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' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR FINAL SUMMARY JUDGMENT

Defendants respectfully submit this Reply in Support of their Motion for Final Summary Judgment (ECF No. 165) ("Motion").

Plaintiffs' Response (ECF No. 179) ("Response" or "Resp.") fails to demonstrate a genuine issue of fact regarding Plaintiffs' lack of standing and inability to establish their claims, because it is based on mischaracterizations of the record and a misapprehension of what HB233 does and does not require of Plaintiffs. Defendants are entitled to final summary judgment.

I. Plaintiffs Cannot Create a Disputed Issue of Fact Through Misrepresentations of the Record.

As with Plaintiffs' Motion for Summary Judgment, the frequency and degree of misrepresentations in Plaintiffs' Response to Defendants' Motion is staggering.

This Court will undoubtedly encounter those misrepresentations in its review of Plaintiffs' citations. Defendants offer the following as examples:

- Plaintiffs assert Representative Roach "did not state that HB233's purpose was to prevent censorship of constitutionally-protected speech . . . but to address concerns of *conservative students' self*-censorship." Resp. at 4–5 ¶ 3 (emphasis in original). The word conservative appears only once in the cited transcript, uttered by a Democrat representative opposing the bill. The cited transcript page states that "[t]he intent of the bill is to assess viewpoint diversity, intellectual freedom on college campus[es]," and "to prevent, you know, self-censorship or compelled speech." ECF No. 164-34 at 6.
- Three times Plaintiff assert that Representative Roach stated HB233's intent was to combat "Marxist professors and students." Resp. at 3, 46–47. This is false. The source of Plaintiffs' assertion is *half of a Tweet*, smuggled into the record vis-à-vis an "expert" report opining on the legal question of legislative intent. Plaintiffs assert Roach "repeatedly stated" this intent, yet the *only* instance provided is an incomplete, unauthenticated, hearsay social-media posting. Partially quoting a single Tweet multiple times is the judicial equivalent of a toddler with a clanging cymbal. It is not the type of admissible evidence that is indicia of legislative intent, let alone the intent that

Representative Roach expressed to his fellow House colleagues in committee and on the floor of the Florida House of Representatives.

- Plaintiffs again assert without basis in fact that the survey was not anonymous, and that Defendants collected information from survey respondents enabling them to identify individual respondents. *Id.* at 18. This is false. The only individuals with knowledge of the survey data testified unequivocally that it would be impossible to identify any respondent without a warrant and the help of law enforcement. Resp. at 7–8. The record does not contain evidence of a single respondent being identified, or of any effort to identify survey respondents. Plaintiffs' witnesses have no personal knowledge of survey results data and no expertise in the data field, and therefore lack any basis to testify that the surveys were not anonymous. Their speculative, unfounded lay testimony on this point does not create a genuine issue of fact regarding the surveys' anonymity.
- MFOL and UFF claim to have knowledge of individual members who declined to join their organization because of , or are aware of instances of recording, or have otherwise claimed injury due to HB 233. *E.g.*, Resp. at 20–23. But the record does not name these individuals—either because they do not exist, or because MFOL and UFF improperly hide behind the First

Amendment privilege, and are merely parroting hearsay and second-hand information at best.

- Plaintiffs assert MFOL has requested funding for security as a result of HB233, and had recruitment efforts disturbed at UCF due to HB233. Resp. at 23–24. MFOL's deposition transcript states it has *not actually* spent a dime on additional security in Florida, and offers no facts tying the UCF incident to HB233.
- Plaintiffs claim Defendants' stated purpose of HB233 is to "re-balance the ideological scales." Resp. at 41. Defendants have said no such thing.
- Plaintiffs assert that Defendants argue the Anti-Shielding Provisions "apply to state actors," while simultaneously arguing that professors are state actors. Resp. at 29. But Defendants' Motion argues (as the law itself states) that the Anti-Shielding Provisions apply to *specific, defined* state actors—the Board of Education, the Board of Governors, and public colleges and universities—not *all* state actors. Obviously, no one has argued HB233 applies to all state actors. That is the point: the Anti-Shielding Provisions tell us the few entities against which they are enforceable. Plaintiffs are not among them.

This is just the tip of the iceberg. The extreme liberties Plaintiffs take with the record will be readily apparent to the Court upon its review of the materials cited by Plaintiffs juxtaposed against Plaintiffs' papers.

