No. 25-13005

In The United States Court of Appeals for the Eleventh Circuit

CASSANDRA SIMON, ET AL.,

Plaintiffs-Appellants,

v.

GOVERNOR OF THE STATE OF ALABAMA, ET AL.

Defendants-Appellees.

APPELLANTS' OPENING BRIEF

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NO. 2:25-CV-00067-RDP

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STATEMENT REGARDING ORAL ARGUMENT

This appeal concerns important constitutional questions under the First Amendment and Due Process Clause involving the constitutional rights of university professors and college students and their freedom to engage in curricular and extracurricular conduct at public universities. Appellants believe oral argument would assist the Court in deciding these consequential issues.

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INTRODUCTION

Alabama Senate Bill 129 ("SB 129") violates the First Amendment by imposing viewpoint-based restrictions on the speech of public university students and professors. In direct contradiction of Supreme Court precedent, University of Alabama officials interpreted SB 129 to prohibit public universities from funding student organizations and/or providing campus space because the student groups' speech is disfavored by the legislature while, at the same time, permitting funding[1] and space for other groups expressing viewpoints that the legislature does not deem objectionable. In addition, SB 129 prohibits public university professors from expressing viewpoints and assigning coursework that the legislature has declared unilaterally to be "divisive," while placing no similar restrictions on professors with contrary viewpoints.

The district court agreed that Appellants have a substantial likelihood of success on the merits with regard to SB 129's viewpoint-based restrictions on the funding of student organizations. However, the district court erred in holding that Student Plaintiffs lack standing. The district court further erred in holding that the

[1] Counsel for UA officials submitted updated student funding guidance to the district court in June 2025. Doc. 71 at 94–95. The guidance purports to return State funding eligibility to all registered student groups. Whether Defendants are complying with this policy remains a contested issue in this case.

First Amendment injuries suffered by Student Plaintiffs did not constitute irreparable harm.

Regarding SB 129's restrictions on Professor Plaintiffs' speech, the district court acknowledged that SB 129 imposes viewpoint-based restrictions on their speech but incorrectly concluded that such restrictions are lawful under the government speech doctrine and existing precedent.

Finally, the district court erred in holding that SB 129 is not unconstitutionally vague under the Fourteenth Amendment, notwithstanding the inability of university administrators and Plaintiffs alike to understand what is allowed and prohibited under the law's terms. The district court's ruling conflicts with at least six other federal courts that have found provisions similar to SB 129 to be unconstitutionally vague.

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction over this constitutional challenge under 28 U.S.C. § 1331. The district court denied the preliminary injunction that is the subject of this appeal on August 14, 2025. Defendants filed a timely notice of appeal on September 9, 2025. This Court has jurisdiction over the interlocutory order granting a preliminary injunction under 28 U.S.C. § 1292(a)(1).

ISSUES PRESENTED

(1) Whether Plaintiffs have Article III standing to challenge SB 129;

(2) Whether Student Plaintiffs suffered irreparable injury as a result of SB 129;

(3) Whether Plaintiff Alabama NAACP provided sufficient evidence that SB 129 violates the First Amendment by restricting, on the basis of viewpoint, Student Plaintiffs' access to, and ability to meet and congregate at, an Alabama public college or university's student facility allocation, which the college or university has made generally available to its student groups;

(4) Whether SB 129 violates the First Amendment by limiting, constraining, banning, prohibiting, censoring, and/or chilling Professor Plaintiffs' speech and expression because of disfavored viewpoints in their course discussions and curriculum;

(5) Whether SB 129 violates the Due Process Clause of the Fourteenth Amendment because it is unconstitutionally vague.

STATEMENT OF THE CASE

The Alabama Legislature enacted SB 129, which prohibits public institutions of higher education in Alabama from "[r]equir[ing]; its students, employees, or contractors to attend or participate in any diversity, equity, and inclusion program or any training, orientation, or course work that advocates for or requires assent to a divisive concept." Doc. 12-2 at 5.

SB 129 lists eight divisive concepts:

> (a) That any race, color, religion, sex, ethnicity, or national origin is inherently superior or inferior;
>
> (b) That individuals should be discriminated against or adversely treated because of their race, color, religion, sex, ethnicity, or national origin;
>
> (c) That the moral character of an individual is determined by his or her race, color, religion, sex, ethnicity, or national origin;
>
> (d) That, by virtue of an individual's race, color, religion, sex, ethnicity, or national origin, the individual is inherently racist, sexist, or oppressive, whether consciously or subconsciously;
>
> (e) That individuals, by virtue of race, color, religion, sex, ethnicity, or national origin, are inherently responsible for actions committed in the past by other members of the same race, color, religion, sex, ethnicity, or national origin;
>
> (f) That fault, blame, or bias should be assigned to members of a race, color, religion, sex, ethnicity, or national origin, on the basis of race, color, religion, sex, ethnicity, or national origin;
>
> (g) That any individual should accept, acknowledge, affirm, or assent to a sense of guilt, complicity, or a need to apologize on the basis of his or her race, color, religion, sex, ethnicity, or national origin;
>
> (h) That meritocracy or traits such as a hard work ethic are racist or sexist.

Doc. 12-2 at 3–4.

Through SB 129, the Alabama Legislature also prohibits Alabama public colleges, universities, and their contractors from taking various actions related to "diversity, equity, and inclusion" programs and "divisive concepts." Doc. 12-2 at 3–5. "Diversity, equity, and inclusion" programs are defined as "[a]ny program, class,

training, seminar, or other event where attendance is based on an individual's race, sex, gender identity, ethnicity, national origin, or sexual orientation, or that otherwise violates this act." Doc. 12-2 at 4. SB 129 also prevents the funding of student organizations associated with any divisive concept or "diversity, equity and inclusion." Doc. 12-2 at 6–7. SB 129 also provides that any public university professor who is found to have violated the law may face discipline or termination. Doc. 12-2 at 6–7.

I. Enforcement of SB 129 Against Professor Plaintiffs

Plaintiff Professor Cassandra E. Simon is an associate professor at the University of Alabama ("UA") School of Social Work. June 25 Hr'g Tr., Doc. 72 at 126. Professor Simon has been employed at UA since 2000. *Id.* at 127. Her research focuses on the intersection of race and health *Id.* at 126–31. UA officials contended that a student-selected and student-led advocacy project in Professor Simon's class, entitled *Anti-Oppression and Social Justice*, violated SB 129, and they threatened her with discipline if she did not cancel the project. *Id.* at 136–40, 142–47. The advocacy project chosen by Professor Simon's students was a sit-in, during which they had planned to discuss the impact of SB 129 on their campus experience. *Id.* at 175–76, 151; Doc. 55-11. Due to SB 129, Professor Simon is concerned about facing either self-censorship, which would significantly diminish the quality of her

instruction to students, or possible termination from UA, where she has taught for twenty-five years. Doc. 72 at 160–63.

Plaintiff Professor Dana Patton is a professor of political science at UA. She is the Director of UA's Dr. Robert E. Witt University Fellows Program that is part of the Honors College ("honors program"). *Id.* at 11–12. Her research interests include health policy, gender politics, and leadership. *Id.* at 9–12. UA investigated Professor Patton for possible violation of SB 129 due to an anonymous complaint regarding her teaching of *Understanding Poverty*, a freshman honors course that she has taught, without incident, for numerous years. *Id.* at 28–32. Specifically, the complaint accused Professor Patton of "embed[ding] divisive concepts" in the honors program and *Understanding Poverty* course lectures and assigned books, accusing her of "producing engaged global citizens as opposed to patriotic Americans." *Id.* at 30–35, 76–77. UA did not identify what provision of SB 129 was potentially violated. Although UA's investigation did not substantiate the accusations against her, Professor Patton was nevertheless shaken by the aggressive and intrusive nature of the investigation, which she had learned was unlike other faculty investigations. *Id.* at 48. In addition, after SB 129 went into effect, the Chair of the Ways and Means Committee for Education in the Alabama Legislature confronted Professor Patton at a UA football game about her teaching and her assigned books, stating that Alabama state legislators were "not going to let this go."

