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.	No.: 4:21-cv-271-MW/MAF

PLAINTIFFS' TRIAL BRIEF

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I. INTRODUCTION

The parties recently submitted to the Court hundreds of pages of summary judgment briefing, together with thousands of pages of evidence, in which they summarized and discussed their respective view of the relevant facts and legal claims in the case. *See* ECF Nos. 165, 167, 177, 179, 181, 183. Rather than regurgitate that briefing in whole or in part in yet another brief for the Court before trial, Plaintiffs submit this somewhat non-traditional trial brief that does the following two things:

First, Plaintiffs briefly explain why, applying the test that the Court applied to the plaintiffs' claims in its recent decision in *Pernell v. Florida Board of Governors of State University System*, -- F. Supp. 3d --, 2022 WL 16985720 (N.D. Fla. Nov. 17, 2022), the Court should find in Plaintiffs' favor on each of their claims. In *Pernell*, this Court held that the appropriate test for determining whether a challenged law that implicates faculty speech in higher education offends the First Amendment can be derived from the Eleventh Circuit's decision in *Bishop v. Aronov*, 926 F.2d 1066, 1047-75 (11th Cir. 1991). *See Pernell*, 2022 WL 16985720, at *29-31.[1] In applying the *Bishop* test here, Plaintiffs cross-reference the factual

[1] Because the *Pernell* decision was issued three days after briefing concluded on the parties' motions for summary judgment, *see* ECF Nos. 181 & 183, Plaintiffs did not discuss it—or apply the test outlined in it—in their summary judgment briefing. However, as discussed further below, the *Pernell* decision—and the test it applies, which Plaintiffs will refer to as the "*Bishop* test"—is firmly grounded in binding precedent, and each of its considerations was discussed in Plaintiffs' summary judgment briefing, albeit not expressly articulated in the same way.

discussions and evidence submitted in support of their recent summary judgment briefing.

Next, in lieu of a traditional trial brief, which this Court made optional in its November 3, 2022 Order (ECF No. 175), Plaintiffs summarize the best governing and persuasive authority on several of the important legal issues that the Court must decide in this case. Each of the issues addressed—and all authority discussed—are listed in the inclusive Table of Contents and Authorities for ease of navigation. *See supra* at i-iiv. In this second half of the brief, *see* III-X, Plaintiffs first list key authority related to standing; they next address issues related to their First Amendment and due process claims on the merits; and lastly, they briefly address their entitlement to facial relief and severability.

II. IF THE COURT APPLIES THE *BISHOP* TEST, IT SHOULD FIND IN FAVOR OF PLAINTIFFS ON ALL OF THEIR CLAIMS.

In its recent decision considering First and Fourteenth Amendment challenges to Florida's Stop WOKE Act, *Pernell*, 2022 WL 16985720, the Court carefully considered the parties' arguments about what test to apply and the governing authority addressing the application of the First Amendment in the context of faculty speech in public post-secondary institutions. The Court determined that, following the approach taken by the Eleventh Circuit in *Bishop*, a three-part test should apply. Specifically, the Court applied a "'case-by-case' approach" that considers: (1) the context in which the restriction arises; (2) "the University's position as a public

employer which may reasonably restrict the speech rights of employees more readily than those of other persons," recognizing that such restrictions "must be both reasonable and supported by evidence of a sufficiently weighty interest to overcome the employee's right to speak," and (3) "the strong predilection for academic freedom as an adjunct of the free speech rights of the First Amendment." *Pernell*, 2022 WL 16985720, at *35-40 (quoting *Bishop*, 926 F.2d at 1074-75); *see also id.* at *15-16, n.12, *21, *28-30.

A. The context in which HB233 arises favors Plaintiffs.

The context of this case is addressed in detail in Plaintiffs' briefing on their summary judgment. *See* ECF No. 167 at 22-30; ECF No. 183 at 19-24; ECF No. 179 at 4-24. Plaintiffs do not repeat those facts wholesale here, but rather reference just some of the key evidence regarding context in broader strokes, to explain how it fits into the *Bishop* test.

First, as in *Pernell*, the context of this case favors Plaintiffs. This is not a case like *Bishop*, where an individual professor repeatedly sought to lecture on his religious beliefs during instructional time and organized a companion after-class meeting for his students where "he lectured on and discussed 'Evidences of God in Human Physiology,'" resulting in multiple, serious student complaints, that made the University concerned it could be vulnerable to an Establishment Clause claim if it did not respond. *Bishop*, 926 F.2d at 1068-69. Among other things, HB233 "does

not implicate Establishment Clause concerns, nor does it focus on student complaints about a single professor who used class time to discuss personal beliefs that the University had deemed to be outside the scope of his course's curriculum." *Pernell*, 2022 WL 16985720, at *36; *cf. Braswell v. Bd. of Regents of Univ. System of Ga.*, 369 F. Supp. 2d 1371, 1379 (N.D. Ga. 2005) (applying *Bishop* to find constitutional a requirement that professor "disentangle[] [her] religious activities and the University's cheerleading program").

Instead, "the context here includes the State of Florida's passage of" sweeping provisions that apply to every single post-secondary institution within Defendants' jurisdiction and control. *See Pernell*, 2022 WL 16985720, at *36. These include (1) the Survey Provisions, which mandate that Defendants annually, broadly, and intrusively inquire into faculty members' and students political and ideological viewpoints;[2] (2) the Anti-Shielding Provisions, which broadly prohibit "limit[ing] students', faculty members', or staff members' access to, or observation of, ideas

[2] It is true that the 2022 Surveys did not ask *students* to self-identify their own political viewpoints or affiliations, but instead to report on their perception of their faculty's and institutions' political ideology. ECF No. 167 at 46-47; *id.* at 47 n.18; *see also* ECF No. 178-20 ¶ 13. As unrebutted expert testimony establishes, this decision on its own rendered the student survey invalid as a matter of survey science. ECF No. 166-10 at 40. As a result, Defendants' decision in this regard ran contrary to the law's own mandate that they conduct an "annual assessment of the intellectual freedom and viewpoint diversity" through an "objective, nonpartisan, and statistically valid" survey. Fla. Stat. §§ 1001.03(19)(b) (BOE), 1001.706(13)(b) (BOG).

and opinions that they may find uncomfortable, unwelcome, disagreeable, or offensive," Fla. Stat. § 1004.097(2)(f); *see also id.* §§ 1001.03(19)(a)(2), 1001.706(13)(a)(2) (applying same restriction to Defendants BOG and BOE); and (3) the Recording Provision, which carves out a highly sui generis exception to Florida's otherwise strict criminal prohibition on recording someone without their consent, solely for "class lectures." *Id.* § 1004.097(3)(g). These provisions "affect[] potentially thousands of professors and serve[] as an *ante hoc* deterrent that 'chills potential speech before it happens,' and 'gives rise to far more serious concerns than could any single supervisory decision,' such as that in *Bishop*." *Pernell*, 2022 WL 16985720, at *36 (quoting *United States v. Nat'l Treas. Emp.'s Union*, 513 U.S. 454, 468 (1995) ("*NTEU*")).

The Plaintiffs are not "seeking to inject unsanctioned concepts into their class content or hijack the established curriculum with their own personal agenda." *Id.* at *37. They simply want the freedom to teach as they have before, without fear that discussing their viewpoints, or exercising legitimate pedological decisions about what to cover in their class—or making decisions about when to shut down a conversation that is unproductive or disruptive to the learning environment—will cause a student to use HB233's new, expansive monitoring tools, to report that their institutions are biased or hostile to intellectual freedom in the annual surveys, or report them for violating the Anti-Shielding Provisions, perhaps secretly recording

them in the process. ECF No. 167 at 22-30; ECF No. 179 at 11-21; ECF No. 178-16 ¶¶ 7, 17-19, 28-29; ECF No. 178-17 ¶¶ 7-9, 18-23; ECF No. 178-18 ¶¶ 7, 11, 16-23, 29; ECF No. 178-19 ¶¶ 11-12, 19, 21-25; ECF No. 178-20 ¶¶ 10-13; *see also* ECF No. 178-31 ¶¶ 12-18.

It is true that before HB233, students could report on or make complaints to their institutions based on an issue that they had with faculty speech, but HB233 dramatically changes that landscape, putting heavy pressure on both faculty and their institutions to significantly modify classroom speech to avoid claims that they are "shielding"—which could now result in a lawsuit against the institution. In doing so, it creates in environment in which institutions are under pressures akin to the one the University found itself in *Bishop*, where it feared the professor's speech could result in it being accused of an Establishment Clause violation—except here that danger is *manufactured by the Legislature* and triggered by virtually any speech that could be deemed problematic under a vague (and largely incomprehensible) prohibition. At the same time, the Survey Provisions also put pressure on Florida colleges, universities, and faculty to avoid any speech that could cause them to be reported to Defendants as excessively liberal in the annual surveys. Those surveys, moreover, are designed to collect information about speech outside of any useful context in which any actual concerns about problematic bias could be appropriately investigated and addressed.

Not only was there no evidence before HB233 that institutional viewpoint bias was an actual problem on Florida's public college and university campuses, but there were also multiple ways in which any actual problems could have been effectively reported and handled, including through the regular anonymous evaluations that students are asked to complete for every course they take. As those evaluations illustrate, different students can have broadly different perceptions of faculty speech, even in the same classroom. *Compare, e.g.*, ECF No. 178-19 at 63 (anonymous student writing in evaluation of Plaintiff Professor Barry Edwards' course *Guns, Freedom and Citizenship* that, despite the student's perception that the course to "lean[ed] towards a gun control ideology," the student found Edwards to be "fair" and commended him for not penalizing the student for their differing views), *with id.* at 65 (criticizing the same course as being politically one sided), *and id.* at 66 (observing that the same course was "really fair and not as liberal as I would have unfortunately expected"), *and id.* at 67 (remarking that Edwards "was neutral in presentation of the facts"); *see also* ECF No. 178-18 at 31 (student evaluation complaining Plaintiff Professor Robin Goodman was not "respectful to students and their opinions"); *id*. at 36 (different student in same class stating "everyone's ideas [were] valued"); *id*. at 32 (different student in same class describing assigned films as "strange/hard to understand" and "disturbing"); *id*. at 30 (different student praising Professor Goodman for "good movie selection"); *id*. at 37 (yet another

student observing that "[Professor] Goodman was very good at stimulating discussions and guiding them."); *id*. at 44 (complaining about lack of "structure in the discussions" and expressing that class discussions "didn't pan out too well").

HB233—and the 2022 surveys implemented by Defendants—remove all nuance in favor of broad proclamations about whether one's faculty, in general, are perceived as liberal, conservative, or other. Fla. Stat. §§ 1001.03(19)(b), 1001.706(13)(b); *see also* ECF No. 166-22; *id.* at 4 (Q13) (asking students to report on their professors' affiliations by asking, for example, whether "My professors or course instructors are generally more" ideologically "Liberal," "Conservative," "Other," or "Don't Know."). And it does all of this, without *any* evidence—much less the highly particularized and significant evidence at issue in *Bishop*—that there was any "problem" that required these measures. *See, e.g*., ECF No. 167 at 18; ECF No. 166-21 at 6; *id.* at 69-70 (Dr. Lichtman explaining that "proponents of HB 233 were not responding to any crisis in public higher education in Florida. To the contrary, in September 2021, Florida Republican U.S. Senator Rick Scott bragged that 'For five years in a row, U.S. News & World Report has rated Florida's higher education system as the best in the nation and this year's rankings show that our colleges and universities continue to excel.'") (citation omitted).

For all of these reasons, here, as in *Pernell*, the context of this case weighs against Defendants. *See* 2022 WL 16985720, at *37.

B. The State's interest in HB233 and its Challenged Provisions are not supported by sufficiently weighty evidence, nor are the restrictions reasonable.

The second factor of the *Bishop* test also weighs in favor of Plaintiffs. As this Court recognized in *Pernell*, while it is true that, as a public employer, the State of Florida "may reasonably restrict the speech rights of employees more readily than . . . those of other persons, . . . such limitations must be both reasonable and supported by evidence of a sufficiently weighty interest to overcome the employee's right to speak." 2022 WL 16985720, at *37 (citations omitted). Moreover, "a public employer may face a heavier burden to justify a prophylactic ban on expression as compared to an isolated disciplinary action," *id.* at n.53 (citing *NTEU*, 513 U.S. at 468), such as was at issue in *Bishop*.

