UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

LEROY PERNELL, et al.,)
)

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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

1 state your name for the record so the court reporter can keep
2 track of who's speaking.
3 For the case ending in number 304, we set a schedule.
4 It was filed first, as should be obvious based on the case
5 numbers.
6 Once we had set that schedule, Case No. 324 was then
7 filed. I had a second scheduling hearing, and a schedule was
8 set, and the parties agreed to hear both cases today.
9 I'm going to start with counsel in Case No. 304, the
10 Pernell case. I'm going to ask a lawyer for -- on behalf of the
11 plaintiffs in each case and the defense, which represents the
12 defendants in both cases, if the following statement is correct.
13 I asked the lawyers through two different status
14 conferences to propose a schedule. I asked them whether or not
15 they needed to secure any additional evidence and what type of
16 evidence, if any, they wish to present, whether they wish to
17 present any evidence at this hearing. And it was based on those
18 conferences and agreement of counsel that the parties set a
19 schedule, filed everything, and determined today would not be an
20 evidentiary hearing but simply a legal argument.
21 Let me start with counsel on the Pernell case for the
22 plaintiffs. Is that correct?
23 MR. SYKES: Yes, Your Honor.
24 THE COURT: And that was Mr. Sykes.
25 MR. SYKES: Yes, Your Honor.

1 THE COURT: All right.
2 And turning to counsel in the Novoa -- is that how to
3 pronounce it?
4 MR. GREUBEL: Yes, Your Honor.
5 THE COURT: And this is Mr. Greubel?
6 MR. GREUBEL: Yes, Your Honor, Greg Greubel for the
7 plaintiffs.
8 THE COURT: Is that correct?
9 MR. GREUBEL: Yes.
10 THE COURT: Turning to Mr. Cooper for the defendants
11 in both cases; is that correct?
12 MR. COOPER: It is, Your Honor. Good morning.
13 THE COURT: Good morning.
14 All right. And I say that because it seems to -- no,
15 it doesn't seem to me. I'm stating the obvious. Y'all have
16 filed your papers. Everybody had a full and fair opportunity to
17 file whatever argument they wanted to file, and the record is
18 closed. Whatever it is, it is and I have before me now.
19 What I'm going to do in just a moment is I'm going to
20 ask some questions. I'm going to do things a little bit
21 differently than I have in the past. Sometimes my questions are
22 going to be directed to a lawyer for the plaintiffs in each case
23 and the defense. Sometimes I've just got a direct question for
24 one of the parties, and if somebody else wants to respond to it
25 on their time, they can, but I want to move things along.

1 Also -- and I say this in the nicest sort of way --
2 these hearings are longer than they need to be because when I
3 have the question-and-answer session, I ask somebody what their
4 favorite ice cream is, and they don't say, Judge, I don't like
5 ice cream, or respond, This is my favorite flavor. Instead
6 they'll say, Judge, what I really want to do is talk about
7 Almond Joy versus Mounds, nuts or no nuts.
8 I'm going to give y'all time to make your arguments,
9 but if you don't want to answer the question, I'm not going to
10 hold you in contempt. Just say, Pass. I mean, I just -- to
11 spend 15 minutes on a monologue that's nonresponsive to my
12 questions and then repeat that same monologue on your time is
13 just an absolute waste of everyone's time.
14 So if I ask a question and, look, it's not that
15 simple, you can say, Judge, I think the answer to your question
16 in some context, yes, but I don't think that case applies, and
17 if you want me to further explain why it doesn't apply, I'll do
18 that. I mean, so I'm not suggesting it's, you know, always a
19 yes-or-no question. But please just don't pivot to talk about
20 some other issue. I'm going to give y'all ample time.
21 I'll also note, as I normally do, I'm going to ask
22 some questions. We'll take a break. We'll come back. I'll
23 then hear from the plaintiffs.
24 Let me find out -- and the seating may not dictate
25 this. Mr. Sykes and Mr. Greubel, have y'all talked about who

1 wants to go first?

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

3 THE COURT: All right. I just didn't want to assume

4 since he's seated in what I characterize as the jump seat as far

5 as your side. And I'm slightly disoriented. I understand

6 there's more of y'all that are seated normally where the defense

7 or the criminal defendant's team would be seated.

8 Mr. Cooper is in the jump seat on his side. He's

9 going to take the lead. But for questions -- and, Mr. Cooper,

10 you know this because you've been in front of me before.

11 But Mr. Sykes and Mr. Greubel, if you want to turn to

12 one of your colleagues to respond to a particular question, you

13 can certainly turn to your colleague. I'm not going to say no.

14 I'm happy to hear from Mr. Ohlendorf or -- is it Ms. Wold?

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

16 THE COURT: -- Ms. Wold.

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

18 Likewise, when you're making your presentations,

19 Mr. Sykes and Mr. Greubel, if you're going to pivot to some

20 point you want to make and you want to turn to one of your

21 colleagues, I'm certainly not going to cut you off. You can

22 say, Judge, on this one issue that we want to talk about, I'm

23 going to turn to my colleague, so-and-so; okay?

24 I really am not asking the questions to be unpleasant

25 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

1 *B an tt* -- for the court reporter, B-l-a-n-c-h-e-t-t-e -- out

2 of the U.S. Supreme Court that says *n r p n ss s*

3 *p u ar y a qu st on t n t s t s tuat on now, rat r*

4 *t an t s tuat on at t t t str t ourt s s on,*

5 *t at ust ov rn*

6 The Eleventh Circuit, of course, is recognizing cases

7 like *H n y,* citing *B an tt* *str t ourt n not*

8 *s ss a as t at was not r p at n t as b o s*

9 *r p b or u nt s nt r* Again, the *H n y* case relying

10 on *B an tt* .

11 And for obvious reasons, I noted those cases in that

12 order. I'm not suggesting that's the only authority on point,

13 but that was a clean way to present it.

14 Mr. Cooper, again, I don't see that in the argument,

15 but I just wanted to find out, since the parties noted that the

16 regulation took effect after the complaint was filed, is there

17 any suggestion that that means that the Pernell case was not

18 ripe?

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

20 argument.

21 THE COURT: All right. Thank you.

22 This is for plaintiffs' counsel in the Pernell case.

23 For plaintiff Dr. Marvin Dunn, in terms of standing, I'm not

24 sure how his voluntary bus tour qualifies as instruction under

25 the implementing legislation.

Regulation 10.005(1)(c) defines instruction as teaching students about a prohibited subject within a course,

1 I'm stuck with the record I've got. So what I want to find out
2 is do I just ignore the definition of "within a course?" How do
3 I -- it seems to me that's an insurmountable problem at this
4 juncture with -- and let me make plain. There is a difference
5 between -- and I don't think anybody disagrees with this. There
6 is a difference between standing for purposes of preliminary
7 injunction versus standing for the motion to dismiss.
8 You don't disagree with that, do you, Ms. Sykes?
9 MR. SYKES: No, Your Honor.
10 THE COURT: Mr. Cooper?
11 MR. COOPER: No, Your Honor. We agree with that.
12 THE COURT: So we have a heightened burden -- you have
13 a heightened burden at this point that's been described as akin
14 to what the burden would be at the summary judgment stage. The
15 record is closed. And I said that not because of this issue,
16 but for, quite frankly, some other issues that -- you know, I
17 let the parties put on what they did, and I didn't restrict you.
18 And we're not -- if I kept reopening the evidence for one side
19 or the other, then there would be no end to a preliminary
20 injunction hearing. So without any artificial limitations by
21 the Court, y'all have the record you have.
22 But what's your best argument that what he's doing is
23 within a course -- the definition of instruction for the
24 provision I'm applying, or does it not matter what the
25 definition is?

1 that opposing counsel has offered this morning, a janitor's
2 conversation with a student in the hallway would qualify as an
3 instruction; a secretary who makes small talk with students who
4 are waiting for office hours with a professor would fall under
5 the definition of instruction.
6 And if that were so, then the definition of
7 instruction would be far more capacious than the plain meaning
8 of that word in the act. And so we think that simply can't be.
9 I think the Board of Governors' regulation is clear
10 that instruction has to happen within a course. We are bound by
11 that, and I think the historic bus tour, which doesn't occur
12 within a course, doesn't qualify.
13 And Your Honor mentioned training, but training is
14 also a word used in the act and then it's separately defined in
15 the Board of Governors' regulation. And I don't think there's
16 been any suggestion that this bus tour qualifies as training.
17 THE COURT: And so I think the record would be clear,
18 I wasn't conflating training with a course. I think what I was
19 repeating back to the plaintiff is argument that the
20 definition -- that the statute coverage was broader, and so it
21 was on that limited point that I asked that question.
22 MS. WOLD: Absolutely.
23 THE COURT: Fair enough. Thank you.
24 MS. WOLD: I think that's clear. I wanted to make
25 sure.

