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**

RICHARD CORCORAN, et al.,

***Defendants*.**
_____/

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' EMERGENCY MOTION FOR PRELIMINARY INJUNCTION

Defendants respectfully submit this Response in Opposition to Plaintiffs' Emergency Motion for Temporary Restraining Order[1] or Preliminary Injunction ("Motion"). ECF No. 75. This Court should deny the Motion because Plaintiffs have not established entitlement to the extraordinary relief they seek.

INTRODUCTION

HB 233, and in particular its Survey provisions, are intended for one clear purpose: to ensure and safeguard the ability for all to represent their views and ideas, no matter who may find them unwelcome.

> [T]he peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation;

[1] On March 28, 2022, this Court denied the motion for a temporary restraining order, narrowing the scope of the motion to the request for a preliminary injunction. *See* ECF No. 76.

> those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

John Stuart Mill, *On Liberty*, 18 COLLECTED WORKS OF JOHN STUART MILL 213, 229 (Univ. of Toronto Press 1977). Plaintiffs claim they are being silenced and threatened with oppression, yet all HB 233 seeks is voluntary, anonymous feedback on whether higher-education employees and students believe they are free to express their views or not.[2] Allowing people to voluntarily petition and provide feedback to government institutions causes no conceivable harm.[3]

Plaintiffs brought a facial challenge to HB 233, but insist that this Court consider factual evidence regarding Defendants' application of HB 233 in their Motion. ECF No. 75. But factual evidence of an unpleaded, as-applied claim is

[2] A nationwide survey published by Heterodox Academy found that while "88% of students agreed that colleges should encourage students and professors to interact respectfully with people whose beliefs differ from their own," unfortunately, "63% of students agreed that the climate on their campus prevents people from saying things that they believe." *See Campus Expression Survey*, Heterodox Academy, at 3 (published Mar. 2022), *available at* https://heterodoxacademy.org/wp-content/uploads/2022/02/CES-Report-2022-FINAL.pdf.

[3] Citizens already do so in response to the U.S. Census Bureau's American Community Survey (ACS), *see* https://www2.census.gov/programs-surveys/acs/methodology/questionnaires/2020/quest20.pdf, and in when they register to vote and select their political-party affiliation, which information is publicly-available in Florida.

irrelevant, and cannot lawfully support the extraordinary relief that Plaintiffs demand. At bottom, Plaintiffs' Motion amounts to three dozen pages of speculation, in reliance on facts that have nothing to do with the facial constitutionality of HB 233—the only claim that Plaintiffs' Complaint asserts. ECF No. 35.

Courts across the country, including the United States Supreme Court, have uniformly recognized that freedom of expression and the uninhibited exchange of information in the marketplace of ideas are foundational principles in American society, and are held particularly sacred in institutions of higher learning. In an effort to protect those values at Florida's public colleges and universities, the Florida Legislature passed HB 233.

Among other provisions, HB 233 requires in part the State Board of Education and the Board of Governors (collectively, the "Boards") to select or create an "objective, nonpartisan, and statistically valid" survey in order to conduct an annual assessment of the "intellectual freedom and viewpoint diversity" throughout Florida's colleges and universities, and "compile and publish the assessments by September 1 of each year." §§ 1001.03(19)(b), 1001.706(13)(b), Fla. Stat. (the "Survey Provisions"). The Survey Provisions are constitutional on their face, and Plaintiffs have failed to carry the heavy burden to clearly prove otherwise.

The extraordinary relief Plaintiffs seek is based upon conjecture and hypothesized fears, wholly untethered from its pending ***facial*** challenge to the

Survey Provisions. Plaintiffs cannot establish the requirements necessary to entitle them to a preliminary injunction, and the Motion should therefore be denied.

LEGAL STANDARD

A preliminary injunction "is an extraordinary and drastic remedy not to be granted unless the movant clearly establishes the burden of persuasion as to the four requisites." *Keister v. Bell*, 879 F.3d 1282, 1287 (11th Cir. 2018) (collecting citations). To obtain this relief, Plaintiffs "must clearly establish": "(1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) that the threatened injury to the [P]laintiff[s] outweighs the potential harm to the [D]efendant[s]; and (4) that the injunction will not disservice the public interest." *Id.* (citations omitted). This standard "does not place upon the non-moving party the burden of coming forward and presenting its case against a preliminary injunction." *Ala. v. U.S. Army Corps of Eng'rs*, 424 F.3d 1117, 1136 (11th Cir. 2005) (citations omitted). "If any element is not proven, there is no need to address the others," *Sofarelli v. Pinellas Cnty.*, 931 F.2d 718, 724 (11th Cir. 1991); rather, the preliminary injunction must be denied, irrespective of whether it meets the other requirements. *See, e.g.*, *Siegel v. LePore*, 234 F.3d 1163, 1175–76 (11th Cir. 2000). Preliminary injunctions are "the exception rather than the rule." *State of Tex. v. Seatrain Int'l, S. A.*, 518 F.2d 175, 179 (5th Cir. 1975).

A "facial challenge to a legislative Act is . . . the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).[4] "Facial challenges are disfavored for several reasons. Claims of facial invalidity often rest on speculation" and "run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Wash. State Grange*, 552 U.S. at 450 (marks and citations omitted).