Here, Defendants broadly asserted two interests in support of HB233's broad and indiscriminating encroachments on and regulations of speech, neither of which is sufficiently weighty to justify the threats they pose to Plaintiffs' First Amendment rights. *First*, Defendants claim HB233 ensures freedom of speech and viewpoint expression on campus. *See, e.g.*, ECF No. 40 at 6. But Florida already expressly protected free expression on public college and university campuses and there was no evidence that those measures were in any way insufficient to achieve those ends. *See* ECF No. 167 at 18, 41-45. *Second*, Defendants claim HB233 promotes exposure to a wide variety of viewpoints and opinions. But this is either indistinguishable from

the interest in promoting free speech on campus, or (as even the statutory text itself indicates, far more likely) a pretext for the constitutionally impermissible goal of "tilt[ing] public debate in a preferred direction." *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 578-79 (2011). That HB233's protections for speech *only* apply to "uncomfortable, unwelcome, disagreeable, or offensive" ideas, Fla. Stat. § 1001.03(19)(a)(2), that HB233 surveils not only exposure to but "encouragement of . . . exploration of" only expression that can be categorized as "ideological and political perspectives," *id*. § 1003.03(19)(a)(1), and that HB233's recording provisions surgically carve out a singular exception to Florida's broad criminal prohibition on recording without consent, only for "class lectures," and expressly for use in "a complaint to the public institution of higher education where the recording was made, or as evidence in, or in preparation for, a criminal or civil proceeding," *id.* § 1004.097(3)(g), all demonstrate that it is the latter. *See* ECF No. 167 at 33-39. But even if HB233 was merely intended to foster free speech on campus (and it was not and does not), that "does not give the State of Florida a safe harbor in which to enact rank viewpoint-based restrictions on protected speech." *Pernell*, 2022 WL 16985720, at *40.

Nor is there any evidence to find that any of the challenged provisions in HB233 are sufficiently weighty to overcome Plaintiffs' right to speak and associate without the state's intrusion or impediment. In fact, HB233's sponsors readily

conceded their lack of evidence, insisting it *justified* the bill. For example, Representative Roach—one of HB233's sponsors—admitted that he was "not alleging that" Florida universities were "falling far short of that ideal expression and commitment to the First Amendment." ECF No. 166-20 at 17:8-14. Likewise, Senator Rodrigues insisted the Survey Provisions were warranted because "without asking" whether students are "being provided an environment that provides for viewpoint diversity and intellectual freedom . . . we won't have the data to know if" there is a problem in Florida. ECF No. 166-19 at 10:13-16.[3] And when another senator asked whether Senator Rodrigues could point to even "one or two instances where faculty administration have been suppressing conservative thoughts" in Florida, Rodrigues admitted he could not. ECF No. 166-19 at 8:22-9:8.

Dr. Allan Lichtman, a highly respected political historian, whose analyses of legislative history and intent have been accepted and relied upon by multiple courts, including the U.S. Supreme Court, *see* ECF No. 183 at 11-13; ECF No. 199 at 30-38, will testify that the Legislature had no evidence of a need for HB233, nor did the Legislature take any steps to confirm its rank suspicions with educators themselves. In fact, HB233's sponsors "crafted [it] without consulting with academic and

[3] If the Legislature was in fact only after data to see if there was a problem, the legislation as drafted begs several questions, not least of all, why not require that the survey be conducted by independent, survey experts, and why conduct it every single year, into perpetuity?

teaching experts . . . [,] cited no academic studies[,] and did not consult with students, faculty, or staff representatives at the state's public colleges and universities." ECF No. 166-21 at 68. They also did not solicit the views of the BOE or BOG. ECF No. 179-2 at 11:15-14:7; ECF No. 179-3 at 50:9-51:11, 72:24-73:19.[4] And although he was a strong advocate for and supporter of HB233, Governor DeSantis, too, had no evidence to justify HB233; when asked by the press, he instead provided a vague allusion to "a lot of parents" who worry about "indoctrination" in higher education. ECF No. 166-21 at 69-70.

Other unrebutted expert testimony will further underscore the paucity of evidence supporting Defendants' proffered interests. For example, Dr. Matthew Woessner has spent two decades studying the impact of faculty ideology in higher education and will testify that research has demonstrated that there is no evidence of

[4] In this way, the approach to HB233 was also markedly different than the approach to other higher-education free speech initiatives in recent years in Florida, including the 2019 "Statement on Free Expression," which BOG developed in conjunction with university leadership, stakeholders, and experts from across the political spectrum, as well as the 2021 BOG-run "Civil Discourse Initiative" that was designed to "establish, maintain, and support a full and open discourse and the robust exchange of ideas and perspectives on all university campuses." ECF No. 179 at 6, n.2; ECF No. 167 at 15. It was also different that the Legislature's approach to the 2019 Campus Free Expression Act, which 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. Unlike HB233, educators largely supported the Campus Free Expression Act, as did FIRE. ECF No. 179 at 6. Yet their requests to legislators to include similar safeguards in HB233 went ignored. *See id*. at 6-7.

faculty "indoctrination" of students. ECF No. 166-10 at 15 ("I . . . have reached the conclusion that the social scientific evidence tends *not* to support claims that faculty indoctrinate their students."). Furthermore, in the unlikely event that a faculty member did in fact attempt to "indoctrinate" their students, or otherwise impose upon them their own political viewpoints, peer-reviewed research demonstrates that they would almost certainly be unsuccessful. *See, e.g.*, ECF No. 188-2 at 2-3, 8-10, 11-23. Students in post-secondary education are not blank slates, nor are they "passive receptors of professors' ideological perspectives." *Id.* at 3, 15. They come equipped with their own well-developed set of belief systems, and critical thinking skills. *Id.* at 18. They are keen observers of their faculty and as a result, highly unlikely to be manipulated into adopting belief systems that they would not otherwise endorse. *Id.* at 3, 13. Indeed, peer-reviewed research demonstrates that, to the extent students' viewpoints change while they are in college, they are not related to the viewpoints of their faculty. *Id.* at 15-16, 19. Accordingly, there is no evidence that HB233 is addressing any real issue. Instead, it will only interfere with legitimate pedological aims; nor is it an effective tool to further "viewpoint diversity" or "intellectual freedom." *See also* ECF No. 190-2 at 4-17 (Dr. Hurtado addressing problems inherent to the survey provisions); *see also* ECF No. 190-3 at 4-5. And, in fact, that has been the Plaintiffs' experience, as well as the experience of the

members of UFF and MFOL. *See* ECF No. 167 at 22-30 (collecting evidence); ECF No. 179 at 9-21 (same).

The absence of any supporting evidence also suggests that the proffered state interests are pretextual—a suggestion that is confirmed by overwhelming evidence both from the legislative proceedings and outside of them. *See Pernell*, 2022 WL 16985720, at *33-34, n.47 (citing Mem. of Decision, *Gonzalez, et al. v. Douglas*, No. 4:10cv623-AWT (D. Ariz. Aug. 22, 2017), ECF No. 468, for the proposition that "several Circuit Courts have 'recognized a pretext-based First Amendment claim in the school curriculum context'; concluding 'that plaintiffs have proven their First Amendment claim because both enactment and enforcement [of challenged law] were motivated by racial animus.'").

Dr. Michael Bérubé has spent decades studying and directly working with attacks on academic freedom in higher education, ECF No. 199 at 19 (citing ECF No. 189-2 at 6-12), and will testify that the specter of shrinking intellectual freedom or viewpoint diversity on campus is not only a myth but a longstanding "stalking horse" for broader viewpoint-motivated attacks on academia. ECF No. 189-2 at 31; *see also id*. at 16-19, 23-35, 43-44. Like other such attacks, it is motivated more by the perception "that liberal and left professors are poisoning young minds," than facts. *Id*. at 35. But as both Dr. Woessner and Dr. Bérubé will testify, these attacks are not based on evidence, and never have been. *E.g.*, *id*. at 31 (noting Pennsylvania

Legislature's investigation of intellectual freedom in state universities "found no systemic bias" against conservatives); *id*. at 41 ("The fears about indoctrination . . . ultimately rely on infantilizing ideas about college students as impressionable young things[.]").

Finally, the challenged provisions are not reasonable. They are broad and indiscriminate, applying to virtually everyone within the college and university systems, subjecting all to an ongoing regime of speech surveillance, fundamentally altering the tenor of the classroom environment. *See supra* at II.A. This on its own directly threatens First Amendment rights in higher education, as "'[t]eachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.'" *Pernell*, 2022 WL 16985720, at *41 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967), which in turn quotes *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)); *see also Shelton v. Tucker*, 364 U.S. 479, 487 (1960) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools").

The Anti-Shielding Provisions are not only indiscriminately broad but incomprehensible and provide no carve outs to allow faculty to continue to impose

limits to advance clear pedagogical aims.[5] The evidence demonstrates that this was no accident. FIRE urged the Legislature to insert express language to protect exactly that—language similar to that included by the Legislature in Campus Free Expression Act a few years prior—but it chose not to do so. *See* ECF No. 183 at 25-26; ECF No. 177 at 6-7; ECF No. 167 at 18-19; *see also* ECF Nos. 166-43 (FIRE lobbying against HB233's companion bill, SB264), 166-44 (same); ECF No. 166-45 (FIRE warning that SB264 (HB233's companion bill) would be "disastrous for campus free speech and academic freedom" absent substantial changes).

The Legislature was also fully aware that the Recording Provision would chill speech in the classroom—indeed, one legislator expressed support for it *because* it would change the content of classroom speech, just as the Legislature "allow[s] the whole world to see this meeting today," recognizing that, "frankly, it does temper our conversation." ECF No. 166-36 at 23:5. The Provision was broadly and vehemently opposed—by free speech advocates and faculty alike.[6] Nevertheless, the

[5] Notably, one legislator supporter of HB233 observed that its breadth and complete lack of definition—namely, that "offensive" could mean different things to different people—was "kind of the beauty of this thing," ECF No. 166-9 at 17:17-19:1.

[6] *See, e.g.*, ECF No. 166-43 at 3 (FIRE advising Senator Rodrigues that it "believe[s] including a right to record in classrooms is unwise, even with an explicit limitation to personal use"); ECF No. 166-44 at 2 (FIRE lobbying Senator Rodrigues against SB264 because of "near certainty" Recording Provision would be "misused by students to record disfavored statements by other students in order to shame them online"); ECF No. 166-45 at 2 (FIRE warning Senator Gruters that Recording Provision would be "disastrous for campus free speech and academic freedom");

Legislature proceeded to carve out an exception to Florida's long-standing criminal prohibition on recording people without their consent, applying it *only* to classroom lectures, and for the explicit purpose of supporting (and, as FIRE warned, implicitly encouraging) complaints about faculty to their institutions or even in Court. Fla. Stat. § 1004.097(3)(g).

As many Plaintiffs have attested, it has resulted in creating an adversarial relationship between them and their students, has had the direct effect of changing the way they teach—and what they say—in the classroom. *See, e.g.*, 166-60 at 64:3-10 (Professor Fiorito testifying that "the threat of using recordings or excerpts of recordings to support complaints to the university" or legal actions "is. . . in the back of [his] mind when [he] is trying to talk about things that might be controversial."); ECF No. 166-62 ¶ 16 (knowing students might be recording them and could take their remarks out of context, UFF member Professor Morse feels forced to avoid the topic of queerness even in gender and sexuality courses); ECF No. 166-2 at 137:17-

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ECF No. 166-46 at 2 (FIRE warning Senator Rodrigues it would publicly oppose SB264 because bill would be "devastating to classroom speech"); ECF No. 166-47 at 2 (blog post on FIRE website condemning Recording Provision as a "threat posed to academic freedom"); ECF No. 166-48 at 2 (blog post on FIRE website warning Recording Provision "invites 'gotcha' politics into the classroom" and would "strongly undermine campus free speech and academic freedom"); ECF No. 166-36 at 12:4-7 (Kathy Bain, on behalf of the Florida Education Association, testifying before legislature that "allowing non-consensual recordings of classroom discussions … will stifle the very free speech you wish to promote."); *see also* ECF No. 167 at 15-16 (discussing Recording Provision).

138:5 (UFF testifying that it has "received reports ... of students sitting at the front of the room with their phone up, recording the faculty member and asking them aggressive questions.").

C. The First Amendment's strong predilection for academic freedom overcomes the State's interests in HB233 and its challenged provisions.

Finally, as in *Pernell*, the third factor of the *Bishop* test strongly favors the Plaintiffs and weighs heavily against the Defendants: "Plaintiffs' free speech claims present an interest in academic freedom of the highest degree. Professor Plaintiffs are not attempting to alter the permitted curriculum. Instead, they seek to prevent the State of Florida from imposing its orthodoxy of viewpoint about that curriculum in university classrooms across the state." *Pernell*, 2022 WL 16985720, at *41.

