22-13992

In the United States Court of Appeals for the Eleventh Circuit

LEROY PERNELL ET AL.,

Plaintiffs-Appellees,

v.

BRIAN LAMB ET AL.,

Defendants-Appellants.

On Appeal from the United States District Court for the Northern District of Florida, No. 4:22-CV-304-MW-MAF

SUPPLEMENTAL APPENDIX OF PLAINTIFFS-APPELLEES
VOLUME 2 of 2

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Exhibit 7

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

LEROY PERNELL et al., Plaintiffs, v. FLORIDA BOARD OF GOVERNORS OF THE STATE UNIVERSITY SYSTEM et al., Defendants.	Case No.: 4:22-cv-00304-MW

DECLARATION OF DR. MARVIN DUNN IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

I, Dr. Marvin Dunn, hereby declare and state as follows:

A. Background

1. My name is Dr. Marvin Dunn. I am over 18 years of age. I identify as a Black man.

2. I have personal knowledge of the following facts and if called to testify could and would competently do so.

3. I am a Professor Emeritus of Psychology at Florida International University ("FIU") in Miami, Florida, where I taught psychology for thirty-four (34) years and focused on racial/ethnic minority communities and the societal and economic inequities facing those communities. In 2000, I was appointed chair

of the Psychology Department and remained in the position until I retired in 2006.

4. I was born in DeLand, Florida during Jim Crow and was educated in the Florida public school system. I earned a Bachelor of Arts degree in psychology from Morehouse College in Atlanta, Georgia. I then began my career as a naval officer, serving from 1961 to 1967. While still on active duty I studied at Roosevelt University in Chicago, Illinois, and received a Master's degree in education administration and supervision in 1965. In 1972, I earned a Ph. D in psychology from the University of Tennessee at Knoxville.

5. After receiving my Ph.D., I became an assistant professor of psychology at FIU. In that position, I began the Cultural and Human Interaction Center, which addressed racially motivated violence in the Dade County schools of the early 1970s. In 1981, I founded the Academy for Community Education, to address the needs of youth at risk of becoming school dropouts. I served as the school's principal for fifteen years while continuing my duties at the university.

6. I have authored numerous books on race and ethnic relations including the *The History of Florida: Through Black Eyes*, published by CreateSpace Independent Publishing Platform in 2016, and *Black Miami in the Twentieth Century*, published by the University Press of Florida in 2017, which offers

firsthand accounts of Black life in Miami from the 1900s to the year 2000, including but not limited to, housing and school desegregation, voting rights, and the socioeconomic position of Black people following the repudiation of Jim Crow laws that significantly stymied Black's people socioeconomic development and advancement. In addition, I have co-authored books entitled *This Land is Our Land, Immigrants and Power in Miami* published by University of California Press in 2003 and *The Miami Riot of 1980: Crossing the Bounds* published by D.C. Health in 1984, chronicling the race riots that ensued following the murder of Arthur McDuffie, a Black man, at the hands of white police officers and the eventual acquittal of those officers by an all-white jury despite evidence showing that the officers had murdered Mr. McDuffie. The riots that ensued following the jury verdict is now commonly referred to as the 1980 McDuffie riots.

7. I have also written numerous articles concerning race and race relations, including but not limited to "Shackled to the Past: Slavery Still Haunts Us Today," published by The Miami Herald on April 13, 2018, and "Slavery in Florida: Make the Apology Meaningful," published by The Miami Herald in April 6, 2008.

8. I have also produced three documentaries centered on race including, "Rosewood Uncovered," documenting the Rosewood Massacre of 1923

where a white mob in rural Levy County murdered Black people in a racially motivated mass killing, "Murder on the Suwanee: The Willie James Howard Story," about the lynching of a fifteen year old black child in Live Oak, Florida in 1944, "Black Seminoles in the Bahamas: The Red Bays Story", which documents the flight of slaves from Florida escaping to the Bahama Islands in the 1800s, and "The Black Miami" based upon my book *Black Miami in the Twentieth Century*.

B. **The Black Miami History Bus Tour and the Impact of HB 7**

9. During my tenure at FIU, I started a half-day Black history bus tour after the 1980 McDuffie riots. I started the tour to take students who were predominately non-Black to areas of importance to Black Miami residents and to explain the anguish Black people felt following the acquittals of the responding officers.

10. Despite being retired from FIU, I continue to instruct FIU students and staff on the tour, with the eventual goal of FIU institutionalizing the tour once I am no longer able to participate. From my discussions with FIU, I understand that I will be acting as an employee of FIU in instructing the students and staff in and outside the classroom about this tour. And I understand that FIU is compensating me for this work with an honorarium.

11. Before students and faculty start the tour, I suggest that they read my book *Black Miami* to receive a background on some of the locations we visit on the tour. In *Black Miami*, I discuss incidents of racial violence, the Klu Klux Klan, limited access to justice—for example, up until the 1960s, Black people could not sit on juries, economic exploitation and the impact of discrimination on the Black community. A significant part of my instruction is on institutional racism and how it affected and continues to affect Miami-Dade County. In particular, I discuss the racist origins of the police department—for example, the Miami-Dade County police station had an electric chair in the basement of their station that they would use to interrogate Black suspects to obtain a confession—and how racial motivations continue in policing the Black community today.

12. On April 22, 2022, Governor Ron DeSantis signed H.B. 7 into law. As I understand it, H.B. 7 makes it illegal to teach about the history of systemic and/or institutionalized racism and the long-lasting effects it has had on Black people.

13. H.B. 7 impacts my ability to instruct on institutionalized racism and historical events, even those that I have experienced firsthand. For example, I grew up during segregation when Jim Crow laws were in effect in Florida. I lived through anti-Black violence, being bused to a segregated school, and the

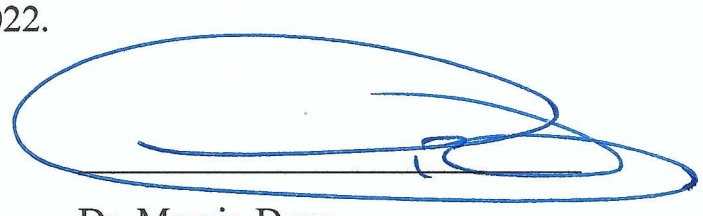
social and economic disadvantages of growing up during a time when Blacks and Whites were separate but "equal." Indeed, despite being an officer in the United States Navy, I was still not welcome in designated "White" areas and intimidated when I appeared in such areas with my co-officers.

14. Telling my story has the potential to make a white person feel sad or "ashamed" of the conduct of other white people. My understanding of H.B. 7 is that it prohibits instruction that would cause students to feel guilt, anguish or other forms of psychological distress because of actions, in which the person played no part, committed in the past by other members of the same race, color, national origin or sex. H.B. 7, therefore, forces me to self-censor when discussing my own experiences that I am sharing to teach students and faculty to be empathetic to the Black experience; not to feel guilty or any form of anguish. What's more, I understand HB 7 to require instructors to be "objective" in their presentation of the facts. However, one cannot be "objective" when discussing one's own lived experience.

15. As a result, I am concerned that a student could file a complaint, or the state of Florida could punish FIU by withholding funding based on me sharing my experiences with participants and the discussions that are likely to arise during the tour.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and accurate.

Executed on August 23, 2022.



Dr. Marvin Dunn

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Exhibit 8

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

LEROY PERNELL, et al., *Plaintiffs*, v. FLORIDA BOARD OF GOVERNORS OF THE STATE UNIVERSITY SYSTEM, et al., *Defendants*.	Case No.: 4:22-cv-304

DECLARATION OF JOHANA DAUPHIN IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

I, Johana Dauphin, hereby declare and state as follows:

A. Background

1. My name is Johana Dauphin. I am 20 years of age.
2. I have personal knowledge of the following facts and if called to testify could and would competently do so.
3. I am from Orlando, Florida and I am currently enrolled as a senior at Florida State University in Tallahassee. I am majoring in International Affairs with a concentration in Urban and Regional Planning.
5. I work with multiple groups on campus to advocate for social and racial justice.

6. I currently serve as the Political Action Chair for FSU's chapter of the NAACP. In this role I work on voter education and registration issues. My goal is to organize a campaign to get as many FSU students as possible to vote.
7. In January of 2022, I became an Organizing Fellow for the People Power for Florida. In this role, I work to fight against voter suppression and educate individuals on voter rights and how to engage in their civic duties.
8. I am a member of the pre-law fraternity Phi Alpha Delta Law Fraternity, and the Events Chair for the Black Female Future Attorneys pre-professional organization. I joined these groups to network with people on the same career path as I am, and to learn more about the legal field and applying to law school. I also hope to use my positions in these organizations to establish mentorship programs with local high school students to help them prepare for college and eventual careers in law and politics.
9. In summer of 2022, I was a Factotum with the Cornell Branch of the Telluride Association Summer Seminar, which works to facilitate college readiness. I worked with seminar professors to prepare and teach Critical Black Studies and Anti-Oppressive Studies workshops for high school

juniors from across the country. I believe that Critical Black studies and Anti-Oppressive Studies help students contextualize their own experiences, and provide them with tools to better understand why racial disparities exist. For example, when students do not know the depths of Black disenfranchisement over the course of history, they may assume that there is a wealth disparity because of some type of cultural deficiency. I believe it is important that we teach students accurate history so that they do not fill in gaps in their knowledge with untrue assumptions.

10. In Spring of 2022 I interned for Representative Anna V. Eskamani at the Florida House of Representatives. I was interested in working at the Capitol because I wanted to learn more about the legislative process and how politicians can influence people's lives. During my internship, I researched and wrote about bills being considered, and kept in touch with constituents.

B. My Experience With House Bill 7 (H.B. 7)

11. I first read the text of H.B. 7 during my internship at the Florida House of Representatives. When I saw that the bill prohibited any instruction that would promote eight concepts, including concepts related to unconscious bias and privilege, it was clear to me that H.B. 7 was an attempt to prevent

certain students from feeling uncomfortable, at the expense of ignoring experiences and perspectives of people like me.

12. I felt compelled to testify against H.B. 7 because I wanted lawmakers to know that H.B. 7 would only make existing issues of racism in schools worse. So, on February 8, 2022, I testified before members of the Florida House of Representatives in opposition to H.B. 7.[1] In my testimony, I emphasized the discomfort I have felt as a Black woman in Florida's public education system, listening to classmates say that Black people are inferior and are responsible for the effects of institutionalized racism. But I strongly believe that free, uncensored discussion about race in public education can help individuals unlearn prejudice and racist behaviors.

13. For example, I took a speech and debate course in high school where students were permitted to openly discuss systemic racism and how it manifests itself in modern society. There was a student who was unequipped to understand how racism operates in society and made several racially ignorant comments, but over time, honest discussions about race in the course educated him, and he learned other viewpoints outside of what he had

[1] *2/8/22 House Education and Employment Committee* at 01:58:26— 1:59:30, The Florida Channel (Feb. 8, 2022), https://thefloridachannel.org/videos/2-8-22-house-education-employment-committee/.

been exposed to previously. H.B. 7 deprives students of those types of experiences in Florida schools.

14. When I found out that there would be testimony before the Senate too, I decided to testify again, because I wanted to provide more detail on the reasons why I oppose H.B. 7. On March 1, 2022, I testified before members of the Florida Senate in opposition to HB 7.[2] In my Senate testimony, I emphasized that H.B. 7 bans precisely the type of education that is needed to address existing racial disparities.

15. When I hear racist remarks in school, I don't automatically assume the people saying them are bad people, or should be blamed for every racist event in history. But I do think that they need to be educated on the history and perspectives of Black people so that they understand where their prejudice may come from, and work to eradicate it. H.B. 7 prevents the type of education helps students understand and confront racism.

16. On April 22, 2022, Governor Ron DeSantis signed H.B. 7 into law. The law sends the message to students and faculty that we should watch what we say when it comes to discussing race and sex in class. I fear my professors will be too afraid to teach comprehensive and accurate lessons on topics that

[2] *3/1/22 Senate Committee on Rules* at 5:27:22—5:29:25, The Florida Channel (Mar. 1, 2022), https://thefloridachannel.org/videos/3-1-22-senate-committee-on-rules/.

have been central to my undergraduate education, like unconscious bias and white privilege.

17. For example, disparities in healthcare were a crucial component to the curriculum in my Race and Biology class. We read studies that showed that, for example, Black and Latina women are stereotyped as having histrionic personalities, so doctors are less likely to take their pain seriously. And we read research showing that maternal mortality rates for Black women are significantly higher than mortality rates for white women who are otherwise similarly situated. We cannot understand these disparities without understanding systemic racism and unconscious bias. If professors feel they cannot advance the concept that some doctors might unconsciously assume that Black women exaggerate pain, then they cannot fully educate students on all the nuances of our healthcare system.

18. For the Fall semester, I am enrolled in a class called Race & Minority Relations. The course covers historical and contemporary race relations in the United States from a sociological perspective. It focuses on how racial and ethnic groups interact with and are affected by social institutions like the mass media, the political economy, the education system, the environment, and the criminal and civil justice system. I wanted to take this course

because I am always looking for more ways to learn about racial justice and take classes that include perspectives of people of color.

19. But because of H.B. 7, I'm worried I will not get the version of this course that students who took it pre-H.B. 7 got, because the instructor cannot advance certain concepts that seem central to this course. For example, one of the "course objectives" listed in the syllabus is: "Identify the ways race/ethnicity is imbedded within the structure of society, and how it materially and symbolically benefits some, while disadvantaging others." How can we fully explore these issues when H.B. 7 bans instruction that advances the concept that a person's status as privileged or oppressed is determined by race? If the professor tries to teach this course without advancing that concept, we will be deprived of relevant information about how race affects people's perceived or actual status in various contexts.

20. I am also enrolled in Religion, Race and Ethnicity for the Fall semester. This course examines the intersection of race and religion, and religious beliefs in a cross-cultural context. I chose to take this course because I am interested in interrogating my own thoughts about religion and my religious upbringing. For example, I have always wondered why I was brought up singing Hymnals in Haitian Creole during the week, but only in French on the Sabbath, as if Creole Hymnals are not respectable enough for the

Sabbath. I am interested in exploring these types of traditions and how they intersect with race and ethnicity.

21. But because of H.B. 7, I fear my professor will not be able to provide all of the information they have in past versions of the course, and might water down the views they express about race. For example, if the professor is worried about facing liability for sharing certain views on colorblindness and unconscious bias, they might be less willing to talk about how religious practices can be discriminatory, or experienced differently depending on a person's race or ethnicity.

22. I plan to enroll in additional courses on race throughout the duration of my studies at Florida State University, because they help me contextualize my own experiences, and I always want to learn from perspectives that have historically been underrepresented. H.B. 7's restrictions will limit my ability to learn about race-related issues in class, and learn to think critically about those issues through honest, uncensored instruction.

23. Because H.B. 7 prohibits the banned concepts from being promoted through any instruction, I can no longer express certain views when I am acting as an "instructor" without violating the law. For example, in a class discussion on race and religion during my first semester at FSU, the topic of responding to being called out for racist comments came up. In my experience, many

people's reaction to being told they said something racist is to work to show that they are a good person. In class, I expressed my opinion that it is unhelpful for people to work on demonstrating that they good person instead of working on unlearning the unconscious prejudices that led them to saying the racist remark. I instructed other students that, in my view, saying that a remark was racist is different than saying a speaker is racist, and it is an indication that there were unconscious prejudices or knowledge gaps at play. That discussion was productive and engaging, but I think it would be illegal under H.B. 7, because it could be seen as subjecting students to instruction that they bear responsibility for and should feel distress about historical racism that led to our generation having unconscious biases.

24. Limitations on the information I can receive and discuss in my college classes affect my future career in addition to my education. My university education should prepare me to apply to law school and embark on a career as a lawyer, but if my professors have to sugar-coat conversations about race, and my professors are scared to engage in honest discussions about race and its relation to the legal system, I will be denied instruction that would have helped me become an effective lawyer.

25. By limiting the information that instructors can teach, H.B. 7 also limits my representation in the curriculum. H.B. 7 will make instructors reluctant to

share certain controversial race-related views when they could avoid doing so, even if doing so would help students develop a fuller understanding of the subject matter at hand and the variety of viewpoints that exist. H.B. 7 empowers instructors to ignore race-related issues in class, or even promote the "virtue" of "colorblindness," which, under H.B. 7, cannot be advanced as racist or as a theory created for oppressive purposes. As I learned in Florida public schools throughout my life, pretending that our society is "color blind" means ignoring Black perspectives.

26. H.B. 7 also minimizes my lived experiences. Proponents of H.B. 7 expressed concerns about *conversations about race* making students uncomfortable, but they were not concerned about *actual racism* making students uncomfortable. The discomfort that I have felt from hearing racist comments from classmates, and sitting through lessons that ignore racism didn't matter at all to these legislators. Instead, they chose to outlaw instruction that they disagree with that might make people who look like them uncomfortable.

D. Exhibits

25. Race and Minority Relations in the U.S. Syllabus

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and accurate.

Executed on _August 19th_____, 2022.

_____

Johana Dauphin

Exhibit A

Race & Minority Relations

The Sociology of Race & Ethnicity

SYD 4700
Spring 2021
Florida State University

Instructor Information

Instructor: Derek Leach, M.S. (he/him/they)
Office Hours: Zoom Office Hours: Fridays 10:00am – 11:00am and by appointment.
Email: dleach@fsu.edu or dl15j@my.fsu.edu

Course Description

The purpose of this course is to provide an introduction to the social construction of race and its real-world consequences in the United States and abroad. The course will focus on how racial and ethnic groups interact with and are affected by social institutions including the mass media, the political economy, the education system, the environment, the institution of medicine, the criminal and civil justice system, and religion. The course material will introduce students to an intersectional critical perspective on privilege, power, representation, recognition, and inequality and how this impacts experiences and understandings of immigration, criminality, sexual politics, environmental pollution, educational achievement, fair housing, health care, and warfare. The class is responsible for answering the following questions:

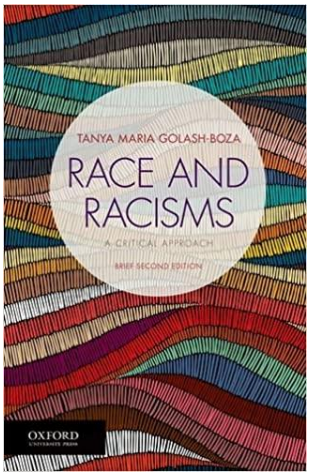
1. How do institutions of power construct marginalized populations along the lines of race?
2. How does this process produce and reproduce new and existing inequalities?
3. How does it impact the way people interact with – or resist and respond to – institutions of power and other people?

Course Objectives

By the conclusion of the course, students will be able to:

1. Think critically about how race/ethnicity shapes their social lives at the individual, group, and institutional levels.
2. Identify the ways race/ethnicity is imbedded within the structure of society, and how it materially and symbolically benefits some, while disadvantaging others.
3. Identify and critically engage with key concepts related to race and ethnicity.
4. Read and critically engage with scholarly research and theory on race and ethnicity.
5. Display effective communication skills in both speech and writing.
6. Use the sociological imagination in pragmatic ways to benefit the world around them.

Required Text



Golash-Boza, Tanya Maria. 2019. *Race and Racisms: A Critical Approach*. Brief Second Edition. New York: Oxford University Press. ISBN: 978-0-19-088943-2

Student Responsibilities

First Day Attendance/Syllabus Agreement

Students will be required to complete a syllabus agreement designed for first day attendance which is mandatory for those wanting to maintain enrollment in the course. The syllabus agreement will be worth 5 points and will open on January 6 at 8am and close that same evening at 11:59pm. Those who do not complete the syllabus agreement will be dropped from the course.

Written Quizzes

Students will have to complete seven written quizzes throughout the course. The written quizzes are open book and will consist of a question that the instructor will ask at the beginning of each week. The answer to the question must be at least 500 words and include references to the course material. Each written quiz will be worth 20 points each. For each week a written quiz is due, it will open up that Monday at 8:00am. It must be submitted via Turnitin by that following Wednesday at 11:59pm.

Discussion Boards

Students will have to complete four discussion boards throughout the course. Each student will be required to write a response to a documentary film and replies to two of their peers. The response to the film must be at least 300 words and include references to the course material. The replies must be 150 words each. The word count must be included at the end of both the response and the replies. The response will be worth 10 points, the two replies will be worth 3.5 points each, and the word count will be worth 3 points, for a total of 20 points. For each week a discussion board is due, it will open up that Monday at 8:00am, and close the following Wednesday at 11:59pm.

Discussion Board 1 is due Wednesday, January 27 at 11:59pm.
Discussion Board 2 is due Wednesday, February 17 at 11:59pm.

Discussion Board 3 is due Wednesday, March 10 at 11:59pm.
Discussion Board 4 is due Wednesday, March 24 at 11:59pm.

Midterm Essay Exam

Students will be required to take one midterm essay exam, which consists of four clusters of questions. It is open book and will require the students to draw on course material (i.e. the textbook, scholarly articles, and film) to answer the questions. Each question will be worth 20 points, for a total of 80 points. Students will have a total of 7 days to answer the questions and complete the exam. The essay exam will open on Monday, February 8 at 8:00am and will need to be submitted via Turnitin, no later than Sunday, February 14, at 11:59pm.

Final Zine Project

A zine is a "self-published, small circulation, non-commercial booklet or brochure" (Underground Press-Zine 101). For the final assignment, students must compile a zine in which they will apply theory to a topic of choice within a social institution (Week 7 – Week 14). The topic can be a social problem, a current or historical event, something pertaining to media or a form of media, or a personal experience. Students must submit a paragraph description of their topic no later than Thursday, January 21 at 11:59pm for 50 points. You will be expected to submit a hard copy of your finalized zine via Turnitin on Wednesday, April 14 at 11:59pm for 150 points.

Grading Scales

Assignment	Points
Final Zine	150
Written Quizzes	140
Midterm Essay Exam	80
Discussion Boards	80
Zine Declaration of Topic	50
First-Day Attendance	5
Total:	505

To convert your final score to a letter grade, divide your final score by 505, multiply it by 100 to get a percentage, and then use the following scale:

A 93-100	A- 90-92.99	B+ 87-89.99	B 83-86.99	B- 80-82.99
C+ 77-79.99	C 73-76.99	C- 70-72.99	D+ 67-69.99	
D 63-66.99	D- 60-62.99	F below 60		

Late Assignment Policy

Missed quizzes and essays will be excused with a valid reason. Valid reasons include documented illnesses, deaths in the immediate family and other documented crises, call to active military duty (I will extend this to spouses of service members) or jury duty, religious holidays,

official University activities, reasons having to do with work and employment, and legal troubles. Accommodations for these excused absences will be made in a way that does not penalize students who have a valid reason. Consideration will also be given to students whose dependent children experience serious illness.

Academic Honor Policy

The Florida State University Academic Honor Policy outlines the University's expectations for the integrity of students' academic work, the procedures for resolving alleged violations of those expectations, and the rights and responsibilities of students and faculty members throughout the process. Students are responsible for reading the Academic Honor Policy and for living up to their pledge to ". . . be honest and truthful and . . . [to] strive for personal and institutional integrity at Florida State University." (Florida State University Academic Honor Policy, found at http://fda.fsu.edu/Academics/Academic-Honor-Policy.)

Academic Success

Your academic success is a top priority for Florida State University. University resources to help you succeed include tutoring centers, computer labs, counseling and health services, and services for designated groups, such as veterans and students with disabilities. The following information is not exhaustive, so please check with your advisor or the Dean of Students office to learn more.

Americans with Disabilities Act

Students with disabilities needing academic accommodation should: (1) register with and provide documentation to the Office of Accessibility Services; and (2) request a letter from the Office of Accessibility Services to be sent to the instructor indicating the need for accommodation and what type; and (3) meet (in person, via phone, email, skype, zoom, etc...) with each instructor to whom a letter of accommodation was sent to review approved accommodations. This syllabus and other class materials are available in alternative format upon request. For the latest version of this statement and more information about services available to FSU students with disabilities, contact the:

Office of Accessibility Services
874 Traditions Way
108 Student Services Building
Florida State University Tallahassee, FL 32306-4167
(850) 644-9566 (voice)
(850) 644-8504 (TDD)
oas@fsu.edu
https://dsst.fsu.edu/oas

Confidential campus resources
Various centers and programs are available to assist students with navigating stressors that might impact academic success. These include the following:

Victim Advocate Program University Center A, Room 4100, (850) 644-7161, Available 24/7/365, Office Hours: M-F 8-5 https://dsst.fsu.edu/vap	University Counseling Center, Askew Student Life Center, 2ndFloor, 942 Learning Way (850) 644-8255 https://counseling.fsu.edu/	University Health Services Health and Wellness Center, (850) 644-6230 https://uhs.fsu.edu/

Free Tutoring at Florida State University
On-campus tutoring and writing assistance is available for many courses at Florida State University. For more information, visit the Academic Center for Excellence (ACE) Tutoring Services' comprehensive list of on-campus tutoring options - see http://ace.fsu.edu/tutoring or contact tutor@fsu.edu. High-quality tutoring is available by appointment and on a walk-in basis. These services are offered by tutors trained to encourage the highest level of individual academic success while upholding personal academic integrity.

Title IX
Since FSU receives federal funds for educational activities, this institution is required by the 1972 Title IX Education Amendments to ensure that all educational programs are free from discriminatory behavior on the basis of sex. Sexual discrimination includes any form of sexual misconduct including:
1. Sexual violence
2. Stalking
3. Intimate Partner Violence (IPV)
4. Animosity or stereotyping based on gender.

If there are any other questions about Title IX, or on how to file a complaint, feel free to visit FSU's Title IX website at https://knowmore.fsu.edu/title-ix/title-ix-signed-statement/. You could also call:

Tricia Buchholz
Title IX Director
(850) 645-2741
tbuchholz@fsu.edu

For additional information with regards to the confidential, on-campus, Victim Advocate Program, please visit the website at https://dos.fsu.edu/yap/.

Syllabus Change Policy
Except for changes that substantially affect implementation of the evaluation (grading) statement, this syllabus is a guide for the course and is subject to change with advance notice.

