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

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Other Authorities

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MEMORANDUM OF LAW

PRELIMINARY STATEMENT

The higher education provisions of the Stop WOKE Act are a naked viewpoint-based restriction on protected speech, violating the First and Fourteenth Amendments. Just as

Plaintiffs ask the Court to enjoin the Act's enforcement and stop its vast chilling effect on protected student and faculty speech. The Court should grant Plaintiffs' motion for four reasons:

1. Plaintiffs have standing to challenge the Act. Each can point to an injury-in-fact to their First Amendment rights traceable to Defendants.

2. Plaintiffs are likely to succeed on the merits. The Stop WOKE Act is presumptively unconstitutional because it violates Plaintiffs' First Amendment rights to speak and receive information—rights essential to the robust debate essential to higher education. The Act is also an overbroad, blanket restriction on faculty speech for which Defendants lack any justification.

3. Plaintiffs will continue to suffer irreparable harm to their First Amendment rights without immediate injunctive relief.

4. The public interest always favors robust and free debate on matters of public concern. By contrast, Florida lacks any interest in suppressing that debate through a viewpoint-driven law.

STATEMENT OF FACTS[1]

Plaintiff Adriana Novoa teaches Latin American history at the University of South Florida (USF). She is joined by Plaintiff Samuel Rechek, an undergraduate student who founded Plaintiff First Amendment Forum at USF, a student organization dedicated to fostering the diverse exchange of ideas on their campus. Plaintiffs are willing speakers and willing listeners who oppose how the Stop WOKE Act controls what they can freely discuss at their university, where the "vigilant protection of constitutional freedoms is nowhere more vital[.]" , 364 U.S. 479, 487 (1960).

I. The Stop WOKE Act's Unclear Language Draws on Efforts to Suppress "Woke" Viewpoints.

The drafters of Stop WOKE drew the Act's language from previous efforts—already struck down as unconstitutional—to suppress teaching in higher education. They coupled the unclear language of the Act with severe penalties for faculty, their colleagues, and their institutions to acce

A. Stop WOKE is introduced to combat "divisive ideologies."

The "Stop Wrongs Against Our Kids and Employees (W.O.K.E.) Act" is Florida's entry in the rush of 191 measures introduced nationwide to target amorphous conceptions of "critical race theory."[2] Although the enacting bill purported to make supportive "legislative findings," it lacked any findings relating to higher education. Steinbaugh Decl. ¶ 3; Exh 1.

But its proponents intended the Act to stop "woke" views in higher education.[3] For example, Governor DeSantis heralded the Act as "build[ing] on" his efforts to "ban Critical Race Theory and the New York Times' 1619 Project." Steinbaugh Decl. ¶¶ 7, 18; Exhs. 10, 21. Its sponsors pledged it would restrict "divisive ideologies" and bar faculty from offering "any sort of ideology or personal beliefs," or "their opinion, or their belief of [divisive

In passing the Stop WOKE Act, the Florida legislature did an about-face from the state's

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A. The Stop WOKE Act chills Professor Novoa from introducing viewpoints necessary to teaching her courses.

At USF, Novoa

issues like (i) the historical development of science to "understand the complicated ways in which science and the cultures in which it is embedded interact and shape each other[,]" . ¶ 158, and (ii) how race and the theory of natural selection was used to "promote" Social Darwinism, including the perceived inferiority of indigenous peoples. . ¶¶ 158-59.

Novoa also assigns her book, which discusses the relationship between European and Latin American scientists and how the relationship has relegated Latin American scientists "to the ." . ¶¶ 161, 163 (emphasis added); Novoa Decl. ¶ 6, Exh. E at p. 2. In assigning her book, Novoa necessarily "endorses" viewpoints she advances in it. Compl. ¶ 164. In engaging students in discussion, reflection, and debate on these issues, Novoa intends to "advance" those viewpoints. Compl. ¶ 172. The Stop WOKE Act inhibits this instruction. . ¶¶ 155-56, 165.

