Defendants ignore key differences between it and HB233. CFEA explicitly protected the right to restrict speech that "materially and substantially disrupt[s] the functioning of the public institution of higher education or infringe upon the rights of other individuals or organizations to engage in expressive activities." S.B. 8 § 6 (creating Fla. Stat. § 1004.097(3)(b)). FIRE—which testified in favor of CFEA but ultimately opposed HB233, *see* Pls.' MSJ 10-11—implored legislators to include similar language in HB233. ECF No. 166-44, 1, 6; ECF No. 166-43, 6-7; ECF No. 166-45, 2. They did not. CFEA's sponsors worked with BOG and BOE to revise it to address their

[2] CFEA prohibited public post-secondary institutions from creating "free-speech zone[s] or otherwise creat[ing] policies restricting expressive activities to a particular area of campus." ECF No. 164-6 at 8 (S.B. 8 § 6 (creating Fla. Stat. § 1004.097(3)(d))). Its purpose was to promote free expression, viewpoint diversity, and civil discourse. *See, e.g.*, Civil Justice & Claims Subcomm. Hr'g on H.B. 909 at 01:16:28-42, 01:34:17-01:36:20 (Jan. 30, 2018), https://www.myfloridahouse.gov/VideoPlayer.aspx?eventID=2715; S. Educ. Comm. Hr'g on S.B. 1234 ("S.B. 1234 Hearing") at 00:21:18, 00:24:05-24:15, 00:43:30-44:09 (Feb. 6, 2018) https://www.flsenate.gov/media/videoplayer?EventID=2443575804_2018021040&Redirect=true; *see also* Ex. 4 & Ex. 5.

concerns;[3] neither BOG nor BOE publicly supported—or were even consulted—about HB233. Ex. 2, 11:15-14:7; Ex. 3, 50:9-51:11, 72:24-73:19. There is *no* evidence CFEA was insufficient to protect and promote speech rights.

6. BOG's development of CDI and SOFE is undisputed; there is *no* evidence either was insufficient to protect and promote speech rights. *See* Pls.' MSJ 31, 36; ECF No. 166-33, 2; Ex. 3, 58:18-22, 64:15-66:15, 100:14-101:1.[4] Both CDI and SOFE were developed in close consultation with experts from across the political spectrum and university leadership. Ex. 3, 62:16-63:21; Pls.' MSJ 8. This starkly contrasts the partisan and cloistered origination and development of HB233 and its surveys. Ex. 3, 156:17-157:4; 163:2-166:7.

7. Plaintiffs' nonparticipation in the survey is undisputed but irrelevant. It chills and monitors Plaintiffs' speech regardless of participation.

8. Disputed. Defendants admitted they collected IP addresses, traceable to respondents. *See* Pls.' MSJ 7-8. Unrebutted evidence establishes an objectively reasonable fear that failure to take the survey could result in retaliation. Pls.' MSJ 21, 40-44; *supra* at ¶¶ 3-4. Given self-selection bias, Ex. 10, 37:4-9, respondents must choose between sitting out the survey and suffering the consequences of skewed results, or reporting their political views to the state. Ex. 11, 36-37; ECF No.

[3] *E.g.*, S.B. 1234 Hearing at 00:52:20-55:35.

[4] BOE also issued a similar SOFE. Ex. 6.

75-2 ¶ 8.

9. Disputed. The Legislature rejected an amendment to require that surveys be voluntary or anonymous. Pls.' MSJ 5; *see also* Ex. 3, 145:4-6; Ex. 12, 61:7-62:2. The 2022 surveys were not anonymous. *See* Pls.' MSJ 5; *see supra* at ¶ 8. Defendants' assertion that the 2022 surveys are "voluntary" ignores the surrounding climate, including the evidence herein and in Plaintiffs' MSJ. Pls.' MSJ 9-15; *see infra* at ¶ 11. Indeed, it is undisputed that the Governor's office drafted legislation to tie funding to survey participation. Ex. 13, 11-12; ECF No. 166-55, 3, 4, 12, 38-39; *see also* Ex. 14, 196:4-197:17.

10. Undisputed.

11. Disputed. Statements by HB233's proponents show HB233 was intended to justify future retaliatory action like budget cuts. Pls.' MSJ 43-44; Ex. 15, 34:15-21, 39:5-13; Ex. 10, 7:25-8:13; *supra* at ¶¶ 8-9. At the bill's signing, the Governor stated institutions deemed too liberal should not receive taxpayer funding. Ex. 1, 9; *see also supra* at ¶ 10. The Governor and Defendants have retaliated financially against viewpoints they disfavor. *See* Pls.' MSJ 13-15. Based on fear of retaliation, many faculty—including Plaintiffs and UFF members—have altered their speech. Pls.' MSJ 15-21; Ex. 19 ¶¶ 15-19, 25; Ex. 18 ¶¶ 16, 18-23, 26, 29; Ex. 21 ¶ 11; Ex. 20 ¶¶ 9-12 Ex. 16 ¶¶ 7, 13-22, 28-29, 36-38; Ex. 17 ¶¶ 5-9, 18-19, 21.

12. Disputed. HB233 has chilled Julie Adams' willingness to join campus

organizations and take certain classes and drove them to drop their double major.[5] Ex. 21 ¶¶ 7, 8, 15. Professor Link retired from UF after 41 years of teaching, in part because of HB233. Ex. 22, 90:2-14; Ex. 16 ¶¶ 6-7. He is not alone. *See* Pls.' MSJ 18. At least some institutions have experienced a downturn in faculty applicants since HB233's enactment. *Id*.

13. Disputed. Faculty who resigned because of HB233 are no longer part of UFF's active membership.[6] Individuals who quit or decline to join do not typically inform organizations of why. *See* Ex. 23, 7; Ex. 24, 25-26. However, MFOL has received reports that students have declined to join MFOL as a result of HB233 and the environment it creates. Ex. 25, 40:9-20.

14. Blake Simpson:

a. Undisputed.

b. Disputed. Simpson testified HB233 threatened to derail classroom discussion to arguments, e.g., "about slavery being a good thing," because faculty may no longer manage their classroom as in the past. Ex. 29, 11:15-12:11. He feared the Recording Provision would chill faculty's speech, interfering with class discussion. *Id*. at 13:1-16. Unrefuted evidence establishes HB233 has this effect. Pls.' MSJ 15-21, 32-34; Ex. 26, 63-71; Ex. 27, 30:12-24, 110:6-20; 127:19-130:11;

[5] Adams is agender and uses they/them pronouns.

[6] Link is now a member of UFF's retired chapter. Ex. 16 ¶ 35.

Ex. 11, 10-11, 47-49, 76-77; Ex. 28, 79:19-83:4; *supra* at ¶ 11.

c. Simpson recorded Zoom classes with the permission of his professors. Ex. 29, 13:1-14:11, 15:12-22.

16. Julie Adams:[7]

a. Disputed. Initially, Adams' brother informed them of the suit. Ex. 30, 17:15-21. Adams reached out to counsel to learn more about the case and HB233 before deciding to become a plaintiff. *See id*. at 17:1-9. Adams repeatedly testified to concrete ways HB233 has impacted them since enactment. *See, e.g.*, *id.* at 20:15-20, 22:21-23:4, 29:21-25; Ex. 21 ¶¶ 7-11; *infra* at ¶¶ 16b-d.

b. Disputed. Adams testified the Anti-Shielding Provisions impede their professors' ability to manage their courses and embolden students to hijack discussions. Ex. 30, 27:11-13, 27:23-28:2. HB233 has chilled Adam's willingness to join on-campus organizations and caused them to drop their double major. *Id.* at 34:1-5; Ex. 21 ¶¶ 8, 15, 16, 18. The Recording Provision has made them "less likely to participate and speak in class," worried other students may be secretly recording. *Id*. ¶ 11.

c. Disputed. HB233 has the effects Adams feared, including by disrupting and altering the learning environment. *See e.g.*, Ex. 16 ¶¶ 7, 13-22, 28-29; Ex. 31

[7] Defendants' brief omits paragraph 15.