Course Schedule

Date	Topic	Reading	Assignments
Week 1 (January 6 – January 8)	Course Introduction and Syllabus Review: Critical Theory, and Social Justice	"The Combahee River Collective Statement"	Syllabus Agreement due Wednesday, January 6 at 11:59pm.
Week 2 (January 11 – January 15)	What is Race: Racial Formation as a Historical Process	Golash-Boza, Tanya Maria. 2019. "The Origin of the Idea of Race." Pp. 1–31 in *Race and Racisms: A Critical Approach.* Brief Second Edition. New York: Oxford University Press.	Written Quiz 1 due Wednesday, January 13 at 11:59pm
Week 3 (January 18 – January 22)	Theories of Race	Golash-Boza, Tanya Maria. 2019. "Racial Ideologies and Sociological Theories of Racism." Pp. 32–63 in *Race and Racisms: A Critical Approach.* Brief Second Edition. New York: Oxford University Press. Dubois, W.E.B. [1903]. "Of Our Spiritual Strivings." Pp. 7–14 in *The Souls of Black Folk.* Oxford World Classics Edition, 2007. New York: Oxford University Press.	Written Quiz 2 due Wednesday, January 20, at 11:59pm. Paragraph description declaring the topic for the zine is due Thursday, January 21, at 11:59pm.
Week 4 (January 25 – January 29)	Policing the Margins: Imperialism and Immigration	Golash-Boza, Tanya Maria. 2019. "Racism and Nativism in Immigration Policy." Pp. 64–102 in *Race and Racisms: A Critical Approach.* Brief Second Edition. New York: Oxford University Press. Agustín, Laura María. 2007. "The Rise of the Social – and of 'Prostitution'." Pp. 96–133 in	Discussion Board 1 due Wednesday, January 27 at 11:59pm

		Sex at the Margins: Migration, Labour Markets and the Rescue Industry. Zed Books First Edition. New York: Zed Books.	
Week 5 (February 1 – February 5)	Colorism and the Latin-Americanization of Race	Golash-Boza, Tanya Maria. 2019. "Colorism and Skin-Color Stratification." Pp. 130–154 in *Race and Racisms: A Critical Approach.* Brief Second Edition. New York: Oxford University Press. Bonilla-Silva, Eduardo. 2002. "We are all Americans!: the Latin Americanization of racial stratification in the USA." *Race & Society* 5: 3–16.	Written Quiz 3 due Wednesday, February 3 at 11:59pm.
Week 6 (February 8 – February 12) **Midterms will be due this week.**			The Midterm Essay Exam will open Monday, February 8, at 8:00am and must be submitted via Turn-It-In no later than Sunday, February 14 at 11:59pm.
Week 7 (February 15 – February 19)	Social Institutions and Race: Controlling Images within the U.S. Media	Golash-Boza, Tanya Maria. 2019. "Racism in the Media: The Spread of Ideology." Pp. 103–129 in *Race and Racisms: A Critical Approach.* Brief Second Edition. New York: Oxford University Press. Collins, Patricia Hill. 2002. "Mammies, Matriarchs, and Other Controlling Images." Pp. 69–96 in *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment*. Second Edition. New York: Routledge.	Discussion Board 2 due Wednesday, February 17 at 11:59pm.

		*********Optional********* Shaheen, Jack G. 2003. "Reel Bad Arabs: How Hollywood Vilifies a People." *The Annals of the American Academy of Political and Social Science* 588(Islam: Enduring Myths and Changing Realities): 171–193. **********	
Week 8 (February 22 – February 26)	Social Institutions and Race: Economic Inequality: The Labor Market and Redlining	Golash-Boza, Tanya Maria. 2019. "Income and Labor Market Inequality." Pp. 182–210 in *Race and Racisms: A Critical Approach.* Brief Second Edition. New York: Oxford University Press. Wingfield, Adia Harvey. 2010. "Are Some Emotions Marked "Whites Only"? Racialized Feeling Rules in Professional Workplaces." *Social Problems* 57(2): 251–268. *********Optional********* Desmond, Matthew. 2012. "Eviction and the Reproduction of Urban Poverty." *American Journal of Sociology* 118(1): 88–133. **********	Written Quiz 4 due Wednesday, February 24 at 11:59pm.
Week 9 (March 1 – March 5)	Social Institutions and Race: Educational Inequality and Segregation	Golash-Boza, Tanya Maria. 2019. "Educational Inequality." Pp. 155–181 in *Race and Racisms: A Critical Approach.* Brief Second Edition. New York: Oxford University Press. Wilkins, Amy. 2012. "'Not Out to Start a Revolution': Race, Gender, and Emotional Restraint among Black University Men." *Journal of Contemporary Ethnography* 41(1): 34–65.	Written Quiz 5 due Wednesday, March 3 at 11:59pm.

		*********Optional********* Holland, Megan M. "Only Here for the Day: The Social Integration of Minority Students at a Majority White High School." *Sociology of Education* 85(2): 101–120. **********	
Week 10 (March 8 – March 12)	Social Institutions and Race: Sexual Politics and the Family	hooks, bell. 1990. "Reflections on Race and Sex." Pp. 57–64 in *Yearning: race, gender, and cultural politics.* Massachusetts: South End Press. Collins, Patricia Hill. 2005. "The Past is Ever Present: Recognizing the New Racism." Pp. 53 – 85 in *Black Sexual Politics: African Americans, Gender, and the New Racism*. New York: Routledge.	Discussion Board 3 is Due Wednesday, March 10 at 11:59pm
Week 11 (March 15 – March 19)	Social Institutions and Race: Environmental Racism and the Institution of Medicine	Golash-Boza, Tanya Maria. 2019. "Health Inequalities, Environmental Racism, and Environmental Justice." Pp. 267–296 in *Race and Racisms: A Critical Approach.* Brief Second Edition. New York: Oxford University Press. Feagin, Joe and Zinobia Bennefield. 2014. "Systemic racism and U.S. health care." *Social Science & Medicine* 103: 7–14. *********Optional********* Bullard, Robert D. 1993. "Chapter 1: Anatomy of Environmental Racism and the Environmental Justice Movement." Pp. 15–39 in *Confronting Environmental Racism: Voices from the Grassroots*, edited by R.	Written Quiz 6 is due Wednesday, March 17 at 11:59pm.

		Bullard. Massachusetts: South End Press. **********	
Week 12 (March 22 – March 26)	Social Institutions and Race: The Criminal Justice System and the New Jim Crow	Golash-Boza, Tanya Maria. 2019. "Racism and the Criminal Justice System." Pp. 235–266 in *Race and Racisms: A Critical Approach.* Brief Second Edition. New York: Oxford University Press. Alexander, Michelle. 2010. "The New Jim Crow." Pp. 173–208 in *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. New York: The New Press. *********Optional********* Pettit, Becky, and Bruce Western. 2004. "Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration." *American Sociological Review* 69: 151–169. **********	Discussion Board 4 is due Wednesday, March 24 at 11:59pm.
Week 13 (March 29 – April 2)	Social Institutions and Race: Racialization of Religion and the War on Terror	Selod, Saher. 2019. "Gendered racialization: Muslim American men and women's encounters with racialized surveillance." *Ethnic and Racial Studies* 42(4): 552–569. Kurzman, Charles, Ahsan Kamal, and Hajar Yazdiha. 2017. "Ideology and Threat Assessment: Law Enforcement Evaluation of Muslim and Right-Wing Extremism." *Socius* 3: 1–13.	Written Quiz 7 is due Wednesday, March 31 at 11:59 pm.
Week 14 (April 5 – April 9)			Nothing scheduled for this week.

Finals Week (April 12 – April 16)			Final Zine Project due Wednesday, April 14 at 11:59pm.

13-9

Exhibit 9

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

LEROY PERNELL, et al., *Plaintiffs*, v. FLORIDA BOARD OF GOVERNORS OF THE STATE UNIVERSITY SYSTEM, et al., *Defendants*.	Case No.: 4:22-cv-304

DECLARATION OF DR. DANIEL A. SMITH IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

I, Dr. Daniel A. Smith, hereby declare and state as follows:

A. Background

1. My name is Daniel A. Smith. I am over 18 years of age.
2. I have personal knowledge of the following facts and if called to testify could and would competently do so.
3. I am Professor and Chair of the Department of Political Science, at the University of Florida ("UF"). I have spent nearly 20 years teaching within this Department and taught for nine years prior to coming to UF. In addition to this work, I am also President of ElectionSmith, which specializes in empirical research on voting and election administration in the American states.

4. I received my doctorate in Political Science from the University of Wisconsin-Madison in 1994, and B.A.s in Political Science and History from Penn State University in 1988.

5. For nearly 30 years, I have conducted research on electoral politics in the American states, focusing on the effect of political institutions on political behavior. I have testified before the U.S. Senate and state legislatures, on voting and election issues, and have served as an expert in election-related litigation in several states, including in Florida and before this court.

B. Political Science Department at UF

6. As Department Chair, I am responsible for overseeing departmental curricula for undergraduate and graduate students, liaising with faculty and staff to ensure that we fulfill the Department's mission to provide a supportive, high quality educational environment, and managing the hiring of new faculty and staff.

7. In the Spring of 2018, following the announcement of UF's "Faculty 500 Teacher/Scholar Initiative," our Department developed a new strategic hiring plan committed to recruiting a cluster of faculty who could teach courses focused on the intersection of race, ethnicity, gender, and categories of identity across subfields in the discipline of Political Science. With backing and resources from the Dean of the College of Liberal Arts and Sciences, our

Department prioritized hiring scholars broadly engaged in field-bridging research and pedagogy, adding to our Department's tradition of intellectual diversity and pluralism and to better reflect the interests of our diverse undergraduate and graduate student populations.

8. As a result of our cluster hiring, our Department now offers new courses to our students, including "Race, Law and the Constitution," "Race, Gender and Politics," "Feminist Political Thought," "Gender & Politics," and "Citizenship and Migration." These and other courses taught by our "Faculty 500" colleagues have not only received excellent reviews from UF students from diverse backgrounds, but are also regularly fully enrolled.

C. HB 7's Impact on the Political Science Department at UF

9. It is my understanding that Governor Ron DeSantis signed House Bill 7 ("H.B. 7") into law sometime in April 2022. Based on reading news articles and conversations with colleagues, I understand that H.B. 7 places limits on classroom instruction for public institutions in Florida. Specifically, H.B. 7 includes a list of "prohibited concepts" that cannot be used in instruction unless they are offered "objectively" and "without endorsement."

10. Within weeks after H.B. 7 became law, the same faculty whom our Department recently hired to teach courses on race, ethnicity, gender, and identity began contacting me seeking guidance on how to conform their

coursework for the fall 2022 semester to H.B. 7. These faculty primarily come from diverse backgrounds and are primarily untenured.

11. I have had one-one-conversations with several of these junior faculty members about whether they need to change their course material or syllabi before the next semester begins; whether they will face legal liability if they continue to teach their courses as they had before H.B.7; and their concerns for their livelihoods. Several members of our junior faculty are deeply concerned that H.B. 7 negatively impacts their ability to teach.

12. Even as Department Chair, there are limits to the protections that I can offer other faculty members, particularly those without tenure. I worry that some of the faculty that we specifically hired to teach about race, ethnicity, gender, and identity will be inhibited from teaching what they were expressly hired to teach as a result of H.B. 7's restrictions on these very topics, making professional achievement and advancement at UF difficult.

13. I am also very concerned about the possibility instructors in our Department may have to modify how they teach – not because their planned coursework is no longer pedagogically sound – but solely because of H.B. 7's restrictions on speech. This is antithetical to the Department's mission, and to the pursuit of political science, which seeks to fairly and critically examine the relationships between governance, power, and the public.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and accurate.

Executed on August 19, 2022.

Dr. Daniel A. Smith

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

LEROY PERNELL, et al., *Plaintiffs*, v. FLORIDA BOARD OF GOVERNORS OF THE STATE UNIVERSITY SYSTEM, et al., *Defendants*.	Case No. 4:22-cv-304-MW-MAF

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

Charles J. Cooper (Bar No. 248070DC)
John D. Ohlendorf (*Pro Hac Vice*)
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Counsel for Defendants Florida Board of Governors of the State University System, et al.

September 22, 2022

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INTRODUCTION

Article III grants federal courts the power to "decide only matters 'of a Judiciary Nature,'" not to "issue advisory opinions." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 430 (Max Farrand ed., 1911)). Accordingly, a plaintiff can call upon the federal courts to adjudicate grievances against a state law only if the plaintiff demonstrates that the law in fact causes some concrete injury, that the injury is actually traceable to the challenged provisions of the law, and that a judgment striking down the law would redress that injury. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

Plaintiffs' claims fall short of Article III's requirements in multiple respects. First, no Plaintiff has standing to sue the Florida Board of Governors, its members, or the Commissioner of the State Board of Education, because those officials and entities have no role in enforcing the Act against individual professors (or students) like Plaintiffs. Any injury plaintiffs have suffered is thus not traceable to these defendants, and they must be dismissed from the case. Second, Plaintiff Dunn lacks standing to bring any claim, because he has not adequately alleged any injury arguably caused by the Act. Third, even those Plaintiffs who *are* plausibly injured by some provision of the Act have not alleged any injury from *all* of its provisions—and so Plaintiffs' challenge to the first, third, fifth, sixth, and seventh concepts

enumerated by the Act must be dismissed, since no Plaintiff has credibly alleged or averred that they wish to engage in any instruction genuinely contrary to them. Accordingly, Plaintiffs' claims must be dismissed in part under FED. R. CIV. P. 12(b)(1) for lack of jurisdiction.

Plaintiffs' Complaint also must be dismissed in its entirety on the merits under FED. R. CIV. P. 12(b)(6). With respect to the first three Counts in the Complaint, dismissal is required for the reasons articulated in our response to Plaintiffs' Preliminary Injunction Motion, which is filed contemporaneously herewith.

With respect to Count Four—the Equal Protection claim—dismissal is appropriate because the Complaint alleges no concrete facts sufficient to meet the legal elements of an actionable Equal Protection claim. Because the Act draws no race-based lines on its face, Plaintiffs can state an Equal Protection race-discrimination claim only by adequately alleging both that the Act, which is race-neutral on its face, has a disparate impact on African-Americans *and* that it was enacted with a racially-discriminatory motive. Yes, the Complaint includes conclusory and threadbare legal assertions that these elements are met; but it does not articulate concrete factual allegations sufficient to nudge Plaintiffs' claim of race discrimination over the line from the conceivable to the plausible. Plaintiffs' allegations of disparate impact collapse upon scrutiny. They have no direct evidence whatsoever that Florida's lawmakers enacted the Act because of an invidious race-

based motive. And while the indirect evidence they present may tell us a great deal about racism in Florida in the 1950s and '60s, and may suggest that the purpose of the Act was (as is obvious from its face) to prevent Florida-employed teachers from *advocating and endorsing certain concepts* related to race relations in America, that circumstantial evidence provides *not even a hint* that the Act was intended to discriminate against African-Americans because of their race. To the contrary, the *whole point* of the Act was to keep Florida's tax dollars from funding the inculcation of ideas *that are contrary* to the Equal Protection Clause's bedrock principle: "the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (cleaned up).

BACKGROUND

I. Florida's Elected Officials Enact the Individual Freedom Act.

Earlier this year, pursuant to its authority to "establish education policy, enact education laws, and appropriate and allocate education resources," FLA. STAT. § 1000.03(2)(a), the Florida Legislature passed the Individual Freedom Act ("the Act"). *See* 2022 Fla. Laws 72. Governor DeSantis approved the Act on April 22, and it took effect on July 1. *See* 2022 Fla. Laws 72, § 8.

As relevant here, the Act amended the Education Code to enumerate actions that constitute "discrimination on the basis of race, color, national origin, [or] sex"

and are thus prohibited under Section 1000.05(2). *Id.* § 2. Specifically, the Act prohibits "subject[ing] any student or employee to training or instruction that espouses, promotes, advances, inculcates, or compels such student or employee to believe any of the following concepts:"

1. Members of one race, color, national origin, or sex are morally superior to members of another race, color, national origin, or sex.

2. A person, by virtue of his or her race, color, national origin, or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously.

3. A person's moral character or status as either privileged or oppressed is necessarily determined by his or her race, color, national origin, or sex.

4. Members of one race, color, national origin, or sex cannot and should not attempt to treat others without respect to race, color, national origin, or sex.

5. A person, by virtue of his or her race, color, national origin, or sex, bears responsibility for, or should be discriminated against or receive adverse treatment because of, actions committed in the past by other members of the same race, color, national origin, or sex.

6. A person, by virtue of his or her race, color, national origin, or sex, should be discriminated against or receive adverse treatment to achieve diversity, equity, or inclusion.

7. A person, by virtue of his or her race, color, sex, or national origin, bears personal responsibility for and must feel guilt, anguish, or other forms of psychological distress because of actions, in which the person played no part, committed in the past by other members of the same race, color, national origin, or sex.

8. Such virtues as merit, excellence, hard work, fairness, neutrality, objectivity, and racial colorblindness are racist or sexist, or were

> created by members of a particular race, color, national origin, or sex to oppress members of another race, color, national origin, or sex.

FLA. STAT. § 1000.05(4)(a)(1)–(8) (as amended by the Act).

The Act, however, draws a sharp distinction between *indoctrination* and *discussion*: it prohibits all persons from subjecting a student or employee to believe these concepts, but at the same time makes clear that it does not "prohibit discussion of the concepts . . . as part of a larger course of training or instruction, provided such training or instruction is given in an objective manner without endorsement of the concepts." FLA. STAT. § 1000.05(4)(b).

The Florida Board of Governors is vested with the authority to "adopt regulations to implement [§ 1000.05] as it relates to state universities." FLA. STAT. § 1000.05(6)(b). Pursuant to that authority, the Board recently finalized Regulation 10.005 to implement the Act. *See 10.005*, *Prohibition of Discrimination in University Training or Instruction*, BD. OF GOVERNORS, STATE UNIV. SYS. OF FLA. (Aug. 26, 2022), *available at* https://bit.ly/3xqDCX8 ("Regulation 10.005"). Under the Regulation, the Board takes enforcement action only against a university that "willfully and knowingly failed to correct a violation of the university regulation." Regulation 10.005(4)(a).

II. Plaintiffs Challenge the Act Under the First Amendment and Due Process Clause.

Plaintiffs are six current professors at Florida universities, one professor emeritus who hosts a university-sponsored bus tour, and one university student. Together, they argue that the Act violates their rights under the First Amendment and under the Fourteenth Amendment's Due Process and Equal Protection Clauses.

The Plaintiffs are affiliated with different Florida universities. Leroy Pernell is a Professor of Law at Florida A&M University College of Law. Dana Thompson Dorsey is an Associate Professor with tenure at the University of South Florida. Sharon Austin is a Professor of Political Science with tenure at the University of Florida. Shelley Park is a Professor and Jennifer Sandoval is an Associate Professor, both at the University of Central Florida. Marvin Dunn is a Professor Emeritus at Florida International University, where he hosts a university-sponsored bus tour. Russell Almond is an Associate Professor at Florida State University, where Johana Dauphin is a student.

Defendants now move to dismiss Plaintiffs' claims in their entirety or, alternatively, in part, under FED. R. CIV. P. 12(b)(1) and FED. R. CIV. P. 12(b)(6).

STANDARD OF REVIEW

Regulation 12 provides that a claim may be dismissed for either "lack of subject matter jurisdiction" or "failure to state a claim upon which relief can be granted." *Id.* Under Regulation 12(b)(1), "[t]he burden for establishing federal

subject matter jurisdiction rests with the party bringing the claim." *Williams v. Poarch Band of Creek Indians*, 839 F.3d 1312, 1314 (11th Cir. 2016). The plaintiff "must clearly and specifically set forth facts to satisfy" the injury-in-fact requirement. *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 924–25 (11th Cir. 2020) (cleaned up).

"Under Rule 12(b)(6), a court should dismiss [a claim] … when the plaintiff's factual allegations, if true, don't allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ziyadat v. Diamondrock Hosp. Co.*, 3 F.4th 1291, 1295 (11th Cir. 2021) (cleaned up). The court must "view the complaint in the light most favorable to the plaintiff and accept all of the plaintiff's well-pleaded facts as true," but it cannot credit "mere conclusory statements," *id*. at 1295–96, and a plaintiff's allegations must be supported with enough detail to "nudge[ ] their claims across the line from conceivable to plausible," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

ARGUMENT

I. No Plaintiff Has Standing To Sue Any Defendant Board of Trustees Other Than That of the Plaintiff's Home Institution.

Each Plaintiff is affiliated with only one university in the Florida University System. It obviously follows that no Plaintiff can allege an injury-in-fact that is traceable to and redressable by the Board of Trustees for any university with which that Plaintiff is *not* affiliated. For example, Plaintiff Leroy Pernell, who is a Professor

of Law at Florida A&M University College of Law, has not (and cannot) allege an injury-in-fact that would be traceable to and redressable by the Defendant Boards of Trustees of the University of Florida, the University of South Florida, or any of the other university defendants. Accordingly, in the event that the Court finds that any individual Plaintiff lacks standing in this case, the Defendant Board of Trustees for that Plaintiff's university should also be dismissed.

II. Plaintiff Dunn Lacks Standing on All Claims Because the Act Does Not Apply to His Bus Tour.

Plaintiff Dunn has also failed to allege standing because the bus tour that he leads is not a "training or instruction" covered by the Act.

Dunn is a Professor Emeritus at Florida International University who leads a "Black history bus tour of Miami," funded by FIU. Pls.' Compl. ("Compl."), Doc. 1, ¶ 28 (Aug. 18, 2022). Dunn alleges that "he fears that the discussions about his past experiences of discrimination with white colleagues" while on his bus tour will violate the Act, and that his bus tour will violate the Act's requirement "that instructors be 'objective' when discussing certain topics related to race." *Id*. at ¶ 30. In fact, Dunn's bus tour is not governed by the Act at all and does not restrict his actions while conducting the tour.

The Act defines discrimination to include "training or instruction" that espouses one of eight prohibited concepts. FLA. STAT. § 1000.05(4)(a)(1)–(8). And Regulation 10.005, which enforces the Act, defines "instruction" as "the process of

teaching or engaging students with content about a particular subject by a university employee or a person authorized to provide instruction by the university *within a course*." Regulation 10.005(1)(c) (emphasis added). Dunn's bus tour does not occur within any course offered by Florida International University, so it cannot qualify as "instruction" under the Act. Regulation 10.005 defines "training" as "a planned and organized activity conducted by the university *as a mandatory condition of employment, enrollment, or participation in a university program*," and Dunn's bus tour does not fall within that definition either. Regulation 10.005(1)(b) (emphasis added). Dunn's bus tour is voluntary and is not a condition of any student's participation or enrollment in any university program. Accordingly, Dunn should be dismissed as a plaintiff in this case.[1]

III. No Plaintiff Has Standing to Assert an Injury to *Other* Professors, Students, or Universities.

These Plaintiffs cannot rescue their standing by pointing to the alleged injuries suffered by *other* individuals or entities. Several of Plaintiffs, including Plaintiffs Austin, Almond, and Dunn, speak extensively about alleged harms to professors, students, or universities who are not parties in this case. *See, e.g.*, Decl. of Sharon Austin in Supp. of Pls.' Mot. for a Prelim. Inj. ("Austin Decl."), Doc. 13-3, ¶¶ 45–

[1] Consequently, the Board of Trustees of FIU must also be dismissed as a defendant because no other Plaintiff has alleged an injury-in-fact that is traceable to and redressable by the FIU Board of Trustees.

57 (Aug. 24, 2022) (describing alleged harms to internal funding, professor recruitment and retention, student access to information, student respect for instructors, minority student recruitment and retention, retaliation against other professors, tenure decisions, outside funding for race studies research, and alleged "chill" of campus discussions); Decl. of Dr. Russel G. Almond in Supp. of Pls.' Mot. for a Prelim. Inj. ("Almond Decl."), Doc. 13-6, ¶¶ 34–35 (Aug. 24, 2022) (asserting potential harm of university funding loss and concern "about how my graduate-level students will perform in their fields after graduation"); Decl. of Dr. Marvin Dunn in Supp. of Pls.' Mot. for a Prelim. Inj. ("Dunn Decl."), Doc. 13-7, ¶ 15 (Aug. 24, 2022) (expressing fear over loss of university funding); *see also* Decl. of Leroy Pernell in Supp. of Pls.' Mot. for a Prelim. Inj. ("Pernell Decl."), Doc. 13-1, ¶¶ 27, 29 (Aug. 24, 2022); Decl. of Dana Thompson Dorsey in Supp. of Pls.' Mot. for a Prelim. Inj. ("Dorsey Decl."), Doc. 13-2, ¶¶ 38–39, 46, 50, 52–57 (Aug. 24, 2022); Decl. of Shelley Park in Supp. of Pls.' Mot. for a Prelim. Inj. ("Park Decl."), Doc. 13-4, ¶¶ 32–33, 35–36 (Aug. 24, 2022); and Decl. of Jennifer Sandoval in Supp. of Pls.' Mot. for a Prelim. Inj. ("Sandoval Decl."), Doc. 13-5, ¶ 28 (Aug. 24, 2022).

These assertions of third-party harms cannot form the basis of an injury-in-fact for any Plaintiff. An injury-in-fact is "a harm *suffered by the plaintiff* that is 'concrete' and 'actual or imminent, not 'conjectural' or 'hypothetical.'" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998) (emphasis added). "In an

ordinary case, a plaintiff is denied standing to assert the rights of third parties." *Young Apartments, Inc. v. Town of Jupiter, Fla.*, 529 F.3d 1027, 1041 (11th Cir. 2008). Plaintiffs do not, and could not, allege that they may assert third-party standing to raise these alleged harms on behalf of other professors, students, and universities.

IV. Plaintiff Dauphin Lacks Standing To Challenge the Act as an Instructor.

Plaintiff Johana Dauphin is a student at Florida State University, and as such, she lacks standing to challenge the Act as an instructor. In her declaration, Dauphin alleges that the Act restricts her classroom speech because she says she "can no longer express certain views when [she is] acting as an 'instructor,'" by, for example, "express[ing] [her] opinion that it is unhelpful for people to work on demonstrating that they [are a] good person instead of working on unlearning the unconscious prejudices that led them to saying the racist remark." Decl. of Johana Dauphin in Supp. of Pls.' Mot. for a Prelim. Inj. ("Dauphin Decl."), Doc. 13-8, ¶ 23 (Aug. 24, 2022).

Student participation in classroom discussions is not covered by the Act. The Act defines discrimination to include "training or instruction" that espouses one of eight prohibited concepts. FLA. STAT. § 1000.05(4)(a)(1)–(8). As defined by the Board of Governor's Regulation 10.005, "instruction" is "the process of teaching or engaging students with content about a particular subject *by a university employee*

or a person authorized to provide instruction by the university within a course." Regulation 10.005(1)(c) (emphasis added). Dauphin is neither a university employee nor a person authorized to provide instruction to other students. Accordingly, Dauphin should be dismissed as to claims (1), (3), and (4) of the Complaint.

V. Plaintiffs Lack Standing To Challenge the First, Third, Fifth, Sixth, and Seventh Concepts.

Even those Plaintiffs who do have standing to challenge certain provisions of the Act do not have standing to challenge the Act as an undifferentiated, unified whole. "Standing is not dispensed in gross. Rather, a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Davis v. FEC*, 554 U.S. 724, 734 (2008) (cleaned up) (citation omitted). Accordingly, Plaintiffs cannot leverage an alleged injury under *one* of the Act's eight concepts into a challenge against—and entitlement to a preliminary injunction barring the enforcement of—*other* prohibited concepts that they have alleged no intention of espousing, not to mention the Act as a whole. And for several provisions of the Act, no Plaintiff alleges any injury.

No Plaintiff states an intention to teach that "[m]embers of one race, color, national origin, or sex are morally superior to members of another race, color, national origin, or sex," FLA. STAT. § 1000.05(4)(a)(1), or that "[a] person, by virtue of his or her race … bears responsibility for, or should be discriminated against or receive adverse treatment because of, actions committed in the past by other

members of the same race," FLA. STAT. § 1000.05(4)(a)(5). Nor does any Plaintiff clearly state an intention to teach that "[a] person's moral character or status as either privileged or oppressed is necessarily determined by his or her race, color, national origin, or sex." FLA. STAT. § 1000.05(4)(a)(3). Plaintiff Sandoval is the only Plaintiff to discuss this principle, but she merely states her belief that no "professor could teach a course on critical race theory without advancing" that principle. Sandoval Decl. ¶ 21. She does not meaningfully explain why. And in any event, Sandoval herself *does not teach* critical race theory—and as explained above, she cannot claim standing to defend the interests of the unspecified professors who do. *See supra*, Part III.