II. Sham Affidavits Submitted to Avoid Summary Judgment do not Create a Genuine Issue of Fact and Should be Disregarded.

This Court should disregard Plaintiffs' declarations submitted for the sole purpose of manufacturing a factual dispute to avoid summary judgment. Plaintiffs had every opportunity to testify about the factual bases of their claims and injuries during hours of deposition. Now faced with a summary-judgment motion, Plaintiffs improperly offer new facts—which would have been responsive to interrogatories and deposition questioning—for the first time through self-serving sham declarations.

"When a party has given clear answers to unambiguous questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony," *Van T. Junkins & Associates, Inc. v. U.S. Indus., Inc.*, 736 F.2d 656, 657–58 (11th Cir. 1984), or disclose new facts to which the party had access at the time of deposition but never mentioned, *id.* (citing *Perma Research & Dev. Co. v. Singer Co.*, 410 F.2d 572, 577–78 (2d Cir. 1969)). This is exactly what Plaintiffs have attempted to do by submitting brand-new declarations contradicting and augmenting their deposition testimony, as well as their interrogatory answers. This Court should disregard the "sham affidavits" Plaintiffs submit for the clear purpose of "manufacturing factual disputes" to avoid summary judgment. *Dimingo v. Midnight Express, Inc.*, 325 F. Supp. 3d 1299, 1305–06 (S.D.

Fla. 2018) (quoting *Bank of Am., NA v. Louis*, No. 8:11-cv-1745-T-27EAJ, 2012 WL 12905987, at *3 (M.D. Fla. Dec. 20, 2012)); *accord Israel v. John Crane, Inc.*, No. 8:20-cv-2133-02-AAS, 2022 WL 1239351 at *7–*9, *11 (M.D. Fla. Apr. 27, 2022 (applying sham affidavit rule and granting Defendants' motion for summary judgment).

The inconsistencies between Plaintiffs' earlier testimony and their new sham declarations—which also include abject speculation and hearsay-within-hearsay—will be readily apparent to this Court upon review, and render the declarations futile. By way of example: Julie Adams testified in no uncertain terms that HB233's provisions had not impacted her, ECF No. 165 at 11, but recants that testimony and discloses brand-new alleged impacts and concerns for the first time in her declaration, ECF No. 178-21. Professor Price testified unequivocally that he *had not* changed the manner in which he conducts his class due to HB233, *see* ECF No. 178-36 at 82:9–15 ("Q: Have you in fact changed the manner in which you conduct your class because of the concerns that you just identified? A: I haven't."), yet Plaintiffs represent the exact opposite to this Court, relying in part on a brand-new declaration, Resp. at 16 ¶19(c). Professor Link testified during his deposition about his pre-existing plans to retire, ECF No. 178-22 at 90:14, and that he had no plans to return to teaching, *id.* at 6:12–7:3. Now, his declaration discloses an ongoing affiliation with the University of Florida, adds convenient new details regarding plans to lecture

and speak on campuses, and revises his testimony regarding HB233's alleged influence on his retirement plans. ECF No. 178-16. Like the other Plaintiffs, Link also recites speculation and hearsay allegedly attributable to unidentified third parties, which is not based on personal knowledge and is inadmissible under elementary evidentiary principles. *Id.*

Additionally, in their interrogatory answers and depositions, Plaintiffs (and their non-party witnesses) uniformly stated that they had not quit or declined to join any organization as a result of HB233, nor could they identify any individual who had. *See* ECF No. 165 at 9 ¶ 12, 18 ¶ 23(g). Now, in an attempt to avoid summary judgment, Plaintiffs insist the exact opposite.

These examples are just the beginning. If Plaintiffs wished to pad the record with dozens of pages of supposed facts establishing their injuries, they were obligated to do so by supplementing their interrogatory answers, and then disclosing those facts in response to questions during their depositions. They did not, and their newly manufactured declarations are worthless as a result.

III. Plaintiffs Cannot Use Inadmissible Expert Opinions and Embedded Hearsay in Lieu of Actual Facts to Fabricate a Dispute for Trial.

Much like Plaintiffs' Motion for Summary Judgment, ECF No. 167, Plaintiffs' Response hangs its hat on inadmissible hearsay and unreliable expert opinions to fabricate factual disputes. The paltry facts admissible through Plaintiffs themselves do not establish standing or actionable claims.

Once again, Plaintiffs rely nearly wholesale on the musings of Dr. Lichtman to prop up their case. Rather than reiterate the utter inadmissibility and unreliability of Dr. Lichtman's opinions here, Defendants respectfully direct this Court to their Response in opposition to Plaintiffs' Motion, ECF No. 177.

