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' TRIAL BRIEF

Defendants respectfully submit this trial brief as authorized in this Court's Pretrial Conference Order (ECF No. 150) and Order Granting In Part And Denying In Part Motion Regarding Pre- And Post-Trial Briefing (ECF No. 175).

INTRODUCTION

Plaintiffs—a teachers' union, a gun control advocacy organization, and a handful of individual teachers and students—initiated this action challenging three of the five provisions in Florida's recently-enacted HB 233 (2021). *See* Ch. 2021-150, Laws of Fla. After more than a year of litigation, the trial in this case will confirm what has been true from the outset: Plaintiffs have not been injured by HB233, none of their hypothetical fears have materialized, none of their conspiracy theories are borne out by the evidence, and none of their constitutional rights have

been violated. The central fact Plaintiffs have successfully established thus far, and the fact they will establish with certainty at trial, is that they vehemently disagree with HB233 as a matter of policy—almost as much as they disagree with separate legislation passed a year later. But a policy disagreement does not give rise to a cognizable injury at all, let alone a deprivation of Plaintiffs' constitutional rights at the hands of Defendants.

The evidence at trial will show that Plaintiffs' claims must fail for at least two reasons. First, Plaintiffs will be unable to show that Defendants or HB233 has harmed them in any legally cognizable way and therefore lack standing. Second, Plaintiffs' claims fail because HB233 is a neutral statute that does not regulate speech at all, let alone discriminate against certain types of speech, either on its face or in its purpose. After nearly a year of discovery, Plaintiffs' have not found—and will not present at trial—any credible evidence to support their claims.

MEMORANDUM OF LAW

I. THE CHALLENGED PROVISIONS OF HB 233.

Plaintiffs challenge three separate provisions of HB 233: the "Survey Provisions," the "Anti-Shielding Provisions," and the "Recording Provisions." ECF No. 101 ¶ 67. They assert four causes of action, three arising under the First Amendment and one arising under the Fourteenth Amendment. First, they bring both a facial and an as-applied viewpoint discrimination challenge to each of the three

provisions at issue. *Id.* ¶¶118–141. Second, they bring a freedom of association challenge (both facial and as-applied), based on the Survey Provisions, but seeking to invalidate HB 233 in its entirety. *Id.* ¶¶ 142–160. Third, they assert that HB 233's Anti-Shielding Provisions compel speech. *Id.* ¶¶ 161–178. And fourth and finally, Plaintiffs challenge the Anti-Shielding Provisions as unconstitutionally vague. *Id.* ¶¶179–184.

A. The Survey Provisions.

The Survey Provisions direct Defendants to require that each state college and university "conduct an annual assessment of the intellectual freedom and viewpoint diversity at that institution." §§ 1001.706(13)(b) (colleges); 1001.03(19)(b) (universities). Specifically, the Survey Provisions require The Board of Education and the Board of Governors to:

> select or create an objective, nonpartisan, and statistically valid survey to be used by each institution which considers the extent to which competing ideas and perspectives are presented and members of the college community, including students, faculty, and staff, feel free to express their beliefs and viewpoints on campus and in the classroom.

Id. Other than compiling and publishing the results of the survey every year by September 1st, the Survey Provisions require nothing of Defendants. *Id.* The Survey Provisions do not require anyone to answer a survey, do not require action by Defendants beyond publishing the survey results, and do not require anyone to "register" their political beliefs—a central feature of Plaintiffs' claims. Importantly,

the Survey Provisions contemplate no consequences based on the survey results, and HB233 includes no mechanism for cutting funding to any institution or program.

As HB233's sponsor articulated, the Survey Provisions' purpose is to move beyond anecdotes to empirically assess freedom of expression and viewpoint diversity on Florida's public campuses. This is a perfectly legitimate end for the State to pursue. Like a thermometer, the surveys are meant to be a diagnostic tool designed to take the temperature of taxpayer-funded campuses. The Survey Provisions presuppose no diagnosis, prescribe no course of treatment, and predict no future action or consequence.

The evidence at trial will show that the only survey administered under the Survey Provisions—which none of the Plaintiffs completed—was voluntary (which Plaintiffs concede) and anonymous (which Plaintiffs will try but fail to dispute through witnesses with no personal knowledge of the survey's administration or data maintenance). Plaintiffs will concede at trial that they have faced no consequences for not taking the survey, or for actively encouraging others to not take the survey. And while Plaintiffs insist that nothing in the statute prevents a future survey from not being voluntary or anonymous, they will present zero evidence to suggest if or when a mandatory, non-anonymous survey might be administered.

B. The 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 (or "shielding")[1] constitutionally-protected expression on the grounds that someone might find the expression unwelcome, uncomfortable, disagreeable, or offensive. This is consistent with the explicit purpose of the First Amendment. *Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, 141 S.Ct. 2038,2046-47 (2021); *Snyder v. Phelps*, 562 U.S. 433, 458 (2011); *Coates v. City of Cincinnati*, 402 U.S. 611, 615-16 (1971). The Anti-Shielding Provisions do not require anyone to utter a word, to endorse any viewpoint, or give equal floor time for all conceivable ideas. The law simply prohibits specific state actors from restricting constitutionally-protected speech on the grounds someone might find it offensive or disagreeable. Additionally, nothing in the text of HB233 suggests that the Anti-Shielding Provisions eliminate institutions', or Defendants', or even Plaintiffs', authority to enact reasonable time, place, and manner restrictions. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (permitting tailored time, place, and manner restrictions on protected speech).

[1] To "shield" means "to limit students', faculty members', or staff members' access to, or observation of, ideas and opinions that they may find uncomfortable, unwelcome, disagreeable, or offensive." §§ 1001.706(13)(a)(2); 1001.03(19)(a)(2), Fla. Stat.

By their terms, the Anti-Shielding Provisions are unenforceable against any Plaintiff, or any other student, professor, or organization and predictably, have not been enforced against Plaintiffs. Similarly, the cause of action in section 1004.097(4)(a), Florida Statutes, applies distinctly to colleges and universities—not students, not professors, not unions, not advocacy organizations—and is enforced by private plaintiffs, not Defendants. *See* ECF No. 66 (Def.'s Supp. Brief re: *Whole Woman's Health v. Jackson*, 142 S.Ct. 522 (2021)). No Plaintiff could ever be sued under this provision, which predates HB233, and only contemplates the vindication of violations to an individual's own expressive rights. § 1004.097(4)(a) ("A person injured by a violation of whose expressive rights are violated by an action prohibited under this section may bring an action . . . *[a]gainst a public institution of higher education* based on the violation of the individual's expressive rights . . ." (emphasis added)). Plaintiffs have not been sued or threatened with suit under the auspices of this statute or HB233, and the evidence at trial will show that they are unaware of anyone who has

C. The Recording Provisions

The Recording Provisions codify a 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. Specifically, the Recording Provisions state that:

> a student may 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.