No Plaintiff challenges the Act's sixth principle either, which states that "[a] person, by virtue of his or her race, color, national origin, or sex, should be discriminated against or receive adverse treatment to achieve diversity, equity, or inclusion." FLA. STAT. § 1000.05(4)(a)(6). Plaintiff Almond purports to do so, but he claims only that he cannot instruct his statistics students about the need to have a "diverse body of reviewers" review assessments, Almond Decl. ¶ 26, and that has nothing to do with the sixth principle, which advocates *adverse treatment* against an individual based solely on race, color, national origin, or sex.

Similarly, with respect to the Act's seventh concept, Plaintiffs' claims fail for lack of standing because they are premised on fundamental misunderstandings about

what that concept covers. The Act's seventh principle prohibits teaching that "[a] person, by virtue of his or her race, color, sex, or national origin, bears personal responsibility for *and must feel* guilt, anguish, or other forms of psychological distress because of actions, in which the person played no part, committed in the past by other members of the same race, color, national origin, or sex." FLA. STAT. § 1000.05(4)(a)(7). Plaintiffs misread this provision to restrict any teaching that merely *has the effect* of making a student feel guilt, anguish, or other forms of psychological distress for historical racism. *See* Dorsey Decl. ¶¶ 35, 47; Park Decl. ¶¶ 19, 25; Sandoval Decl. ¶ 12; Dunn Decl. ¶ 14. But the Act only restricts advocating the proposition that a student *must feel* guilt, anguish, or other forms of psychological distress, and no Plaintiff admits to intending to teach *that*. *See* Order, *Falls v. DeSantis*, No.22-cv-166, Doc. 68, at 9–10 (N.D. Fla. July 8, 2022). Plaintiffs' challenge to this concept is thus based on an alleged "subjective 'chill'" rather than an objectively reasonable "threat of specific future harm" under the Act. *Laird v. Tatum*, 408 U.S. 1, 13–14 (1972).

VI. Counts One, Two, and Three Should Be Dismissed Because Plaintiffs Have Failed to State a Claim Under the Free Speech or Due Process Clauses.

Counts One, Two, and Three should also be dismissed in their entirety because they fail to state a claim for the reasons set out in Defendants Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction, filed

contemporaneously with this Motion, which are hereby incorporated by reference. All of Plaintiffs' Free Speech and vagueness claims fail on their merits. The Act's educational provisions regulate only curricular speech, which is pure government speech, so the First Amendment simply does not apply; and even if it did, (1) Florida's decisions concerning the content of curricular speech must prevail in disputes with individual educators and (2) the State's indisputably compelling interest in preventing its educators from espousing the prohibited concepts, which the State condemns as discriminatory and abhorrent, to Florida's students would justify any burden the Act may place on the Free Speech rights of individual professors or students to advocate or hear those ideas on the State's dime. And because the Act gives fair notice, in readily understood language, of the conduct it prohibits, it is not unconstitutionally vague.

VII. Count Four Should Be Dismissed Because Plaintiffs Have Failed To State a Claim Under the Equal Protection Clause.

Plaintiffs' claim that the Act violates the Equal Protection Clause by intentionally discriminating against African-Americans also fails as a matter of law. The Act draws no explicit distinctions based on race—on its face, it prevents teachers of *any* race from endorsing the prohibited concepts, which are themselves race neutral. Because it is facially neutral, the Plaintiffs can state an Equal Protection violation only if they plausibly allege both that the Act "has a racially disproportionate impact" and "a racially discriminatory purpose." *Washington v.*

Davis, 426 U.S. 229, 239 (1976); *see also Greater Birmingham Ministries v. Ala. Sec'y of State*, 992 F.3d 1299, 1321 (11th Cir. 2021). They have done neither.

A. Plaintiffs Have Failed To Plausibly Allege that the Act Has a Disparate Impact on African-Americans.

Plaintiffs' claim fails to leave the starting gates because they have not pleaded adequate factual material to lend plausibility to their threadbare allegation that the Act will "have a disparate impact on Black students and instructors." Compl. ¶ 199.

1. Plaintiffs' primary support for their assertion of disparate impact is based on the following chain of inferences: (i) the Act disproportionately restricts the teaching of "instructors who teach Critical Race Theory, race studies, ethnic studies, or otherwise discuss systemic racism, and gender and sex discrimination," *id.* at ¶¶ 183–84; and (ii) "Black instructors within Florida's State University System are more likely to teach courses on race studies, Critical Race Theory, ethnic studies, and other courses that involve" the prohibited concepts, *id.* at ¶ 185; so therefore (iii) "the law's impact will bear particularly heavily on Black instructors, who are more likely to teach on these topics," *id.* at ¶ 240. This conclusion does not follow, however, because Plaintiffs have not plausibly supported either of the premises.

As an initial matter, Plaintiffs' syllogism effectively ignores the Act's application to *sex* discrimination. Under the Act, instructors cannot teach that individuals, solely because of their sex, are inherently *sexist* any more than that they, solely because of their race, are inherently *racist*; they cannot teach that members of

one *sex* "are morally superior" to members of the other sex any more than they can teach that one *race* is morally superior. Indeed, all eight of the Act's concepts apply to sex discrimination in equal measure as race discrimination. And when the Act's application to sex discrimination is taken into account, Plaintiffs' conclusory allegation that "Black instructors . . . are more likely to teach courses . . . that involve" the Act's concepts, *id.* at ¶ 185, becomes completely implausible. "Departments of African American Studies" may well be "predominantly staffed by Black instructors," *id.* at ¶ 186, but Plaintiffs do not even allege that departments of sex and gender studies are.

This shortfall is even more obvious at the K-12 level, where there are no dedicated African-American studies departments. Plaintiffs do not allege that African-Americans make up a disproportionate share of teachers in these grades affected by the Act. Nor do they offer any justification for their decision to limit their allegations of disparate racial impact to the "University System," rather than K-20, since the Act applies to teachers at all of these levels in equal measure. *Id.* at ¶ 185.

Moreover, even if the Act's application to sex discrimination could be ignored, Plaintiffs have still failed to show a disparate impact. Yes, courses involving "Critical Race Theory, race studies, [and] ethnic studies", Compl. ¶¶ 183–84, are likely to deal with material implicating the Act's eight concepts, but they

hardly have a monopoly on the subject matter. Courses across a wide range of subjects may raise these concepts—indeed, Plaintiff Almond is a statistics professor, and as Plaintiffs' note, one legislator pointed during the drafting process to one teacher's discussion of "white privilege" in mathematics courses. *Id.* ¶ 115. Yet even with respect to the Act's application to race alone, Plaintiffs nowhere allege that the category of K-20 teachers who wish to teach one or more of the Act's concepts is disproportionately comprised of African-Americans.

2. Plaintiffs also allege that the Act will have a disparate impact on "Black students" by exposing them to an increased likelihood of "racial harassment and discrimination." *Id.* ¶¶ 194, 240. Plaintiffs' theory is that "[i]nstruction about race, and student awareness of racism, reduce the likelihood that students will engage in racial harassment," while "removing this instruction increases the likelihood that students of color will experience increased racial harassment and discrimination." *Id.* ¶¶ 193–94. The problem with this argument is that the Act *does not limit* "instruction" about race or "awareness of racism" in general. Such instruction remains permissible so long as it does not include the endorsement of one of the Act's eight enumerated concepts. Plaintiffs do not allege—and it would be completely implausible to conclude—that instruction endorsing the concepts the Act actually prohibits would reduce racial harassment. Indeed, the Act prohibits the inculcation of the eight enumerated concepts *precisely because* the state of Florida

determined that they *constitute racial discrimination* and are thus the *source* of racial division and harassment.

B. Plaintiffs Have Alleged No Direct Evidence of Intentional Race Discrimination.

Even if Plaintiffs had adequately alleged a disparate impact, "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). Plaintiffs must allege sufficient factual matter to give rise to a plausible inference that "racial discrimination was a substantial or motivating factor behind enactment of the law." *Stout by Stout v. Jefferson Cnty. Bd. of Educ.*, 882 F.3d 988, 1006 (11th Cir. 2018). They have not done so.

While Plaintiffs' complaint includes conclusory allegations that the Act "was enacted with the intent to discriminate against Black instructors and students," Compl. ¶ 9, it is entirely devoid of any *direct* evidence of such a discriminatory purpose. Plaintiffs reproduce a number of statements from Governor DeSantis and various supporters of the Act in the state legislature, but these statements, at most, support the allegation that the Act "was enacted to suppress *speech* about systemic racism, white privilege, and 'Critical Race Theory,'" *id.* ¶ 93 (emphasis added)—not that it was enacted to suppress or otherwise discriminate against *a particular race*. Thus, while Plaintiffs quote Governor DeSantis, for example, stating that "[t]here is no room in our classrooms for things like Critical Race Theory," *id.* ¶ 94,

that does not even remotely or conceivable imply that there is no room in our classrooms for *a particular race*.

Plaintiffs get no further by reciting various legislators' promotion of "the ideology of colorblindness," or their opposition to those who "ask[] us to consider people not as individuals but as groups." *Id.* ¶¶ 118–19. Plaintiffs may reject "the ideology of colorblindness" and embrace judging people by their race, but they have not plausibly alleged that all those who disagree with them—and who continue to believe that individuals should be judged "based on the content of their character and based on their hard work and what they're trying to accomplish in life," rather than "based on skin color," *id.* ¶ 98—are racist, let alone *necessarily racist*. After all, a society that treat[s] citizens as individuals" rather than members of a racial group has been the aspirational goal of *decades* of Equal Protection jurisprudence. *See Miller*, 515 U.S. at 911.

C. Plaintiffs' Circumstantial Evidence Does Not Plausibly Support Any Inference of Intentional Race Discrimination.

Because Plaintiffs lack any *direct* evidence that the Act was "the product of intentional race discrimination," *League of Women Voters of Fla., Inc. v. Fla. Sec'y of State*, 32 F.4th 1363, 1372 (11th Cir. 2022), they can state an Equal Protection claim only if they have adequately alleged sufficient *circumstantial* evidence of a racially discriminatory motivation, under the test articulated by the Supreme Court

in *Arlington Heights*. As the Eleventh Circuit has explained, that test considers such factors as:

> (1) the impact of the challenged law; (2) the historical background; (3) the specific sequence of events leading up to its passage; (4) procedural and substantive departures; . . . (5) the contemporary statements and actions of key legislators[;]…(6) the foreseeability of the disparate impact; (7) knowledge of that impact; and (8) the availability of less discriminatory alternatives."

Id. at 1373 (cleaned up) (citations omitted). Here, the first consideration does not weigh in Plaintiffs' favor because—as explained above—they have failed to plausibly allege that the Act has any disparate impact on African-Americans. And Plaintiffs also do not plausibly allege that any of the other factors give rise to an inference of racial animus.

1. The "historical background" of the Act does not suggest that it was enacted for a discriminatory purpose.

Plaintiffs begin their discussion of the "historical background" of the Act in 1956, and the bulk of it concerns events that occurred in the 1960s and 1970s. There is no question that African-Americans in Florida faced discriminatory violence and oppression during this period. But binding Supreme Court and Eleventh Circuit precedent makes clear that the racist actions that occurred in Florida during this era cannot show that legislation enacted *five to seven decades later* in 2022 was racially motivated. The *Arlington Heights* inquiry into a law's historical background must "be focused on the specific sequence of events leading up to the challenged decision

rather than providing an unlimited lookback to past discrimination." *League of Women Voters*, 32 F.4th at 1373 (cleaned up). Otherwise, *every* modern action taken by the Florida government could be shown to be intentionally racially discriminatory. It does not diminish the grievous injury suffered by African-Americans for much our Nation's history to recognize that "[p]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018) (cleaned up).

Plaintiffs' more recent "historical background" evidence also falls short. Tragedies such as the 1996 police shooting of "an unarmed Black Teenager," the 2012 "killing of Trayvon Martin," or the killing of George Floyd, Compl. ¶¶ 67, 71, 73, do not show that the Florida legislature acted with racial animus when it passed the Act in 2022. Florida's legislators did not perpetrate these tragic acts and in fact had nothing to do with them.

2. Neither the "events leading up to [the Act's] passage" nor the "statements and actions" of its legislative supporters indicate any discriminatory motivation.

Plaintiffs' discussion of the Act's more immediate historical context, far from revealing some clandestine, racially discriminatory motive, confirms the purpose that is plain from the Act's text. The Act was not designed to oppress African-Americans. It was designed to prevent State-employed teachers from inculcating a set of controversial and highly contested concepts and policy prescriptions relating

to race relations in America—concepts and policies that the People of Florida, in their sovereign judgment, believe to be abhorrent and have determined to be *themselves racially discriminatory*.

That is shown by Plaintiffs' lengthy discussion of the campus activism in the two years leading up to the Act's passage. The handful of student and faculty demands recounted in Plaintiffs' complaint that even potentially touch on issues related to the Act do so only to the extent they advance *concepts* that the Act prohibits—not because some of the students and teachers advocating those concepts were African-American. Moreover, Plaintiffs' narrative repeatedly describes how Universities *welcomed and implemented* these faculty and student recommendations—by, for example, "including activities within courses that will target dismantling racism," and "developing mandatory diversity and inclusivity training for all campus employees and students." *Id.* ¶¶ 86, 88. To the extent that Plaintiffs are right to infer that the Act was a response to these university actions, that does not reveal any racial animus. Rather, it confirms that the purpose of the Act is the one that is evident on its face: Florida's determination that it no longer wants teachers in the Universities and schools it operates to endorse and advocate, at taxpayer expense, a set of controversial concepts that the People of Florida have judged to be racially discriminatory and pernicious.

The statements of the Act's supporters reproduced in the Complaint tell the same story. As an initial matter, Plaintiffs cite statements by only five Florida officials—Governor DeSantis, Representatives Avia, Massullo, and Andrade, and Senator Diaz—and precedent makes clear that a court cannot "impute the discriminatory intent of one or a few decisionmakers to the entire group." *Thai Meditation Ass'n of Ala., Inc. v. City of Mobile, Ala.*, 980 F.3d 821, 836 (11th Cir. 2020); *see also Greater Birmingham Ministries*, 992 F.3d at 1324–25. But even if it could, the statements cited by Plaintiffs, rather than revealing some sort of intent to discriminate against African-Americans, again shows the legislature's intent to prevent Florida-employed teachers from endorsing particular, controversial concepts. *See, e.g.*, Compl. ¶¶ 86, 88, 125.

Nor does the fact that the Act passed the legislature largely on racially divided lines demonstrate that it was intended to be an instrument of intentional race discrimination. Plaintiffs' own allegations show that the vote tallies are far more indicative of *partisan* divisions than of *racial* ones: one African-American member in the Florida House—a Republican—voted *in favor* of the Act. *See* Compl. ¶ 121; Florida House of Representatives, Passage, H.B. 7, 2022 Reg. Sess. (Feb. 24, 2022, 12:34 PM), https://bit.ly/3Uas4kI (recording Representative Barnaby's yea vote); *cf. Abbott*, 138 S. Ct. at 2314 (noting in the redistricting context that "because a voter's race sometimes correlates closely with political party preference, it may be very

difficult for a court to determine whether a districting decision was based on race or party preference" (citations omitted)). And binding Eleventh Circuit precedent makes clear that such voting patterns do not support an Equal Protection claim so long as the State "has provided valid neutral justifications . . . for the law's passage," *Greater Birmingham Ministries*, 992 F.3d at 1326–27—here, preventing state-employed teachers from inculcating in their classrooms concepts that Florida deems to be racist and offensive.

Finally, Plaintiffs attempt to indict the Act by highlighting its proximity to a wholly unrelated statute—pointing to the legislature's contemporaneous passage of "Senate Bill 90, a restrictive voting law that was challenged by several nonprofit groups." Compl. ¶ 95. There is nothing to this. The Individual Freedom Act must be assessed only on its own terms and its own legislative background. Indeed, if any state law was subject to invalidation under the Equal Protection clause merely because the State's legislature also passed a (wholly unrelated) voting law that has been challenged as racially discriminatory, the legislative process in over a half-dozen States would be brought to a standstill. *See Courtroom Battles, Access to the Ballot*, NAACP LEGAL DEF. & EDUC. FUND: VOTING RIGHTS 2022 (last visited Sept. 20, 2022, 5:47 PM), https://bit.ly/3xjP46Q.

3. Plaintiffs do not identify any meaningful "procedural and substantive departures" in the Act's enactment process.

Plaintiffs next attempt to identify "[d]epartures from the normal procedural sequence" during the Act's passage. *Arlington Heights*, 429 U.S. at 267. They come up empty. Plaintiffs first claim that the Act's language was "lifted" from "former President Trump's Executive Order 13950," even though that Order was "ruled unconstitutional over a year before H.B. 7 was introduced." Compl. ¶ 129. But Executive Order 13950 was enjoined on vagueness grounds, not Equal Protection grounds; and the district court's reasoning was principally based on language in a Department of Labor FAQ—not the text that is shared by the Executive Order and the Act. *See Santa Cruz Lesbian & Gay Cmty. Ctr. v. Trump*, 508 F. Supp. 3d 521, 544–45 (N.D. Cal. 2020).

Plaintiffs' next supposed procedural departure is that the Act's legislative supporters justified it by referring to educational "materials . . . [from] across the nation" rather than from "classroom discussions or university lectures in Florida." Compl. ¶ 130. But elsewhere in the materials cited by Plaintiffs, the Act's supporters *did* point to examples from Florida schools. *See 2/22/22 House Session*, THE FLORIDA CHANNEL, at 01:04:41—01:06:10 (Feb. 22, 2022), https://bit.ly/3BaLCN0. And at any rate, Plaintiffs do not explain why Florida's determination to address a problem occurring in other States before it spreads to Florida is a "[d]eparture[ ] from the normal procedural sequence." *Arlington Heights*, 429 U.S. at 267.

Plaintiffs also complain that "the Florida legislature declined to formally consult with any instructors throughout the bill drafting process," and that "[i]nstead, the legislature and Governor DeSantis's office consulted with [Christopher] Rufo, a Senior Fellow of the Manhattan Institute." Compl. ¶¶ 131–32. But all these allegations show is that the Act's proponents focused their efforts on consulting with individuals who *supported* the Act and believed it necessary—rather than groups who *opposed* the Act and, in fact, represented the very teachers who the State feared would likely endorse and inculcate one or more of the Act's eight concepts. The Act's opponents in the legislature no doubt consulted with those who, likewise, opposed its enactment. That does not *depart* from the normal legislative process; it *follows* it.

Plaintiffs' final supposed procedural departure has nothing to do with the substantive provisions of the Act, but rather with an enforcement mechanism allowing the withholding of funding to universities that violate the Act, which Plaintiffs allege was added "to a budget appropriation bill" throughout "the last few weeks of the session." *Id.* ¶ 135. So what? While Plaintiffs characterize the adoption of this language as "a rushed process," they do not allege that it was adopted more rapidly, or with less debate, than other appropriation riders of this nature. And Plaintiffs' argument also ignores the substantial and lengthy debate that had *already occurred* during the enactment of the Act's substantive provisions. Given that earlier

debate, the addition of this enforcement mechanism to the 2022 appropriation bill "did not require a prolonged process," and the "brevity of the legislative process" cannot "can give rise to an inference of bad faith—and certainly not an inference that is strong enough to overcome the presumption of legislative good faith" that applies to all duly enacted legislation. *Abbott*, 138 S. Ct. at 2328–29.

Even if one or more of the features of the Act's passage singled out by Plaintiffs *did* constitute a departure from the ordinary legislative process (and they do not), such "procedural abnormalities are only relevant within a larger scope" or "context that renders th[e] deviation suspect." *Hallmark Devs., Inc. v. Fulton Cnty., Ga.*, 466 F.3d 1276, 1285 (11th Cir. 2006). And Plaintiffs allege no reason—none at all—to conclude that any of their supposed procedural departures is actually indicative of racial animus.

4. The purported "foreseeability" and legislative "knowledge" of the Act's supposed "disparate impact" do not give rise to any inference of racial animus.

Plaintiffs also claim that the Court should infer a racially discriminatory motive because the Act's "opponents put the legislature on notice that it would have a disparate impact on Black students and instructors." Compl. ¶ 199. This argument fails, first, because its premise is false: as shown above, *supra* Part VII. A, Plaintiffs have failed to credibly allege that the Act in fact has any disparate impact on African-Americans. But even granting Plaintiffs' that premise, the argument still fails,

because none of the statements identified in the Complaint actually pointed to the supposed "disparate impact" that Plaintiffs now allege.

Student Plaintiff Dauphin, for instance, did testify that she experienced various instances of racism in school and that, in her opinion, the legislature "do[esn't] seem to care about that." *Id.* ¶ 200. But Plaintiffs do not allege that she testified that the Act would have any disparate impact on African-American students. The statements by other students, and by the ACLU, are cut from the same cloth—none identify any of the purported disparate impacts alleged in Plaintiffs' complaint. *Id.* ¶¶ 201–05.

Finally, even if Plaintiffs *had* adequately demonstrated that the Act will have a disparate racial impact and that the Legislature was actually put on notice of that impact, that would at most "demonstrate[ ] 'an awareness of consequences,' which is insufficient to establish discriminatory purpose." *League of Women Voters*, 32 F.4th at 1373–74. Plaintiffs' complaint includes *no* credible allegations giving rise to the inference that the legislature enacted the Act "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

5. The State reasonably concluded that none of Plaintiffs' "less restrictive" alternatives to the Act would adequately accomplish its compelling interests.

Finally, Plaintiffs fault the State for passing the Act rather than other available, less-restrictive alternatives. They allege that the legislature rejected "at least ten (10) proposed amendments that would have been less restrictive." Compl. ¶ 163. But the legislature did adopt numerous other amendments during the enactment process, *see House Bill 7*, *Amendments*, THE FLORIDA SENATE (last visited Sept. 21, 2022, 10:23 AM), https://bit.ly/3ePqzIp, so it is not as though it "categorically refuse[d] to consider changes." *Abbott*, 138 S. Ct. at 2329. And even if the Act's supporters did "generally hope[ ] to minimize amendments" that "hardly shows that [it] acted with discriminatory intent." *Id.* Nor does the existence of other "provisions in state and federal law" that "protect against . . . race discrimination," Compl. ¶ 162, give rise to any inference of racial animus. The State concluded that these other legal protections *were insufficient* to prevent the form of race discrimination it enacted the Act to curb. The Equal Protection Clause is not a straitjacket confining the States to striking at only those aspects of race discrimination addressed by preexisting law.

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss should be granted.

Dated: September 22, 2022

Respectfully Submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to Northern District of Florida Rule 7.1(F), the undersigned counsel hereby certifies that the foregoing Defendant's Memorandum of Law in Support of Motion to Dismiss, including body, headings, quotations, and footnotes, and excluding those portions exempt by Local Rule 7.1(F), contains 7,247 words as measured by Microsoft Office for Word 365.

s/ Charles J. Cooper
Charles J. Cooper

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

LEROY PERNELL, et al., *Plaintiffs*, v. FLORIDA BOARD OF GOVERNORS OF THE STATE UNIVERSITY SYSTEM, et al., *Defendants*.	Case No. 4:22-cv-304-MW-MAF

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

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INTRODUCTION

"At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (cleaned up). "All provisions of federal, state, or local law requiring or permitting such discrimination must yield to this principle." *Brown v. Board of Educ. of Topeka, Kan.*, 349 U.S. 294, 298 (1955).

Impelled by the fundamental moral principle at the root of the Equal Protection Clause—that discriminating against people solely because of their race, sex, or other immutable characteristics is "odious to a free people whose institutions are founded upon the doctrine of equality, " *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (cleaned up)—the State of Florida has enshrined in the statute at issue in this case, the Individual Freedom Act, eight concepts that may not be endorsed by its teachers. For example, the Act prohibits teachers from endorsing the proposition that members of one race are morally superior to members of another, that individuals are inherently racist solely by virtue of their race, or that a person's moral character is necessarily determined by his or her race. Believing these concepts to be reprehensible, the Florida Legislature has directed that they cannot be endorsed in the instruction provided to students in Florida's public universities.

Plaintiffs have brought suit challenging the Act's provisions related to these principles as contrary to the First Amendment, and they have requested a preliminary injunction preventing the Act from taking effect. The request should be denied.

Plaintiffs' First Amendment challenge fails because the Florida Government has simply chosen to regulate *its own speech*—the curriculum used in state universities and the in-class instruction offered by state employees—and the First Amendment simply has no application in this context. "When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says." *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015). Indeed, that is the only way government of any kind can go on; for if the First Amendment required content neutrality in this context, the government would be forced "to voice the perspective of those who oppose" it. *Id.* at 208. Here, the Act does not prevent the State's educators from espousing whatever views they may hold, on race or anything else, on their own time, and it does not prevent students from seeking them out and listening to them. All it says is that state-employed teachers may not espouse in the classroom the concepts prohibited by the Act, while they are on the State clock, in exchange for a State paycheck. The First Amendment does not compel Florida to pay educators to advocate ideas, in its name, that it finds repugnant. Nor does it anoint individual professors as universities unto themselves, at liberty to indoctrinate college students in whatever views they please, no matter

how contrary to the university's curriculum or how noxious to the people of Florida. And even if the First Amendment did apply here, Florida's compelling interest in stamping out discrimination based on race and other immutable characteristics amply justifies any burden on speech the Act may impose.

Plaintiffs' vagueness claim likewise fails. The Act is written in plain and common terms that an ordinary person can easily understand. These provisions more than satisfy the vagueness standard that applies to the government's regulation of its own employees.

Plaintiffs are not likely to succeed on the merits of their claims, the balance of the equities favors enforcement of the Act, and the motion for preliminary injunction should be denied.

FACTUAL BACKGROUND

I. The People of Florida Empowered Their Elected Officials To Set the Curriculum for Public Universities.

The People of Florida enshrined in their Constitution fundamental principles that serve as the bedrock of our Nation and the State of Florida. Article I, § 2, of the Florida Constitution enumerates these "Basic Rights":

> All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property. No person shall be deprived of any right because of race, religion, national origin, or physical disability.

And the People of Florida empowered their elected officials to enact laws that both promote these fundamental principles, and prohibit efforts to contravene them. *See* FLA. CONST. art. III, § 8(a).

For example, the Florida Constitution directs the Legislature to enact laws making "[a]dequate provision" for a "high quality system of free public schools that allows students to obtain a high quality education." FLA. CONST. art. IX, § 1(a). To that end, the Florida Legislature exercises the power to "establish education policy, enact education laws, and appropriate and allocate education resources." FLA. STAT. § 1000.03(2)(a). Florida's elected officials therefore help shape the curriculum of Florida's public schools. *See* FLA. STAT. § 1000.01 *et seq.* (The "Florida Early Learning-20 Education System"). And the "priorities of Florida's Early Learning-20 education system" include not only academic performance, but also the hope that students "are prepared to become civically engaged and knowledgeable adults who make positive contributions to their communities." FLA. STAT. § 1000.03(5)(a)-(c).

Apart from the public-school curriculum, Florida's elected officials have recognized that the State must practice the principles it teaches. Therefore, Florida law prohibits discrimination on the basis of race or sex "against a student or an employee in the state system of public K-20 education." FLA. STAT. § 1000.05(2)(a). Thus, no person may "be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any public K-20 education program or

activity" on the basis of race or sex. *Id.* "A person aggrieved" by such discrimination "has a right of action for such equitable relief as the court may determine." *Id.* § 1000.05(9).

II. Florida's Elected Officials Exercised this Power When Enacting the Individual Freedom Act and Adopting Implementing Regulations.

