UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

UNITED FACULTY OF FLORIDA, et al.

Plaintiffs,

v.

RICHARD CORCORAN, in his official capacity as the Florida Commissioner of Education, et al.

Defendants.

Case No. 4:21-cv-00271-MW-MAF

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT

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INTRODUCTION

What is perhaps most remarkable about Defendants' motion to dismiss, ECF No. 40 ("Mot."), is the raft of highly relevant, binding U.S. Supreme Court and Eleventh Circuit precedent that the motion simply ignores. Those cases establish, first, that Plaintiffs have adequately alleged standing; second, that this matter is ripe for review; and third, that Plaintiffs allege viable claims for relief sufficient to survive a motion to dismiss. The motion should be denied.

BACKGROUND

Plaintiffs are a statewide faculty union representing more than 25,000 faculty and academic professionals at twelve state universities and fifteen state and community colleges across Florida (United Faculty of Florida or "UFF"), a youth-focused gun violence prevention advocacy organization (March for Our Lives Action Fund or "MFOL"), and nine individuals who are current faculty or students at six of Florida's public colleges or universities. They challenge three provisions in the newly-enacted HB 233 (the "challenged provisions," described below), on the grounds that they violate Plaintiffs' First and Fourteenth Amendment rights.

A. The Survey Provisions

The Survey Provisions mandate that the Florida Board of Governors and Board of Education (the "Boards") "*require* each [public] Florida [college or

university] to conduct an annual assessment of the intellectual freedom and viewpoint diversity at that institution." Fla. Stat. §§ 1001.03(19)(b), 1001.706(13)(b) (emphasis added); *see also* ECF No. 35 ("Am. Compl.") ¶¶ 63-67. The law defines "intellectual freedom" as "the exposure of students, faculty, and staff to, and the encouragement of their exploration of, a variety of *ideological and political* perspectives." *Id*. ¶ 64 (emphasis added). The Boards must "compile and publish the assessments by September 1 of each year," beginning in 2022. *Id*. ¶ 67.

On their face, these Provisions require the Boards to mandate a survey that will somehow provide "an objective, nonpartisan, and statistically valid" report on the extent to which ideological and political perspectives are represented in post-secondary educational institutions and members of those communities "feel free to express their beliefs and viewpoints on campus and in the classroom." *Id*. ¶ 66. The Boards must do so, moreover, in time for the survey to be drafted, implemented, completed by its recipients, and returned within the next year, to meet their mandate to "compile and publish [those] assessments" annually, with the first reporting date less than a year from today, on September 1, 2022. *Id*. ¶ 67. The Legislature was inspired by surveys that include invasive questions about respondents' political views and leanings, as well as partisan affiliations, religious affiliations, and sexual orientations. *Id*. ¶¶ 73, 75-76.

No provision of HB 233 prevents the survey from being required of faculty, students, staff members, or anyone else at the institutions where it is now mandated by state law. Nor does any provision ensure protection of the information gathered from public disclosure.[1] In fact, the Legislature *rejected* amendments that would have imposed such limitations, and the law requires that the survey reports be published every September. *Id*. ¶¶ 6, 68-70. It also includes no limitation on how the information may be used, leaving the door open for schools, faculty, and staff to be punished or subject to retributory action as a result of their responses. *Id*. ¶ 78.

The law's proponents made no secret of its purpose. They repeatedly made clear that HB 233 is part of an ongoing "war" against the "radical left," in which the government is set on punishing schools and faculty perceived as promoting liberal viewpoints. *See, e.g.*, *id*. ¶ 45 (Gov. DeSantis declaring Florida's tax dollars will not be used "moving forward" to support the "indoctrinat[ion]" of students at universities that have become "hotbeds for stale ideology"); *id*. ¶ 80 (Rep. Sabatini, who co-sponsored the bill, describing survey as a tool for "defunding the radical institutions" on campuses that "we've lost . . . to the radical left" and "defunding

[1] Indeed, survey responses will likely be accessible through Florida's public records laws, which do not clearly prohibit the disclosure of such documents. Fla. Stat. § 119.01.

these insane professors that hate conservatives and hate this country"); *see also id*. ¶¶ 6, 50-52.

Defendants, charged with enforcing the law, have indicated not just a willingness, but a dedicated commitment to punishing educators and schools that they identify as members of, or sympathetic to, the "radical left." *Id*. ¶ 61 (Commissioner Corcoran bragging he has "censored or fired or terminated numerous teachers" for "indoctrinat[ing] students" with leftist viewpoints); *see also id*. ¶ 77 (trustee implying she was appointed by Governor to serve as a check on faculty ideology in granting tenure and other promotions).

B. The Anti-Shielding Provisions

The Anti-Shielding Provisions further evidence that HB 233 was intended as a weapon to be wielded against schools who express views with which Defendants, the Governor, and the Legislature disagree. Their text prohibits the Boards, as well as public colleges and universities, from "shield[ing] students, faculty, or staff at state universities from free speech protected under the First Amendment." *Id*. ¶ 82. The law broadly defines "shielding" as "limit[ing] students', faculty members', or staff members' access to, or observation of, ideas and opinions that they may find uncomfortable, unwelcome, disagreeable, or offensive." *Id*. ¶ 84. It creates a brand-new private right of action for any person injured under these provisions who

believes that their "expressive rights" were violated. *Id*. ¶ 86. If successful, such litigants are entitled to declaratory and injunctive relief, court costs, and even attorneys' fees. *Id*. There is no similar fee-shifting provision for those forced to defend against such lawsuits.