. Novoa has taught History of Sports annually since 2015 and expects to teach it this academic year. . ¶ 174. Historically, Novoa has assigned an article,

( ). . ¶176; Novoa Decl. ¶2, Exh. A. In lectures, Novoa uses to "advance" the argument that Afro-Latino baseball players, despite coming from different backgrounds

Rechek and members of First Amendment Forum are adults capable of determining whether viewpoints Novoa introduces are sound. . ¶¶ 227-28. Still, they cannot assess these viewpoints unless they are able to encounter them. . ¶ 229. Novoa and Rechek—a willing speaker and willing listener—want to engage in academic discussion about the topics in Novoa's course. . ¶ 230.

The Stop WOKE Act prevents Rechek and members of First Amendment Forum from benefitting from robust debate. . ¶¶ 235, 238. Instead, the Act threatens their First Amendment rights because it narrows, for ideological purposes, the range of viewpoints available to these students. . ¶ 234. For example, the First Amendment Forum's members cannot engage in a full and frank discussion of contested matters—like issues over race and its historic and modern roles—if they fear a professor's response to their questions may be reported to administrators, the Inspector General, or lawmakers. . ¶¶ 235, 238(c). More broadly, the Act chills the ability of students to access information unfettered by ideological filters imposed by political officials. ¶ 238(b).

discourse. , 23 F.4th 1282, 1290–91 (11th Cir. 2022) (setting forth preliminary injunction standards).

I. There Is a Strong Likelihood That Plaintiffs W

21. Were that not enough, lawmakers precariously balanced tens of millions of dollars of state funding on administrators' willingness to crack down on even perceived violations of the Act. Fla. Stat. § 1001.92(5). A lionhearted faculty member might risk their own career by introducing a transgressive concept, but only a fool would risk their colleagues' funding.

Novoa is hardly alone, and evid

, 142 S. Ct. 522, 535 (2021);

, 32 F.4th 1110, 1117–18 (11th Cir. 2022) ("bias-related incident" policy allowed students to be "anonymously accused of an act of 'hate or bias'"); Fla. Stat. § 1000.05(6)(b); Bd. of Govs. Reg. No. 10.005(2)-(4). Enjoining the Act's enforcement is necessary to stop the chilling injury to protected expression and prevent irreparable harm.

3. First Amendment Forum has organizational standing.

First Amendment Forum also has organizational standing. First, Rechek and other members have standing.

, 517 U.S. 544, 551–53 (1996);

, 422 U.S. 490, 511 (1975) (association can "allege that its members, or any one of them," will be injured). Second, the Forum's interests—access to ideas free from state censorship—are germane to its purpose of protecting unfettered discourse at USF. , 517 U.S. at 553; Compl. ¶ 233. Third, the Forum's individual members' participation is "not normally necessary" when a suit seeks prospective injunctive relief.

, 517 U.S. at 552.

B. The First Amendment protects Plaintiffs' rights to free expression and access to information and ideas.

As to Plaintiffs, the content-based Stop WOKE Act violates two core First Amendment rights. First, it restricts Novoa's right to share information and materials pedagogically relevant to her courses. Second, it infringes the rights of students like Rechek to receive information and ideas free of ideologically driven state interference.

1. The First Amendment protects faculty speech related to scholarship and teaching.

At public universities and colleges, faculty members' speech related to scholarship or teaching and classroom speech related to matters of public concern both are protected by the First Amendment. , , 640 F.3d 550, 562 (4th Cir. 2011) (discrimination against professor's "outspoken Christian and conservative beliefs"); , 992 F.3d 492, 507 (6th Cir. 2021) (professor's refusal to use students' preferred gender pronouns in teaching). This First Amendment protection extends to viewpoints that "however repugnant," are "germane to the classroom subject matter." , 260 F.3d 671, 683 (6th Cir. 2001). So, too, does it extend to viewpoints some might consider false; the First Amendment

recognizes no such thing as "a false idea."[8] , 418 U.S. 323, 339 (1974). Instead, the First Amendment demands correction of viewpoints not through authoritative selection, "but on the competition of other ideas." at 339–340.

The relevant Supreme Court decision, by its "plain language . . . explicitly left open the question of whether its principles apply" to faculty members engaged in "scholarship or teaching." , 640 F.3d at 561–63 (holding that is inapplicable "in the academic context of a public university"); , 547 U.S. 410, 425 (2006) (declining to hold that its analysis would apply "to a case involving speech related to scholarship or teaching"). Otherwise, it would "imperil First Amendment protection of academic freedom in public colleges and universities," which encompasses "the teaching of a public university professor." , 547 U.S. at 438 (Souter, J., dissenting).