Earlier this year, the Florida Legislature passed the Individual Freedom Act (the Act). *See* 2022 Fla. Laws 72. Governor DeSantis approved the Act on April 22, and it took effect on July 1. *See* 2022 Fla. Laws 72, § 8. Sections 2 through 7 of the Act amended the Education Code.

As relevant here, the Act amended the Education Code to enumerate actions that constitute "discrimination on the basis of race, color, national origin, or sex" and are thus prohibited under § 1000.05(4)(a). The Act prohibits the practice of "subject[ing] any student or employee to training or instruction that espouses, promotes, advances, inculcates, or compels such student or employee to believe any of eight enumerated concepts. *See* FLA. STAT. § 1000.05(4)(a)(1)-(8). The Act, however, draws a sharp distinction between *indoctrination* and *discussion*: It prohibits all persons from subjecting a student or employee to indoctrination in the concepts, but at the same time makes clear that it does not "prohibit discussion of the concepts ... as part of a larger course of training or instruction, provided such training or instruction is given in an objective manner without endorsement of the concepts." FLA. STAT. § 1000.05(4)(b).

The Florida Board of Governors possesses the authority to "adopt regulations to implement" § 1000.05 "as it relates to state universities." FLA. STAT. § 1000.05(6)(b). Pursuant to that authority, the Board recently finalized Regulation 10.005 to implement the Act. *See 10.005*, *Prohibition of Discrimination in University Training or Instruction*, BD. OF GOVERNORS, STATE UNIV. SYS. OF FLA. (Aug. 26, 2022), *available at* https://bit.ly/3xqDCX8 ("Regulation 10.005").

Regulation 10.005 creates a detailed enforcement process that consists of numerous steps. The Regulation first requires universities to develop their own regulations that track the Act; those regulations must "contain a method for submitting complaints of alleged violations" to the university. *See* Regulation 10.005(2)(a). When the university receives a complaint, it must investigate only "credible" complaints. Regulation 10.005(3)(b). If the university ultimately determines that "instruction or training is inconsistent with the university regulation," it must notify the Board and "take prompt action to correct the violation by mandating that the employee(s) responsible for the instruction or training modify it to be consistent with the university regulation." Regulation 10.005(3)(c). As part of correcting the violation, the university may "issu[e] disciplinary measures where appropriate," but it may "remove, by termination if appropriate, the employee(s)" violating the regulation only "if there is a failure or refusal to comply with the mandate." *Id.*

Under the Regulation, the Board takes enforcement action only against a university that "willfully and knowingly failed to correct a violation of the university regulation." Regulation 10.005(4)(a). The Board's Inspector General will investigate a "credible allegation" of a willful and knowing failure to correct, taking into account "whether the university made a good faith determination that the complaint did not allege a violation of the university regulation." *Id.* The Board will ultimately determinate whether the allegation is "substantiated," Regulation 10.005(4)(c), meaning "the existence or truth of" the violation has been "established" "through the use of competent evidence," Regulation 10.005(1)(d). If the Board determines "that a university willfully and knowingly engaged in conduct at the institutional level that constituted a substantiated violation of [§ 1000.05(4)(a)] and failed to take appropriate corrective action, the university will be ineligible for performance funding for the next fiscal year." *Id.* at (4)(d). The university may seek judicial review of the Board's decision. Regulation 10.005(5).

III. Plaintiffs Challenge the Act Under the First Amendment and Due Process Clause.

Plaintiffs are six active higher-education professors, one retired professor, and a college student. The active professors serve at six major colleges and universities throughout Florida and teach various subjects, including law, government, and history. *See* Doc. 1, ¶¶ 10, 13, 16, 19, 23, 25. The retired professor, Dr. Dunn, leads "a Black history bus tour of Miami" that is allegedly funded by Florida International

University. *Id.* ¶ 28. Together, the educator-plaintiffs contend that the Act "imposes unconstitutional viewpoint-based restrictions on instructors' speech and is contrary to the principle of academic freedom." *Id.* ¶ 217. The student plaintiff is a rising senior at Florida State University. *Id.* ¶ 31. This fall, she is enrolled in two courses "that she fears will be negatively affected by" the Act. *Id.* ¶ 32.

Plaintiffs also argue that the Act is unconstitutionally vague. *Id.* ¶ 228. In particular, they assert that the Act "fails to provide fair notice of what college professors, student teaching assistants, and other instructors can and cannot say in their courses." *Id.* They also assert that the Act "invites arbitrary and discriminatory enforcement." *Id.*

In addition, Plaintiffs allege that the Act violates the Equal Protection Clause, contending that the Act "was enacted for a racially discriminatory purpose." *Id.* ¶ 236. Alongside their complaint, Plaintiffs seek a preliminary injunction, Doc. 12, on the basis of their First Amendment and vagueness claims, but not on their Equal Protection Claim, *see* Doc. 13 at 3 n.2 (Pls.' Br.).

STANDARD OF REVIEW

Under Rule 65 of the Federal Rules of Civil Procedure, a district court may grant a preliminary injunction if the movant shows "(1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the

proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest." *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1247 (11th Cir. 2016) (cleaned up). The movant "bears the burden of persuasion to clearly establish all four of these prerequisites." *Id.* (cleaned up). Here, Plaintiffs have failed to carry their burden on all four scores.

ARGUMENT

I. Plaintiffs Have Failed To Establish Standing Sufficient To Support a Preliminary Injunction with Respect to Several Provisions of the Act.

Plaintiffs fail at the threshold to show a likelihood of success with respect to several provisions of the Act because they lack standing. As shown in Defendants' motion to dismiss ("MTD"), filed contemporaneously with this brief, no Plaintiff has adequately alleged they will deliberately and persistently violate the Act, which is a prerequisite to punishment under the Board's regulation, MTD 9-10; no Plaintiff has adequately alleged an injury related to the first, third, fifth, sixth, and seventh concepts, *id.* at 12-14; neither Plaintiff Dunn nor Plaintiff Dauphin provide "instruction" as defined by the Act, *id.* at 9-12. Even if Plaintiffs alleged standing sufficient to survive a motion to dismiss with respect to these provisions, they have failed to meet "the heightened standard for evaluating a motion for summary judgment" that applies at the preliminary-injunction stage. *Waskul v. Washtenaw Cnty. Cmty. Mental Health*, 900 F.3d 250, 255 n.3 (6th Cir. 2018).

II. In-Class Instruction in Public Universities Is Government Speech and Thus Not Entitled to First Amendment Protection.

As relevant here, the Act governs the substance of the instruction and curriculum offered at public universities, which is heartland government speech. Neither the educator-plaintiffs nor the student plaintiff have a First Amendment right to control that government speech. Their First Amendment claims thus fail.

A. University Professors Do Not Have a First Amendment Right To Override the State's Curriculum.

"When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says." *Walker*, 576 U.S. at 207. "Were the Free Speech Clause interpreted otherwise, government would not work," because it could not "effectively" implement its policies if it "had to voice the perspective of those who oppose" it. *Id.* at 207-08. Therefore, government speech—"and government actions and programs that take the form of speech"—generally do not "trigger the First Amendment rules designed to protect the marketplace of ideas." *Id.* at 207 (cleaned up). The Constitution instead "relies first and foremost on the ballot box, not on rules against viewpoint discrimination, to check the government when it speaks." *Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1589 (2022).

A public university's curriculum is set by the university in accordance with the strictures and guidance of the State's elected officials. It is government speech. As the Supreme Court held in *Rosenberger v. Rector and Visitors of University of*

Virginia, a case involving a public university: "When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message." 515 U.S. 819, 833 (1995). The same principle—that public universities do not violate the First Amendment when setting their curriculum—explains why universities may even control *student* speech in a school-sponsored student newspaper that could "fairly be characterized as part of the school curriculum," and thus "bear the imprimatur of the school." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988). When the government "determines the content of the education it provides" in public universities, it is thus the government speaking, *Rosenberger*, 515 U.S. at 833, and its determination does not implicate the Free Speech Clause, *Walker*, 576 U.S. at 207-08.

The in-class instruction offered by state-employed educators is also pure government speech, not the speech of the educators themselves. When "public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes." *Garcetti v. Ceballos*, 547 U.S. 410, 421-22 (2006). And "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen." *Id.* at 421-22. Therefore, "the employee

has no First Amendment cause of action." *Id.* at 418. Accordingly, under the square reasoning of *Garcetti*, educators in public universities do not have a First Amendment right to control the curriculum.

To be sure, *Garcetti* reserved the question whether its holding applies to classroom instruction. *Id.* at 425. But this Court is bound by *Garcetti*'s reasoning in equal measure with its holding, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996), and public-university professors providing instruction to students clearly fall within the rationale of *Garcetti* because they are making "statements pursuant to their official duties," 547 U.S. at 421-22. Moreover, if *Garcetti* did not apply to curricular speech, it would invite "judicial intervention" that is "inconsistent with sound principles of federalism," *id.* at 423, because the Supreme Court has articulated the "oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges," *Kuhlmeier*, 484 U.S. at 273.

Multiple courts have recognized that *Garcetti*'s reasoning applies to public-school teachers providing instruction. The Seventh Circuit explained that, because "teachers hire out their own speech," applying *Garcetti* to a public-school teacher's in-class speech was "an easier case for the employer than *Garcetti*" itself, "where speech was not what the employee was being paid to create." *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 479 (7th Cir. 2007). For similar reasons, the Sixth

Circuit has likewise applied *Garcetti* to in-class instruction in a public high school. *See Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist.*, 624 F.3d 332 (6th Cir. 2010).

Both the Sixth and Seventh Circuits recognized the difficulty the Supreme Court envisioned if the First Amendment were to apply to government speech—"government would not work." *Walker*, 576 U.S. at 207-08. The Sixth Circuit identified numerous challenging questions that would follow if *Garcetti* did not apply to teachers' in-class curricular speech. As most relevant here: "Could a teacher continue to assign materials that members of the community perceive as racially insensitive even after the principal tells her not to?"; or "Could a teacher raise a controversial topic (say, the virtues of one theory of government over another or the virtues of intelligent design) after a principal has told her not to?" *Evans-Marshall*, 624 F.3d at 341-42.

The application of *Garcetti* aligns with other Circuits' determination that curricular speech is not subject to First Amendment scrutiny. For example, in an opinion by then-Judge Alito, the Third Circuit held that "a public university professor does not have a First Amendment right to decide what will be taught in the classroom." *Edwards v. Calif. Univ. of Penn.*, 156 F.3d 488, 491 (3d Cir. 1998). Similarly, the Fourth Circuit has held that "speech" that "is curricular in nature" is unprotected because it is not on "a matter of public concern" within the meaning of

the balancing test established by *Pickering v. Board of Education of Township High School District 205, Will County*, 391 U.S. 563 (1968). *See Lee v. York Cnty. Sch. Div.*, 484 F.3d 687, 697 (4th Cir. 2007). So too the Fifth Circuit has held "that public school teachers are not free, under the first amendment, to arrogate control of curricula" because they do "not speak out as a citizen" when teaching in class. *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 800-02 (5th Cir. 1989).

The Eleventh Circuit's pre-*Garcetti* decision in *Bishop v. Aronov* also supports the application of *Garcetti* to speech related to the "content in the courses" taught. 926 F.2d 1066, 1076 (11th Cir. 1991). In *Bishop*, the Court held that a public university's decision to prohibit a professor from speaking about his religious beliefs "during instructional time" did not violate that professor's free speech rights. *Id.* at 1076-77. The Court spoke in no uncertain terms: The government's "conclusions about course content must be allowed to hold sway over an individual professor's judgments." *Id.* at 1077. When the government (there, the university) and an individual educator "disagree about a matter of content in the courses he teaches," the Court explained, the government "must have the final say in such a dispute." *Id.* at 1076-77. The government, "as an employer and educator can direct" an individual professor "to refrain from expression" of particular views "in the classroom," and federal judges cannot second-guess the government's determination by acting as "ersatz deans or educators." *Id.* at 1075, 1077.

Drawing from the Supreme Court's decision in *Kuhlmeier*—then the leading case on the subject—the Eleventh Circuit concluded that the appropriate analysis was limited to determining whether the State's restrictions "are reasonably related to legitimate pedagogical concerns," *id.* at 1074—a standard largely indistinguishable from "rational basis" review, the form of scrutiny that would apply *in the absence* of any First Amendment (or other fundamental) right, under "the separate constitutional prohibitions on irrational laws," *District of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008). And although this Court has previously concluded that "*Bishop* crafted a balancing test to judge whether a public university's restriction on a professor's speech violates the professor's rights under the First Amendment," Order, *Falls v. DeSantis*, No. 4:22-cv-166-MW-MJF, Doc. 68 at 5 (July 8, 2022), Defendants respectfully believe *Bishop* is best read to hold that the government's "interests in the classroom conduct of its professors" are *per se* a legitimate pedagogical concern. 926 F.2d at 1076.

Both *Bishop*'s reasoning and its holding thus accurately anticipated the Supreme Court's later cases in *Rosenberger* and *Garcetti*: Where, as here, a State prescribes or restricts the curricular instruction taught in its schools and the in-class conduct of its educators, nothing but government speech is in play, and the First Amendment has no application. Although *Bishop* did not hold that the First Amendment categorically does not apply in this context under the government

speech doctrine, the Supreme Court had *not yet announced* that doctrine. The *Bishop* Court candidly admitted that it was doing its best to "frame" its "own analysis to determine the sufficiency of the University's interests in restricting" the professor's "expression in the classroom," in the absence of any "controlling" "cases satisfactorily on point." *Id.* at 1074. But thirty years later, in the more penetrating light shed by the Supreme Court's intervening decisions in *Rosenberger* and *Garcetti*, the best reading of *Bishop* is plainly the one that accords with the teachings of those cases: The First Amendment simply has no purchase here.

Plaintiffs' argument to the contrary rests on a purported individual right to academic freedom. Pls.' Br. 17-18. But *Bishop* rejected this argument in no uncertain terms: "Though we are mindful of the invaluable role academic freedom plays in our public schools, particularly at the post-secondary level, we do not find support to conclude that academic freedom is an independent First Amendment right." 926 F.2d at 1075. *Bishop* acknowledged "abundant cases" that "acclaim academic freedom," including *Keyishian v. Board of Regents*, 385 U.S. 589 (1967). *Bishop*, 926 F.2d at 1075. But it held that the "pronouncements about academic freedom" in the "context" of those cases "cannot be extrapolated to deny schools command of their own courses." *Id.* Under *Bishop*, Plaintiffs have no individual right of academic freedom to control the curriculum.

Even if *Bishop* had not settled this issue, the conclusion that university professors do not have an individual right to academic freedom is obviously correct. As the en banc Fourth Circuit explained in its exhaustive analysis of the right to academic freedom, that right, to the extent it exists, belongs to academic *institutions*—specifically universities—and does *not* belong to individual educators. *See Urofsky v. Gilmore*, 216 F.3d 401, 410-14 (4th Cir. 2000) (en banc). Indeed, Justice Frankfurter's classic statement on academic freedom makes clear that it is comprised of "'the four essential freedoms' *of a university*—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.'" *Sweezy v. State of New Hampshire by Wyman*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (citation omitted).

Other courts agree that any purported right to academic freedom is held by universities as an institution. As then-Judge Alito explained, "academic freedom ha[s] been described" only "as a *university's* freedom." *Edwards*, 156 F.3d at 492 (emphasis added); *see also Johnson-Kurek v. Abu-Absi*, 423 F.3d 590, 593-94 (6th Cir. 2005) (same). And how could it be otherwise? The notion that individual professors have a constitutional right to make their own decisions, free from interference by anyone, whether university administrators or the State itself, concerning what may be taught and how it shall be taught would be a recipe for educational chaos, not excellence. Again, when the university and an individual

educator "disagree about a matter of content in the courses he teaches," the university "must have the final say in such a dispute." *Bishop*, 926 F.2d at 1076-77.

Moreover, to whatever extent public universities possess an institutional right of academic freedom, that right is best understood as a right of institutional autonomy *from the judiciary*, not the State that chartered it, governs it, and provides its funding. *See, e.g.*, *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985) (citing *Keyishian* as representing *the Court's* "reluctance to trench on the prerogatives of state and local educational institutions"). Indeed, it is unclear "how the Universities, as subordinate organs of the State," could "have First Amendment rights against the State or its voters." *Coal. to Def. Affirmative Action v. Granholm*, 473 F.3d 237, 247 (6th Cir. 2006). Plaintiffs have not cited a single case holding that a public university possesses a right to academic freedom that permits the institution to reject and override the State's education curriculum.

True, decisions in the Ninth Circuit and Sixth Circuit have distinguished between curricular speech at the college and K-12 levels, holding that *Pickering*, and not *Garcetti*, governs the regulation of such speech in university classrooms. *See, e.g.*, *Demers v. Austin*, 746 F.3d 402, 418 (9th Cir. 2014); *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021). But those decisions are inconsistent with the holding of *Bishop*, the reasoning of *Garcetti* and *Rosenberger*, and the historical foundation of academic freedom outlined in *Urofsky*.

Finally, the Act applies solely to "training or instruction." FLA. STAT. § 1000.05(4)(a). Per the Board's Regulation 10.005, "training" is "a planned and organized activity conducted by the university as a mandatory condition of employment, enrollment, or participation in a university program for the purpose of imparting knowledge, developing skills or competencies, or becoming proficient in a particular job or role." Regulation 10.005(1)(b). And "instruction" is "the process of teaching or engaging students with content about a particular subject by a university employee or a person authorized to provide instruction by the university *within a course*." Regulation 10.005(1)(c) (emphasis added). The Act therefore does not implicate educators' published scholarship. Nor does it broadly regulate anything that "relates to" educators' "expertise," *Austin v. University of Florida Board of Trustees*, 580 F. Supp. 3d 1137, 1161 (N.D. Fla. 2022), or their membership in private organizations.

In sum, the speech that the Individual Freedom Act's education provisions regulate—the content of the curriculum used in public universities and the in-class instruction that occurs there—constitutes pure government speech that does not implicate Plaintiffs' Free Speech rights.

B. University Students Do Not Have a First Amendment Right To Control the State's Curriculum.

The claim by the student plaintiff, Ms. Dauphin, that the Act violates her First Amendment right to "receive information" also fails. Again, the Act regulates the

public-university curriculum, which is pure government speech that does not implicate the First Amendment. *See supra*, at 10-20.

Students have no independent right to "receive information" that dictates the university's curriculum. Although the Supreme Court has said that the "freedom (of speech and press) necessarily protects the right to receive" speech and published writings, *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (cleaned up), it has never held that students possess a right to receive information that trumps the university's selected curriculum. Indeed, even when four Justices stated that a local school board's decision to remove books from the school library was subject to some form of First Amendment scrutiny, they "carefully circumscribed th[e] potential right, acknowledging that the case 'does not involve textbooks' and that the Court's conclusion 'does not intrude into the classroom, or into the compulsory courses taught there.'" *Chiras v. Miller*, 432 F.3d 606, 619 (5th Cir. 2005) (quoting *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 862 (1982) (plurality opinion)).

To the extent the Eleventh Circuit's decision in *Virgil v. School Board of Columbia County* is to the contrary, that case's tentative conclusion about the power of school boards has been abrogated by the Supreme Court's government speech cases. *Virgil* involved a school board's decision to "remov[e] a previously approved textbook." 862 F.2d 1517, 1518 (11th Cir. 1989). Like *Bishop*, *Virgil* was decided

before the Court issued its key government speech precedents in *Rosenberger* and *Garcetti*. The *Virgil* opinion noted that courts had thus far "failed to achieve a consensus on the degree of discretion to be accorded school boards to restrict access to curricular materials." *Id.* at 1520-21. And like *Bishop*, "the most direct guidance from the Supreme Court" at that time regarding the application of the First Amendment to the content of a public school's curriculum was *Kuhlmeier*. *Id.* at 1521. Therefore, the Court applied the *Kuhlmeier* standard and held that the board could remove the textbook from the curriculum without violating the First Amendment if its actions were "reasonably related to legitimate pedagogical concerns." *Id.* at 1518, 1520-22 (cleaned up).

But *Virgil*, like *Bishop*, must now be read in light of the Supreme Court's subsequent decisions in cases like *Rosenberger* and *Walker*. *See Chiras*, 432 F.3d at 617 (noting *Virgil* "did not have the benefit of" the Supreme Court's recent government-speech cases). In the light shed by those cases, *Virgil* cannot be read as requiring any sort of heightened First Amendment scrutiny in the context of a public university setting its own curriculum.

C. The Act's Educational Provisions Satisfy Any Standard of Heightened Constitutional Scrutiny.

Even if the Court reads the Eleventh Circuit's pre-*Garcetti* decisions in *Bishop* and *Virgil* as adopting a level of scrutiny marginally more stringent than rational basis review, that standard still requires, only and at most, that the Act's provisions

be "reasonably related to legitimate pedagogical concerns." *Kuhlmeier*, 484 U.S. at 272-73; *see Bishop*, 926 F.2d at 1074; *Virgil*, 862 F.2d at 1521-23. The educational provisions here easily pass muster under this "deferential standard." *Virgil*, 862 F.2d at 1520. As the Ninth Circuit held, educational statutes that, among other things, prohibit teaching classes that "[p]romote resentment toward a race or class of people" or "[a]dvocate ethnic solidarity instead of the treatment of pupils as individuals" are "reasonably related to the state's legitimate pedagogical interest in reducing racism." *Arce v. Douglas*, 793 F.3d 968, 973, 985-86 (9th Cir. 2015) (cleaned up).

If the Court concludes that *Bishop* and *Virgil*'s "reasonably related" standard does not apply, then it should apply the *Pickering* balancing test because the speech at issue involves government employees. Under that test, the court must balance the employee's interest against the State's interest, as employer, in promoting the efficiency of its programs. *Lane v. Franks*, 573 U.S. 228, 236 (2014).

Here, recognizing a right of individual educators to espouse whatever views they wished in the classroom, no matter how contrary to the State's established curriculum policies would clearly "imped[e] the teacher's proper performance of his daily duties in the classroom." *Pickering*, 391 U.S. at 572-73. The First Amendment does not require Florida's education administrators to stand idly by as a teacher, for example, espouses racist or sexist views at the head of a government-funded

university classroom. The State's interest in providing its legislatively defined educational curriculum to students vastly outweighs that individual interest under *Pickering*.

In all events, the provisions here pass muster even under strict scrutiny. The compelling nature of the government's interest in stamping out racial discrimination is so fundamental that it is embodied in our highest law. *See Brown*, 349 U.S. at 298 (noting the "fundamental principle that racial discrimination in public education is unconstitutional"). Thus, public universities are *constitutionally prohibited* from teaching, for example, that members of one race are "morally superior" to members of another race, or that a person "should be discriminated against" on the basis of race. The same is true of discrimination on the basis of sex, religion, and national origin.

The Act's educational provisions are "narrowly drawn to accomplish those ends." *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1267 (11th Cir. 2005). Although the Court has previously stated otherwise, *see Honeyfund.com, Inc. v. DeSantis*, 4:22-cv-227, 2022 WL 3486962, at *10-11 (N.D. Fla. Aug. 18, 2022) ("*Honeyfund*"), Defendants respectfully disagree with that conclusion. As an initial matter, by its own terms, the Act does *not* "prohibit discussion of the concepts" listed in Section 1000.05(4)(b). It merely requires that those concepts be taught "as part of a larger course of training or instruction" and "in an objective manner without

endorsement." *Id.* The Act only prohibits teaching that "espouses, promotes, advances, inculcates, or compels" students or employees to believe the concepts. *Id.* at 4(a). And even within the concepts themselves, the provisions are narrowly drawn—for example, prohibiting instruction that a person is "inherently" racist "solely" by virtue of his or her race or sex, meaning that a person's race is the *only and entire* explanation for his or her racism.

Plaintiffs are also wrong to suggest that they prevail if the Act regulates based on viewpoint. As *Bishop* makes clear, the State "*must* be allowed" to determine the "*viewpoints*" that are taught "in the classroom." 926 F.2d at 1077 (emphasis added); *see also Shurtleff*, 142 S. Ct. at 1589 (For "government speech," the government may regulate "based on viewpoint."). Much curricular speech mandated by state education authorities is, after all, inherently viewpoint based. And in all events, even viewpoint-based regulation is at most subject to strict scrutiny, *see R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 395-96 (1992)—which the Act survives.

III. The Challenged Provisions Are Not Unconstitutionally Vague.

Under the Due Process Clause, a statute is void for vagueness "if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or "if it authorizes or even encourages arbitrary and discriminatory enforcement." *Wollschlaeger v. Gov. of Fla.*, 848 F.3d 1293, 1319 (11th Cir. 2017) (cleaned up). Typically, in the speech context, the government must

regulate "with narrow specificity," but "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Id.* at 1320. And "[i]n the public employment context, the Supreme Court has reiterated that the vagueness doctrine is based on fair notice that certain conduct puts persons at risk of discharge." *O'Laughlin v. Palm Beach Cnty.*, 30 F.4th 1045, 1055 (11th Cir. 2022) (cleaned up). A provision governing public employment is "not void for vagueness as long as ordinary persons using ordinary common sense would be notified that certain conduct will put them at risk of discharge." *Id.* (cleaned up). Applying that standard, courts have upheld the termination of public university professors based on, for example, a provision requiring professors "to maintain, 'standards of sound scholarship and competent teaching.'" *San Filippo v. Bongiovanni*, 961 F.2d 1125, 1137 (3d Cir. 1992); *see also Arnett v. Kennedy*, 416 U.S. 134, 158-62 (1974) (plurality) (upholding a regulation that allowed termination for speech that hindered the "efficiency of the service").

Here, "ordinary persons using ordinary common sense would be notified that certain conduct will put them at risk" of violating the Act. *O'Laughlin*, 30 F.4th at 1055. Each of the challenged provisions uses plain, everyday language that has an "ordinary or natural meaning" that is either commonly known or can be easily discerned. *Tracy v. Fla. Atl. Univ. Bd. of Tr.*, 980 F.3d 799, 807 (11th Cir. 2020) (consulting dictionary definitions to hold that a term was not unconstitutionally

vague). The "mere fact that close cases can be envisioned" in applying statutory requirements does not render a statute vague. *United States v. Williams*, 553 U.S. 285, 305 (2008).

Plaintiffs are mistaken when they contend that the Court's decision in *Honeyfund* is dispositive here. *See* Pls.' Br. 30-31. Contrary to their assertion, the vagueness standard is *not* "the same" for public employees and private individuals. *Id.* at 31. For example, although "speech restrictions must generally define the speech they target," "surely a public employer may, consistently with the First Amendment, prohibit its employees from being 'rude to customers,' a standard almost certainly too vague when applied to the public at large." *Waters v. Churchill*, 511 U.S. 661, 673 (1994) (plurality); *see also Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 686 (1986) ("[T]he school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions."). Therefore, "[g]overnment employee speech must be treated differently" in the vagueness analysis. *See Waters*, 511 U.S. at 673. And the standard for public employees is merely whether "ordinary persons using ordinary common sense would be notified that certain conduct will put them *at risk*" of violating the Act. *O'Laughlin*, 30 F.4th at 1055 (emphasis added).