Id. at 51–61. Professor Patton was intimidated by this encounter because the legislator suggested that funding for the honors program may be jeopardized if she refused to modify her courses because he controlled "the education budget." *Id.* at 56. After having experienced the investigation and the encounter with the state legislator, Professor Patton self-censored, fearing termination. She has modified her curriculum by not showing certain documentaries and not teaching certain race-related theories that she has long taught, and she has eliminated small group discussions in her courses out of fear of enforcement of SB 129. *Id.* at 65–72.

Plaintiff Professor Richard Fording is a professor of political science at UA. Professor Fording's courses study the intersection among race, ethnicity, and politics. *Id.* at 194–96. His courses include *Politics of Poverty*, *Politics and Voting Rights*, and *Social Movements of U.S. Politics*, all of which include subject matter pertaining to discrimination on the bases of race and sex against people of color, women, and LGBTQIA people. *Id.* at 217. After learning about the investigation of Professor Patton and the forced cancellation of the students' advocacy project in Professor Simon's class, Professor Fording modified the curriculum of some of his courses to avoid violating SB 129. *Id*. He also elected not to teach *Politics of Poverty*—a modified version of the course that was the subject of the complaint against and investigation of Professor Patton and that uses many of the same course materials—for fear of violating SB 129. *Id.*; Doc. 73 at 236–37. After teaching

political science for almost 30 years, Professor Fording is concerned, for the first time in his career, about having to choose between not teaching courses that are integral to his scholarship or facing the risk of discipline or termination by UA.

II. Enforcement of SB 129 Against Student Plaintiffs

Plaintiffs Miguel Luna and Sydney Testman have suffered injuries from University of Alabama at Birmingham's ("UAB") enforcement of SB 129. As a direct result of SB 129, Luna lost multiple lines of State funding and was unable to obtain the remaining source of State funding for a student group that he co-founded, Esperanza. *Id.* at 356–59. Esperanza was created to provide support for, and foster community among, Latine[2] students at UAB. *Id.* at 348. Similarly, Testman, also a student at UAB, formerly served as the finance coordinator of UAB's Social Justice Advocacy Council ("SJAC"), a former University Funded Organization[3] ("UFO") that hosted programs on social justice issues and provided funding to other student groups to host social justice related programming on campus. Due to SB 129, UAB closed the Student Multicultural and Diversity Programs office ("SMDP"), which terminated university funding for SJAC and terminated a university stipend to

[2] The term Latine means of, relating to, or marked by Latin American heritage.

[3] University Funded Organizations received guaranteed funding annually and automatically from the University. This is juxtaposed to Registered Student Organizations ("RSOs") who had to apply for funding on an event-by-event basis and had no guaranteed funding. Doc. 79 at 45–46.

Testman for her work as SJAC's finance coordinator. *Id.* at 313–18. UAB interpreted SB 129 to prohibit use of State funding for student organization events deemed to promote a divisive concept or be associated with a DEI program. This prohibition applied to both RSOs and UFOs. For example, UAB's written guidance stated: "UAB is unable to provide state funds to the registered student organization to be used for a specific 'DEI program' or event that promotes 'divisive concepts.'" Doc. 69-12 at 9. UAB's Dr. Wallace explained that decisions about which RSOs would receive State funding were made based on whether the RSO was deemed to be associated with a divisive concept. Doc. 69-8 at 20. UAB failed to identify which divisive concept or component of SB 129's diversity, equity and inclusion definition were implicated in the programming for SJAC and Esperanza.

III. SB 129 Impact on Alabama NAACP

The State Conference of the National Association for the Advancement of Colored People, Inc. in Alabama ("Alabama NAACP") has a student chapter at UA, and its members use campus spaces and facilities for student groups. Based on its interpretation of SB 129, UA closed spaces used by Alabama NAACP members, including the Black Student Union ("BSU") space and the Safe Zone space.

IV. Procedural History

On January 14, 2025, Plaintiffs filed a complaint, alleging that SB 129 violates the First and Fourteenth Amendments. Doc. 1. They moved to preliminarily enjoin

the higher education provisions of SB 129 on the grounds that the law impermissibly restricts speech on the basis of viewpoint and is unconstitutionally vague. Doc. 12. The district court held a two-day evidentiary hearing on the motion for a preliminary injunction on June 25, 2025, and June 26, 2025, in which six witnesses testified in support of Plaintiffs.[4] Doc. 72; Doc. 73. The district court held oral argument on the preliminary injunction on July 2, 2025. Doc. 71. On August 14, 2025, the district court issued a decision denying Plaintiffs' motion for preliminary injunction. Doc. 80. The district court found that Professor Plaintiffs had standing for their First Amendment and Fourteenth Amendment vagueness claims but ruled that they did not have a substantial likelihood of succeeding on the merits because, as government speech, their classroom instruction was not protected by the First Amendment and because SB 129's provisions were not unconstitutionally vague. Doc. 79. In addition, the district court found that Student Plaintiffs had a substantial likelihood of succeeding on the merits of their student funding claims, but that they and the Alabama NAACP lacked standing for these claims. Specifically, the district court held that Luna had not established an injury-in-fact for his student funding claims, and that both Student Plaintiffs had not established redressability for their student

[4] The State's witnesses were unable to attend the hearing based on scheduling conflicts and therefore sat for depositions prior to the evidentiary hearing. Doc. 69-7; Doc. 69-8.

funding claims. The court also found that the Alabama NAACP had established Article III organizational standing to challenge certain aspects of SB 129 but did not have associational standing due to a lack of redressability.

STANDARD OF REVIEW

This Court reviews "standing determinations de novo." *BBX Cap. v. Fed. Deposit Ins. Corp.*, 956 F.3d 1304, 1312 (11th Cir. 2020) (per curiam). A preliminary injunction is warranted under Federal Rule of Civil Procedure 65 where Plaintiffs show: "(1) [they] ha[ve] a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant[s] outweighs whatever damage the proposed injunction may cause to the [opposing] party; and (4) if issued, the injunction would not be adverse to the public interest." *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1354 (11th Cir. 2005) (quoting *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc)).

This Court reviews the denial of a decision to issue a preliminary injunction for abuse of discretion. *Scott v. Roberts*, 612 F.3d 1279, 1289 (11th Cir. 2010). "An abuse of discretion occurs if the district court bases its decision on an erroneous factual premise." *Am. Civ. Liberties Union of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd.*, 557 F.3d 1177, 1198 (11th Cir. 2009). Typically, when reviewing the denial, the Eleventh Circuit reviews "the findings of fact of the district court for clear error and legal

conclusions de novo." *Scott*, 612 F.3d at 1289. However, the Eleventh Circuit reviews issues of constitutional fact de novo when First Amendment claims are involved. *Am. Civ. Liberties Union of Fla., Inc.*, 557 F.3d at 1198. Constitutional facts are facts "that determine the core issue of whether the challenged speech is protected by the First Amendment." *United States v. Hanna*, 293 F.3d 1080, 1088 (9th Cir. 2002). Consequently, facts related to Plaintiffs' First Amendment viewpoint discrimination claims are entitled to "a fresh examination of crucial facts in order to resolve the First Amendment issue in this case." *Am. Civ. Liberties Union of Fla., Inc.*, 557 F.3d at 1205 (internal quotation marks and citations omitted).