Like *Pernell*, this case concerns a state-imposed dictate about what faculty can (or must, as is also true here) include in their curricula or classroom. *Id.* Specifically, HB233 requires faculty to defer to the state's preferred "ideas and opinions": those that students may find "unwelcome, disagreeable, or offensive." Fla. Stat. § 1004.097(2)(f). And because faculty have limited time in their classroom and space in their syllabi, the inclusion of the State's preferred speech means the exclusion of their own. *E.g.*, ECF No. 166-17 at 73:14-19 (Professor Price testifying there are "at best 2,250 minutes for instruction and assessment in a semester" so HB233 requires him to make "choices in ways that [he] wouldn't have done

previously"); *see also* ECF No. 167 at 22-28. Furthermore, by subjecting faculty to surveillance, the Recording Provision and Survey Provisions amplify that effect *and* the effect of other statutes such as HB 7, the statute at issue in *Pernell*. In short, HB233, no less than HB 7, "is antithetical to academic freedom and has cast a leaden pall of orthodoxy over Florida's state universities" and colleges. *Pernell*, 2022 WL 16985720, at *41.

Bishop itself confirms this analysis. First, in contrast to the instant case, the professor there sought to "interject his religious views into the course material." *Bishop*, 926 F.2d at 1076. That professor's repeated efforts at religious proselytization during class time fell comfortably outside of the realm of academic freedom. As Dr. Bérubé will testify, the historical understanding of academic freedom in higher education in the United States does *not* protect "persistently intruding material [in class] which has no relation to [the faculty's] subject." ECF No. 166-12 at 39. That is not the case here: as in *Pernell*, Faculty Plaintiffs seek only to teach relevant course material using their best academic judgment. *See supra* at 17-18; *see also* ECF No. 166-17 at 73:14-19; ECF No. 167 at 40-41.

Second, *Bishop* deferred to the university's judgment because it was an academic institution whose autonomy the principle of academic freedom protects from external interference. 926 F.2d at 1075. As *Bishop* explained, courts should hesitate to interfere with university self-regulation because academic freedom

thrives "on autonomous decisionmaking [sic] by the academy itself." *Id*. (quoting *Ala. Student Party v. Student Gov't Ass'n*, 867 F.2d 1344, 1347 (11th Cir. 1989)); ECF No. 166-13 at 22:9-11 (Dr. Bérubé: "[T]he most important thing about academic freedom is a degree of intellectual autonomy from the State").

The same logic does not apply to legislative decrees of classroom orthodoxy—like HB233 and HB 7—because legislatures are not academic institutions. To the contrary, it is precisely academic autonomy from the legislature that academic freedom protects. Accordingly, *Bishop*'s rationale militates in favor of Plaintiffs' position here, just as it did in *Pernell*.

In sum, applying the *Bishop* test, as this Court did recently in its decision in *Pernell*, similarly supports finding in Plaintiffs' favor in this case.

III. PLAINTIFFS HAVE STANDING UNDER BINDING PRECEDENT.

Standing requires three things: (1) an "injury in fact" based on "an invasion of a legally protected interest" that is concrete and actual or imminent (2) "a causal connection between the injury and the conduct complained of" which requires the injury to be "'fairly trace[able] to the challenged action of the defendant,'" and (3) a likelihood that the injury will be "'redressed by a favorable decision.'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (citations omitted). Only one Plaintiff need have standing to bring each claim. *See Town of Chester v. Laroe Estates, Inc.*, —— U.S. ——, 137 S. Ct. 1645, 1651, 1650 (2017). For the reasons discussed in

prior briefing, including Plaintiffs' opposition to Defendants' motion for summary judgment, ECF No. 179 at 25-39, Plaintiffs more than clear this bar.

In fact, Plaintiffs have standing on multiple, independent grounds. The Individual Plaintiffs have standing based on the ways in which HB233's Challenged Provisions, collectively and independently, threaten and injure their free speech and associational rights, as reflected by their self-censorship, changes they have felt compelled to make to their speech, and the risk that their political affiliations or associations could expose them to retaliation or harassment, whether through threats to their institutions, or themselves. ECF No. 179 at 26-32. The Organizational Plaintiffs have standing based on the harms HB233 imposes on the rights of their members as well as direct harms that it inflicts on the organizations. *Id.* at 32-35. There is a causal link between Plaintiffs' injuries and Defendants' conduct, and their injuries would be redressed by a favorable decision. *Id.* at 35-39.

The best controlling and persuasive authority on several questions related to Plaintiffs' standing are summarized below.

A. Plaintiffs' self-censorship or decision to speak despite risk of harm constitutes a cognizable injury in fact.

All Plaintiffs, as individuals or membership organizations asserting associational standing, have standing to bring their First and Fourteenth Amendment claims based on self-censorship. Moreover, as this Court recently recognized in *Pernell*, Faculty Plaintiffs who intend to speak despite the risks that follow from

doing so, also have standing, because "[t]o find otherwise would further encourage would-be plaintiffs to self-censor lest they strip themselves of standing." 2022 WL 16985720, at *46.

The best controlling authority on this point from the U.S. Supreme Court or Eleventh Circuit is:

- ***Virginia v. American Booksellers Association, Inc.*, 484 U.S. 383 (1988):** A statute that induces self-censorship inflicts cognizable harm for standing "even without an actual prosecution." *Id.* at 393. The Court found that plaintiffs had an "actual and well-founded fear that the [challenged] law will be enforced against them" where "[t]he State has not suggested that the newly enacted law will not be enforced" and saw "no reason to assume otherwise." *Id*.

- ***Meese v. Keene*, 481 U.S. 465 (1987):** Plaintiff, a lawyer and member of the California State Senate, wanted to show three films categorized as "political propaganda" under the Foreign Agents Registration Act. He claimed that this label chilled his exercise of the First Amendment right to exhibit the films. The Court found that Plaintiff had standing because he established more than a "subjective chill" by demonstrating that "[he] could not exhibit the films without incurring a risk of injury to his reputation and of an impairment of his political career." *Id.* at 475. Although he might have minimized such a risk by providing a statement about the quality of the films, "the need to take such affirmative steps to avoid the risk of harm to his reputation constitutes a cognizable injury in the course of his communication with the public." *Id.*

- ***Baggett v. Bullitt*, 377 U.S. 360 (1964):** In finding loyalty oath that required university faculty to make affirmations swearing they were not subversive unconstitutionally void for vagueness, the Court rejected argument that faculty were not harmed because they may never face prosecution: "This contention ignores not only the effect of the oath on those who will not solemnly swear unless they can do so honestly and without prevarication and reservation, but also its effect on those who believe the written law means what it says." *Id*. at 367, 374. "[I]t is not the penalty itself that is invalid, but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all." *Id*.; *see also id*. at 372-73 (given the

uncertain meanings of the oath, recognizing risk that faculty would restrict their conduct only to that which is unquestionably safe, and finding "Free speech may not be so inhibited") (citations omitted).

- ***Henry v. Attorney General, Alabama*, 45 F.4th 1272 (11th Cir. 2022):** Unanimous decision describing 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." *Id*. at 1288. 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, Inc. v. Cartwright*, 32 F. 4th 1110, 1119 (11th Cir. 2022)).

- ***Speech First, Inc. v. Cartwright*, 32 F.4th 1110 (11th Cir. 2022):** 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. *Id*. at 1120 (cleaned up). The test is simply "whether the operation or enforcement of the government policy 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*. (citations omitted) (cleaned up). Accordingly, "the threat of formal discipline or punishment" is relevant but not decisive, *id*. and "fear of the investigative process" alone may be sufficient to create objective chill. *Id*. (citing *Speech First, Inc. v. Fenves*, 979 F.3d 319 (5th Cir. 2020)).

- ***Wollschlaeger v. Governor, Florida*, 848 F.3d 1293 (11th Cir. 2017) (en banc) (Jordan, J.)[7]:** "Where the 'alleged danger' of legislation is 'one of self-

[7] "There are *two majority opinions* for the en banc Court, one by Judge Jordan and one by Judge Marcus. Judge Jordan's opinion is joined by Chief Judge Ed Carnes and Judges Hull, Marcus, William Pryor, Martin, Rosenbaum, Julie Carnes, and Jill Pryor. Judge Marcus' opinion is joined by Judges Hull, Wilson, Martin, Jordan, Rosenbaum, and Jill Pryor." *Wollschlaeger*, 848 F.3d at 1300 (emphasis added). The notation above indicates that the citations come from the first majority opinion authored by Judge Jordan and joined by the nine judges listed above.

censorship,' harm 'can be realized even without an actual prosecution.'" *Id*. at 1305 (quoting *Va. Am. Booksellers Ass'n*, 484 U.S. at 393). The requirement that plaintiffs show a "credible threat of prosecution" is "quite forgiving." *Id*. at 1305. Defendants' intent to enforce the challenged law may be inferred where plaintiffs challenge the law shortly after enactment and the defendants have "since vigorously defended the Act in court." *Id*. at 1305.

- ***Harrell v. The Florida Bar*, 608 F.3d 1241 (11th Cir. 2010)**: Emphasizing that the Eleventh Circuit has applied "the injury-in-fact requirement most loosely where First Amendment rights are involved, lest free speech be chilled even before the law or regulation is enforced." *Id.* at 1254 (citations omitted). It is "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.'" *Id.* at 1254 (quoting *Pittman v. Cole*, 267 F.3d 1269, 1283 (11th Cir. 2001)). In such cases, the plaintiff need only show that it "wishes to engage in expression that is at least arguably" restricted by the pertinent law, and "there is at least some minimal probability that the challenged rules will be enforced if violated." *Id.* at 1260.

The best persuasive authority on this point is:

- ***Speech First, Inc. v. Fenves*, 979 F.3d 319 (5th Cir. 2020), *as revised* (Oct. 30, 2020)**: Reversed and remanded decision dismissing claims based on the fact that plaintiff "failed to present 'specific evidence of the speech in which the students wish to engage'" that had been chilled by several University of Texas policies, including one prohibiting "verbal harassment," which was defined to include "hostile or offensive speech" that exempted the expression of political, religious, philosophical, ideological, or academic ideas or arguments regardless of whether some listeners might find them offensive. *Id.* at 323. The Fifth Circuit held plaintiff had sufficiently alleged an injury-in-fact sufficient to confer standing based on its claim that "its student-members wish to engage in robust debate on timely and controversial political topics from a contrarian point of view," and that the challenged policies had chilled such speech. *Id.* at 30.

- ***Pernell v. Florida Board of Governors of State University System*, -- F. Supp. 3d --, 2022 WL 16985720 (N.D. Fla. Nov. 17, 2022):** Recognizing that, "'[w]hen First Amendment rights are involved, courts apply the injury-in-fact requirement most loosely, 'lest free speech be chilled even before the law or regulation is enforced.'" *Id*. at *17 (quoting *Harrell*, 608 F.3d at 1254).

Under that doctrine, plaintiffs have standing based on the burdens imposed on their protected speech whether they (1) intend to speak, despite the risk of discipline, or (2) plan to self-censor to avoid discipline. "Both Plaintiffs' intended speech and self-censorship show an intent to engage in an act 'arguably affected with a constitutional interest'" under binding precedent. *Id.* at 18.

- ***Gale Force Roofing & Restoration, LLC v. Brown*, 548 F. Supp. 3d 1143 (N.D. Fla. 2021):** Discussing precedent summarized above to find that contractor had standing to challenge law that impeded their commercial speech based on their self-censorship. *Id.* at 1154; *see also id.* at 1156-57. Further, the Court found that the defendant's intent to enforce the challenged law may be inferred where the plaintiffs challenged the law at issue shortly after it was enacted and the defendant "has since vigorously defended the Act in court." *Id.* at 1156 (quoting *Wollschaleger*, 848 F.3d at 1305).

B. Plaintiffs' unequal treatment under the Anti-Shielding and Recording Provisions constitutes a cognizable injury in fact.

All Plaintiffs, as individuals or membership organizations asserting associational standing, have standing to challenge the Anti-Shielding's more favorable treatment of "ideas and opinions that" listeners "may find uncomfortable, unwelcome, disagreeable, or offensive," Fla. Stat. § 1004.097(2)(f), the more favorable treatment of every other speech beyond classroom lectures that the Recording Provision creates under Florida law by excepting only classroom lectures from Florida's recording consent regime, *id.* § 1004.097(3)(g), and the more favorable treatment afforded to students wishing to record lectures in order to engage in their own speech—namely for use "in connection with a complaint to the public institution of higher education where the recording was made, or as evidence in, or in preparation for, a criminal or civil proceeding," *id.*, based on inequal treatment.

The best persuasive authority on this point is:

- ***Barr v. American Association of Political Consultants, Inc.*, 140 S. Ct. 2335 (2020):** Plurality of Court recognizing that, "[t]he 'First Amendment is a kind of Equal Protection Clause for ideas,'" *id*. at 2354 (quoting *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 470 (Scalia, J., dissenting)). In such a case, "a plaintiff who suffers unequal treatment has standing to challenge a discriminatory exception that favors others." *Id*. at 2356 (citing cases) (plurality op.).