Plaintiffs' misunderstanding of the relevant standard undermines all their vagueness arguments. For example, Plaintiffs contend that § 1000.05(4)(b) is

unconstitutionally vague because it expressly permits the discussion of the prohibited concepts "in an objective manner." *See* Pls.' Br. 32. Plaintiffs assert that "[p]hilosophers have for centuries debated what 'objectivity' means" and note that two plaintiffs' "research and teaching directly challenge the notion of objectivity." *Id.* at 32-33 & n.21. This Court concluded similarly in *Honeyfund* at *13 & n.12. But the vagueness inquiry for public employment, we respectfully submit, does not require a statutory definition that definitively settles all possible philosophical debates; it requires statutory language that gives fair notice that certain conduct raises a risk of violating the Act. After all, "there are limitations in the English language with respect to being both specific and manageably brief," and even if the Act's "prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with." *U.S. Civil Serv. Comm'n v. Nat'l Assoc. of Letter Carriers AFL-CIO*, 413 U.S. 548, 578 (1973). And if plaintiffs' scholarship "challenge[s] the notion of objectivity," they obviously must have some understanding of what "the notion of objectivity" is in the first place. Section 1000.05(4)(b) provides sufficient notice of what conduct puts a professor at risk of violating the Act.

Indeed, this provision meets the typical vagueness standard for private individuals. The statute's dichotomy between discussing a concept "in an objective

manner" as distinct from "endors[ing]" or "espous[ing]" the concept provides more than fair notice of what is prohibited. The plain meaning of these terms permits discussion of the concepts (*i.e.*, as concepts that others have articulated) without voicing approval to the concepts (*i.e.*, saying the concept *is correct or true*). For example, although it does not apply to universities, the Florida Board of Education has provided a useful, albeit obvious, description of the distinction between discussion and endorsement: "Efficient and faithful teaching further means that ... teachers serve as facilitators for student discussion and do not share their personal views or attempt to indoctrinate or persuade students to a particular point of view[.]" 6 FLA. ADMIN. CODE ANN. R. 6A-1.094124(3)(c). Thus, although contrary to this Court's prior conclusion, Defendants respectfully maintain that it is possible to discuss a concept objectively, without "lend[ing] credence" to it. *Honeyfund* at *14

Plaintiffs argue that other specific provisions are also vague. For example, Plaintiffs contend that Section 1000.05(4)(a)(4) is "indecipherable." Pls.' Br. 31. This Court has previously expressed a similar view. *See Honeyfund* at *13. That provision prohibits endorsing the proposition that "[m]embers of one race ... cannot and should not attempt to treat others without respect to race[.]" FLA. STAT. § 1000.05(4)(a)(4). As a matter of plain meaning, to treat someone "without respect to race" is to treat them the same no matter what their race is—that is, in a manner that is indifferent to and takes no account of their race. Therefore, to say that an

individual "cannot and should not" try to treat people the same no matter their race is to say that the individual is either *unable* or should be *unwilling* to treat people the same regardless of their race. This straightforward provision is far from "indecipherable" and instead provides sufficient notice of what conduct places one at risk of violating the Act.

Next, Plaintiffs take issue with two other provisions. First, echoing this Court's *Honeyfund* opinion, they contend that the phrase "morally superior" in § 1000.05(4)(a)(1) is "opaque." Pls.' Br. 31; *see Honeyfund* at *12. That provision prohibits endorsing the concept that, for example, "[m]embers of one race ... are morally superior to members of another race[.]" FLA. STAT. § 1000.05(4)(a)(1). As a matter of "ordinary or natural meaning," *Tracy*, 980 F.3d at 807, however, we submit that this provision simply prohibits endorsing the idea that members of one race are better than members of another race at adhering to ethical behavior.

Second, Plaintiffs point to § 1000.05(4)(a)(3)'s prohibition on endorsing the concept that an individual's "status" as "privileged or oppressed" is "necessarily determined by his or her race." Pls.' Br. 23. This provision, Plaintiffs say, "limits speech about white privilege" and "arguably also bans teaching that race-based programs confer a privileged status on marginalized individuals." *Id*. at 31. But to say that a provision "limits" and "bans" particular speech is not a vagueness argument. *See U.S. Civil Serv. Comm'n*, 413 U.S. at 579 (explaining that public

employees did not have a vagueness claim in part because "there seemed to be little question in the minds of the plaintiffs who brought this lawsuit as to the meaning of the law, or as to whether or not the conduct in which they desire to engage was or was not prohibited by the Act"). And the provision is sufficiently clear that it prohibits endorsing the idea that an individual's race *unavoidably—i.e.*, without exception—determines whether the individual occupies the status of holding a peculiar benefit or advantage over individuals of a different race. Plaintiffs fail to explain what "race-based programs" they believe confer a privilege on every single member of a particular race solely because of their race.

Finally, Plaintiffs contend that the Act "leaves the government with unbridled discretion to determine whether or not an instructor has violated the law." Pls.' Br. 33. But the scienter requirement in the Act and the Board's Regulation 10.005 eliminates any genuine vagueness concerns because "even laws that are in some respects uncertain may be upheld against a vagueness challenge if they contain a scienter requirement." *Jones v. Gov. of Fla.*, 975 F.3d 1016, 1047 (11th Cir. 2020) (internal quotation marks omitted). That Act itself uses terms that imply a scienter requirement. *See Arce*, 793 F.3d at 988-89 (noting that verbs like "advocate" and "promote" "impl[y] an affirmative act and intent"). In addition, Regulation 10.005 makes clear that a university risks losing funding only if the Board determines that the university "willfully and knowingly engaged in conduct at the institutional level

that constituted a substantiated violation of section 1000.05(4)(a)," and "failed to take appropriate corrective action." Regulation 10.005(4)(d).

Moreover, Regulation 10.005 explains that universities should enforce the Act against individual instructors who violate it by first mandating the instructor to "modify" the relevant training or instruction, and second by using "disciplinary measures where appropriate and remov[ing], by termination if appropriate, the employee(s)" only "if there is a failure or refusal to comply with the mandate." Regulation 10.005(3)(c). This structure—punishing only failure to take corrective action—likewise reduces vagueness concerns. *See U.S. Civil Serv. Comm'n*, 413 U.S. at 580 (noting it was "important" that government had "established a procedure by which an employee in doubt about the validity of a proposed course of conduct may seek and obtain advice from the [government] and thereby remove any doubt there may be as to the meaning of the law"). The combination of the scienter requirement and the reservation of punishment to only examples where an employee *refuses to correct* prohibited teaching eliminates any perceived vagueness and thus eliminates any risk of arbitrary enforcement.

IV. Any Unconstitutional Provisions Are Severable.

To the extent the Court finds Plaintiffs' claims likely to succeed with respect to any of the Act's provisions, it should sever them from the remainder of the Act. Severability is "a matter of state law," and in Florida, unconstitutional provisions are

severable even in the absence of a severability clause if "(1) they can be separated from the remaining valid provisions; (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void; (3) the good and the bad features are not so inseparable in substance that it can be said that the Legislature would have passed the one without the other; and (4) an act complete in itself remains after the invalid provisions are stricken." *Wollschlaeger*, 848 F.3d at 1318 (cleaned up). Here, each of the eight prohibited concepts of the Act clearly stands on its own and independently furthers Florida's interests in enacting it. If any portion of the Act is held unconstitutional, it should be severed from the remaining, valid provisions.

V. Plaintiffs Are Not Entitled to a Preliminary Injunction.

A. Plaintiffs Have Not Shown Irreparable Injury.

Plaintiffs' cursory argument that the Act will cause them irreparable harm is based entirely on the rule that a violation of the First Amendment constitutes a per se "irreparable injury." Pls.' Br. 33-34. Similarly, Plaintiffs invoke "a presumption of irreparable harm" that applies when "pure speech is chilled." *Id.* at 34 (internal quotation marks omitted). But because they have not shown any likelihood that the Act *actually violates* any First Amendment freedoms, this presumption does not apply.

Plaintiffs' failure to show irreparable harm is especially pronounced given the timing of their challenge. The Act was signed into law back in April, it went into effect on July 1, and this Court has already entertained (and ruled on) multiple preliminary-injunction motions related to the Act. On top of Plaintiffs' months-long delay, they did not file their motion for preliminary injunction until *after* classes began at almost all the named university-defendants and on the same day that classes began at the only remaining university-defendant.[1] Given Plaintiffs' unexplained delay, a preliminary injunction would inject chaos into a fall semester that has been underway for weeks even though the law was signed last spring. Plaintiffs' delay should foreclose their demand for emergency relief. *See Wreal*, 840 F.3d at 1248 (plaintiff's "unexplained five-month delay in seeking a preliminary injunction, by itself, fatally undermined any showing of irreparable injury").

B. The Balance of the Equities Militates Against Preliminary Injunctive Relief.

The balance of the equities and the public interest weigh decisively against enjoining the Act. As shown above, the State has a compelling—constitutionally imperative—interest in ending discrimination based on race and other immutable

[1] *See* USF FALL CALENDAR (Aug. 2022), https://bit.ly/3qNKrhV; FIU FALL CALENDAR (same), https://bit.ly/3UnulsH; FAMU FALL CALENDAR (same), https://bit.ly/3DxmkeS; FSU FALL CALENDAR (same), https://bit.ly/3qO4k8n; UCF FALL CALENDAR (same), https://bit.ly/3SjNuK7; UF FALL CALENDAR (Aug. 24), https://bit.ly/3DC1evP.

characteristics, and enjoining the Act will sanction conduct and curricular speech that Florida has determined, in the exercise of its sovereign judgment, is pernicious and contrary to the State's most cherished ideals. "Any time a State is enjoined by a court 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) (cleaned up), and that is true all the more when the statute at issue furthers interests as fundamental as those at the heart of Florida's Individual Freedom Act.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for a preliminary injunction should be denied.

Dated: September 22, 2022

Respectfully Submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to Northern District of Florida Rule 7.1(F), the undersigned counsel hereby certifies that the foregoing Defendant's Response in Opposition to Plaintiffs' Motion for a Preliminary Injunction, including body, headings, quotations, and footnotes, and excluding those portions exempt by Local Rule 7.1(F), contains 7,984 words as measured by Microsoft Office for Word 365.

/s/Charles J. Cooper
Charles J. Cooper

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

LEROY PERNELL, et al.,	)	
	)	
Plaintiffs,	)	Case No: 4:22cv304
	)	
v.	)	Tallahassee, Florida
	)	October 13, 2022
FLORIDA BOARD OF GOVERNORS OF THE STATE UNIVERSITY SYSTEM, et al.,	)	
	)	9:01 AM
Defendants.	)	
	)	
ADRIANA NOVOA, et al.,	)	
	)	
Plaintiffs,	)	Case No: 4:22cv324
	)	
v.	)	
	)	
MANNY DIAZ, JR., in his official capacity as the commissioner of the Florida State Board of Education, et al.,	)	
	)	
Defendants.	)	

TRANSCRIPT OF PRELIMINARY INJUNCTION PROCEEDINGS
BEFORE THE HONORABLE MARK E. WALKER
UNITED STATES CHIEF DISTRICT JUDGE
(Pages 1 through 98)

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P R O C E E D I N G S

(Call to Order of the Court at 9:01 AM on Thursday, October 13, 2022.)

THE COURT: Please take your seats.

I'm going to open these proceedings with a personal note. This evening we'll have a memorial service for Judge Smoak, one of my colleagues. Judge Smoak attended and graduated from the United States Military Academy, more commonly referred to as West Point. He served multiple tours in Vietnam, fought in some of the most storied actions, including Hamburger Hill where he distinguished himself and was awarded -- or recognized for his valor.

He returned from the war, attended law school, was a brilliant lawyer that practiced in this district for years. He was nominated and confirmed and served as a U.S. District Judge here for many years.

This evening we'll say good-bye to Judge Smoak, and I think it's only right and proper, since today is the day of his memorial, to recognize him and his service to this country and to this court.

We are here on two cases that overlap that are -- in terms of some legal issues, but are separate and apart, distinct: Case No. 4:22cv304 and 4:22cv324.

I have counsel present. I'm not going to have everybody announce their appearance. When you speak, if you'll

state your name for the record so the court reporter can keep track of who's speaking.

For the case ending in number 304, we set a schedule. It was filed first, as should be obvious based on the case numbers.

Once we had set that schedule, Case No. 324 was then filed. I had a second scheduling hearing, and a schedule was set, and the parties agreed to hear both cases today.

I'm going to start with counsel in Case No. 304, the Pernell case. I'm going to ask a lawyer for -- on behalf of the plaintiffs in each case and the defense, which represents the defendants in both cases, if the following statement is correct.

I asked the lawyers through two different status conferences to propose a schedule. I asked them whether or not they needed to secure any additional evidence and what type of evidence, if any, they wish to present, whether they wish to present any evidence at this hearing. And it was based on those conferences and agreement of counsel that the parties set a schedule, filed everything, and determined today would not be an evidentiary hearing but simply a legal argument.

Let me start with counsel on the Pernell case for the plaintiffs. Is that correct?

MR. SYKES: Yes, Your Honor.

THE COURT: And that was Mr. Sykes.

MR. SYKES: Yes, Your Honor.

THE COURT: All right.

And turning to counsel in the Novoa -- is that how to pronounce it?

MR. GREUBEL: Yes, Your Honor.

THE COURT: And this is Mr. Greubel?

MR. GREUBEL: Yes, Your Honor, Greg Greubel for the plaintiffs.

THE COURT: Is that correct?

MR. GREUBEL: Yes.

THE COURT: Turning to Mr. Cooper for the defendants in both cases; is that correct?

MR. COOPER: It is, Your Honor. Good morning.

THE COURT: Good morning.

All right. And I say that because it seems to -- no, it doesn't seem to me. I'm stating the obvious. Y'all have filed your papers. Everybody had a full and fair opportunity to file whatever argument they wanted to file, and the record is closed. Whatever it is, it is and I have before me now.

What I'm going to do in just a moment is I'm going to ask some questions. I'm going to do things a little bit differently than I have in the past. Sometimes my questions are going to be directed to a lawyer for the plaintiffs in each case and the defense. Sometimes I've just got a direct question for one of the parties, and if somebody else wants to respond to it on their time, they can, but I want to move things along.

Also -- and I say this in the nicest sort of way -- these hearings are longer than they need to be because when I have the question-and-answer session, I ask somebody what their favorite ice cream is, and they don't say, Judge, I don't like ice cream, or respond, This is my favorite flavor. Instead they'll say, Judge, what I really want to do is talk about Almond Joy versus Mounds, nuts or no nuts.

I'm going to give y'all time to make your arguments, but if you don't want to answer the question, I'm not going to hold you in contempt. Just say, Pass. I mean, I just -- to spend 15 minutes on a monologue that's nonresponsive to my questions and then repeat that same monologue on your time is just an absolute waste of everyone's time.

So if I ask a question and, look, it's not that simple, you can say, Judge, I think the answer to your question in some context, yes, but I don't think that case applies, and if you want me to further explain why it doesn't apply, I'll do that. I mean, so I'm not suggesting it's, you know, always a yes-or-no question. But please just don't pivot to talk about some other issue. I'm going to give y'all ample time.

I'll also note, as I normally do, I'm going to ask some questions. We'll take a break. We'll come back. I'll then hear from the plaintiffs.

Let me find out -- and the seating may not dictate this. Mr. Sykes and Mr. Greubel, have y'all talked about who

wants to go first?

MR. GREUBEL: Yeah, Mr. Sykes will be going first.

THE COURT: All right. I just didn't want to assume since he's seated in what I characterize as the jump seat as far as your side. And I'm slightly disoriented. I understand there's more of y'all that are seated normally where the defense or the criminal defendant's team would be seated.

Mr. Cooper is in the jump seat on his side. He's going to take the lead. But for questions -- and, Mr. Cooper, you know this because you've been in front of me before.

But Mr. Sykes and Mr. Greubel, if you want to turn to one of your colleagues to respond to a particular question, you can certainly turn to your colleague. I'm not going to say no. I'm happy to hear from Mr. Ohlendorf or -- is it Ms. Wold?

MS. WOLD: That's correct. Thank you.

THE COURT: -- Ms. Wold.

And so, Mr. Cooper, you're, you know, free to do that.

Likewise, when you're making your presentations, Mr. Sykes and Mr. Greubel, if you're going to pivot to some point you want to make and you want to turn to one of your colleagues, I'm certainly not going to cut you off. You can say, Judge, on this one issue that we want to talk about, I'm going to turn to my colleague, so-and-so; okay?

I really am not asking the questions to be unpleasant or difficult. I do it for a reason. If I'm asking you

questions, it gives y'all an opportunity to know, Here's what the judge's concerns are, so you can address them directly, not just for me but to have an opportunity to be heard and respond so that if one side or the other wants to talk to the Eleventh Circuit, it's -- you've had a chance at this stage to develop whatever your response is, and it just isn't left unanswered.

I used to be incredibly frustrated as a lawyer when we'd get to the end of a hearing and the judge would announce his ruling and I was like, Well, Judge, had I known that you were focused on that, I would have addressed that. And so there is a method to why I'm -- a reason why I'm doing it this way.

All right. With those preliminary matters out of the way, I do have a series of questions and in no particular order.

Y'all noted in your Rule 26 report that one of the regulations at issue took effect after the complaint was filed in the Pernell case. That is a factually accurate statement.

I didn't understand -- and this is really for Mr. Cooper or anybody on your team. I didn't understand anybody on your team -- there's certainly some standing issues you raised, so I want to make that plain. But setting that aside, I didn't understand anybody on your team to be arguing that the case was not ripe because the regulation took effect after the Pernell complaint was filed.

There's a number of cases, not the least of which is

Blanchette -- for the court reporter, B-l-a-n-c-h-e-t-t-e -- out of the U.S. Supreme Court that says: *Since ripeness is peculiarly a question of timing, it is the situation now, rather than the situation at the time of the district court's decision, that must govern.*

The Eleventh Circuit, of course, is recognizing cases like *Henley*, citing *Blanchette: The district court need not dismiss a case that was not ripe at filing if the case becomes ripe before judgment is entered.* Again, the *Henley* case relying on *Blanchette*.

And for obvious reasons, I noted those cases in that order. I'm not suggesting that's the only authority on point, but that was a clean way to present it.

Mr. Cooper, again, I don't see that in the argument, but I just wanted to find out, since the parties noted that the regulation took effect after the complaint was filed, is there any suggestion that that means that the Pernell case was not ripe?

MR. COOPER: No, Your Honor, we're not offering that argument.

THE COURT: All right. Thank you.

This is for plaintiffs' counsel in the Pernell case. For plaintiff Dr. Marvin Dunn, in terms of standing, I'm not sure how his voluntary bus tour qualifies as instruction under the implementing legislation.

Regulation 10.005(1)(c) defines instruction as teaching students about a prohibited subject within a course, and you could have a voluntary bus tour that is part of the course. It's just not -- it's not a mandatory requirement, but it's part of the course.

But I've looked through the record -- and I could be missing something, which is why I'm asking the question. I didn't see anything to suggest that the voluntary bus tour at issue was part of the course. Whether it was mandatory or discretionary is a different question, but I didn't see any -- it seemed to me that it was a -- something he did separate and apart from the courses he was teaching.

If I've got that wrong, then let me know, because I want to make sure I'm not overlooking something in the record.

MR. SYKES: Thank you, Your Honor. Emerson Sykes for the Pernell plaintiffs.

We allege that Dr. Dunbar's tour is appropriately understood as falling within the definition of instruction.

THE COURT: How is it within a course if there's no evidence it was in a course?

MR. SYKES: It's not within a traditional course that he is taking -- or that he is teaching. We'd be happy to provide supplemental information about it. It's somewhat of a unique tour --

THE COURT: That's why I said the record is closed.

I'm stuck with the record I've got. So what I want to find out is do I just ignore the definition of "within a course?" How do I -- it seems to me that's an insurmountable problem at this juncture with -- and let me make plain. There is a difference between -- and I don't think anybody disagrees with this. There is a difference between standing for purposes of preliminary injunction versus standing for the motion to dismiss.

You don't disagree with that, do you, Ms. Sykes?

MR. SYKES: No, Your Honor.

THE COURT: Mr. Cooper?

MR. COOPER: No, Your Honor. We agree with that.

THE COURT: So we have a heightened burden -- you have a heightened burden at this point that's been described as akin to what the burden would be at the summary judgment stage. The record is closed. And I said that not because of this issue, but for, quite frankly, some other issues that -- you know, I let the parties put on what they did, and I didn't restrict you. And we're not -- if I kept reopening the evidence for one side or the other, then there would be no end to a preliminary injunction hearing. So without any artificial limitations by the Court, y'all have the record you have.

But what's your best argument that what he's doing is within a course -- the definition of instruction for the provision I'm applying, or does it not matter what the definition is?

MR. SYKES: Your Honor, it's admittedly not a traditional course, but we understand the intent behind the regulation to include the kind of instruction that's offered to students and professors as a part of the departmental curriculum. So in that way we believe that it should be considered just as any other course, though it is admittedly not a traditional in-class course like what we normally think about.

THE COURT: The idea being, Judge, the sweep of the statute is not just what is or is not taught in class. It can be a lecture series. It can even -- although nobody has raised it that I'm aware of in this case, it also extends to training for faculty, for example; right?

MR. SYKES: Yes, Your Honor.

THE COURT: Okay. Mr. Cooper, anybody on your team want to be heard on that limited point?

MS. WOLD: Yes, Your Honor. This is Megan Wold.

I think it's a new argument today to suggest that Professor Dunn's historic bus tour is somehow within a course, even though I don't think there is any evidence, as Your Honor noted, in the record that it is. The argument that plaintiffs have made in their brief is that within a course isn't applicable to university professors within the definition of regulation 10.005.

And as we explained in our brief, we don't think that's true under that reading, and I think under the reading

that opposing counsel has offered this morning, a janitor's conversation with a student in the hallway would qualify as an instruction; a secretary who makes small talk with students who are waiting for office hours with a professor would fall under the definition of instruction.

And if that were so, then the definition of instruction would be far more capacious than the plain meaning of that word in the act. And so we think that simply can't be.

I think the Board of Governors' regulation is clear that instruction has to happen within a course. We are bound by that, and I think the historic bus tour, which doesn't occur within a course, doesn't qualify.

And Your Honor mentioned training, but training is also a word used in the act and then it's separately defined in the Board of Governors' regulation. And I don't think there's been any suggestion that this bus tour qualifies as training.

THE COURT: And so I think the record would be clear, I wasn't conflating training with a course. I think what I was repeating back to the plaintiff is argument that the definition -- that the statute coverage was broader, and so it was on that limited point that I asked that question.

MS. WOLD: Absolutely.

THE COURT: Fair enough. Thank you.

MS. WOLD: I think that's clear. I wanted to make sure.

Thank you.

THE COURT: All right. Let's talk about *Virgil*. And, again, I'm making the following comment. I'm not trying to be unpleasant. I'm not scowling. I'm not pounding on the bench. And both sides are guilty of this sin in this case. Everybody seems to like to cut and lift statements out of opinions completely divorced from the context and the rest of the language of the opinions.

You know, I didn't clerk for the U.S. Supreme Court. I didn't go to an Ivy League school, but, at the very least, my public education taught me in law school that, you know, the holding and the context in which it's held matters and not just some language lifted out of a case out of context.

So my basic question, in terms of trying to ascertain what the appropriate analytical framework for the claims is, boils down to this. Let me start with Sykes, then I'll go to Greubel, then I'll go to Cooper, and then the next question I'll do it another order.

For purpose of evaluating the students' claims, has *Virgil* been set aside by the Eleventh Circuit en banc? Or has the U.S. Supreme Court set aside *Virgil*? And if not, why doesn't *Virgil* from the Eleventh Circuit dictate the contours of the claims of the students' right of access to information?

MR. SYKES: Thank you, Your Honor.

The reason that we don't think *Virgil* provides very

strong indications of what the Court should do here is because it's in the K-12 context, and it was about removal of a book from the curriculum.

And we think that fundamentally different rules apply in higher education where all the students involved are adults. For example, the book that was removed in *Virgil* was for explicit material that, of course, would not have been evaluated in the same way if it were being taught in a college course. So I think the facts of *Virgil* itself show that it's a very different set of circumstances where you are worried about exposure of young folks to explicit material versus a higher education context.

THE COURT: Since every case practically talks about how the facts matter, and whether it's *Bishop* in a balancing test or *Virgil* talking about things being reasonably related to a pedagogical interest, why isn't -- whether it's under *Virgil* or under *Bishop*, why is that just not part of the context and the facts that goes into evaluating the claim, as opposed to suggesting the standard isn't the right standard? That's where both sides have lost me.

We've got the Eleventh Circuit that passes on the question generally in *Virgil*. We then have the Eleventh Circuit in *Bishop* talk about it creates a balancing test that y'all don't seem thrilled with and try to distinguish. I didn't write *Bishop*. I wouldn't have written it the way it was written, but

it doesn't matter. It's the Eleventh Circuit.

The defense says it establishes a bright-line rule that we can do whatever we want, which is sort of the exact opposite of a balancing test, so I'll ask Mr. Cooper that in a few minutes. I just -- you know, Judge Cox, who I clerked for, was part of that panel, and he was many things, but stupid wasn't one of them. And he knew the difference between a bright-line rule and a balancing test.

So I'm not sure how I read *Bishop* to establish a bright-line rule when they say this a balancing test. But that's where both sides lose me. Because y'all don't like some language, one side or the other in some of these cases, you just try to distance yourself from them. But if I'm not going to analyze the students' claims under *Virgil* and ask the question about whether, A, the speech is clearly characterized as part of the school curriculum, and, B, is it reasonably related to a legitimate pedagogical, interest -- reasonably being the operative -- well, not the operative -- but a critical word -- what's the test that I'm supposed to apply?

MR. SYKES: Thanks, Your Honor.

A few quick points. One is I don't think that we take any issue with *Bishop*. We are not asking you to --

THE COURT: Well, let's focus on *Virgil* now, and we're going to pivot to *Bishop*.

MR. SYKES: Understood, Your Honor.

I want to make clear that even under the standard adopted by *Virgil*, from *Hazelwood* --

THE COURT: And I'm going to ask y'all to apply these standards later.

For example, I read the defendant's brief, and they go, *Bishop* ain't it; but if you are going to apply *Bishop*, here's how it should be applied. They say that, Anything that's said in a classroom is government speech -- end of inquiry, full stop -- we can control absolutely down to the -- you know, the intro statement of a professor, what's said in the class. That's their starting position. They then said that, If you apply *Bishop*, here's how it should be applied.

I'm going to ask y'all both to apply *Virgil* to this record -- and I did emphasize the word "record," and I'm going to have y'all apply *Bishop* to this record. But I want to find out what -- assuming *Virgil* is not the test, what is the test or the analytical framework, however you want to phrase it? I just -- Judge, this is what you're supposed to look at, the factors, the -- what are you supposed to balance? What am I supposed to look at in analyzing the students' claims other than, Judge, it's in the university setting and academic freedom, which is not a right, but an interest that's been recognized and balanced by the Eleventh Circuit explicitly in *Bishop* has a special niche, which the U.S. Supreme Court has repeatedly said? So, Judge, it's -- I get it. Y'all have

repeated like some talisman over and over and over again it's a special niche and it has this heightened scrutiny. I get that.

But aside from that general statement that's cut and pasted over and over and over and over again, what is the analytical framework for the students' claim if it's not *Virgil*?

MR. SYKES: Your Honor, we think that it's a -- what the basic test for whenever a legislature tries to discriminate based on viewpoint, it's presumptively unconstitutional and, if not, subject to scrutiny.

I would just point out that both in *Virgil* and in *Bishop*, the Court was looking at a school disciplining a student or the authority of the university to discipline a professor or the authority of the school district to remove the book.