Thank you.

THE COURT: All right. Let's talk about [illegible]. 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 [illegible] been set aside by the Eleventh Circuit en banc? Or has

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 *Pratt* 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 *Pratt* 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 *Pratt* talking about things being reasonably related to a pedagogical interest, why isn't -- whether it's under *Pratt* 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 *Pratt*. 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 *B[illegible]s op* 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

1 I want to make clear that even under the standard
2 adopted by [illegible], from *Ha woo* --
3 THE COURT: And I'm going to ask y'all to apply these
4 standards later.
5 For example, I read the defendant's brief, and they
6 go, *B s op* ain't it; but if you are going to apply *B s op*,
7 here's how it should be applied. They say that, Anything that's
8 said in a classroom is government speech -- end of inquiry, full
9 stop -- we can control absolutely down to the -- you know, the
10 intro statement of a professor, what's said in the class.
11 That's their starting position. They then said that, If you
12 apply *B s op*, here's how it should be applied.
13 I'm going to ask y'all both to apply [illegible] to this
14 record -- and I did emphasize the word "record," and I'm going
15 to have y'all apply *B s op* to this record. But I want to find
16 out what -- assuming [illegible] is not the test, what is the test or
17 the analytical framework, however you want to phrase it? I
18 just -- Judge, this is what you're supposed to look at, the
19 factors, the -- what are you supposed to balance? What am I
20 supposed to look at in analyzing the students' claims other
21 than, Judge, it's in the university setting and academic
22 freedom, which is not a right, but an interest that's been
23 recognized and balanced by the Eleventh Circuit explicitly in
24 *B s op* has a special niche, which the U.S. Supreme Court has
25 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 [illegible]?

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 [illegible] and in *B[illegible]s op*, the Court was looking at a school disciplining a student

1 But are you suggesting the Florida Legislature does
2 not have a right to set the curriculum?
3 MR. SYKES: It is not the role of the legislature --
4 THE COURT: Not should they. What's the best legal
5 case for the State cannot set the curriculum for a university,
6 only individual universities can set the curriculum?
7 MR. SYKES: To be honest, Your Honor, we don't have a
8 case on all fours here because what the legislature has done is
9 so unique. There have been a lot of proposals, similar cutting
10 and pasting, similar language in many districts in many states.
11 But we have looked hard to find a place where a state
12 legislature has tried to enforce a particular viewpoint on
13 college professors and other instructors. You have to go all
14 the way back to the -- sort of the loyalty oath cases of the
15 late '50s and '60s. We don't have a lot of cases in this area
16 because state legislatures generally stay out of this kind of
17 viewpoint-based requirement and --
18 THE COURT: Again, I want to -- surely, Mr. Sykes,
19 you're not trying to collapse the concept of viewpoint and
20 content. Is that really the plaintiffs' suggestion, that
21 viewpoint and -- there's no daylight between those two concepts?
22 MR. SYKES: Not at all, Your Honor.
23 THE COURT: Because I thought what the law for well
24 over a century has taught us is that there is a huge difference
25 between content and viewpoint.

1 So my question to you -- and I'm going to ask this to
2 Mr. Cooper. It seems to me one of the questions, whether I'm
3 applying, for example, *B s op* or *r* , or any of these cases,
4 is -- and I know some Courts in a perfunctory way roll over
5 concepts and conflate concepts. I'm not being critical, but
6 Courts do that. And when you write a three page -- pages on a
7 complex legal issue, then you tend to get that sort of
8 conflating concept -- conflating of concepts.
9 So when I'm talking -- does curriculum suggest both
10 content and viewpoint, or does it envision -- curriculum as it's
11 been applied by Courts to mean content?
12 MR. SYKES: It's difficult to say, Your Honor. As you
13 said, Courts use these terms differently. We do not mean to
14 suggest that there's no difference between --
15 THE COURT: Do I get to ignore the U.S. Supreme Court?
16 For the life of me -- and I'm going to ask Mr. Cooper
17 about this. In *os nb r r* --
18 MR. SYKES: Yes, Your Honor.
19 THE COURT: -- which gets quoted like it's, quite
20 frankly, out of context, but gets -- the language over and over
21 talks about what a university can do, but it explicitly talks
22 about it made content-based choices. But when *os nb r r* says
23 that, they spent the first five pages before that distinguishing
24 between content and viewpoint.
25 So I just -- when I'm analyzing what the university --

1 what you can or can't do, whether it's the State or the
2 university, you say I should analyze the State differently from
3 the public university. And I get it's one step removed. But
4 for the life of me -- and I'm going to have Mr. Cooper -- I
5 don't understand, if I read *os nb r[illegible] r* -- and, again, maybe
6 they taught me something different at UF than they teach you
7 folks at Harvard. But I thought when I read that statement by
8 the Court, the holding, talking about [illegible] *ar*, that the State, as
9 a speaker, may make content-based choices.
10 How in the world do I read that statement and cut and
11 paste it and ignore the first five pages of the order that
12 distinguish between content and viewpoint?
13 I just, for the life of me, don't understand why I
14 would do that.
15 MR. SYKES: We're not asking you to do that. I did
16 not go to Harvard, but I agree that there is a big difference
17 between viewpoint and content. And we think that this language
1818181 jus obs2[illegible] *r* is dicta, and it's talking about regulating --
15 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 *os nb r[illegible] r* when, to me, it makes one of the fundamental points which underlies your argument if I'm going to apply *B[illegible]s op*, 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 *os nb r[illegible] r* 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.

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 [illegible] ?

MR. GREUBEL: Not on the [illegible] point, Your Honor, no.

THE COURT: Mr. Cooper?

1 it's -- why is the *Ha woo* test applied in [illegible] not the test
2 I apply to the students' claims.
3 MR. COOPER: Your Honor, because what we are dealing
4 with here is a claimed right of a student to receive instruction
5 and speech from a professor of a particular kind, and that
6 cannot possibly be a right that's independent of the right of
7 the professor, if the professor has one, under the First
8 Amendment to provide the speech that the student says the
9 student wants to hear.
10 If the professor, as we maintain, Your Honor, has no
11 First Amendment right to espouse the concepts in the Individual
12 Freedom Act, then it cannot be that the student has some
13 independent right to insist that the professor provide the
14 professor's espousal or the professor's opinions about that
15 concept. The student can't have a right that the professor
16 clearly does not have. The student can't insist on a bespoke
17 curriculum or bespoke viewpoints to be offered.
18 THE COURT: So let me ask you this. So, Judge, when
19 the case law that says that actually the student, because their
20 speech is not government speech, would be -- at the university
21 level for case law would be afforded a more expansive right to
22 speak, Judge, that's different because that's talking about the
23 student's right to speak, not receive information?
24 MR. COOPER: Yes.
25 THE COURT: So to the extent there's language that

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

1 situation under the Stop WOKE Act, they are sort of on the flip
2 side of that.
3 THE COURT: All right. Mr. Greubel, you agree?
4 MR. GREUBEL: That's right, Your Honor. And it's our
5 position as well that the State is not permitted to impose
6 itself artificially between the right of a student -- or the
7 right of students to receive information and the right of
8 professors to teach the curriculum.
9 THE COURT: Thank you.
10 So that's helpful. This is why we have oral argument.
11 Y'all at least agree on that point.
12 Mr. Cooper, I'm going to let you respond to some of
13 the other issues that were raised during my discussion with
14 Mr. Sykes and Mr. Greubel, but why don't you -- one thing I am
15 curious that I need your help with me understanding is your
16 position as it relates to setting curriculum or content versus
17 viewpoint. And is there a distinction between the two, and, if
18 not, why not, and what's your best authority for that?
19 MR. COOPER: Your Honor, I think there is a
20 distinction generally in the law between consent-based
21 restrictions and, beyond that, viewpoint-based restrictions
22 within context.
23 THE COURT: Fair enough. Fair enough. Poorly phrased
24 question. I didn't mean in general First Amendment
25 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

