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' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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TABLE OF ABBREVIATIONS AND DEFINED TERMS

ACFS	Advisory Council of Faculty Senates
BOE	Board of Education, Defendant (together with BOG, "Defendants")
BOG	Board of Governors, Defendant (together with BOE, "Defendants")
CFEA	Campus Free Expression Act
Faculty Plaintiffs	William Link, Barry Edwards, Jack Fiorito, Robin Goodman, David Price
FIRE	Foundation for Individual Rights and Expression (previously Foundation for Individual Rights in Education)
MSJ	Motion for Summary Judgment
UCLA	University of California, Los Angeles

For the reasons set forth in Plaintiffs' motion (ECF No. 167) and supporting exhibits (ECF No. 166), HB233's Challenged Provisions were intended to and do operate as content-based restrictions on speech in violation of the First Amendment, under several independent legal theories; the Survey Provisions separately—both facially and as applied—violate the First Amendment because they inquire into protected political beliefs and associational rights without a sufficiently compelling basis or narrow tailoring; and the Anti-Shielding Provisions are unconstitutionally vague. Plaintiffs are entitled to summary judgment on each of their claims. Defendants' opposition provides no reason to find otherwise.

I. DEFENDANTS FAIL TO ESTABLISH ANY GENUINE ISSUE OF MATERIAL FACT.

Defendants begin with the sweeping claim that "Plaintiffs' Motion barely articulates a single undisputed fact," Opp. 1 (ECF No. 177), but then ask the Court to take their word for it: throughout their 46-page response, Defendants fail to address—much less rebut—*nearly all* of Plaintiffs' factual assertions.

In the few instances where Defendants do engage with the facts, their arguments are easily rebutted. For example, Defendants' claim that Plaintiffs rely solely on experts to prove the Anti-Shielding Provisions' chilling effects, Opp. 4, ignores extensive non-expert evidence cited throughout Plaintiffs' motion showing the Provisions *are* chilling and compelling faculty and student speech across Florida. *See* Pls.' MSJ 15-23, 32-34. Defendants' claim that Plaintiffs do not support their

assertion that Defendants never treated the Survey as a serious exercise, *see* Opp. 5, is even more perplexing. A paragraph's worth of factual citations support it, demonstrating that Defendants' implementation of the Survey was highly partisan, unprofessional, and unorthodox. *See* Pls.' MSJ 6-7 & n.6. Defendants fail to rebut *any* of those facts. And Defendants' attempt to dispute that HB233's sponsors declined to amend it to make the survey voluntary or anonymous ignores that, in the very citation to which Defendants object, the sponsor clearly stated he "would not be interested in amending the bill" along those lines. *Compare* Opp. 5, *with* ECF No. 166-18, 8:4-24.

Each of the facts that Defendants ignore are properly deemed undisputed under Rule 56(e)(2). The same is true of the handful of facts Defendants quibble about but fail to (1) cite to particular parts of materials in the record that genuinely dispute those facts, (2) show that the cited materials do not establish the absence of a genuine dispute, or (3) show that Plaintiffs cannot produce admissible evidence to support the fact. Fed. R. Civ. P. 56(c)(1).

II. DEFENDANTS' OBJECTIONS TO PLAINTIFFS' EXHIBITS ARE MERITLESS.

Instead of rebutting Plaintiffs' factual assertions under the standard set forth in Rule 54(c)(1), Defendants object to 22 of Plaintiffs' exhibits. The Court should deem conceded the admissibility of the 54 exhibits to which Defendants do not object. *See, e.g.*, *Burnett v. Stagner Hotel Courts, Inc.*, 821 F. Supp. 678, 683 n.2

(N.D. Ga. 1993), *aff'd*, 42 F.3d 645 (11th Cir. 1994).[1] Defendants' specific objections are also meritless.