Here we're not looking at a university disciplining students or disciplining professors. We're talking about a legislature injecting itself into the college classroom. And we think that this is a very important distinction.

THE COURT: Let me ask you a question there.

MR. SYKES: Sure.

THE COURT: Can the legislature -- are you suggesting only a university in the university setting or only the school board in a secondary school setting has the right to control the curriculum? Or if it's truly curriculum -- and we're going to talk about the difference between curriculum and everything that's said in a classroom in a little bit.

But are you suggesting the Florida Legislature does not have a right to set the curriculum?

MR. SYKES: It is not the role of the legislature --

THE COURT: Not should they. What's the best legal case for the State cannot set the curriculum for a university, only individual universities can set the curriculum?

MR. SYKES: To be honest, Your Honor, we don't have a case on all fours here because what the legislature has done is so unique. There have been a lot of proposals, similar cutting and pasting, similar language in many districts in many states. But we have looked hard to find a place where a state legislature has tried to enforce a particular viewpoint on college professors and other instructors. You have to go all the way back to the -- sort of the loyalty oath cases of the late '50s and '60s. We don't have a lot of cases in this area because state legislatures generally stay out of this kind of viewpoint-based requirement and --

THE COURT: Again, I want to -- surely, Mr. Sykes, you're not trying to collapse the concept of viewpoint and content. Is that really the plaintiffs' suggestion, that viewpoint and -- there's no daylight between those two concepts?

MR. SYKES: Not at all, Your Honor.

THE COURT: Because I thought what the law for well over a century has taught us is that there is a huge difference between content and viewpoint.

So my question to you -- and I'm going to ask this to Mr. Cooper. It seems to me one of the questions, whether I'm applying, for example, *Bishop* or *Virgil*, or any of these cases, is -- and I know some Courts in a perfunctory way roll over concepts and conflate concepts. I'm not being critical, but Courts do that. And when you write a three page -- pages on a complex legal issue, then you tend to get that sort of conflating concept -- conflating of concepts.

So when I'm talking -- does curriculum suggest both content and viewpoint, or does it envision -- curriculum as it's been applied by Courts to mean content?

MR. SYKES: It's difficult to say, Your Honor. As you said, Courts use these terms differently. We do not mean to suggest that there's no difference between --

THE COURT: Do I get to ignore the U.S. Supreme Court?

For the life of me -- and I'm going to ask Mr. Cooper about this. In *Rosenberger* --

MR. SYKES: Yes, Your Honor.

THE COURT: -- which gets quoted like it's, quite frankly, out of context, but gets -- the language over and over talks about what a university can do, but it explicitly talks about it made content-based choices. But when *Rosenberger* says that, they spent the first five pages before that distinguishing between content and viewpoint.

So I just -- when I'm analyzing what the university --

what you can or can't do, whether it's the State or the university, you say I should analyze the State differently from the public university. And I get it's one step removed. But for the life of me -- and I'm going to have Mr. Cooper -- I don't understand, if I read *Rosenberger* -- and, again, maybe they taught me something different at UF than they teach you folks at Harvard. But I thought when I read that statement by the Court, the holding, talking about *Widmar*, that the State, as a speaker, may make content-based choices.

How in the world do I read that statement and cut and paste it and ignore the first five pages of the order that distinguish between content and viewpoint?

I just, for the life of me, don't understand why I would do that.

MR. SYKES: We're not asking you to do that. I did not go to Harvard, but I agree that there is a big difference between viewpoint and content. And we think that this language in *Rosenberger* is dicta, and it's talking about regulating -- and it was about student activity fees. So we think that its application to in-class curriculum is not one to one, but we agree with you wholeheartedly --

THE COURT: Why does it hurt you? This is what -- for both sides, y'all -- one side relies on a case, and y'all desperately try to say it doesn't -- isn't applicable. But it does talk about general First Amendment principles, and I don't

understand why -- and maybe -- and you and Mr. Greubel may be able to explain this to me -- why y'all don't like *Rosenberger* when, to me, it makes one of the fundamental points which underlies your argument if I'm going to apply *Bishop*, which is there's a huge difference between viewpoint regulation and content regulation. And you'd have a hard road to hoe to convince me that the State of Florida or the university can't dictate what's in the curriculum.

But it seems to me that is vastly different than establishing what viewpoints are permissible, which runs afoul of the most basic principles of First Amendment jurisprudence from the first time the U.S. Supreme Court addressed or applied free speech issues.

MR. SYKES: Your Honor, I agree completely, and to the extent we have given a different impression, I apologize. I think we think that *Rosenberger* exactly stands for the idea that the University may have some right to control the content but not the viewpoint. So we agree, I think, entirely.

THE COURT: And then let me -- and I've got a follow-up question. We'll hear from Mr. Greubel on that.

MR. GREUBEL: Yes, Your Honor. It is possible, and the Eleventh Circuit did recognize this in the *Speech First v. Cartwright*. For the reporter, it's 32 F.4th 1110.

And the discriminatory harassment policy in that case was both content-based and viewpoint discriminatory. So there

is the possibility that a law, like this one, can be content-based and viewpoint discriminatory in a way that offends the First Amendment.

THE COURT: What I'm really asking is the reverse: Is there any case that says you can have a purely viewpoint policy?

MR. GREUBEL: That the government may have a purely viewpoint policy?

THE COURT: Yes.

MR. GREUBEL: Not in the higher education context.

THE COURT: And, Mr. Greubel, anything else you want to add about evaluating the students' claims in *Virgil*?

MR. GREUBEL: Not on the *Virgil* point, Your Honor, no.

THE COURT: Mr. Cooper?

MR. COOPER: Yes, thank you, Your Honor.

Your Honor, I don't think that one can analyze the *Virgil* decision and the rights of students to receive information in a way that's divorced from the antecedent right, if you will, of professors, if they have one, to say what they wish to say in classrooms.

THE COURT: I'm not saying that issues don't overlap. But help me to understand, if in *Virgil*, in evaluating access to information, they applied, I believe, the *Hazelwood* test -- correct?

MR. COOPER: Yes, Your Honor, pedagogical concerns.

THE COURT: And whether it's *Virgil* or -- I mean,

it's -- why is the *Hazelwood* test applied in *Virgil* not the test I apply to the students' claims.

MR. COOPER: Your Honor, because what we are dealing with here is a claimed right of a student to receive instruction and speech from a professor of a particular kind, and that cannot possibly be a right that's independent of the right of the professor, if the professor has one, under the First Amendment to provide the speech that the student says the student wants to hear.

If the professor, as we maintain, Your Honor, has no First Amendment right to espouse the concepts in the Individual Freedom Act, then it cannot be that the student has some independent right to insist that the professor provide the professor's espousal or the professor's opinions about that concept. The student can't have a right that the professor clearly does not have. The student can't insist on a bespoke curriculum or bespoke viewpoints to be offered.

THE COURT: So let me ask you this. So, Judge, when the case law that says that actually the student, because their speech is not government speech, would be -- at the university level for case law would be afforded a more expansive right to speak, Judge, that's different because that's talking about the student's right to speak, not receive information?

MR. COOPER: Yes.

THE COURT: So to the extent there's language that

would suggest that the students' rights are more expansive than a professor's right to speak who is speaking for, in this case, the State, based on your arguments, that's the distinction between those type of -- here, Judge, we are not talking about the right of the student to bring up a viewpoint or say something in class; we're talking about the right to receive this information. And that's the important distinction that separates this case out from those cases that suggest that the student would have a greater right than the teacher to speak in the classroom setting.

MR. COOPER: Your Honor, that's a concise and, I think, accurate statement of our view of things.

THE COURT: So when I do that, I'm not -- I understand that I'm not inventing fire. I repeat it back because I want to make sure that -- and I thought that was your argument. So sometimes just to cut to the chase, I'll repeat back the argument. But I've got that argument correct; right?

MR. COOPER: You do. You do, Your Honor, but -- and, again, yes, the students have a right to -- First Amendment right to speak that is different from, and we would say certainly broader than the right of a government employee of any kind, including professors.

THE COURT: So the right to receive information is concurrent and conterminous with -- or the exact same as the rights of the -- what rights, if any, the professor has?

MR. COOPER: Exactly, Your Honor. The student can't possibly have a right to insist on the professor's opinion, even if a professor doesn't want to give the opinion --

THE COURT: I understand.

MR. COOPER: -- or if the State has a right to prevent the professor from giving that opinion.

THE COURT: I understand. If you'll hold tight on that.

MR. COOPER: Yes.

THE COURT: Mr. Sykes and/or Mr. Greubel, why is that not so, that the *Virgil* case is the case that -- you know, they're really inapposite because here we're talking about something narrower, which is the right to receive information; and if you have no right to give it, why would the right to receive it be broader than the right to give it?

MR. SYKES: Your Honor, in the circumstances of this case where the Stop WOKE Act targets instruction, we agree that the students rights are sort of the flip side of the instructor's rights. I would just note that that's not going to be true always. And in many cases, including in *Virgil*, a K-12 teacher might not have a First Amendment right to put certain books in the library, but the student still has a First Amendment right to be able to access those rights -- those books. So it's not that in all situations they are exactly -- they have to go hand in hand, but we agree that in the current

situation under the Stop WOKE Act, they are sort of on the flip side of that.

THE COURT: All right. Mr. Greubel, you agree?

MR. GREUBEL: That's right, Your Honor. And it's our position as well that the State is not permitted to impose itself artificially between the right of a student -- or the right of students to receive information and the right of professors to teach the curriculum.

THE COURT: Thank you.

So that's helpful. This is why we have oral argument. Y'all at least agree on that point.

Mr. Cooper, I'm going to let you respond to some of the other issues that were raised during my discussion with Mr. Sykes and Mr. Greubel, but why don't you -- one thing I am curious that I need your help with me understanding is your position as it relates to setting curriculum or content versus viewpoint. And is there a distinction between the two, and, if not, why not, and what's your best authority for that?

MR. COOPER: Your Honor, I think there is a distinction generally in the law between consent-based restrictions and, beyond that, viewpoint-based restrictions within context.

THE COURT: Fair enough. Fair enough. Poorly phrased question. I didn't mean in general First Amendment jurisprudence. I mean specifically as it relates to --

MR. COOPER: Yes, sir.

THE COURT: -- regulating what can and cannot be said in a university classroom, is there -- does the law recognize a distinction between viewpoint and content, and, if not, why not? And if not, why do the cases talk about content and curriculum? And what's your best case that there's no daylight between those concepts for purposes of a lecture in a university setting?

MR. COOPER: Yes, Your Honor. I do not think there is a difference in terms of the State's authority to set curriculum to --

THE COURT: What's your best case for curriculum equals content and viewpoint for purposes of a First Amendment analysis as it relates to regulating what's taught by the State?

MR. COOPER: I like *Rosenberger* very much, Your Honor.

THE COURT: Let me pause you. Help me to understand that, because I want to read *Rosenberger*, and I really want you -- and this is good -- I mean, this is like a CLE for me.

Help me to understand how I read *Rosenberger* that says the government can regulate content when they just spent five pages distinguishing between content and viewpoint? Why would I then collapse those concepts in the very same decision, just a few pages away, when they only use the word "content"?

MR. COOPER: Your Honor, they don't only use the word "content." *Rosenberger* itself did collapse those -- those different concepts. And to my mind anyway, my reading made

clear that when the university is setting its curriculum, it is entitled to have a viewpoint. It is entitled to -- and its professors are speaking with its voice, and it's entitled to determine what they say.

THE COURT: But this circles back, though, Mr. Cooper, to your proposition that the State of Florida, without qualification of any kind, can dictate not just that you're going to teach biology, but everything that can be said in the biology class without restriction.

How does that then square with *Bishop* that says it's a balancing test? I don't understand how we can have an absolute right to do something, and then we've got a balancing test. Those seem like two distinct concepts to me that would -- can't possibly be reconciled.

MR. COOPER: Let me try to reconcile them, Your Honor, because I understand the point you make, and I've given a lot of thought to this as well.

And, yes, the Court of Appeals in *Bishop* did, indeed, employ a balancing test. They were clear about that. They used *Hazelwood* as their polestar, and they went from there, and they analyzed the various elements of -- and considerations that should go into the balance, academic freedom, ultimately concluding that that is not an independent First Amendment right.

THE COURT: We keep saying that, but why do I care?

If you've got a balancing test that says it's an interest you're going to balance -- I understand it's a good -- you know, if CNN or Fox News is going to interview you, I understand why it's a good sound byte there's no right to academic freedom. I'm not aware of anybody suggesting there's a right to academic freedom, but what -- the Eleventh Circuit, which I'm bound to follow, has said it's an interest that's weighed. So while you may not call it a right, who cares? I understand it would be a higher -- it would be subject to higher review if it was a right.

MR. COOPER: I care because if they're right and their professors have a right to academic freedom to say whatever they want, I lose. I lose. That's why I care. But -- so --

THE COURT: But they haven't argued -- have y'all argued that there's an absolute right?

MR. GREUBEL: No, Your Honor, that's not at all what we've argued. Does the *Bishop* case recognize --

THE COURT: Hold on. I've got -- you answered that question, and we'll talk about more -- I'll get both sides to talk about *Bishop* and how it should be applied.

I guess my thing is I don't understand -- I absolutely agree, and I will say right now -- because I can read the King's English -- it says in *Bishop* there is not a right to academic freedom. There is no right to academic freedom. Boom. We're done. On that issue you win, but that's not the end of the inquiry.

MR. COOPER: No, it's not.

THE COURT: The inquiry still is -- that is an interest that has to be balanced against other interests, and you keep saying to me, basically, like -- not basically like. You keep saying to me explicitly and in your papers the State of Florida or university can tell a professor not only the subject areas, not only the topics they've got to cover, not only the information that has to be covered, but precisely how they say it and the opinions that they express when they're saying it, and they can control -- because it's the government speaking, literally can control every word.

They could hand every professor -- and maybe that's where we're heading; I don't know -- a transcript that says, You're going to read from this transcript semester after semester verbatim because we have absolute control over what you say and how you say it.

If that's true, then why does *Bishop* have a balancing test? I just don't understand that.

MR. COOPER: Your Honor, once again you're right. It does -- academic freedom is among the interests to be placed in that balance. So also is the fact that professors and other teachers are employees of the State. The Court placed significant weight on that point, and I would say dominantly on ultimately that point in the balance, because, Your Honor, what I believe that *Bishop* did was after undertaking that balancing

process, it concluded that the autonomy of the professors in that balancing process can never, never overcome the university's decision about what shall be and shall not be taught. In other words -- and that's essentially what they said.

I mean, how else are we to understand after the long windup?

THE COURT: Well, apparently Justice Alito is a simpleton just like I am, because didn't he --

MR. COOPER: Who are you talking about?

THE COURT: Justice Alito. Didn't Justice Alito -- let me find the case that you --

MR. COOPER: *Edwards*, one of my favorites.

THE COURT: -- cited. Doesn't he -- hold on. Let me find it. I've got it somewhere in my stack. It must be in another stack. Give me one second.

(Pause in proceedings.)

THE COURT: I'm sorry. It was in a different stack.

In *Edwards* -- I was just trying to get the language -- in talking about the right to control, he puts, "But see Bishop." Now, maybe Justice Alito learned something when he went on the Supreme Court he didn't know when he was a circuit judge.

But what does "but see" mean other than the Eleventh Circuit has held something to the contrary?

MR. COOPER: Your Honor, I -- I believe -- I'm not sure the passage that he's saying "but see" is connected to, but I have to say that *Edwards* is strong support, I believe, for our position. Justice Alito at length, analyzing Rosenberger and concludes, Your Honor, a public university professor does not have a First Amendment right to decide what will be taught in the classroom.

THE COURT: And then --

MR. COOPER: Pure and simple.

THE COURT: And then -- and then says, "But see" -- *but see Bishop,*" with a parenthetical that says, "recognizing the First Amendment is implicated when you're talking about a university's speech."

I just -- I get it. I get there is this push, because this happens in my courtroom with some frequency, Judge, we think the U.S. Supreme Court is going to change the law. Fair enough. They might.

Judge, we -- we want you to look to what Justice Alito said as a circuit judge because he's likely to lead the call for a change on the U.S. Supreme Court.

But I don't get to predict what the U.S. Supreme Court is going to do, and I wouldn't even try. I've got to apply the Eleventh Circuit case, and so I just -- when Justice Alito says "but see," it's just hard for me to understand how you then stand and waive that decision and say, Judge, *Bishop* means

something other than what Justice Alito said it meant. I just -- for the life of me, I don't understand why I should adopt a construction different than Alito and apply *Bishop* in a different way.

You have a -- the Eleventh Circuit may well en banc -- although their predilection to ignore the prior panel rule, they may not go en banc. They may decide they don't like *Bishop* anymore. The proper mechanism would be to go en banc, but maybe they don't. Maybe they just ignore the prior panel rule.

But I don't understand how I read *Bishop* to say there's no real balancing; the professors always win on balancing, when even Justice Alito didn't read it that way.

MR. COOPER: Your Honor --

THE COURT: But maybe he was, you know -- I don't know -- not thinking that day or something.

MR. COOPER: If we get to the Eleventh Circuit -- it could happen -- then I'm going to ask the Eleventh Circuit to read *Bishop* exactly the same way I'm asking you to, which is to understand the following sentences.

In short -- in short -- Your Honor, this is its -- this is its conclusion from all of the balancing that it did -- *Dr. Bishop and the University disagree about a matter of content in the courses he teaches. The University must have the final say in such a dispute.* They go on: *The University's conclusions about course content must be allowed to hold sway*

over an individual professor's judgments. Finally: *The University necessarily has dominion over what is taught by its professors...*

THE COURT: Sure. Curriculum, I agree, they can set you can teach this kind of class; you can't teach this kind of class.

But you're reading that -- didn't it also in balancing that -- they also had some other interesting language. *The university has not suggested that Dr. Bishop cannot hold his particular views; express them, on his own time,* et cetera. *The University has simply said that he may not discuss his religious beliefs...under the guise of University courses.*

If the course doesn't include religion or talking about religion -- but you can't simply -- I mean, I think that's got a quote mark around it. So people can raise their eyebrows, but I'm reading directly from a quote. *...the University's interests in the classroom conduct of the professors are sufficient...to warrant the reasonable restrictions...*

Because they talk about how you didn't -- this is not part of your core curriculum that you're teaching. It's a separate class that you're teaching. You're calling a separate after-hours class to talk about your own personal views, as opposed to teaching the subject matter of the class. It's coercive because it's done during exams, and while you may say you're not forcing them to listen to your personal views outside

of class, you've effectively made it mandatory because it's coercive because it's during exam time.

So, I mean -- *Bishop* also says we're going to look at all the particular facts, and in making the statements you're talking, they don't -- I mean, this is the wonderful thing about case law. Those statements are not divorced from the facts of the case, and they start by saying that, This is a fact-intensive inquiry. We're applying *Hazelwood*, and under these specific facts, this is why we can control this specific professor from espousing these particular views. And they go through and say this is why it weighs on that side.

But they didn't say he couldn't say in the classroom -- the State could control if he was not doing it after hours, was doing it in his regular class as part of the curriculum, said, And I disagree with this particular, you know, viewpoint by this particular group of academics or something. It doesn't say he can't express his opinions. It's completely divorced from that. It says, Here are all the ways it's detached from the curriculum.

And I just don't understand why I ignore all those facts. It seems to me that's why *Bishop* is -- in terms of the application of the facts is a very odd and narrow set of facts and isn't really about does the State have the right to control you offering an opinion about the subject matter about what you're teaching.

MR. COOPER: Who gets to decide whether it's part of the subject matter of what you're teaching? Isn't that also the professor's First Amendment right, according to the plaintiffs?

And, Your Honor, yes, we're not arguing that the plaintiffs here or Dr. Bishop, in his case, can't say whatever he wants to -- whatever opinions he has on his own time not in the context of the classroom. But even apart from his optional class, he would offer his views -- his viewpoints, as the *Bishop* Court called them, exactly the same as the *Rosenberger* did and Justice Alito in *Edwards* called them, viewpoints. He would offer those viewpoints in his formal classes, and here's what -- you know, yes, here's the language of the Court.

THE COURT: What -- point me to the headnote so I can find out what you're reading from.

MR. COOPER: I don't know about the headnote.

THE COURT: Or just a general area, page number, anything so I can find where you're reading from.

MR. COOPER: Page 1077.

THE COURT: Hold on one second.

I've got 1071. This is 10 -- hold on.

MR. COOPER: It begins with the "In short" -- the paragraph --

THE COURT: I've got it, the last paragraph, "In short..."

MR. COOPER: "In short," that's where the paragraph

begins, and I've already shared that passage with the Court. But if you go on down after the "hold sway" sentence, the Court says: *By its memo to Dr. Bishop, the university seeks to prevent him from presenting his religious viewpoint during instructional time* -- and here's the point I want to focus on -- *even to the extent that it represents his professional opinion about his subject matter.*

So he -- he believes in his human physiology class that his religious views were important and directly relevant to human physiology, no less so, I would submit to you --

THE COURT: So that, then, would result in the absolute rule that no matter how directly related it was, even if it's part of the -- you're commenting on a reading -- let's say the university -- the State of Florida next passes a list of: These are the only 100 books you can read -- and maybe that's coming in the next legislative session -- and you're reading directly from the book, that then this is what -- not only is this the course you're going to teach, not only is this the content, these are the books you're going to have your class read and discuss in class.

You would read that paragraph in Bishop to say -- and they can pass a law that says -- And the professor can't comment or can't express an opinion about anything, even in the prescribed curriculum? That's how broad? That's what that paragraph means?

MR. COOPER: Your Honor --

THE COURT: And why -- if that's the case, why is the rule not -- and maybe we're headed there. Maybe the rule is that the State of Florida can issue transcripts to every university professor. But isn't that the logical conclusion of your position, that they can regulate everything that's said in the courtroom -- I'm sorry -- in the classroom down to the last word of the professor?

MR. COOPER: Your Honor, it is not our position that the First Amendment has no scope of operation when the State --

THE COURT: And I thought you just said to me there is no scope of operation in the classroom.

MR. COOPER: No, no.

THE COURT: So either you're pregnant or you're not. There's no such thing as being a little bit pregnant.

MR. COOPER: Your Honor, I've never said that.

THE COURT: In the classroom -- I want to find out. In the classroom, what is the defense position? Is the State of Florida -- or I'm sorry. Is the defense's position that in the classroom there's no limitation in terms of the First Amendment on the State controlling what a university professor says?

MR. COOPER: That is not my position. I do believe that there is a very, very narrow scope to the First Amendment.

THE COURT: And what would that narrow scope be?

MR. COOPER: I think it flows from *Barnett*, and I

don't believe the State can require a professor to express a belief to pledge allegiance to the flag --

THE COURT: They can't compel speech, but they can prohibit all speech?

MR. COOPER: They can't compel a professor or any employee to express a belief --

THE COURT: I understand.

MR. COOPER: -- that the person does not --

THE COURT: But they can prohibit any speech, full stop, without qualification; correct?

MR. COOPER: They can prohibit a professor from espousing an opinion that the --

THE COURT: They can't force an opinion, but they can prohibit a professor from expressing any particular opinion without qualification?

MR. COOPER: Your Honor, government speech under *Garcetti*, we believe, under *Rosenberger*, it's clear that the professors are speaking -- or that what they utter is government speech, and the government is entitled to determine the content of that speech and to prohibit the expression of certain viewpoints.

THE COURT: Is all the case law about we're not going to apply the First Amendment in such a way to have some, you know, orthodoxy that we're all going to read from the same page of music? Is that just fanciful, silly nonsense that has

no application?

MR. COOPER: Your Honor, it's not at all fanciful and it's not at all silly. And the State of Florida embraces that with the most narrow, narrow exception, which is to say that these particular eight concepts, which we believe are racially discriminatory and repugnant, we are not going to permit professors speaking in our State-prescribed curriculum, in our classrooms, on our time, accepting our paychecks to express these particular viewpoints. And yes, viewpoints, paycheck --

THE COURT: Riddle me this, Batman. If the administration changes and the government changes in 15 years in Florida, under your theory, the State of Florida could prohibit the instruction on American exceptionalism because it alienates people of color and minorities because it suggests -- and other disadvantaged groups because it suggests that America doesn't have a darker side that needs to be qualified. So that's --

MR. COOPER: Yes.

THE COURT: -- sort of the 30,000-foot-up view problem I have with your suggestion, Mr. Cooper, about the scope of the law. Because it suggests that from state to state you can pick and choose which types of what viewpoint you like and, under the guise of stopping indoctrination, you promote indoctrination. Why isn't that so?

MR. COOPER: Your Honor, the government, again, is the one who decides. It is the State who decides what the

curriculum will be and what will be taught and what will not be taught. And that's true today in Florida and will be true 15 years from now in Florida. If the political profile of this state changes completely and the --

THE COURT: So the scope of the First Amendment and what it does -- I get it. Fair enough.

Go ahead. I interrupted you.

MR. COOPER: Well, and the concepts that now the State prohibits espousing in its classrooms become the doctrine that this state and its people, through its legislature, decide to embrace and to prescribe as part of the curriculum. But they're -- and, yes, Your Honor, I have to emphasize that the State, like I believe all states, embraces the policy of academic freedom. This is -- and in the main in general --

THE COURT: So long as you say what we like, we believe in academic freedom; right?

MR. COOPER: Well, in this narrow area --

THE COURT: How does that even work, Mr. Cooper? We have the absolute right to control what you say in opinions you offer, but we believe in academic freedom: What does that mean? That seems like the most -- I mean, I would have to read the worst dystopian novel to come up with the, we believe in academic freedom so long as you say what we say. I mean, that sounds like you just quoted directly from something George Orwell wrote. I mean, I just -- I don't get it.

You don't see the inconsistency in saying, we wholeheartedly, as a talking point, believe in academic freedom so long as you say what we want you to say?

MR. COOPER: Your Honor, we don't believe that is a right inherent in a professor, a First Amendment right. We do believe that it is a very important interest in any balancing process that might be --

THE COURT: It's an important interest, but you always lose. I mean, that's what you said.

MR. COOPER: You always lose in a dispute between a professor and the university, and therefore the State, about the content of the curriculum and the content of the class.

THE COURT: Next question. Does it not -- and, again, we'll just have to agree to disagree whether content and viewpoint are the same concepts. Apparently those are the only contexts in the First Amendment where that's true.

But let me -- I'll let you finish up. We've been going over an hour, so we're going to take a break for the benefit of the court reporter.

MR. COOPER: Thank you, Your Honor.

I just, I guess, want to make one point in follow-up to this colloquy we've just had.

Yes, 15 years from now the State may change its mind and prescribe or prohibit concepts that are precisely the opposite of what the State does now.

The plaintiffs are arguing that here and now their professors -- professors generally have the First Amendment right to say that members of the White race are morally superior to members of the Black race. They have a First Amendment right to say that.

THE COURT: Well --

MR. COOPER: I disagree with that, Your Honor.

THE COURT: -- what's clear is you have a right to talk about eugenics and say that Whites are physically superior to Blacks because that's not prohibited by this; correct?

MR. COOPER: I beg your pardon?

THE COURT: You can talk about eugenics all day long under this; right? You just can't talk about moral superiority; right?

MR. COOPER: I'm not sure that the example you are raising isn't within one of the eight concepts. I haven't honestly --

THE COURT: Physical versus moral superiority -- anyway, fair enough. We'll just have to agree to disagree on that.

MR. COOPER: Thank you, Your Honor.