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 *B s op* 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,

1 If you've got a balancing test that says it's an interest you're
2 going to balance -- I understand it's a good -- you know, if CNN
3 or Fox News is going to interview you, I understand why it's a
4 good sound byte there's no right to academic freedom. I'm not
5 aware of anybody suggesting there's a right to academic freedom,
6 but what -- the Eleventh Circuit, which I'm bound to follow, has
7 said it's an interest that's weighed. So while you may not call
8 it a right, who cares? I understand it would be a higher -- it
9 would be subject to higher review if it was a right.
10 MR. COOPER: I care because if they're right and their
11 professors have a right to academic freedom to say whatever they
12 want, I lose. I lose. That's why I care. But -- so --
13 THE COURT: But they haven't argued -- have y'all
14 argued that there's an absolute right?
15 MR. GREUBEL: No, Your Honor, that's not at all what
16 we've argued. Does the *B▄s op* case recognize --
17 THE COURT: Hold on. I've got -- you answered that
18 question, and we'll talk about more -- I'll get both sides to
19 talk about *B▄s op* and how it should be applied.
20 I guess my thing is I don't understand -- I absolutely
21 agree, and I will say right now -- because I can read the King's
22 English -- it says in *B▄s op* there is not a right to academic
23 freedom. There is no right to academic freedom. Boom. We're
24 done. On that issue you win, but that's not the end of the
25 inquiry.

1 MR. COOPER: No, it's not.
2 THE COURT: The inquiry still is -- that is an
3 interest that has to be balanced against other interests, and
4 you keep saying to me, basically, like -- not basically like.
5 You keep saying to me explicitly and in your papers the State of
6 Florida or university can tell a professor not only the subject
7 areas, not only the topics they've got to cover, not only the
8 information that has to be covered, but precisely how they say
9 it and the opinions that they express when they're saying it,
10 and they can control -- because it's the government speaking,
11 literally can control every word.
12 They could hand every professor -- and maybe that's
13 where we're heading; I don't know -- a transcript that says,
14 You're going to read from this transcript semester after
15 semester verbatim because we have absolute control over what you
16 say and how you say it.
17 If that's true, then why does *B s op* have a balancing
18 test? I just don't understand that.
19 MR. COOPER: Your Honor, once again you're right. It
20 does -- academic freedom is among the interests to be placed in
21 that balance. So also is the fact that professors and other
22 teachers are employees of the State. The Court placed
23 significant weight on that point, and I would say dominantly on
24 ultimately that point in the balance, because, Your Honor, what
25 I believe that *B s op* did was after undertaking that balancing

1 process, it concluded that the autonomy of the professors in
2 that balancing process can never, never overcome the
3 university's decision about what shall be and shall not be
4 taught. In other words -- and that's essentially what they
5 said.
6 I mean, how else are we to understand after the long
7 windup?
8 THE COURT: Well, apparently Justice Alito is a
9 simpleton just like I am, because didn't he --
10 MR. COOPER: Who are you talking about?
11 THE COURT: Justice Alito. Didn't Justice Alito --
12 let me find the case that you --
13 MR. COOPER: *E war s*, one of my favorites.
14 THE COURT: -- cited. Doesn't he -- hold on. Let me
15 find it. I've got it somewhere in my stack. It must be in
16 another stack. Give me one second.
17 (Pause in proceedings.)
18 THE COURT: I'm sorry. It was in a different stack.
19 In *E war s* -- I was just trying to get the language --
20 in talking about the right to control, he puts, "But see
21 Bishop." Now, maybe Justice Alito learned something when he
22 went on the Supreme Court he didn't know when he was a circuit
23 judge.
24 But what does "but see" mean other than the
25 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 *E war s* 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 s B s op,*" 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

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

1 *ov r an n v ua pro ssor s u nts* Finally
2 *n v rs ty n ssar y as o n on ov r w at s tau t by ts*
3 *pro ssors ..*
4 THE COURT: Sure. Curriculum, I agree, they can set
5 you can teach this kind of class; you can't teach this kind of
6 class.
7 But you're reading that -- didn't it also in balancing
8 that -- they also had some other interesting language.
9 *un v rs ty as not su st t at Dr B s op annot o s*
10 *part u ar v ws xpr ss t , on s own t ,* et cetera.
11 *n v rs ty as s p y sa t at ay not s uss s r ous*
12 *b s un r t u s o n v rs ty ours s*
13 If the course doesn't include religion or talking
14 about religion -- but you can't simply -- I mean, I think that's
15 got a quote mark around it. So people can raise their eyebrows,
16 but I'm reading directly from a quote. *t n v rs ty s*
17 *nt r sts n t assroo on u t o t pro ssors ar*
18 *su nt to warrant t r asonab r str t ons...*
19 Because they talk about how you didn't -- this is not
20 part of your core curriculum that you're teaching. It's a
21 separate class that you're teaching. You're calling a separate
22 after-hours class to talk about your own personal views, as
23 opposed to teaching the subject matter of the class. It's
24 coercive because it's done during exams, and while you may say
25 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.

1 MR. COOPER: Who gets to decide whether it's part of
2 the subject matter of what you're teaching? Isn't that also the
3 professor's First Amendment right, according to the plaintiffs?
4 And, Your Honor, yes, we're not arguing that the
5 plaintiffs here or Dr. Bishop, in his case, can't say whatever
6 he wants to -- whatever opinions he has on his own time not in
7 the context of the classroom. But even apart from his optional
8 class, he would offer his views -- his viewpoints, as the *B s op*
9 Court called them, exactly the same as the *os nb r r* did and
10 Justice Alito in *E war s* called them, viewpoints. He would
11 offer those viewpoints in his formal classes, and here's what --
12 you know, yes, here's the language of the Court.
13 THE COURT: What -- point me to the headnote so I can
14 find out what you're reading from.
15 MR. COOPER: I don't know about the headnote.
16 THE COURT: Or just a general area, page number,
17 anything so I can find where you're reading from.
18 MR. COOPER: Page 1077.
19 THE COURT: Hold on one second.
20 I've got 1071. This is 10 -- hold on.
21 MR. COOPER: It begins with the "In short" -- the
22 paragraph --
23 THE COURT: I've got it, the last paragraph, "In
24 short..."
25 MR. COOPER: "In short," that's where the paragraph

1 begins, and I've already shared that passage with the Court.

2 But if you go on down after the "hold sway" sentence, the Court

3 says *By ts o to Dr B s op, t un v rs ty s s to*

4 *pr v nt ro pr s nt n s r ous v wpo nt ur n*

5 *nstru t ona t* -- and here's the point I want to focus on --

6 *v n to t xt nt t at t r pr s nts s pro ss ona op n on*

7 *about s sub t att r*

8 So he -- he believes in his human physiology class

9 that his religious views were important and directly relevant to

10 human physiology, no less so, I would submit to you --

11 THE COURT: So that, then, would result in the

12 absolute rule that no matter how directly related it was, even

13 if it's part of the -- you're commenting on a reading -- let's

14 say the university -- the State of Florida next passes a list

15 of: These are the only 100 books you can read -- and maybe

16 that's coming in the next legislative session -- and you're

17 reading directly from the book, that then this is what -- not

18 only is this the course you're going to teach, not only is this

19 the content, these are the books you're going to have your class

20 read and discuss in class.

21 You would read that paragraph in Bishop to say -- and

22 they can pass a law that says -- And the professor can't comment

23 or can't express an opinion about anything, even in the

24 prescribed curriculum? That's how broad? That's what that

25 paragraph means?