- ***Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987):** In lawsuit brought by magazine publisher challenging sales tax scheme that exempted some categories of magazines, Court noted that the plaintiff's "First Amendment claims [were] obviously intertwined with interests arising under the Equal Protection Clause," but primarily analyzed them using a First Amendment analysis. *Id.* at 228 n.3.

- ***Finlator v. Powers*, 902 F.2d 1158 (4th Cir. 1990):** In lawsuit brought by book purchasers and sellers against North Carolina Secretary of Revenue of North Carolina, challenging statute that exempted Bibles from state's retail sales and use tax, the Fourth Circuit found that plaintiffs had standing to challenge the tax exemption based on their assertion of unequal treatment, and more specifically that "that others similarly situated were exempt from the operation of a state law adversely affecting the claimant." *Id.* at 1161 (quoting *Arkansas Writers' Project*, 481 U.S. at 227). The Fourth Circuit found that the tax exemption unlawfully differentiated "between a Christian sacred text and other publications, both sacred and non-sacred and Christian and non-Christian," which "force[d] the State to discriminate on the basis of the contents of a . . . published work, which is intolerable under the First Amendment." *Id.* at 1163.

- ***Kucharek v. Hanaway*, 902 F.2d 513 (7th Cir. 1990):** Sellers of sexually explicit materials brought lawsuit challenging Wisconsin obscenity statute as unconstitutional. Plaintiffs argued the statute was unconstitutionally vague and its exemptions—for contract printers, officers, public employees, and libraries—irrational. The Seventh Circuit concluded plaintiffs had standing, in part, based on those exemptions. "A person is allowed to point to the existence of an exemption in order to demonstrate the irrationality of a prohibition to which he is subject, even if the exemption itself does not harm him by conferring an advantage on a rival." *Id.* at 516.

C. The Supreme Court has held that the injury-in-fact requirement is relaxed for First Amendment claims alleging vagueness.

All Plaintiffs, as individuals or membership organizations asserting associational standing, have standing to challenge the Anti-Shielding Provisions as void for vagueness in violation of the First and Fourteenth Amendments. The standing requirements when a plaintiff brings this type of challenge are relaxed. Indeed, the Supreme Court has held that plaintiffs may even bring voidness challenges based on First Amendment harms that a law will impose on others. The best controlling authority on these points from the U.S. Supreme Court or Eleventh Circuit is:

- ***Virginia v. American Booksellers Association, Inc.*, 484 U.S. 383 (1988):** Two bookstores and an organization representing booksellers challenged a Virginia statute that prohibited any person from displaying visual or written sexual material that "juveniles may examine and peruse," arguing it was unconstitutional because it was impossible to determine what standard should be used to determine whether a work was appropriate for "juveniles," who vary in ages and maturity levels. The Court found the plaintiffs had standing because they "alleged an actual and well-founded fear that the law will be enforced against them" and "the alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution." *Id.* at 393. The Court further noted that in the relevant First Amendment context, "litigants are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Id.* at 392–93 (alterations and quotation marks omitted). On this basis, the plaintiff booksellers and bookstores also had standing based on an the "alleged [] infringement of the rights of [third-party] bookbuyers." *Id.* at 393.

- ***Broadrick v. Oklahoma*, 413 U.S. 601 (1973):** "[T]he Court has altered its traditional rules of standing to permit—in the First Amendment area—'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'" *Id.* at 612 (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965)). Thus, plaintiffs are "permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Id.*

- ***Coates v. City of Cincinnati*, 402 U.S. 611 (1971):** A plaintiff bringing a facial vagueness claim may establish standing by demonstrating that the law provides no reliable standard for what is or is not proscribed of their conduct under any circumstance. Here, the Court invalidated an ordinance on vagueness grounds not because it "require[ed] a person to conform [their] conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." *Id*. at 614.

- ***Baggett v. Bullitt*, 377 U.S. 360 (1964):** Faculty and students at the University of Washington brought challenge to loyalty oath that required public university faculty to make certain affirmations swearing they are not subversive. *Id*. at 367. The Court found the oath unconstitutionally vague while, as noted *supra* at 22, rejected the argument that faculty were not harmed because they may never face prosecution, recognizing that they suffered a constitutionally cognizable injury where they could not discern what the oath did or did not require of them. *See, e.g*., *id*. at 372-73.

- ***Speech First, Inc. v. Cartwright*, 32 F.4th 1110 (11th Cir. 2022):** Students had standing to challenge discriminatory-harassment policy that was so imprecise that even counsel for the defendant University could not say with confidence what types of conduct would—or would not—violate it. *Id*. at 1121. The court concluded: if someone so intimately familiar with the policy "can't tell whether a particular statement would violate the policy, it seems eminently fair to conclude" that the plaintiffs can't either. *Id*. at 1122. The policy's imprecision exacerbates its unconstitutional chilling effects. *Id.*

- ***Harrell v. The Florida Bar*, 608 F.3d 1241 (11th Cir. 2010):** To have standing to bring a vagueness claim that allegedly chills speech, a plaintiff

must show that (1) he seriously wishes to speak; (2) such speech would arguably be affected by the challenged provision, but the rules are at least arguably vague as they apply to the plaintiff; and (3) there is at least a minimal probability that the rules will be enforced if they are violated. *Id*. at 1254.

The best persuasive authority on this point is:

- ***Pernell v. Florida Board of Governors of State University System*, -- F. Supp. 3d --, 2022 WL 16985720 (N.D. Fla. Nov. 17, 2022):** "When First Amendment rights are involved, courts apply the injury-in-fact requirement most loosely, 'lest free speech be chilled even before the law or regulation is enforced.'" *Id.* at *44 (quoting *Harrell*, 608 F.3d at 1254). "A person 'c[an] bring a pre-enforcement suit when he "has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution[.]"'" *Id.* at *45 (quoting *Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293, 1304 (11th Cir. 2017) (en banc) (Jordan, J.) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014)).

D. Harm to the Student Plaintiffs, both individually and as members of MFOL, based on injuries to their right to receive information, are cognizable injuries in fact.

The best controlling authority on this point from the U.S. Supreme Court or Eleventh Circuit is:

- ***Board of Education, Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853 (1982):** Students had First Amendment right to receive information that could be violated by school board's decision to remove books from high school libraries simply because they dislike the ideas contained in their books and seek their removal to prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. *Id*. at 866-68, 872.

- ***Martin v. Struthers*, 319 U.S. 141, 143 (1943):** First Amendment protects not only right to speak, but also corollary right to receive such speech: "The right of freedom of speech . . . has broad scope. The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful

ignorance. This freedom embraces the right to distribute literature, . . . and necessarily [also] protects the right to receive it." *Id.* at 143 (citation omitted).

- ***American Civil Liberties Union (ACLU) of Florida, Inc. v. Miami-Dade County School Board*, 557 F.3d 1177 (11th Cir. 2009):** Holding, in case challenging removal of a book about Cuba from the school library, the parent of a schoolchild suffered a cognizable harm through the violation of his and his son's right *to receive information* contained in the book. *Id*. at 1195.

The best persuasive authority on this point is:

- ***Pernell v. Florida Board of Governors of State University System*, -- F. Supp. 3d --, 2022 WL 16985720 (N.D. Fla. Nov. 17, 2022):** Recognizing that the "right to receive information 'is an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution,'" *id*. at *12 (citing *Pico*, 457 U.S. at 867), and finding that student plaintiffs challenging Florida's STOP WOKE Act had a first Amendment right "to receive the information and ideas that, but for the viewpoint-based prohibitions of the [Act], university professors would provide during class instruction," *id.* at 13.

E. Plaintiffs' injuries arising out of HB233's intrusive questions into speech and associational rights are cognizable injuries in fact.

All Plaintiffs, as individuals or membership organizations asserting associational standing, have standing to challenge the government's intrusive questions into their associational and speech rights based on the risk of chill such intrusion imposes. The best controlling authority on this point from the U.S. Supreme Court or Eleventh Circuit is:

- ***Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2022):** Right to association protected by the First Amendment "'is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.'" *Id*. at 2382 (citation omitted). "Government infringement of this freedom can take a number of forms," including "broad and sweeping state inquiries into these protected

areas," which may operate to "discourage citizens from exercising rights protected by the Constitution," *id*. at 2384 (cleaned up), and "constitute as effective a restraint on freedom of association as other forms of governmental action," *id*. at 2382 (citations omitted). Thus, First Amendment scrutiny triggered even when the "demand . . . *might* chill association." *Id*. at 2387 (emphasis added); *see also id*. at 2388 (finding First Amendment scrutiny appropriate even where there was only a "*possible* deterrent effect of disclosure"); *id*. at 2389 **(**"When it comes to the freedom of association, the protections of the First Amendment are triggered not only by actual restrictions on an individual's ability to join with others to further shared goals. *The risk of a chilling effect on association is enough* . . . ." (emphasis added)). This is because the "unnecessary risk of chilling" created by such governmental intrusions is, on its own, a "violation of the First Amendment." *Id.* at 2388. Nor does the intention to keep information private—or the fact that some would not mind disclosure—eliminate the risk of chill. *Id*. 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).

- ***Baird v. State Bar of Arizona*, 401 U.S. 1 (1971):** Requirement that attorneys must disclose their beliefs and affiliations by swearing that they have never been a member of any anti-American or pro-Communist organization to be admitted to the legal bar violated the First Amendment. *Id.* at 6. Such "[b]road and sweeping state inquiries into these protected areas … discourage citizens from exercising rights protected by the Constitution." *Id.* at 6.

- ***Shelton v. Tucker*, 364 U.S. 479 (1960):** An Arkansas statute that "compels every teacher, as a condition of employment in a state-supported school or college, to file annually an affidavit listing without limitation every organization to which he has belonged or regularly contributed within the preceding five years," threatened cognizable injury to the teachers, "[e]ven if there [is] no disclosure to the general public." *Id*. at 486. The Court emphasized the "constant and heavy" pressure teachers would feel "to avoid any ties which might displease those who control his professional destiny would be constant and heavy" and the "possibility of public pressures … to discharge teachers … operate[s] to widen and aggravate the impairment of constitutional liberty." *Id.* at 486-87. This pressure—even without public disclosure—threatened to "chill that free play of the spirit which all teachers ought especially to cultivate and practice." *Id.* at 487. The Court further noted

that the statute in question did not require that the information remain confidential, leaving each school board free to deal with the information as it wished. *Id*. at 486.

The best persuasive authority on this point is:

- ***281 Care Committee v. Arneson*, 766 F.3d 774 (8th Cir. 2014):** Advocacy organizations alleged sufficient injury-in-fact to challenge statute that criminalized making false statements about proposed ballot initiatives. "Self-censorship [can] itself constitute an injury in fact." *Id.* at 780 (quotation marks omitted). Because plaintiffs "claim[ed] they plan[ned] to engage in electoral speech concerning opposition to school-funding ballot initiatives," denying them judicial review would "forc[e] them to choose between refraining from core political speech on the one hand, or engaging in that speech and risking costly [] proceedings and criminal prosecution on the other." *Id.* at 782 (quotation marks and alterations omitted).

F. Both organizational plaintiffs—UFF and MFOL—may assert the injuries in fact suffered by their members and constituents.

Both Organizational Plaintiffs have standing to bring the claims in this lawsuit on behalf of their members and constituents. This is true regardless of whether individual members of either Organizational Plaintiff testifies (though members of both will testify here), or if the Organization offers evidence of injuries to members who have not come forward publicly out of fear of retribution. The best controlling authority on this point from the U.S. Supreme Court or Eleventh Circuit is:

- ***Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977):** An organization need not have individual "members" for standing if it represents a constituency and provides means by which constituents express "their collective views and protect their collective interests." *Id*. at 345. The Court further emphasized that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.* The association's claims did not "require[] individualized proof" from specific members. *Id.* at 344. Indeed, the fact that proof from individual

members was unnecessary is why the claims were "properly resolved in a group context." *Id.*

- ***Florida State Conference of NAACP v. Browning*, 522 F.3d 1153 (11th Cir. 2008):** Organizations representing interests of racial and ethnic minority communities had standing to challenge voter registration statute even though it was impossible to know in advance which members would be left off the rolls, and no individual members testified to their injuries (which had not yet happened). *Id.* at 1160. "When the alleged harm is prospective, [the Eleventh Circuit has] not required that the organizational plaintiffs *name names* because *every member* faces a *probability* of harm in the near and definite future." *Id.* (emphases added). All that an organization must demonstrate is "when and in what manner the alleged [members'] injuries are likely to occur." *Id.* at 1161.

- ***Doe v. Stincer*, 175 F.3d 879 (11th Cir. 1999):** A "protection and advocacy" organization authorized by Congress to serve as a representative body for individuals with mental illness had standing to sue on behalf of its constituents. The Eleventh Circuit concluded that the composition of the organization's Board and Advisory Council meant that constituents of the organization "possess the means to influence the priorities and activities" of the organization, and that the organization could therefore sue on its constituents' behalf. *Id.* at 886.