ARGUMENT

I. PLAINTIFFS' FACIAL CHALLENGE FORECLOSES THE EXTRAORDINARY RELIEF THEY SEEK.

Plaintiffs ask this Court to enter a preliminary injunction on a claim that does not appear in their Complaint. ECF No. 35. Despite pleading ***only a facial challenge***

[4] The Supreme Court has recognized "a second type of facial challenge in the First Amendment context under which a law may be overturned as impermissibly overbroad because a 'substantial number' of its applications are unconstitutional, 'judged in relation to the statute's plainly legitimate sweep.'" *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008) (quoting *New York v. Ferber*, 458 U.S. 747, 769–71 (1982)). In evaluating a law, a court "must be careful not to go beyond the statute's facial requirements and speculate about "hypothetical" or "imaginary" cases, to avoid application of "the 'strong medicine' of overbreadth analysis where the parties fail to describe the instances of arguable overbreadth of the contested law." *Id*. Plaintiffs have not made the weighty showing through concrete facts necessary for this Court to make this disfavored finding.

to the Survey Provisions, *id.*, Plaintiffs' Motion relies on (i) the contents of draft surveys developed by the Boards pursuant to the challenged statutes; (ii) conjectural declarations; and (iii) meritless discovery grievances that were never raised in a motion to compel. Each element of Plaintiffs' request for preliminary injunctive relief necessarily depends on how the Boards and others might utilize information gleaned from the Survey Provisions in the future, and therefore depends on conjectured facts and arguments that "do not have any apparent bearing on" the facial constitutionality of the Survey Provisions. *See, e.g.*, *Bill Salter Advert., Inc. v. City of Brewton, Ala.*, 486 F. Supp. 2d 1314, 1319–20 (S.D. Ala. 2007) (citing *Solantic, LLC v. City of Neptune Beach,* 410 F.3d 1250, 1274 (11th Cir. 2005) (observing that constitutional claim raised purely legal questions when challenge to ordinance was "facial rather than as applied," and thus "resolution of the legal questions is only minimally intertwined with the facts")); *League of Women Voters of Fla. v. Browning*, 575 F. Supp. 2d 1298, 1322 (S.D. Fla. 2008) (plaintiffs' reliance on "a series of hypothetical scenarios that purport to demonstrate" how a challenged law might harm them in the future "are not properly considered for purposes of [a] facial challenge").

No emergency exists simply because Plaintiffs waited until the last minute to move for a preliminary injunction based on facts that have nothing to do with the text of the Survey Provisions. As a preliminary matter, Defendants reject Plaintiffs'

incorrect characterization of Defendants' discovery conduct. Defendants timely asserted relevance objections more than five months ago, which Plaintiffs never raised in a motion to compel. Moreover, the Boards only completed the final version of the Surveys a few days ago.[5]

But all of this misses the point. The content of the Final Surveys has *nothing to do with a facial challenge*. Because they pursue a facial challenge, Plaintiffs face the monumental task of proving that no set of circumstances exist in which a government can lawfully offer its citizens the opportunity to voluntarily, and even anonymously, submit their opinions on their own campus. The content of the Final Surveys is irrelevant to this question. And likewise, the timing of Plaintiffs' receipt of the Final Survey has nothing to do with their entitlement to preliminary injunctive relief—and certainly, that timing did not create an "emergency" requiring the "sounding [of] an alarm in the chambers of the district court judge." *VMR Prod., LLC v. Elec. Cigarettes Outlet, LLC*, No. 12-23092, 2013 WL 5567320, at *1 (S.D. Fla. Oct. 3, 2013). Given Plaintiffs' position that "the state may not mandate inquiries into its citizens' ideological and political views unless it can meet exacting scrutiny," even when made in the form of a voluntary or anonymous request for

[5] The process by which the Boards developed and revised the Surveys is set forth in the Declarations of Kathryn Hebda and Jon Rogers, attached hereto as Exhibits 3 and 4, respectively.

participation, Plaintiffs' Motion is a false alarm that could have been filed contemporaneously with their Complaint. ECF No. 75 at 6, 28.

Plaintiffs' Motion laments the foreseeable implementation of the Surveys required by HB 233, which poses no emergency.[6] "No one's health or safety is at stake, nobody is at risk of being deprived of an essential service, and nothing that is irreplaceable or for which compensation would not be available is in jeopardy." *Privitera v. Amber Hill Farm, L.L.C.*, No. 5:12-CV-7-OC-32TBS, 2012 WL 1900559, at *2 (M.D. Fla. May 24, 2012). Plaintiffs admit, and HB 233 requires, that the Boards would "implement the Survey Provisions" and "compile and publish the assessments by September 1." ECF No. 35 at ¶ 67. Yet, Plaintiffs sound the alarm because they allegedly "recently learned" that the Surveys will be sent to students[7] and employees on April 4, 2022, and that Survey response collection is planned to close on April 8, 2022. *See* ECF No. 75-2 at ¶ 3; 75-3 at ¶ 7; Decl. of Eugene Kovacs ¶ 16.

[6] *Compare Fla. Democratic Party v. Scott*, No. 4:16CV626-MW/CAS, 2016 WL 6080225, at *1 (N.D. Fla. Oct. 12, 2016) (preliminary injunction extending voter registration deadline was appropriate due to hurricane), *with Namphy v. DeSantis*, 493 F. Supp. 3d 1130, 1146 (N.D. Fla. 2020) (preliminary injunction extending voter registration deadline was not appropriate where thousands of voters were deprived of the right to cast their ballot due to website crash).

[7] Plaintiffs filed no declarations from the Student Plaintiffs or evidence of their threatened harm.

Plaintiffs' surprise at this foreseeable timeline is unwarranted based on the record. To be sure, Defendants advised Plaintiffs on March 11, 2022 that "the surveys should go out at the end of this month," and on March 17, 2022 that "[t]he surveys should be distributed to the students and faculty at the end of this month." *See* ECF No. 75-1 at 13–14. And as noted above, the challenged laws impose a September 1 deadline for the publication of survey results. Defendants' adherence to this statutory deadline does not put Plaintiffs in any conceivable jeopardy justifying preliminary intervention by this Court.