1 MR. COOPER: Your Honor --
2 THE COURT: And why -- if that's the case, why is the
3 rule not -- and maybe we're headed there. Maybe the rule is
4 that the State of Florida can issue transcripts to every
5 university professor. But isn't that the logical conclusion of
6 your position, that they can regulate everything that's said in
7 the courtroom -- I'm sorry -- in the classroom down to the last
8 word of the professor?
9 MR. COOPER: Your Honor, it is not our position that
10 the First Amendment has no scope of operation when the State --
11 THE COURT: And I thought you just said to me there is
12 no scope of operation in the classroom.
13 MR. COOPER: No, no.
14 THE COURT: So either you're pregnant or you're not.
15 There's no such thing as being a little bit pregnant.
16 MR. COOPER: Your Honor, I've never said that.
17 THE COURT: In the classroom -- I want to find out.
18 In the classroom, what is the defense position? Is the State of
19 Florida -- or I'm sorry. Is the defense's position that in the
20 classroom there's no limitation in terms of the First Amendment
21 on the State controlling what a university professor says?
22 MR. COOPER: That is not my position. I do believe
23 that there is a very, very narrow scope to the First Amendment.
24 THE COURT: And what would that narrow scope be?
25 MR. COOPER: I think it flows from *Barn tt*, and I

1 don't believe the State can require a professor to express a
2 belief to pledge allegiance to the flag --
3 THE COURT: They can't compel speech, but they can
4 prohibit all speech?
5 MR. COOPER: They can't compel a professor or any
6 employee to express a belief --
7 THE COURT: I understand.
8 MR. COOPER: -- that the person does not --
9 THE COURT: But they can prohibit any speech, full
10 stop, without qualification; correct?
11 MR. COOPER: They can prohibit a professor from
12 espousing an opinion that the --
13 THE COURT: They can't force an opinion, but they can
14 prohibit a professor from expressing any particular opinion
15 without qualification?
16 MR. COOPER: Your Honor, government speech under
17 *Gar tt*, we believe, under *os nb r r*, it's clear that the
18 professors are speaking -- or that what they utter is government
19 speech, and the government is entitled to determine the content
20 of that speech and to prohibit the expression of certain
21 viewpoints.
22 THE COURT: Is all the case law about we're not going
23 to apply the First Amendment in such a way to have some, you
24 know, orthodoxy that we're all going to read from the same
25 page of music? Is that just fanciful, silly nonsense that has

1 no application?
2 MR. COOPER: Your Honor, it's not at all fanciful and
3 it's not at all silly. And the State of Florida embraces that
4 with the most narrow, narrow exception, which is to say that
5 these particular eight concepts, which we believe are racially
6 discriminatory and repugnant, we are not going to permit
7 professors speaking in our State-prescribed curriculum, in our
8 classrooms, on our time, accepting our paychecks to express
9 these particular viewpoints. And yes, viewpoints, paycheck --
10 THE COURT: Riddle me this, Batman. If the
11 administration changes and the government changes in 15 years in
12 Florida, under your theory, the State of Florida could prohibit
13 the instruction on American exceptionalism because it alienates
14 people of color and minorities because it suggests -- and other
15 disadvantaged groups because it suggests that America doesn't
16 have a darker side that needs to be qualified. So that's --
17 MR. COOPER: Yes.
18 THE COURT: -- sort of the 30,000-foot-up view problem
19 I have with your suggestion, Mr. Cooper, about the scope of the
20 law. Because it suggests that from state to state you can pick
21 and choose which types of what viewpoint you like and, under the
22 guise of stopping indoctrination, you promote indoctrination.
23 Why isn't that so?
24 MR. COOPER: Your Honor, the government, again, is the
25 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

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. ofis48.41308(t)308(n)(n)18.2729(t

[illegible]8.41188(n)8.41188(t)8.41188( )8.41188(o)8.41188(f)8

1 academic freedom means is it's whatever the political party in
2 power says it is, is what I just understood you to say. Sure,
3 Judge, if power changes hands tomorrow in Florida or in a few
4 weeks in Georgia, whatever political party takes control gets to
5 dictate the scope; not what subject matter is taught, not the
6 curriculum, not what topics have to be covered, but down to what
7 viewpoints are expressed in the classroom. Academic freedom
8 equates to whoever has the political power; right?
9 MR. COOPER: Your Honor, even from Bishop we know that
10 the professor can't express -- and he was disciplined for
11 expressing his religious viewpoints in a class that he thought
12 they were directly relevant to his subject matter -- his
13 religious viewpoints. The State had the authority, and the
14 professor did not have the First Amendment right to express
15 those viewpoints.
16 THE COURT: I understand.
17 MR. COOPER: This -- the Individual Freedom Act is no
18 different. These are familiar concepts and viewpoints that the
19 State, just as if it were dealing with religious viewpoints -- I
20 mean, is there any doubt that the State could pass --
21 THE COURT: Well, what I've come to learn is the only
22 people that have First Amendment rights are based on religion;
23 but fair enough. We'll have to agree to disagree on that.
24 MR. COOPER: Well, let me ask this. Are religious
25 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

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.

1 discipline post-speech, that's been analyzed differently from a
2 pre-speech prohibition. So my question is, does that matter in
3 the claims before me? Or, Judge -- you know, it does or
4 doesn't. So I want y'all to address that. For the -- and both
5 sides. Y'all may agree on that, and if you don't, you can tell
6 me why not.
7 For the defense, I need you to clearly identify me --
8 identify for me the legislature's pedagogical concerns behind
9 the law at issue and explain to me how the viewpoint
10 restrictions at issue are reasonably related to that pedagogical
11 concern.
12 And then I need you to point to, other than legal
13 argument, which last time I checked isn't evidence, what
14 evidence is there in this record that reveals the legislature's
15 pedagogical concerns and what evidence, as opposed to legal
16 argument, if any, supports the conclusion -- or would support a
17 conclusion that those pedagogical concerns are reasonably
18 related to a -- I'm sorry -- that the restrictions are
19 reasonably related to a legitimate pedagogical concern.
20 Then, for both sides, I need y'all to answer the
21 question that I just asked, which is, is there any evidence in
22 the record to demonstrate that this statute and regulation
23 reasonably are related to furthering a legitimate pedagogical
24 interest. I understand the plaintiffs say it's not reasonably
25 related, but that's a different question. The question is

1 whether there's evidence to support that.

2 And then finally, I'm interested, in light of

3 *Ha* *woo* and the other cases that have gone through this

4 process and Rule 65 and the -- under Rule 65, the burden of

5 persuasion rests with the plaintiff, but it's my understanding

6 that once the plaintiff establishes that we want to speak, we

7 are going to speak, we are not allowed to speak, that it would

8 be up to the defense to have -- point directly to evidence that

9 would support the -- whatever the pedagogical concern is and

10 that it's reasonably related.

11 So I want y'all to talk about who bears what burden in

12 the context of a preliminary injunction hearing under Rule 65.

13 Those are the additional questions I have at this

14 juncture, and I also am going to let y'all confer with each

15 other so that y'all can address different points and streamline

16 your presentation.

17 Let me find out from -- actually, why don't we do

18 this. I'm going to -- if y'all will keep your seats.

19 And, Mr. Cooper, if you, Ms. Wold, and Mr. Ohlendorf

20 will figure out how long you'd like for a break and how long

21 you'd like for your presentation, because I want -- I find if we

22 give you a chance to confer and think about the questions I just

23 asked and take notes, it will go faster, not slower.

24 And I'm going to ask the same thing -- Mr. Sykes, you

25 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, 368.375 -26.52 Td [(y)8.41248

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

1 (Resumed at 10:56 AM.)
2 THE COURT: Please take your seats.
3 We've got everybody present.
4 Mr. Sykes, you have the floor.
5 MR. SYKES: Thank you, Your Honor.
6 I'd like to make a very brief statement, and then I'll
7 take your questions in turn. And my colleague, Morenike Fajana,
8 will help with the evidence of the legislative intent, if that's
9 okay with you, Your Honor.
10 May it please the Court, the Stop WOKE Act is a
11 viewpoint-based limitation on instructors' speech and students'
12 rights to receive information in Florida public colleges and
13 universities. Through the Act, the legislature has identified
14 eight politically incorrect views about race and sex that it
15 doesn't like and has banned them from university instruction.
16 This a clear violation of the First Amendment and the principle
17 of academic freedom.
18 Our plaintiffs intend to teach and learn about issues
19 like White privilege, unconscious bias, and color blindness in
20 their courses, but they are prohibited from doing so by the Stop
21 WOKE Act. For example, instructors are not allowed to teach
22 that White privilege exists, but they are allowed to teach that
23 it does not exist; same with unconscious bias. And they are not
24 allowed to criticize the idea of color blindless, but they are
25 allowed to support it.