¶¶ 12-18; Pls.' MSJ 15-21.

d. Disputed. Adams feared HB233 would force professors "to give class time" to fringe, racist, and unscientific ideas at the expense of legitimate learning objectives, impeding Adams's education. Ex. 30, 24:2-5; Ex. 21 ¶¶ 9, 10. HB233 has had that effect. *See, e.g.*, Ex. 7, 65:7-20; Ex. 18 ¶ 10; Ex. 31 ¶¶ 13-14.

17. William A. Link:

a. Professor Link retired from UF, in substantial part because of HB233. *See supra* at ¶¶ 12-13; Ex. 16 ¶¶ 6-7. He remains a member of several Ph.D. committees for UF doctoral candidates, and intends to continue to teach on Florida campuses as a visiting lecturer, if HB233 does not complicate that. *Id.* at ¶¶ 36-38.

b. Link teaches the history of the American South, including the impact of slavery. *See* Ex. 16 ¶¶ 7, 12-28. His work was targeted by HB233, such that continuing to teach as before became untenable. Ex. 22, 51:3-20, 90:2-14; Ex. 32, 7, 10-11; Ex. 16 ¶ 7. Although Link tried not to be impacted, his speech was chilled by HB233; he stopped using terms like "institutional racism" or "critical race theory," or even "talk[ing] about institutionalized racism"—although these are concepts critical to his teaching. Ex. 15, 38:16-39:1, 50:1-11, 50:17-51:20; 57:9-24; Ex. 16 ¶¶ 7, 12-28.

c. Disputed. Link believes HB233 is designed to protect conservative viewpoints and target liberal viewpoints. Ex. 22, 56:18-57:8, 67:4-18; Ex. 16 ¶ 7.

The survey's purpose is to determine "if a campus is, supposedly, either liberal or conservative in its point of view" based on the preconceived notion that campuses are "excessively liberal," *id.* at 67:21-25; its only utility is to collect information about political leanings at schools—there would be no reason to do this unless there was an intention to act, and any action "would be toxic to the campus or university culture." *Id.* at 69:8-18; *see also id*. at 70:5-9 (testifying it is inconceivable there would not be retributive action "if it turns out [for example] that the philosophy department is 90 percent liberal").

d. Rather than change his syllabi or significantly alter his courses, Link retired. *See supra* at ¶ 17a; Pls.' MSJ 18; *infra* at ¶ 17b.

e. Undisputed.

f. Link has a reasonable basis to believe that HB233 will be used to target faculty and departments deemed to be "too liberal." *See supra* at ¶ 17c. The chilling effect of HB233, with which Link is deeply concerned, is already occurring. *E.g.*, Pls.' MSJ 15-21; Ex. 22, 56:18-58:18.

g. For many years, Link neither recorded his in-person classes, nor allowed recording without permission and a reasonable purpose. Ex. 22, 43:20-44:2. When he began teaching on Zoom, he sometimes recorded his lectures for his students' educational benefit because it did not occur to him it might be misused. *Id.* at 44:23-45:6. He *stopped* after HB233's enactment because of fear of misuse under

the new provisions. *Id.* at 43:17-45:6, 82:25-83:14, 84:3-14. HB233 does not require students to inform faculty that they are recording or that they are using the recording (whether "properly" or "improperly"). Fla. Stat. § 1004.097(3)(g). The *threat* alone chills Link's speech. *See* Ex. 22, 44:11-45:10

18. Jack Fiorito:

a. Professor Fiorito's scholarship and teaching focuses on labor and industrial relations, and include discussing Marxism, among other viewpoints disfavored by the Legislature and targeted by HB233. Ex. 9, 55:18-57:12; Ex. 20 ¶ 8; Ex. 1, 8, 92-95, 201. Fiorito is aware of the "words of [HB233's] supporters" evidencing intent to target topics he regularly teaches. Ex. 9, 94:25-95:3; 89:8-90:2. As a result, Fiorito has substantially altered his teaching, and is "more careful" with his classroom speech. *See* Pls.' MSJ 17 (quoting Ex. 9, 63:2-6). As he has engaged in protective self-censorship, he has not yet faced retribution under HB233.

b. Disputed. The Anti-Shielding Provisions force Fiorito to alter his classroom speech, including by self-censoring some speech and being forced to engage in speech he otherwise would not. Pls.' MSJ 17, 34; Ex. 20 ¶ 8-10. Fiorito did not state *HB233* gives him the right to talk about controversial topics in the classroom. *Compare* Defs.' MSJ 13 *with* Ex. 9 64:15-19; *cf.* Ex. 20 ¶ 8-9.

c. Disputed. Fiorito testified the Recording Provision has chilled some of his speech and compelled other speech. Ex. 9, 64:3-10. While Fiorito is not aware

of the use of a recording against him to date, the chilling effect is present nonetheless. *Id*. at 61:16-62:4; Ex. 20 ¶¶ 9-12. The Recording Provision makes filing a complaint and misrepresenting his statements with selective clips easier, Ex. 9, 61:16-62:4, 65:4-7, and encourages students to police his speech at the expense of the learning environment.

d. During remote learning in the pandemic, Fiorito sometimes recorded his lectures for his students' educational benefit and personal use. *Id.* at 66:10-24. HB233's threat that students will record without Fiorito's knowledge, and for the purpose of policing and reporting on his speech, contributes to its chilling effect. *Id.* at 60:3-10, 18-24; Ex. 20 ¶¶ 9-12.

e. Fiorito has administered questionnaires to students in his Management Research Methods, Negotiations, and Labor and Industrial Relations courses. Ex. 9, 69:8-70:10; 80:23-81:14; *id.* at 84:1-15. The questionnaires are available in his public syllabi and are tailored to learn about students' experiences relating to course material, and interest in relevant topics. *Id*. at 69:22-70:20, 71:20-72:17, 73:13-18, 74:13-75:22, 81:2-5; 82:2-25; Ex. 33, 10; Ex. 34, 1, 10-11. If students submit blank questionnaires, he does not require they fill it out. Ex. 9, 73:22-74:1. Fiorito uses the information to help teach about public perceptions of unions, management, and other actors central to his courses. *See* Ex. 9, 74:4-75:22. The student questionnaires are not analogous to the broad and indiscriminate surveys mandated by HB233 of every

faculty, staff, and student in public post-secondary institutions.

f. Fiorito has conducted narrow, targeted research asking survey participants for political beliefs to determine whether there is a connection "between political leaning and attitudes towards unions[.]" *Id.* at 79:21-24. Fiorito conducted this research in connection with his bonafide academic work and engaged professional firms specializing in survey research to administer the surveys. *Compare id*. at 77:6-78:1, *with* Pls.' MSJ 6-7. His survey was administered via a third party and respondents were "a random cross section of employed persons in the United States." Ex. 9, 77:17-19. He obviously has no power to retaliate against the respondents.

19. David Price:

a. In response to a question in his May deposition, asking whether he had "changed his instruction … because of any survey results," Professor Price answered, "not yet," noting there were no survey results then. Ex. 36, 96:15-19. Price testified he is concerned about his ability to continue teaching Critical Race Theory, fearing students may report his institution has a "liberal bias" in the survey. *Id*. at 92:1-5. The "broad … language" of the Anti-Shielding Provisions has made him change his instruction. *Id.* at 96:1-9; Pls.' MSJ 15-16.

b. Defendants' assertion that Price's "concerns related to the Anti-Shielding Provisions have not occurred," Defs.' MSJ 14, is incorrect. *See infra* at

¶ 19a; Ex. 36, 96:1-9, 76:12-18, 71:12-24; Ex. 17 ¶¶ 5-9. It is irrelevant that he has not been retaliated against for the speech he has avoided because of HB233—that is how "chill" works. Ex. 17 ¶ 8.

c. Defendants' contention that Price has not changed the way he teaches as a result of the Recording Provision contradicts his deposition testimony: Price was explicit that he *has changed his teaching*, abandoning his prior format of lecture *and* discussion. Ex. 36, 82:5-7, 80:24-81:20; Ex. 17 ¶¶ 8, 18.