Courts answering 's open question have held it does not apply to faculty at postsecondary institutions.[10] That answer recognizes that universities' purpose is best served by learning from a "multitude of tongues,

rather than through any kind of authoritative selection." , 385 U.S. at 603 (cleaned up). That is why "academic freedom" is an area "in which government should be extremely reticent to tread." , 354 U.S. at 250.

In the end, Novoa's classroom speech is her own, not the state's, and remains protected under the First Amendment.

2. The First Amendment and Florida state law protect students' access to information and ideas against laws imposing the "pall of orthodoxy."

The Supreme Court explained that because of the unique role universities occupy, the First Amendment prohibits "laws that cast a pall of orthodoxy over the classroom." , 385 U.S. at 603. First Amendment protection against state-imposed campus orthodoxy flows from two core First Amendment rights: the right to convey information—that is, to speak—and the right to "receive information and ideas." , 394 U.S. 557, 564 (1969). This is because the First Amendment protects the "right to distribute" information and the corollary "right to receive it." , 319 U.S. 141, 143 (1943). In turn, these harmonizing First Amendment rights serve the "chief mission" of the university: "to equip students to examine arguments critically and, perhaps even more importantly, to prepare young citizens to participate in the civic

and political life of our democratic republic."

, 32 F.4th 1110, 1128 (11th Cir. 2022).

Thus, Rechek and First Amendment Forum members have a First Amendment right to receive information and ideas in the classroom. And the State of Florida agrees. One year before adopting the Stop WOKE Act, Florida amended the Campus Free Expression Act to reinforce students' rights under the First Amendment. Fla. Stat. § 1004.097. As amended, the Campus Free Expression Act recognizes students' right to "access to . . . ideas" and prohibits universities from shielding them from ideas on the basis that students might find them "uncomfortable, unwelcome, disagreeable, or offensive." Fla. Stat. §§ 1004.097(2)(f), (3)(f).

C. The Stop WOKE Act Violates the First and Fourteenth Amendments and Conflicts with the Campus Free Expression Act.

The raison d'être of the Stop WOKE Act is plain: driving viewpoints that some officials dislike out of the classroom. But distorting the "marketplace of ideas" via state-imposed ideological litmus tests is as obvious a First Amendment violation as they come. As the Supreme Court held, no official "high or petty

darkening a "fixed star in our constitutional constellation[.]"

, 319 U.S. 624, 642 (1943).

1. Because the Stop WOKE Act discriminates against viewpoints, it is presumptively unconstitutional.

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For example, Novoa could vociferously condemn the view that historically, Afro-Latino baseball players were reduced to their perceived racial identity. Compl. ¶¶ 176-180. But if she merely "advances" that view. ¶¶

ideology or perspective that the speech expresses."

, 390 F.3d 65, 82 (1st Cir. 2004).

Because it

What interest the Act serves is unclear. I

knowing violations. Because it lacks these speech-protective measures, the Stop WOKE Act sweeps far beyond any purpose it might harbor—

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the existence of the disease sought to be cured," addressing only "conjectural" harms already alleviated by existing anti-discrimination law. at 475 (quoting , 512 U.S. 622, 664 (1994)).

While the state has an important interest in addressing discrimination, the mere utterance of an idea, however offensive a listener finds it, is not alone discrimination. , , 605 F.3d 703, 708–09 (9th Cir. 2009) ("the desire to maintain a sedate academic environment does not justify limitations on a teacher's freedom to express himself on political issues in vigorous, argumentative, unmeasured, and even distinctly unpleasant terms." (quoting , 523 F.2d 929, 934 (9th Cir. 1975))). Indeed, it is a "bedrock First Amendment principle" that "[s]peech may not be banned on the ground that it expresses ideas that offend." , 137 S. Ct. 1744, 1751 (2017). And in passing the Campus Free Expression Act, Florida already acknowledged that shielding students from uncomfortable ideas conflicts with the purpose of a university. Fla. Stat. § 1004.097(2)(f), (3)(a), (3)(f).

