IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

WILLIAM A. LINK, *et al*.,

Plaintiffs,

v. Case No.: 4:21cv271-MW/MAF

MANNY DIAZ JR., *et al*.,

Defendants.
_____/

DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSION OF LAW

Pursuant to this Court's Pretrial Conference Order (ECF No. 150), Defendants respectfully submit the following Proposed Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

HOUSE BILL 233.

In April 2021, the Florida Legislature passed ("HB233"). The Governor signed HB233 into law in June 2021, and the law became effective on July 1, 2021.

HB233 amends sections 1001.03, 1001.706, 1004.097, 1004.26, and 1006.60, Florida Statutes. HB233 contains five provisions, three of which Plaintiffs challenge in this lawsuit: the Survey Provisions, the Anti-Shielding Provisions, and the Recording Provisions.

STATE INTEREST AND LEGISLATIVE RECORD.

Prior to HB233's enactment, the Board of Governors began a Civil Discourse Initiative aimed at promoting respectful discussions of differing viewpoints on campuses. The Board of Governors also developed a State University System Statement on Free Expression, signed by universities and the Board, with a parallel goal of encouraging freedom of expression on college and university campuses.

During legislative proceedings on HB233, the bill's sponsor, Representative Spencer Roach, thoroughly explained the purpose of the bill as assessing and promoting viewpoint diversity and intellectual freedom on campuses, and preventing censorship of constitutionally-protected speech. Quoting *Healy v. James*, 408 U.S. 169 (1972), he explained: "The college classroom is peculiarly the marketplace of ideas, and the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools . . . ." The Survey Provisions' purpose was to move beyond anecdotes to empirically assess freedom of expression and viewpoint diversity on Florida's public campuses. Representative Roach explained "we need to push back hard against this sort of culture and this belief that our college students are somehow fragile and we need to protect them from views that they don't agree with." Representative Roach was not the only person to ever posit such a perspective. Quoting the "Chicago Statement" published by the Committee of Freedom of Expression at the University of Chicago, he

explained: "It is not the proper role of the university to attempt to shield individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive. Although the university greatly values civility and a climate of mutual respect, concerns about civility and mutual respect can never be used as a justification for closing off discussion of ideas, however offensive or disagreeable those ideas may be to some members of our community." During proceedings on the Senate's counterpart to HB233, SB264, the bill's sponsor, Senator Ray Rodrigues, explained the purpose of SB264 in similar terms and quoting the same provisions of the Chicago Statement referenced by Representative Roach. Senator Rodriguez expressed that he and other members of the Legislature have received reports from students on our campuses that they felt like they needed to self-censor. Such was the impetus of the bill. Senator Rodriguez went on to explain "That's why an anonymous survey is very important. Students need to be asked: In your college classrooms, are you being provided an environment that provides for viewpoint diversity and for intellectual freedom? And without asking that question, we won't have the data to know if what we know is happening in other states is happening in Florida." Senator Rodriguez again expressed the importance of making the survey anonymous: "that is why an anonymous survey is so important. I mean, this is something that if students are asked via an anonymous survey, they are much more

likely to give a truthful and accurate answer than if you put them on the spot of saying you must come forward and put your name on a complaint."

IMPLEMENTATION OF SURVEY PROVISIONS.

In accordance with their statutory duty, the Boards developed and administered a survey to assess intellectual freedom and viewpoint diversity at public colleges and universities. There was one survey for students ("Student Survey") and one survey for faculty and staff ("Employee Survey"). The Board of Education and the Board of Governors used the same surveys. The 2022 surveys were administered and the results were published by the September 1st statutory deadline.

The surveys administered by the Boards were voluntary. The instructions on the survey made plain that the survey was voluntary. Recipients could choose to ignore the survey all together. Recipients were also free to provide a response to any or all of the questions on the survey.

No Plaintiff took the survey. UFF encouraged its members to not take the survey. No Plaintiff—or anyone else—faced retribution or any threat of the same for not participating in the survey.