A. The Court may rely on Plaintiffs' experts.

Under Rule 56(c)(1), parties may support summary judgment motions by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations … , admissions, interrogatory answers or other materials." Plaintiffs' experts' sworn deposition testimony and sworn reports (ECF Nos. 166-10, -11, -12, -13, -21, -24, -37, -71*)* satisfy this Rule. *See Colonial Pipeline Co., Inc. v. Ceco Pipeline Servs. Co., Inc.*, No. 2:19-cv-1334-AMM, 2022 WL 4283098, at *8-10 (N.D. Ala. July 13, 2022). They also establish that each expert satisfies Rule 702's qualification requirements. Any further objections Defendants make on those grounds go "to credibility and weight, not admissibility." *Clena Invs., Inc. v. XL Specialty Ins. Co.*, 280 F.R.D. 653, 661 (S.D. Fla. 2012). As to methodology, the only challenge Defendants make is to broadly object to *all* of the reports on the grounds that the experts did not interview Florida students and faculty. Opp. 16. But the relevant question is simply whether their approaches were reasonable and reliable. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 154-55 (1999); *Daubert v. Merrell*

[1] The non-objected to exhibits are: ECF Nos. 166-2-4, -9, -11, -13-20, -22-23, -25-27, -29-33, -35-37, -40-42, -50, -52-54, -56-62, -64-74.

Dow Pharms., Inc., 509 U.S. 579, 590 (1993). Defendants offer nothing indicating that interviews are the only reasonable and reliable way to reach any of the opinions at issue. Finally, Defendants' contention that the testimony is inadmissible "hearsay-within-hearsay" is misplaced. Much of what Defendants object to is also established by non-expert evidence (including legislative hearing transcripts), or offered for non-hearsay purposes. But, also, under Rule 703, if the facts or data are the kind upon which experts in the relevant field would reasonably rely, the testimony is admissible even if it would otherwise constitute hearsay. All of the testimony passes this test.

None of the cases Defendants cite support excluding Plaintiffs' experts. Each considered whether a party could survive summary judgment *without offering* expert testimony. *See Hicks v. United States*, No. 20-CIV-61241, 2021 WL 5359724, *1-3 (S.D. Fla. Nov. 16, 2021) (finding failure to offer competing expert not "fatal" on summary judgment where plaintiff cited other evidence raising genuine issues of material fact); *Arias v. DynCorp*, 752 F. 3d 1011, 1016 (D.C. Cir. 2014) (reversing decision that claims for battery and nuisance *required* expert evidence, but affirming dismissal of claims for crop damages due to lack of causation expert); *Las Originales Pizza, Inc. v. Batabano Group, Inc.*, No. 19-22553-CIV, 2022 WL 4369615, *8–9 (S.D. Fla. July 18, 2022), *report and recommendation adopted*, 2022 WL 4366952

(Sept. 21, 2022) (rejecting idea that "retaining a … rebuttal expert is the price of admission for *cross-examining* [opposing expert witness]" (emphasis added)).

Defendants fail to offer *any* evidence—expert or otherwise—to establish that material facts are in dispute. Instead, they baldly assert that Plaintiffs' experts' deposition testimony "dooms" them, Opp. 15, without citation or explanation. Defendants' promise that they intend to move to exclude, Opp. 14, continues the theme of a broad-brush attack without substance. The Court obviously cannot reject evidence based on arguments that have not been made. As discussed below, the few specific arguments that Defendants make as to each expert fare no better.

1. Dr. Allan Lichtman.

Dr. Lichtman is a well-regarded expert in political history, social science, and historical and statistical methods who offers opinions here on legislative intent. Ex. 1, 5. Dr. Lichtman has worked as an expert more than one hundred times and testified in more than a dozen cases since 2015. *See id.* at 12-13, 141-42. Courts (including the Supreme Court) have repeatedly relied on his analyses as to legislative intent and in cases applying the *Arlington Heights* factors. *See, e.g.*, *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 427, 439 (2006); *see also City of S. Miami v. DeSantis*, 508 F. Supp. 3d 1209, 1218 n.7, 1231-32 (S.D. Fla. 2020) (relying on Dr. Lichtman's opinion on summary judgment); *City of S. Miami v. DeSantis*, 561 F.