This is exactly the kind of viewpoint-based censorship Courts have repeatedly struck down. Six decades ago in *K y s an*, 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 *p F rst*, 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 c8(o)8.41308(o)8.4130 r

1 ask, therefore, that this Court immediately enjoins enforcement
2 of the Stop WOKE Act.
3 Turning to Your Honor's specific questions, first on
4 the vagueness point, we agree completely that context does
5 indeed matter; and while it may be true that the word
6 "objective" appears elsewhere than just in the Stop WOKE Act,
7 when we look at the facts of this case, it becomes clear that --
8 what does it mean to teach something objectively and without
9 endorsement?
10 For example, our plaintiff, Leroy Pernell,
11 Professor Pernell, teaches a variety of courses at FAMU law
12 school, including the role of racism in criminal procedure.
13 He's teaching in that course from his own textbook about -- it's
14 called *Co bat[illegible]n[illegible] a[illegible]s [illegible]n Cr[illegible]na[illegible] ro ur*.
15 What would it mean for him to teach the concepts in
16 this class based on his own scholarship, based on his own
17 rigorous research and analysis, objectively and without
18 endorsement? Is he required to say at the end of the day, It's
19 up to you; I don't know? Students enroll in his class,
20 especially, you know, these higher level elective classes,
21 because they want to hear from him about his research. They
22 respect his scholarship. They want to hear his expertise and
23 his analysis. And, crucially, they want to know what his
24 conclusions are based on his years of study.
25 And so for the law -- for the State to require him to

1 withhold any endorsement of any view that's listed there, in
2 practice it's impossible to understand how Professor Pernell
3 could uphold his professional standards, could act as a
4 responsible teacher and scholar, while also sort of teaching,
5 supposedly, in an objective way and without endorsement.
6 Moving to your second question, I think, quite simply,
7 Your Honor asked whether students -- whether it matters whether
8 the discipline is post-speech or a prophylactic broad rule. And
9 I think the short answer is yes, it does matter.
10 In cases such as *E* , the Supreme Court said that
11 there is more -- in the balancing that the -- where there is a
12 prophylactic rule that bans broad swaths of speech, rather than
13 targeting individual professionals, the First Amendment
14 interests are especially strong.
15 So, in short, we -- we think it does matter, and yes,
16 it works in our favor.
17 I'll now turn to my colleague, Morenike Fajana, from
18 the Legal Defense Fund to talk about the evidence of the
19 pedagogical interest, and then I'll close.
20 MS. FAJANA: Thank you.
21 So based on the record evidence that we have in this
22 case, we do not believe that there was a legitimate pedagogical
23 interest behind the Stop WOKE Act, and we believe this for --
24 THE COURT: Counsel, let me ask you a question.
25 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

plaintiffs have put in support those pedagogical concerns.

1 assume the analysis should be, Judge, it also matters where you
2 stick it. If you stick it in a statute that's otherwise
3 structured for a particular purpose and has a purpose and this
4 then expands it, then that also informs what the concerns are;
5 correct?
6 MR. COOPER: That's right.
7 THE COURT: I understand that, and I understood that
8 from your papers.
9 Let me turn back. Counsel, I've now burned up a
10 little bit of your time, but I did want to make sure that there
11 was no disagreement about what was properly in front of me.
12 Go ahead.
13 MS. FAJANA: Thank you, Your Honor.
14 Just on that point about evidence, I also wanted to
15 point out that the complaint references public statements made
16 by Governor DeSantis as well which we believe that Your Honor
17 can take judicial notice of.
1818181 THE COURT: And Mr. Cooper has expressed why in their
1s 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

that was harmful to educators, that was harmful to the larger educational environment, or that they otherwise weren't being

1 any discussions or soliloquies in the legislative record where
2 they pointed to the intellectual diversity survey as something
3 that was emanating the need behind the Stop WOKE Act.
4 THE COURT: All right.
5 MR. SYKES: Your Honor, on your last specific
6 question, before I offer a brief closing statement, under Rule
7 65, we agree that once we have established that First Amendment
8 rights of our clients have been impacted that the burden is then
9 on the defendants to prove that it meets the strict scrutiny
10 test.
11 THE COURT: Or if I don't apply strict scrutiny, it
12 would be their burden to show it was reasonably related?
13 MR. SYKES: Yes.
14 And for the record, Your Honor, we believe that -- as
15 much as we encourage you not to apply a K-12 test, we believe we
16 still win even under the legitimate pedagogical interest test.
17 And, finally, I just want to underscore the broad
18 impact that this law is having on the academy. It's clear who
19 the targets are, as my colleague said, critical race theorists.
20 Our plaintiffs teach critical race theory. They teach feminist
21 theories, critical race studies, intercultural communications.
22 THE COURT: But the defendant says those are abhorrent
23 ideas, and we have the right to control and restrict abhorrent
24 ideas. I think that was the adjective -- did I get the
25 adjective wrong?

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

1 matter? So does -- the fact that you had never limited a
2 viewpoint and you've now got the Florida Legislature dictating
3 that viewpoint is going to be limited and you've got to add that
4 into the mix of whether you are or are not being objective, does
5 that in any way inform the vagueness analysis?
6 MR. GREUBEL: It does inform the vagueness analysis,
7 Your Honor, and part of the reason why is because this is
8 targeting social sciences, which the Supreme Court has taught us
9 are some of the most fraught in terms of academics in which
10 our -- where there are rarely truths that must be mandated. In
11 that way, the law is clearly not an attempt to raise the
12 standard of teaching at Florida colleges. It's attempting to
13 suppress a certain viewpoint and to ensure that the teachers
14 feel that they are not capable of teaching those things in their
15 classroom out of fear that if they would teach one of the
16 prohibited concepts, that their university could lose funding to
17 the tune, for the University of South Florida, of about
18 $77 million.
19 Thank you, Your Honor.
20 On the point of prediscipline versus postdiscipline, I
21 agree with the ACLU -- and this is in our papers as well -- that
22 *E* is the proper standard when there is a broad restriction on
23 employee speech that applies across the board that's not done
24 after the fact where typically --
25 THE COURT: Didn't that case deal, though, with speech

1 outside of work?

2 MR. GREUBEL: Not entirely, Your Honor. Well, it did

3 deal with speech outside of work entirely, but there was a

4 distinction -- well, it says with few exceptions that the law

5 applied to the employees' subject matter. So there were some

6 employees that did talk about the subject matter of their

7 employment with -- per the honorarium, but it wasn't related

8 directly to their job.

9 But that case still stands for the proposition that

10 when it's a broad measure that's taken against an entire class

11 of employees, you have to consider the interests of the audience

12 and consider the interests of the speakers, and that the law

13 is -- there's a heavier burden, which I believe you referred to

14 in the *Aust[illegible]n* case as exacting scrutiny, where the State has to

15 show that its --

16 THE COURT: But in the *Aust[illegible]n* case, they weren't

17 teaching in a classroom or speaking as a professor. And didn't

18 I categorically reject the notion that just because you use your

19 educational background and expertise to speak, you are not

20 speaking as a governmental employee, which is why that case law

21 was distinguishable? Maybe I don't recall my analysis from

22 *Aust[illegible]n*, but I thought that was part of it.

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

24 But I think the point still stands that if -- here

25 that they are -- the State -- when the State is taking a

1 measure -- and this is very similar to the *E* case where it
2 was an honorary ban, that there was no certain process by which
3 employees were supposed to go and ask for whether or not there
4 -- a certain speaking engagement was permitted or not permitted.
5 It was an all-out ban on the speaking -- or on honoraria
6 acceptance by state employees.
7 THE COURT: But would that same -- would that analysis
8 have applied and would they have gone through that analytical
9 framework if it wasn't going out and speaking but instead was
10 conversations had as part of internal training in the workplace
11 that was part of speech directly related to and, in fact,
12 located in the workplace?
13 MR. GREUBEL: I believe so, Your Honor. And I would
14 give this as an example. So if an employer -- if a college has
15 a policy that restricts employees from being able to speak to
16 the media on any subject, period, that that would be a case that
17 would be analyzed under *E* because it is an example of a broad
18 restriction on employee speech that they are entitled to such
19 that it should be analyzed with a heavier burden because it's
20 not specifically about the context in which one employee made a
21 decision and the university -- like the *B s op* case where the
22 university was taking an action in response to actual concrete
23 evidence of a harm that appeared on campus.
24 THE COURT: I understand your answer.
25 Anything additional?