20. Robin Goodman:

a. Professor Goodman testified that because of HB233 she felt compelled to remove from her syllabus "a prohibition against neo-Nazi and white supremacist[] and hate speech." Ex. 7, 65:7-20; Ex. 18 ¶ 16. The Recording Provision and Survey Provisions subject Goodman to surveillance and compel her to speak in ways she otherwise would not, and chill speech she wants to engage in. *Id*. at 43:16-44:14. Ex. 18 ¶¶ 18-20, 23, 29; Pls.' MSJ 16. Goodman previously removed two films from her classes because her students found them "disturbing." Ex. 18 ¶¶ 8-9. If she has to re-introduce those films—compelling her speech—it will hurt her ability to teach effectively. *Id*. ¶ 10. Defendants' assertions that Goodman "agrees HB233 does not require her to say anything" or "require her to present a syllabus that balances various viewpoints," Defs.' MSJ 15, are based upon testimony solicited by objected-to questions calling for legal conclusions. *See* Ex. 7, 44:2-14, 52:11-53:3.

b. Goodman altered her syllabus and HB233 has altered her classroom speech as noted *supra* at ¶ 20a. Defendants' claim that Goodman has not been "threatened with consequences" is similarly misleading. Defs.' MSJ 15. She testified that, based on the law, she remains afraid she could be. Ex. 7, 91:6-14.

c. Goodman is not aware of a specific instance in which she has been recorded pursuant to HB233. But HB233 allows students to record in *secret*, contributing significantly to its chilling effect. *Id*. at 35:14-20, 44:7-14.

d. Prior to HB233, Goodman instructed her students that they should not disrupt class with speech likely to harm the learning environment. *See supra* at ¶ 20a. This included speech such as "call[ing] [Goodman] a bitch," Ex. 7, 17:25-18:1; "you [Goodman, a Jewish woman] should go to the ovens," *id*. at 67:18-20; "Jews are replacing us," *id.* at 66:22-25; or "Hitler was right." *Id.* at 68:6-8. Such speech undermines Goodman's ability to teach because it is threatening to Goodman and other students and disruptive of learning objectives. Ex. 18 ¶ 17. Similarly, Goodman did not permit her students to make factually baseless statements in her classroom—for example, that "[t]he Democratic Party is running a child sex slavery ring out of pizza parlors." Ex. 7, 67:14-17, 28:18-29:8, 30:1-5, 30:17-31:7. Defendants describe this classroom governance as "prohibit[ing] others from expressing certain viewpoints in [the] classroom," Defs.' MSJ 15, implicitly conceding that HB233 requires faculty to allow such disruptive speech, even if it interferes with their

pedological aims and ability to teach.

e. Defendants' "factual" assertions here are premised upon Goodman's response to Defendants' improper, objected-to questions asking for legal analyses. Ex. 7, 42:4-10, 62:10-16. Goodman does *not* believe "the intention of HB233 was to prevent students from shouting down someone who was expressing" favored viewpoints. Defs.' MSJ 15. She testified HB233 prevents *her* and "the law" from "stopping students from expressing ideas that were uncomfortable, unwelcome, disagreeable or offensive," Ex. 7, 42:12-17, and that it "restrict[s] the [F]irst [A]mendment." *Id*. at 43:2-8. Goodman's testimony makes clear her belief that HB233 suppresses liberal viewpoints. *See, e.g.*, *id*. at 25:4-18, 56:16-24; Ex. 18 ¶¶ 12-14. Moreover, Goodman noted that HB233 on its face protects some speech over others: it "allow[s] students to sue … for shielding them from things that may be uncomfortable." Ex. 7, 62:10-20.

21. Barry Edwards:

a. Defendants mischaracterize how and why Professor Edwards became involved in this litigation, ignoring his testimony that he did so "to do some academic service and to stand up for and work for what [he] thought was right" despite some "*personal cost [to] him*." Ex. 37, 32:13-18 (emphasis added).

b. Funding cuts are a continual source of worry for universities and existed before HB233. But the threat that funding may be cut because of a campus's political

viewpoint distribution is deeply offensive to the First Amendment, and directly linked to HB233's enactment. *See supra* at ¶ 10; Pls.' MSJ 39, 43-44.

c. Edwards testified no one from BOG specifically has "knocked on [his] door" and told him he must express a specific viewpoint. Ex. 37, 44:8-18. The nature of HB233's chilling effect is that such instructions are not necessary. As Edwards explained, HB233 has compelled him "to modify" course content in ways he is uncomfortable with. Ex. 37, 44:18-21, 45:2-65:17. As a result, he must "share viewpoints in … an artificial manner to try to appear …balanced, or playing both sides of the fence, on issues rather than like curating the material to have a more focused viewpoint or what [he] would consider a more objective viewpoint." *Id*. at 44:20-45:1.

d. That no one has "directly and explicitly threatened" Edwards is irrelevant. *Id.* at 64:22-25. HB233 carries a "threat looming over" him and his department regarding "the content of [their] classes and what [they] teach." *Id*. at 65:1-3. He has censored himself as a result, removing certain viewpoints from his teaching, and engaging in classroom speech he would not otherwise engage in. Pls.' MSJ 16-17; Ex. 19 ¶¶ 8-19.

e. Prior to HB233, Edwards allowed course recording under certain circumstances. *Id.* ¶ 21; Ex. 37, 94:5-8; 100:9-12. When Edwards "knows that there's a video of the class" he "can tailor [his] presentation accordingly." Ex. 37,

94:8-14. HB233 does not require students to notify him, implicit in the Recording Provision is the message students should be "spying" on their faculty "and if they find something[] that smells like indoctrination to somebody, we'll blow the whistle and take them to court." *Id.* at 94:15-22.

f. Undisputed. But Edwards also explained that what is said during class should remain "within the walls of the classroom … where students are free to ask questions, to explore ideas," affording students "a limited amount of privacy," a "special place where we can explore ideas and learn together." *Id*. at 98:1-7.

22. **United Faculty of Florida:**

a. UFF is not currently aware of any members who have been identified or retaliated against based on the survey; however, the identification of their members is possible due to how Defendants conducted the survey, and UFF would not necessarily know if a member was identified or retaliated against. Pls.' MSJ 7-8; Ex. 8, 102:19-25. Moreover, Defendants' suggestion that UFF's members are not injured merely because they did not take the survey is itself a *kind* of retaliation: it puts them in the position of choosing between, on the one hand, disclosing their political views to the State or, on the other, not having standing (in Defendants' view).

b. UFF testified that "students [have been] sitting in the front of the room with their phone up, recording the faculty member and asking them aggressive

questions." Ex. 12, 137:20-138:5. UFF declined to identify by name faculty who made confidential complaints to UFF, as their union, asserting First Amendment privilege. *Id.* at 139:1-22. UFF's advice to its members to abstain from the survey was also a proper exercise of its First Amendment rights to advise its members. Defendants' assertion that the survey "was voluntary and did not collect respondent's names," is misleading, as discussed *supra* at ¶ 8.

c. Undisputed.

d. Undisputed.

e. Disputed. The UF Chapter administered a "faculty climate survey" that pertained, broadly, to diversity, equity, and inclusion, but UFF, the Plaintiff here, was uninvolved. Ex. 12, 23:3-24:20. A union's survey of its members regarding working conditions is not analogous to the government-mandated statewide survey required by HB233. *See id.* at 194:19-195:1.

23. March for Our Lives:

a. Undisputed.

b. Although MFOL believed the survey was anonymous when it was deposed, *see* Ex. 25, 34:2-4, that was before learning Defendants affirmatively chose to collect IP addresses, making it possible to identify respondents. *See supra* at ¶¶ 12-13. The Anti-Shielding Provisions also restrict and compel the speech of MFOL's faculty advisors, Ex. 25, 91:6-18, 92:5-11; HB233 alters the campus

environment in which MFOL's members learn and live, *id*. at 46:12-47:3; and the Recording Provision permits students to record class discussions in which MFOL's members participate, and its faculty advisors teach, chilling their speech and compromising their safety. *Id*. at 88:16-22, 89:9-17, 91:6-18, 92:5-11; *see also infra* at 30-31.

c. MFOL is unaware of members punished by Defendants or the Legislature for expressing their views on gun violence policy. *Id*. at 55:18-56:24. Nor is it presently aware of members who have been forced to disclose associations or been unable to host mission-oriented events. However, MFOL is aware of a UCF member who was discouraged by the administration from counter-protesting a neo-Nazi rally on campus. *Id*. at 55:1-10. Moreover, HB233 has a chilling effect on its members, causing them to self-censor, and burdens MFOL's, and its members', ability to associate and host mission-oriented events. *E.g.*, *id*. at 38:7-39:7, 40:9-20, 46:16-47:3, 53:22-54:2, 54:16-25, 57:24-58:1, 62:9-25, 63:7-15, 73:13-22, 89:12-17.