The best persuasive authority on this point is:

- ***Dream Defenders v. DeSantis*, 553 F. Supp. 3d 1052 (N.D. Fla. 2021):** membership organizations can assert associational standing when: (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. *Id.* at 1071 (citing *Greater Birmingham Ministries v. Sec'y of State of Ala.,* 992 F.3d 1299, 1316 (11th Cir. 2021) ("*GBM*")).

- ***Hotel & Restaurant Employees Union, Local 25 v. Smith*, 846 F.2d 1499 (D.C. Cir. 1988):** Union had standing to challenge immigration regulations on behalf of *anonymous members*, because union had shown that the injured members existed, and the identity of the members "adds no essential information bearing on the injury component of standing." *Id.* at 1506.

G. Both organizational plaintiffs—UFF and MFOL—have suffered direct injuries in fact.

Both Organizational Plaintiffs have standing to bring the claims in this lawsuit on their own behalf, based on the Challenged Provisions' injury to their constitutional rights of association, as well as the injury they threaten to their mission and their resulting need to divert resources to combat that harm. The best controlling authority on this point from the U.S. Supreme Court or Eleventh Circuit is:

- ***Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2022):** Adjudicating challenge to compelled donor disclosure law brought by charitable foundation on the grounds that disclosure of donor names might make some donors less willing to associate with the Foundation—threatening not only their donors' but the Foundation's own associational rights—or might ultimately subject them or their donors to retaliation, including in the form of harassment from members of the public. *Id.* at 2379-81. The Court held: "When it comes to the freedom of association, the protections of the First Amendment are triggered not only by actual restrictions on an individual's ability to join with others to further shared goals. *The risk of a chilling effect on association is enough*, 'because First Amendment freedoms need breathing space to survive.'" *Id*. at 2389 (citation omitted) (emphasis added).

- ***Havens Realty Corporation v. Coleman*, 455 U.S. 363 (1982):** Finding standing for organization based "concrete and demonstrable injury to the organization's [core] activities" which resulted in a "consequent drain on the organization's resources." *Id*. at 379.

- ***Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 11 F.4th 1266 (11th Cir. 2021):** Plaintiff organization had standing based on diversion of resources where challenged ordinance caused the organization "to expend resources in the form of volunteer time, including efforts to collect bail money and organize legal representation for its members who were arrested under the Ordinance," and where "volunteers who would have normally worked on preparing for food-sharing demonstrations had to divert their energies to

advocacy activities such as attending City meetings and organizing protests against the Ordinance." *Id.* at 1287.

- ***Arcia v. Florida Secretary of State*, 772 F.3d 1335 (11th Cir. 2014):** "[O]ur precedent provides that organizations can establish standing to challenge [a] law[] by showing that they will have to divert personnel and time to educating [the public] on compliance with the laws." *Id.* at 1341.

- ***Florida State Conference of NAACP v. Browning*, 522 F.3d 1153 (11th Cir. 2008):** Organizations have diversion-of-resources standing where they "reasonably anticipate that they will have to divert personnel and time to educating volunteers and voters on compliance with Subsection 6 and to resolving the problem of voters left off the registration rolls on election day." *Id.* at 1158, 1165-66. These resources would otherwise be spent on registration drives and election-day education and monitoring." *Id.* This was so "[e]ven though the injuries are anticipated rather than completed events." *Id.*

The best persuasive authority on this point is:

- ***Dream Defenders v. DeSantis*, 553 F. Supp. 3d 1052 (N.D. Fla. 2021):** Organizations can assert standing on their own behalf when a challenged law impairs their ability "to engage in [their] own projects by forcing" them "to divert resources in response." *Id*. at 1071 (citing *Arcia*, 772 F.3d at 1341).

- ***League of Women Voters of Florida, Inc. v. Detzner*, 354 F. Supp. 3d 1280 (N.D. Fla. 2018):** Holding that, where plaintiff organizations "have associational standing through their members, this Court need not discuss whether the organizations have [direct] standing on their own." *Id*. at 1287.

H. Plaintiffs' injuries are traceable to Defendants' enforcement of HB233.

Plaintiffs satisfy Article III's traceability requirement because their injuries are traceable to Defendants' enforcement of HB233. *See* ECF No. 179 at 35-39. The best controlling authority on this point from the U.S. Supreme Court or Eleventh Circuit is:

- ***Speech First, Inc. v. Cartwright*, 32 F.4th 1110 (11th Cir. 2022):** Reversed decision by lower court that Speech First lacked standing to challenge a bias-related incidents policy because the defendant "couldn't punish students itself but . . . could only refer them to other university actors for discipline." *Id*. at 1122. The Eleventh Circuit found that "the district court erred in focusing so singularly on the [defendant's] power to punish," because "a government actor can objectively chill speech—through its implementation of a policy—even without formally sanctioning it." *Id*. The Eleventh Circuit found that binding precedent "demonstrate[s] a commonsense proposition: Neither formal punishment nor the formal power to impose it is strictly necessary to exert an impermissible chill on First Amendment rights—indirect pressure may suffice." *Id*. at 1123. The question for the court "is whether the average" person in plaintiff's position "would be intimidated—and thereby chilled from exercising [their] free-speech rights," because of the policy and the defendant's role in enforcing it. *Id*. at 1124.

- ***Wilding v. DNC Services Corporation*, 941 F.3d 1116 (11th Cir. 2019):** Traceability requires a showing that the plaintiffs' "injuries are connected with" Defendants' "conduct." *Id*. at 1125 (cleaned up) (quoting *Trump v. Hawaii*, —— U.S. —— (2018)). Traceability of enforcement need not be direct; "'even harms that flow indirectly from the action in question can be said to be "fairly traceable" to that action for standing purposes.'" *Id.* at 1125-26 (quoting *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1273 (11th Cir. 2003)). In other words, "[p]roximate causation is not a requirement of Article III standing, which requires only that the plaintiff's injury be fairly traceable to the defendant's conduct." *Id.* at 1126 (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 n.6 (2014)). To that end, plaintiffs need not show "that 'the defendant's actions are very last step in the chain of causation.'" *Id.* at 1125-26. Enforcement is traceable to defendants even if they are not always "the very last step in the chain of causation." *Id.* at 1125-26.

- ***Wollschlaeger v. Governor, Florida*, 848 F.3d 1293 (11th Cir. 2017) (en banc) (Jordan, J.):** Finding that the defendants "vigorous[] defen[se] of" a challenged law in court itself allows for an inference that the state has "an intent to enforce" the law. *Id.* at 1305.

  ***Harrell v. The Florida Bar*, 608 F.3d 1241 (11th Cir. 2010):** Holding that courts may infer an intent to enforce a statute when the statute was "recently enacted" or "if the enforcing authority is defending the challenged law or rule

in court[.] *Id.* at 1257. Applying this principle, the Eleventh Circuit inferred that the State Bar intended to enforce challenged State Bar rules because it had revised the rules in 2004, was "once again defending [the rules] in the instant action," and warned the plaintiff that violating the rules might "subject him to discipline." *Id.*

The best persuasive authority on this point is:

- ***Pernell v. Florida Board of Governors of State University System*, -- F. Supp. 3d --, 2022 WL 16985720 (N.D. Fla. Nov. 17, 2022):** Finding faculty plaintiffs challenging Florida's Stop WOKE Act satisfied requirements for redressability against defendants the Commissioner of Education and Board of Governors where both had direct and indirect roles and duties related to the implementation and oversight of the Act at issue. *Id*. at *27-28.

- ***Gale Force Roofing & Restoration, LLC v. Brown*, 548 F. Supp. 3d 1143 (N.D. Fla. 2021):** Finding injury from law fairly traceable to Secretary of Florida Department of Business and Professional Regulation, where Secretary's Department had the power under Florida law to investigate alleged violations of the challenged law and the power to initiate disciplinary proceedings resulting from those violations. *Id.* at 1154-55.

I. Plaintiffs' requested relief would redress Plaintiffs' injuries.

Plaintiffs satisfy Article III's redressability requirement because their injuries will be redressed, at least in part, if HB233's mechanisms for regulating and surveilling Plaintiffs' speech are no longer available to Defendants. *See* ECF No. 65 at 8-16; ECF No. 179 at 39. Moreover, the private right of action provision, Fla. Stat. § 1004.097(4)(a), does not undermine Plaintiffs' standing. The best controlling authority on these points from the U.S. Supreme Court or Eleventh Circuit is:

- ***Massachusetts v. EPA*, 549 U.S. 497 (2007):** State-plaintiff had redressability in challenge to Environmental Protection Agency's failure to "regulate greenhouse gas emissions from new motor vehicles," even though EPA's failure to act contributed to the asserted harm—climate change—only

in part. *Id*. at 525-26. As the Court explained, a remedy for the state-plaintiff would "slow the pace of global emissions increases," even if other countries continued to produce such emissions. *Id.* at 526.

- ***Larson v. Valente*, 456 U.S. 228, 242 (1982):** Finding plaintiff church did not need to establish remedy would relieve "every injury" to itself to satisfy requirements of redressability. *Id*. at 242, 244 n.15. Church brought challenge to limitation on religious organizations' ability to qualify for exemption from charitable solicitations statute. Though recognizing the church might ultimately not qualify for exemption "on some ground other" than the challenged rule, the Court still concluded the church suffered injury arising from the rule and redressable by favorable decision. *Id*. at 242-43.

The best persuasive authority on these points is:

- ***Pernell v. Florida Board of Governors of State University System*, -- F. Supp. 3d --, 2022 WL 16985720 (N.D. Fla. Nov. 17, 2022):** In challenge by professors and students to state law targeting teaching of "critical race theory," university professor established redressability against BOG because enjoining it from "enforcing [the challenged law] would remove some chill on [the professor's] speech" as her university would "no longer be required to discipline any employee" who violates the law. *Id*. at 28-29.

- ***Honeyfund.com, Inc. v. DeSantis*, No. 4:22cv227-MW/MAF, 2022 WL 3486962 (N.D. Fla. Aug. 18, 2022):** Holding that injunction against enforcement of challenged law by state officials would provide "at least partial redress," and therefore satisfied requirement of redressability, even though "an injunction may not prevent" private individuals from filing lawsuits to enforce the law. *Id*. at *4.

- ***Dream Defenders v. DeSantis*, 553 F. Supp. 3d 1052 (N.D. Fla. 2021):** Holding, in challenge by racial justice organizations to "anti-riot" law, plaintiffs satisfied redressability in bringing suit against the governor, who would be barred from using state law enforcement to enforce laws, even though sheriffs could still enforce the law, because "Article III . . . does not demand that the redress sought by plaintiff be complete." *Id*. at 1084-85 (quoting *Moody v. Holman*, 887 F.3d 1281, 1287 (11th Cir. 2018)).

- ***Gale Force Roofing & Restoration, LLC v. Brown*, 548 F. Supp. 3d 1143 (N.D. Fla. 2021):** Finding plaintiffs satisfied redressability requirement in lawsuit against Secretary of Department of Business and Professional Regulation, where Department had the power under Florida law to investigate alleged violations of the challenged law and the power to initiate disciplinary proceedings resulting from those violations. *Id*. at 1154-55.

IV. THE CHALLENGED PROVISIONS IMPLICATE THE FIRST AMENDMENT.

A. First Amendment protections apply to all on-campus speech, including faculty speech.

The First Amendment applies to Plaintiffs' speech in higher education, including in college and university classrooms, where courts have repeatedly noted the paramount importance of the free exchange of ideas and information. This is true of faculty's in-class speech, even if it is made in the context of a professor's employment. The best controlling authority on this point from the U.S. Supreme Court or Eleventh Circuit is:

- ***Epperson v. Arkansas*, 393 U.S. 97 (1968):** Noting, even in the much more deferential context of public high school curriculum: "The State's undoubted right to prescribe the curriculum for its public schools does not carry with it the right to prohibit, on pain of criminal penalty, the teaching of a scientific theory or doctrine where that prohibition is based upon reasons that violate the First Amendment. It is much too late to argue that the State may impose upon the teachers in its schools any conditions that it chooses, however restrictive they may be of constitutional guarantees." *Id*. at 107 (citing *Keyishian v. Bd. of Regents*, 385 U.S. 589, 605-606 (1967)).

- ***Keyishian v. Board of Regents of University of State of New York*, 385 U.S. 589 (1967):** Noting, in a case striking down New York's attempts to remove "subversives" from academic positions within universities by requiring them to disclose their political affiliations, that "safeguarding academic freedom ... is [] a special concern of the First Amendment, which

does not tolerate laws that cast a pall of orthodoxy over the classroom." *Id.* at 603.

- ***Shelton v. Tucker*, 364 U.S. 479 (1960):** Holding that requiring teachers to disclose their political affiliations violates the First Amendment by "chill[ing] that free play of the spirit which all teachers ought especially to cultivate and practice." *Id.* at 486-87.