THE COURT: Mr. Cooper, why -- I just -- for the life of me, I don't understand why -- what you're saying is academic freedom is an interest; not a right, but it's an interest. It's an interest that has to be weighed under *Bishop*. But what

academic freedom means is it's whatever the political party in power says it is, is what I just understood you to say. Sure, Judge, if power changes hands tomorrow in Florida or in a few weeks in Georgia, whatever political party takes control gets to dictate the scope; not what subject matter is taught, not the curriculum, not what topics have to be covered, but down to what viewpoints are expressed in the classroom. Academic freedom equates to whoever has the political power; right?

MR. COOPER: Your Honor, even from Bishop we know that the professor can't express -- and he was disciplined for expressing his religious viewpoints in a class that he thought they were directly relevant to his subject matter -- his religious viewpoints. The State had the authority, and the professor did not have the First Amendment right to express those viewpoints.

THE COURT: I understand.

MR. COOPER: This -- the Individual Freedom Act is no different. These are familiar concepts and viewpoints that the State, just as if it were dealing with religious viewpoints -- I mean, is there any doubt that the State could pass --

THE COURT: Well, what I've come to learn is the only people that have First Amendment rights are based on religion; but fair enough. We'll have to agree to disagree on that.

MR. COOPER: Well, let me ask this. Are religious viewpoints the only ones that the State has the authority,

notwithstanding a claim of First Amendment academic freedom, or otherwise, to place off limits?

THE COURT: No. I think in a religion class a professor could certainly express their viewpoints about particular religious doctrine, absolutely.

But I think there's a world of difference between outside of class coercing your students to feel like during the middle of exams that they are going to ruin their chances to get a good grade in the class. You're forcing them to go to an extra class, not as part of the regular curriculum, but to discuss your personal views on religion as it could relate to anything up to and including the subject matter of the class. I think that's fundamentally different than saying a professor in a religion class could not offer their personal views on a particular religious doctrine that was integral to the very subject matter they're being required to teach because it's a part of the prescribed curriculum of the university. I think those things are very different, and I think it's disingenuous to suggest otherwise.

But we are going to go ahead and take a break. It's 10:10, and we'll come back in ten minutes.

(Recess taken at 10:12 AM.)

(Resumed at 10:23 AM.)

THE COURT: Please take your seats.

I need one of y'all for each side to have somebody

that's going to act as secretary. What I'm going to do is I'm going to identify -- because it's taken longer than I anticipated with my questioning. I told my law clerks I wasn't going to question y'all today, and I guess I'm buying pizza because I lost that bet.

There are some other topics, but I want to -- these topics I'm going to want to cover more quickly. So these are some things I'm going to want y'all to address, and then we are going to take a break. You are going to tell me how long you need, and we are going to come back, and I'm going to let the plaintiffs go and then the defense go, and then we'll be done for the day.

With respect to vagueness -- and this is more directed to the plaintiffs -- I understand the argument that's been made that if there is -- a word appears in a dictionary, it, by definition, can't be vague, which is an interesting concept. But then we would no longer have the vagueness doctrine because I've never seen a nonword be the subject matter of a vagueness challenge.

I also understand that there's a ton of cases that talk about syntax that can make something vague or not vague.

I also understand there's case law that says context matters. So, for example, in deliberate indifference, saying that there is both an -- objective and subjective components, you have to look at it both from the standpoint of the person

who's allegedly violated somebody's right, as well as is it reasonable. Just because in one context a word may be not vague doesn't mean in every context and what it's modifying means it's never vague. So I understand those arguments and issues. I don't need y'all to further elaborate. Although, certainly, if the defense wants to reassert those positions, it can.

What I do want you to address is a new issue that appeared -- I think it was in the reply -- and forgive me. This is about the third preliminary injunction hearing I've had in a couple of weeks. The issue was raised that because the collective bargaining agreement uses the word "objective," somehow that means it couldn't possibly be vague in this context as a statute is written. So if the plaintiff will address that point. Anything else you want to say, the other side wants to say about objective -- I mean vagueness, you can say it.

The next issue -- and I don't think anybody has really raised this, and the answer may be like the question, Judge, we're holding hands on the issue of you're going to analyze the student's right in this case -- I understand Mr. Sykes' point, which was well-taken, it's not in every case, but in this case we agree and Mr. Cooper's thoughtful analysis that the right of the student to receive is -- can't be separated out from the right of the teacher to speak. It's not an additional analysis for the reasons explained. But historically there's -- not historically. But in other context where there's been a

discipline post-speech, that's been analyzed differently from a pre-speech prohibition. So my question is, does that matter in the claims before me? Or, Judge -- you know, it does or doesn't. So I want y'all to address that. For the -- and both sides. Y'all may agree on that, and if you don't, you can tell me why not.

For the defense, I need you to clearly identify me -- identify for me the legislature's pedagogical concerns behind the law at issue and explain to me how the viewpoint restrictions at issue are reasonably related to that pedagogical concern.

And then I need you to point to, other than legal argument, which last time I checked isn't evidence, what evidence is there in this record that reveals the legislature's pedagogical concerns and what evidence, as opposed to legal argument, if any, supports the conclusion -- or would support a conclusion that those pedagogical concerns are reasonably related to a -- I'm sorry -- that the restrictions are reasonably related to a legitimate pedagogical concern.

Then, for both sides, I need y'all to answer the question that I just asked, which is, is there any evidence in the record to demonstrate that this statute and regulation reasonably are related to furthering a legitimate pedagogical interest. I understand the plaintiffs say it's not reasonably related, but that's a different question. The question is

whether there's evidence to support that.

And then finally, I'm interested, in light of *Hazelwood* and the other cases that have gone through this process and Rule 65 and the -- under Rule 65, the burden of persuasion rests with the plaintiff, but it's my understanding that once the plaintiff establishes that we want to speak, we are going to speak, we are not allowed to speak, that it would be up to the defense to have -- point directly to evidence that would support the -- whatever the pedagogical concern is and that it's reasonably related.

So I want y'all to talk about who bears what burden in the context of a preliminary injunction hearing under Rule 65.

Those are the additional questions I have at this juncture, and I also am going to let y'all confer with each other so that y'all can address different points and streamline your presentation.

Let me find out from -- actually, why don't we do this. I'm going to -- if y'all will keep your seats.

And, Mr. Cooper, if you, Ms. Wold, and Mr. Ohlendorf will figure out how long you'd like for a break and how long you'd like for your presentation, because I want -- I find if we give you a chance to confer and think about the questions I just asked and take notes, it will go faster, not slower.

And I'm going to ask the same thing -- Mr. Sykes, you and Mr. Greubel can talk in terms of how you want to divide

things up and how much time you think you need to make whatever additional presentation you want to make, and just raise your hand when you're ready to tell me how much time you need.

MR. COOPER: Five minutes, Your Honor.

THE COURT: Five minutes for a break.

How long do you want for your presentation?

MR. COOPER: Oh, I'm sorry.

If it's without interruption, Your Honor, about 15 minutes, but I suspect we'll talk about this a little longer than that.

THE COURT: I may not interrupt you. It's -- well, it's also possible that Santa Claus is going to deliver gifts to my house this year.

MR. SYKES: Your Honor, just to qualify, we're talking about after the break, not the current round of questions?

THE COURT: Two things. I'm not -- I'm not asking you these questions. I'm saying when we take a break, how long do you want for the break, and then how long do you want when you come back to both make your presentation and address -- and, again, you can say, Pass. You don't have to address them. I just -- how long do you want for a break? Let's start there.

MR. SYKES: I think 15 minutes, Your Honor.

MR. GREUBEL: 15 minutes.

THE COURT: I'll go with the highest bidder because it's reasonable, 15 minutes.

And how long, Mr. Sykes, do you want and how long does Mr. Greubel want for whatever presentation y'all are going to make?

MR. SYKES: Your Honor, we would appreciate ten minutes for the presentation and five minutes for rebuttal.

THE COURT: Mr. Greubel?

MR. GREUBEL: Same, Your Honor.

THE COURT: All right. Mr. Cooper, I'm going to give you longer if you need it, even if I'm not interrupting you. I'm not going to sandwich -- just because we have consolidated cases -- if we had two sets of lawyers here, I'd give y'all the same amount of time as the other time. We may not use all that time, but I just want to let you know I'm not going to artificially cut you off at 15 minutes if the other side spent 20 followed by another 10. So you'll be able to take the time you need.

MR. COOPER: Thank you, Your Honor.

THE COURT: All right. So we're going to take a 15-minute break. We're going to come back at 10:50. We'll start -- Mr. Sykes, are you going first?

MR. SYKES: Yes, sir.

THE COURT: Mr. Sykes is number one; Mr. Greubel is number two, and Mr. Cooper will go third. Okay. Thank you.

Court is in recess.

(Recess taken at 10:33 AM.)

(Resumed at 10:56 AM.)

THE COURT: Please take your seats.

We've got everybody present.

Mr. Sykes, you have the floor.

MR. SYKES: Thank you, Your Honor.

I'd like to make a very brief statement, and then I'll take your questions in turn. And my colleague, Morenike Fajana, will help with the evidence of the legislative intent, if that's okay with you, Your Honor.

May it please the Court, the Stop WOKE Act is a viewpoint-based limitation on instructors' speech and students' rights to receive information in Florida public colleges and universities. Through the Act, the legislature has identified eight politically incorrect views about race and sex that it doesn't like and has banned them from university instruction. This a clear violation of the First Amendment and the principle of academic freedom.

Our plaintiffs intend to teach and learn about issues like White privilege, unconscious bias, and color blindness in their courses, but they are prohibited from doing so by the Stop WOKE Act. For example, instructors are not allowed to teach that White privilege exists, but they are allowed to teach that it does not exist; same with unconscious bias. And they are not allowed to criticize the idea of color blindless, but they are allowed to support it.

This is exactly the kind of viewpoint-based censorship Courts have repeatedly struck down. Six decades ago in *Keyishian*, the Supreme Court held that the First Amendment does not tolerate laws that cast a pall of orthodoxy over the classroom. And just this year in *Speech First*, as we heard, the Eleventh Circuit said that the dangers of viewpoint discrimination are heightened in the university setting, and viewpoint discrimination is unconstitutional seemingly as a per se matter.

The Stop WOKE Act violates the fundamental principle that the government cannot ban viewpoints it doesn't like from college instruction and, therefore, must be struck down.

Plaintiffs also argue that the Stop WOKE Act is unconstitutionally vague for the additional and independent reason -- it's unconstitutional for the additional and independent reason that is a void for vagueness.

Your Honor, look closely at the language in *Honeyfund*. So suffice it to say, plaintiffs agree that the Act is obviously impermissible. And I'll come back to your specific question.

Finally, I want to underscore that every day that the Stop WOKE Act is in effect plaintiffs, and other similarly situated instructors and students, are suffering ongoing and irreparable injury as they self-sensor and live in fear that they will lose their jobs or their universities will lose state funding if they violate this vague and discriminatory law. We

ask, therefore, that this Court immediately enjoins enforcement of the Stop WOKE Act.

Turning to Your Honor's specific questions, first on the vagueness point, we agree completely that context does indeed matter; and while it may be true that the word "objective" appears elsewhere than just in the Stop WOKE Act, when we look at the facts of this case, it becomes clear that -- what does it mean to teach something objectively and without endorsement?

For example, our plaintiff, Leroy Pernell, Professor Pernell, teaches a variety of courses at FAMU law school, including the role of racism in criminal procedure. He's teaching in that course from his own textbook about -- it's called *Combating Racism in Criminal Procedure*.

What would it mean for him to teach the concepts in this class based on his own scholarship, based on his own rigorous research and analysis, objectively and without endorsement? Is he required to say at the end of the day, It's up to you; I don't know? Students enroll in his class, especially, you know, these higher level elective classes, because they want to hear from him about his research. They respect his scholarship. They want to hear his expertise and his analysis. And, crucially, they want to know what his conclusions are based on his years of study.

And so for the law -- for the State to require him to

withhold any endorsement of any view that's listed there, in practice it's impossible to understand how Professor Pernell could uphold his professional standards, could act as a responsible teacher and scholar, while also sort of teaching, supposedly, in an objective way and without endorsement.

Moving to your second question, I think, quite simply, Your Honor asked whether students -- whether it matters whether the discipline is post-speech or a prophylactic broad rule. And I think the short answer is yes, it does matter.

In cases such as *NTEU*, the Supreme Court said that there is more -- in the balancing that the -- where there is a prophylactic rule that bans broad swaths of speech, rather than targeting individual professionals, the First Amendment interests are especially strong.

So, in short, we -- we think it does matter, and yes, it works in our favor.

I'll now turn to my colleague, Morenike Fajana, from the Legal Defense Fund to talk about the evidence of the pedagogical interest, and then I'll close.

MS. FAJANA: Thank you.

So based on the record evidence that we have in this case, we do not believe that there was a legitimate pedagogical interest behind the Stop WOKE Act, and we believe this for --

THE COURT: Counsel, let me ask you a question.

MS. FAJANA: Yes.

THE COURT: In your case, other than the declarations of the plaintiffs, is there any record evidence in your case?

I know in the other case they filed the legislative history and so forth. Is there any record evidence of anything other than the declarations of your clients?

MS. FAJANA: Yes, Your Honor. We're also relying on the allegations in our compliant for that point and where we extensively cited the legislative record as well. So we believe Your Honor can take judicial notice of those statements.

THE COURT: Okay. So, Judge, we've got our declarations. We've also cited to the legislative record for which we now ask you to take judicial notice.

Let me find out from Mr. Cooper. He may not -- find out what their position is. I start off by saying the record is closed. I don't recall seeing any requests for judicial notice, but -- and I know that we've got the whole legislative -- not the whole. We've got the legislative history and stuff in the other case.

But what says you, Mr. Cooper, about you or the other side relying on the legislative history as taking judicial notice of it as cited in the papers in the Pernell case?

MR. COOPER: Yes, Your Honor. Well, just in terms of the question of what reveals the pedagogical concerns behind the Individual Freedom Act, we believe it's clear on its face, but we also believe that the legislative materials that the

plaintiffs have put in support those pedagogical concerns.

THE COURT: And I assumed you were going to say, Judge, that we're going to rely on it, and there would have been no reason for you to file it in the other case because they filed it, if you want to also rely on it.

I'm just asking more a technical question. We don't have those materials that were not filed. Those materials were not filed in the Pernell case. They were cited in the complaint, but I didn't have a request to take judicial notice of them until now. If you have no objection, because, Judge, we are going to refer to them as well, then that's fine. I just wanted to find out if you objected to me relying on the legislative history for purposes of both cases.

MR. COOPER: I do not, Your Honor.

THE COURT: Okay.

MR. COOPER: And I'm sorry. I thought there were legislative materials filed with -- in connection with the declarations that were put in.

THE COURT: Are they with the declarations in Pernell? I thought they were just cited in the complaint.

And, again --

MR. COOPER: My bad.

THE COURT: -- I didn't want to evaluate -- if nobody disagrees, we don't need to talk about it. I stood by what I said before, because there was some question -- I forgot. Maybe

it was Mr. Sykes said I could -- somebody said we could supplement the record. I go, No, you can't, because the record is closed.

MR. COOPER: Right.

THE COURT: But for this purpose, I assumed everybody was going to rely on it and refer to it, and it was in the other case. If nobody has any objections, then I will consider it for both cases.

One thing, Mr. Cooper, before I turn back -- and I really didn't plan on asking any questions, but I wanted to make sure I knew what the state of the record was moving forward.

I understand -- and, quite frankly, my response to my question would have been, Judge, the pedagogical concerns are expressed in the legislation. And I should have -- I just didn't want to make that argument for you without asking you -- having you say it, because I agree with you.

But it seems to me the question arguably is different from what evidence is that it's reasonably related, and I do want you, when you stand up to talk, to address that. What's the state of the record and what would support my conclusion that it's reasonably related and what would I be relying on in the record to support that conclusion as it being reasonably related as opposed to the concern which is expressed on the face of the legislation and the context of where it is?

When I say "the face of the legislation," part of -- I

assume the analysis should be, Judge, it also matters where you stick it. If you stick it in a statute that's otherwise structured for a particular purpose and has a purpose and this then expands it, then that also informs what the concerns are; correct?

MR. COOPER: That's right.

THE COURT: I understand that, and I understood that from your papers.

Let me turn back. Counsel, I've now burned up a little bit of your time, but I did want to make sure that there was no disagreement about what was properly in front of me.

Go ahead.

MS. FAJANA: Thank you, Your Honor.

Just on that point about evidence, I also wanted to point out that the complaint references public statements made by Governor DeSantis as well which we believe that Your Honor can take judicial notice of.

THE COURT: And Mr. Cooper has expressed why in their papers I shouldn't. It doesn't matter what the Governor says, and I shouldn't consider it I believe is the defense's position; correct?

MR. COOPER: That's right, Your Honor.

THE COURT: Not that he didn't make the statements, but, Judge, we've explained, and we think appropriately, why it doesn't -- is not part of the mix of your analysis of this

statute; correct?

MR. COOPER: That's correct, Your Honor.

THE COURT: Which are two different things. Why does it matter? You say it matters, they say it doesn't matter is a different issue as to whether he said it or not. And they don't disagree.

But go ahead.

MS. FAJANA: Okay. Thank you, Your Honor.

So we believe that this evidence shows that the primary motivation behind the Stop WOKE Act is the suppression of speech which is not a legitimate pedagogical interest. We believe that this can be found from the name of the Act itself, stopping wokeness. We believe it can be found from the Governor's statement that he wants to ensure a woke-free state of Florida.

We believe that the statements from bill proponents and the bill sponsors in the House and Senate that concepts such as critical race theory and White privilege have no place in the state of Florida are un-American and don't belong in the Floridian education system. All of those things taken together demonstrate that this Act was designed to chill pure speech.

Unlike in other situations, there was no evidence before the legislature that these specific concepts or these specific viewpoints were being used in a manner, whether in K through 12 or higher education, that was harmful to students,

that was harmful to educators, that was harmful to the larger educational environment, or that they otherwise weren't being used for a legitimate pedagogical interest.

And, finally, I just wanted to --

THE COURT: Well, what says you about the survey where they got 4 percent, which somehow is statistically significant, of students to respond and was sort of self-selective because the people that thought it was a problem were the ones most likely to respond? That's not -- the survey results are not before me; correct?

MS. FAJANA: No, they are not before you.

THE COURT: And that was done after this law was passed?

MS. FAJANA: The intellectual diversity survey, is that the one Your Honor is referring to?

THE COURT: The survey results came out after this law was passed or before?

MS. FAJANA: The survey itself was taken before the law was passed. The results came out afterwards.

THE COURT: Well, I guess if you assume the conclusion of the survey, then -- and I guess maybe you can if you only have 2 percent respond -- the people that like your survey, unless they were clairvoyant or assumed the conclusion, that wouldn't be a basis, even if it was in the record; correct?

MS. FAJANA: Correct, Your Honor. And we didn't see

any discussions or soliloquies in the legislative record where they pointed to the intellectual diversity survey as something that was emanating the need behind the Stop WOKE Act.

THE COURT: All right.

MR. SYKES: Your Honor, on your last specific question, before I offer a brief closing statement, under Rule 65, we agree that once we have established that First Amendment rights of our clients have been impacted that the burden is then on the defendants to prove that it meets the strict scrutiny test.

THE COURT: Or if I don't apply strict scrutiny, it would be their burden to show it was reasonably related?

MR. SYKES: Yes.

And for the record, Your Honor, we believe that -- as much as we encourage you not to apply a K-12 test, we believe we still win even under the legitimate pedagogical interest test.

And, finally, I just want to underscore the broad impact that this law is having on the academy. It's clear who the targets are, as my colleague said, critical race theorists. Our plaintiffs teach critical race theory. They teach feminist theories, critical race studies, intercultural communications.

THE COURT: But the defendant says those are abhorrent ideas, and we have the right to control and restrict abhorrent ideas. I think that was the adjective -- did I get the adjective wrong?

MR. SYKES: I'm not sure, Your Honor, but we respectfully disagree with defendants on that point. I think, as we made clear, I think -- would just highlight the extent to which it goes far beyond these, you know, admittedly not universally held views.

Our plaintiff, Russell Almond, is a statistics professor at the College of Education in the School of Educational Psychology. In the course of teaching his courses -- I believe in the current semester he's teaching a course on basic descriptive and inferential statistical applications, and nothing could seem less politically controversial than something like that. But what Professor Almond looks at is how data is used to account for differences in educational outcomes, and crucial to his work is explaining to students the role that unconscious bias and structural racism play in data collection design and data analysis and social structures outside of the schools.

So for even someone who is teaching something like statistical applications -- another course he teaches is scale and instrument design, how do you design the tools that will measure statistics that will tell us about how education works. Even he is at a loss for how he can honestly teach his course and share his expertise and expose his students to scholarship with his own judgment about which is rigorous scholarship, which is not, so-called, without -- objectively and without

endorsement.

So we think for all these reasons, this law is having an extraordinarily pernicious effect throughout the state of California and should be --

THE COURT: Florida.

MR. SYKES: Florida. Sorry.

THE COURT: No worries.

You really would be hard-pressed to confuse those two.

Mr. Greubel?

MR. GREUBEL: Thank you, Your Honor.

Friends of the ACLU have just done an excellent job of going through most of these, but I will do my best to add a little bit extra here.

On the vagueness point, Your Honor, the CBA that the defendants have cited to does not apply to my client because those are the CBAs from the Florida State University and Valencia College. It was not the CBA from the University of South Florida where Dr. Novoa teaches, and because --

THE COURT: If somebody signs a document that uses a word, does that mean it's not vague?

MR. GREUBEL: No, especially not CBA, which all pertain to the just cause provision, and if it were clear what just cause meant, I think labor law would collapse in on itself and no longer be a viable field for lawyers.

THE COURT: And in determining this, does context

matter? So does -- the fact that you had never limited a viewpoint and you've now got the Florida Legislature dictating that viewpoint is going to be limited and you've got to add that into the mix of whether you are or are not being objective, does that in any way inform the vagueness analysis?

MR. GREUBEL: It does inform the vagueness analysis, Your Honor, and part of the reason why is because this is targeting social sciences, which the Supreme Court has taught us are some of the most fraught in terms of academics in which our -- where there are rarely truths that must be mandated. In that way, the law is clearly not an attempt to raise the standard of teaching at Florida colleges. It's attempting to suppress a certain viewpoint and to ensure that the teachers feel that they are not capable of teaching those things in their classroom out of fear that if they would teach one of the prohibited concepts, that their university could lose funding to the tune, for the University of South Florida, of about $77 million.

Thank you, Your Honor.

On the point of prediscipline versus postdiscipline, I agree with the ACLU -- and this is in our papers as well -- that *NTEU* is the proper standard when there is a broad restriction on employee speech that applies across the board that's not done after the fact where typically --

THE COURT: Didn't that case deal, though, with speech

outside of work?

MR. GREUBEL: Not entirely, Your Honor. Well, it did deal with speech outside of work entirely, but there was a distinction -- well, it says with few exceptions that the law applied to the employees' subject matter. So there were some employees that did talk about the subject matter of their employment with -- per the honorarium, but it wasn't related directly to their job.

But that case still stands for the proposition that when it's a broad measure that's taken against an entire class of employees, you have to consider the interests of the audience and consider the interests of the speakers, and that the law is -- there's a heavier burden, which I believe you referred to in the *Austin* case as exacting scrutiny, where the State has to show that its --

THE COURT: But in the *Austin* case, they weren't teaching in a classroom or speaking as a professor. And didn't I categorically reject the notion that just because you use your educational background and expertise to speak, you are not speaking as a governmental employee, which is why that case law was distinguishable? Maybe I don't recall my analysis from *Austin*, but I thought that was part of it.

MR. GREUBEL: That's right, Your Honor.

But I think the point still stands that if -- here that they are -- the State -- when the State is taking a

measure -- and this is very similar to the *NTEU* case where it was an honorary ban, that there was no certain process by which employees were supposed to go and ask for whether or not there -- a certain speaking engagement was permitted or not permitted. It was an all-out ban on the speaking -- or on honoraria acceptance by state employees.

THE COURT: But would that same -- would that analysis have applied and would they have gone through that analytical framework if it wasn't going out and speaking but instead was conversations had as part of internal training in the workplace that was part of speech directly related to and, in fact, located in the workplace?

MR. GREUBEL: I believe so, Your Honor. And I would give this as an example. So if an employer -- if a college has a policy that restricts employees from being able to speak to the media on any subject, period, that that would be a case that would be analyzed under *NTEU* because it is an example of a broad restriction on employee speech that they are entitled to such that it should be analyzed with a heavier burden because it's not specifically about the context in which one employee made a decision and the university -- like the *Bishop* case where the university was taking an action in response to actual concrete evidence of a harm that appeared on campus.

THE COURT: I understand your answer.

Anything additional?

MR. GREUBEL: On that point, no.

THE COURT: You may proceed.

MR. GREUBEL: On the evidence of pedagogical -- or on what the State has as evidence that this law is aimed at a legitimate pedagogical concern, I am not aware of any. I believe that the law is clearly -- that these eight concepts were copied and pasted from an executive order President Trump issued. We know where they came from. This did not come from a deliberative process by the legislature to identify harms that were occurring on college campuses.

THE COURT: But if it's -- well, that's the "related to" as opposed to the purpose; correct?

I mean -- so, for example, if they say discrimination is a problem and we stick it in a statute designed to prohibit discrimination and we -- they say, you know, The real issue here isn't marginalized groups: The LGBTQ community or people of color. That's not the real -- the real problem with discrimination is wealthy white men. Those are the true victims of our society, and we need to protect them. And then they stick it in an antidiscrimination bill.

Why is that not a legitimate concern based on the context of where it's located and on the face of the language? We want to stop this -- that doesn't mean it's reasonably related, though. It doesn't mean it's reasonable. That's a different inquiry. But given the case law and the -- that says

what burden there is to establish that, why is that -- based on the face of the language itself and the context that is the statute in which it's put, why is that not enough to establish the concern, which is separate and apart from whether it's reasonably related?

MR. GREUBEL: I don't -- I'm not sure that I understand your question, Your Honor. Are you saying that if the State says that this is a concern, why is that not -- why is that not sufficient to establish that as a pedagogical concern?

THE COURT: Right. If they say, We're doing this to prohibit discrimination --

MR. GREUBEL: Sure.

THE COURT: -- it seems to me the case law says there's a low threshold on that part of the inquiry. The more exacting inquiry deals with whether it is, in fact, reasonably related to a legitimate pedagogical interest, as opposed to what is the interest.

The second prong, it seems to me, has two components: Is it legitimate and, two, is it reasonable, which is separate and apart from is there an articulated pedagogical concern. Why is prohibiting discrimination in the educational setting by definition not a legitimate pedagogical concern? That doesn't mean it's -- I'm sorry -- wasn't it a pedagogical concern.

MR. GREUBEL: Sure.

THE COURT: That doesn't mean it's legitimate. It

doesn't mean it's reasonably related, and we look at the facts and the whole context to determine that. But it just seems to me the first question is -- what is the pedagogical concern is a less exacting inquiry than whether it's legitimate or reasonably related.

Do I have that wrong?

MR. GREUBEL: No. That's right, Your Honor. I'm sorry if I misrepresented this. But combating racism is a legitimate pedagogical concern.