1 MR. GREUBEL: On that point, no.
2 THE COURT: You may proceed.
3 MR. GREUBEL: On the evidence of pedagogical -- or on
4 what the State has as evidence that this law is aimed at a
5 legitimate pedagogical concern, I am not aware of any. I
6 believe that the law is clearly -- that these eight concepts
7 were copied and pasted from an executive order President Trump
8 issued. We know where they came from. This did not come from a
9 deliberative process by the legislature to identify harms that
10 were occurring on college campuses.
11 THE COURT: But if it's -- well, that's the "related
12 to" as opposed to the purpose; correct?
13 I mean -- so, for example, if they say discrimination
14 is a problem and we stick it in a statute designed to prohibit
15 discrimination and we -- they say, you know, The real issue here
16 isn't marginalized groups: The LGBTQ community or people of
17 color. That's not the real -- the real problem with
18 discrimination is wealthy white men. Those are the true victims
19 of our society, and we need to protect them. And then they
20 stick it in an antidiscrimination bill.
21 Why is that not a legitimate concern based on the
22 context of where it's located and on the face of the language?
23 We want to stop this -- that doesn't mean it's reasonably
24 related, though. It doesn't mean it's reasonable. That's a
25 different inquiry. But given the case law and the -- that says

1 what burden there is to establish that, why is that -- based on
2 the face of the language itself and the context that is the
3 statute in which it's put, why is that not enough to establish
4 the concern, which is separate and apart from whether it's
5 reasonably related?
6 MR. GREUBEL: I don't -- I'm not sure that I
7 understand your question, Your Honor. Are you saying that if
8 the State says that this is a concern, why is that not -- why is
9 that not sufficient to establish that as a pedagogical concern?
10 THE COURT: Right. If they say, We're doing this to
11 prohibit discrimination --
12 MR. GREUBEL: Sure.
13 THE COURT: -- it seems to me the case law says
14 there's a low threshold on that part of the inquiry. The more
15 exacting inquiry deals with whether it is, in fact, reasonably
16 related to a legitimate pedagogical interest, as opposed to what
17 is the interest.
18 The second prong, it seems to me, has two components:
19 Is it legitimate and, two, is it reasonable, which is separate
20 and apart from is there an articulated pedagogical concern. Why
21 is prohibiting discrimination in the educational setting by
22 definition not a legitimate pedagogical concern? That doesn't
23 mean it's -- I'm sorry -- wasn't it a pedagogical concern.
24 MR. GREUBEL: Sure.
25 THE COURT: That doesn't mean it's legitimate. It

1 doesn't mean it's reasonably related, and we look at the facts
2 and the whole context to determine that. But it just seems to
3 me the first question is -- what is the pedagogical concern is a
4 less exacting inquiry than whether it's legitimate or reasonably
5 related.
6 Do I have that wrong?
7 MR. GREUBEL: No. That's right, Your Honor. I'm
8 sorry if I misrepresented this. But combating racism is a
9 legitimate pedagogical concern.
10 We encourage there's nothing in the record evidence
11 here to show that there is any reasonable fit between the Stop
12 WOKE Act and that legitimate pedagogical concern, and there's
13 already been -- there are laws on the books that prohibit
14 discrimination in education. And if what they -- they are
15 targeting pure speech, and the line for pure speech and when
16 that crosses from permitted to unpermitted is when it's severe
17 and pervasive, not when the State of Florida decides that it is
18 per se discrimination.
19 THE COURT: Well, even so, it's deemed as -- it's
20 deemed as conduct, but we go through this legal fiction that if
21 it's so severe and pervasive, we're not restricting speech. It
22 becomes conduct because it's so overwhelming and so pervades the
23 workplace. That's why you get to it.
24 But it's -- Title VII is still conduct; correct?
25 MR. GREUBEL: That is the finding --

1 THE COURT: And it can incidentally include speech,
2 but that's --
3 MR. GREUBEL: Yes.
4 THE COURT: It's still viewed as a conduct, not
5 speech-related restriction; correct?
6 MR. GREUBEL: That's right.
7 And finally, Your Honor, on the point of burden, we
8 have -- we carry the burden here on the preliminary injunction
9 to show that our clients have a claim. They have conceded that
10 Professor Novoa has standing to challenge these laws, so the
11 burden then shifts back to the State to prove the
12 constitutionality of the law.
13 THE COURT: Namely, the legitimate pedagogical
14 concerns that this is reasonably related to?
15 MR. GREUBEL: That's right.
16 THE COURT: I understand.
17 Anything further?
18 MR. GREUBEL: Nothing else.
19 THE COURT: And so we're not going back and forth and
20 back and forth -- I'm going to give Mr. Cooper all the time he
21 needs -- Mr. Sykes or Ms. Moraff -- Moraff; right?
22 MS. FAJANA: No.
23 THE COURT: I'm sorry. I've got y'all switched. I'm
24 sorry.
25 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.(o)8.411ed.

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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 *B█s op* -- we're not asking to disturb *B█s op* in any way, but if you look at the balancing that the Court -- that the Eleventh Circuit did in *B█s op*, 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

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

1 MR. COOPER: Thank you, Your Honor. I think this is
2 going to depend more on you than me.
3 THE COURT: I'll be quiet as a church mouse,
4 Mr. Cooper.
5 MR. COOPER: Did you take that down, Court Reporter?
6 THE COURT REPORTER: Sure did.
7 MR. COOPER: Let me speak first to vagueness,
8 Judge Walker. And we've been back and forth in the earlier
9 encounter about that subject matter, but I would like to add
10 that our view is that the standard for vagueness is different in
11 the public employee case.
12 And this is something that we didn't articulate in
13 *Fa s*, and it's new, so I want to make sure I call this to your
14 attention. It springs from the Supreme Court case of *Arn tt*
15 *a ia nst K nn y* The Eleventh Circuit has acknowledged this in
16 dicta really, to be sure, in the *Lau n* case.
17 And that test, Your Honor, is whether ordinary persons
18 using ordinary common sense would be notified that certain
19 conduct will put them at risk of discharge, and that test,
20 again, coming from the cases I've mentioned, were applied in the
21 *an ppo* case by the Third Circuit to uphold the firing of
22 a -- of a university professor for failure to abide by this
23 standard to maintain standards of sound scholarship and
24 competent teaching, a standard, you know, we would submit to
25 you, that is far less concrete than the ones that are before you

1 in the Individual Freedom Act.

2 And in *at rs a[illegible]a nst C ur [illegible]*, Your Honor, the

3 Supreme Court noted that a public employer may, consistent with

4 the First Amendment, prohibit an employee from being rude to

5 customers, a standard almost certainly too vague when applied to

6 the public at large.

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

8 THE COURT: Well, let me ask you a concrete example.

9 If I'm a professor at FAMU and I invite Cornel West to come and

10 talk about his book which is part of the assigned reading, but

11 I'm not offering my opinion as the professor, in order for it

12 not to be seen as an endorsement, an advancement of whatever

13 Cornel West is saying, do I have to invite a professor from

14 Liberty as a counterpoint to inviting Cornel West, for example?

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

16 head.

17 THE COURT: Because there is the objective savings

18 clause. If the presentation -- so I just, for the life of me --

19 because I can't imagine the people that drafted this bill would

20 think that anything that came out of Cornel West's mouth, who I

21 admire, would be objective on any topic, potentially.