The survey did not require anyone to disclose their political beliefs or associations, nor does HB233 require as much. There were no questions on the Student Survey or the Employee Survey seeking information about any individual's

associations, political or otherwise. There was a single question on the Employee Survey that asked where the employee would place themselves on the scale of "conservative, moderate, liberal, or none of the above." As with any other question, the responder was free to not answer this question and was also free to not participate in the survey as a whole.

The survey was anonymous. Defendants collected public IP addresses that do not identify individuals. The only credible testimony on the issue of anonymity came from a Board of Governors' witness with personal knowledge of the survey results data, who testified that it would be impossible to identify any individual through a public IP address without the assistance of law enforcement and a warrant.

Plaintiffs offered no credible evidence that the surveys required by HB233 were not voluntary or not anonymous. Nor have the Plaintiffs provided any credible evidence that anyone—much less Plaintiffs themselves—faced a threat of discipline or was retaliated against for not taking the survey.

IMPLEMENTATION OF THE RECORDING PROVISIONS.

No Plaintiff has been charged with violating the Recording Provisions or subjected to or threatened with discipline under the Recording Provisions. Plaintiffs have not presented any evidence of their classes being recorded since HB233 was enacted. No Plaintiff has had a recording of their courses published.

Neither the Board of Governors nor the Board of Education has promulgated rules or adopted policies implementing, interpreting, or enforcing the Recording Provisions.

PLAINTIFF'S FUTURE FUNDING AND "TARGETING" CONCERNS.

The Student and Professor Plaintiffs claim to fear future budget cuts to their institutions as a result of HB233, but no budget cuts or fiscal penalties have been threatened or implemented as a result of HB233. Defendants do not exercise the Legislature's appropriations power, nor the Governor's veto power. Nor does the text of HB233 contemplate or require any consequences or future actions flowing from the surveys or their results. Quite simply, Plaintiffs presented no evidence to support their fears of future financial repercussions—repercussions that would not impact them directly, if at all—beyond their own speculation and hypothesizing.

Plaintiffs also claim that HB233 will somehow be used to "target" students and faculty who hold certain viewpoints, or "target" campuses that skew towards a particular viewpoint. But these claims are not borne out by the evidence. Plaintiffs fail to articulate what such "targeting" might entail, but in any event, have not themselves been targeted under the auspices of HB233, as Plaintiffs readily admit they have not faced any discipline, retaliation, or threat of the same. Plaintiffs also offer no evidence to suggest how HB233 has in fact been used—or will imminently be used—to target any other student, professor, or institution.

PLAINTIFFS' ASSOCIATIONAL CONCERNS.

No Plaintiff has resigned from an organization as a result of HB233. No Plaintiff has offered any credible evidence that they have declined to join an organization as a result of HB233. The organizational Plaintiffs failed to identify anyone who quit or declined to join their organizations as a result of HB233. Neither UFF nor MFOL has established any tangible harm to their membership or their resources traceable to Defendants or HB233.

PLAINTIFFS' COMPELLED SPEECH CONCERNS.

No Plaintiff has been coerced to engage in, or refrain from, any speech as a result of HB233—nor threatened with discipline for not doing so. While a select few of the Professor Plaintiffs have asserted that they have made—or may someday make—adjustments to how they teach certain topics, they fail to explain how those adjustments result from HB233 (as opposed to other laws, or things they read in the press, for example). Additionally, as explained below in the conclusions of law, HB233 does not compel anyone to say anything and is not enforceable against Plaintiffs. Thus, setting aside the credibility of their claims, the changes in conduct Plaintiffs assert they have made or might make in the future are not objectively reasonable responses to the plain language of HB233, and cannot be used to manufacture standing or establish the merits of a First Amendment claim.

NO HARM TO PLAINTIFFS.

No Plaintiff has suffered any cognizable injury as a result of HB233. No Plaintiff has completed the survey. No Plaintiff has been compelled to make any statement. No Plaintiff has disclosed any personal belief or their associations. No Plaintiff has been disciplined or threatened with consequences for not doing so under HB233.