SUMMARY OF ARGUMENT

The district court committed an abuse of discretion, which led to the denial of Plaintiffs' motion for a preliminary injunction.

First, the district court committed an abuse of discretion when it found that Testman and Luna lacked standing to bring claims based on the termination of State funding to their university student groups. The district court committed additional errors when it found that Testman and Luna lacked standing because their injuries from SB 129 are not redressable. Based on the controlling precedent and the facts in the record, the district court should have found that Student Plaintiffs establish both standing and irreparable harm on their claims.

Second, the district court committed an abuse of discretion when it found that Alabama NAACP lacked standing to challenge the constitutional violations stemming from the closure of the BSU and Safe Zone spaces on campus due to the viewpoints expressed by those student groups. Based on the evidence in the record and the current state of the law, the district court should have found that Alabama NAACP established standing and proffered sufficient evidence for its First Amendment freedom of association claim.

Third, the district court committed error when it found that Professor Plaintiffs did not have a substantial likelihood of success on their First Amendment claims because their classroom speech constituted government speech, which is not protected by the First Amendment. The district court's application of the government speech doctrine to public university professors' classroom discussions and instruction conflicts with rulings by all federal appellate courts that have addressed this issue, as well as rulings by district courts in the Eleventh Circuit. Additionally, the district court misapplied this Circuit's decision in *Bishop* by ruling that Defendants' interest in enforcing an unconstitutional viewpoint discrimination law outweighs Professor Plaintiffs' academic freedom interests. The district court made a similar error in applying the *Pickering*/*Connick* test. The district court should have found that Professor Plaintiffs had a substantial likelihood of success on the merits of their First Amendment claim.

Finally, the district court committed an abuse of discretion when it determined that SB 129 was not unconstitutionally vague, serving as an outlier from every other court that has adjudicated nearly identical language in similar laws.

Plaintiffs have established a substantial likelihood of success on the merits of all their claims. The remaining equitable factors also weigh in Plaintiffs' favor. The Court should reverse the district court's order, which had denied Plaintiffs' request for a preliminary injunction.

ARGUMENT

I. The District Court Committed an Abuse of Discretion When Finding that Student Plaintiffs Lack Standing to Challenge SB 129.

To properly assert standing, Plaintiffs must demonstrate (i) an "injury in fact" (ii) fairly traceable to the defendants' challenged action (iii) that is "likely" to be "redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (citation omitted). Courts apply the injury-in-fact requirement loosely where First Amendment rights are implicated, "lest free speech be chilled even before the law or regulation is enforced." *Harrell v. Fla. Bar*, 608 F.3d 1241, 1254 (11th Cir. 2010). "When a plaintiff has stated that he intends to engage in a specific course of conduct arguably affected with a constitutional interest, . . . he does not have to expose himself to enforcement to be able to challenge the law." *Taylor v. Polhill*, 964 F.3d 975, 980 (11th Cir. 2020) (internal quotation marks and citations omitted).

A. Plaintiff Testman Has Standing to Bring a First Amendment Claim Based on the Loss of Student Funding.

The district court correctly found that Testman had suffered an injury-in-fact directly traceable to SB 129. Doc. 79 at 75. However, the district court then committed an abuse of discretion when it determined that Testman lacked standing because her student funding claim was not redressable. The district court held that "no evidence was presented that Testman would be reinstated to the Finance Coordinator position or that SJAC would reinstate her $600 stipend." *Id*. This holding placed an improper burden of proof on Testman.[5]

A claim is redressable if "a favorable decision would amount to a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered." *S. River Watershed All., Inc. v. Dekalb Cnty., Ga.*, 69 F.4th 809, 820 (11th Cir. 2023) (internal quotation marks and citations omitted). Where a plaintiff asserts that it has been improperly denied a position or a contract, it need only show that the plaintiff is "able and ready" to apply if the illegal impediment is removed. *Am. All. for Equal Rts. v. Fearless Fund Mgmt., LLC*, 103 F.4th 765, 772 (11th Cir. 2024). A plaintiff is not required to prove actually obtaining the position

[5] As discussed *infra* at I(C), the district court's exclusive focus on the economic component of Testman's injuries was also incorrect. It was reversible error to require Testman to make any showing, regardless of the burden of proof, that her stipend would be reinstated to establish standing.

or funding upon removal of the illegal impediment. *See id.*; *Aaron Priv. Clinic Mgmt. LLC v. Berry*, 912 F.3d 1330, 1337 (11th Cir. 2019).

Testman meets this standard. She previously held the Finance Coordinator position on the SJAC board and received the $600 stipend, showing that she has the qualifications for the position and the accompanying stipend. The undisputed evidence establishes that SB 129 caused the termination of Testman's position and her stipend, Doc. 69-8 at 18, and that Testman would return to the Finance Coordinator position if the impediment caused by SB 129 was removed. Doc. No. 31-1 at 2. The law does not require Testman to provide additional proof. *Fearless Fund Mgmt., LLC*, 103 F.4th at 772.

The district court also asserted, without explanation, that enjoining SB 129 would not redress Testman's injuries because the court would not order the reopening of the SMPD office or restoration of SJAC's UFO status. Doc. 79 at 75–76. This, too, was reversible error. District courts have wide discretion to correct constitutional violations and could have fashioned a variety of remedies to restore the student funding denied to Testman's organization because of SB 129. *Gibson v. Firestone*, 741 F.2d 1268, 1273 (11th Cir. 1984) ("[F]ederal courts have broad equitable powers to remedy proven constitutional violations.").

The undisputed evidence establishes that UAB closed the SMDP office and eliminated SJAC's UFO status due to SB 129. Doc. 69-8 at 16. The district court has

flexibility to craft an injunction to address the harms caused by SB 129, including an order to reopen the SMDP office and restore SJAC's UFO status. *See Am. Ass'n of Colls. for Tchr. Educ. v. McMahon*, 770 F. Supp. 3d 822, 843 (D. Md. 2025), *reconsideration denied*, No. 1:25-CV-00702-JRR, 2025 WL 863319 (D. Md. Mar. 19, 2025) ("[A] decision in Plaintiffs' favor, finding the Department's termination illegal and reinstating NCTR's SEED grant would remedy NCTR's alleged harm."). Alternatively, the district court could order UAB to provide funding through another mechanism. However, questions as to how to structure the remedy do not defeat standing.

The district court also suggested that its finding of no redressability was bolstered by the fact that UAB might have eliminated SJAC's UFO status even if SB 129 did not exist. As an initial matter, there is no dispute in the record that UAB terminated SJAC's UFO status because of SB 129, not for some other reason. Doc. 69-8 at 16, 38–42; Doc. 73 at 320, 320–21, 99–100. It is irrelevant whether, as suggested after the fact by Dr. Wallace, UAB might have changed the funding model even if SB 129 had not been enacted. Doc. 79 at 48. The law is clear that the existence of a potential, alternative ground for a defendant to take an action does not defeat standing to challenge the actual ground upon which that action was based. *See Gutierrez v. Saenz*, 606 U.S. 305, 319–20 (2025).

Finally, the district court cited, in a footnote, to recent guidance by the Department of Justice for recipients of federal funding concerning their compliance with federal equal protection and antidiscrimination law. *See* Doc. 79 at 76 n. 32. The guidance, by its own terms, is nothing more than "non-binding suggestions" and does not (and cannot) purport to establish "mandatory requirements." Doc. 77-1. Thus, the guidance is not legal authority to which the district court or this Court must or should give deference. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 385 (2024). Moreover, even if the guidance were binding authority, neither the district court nor Appellee explained how it bars UA from funding SJAC, an organization that is not focused on race, gender, or any other identity. Importantly, the DOJ guidance was issued ***after*** UAB terminated SJAC's funding, causing Testman to lose her position in SJAC and the related stipend and, thus, could not have been the basis for UAB's actions. Once again, the existence of an alternative ground for an action does not defeat standing to challenge the actual basis relied upon for the action. *Gutierrez*, 606 U.S. at 319–20.