- ***Sweezy v. New Hampshire*, 354 U.S. 234 (1957):** "The essentiality of freedom in the community of American universities is almost self-evident … Scholarship cannot flourish in an atmosphere of suspicion and distrust." *Id.* at 250. "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Id.* Governmental inquiry into the contents of lectures at a public institution is "unquestionably [] an invasion of [] liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread." *Id.* These rights extend to a professor's "right to lecture," with the Supreme Court recognizing long ago that the "government should be extremely reticent to tread" into "the areas of academic freedom and political expression." *Id*. at 249-50.

- ***Otto v. City of Boca Raton*, 981 F.3d 854, 866 (11th Cir. 2020):** Holding speech is not exempt from First Amendment protection because it is made "in the context of a profession": "'[P]rofessional speech' is not a traditional category of speech that falls within an exception to normal First Amendment principles." *Id*. *Otto* also rejected the effort to recharacterize such speech as "conduct," analogizing the speech at issue there—gay conversion therapy—to other kinds of "conduct" constituting protected expression: "If [conversion therapy] is conduct, the same could be said of teaching[.]" *Id*. at 865.

- ***Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991):** Approving of highly-specific and narrowly-tailored response of university to a particular professor's repeated attempts to impose his own religious views on students, giving rise to concerns that the University could be subject to an Establishment Clause violation. *Id*. at 1068-69, 1071. In doing so, the Eleventh Circuit found that the restrictions "*implicate First Amendment freedoms*." *Id*. at 1075 (emphasis added); *see also Pernell v. Fla. Bd. of Governors of State Univ. Sys*., -- F. Supp. 3d --, 2022 WL 16985720, at *11 (N.D. Fla. Nov. 17, 2022) ("[I]f *Bishop* stands for anything, it is that the First Amendment places some limit on the State's ability to prohibit what a

professor may say in a university classroom."). The university's response to the professor did not suffer from tailoring problems or vagueness: it clearly "prescrib[ed] particular conduct of Dr. Bishop so that he can know what the University does not want him to do." *Bishop*, 926 F.2d at 1078.[8]

The best persuasive authority on this point is:

- ***Pernell v. Florida Board of Governors of State University System*, -- F. Supp. 3d --, 2022 WL 16985720 (N.D. Fla. Nov. 17, 2022):** Rejecting Board of Governors' argument that the First Amendment does not protect faculty speech in the classroom in public colleges and universities. *Id*. at *11. In doing so, this Court found that, in *Bishop*, the Eleventh Circuit found "that the First Amendment protects university professors' in-class speech and sought to fashion a test that would appropriately balance the speaker's First Amendment rights with the university's special interests in enforcing some limitations on that speech." *Id*. at *12.

- ***Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021):** Holding "professors at public universities retain First Amendment protections at least when engaged in core academic functions, such as teaching and scholarship." *Id*. at 505. Those activities include content of syllabi and in-class speech. A professor challenging university policy requiring faculty to use students' preferred gender pronouns accordingly stated a claim under First Amendment for a violation of his right to express his views on gender identity in his syllabus and to refuse to use a student's appropriate pronouns in class. The court rejected university's argument that pronoun rules were purely procedural because "[a]ny teacher will tell you that choices about how to lead classroom discussion shape the *content* of the instruction enormously." *Id*. at 506.

[8] *See also Pernell*, 2022 WL 16985720, at *36 ("The Eleventh Circuit never said the University of Alabama had unfettered power to control every thought or opinion a professor wished to express during class. Instead, it determined that the University had proved it had a sufficient interest to justify restricting Dr. Bishop's in-class speech about his religious beliefs.").

B. The First Amendment protects professors' rights to curate and control classroom discussions to maintain autonomy over their message.

The First Amendment protects Faculty Plaintiffs' right to curate classroom discussions, including by not covering certain topics or not giving airtime to certain issues. That is because what a speaker decides to exclude from their presentation is just as expressive, and therefore just as protected by the First Amendment, as what the speaker decides to include. The best controlling authority on this point from the U.S. Supreme Court or Eleventh Circuit is:

- ***Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, (1995):** First Amendment right to free expression protected ability of parade organizers to exclude gay, lesbian, and bisexual group from the parade by compelling the organizers to "impart[] a message the organizers do not wish to convey." *Id*. at 559, 572-73.

- ***Wooley v. Maynard*, 430 U.S. 705 (1977):** "[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Id.* at 714 (citing *Bd. of Educ. v. Barnette*, 319 U.S. 624, 633-634 (1943); *see also id*., at 645 (Murphy, J., concurring)).

The best persuasive authority on this point is:

- ***Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021):** Holding right to free speech extends to content of syllabi and in-class speech, and noting: "[a]ny teacher will tell you that choices about how to lead classroom discussion shape the *content* of the instruction enormously." *Id*. at 506.

C. HB233 targets speech, not conduct.

Defendants' contention that HB233 targets conduct, not speech, is contrary to binding precedent. The best controlling authority on this point from the U.S. Supreme Court or Eleventh Circuit is:

- ***Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011):** Rejected argument that a law that singled out pharmaceutical marketing for unfavorable treatment regulated conduct, not speech (or that any regulation of speech was incidental to regulation of conduct). As the Court found, the law "does not simply have an effect on speech, but is directed at certain content and is aimed at particular speakers." *Id*. at 567.

- ***Otto v. City of Boca Raton, Florida*, 981 F.3d 854 (11th Cir. 2020):** In challenge to ordinances that prohibited licensed therapists from offering particular types of therapy, Eleventh Circuit held "governments [cannot] evade the First Amendment's ordinary presumption against content-based speech restrictions by saying that the plaintiffs' speech is actually conduct." *Id.* at 861. It underscored that "the enterprise of labeling certain verbal or written communications 'speech' and others 'conduct' is unprincipled and susceptible to manipulation." *Id.* (quoting *Wollschlaeger*, 848 F.3d at 1308).

The best persuasive authority on this point is:

- ***Barr v. American Association of Political Consultants, Inc.*, 140 S. Ct. 2335 (2020):** A plurality of the Court rejected the United States' argument that federal robocall law that carved out favorable treatment for calls "made solely to collect a debt owed to or guaranteed by the United States" regulated conduct, not speech because—as Government argued—it "depends . . . on whether the caller is engaged in a particular economic activity." *Id*. at 2344-45, 2347 (plurality op. by Kavanaugh, J., joined by the Chief Justice, Alito, J., and Thomas, J.). The plurality noted that the law focused not on the economic activity itself, but on what was said when a person was *speaking* while engaged in that activity. *Id*. at 2347.

- ***Honeyfund.com, Inc. v. DeSantis*, No. 4:22cv227-MW/MAF, 2022 WL 3486962 (N.D. Fla. Aug. 18, 2022):** "[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." *Id.* at *8.

V. THE CHALLENGED PROVISIONS ARE CONTENT-BASED RESTRICTIONS ON SPEECH THAT VIOLATE THE FIRST AMENDMENT.

HB233 and its challenged provisions are content-based on their face. But even if facially neutral, they are still impermissible content-based regulations of speech because they were *intended* to elevate certain types of speech and chill others—that is, the State's purpose in enacting them was to favor or disfavor certain speech with which the government agreed or disagreed.

A. There are several standards for determining if a restriction is a content-based restriction on speech.

There are several ways in which a law may be found to be content-based. A law may be content based on its face, "draw[ing] distinctions based on the message a speaker conveys." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). But even a facially neutral law is content-based and presumptively unconstitutional if it (1) "cannot be justified without reference to the content of the regulated speech," (2) was "adopted by the government because of disagreement with the message [the speech] conveys," *id.* at 164 (quotation marks omitted), or (3) alters the content of speech by requiring a speaker to carry a different message than the one they would

otherwise convey, *see Nat'l Inst. of Family & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371 (2018).

The best controlling authority from the U.S. Supreme Court or Eleventh Circuit is:

- ***National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018):** Finding a notice requirement was a "content-based regulation of speech" because, "[b]y compelling individuals to speak a particular message, such notices 'alter the content of their speech.'" *Id.* at 2371 (cleaned up).

- ***Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011):** Found Vermont law, which governing who may purchase certain information about pharmaceutical prescribers, imposed content- and speaker-based restrictions on its face, including because it included exceptions "based in large part on the content of a purchaser's speech," and specifically "disfavored speakers." *Id*. at 564.

- ***Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994):** Acknowledging that "[d]eciding whether a particular regulation is content based or content neutral is not always a simple task." *Id*. at 642. The "principal inquiry in determining content neutrality ... is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys." *Id*. (alteration in original). Often "[t]he purpose" will be evident the face of the law, but that is not always the case. *Id*.

- ***Boos v. Barry*, 485 U.S. 312 (1988):** Finding the "target[ing of] the direct impact of a particular category of speech ... leads readily to the conclusion that the [challenged law] is content-based." *Id.* at 321.

B. A court may look beyond statutory text to determine whether a law is a content-based speech restriction.

The Court can look beyond the text of HB233 in determining whether it is a content-based restriction on speech. The best controlling authority on this point from the U.S. Supreme Court or Eleventh Circuit is:

- ***City of Austin v. Reagan National Advertising of Austin, LLC*, 142 S. Ct. 1464 (2022):** Holding that, "[i]f there is evidence that an impermissible purpose *or* justification underpins a facially content-neutral restriction, … that restriction may be content based." *Id*. at 1475. Here, however, the Court approved of district court's content-neutral approach, because there was "*no* evidence in the record" that the government's stated purpose for the provisions was a "pretext for any other purpose." *Id*. at 1470; *see also id*. at 1479 (emphasizing again "no evidence" that government issued the regulation "to censor a particular viewpoint or topic, *or that its regulations have had that effect in practice*") (Breyer, J., concurring) (emphasis added).

- ***Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011):** In finding unconstitutional law that singled out pharmaceutical marketing for unfavorable treatment, Court found the law "does not simply have an effect on speech, but is directed at certain content and is aimed at particular speakers." *Id*. at 567. It looked first to the statute's text, and then to the evidentiary record, including formal legislative findings, evidence submitted about the types of people likely to be impacted by the law, *id*. at 564-65, and evidence regarding the credibility of the legislature's explanation for the law, *see id*. at 578 (noting that, contrary to the legislature's assertions, some doctors view the now restricted speech as instructive).

- ***Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 642 (1994):** Reversed order granting summary judgment in favor of government in case by cable television system operators challenging constitutionality of federal provisions that required carriage of local broadcast stations on cable systems. *Id.* at 626. Court stressed the "paucity of evidence indicating that broadcast television is in jeopardy"—the justification the government gave for the law. *Id.* at 667 (emphasis added). It held that even under the intermediate standard applied in the case (applicable because the provisions were content-neutral restrictions with incidental burdens on speech, *id.* at 645), there had to be a more substantial showing of evidence to support the government's purported purpose for it to overcome challenge. *Id.* at 667. The Court emphasized it has "stressed in First Amendment cases that the deference afforded to legislative findings does not foreclose our independent judgment of the facts bearing on an issue of constitutional law." *Id.* at 666 (citation omitted) (cleaned up); *see also id.* ("When trenching on first amendment interests, even incidentally, the government must be able to adduce either empirical support or at least sound reasoning on behalf of its measures.") (citations omitted) (cleaned up).

- ***Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993):** In free exercise case, considering circumstantial evidence of the sort discussed in *Arlington Heights v. Metropolitan Housing Development Corp*., 429 U.S. 252 (1977), "among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment," and "the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body," as well as individuals who spoke with members of that body. *See* 508 U.S. at 540-42. The Court also considered the actual impact of the law in operation, holding, while it is not always dispositive, "[t]he effect of a law in its real operation is strong evidence of its object." *Id*. at 535. The Court also found "significant evidence of the [law's] improper targeting" that it proscribes more conduct than is necessary to achieve its stated ends. *Id*. at 538.

- ***R.A.V. v. City of St. Paul*, 505 U.S. 377, 394 (1992):** Court considered "comments and concessions" of the government in the case in determining that it was certain that the city was attempting to handicap certain ideas with the challenged ordinance. *Id*. at 394. It also considered the "practical application" of the ordinance itself in determining whether it was not just content-based, but also viewpoint-based. *Id*. at 391. Finally, Court considered whether there were "adequate content-neutral alternatives" that could achieve the state's asserted compelling interests in the law, finding that the existence of such alternatives, "'undercuts significantly' any defense of" the law, and further "cast[s] considerable doubt on the government's protestations that the asserted justification is in fact an accurate description of the purpose and effect of the law." *Id*. at 395 (citations omitted) (cleaned up).