Supp. 3d 1211, 1226 n.5, 1262, 1264-66, 1268-71, 1278-80 (S.D. Fla. 2021) (relying on Dr. Lichtman in final findings of fact and conclusions of law).

Defendants do not rebut any of Dr. Lichtman's conclusions. Instead, they (1) claim his testimony is a collection of random factoids comprised of "hearsay-within-hearsay," and (2) mischaracterize his opinions as legal conclusions. Defendants are wrong on both counts. Their arguments are also inconsistent with the decisions of countless courts, which regularly find expert testimony like Dr. Lichtman's to be admissible and helpful in unraveling questions of intent. *See, e.g.*, *Hunter v. Underwood*, 471 U.S. 222, 229 (1985) (affirming decision relying on expert legislative intent testimony provided by "two expert historians"); *Ne. Ohio Coal. for the Homeless v. Husted*, No. 2:06-CV-896, 2016 WL 1047130, at *2 (S.D. Ohio Mar. 16, 2016) (denying motion to exclude intent expert and noting when plaintiffs allege discriminatory intent or purpose, "nothing is more relevant than evidence that the legislature did in fact act with such intent").

Many of the materials cited by Dr. Lichtman are independently admissible, *e.g.*, not offered for the truth, or subject to an exception. *See, e.g.*, Ex. 1, 36, n.63 (Governor's remarks satisfy Rule 803(3)'s state-of-mind exception); *id*. at 38, n.65 (BOE social studies standards are 803(8) business records and 801(d)(2) party admissions); *id.* at 48, n.90 & 57, n.111 (bill text and other legislative history). And Defendants fail to show that anything upon which Dr. Lichtman relies violates Rule

703. Nor could they: Dr. Lichtman's analysis was "standard" and "consistent with the analysis [he does] as a professional historian." Ex. 2, 6:16-23.

City of South Miami, which Defendants cite, rejected their arguments. There, the court found that Dr. Lichtman has: (1) "been recognized as an expert across a wide variety of different subjects, including … discriminatory legislative intent and impact," 2020 WL 7074644, at *8; (2) "served as an expert witness in numerous cases where he was asked to … provide opinions on issues specifically relating to the discriminatory intent of a legislative body," *id.*; and (3) properly relied on third-party sources, including hearsay, under Rule 703, consistent with general practice in his field. *id.* at *11, 15-16. The court *rejected* the contention that use of the *Arlington Heights* framework made Dr. Lichtman's analysis inadmissible legal conclusion. *Id.* at *7, 11 ("[T]he *Arlington Heights* guidelines are generally consistent with the analytical framework routinely employed by historians in his field in determining discriminatory intent."). While the court made clear that it would make its own conclusion on the "ultimate issue of discriminatory legislative intent," *id.* at *13, it credited and relied on Dr. Lichtman's analysis for all but that ultimate legal conclusion on summary judgment and after trial. *See City of S. Miami*, 508 F. Supp. 3d at 1218 n.7, 1231-32; *City of S. Miami*, 561 F. Supp. 3d at 1226 n.5, 1262, 1264-66, 1268-71, 1278-80.

2. Dr. Matthew Woessner.

Dr. Woessner is a political scientist who has spent nearly two decades studying politics and ideology in higher education. Ex. 3, 11-13. He has significant expertise using survey data including in his own peer-reviewed research into how politics impacts teaching and student experience. *Id.* Based on his experience, Dr. Woessner opines that: (1) to the extent the Legislature was concerned about faculty "indoctrination" of students, research refutes arguments that this is an actual issue; (2) the Survey HB233 requires is unlikely to provide an accurate or reliable picture of intellectual freedom or viewpoint diversity; (3) the Anti-Shielding Provisions will discourage—not protect—speech; (4) the Recording Provision will chill classroom discussion; and (5) the Challenged Provisions work together to substantially interfere with free speech. *Id.* at 5-11.

Defendants mention Dr. Woessner only twice. First, they claim that unspecified portions of his report are hearsay or excludable under *Daubert*. Opp. 10. They do not explain these objections, which must be rejected for reasons already discussed. Defendants' only other mention of Dr. Woessner is in a single line, attempting to reduce the bases for each of his detailed opinions to "common sense." *Id.* at 16. The testimony that Defendants cite to support that assertion does not support it. *See* Ex. 4, 70:23–72:13.