One additional example bears noting, as it encapsulates both the absurdity of Dr. Lichtman's opinions and the impossibility of proving Plaintiffs' theories with admissible evidence. Plaintiffs assert that "[w]hen HB233 passed the House, Roach thanked his colleagues 'for passing this bill to . . . stem the tide of Marxist indoctrination on university campuses.'" Resp. at 5. The source, of course, is Dr. Lichtman's report, which purports to opine on the "intent of decision-makers" in passing HB233 to "discriminate against . . . viewpoints." ECF No. 178-1 at 92. Dr. Lichtman's source for this claim is a FloridaPolitics.com blog article, which in turn purports to quote a *Facebook post*, that attributes a statement to Representative Roach, allegedly made *after* HB233 passed the House. *Id.*

Setting aside the lack of any methodology or analysis, this alleged statement is buried within multiple layers of hearsay, the ultimate source of which—Facebook—is not probative of or a proper source for determining legislative intent, regardless of whether it is smuggled in through an expert witness. *See Brooks v. Miller*, 158 F.3d 1230, 1242–43 (11th Cir. 1998) (rejecting newspaper articles in favor of legislative record in determining legislative intent under *Arlington Heights*).

Plaintiffs do not incidentally disclose this hearsay-within-hearsay-within-hearsay in the course of explaining Dr. Lichtman's opinion; they rely on the hearsay itself to manufacture a dispute using a fact that could *never* be established or admitted on its own. *See In re 3M Combat Arms Earplus Products Liability Litigation*, Case No. 3:19md2885, 2021 WL 684183, at * 2 (N.D. Fla. Feb. 11, 2021) (relying on *Marvel Characters Inc. v. Kirby*, 726 F.3d 119, 136 (2d Cir. 2013)).

Plaintiffs again characterize their expert reports as "unrebutted," but for the reasons argued in Defendants' Response to Plaintiffs' Motion, this characterization is untenable. ECF No. 177 at 14–17. Plaintiffs cannot escape their inability to prove their own claims, and thus cannot avoid summary judgment, by using expert reports in lieu of facts—particularly not unreliable expert reports which wholly ignore the legislative record, traffic only in hearsay and speculation, and lack a discernable methodology beyond their own *ipse dixit*.

In addition to their experts' inadmissible regurgitation of hearsay and legal conclusions, Plaintiffs endeavor to engineer a factual dispute through inadmissible exhibits, which this Court cannot properly consider as summary-judgment evidence. *Rowell v. BellSouthCorp.*, 433 F.3d 794, 800 (11th Cir. 2005); *see also* ECF No. 177 at 9–13. Examples include:

- ECF No. 178-19, a declaration incorporating self-serving hearsay, including the contents of a letter from Edwards to the University of Central Florida

administration regarding HB7, and like the other Plaintiffs' declarations, offers new facts that conveniently diverge from deposition testimony;

- ECF No. 178-13, an unauthenticated, hearsay email and attachment exchanged between non-parties after HB233 was passed, which purports to regard draft bill language that was never enacted, nor is there any evidence the language was ever even introduced in either chamber;
- ECF No. 178-43, an unauthenticated, hearsay website article that has nothing to do with HB233, and was published *after* Defendants filed their Motion, a year and a half after HB233's passage;
- ECF No. 178-41, an unauthenticated, hearsay transcript of a local news broadcast that purportedly aired after HB233's passage.

These are mere examples of Plaintiffs' irrelevant exhibits that cannot be reduced to admissible evidence, and should therefore be ignored.

IV. Plaintiffs' Factual and Legal Arguments Reveal a Fundamental Misunderstanding of HB233.

a. Plaintiffs Misconstrue the Anti-Shielding Provisions.

Many of the factual disputes Plaintiffs try (and fail) to identify arise from a misinterpretation of what the law does and does not require of them. *See* ECF No. 165 at 20–24, 28–31, 49–50; ECF No. 177 at 29–32. The Anti-Shielding Provisions' text prohibits Defendants and public institutions from restricting protected expression based solely on someone's subjective assessment that the expression

causes offense or discomfort. The Anti-Shielding Provisions do not require "offensive" or "uncomfortable" speech from anyone, nor do they prevent anyone from expressing their own offense or discomfort. And they certainly do not require anyone to change the content of their curriculum, or forbid instruction on certain topics. The text says no such thing.