§ 1004.097(3)(g), Fla. Stat. The Recording Provisions also prohibit a classroom recording from "be[ing] published without the consent of the lecturer." *Id.*

The Recording Provisions contain no enforcement mechanism against students, professors, or organizations such that any Plaintiff could be held liable for their violation (unless they unlawfully publish a recorded lecture). No Plaintiff will testify that they have been charged with violating these provisions or have been threatened with discipline under them. Some Plaintiffs will concede outright that the Recording Provisions have not harmed them. Plaintiffs are not subject to suit by Defendants or anyone else under the Recording Provisions, and will not testify otherwise at trial. And Plaintiffs will not elicit any testimony identifying even a single instance of a class being recorded since HB233 was enacted.

Plaintiffs may dislike like HB233 but they have not been harmed by it. Only the latter confers standing in federal court. *Lujan*, 504 U.S. at 461; *City of Los Angeles v. Lyons*, 461 U.S. 95, 105–07 (1983). HB233 has not been enforced against them, and Plaintiffs will offer no evidence at trial that it will imminently be enforced.

II. ALL PLAINTIFFS LACK ARTICLE III STANDING

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

legally protected interest which is (a) concrete and particularized, and (b) actual 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.

Plaintiffs' own testimony will confirm for this Court that they have not suffered an injury-in-fact: no Plaintiff faces a credible threat (or even a legal possibility) of any provision of HB233 being enforced against them, or that they have engaged in reasonable self-censorship out of a objectively reasonable belief that HB 233 will be enforced against them. Any hypothetical injury Plaintiffs may pontificate about at trial will not be traceable to Defendants, or even to HB233. Indeed, as Plaintiffs themselves allege in their Complaint, any future injury they may suffer will come at the hands of third parties. *See, e.g.*, ECF No. 101 ¶ 103 ("[T]he

Recording Provision provides *students* the means to harass faculty members who express views with which the students disagree." (emphasis added)).

Nor could Plaintiffs' alleged injuries be redressed by a judgment against Defendants. *Cf. Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 924 (11th Cir. 2020) (en banc) ("In plainer language, the plaintiff needs to show that the defendant harmed him, and that a court decision can either eliminate the harm or compensate for it."); *Lujan*, 504 U.S. at 562 (When "a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else . . . causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction."). Accordingly, at trial, Plaintiffs will continue to fail to meet their burden as to any portion of the tripartite Article III standing analysis.

A. Standing Must Be Analyzed Separately as to Each Challenged Provision of HB 233

As mentioned above, Plaintiffs bring four claims targeting three separate provisions of HB 233: the Survey Provisions, the Anti-Shielding Provisions, and the Recording Provisions. Count I challenges all three of these provisions; Count II challenges the Survey Provisions, yet asks to enjoin all of HB233; and Counts III and IV challenge only the Anti-Shielding Provisions. Plaintiffs repeatedly reference the harms of HB233 as a whole and they ask this Court to declare HB233 unconstitutional in its entirety. *See, e.g.*, ECF No. 101 at 56, 64. But Plaintiffs cannot

establishing standing by showing an injury flowing from one provision that can only be remedied by striking down a separate provision or HB 233 as a whole. *Missouri v. Jenkins*, 515 U.S. 70, 88, 89, (1995) ("[T]he nature of the . . . remedy is to be determined by the nature and scope of the constitutional violation" (citation and internal quotation marks omitted)). *Lewis v. Casey*, 518 U.S. 343, 357 (1996) ("The remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established." (citing *Jenkins*)); *see also Air Methods Corp. v. Altmaier*, 4:20-CV-462-AW-MAF, 2021 WL 6303231, at *3 (N.D. Fla. Oct. 12, 2021) ("In [Plaintiffs'] view, if one part of the law falls, the other part falls too. This may be so as a matter of state law, but it does not help [Plaintiff] with traceability or redressability. [Plaintiff] still has to show standing as to one provision or the other, and it has not. And even if it had shown standing as to one provision, the remedy would be to enjoin enforcement of that provision.").

The Supreme Court reiterated this concept in *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). ("We have insisted, for instance, that 'a plaintiff must demonstrate standing separately for each form of relief sought."(citations omitted)). As the Court explained "if standing were commutative, as plaintiffs claim, this insistence would make little sense when all claims for relief derive from a 'common nucleus of operative fact.'" *Id.* Plaintiffs attempt to circumvent this constitutional

principle by citing to and distorting the language of *Iancu v. Brunetti*, 204 L. Ed. 2d 714 (2019). ECF No. 101 at ¶ 124.

In *Iancu*, a clothing manufacturer named "Friends You Can't Trust" applied to trademark the word "FUCT," which, as the Court explained, sounds like "the equivalent of the past participle form of a well-known word of profanity." *Id.* Plaintiff sued the Patent Office challenging as unconstitutional a provision of the Lanham Act "prohibiting the registration of 'immoral[ ] or scandalous' trademarks." *Id.* The Court held that the challenged provision was unconstitutional saying:

> Put the pair of overlapping terms together and the statute, on its face, distinguishes between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them; those inducing societal nods of approval and those provoking offense and condemnation. The statute favors the former, and disfavors the latter.

Iancu, 204 L. Ed. 2d 714. Plaintiffs quote this language in their Complaint—but not in its entirety—to suggest that the entirety of "HB 233 is an unconstitutional content-based restriction." ECF No. ¶ 124. But the Court in *Iancu* did not conflate together two separate provisions, as Plaintiffs ask the Court to do here. Rather, it considered two words in the same sentence together to determine that the provision in question was a content-based regulation. Ironically, the Court noted that it had ruled "a neighboring provision of the Act" prohibiting 'disparaging trademarks'" unconstitutional two years earlier. *Id.* (quoting 15 U.S.C. § 1052(a)) "[S]tanding is not dispensed in gross . . . 'nor does a plaintiff who has been subject to injurious

conduct of one kind possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject.'" *Lewis v. Casey*, 518 U.S. 343, 358 (1996).

The Eleventh Circuit's recent *NetChoice* decision further underscores the impropriety of blurring the lines between separate statutory provisions. In *NetChoice*, the Court rejected the argument that an allegedly-discriminatory legislative motive could be imputed to the entire challenged law to manufacture a First Amendment claim. *See* 34 F.4th at 1224. The Court refused to recognize legislative motivation as the grounds for a free-speech challenge to the whole enactment, and proceeded to scrutinize each challenged provision—all of which regulated speech on their face—on a provision-by-provision basis. *Id.* at 1224–31.