This Court should deny Plaintiffs' Motion because Plaintiffs fail to satisfy any of the four requisites that they "must clearly establish" in order to obtain a preliminary injunction. *Keister*, 879 F.3d at 1287. Plaintiffs cannot show a substantial likelihood of success on the merits, in no small part because Plaintiffs lack standing, and their Motion makes as-applied rather than facial arguments. Nor can Plaintiffs establish irreparable harm based on speculative as-applied injuries, or that equity and the public interest favors the extraordinary relief they demand at the eleventh hour.

II. PLAINTIFFS CANNOT CLEARLY ESTABLISH A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS.

Plaintiffs are unlikely to succeed on the merits of their constitutional challenge to the Survey Provisions. Plaintiffs insist that the Court will strike down the Survey Provisions of HB 233 as facially unconstitutional, despite Plaintiffs' lack of standing

and their laser-focus on the law's application despite having never pleaded an as-applied challenge. According to Plaintiffs, the future injuries they allege flow primarily from how non-parties to this lawsuit might someday utilize the Survey, and therefore depend on a hypothetical chain of contingencies[8] that finds no footing in the language of challenged law. Just like their legally-flawed Complaint,[9] Plaintiffs' Motion and supporting evidence cannot support a preliminary injunction.

A. No Justiciable Case or Controversy Exists For All Three Counts

Plaintiffs cannot clearly establish a substantial likelihood of success on the merits as required to support the drastic remedy of a preliminary injunction.

1. Plaintiffs Lack Standing

Plaintiffs bear the burden of establishing the constitutional standing requirements. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). To have standing, Plaintiffs must show "(1) [they] ha[ve] suffered an 'injury in fact' that is

[8] *See Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 584 (1998) (observing the Court's reticence to "invalidate legislation on the basis of its hypothetical application to situations not before the Court") (quotations omitted); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 396 (1969) ("[W]e will not now pass upon the constitutionality of these regulations by envisioning the most extreme applications conceivable . . . but will deal with those problems if and when they arise.") (internal citation omitted).

[9] Rather than recite the legal insufficiencies of Plaintiffs' claims in their entirety for a second time, Defendants respectfully refer the Court to their pending Motion to Dismiss, ECF No. 40, and incorporate the legal arguments related to the Survey Provisions into this Response to demonstrate why Plaintiffs cannot clearly establish that they are substantially likely to succeed on the merits of their claims or suffer any harm. *See* ECF No. 40 at 9–11, 14–21, 23–25, 28–30.

(a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *White's Place, Inc. v. Glover*, 222 F.3d 1327, 1329 (11th Cir. 2000). Based on Plaintiffs' chain of conjured contingencies, they have failed to carry their burden of establishing the constitutional standing requirements.

Plaintiffs' allegations concerning the future impact of the Survey Provisions are quintessential "some day" fears, *see Lujan*, 504 U.S. at 564, and generalized grievances for which standing is not recognized under Article III. *See ASARCO Inc. v. Kadish*, 490 U.S. 605, 616 (1989) (opinion of Kennedy, J.) ("[G]eneralized grievances brought by concerned citizens . . . are not cognizable in the federal courts."); *Hollingsworth v. Perry*, 570 U.S. 693, 706 (2013) (same).

Plaintiffs assume how the Surveys *might* be used, someday in the future, but their speculations are not contemplated by the plain language of HB 233. *See* ECF No. 35 ¶ 32 (how "the state of Florida could weaponize the [Survey] results to cut funding"); *id.* ¶ 78 (how the Governor or the Florida Legislature "might use the results of the survey"). Plaintiffs' claimed injuries stemming from speculative hypotheticals do not establish an injury-in-fact for purposes of Article III standing. Other concerns, such as whether the Surveys are anonymous or voluntary, *see* ECF

No. 35 ¶¶ 68–71, have since been resolved in contradiction to Plaintiffs' speculative allegations of compelled participation. *See, e.g.,* Decl. of Kathy Hebda ¶ 8; Kovacs Decl. ¶¶ 5–9, 20.

Plaintiffs' allegations concerning future funding based on the Survey results, *see* ECF No. 75-2 at ¶ 10; ECF No. 75-3 at ¶ 7, do not flow directly from HB 233 or any current law, are far too speculative to confer Article III standing under *Lujan* or to establish a substantial likelihood of success on the merits, and require the action of independent third parties, namely the Legislature and the Governor. *See, e.g.*, *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342, 126 S. Ct. 1854, 1862, 164 L. Ed. 2d 589 (2006) (Ohio taxpayers lacked standing based on allegation of disproportionate tax burdens resulting from tax breaks; claimed injury was hypothetical and dependent on future legislation); *Nat'l Alliance for Mentally Ill, St. Johns Inc. v. St. Johns Cnty.*, 376 F.3d 1292, 1295 (11th Cir. 2004) (plaintiffs lacked concrete injury based on County Commission's failure to fund a project when plaintiffs could not identify specific lost resources); *Moore v. Navy Pub. Works Ctr.*, 139 F. Supp. 2d 1349, 1355–56 (N.D. Fla. 2001) (feared loss of public employment was not a concrete injury in fact sufficient to confer standing).

Any future action taken based on the results of the Surveys is speculative, and disconnected from Defendants and existing law. HB 233 does not address funding or budgetary measures, nor does it direct any particular action based upon the

outcome of the Surveys. For Plaintiffs to be harmed, a different law would have to be passed before that harm would be concrete and not hypothetical, and even then, it may not be traceable to these Defendants. Moreover, Plaintiffs do not have a constitutional right to an undisturbed minimum amount of funding for their programs or schools. *See, e.g.*, *Graham v. Haridopolos*, 75 So. 3d 315, 319 (Fla. 1st DCA 2011), *approved*, 108 So. 3d 597 (Fla. 2013) (affirming the legislative "power of the purse" over state university tuition and fees); *Lewis v. Casey*, 518 U.S. 343, 365 (1996) (Thomas, J., concurring) (finding "no basis in the Constitution . . . for the right to have the government finance" state inmates' endeavor to bring suit). In the absence of a cognizable injury-in-fact, Plaintiffs lack standing. In the absence of standing, Plaintiffs cannot succeed on their facial challenges to the Survey Provisions, and cannot establish their entitlement to preliminary injunctive relief.