C. The Recording Provisions

HB 233's Recording Provisions further encourage—and appear designed to ensure that faculty members will be subject to—disruptive and retaliatory harassment for the exercise of free speech. They dramatically pit students against faculty, explicitly permitting students to record lectures to obtain "evidence" in support of any legal proceedings or institution-level complaints, including complaints and lawsuits to enforce the new Anti-Shielding Provisions. *Id*. ¶ 87.

LEGAL STANDARD

Where a motion under Rule 12(b)(1) facially attacks the legal sufficiency of a complaint's allegations in support of subject matter jurisdiction, the complaint's allegations are "taken as true." *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990). Likewise, to survive a motion to dismiss under Rule 12(b)(6), a complaint need only include enough factual allegations, accepted as true and construed in the light most favorable to the plaintiffs, to "raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

ARGUMENT

I. Plaintiffs have standing.

Defendants contend Plaintiffs fail to satisfy Article III's injury-in-fact requirement, but their argument ignores both the allegations in the Amended Complaint and binding Supreme Court and Eleventh Circuit precedent. Defendants' 12(b)(1) motion to dismiss on these grounds should be rejected.

A. Defendants' arguments are contrary to relevant precedent.

The most obvious problem with Defendants' standing arguments is that they run contrary to the clear dictates of binding First Amendment precedent. Defendants attempt to manage this inconvenient truth by avoiding virtually any discussion of the relevant case law, including *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021), decided by the Supreme Court just two months ago. But that precedent cannot be reconciled with Defendants' contention that Plaintiffs fail to allege a cognizable injury-in-fact.

In *Bonta*, the Supreme Court found that when a disclosure requirement "creates an unnecessary risk of chilling" speech or association, it violates the First Amendment. *Id*. at 2388 (quotation marks and citation omitted). This is no throw-away line. It repeats throughout the opinion, with the Court inserting its own emphases to underscore that a First Amendment injury is triggered by "state action

which *may* have the effect of curtailing the freedom to associate," or which acts as a "*possible* deterrent" to the exercise of protected rights of speech or association, or where "fear of reprisal *might* deter" permissible First Amendment activities. *Id*. (emphases in *Bonta*) (citations omitted); *see also id*. at 1389 ("[T]he protections of the First Amendment are triggered not only by actual restrictions" on an individual's rights—"[t]he risk of a chilling effect on association is enough, '[b]ecause First Amendment freedoms need breathing space to survive'") (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). *Bonta* also rejected the argument that an intention to keep the disclosed information private eliminated the risk of chill, *see id*. at 2387-88, citing its decision in *Shelton v. Tucker*, 364 U.S. 479, 486 (1960), as establishing the same.

Shelton is broadly relevant here. Yet, like *Bonta*, Defendants do not address it in their motion. *Shelton* considered the constitutionality of a state statute that compelled teachers to annually report every organization to which they belonged or had regularly contributed within the past five years. *Shelton*, 364 U.S. at 480. The statutory text did not guarantee the information would be kept confidential; "[e]ach school board [was] left free to deal with the information as it wishe[d]." *Id*. at 486. Yet, the Court concluded that the teachers' "fear of public disclosure is neither theoretical nor groundless," recognizing that, "[e]ven if there were no disclosure to

the general public, the pressure upon a teacher to avoid any ties which might displease those who control his professional destiny would be constant and heavy." *Id*.; *see also Bonta*, 141 S. Ct. at 2388. The Court was particularly concerned about the chilling effect in the educational setting. It emphasized: "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton*, 364 U.S. at 487; *see also Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 835 (1995).

That significant First Amendment concerns are triggered when a state seeks to broadly inquire into its citizenry's beliefs and associations is also evident in *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971), another case that Defendants do not mention. There, too, the Court was clear: "[W]hen a State attempts to make inquiries about a person's beliefs or associations, its power is limited by the First Amendment." *Id*. at 6. Precisely because of the risk that "[b]road and sweeping state inquiries into these protected areas . . . [may] discourage citizens from exercising rights protected by the Constitution," there is "a heavy burden" on the state to demonstrate that the law is "necessary" to serve the state's interests. *Id*. at 6-7.

Against this backdrop, the Eleventh Circuit has properly recognized that a court must "apply the injury-in-fact requirement most loosely where First Amendment rights are involved, lest free speech be chilled even before the law or

regulation is enforced." *Harrell v. The Fla. Bar*, 608 F.3d 1241, 1254 (11th Cir. 2010) (citing *Hallandale Prof'l Fire Fighters Local 2238 v. City of Hallandale*, 922 F.2d 756, 760 (11th Cir. 1991)). "[T]o establish an injury in fact . . . based upon chilled expression," the plaintiff need only show a "credible threat of enforcement" of the challenged provision. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 165 (2014).[2] Injury based on chilled association is similarly established by a reasonable "fear of community hostility and economic reprisals that would follow public disclosure" that might cause new members not to join or members to withdraw. *Bonta*, 141 S. Ct. at 2393 (quoting *Bates v. Little Rock*, 361 U.S. 516, 524 (1960)).

B. Plaintiffs adequately allege an injury-in-fact.

Instead of addressing any of the seminal decisions discussed above, Defendants rely on language in *Laird v. Tatum*, 408 U.S. 1, 13 (1972), providing that "[a]llegations of a 'subjective chill'" are not sufficient to satisfy Article III, to argue Plaintiffs lack standing. Mot. at 15. Defendants' reliance is misplaced. The risk of chill by the challenged provisions is not "subjective."