Here, unlike in *NetChoice*, none of the three challenged provisions of HB233 restrict or require any speech. Rather, Plaintiffs hang their hat on "invalidating [HB233] 'root and branch'" as violative of their free-speech rights based solely on allegations of improper legislative motivation. *Id.* 1226. As a matter of First Amendment analysis and as a matter of Article III standing, this is improper.

Plaintiffs have not challenged the entirety of HB233 and cannot obtain relief enjoining Defendants from enforcing all three challenged provisions by showing an injury that flows from only one. Plaintiffs' could not, for example, obtain injunctive relief from the Survey Provisions by succeeding only on Count IV, which challenges

only the Anti-Shielding Provisions. *Lewis v. Casey*, 518 U.S. 343, 357 1996) ("The actual-injury requirement would hardly serve the purpose . . . of preventing courts from undertaking tasks assigned to the political branches[,] if once a plaintiff demonstrated harm from one particular inadequacy in government administration, the court were authorized to remedy all inadequacies in that administration."); *Air Methods Corp. v. Altmaier*, 4:20-CV-462-AW-MAF, 2021 WL 4955907, at *2 (N.D. Fla. Mar. 24, 2021) ("A plaintiff must have standing for each claim he brings, so an injury from one provision cannot provide standing to challenge another."); *League of Women Voters of Florida, Inc. v. Lee*, 4:21CV186-MW/MAF, 2022 WL 969538, at *6 (N.D. Fla. Mar. 31, 2022) ("Before this Court addresses Plaintiffs' claims, it must ensure that Plaintiffs have standing to challenge each of the provisions.").

To establish standing as to any one of the challenged provisions, Plaintiffs must show an injury flowing from that provision that can be redressed by an order enjoining that provision. This has long been the law. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 235 (1990), *holding modified by City of Littleton, Colo. v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004) ("Because we conclude that no petitioner has shown standing to challenge either the civil disability provisions or the provisions involving those who live with individuals whose licenses have been denied or revoked, we conclude that the courts below lacked jurisdiction to adjudicate

petitioners' claims with respect to those provisions."). *CAMP Legal Def. Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1273 (11th Cir. 2006) ("*FW/PBS* forecloses the argument by CAMP that injury under one provision is sufficient to confer standing on a plaintiff to challenge all provisions of an allegedly unconstitutional ordinance."); *Granite State Outdoor Advert., Inc. v. City of Clearwater, Fla.*, 351 F.3d 1112, 1117 (11th Cir. 2003) ("In this case, the only harm that Granite State has personally suffered is under § 3–1806.B.1. of the Clearwater Community Development Code. It was under this provision that Granite State's billboard permits were denied. Granite State has suffered no injury regarding any other provision in Article 3, Division 18. Thus, Granite State has standing to challenge the constitutionality of *only* § 3–1806.B.1. as applied to it and, under the overbreadth doctrine, as applied to non-commercial speech."); *see also Maverick Media Group, Inc. v. Hillsborough Cnty., Fla.*, 528 F.3d 817, 822–23 (11th Cir. 2008); *Get Outdoors II, LLC v. City of San Diego, Cal.*, 506 F.3d 886, 892 (9th Cir. 2007) ("Get Outdoors II cannot leverage its injuries under certain, specific provisions to state an injury under the sign ordinance generally."); *Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983).

In assessing Plaintiffs' asserted harms at trial—both in analyzing standing and the merits of Plaintiffs' claims—this Court should reject Plaintiffs' calculated conflation of the three challenged provisions and their asserted impacts on Plaintiffs.

B. No Plaintiff will establish an injury-in-fact

The evidence at trial will show Plaintiffs' claimed injuries have not materialized, and certainly are not concrete and particularized. Nor are their injuries 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' "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 (N.D. Fla. Sept. 29, 2022).

Plaintiffs will not show they have been charged with violating any provision of HB233 or faced any consequence. Rather, Plaintiffs will merely speculate about what may or may not happen in the future under HB233—but worst-case-scenario guesswork and inference-stacking is no substitute for Article III standing. *Falls v. DeSantis*, No. 4:22cv166-MW/MJF, 2022 WL 2303949, *6–*7 (N.D. Fla. June 27, 2022). Because Plaintiffs will be unable 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).

i. Plaintiffs' Asserted Injuries Depend on Hypothetical Future Actions

"A claim resting upon contingent future events that may not occur as anticipated, or indeed may not occur at all, is not fit for adjudication." *Texas v.*

United States, 523 U.S. 296, 296 (1998). "[I]n order to establish a justiciable Article III case, the plaintiffs here must establish (1) that they were injured (2) by the actions of the [Defendants] (3) because [they] can enforce [HB233] against them and has either done so or threatened to do so." *Support Working Animals, Inc. v. Governor of Fla.*, 8 F.4th 1198, 1202 (11th Cir. 2021). Plaintiffs must provide evidence of a "concrete, particularized, non-hypothetical injury to a legally protected interest." *Common Cause, Ga. v. Billups*, 554 F.3d 1340, 1351 (11th Cir. 2009); *accord Lyons*, 461 U.S. 95, 101–02, 106–09 (plaintiff's alleged "abstract injury" that may occur in the future did not establish standing).

Plaintiffs' claimed injuries have no demonstrable basis in facts that have occurred, or will imminently occur, *see Lujan*, 504 U.S. at 461, and constitute impermissible inference-stacking, *see Falls*, 2022 WL 2303949 at *7. As they have done throughout this litigation, Plaintiffs are sure to testify at trial that they fear of future funding reductions to their institutions or programs as a result of HB233. But Plaintiffs will not elicit any testimony at trial regarding any proposed or actual funding cuts to any institution based on HB233, nor will they point to any provision in HB233 that contemplates any funding decisions. The Legislature does not need HB233 to exercise appropriations authority, Prelim In. Hrg. Tr. 28:23-29:13, and Defendants have no appropriations authority over funding for colleges and universities. Any injunction purporting to dictate the non-party Florida Legislature's

future appropriations or enactments would be improper. And of course, Plaintiffs are not colleges or universities, and have no legally-protected interest in the budgets of colleges and universities.