2. Plaintiffs' Claims are Not Ripe

Plaintiffs' concerns about the future impact of the Survey Provisions are not ripe for adjudication because they are based on "speculation about contingent future events." *Pittman v. Cole*, 267 F.3d 1269, 1278 (11th Cir. 2001). Again, Plaintiffs' conjecture about how the Governor or the Florida Legislature might use the results of the survey, whether for budget cuts or other action, "rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal quotations omitted). Because the

Surveys are voluntary and anonymous, the lack of hardship to the parties also counsels against a finding of ripeness. *See Pittman*, 267 F.3d at 1280 ("[I]f a party is to suffer an 'immediate and direct impact' from a challenged policy, a case is more likely to be considered ripe.") (quotation omitted). Here, Plaintiffs' claims are not ripe because they are not "sufficiently mature;" rather, they are based on a speculative chain of events outside of Defendants' control. An unripe claim cannot form the basis of a preliminary injunction. *See Staver v. Am. Bar Ass'n*, 169 F. Supp. 2d 1372, 1376–78 (M.D. Fla. 2001); *see also Digital Props., Inc. v. City of Plantation*, 121 F. 3d 586, 589–90 (11th Cir. 1997) (affirming dismissal of facial and as-applied constitutional challenges to local ordinance in response to motion for preliminary injunction when claim was not ripe for adjudication).

B. Plaintiffs Failed to State a Claim

Plaintiffs' Complaint allegations are not sufficient to sustain a facial challenge, for the reasons outlined in Defendants' Motion to Dismiss. ECF No. 40. Inexplicably, Plaintiffs' Motion seems to abandon the Complaint's facial challenge altogether, focusing instead on the content of the Surveys developed pursuant to the challenged laws, and how Survey results *might* be used in the future. This argument and evidence does not and cannot establish Plaintiffs' likelihood of success on the merits of their claims.

For example, Plaintiffs' Motion features a declaration from Professor Sylvia Hurtado of UCLA, who opines that the Surveys' design and methodology is flawed. *See generally* ECF No. 75-4. Hurtado's opinions about the application of HB 233's Survey Provisions has no bearing on Plaintiffs' facial challenge, and thus no bearing on Plaintiffs' entitlement to a preliminary injunction. *See Ficken v. City of Dunedin, Fla.*, No. 8:19-CV-1210-CEH-SPF, 2021 WL 1610408, at *25 (M.D. Fla. Apr. 26, 2021) ("[a]n as-applied challenge is distinct from a facial challenge"); *Sheets v. City of Punta Gorda, Fla.*, 415 F. Supp. 3d 1115, 1121 (M.D. Fla. 2019) (challenges are "subject to different standards").

Even if her opinions were correct (they are not), Hurtado's criticism of the quality or statistical validity of the Surveys is a critique of Defendants' *application* of the Survey Provisions' requirements, or possibly an admonishment to future policy makers regarding the weight that should be given data gathered from the survey. Hurtado's opinions simply have nothing to do with the constitutionality of the Survey Provisions. Hebda Decl. ¶ 7. After all, a voluntary survey would not be constitutionally infirm for merely being statistically objectionable.

Moreover, Hurtado's opinions are not credible and would never be admissible, as they are "based on [her] extensive experience" and nothing else. *Id.* ¶

6.[10] "If the witness is relying solely or primarily on experience, then the witness must explain *how* that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply taking the expert's word for it." *United States v. Frazier*, 387 F.3d 1244, 1261 (11th Cir. 2004) (quotation and marks omitted).

Hurtado opines on the internal motivations of individuals with whom she never spoke, and on how Survey data could hypothetically be misused, based on nothing more than bald conjecture. *See, e.g.*, ECF No. 75-4 ¶¶ 8, 16. Hurtado recites her experience, then recites her opinions—and nothing more. This is the approach of an activist relying on the logical fallacy of appeal to authority, rather than an

[10] Notably, for all of Hurtado's concern about protecting the free exchange of ideas, her own university has struggled with tolerating the expression of unpopular viewpoints. *See, e.g., The Atlantic*, "The Anti-Free Speech Movement at UCLA," Oct. 15, 2015, https://www.theatlantic.com/politics/archive/2015/10/the-anti-free-speech-movement-at-ucla/410638/; ABC 7, "Conservative speaker Ben Shapiro spoke at UCLA amid protests," Nov. 14, 2017, https://abc7.com/ben-shapiro-ucla-speech-monday-the-daily-wire/2641557/; CBS News, "Protestors interrupt Donald Trump Jr. book event at UCLA, forcing it to abruptly end," Nov. 11, 2019, https://www.cbsnews.com/news/donald-trump-jr-heckler-protestors-interrupt-book-event-with-kimberly-guilfoyle-at-ucla-forcing-it-to-abruptly-end/. Moreover, the free exchange of opinions apparently does not extend to opinions about university faculty, who according to Hurtado, should be immune from criticism. ECF No. 75-4 ¶ 15 ("To question our faculty is to question graduate education in the U.S., longstanding norms for shared governance supported by the American Association of University Professors, and numerous educational associations that establish quality standards for degrees.").