B. Plaintiff Luna Has Standing to Bring a First Amendment Claim Based on the Loss of Student Funding.

The district court committed an abuse of discretion when it determined that Luna failed to establish standing because his student funding claim lacked an injury-in-fact and redressability.

First, this holding ignored how Luna's organization, Esperanza, incurred injury-in-fact when it lost two different sources of funding as a direct result of SB 129. Specifically, Esperanza lost funding from UAB's Diversity Equity and Inclusion Office, as well as the ability to co-host events with organizations that received funding from SJAC. Doc. 73 at 351–54.

Second, to establish standing, Luna was not required to apply for RSO funding, which would have been "futile." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 365–66 (1977). It is undisputed that UAB administrators told Luna that, in response to SB 129, UAB adopted a policy of not providing State funding to RSOs associated with a divisive concept or a DEI program, which prevented Esperanza from receiving funding as an RSO. Doc. 73 at 356–57; Doc. 69-8 at 20. Based on the record evidence, UAB's interpretation of SB 129 rendered Esperanza ineligible for State funding because the university determined that it is associated with a divisive concept—though the specific divisive concept was never articulated. *Id.* That in and of itself is a cognizable injury because it constitutes unlawful viewpoint discrimination. Groups with similar missions to Esperanza's, like the Spanish and Latino Student Association, were also denied State funding, further corroborating Luna's understanding that Esperanza was ineligible for State funding. Doc. 72 at 135, 137–39, 142; Doc.73 at 357–60. Thus, UAB made private funding available to student groups but, pursuant to SB 129, engaged in viewpoint

discrimination to deny certain groups access to State funding based on their perceived viewpoints. Doc. 69-8 at 16.

Contrary to the district court's assertion, there was nothing speculative about Luna's claim. His organization lost multiple lines of funding and did not apply for the remaining source because of the organization's ineligibility, as explained by UAB. *See Miss. Ass'n of Educators v. Bd. of Trs. of State Insts. of Higher Learning*, No. 3:25-CV-00417-HTW-LGI, 2025 WL 2142676, at *4 (S.D. Miss. July 20, 2025).

Third, the district court's errors with regard to the redressability of Testman's claims apply equally to the redressability of Luna's claims. *See supra* at I(A).

C. Plaintiffs Testman and Luna Incurred Irreparable Harm.

The district court committed additional errors when it held that it could not grant an injunction because the injuries incurred by Testman and Luna were monetary and, therefore, not irreparable. The district court's exclusive focus on monetary loss was erroneous because the constitutional violation—the denial of student funding based on viewpoint—is what renders the injury irreparable, not the financial impact. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981); *Miss. Ass'n of Educators*, 2025 WL 2142676 at *5. The Eleventh Circuit has made clear that "an 'ongoing violation of the First Amendment' . . . constitutes an irreparable injury"

without any need to show economic loss. *Honeyfund.com, Inc. v. Governor, Fla.*, 94 F.4th 1272, 1299 (11th Cir. 2024) (quoting *FF Cosms. FL, Inc. v. City of Miami Beach*, 866 F.3d 1290, 1298 (11th Cir. 2017); *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1271–72 (11th Cir. 2006)). Moreover, the incidental harms suffered by Testman and Luna from the First Amendment injury included loss of programing opportunities, as well as monetary losses. Doc. 73 at 321–22; 353–54; *Fearless Fund Mgmt., LLC*, 103 F.4th at 780 ("[M]ore specifically, each [Alliance member] lost opportunity to enter Fearless's contest works an irreparable injury because it prevents the Alliance's members from competing at all—not just for the $20,000 cash prize but also for Fearless's ongoing mentorship and the ensuing business opportunities that a contest victory might provide.").

D. Alabama NAACP Has Standing for Their First Amendment Claim Based on the Freedom of Association.[6]

The district court correctly found that the Alabama NAACP suffered an injury-in-fact. However, the district court committed reversible legal error when it determined that Alabama NAACP failed to establish redressability because of a lack of evidence that the student spaces at issue were closed due to SB 129 and because

[6] The district court's redressability analysis mirrors their likelihood of success analysis in erroneously finding that Alabama NAACP did not proffer sufficient evidence for the closure of the BSU. Doc. 79 at 127–28. The arguments below demonstrate that this Court should find that the Alabama NAACP also has established a substantial likelihood of success of the merits on their First Amendment claim.

of concerns that the student spaces potentially violated U.S. Supreme Court precedent and federal law.

First, Alabama NAACP proffered sufficient evidence tying the closure of the BSU and Safe Zone campus spaces to SB 129. Doc. 1 at 72; Doc. 12-7 at 4; Doc. 72 at 182–83. Indeed, Provost Dalton admitted that UA closed the BSU space because administrators believed it violated SB 129. Doc. 69-7 at 14. Standing, including redressability, should be judged on the "sufficiency of the allegations of the complaint, with any preliminary hearing evidence favorable to the plaintiffs on standing treated as additional allegations of the complaint." *Church v. City of Huntsville*, 30 F.3d 1332, 1336 (11th Cir. 1994). Alabama NAACP has more than exceeded the standard for sufficient pleadings and, during the preliminary hearing, provided extensive evidence of the underlying reasons for the closure of the BSU and Safe Zone campus spaces.

In addition, the district court erred when it ruled that it was unable to determine, from the record, whether the BSU and Safe Zone spaces were closed due to SB 129, federal law, or other guidance issued by the Trump administration. Both the BSU and Safe Zone spaces were open to all students, and there is no federal law—including the Supreme Court's recent decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181 (2023)—that prohibits those spaces. In fact, it would be impossible for UA to close the BSU space for reasons other than SB

129 because the closure during the Fall 2024 semester occurred before the current administration issued any federal orders or guidance in 2025. Doc. 55-3; Doc.69 at 14. Furthermore, the Dear Colleague Letter and associated Frequently Asked Questions document,[7] which the district court cited as a possible obstacle to reopening the BSU, are currently enjoined in three separate federal cases for constitutional violations. *See Nat'l Educ. Ass'n v. U.S. Dep't of Educ*., No. 25-CV-091-LM, 2025 WL 1188160, at *9 (D.N.H. Apr. 24, 2025); *Am. Fed'n of Tchrs. v. Dep't of Educ*., No. CV SAG-25-628, 2025 WL 1191844, at *24 (D. Md. Apr. 24, 2025); Order at 2, *NAACP v. U.S. Dep't of Educ*., No. 25-CV-1120 (DLF) (D.D.C. Apr. 24, 2025), ECF No. 31. Moreover, even if actions by the federal government provided additional rationales for the closure of the BSU and Safe Zone, Plaintiffs' requested relief would still be sufficient to redress their constitutional injuries, as confirmed recently by Supreme Court precedent. *See supra* Section I(A).

II. The District Court Committed an Abuse of Discretion in Finding that Professor Plaintiffs Do Not Have a Substantial Likelihood of Succeeding on the Merits of Their First Amendment Claim.

In a departure from every other federal appellate court to have considered the issue, and in contradiction to other federal district courts to have reviewed similar legal provisions banning "divisive concepts," the district court held that Professor

[7] U.S. Dep't of Educ., Dear Colleague Letter (Feb. 14, 2025), https://www.ed.gov/media/document/dear-colleague-letter-sffa-v-harvard-109506.pdf.