The Supreme Court recognized as much in *Shelton*, where it found that forcing teachers to disclose their associational activity had "an unmistakable tendency to

[2] Establishing injury-in-fact as to a claim of compelled speech is the same. *See Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 796-97 (1988).

chill that free play of the spirit which all teachers ought especially to cultivate and practice," and raised the dangerous "possibility of public pressures . . . to discharge teachers who belong to unpopular or minority organizations." 364 U.S. at 486-87. The Court rejected the State's arguments that these amounted to "theoretical [or] groundless" injuries. *Id.* at 486; *see also Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 604 (1967) ("[W]hen one must guess what conduct or utterance may lose him his position, one necessarily will steer far wider of the [impermissible] zone.") (quotation marks omitted).

These same dangers are present here, even before the survey is actually implemented. Like the law in *Shelton*, HB 233 includes no limitations on how the survey might be used, allowing the Boards (and anyone else who has or gains access to the information gathered) to use it however they choose. *See* Am. Compl. ¶¶ 68-80. The freedom that it gives to the State to inquire into political and ideological perspectives is similarly broad, giving the Boards free range to impose virtually any inquiry that they desire. *Cf. Shelton*, 364 U.S. at 487-88 (emphasizing the breadth of the statute, which reached into relationships that could have no possible bearing on occupational competence or fitness). And, here, too, "[t]he . . . Legislature ha[s] made no secret of its desire for teachers' disclosures to be used for hiring and firing decisions." *Bonta*, 141 S. Ct. at 2397 (Sotomayor, J., dissenting). As for the Anti-

Shielding and Recording Provisions, they are already in effect and could operate to chill protected speech and activity immediately. *See* Am. Compl. ¶¶ 54, 81-86, 87-94. The fact that they put enforcement in the hands of the public, by creating a private right of action to sue for perceived violations, only "bolster[s]" the credibility of the threat that they pose to speech. *Driehaus*, 573 U.S. at 164.

The chilling effects of the challenged provisions of HB 233, including Plaintiffs' fears of reprisal, are supported by substantial factual allegations throughout the Amended Complaint. They are concrete, far from "hypothetical," and imminent. Indeed, among some Plaintiffs the effects are already being felt.[3] For example, Plaintiff Professor Robin Goodman is now hesitant to offer "Third World Cinema," a class that examines difficult issues like terrorism from different perspectives, because of complaints of political bias by students unhappy with how she has taught the course previously. Am. Compl. ¶¶ 31-33. Many of the other Faculty Plaintiffs who teach controversial courses fear that the new law will impede their freedom in shaping their syllabi and lectures, as well as irreparably chill participation and injure the learning experience, which depends, as the Supreme

[3] If one plaintiff has standing for each claim, the court "need not address whether the remaining plaintiffs have standing." *Fla. ex rel. Att'y Gen. v. U.S. Dep't of Health & Human Servs*., 648 F.3d 1235, 1243 (11th Cir. 2011), *aff'd in part, rev'd in part sub nom. Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

Court has recognized, on "that free play of the spirit." *Shelton*, 364 U.S. at 487; *see also* Am. Compl. ¶¶ 23-34. This is particularly true for faculty like Dr. Price, who has taught ideas based in critical race theory, a subject that Members of the Board of Education recently unanimously voted to prohibit in the K-12 context, and which Commissioner Corcoran has specifically identified as the type of "crazy liberal stuff" that he is committed to censoring in his "war" against the "radical left," with his assurances that he has and will "censor[] or fire[] or terminate[]" teachers for this type of teaching, which he views as "indoctrination." Am. Compl. ¶¶ 34, 61.

MFOL and the Student Plaintiffs, too, are threatened with concrete and imminent risks of injury to their rights of association, as the mere threat of enforcement of HB 233's challenged provisions makes it harder for them to recruit and associate with likeminded students about issues they care about, including gun violence, *id*. ¶¶ 21-22, 35, climate change, *id*. ¶ 35, reproductive healthcare rights, *id*. ¶ 35, police brutality, *id*. ¶ 36, LGBTQ+ rights, *id*. ¶ 38, and housing insecurity, *id.* All of these issues fall squarely within the crosshairs of the ideologies and viewpoints that HB 233's proponents have publicly stated they intend to target. *See, e.g.*, *id.* ¶¶ 6, 45, 56-62, 113, 134, 139. And MFOL independently has standing because the law will force it to divert resources, including by spending more money

on off-campus recruitment and protecting its own impacted members.[4] *See Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1341 (11th Cir. 2014) (explaining an organization "has standing to sue [under a diversion of resources theory] when a defendant's illegal acts impair" its "ability to engage in its own projects by forcing the organization to divert resources in response").