We encourage there's nothing in the record evidence here to show that there is any reasonable fit between the Stop WOKE Act and that legitimate pedagogical concern, and there's already been -- there are laws on the books that prohibit discrimination in education. And if what they -- they are targeting pure speech, and the line for pure speech and when that crosses from permitted to unpermitted is when it's severe and pervasive, not when the State of Florida decides that it is per se discrimination.

THE COURT: Well, even so, it's deemed as -- it's deemed as conduct, but we go through this legal fiction that if it's so severe and pervasive, we're not restricting speech. It becomes conduct because it's so overwhelming and so pervades the workplace. That's why you get to it.

But it's -- Title VII is still conduct; correct?

MR. GREUBEL: That is the finding --

THE COURT: And it can incidentally include speech, but that's --

MR. GREUBEL: Yes.

THE COURT: It's still viewed as a conduct, not speech-related restriction; correct?

MR. GREUBEL: That's right.

And finally, Your Honor, on the point of burden, we have -- we carry the burden here on the preliminary injunction to show that our clients have a claim. They have conceded that Professor Novoa has standing to challenge these laws, so the burden then shifts back to the State to prove the constitutionality of the law.

THE COURT: Namely, the legitimate pedagogical concerns that this is reasonably related to?

MR. GREUBEL: That's right.

THE COURT: I understand.

Anything further?

MR. GREUBEL: Nothing else.

THE COURT: And so we're not going back and forth and back and forth -- I'm going to give Mr. Cooper all the time he needs -- Mr. Sykes or Ms. Moraff -- Moraff; right?

MS. FAJANA: No.

THE COURT: I'm sorry. I've got y'all switched. I'm sorry.

MS. FAJANA: Ms. Fajana.

THE COURT: Oh, I had you seated in a different place. I apologize, Ms. Fajana.

If Ms. Fajana or Mr. Sykes wants to add anything -- I'm not suggesting you need to or should, but if there's something you want to add, I'd rather do that now to Mr. Greubel's comments than go back and forth.

MS. FAJANA: Yes, I just wanted to add one thing to this discussion about the fact that the Stop WOKE Act was inserted into a preexisting antidiscrimination lawsuit -- or statute. Excuse me.

I think that is one piece of evidence to be considered about whether or not antidiscrimination is the actual pedagogical concern here, in addition to the statements of the bill proponents themselves describing what they believed the Act was doing.

THE COURT: So, Judge, you can stick an act on how pigs can be housed in the same statute, but that doesn't inform the purpose as antidiscrimination simply because you put something unrelated in the act.

MS. FAJANA: Exactly.

Thank you.

THE COURT: I understand.

MR. SYKES: Your Honor, just one brief final point about the appropriateness of applying -- we've talked a lot about applying K-12 standards, but I also want to say a word

about applying government speech tests as well.

We are not talking about a university president or a communications director speaking on behalf of the university. We're talking about a professor teaching in class on their subject area within their expertise, and I think that's categorically different.

If you look at the reasoning in those employee speech cases, even in *Bishop* -- we're not asking to disturb *Bishop* in any way, but if you look at the balancing that the Court -- that the Eleventh Circuit did in *Bishop*, it was notably a university's interest, not the legislature. But it was about where the university has its own academic freedom interests. So that, I think, is the key point about how a Court analyzes public employee speech in the university context.

There may be some deference to the university to regulate its own affairs because both individual teachers and the university as an institution have academic freedom interests, and those need to be weighed against each other in some cases. In this case, they are both on the same side because it's the legislature that's trying to impose this rule upon both universities and individual instructors.

And the cases like *Garcetti* and even *NTEU*, as you pointed out, Your Honor, talk about whether you're at work or not at work, or whether it's related to, you know, a matter of public concern or not, or whether it could be interpreted as a

message directly for the government.

And respectfully, academic speech that we're considering fits none of these. It doesn't -- it's not really about a public concern. It's not really out of -- it's not really speaking as a private citizen. You're clearly a public employee, but you're obviously not speaking on behalf of the government. Students don't understand it that way; instructors don't understand it that way, and we encourage the Court not to create a new rule that would say so.

Thank you, Your Honor.

THE COURT: Mr. Cooper, are you ready to proceed or do you need -- I'm not going to --

MR. COOPER: Ready to go, Your Honor.

THE COURT: I'm sorry?

MR. COOPER: Ready to go.

THE COURT: All right. Very good.

MR. COOPER: Thank you.

So let me address --

THE COURT: And they collectively spent about -- one moment, please.

What time did we start back?

THE COURTROOM DEPUTY: 10:06.

THE COURT: They collectively spent a half an hour, so you have -- you asked for 15, but you've got a half an hour if you want it.

MR. COOPER: Thank you, Your Honor. I think this is going to depend more on you than me.

THE COURT: I'll be quiet as a church mouse, Mr. Cooper.

MR. COOPER: Did you take that down, Court Reporter?

THE COURT REPORTER: Sure did.

MR. COOPER: Let me speak first to vagueness, Judge Walker. And we've been back and forth in the earlier encounter about that subject matter, but I would like to add that our view is that the standard for vagueness is different in the public employee case.

And this is something that we didn't articulate in *Falls*, and it's new, so I want to make sure I call this to your attention. It springs from the Supreme Court case of *Arnett against Kennedy.* The Eleventh Circuit has acknowledged this in dicta really, to be sure, in the *O'Laughlin* case.

And that test, Your Honor, is whether ordinary persons using ordinary common sense would be notified that certain conduct will put them at risk of discharge, and that test, again, coming from the cases I've mentioned, were applied in the *Sanfilippo* case by the Third Circuit to uphold the firing of a -- of a university professor for failure to abide by this standard to maintain standards of sound scholarship and competent teaching, a standard, you know, we would submit to you, that is far less concrete than the ones that are before you

in the Individual Freedom Act.

And in *Waters against Churchill*, Your Honor, the Supreme Court noted that a public employer may, consistent with the First Amendment, prohibit an employee from being rude to customers, a standard almost certainly too vague when applied to the public at large.

So there is a difference, and we think it's more --

THE COURT: Well, let me ask you a concrete example. If I'm a professor at FAMU and I invite Cornel West to come and talk about his book which is part of the assigned reading, but I'm not offering my opinion as the professor, in order for it not to be seen as an endorsement, an advancement of whatever Cornel West is saying, do I have to invite a professor from Liberty as a counterpoint to inviting Cornel West, for example?

MR. COOPER: No, Your Honor, just off the top of my head.

THE COURT: Because there is the objective savings clause. If the presentation -- so I just, for the life of me -- because I can't imagine the people that drafted this bill would think that anything that came out of Cornel West's mouth, who I admire, would be objective on any topic, potentially.

So if I have him speak in my class, can that -- even though I'm not, as a professor, voicing an opinion, by bringing him into class and giving him that forum, am I not advancing, endorsing, or otherwise supporting the viewpoint of his that

I've introduced to the class, and how can I fall under the objective savings clause unless I bring another speaker from another school as a counterpoint?

MR. COOPER: Your Honor --

THE COURT: This is just one -- I'm trying to come up with examples. If I'm a professor, I'm not sure necessarily what I can or can't do under that savings clause.

MR. COOPER: Your Honor, I think that savings clause focuses on the actual speech and instruction that takes place in the class -- in the class.

THE COURT: Bringing a speaker to my class to speak is not part of the class or speaking?

MR. COOPER: Yes, it would be.

THE COURT: So, again, I reiterate my question. How am I not advancing Dr. West's ideas if I bring him in and have him speak and give him this forum, and am I in danger of discipline if I don't bring in a countervailing speaker?

MR. COOPER: Your Honor, I think you may well be advancing one of the eight concepts if you bring in Dr. West and Dr. West, in the context of that class within that course, articulates these -- any of these eight concepts. You may well. I don't think it's a question of -- and in that context, the professor of the class on the payroll would violate one of the eight concepts if the professor endorsed or espoused --

THE COURT: Is calling them endorsing or advancing --

same question. I'm now at the University of Florida, and I'm teaching a course on feminism or women, gender something, gender studies -- we'll -- gender studies, and I invite Gloria Steinem to speak.

Haven't I just violated one of these eight principles by having Gloria Steinem speak?

MR. COOPER: Your Honor, if it's within context of the course and the instruction from -- whether it's the professor or Gloria Steinem espouses any of these eight concepts, then, yes, you have.

THE COURT: I understand.

I'm sorry. Go ahead.

MR. COOPER: But, Your Honor, to come back to the question of objective and in an objective manner, we do -- whether the collective burden --

THE COURT: I'm sorry. You didn't answer part two.

But if I call somebody with a countervailing view to Cornel West, have I then fixed it for purposes of the savings clause?

MR. COOPER: I think that those events would be analyzed apart from each other, not necessarily in conjunction with each other. If you invited someone else to come and be the lecturer in your class as part of your course and that individual did not espouse or endorse the eight concepts or --

THE COURT: So you can have a professor from Liberty

speak who criticizes those concepts; you just can't have Cornel West in the classroom?

MR. COOPER: Your Honor, the statute is very clear. You can't espouse, promote --

THE COURT: So, like, when I was a UF student and ACCENT spent thousands of dollars bringing William F. Buckley and McGovern to speak, it would have been fine for me to listen to Buckley, just not McGovern, because I was seriously in danger of being indoctrinated when I was 20 years old at UF because, even though I graduated in the top of my class, apparently I was thoughtless and too simple to distinguish between what a professor said and what I believe. But go ahead.

MR. COOPER: I don't think that particular scenario, if I understand it, would be within the construct of instruction.

THE COURT: Oh, I agree.

MR. COOPER: Of course --

THE COURT: I meant if I brought them in a classroom. What they did at ACCENT is speakers being brought in. If you had those two speaking in the classroom -- if McGovern, which I suspect if he was alive would, endorsed any of these eight concepts, then he couldn't speak, but William F. Buckley could come in and deride all eight topics.

MR. COOPER: Your Honor, the statute does -- it prohibits espousing these eight concepts --

THE COURT: I understand.

MR. COOPER: -- in the context of a course in the classroom in Florida public schools.

THE COURT: I'm sorry. Go ahead.

MR. COOPER: I want to come back to the collective bargaining agreement. Whether it applies or not, it uses the same wording that is used in the statute, and our simple point is we -- I know the Court, you know, disagrees with us on this, but I would simply respectfully repeat that we don't think that that formulation is impermissibly vague, and we think that that formulation in an objective matter -- discussion in an objective matter does depend upon context, and you can -- and its meaning becomes clear when you look at its context next to the verbs that the statute itself uses: Espouse, inculcate, promote, advance. And it's followed, Your Honor, with -- without endorsement. When you see --

THE COURT: Let me ask you this because it's -- if I put up a billboard and I've just got a giant picture of Gatorade on it with nothing -- I say nothing on it. If one of the principles is you couldn't endorse, promote, or advance Gatorade, wouldn't that violate it even without any speech at all?

MR. COOPER: Forgive me, Your Honor.

THE COURT: What I'm asking -- I'm using an example, and I'm using the example for a reason. It just seems to me

this idea that you can draw a clear line between advance, promote, and endorse, I just -- for the life of me, I don't understand why those are obvious concepts. I mean, the fact that you're here speaking and Mr. Sykes is speaking -- I asked you both questions. I don't see how anybody can perceive the fact that I've had y'all here speaking is me endorsing a thing that's come out of either one of your mouths, but I advanced it.

So I guess the -- my question is I just -- I'm still having trouble with how -- if it just said you can't express -- you can't teach anything about gender studies at all, that's controlling the curriculum. You can do that.

If I said, in terms of vagueness, the -- a professor cannot offer any personal opinions about the subject matter, okay, I get it. I can't offer any personal opinions.

But for the life of me, I don't understand -- when you start with this string of terms -- advance or promote -- how does that give somebody fair notice about what they can and can't do and wouldn't result in selective enforcement by whatever entity is going to review the professor in what they did or did not do?

MR. COOPER: Your Honor, I think there is a difference -- a readily understandable difference to people of ordinary intelligence using ordinary common sense between espousing or inculcating a particular view.

THE COURT: But it's not just espousing or

inculcating. It's advancing or promoting; right?

MR. COOPER: Yes, yes, advance or promote. And promote is -- you know, all --

THE COURT: If I assign Cornel West's book as part of my curriculum, how am I not promoting Cornel West and the -- Dr. West and the ideas in his book?

MR. COOPER: Your Honor, if you assign it and you do advance the notion that what Cornel West has to say -- and I'm not sure what that is, but if it violates these concepts --

THE COURT: If Cornel West speaks on one of these topics in a book he writes and I assign the book, you're saying it's self-evident that if I don't say a word about it, we don't discuss it in class -- if I just assign it as part of the curriculum, Judge, easy peasy, self-evident. You just got fired from UF because you assigned his book that covered one of these eight topics whether you ever talk about it or not.

That's self-evident that that would run afoul of this provision?

MR. COOPER: No, I'm not at all sure that's the case, Your Honor. I mean --

THE COURT: Then how would a professor know? If you're not sure, how would a professor know?

MR. COOPER: Your Honor, the statute makes clear that the professor is permitted and the statute cannot be construed to prohibit the professor discussing these concepts in an

objective manner without endorsing them. So the fact that --

THE COURT: And what I'm asking is a different question. Can you do an end run around that by saying, Aha. I'm not going to talk about it in class. I'm not going to tell my class what I think, but I'm going to assign Dr. -- Cornel West's book on this topic that violates one of the eight topics because I want my students to at least be exposed to his ideas?

I don't, for the life of me, understand -- if I assign a book -- and maybe your experience in school was different, but most of my classes, whether it was on English legal history or Latin American history, you might -- I didn't have texts in 4000- or 5000- or 3000-level classes, but you'd have a handful -- you'd have materials, and then you'd have a handful of books, and then you'd have recommended reading.

But if you're telling me to read something, even if I'm not discussing it in class, wouldn't that be advancing whatever that is and promoting whatever that is?

MR. COOPER: No, Your Honor, it would not be advancing and promoting it in the sense in which those terms are clearly used in the statute.

Those terms are clearly used as colloquially synonymous terms with espousing, with inculcating, with endorsing. The legislature used closely synonymous terms for the avoidance of doubt -- not to sow doubt, for the avoidance of doubt that it is the endorsement, the espousing, the embracing

by a university-paid state employee of these eight concepts that is forbidden.

And it makes equally clear, Your Honor, that what is not forbidden and what this statute may not be construed to prohibit is discussion of the concepts, and you can't discuss the concepts unless you advance them in the -- in the sense of bringing them forward for discussion. But that's not the sense in which this statute clearly uses advance --

THE COURT: So let me ask you --

MR. COOPER: -- because that would utterly obliterate the whole notion of this savings clause, as you call it.

THE COURT: All right. Then let me ask you this. Is there any doubt, based on what you just described, then, Judge, you're free to assign writing. You're -- reading. You're free to have class discussions, so long as the professor doesn't offer an opinion. So all we're excluding is the opinion.

Can we agree that this is, by definition, limiting a viewpoint, that that's all it's doing? Since you can talk about the content all day long and include the content all day long, isn't it, by definition -- based on your argument, this is absolutely directed to viewpoint, and that's it?

MR. COOPER: We believe that these eight concepts are viewpoints.

THE COURT: Okay. So there is no -- if I issue an order, there is no quibbling that both sides' position is this

is viewpoint limitations?

MR. COOPER: Yes, Your Honor.

THE COURT: Okay.

MR. COOPER: The State is entitled to have a viewpoint. It has expressed that viewpoint in this statute.

Your Honor, I don't really have any more to say about the question of vagueness and the meaning of in an objective manner.

Let me move, then, to the question the Court has asked about pre- and post-speech standards.

Your Honor, the *NTEU* case, as the Court earlier mentioned, dealt with speech and whether or not, under the Ethics in Government Act, government employees could be paid honoraria for speech -- and these were GS-16 and below, not senior executives -- could be paid for speeches that had no relationship to their job responsibilities.

There was no question at all, reading this decision, that if -- that the Ethics in Government Act -- to the extent it prohibited honoraria for speech by these government employees on subjects that were within their job responsibilities, that that would have been upheld.

THE COURT: I understand. Because even *Bishop* recognizes that; right?

MR. COOPER: Yes.

THE COURT: *Bishop* recognizes the farther you get away

from the classroom, the farther you get away from the contours of your actual job description and you're doing something on your own -- we're not going to be having this same discussion is what -- to use that language. But that's, in essence, even what *Bishop* recognized; right?

MR. COOPER: I think that's right, Your Honor.

Now, I will concede that if the *Pickering* balancing test applies to the Individual Freedom Act, then under *NTEU,* because it is a prophylactic prohibition and it embraces, perhaps, many, but certainly more than one professor, and because it is dealing with, perhaps, many audiences, not just isolated classes, that the burden on the State in that *Pickering* process is heavier.

THE COURT: But, Judge, we don't believe *Pickering* applies for the reasons we've stated.

MR. COOPER: That's right.

THE COURT: I understand.

MR. COOPER: That's right.

Your Honor, coming now to the question of the pedagogical concerns that are addressed by the -- by the Individual Freedom Act and the -- and their relationship -- or the Act's relationship to those pedagogical concerns, Your Honor, we would submit to you that the pedagogical concern of reducing racism or prohibiting racial discrimination is a legitimate pedagogical concern. In fact, it's a compelling

governmental interest.

And that on the face of the statute is the concern -- is the governmental issue -- interest that the legislature was addressing in its view, Your Honor, and it says it quite straight up. The instruction that espouses or promotes, and the rest of the verbs, any of these eight concepts are themselves that -- that speech, if you will, is racially discriminatory or sexually discriminatory or -- but on whatever immutable characteristic is at issue, Your Honor, that is a compelling governmental interest.

Now, the -- the relationship between that interest and prohibiting this speech, which the legislature has defined as being racially discriminatory, is as tight as it can possibly be. The legislature, on the face of the statute, defines espousing these concepts as racial discrimination, and it prohibits that racial discrimination. It prohibits espousing any of these eight concepts.

In this respect, Your Honor, it is an extension on existing federal law, Title IX, the federal funding statutes that prohibit sexually discriminatory or racially discriminatory educational environments, which counsel for the plaintiffs say -- acknowledge are there and acknowledge to be entirely consistent with the First Amendment and saying made unnecessary this statute, at least insofar as they argue that at some level of severity and pervasiveness and objective offensiveness the

legislatures can restrict speech -- speech.

Your Honor, this is the same principle at work, and there's nothing in the jurisprudence that we're aware of that sets those federal restrictions on hostile environment from speech.

THE COURT: Don't all the cases that construe that, every one, say we're restricting conduct, not speech, and it's only the speech that's incidental, and it's only when the speech rises to the level of severe and pervasive?

I mean, I just -- Mr. Cooper, I've got to tell you I've tried, as both a lawyer and as a judge, more employment cases than I want to think about, and I've ruled on more summary judgments on Title VII cases and Title IX cases than I want to think about, and I'm not aware of any case from anywhere that has said language by itself in limited language is actionable under Title VII and Title IX. In fact, the cases take great pains to explain why that's not so.

Is that -- what part am I missing of that?

MR. COOPER: Your Honor, we would simply submit that to the extent that speech, if it is severe and pervasive enough, can somehow become conduct, then the legislature of Florida has determined that that -- this speech that it is proscribing in its classrooms is per se severe and pervasive.

THE COURT: All right. I want to make sure I understand that.

Is concept six -- that's basically affirmative action by any other name; right?

MR. COOPER: Your Honor, yes.

THE COURT: All right. So a professor at the University of Florida can use the N-word in class, and that's not actionable if they use it once. But if they mention affirmative action once under this new law, it's actionable; right?

MR. COOPER: No, Your Honor.

THE COURT: Why not?

MR. COOPER: A university professor cannot use the N-word.

THE COURT: You can -- you would have a Title VII, Title IX, or Chapter 760 claim if the N-word -- because I want you -- Mr. Cooper, you need to write a brief to Marie Mattox. She's the local lawyer that does employment cases. Please send her a memo.

You're telling me that under federal law the use of the N-word one time in a classroom by a teacher would be actionable?

MR. COOPER: Your Honor, I'm not going to represent what the federal statutes would say about that.

THE COURT: Doesn't Chapter 760, Florida's parallel to Title VII, say, We adopt the case law of Title VII in construing the contours of 760? I don't know about other states, don't

really care about other states. But in Florida, last time I checked, 760 parallels Title VII.

Do I have that wrong?

MR. COOPER: I defer to your statement on that score, Your Honor.

THE COURT: So I repeat my question. I'm having a hard time grappling with the idea that if a professor at the University of Florida says, The way we're going to fix problems in higher education is to maintain affirmative action -- he makes that one statement. Under this provision, he could be sued by the student, and he could be disciplined by the school.

But if that same teacher got angry and upset and used the N-word, it would not be actionable under -- one time and he didn't, like, lock his student -- I know there's case law that if you lock your -- somebody in the classroom and you make racially charged statements and you do it in reaction -- because there's a case that I cited in one of the other cases about, you know, on Juneteenth you do it. All the facts taken together -- but there's a lot of cases that say the use of a racial, you know, term one time out of -- born of frustration, but with no other coercive effects, is not actionable.

I mean, that's a -- it just strikes me as interesting that the state of the law in Florida is going to be a professor can't get sued for using the N-word, but they can -- oh, my gosh, that abhorrent concept of affirmative action. If you

mention it, it's actionable.

Why is that not so under your application of these provisions?

MR. COOPER: Your Honor --

THE COURT: And maybe that's a good thing. Maybe affirmative action is more abhorrent in our new age than using the N-word. I'm not going to make a judgment of that. It's shocking if that's our -- the new values that we embrace, but I -- just for the life of me, I don't understand that's not a consequence of your reading of the statute.

MR. COOPER: That is not a consequence of my reading of the statute, Your Honor, and in particular whether or not there would be a cause of action under some federal statute or even state law. I just have no doubt that the university could take disciplinary action.

THE COURT: Oh, they could take disciplinary action. That's true.

You couldn't sue, though, somebody in court; right?

MR. COOPER: Well, that is the point of this statute.

THE COURT: The statute goes beyond that, doesn't it? Am I confused? I thought it went beyond discipline. It doesn't?

MR. COOPER: Forgive me.

THE COURT: The statute doesn't go beyond discipline? I thought it created a cause of action. Am I wrong?

MR. COOPER: It creates a cause of action, yes, Your Honor.

THE COURT: Which is why it's stuck in the chapter it's stuck in; right?

MR. COOPER: Excuse me?

THE COURT: That's why it's where it's at?

MR. COOPER: Yes, Your Honor. And it defines racial discrimination in the context of these eight concepts that can't be espoused.

THE COURT: Yeah. I didn't ever say somebody could say whatever they wanted and call somebody whatever name they want in a classroom, and there would be no discipline. We were talking about whether you could sue or not, and I was talking about Chapter 760 and Title VII and Title IX. And I just didn't bring that up out of nowhere. You were talking about Title IX and Title VII.

Fair enough. Go ahead.

MR. COOPER: I think the other issue that the Court raised relates to burden of proof, and to the extent that the *Hazelwood* standard applies -- and, again, of course, we submit that it does not here. But to the extent that it does, it is closely analogous to the rational relationship test, and under the rational relationship test, throughout constitutional jurisprudence it is the plaintiffs that bear the burden of proof from beginning, Your Honor, to end.

But to the extent that the burden is on the government, we submit, once again, that the interests -- the governmental interests, the pedagogical concerns that are served by the Individual Freedom Act, are plain on the face of the Act, and that the prohibition on espousing the eight concepts is clearly reasonably related to ending that racial discrimination.

THE COURT: I understand.

MR. COOPER: I don't have more to say on the questions the Court has put forward.

THE COURT: Thank you, Mr. Cooper.

MR. COOPER: Yes.

THE COURT: I didn't -- I said we weren't going to go back and forth, but, Mr. Cooper, I'm going to let you confer with your colleagues.

And Mr. Sykes and Mr. Greubel, I'm not inviting a reply.

But if either side says, Judge, there's this one point that we didn't -- that we talked about in our papers that we haven't really addressed; we just want to make sure that you consider X when you're reviewing this case, I want to give you a chance because I know that I interrupt y'all and redirect some of the conversation. I want to make sure I'm not trying to artificially cabin the discussion to just the points we've discussed.

So why don't y'all -- each side take a minute to

confer with each other, and if there's something we haven't discussed -- I'm not asking plaintiffs to reply to Mr. Cooper. I said we are not going to go back and forth. But if there is something we haven't discussed, then you can bring that topic to my attention.

(Pause in proceedings.)

THE COURT: We are back on the record.

Mr. Sykes, anything that we haven't covered that, Judge, we just want to make sure we didn't lose sight of X?

MR. SYKES: Nothing additional substantive, Your Honor.

We did want to ask a question about logistics and the scheduling of the motion to dismiss argument, but that's a separate thing we wanted to address before the end of the day.

THE COURT: I didn't have any particular questions, and I planned on -- other than what I've already asked. I didn't plan on -- I planned on ruling on both -- well, I say both. We have two cases. But ruling on motions to dismiss and preliminary injunctions and working on them -- typically I do that in tandem.

Were you asking for additional argument on the motion to dismiss?

MR. SYKES: No, Your Honor. In the scheduling conference we had, I remembered that there was some mention of potentially doing one telephonically a week or ten days later,

but we are fine with proceeding based on the briefing.

MR. GREUBEL: Nothing else from us either, Your Honor.

THE COURT: Do you feel the need to have additional arguments on the motion to dismiss?

MR. GREUBEL: No, we do not.

THE COURT: Mr. Cooper, any other topics or things that, Judge, we didn't want to lose sight of X, and we want to make sure you draw your attention to that?

MR. COOPER: Thank you, Your Honor, but I think not.

THE COURT: All right. And do you require any additional argument on any issues raised in the motions to dismiss?

MR. COOPER: No, Your Honor.

THE COURT: Okay. All right.

Thank you. I know it's been three hours. I know it's no fun to come in and have me pepper y'all with questions. Imagine how my children feel. But it is helpful, and it's helpful for me to go through this process, and it's useful when I start preparing an order and I go back -- circle back. Both sides have given me a lot to think about, and I appreciate your thoughtful arguments.

I hope you have safe trips home.

I will tell you that I will endeavor to work on this and not sit on it. So I'm not going to wait months and months, but I do have other obligations, including a five- to six-week

criminal trial that's starting pretty soon and a flurry of motions. So I'm going to do my best not to sit on it, but this is not going to be a case where I can issue an order in 72 hours. I mean, it's going to take me time to do it, and I've got to balance that against my other commitments.

So I'm not going to tell you you are going to get it in two weeks or some artificial timeline. I'll just let you know I'll try to do it as quickly as I can, but I also want to take the time I need. So I promise you, you wouldn't be waiting for an order in January. On the other hand, I can't promise you'll get it in a week. So I'll do my best to get it out sooner rather than later.

So thank you for your patience and your hard work and your thoughtful papers that you filed.

I hope, again, everyone has a safe trip home, a pleasant evening.

Court is in recess.

(Proceedings concluded at 12:06 PM on Thursday, October 13, 2022.)

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I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. Any redaction of personal data identifiers pursuant to the Judicial Conference Policy on Privacy is noted within the transcript.

/s/ Megan A. Hague 10/14/2022
Megan A. Hague, RPR, FCRR, CSR Date
Official U.S. Court Reporter

CERTFICIATE OF SERVICE

I hereby certify that on June 16, 2023, the foregoing was filed electronically with the Clerk of Court through the appellate CM/ECF system. I further certify that all parties required to be served have been served.

Dated: June 16, 2023

/s/ Leah Watson
Leah Watson

Counsel for Plaintiffs-Appellees