Plaintiffs' classroom speech was not protected by the First Amendment because it constituted "government speech" under *Garcetti v. Ceballos*, 547 U.S. 410, 421, 425 (2006). Additionally, the district court erred in concluding that, even if their speech was constitutionally protected, (1) the *Bishop* balancing test weighs in favor of Defendants; and (2) the university's interests outweigh the professors' interests under the *Pickering/Connick* balancing test. Though Plaintiffs would prevail under either test, *Bishop* is binding precedent in this Circuit and provides the appropriate test for Professor Plaintiffs' First Amendment claims. *Bishop v. Aronov*, 926 F.2d 1066, 1074–75 (11th Cir. 1991).

A. Professor Plaintiffs' In-Class Instruction Is Not Government Speech Under Garcetti.

The district court incorrectly held that, under *Garcetti*, Professor Plaintiffs' instructional speech was "pursuant to [their] official duties" and therefore constituted government speech, rather than citizen speech, and therefore not entitled to First Amendment protections. Doc 79 at 100, 103–06. In *Garcetti*, the Supreme Court explicitly reserved the question of whether the "official duties" test applied to university instruction. Recognizing that "expression related to academic scholarship or classroom instruction implicates additional constitutional interests," the Court declined to "decide whether the [traditional government speech] analysis . . . would apply in the same manner to a case involving speech related to scholarship or teaching." *Garcetti*, 547 U.S. at 425. Given how the *Garcetti* Court explicitly

declined to extend its holding to university classroom instruction, the district court erred in holding that the *Garcetti* "official duties" test foreclosed Professor Plaintiffs' First Amendment claims. Indeed, the district court's decision to apply *Garcetti* to restrict the First Amendment protection of professors' academic speech breaks sharply with the reasoning adopted by every other circuit to consider the issue. *See Kilborn v. Amiridis*, 131 F.4th 550, 558 (7th Cir. 2025); *Adams v. Trs. of the Univ. of N.C.-Wilmington*, 640 F.3d 550 (4th Cir. 2011); *Demers v. Austin*, 746 F.3d 402, 412 (9th Cir. 2014); *Meriwether v. Hartop*, 992 F.3d 492, 506 (6th Cir. 2021); *Heim v. Daniel*, 81 F.4th 212, 226 (2d Cir. 2023).

The district court dismissed these cases as "distinguishable" because "they did not deal with curricular speech in the classroom." Doc. 79 at 102. To the contrary, the facts of these cases involve professors speaking, writing, or advocating in ways integral to their academic roles. For example, in *Kilborn*, the Seventh Circuit concluded that a professor's exam question and in-class remarks received First Amendment protection. *Kilborn*, 131 F.4th at 560. Notably, the *Garcetti* Court stated that "additional constitutional interests" should be considered for cases that involved "academic scholarship *or* classroom instruction," thus providing no basis for distinguishing cases based on whether the professor's speech constituted "curricular speech in the classroom" or extracurricular scholarship. *Garcetti*, 547 U.S. at 425. Additionally, in both cases cited by the district court to support its government

speech ruling, the courts noted that its analysis extended to both scholarship and instruction. *Adams*, 640 F.3d at 562; *Demers*, 746 F.3d at 417.

In treating university professors as traditional public employees under the *Garcetti* framework, the district court discounted decades of Supreme Court precedent recognizing the importance of protecting university professors' free speech and academic freedom under the First Amendment. *See, e.g.*, *Keyishian v. Bd. of Regents of Univ. of State of N. Y.*, 385 U.S. 589, 603 (1967). This protection has included barring state legislatures from imposing specific ideological preferences into university classrooms. *Edwards v. Aguillard*, 482 U.S. 578, 599 (1987). Moreover, the Supreme Court has directed courts to "exercise great caution before extending our government-speech precedents" because those precedents are "susceptible to dangerous misuse." *Matal v. Tam*, 582 U.S. 218, 235 (2017).

As the "marketplace of ideas," college campuses have long held a unique position within First Amendment jurisprudence. *Keyishian*, 385 U.S. at 603; *Heim*, 81 F.4th at 227; *Meriwether*, 992 F.3d at 507. "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Sweezy v. State of New Hampshire*, 354 U.S. 234, 250 (1957). Our public educational institutions are the "nurseries of democracy"; and they can "only work[] if we protect the marketplace of ideas," *Mahanoy Area Sch. Dist. v. B. L. ex rel. Levy*, 594 U.S. 180,

190 (2021) (internal quotation marks omitted), where individuals can vigorously engage in the free exchange of ideas in the pursuit of knowledge. Equating professors' in-class instruction to government speech, therefore, runs afoul of the First Amendment's goals by jeopardizing the vital role that free speech and academic freedom play in our democracy.

This Court's decision in *Wood v. Florida Department of Education*, 142 F.4th 1286 (11th Cir 2025), does not support the district court's erroneous conclusions. In applying *Garcetti* to a public-school teacher's speech, the *Wood* court emphasized that its decision "is a narrow one," limited to a K-12 teacher's use of pronouns. *Id.* at 1293. However, in contrast to K-12 education, the Supreme Court has "long recognized" that, "given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003). The separate considerations in the higher education context, therefore, demand that the speech of university professors be governed by different legal standards.[8] *Demer*, 746 F.3d at 413.

[8] Multiple courts of appeal may have extended the *Garcetti* framework to the in-classroom speech of primary and secondary school teachers but none have done so in the higher education context. *Compare Brown v. Chi. Bd. of Educ.*, 824 F.3d 713, 715–16 (7th Cir. 2016) (applying *Garcetti* in the "primary and secondary school context") *with Kilborn v. Amiridis*, 131 F.4th 550, 558 (7th Cir. 2025)

B. Professor Plaintiffs Have a Substantial Likelihood of Prevailing Under *Bishop*.

The operative test for university professors' First Amendment claims in the Eleventh Circuit is *Bishop*, and Plaintiffs are likely to establish a substantial likelihood of success under that binding precedent. In *Bishop*, an exercise physiology professor at UA was asked to refrain from sharing his religious beliefs while teaching his higher education courses. 926 F.2d at 1068–69. To analyze the professor's First Amendment claim, the Eleventh Circuit developed a balancing test to evaluate "to what degree a school may control classroom instruction before touching the First Amendment rights of a teacher." *Id.* at 1073. This Court concluded that a "case-by-case inquiry" is required to determine "whether the legitimate interests of the authorities are demonstrably sufficient to circumscribe a teacher's speech." *Id.* at 1074. This inquiry considers three factors: (1) context, (2) the university's position as a public employer, and (3) "the strong predilection for academic freedom as an adjunct of the free speech rights of the First Amendment." *Id.* at 1074–75.

Rather than engage in the fact-specific inquiry demanded by *Bishop*, the district court incorrectly treated *Bishop* as creating a bright-line rule that gives the government ultimate authority over the viewpoints expressed in the classroom.

(declining "to extend *Garcetti* to speech involving university teaching and scholarship").

Additionally, the district court erroneously treated each factor as a condition to be "met" without balancing the context, the university's position, and the academic freedom interests in the instant case, as *Bishop* requires.

1. *Bishop*'s First Factor (Context) Weighs in Favor of Professor Plaintiffs.

In *Bishop*, the context entailed the university issuing a reprimand to an individual professor regarding his speech about a specific topic (religion). 926 F.2d at 1075. Unlike a singular memo directed at an individual professor, SB 129 applies to every public college and university instructor in Alabama. The context of a directive targeted at a specific professor regarding a single topic differs significantly from a state-wide directive that restricts a multitude of disfavored viewpoints. "This prophylactic ban on university employees' speech affects potentially thousands of professors and serves as an ante hoc deterrent that 'chills potential speech before it happens,' and 'gives rise to far more serious concerns than could any single supervisory decision,' such as that in *Bishop*." *Pernell v. Fla. Bd. of Governors of State Univ. Sys.*, 641 F. Supp. 3d 1218, 1271–72 (N.D. Fla. 2022) (citing *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 468 (1995)).