Plaintiffs' speculative, trickle-down injury allegations do not confer standing. Plaintiffs' speculation here is farther afield than plaintiffs in *Elend*, 471 F.3d at 1207–10, whose standing was rejected at the dismissal stage. Plaintiffs' alleged threat of future injury remains "wholly inchoate" and insufficient to confer standing. *Id.*; *cf. Bischof v. Osceola Cnty., Fla.*, 222 F.3d 874, 877, 884 (11th Cir. 2000) (plaintiffs had standing when they were threatened with arrest for handbilling, their colleagues had been arrested for the same conduct, and plaintiffs intended to return to the same intersection to handbill but did not for fear of arrest).

ii. Any Self-Censorship by Plaintiffs in Response to HB233 is Objectively Unreasonable

Subjective allegations that a plaintiff's speech will be chilled is an insufficient substitute under Article III for a specific, objective injury or threat of injury. *Laird v. Tatum*, 408 U.S. 1, 13–14 (1972). A subjective fear that speech will be chilled is not objectively reasonable when it depends on speculation and conjecture. *Fla. Fam. Pol'y Council v. Freeman*, 561 F.3d 1246, 1255 (11th Cir. 2009).

Plaintiffs are sure to insist at trial the HB233 will chill speech, but their assertions are not founded on events that have occurred, or that are reasonably feared. HB233 is simply not enforceable against individual students or professors,

nor does it identify any speech that is impermissible or off-limits. This Court should reject any testimony from Plaintiffs' regarding any chilling or self-censorship that has purportedly occurred as a result of HB233 as objectively unreasonable. *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). "[P]ersons having no fears of state prosecution except those that are imaginary or speculative" lack standing, and are not . . . appropriate plaintiffs." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979).

Thus, Plaintiffs' anticipated testimony regarding alleged self-censorship is not objectively reasonable as a matter of law because Plaintiffs do not face "a realistic danger of sustaining direct injury as a result of the statute's operation or enforcement" if they do not self-censor. *Am. Civil Liberties Union v. The Fla. Bar*, 999 F.2d 1486, 1492 (11th Cir. 1993) (marks omitted). Plaintiffs will not show any

concrete evidence at trial that they have *reasonably* self-censored their speech as a result of HB233 (as opposed to some other law they dislike), or that any future self-censorship would be objectively reasonable. On its face, HB233 does not dictate or regulate the content of any speech, so any actual or future self-censorship is necessarily based on Plaintiffs' improper, subjective assumptions—not the law's text or Defendants' application of it. *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."). [2]

This Court should also reject Plaintiffs' testimony that the cause of action set forth in 1004.097(4)(a), Florida Statutes, contributes to any alleged chilling or self-censorship. HB233 amended, but did not create, the cause of action in section 1004.097(4)(a). *See* Ch. 2021-159, Section 3, Laws of Fla. This cause of action is

[2] By contrast, in *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1121 (11th Cir. 2022), the alleged chilling effect was objectively reasonable because the challenged "discriminatory-harassment policy" explicitly "prohibited a broad swath of expressive activity." In addition to banning speech, the policy banned "conduct that may be humiliating," the "encourag[ement]" of banned speech, and the "failure to intervene" to stop banned speech. *Id.* Here, HB233 does not prohibit any speech or subject speech to consequences. To the contrary, it preserves the individual's right to speak, and prohibits Defendants and public institutions from restricting protected expression.

available only to individuals, and only against institutions—not students, not professors, not faculty unions, and not advocacy organizations—to vindicate violations of someone's own "expressive rights." No Plaintiff could ever be sued or held liable for damages under this statute, nor can Defendants ever enforce it. And of course, Plaintiffs' testimony at trial will show that they are not aware of any suit pursued under this subsection, and certainly not any suits in which Plaintiffs are the target. Thus, Plaintiffs' anticipated testimony regarding present or future self-censorship based on this cause of action are objectively unreasonable not only because they are speculative, but also because section 1004.097(4)(a) existed in substance before HB233 and is not enforceable against Plaintiffs. *Laird*, 408 U.S. at 12-14; *Babbitt*, 442 U.S. at 298.

The testimony at trial will irrefutably show that the 2022 surveys were voluntary, and the only credible testimony from witnesses with personal knowledge will establish that the surveys were also anonymous. Plaintiffs will present no evidence remotely suggesting that future surveys will not be voluntary and anonymous. Meanwhile, Defendants' evidence at trial will show that colleges and universities across Florida administer Diversity, Equity, & Inclusion (DEI) surveys covering topics more invasive and personal than the 2022 HB233 survey's benign questions. If allowed to testify, Plaintiffs' expert, Dr. Sylvia Hurtado, will acknowledge that public universities frequently administer "useful" campus-climate

surveys (covering topics including race, religion, gender, and political views). But there will be no evidence presented at trial to suggest HB233's voluntary survey will now uniquely chill speech, when pre-existing surveys did not.

Plaintiffs and their experts are sure to spend an inordinate amount of time at trial criticizing the technical quality of the 2022 survey's questions and administration. But these criticisms are irrelevant, and this Court should disregard them. Plaintiffs did not file suit to force Defendants to draft a quality survey—they filed suit to invalidate the Survey Provisions as unconstitutional. Nit-picking the wording of survey questions that no Plaintiff completed will fail to move the needle as to any element of Plaintiffs' constitutional claims.

Finally, Plaintiffs' testimony will show that their grievances, and specifically their 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 (like HB7, HB1557, and SB7044, all enacted the year *after* HB233). These claimed injuries are not traceable to Defendants' enforcement of HB233, or redressable by HB233's invalidation.

iii. No Student Plaintiff or Professor Plaintiff Can Establish an Injury-In-Fact.

Neither of the Student Plaintiffs and none of the Professor Plaintiffs has suffered a cognizable injury-in-fact from HB233 that is traceable to Defendants. Defendants respectfully incorporate the facts and arguments as to these individual

Plaintiffs set forth in their Motion for Summary Judgment (ECF No. 165), Response in Opposition to Plaintiffs' Motion for Summary Judgment (ECF No. 177), and Reply in Support of Defendants' Motion for Summary Judgment (ECF No. 181). As Plaintiffs' deposition testimony and written discovery responses make inevitably plain, Plaintiffs' testimony at trial will fail to establish their standing, and will likewise fail to establish the elements of their First and Fourteenth Amendment claims.

iv. UFF Has Not Suffered an Injury-In-Fact

UFF Has Not Itself Suffered a Constitutional Injury

UFF alleges that it is "directly harmed" by HB233 because it has had to "divert limited resources to combat the discriminatory and chilling effects of the law." ECF No. 101 ¶ 25. UFF will not present evidence at trial of this alleged diversion of resources sufficient to establish a cognizable injury under Article III.