d. MFOL's corporate representative spoke to four current or former UCF students *in preparation for the deposition*. *Id*. at 13:10-15:14. Obviously, Mr. Gokhale has far greater familiarity with MFOL's operations and has spoken to far more than four MFOL members during his time with the organization. *See id.* at 10:7-24, 38:20-40:13; ECF No. 137-2 ¶ 2.

e. Defendants' assertion that MFOL's UCF chapter was not started until after HB233's passage is false. UCF long had an unofficial chapter which then became officially recognized by UCF in Fall 2021. Ex. 38, 18:1-9.

f. MFOL has identified resources it has had to divert from other priorities because of HB233. *See infra* at 30-31.

g. Students who decline to join MFOL or leave typically do not say why they did so. Ex. 23, 7. Nevertheless, MFOL is aware students have declined to join MFOL because of HB233 and the environment it creates. Ex. 25, 40:9-20.

h. MFOL is unaware of HB233's funding reductions to a university, but HB233 has affected its ability to recruit members on Florida campuses. *See supra* at ¶ 23c, g. As a result of HB233, "people who would typically join [MFOL] … do not feel safe to do so because they would be identified with [MFOL]." Ex. 25, 38:20-39:7; *see also supra* at ¶ 23c, g.

i. The "impact on the environment" about which MFOL testified concerned HB233's chilling effect on its members' speech. *Id.* at 88:18-22; 89:12-17. That environment "dissuades members from joining" MFOL because of fears of retaliation. *See, e.g., id.* at 38:8-14. HB233 has emboldened students to interfere with recruitment efforts: at UCF, a group physically obstructed MFOL members who

were "tabling" to recruit members. *Id.* at 41:15-23, 72:14-16.[8] MFOL's "Florida chapters for the first time" must now screen members and have requested funding for security for their meetings. *Id*. at 63:7-15. MFOL is concerned about the *safety* of its members, which the Recording Provision imperils, particularly in light of past use of recordings against its members. *Id*. at 89:9-17, 98:2-13. An MFOL member at UCF was also discouraged by the administration from counter-protesting a neo-Nazi rally on campus. *Id.* at 55:1-10. And MFOL is concerned about its members being subject to hostile learning environments due to the Anti-Shielding Provisions. *Id*. at 43:5-21. This is no question of mere "feelings."

LEGAL STANDARD

In considering a summary judgment motion, the Court "view[s] the evidence and all factual inferences therefrom in the light most favorable to the non-movant, and resolv[es] all reasonable doubts about the facts in favor of the non-moving party." *Am. Bankers Ins. Grp. v. United States*, 408 F.3d 1328, 1331 (11th Cir. 2005). Summary judgment is appropriate only where "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).

[8] Prior to HB233, CFEA governed this type of public speech and allowed schools to intervene in such a case, *see supra* at ¶ 8. Because of HB233 that, that authority is no longer clear. *See* Fla. Stat. § 1004.097(2)(f), (3)(f).

ARGUMENT

I. PLAINTIFFS HAVE STANDING TO CHALLENGE HB233.

Article III requires plaintiffs to show (1) an injury-in-fact (2) fairly traceable to the defendant (3) that is likely to be redressed by a favorable decision. *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1119 (11th Cir. 2022). "Article III standing is not a 'You must be this tall to ride' measuring stick.'" *Salcedo v. Hanna*, 936 F.3d 1162, 1172 (11th Cir. 2019). "[T]he focus is on the qualitative nature of the injury, regardless of how small" it may be. *Id*. Only one plaintiff needs standing for a case to proceed. *Rumsfeld v. F. for Acad. & Inst. Rts., Inc.*, 547 U.S. 47, 52 n.2 (2006).

When First Amendment rights are involved, the Eleventh Circuit has "long emphasized that the injury requirement is most loosely applied—particularly in terms of how directly the injury must result from the challenged governmental action …. because of the fear that free speech will be chilled even before" the law is enforced. *Speech First*, 32 F. 4th at 1119 (citations omitted) (cleaned up). Writing for a recent unanimous panel, Judge Luck described a defendant's decision *not* to challenge a plaintiff's assertions of self-censorship as an insufficient injury-in-fact as "wise[]," noting such speech violations "are concrete and particular injuries for purposes of Article III standing." *Henry v. Att'y Gen., Ala.*, 45 F.4th 1272, 1288 (11th Cir. 2022) (citations omitted). The question is simply, "whether the operation or enforcement" of the law "would cause a reasonable would-be speaker to self-

censor—even where the policy falls short of a direct prohibition against the exercise of First Amendment rights.'" *Id*. (quoting *Speech First*, 32 F. 4th at 1119). Here, the answer is decidedly yes.

A. The individual Plaintiffs have suffered cognizable injuries-in-fact.

Defendants' arguments are so divorced from the applicable standing doctrine they do not acknowledge the basic starting point: it is beyond "well-established that 'an actual injury can exist when the plaintiff is chilled from exercising her right to free expression or forgoes expression in order to avoid enforcement consequences.'" *Harrell v. The Fla. Bar*, 608 F.3d 1241, 1254 (11th Cir. 2010) (quoting *Pittman v. Cole*, 267 F.3d 1269, 1283 (11th Cir. 2001)). In such cases, self-censorship *is* the Article III injury.

Plaintiffs have established a robust, undisputed record of self-censorship, as well as overwhelming evidence that self-censorship is objectively reasonable. Goodman removed prohibitions on hate speech in her classroom, for fear it limited access to "offensive" ideas—now entitled to special protection under HB233. *See* Pls.' MSJ 16.[9] Because of HB233, Price now avoids certain topics entirely, fearing he otherwise must indulge "every position [on those topics] including non-

[9] The fact that Defendants characterize Goodman's efforts in this regard as "prohibit[ing] others from expressing certain viewpoints in her classroom," Defs.'MSJ 15, shows that Defendants' view is in fact that, under HB233, faculty may no longer make these types of decisions in their classrooms, even to ensure a productive learning environment.

mainstream [ideas]." *Id.* at 15; *see also* Ex. 17 ¶¶ 19-23. UFF Member Nicole Morse avoids class discussion on controversial topics, because HB233 limits their ability to moderate. *See* Pls.' MSJ 18-19, 26. Similarly, Edwards now refrains from discussing some topics and makes others more generic to avoid running afoul of HB233 or risking a recording that could be taken out of context. Pls.' MSJ 16; Ex. 19 ¶¶ 14-20. Fiorito explained that secret recording is always "in the back of his mind when trying to talk about things that might be controversial," making him hyper-conscious of his classroom speech. Pls.' MSJ 17; Ex. 9, 64:3-10; Ex. 20 ¶¶ 9-11. Link determined it would be impossible to continue teaching as before and comply with HB233. Ex. 16 ¶¶ 7, 15-19, 23-28.

HB233 also chills students' expression, making them reluctant to speak up in class for fear of being recorded. *See* Ex. 21 ¶ 11. The ways in which HB233 has distorted teaching also injures students—depriving them of access to content they would otherwise receive. *See Martin v. Struthers*, 319 U.S. 141, 143 (1943) (holding First Amendment protects "right to receive" information); *Am. C.L. Union of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd.*, 557 F.3d 1177, 1195 (11th Cir. 2009) (finding standing for parent who planned to read book to child that was removed from school libraries). As Adams testified, their professors are now less willing to engage on topics that may "open the door[]" to "any kind of more harmful discussion." Ex. 30,

30:22-31:8; *see also* Pls.' MSJ 22-23 (testimony of MFOL member Olivia Solomon).

These injuries are "imminent, not conjectural or hypothetical." *Henry*, 45 F.4th at 1288. Defendants' position that Plaintiffs must possess "oracular vision" of how they would be harmed is misplaced. *Elend v. Basham*, 471 F.3d 1199, 1208 (11th Cir. 2006). The question is simply, would "the operation or enforcement of" HB233 "cause a reasonable would-be speaker to self-censor"? *Henry*, 45 F.4th at 1288 (quoting *Speech First*, 32 F.4th at 1120). Plaintiffs have produced specific facts and evidence proving the answer is yes.