CONCLUSIONS OF LAW

INTERPRETATION OF HB 233.

Survey Provisions. The Survey Provisions do not require the surveys to be mandatory or non-anonymous. Nor do the Survey Provisions require any individual to disclose their political beliefs or associations to the state. The Survey Provisions contemplate no consequences based on the survey results, and include no mechanism for cutting funding to any institution or program.

Anti-Shielding Provisions. The Anti-Shielding Provisions prohibit specific state actors—the Board of Education, the Board of Governors, and public colleges and universities—from restricting constitutionally-protected expression on the grounds that someone might find the expression unwelcome, uncomfortable, disagreeable, or offensive. The Anti-Shielding Provisions do not require anyone to affirmatively speak or to express or endorse any viewpoint. Nor do the Anti-Shielding Provisions prohibit or discourage particular viewpoints or topics. The Anti-Shielding

Provisions do not restrict or promote speech based on content, but instead, prohibit constitutionally-protected speech from being censored.

By their terms, the Anti-Shielding Provisions are unenforceable against Plaintiffs,[1] or any other student or professor, and predictably, have not been enforced against Plaintiffs.

Recording Provisions. The Recording Provisions codify a student's right to record lectures for personal use, limit other uses of recorded lectures to defined circumstances, prohibit unauthorized publication of lectures, and provide a cause of action for unauthorized publication. The Recording Provisions contain no enforcement mechanism against students or professors such that any Plaintiff could be held liable for their violation, unless they unlawfully publish a recorded lecture.

The Cause of Action. Section 1004.097(4)(a), Florida Statutes, is not among the "Challenged Provisions" raised in Plaintiffs' Second Amended Complaint. Nor

[1] Even if the Anti-Shielding Provisions did regulate curricula, the Professor Plaintiffs would lack standing because the government can regulate public employees' employment-related speech. *See Garcetti v. Ceballos*, 547 U.S. 410 (2006) (public-employee speech made pursuant to official duties is not "insulate[d]" from "employer discipline" under First Amendment); *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991) (recognizing that to further their educational mission, schools may restrict teacher's speech in classroom in a manner it could not outside the classroom, because a teacher's in-school speech might be attributed to the school, and schools can restrict the speech of their own employees more than others; concluding that a professor's "interest in academic freedom and free speech do not displace the University's interest inside the classroom").

was the cause of action set forth in this subsection created by HB233. This provision is separate from the Anti-Shielding Provisions and the Recording Provisions. The only private cause of action that exists in Section 1004.094(4)(a) is available to *individuals* who seek to remedy violations of their individual expressive rights, and is available only against institutions. § 1004.097(4)(a), Fla. Stat. This cause of action existed before HB233. *See* § 1004.097(4) (2020), Fla. Stat. The reference to the Anti-Shielding Provisions in section 1004.097(3)(f), does not change the nature of the cause of action; it does not expand the scope of the available claim, nor does it identify new potential plaintiffs or defendants. This much is plain from the text of the statute.

The cause of action applies distinctly to colleges and universities—not students, not professors, not unions, not advocacy organizations—and is enforced by private plaintiffs, not Defendants. *See Whole Woman's Health v. Jackson,* 142 S.Ct. 522 (2021). This cause of action is separate from HB233, and outside the scope of Plaintiffs' claims. Moreover, as a practical matter, Plaintiffs offered no evidence of any individual or institution that has been the subject of or threatened with a cause of action under section 1004.097(4)(a) since HB233's enactment.

PLAINTIFFS' LACK STANDING.

"[T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an 'injury in fact'—an invasion of

or imminent, *not conjectural or hypothetical*. . . . Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly . . . trace[able] to the challenged action *of the defendant*. . . . Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defendants of Wildlife,* 504 U.S. 555, 560-61 (1992) (citations omitted) (emphases supplied).