expert witness offering a methodologically-sound analysis based on reliable facts and data that will assist the Court. No facts or methodology underlie Hurtado's conclusions at all; she asks the Court to simply anoint her unadulterated speculation as "expert" evidence based on her experience alone. This is precisely what *Frazier* and its progeny preclude. Hurtado's opinions are irrelevant to establishing the likelihood of Plaintiffs' success, "offer[] nothing more than what lawyers . . . can argue in closing arguments," *Frazier*, 387 F. 3d at 1257, and this Court should reject her declaration out-of-hand.[11]

Plaintiffs' late-night disclosure of Dr. Isaac Kamola's declaration fares no better. ECF No. 84-3. Kamola's declaration addresses: (i) the content of the Surveys, which is irrelevant for the same reasons discussed with respect to Hurtado's declaration; and (ii) attacks on Campus Reform, an irrelevant, non-party entity that Kamola clearly dislikes, but fails to connect in the slightest to the Legislature's passage of HB 233 or Plaintiffs' entitlement to preliminary injunctive relief. Kamola's declaration is long on "us versus them" criticism—quite clearly revealing his disdain and identifying "them" as the "right-wing"—but short on evidence, or any relationship to the challenged legislation. It is pure speculation about motives and harm, based on differing perspectives about the free speech climate on college

[11] Hurtado's Amended Declaration filed late last night, *see* ECF No. 84-2, is flawed for the same reasons as her original declaration, augmented by further reliance on speculation and fixation on the contents of the Final Survey.

campuses—which non-partisan institutions like the Foundation for Individual Rights in Education (FIRE) have tracked for two decades out of concern for feared erosion. Finally, Kamola's declaration suffers from the same legal flaw as Hurtado's under *Frazier*, 387 F.3d at 1257, 1261, relying on professional experience alone to cloak political opinions with claimed expertise in the absence of methodology or facts.

Finally, most of Kamola's opinions about HB 233 and Campus Reform are not dependent on the Final Surveys, and therefore could and should have been produced contemporaneously with the Motion in order to give Defendants a meaningful chance to respond. Rather than supplement an original declaration like they did for Hurtado, Plaintiffs ambushed Defendants with a brand-new "expert" at the eleventh hour. This Court should give no weight to Kamola's irrelevant and untimely declaration.

1. Plaintiffs are Unlikely to Succeed on their Viewpoint Discrimination Claim (Count I).

Plaintiffs failed to state a viewpoint discrimination claim and therefore are unlikely to succeed on the merits of that claim. If HB 233 regulates speech—which it does not—it does so in a content-neutral manner. HB 233 codifies what the Supreme Court has reiterated time and time again: speech may not be suppressed simply because it expresses ideas of any viewpoint that are offensive, disagreeable, invites disputes, or creates dissatisfaction. *See Mahanoy Area Sch. Dist.*, 141 S. Ct.

at 2049 (Alito, J., concurring) ("[P]ublic school students, like all other Americans, have the right to express 'unpopular' ideas on public issues, even when those ideas are expressed in language that some find 'inappropriate' or 'hurtful'; public schools have the duty to teach students that freedom of speech, including unpopular speech, is essential to our form of self-government.") (internal quotations omitted).

HB 233 does not *limit* speech or violate the speaker's First Amendment rights. Instead, it facilitates the ability of higher education employees and students to experience, *first hand*, the First Amendment's guarantee of the right to petition one's government for the redress of grievances. *See* U.S. Const, Amend I. Neither the Survey Provisions nor the Surveys themselves are content based. They impose no restriction, penalty, or burden based on the content of anyone's speech. *See Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 645–45 (1994). Because HB 233 does not regulate speech, much less discriminate based upon a viewpoint, it does not violate the First Amendment.

Because Plaintiffs failed to state a claim for viewpoint discrimination, Plaintiffs cannot clearly establish a substantial likelihood of success on the merits of that claim and therefore are not entitled to a preliminary injunction.

2. Plaintiffs are Unlikely to Succeed on their Freedom of Association Claim (Count II).

Plaintiffs' alleged violation of their free associational rights are premised upon conjectural fears about what might occur after the Survey Provisions are applied—but that have nothing to do with the text of the Survey Provisions.

Plaintiffs' allegations that their freedom to associate will be abridged by the Survey Provisions do not "raise a right to relief above the speculative level," and instead amount to unsupported conclusions that do not permit this Court to infer that Plaintiffs are entitled to relief. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007). Indeed, because the Surveys are anonymous, *see* Kovacs Decl. ¶¶ 4–9, HB 233 does not *mandate* disclosure of Plaintiffs' memberships in associations or their political views. *See, e.g.*, *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 190 (3d Cir. 2005) (anonymous surveys did not violate parents' or students' privacy or speech rights).

Florida has a legitimate and compelling interest in assessing the intellectual freedom and viewpoint diversity at public universities and institutions. *See* Hebda, ¶ 14-16; s*ee also* *Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, 141 S. Ct. 2038, 2046 (2021) ("America's public schools are the nurseries of democracy" and that "[o]ur representative democracy only works if we protect the 'marketplace of ideas.'"); *accord Keyishian v. Bd. of Regents of Univ. of State of N. Y.*, 385 U.S. 589, 603 (1967) (emphasizing the importance of a "wide exposure to that robust exchange

of ideas which discovers truth out of a multitude of tongues, (rather) than through any kind of authoritative selection"). Complementary to this eminently legitimate and compelling end, the Surveys' anonymity guarantee that any information about the climate of intellectual freedom and viewpoint diversity at public postsecondary institutions will have no impact on Plaintiffs' freedom to associate.

In the absence of any harm to their associational rights based on the face of the Survey Provisions, Plaintiffs cannot establish a substantial likelihood of success on the merits.