The Eleventh Circuit's analysis in *Speech First* is instructive. There, imprecise and sweeping regulations of speech were held to "objectively chill" students' speech. 32 F.4th at 1120. Similarly, faced with HB233, "[n]o reasonable college student [or professor] wants to run the risk of being accused" of shielding or promoting liberal bias and indoctrination. *Id.* at 1124. Defendants attempt to distinguish this case by baldly stating "HB233 does not prohibit any speech or subject speech to consequences." Defs.' MSJ 31. This is rebutted by HB233's text, which establishes brand new consequences for violating the befuddling Anti-Shielding provisions. *See* Fla. Stat. § 1004.097(3)(f); Pls.' MSJ 45-49. Moreover, in *Henry*, decided less than three months ago, the Eleventh Circuit was clear that the plaintiff need *not* show that the policy is a "direct prohibition against the exercise of

First Amendment rights," *or* that there is a threat of formal discipline or punishment. 45 F.4th at 1288 (the latter point "is relevant to the inquiry, but it is not decisive").

In campus speech cases, the fear of the investigative process itself is sufficient to create an objective chill to satisfy standing. *Speech First*, 32 F.4th at 1120 (citation omitted). The Anti-Shielding Provisions expressly threaten an investigative or complaint process, and even a lawsuit, if violated. Fla. Stat. § 1004.097(4). Their vague terms only enhance their chilling effects. *See Speech First*, 32 F.4th at 1121. Because Plaintiffs have no reasonable way of knowing how they might violate it, they are self-censoring in myriad ways. *See* Pls.' MSJ 45-49; *see also* Ex. 17 ¶¶ 6-7, 19; Ex. 16 ¶¶ 7-29; Ex. 19 ¶¶ 8-23, 25-27. In discovery, witnesses evidenced dramatically different interpretations of the statute, and—as in *Speech First*—in depositions, Defendants could not state whether specific fact patterns would in fact violate the Anti-Shielding Provisions. *Compare* Pls.' MSJ 46-47, with *Speech First*, 32 F.4th at 1121-22. Even in their brief, Defendants cannot seem to decide what the Provisions mean—insisting they apply only to "state actors" and are therefore "unenforceable against Plaintiffs," Defs.' MSJ 22-23, yet *in the very same pages* arguing Faculty Plaintiffs *are* state actors, engaging in government speech,[10] *id.* at

[10] Defendants' suggestion that Faculty Plaintiffs have no First Amendment interest in their classroom speech or curriculum is not only wrong on the law, *see infra* at Section II.A.2, it also improperly muddles the merits—whether the Anti-Shielding

23 n.2. Defendants even argue that the statutory terms are so meaningless they should be understood as "the First Amendment" reincarnate. *Id.* at 22, 23, 41, 42. But obscure statutory language does not shield the government from judicial review. Plaintiffs need only show their speech would "arguably be affected by" the challenged provisions. *Harrell*, 608 F.3d at 1254. Given the striking unclarity that remains about their meaning, even a year-and-a-half into this litigation, a reasonable Plaintiff could determine "he'd be better off just keeping his mouth shut." *Speech First*, 32 F.4th at 1122; *see also, e.g.*, Ex. 19 ¶ 27 (submitted formal request for clarification on how one can possibly reconcile HB233 with HB 7); Ex. 17 ¶¶ 6-7, 20. This objective chill is more than sufficient for standing. *Id*.

Similarly, courts have long recognized that intrusive surveillance of speech and association—through mechanisms like the Survey and Recording Provisions—objectively suppress expression: "Broad and sweeping state inquiries into these protected areas … discourage citizens from exercising rights protected by the Constitution." *Baird v. State Bar of Ariz.*, 401 U.S. 1, 6 (1971). And although Plaintiffs have *repeatedly* cited *Baird*, *Shelton v. Tucker*, 364 U.S. 479 (1960), and *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2022), for this proposition, *see, e.g.*, ECF Nos. 35, 43, 75, 101, Defendants continue to fail to

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provisions violate the First Amendment—with the standing inquiry. *See Debernardis v. IQ Formulations, LLC*, 942 F.3d 1076, 1084 (11th Cir. 2019).

address those cases at all, much less explain why the Court should disregard their conclusions that such inquiries trigger First Amendment scrutiny even when there is only a "*possible* deterrent effect of disclosure." *Bonta*, 141 S. Ct. at 2388. The "unnecessary risk of chilling" created by the Survey and Recording Provisions is, on its own, a "violation of the First Amendment." *Id.*

Defendants put much stock in the provisions that "prohibit unauthorized publication of lectures, and provide a cause of action for unauthorized publication," Defs.' MSJ 24, but their reliance is misplaced, as a matter of fact and law. *First*, those provisions do nothing to protect faculty from recordings used in an internal complaint—which is expressly permitted by the statute. Fla. Stat. § 1004.097(3)(g); *see Speech First*, 32 F.4th at 1120 (noting "fear of the investigative process" is sufficient to create objective chill). These concerns are exacerbated and validated by a recent BOG proposed rule governing tenure review, which specifically included an examination of complaints about "bias[]" and "indoctrination." ECF No. 166-56 at 3; *see also Shelton*, 364 U.S. at 486-87 (holding even "if there were no disclosure to the general public, the pressure upon a teacher to avoid any ties which might displease those who control his professional destiny would be constant and heavy" and recognizing "possibility of public pressures … to discharge teachers … simply operate[s] to widen and aggravate the impairment of constitutional liberty").

Second, Defendants assume that the prohibition is an effective means of preventing leaked footage; but unrebutted expert testimony refutes this. *See, e.g.*, Ex. 26, 61; Ex. 1, 82-83. Nor can a civil action brought against a student after the fact reliably remedy the damage. *See* Pls.' MSJ 16. Nothing protects anyone in such recordings from being harassed. Indeed, the Supreme Court *rejected* this argument in *Bonta*, finding the government's intention to keep information private did not eliminate the risk of chilling free speech. 141 S. Ct. at 2387-88 (noting risks of public harassment "are heightened …. as anyone with access to a computer can compile a wealth of information about anyone else") (citations omitted) (cleaned up).

B. The organizational Plaintiffs also have standing.

First, UFF and MFOL each have associational standing, because for each: (1) their members would have standing to sue in their own right, (2) the interests they seek to protect are germane to their organizational purpose, and (3) the claims and relief requested do not require individual members' participation. *Dream Defs. v. DeSantis*, 553 F. Supp. 3d 1052, 1071 (N.D. Fla. 2021) (citing *Greater Birmingham Ministries v. Sec'y of State of Ala.* ("*GBM*"), 992 F.3d 1299, 1316 (11th Cir. 2021)).

Defendants contest only the first element, contending UFF and MFOL's members lack standing, Defs.' MSJ 38-39, but as with Defendants' contention that the individual Plaintiffs lack standing, their argument must be rejected. Several individual Plaintiffs are UFF members. *See* Ex. 16 ¶ 35; Ex. 18 ¶ 4; Ex. 19 ¶ 4; Ex.

20 ¶ 6. For reasons already discussed, each is suffering ongoing injuries to their First Amendment rights sufficient to support standing. The same is true of UFF member Morse, who has fundamentally changed the way they teach because of HB233. *See* Pls.' MSJ 18-20; Ex. 31 ¶¶ 13-25. And many more members have suffered injuries but are afraid to come forward. *See* Ex. 12, 123:2-124:18. That fear speaks to the challenged provisions' pervasive chilling effects. As for MFOL, its members have limited their associations with "liberal" causes, such as MFOL's, for fear of retaliation. This was established through testimony from MFOL, as well as direct testimony by an MFOL member. *See* Pls.' MSJ 22-23.[11]

Second, UFF and MFOL each has standing because HB233 impairs their ability "to engage in [their] own projects by forcing" them "to divert resources in response." *Dream Defs.*, 553 F. Supp. 3d at 1071 (citing *Arcia v. Fla. Sec'y of State*,

[11] Defendants' misplaced argument that UFF and MFOL abused the First Amendment privilege has no bearing on their standing. As Plaintiffs' brief addressing that subject emphasized, "courts regularly reject arguments that the First Amendment privilege must yield so that a defendant may 'test' a plaintiff's standing allegations." ECF No. 138 at 29. It would be perverse to find that, where UFF's members' fear of retaliation from Defendants has led them to sue, they must reveal confidential communications. *See Black Panther Party v. Smith*, 661 F.2d 1243, 1265 (D.C. Cir. 1981) ("To say [plaintiffs] must waive those rights when they come into court would make any judicial protection meaningless."). As for Defendants' brand-new concern about the preparation of MFOL's corporate representative, it is not only unfounded, but should have been raised (if at all) in a motion during the discovery period.