An "imminent" injury sufficient to confer standing is one that will "proceed with a high degree of immediacy." *Id.* at 563 n.2; *31 Foster Children v. Bush,* 329 F.3d 1255, 1266-67 (11th Cir. 2003) (same). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan,* 504 U.S. at 561.

No Injury in Fact. Because Plaintiffs have failed to prove they have suffered an injury-in-fact that is "actual or imminent, not conjectural or hypothetical," Plaintiffs lack standing. *Elend v. Basham,* 471 F.3d 1109, 1207 (11th Cir. 2006).

As found above, no Plaintiff has taken the survey and HB233 does not mandate that any Plaintiff refrain from or adopt any speech. To the extent some Plaintiffs have indicated they have chilled or altered their speech, doing so was not an objectively reasonable reaction to HB233. HB233 does not dictate or regulate the content of any speech, so any actual or future self-censorship is necessarily based on Plaintiffs' subjective assumptions—not the law's text. *Digital Props., Inc. v. City of Plantation,* 121 F.3d 586, 590-91 (11th Cir. 1997) ("No explicit delineation . . . exists

in the Code of Ordinances. Digital's challenge, therefore, is founded upon its anticipated belief that Plantation would interpret the P.C.O. in such a way as to violate Digital's First Amendment rights.").

Moreover, HB233 cannot be enforced against Plaintiffs, nor is there any evidence that it has been or will be imminently enforced against Plaintiffs. *See Pittman v. Cole,* 267 F.3d 1269, 1283-84 (11th Cir. 2001) ("[I]n order for a plaintiff alleging that his speech was chilled to have standing, he or she must show that either (1) he was threatened with prosecution; (2) prosecution is likely; or (3) there is a credible threat of prosecution." (marks omitted)). "[I]f no credible threat of prosecution looms, the chill is insufficient to sustain the burden that Article III imposes. A party's subjective fear that she may be prosecuted for engaging in expressive activity will not be held to constitute an injury for standing purposes unless that fear is objectively reasonable." *Wilson v. State Bar of Ga.,* 132 F.3d 1422, 1428 (11th Cir. 1998) (citation and marks omitted); *Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 298 (1979) ("[P]ersons having no fears of state prosecution except those that are imaginary or speculative lack standing, and are not . . . appropriate plaintiffs.").

Plaintiffs' Asserted Injuries are not Traceable to Defendants' Enforcement of HB233 Nor Redressable Against Defendants. Plaintiffs' "alleged harm is not plausibly tied to [HB233's] enforcement so much as the law's very existence."

Equality Fla. v. State Bd. of Ed., 4:22-cv-134-AW/MJF, ECF No. 120 at 3 (Sept. 29, 2022). Plaintiffs' alleged injuries are not traceable to Defendants. *Collins v. Yellen,* 141 S.Ct. 1761, 1779 (2021) ("[F]or purposes of traceability, the relevant inquiry is whether the plaintiffs' injury can be traced to . . . *the defendant*, not to the provision of law that is challenged." (emphasis supplied)).

Plaintiffs' speculative alleged injuries cannot be redressed by a favorable judgment in this case. As to Plaintiffs' claimed injuries related to future impacts to their universities or programs, particularly in the realm of funding, these asserted injuries are entirely speculative, with no facts to suggest their imminence, or any tangible likelihood of occurrence whatsoever. Moreover, the Legislature controls appropriations, and the Governor has veto authority. This was true before HB233, and remains true after HB233. Neither needs HB233 to exercise their constitutional authority to appropriate or veto funds. An injunction against Defendants could not change that. *See Jacobson v. Fla. Sec. of State,* 974 F.3d 1236, 1254-55 (11th Cir. 2020) ("Because [plaintiffs] failed to sue the officials who will cause any future injuries, even the most persuasive of judicial opinions would have been powerless to redress those injuries."); *Lewis v. Gov. of Alabama*, 944 F.3d 1287, 1301 (11th Cir. 2019) ("[I]t must be the effect of the court's judgment on the defendant—not an absent third party—that redresses the plaintiff's injury[.]" (marks omitted)); *Support Working Animals, Inc. v. Florida,* 8 F.4th 1198, 1205 (11th Cir. 2021) ("[A]

plaintiff's injury isn't redressable by prospective relief where other state actors, who aren't parties to the litigation, would remain free and clear of any judgment and thus free to engage in the conduct that the plaintiffs say injures them.").