"Under the diversion-of-resources theory, an organization has standing to sue when a defendant's illegal acts impair the organization's ability to engage in its own projects by forcing the organization to divert resources in response." *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1341 (11th Cir. 2014); *accord Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) (organization must prove "that it has indeed suffered impairment in its role of facilitating open housing before it will be entitled to judicial relief" based on diversion-of resources-theory of standing). UFF cannot

meet this standard because the evidence shows no departure from UFF's "own projects," *see id.*, which include political advocacy and educating members as a matter of course. Broad generalizations and conjecture cannot establish an injury-in-fact. *Lujan*, 504 U.S. at 561.

UFF's trial testimony will not reveal any harm to its ability to collectively bargain or advocate for its members. Rather, UFF's trial testimony will show nothing more than its ordinary educational and advocacy activities. Like plaintiffs in *Jacobson* who testified only that they expended "additional resources" in response to a law, UFF will offer no specific proof at trial that it has reasonably diverted resources "away from" its other priorities "in order to spend additional resources on combating" HB233, or "what activities, if any, might be impaired by" UFF's time spent on HB233. *See Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1250 (11th Cir. 2020).

UFF's communication with local chapters, development of guidance for its members, and engagement in the political process—which it does daily, supported in part by funding from FEA—is unremarkable, and does not come close to the diversion of resources necessary to confer standing. *See Ga. Repub. Party v. Sec. & Exch. Comm'n*, 888 F.3d 1198, 1203 (11th Cir. 2018) (plaintiff lacked standing when it failed to prove diversion of resources in a manner that "impairs the [organization]"); *Dream Defs. v. DeSantis*, 553 F. Supp. 3d 1052, 1072 (N.D. Fla.

2021) (organization's "disappointment and frustration" with law, which was "simply a setback to the organization's abstract social interests," did not impair organization's ability to "fulfill [its] purpose, i.e., advocate" and did not confer standing). An "organization's abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required by Art. III." *Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 40 (1976); *accord Jacobson*, 974 F.3d at 1250–51 ("[A] setback to . . . abstract social interests" is not a concrete injury). At trial, UFF will be unable to offer any factual evidence that any provision of HB233 "impedes its ability to attract members, to raise revenues, or to fulfill its purposes," or otherwise harms its interests. *Fla. Democratic Party v. Hood*, 342 F. Supp. 2d 1073, 1079 (N.D. Fla. 2004).

UFF Will Be Unable to Show a Constitutional Injury to Any of Its Members

Similarly, the evidence at trial will not show that UFF's members have suffered an injury-in-fact. UFF only has standing through its members if "its members would otherwise have standing to sue in their own right." *Greater Birmingham Ministries v. Sec y of State of Ala.*, 992 F.3d 1299, 1316 (11th Cir. 2021) ("*GBM*"). This requires that "at least one identified member has suffered or will suffer harm." *Ga. Republican Party v. Sec. & Exch. Comm'n*, 888 F.3d 1198, 1203 (11th Cir. 2018) (citations omitted). But HB233 is not enforceable against UFF's

members, and UFF cannot rely on the Professor Plaintiffs to establish standing when the Professor Plaintiffs cannot prove their own concrete injuries-in-fact.

For the same reasons, trial testimony from non-party professors (such as James Maggio, Dan Smith, or Nicole Morse) will not be sufficient to establish UFF's standing. The evidence at trial will show these members cannot establish any cognizable injury for the same reasons as the Professor Plaintiffs: the challenged provisions are not enforceable against them, they have not taken the survey, have not identified any instances of recording, have not been compelled to engage in speech, and have not otherwise been disciplined or threatened with consequences as a result of HB233.

v. MFOL Has Not Suffered an Injury-In-Fact

MFOL will also be unable to establish at trial an injury-in-fact to its own interests or to its members. Neither MFOL's corporate representative, Tej Gokhale, nor its member witness, Olivia Solomon, will be able to testify that HB233 has actually harmed any individual MFOL member or damaged MFOL's associational activities. Defendants' respectfully incorporate the facts and arguments set forth in their Motion for Summary Judgment (ECF No. 165), Response in Opposition to Plaintiffs' Motion for Summary Judgment (ECF No. 177), and Reply in Support of Defendants' Motion for Summary Judgment (ECF No. 181).

C. Plaintiffs' alleged injuries are not traceable to Defendants or capable of being redressed through a judgment against Defendants.

Setting aside the speculative and insufficient nature of Plaintiffs' claimed injuries, those injuries cannot be redressed by a favorable judgment in this case for legal reasons, rather than factual reasons. Thus, nothing Plaintiffs testify about at trial will salvage the lack of redressability from which their claims suffer.

First, there will be zero evidence presented at trial suggesting that Defendants could or would make funding decisions based on HB233. The Legislature controls appropriations, and the Governor has veto authority. The Legislature does not need HB233 to reduce funding, and the Governor does not need HB233 to veto appropriations. *See Jacobson v. Fla. Sec'y 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."). Plaintiffs' feared funding cuts could come to fruition irrespective of HB233, and a futile injunction against Defendants changes nothing. *See 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)). "[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." *Support Working Animals*, 8 F.4th at 1205.

Second, if Plaintiffs express doubts at trial about what speech is permitted on campus or in classrooms, or have concerns regarding the types of unpopular speech the First Amendment allows, those concerns arise from the complexity of First Amendment jurisprudence—not the operation of HB233. The First Amendment existed long before HB233, and its contours would be no different without HB233. Individuals have long held the First Amendment right to express unpopular viewpoints, along with entitlement to vindicate those rights in court. *E.g., Snyder v. Phelps*, 562 U.S. 443 (2011); *Nat'l Socialist Party of Am. v. Skokie*, 432 U.S. 43 (1977) (per curiam); *Collin v. Smith*, 578 F. 2d 1197 (7th Cir. 1978). Those rights—whether exercised by Plaintiffs or by the groups that Plaintiffs "quite justifiably reject[] and despise[]," *Collin*, 578 F. 2d at 1210—will exist no matter the outcome of this litigation. For example, Professor Goodman will likely testify that she is concerned that HB233 will require her to permit students to express what she terms white supremacist or neo-nazi viewpoints during classroom discussion. But even without HB233, the First Amendment would prohibit her, as a government actor, from shutting down the expression of such viewpoints unless the speech falls outside the parameters of the First Amendment's protection in the classroom (an analysis which includes appropriate time, place, and manner restrictions). *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.").

The same is true regarding the cause of action against institutions in section 1004.097(4)(a), Florida Statutes, which Plaintiffs and their experts are certain to invoke at trial. But Plaintiffs' reliance on this cause of action is a red herring, as the cause of action is not the product of HB233 and thus cannot be stricken in this lawsuit. HB233 reorganized section 1004.097(4), added a damages provision, and added a cause of action for unlawful publication of recordings, *see id.* § 1004.097(4)(b), Fla. Stat. But the cause of action for violating an individual's expressive rights existed only against institutions before HB233, and would exist only against institutions in HB233's absence. *Compare* § 1004.097(4), Fla. Stat. (2020) *with* § 1004.097(4)(a), Fla. Stat. (2021).