Furthermore, unlike in *Bishop*, Professor Plaintiffs are not attempting to interject material outside the scope of the course into their classroom instruction. Although the *Bishop* Court acknowledged that a portion of the plaintiff's religious beliefs could be considered "professional" opinions, it also characterized the

university's actions as prohibiting the professor from "discuss[ing] his religious beliefs or opinions *under the guise of* University courses." *Bishop*, 926 F.2d at 1076 (emphasis added). The university's memo to Bishop also asked him to "refrain from interjecting his religious preferences and/or beliefs *not necessary* to class discussion or class materials." *Id.* at 1069 (emphasis added). The university clearly viewed Dr. Bishop's religious views to be irrelevant to his course. In contrast, each Professor Plaintiff testified that the subject matter that they fear may violate SB 129 is integral to their courses and had been approved by the university and taught to students for decades without incident. Doc. 72 at 66–67, 133, 197.

Furthermore, the university directive provided to Bishop was viewpoint neutral and applied to all religious content regardless of the professor's specific religious beliefs. "A governmental regulation of speech is content-based if it applies by its terms to speech 'because of the topic discussed.'" *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1126 (11th Cir. 2022) (quoting *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015)). In *Bishop*, the professor was reprimanded based on the topic discussed—religion—rather than because of any particular viewpoint he espoused within that topic. 926 F.2d at 1077–78. Here, Defendants admit that SB 129 constitutes a viewpoint-based restriction on certain ideas and beliefs that are disfavored by the State legislature. Doc. 71 at 123–24. This admission distinguishes

SB 129 from the viewpoint-neutral directive that the Eleventh Circuit held was constitutional in *Bishop*, yet the district court failed to address this distinction.

The district court also evaluated SB 129 solely in the context of in-class instruction and did not address SB 129's chilling effect on non-instructional activities. For example, Professor Patton fears that students may feel guilt or shame while participating in a school-sanctioned trip to the Equal Justice Initiative ("EJI") Legacy Museum, which could lead to an allegation that she violated SB 129 since it is a part of her university approved coursework. Doc. 72 at 75–76; *see* Doc. 12-2 at 4. The widespread chilling effect that SB 129 has on a variety of pedagogical methods is distinguishable from the specific and narrowly tailored guidance that applied to a small portion of the classroom instruction at issue in *Bishop*.

2. *Bishop*'s Second Factor (University as Public Employer) Weighs in Favor of Professor Plaintiffs.

The district court assumed that viewpoint discrimination is a "reasonable" restriction on Professor Plaintiffs' speech because the public employer in this case is a public university, which has the power to modify curricular content. But SB 129 restricts the viewpoints taught by professors in class, not solely what courses they teach and what tools they use to teach them. The university's position as a public employer elevates, rather than lessens, the free speech interests at issue because "[n]owhere is free speech more important than in our leading institutions of higher learning." *Speech First*, 32 F.4th at 1128; *see also id.* at 1127 n.6 (quoting *Gay*

Lesbian Bisexual All. v. Pryor, 110 F.3d 1543, 1550 (11th Cir. 1997)). Decades of precedent establishing that viewpoint discrimination is an "egregious form of content discrimination," *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 829 (1995), cannot be brushed aside so that a university can freely favor certain viewpoints expressed by certain professors over others simply because it is a public employer.

These concerns are further heightened by the universities' broad interpretation of SB 129. Professor Fording received a forwarded email from Provost Dalton stating that the university would prefer to "take actions to prevent faculty" from breaking the law, and that this broad enforcement of SB 129 "may likely be viewed or experienced as UA interpreting the law too broadly on many occasions." Doc. 55-30 at 1; Doc. 72 at 215–17. For Professor Fording, these kinds of statements exacerbated the chilling effects of SB 129. *Id.*

Importantly, unlike the university memo challenged in *Bishop*, it is the Alabama Legislature—not the University of Alabama administrators—that is banning disfavored viewpoints expressed by professors and their classroom readings in Alabama public colleges and universities. In its analysis, the district court improperly conflated the interests and roles of the State legislature and the state university. *See* Doc. 79 at 108. "[U]niversities occupy a special niche in our constitutional tradition." *Grutter*, 539 U.S. at 329. And unlike "school officials who

seek to reasonably regulate speech and campus activities in furtherance of the school's educational mission," State policymakers do not have the knowledge nor the expertise that would afford them any deference from courts for academic matters. *Bishop*, 926 F.2d at 1075; *see E.K. v. Dep't of Def. Educ. Activity*, No. 1:25-CV-637, 2025 WL 2969560, at *19 (E.D. Va. Oct. 20, 2025); *Heim*, 81 F.4th at 234. Consequently, the *Bishop* Court's deference to the university's decision making does not apply to Defendants' enforcement of SB 129, a policy which was not developed by university administrators and instead is a product of the State legislature that has been imposed on university administrators.

3. *Bishop*'s Third Factor (Academic Freedom) Weighs in Favor of Professor Plaintiffs.

The district court completely ignored Professor Plaintiffs' constitutional interest in academic freedom and dismissed their reasonable fears of violating SB 129, which caused them to stop teaching certain courses, teaching certain information, and/or modify course material. Contrary to the district court's conclusion, Doc. 79 at 117, an absence of actual penalties against Professor Plaintiffs for violating SB 129 does not undermine these academic freedom concerns. The Supreme Court has recognized that "[t]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions." *Keyishian*, 385 U.S. at 604 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). Whether with explicit instructions, like those given to Professor Simon, or the threat of an investigation for

possible violation of SB 129, like the one to which Professor Patton was subject, SB 129 "impose[s] a[] strait jacket upon the intellectual leaders" at Alabama's public universities and infringes on their academic freedom. *Sweezy*, 354 U.S. at 250.

Professor Plaintiffs' interest in academic freedom is heightened where, as here, the origin of the restriction on their speech is motivated by political rather than pedagogical concerns. *See Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 238–39 (2000) (Souter, J., concurring). "The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, (rather) than through any kind of authoritative selection." *Keyishian*, 385 U.S. at 603 (citation omitted). The authoritative selection of viewpoints that SB 129 imposes on Alabama professors undermines Professor Plaintiffs' academic freedom.

C. The District Court Incorrectly Relied on *Pickering*/*Connick* and Impermissibly Relied on In-Court Representations in Its Analysis.

The district court erroneously applied *Pickering*/*Connick* to the Professor Plaintiffs' First Amendment claims. Doc. 79 at 92–93. Over thirty years ago, in *Bishop*, 926 F.2d at 1066, this Court declined to apply *Pickering* to in-classroom instruction by public university professors, holding that it was one of many cases that was not "satisfactorily on point" to analyze a university professor's First Amendment claim. Instead, the *Bishop* Court elected to develop its own balancing

test to determine "to what degree a school may control classroom instruction before touching the First Amendment rights of a teacher." *Bishop*, 926 F.2d at 1073–74.

Further, Supreme Court precedent suggests that *Pickering/Connick* and its progeny are not applicable for broad, sweeping prior restraints on speech such as SB 129. *See, e.g.*, *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 907 (2018). In *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995) [*NTEU*], the Supreme Court distinguished the "post hoc analysis of one employee's speech and its impact on that employee's public responsibilities," which was at issue in *Pickering*, from a "wholesale deterrent to a broad category of expression by a massive number of potential speakers," which demands a heavier burden than the *Pickering* test. *NTEU*, 513 U.S. at 467–68.