3. Dr. Sylvia Hurtado.

Dr. Hurtado is a preeminent scholar in higher education survey design, drafting, and administration. Ex. 5 at 6-7. For more than a decade, she directed UCLA's Higher Education Research Institute ("HERI"), overseeing the administration of HERI's survey of college students and faculty—the gold standard of such surveys. *Id.* at 6; Ex. 3, 6. Among the opinions offered by Dr. Hurtado are that features of HB233 and the context in which it was enacted make it impossible to obtain valid, reliable data; the Survey lacks an educational purpose; and the 2022 Survey was grievously flawed in its design and administration. Ex. 5, 5-6, 51-52.

Defendants do not and cannot question Dr. Hurtado's expertise in survey design and administration. Instead, they attack her for relying on Defendants' own admission that the 2022 Survey collected public IP addresses, which BOG's own corporate witness admitted could be used to trace responses. *Compare* Opp. 16, *with* Pls.' MSJ 8. Dr. Hurtado need not be a cyber security expert to know that collecting this information while telling respondents a survey is anonymous is an egregious misstep—both ethically and as a matter of survey security. *See* Ex. 6, 38:22-39:3, 34:1-25.

Defendants also mischaracterize Dr. Hurtado's testimony. Opp. 38, n.14. She explained that a longitudinal study of an *individual's changing perception* over years would need to collect personally-identifying information. Ex. 6, 50:17-51:11. But,

in such cases, great care is taken to protect respondents' identity and anonymity. *Id.* at 47:7-48:13. HB233's Survey is not longitudinal, and Defendants do not claim to have taken *any* of the precautions survey scientists use to protect respondents—including engaging a third-party survey provider or obtaining IRB approval. Instead, the unrebutted evidence establishes they chose *not* to do any of these things. *See* Pls.' MSJ 6-7 & n.6.

Defendants' other generic criticisms of Dr. Hurtado for relying on "hearsay" fail for reasons already discussed.

4. Dr. Michael Bérubé.

For more than twenty years, Dr. Bérubé has studied academic freedom in higher education, including the long history of attacks that have masqueraded as concerns about liberal indoctrination. *See, e.g.*, Ex. 7, 5, 9-14, 77-84, 102-03, 109; Ex. 8, 30:25-32:23, 92:3-12. Relying on that extensive expertise—as well as his experience as an educator, both in the classroom and in positions in academia focused on issues of academic freedom—Dr. Bérubé opines on how HB233 fits into the history of political attacks on academic freedom and how it is likely to impact speech within academia. *See, e.g.*, Ex. 7, 6-9. Defendants mischaracterize Dr. Bérubé's testimony, attempting to reduce his expertise to "the interpretation of" text. Opp. 16. Dr. Bérubé's report refutes this claim, explaining not only the breadth of his relevant experience but his methodology here, as well as the scope of his review

of the literature related to academic freedom and the history of attacks on it. Ex. 7, 14-15. Defendants' other criticisms based on the purported reliance on "hearsay" fail for reasons already explained.

B. Defendants' other objections are without merit.

Defendants' objections to Plaintiffs' other exhibits should be rejected. Each is admissible as discussed below.