In addition to the injuries threatened against UFF's approximately 25,000 members, any number of whom may self-censor to avoid the threatened ramifications, *see American Civil Liberties Union v. The Fla. Bar*, 999 F.2d 1486, 1493 (11th Cir. 1993) (finding self-censorship in response to objective threat of enforcement is a cognizable injury-in-fact), UFF is also deeply concerned (like the petitioners in *Bonta*, 141 S. Ct. at 2380) that HB 233 will make it difficult to recruit members, both because it will discourage academics from even coming to Florida, and also because Defendants have made it clear that unions like UFF are directly in their line of fire. *See* Am. Compl. ¶¶ 18-20. In addition, UFF has standing in its own right because it has already had to divert resources to combat the effects of HB 233

[4] Defendants' assertion that MFOL does not allege that any one or more of its members is injured is false. Am. Compl. ¶ 22 ("HB 233 harms MFOL by chilling Florida's public university and college students who have joined the MFOL movement from freely speaking and associating on campus" and "threatens students associated with MFOL's movement with budget cuts to their institutions").

and will continue to do so. *Id*. ¶ 20. This includes preparing and advocating for collective action as well as providing guidance to its members on navigating the new law. *Id.*[5]

Defendants' argument that "since the survey has not yet been developed," Plaintiffs have no injury, Mot. at 10, ignores the factual allegations in the Amended Complaint, as well as the case law discussed above establishing that (1) the state may not mandate broad inquiries into its citizens' ideological and political views unless it can meet exacting scrutiny, and (2) a First Amendment injury arises when state laws trigger a concrete and objective risk of enforcement that chills protected activity. Defendants also ignore the plain text of the Survey Provisions themselves. The law leaves no question that the Survey must be imposed in time to report its results by September 1, 2022. Thus, the question as to whether any number of the Plaintiffs might find themselves subject to a survey concerning the extent to which ideological and political perspectives are represented on their campuses has already been answered: under the terms of the law, it is not only inevitable, but imminent.

[5] All of Plaintiffs' allegations, moreover, must be read with the following in mind: "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct" suffice to establish standing, because the court "presume[s] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (quotations and citations omitted).

And Plaintiffs' factual allegations establish that the very threat of the survey—particularly against the backdrop of the clearly stated intentions of those who promoted, sponsored, signed, and planned to enforce it—is already having a chilling effect on both their speech and associational rights. *See* Am. Compl. ¶¶ 19, 22, 95, 102-103; *see also Bonta*, 141 S. Ct. at 2388.

Defendants' contention that the Court may not consider anything beyond the plain language of the statute in assessing standing is unfounded. Both explicit threats and practical concerns as to how the information may be used are absolutely relevant to the question of whether there is a legitimate and objective threat of chill. *See Shelton*, 364 U.S. at 486 n.7; *see also Bonta*, 141 S. Ct. at 2373 ("Exacting scrutiny is triggered by state action which *may* have the effect of curtailing the freedom to associate, and by the *possible* deterrent effect of disclosure." (quotation marks omitted) (emphasis in original)); *id.* at 2398 (noting that, in *Shelton*, the "Legislature had made no secret of its desire for teachers' disclosures to be used for hiring and firing decisions" as relevant to question of whether plaintiffs established concrete threat of chill) (Sotomayor, J., dissenting).

Defendants cite nothing that requires (or allows) the Court to turn a blind eye to clear statements of intent that would reasonably influence Plaintiffs' concerns about the risks of engaging in protected activity. In fact, the case law clearly

establishes the opposite. In addition to the cases discussed above, the Supreme Court has repeatedly emphasized that when determining whether a particular provision challenged under the First Amendment is content neutral, courts must consider "whether the government has adopted a regulation of speech *because of disagreement* with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (emphasis added). Defendants' motion ignores this precedent, as well.

The cases on which Defendants rely do not refute Plaintiffs' standing. In *Clapper v. Amnesty International USA*, 568 U.S. 398, 411-412 (2013), there was no explicit threat of how the new surveillance would be used nor any statements by proponents of the law indicating it was motivated by animus towards certain viewpoints or ideas. As for *Virginia v. American Booksellers Association, Inc.*, it undermines Defendants' argument. 484 U.S. 383, *certified question answered sub nom. Commonwealth v. Am. Booksellers Ass'n, Inc.*, 236 Va. 168 (1988). There, the Supreme Court found that the plaintiffs plainly established a pre-enforcement injury-in-fact, because they met their minimal burden in establishing a "threatened or actual injury resulting from the putatively illegal action." *Id.* at 392 (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). So too here.

Of course, none of the "pre-enforcement" arguments apply to the Anti-Shielding or Recording Provisions, both of which went into effect on July 1, 2021. Am. Compl. ¶ 54. And Defendants' contention that the Recording Provisions cannot cause an injury-in-fact because they provide a cause of action "against any person who publishes a recorded lecture without the lecturer's consent," Mot. at 13, misses the point. The Recording Provisions injure Plaintiffs not only by threatening potential *future publication*, but by expressly authorizing under state law the *recording* of lectures without consent *right now*, immediately imposing a concrete risk that protected speech will be chilled within the classroom. *See* Am. Compl. ¶¶ 87-94; *see also Shelton*, 364 U.S. at 248 ("Scholarship cannot flourish in an atmosphere of suspicion and distrust," "[t]eachers and students must always remain free to inquire, to study and to evaluate."). Thus, while Defendants point to lecturers' ability to recover damages *after* a recording has been misused, it cannot erase the clear and imminent harm posed by the challenged provisions. Indeed, in this modern world where artful editing can easily change the meaning of a recording, this provides little to any practical protection to a lecturer in the aftermath of the misuse of a recording, where their reputation may very well already be irreparably destroyed. *See, e.g.*, *Bonta*, 141 S. Ct. at 2388 (noting that certain risks to speech, including the risk of dangerous harassment, "are heightened in the 21st century and

seem to grow with each passing year"); *Driehaus*, 573 U.S. at 165-66 (finding "practical effect" of law targeting speech to include fact that "the target . . . may be forced to divert significant time and resources to hire legal counsel," and in some cases the existence of the proceeding itself can cause reputational harm).