3. Plaintiffs are Unlikely to Succeed on the Merits of their Compelled Speech Claim (Count III).

There is no mandate for participation in HB 233, but that is no matter, because the reality is that the Surveys are voluntary and anonymous.[12] *See* Hebda Decl. ¶¶ 7–8; Kovacs Decl. ¶¶ 5–9, 20. A survey participant may answer a single question, a series of questions, no questions at all, or may refuse to even participate altogether. *See* Hebda Decl. ¶¶ 7–8. Plaintiffs therefore cannot state a compelled speech claim, and are consequently unlikely to succeed on the merits of that claim.

On their face, the Survey Provisions seek to assess whether government actors are suppressing speech that is protected by the First Amendment, which is consistent

[12] Count III is limited to HB 233's "anti-shielding" provisions, but in an abundance of caution, Defendants' Response makes clear that Plaintiffs cannot succeed on a compelled-speech claim should Plaintiffs try to aim Count III at the Survey Provisions.

with the First Amendment's counter-majoritarian protections. *See Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293, 1327 (11th Cir. 2017) ("The promise of free speech is that even when one holds an unpopular point of view, the state cannot stifle it."); *Women's Emergency Network v. Bush*, 323 F.3d 937, 947 (11th Cir. 2003) ("The First Amendment protects the right to speak; it does not give Appellants the right to stop others with opposing viewpoints from speaking.").

Even if HB 233 did regulate speech—which it does not—it certainly does not compel speech. Speech is compelled when the speaker is required to express a viewpoint with which he or she does not agree. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 557 (2005). However, "voluntary actions do not constitute compelled . . . speech because . . . they [do not] amount to a government regulation that compelled them to express a message in which they did not agree." *Foley v. Orange Cnty.*, 638 F. App'x 941, 945 (11th Cir. 2016). Nothing in Plaintiffs' Complaint or Motion suggests that anyone has been required to express any view point at all, or that such speech is imminently likely to be required in the future. Nothing in the text of HB 233 requires any student, professor, or staff to make any expression. HB 233's voluntary, anonymous Surveys do not compel Plaintiffs to adopt speech, "personally speak the government's message," or "host or accommodate another speaker's message." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 63 (2006). *See, e.g.*, Hebda Decl., Ex. A at 4

("Your participation in this survey is completely voluntary. You are free to not answer any question or withdraw from the survey at any time.").

Plaintiff's Complaint does not state a claim for compelled speech, and Plaintiffs' Motion fails to salvage its insufficient pleading. Plaintiffs are unlikely to succeed on the merits of a compelled-speech claim when the face of the challenged law requires no speech at all, and in application, the Surveys at issue are voluntary and anonymous.

III. PLAINTIFFS CANNOT CLEARLY ESTABLISH IRREPARABLE HARM.

Plaintiffs rely on as-applied harms to support injunctive relief without ever pleading an as-applied claim. This is improper. Thus, even if Plaintiffs established a likelihood of success on the merits, the absence of a substantial likelihood of irreparable harm would, by itself, make a preliminary injunction inappropriate. *See Snook v. Tr. Co. of Ga. Bank of Savannah, N.A.*, 909 F.2d 480, 486 (11th Cir. 1990) (affirming denial of preliminary injunction when plaintiff established likelihood of prevailing but failed to prove irreparable injury).

To support extraordinary injunctive relief, the asserted irreparable harm "must be neither remote nor speculative, but actual and imminent." *Siegel*, 234 F.3d at 1176 (quoting *Ne. Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 896 F.2d 1283, 1285 (11th Cir. 1990)). "Mere injuries, however substantial, in terms of money, time and energy necessarily expended . . . are not

enough." *Ne. Fla. Chapter of Ass'n of Gen. Contractors of Am.*, 896 F.2d at 1285. "The key word in this consideration is irreparable." *Id.* "The fact that [Plaintiffs are] asserting First Amendment rights does not automatically require a finding of irreparable injury." *Respect Maine PAC v. McKee*, 622 F.3d 13, 15 (1st Cir. 2010) (quotation omitted). Moreover, "a public university professor does not have a First Amendment right to decide what will be taught in the classroom." *Edwards v. California Univ. of Pennsylvania*, 156 F.3d 488, 491 (3d Cir. 1998).

From the text of HB 233 alone, Plaintiffs cannot demonstrate an "actual" and "imminent" threat of "irreparable" harm. Plaintiffs all but concede that they suffer no harm at present, let alone irreparable harm. Every alleged harm conjured up by Plaintiffs is based on a hypothetical chain of contingencies, speculating on what could happen after the Surveys are administered—or in other words, what happens *after* the law is *applied*, and not what the law says *on its face*. *See Fla. Fam. Pol'y Council v. Freeman*, 561 F.3d 1246, 1255 (11th Cir. 2009) ("The fear is not objectively reasonable because it depends on speculation and conjecture[.]"); *see also Browning*, 575 F. Supp. 2d at 1322 (S.D. Fla. 2008) ("Plaintiffs have nevertheless proposed a series of hypothetical scenarios . . . [that are] highly speculative—relying on the possibility that hundreds of thousands of applications will be mishandled and that as a result, Defendants will indiscriminately impose the

maximum possible fine on thousands of individuals and organizations. Such assertions . . . are not properly considered for purposes of this facial challenge.")

For example, Plaintiffs claim to face an attenuated risk of harm at the hands of students or those in charge of funding decisions, *see* ECF No. 75-3 ¶ 7 ("students . . . could weaponize that dissatisfaction in the survey, which could then lead to cuts to funding"), *see id.* ¶ 9 (referencing a "'data' pool that the government has made clear it intends to use to make retaliatory decisions, including about funding"), and unidentified "other actors." ECF No. 75-2 ¶¶ 9, 11. Plaintiffs' subjective fear, based on what students, government officials, or "other actors" might or might not do in response to the Survey responses, is not enough. *See Doe v. Pryor*, 344 F.3d 1282, 1287 (11th Cir. 2003) ("The plaintiffs have alleged nothing more than a subjective fear that [they] may be prosecuted for engaging in expressive activity, which we have held is not enough.") (quotations omitted).