Exhibit ECF Nos. 166-	**Bases for Admissibility**
1	Not offered for truth but to show effect on listener/knowledge/notice—Legislature was aware there was no free speech crisis in Florida and that justification was pretextual. Rule 801(c).
8	Not offered for truth but to show others' understanding of the meaning and likely impact of the law (correct or incorrect) and effect on listener/knowledge/notice—Defendants were provided a legal analysis concluding that Anti-Shielding Provisions are incomprehensible and likely to chill and compel speech. Rule 801(c).
28	Not offered for truth but to show effect on listener/knowledge/notice—Defendants solicited and received glut of immediate negative feedback from survey respondents. Rule 801(c). Reactions to the survey also are present sense impressions of respondents and a public record of feedback BOG solicited. Rule 803(1), (8).
34	Not offered for truth but to show effect on listener/knowledge/notice—Defendants were provided ACFS resolution expressing serious concern with HB233. Rule 801(c). Defendants' contention that Exhibit 34—a document Defendants produced in discovery, which bears their own Bates number, was emailed to BOG directly from the Chairman of ACFS, and which Criser recognized and described during BOG's 30(b)(6) deposition, *see* Ex. 9, 85:20-87:12—should not be considered because it is "unauthenticated" is illustrative of Defendants' indefensible approach to objections here.
38	Explicit statements admonishing certain viewpoints to show effect on Plaintiffs. Rule 801(c). Public record of statement of public official. Rule 803(8). Reflection of declarant's state of mind. Rule 803(3).

39	Explicit statements made admonishing viewpoints to show effect on Plaintiffs. Rule 801(c). Public record of statement of public official. Rule 803(8). Reflection of declarant's state of mind. Rule 803(3).
43-46	Emails from FIRE to show effect on listener/knowledge/notice—Legislature aware of serious First Amendment concerns. Rule 801(c).
47-49	Articles by and proposed edits from FIRE regarding how HB233 will chill speech offered show effect/knowledge/notice on, of, to Legislature. Rule 801(c).
51	Explicit statements admonishing viewpoints to show effect on Plaintiffs. Rule 801(c). Public record of statement of public official. Rule 803(8). Reflection of declarant's state of mind. Rule 803(3).
55	Proposed legislation to show effect on Plaintiffs. Rule 801(c). Public business record produced by Governor DeSantis. Rule 803(8). Draft legislation reflecting declarant's state of mind. Rule 803(3).
63	Official report of Faculty Senate on Academic Freedom to show effect on Defendants (e.g., knowledge/notice). Rule 801(c). Public record of official report of public body. Rule 803(8).
75	Email attaching article using survey results to rank Florida universities as "most politically oppressive" as circulated by Defendants offered to show effect on Defendants (knowledge/notice) and state of mind. Rules 801(c), 803(3). Business record under Rule 803(8).
76	BOE's internal analysis of HB233 is an admission by a party opponent. Rule 801(d)(2). Reflects BOE's state of mind/knowledge/notice regarding survey design requirements. Rule 803(3). Business record under Rule 803(8).

III. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT.

A. The First Amendment protects faculty speech.

As explained in Plaintiffs' motion at 23-26, their classroom speech is protected under the First and Fourteenth Amendments. Defendants' largely leave this section unrebutted, save for a footnote suggesting that Plaintiffs' First Amendment claims are foreclosed by *Garcetti v. Ceballos*, 547 U.S. 410 (2006), and *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991). This is incorrect.

Garcetti explicitly did not address "scholarship or teaching." 547 U.S. at 425; *see also* Pls.' Opp. 38-39 (ECF No. 179). Nor does *Bishop* support Defendants—because of factual differences that Defendants acknowledge, Opp. 33-34, and reasons noted in Plaintiffs' motion at 25-26—but also because, even in upholding the exceedingly "narrow[]" restrictions that the university crafted there to address complaints about a particular professor, the court found that the restrictions "*implicate First Amendment freedoms*." 926 F.2d at 1075 (emphasis added). Furthermore, the court's reasoning centered on the deference afforded to universities as educational institutions, to enable them to respond to specific issues, while also protecting academic freedom. *Id.* In contrast, HB233 is an edict from the Legislature to *all* post-secondary institutions that broadly *impedes* upon academic freedom *and* institutions' ability to carefully tailor their response to specific issues when they do arise.

B. Plaintiffs are entitled to summary judgment on their claim that HB233 is an unconstitutional content-based speech restriction.

Defendants largely do not address Plaintiffs' arguments (or evidence) establishing that HB233 is content-based under several independent tests, each established by binding precedent. *See* Pls.' MSJ 26-38; Pls.' Opp. 39-46. Instead, Defendants focus entirely on the Anti-Shielding Provisions, mistakenly contending Plaintiffs do not argue that the Recording or Survey Provisions are content-based.