Third, Plaintiffs and their experts are also certain to invoke other laws enacted after HB233—like HB7, HB1557, and SB7044, as examples—when testifying about their purported injuries. Indeed, Plaintiffs' claims and their experts' opinions appear wholly dependent on borrowing from criticisms of those laws. This dependence destroys redressability, however, and thus destroys Plaintiffs' standing, as striking down HB233 will not assuage Plaintiffs' concerns about or reactions to other laws.

III. PLAINTIFFS' EXPERTS WILL NOT OFFER RELEVANT OR RELIABLE OPINIONS, AND THIS COURT SHOULD AFFORD THOSE OPINIONS NO WEIGHT.

On December 7, 2022, this Court denied Defendants' Motions In Limine to Exclude Five Of Plaintiffs' Expert Witnesses. ECF No. 202 (denying ECF Nos. 188–192). In so doing, the Court noted that Defendants' objections to the testimony of these experts "go toward challenging the weight this Court should assign to Plaintiffs' experts' testimony, rather than its admissibility." *Id.* at 4. Defendants need not regurgitate those arguments in full here, but they offer the following synopsis as to why each of these five witnesses' testimony should be given no weight, and should be excluded at trial upon objection by Defendants to the extent their testimony encroaches on the province of this Court or exceeds the bounds of the expert's purported expertise.[3]

Dr. Matthew Woessner will offer irrelevant testimony regarding the ultimate legal issue before the court. Dr. Woessner's opinions about the text of HB233 are unhelpful to the trier of fact (which, in this case, is the Court), and constitute ultimate legal conclusions. His opinions regarding HB233's impacts are not based on any facts or data, are not the product of a reliable methodology, and represent pure policy argument and lay speculation. And finally, his opinions about survey quality are

[3] Defendants reserve the right to object to these witnesses testimony at trial, as explicitly permitted in the Court's Order Denying Defendants' Motions In Limine to Exclude Five Of Plaintiffs' Expert Witnesses. ECF No. 202

irrelevant and unhelpful because Plaintiffs' have not challenged the quality of the survey. Dr. Woessner will testify that he did nothing more than simply read the text of HB233 and then envision how it might hypothetically be applied. Dr. Woessner's ability to read and interpret HB233 is far outweighed by this Court's and his imagination is devoid of any reasoning or reliable method for reaching his conclusions. Any hypothetical applications of HB233 that Dr. Woessner conjured up are irrelevant to both Plaintiffs' facial and as-applied challenges to HB233.

Dr. Michael Berube will attempt to tell the Court how it should interpret HB233, what the legislature intended when it passed HB233, and how faculty, students, and staff will interpret and be impacted by HB233—despite having never spoken to any faculty member or student about HB233 (in Florida or elsewhere), having conducted no analysis to determine whether or how HB233 has actually impacted Florida's college and university campuses, and having no knowledge of whether any of the outcomes he opines about with claimed certainty have occurred, or when they might occur in the future. He will also offer his opinion on the quality of the survey administered in 2022, but has never developed a survey and does not conduct surveys. Like Dr. Woessner, Dr. Berube's interpretation of HB233 represents pure policy argument and lay speculation and his opinion on how HB233 will be interpreted on campuses and his opinion on the quality of the 2022 Survey amount to nothing more than a wild hunch.

Plaintiffs will offer Dr. Sylvia Hurtado, an expert in survey design in the higher-education context, to opine on issues that either do not matter (like the quality of survey questions that no Plaintiff answered), or are outside of her area of expertise (like data security and legislative intent). But her legal opinions are not relevant to this Court's legal conclusions. Likewise, her opinion as to the quality of the 2022 survey is irrelevant because Plaintiffs' make no allegations regarding the survey's quality.

Dr. Allan Lichtman will also offer legal conclusions masked as an academic, historical analysis of legislative intent. Dr. Lichtman applied the "enhanced" *Arlington Heights* factors to conclude that HB233 was passed with the intent to discriminate against Plaintiffs' viewpoints. To reach these legal conclusions, Dr. Lichtman will launder mountains of hearsay through his testimony without applying any actual expertise or methodology in the process. He will testify that he believes that the liberal/conservative distinction is a false dichotomy, while simultaneously testifying that a conservative legislature acted with the intent to discriminate against liberal viewpoints. Even if *Arlington Heights* is used by historians to discern legislative intent, Dr. Lichtman's ability to apply the *Arlington Heights* factors is no greater than this Court's. But Dr. Lichtman only purports to apply the "enhanced" *Arlington Heights* factors, a test that adds a factor no court of law has recognized as valid—the legislatures' past patterns of discrimination. How he analyzed prior

legislatures' patterns of intentional discrimination is unknown. What *is* known is that his legal conclusions should be given zero weight and any opinions as to fact are unreliable and would usurp the role of this Court. And moreover, Dr. Lichtman also applies the *Arlington Heights* analysis to determine the *effects* of HB233, even though *Arlington Heights* is designed only as a legal standard for determining legislative *intent*. Attempting to apply the *Arlington Heights* factors to determine HB233's effects is as useful as trying to use a watch to tell the temperature or reading a car's fuel gage to determine how fast it is traveling.

Dr. Isaac Kamola will testify about what they believe to be a "Koch Donor Network" conspiracy and the quality of the software used to administer the online survey. Dr. Kamola and Dr. Ralph Wilson authored one joint expert report and Plaintiffs' have informally indicated that only Dr. Kamola is expected to testify. Dr. Wilson has specialized knowledge of computer code, but Dr. Kamola does not. But Dr. Kamola cannot testify about Dr. Wilson's expert conclusions in his absence, and cannot testify himself about the computer code because he has essentially no knowledge, specialized or otherwise, about computer code. If both these experts testify, Dr. Kamola's testimony will serve no purpose other than to improperly bolster Dr. Wilson's testimony.

Moreover, any testimony regarding computer code would be irrelevant and should be given no weight at all. Again, Plaintiffs do not challenge Defendants'

compliance with the Survey Provisions, or any other provision of HB233, in this suit. Likewise, any testimony regarding the Koch Brothers or their Foundation—or the campus organizations they allegedly support, or alleged harassment of faculty—are nothing more than laundered hearsay and speculation without a modicum of expertise.