Moreover, the district court erred by erroneously relying on Defendants post hoc representations during the evidentiary hearing on how they intend to interpret and enforce SB 129, even though those interpretations were belied by *the actual text* of SB 129. Doc. 79 at 11, 35, 50, 69, 90 n. 36, 95–96, 106–07, 117. In its decision, the district court, when it applied the *Pickering/Connick* test, repeatedly relied on Defendants' promises about how they would interpret and enforce SB 129: "SB 129 allows professors to teach, discuss, and present on [divisive] concepts," *id.* at 69; and that "this case has no bearing on what reading assignments professors may assign to students." *Id.* at 96. At the hearing, both Governor Ivey and the Board

conceded that nothing in SB 129 speaks to assigned readings. Doc. 72 at 155–56. But these promises contrast sharply with the plain text of the statute, which prohibits the university and/or its professors from "requir[ing] its students" to "participate in any . . . course work that advocates for or requires assent to a divisive concept." Doc. 12-2 at 5. This Court has refused to take "the State at its word" and rely on "good faith" statements made by individuals responsible for enforcing a statute to determine its constitutionality, especially where those interpretations "stand[] in stark contrast to the plain text of the statute." *See Wollschlaeger v. Governor of Florida*, 848 F.3d 1293, 1321–22 (11th Cir. 2017).

District courts within the Eleventh Circuit likewise have concluded that the *Pickering* balancing test does not apply to government actions, like SB 129, that forbid or suppress government employee speech before it occurs.[9] *See, e.g.*, *Cochran v. City of Atlanta, Ga.*, 289 F. Supp. 3d 1276, 1294–99 (N.D. Ga. 2017); *Davis v. Phenix City, Ala.*, No. 3:06CV544-WHA, 2008 WL 401349, at *9–10 (M.D. Ala. Feb. 12, 2008). And this Court affirmed one district court's conclusion that *Pickering* is inapplicable to prior restraints on speech. *Davis v. Phenix City, Ala.*, 296 F. App'x 759, 761 (11th Cir. 2008) (per curiam).

[9] Several Courts of Appeal have also adopted this approach. *See, e.g.*, *Moonin v. Tice*, 868 F.3d 853, 861 (9th Cir. 2017); *Crue v. Aiken*, 370 F.3d 668, 678 (7th Cir. 2004); *Wolfe v. Barnhart*, 446 F.3d 1096, 1105 (10th Cir. 2006).

D. The *Pickering*/*Connick* Balancing Test Weighs in Professor Plaintiffs' Favor.

Assuming *arguendo* that *Pickering* and its progeny apply in the instance case, Plaintiffs still prevail. When conducting the *Pickering/Connick* balancing test, the district court erroneously credited the State's purported interest in prohibiting the "divisive concepts" identified in SB 129 and discounted Professor Plaintiffs' significant constitutional interests to not censor certain viewpoints within the courses they teach.

There is "no legitimate interest in enforcing" a law that is unconstitutional. *KH Outdoor*, 458 F.4d at 1272. Numerous courts have held that laws, like SB 129, banning "divisive concepts" are unconstitutional. *Santa Cruz Lesbian & Gay Cmty. Ctr. v. Trump*, 508 F. Supp. 3d 521, 543 (N.D. Cal. 2020); *see Honeyfund.com, Inc. v. DeSantis*, 622 F. Supp. 3d 1159, 1183–84 (N.D. Fla. 2022), *aff'd*, 94 F.4th 1272 (11th Cir. 2024). And laws that discriminate based on viewpoint are presumed to be unconstitutional. *Rosenberger*, 515 U.S. at 829. The district court and Defendants concede that SB 129 discriminates based on viewpoint. Doc. 73 at 371; Doc. 71 at 64, 122–24, 128. Yet, the district court failed to acknowledge Professor Plaintiffs' constitutional right to be free from viewpoint discrimination in its *Pickering/Connick* analysis.

The district court cited to Defendants' interest in promoting a policy ensuring "no discrimination in their classrooms." Doc. 79 at 108. But Defendants have never

explained how banning divisive concepts would prevent discrimination nor what populations would be protected from discrimination under SB 129. Moreover, the district court failed to account for the equal protection allegations in the complaint pertaining to the State legislature, including the bill's sponsors, that undercut any claim that anti-discrimination is the driving force behind SB 129. Doc. 1 at 30–32, 61. Without evidence from Defendants about how SB 129 advances anti-discrimination, the district court improperly supplemented its own analysis with citations from unrelated cases and general statements regarding the importance of preventing discrimination. Doc. 79 at 107–08. The district court's unspecified concern about potential discrimination is insufficient to establish that Defendants' interest in a prophylactic ban on disfavored concepts outweighs Professor Plaintiffs' right to speak free from viewpoint discrimination. *Pickering v. Bd. of Educ. Twp. High Sch. Dist. 205*, 391 U.S. 563, 570 (1968); *see also Rankin v. McPherson*, 483 U.S. 378, 384 (1987). Furthermore, any concerns about discrimination in higher education curriculum can, of course, be addressed through existing state and federal anti-discrimination law and longstanding processes to investigate such claims.

Professor Plaintiffs have also demonstrated that, despite any claim that SB 129 prevents discrimination, the topics and subject matter censored by the law disproportionately impact discussions and scholarship about the importance of preventing or remedying racial discrimination. The district court acknowledged, in

its standing analysis, the censorship that Professor Plaintiffs currently face. Doc. 79 at 67–74. For example, Professor Patton reasonably fears that her teaching about convict leasing and an academic excursion to the EJI Legacy Museum could violate the law if students feel "guilt" or "blame" under divisive concepts (f) and (g). Doc. 72 at 67–68, 75–76. Professor Simon is concerned that her teaching about the privileges and advantages that people may experience from their race could violate the law. *Id.* at 156–60. Based on the university's scrutiny of Professor Patton and Professor Simon, Professor Fording reasonably fears that teaching about Black Lives Matter could violate the law. Doc. 73 at 243–45. Thus, the evidence in the record demonstrates that SB 129 restricts, rather than encourages, academic material about anti-discrimination.

The district court further erred by concluding that SB 129 applies only to "instruction" and not to other "course work," such as readings and assignments. Doc. 72 at 155–56, 205–07. SB 129 specifically prohibits "training, orientation, or *course work* that advocates for or requires assent to a divisive concept." Doc. 12-2 at 5 (emphasis added). The term "course work" has a broad scope and includes readings assigned for class, lectures, guest speakers, projects, assignments and tests. Doc. 72 at 159–60; Doc. 73 at 225. Under Section 2(3) of SB 129, even if a professor is not "advocat[ing]" for a "divisive concept," the professor nonetheless violates SB 129 if any assigned reading or other "course work" does.

The district court's conclusion about other "course work" is belied by the evidentiary record. A few days after SB 129's enactment, UA officials told Professor Patton that her *Understanding Poverty* course was the subject of an SB 129 complaint. Doc. 55-20. This complaint contained numerous misquotes and mischaracterizations of her course's assigned readings and books. *Id.*; Doc. 72 at 32–35. Defendant UA also asked Professor Patton about her course readings as part of the UA administration's complaint investigation. Doc. 72 at 40–41; Doc. 55-22. The plain text of the law, as well as Defendant UA's own actions, demonstrates that SB 129 restricts academic activities beyond in-classroom instruction.

III. The District Court Erred in Finding That SB 129 Was Not Unconstitutionally Vague.

A statute can be void for vagueness "if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or "if it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000). SB 129's provisions are unconstitutionally vague on both accounts because it forbids conduct "in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application." *Wollschlaeger*, 848 F.3d at1319 (11th Cir. 2017) (cleaned up). SB 129 "is no law at all," *United States v. Davis*, 588 U.S. 445, 447 (2019), due to its failure to provide at least minimum clarity of its provisions, making it "repugnant to the due

process clause of the Fourteenth Amendment." *Lanzetta v. State of New Jersey*, 306 U.S. 451, 452 (1939).