Opp. 29. That is false. Pls.' MSJ 28-29 (explaining Challenged Provisions work together as content-based speech restrictions).

Even as to the Anti-Shielding Provisions, Defendants fail to rebut Plaintiffs' showing that they are entitled to summary judgment. Defendants' assertion that "no one is forced to engage" in HB233's favored speech misconstrues the relevant legal test and is refuted by undisputed facts. It is enough that the law, *on its face*, provides "uncomfortable, unwelcome, disagreeable, or offensive" speech—and *only* speech with that content—special protection not extended to other speech. Pls.' MSJ 27-29. But Defendants' bald assertion also ignores unrefuted evidence establishing that many *do* read HB233 to require faculty to engage in speech they otherwise would not—and that the law has had that effect. *See, e.g.*, ECF No. 166-8, 3 (memo from Chair of Higher Education practice at defense counsel's firm indicating Provisions could be read to "put an affirmative duty on faculty to actively promote diversity of viewpoints in their classroom"); ECF No. 166-44, 2 ("The language currently in the bill, if applied literally, would intrude on faculty's ability to ensure the smooth operation of the classroom."); ECF No. 166-45, 2 ("[T]he term 'shield' makes no exception that would allow faculty to maintain order in the classroom or decide the scope of classroom discussions[.]"); Ex. 10, 20:2-12 (Professor Maggio would "skew [his] class in a more politically conservative direction" due to HB233); *see*

also Pls.' MSJ 15-21; Pls.' Opp. 8-17.[2] Similarly, Defendants' assertion that there is no objectively reasonable chill, because the "Anti-Shielding Provisions do not dictate what professors can or cannot discuss in their classrooms," Opp. 33, is both belied by the extensive undisputed record evidence and contrary to Defendants' argument that "HB233 *prevents* [Plaintiffs] from prohibiting disfavored speech *in their classrooms*." Opp. 36 (emphases added).

As for Defendants' insistence that HB233 "has never been justified based on the content of regulated speech," they once again provide no affirmative evidence or argument. Instead, they quibble with their own interrogatory responses, which themselves justify HB233 in relation to the speech regulated. Opp. 31-32; ECF No. 166-69, 17-18; ECF No. 166-70, 17-18. Defendants' assertions otherwise are irreconcilable with their own responses and the legislative history. Pls.' MSJ 9-15, 28-29; Pls.' Opp. 1-2, 40-41.

Defendants' repeated claim that HB233 is "not enforceable against individual[s]," Opp. 2, 33, 36 n.13, 41-43, 45, is also wrong. Only HB233's *cause of action* is limited to institutions—Defendants can enforce its other provisions against individuals, including faculty who may now be secretly recorded under

[2] Defendants have not offered any public guidance on the law's meaning, despite being aware that many *do* believe that it requires engaging in affirmative speech. Ex. 11, 154:10-155:4.

HB233. Pls.' MSJ 32-34; Pls.' Opp. 9-18, 32-35. Defendants also ignore Plaintiffs' arguments—and evidence—that the Challenged Provisions were intended to chill the speech of faculty whom the Legislature feared were "indoctrinating" students with liberal ideas. Pls.' MSJ 8-15, 30-33; Pls.' Opp. 1-3. Binding precedent establishes that speech and association can be effectively chilled—in violation of the First Amendment—through the implementation of surveillance mechanisms such as the Recording and Survey Provisions, as well as the mere threat of retaliatory action, whether against Plaintiffs personally (including through internal complaints or public harassment) or against their institutions. *See* Pls.' Opp. 25-29; Pls.' MSJ 8-9, 38-39.[3]

Defendants wrongly suggest that *NetChoice, LLC v. Attorney General, Florida*, 34 F. 4th 1196 (11th Cir. 2022), "foreclosed" Plaintiffs' intent-based claim. *NetChoice* evaluated two claims: one involving specific regulatory provisions, and another challenging "S.B. 7072 in toto" based on legislative motive. *Id*. at 1224. In the latter, plaintiffs argued that "viewpoint-based motivation" tainted the *entirety* of the Act "root and branch." *Id.* In finding that the plaintiffs were unlikely to succeed