The purported imminence of Plaintiffs' claimed harms is based on "when Defendants and related actors disseminate the Survey," *see* ECF No. 75 at 1–2, while the substance of their alleged harm stems from other actors' hypothesized "use" of the Surveys. *See* ECF No. 75-4 ¶ 16 (Plaintiffs' expert declares she has "grave concerns about the *use* of these surveys.") (emphasis added). But neither the date of dissemination, nor how the Surveys might be used or by whom, are contemplated by HB 233's text, and Plaintiffs' hair-on-fire speculation is therefore outside the scope

of the Court's inquiry in a facial challenge. *See, e.g., Gold Coast Publications, Inc. v. Corrigan*, 42 F.3d 1336, 1345 n.11 (11th Cir. 1994) ("Whether the Ordinance has a disparate impact on *¡Exito!*, however, is an issue appropriate for an 'as applied' challenge rather than a facial challenge."); *Cafe Erotica/We Dare to Bare/Adult Toys/Great Food/ Exit 94, Inc. v. St. John's Cnty.*, 143 F. Supp. 2d 1331, 1333 n.1 (M.D. Fla. 2001) ("St. Johns County alleges that Plaintiff erected the billboard first and then applied for the sign permit. The order of Plaintiff's actions, however, are not particularly relevant to Plaintiff's facial challenge to the Ordinance."); *accord Solantic,* 410 F.3d at 1274.

HB 233 simply requires the Boards to "compile and publish the assessments by September 1 of each year," *see* §§ 1001.03(19)(b), 1001.706(13)(b), Fla. Stat., nothing more. Plaintiffs' alleged injuries are therefore not traceable to the text of HB 233. *See Freedom Path, Inc. v. Internal Revenue Serv.*, 913 F.3d 503, 508 (5th Cir. 2019) ("Freedom Path's claimed chilled-speech injury is not fairly traceable to the text of Revenue Ruling 2004-6, meaning it does not have standing to bring this facial challenge."). And because the Surveys are voluntary and anonymous, they do not violate Plaintiffs' First Amendment freedoms or implicate the compelled disclosure of information of any faculty, staff, or student. In sum, the State of Florida does not violate the Constitution by simply inquiring about the perceptions of those who work

and study on campuses across the State, especially on an anonymous, voluntary basis.

For the first time, Plaintiffs raise in their Motion a concern about "risk of third-party access to the information" from the Surveys. *See* ECF No. 75 at 29. Of course, this concern has nothing to do with the face of the Survey Provisions. Further illustrating Plaintiffs' error, Plaintiff Robin Goodman's declaration concedes that "end-of-semester reviews" are appropriate, *see* ECF No. 75-3 ¶ 4, despite the same risk, if not inevitability, that end-of-semester reviews will be accessed by third-parties. *See Am. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2381, 2387–88 (2021). If end-of-semester reviews are appropriate and do not cause irreparable harm, then the Surveys should be no different. The claimed "risk of third-party access to information" is purely hypothetical, finding no basis in the evidence or in the text of the Survey Provisions. Even so, as explained in the Declaration of Gene Kovacs, the surveys will collect no personally identifying information. *See* Kovacs Decl. ¶¶ 5–9. Accordingly, Plaintiffs' concerns are baseless

By and large, Plaintiffs' alleged harm turns on how "Florida's leaders . . . intend to use" Survey results. *See* ECF No. 75 at 30 ("[A]ny collected data . . . will swiftly be used to support policies that harm Plaintiffs and their institutions, including cutting their funding."). That is an as-applied injury. Regardless, Plaintiffs' asserted harm is the potential, "later," misuse of the data "by those seeking

to use it as a cudgel against Plaintiffs." *Id.* That concern is clearly "remote," "speculative," hypothetical, actual and "later"—if at all—and only *after* yet another different law has been enacted. *See Siegel*, 234 F.3d at 1176. Plaintiffs' "[b]are allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur." *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

Finally, the Student Plaintiffs have not filed declarations, and thus have not offered any evidence of the irreparable harm necessary to support a claim for injunctive relief. *See, e.g.*, *United States v. Lambert*, 695 F.2d 536, 540 (11th Cir. 1983) ("testimony that continued filling would make restoration 'more difficult, more expensive, and more uncertain' . . . [was] insufficient in and of itself to require a finding of irreparable harm that overcomes the equities against an injunction"). Accordingly, the record does not support preliminarily enjoining the administration of the Surveys to students.

This Court simply cannot find irreparable harm based on the naked speculation that Plaintiffs offer regarding the application of the Survey Provisions—particularly in light of the exceedingly heavy burden that Plaintiffs' face in pursuing a facial challenge. Because Plaintiffs have failed to carry that burden, this Court should deny the Motion for a preliminary injunction.

IV. PLAINTIFFS CANNOT CLEARLY ESTABLISH THAT THEIR THREATENED INJURY OUTWEIGHS THE POTENTIAL HARM TO DEFENDANTS.

Plaintiffs argue that "Defendants will suffer no harm if the Surveys are temporarily enjoined while litigation progresses." ECF No. 75 at 30. In the same breath, Plaintiffs acknowledge the deadline that the Boards must "compile and publish the assessments" by "September 1, 2022." *Id.* at 31; §§ 1001.03(19)(b), 1001.706(13)(b), Fla. Stat. Defendants cannot attest to the amount of time required to distribute the Surveys and aggregate the results. The potential harm to Defendants is enjoining their Survey efforts, even briefly, will hinder their ability to efficiently and uniformly administer the surveys and meet their statutory reporting deadline of September 1. *See* Hebda Decl. ¶¶11–13; Kovacs Decl., ¶¶ 10–16. Any injunction would jeopardize the statutory timeline and objective, and when a State is "enjoined . . . from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers).