772 F.3d 1335, 1341 (11th Cir. 2014)).[12] Students are less willing to join and engage with MFOL's campus chapters in Florida because of HB233, frustrating MFOL's ability to carry out its mission. *See* Ex. 25, 9:1-9, 19-25, 28:17-20, 47:8-16; Ex. 23, 7. MFOL must accordingly divert time and financial resources away from its advocacy efforts toward "planning new strategies for organizing and recruiting members" and renting space and providing transportation for off-campus events, Ex. 23, 8-9, as well as educating people about HB233, Ex. 25, 77:10-78:7, 78:14-79:7. The Anti-Shielding Provisions "embolden[] … students with viewpoints that are opposed to MFOL's mission." Ex. 23, 10. At UCF, such students "openly taunt[ed]" MFOL's members during a recruiting event and "disrupt[ed]" MFOL's activities. Ex. 25, 41:15-23. Accordingly, MFOL members "are feeling unsafe to be part of [MFOL]" and MFOL is diverting resources from core advocacy work to engage in vetting to protect their members. *Id.* at 46:16-23. MFOL has also had to weigh spending its limited resources on security for its members. *Id.* at 46:24-47:3.

[12] Defendants misread *Arcia* in suggesting Plaintiffs must divert resources inconsistently with their organizational mission. *See* 772 F.3d at 1341 (finding voter advocacy organization had standing to challenge law that impeded its election-related efforts). Their other cases fair no better. *See also Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (finding standing for organization based on diversion of resources within its core mission); *Ga. Republican Party v. Sec. & Exch. Comm'n*, 888 F.3d 1198, 1203 (11th Cir. 2018) (finding lack of standing where plaintiff offered no factual evidence of harm); *Dream Defs.*, 553 F. Supp. 3d at 1072 (not considering diversion of resources).

UFF is also diverting resources to address HB233. This includes addressing the survey and advising its members regarding it. *See* Ex. 12, 29:7-31:8. And, particularly considering the lack of clear guidance from Defendants on how to comply with the Anti-Shielding and Recording Provisions, UFF has to devote extensive resources to "develop[] legal and classroom guidance … and other actions that [UFF] would not have taken" absent HB233. *See* Ex. 12, 269:2-22. These resources are diverted away from advocacy in other areas, like COVID-19 policy, and administering the statewide faculty union. *Id.* at 269:2-270:10.

C. Plaintiffs' injury is traceable to HB233, which Defendants enforce.

As Plaintiffs previously explained, *see* ECF No. 65, Defendants not only have the power, but sometimes the duty, to enforce HB233.

Defendants are expressly charged with implementing and enforcing HB233's Survey Provisions. *See* Fla. Stat. §§ 1001.03(19)(b), 1001.706(13)(b).[13] Defendants also have the power to enforce all of the challenged provisions under pre-existing law, which provides that BOE, for example, "shall oversee the performance" of public post-secondary institutions, including "in the enforcement of all laws and rules," like HB233, which are unquestionably state law. BOE is also expressly authorized to (1) "investigate allegations of noncompliance with law," (2) directly

[13] BOE was expressly granted rulemaking authority to implement this provision. *Id.* at § 1001.03.

"order compliance within a specified timeframe," (3) "[r]eport to the Legislature" that an institution is "unwilling or unable to comply with law," and (4) "[w]ithhold the transfer of state funds" until the institution "complies with the law." Fla. Stat. § 1008.32.

Commissioner Diaz has independent obligations to ensure that FCS institutions comply with applicable laws, including investigatory powers and the power to refer matters to BOE, which in turn "shall require" institutions' boards of trustees to document compliance. *Id*. If BOE determines an institution "is unwilling or unable to comply with law," it is empowered to take a range of actions, including withholding education funding and declaring the institution ineligible for competitive grants. *Id.*

BOG similarly has "responsib[ility] for compliance with state …. laws" by the institutions it supervises, including all SUS institutions. *Id.* § 1008.322. BOG has adopted regulations that provide it with the same enforcement mechanisms available to BOE and the Commissioner. *See* BOG Regulation 4.004(5), (6).

In enacting HB233, the Legislature clearly believed Defendants had the power to enforce it, as evidenced repeatedly in the legislative history and its own analysis of HB233's companion bill. *See, e.g.*, Ex. 39, 19:6-23; ECF No. 166-4, 2-3. And Defendants' intended implementation and enforcement of HB233 is beyond question. Defendants created a survey, distributed it, and published its results as

HB233 requires. Further, Defendants have vigorously defended this law in litigation, evidencing "an intent to enforce" it. *Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293, 1305 (11th Cir. 2017) (citing *Harrell*, 608 F.3d at 1257). Both the Commissioner and the incoming SUS Chancellor voted for HB233 as legislators.

This enforcement reaches Plaintiffs directly and indirectly—each independently establishing traceability. *Wilding v. DNC Servs. Corp.*, 941 F.3d 1116, 1125 (11th Cir. 2019). Indirectly, Defendants' oversight of SUS and FCS will result in HB233's implementation at each institution. Indeed, Plaintiffs have introduced evidence of this self-evident fact, where professors have been instructed by their administration to change how they teach certain subjects because of HB233. *See* Pls.' MSJ 20. This enforcement is traceable to Defendants even if they are not always "the very last step in the chain of causation." *Wilding*, 941 F.3d at 1126; *see also Support Working Animals, Inc. v. DeSantis*, 457 F. Supp. 3d 1193, 1205 (N.D. Fla. 2020) (finding it sufficient "injury is directly traceable to the passage of" challenged law and defendants have authority to enforce it).

Defendants also have authority to directly investigate and even impose penalties on individual persons and departments. *See* Fla. Stat. §§ 1008.32, 1008.322; *see also* Ex. 40, 56:11-63:15; Ex. 3, 111:1-113-16. This threat alone can suffice to chill speech, regardless of outcome. *See, e.g.*, *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 166 (2014); *Speech First*, 32 F.4th at 1120; Ex. 12, 132:16-

133:24 (investigations based on false allegations can "ruin [a member's] career"). Defendants' power to withhold state funds can be targeted at individual salaries—as BOE did with school board members over COVID safety measures. *See* Ex. 40, 56:11-63:15. Likewise, BOG admitted it has the authority to approve a new metric for performance-based funding under § 1001.9 and to suspend or terminate professional and doctoral degree programs. Ex. 3, 113:17-114:19; 118:17-119:19. BOG recently released a proposed post-tenure review regulation, which includes consideration of "bias," "indoctrination," and "substantiated student complaints." ECF No. 166-56, 3. Defendants' recent use of enforcement powers suffices to show future enforcement is objectively threatened. *Dream Defs.*, 559 F. Supp. 3d at 1261-62.

Given the broad authority—and actual use—of Defendants' enforcement powers, this case is wholly unlike *Falls v. DeSantis*, No. 4:22-cv-166-MW/MJF, 2022 WL 2303949 (N.D. Fla. June 27, 2022). There, this Court denied a preliminary injunction finding Plaintiffs' theory of traceability had too many steps without any supporting allegations. *Id.* at *7. Here, Plaintiffs' theory of traceability is one step—if they do not comply with HB233, Defendants can directly investigate them or even withhold Plaintiffs' salaries or funding. A student group that engages in shielding, or a professor who does not permit their students to record class, could be directly

sanctioned by Defendants. These threats exist in addition to institution-level enforcement, which is subject to Defendants' oversight.