Additionally, Plaintiffs' allegations regarding chilled speech or self-censorship, are inextricably tied to—if not wholly dependent on—laws and parties not at issue in this case such as Chapter 2022-72 (HB7 (2022)), Chapter 2022-22 (HB1557 (2022)), and Chapter 2022-70 (SB7044 (2022)), Laws of Florida, all enacted the year *after* HB233. As discussed above, these claimed injuries do not flow from a reasonable reading of HB233's text or from actions—actual, threatened, or otherwise—that could be taken by Defendants. Thus, Plaintiffs' claimed injuries are not traceable to Defendants' enforcement of HB233, nor are they redressable by HB233's invalidation.

HB233 DOES NOT VIOLATE PLAINTIFFS' FIRST AMENDMENT RIGHTS.

HB 233 Does Not Regulate Speech. HB233's text does not regulate or deregulate speech at all, much less "based on its substantive content or the message it conveys"—the lynchpin concern of the First Amendment. *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 828 (1995). HB233 regulates conduct which the First Amendment does not protect. *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.,* 547 U.S. 47, 62, 65-66 (2006). HB233 merely directs governmental actors to not violate the already-existing rights of those who wish to express a

viewpoint with which others may disagree. *See Women's Emergency Network v. Bush*, 323 F.3d 937, 947 (11th Cir. 2003) (finding that the "Choose Life statute does not in any way restrict or prohibit Appellants' speech . . . . The First Amendment protects the right to speak; it does not give Appellants the right to stop others with opposing viewpoints from speaking.").

Plaintiffs' First Amendment Claims Based on Impermissible Legislative Intent are Barred by Binding Precedent. HB 233 is a neutral law that does not regulate speech. As such, binding case law precludes this Court from relying on allegations of impermissible legislative intent as a basis for Plaintiffs' First Amendment Claims. *NetChoice, LLC v. Attorney General, Florida*, 34 F. 4th 1196, 1224– 25 (11th Cir. 2022). "[W]hen a statute is facially constitutional, a plaintiff cannot bring a free-speech challenge by claiming that the lawmakers who passed it acted with a constitutionally impermissible purpose." *Id.* at 1224 (citing *In re Hubbard*, 803 F. 3d 1298, 1312 (11th Cir. 2015) (marks omitted). The Eleventh Circuit observed that no "Supreme Court or Eleventh Circuit decision . . . [has] relied on legislative history or statements by proponents to characterize as viewpoint-based a law challenged on *free speech* grounds." (*Id.* at 1225 (emphasis in original)). The Court instead reaffirmed the Supreme Court's decision in *United States v. O'Brien*, 391 U.S. 367 at 382–83 (1968), noted the "absence of clear precedent enabling [the Court] to find a viewpoint-discriminatory purpose based on legislative history," and "determined

that [it] cannot use the Act's chief proponents' statements as a basis to invalidate" the challenged law. *Id* at 1226. *NetChoice* binds this Court's analysis and ends the inquiry.

Even if this Court were to look at legislative intent, it would not change the outcome. The text of HB233, contemporaneous statements from bill sponsors, and the legitimacy of the State's interest in preserving free expression on campuses handily outweigh stray hearsay from non-legislators and individual legislators post-passage. *See Blanchette v. Connecticut Gen. Ins. Corp.*, 419 U.S. 102, 132 (1974); *Greater Birmingham Ministries v. Alabama*, 992 F.3d 1299, 1322–27 (11th Cir. 2021).

HB233 Does Not Discriminate on the Basis of Viewpoint. Neither the text of HB233 nor the evidence before this Court establishes a viewpoint-discrimination claim. HB233 does not reference any viewpoint, or subject certain viewpoints to differential treatment. Therefore no viewpoint discrimination claim can lie. *See Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995) ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.").