In sum, Plaintiffs' experts, though permitted to testify given this Court's ruling on Defendants' motions in limine, will offer legal opinions that cannot be considered as a matter of law, opinions on fields in which they are not experts, opinions based on an inadequate (or non-existant) methodologies and insufficient factual foundations, or opinions that are plainly irrelevant to any issue before the Court.

IV. HB 233 IS A CONTENT-NEUTRAL STATUTE THAT DOES NOT REGULATE OR RESTRICT SPEECH, AND THE EVIDENCE WILL SHOW THAT THE LEGISLATURE ENACTED HB233 FOR A SUBSTANTIAL, NON-DISCRIMINATORY PURPOSE.

HB233's text does not regulate or deregulate speech at all, let alone "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). At most, 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). The fact that the regulated conduct—for example, unlawful censorship—may be evidenced by words does not bring HB233 within the First Amendment's

ambit. *Id.* at 62 (citing *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949) ("[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language . . . ."")); *see also 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.").

Moreover, *O'Brien*, *NetChoice*, and *Hubbard* hold when a law does not regulate speech, First Amendment concerns are not implicated. *U.S. v. O'Brien*, 391 U.S. 367, 383 (1968) ("[T]he purpose of Congress . . . is not a basis for declaring this legislation unconstitutional. It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit motive."); *NetChoice, LLC v. Att'y Gen., Fla.*, 34 F.4th 1196, 1224 (11th Cir. 2022) ("We have held—'many times'—that 'when 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.' . . . [C]ourts shouldn't look to a law's legislative history to find an illegitimate motivation for an otherwise constitutional statute." (citation omitted); *In re Hubbard*, 803 F.3d 1298, 13113 (11th Cir. 2015) (challenged law "d[id] not, on its

face, impinge on any constitutional rights" when it "only decline[d] to promote speech, rather than abridge[e] it" and thus "d[id] not implicate any constitutionally protected conduct"); *cf. Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 165–66 (2015) (only content-based statutes are subject to heightened scrutiny); *Hill v. Colorado*, 530 U.S. 703, 724–25 (2000) ("[T]he contention that a statute is 'viewpoint based' simply because its enactment was motivated by the conduct of the partisans on one side of a debate is without support.").

HB233 is facially constitutional, and this Court should not reach the question of legislative motivation, which is not a standalone basis to invalidate HB233 on free-speech grounds. *NetChoice*, 34 F.4th at 1224; *see also* ECF No. 193 (Defendants' Motion in Limine to Exclude Improper Evidence of Intent). Should this Court permit Plaintiffs to offer at trial evidence of legislative intent, such evidence should be appropriately limited to HB233's legislative history and contemporaneous statements made during legislative proceedings.

While *Reed* might allow this Court to consider the Legislature's expressed intent confirm content-neutrality, 576 U.S. at 165–66, *Reed* does not look to miscellaneous individual statements to invalidate otherwise-neutral laws on free-speech grounds. This misuse of *Reed* would conflict with *O'Brien* and *NetChoice*. "[T]he First Amendment does not support" a "challenge to an otherwise constitutional statute based on the subjective motivations of the lawmakers who

passed it." *Hubbard*, 803 F.3d at 1312–13 (explaining that courts may not "void a statute that is . . . constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it"); *accord O'Brien*, 391 U.S. at 384 ("What motivates one legislator to make a speech about a statute is not necessarily what motives scores of others to enact it. . . . We decline to void . . . legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it."); *see also Hill v. Colorado*, 530 U.S. 703, 724–25 (2000) ("Similarly, the contention that a statute is 'viewpoint based' simply because its enactment was motivated by the conduct of the partisans on one side of a debate is without support."); *Sons of Confederate Veterans, Virginia Div. v. City of Lexington, Va.*, 722 F.3d 224, 231 (4th Cir. 2013) ("The Free Speech Clause only forbids Congress and the States from making laws abridging the freedom of speech—a far different proposition than prohibiting the intent to abridge such freedom." (marks and citation omitted)).

Even if this Court considers evidence at trial related to the Legislature's motivation in enacting HB233, Plaintiffs' proffered evidence will reveal little more than an inadmissible patchwork of conspiracies and assumptions, none of which are attributable to Defendants or the entire Florida Legislature. Plaintiffs will be unable to support with admissible evidence their repeated insistence that HB233 was motivated by a desire to suppress and punish certain speech, or that HB233 cannot

be justified without reference to the content of speech. This theory is simply not borne out by the facts, and is thus impossible for Plaintiffs to prove at trial. For the reasons articulated in Defendants' summary-judgment papers and in their Motions in Limine, the lion's share of Plaintiffs' proffered evidence is inadmissible and not probative of legislative intent as a matter of law. Plaintiffs' nearly wholesale reliance on this improper and inadmissible evidence will be clear to this Court upon review of Plaintiffs' exhibit list included in the Joint Pretrial Stipulation.

By contrast, HB233's text and its legislative history articulate the substantial state interest in promoting free expression and viewpoint diversity on public college and university campuses, and reveal this interest as the Legislature's overarching motivation in enacting HB233. Plaintiffs' own expert, Dr. Matthew Woessner, will likewise testify to the value in pursuing intellectual diversity and free expression on campuses, and acknowledges present threats to that freedom, like speaker disinvitations and shout-downs. *See Speech First*, 32 F.4th at 1125 (denouncing speech restrictions enacted at Florida university); *Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, 210 L. Ed. 2d 403 (2021) ("[S]chools have a strong interest in ensuring that future generations understand the workings in practice of the well-known aphorism, 'I disapprove of what you say, but I will defend to the death your right to say it.'"). Plaintiffs' own testimony will also show that they would prefer

that disfavored speech be restricted on campus, further demonstrating the legitimacy of the state interest Defendants and the Legislature have consistently asserted.

All roads at trial will lead to one inevitable conclusion: HB233 does not restrict any speech, is not content-based on its face, and the state's asserted interest, backed by the legislative record, is similarly content-neutral, unrelated to the suppression of speech.

This Court advised that in evaluating legislative motive, it would consider the factors enumerated in *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265 (1977). Even under this framework, Plaintiffs' evidence at trial will fail to establish that the Legislature harbored a discriminatory motive in enacting HB233. For example, remarks by single legislators or executive-branch officials outside the legislative process, often related to different legislation, should never make their way into the record at trial. Nor does inadmissible, stray hearsay plucked from news articles evince legislative intent under *Arlington Heights* or any other standard—regardless of whether it is laundered through an expert witness. *See id.*, 429 U.S. at 268; *GBM*, 992 F.3d at 1323–27.