22 So if I have him speak in my class, can that -- even

23 though I'm not, as a professor, voicing an opinion, by bringing

24 him into class and giving him that forum, am I not advancing,

25 endorsing, or otherwise supporting the viewpoint of his that

1 I've introduced to the class, and how can I fall under the
2 objective savings clause unless I bring another speaker from
3 another school as a counterpoint?
4 MR. COOPER: Your Honor --
5 THE COURT: This is just one -- I'm trying to come up
6 with examples. If I'm a professor, I'm not sure necessarily
7 what I can or can't do under that savings clause.
8 MR. COOPER: Your Honor, I think that savings clause
9 focuses on the actual speech and instruction that takes place in
10 the class -- in the class.
11 THE COURT: Bringing a speaker to my class to speak is
12 not part of the class or speaking?
13 MR. COOPER: Yes, it would be.
14 THE COURT: So, again, I reiterate my question. How
15 am I not advancing Dr. West's ideas if I bring him in and have
16 him speak and give him this forum, and am I in danger of
17 discipline if I don't bring in a countervailing speaker?
18 MR. COOPER: Your Honor, I think you may well be
19 advancing one of the eight concepts if you bring in Dr. West and
20 Dr. West, in the context of that class within that course,
21 articulates these -- any of these eight concepts. You may well.
22 I don't think it's a question of -- and in that context, the
23 professor of the class on the payroll would violate one of the
24 eight concepts if the professor endorsed or espoused --
25 THE COURT: Is calling them endorsing or advancing --

1 same question. I'm now at the University of Florida, and I'm
2 teaching a course on feminism or women, gender something, gender
3 studies -- we'll -- gender studies, and I invite Gloria Steinem
4 to speak.
5 Haven't I just violated one of these eight principles
6 by having Gloria Steinem speak?
7 MR. COOPER: Your Honor, if it's within context of the
8 course and the instruction from -- whether it's the professor or
9 Gloria Steinem espouses any of these eight concepts, then, yes,
10 you have.
11 THE COURT: I understand.
12 I'm sorry. Go ahead.
13 MR. COOPER: But, Your Honor, to come back to the
14 question of objective and in an objective manner, we do --
15 whether the collective burden --
16 THE COURT: I'm sorry. You didn't answer part two.
17 But if I call somebody with a countervailing view to
18 Cornel West, have I then fixed it for purposes of the savings
19 clause?
20 MR. COOPER: I think that those events would be
21 analyzed apart from each other, not necessarily in conjunction
22 with each other. If you invited someone else to come and be the
23 lecturer in your class as part of your course and that
24 individual did not espouse or endorse the eight concepts or --
25 THE COURT: So you can have a professor from Liberty

1 speak who criticizes those concepts; you just can't have Cornel
2 West in the classroom?
3 MR. COOPER: Your Honor, the statute is very clear.
4 You can't espouse, promote --
5 THE COURT: So, like, when I was a UF student and
6 ACCENT spent thousands of dollars bringing William F. Buckley
7 and McGovern to speak, it would have been fine for me to listen
8 to Buckley, just not McGovern, because I was seriously in danger
9 of being indoctrinated when I was 20 years old at UF because,
10 even though I graduated in the top of my class, apparently I was
11 thoughtless and too simple to distinguish between what a
12 professor said and what I believe. But go ahead.
13 MR. COOPER: I don't think that particular scenario,
14 if I understand it, would be within the construct of
15 instruction.
16 THE COURT: Oh, I agree.
17 MR. COOPER: Of course --
18 THE COURT: I meant if I brought them in a classroom.
19 What they did at ACCENT is speakers being brought in. If you
20 had those two speaking in the classroom -- if McGovern, which I
21 suspect if he was alive would, endorsed any of these eight
22 concepts, then he couldn't speak, but William F. Buckley could
23 come in and deride all eight topics.
24 MR. COOPER: Your Honor, the statute does -- it
25 prohibits espousing these eight concepts --

1 THE COURT: I understand.
2 MR. COOPER: -- in the context of a course in the
3 classroom in Florida public schools.
4 THE COURT: I'm sorry. Go ahead.
5 MR. COOPER: I want to come back to the collective
6 bargaining agreement. Whether it applies or not, it uses the
7 same wording that is used in the statute, and our simple point
8 is we -- I know the Court, you know, disagrees with us on this,
9 but I would simply respectfully repeat that we don't think that
10 that formulation is impermissibly vague, and we think that that
11 formulation in an objective matter -- discussion in an objective
12 matter does depend upon context, and you can -- and its meaning
13 becomes clear when you look at its context next to the verbs
14 that the statute itself uses: Espouse, inculcate, promote,
15 advance. And it's followed, Your Honor, with -- without
16 endorsement. When you see --
17 THE COURT: Let me ask you this because it's -- if I
18 put up a billboard and I've just got a giant picture of Gatorade
19 on it with nothing -- I say nothing on it. If one of the
20 principles is you couldn't endorse, promote, or advance
21 Gatorade, wouldn't that violate it even without any speech at
22 all?
23 MR. COOPER: Forgive me, Your Honor.
24 THE COURT: What I'm asking -- I'm using an example,
25 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.

1 inculcating. It's advancing or promoting; right?
2 MR. COOPER: Yes, yes, advance or promote. And
3 promote is -- you know, all --
4 THE COURT: If I assign Cornel West's book as part of
5 my curriculum, how am I not promoting Cornel West and the --
6 Dr. West and the ideas in his book?
7 MR. COOPER: Your Honor, if you assign it and you do
8 advance the notion that what Cornel West has to say -- and I'm
9 not sure what that is, but if it violates these concepts --
10 THE COURT: If Cornel West speaks on one of these
11 topics in a book he writes and I assign the book, you're saying
12 it's self-evident that if I don't say a word about it, we don't
13 discuss it in class -- if I just assign it as part of the
14 curriculum, Judge, easy peasy, self-evident. You just got fired
15 from UF because you assigned his book that covered one of these
16 eight topics whether you ever talk about it or not.
17 That's self-evident that that would run afoul of this
18 provision?
19 MR. COOPER: No, I'm not at all sure that's the case,
20 Your Honor. I mean --
21 THE COURT: Then how would a professor know? If
22 you're not sure, how would a professor know?
23 MR. COOPER: Your Honor, the statute makes clear that
24 the professor is permitted and the statute cannot be construed
25 to prohibit the professor discussing these concepts in an

1 objective manner without endorsing them. So the fact that --
2 THE COURT: And what I'm asking is a different
3 question. Can you do an end run around that by saying, Aha.
4 I'm not going to talk about it in class. I'm not going to tell
5 my class what I think, but I'm going to assign Dr. -- Cornel
6 West's book on this topic that violates one of the eight topics
7 because I want my students to at least be exposed to his ideas?
8 I don't, for the life of me, understand -- if I assign
9 a book -- and maybe your experience in school was different, but
10 most of my classes, whether it was on English legal history or
11 Latin American history, you might -- I didn't have texts in
12 4000- or 5000- or 3000-level classes, but you'd have a
13 handful -- you'd have materials, and then you'd have a handful
14 of books, and then you'd have recommended reading.
15 But if you're telling me to read something, even if
16 I'm not discussing it in class, wouldn't that be advancing
17 whatever that is and promoting whatever that is?
18 MR. COOPER: No, Your Honor, it would not be advancing
19 and promoting it in the sense in which those terms are clearly
20 used in the statute.
21 Those terms are clearly used as colloquially
22 synonymous terms with espousing, with inculcating, with
23 endorsing. The legislature used closely synonymous terms for
24 the avoidance of doubt -- not to sow doubt, for the avoidance of
25 doubt that it is the endorsement, the espousing, the embracing

by a university-paid state employee of these eight

1 from the classroom, the farther you get away from the contours
2 of your actual job description and you're doing something on
3 your own -- we're not going to be having this same discussion is
4 what -- to use that language. But that's, in essence, even what
5 *B[illegible]s op* recognized; right?
6 MR. COOPER: I think that's right, Your Honor.
7 Now, I will concede that if the [illegible] balancing
8 test applies to the Individual Freedom Act, then under *E[illegible]*
9 because it is a prophylactic prohibition and it embraces,
10 perhaps, many, but certainly more than one professor, and
11 because it is dealing with, perhaps, many audiences, not just
12 isolated classes, that the burden on the State in that [illegible]
13 process is heavier.
14 THE COURT: But, Judge, we don't believe [illegible]
15 applies for the reasons we've stated.
16 MR. COOPER: That's right.
17 THE COURT: I understand.
18 MR. COOPER: That's right.
19 Your Honor, coming now to the question of the
20 pedagogical concerns that are addressed by the -- by the
21 Individual Freedom Act and the -- and their relationship -- or
22 the Act's relationship to those pedagogical concerns,
23 Your Honor, we would submit to you that the pedagogical concern
24 of reducing racism or prohibiting racial discrimination is a
25 legitimate pedagogical concern. In fact, it's a compelling

1 governmental interest.
2 And that on the face of the statute is the concern --
3 is the governmental issue -- interest that the legislature was
4 addressing in its view, Your Honor, and it says it quite
5 straight up. The instruction that espouses or promotes, and the
6 rest of the verbs, any of these eight concepts are themselves
7 that -- that speech, if you will, is racially discriminatory or
8 sexually discriminatory or -- but on whatever immutable
9 characteristic is at issue, Your Honor, that is a compelling
10 governmental interest.
11 Now, the -- the relationship between that interest and
12 prohibiting this speech, which the legislature has defined as
13 being racially discriminatory, is as tight as it can possibly
14 be. The legislature, on the face of the statute, defines
15 espousing these concepts as racial discrimination, and it
16 prohibits that racial discrimination. It prohibits espousing
17 any of these eight concepts.
18 In this respect, Your Honor, it is an extension on
19 existing federal law, Title IX, the federal funding statutes
20 that prohibit sexually discriminatory or racially discriminatory
21 educational environments, which counsel for the plaintiffs
22 say -- acknowledge are there and acknowledge to be entirely
23 consistent with the First Amendment and saying made unnecessary
24 this statute, at least insofar as they argue that at some level
25 of severity and pervasiveness and objective offensiveness the

Is concept six -- that's basically affirmative action by any other name; right?