The Anti-Shielding Provisions do not provide favorable treatment to "uncomfortable, unwelcome, disagreeable, or offensive" speech. No one is forced to engage in "uncomfortable, unwelcome, disagreeable, or offensive" speech, nor is

such speech afforded greater protection than any other First-Amendment protected speech. The text of the Anti-Shielding Provisions simply prohibit *suppression of protected speech*—regardless of content—on the grounds that someone might find the protected speech unwelcome, disagreeable, etc. This prohibition on state-sponsored censorship applies equally to *all* protected speech, regardless of content, regardless of viewpoint, and regardless of why someone might find subjectively the speech offensive or disagreeable.

HB233 Does Not Compel Speech. As noted above, the Anti-Shielding provisions prevent Defendants, public colleges, and public universities from silencing First-Amendment-protected expression on the grounds that someone finds the expression "uncomfortable, unwelcome, disagreeable, or offensive." They do not compel Plaintiffs to adopt speech, alter their syllabi, "personally speak the government's message," or "host or accommodate another speaker's message." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 63 (2006).

The Anti-Shielding Provisions are not Unconstitutionally Vague. The Anti-Shielding Provisions are clear on their face: they prevent Defendants and public colleges and universities from restricting constitutionally-protected speech on the grounds that someone may perceive the speech as offensive, unwelcome, or disagreeable. Nothing in the text of HB233 suggests that the Anti-Shielding Provisions eliminate a Defendants', a higher education institutions', or even the

Professor Plaintiffs' authority to enact reasonable time, place, and manner restrictions for the classroom. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Coates v. City of Cincinnati*, 402 U.S. 611, 615-16 (1971) (permitting tailored time, place, and manner restrictions on protected speech).

These provisions impose obligations on Defendants, universities, and colleges, which are therefore the only entities subject to enforcement. The Anti-Shielding Provisions are plainly understandable, but regardless, it is immaterial whether Plaintiffs find the Anti-Shielding Provisions vague. With no "actual and well-founded fear that [the Anti-Shielding Provisions] will be enforced *against them*," and *by Defendants*, Plaintiffs lack standing to challenge those provisions as unconstitutionally vague. *Virginia v. Am. Booksellers Ass'n, Inc.,* 484 U.S. 383, 393 (1988) (emphasis supplied); *accord Lewis v. Gov. of Alabama,* 944 F.3d 1287, 1299 (11th Cir. 2019) ("[T]he Act itself . . . doesn't require (or even contemplate) 'enforcement' by anyone, let alone [the defendant].").

HB233 Does Not violate Plaintiffs' Freedom of Association. The Survey Provisions of HB233 do not constrain Plaintiffs' associational freedoms. HB233 does not "interfere[] with individuals' selection of those with whom they wish to join in a common endeavor" or "associate [with] for the purpose of engagement in . . . activities protected by the First Amendment." *Roberts v. U.S. Jaycees,* 468 U.S. 609, 617–18 (1984). Plaintiffs "simply weren't denied [the] right" to associate, and

have produced no credible evidence that there is an imminent threat that their right to associate will be denied. *O'Laughlin v. Palm Beach Cnty.,* 30 F.4th 1045, 1053–54 (11th Cir. 2022) ("Plaintiffs complain that they were unfairly disciplined for their social-media posts . . . not that they were punished for joining the union, collectively bargaining, or otherwise hanging around with people who share their beliefs."). Plaintiffs have not been punished, disciplined, retaliated against, or threatened in any fashion, for any reason.

Plaintiffs lack standing to pursue their claims, and failed to prove the merits of those claims. Defendants are entitled to final judgment in their favor on all four counts of Plaintiffs' Second Amended Complaint.

Respectfully submitted on December 8, 2022.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on December 8, 2022, the foregoing document has been served by the Court's CM/ECF system which will serve a copy via email on all counsel of record.

/s/ George T. Levesque
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