It is simply a fabrication to say that Defendants have "with[held] the final Survey" to "stymie review." ECF No. 75 at 32. The Final Surveys "were finalized on March 28, 2022." Hebda Decl. ¶ 7. Given the joint desire for the Board of Education and the Board of Governors to create uniform Surveys that would be consistently administered across all educational institutions at the same time, coordinating those efforts and choosing the right window for administration took time. *See* Hebda Decl. ¶ 12; Kovacs Decl. ¶¶ 10–14. Most critically, the timing of

Plaintiffs' receipt of the Final Surveys is entirely irrelevant to a facial challenge. Plaintiffs' have been apprised of Defendants' relevance objection on this ground for more than five months, and Defendants briefed the facial-challenge issue extensively in their Motion to Dismiss filed more than six months ago. *See* ECF No. 40.

Even still, it is not Defendants' burden to prove that its potential harm is outweighed by Plaintiffs' alleged injury—it is Plaintiffs' burden to prove the inverse. *See United States v. Jefferson Cnty.*, 720 F.2d 1511, 1519 (11th Cir. 1983) ("The burden of persuasion in all of the four requirements is at all times upon the plaintiff."). Plaintiffs cannot clearly establish that their threatened injury outweighs the potential harm to Defendants.

V. PLAINTIFFS CANNOT CLEARLY ESTABLISH THAT THE EQUITIES AND THE PUBLIC INTEREST FAVOR EXTRAORDINARY RELIEF.

"[T]he public interest is always served in promoting First Amendment values." *Barrett v. Walker Cnty. Sch. Dist.*, 872 F.3d 1209, 1230 (11th Cir. 2017). Because the compelling purpose of HB 233 is to protect free speech and academic freedom, and because the Surveys are designed to facilitate that purpose, the equities and public interest decidedly weigh against the extraordinary relief Plaintiffs seek of enjoining Defendants from distributing, collecting, or reporting the Surveys.

The academic freedom necessary to secure the benefits of a vigorous educational system is an essential constitutional right protected by the First

Amendment. The Supreme Court has emphasized the importance of academic freedom and diversity of thought:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the marketplace of ideas.

Keyishian, 385 U.S. at 603 (citation and marks omitted). The Court also observed that the "essentiality of freedom in the community of American universities is almost self-evident. . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Sweezy v. State of N.H. by Wyman*, 354 U.S. 234, 250 (1957). *Accord Regents of Univ. of California v. Bakke*, 438 U.S. 265, 312 (1978) ("Academic freedom . . . long has been viewed as a special concern of the First Amendment.").

The Fourteenth Amendment's Due Process Clause likewise "denotes not merely freedom from bodily restraint but also the right of the individual . . . to acquire useful knowledge." *Meyer v. Nebraska*, 262 U.S. 390, 399, (1923). This right to acquire knowledge is consistent with "the right to receive information and ideas" and to "afford[] the public access to discussion, debate, and the dissemination of information and ideas." *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v.*

Pico, 457 U.S. 853, 866–67 (1982) (citations omitted); *see also Sweatt v. Painter*, 339 U.S. 629, 634 (1950) ("no one . . . would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views").

Academic freedom is, at its core, the ability to express *all ideas*, even ideas that may make people uncomfortable or offended. *See Texas v. Johnson*, 491 U.S. 397, 414 (1989) (The "bedrock principle underlying the First Amendment . . . is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); *Florey v. Sioux Falls Sch. Dist. 49-5*, 619 F.2d 1311, 1318 (8th Cir. 1980) ("If we are to eliminate everything that is objectionable . . . , we will leave public education in shreds.").

Here, the public interest in disseminating the Survey is exemplified by the actions of the Faculty Plaintiffs. For example, Plaintiff Professor Robin Goodman has already admitted that she had to stop suppressing students' expression in class discussions by eliminating discriminatory language from her syllabus. *See* Ex. 4 ("Plaintiff has also altered her syllabi . . . . [S]he previously included language in her syllabus stating: 'While respectful debate is always encouraged, I will in no way tolerate any sort of alt-right/Neo-nazi/fascist/white nationalist speech.'). Professor Goodman's response reveals that she was, at least in the past, potentially suppressing students' free expression of ideas that she or others may have found to be "uncomfortable, unwelcome, disagreeable, or offensive." But uncomfortable,

offensive speech is unquestionably protected by the First Amendment, and not subject to Professor Goodman's subjective censorship, even if her offense or discomfort is reasonable.

In this case, the only arguable "threatened First Amendment injury," ECF No. 75 at 33, is the impairment of students and employees' right to petition their institutions by Plaintiffs' obstruction efforts. Plaintiffs cannot establish that the equities and the public interest favor a preliminary injunction, to the detriment of the compelling goals that the Survey Provisions seek to achieve.

CONCLUSION

Because Plaintiffs have failed to clear the high thresholds for the extraordinary relief they seek in this facial challenge to the constitutionality of HB 233, Defendants respectfully request this Court to deny Plaintiffs' Emergency Motion for Preliminary Injunction.

Respectfully submitted on March 31, 2022.

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(F)

The undersigned certifies this Response in Opposition to Plaintiffs' Emergency Motion for Preliminary Injunction contains 7,988 words.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 31, 2022, the foregoing was filed with the Court's CM/ECF system which will serve a copy via email on the following co-counsel for Plaintiffs:

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