Defendants also err in their contention that Plaintiffs fail to allege an injury-in-fact resulting from the Anti-Shielding Provisions because the Provisions "do not require Plaintiffs to espouse views at all, including views they do not hold." As discussed below at Section III.C, the Provisions, by their plain meaning, compel Faculty Plaintiffs to espouse views they do not hold.[6] In sum, Plaintiffs more than satisfy the standards for alleging a First Amendment injury-in-fact.

[6] Defendants argue in a footnote that, "[e]ven if HB 233 dictated curricula," Plaintiffs fail to state a compelled speech claim, citing cases discussing public colleges and universities' broader First-Amendment leeway when acting in furtherance of their educational mission. This argument is misplaced, not least of all because each of the cases upon which Defendants rely dealt with a *school's* power to regulate speech, not the State's. The Supreme Court's holdings on academic freedom help illuminate the importance of this distinction. In a quote cited in both circuit cases relied upon by Defendants, the Court explained "Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself." *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985). Following this principle, the cases cited by Defendants affirm the autonomy of a university to determine "what may be taught [and] how it shall be taught." *Widmar v. Vincent*, 454 U.S. 263, 278 (1981) (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)). HB 233's Anti-Shielding Provisions trench on that autonomy. Moreover, the schools' autonomous leeway is not without its limits.

II. Plaintiffs' claims are ripe.

For the same reasons that Defendants' standing arguments fail to carry the day, their argument that this action is not yet ripe must also be rejected. *See Duke Power Co. v. Carolina Envtl. Study Grp.*, 438 U.S. 59, 81-82 (1978) (concluding where plaintiffs suffer an injury-in-fact redressable by relief requested, Article III's ripeness requirement is satisfied). Nevertheless, Defendants press on, raising the theory of "prudential" ripeness. *See* Mot. at 19 (arguing the prudential factors of "hardship" and "fitness"). But even if that doctrine had continuing validity (itself a dubious proposition, *see Driehaus*, 573 U.S. at 167), it would not apply here.

First, for reasons already discussed, Plaintiffs would clearly suffer hardship if relief were delayed: HB 233 is already chilling their freedoms of speech and association. Second, Plaintiffs' claims are fit for judicial review because no further factual development is necessary for this Court to strike them down. *See id.* at 167.

The Eleventh Circuit has recognized (in one of the cases cited by Defendants) that a university's restrictions on a professor's speech during lectures "implicate first amendment freedoms." *Bishop v. Aronov*, 926 F.2d 1066, 1075 (11th Cir. 1991); *see also Meriwether v. Hartop*, 992 F.3d 492, 505 (6th Cir. 2021) ("[P]rofessors at public universities retain First Amendment protections at least when engaged in core academic functions, such as teaching and scholarship . . . in reaffirming this conclusion, we join three of our sister circuits: the Fourth, Fifth, and Ninth.") (collecting cases).

Its proponents have assured this by repeatedly saying the quiet part out loud. Thus, Defendants' "prudential" ripeness argument, even if doctrinally sustainable, fails.[7]

III. Plaintiffs state cognizable claims.

Defendants' alternative motion under Rule 12(b)(6) should also be rejected. Plaintiffs more than adequately allege that provisions of HB 233, individually and collectively, (1) discriminate on the basis of viewpoint, (2) burden Plaintiffs' freedom of association, and (3) compel speech, all in violation of the First and Fourteenth Amendments.

A. HB 233 discriminates on the basis of viewpoint.

The Constitution bars the government from regulating speech "because of agreement or disagreement with the message it conveys." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) (cleaned up). "As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed" are content-based regulations. *Id.* at 643. When a law is challenged as content based, a court first "consider[s] whether [the law] 'on its face' draws

[7] Defendants cite *Pittman* for the proposition that Plaintiffs' claims are not yet justiciable. But at issue in *Pittman* was the plaintiffs' challenge to an informal opinion from the state bar's general counsel, which was not an official policy statement and therefore lacked the weight of a formal enforcement plan. *Pittman v. Cole*, 267 F.3d 1269, 1278-80 (11th Cir. 2001). Here, by contrast, Plaintiffs face an enacted law with present and serious consequences to their rights under the First Amendment.

distinctions based on the message a speaker conveys." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). But even if a law is facially content neutral, it still will be deemed to be content based if (1) it "cannot be justified without reference to the content of the regulated speech," or (2) it was "adopted by the government because of disagreement with the message [the speech] conveys." *Id.* at 164 (quotation marks omitted). Content-based laws are subject to strict scrutiny, "which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Id.* at 164, 171.

Plaintiffs have adequately alleged that HB 233 is a content-based restriction subject to (and unable to survive) strict scrutiny. Defendants' motion to dismiss this claim should be denied.

1. HB 233 discriminates in favor of offensive speech.

As the Supreme Court has made clear, "[g]iving offense is a viewpoint," *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017), and HB 233 singles it out for express preferential treatment. As such, it is content based on its face and violates the First Amendment's mandate that the government may not "regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Id.* at 1757.

In *Matal*, the Supreme Court struck down a "disparagement clause," which allowed trademark owners to register a mark if it was laudatory about a person but

not if it was disparaging." 137 S. Ct. at 1763; *see also Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019) (discussing *Matal*). This distinction, the Court explained, was the "essence of viewpoint discrimination" because "[t]he law . . . reflect[ed] the Government's disapproval of a subset of messages it [found] offensive." *Matal*, 137 S. Ct. at 1766 (Kennedy, J., concurring); *see also Iancu*, 139 S. Ct. at 2299 (finding law that discriminated against "immoral" and "scandalous" speech "viewpoint-based").