Plaintiffs likewise will offer no evidence at trial that HB233 has had a foreseeable disparate impact (or *any* cognizable impact on Plaintiffs or anyone else), nor will they offer statements from "key" legislators during legislative proceedings supporting their theory. *Arlington Heights*, 429 U.S. at 265–66. By trial's end, it will

be plain to this Court that 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 Plaintiffs' proffered evidence—which should never be admitted in the first place—and unreliable expert speculation. *See Blanchette*, 419 U.S. at 132; *GBM*, 992 F.3d at 1322-27; *Tinsley Media*, 206 F. App'x at 273. The evidence at trial will confirm what the text of HB233 makes clear: HB233 is not a content-based restriction on speech—or a restriction on speech at all.

V. THE EVIDENCE AT TRIAL WILL ALSO SHOW THAT EACH OF PLAINTIFFS' CLAIMS FAILS ON THE MERITS.

A. Plaintiffs cannot show that HB 233 discriminates based on viewpoint.

Count I of Plaintiffs' Second Amended Complaint alleges that the Survey, Anti-Shielding, and Recording Provisions unlawfully discriminate against certain viewpoints. The text of these provisions does not come close to establishing a viewpoint-discrimination claim, and the evidence at trial will fare no better.

Critically, by its terms, HB233 does not subject certain viewpoints to differential treatment (as multiple Plaintiffs will have no choice but to acknowledge at trial in light of their deposition testimony). Therefore no viewpoint discrimination claim can lie. *Digital Props., Inc.*, 121 F.3d at 590-91 ("[N]o explicit delineation between book and video stores and adult book and video stores 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. Accordingly, this action only constitutes a potential dispute, and this court has neither the power nor the inclination to resolve it.").

The plaint text of the Anti-Shielding Provisions provides no special treatment to "uncomfortable, unwelcome, disagreeable, or offensive" speech, and does not prevent anyone from expressing their own offense. The Anti-Shielding Provisions simply provide that constitutionally-protected expressions be treated equally, even if someone subjectively finds the expression offensive. The evidence at trial will confirm this plain-language reading. While Defendants maintain that this alone should end the Court's inquiry, the evidence at trial, if permitted, will similarly fail to establish that the "manifest purpose" of HB 233 was to discriminate on the basis of viewpoint, or that Plaintiffs have been harmed as a result. *NetChoice*, 34 F.4th at 1124–25; *Hill*, 530 U.S. at 724–25 ("Similarly, the contention that a statute is 'viewpoint based' simply because its enactment was motivated by the conduct of the partisans on one side of a debate is without support.").

B. HB233 Does Not Implicate Plaintiffs' Associational Rights, Nor Will the Evidence at Trial Establish Any Injury to Those Rights.

Count II alleges the Survey Provisions violate Plaintiffs' freedom of association. No coherent reading of the Survey Provisions "interferes 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); *see also O'Laughlin v. Palm Beach Cnty.*, 30 F.4th 1045, 1053–54 (11th Cir. 2022) (plaintiffs "failed to allege any association conduct upon which the [defendant county] infringed," and thus plaintiffs were not "denied [the] right" to "choose [their] associates"). Absolutely nothing in HB233 constrains Plaintiffs' associational freedoms.

Again, the evidence at trial will fare no better: the 2022 survey was voluntary and anonymous, no Plaintiff completed the survey, no Plaintiff has been forced to disclose their beliefs or associations, and no Plaintiff can identify anyone who declined to join or resigned from an association as a result of HB233.

Plaintiffs "simply weren't denied [the] right" to associate, and have yet to articulate any imminent threat that their right to associate will be denied. *O'Laughlin*, 30 F.4th at 1053–54 ("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 cannot prevail on Count II.

C. Plaintiffs Will Present No Evidence of Compelled Speech

Plaintiffs' compelled speech claim lacks any evidence of compelled speech, which is unsurprisingly fatal to the claim. Count III of Plaintiffs' Second Amended Complaint alleges the Anti-Shielding Provisions unconstitutionally compel Plaintiffs' speech, but on their face, these provisions do not compel Plaintiffs or anyone else to speak or publish a word. Rather, the Anti-Shielding Provisions quite clearly 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." This requirement is wholly consistent with the First Amendment, which contrary to Plaintiffs' apparent preferences, prevents the "stifl[ing]" of "unpopular point[s] of view." *Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293, 1327 (11th Cir. 2017).

There will be no evidence presented at trial showing that the Anti-Shielding Provisions have or will imminently be used to force Plaintiffs' speech, to dictate curricula, or to compel equal discussion time for every conceivable idea—none of which could result from a plain-language reading of the text.[4] Barring an

[4] Moreover, Plaintiffs could never establish a compelled-speech claim based on their course content: public institutions determine the content of the education they provide, and the government is entitled to regulate its own message and its messengers. *See* ECF No. 40 at 12 n.10; *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (public-employee speech made pursuant to official duties is not "insulate[d]" from "employer discipline" under the First Amendment); *Hubbard v. Clayton Cnty. Sch. Dist.*, 756 F.3d 1264, 1268 (11th Cir. 2014) (confirming the government can

inexplicable recantation of their sworn deposition testimony, several of the Plaintiffs will concede at trial that their speech has never been compelled under HB233.

At bottom, the Anti-Shielding Provisions are not enforceable against Plaintiffs, and do not compel speech—they prevent its suppression. *Equality Fla.*, Case No. 4:22-cv-00134, ECF No. 120 at 6–7 ("The law is enforced against school districts—not individual teachers. . . . With or without the law, school districts direct teachers as to what they may and may not teach."). Plaintiffs' evidence at trial will cast no doubt on this unavoidable legal reality, and their compelled speech claim is bound to fail.

D. HB233's Anti-Shielding Provisions are Not Unconstitutionally Vague.

Count IV alleges that the Anti-Shielding Provisions are unconstitutionally vague. ECF No. 101 ¶¶ 179–84. Plaintiffs cannot prove this claim at trial. The Anti-Shielding Provisions are clear on their face, and Plaintiffs will not present any evidence suggesting that these provisions have harmed or could ever injure them.

The Anti-Shielding Provisions are plainly understandable for the reasons discussed above and in Defendants' summary-judgment papers. But regardless, it is immaterial whether Plaintiffs find the Anti-Shielding Provisions vague because the Anti-Shielding Provisions are not enforceable against Plaintiffs. With no "actual and

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"control official communications" because "[o]fficial communications have official consequences").

well-founded fear that [the Anti-Shielding Provisions] will be enforced against them" *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*, 944 F.3d at 1299 ("[T]he Act itself . . . doesn't require (or even contemplate) 'enforcement' by anyone, let alone [the defendant]."). Plaintiffs' evidence at trial will fail to establish Plaintiffs' void-for-vagueness claim, which they lack standing to pursue in the first place.

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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