Existing anti-discrimination law demonstrates that discriminatory conduct can be remedied without wholesale restrictions on protected

from constitutional obligations; instead, it targets a phantom the state struggles to describe. And where the university in

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The Stop WOKE Act is unconstitutionally overbroad.

A statute is overbroad when "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate

The Stop WOKE Act violates the Due Process Clause of the Fourteenth Amendment because it is unconstitutionally vague. A law is void for vagueness where it either lacks "sufficient definiteness that ordinary people can understand what conduct is prohibited" or "encourage[s] arbitrary and discriminatory enforcement." 461 U.S. 352, 357 (1983).

These faults are acute in the context of free expression, where the "substantial impairment of those [First Amendment] rights may be critical, since those covered by the statute are bound to limit their behavior to that which is unquestionably safe." , 385 U.S. at 609 (cleaned up). "Content-based regulations thus require 'a more stringent vagueness test.'" , 848 F.3d at 1320 (citation omitted).

The Stop WOKE Act fails both tests imposed by .

First, and leaving aside the abstruse descriptions of prohibited "concepts,"[12] the statute's authorization of debate only in an "objective manner without endorsement" is inherently vague. It suggests that speech

[12] As *Honeyfund* observed, the enumerated "concepts" are replete with language "bordering on unintelligible" and "a rarely seen triple negative, resulting in a cacophony of confusion." *Honeyfund* at *35.

a viewpoint is objective, but a viewpoint renders the teaching unobjective. Certainly, Florida's legislature did not intend to suggest that faculty may not tell students that advocacy of racial superiority is . Moreover, whether a discussion is "objective" is an inherently subjective evaluation. That's pointedly so where those rendering the decision disagree with the speaker.

This vagueness chills speech as faculty must second-guess whether their teaching will be seen by budget-conscious administrators or culture-warrior lawmakers as sufficiently "objective." Imposing rules of debate with stark penal

§ 1004.097(2)(f), (3)(a), (3)(f). Faculty members who guess wrong about what the Stop WOKE Act prohibits violate the Campus Free Expression Act; a faculty member who guesses wrong about what the Campus Free Expression Act protects risks institutional funding. This inconsistency invites arbitrary and discriminatory enforcement.

II. Plaintiffs Satisfy the Remaining Requirements to Obtain a Preliminary Injunction.

Plaintiffs satisfy the remaining preliminary injunction factors, namely: they will suffer irreparable harm; the balance of equities tips in their favor; and an injunction is in the public interest.

, 555 U.S. 7, 20 (2008).

A. Plaintiffs will suffer irreparable injury absent an injunction.

The Stop WOKE Act's invasion of the First Amendment will continue to harm Novoa, Rechek, and the First Amendment Forum if not enjoined. The "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." , 427 U.S. 347, 373 (1976). The Stop WOKE Act will keep harming their right to speak on and receive information and ideas.[13]

[13] Compl. ¶¶ 165, 173, 182, 190, 196, 214, 234–235, 238.

CONCLUSION

Florida has attempted what other censors wouldn't dare. Instead of barring speakers or groups because of their ideas, Florida simply declares those ideas harassment and bans them. This result is un-American and unconstitutional, teaching students a "rotten lesson" about citizenship in a "free society."[14]

REQUEST FOR ORAL ARGUMENT

Under Local Rule 7.1(K), Plaintiffs request oral argument on this motion and estimate that one hour will be required for oral argument. Additional time will be required if this Court prefers testimony.

DATED: September 15, 2022

Respectfully Submitted,

Greg H. Greubel

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(B)

On September 13, 2022, counsel for the Plaintiffs contacted the Defendants' counsel to inform them of Plaintiffs' intent to file a motion for preliminary injunction. Defendants confirmed their intent to oppose Plaintiffs' motion.

/s/ Gary S. Edinger
Gary S. Edinger

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 24.1

Plaintiffs certify that they have complied with the requirements of Local

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(F)

I hereby certify that this motion and memorandum of law contains 7,993 words.

/s/ Greg H. Greubel
Greg H. Greubel !

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CERTIFICATE OF SERVICE

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