Plaintiffs' alleged reactions to HB233 are therefore unreasonable, as are Plaintiffs' descriptions of how the law operates. For example, Plaintiffs argue the Anti-Shielding Provisions give "preferential treatment" to offensive, uncomfortable, unfavorable, and unwelcome speech. Resp. at 39–40. Apparently, Plaintiffs believe that treating unpopular protected speech the same as all other protected speech constitutes preferential treatment. Plaintiffs are incorrect. Likewise, Plaintiffs argue the Anti-Shielding Provisions grant "special protections" to offensive and unwelcome ideas, Resp. at 43. Yet Plaintiffs cannot seem to articulate *what* special protections are granted. The reason for this is simple: the only "protection" that the Anti-Shielding Provisions contemplate at all is freedom from censorship in violation of the First Amendment, which is afforded to all protected speech equally.

b. Plaintiffs Conflate the Anti-Shielding Provisions with the Recording Provisions and the Pre-Existing Cause of Action for Violations of an Individual's Expressive Rights.

Plaintiffs also attempt to muddy the waters by conflating the Anti-Shielding Provisions, the Recording Provisions, and the cause of action in section

1004.097(4)(a)—the latter of which Plaintiffs do not challenge. But the law is clear: there is no cause of action—before or after HB233—for violating the Anti-Shielding Provisions. The only private cause of action is for violations of an individual's expressive rights, § 1004.097(4)(a), Flat Stat., which is only available against institutions, *id.*, and existed before HB233, § 1004.097(4) (2020).[1] A single section of the Anti-Shielding Provisions appears in section 1004.097, and has nothing to do with the cause of action for violations of an individual's expressive rights. § 1004.097(3)(f), Fla. Stat. The remainder of the Anti-Shielding Provisions appear elsewhere. ECF No. 164-3.

To illustrate, Plaintiffs claim that HB233 enacts "brand new consequences for violating the Anti-Shielding Provisions," Resp. at 28, but conspicuously fail to identify any such consequences, or allege any Plaintiff has suffered such consequences. Instead, Plaintiffs cite without explanation to section 1004.097(3)(f), which of course sets forth no consequences, and simply states that public colleges and universities cannot engage in shielding.

Plaintiffs likewise claim the Anti-Shielding Provisions "expressly threaten" investigations and complaints if violated, citing section 1004.097(4), Florida

[1] The same is true with respect to Defendants' general statutory oversight authority, *see* Resp. at 36–37, which applies to institutions—not to individual students or faculty members—and vests primary responsibility for compliance with the law with institution-level boards of trustees. §§ 1008.32, 1008.322, Fla. Stat.

Statutes. Resp. at 29. This is simply not true, and Plaintiffs' contention finds no basis in the statute. Again, the violation of an *individual's* expressive rights, and the vindication of such violation, is the subject of a cause of action that predates HB233. Perhaps an act of shielding could, under hypothetical circumstances not before the Court, simultaneously constitute a violation of an individual's expressive rights. But it is the latter violation—not the shielding—that gives rise to a cause of action under section 1004.097(4)(a). In any event, none of this has occurred, no Plaintiff could ever be the object of such a suit (available only against institutions), nor could Defendants ever be the plaintiff in such a suit (available only to individuals).

V. Plaintiffs' Legislative Intent Arguments Find No Support in Fact or Law.

Plaintiffs' Response does not support their theory that subjective intentions expressed by individuals outside the legislative process can be used to invalidate an otherwise constitutional statute. The Eleventh Circuit and Supreme Court foreclose this legal argument, and under any standard, neither the proper record evidence nor Plaintiffs' cherry-picked hearsay evidence comes close to establishing *the entire Florida Legislature* harbored an intention to discriminate against particular viewpoints in enacting HB233. Nor does the record show that HB233 has in fact operated to discriminate against any particular viewpoints. Defendants respectfully direct this Court to their Motion (ECF No. 165) and Response in opposition to Plaintiffs' summary-judgment motion (ECF No. 177) for discussion of the proper

sources of legislative intent, and when it is appropriate for the Court to reach the question of legislative intent.