D. Plaintiffs' injury is redressable by this Court.

Because traceability and redressability go hand in hand, an injunction "prohibiting [Defendants'] enforcement would be effectual" and would redress Plaintiffs' injuries. *Support Working Animals*, 8 F.4th at 1201. Defendants' arguments to the contrary ignore the standing doctrine's actual requirements. Essentially, Defendants argue they could violate Plaintiffs' First Amendment Rights even if they are enjoined from enforcing HB233. Defs.' MSJ 40-43. But "Article III … does not demand that the redress sought by plaintiff be complete." *Dream Defs.*, 553 F. Supp. 3d at 1084-85; *see also Honeyfund.com, Inc. v. DeSantis*, No. 4:22cv227-MW/MAF, 2022 WL 3486962, at *4 (N.D. Fla. Aug. 18, 2022) ("[E]njoining Defendants here will provide at least partial redress."). It is enough that three significant mechanisms for regulating and surveilling Plaintiffs' speech will no longer be available to Defendants.

II. HB233 IS UNCONSTITUTIONAL.

A. Defendants are not entitled to summary judgment on Plaintiffs' First Amendment claims.

1. HB233 regulates speech.

Defendants' contention that HB233 does not implicate speech fails. The Anti-Shielding Provisions expressly identify certain types of speech now entitled to

preferential treatment—i.e., speech that others may find "unwelcome, uncomfortable, disagreeable, or offensive." ECF No. 166-74; *see* Pls.' MSJ 27-28. The Recording Provision exists to enforce the Anti-Shielding Provisions, among other speech regulations. *See* Fla. Stat. § 1004.097(3)(g). And the Survey Provisions are another tool for monitoring speech, through a mandated, annual inquiry into "the exposure of students, faculty, and staff to, *and the encouragement of their exploration of*, a variety of *ideological and political perspectives*," *e.g.*, *id.* § 1001.03(19)(a)(1) (emphasis added), with the implicit threat of retribution for disfavored speech. Pls.' MSJ 5, 43-44.

Defendants cannot escape the First Amendment's constraints by "relabel[ling] … speech as conduct," *Otto v. City of Boca Raton*, 981 F.3d 854, 861 (11th Cir. 2020). Defendants contend, moreover, that the targeted "conduct" is "unlawful censorship." Defs.' MSJ 43. But Defendants admit that "censorship" is "evidenced by words." *Id.* What is more, "censorship" is itself protected expression. The Supreme Court made this clear in *Hurley*, when it found parade organizers had a right to exclude a particular contingent. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. Of Bos.,* 515 U.S. 557, 572-73 (1995). Faculty are similarly engaged in protected expression when they exclude material from their classes. In other words, the only "conduct" HB233 seeks to regulate is protected expression. *See Otto*, 981 F.3d at 866.

The State may sometimes prohibit "conduct in part initiated, evidenced, or carried out by language," but *only* where the speech is "incidental to the … regulation of conduct." *Rumsfeld*, 547 U.S. at 62. HB233's regulation of speech is not "incidental" to anything else—it is the law's direct target. *Cf. Honeyfund*, 2022 WL 3486962, at *8 ("[T]he telltale sign of the state's intention to punish communication is that statutory violations are not based on conduct that is 'separately identifiable' from speech." (citation omitted)). In fact, Defendants concede that the law's entire purpose is speech-related: to—in their view—re-balance the ideological scales on university campuses. Defs.' MSJ 46. Their celebration of the law's supposed promotion of "free expression and viewpoint diversity" is irreconcilable with their claim that HB233's regulation pertains to conduct, not expression.

2. The First and Fourteenth Amendments protect Faculty Plaintiffs' scholarship and teaching.

Defendants also incorrectly—and without analysis—argue that the content of Faculty Plaintiffs' courses could "never" support a First Amendment claim because it is government speech. Defs.' MSJ 52. Both the Supreme Court and multiple courts of appeals have found the First Amendment extends to professors' speech inside and outside the classroom. *See* Pls.' MSJ 23-26 (citing cases).

In asserting otherwise, Defendants cite only two cases; neither supports their position. In *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the Court expressly stated it

was not addressing cases "involving speech related to scholarship or teaching." *Id.* at 425. Likewise, *Hubbard v. Clayton County School District*, 756 F.3d 1264 (11th Cir. 2014), involved the inapposite question of whether a *K-12 school district administrator* was speaking pursuant to his official job duties; the Eleventh Circuit held he was not. *Id.* at 1266-68.

B. Defendants' arguments as to Plaintiffs' content-based claims fail.

For the reasons discussed in Pls' MSJ at 33-41, HB233 not only regulates speech, it discriminates based on viewpoint. Defendants' arguments to the contrary fail.

Defendants' assertion of facial neutrality, Defs.' MSJ 47, ignores the Anti-Shielding Provisions' express distinctions among viewpoints—protecting *only* ideas that some may find "uncomfortable, unwelcome, disagreeable, or offensive," and not any others. *See* Pls.' MSJ 27-28. Defendants' (mis)characterization that these provisions merely "provide that constitutionally-protected expressions be treated equally" is at odds with the statutory text. Defs.' MSJ 50. Defendants' argument evidences the same myopic view as HB233's proponents—that "uncomfortable, unwelcome, disagreeable, or offensive" ideas may be liberal as well as conservative, *id.* at 15. But "viewpoint" is not limited to ideology—much less to distinctions between Defendants' broadly defined poles of "liberal" and "conservative."

Rather, "[g]iving offense *is a viewpoint*," *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017); *see also Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019). And by its terms HB233 requires special protections *only* for "uncomfortable, unwelcome, disagreeable, or offensive" ideas or opinions, impermissibly attempting to "tilt public debate" on university campuses "in a preferred direction." *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 578-579 (2011). Again, these are cases Plaintiffs have cited repeatedly, *see, e.g.*, ECF No. 43, 27-32, that Defendants do not even mention, much less rebut.[14]

Moreover, overwhelming, undisputed evidence firmly establishes HB233 is a viewpoint- or content-based "regulation of speech." *Reed*, 576 U.S. at 164. Even when faced with a facially neutral statute, the Court must consider whether the law "cannot be justified without reference to the content of the regulated speech *or* that [it was] adopted by the government because of disagreement with the message the speech conveys." *Id*. (emphasis added, cleaned up). A law is also content-based if it compromises a speaker's autonomy over their message. *See Hurley*, 515 U.S. at 576. This is a standalone legal argument with which Defendants do not engage, except to

[14] *Digital Props Inc. v. City of Plantation*, 121 F.3d 586 (11th Cir. 1997), cited by Defendants at 49, concerned ripeness, not viewpoint neutrality. *See id.* at 590 (discussing absence of "concrete case or controversy"). It also involved a textually-neutral statute, whereas here there is an "explicit delineation between" favored and disfavored speech. *Id*. at 590-591.

baldly assert that the Anti-Shielding Provisions "do not compel Plaintiffs or anyone else to speak or publish a word," Defs.' MSJ 51. Under any of these tests, the law is an impermissible content-based regulation of speech. Plaintiffs satisfy all of them. Pls.' MSJ 28-34.[15]

Defendants' suggestion that HB233 is justifiable without "reference to the content of the regulated speech," is plainly inaccurate. *See* Pls.' MSJ 28-29. They invoke *Speech First*, 32 F.4th 1110, but *Speech First* did not conduct the inquiry counseled by *Reed* because it found the policy there was content- and viewpoint-based on its face. 32 F.4th 1110 at 1126; Defs.' MSJ 44. Moreover, *Speech First* cuts *against* Defendants: like the policy there, HB233 "regulate[s] speech by design," Defs.' MSJ 44, and does so by "draw[ing] facial distinctions defining regulated speech by particular subject matter." 32 F.4th at 1126 (cleaned up); *see* Pls.' MSJ 34-35.

[15] Defendants erroneously suggest *Reed* requires showing *both* discriminatory purpose and justification, Defs.' MSJ 45-46, but this argument is contrary to precedent. *See, e.g.*, *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1475 (2022) ("If there is evidence that an impermissible purpose *or* justification underpins a facially content-neutral restriction, … that restriction may be content based.") (emphasis added); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 394 (1992) (explaining "possibility that the [government] is seeking to handicap the expression of particular ideas" is alone "enough to render the [law] presumptively invalid").