- ***Board of Education, Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 853 (1982):** Finding key question in case where school board ordered removal of books from public high school libraries was whether board was motivated by desire to deny respondents ideas with which the board disagreed. *Id*. at 871. If that was the board's motivation, the decision would violate the First Amendment. *See id*. (plurality op.). A majority found that the evidence before below raised a genuine issue of material fact as to the board's motivation and remanded for further proceedings. *Id*. at 873, 875 (plurality op.); *see also id*. at 883 (agreeing with decision to remand on this record for trial to consider facts, while declining to decide the ultimate constitutional question) (White, J., concurring). That evidence included: affidavits by both respondents and petitioners; public explanations that the school board had given for removal of the books; the board's response (or lack thereof) to

recommendations and input that they make different decisions regarding the books in question; inconsistencies between explanations the board offered for its actions and other actions that they took; the fact that the board's actions were "vigorously challenged" by the plaintiffs; that in making their decisions the board ignored the advice of literary experts, the views of librarians and teachers within the school system, the advice of the Superintendent of Schools, and the guidance of respected publications rating books for high school students. *See id*. at 872-875.

- ***Burton v. City of Belle Glade*, 178 F.3d 1175, 1189 (11th Cir. 1999):** In assessing whether a discriminatory purpose was a motivating factor in City's refusal to annex a project, Eleventh Circuit stated it "evaluate[s] all available direct and circumstantial evidence of intent," including "substantial disparate impact, a history of discriminatory official actions, procedural and substantive departures from the norms generally followed by the decision-maker, and the legislative and administrative history of the decision." *Id.* at 1189. The Court has also "repeatedly recognized that evidence of the historical background of the decision is relevant to the issue of discriminatory intent." *Id.* (alterations and internal quotation marks omitted).

The best persuasive authority on this point is:

- ***Barr v. American Association of Political Consultants, Inc*., 140 S. Ct. 2335 (2020):** In case challenging exceptions to federal robocall laws carving out calls made to collect debts owed to the United States, the Court considered federal legislative landscape as a whole and legislative developments from 1991 through 2020 related to restriction of robocalls in determining whether exception served to "diminish the credibility of the government's rationale for restricting speech"—here, robocalls—"in the first place." *Id*. at 2348 (plurality op. by Kavanaugh, J., joined by Roberts, C.J. and Alito, J.). The challengers argued that, because the law made a content-based exception for one type of call, the entire robocall restriction regime should be invalidated. But the Court determined, based on (1) fact that, for many years, Congress "has retained a very broad restriction on robocalls," (2) examination of the pre-1991 statistics on robocalls (before regulation), and (3) the lack of evidence that the incentives to make robocalls (if now allowed) would diminish, that the record established "Congress's continuing interest in consumer privacy." *Id*. at 2348. As a result, the Court found that the exception

was unconstitutional, but declined to invalidate the broader scheme in regulation of robocalls.[9]

- ***Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000):** In evaluating charges of intentional age discrimination, Court found that "[p]roof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive." *Id.* at 147. This evidence functions in two ways. First, it is appropriate for the factfinder to "infer from the falsity of the explanation that the [defendant] is dissembling to cover up a discriminatory purpose." *Id.* Second, once the defendant's "justification has been eliminated, discrimination may well be the most likely alternative explanation." *Id.*

- ***Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977):** Held that the denial of a zoning permit would violate the Equal Protection Clause if racial discrimination "ha[d] been a motivating factor in the decision." *Id.* at 265-66. The Court explained that determining "whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id.* at 266. To guide its analysis, the Court identified—"without purporting to be exhaustive"—several "subjects of proper inquiry in determining whether racially discriminatory intent exist[s]." *Id.* at 268. Those subjects include: (1) the "impact of the official action," (2) the "historical background of the decision," (3) the "specific sequence of events leading up

[9] A direct analogy would be if the Plaintiffs here argued that, due to the singular exception that the Recording Provision carves out to Florida's broad criminalization of recording without consent, *see* Fla. Stat. § 1004.097(3)(g) (creating exception to Florida Statute 934.03 to allow students to "record video or audio of class lectures for their own personal educational use, in connection with a complaint to the public institution of higher education where the recording was made, or as evidence in, or in preparation for, a criminal or civil proceeding"), Florida's entire recording-consent law, Fla. Stat. 934.03, should be invalidated due to the content-based carve out. Plaintiffs do not make that argument. As in *Barr*, "[t]his is not a case where" Florida's two-party consent law "is littered with exceptions that substantially negate" its ordinary treatment of speech. *Id*. at 2348. HB233, and its content-based treatment of speech—including in the Recording Provision, Survey Provision, and Anti-Shielding Provision—*represent very idiosyncratic exceptions* to Florida's general treatment of speech not only more broadly, but in higher education, as well.

to the challenged decision," (4) any "[d]epartures from the normal procedural sequence," and (5) the "legislative or administrative history." *Id.* at 267-68.

- ***Arce v. Douglas*, 793 F.3d 968, 980 (9th Cir. 2015):** A student and her father sued public school officials, claiming that statutes that led to the elimination of the Mexican American Studies program in Tucson public schools were unconstitutional. Ninth Circuit evaluated whether decision was motivated by a discriminatory purpose using *Arlington Heights*. *Id*. at 977. Court examined both the official record and evidence outside of it because "officials acting in their official capacities seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority," requiring courts to "look to whether [state actors] have 'camouflaged' their intent." *Id*. at 978 (quoting *Smith v. Town of Clarkton*, 682 F.2d 1055, 1064, 1066 (4th Cir.1982)). For instance, the court found evidence of discriminatory intent in one administrator's campaign website for another office.

- ***Ammons v. Dade City*, 594 F. Supp. 1274, 1303 (M.D. Fla. 1984), *aff'd*, 783 F.2d 982 (11th Cir. 1986):** Plaintiffs, a class of Black citizens, claimed that they were denied their right to equal municipal services, such as street paving, resurfacing, and maintenance, and storm water draining facilities. Plaintiffs sued City seeking injunctive and declaratory relief. Court engaged in an *Arlington Heights* analysis in determining that the City engaged in an intentionally discriminatory course of conduct.

C. Content-based laws are subject to strict scrutiny.

If the Court determines that the law is content-based, it must apply strict scrutiny to Plaintiffs' First Amendment speech-based claims, under which Defendants must prove all of the following: (1) the law is justified by a compelling interest; (2) the Legislature had strong evidence to support that justification; (3) the law is narrowly tailored to serve that compelling interest, and (4) serving that interest was the Legislature's actual purpose.

The best controlling authority on this point from the U.S. Supreme Court or Eleventh Circuit is:

- ***Reed v. Town of Gilbert, Arizona*, 576 U.S. 155 (2015):** "Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny." *Id.* at 163-64.

- ***McCullen v. Coakley*, 573 U.S. 464 (2014):** Explaining that a law cannot be said to be narrowly tailored to accomplish what is already accomplished by some other provision of law. *Id.* at 482.

- ***Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011):** The fact that the government fears a message is too persuasive, or that it has a desire to merely tilt the public debate, is not a permissible purpose under the First Amendment. *See id*. at 579. The First Amendment *forbids* the government from "quiet[ing] the speech or [] burden[ing] the messengers" of viewpoints that are objectionable because they are "too persuasive." *Id*. at 578.

- ***United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000):** In order to "satisf[y] strict scrutiny . . . [law] must be narrowly tailored to *promote* a compelling Government interest, and if a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *Id.* at 804.

- ***R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992):** Content-based laws must be *necessary* to serve the state's compelling interests. Where the law in question is not reasonably necessary to achieve those interests, it is unconstitutional. *Id*. at 395-96. The court need not even consider narrow tailoring at that point.

- ***Otto v. City of Boca Raton*, 981 F.3d 854 (11th Cir. 2020):** "Reiterat[ing]" that, under strict scrutiny, "the government bears the risk of uncertainty" and as such "'ambiguous proof' will not suffice" *Id*. at 869 n.9 (quoting *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 799-800 (2011)).

- ***KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006):** Finding that an interest in suppressing disfavored viewpoints is not legitimate, let alone compelling. *Id.* at 1272.

- ***Bourgeois v. Peters*, 387 F.3d 1303 (11th Cir. 2004):** Under strict scrutiny, government must provide evidence supporting its asserted interests which it actually relied upon in enacting a challenged law. In *Bourgeois*, protesters challenged a city policy "requiring everyone wishing to participate in" their protest to submit to a search near the protest site. *Id*. at 1307. Applying strict scrutiny, the court found that the policy was not narrowly tailored to advance the asserted interest in "maintaining public safety, security, and order." *Id*. at 1321-22 (cleaned up). Though declining to rule on whether government's interest was compelling, *Bourgeois* noted that the city's asserted government interest was likely insufficient because the city had "failed to develop[] a record at the district court level indicating that [the asserted interest] *actually motivated the adoption of that* policy." *Id*. 1322-23 (emphasis added). The appropriate inquiry is not whether the evidence exists but "whether the [government] actually took this [evidence] into consideration when drafting its policy." *Id*. at 1323.

The best persuasive authority on this point is:

- ***Honeyfund.com, Inc. v. DeSantis*, No. 4:22cv227-MW/MAF, 2022 WL 3486962 (N.D. Fla. Aug. 18, 2022):** Finding a law cannot be narrowly tailored to accomplish what is already accomplished by the First Amendment or other law. *Id.* at *10.

D. Even content neutral laws are subject to intermediate scrutiny.

Even if the Court determines that the law is content neutral, it must still apply "intermediate scrutiny," which requires Defendants to show that the law is narrowly tailored to serve a significant government interest and leaves open ample alternative channels for communication. The best controlling authority on this point from the U.S. Supreme Court or Eleventh Circuit is:

- ***Ward v. Rock Against Racism*, 491 U.S. 781 (1989):** Even content-neutral regulations of speech must be narrowly tailored to serve a significant government interest and leave open ample alternative channels for communication of the information. *Id.* at 791.

- ***Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 11 F.4th 1266 (11th Cir. 2021):** Invalidated city regulation that banned advocacy group from passing out food to homeless individuals without a permit. *Id.* The court found it was content-neutral, subject to intermediate scrutiny. *Id.* at 1291. As such, it must be "narrowly drawn to further a substantial governmental interest" that is "is unrelated to the suppression of free speech." *Id.* at 1294 (cleaned up). The court found it did not meet this standard because the regulation did not "promote[] a substantial governmental interest that would be achieved less effectively absent the regulation" and the means chosen were "substantially broader than necessary to achieve the government's interest". *Id.* at 1292 -1296. Important to the court's conclusion was the high risk of arbitrariness over enforcement and the permit process. "Generally, subjecting protected expression to an official's 'unbridled discretion' presents 'too great' a 'danger of censorship and of abridgment of our precious First Amendment freedoms.'" *Id*. at 1295 (citing *Se. Promotions, Ltd v. Conrad*, 420 U.S. 546, 553 (1975)).

- ***Bell v. City of Winter Park*, 745 F.3d 1318 (11th Cir. 2014):** Content-neutral regulations of speech must "withstand[] intermediate scrutiny," *id*. at 1322, under which they survive only if they "serve[] a significant government interest," are "narrowly tailored" to advance that interest, and "leave[] ample alternative avenues for speech." *Id*. at 1321 (quoting *Frisby v. Schultz*, 487 U.S. 474, 484-85 (1988)).

VI. THE ANTI-SHIELDING PROVISIONS ARE VIEWPOINT-BASED RESTRICTIONS ON SPEECH THAT VIOLATE THE FIRST AMENDMENT.

A. Viewpoint-Based laws are *per se* unconstitutional.

If the Court determines HB233 or any of its provisions are viewpoint-based, they are per se unconstitutional. The best controlling authority on this point from the U.S. Supreme Court or Eleventh Circuit is:

- ***Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011):** the First Amendment *forbids* the government from "quiet[ing] the speech or [] burden[ing] the messengers" of viewpoints that are objectionable because they are "too persuasive." *Id*. at 578. Accordingly, "[t]he State may not burden the speech of others in order to tilt public debate in a preferred direction." *Id*. at 578-79.

- ***Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995):** Holding that University of Virginia's denial of funding for a student group amounted to impermissible viewpoint discrimination because it was based, not on the general religious subject matter of the student group's publication, but on the "prohibited perspective" of the Christian editorial column. *Id.* at 831. "Viewpoint discrimination is . . . an egregious form of content discrimination." *Id.* at 829.

- ***R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992):** Government may not show "hostility—or favoritism—towards" expression in regulating speech. *Id*. at 386 (cleaned up). Such selectivity in treatment of speech is presumptively invalid because it "creates the possibility that the [government] is seeking to handicap the expression of particular ideas." *Id*. at 394. That "possibility" is alone "enough to render the [law] presumptively invalid . . ." *Id*. However, in practical operation, the Court found the challenged law went "even beyond mere content discrimination, to actual viewpoint discrimination .... St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *Id*. at 391.