MR. COOPER: Your Honor, yes.

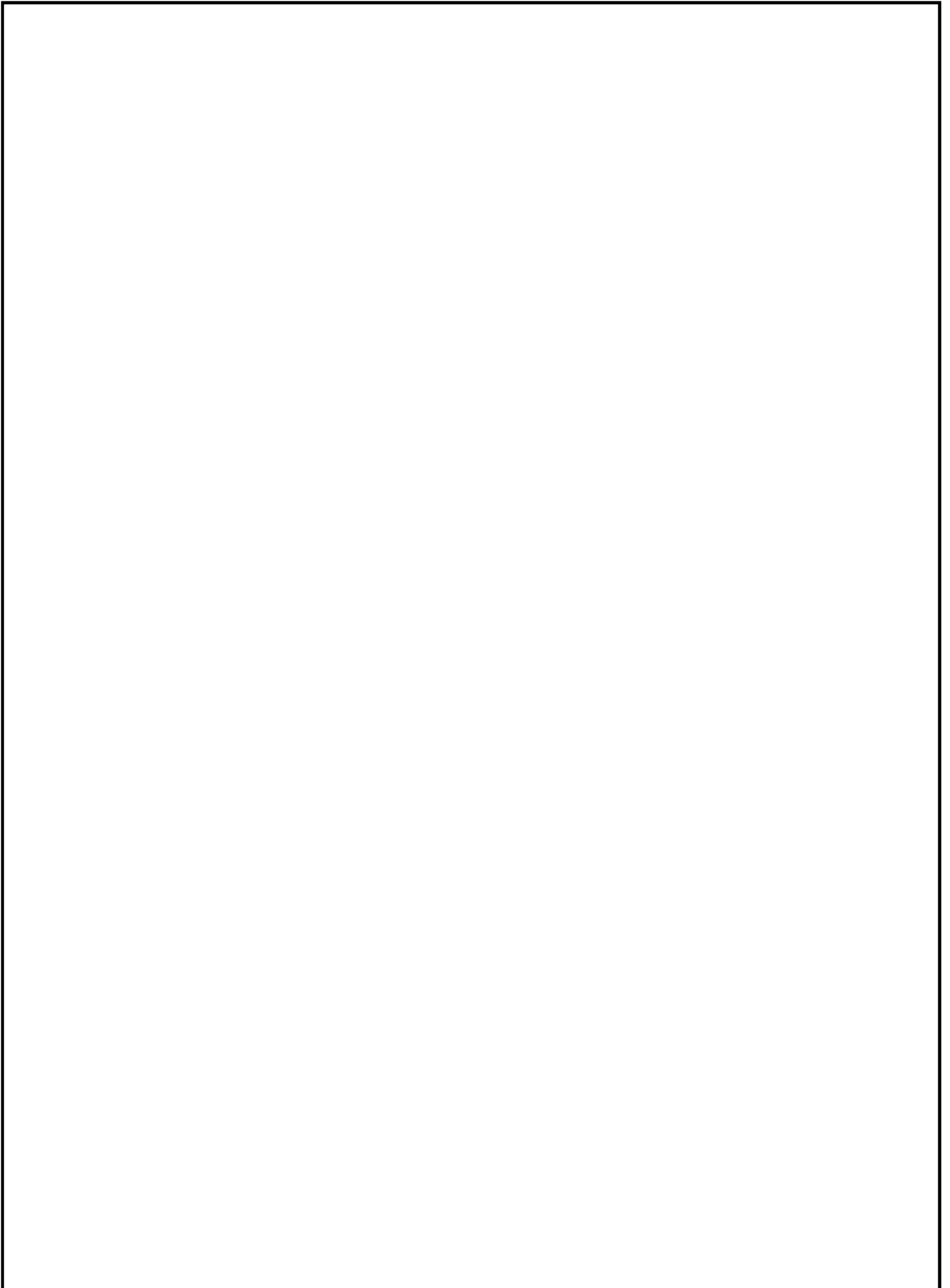
THE COURT: All right. So a professor at the University of Florida can use the N-word in class, and that's not actionable if they use it once. But if they mention affirmative action once under this new law, it's actionable; right?

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,



1 mention it, it's actionable.
2 Why is that not so under your application of these
3 provisions?
4 MR. COOPER: Your Honor --
5 THE COURT: And maybe that's a good thing. Maybe
6 affirmative action is more abhorrent in our new age than using
7 the N-word. I'm not going to make a judgment of that. It's
8 shocking if that's our -- the new values that we embrace, but
9 I -- just for the life of me, I don't understand that's not a
10 consequence of your reading of the statute.
11 MR. COOPER: That is not a consequence of my reading
12 of the statute, Your Honor, and in particular whether or not
13 there would be a cause of action under some federal statute or
14 even state law. I just have no doubt that the university could
15 take disciplinary action.
16 THE COURT: Oh, they could take disciplinary action.
17 That's true.
18 You couldn't sue, though, somebody in court; right?
19 MR. COOPER: Well, that is the point of this statute.
20 THE COURT: The statute goes beyond that, doesn't it?
21 Am I confused? I thought it went beyond discipline. It
22 doesn't?
23 MR. COOPER: Forgive me.
24 THE COURT: The statute doesn't go beyond discipline?
25 I thought it created a cause of action. Am I wrong?

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

1 confer with each other, and if there's something we haven't
2 discussed -- I'm not asking plaintiffs to reply to Mr. Cooper.
3 I said we are not going to go back and forth. But if there is
4 something we haven't discussed, then you can bring that topic to
5 my attention.
6 (Pause in proceedings.)
7 THE COURT: We are back on the record.
8 Mr. Sykes, anything that we haven't covered that,
9 Judge, we just want to make sure we didn't lose sight of X?
10 MR. SYKES: Nothing additional substantive, Your
11 Honor.
12 We did want to ask a question about logistics and the
13 scheduling of the motion to dismiss argument, but that's a
14 separate thing we wanted to address before the end of the day.
15 THE COURT: I didn't have any particular questions,
16 and I planned on -- other than what I've already asked. I
17 didn't plan on -- I planned on ruling on both -- well, I say
18 both. We have two cases. But ruling on motions to dismiss and
19 preliminary injunctions and working on them -- typically I do
20 that in tandem.
21 Were you asking for additional argument on the motion
22 to dismiss?
23 MR. SYKES: No, Your Honor. In the scheduling
24 conference we had, I remembered that there was some mention of
25 potentially doing one telephonically a week or ten days later,

1 but we are fine with proceeding based on the briefing.
2 MR. GREUBEL: Nothing else from us either, Your Honor.
3 THE COURT: Do you feel the need to have additional
4 arguments on the motion to dismiss?
5 MR. GREUBEL: No, we do not.
6 THE COURT: Mr. Cooper, any other topics or things
7 that, Judge, we didn't want to lose sight of X, and we want to
8 make sure you draw your attention to that?
9 MR. COOPER: Thank you, Your Honor, but I think not.
10 THE COURT: All right. And do you require any
11 additional argument on any issues raised in the motions to
12 dismiss?
13 MR. COOPER: No, Your Honor.
14 THE COURT: Okay. All right.
15 Thank you. I know it's been three hours. I know it's
16 no fun to come in and have me pepper y'all with questions.
17 Imagine how my children feel. But it is helpful, and it's
18 helpful for me to go through this process, and it's useful when
19 I start preparing an order and I go back -- circle back. Both
20 sides have given me a lot to think about, and I appreciate your
21 thoughtful arguments.
22 I hope you have safe trips home.
23 I will tell you that I will endeavor to work on this
24 and not sit on it. So I'm not going to wait months and months,
25 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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