[3] Defendants' suggestion that HB233 has not harmed Plaintiffs because they "have never been charged with violating [it]" or explicitly "instructed to alter their speech or conduct," Opp. 35, similarly evidences a fundamental misunderstanding of how speech may be chilled under the First Amendment. Pls.' Opp. 22-32. It is also wrong: there *are* instances where the implicit has been made explicit. Pls.' MSJ 18-21; *see also* ECF No. 166-16, 18:18-19:17; Ex. 12, ¶¶ 20-25.

on the merits to justify a preliminary injunction against the entire Act, the Eleventh Circuit cited the weak record of viewpoint-based motivation and the novelty of such a *broad* Act-wide intent-based claim, distinguishing it from a conventional First Amendment claim. *Id.* at 1225-26. Even then, it did not close the door. It declined to find that a preliminary injunction was warranted "in the absence of clear precedent" and expressly reserved judgment on "whether courts can ever refer to a statute's legislative and enactment history to find it viewpoint-based." *Id.* at 1226 n.21.[4]

Defendants' reliance on *Greater Birmingham Ministries v. Secretary of State for Alabama*, 992 F.3d 1299 (11th Cir. 2021), is also misplaced. At most, it counsels courts to not over-rely on distant history as highly probative. *Id*. at 1325; *see also* Pls.' Opp. 43; ECF No. 120, 16. Indeed, courts must "evaluate all available direct and circumstantial evidence of intent in determining whether a discriminatory purpose was a motivating factor in a particular decision." *Burton v. City of Belle Glade*, 178 F.3d 1175, 1189 (11th Cir. 1999).

Defendants' discussion of *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), protests too much—identifying minor distinctions

[4] The Court also did not fully engage the content-neutrality inquiry because it determined that the specifically challenged provisions failed to survive even intermediate scrutiny. *Id.* at 1226-27. Thus, it did not need to engage with the seminal cases on which Plaintiffs rely.

with no legal significance. Defendants effectively argue that, when a city passes discriminatory ordinances four months apart, that is "contemporaneous[]," Opp. 26, but when the same legislature and governor engage in viewpoint discrimination ten months apart, it is wholly irrelevant. There is no basis for this distinction. The body that passed HB233, HB7, and SB7044 is the *same* Legislature—every bill enacted since HB233 has been from the same body, without an intervening election—to say nothing of the continuity of the gubernatorial administration.

Finally, Defendants ignore that the *Arlington Heights* inquiry into "historical background" is "based upon familiar tort principles that inferences may be drawn from evidence of similar transactions and happenings." *Ammons v. Dade City*, 594 F. Supp. 1274, 1303 (M.D. Fla. 1984), *aff'd*, 783 F.2d 982 (11th Cir. 1986). Here, the evidence in question falls comfortably within this ambit.

C. Plaintiffs are entitled to summary judgment on their association-based claim.

Defendants make no legal argument as to Plaintiffs' associational claim, merely asserting that the record does not support it. Opp. 38-41. Plaintiffs have proven otherwise. Pls.' MSJ 21-23, 45-51.

D. Plaintiffs are entitled to summary judgment on their vagueness claim.

Defendants do not dispute Plaintiffs' factual assertions supporting the claim that the Anti-Shielding Provisions are unconstitutionally vague, including that

government officials (including Defendants), have offered differing interpretations of those Provisions, Pls.' MSJ 3, 46-47; Defendants could not say whether certain scenarios constitute "shielding," *id*. at 3; lawyers flagged concerns about the vagueness of these Provisions prior to passage, *id*.; the Legislature was aware they were vague, *id*.; Pls.' Opp 3; due to their vagueness, Faculty Plaintiffs have self-censored and altered their speech to avoid inadvertently violating them (or being accused of violating them), Pls.' MSJ 15-21; and institutions have advised faculty to alter their speech, *id*. at 19-20.