HB 233 is the converse of *Matal*—rather than discriminate *against* offensive speech, the law expressly *favors* it. By its text, it bars schools, and by association, faculty, from shielding students from "uncomfortable, unwelcome, disagreeable, or offensive" speech. Fla. Stat. §§ 1001.03(19)(c), 1001.706(13)(c), 1004.097(3)(f). Students aggrieved by a violation of this law may bring suit to vindicate its new protections. *Id.* at § 1004.097(4). And to strengthen those challenges, the Recording Provision permits students to record lectures to obtain evidence. *id.* at § 1004.097(3)(g). "Put" these provisions "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." *Iancu*, 139 S. Ct. at 2300. HB 233 singles out offensive speech for special protections, by protecting it against

"shielding" and providing a mechanism to ensure this speech is provided the special treatment the law contemplates. The law provides no similar protections to inoffensive speech. As such, it is a viewpoint-based regulation on its face.

Where "the government targets not subject matter, but particular views taken by speakers . . . the violation of the First Amendment is all the more blatant." *Rosenberger*, 515 U.S. at 829. Thus, "[i]n the ordinary case, it is all but dispositive to conclude that a law is content based and, in practice, viewpoint discriminatory." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571 (2011); *see also Otto v. City of Boca Raton*, 981 F.3d 854, 864 (11th Cir. 2020) ("Viewpoint-based regulations . . . are an egregious form of content discrimination. Indeed, there is an argument that such regulations are unconstitutional per se.").

This is the ordinary case. Defendants cannot identify a compelling interest, narrowly tailored to its aim, to defend the law. *Reed*, 576 U.S. at 171. Defendants' stated interest in fostering intellectual diversity is belied by the statutory text which expressly favors certain viewpoints over others, as well as by the law's proponents, who have made plain it was passed with the intent of suppressing liberal and progressive viewpoints. *See, e.g.*, Am. Compl. ¶¶ 61, 62, 64, 111. Nor can there be any serious argument that it is narrowly tailored to promoting intellectual diversity.

Facing adverse precedent and unhelpful text, Defendants argue that a law is

only viewpoint based if it "limits speech that would otherwise be allowed." Mot. at 29. And they insist that HB 233 merely "codifies" the notion that "speech may not be suppressed simply because it expresses" offensive ideas. *Id.* Not so, on both accounts. A law can be viewpoint based by merely singling out a particular viewpoint for special treatment, even if it doesn't limit speech that would otherwise be allowed. The Supreme Court and the Eleventh Circuit have repeatedly affirmed this principle. *See, e.g.*, *Turner Broad.*, 512 U.S. at 643 ("[L]aws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed" are content-based regulations) (quotation marks and brackets omitted); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992) (explaining the government may not show "hostility—or favoritism—towards" expression).

In any event, HB 233 *does* suppress otherwise allowable speech. By preferring offensive viewpoints and vaguely defining "shield," HB 233 chills Plaintiffs from voicing less- or non-offensive viewpoints out of fear it will make them and their institutions vulnerable to legal or reputational reprisals. After all, HB 233 creates a cause of action to support its Anti-Shielding Provisions, and Recording Provisions supply the evidence to bolster those claims. Nor are Defendants correct that HB 233 merely codifies the notion that offensive speech is constitutionally protected. Nowhere in the Constitution does it say the Boards cannot "shield" students from

"uncomfortable, unwelcome, disagreeable, or offensive" speech. Nowhere in the Constitution does it provide a private right of action against public institutions of higher education if they fail to prevent such shielding. And nowhere in the Constitution does it provide that students have a right to record lectures against faculty's consent to gather evidence in support of those claims.

2. HB 233's purpose and justification are content based.

HB 233's text alone is sufficient to subject it to strict scrutiny. But the Supreme Court has found that even facially content-neutral laws "that cannot be justified without reference to the content of the regulated speech, or that were adopted by the government because of disagreement with the message [the speech] conveys," are content-based restrictions subject to strict scrutiny. *Reed*, 576 U.S. at 164. Thus, for example, "ideologically driven attempts to suppress a particular point of view" by cutting or withholding funding "are presumptively unconstitutional." *Rosenberger*, 515 U.S. at 830. Courts may determine a law's "content-based" aim from "the record and . . . formal legislative findings." *Sorrell*, 564 U.S. at 564.

HB 233 is content based under both the justification and purpose tests. Notably, a content-based purpose invalidates a law regardless of how or even whether the State actually uses it to suppress the speech it disfavors. As the Supreme Court emphasized in *R.A.V.*, the mere "*possibility* that the [government] is seeking

to handicap the expression of particular ideas . . . . would alone be enough to render the [law] presumptively invalid." 505 U.S. at 394 (emphasis added). But in this case, the evidence, including the "comments and concessions" made by HB 233's sponsors, proponents, and enforcers "elevate the possibility to a certainty," *id*., making it not even a close question. For example, Governor DeSantis and Commissioner Corcoran have made plain that the law is intended to be a tool in their ongoing "war" against the "radical left," helping to identify campuses that embrace progressive views for retribution, including potentially budget cuts. Am. Compl. at ¶ 111; *see also id*. at ¶¶ 60-62.