Plaintiffs' criticism of *NetChoice* hinges on a footnote, and does not displace its holding or its strong reaffirmation of *Hubbard* and *O'Brien*. *See* ECF No. 177 at 17–21, 24. The weight of this precedent forecloses a free-speech claim premised upon accusations about the subjective motivations of elected officials. In addition to *O'Brien*, the Supreme Court has recognized, in contrast to Plaintiffs' theory, that "the contention that a statute is 'viewpoint based' simply because its enactment was motivated by the conduct of the partisans on one side of a debate is without support." *Hill v. Colorado*, 530 U.S. 703, 724–25 (2000); *see also Sons of Confederate Veterans, Virginia Div. v. City of Lexington, Va.*, 722 F.3d 224, 231 (4th Cir. 2013) ("*SCV*") (The SCV's primary contention on appeal—that the motive behind the Ordinance dictates its constitutionality—lacks controlling precedent. . . . The Free Speech Clause only 'forbids Congress and . . . the States from making laws abridging the freedom of speech—a far different proposition than prohibiting the intent to abridge such freedom.' . . . . Furthermore, '[w]e are governed by laws, not by the intentions of legislators.'" (internal marks and citations omitted)). Plaintiffs arguments in support of their claims stray far from the text of HB 233, and equally far from the intent expressed in the legislative record.

As discussed above, Plaintiffs' factual "evidence"—including facts purporting to relate to legislative intent—suffers from the flaws Defendants have highlighted for months. Post-passage remarks are useless, as are remarks by individuals other than the legislators who voted on the challenged bill. Extraneous commentary reflected in articles or social-media posts are not admissible sources of legislative intent, nor are they probative of legislative intent. *Brooks*, 158 F.3d at 1242–43.[2] Plaintiffs insist post-passage remarks are a "minute" portion of their evidence, Resp. at 47, but the *immediately preceding citation* is a post-passage statement purportedly made by Representative Sabatini during a television interview, *id.* (citing ECF No. 178-41 at 7:19–24), and the *next page* cites a website article published on October 24, 2022—fewer than three weeks ago—that is silent as to HB233.[3] Plaintiffs' Response also mentions HB7, race, or tenure more than a half-dozen times, while their Motion for Summary Judgment mentions HB7 eleven times, race seven times, and tenure twice—excluding their experts' incessant incantation of these terms—all of which relate to legislation enacted *after* HB233.

[2] Additionally, Rule 803(3)'s exception for statements of motive, intent, or plan does not apply because Plaintiffs do not offer out-of-court statements to show the speaker's *future* plans or intent. Rather, Plaintiffs offer post-enactment statements and statements from non-legislators to explain the entire Legislature's intent regarding *past* conduct—not to show why the speaker took some future action in accord with the previously-expressed intent.

[3] The purported transcript of this interview, ECF No. 178-41, as well as the article and its internal quotes, ECF No. 178-43, constitute unauthenticated hearsay-within-hearsay and are not proper summary-judgment evidence.

The text of HB233 and the transcripts of the legislative proceedings on HB233 and SB264 speak for themselves, and refute any suggestion that HB 233 was motivated by the Legislature's discriminatory desire to suppress certain viewpoints.

VI. Plaintiffs' Discussion of Legal Precedent is Flawed.

There is nothing illogical or contradictory about Defendants' observation that neither HB233 nor the First Amendment impose regulations or restrictions on speech. *See* Resp. at 4. The First Amendment condemns laws abridging speech or treating speech differently based on content—not laws "prohibiting the intent to abridge such freedom," which is precisely HB233's purpose and operation. *SCV*, 722 F.3d at 231 (quoting *Grossbaum v. Indianapolis–Marion Cnty. Bldg. Auth.*, 100 F.3d 1287, 1293 (7th Cir.1996)).

Plaintiffs direct this Court to the Eleventh Circuit's recent decision in *Henry v. Attorney General, Alabama*, 45 F.4th 1272 (11th Cir. 2022), which provides another useful illustration of how distinguishable HB233 is from laws that actually restrict and chill speech, and reinforces the threshold requirement that a plaintiff be subject to enforcement under the law they are challenging. In *Henry*, the challenged "grand jury secrecy law" prohibited individuals from speaking about information developed during grand jury proceedings, including the content of testimony and deliberations. *Id.* at 1279–80, 1286–88, 1291–92. Obviously, an explicit prohibition on certain speech chills the prohibited speech by design. Thus, of course it was

"wise[]" for the defendant Attorney General to not challenge the plaintiff's asserted injury—chilled speech—when the plaintiff was plainly subject to prosecution under the law, and his chilling allegations were directly related to his participation in grand jury proceedings. *Id.* at 1288.

By contrast, HB233 cannot be enforced against Plaintiffs, and the vastly varied content of their allegedly chilled speech—from labor relations to "queer theory" to American history—is mentioned nowhere in HB233. Indeed, in *Henry*, the Court rejected the plaintiff's First Amendment challenge to a separate provision in the grand jury secrecy law that, by its plain language, did not cover the plaintiff's allegedly chilled speech. *Id.* at 1290–92.