Instead, Defendants claim that "[t]he Anti-Shielding Provisions are clear on their face," Opp. 43, before offering an interpretation that is both divorced from the statutory text and ultimately unilluminating. *First*, they point to the Provisions' application to "public colleges and universities," *id*., without clarifying *who* could violate them on those institutions' behalf. *Second*, they suggest the Provisions only apply if the "grounds" for restricting speech are "that someone finds the speech offensive, unwelcome, or disagreeable." *Id.* at 43, 31. But under the Provisions' plain text, so long as someone "may find" an "idea or opinion" "uncomfortable, unwelcome, disagreeable, or offensive," it is impermissible to "limit … access to or observation of" that idea, period. Fla. Stat. § 1004.097(2)(e)-(f). Just a few years earlier, the Legislature explicitly included language in the CFEA protecting higher educational institutions' ability to restrict speech that "materially and substantially

disrupt[s]" their functioning "or infringe[s] upon the rights of other individuals or organizations to engage in expressive activities." Pls.' Opp. 3. FIRE implored legislators to include similar language to protect faculty's ability to do the same in the classroom under HB233, but they refused. *See id.*; Pls.' MSJ 11-12. In any event, this distinction would not make the law constitutional. HB233 does not require that a person put another on notice that they find speech offensive, unwelcome, or disagreeable before the Anti-Shielding Provisions are triggered, and laws that require one to predict how another might react to speech are routinely found unconstitutionally vague. *Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293, 1321-22 (11th Cir. 2017).

Defendants do not deny their inability to explain how the Anti-Shielding Provisions function in their depositions, Pls.' MSJ 46-47, instead claiming the evidence is inadmissible because it offers legal conclusions and speculation, Opp. 43-45. But Plaintiffs agree that this Court is the arbiter of the Provisions' meaning and do not offer this testimony to prove that ultimate legal question. Rather, it is relevant to the *factual* questions of whether (1) Plaintiffs' self-censorship in the face of the Anti-Shielding Provisions is objectively reasonable, or (2) a person of ordinary intelligence could understand the statute. There is no risk that the evidence will be improperly considered, as this case is not before a jury. And courts regularly consider this type of evidence in cases alleging that a law is unconstitutionally vague.

See, e.g., Pls.' Opp. 26 (citing and discussing similar analysis in *Speech First v. Cartwright*, 32 F.4th 1110, 1121–22); *see also Baggett v. Bullitt*, 377 U.S. 360, 369–70 (1964); *White Coat Waste Project v. Greater Richmond Transit Co.*, 463 F. Supp. 3d 661, 680 n.16 (E.D. Va. 2020), *aff'd in part, rev'd in part and remanded*, 35 F.4th 179 (4th Cir. 2022); *Preston v. Leake*, 660 F.3d 726, 738–39 (4th Cir. 2011). Nor may Defendants avoid adjudication of this claim by misrepresenting the standing threshold for a vagueness claim, which Plaintiffs exceed, especially under the vagueness context's lenient standard. Pls.' MSJ 45-49; Pls.' Opp. 26-27, 32-36.[5]

E. Defendants' standing arguments must be rejected.

Defendants' standing arguments fail for reasons already explained. *See* Pls.' Opp. 5-21, 22-36; Pls.' Mot. 15-23, 32-34.

IV. CONCLUSION

Plaintiffs' motion for summary judgment should be granted.

[5] Defendants also confuse the meaning of "overbreadth." Opp. 42-43. As a Fourteenth Amendment issue, the scope of the Anti-Shielding Provisions is exceedingly broad, which exacerbates the vagueness problems. As a First Amendment issue, the "overbreadth" doctrine is not a separate claim; it is an argument that can be made in support of a facial First Amendment challenge—which Plaintiffs have properly pled. *Bd. of Airport Comm'rs of City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 572 (1987) (affirming facial First Amendment challenge on overbreadth theory, separate from vagueness challenge).

Respectfully submitted this 14th day of November, 2022.

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LOCAL RULE 7.1(F) CERTIFICATION

The undersigned, Frederick Wermuth, certifies that this motion contains 4,987 words, excluding the case style and certifications.

CERTIFICATE OF SERVICE

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

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