- ***Speech First, Inc. v. Cartwright*, 32 F.4th 1110 (11th Cir. 2022):** When a law burdens speech based on *the viewpoint of the regulated speech* the law appears to fail "seemingly as a *per se* matter," with no showing of discriminatory intent or further balancing needed. *Id.* at 1126.

B. Laws that privilege "offensive" speech are viewpoint-based.

Viewpoint-based restrictions on speech are a distinct subset of content-based discrimination. The Anti-Shielding Provisions amount to viewpoint-based regulations on speech. The best controlling authority on this point from the U.S. Supreme Court or Eleventh Circuit is:

- ***Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019):** Considering First Amendment challenge to a "neighboring provision" of the Lanham Act than that which was considered—and invalidated—in *Matal*, *see infra*, and finding that it, too, violates the First Amendment as an impermissible viewpoint-based regulation of speech. *Id*. at *2297. This provision applied to marks that "consist of or comprise immoral or scandalous matter." *Id*. at *2298 (citations omitted) (cleaned up). The Court concluded it was viewpoint-based because "the statute, on its face, distinguishes between two opposed sets of ideas: … those inducing societal nods of approval and those provoking offense and condemnation," favoring the former and disfavoring the latter. *Id*. at 2300.

- ***Matal v. Tam*, 137 S. Ct. 1744 (2017):** Finding Lanham Act's "disparagement clause," which prohibits registration of a trademark if the trademark examiner finds that the trademark's meaning is found to refer to identifiable persons, institutions, beliefs or national symbols, and further finds that a substantial composite of the referenced group would find the proposed mark "to be disparaging in the context of contemporary attitudes," *id*. at 1753-54, to be unconstitutional viewpoint-discrimination in violation of the First Amendment. As the plurality explained: "[g]iving offense *is a viewpoint*." *Id*. at 1763; *see also id*. at 1766 (four additional justices agreeing that because the law reflects "the Government's disapproval of a subset of messages it finds offensive" it is "the essence of viewpoint discrimination").

- ***Speech First, Inc. v. Cartwright*, 32 F.4th 1110 (11th Cir. 2022):** "The Supreme Court has reiterated time and again—and increasingly of late—the 'bedrock First Amendment principle' that '[s]peech may not be banned on the ground that it expresses ideas that offend.'" *Id.* at 1126 (quoting *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017)).

VII. THE SURVEY PROVISIONS ARE SUBJECT TO EXACTING SCRUTINY.

Because the Survey Provisions infringe on Plaintiffs' associational rights, Defendants must satisfy exacting scrutiny. The best controlling authority on this point from the U.S. Supreme Court or Eleventh Circuit is:

- ***Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2022):** The Court held that, "[w]hen it comes to a person's beliefs and associations,

broad and sweeping state inquiries into these protected areas . . . discourage citizens from exercising rights protected by the Constitution." *Id*. at 2384 (quoting *Baird*, 401 U.S. at 6 (1971) (plurality op.)) (cleaned up). Such laws are subject to—at minimum—exacting scrutiny. *Id.* at 2383. Under that test, they are invalid unless Defendants demonstrate they (1) have "a substantial relation" to "a sufficiently important governmental interest," and (2) are "narrowly tailored to" that interest. *Id*. at 2385.[10] The Court considered specifically the "dramatic mismatch" between the interests that the state claimed to seek to promote and the specific law that had been "implemented in service of that end." *Id*. at 2386. A state "is not free to enforce *any* disclosure regime that furthers its interests"; it has the burden of demonstrating "its need for universal production in light of any less intrusive alternatives." *Id*. Where it fails to establish that less intrusive alternatives could serve those same ends (and in *Bonta*, it became clear that the state had not even considered less intrusive alternatives), the law cannot be justified. *Id*.

- ***Baird v. State Bar of Arizona*, 401 U.S. 1 (1971):** "When a State seeks to inquire about an individual's beliefs and associations a heavy burden lies upon it to show that the inquiry is necessary to protect a legitimate state interest." *Id.* at 6-7.

VIII. THE ANTI-SHIELDING PROVISIONS ARE VOID FOR VAGUENESS IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS.

A. Laws that regulate expression are subject to a more stringent vagueness test.

The Anti-Shielding Provisions cannot survive the more stringent vagueness test that applies to laws that regulate expression, which extends to a professor's "right to lecture." *Sweezy*, 354 U.S. at 249-50 (recognizing that "government should

[10] Plaintiffs bring both facial and as applied challenges in this case, but it is worth emphasizing that, as in *Bonta*, a facial challenge is appropriate here because "the lack of tailoring to the State's [] goals is categorical—present in every case." 141 S. Ct. at 2387.

be extremely reticent to tread" into "the areas of academic freedom and political expression."). The best controlling authority on this point from the U.S. Supreme Court or Eleventh Circuit is:

- ***Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982)*:*** Holding if a law "interferes with the right of free speech or of association, a more stringent vagueness test should apply." *Id.* at 499.

- ***Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971):** Considered whether ordinance that prohibited three or more persons to assemble on public sidewalks and "conduct themselves in a manner annoying to persons passing by" was unconstitutional on its face. *Id.* at 611-12. The Court found it unconstitutionally vague "because it subjects the exercise of the right of assembly to an ascertainable standard, and unconstitutionally broad because it authorizes the punishment of constitutionally protected conduct." *Id*. at 614. In so finding, the Court noted that it was not clear "upon whose sensitivity a violation does depend," *id*. at 613, but in any event, "[c]onduct that annoys some people does not annoy others," requiring the conclusion that the ordinance was unconstitutionally vague, *id*. at 614.

- ***Keyishian v. Board of Regents*, 385 U.S. 589 (1967):** In a case involving the state's attempt to remove "subversives" from academic positions at universities, the Court held that the "complicated and intricate scheme" at issue violated the First Amendment, reiterating that, "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Id.* at 604 (citation omitted). "[W]hen one must guess what conduct or utterance may lose him his position, one necessarily will steer far wider of the [impermissible] zone." *Id.* (quotation marks omitted).

- ***Baggett v. Bullitt*, 377 U.S. 360, 372 (1964):** In finding loyalty oath that required university faculty to make affirmations swearing they are not subversive, void for vagueness, the Court held the following test applied: provision (1) "must be narrowly drawn to meet the precise evil the legislature seeks to curb," and (2) "the conduct proscribed must be defined specifically so that the person or persons affected remain secure and unrestrained in their rights to engage in activities not encompassed by the legislation." *Id.* 372 n.10 (citation omitted). The Court further rejected the state's arguments that a sense

of fairness and constitutional restrictions would prevent successful enforcement of the provision "for some of the activities seemingly embraced within the sweeping statutory definitions." *Id*. at 373.

- ***Wollschlaeger v. Governor, Florida*, 848 F.3d 1293, 1321-22 (11th Cir. 2017) (en banc) (Jordan, J.):** It is a "basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Id.* at 1319 (quoting *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972)). Laws that require one to predict how another might react to speech are routinely found unconstitutionally vague. They are unconstitutional if not narrowly drawn, the conduct they proscribe is not specific to provide a reasonable opportunity to understand what conduct it prohibits, and it authorizes or even encourages arbitrary and discriminatory enforcement. *Id*. This is required, lest potential speakers steer far wide of the prohibited zone, chilling a wide range of protected speech. *Id.* at 1320 (cleaned up) (quoting *Baggett*, 377 U.S. at 372). A law runs afoul of due process when it requires "predict[ing] individual tolerances for hearing" about particular ideas or opinions. *Id.* at 1321-22.

The best persuasive authority on this point is:

- ***Big Mama Rag, Inc. v. United States*, 631 F.2d 1030 (D.C. Cir. 1980):** In considering whether a definition was unconstitutionally vague in violation of the First Amendment, the court held that the "I know it when I see it" standard is particularly egregious in the First Amendment context. *Id.* at 1040.

B. In considering Plaintiffs' vagueness challenge, the Court can and should consider the various interpretations of the statute that have been offered by Defendants and others.

The best controlling authority on this point from the U.S. Supreme Court or Eleventh Circuit is:

- ***Speech First, Inc. v. Cartwright*, 32 F.4th 1110 (11th Cir. 2022):** In challenge to a discriminatory-harassment policy, the Eleventh Circuit found it relevant that counsel for the defendant University could not say with confidence what types of conduct would—or would not—violate the policy. *Id*. at 1121. As the Court reasoned, if someone so intimately familiar with the policy "can't tell whether a particular statement would violate the policy, it

seems eminently fair to conclude" that the plaintiffs can't either. *Id*. at 1122. The Court further found it relevant that the policy's trigger—it applied to conduct that "unreasonably … alter[ed]" another's educational experience—was "pretty amorphous" and its "application would likely vary from one student to another," with the "totality-of-known-circumstances approach to determining whether particular speech crosses the line only mak[ing] matters worse." *Id*. at 1121; *see also id*. at 1125 (emphasizing the policy applied to "conduct that *may* be humiliating" and "employs a gestaltish" approach to determining which speech came within its ambit).

- ***Baggett v. Bullitt*, 377 U.S. 360 (1964):** The Court considered the State's contention that "the suggested possible coverage" of the statutes at issue was "wholly fanciful" and based a finding of vagueness in part on the fact that the State's "contention only emphasizes the difficulties with the two statutes; for if [they] do not reach some or any of the behavior suggested, what specific conduct do [they] cover? Where does fanciful possibility end and intended coverage begin?" *Id.* at 373.

The best persuasive authority on this point is:

- ***Honeyfund.com, Inc. v. DeSantis*, No. 4:22cv227-MW/MAF, 2022 WL 3486962, at *10 (N.D. Fla. Aug. 18, 2022):** In analyzing vagueness claims, Court considered defendants' interpretation of the statute, pulling language concerning their interpretation directly from their briefs. *Id.* at *13.

- ***White Coat Waste Project v. Greater Richmond Transit Co*., 463 F. Supp. 3d 661 (E.D. Va. 2020), *aff'd in part, rev'd in part and remanded,* 35 F.4th 179 (4th Cir. 2022):** The court found that the "probative value of [deponent's] responses to the hypothetical [questions] is apparent" to the determination of the plaintiff's vagueness claim because the challenged policy "must provide a person of ordinary intelligence a reasonably opportunity to understand what conduct it prohibits." *Id.* at 680 n.16.

IX. THE CHALLENGED PROVISIONS MUST BE STRICKEN TOGETHER, BUT THEY ARE SEVERABLE FROM THE REMAINDER OF HB233.

Whether sections of a challenged statute are severable from one another, or the remainder of the statute, turns on the legislative intent behind the challenged

portions of the statute and its remaining language. The Anti-Shielding Provisions, Survey Provisions, and Recording Provision are all motivated by the same unconstitutional, viewpoint discriminatory intent and must be stricken. *See supra* at IV. However, they are severable from the remainder of HB233 under Florida law because the remainder of the law, which pertains to campus codes of conduct and due process in adjudicating violations of such codes, is not motivated by the same discriminatory purpose and can be accomplished independently of the challenged provisions. The best controlling authority on this point from the U.S. Supreme Court or Eleventh Circuit is:

- ***Leavitt v. Jane L.*, 518 U.S. 137 (1996):** Severability of state legislative provisions is "a matter of state law." *Id.* at 139.

- ***Jones v. Governor of Florida*, 950 F.3d 795 (11th Cir. 2020):** "Florida's severance doctrine is designed to show great deference to the legislative prerogative to enact laws by recognizing the obligation of the judiciary to uphold the constitutionality of legislative enactments where it is possible to strike only the unconstitutional portions," and "Florida law thus adopts a strong presumption of severability, and squarely places the burden on the party challenging severability." *Id.* at 831 (citations and quotations omitted). "Under Florida law, 'the remainder of the act [may] stand' where 'a part of a statute [has been] declared unconstitutional' so long as four requirements are met: (1) the unconstitutional provisions can be separated from the remaining valid provisions, (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void, (3) the good and the bad features are not so inseparable in substance that it can be said that the Legislature would have passed the one without the other and, (4) an act complete in itself remains after the invalid provisions are stricken." *Id.* at 831 (quoting *Smith v. Dep't of Ins.*, 507 So. 2d 1080, 1089–90 (Fla. 1987)).

- ***Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250 (11th Cir. 2005):** "Florida law clearly favors (where possible) severance of the invalid portions of a law from the valid ones." *Id.* at 1269 n.16 (citation omitted).

The best persuasive authority on this point is:

- ***Emerson v. Hillsborough County*, 312 So. 3d 451, 460 (Fla. 2021):** "'The question is whether the taint of an illegal provision has infected the entire enactment, requiring the whole unit to fail.'" (citation omitted). In applying these factors, Florida courts "have recognized the cardinal principle of severability analysis: 'The severability of a statutory provision is determined by its relation to the *overall legislative intent* of the statute of which it is a part, and whether the statute, less the invalid provision, can still accomplish this intent.'" (citation omitted).

Respectfully submitted this 8th day of December, 2022.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 8, 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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