Next, Defendants erroneously contend *Reed*'s purpose-based analysis does not allow the consideration of Plaintiffs' record evidence. Defs.' MSJ 45-48. But in doing so, Defendants simply set up their own straw man to try and knock down. Plaintiffs do *not* ask the Court to look to a "handful" of "miscellaneous" statements to determine legislative intent. Plaintiffs present overwhelming evidence, including from the legislative record itself, and multiple unrebutted expert reports, applying the well-established intent standard set forth in *Arlington Heights* and its progeny. *See, e.g.*, Pls.' MSJ 9-15, 29-32; Ex 1, 29-30, 48-55, 89-91; Pls.' MSJ 39-40 (citing multiple unrebutted expert reports); *see also Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977).

Defendants also misconstrue the cases they cite. *United States v. O'Brien*, 391 U.S. 367 (1968), was decided nearly 50 years before *Reed* and says nothing about how a court should determine the intent of a law that independently implicates speech, *see supra* at Section II.A, because it found that the law at issue narrowly targeted the "noncommunicative impact of [] conduct." 391 U.S. at 381-82. Even then, *O'Brien* examined whether "the governmental interest is unrelated to the suppression of free expression," finding in the affirmative, *id.* at 375, 377, and considered the legislation's limited floor debate, *id.* at 385-86; *see also Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 645 (1994) ("[A] regulation neutral on its face may be content based if its manifest purpose is to regulate speech because of

the message it conveys."); ECF No. 90, 3. Defendants' reliance on *Hubbard* is also misplaced. 803 F.3d 1298 (a discovery ruling, relying only on pre-*Reed* cases).[16]

Likewise, the statements Defendants take issue with are relevant under *Arlington Heights*, together with the magnitude of Plaintiffs' other evidence addressing HB233's purpose. *See, e.g.*, *Arce v. Douglas*, 793 F.3d 968, 980 (9th Cir. 2015) (considering state senator's campaign website in *Arlington Heights* analysis). *GBM* does not say otherwise; it simply finds relevant statements must be temporally proximate (not from over a decade prior), from a "sponsor of [the] legislation," and related to the "subject" of the challenged law. 992 F.3d at 1323.[17]

Here, Plaintiffs point to contemporaneous statements by HB233's primary sponsors repeatedly stating their desire to limit liberal or left-wing thought by de-platforming "Marxist professors and students," both in the context of HB233 specifically and education policy broadly. Pls.' MSJ 3, 12, 30-32. They spoke openly about the legislature's intent to target liberal professors and liberal campuses and

[16] Although *NetChoice v. Att'y Gen.*, 34 F.3th 1196 (11th Cir. 2022), cites *O'Brien* and *Hubbard* in rejecting a motivation-based argument in the First Amendment context, the Eleventh Circuit there expressly limited its holding. *Id.* at 1226 n.21 ("[W]e needn't—and don't—decide whether courts can *ever* refer to a statute's legislative and enactment history to find it viewpoint-based.").

[17] Defendants' assertion that Plaintiffs failed to adduce "evidence of disparate impact" (Defs.' MSJ at 48) is wrong—legally, because it is unclear that factor applies in the First Amendment context, and factually, because Plaintiffs have more than met their evidentiary burden, *see supra* at Section I.A-B; Ex. 1, 81-91.

their indifference—or outright embrace—of the chilling effect numerous witnesses testified would occur if the law was enacted. *See id.* Other co-sponsors openly talked of "defunding the radical institutions." Ex. 41, 7:19-24. These are far more than the kinds of "remarks by single legislators or executive-branch officials outside the legislative process" of which Defendants complain. Defs.' MSJ 47.

Defendants' complaint that post-enactment statements—a minute portion of the evidence—are irrelevant likewise misses the mark. Those statements do not stand alone. They are echoes of the *many* similar statements by HB233's proponents throughout the course of the law's consideration. *See* Pls.' MSJ 9-14, 29-32. Even prior to the final vote on HB233, sponsors stated its purpose was to address "acts of cancel culture" and combat "Marxist professors and students." Ex. 1, 93. The instant case is therefore distinct from the cases Defendants cite, which concern words "written after the vote *and the President's signature*" and "uninfluential in the process leading to the vote." *Covalt v. Carey Canada Inc.*, 860 F.2d 1434, 1438 (7th Cir. 1988) (emphasis added).[18] Far from "chang[ing] the legislative intent of [the

[18] Defendants' citation to *Tinsley Media, LLC v. Pickens County*, 203 F. App'x 268 (11th Cir. 2006), is even further afield. That case concerned "the admissibility of [an] affidavit" as "*post hoc* testimony" by a county commissioner *in support of the constitutionality* of a challenged ordinance and specifically for purposes of litigation. *Id*. at 273.

Legislature] expressed before the Act's passage," *Blanchette v. Conn. Gen. Ins. Corp.*, 419 U.S. 102, 132 (1974), these statements *reiterated* that express intent.

Also relevant are records and statements by the Governor and Defendants—including at HB233's signing or prior to its enactment, of which there are many, *see* Ex. 42—because they pertain to "the challenged law's impact" and "knowledge of that impact." *Fla. State Conf. of NAACP v. Lee*, 566 F. Supp. 3d 1262, 1293 (N.D. Fla. 2021); *cf. Ward v. Rock Against Racism*, 491 U.S. 781, 795 (1989) (upholding statute against First Amendment challenge in part by looking to how "city has interpreted" it). This includes statements detailed in Plaintiffs' unrebutted expert reports. *See* Ex. 1, 85-91. Subsequent events have confirmed what the Governor and Defendants previewed. *See, e.g.*, *id.* at 145-51, 209-14; *see also* Ex. 43, 2-3.

Defendants also make the bizarre claim that "when a law does not regulate speech based on content, First Amendment concerns are not implicated." Defs.' MSJ 44. Not so. Content-based laws are a particularly egregious type of governmental intrusion into free-speech rights, but they do not comprise the whole universe of potential violations. The authority Defendants cite does not support their proposition. *Hubbard* was an appeal from a discovery order in a case that concerned a state's decision not "to promote speech," whereas this case concerns a law that affirmatively promotes some kinds of speech over, and chills, others. 803 F.3d at 1313. And *O'Brien* held that even content-neutral regulations are subject to

heightened scrutiny. 391 U.S. at 377; *see also Bell v. City of Winter Park*, 745 F.3d 1318, 1323 (11th Cir. 2014) (considering whether content-neutral law withstands intermediate scrutiny); *CAMP Legal Def. Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1280 (11th Cir. 2006) (same). HB233 cannot survive intermediate scrutiny, either: it does not advance any legitimate—let alone important—government interest, nor is it "narrowly tailored to achieve those ends." *Bell*, 745 F.3d at 1323; *cf.* Pls.' MSJ 34-38.

Finally, as noted, Defendants barely engage with Plaintiffs' independent claim that HB233 impermissibly alters the content of speech, Pls.' MSJ 32-34, contending only that Plaintiffs do not support this claim with evidence. *See* Defs.' MSJ 51-52. That is plainly false. *See* Pls.' MSJ 15-23.

In sum, because HB233 *is* a content and viewpoint discriminatory regulation of speech, it is either *per se* unconstitutional or subject to strict scrutiny. HB233 cannot survive that test, *see* Pls.' MSJ 34-38, nor do Defendants argue it can.

C. Defendants are not entitled to summary judgment on Plaintiffs' associational or due process claims.

Defendants make *no* legal argument as to Plaintiffs' associational claim, relying only on an assertion that the claim is unsupported by the record, *see* Defs.' MSJ 50-51, which fails for the reasons stated in Plaintiffs' MSJ at 45-51.

Likewise, Defendants' discussion of Plaintiffs' vagueness claim is perfunctory, relying on the bare assertion that the Anti-Shielding Provisions are

"clear" and unenforceable against Plaintiffs by Defendants. Defs.' MSJ 53. As to the former, Defendants' argument fails for the reasons in Plaintiffs' MSJ at 45-49. The latter just rehashes the standing issue and fails for the reasons set forth above. *See supra* at Section I.

CONCLUSION

For all of the reasons discussed, Defendants' motion for summary judgment must be denied.

REQUEST FOR ORAL ARGUMENT

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

Respectfully submitted this 4th day of November, 2022.

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LOCAL RULE 7.1(F) CERTIFICATION

The undersigned, Frederick Wermuth, certifies that this memorandum contains 10,882 words, excluding the case style and certifications.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 4, 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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