In sum, *Henry* has little application beyond reinforcing the arguments Defendants have raised repeatedly. Plaintiffs' chilling-effects theory is objectively unreasonable because HB233 is not enforceable against them, and because it makes no mention of the topics on which Plaintiffs have allegedly chilled their speech. Thus, they face no credible threat of prosecution for engaging in the speech they say they have chilled. *E.g.,* ECF No. 165 at 28–32, 53; ECF No. 177 at 34, 35. *Henry* does not stand for the proposition that the injury requirement is automatically satisfied by simply declaring your speech has been chilled, nor does *Henry* depart from or overrule decades of Supreme Court and Eleventh Circuit precedent requiring chilling to be objectively reasonable and coupled with a credible threat of

prosecution. *E.g., Laird v. Tatum*, 408 U.S. 1, 12–14 (1972); *Hallandale Prof's Fire Fighters Local 2238 v. City of Hallandale*, 922 F.2d 756, 760–62 (11th Cir. 1991).

Next, Plaintiffs inaccurately claim Defendants have failed to "rebut" their citations to cases like *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971), *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2022), and *Matal v. Tam*, 137 S. Cr. 1744 (2017). Resp. at 30–31, 43. But patently distinguishable and irrelevant cases do not warrant rebuttal. Defendants prudently ignored case law with no bearing on the outcome of this case. HB233 does not mandate any disclosures as in cases like *Bonta*, nor does it prevent any person from taking offense or expressing their offense as in *Matal*. Nothing more remains to be said.

Plaintiffs perplexingly invoke the Eleventh Circuit's *Speech First* decision, arguing that Plaintiffs' only available option in response to HB233 is to simply "keep[]" their "mouth shut" rather than run afoul the law. Resp. at 30 (quoting *Speech First*, 32 F.4th at 1122). But this tenuous analogy elicits an obvious question in light of HB233's text: keep their mouths shut *about what*? Whereas the speech code in *Speech First* deemed specific content forbidden (i.e., "discriminatory" or "humiliating" speech or conduct based on "race," "religion," "sex," "political affiliations," among other categories), 32 F.4th at 1114–15, and the grand jury secrecy law in *Henry* prohibited disclosure of grand jury testimony and deliberations, 45 F.4th at 1277, HB233 does not tell anyone to speak or not speak

about any subject. If anything, Plaintiffs' criticism is again of HB7, or perhaps of HB1557—but not HB233. *See* Resp. at 30.[4]

Remarkably, Plaintiffs also argue that the Professor Plaintiffs' "[c]ensorship is protected expression." Resp. at 40 (citing *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557 (1995)). This statement is unequivocally false when the censor is a State employee who violates a private individual's First Amendment rights.[5] *Hurley* is inapposite because it regarded a *private organization's* right to regulate the content of its message. *Id.* at 559, 569–73. Here, the Professor Plaintiffs are employees of taxpayer-funded institutions, who in the course of their employment do not have free reign to censor students' speech outside the contours of First Amendment jurisprudence (i.e., time, place, and manner restrictions).

[4] Plaintiffs' new fixation on framing their injury as "altered speech"—raised for the first time in their Motion for Summary Judgment—is a tacit acknowledgement that their compelled speech claim has no basis in fact or law. And regardless of Plaintiffs' framing, the law requires Plaintiffs to show that their chilled speech—or altered speech, as Plaintiffs now insist—is objectively reasonable in order to confer standing to pursue a pre-enforcement challenge. *See* ECF No. 177 at 2, 32–38. To the extent Plaintiffs' new "altered speech" theory is intended to represent a new claim, Plaintiffs are precluded from raising a new claim or asserting a new injury for the first time at the summary-judgment stage. *See id*. at 42.

[5] This argument also ignores the Eleventh Circuit's on-point decision in *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991) which held that a university had the right to regulate the instructional speech of a professor in the classroom.

VII. Conclusion.

For the reasons set forth above and in Defendants' Motion (ECF No. 165), Defendants respectfully request this Court enter final summary judgment in Defendants' favor.

Respectfully submitted on November 14, 2022.

/s/ *George T. Levesque*
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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(F)

The undersigned certifies this Reply in Support of Defendant's Motion for Summary Judgment contains approximately 4,445 words.

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CERTIFICATE OF SERVICE

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

/s/ George T. Levesque
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