"Given the legislature's" and others' "expressed statement of purpose, it is apparent that [the challenged statute] imposes burdens that are based on the content of speech and . . . aimed at a particular viewpoint." *Sorrell*, 564 U.S. at 565. Defendants enacted HB 233 to "burden[] a form of protected expression that it found too persuasive" on its public campuses and will leave "unburdened those speakers whose messages are in accord with its own views." *Id.* at 580. Thus, the law "cannot be justified without reference to the content of the regulated speech" and was "adopted by the government because of disagreement with the message [the speech] it attempts to suppress conveys." *Reed*, 576 U.S. at 164 (citation and internal quotation marks omitted).

Defendants offer no contrary evidence or counter-explanation for the law. Instead, they attempt to sidestep the record by asserting that a legislature's motives are constitutionally irrelevant "where the statute is facially-neutral." Mot. at 30. But Plaintiffs cite evidence of HB 233's invidious intent to show that the law's "justification or purpose" is content based. And this, the Supreme Court has emphatically instructed, *is* relevant *even when* the statute is facially neutral. *See, e.g.*, *Reed*, 576 U.S. at 166 (collecting cases); *see also Harbourside Place, LLC v. Town of Jupiter*, 958 F.3d 1308, 1317 (11th Cir. 2020) ("We may also consider whether the regulation was enacted due to an impermissible motive.").[8]

[8] Defendants cite *United States v. O'Brien*, 391 U.S. 367 (1968), but, in fact, the Supreme Court has cited *O'Brien* for precisely the position Plaintiffs assert here: the First Amendment requires courts to consider the law's text *and* its justification or purpose. *See Reed*, 576 U.S. at 166 (citing *O'Brien*). Similarly misplaced is Defendants' argument that Plaintiffs' viewpoint discrimination claim fails because they have not satisfied the "overbreadth doctrine." Mot. at 23-24. The overbreadth doctrine applies where a plaintiff identifies a "law[] . . . written so broadly" that it is likely to "inhibit the constitutionally protected speech of third parties." *City Council of City of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 798-800 (1984); *see also Virginia v. Hicks*, 539 U.S. 113, 118-121 (2003). The doctrine is inapposite here where the harm at issue was suffered by Plaintiffs directly and where Plaintiffs allege that HB 233 is facially unconstitutional not because it is too broad but because it is a viewpoint-based regulation. The cases Defendants cite in support of this proposition do not support them. *See C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 189 (3d Cir. 2005) (addressing neither overbreadth doctrine nor viewpoint discrimination); *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1206 n.7 (9th Cir. 2005) (explaining case did not implicate the First Amendment). In any event, even were the doctrine to apply here, HB 233 is substantially likely to infringe speech in

Plaintiffs have sufficiently stated a claim that the law violates the First and Fourteenth Amendments' prohibitions on viewpoint discrimination.

B. HB 233 violates Plaintiffs' freedom of association.

Plaintiffs have also stated a claim that HB 233's challenged provisions impose an unconstitutional burden on their right to freedom of association. Just a few months ago, the Supreme Court reaffirmed that the right to freely associate "may be violated . . . where individuals are punished for their political affiliation" and where a law compels the "'disclosure of affiliation with groups engaged in advocacy.'" *Bonta*, 141 S. Ct. at 2382 (citation omitted). Even the "risk of reprisals if" a person's "affiliation with [an] organization became known," is sufficient to state a freedom of association claim. *Id.* As a consequence, "[w]hen a State seeks to inquire about an individual's beliefs and associations a heavy burden lies upon it to show that the inquiry is necessary to protect a legitimate state interest." *Baird*, 401 U.S. at 6-7.

HB 233 burdens Plaintiffs' right to freely associate in each of these ways. The Survey Provisions mandate that the Boards require each public post-secondary school "to conduct an annual assessment of the intellectual freedom and viewpoint diversity at that institution." Fla. Stat. § 1001.03(19)(b); § 1001.706(13)(b). Echoing

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each of its possible applications as explained *supra* at Section I.B and *infra* at Section III.B.

the civil rights abuses of the McCarthy Era and Florida's own "Johns Committee," the Survey Provisions will necessarily collect information related to Plaintiffs' private affiliations and threaten the "risk of reprisals" for those associations, "creat[ing] an unnecessary risk of chilling' in violation of the First Amendment." *Bonta*, 141 S. Ct. at 2388 (citation omitted). Those threats come from the public, which the law induces to harass Plaintiffs for their protected speech, as well as Governor DeSantis and Commissioner Corcoran, who have practically promised retaliation against Plaintiffs' speech. *See, e.g.*, Am. Compl. ¶¶ 45,51, 61-62, 111; *cf. Driehaus*, 573 U.S. at 165-66 (explaining how the threat of even false complaints can give rise to an injury).

Nevertheless, Defendants claim that Plaintiffs fail to state a freedom of association claim because the survey has not yet been implemented and because the survey, once implemented, may be voluntary and/or anonymous. Mot. at 24. Again, Defendants misunderstand Plaintiffs' allegations. HB 233 threatens Plaintiffs and their associations with *present* reprisals, causing them harm right now, even before the survey is implemented. These harms persist, moreover, *even if* the survey that is rolled out later this year is anonymous, and *even if* it is ultimately discretionary.[9]

[9] Notably, a sponsor of HB 233 has asserted that the survey will be mandatory for faculty and that it "will say something along the lines of: 'Where are you on the

That the State is now so empowered—indeed, required—to conduct annual surveys into political and ideological viewpoints on campuses that it will publish (and may otherwise use however it wishes) imposes its own First Amendment threat. But an additional threat can also arise solely from any aggregate data the survey collects. Defendants have made plain they intend to suppress disfavored viewpoints on public campuses where they are widely held. To realize this aim, Defendants need only campus-wide statistics, not individualized responses. Am. Compl. at ¶¶ 135-36.

Because the law burdens the right to freely associate, it is subject to at least exacting scrutiny. *Bonta*, 141 S. Ct. at 2383. It must be struck down unless Defendants can demonstrate it is "narrowly tailored to the government's asserted interest." *Id*. Defendants cannot meet this burden. With regard to the state's actual interest in the law, the evidence will demonstrate that it is motivated by the invidious interest in suppressing liberal and progressive associations and speech, an interest that itself is illegitimate. But even if Defendants were able to prove that the law was justified by an interest in fostering intellectual diversity (as they claim), it would remain subject to invalidation, because "[t]here is a dramatic mismatch . . . between the interest" Defendants assert and the law they created "in service of that end." *Id.*

political spectrum?' 'Do you believe in diversity of thought?' 'Do you believe Republicans are evil?' And so forth." Am. Compl. ¶ 6.

at 2386. By creating a survey that will capture political affiliation and viewpoints in a climate that clearly evidences an interest in stamping out liberal and progressive viewpoints, HB 233 will achieve precisely the opposite end. *See generally Shelton*, 364 U.S. at 486 (noting "constant and heavy" pressure that would fall on teachers "to avoid any ties which might displease those who control his professional destiny"); *Bonta*, 141 S. Ct. at 2388. This is achieved not only by the Survey Provisions, but also the Anti-Shielding and Recording Provisions. *See Shelton*, 364 U.S. at 486 ("Scholarship cannot flourish in an atmosphere of suspicion and distrust.") (quoting *Sweezy*, 354 U.S. at 250).

For all of the reasons discussed, HB 233 will chill Plaintiffs' willingness to associate in groups or express ideas related to those views and ideas disfavored by the law and its sponsors. Plaintiffs have stated a claim for violation of freedom of association.

C. The Anti-Shielding Provisions compel speech.

Finally, Defendants' argument that the Anti-Shielding Provisions do not compel speech is without merit. The government compels speech when it forces an individual to "personally speak the government's message" or "host or accommodate another speaker's message." *Rumsfeld v. Forum for Acad. and Institutional Rts., Inc.*, 547 U.S. 47, 63 (2006). The First Amendment bars the

government from not only compelling "affirmance with a belief with which the speaker disagrees" but also forcing speakers to express "statements of fact the speaker would rather avoid." *Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995). This is precisely what the Anti-Shielding Provisions do.

In interpreting a statute, the Court begins with the text, interpreting each word according to its plain meaning. *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1199 (11th Cir. 2007). In interpreting a state statute to determine whether it complies with the federal Constitution, courts ask whether "there is a constitutional reading of the statute that is both *reasonable* and *readily* apparent and" does not require rewriting the statute. *Dream Defenders v. DeSantis*, 2021 WL 4099437, at *19 (N.D. Fla. Sept. 9, 2021) (Walker, J.) (emphasis in original).

The Anti-Shielding Provisions vary slightly in their wording but are substantively the same for purposes of this dispute. Focusing on the third for simplicity's sake, it prohibits a Florida College System institution or state university from "shield[ing] students, faculty, or staff from expressive activities." Fla. Stat. § 1004.097(3)(f). "Expressive activities," include, but are not limited to, "any lawful oral or written communication of ideas," reaching not only lectures but even unpublished writings and commentary. *Id.* § 1004.097(3)(a). "Shield" is defined as

"limit[ing] students', faculty members', or staff members' access to, or observation of, ideas and opinions that they may find uncomfortable, unwelcome, disagreeable, or offensive." *Id*. § 1004.097(2)(f).

These Provisions, by their plain meaning, compel faculty member speech. When Plaintiffs exclude materials from their syllabi or lectures because they are "disagreeable[] or offensive," they "limit students' . . . access to, or observation of" such materials in violation of the Provisions. Consider a professor of genetics who chooses not to teach about "The Bell Curve," which is roundly viewed as "disagreeable" or "offensive." In doing so, the professor limits students' "access to, or observation of" the book. This would run afoul of the Anti-Shielding Provisions' text. The professor must therefore choose between teaching "The Bell Curve" or violating HB 233.

Defendants do not meaningfully engage with the text of the statute or respond to Plaintiffs' plain-meaning interpretation. Instead, they baldly claim that the Anti-Shielding Provisions "simply direct[] governmental actors to protect and not violate the already-existing rights of those who wish to express a viewpoint with which others may disagree." Mot. 26-27. In advancing this atextual interpretation, Defendants ask this Court to cross out the Anti-Shielding Provisions in their entirety and replace them with a simple command to colleges and universities to respect

expressive rights. Such an interpretation is "neither reasonable nor readily apparent given the plain language of the statute," and "reduces much of the verbiage" of the Provisions "to surplusage and invites [the] Court to fill in the blanks that the Florida Legislature left behind." *Dream Defenders*, 2021 WL 4099437, at *25. The plain text of the statute leaves no doubt that the Anti-Shielding Provisions compel speech by forcing Faculty Plaintiffs to "discuss topics which they otherwise would not discuss, assign reading they otherwise would not assign, and invite guest speakers they otherwise would not invite." Am. Compl. at ¶ 155.

CONCLUSION

For the reasons stated above, the motion to dismiss should be denied.

LOCAL RULES CERTIFICATION

Undersigned counsel certifies that this response contains 7,988 words, excluding the case style, table of contents, table of authorities, and certificate of service.

Respectfully submitted this 21st day of September 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 21, 2021 I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

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