A. Failure to Provide People of Ordinary Intelligence with a Reasonable Opportunity to Understand What Conduct It Prohibits.

1. The Terms "Objective Manner and Without Endorsement" and "Historically Accurate Context" Are Unconstitutionally Vague.

The district court incorrectly concluded that the terms "objective manner and without endorsement" and "historically accurate context" within SB 129, which purportedly provide a "safe harbor" to allow professors to teach about divisive concepts under those limited circumstances, are not vague. The district court interpreted those terms to mean "that a professor should present facts (not feelings) and, at a minimum, be balanced in educating students about a divisive concept." Doc. 79 at 133. According to the district court, these safe harbor provisions were designed to "provide[] instructions on how to interpret the law" and "permit[] teaching about [divisive concepts] in an objective manner and in a historically accurate context." *Id.* at 4, 144.

However, the district court's analysis fails because it views the word "objective" in a vacuum. By allowing these safe harbor provisions to "turn solely on dictionary definitions of [their] component words" without considering "the specific context in which that language is used, and the broader context of the statute as a

whole," *Yates v. United States*, 574 U.S. 528, 537 (2015), the district court failed to grapple with the practical consequences of using a loaded word like "objective" within an academic context. Borrowing definitions from a dictionary or jury instructions for the word "objective" "does not magically extinguish vagueness concerns." *Honeyfund.com*, 622 F. Supp. 3d at 1181; *see also Nat'l Educ. Ass'n-N.H. v. NH Att'y Gen.*, No. 25-CV-293-LM, 2025 WL 2807652, at *13 (D.N.H. Oct. 2, 2025). In addition, the safe-harbor provisions must be read in conjunction with the values-laden terms in the "divisive concepts." Courts have long held that using values-laden terms discussing abstract principles, where the meaning depends on political or social assumptions of an individual, can make a statute unconstitutionally vague. *See Tenn. Educ. Ass'n v. Reynolds*, 732 F. Supp. 3d 783, 807–09 (M.D. Tenn. 2024); *Young Israel of Tampa, Inc. v. Hillsborough Area Reg'l Transit Auth.*, 89 F.4th 1337, 1348 (11th Cir.), *cert. denied*, 145 S. Ct. 161 (2024); *Smith v. Goguen,* 415 U.S. 566, 578 (1974); *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971). Thus, it is a near impossibility to require Professor Plaintiffs to discuss topics like "moral character," "racist," or "sexist" without feeling, as the district court proscribes. *See Honeyfund.com*, 622 F. Supp. 3d at 1183 (finding "objective" to be a vague term "especially true when discussing concepts rooted in historical phenomena, like systemic racism, critical race theory, white privilege, and male privilege").

In addition, the district court fails to contend with the inherent tension with teaching in an "objective manner" and "without endorsement." *See also Pernell*, 641 F. Supp. 3d at 1283–84 (finding plaintiffs likely to succeed on vagueness claims even though Florida censorship law banning "divisive concepts" permitted "objective" instruction of the prohibited divisive concepts "without endorsement"). The district court states that, to avoid violating SB 129, Professor Plaintiffs simply need to avoid presenting a divisive concept by way of "indoctrination" or requiring a student's assent to that concept. However, this ignores the central role that professors play, as experts in their field, to teach about the results of their research in a field of study affirmatively, as their best understanding of the issues based on their scholarship. For example, Professor Simon cannot discern how to "objectively" teach and test on topics that recognize the existence of structural racism, supported by substantial academic research, without being viewed as "compelling assent" to such topics. Doc. 72 at 162–63.

Finally, the district court erroneously found that SB 129's provision, which allows for "the teaching of topics or historical events in a historically accurate context," is not unconstitutionally vague. Doc. 79 at 133–34. Many historical events continue to be vigorously debated with competing views, and previously assumed "facts" are often revisited. In fact, "objectiveness" can often be elusive in academic fields like humanities and social sciences.

The vagueness of SB 129 within an academic setting is corroborated by the record before the district court, which makes clear that professors are unable to make sense of the aforementioned safe harbor provisions. Professor Patton, for example, testified that she wished the safe harbor provisions were "better defined," and reasonably worried about being seen as endorsing the ideas and content of an assigned documentary. Doc. 72 at 77; *see also id.* at 39, 78, 162–63, 203; Doc. 73 at 268–70. Importantly, SB 129 has limited Professor Plaintiffs' discussions related to race, which are integral to their scholarship and teaching. Professor Fording expressed concern that teaching about the Black Lives Matter movement and having students participate in coursework related to teaching about the movement would be considered advocating for a divisive concept and thus violate the law. Doc. 73 at 243–45; *see also* Doc. 72 at 30–32.

2. The Terms "Compel Assent" and "Advocate For" Are Unconstitutionally Vague.

The district court erred in concluding that the terms "compel assent" and "advocate for" are not unconstitutionally vague. It makes the same mistake with the term "objective," *see supra* Section III(A)(1), by exclusively relying on dictionary definitions for "compel," "assent," and "advocate" without properly placing the words in the context of a university learning environment. Doc. 79 at 132–35. SB 129 provides no clear boundaries on how a professor is to avoid "compelling assent" or "advocating for" a particular idea. *See NAACP v. U.S. Dep't of Educ.*, 779 F.

Supp. 3d 53 (D.D.C. 2025). The district court's assertion that professors should not "indoctrinate[]" their students, as an attempt to provide further clarity, only further mires SB 129 into ambiguity. Doc. 79 at 135. For example, Professor Fording's final exam in his *Politics of Poverty* course requires students to accept, as historical fact, that "race is inextricably linked to poverty itself" and to explain how race is related to causes of poverty. Doc. 73 at 235. Professor Fording has concerns that requiring his students to complete assignments and take exams on subject matter that acknowledge the existence of ongoing discrimination and structural racial inequalities could potentially implicate divisive concepts (a), (b), (c), (e), (f), or (g). *Id.* at 259–62. The district court's dictionary definitions, therefore, fail to elucidate whether his assignments or exams may be considered "compelling assent," "advocating" for, or otherwise "indoctrinating" students about any of the divisive concepts.

Moreover, the record is replete with evidence of UA's own confusion about these terms. UA's College of Arts and Sciences presented a mandatory Legal Training, advising professors not to test or require "assignments, like papers" on divisive concepts for fear that they would constitute "compelling assent" of students. Doc. 72 at 199, 202; Doc. 55-25 at 98. However, at the evidentiary hearing, university counsel took a contrary stance, asserting that assignments and exams are not examples of "compelling assent." Doc. 73 at 292.

Adding to this confusion is the UA Provost's suggestion that a "true/false" question on an exam may constitute "compelling assent" from students. Doc. 69-7 at 13. In fact, he conceded the ambiguity of SB 129, explaining that faculty may experience "UA interpreting the law too broadly on many occasions." Doc. 55-30 at 1. Tellingly, with respect to Professor Simon's student advocacy project, the Provost was unable to identify a single divisive concept invoked by the project and could not explain how the project compelled assent to any unidentified divisive concept, where the project simply provided an opportunity for students to discuss the negative impact of SB 129 on their educational experience. Doc. 72 at 151; Doc. 55-11 at 4. Professor Simon has never been told which divisive concept was violated by her students' advocacy project. Doc. 72 at 152.

Finally, the district court erred in impermissibly soliciting and crediting Defendants' representations and interpretations of SB 129 from Defendants' counsel to try to cure SB 129's ambiguities, some of which directly contradicted the explicit text of the law. Doc. 79 at 11, 35, 50, 69, 90 n. 36, 95–96, 106–07, 117. None of these representations reflected the evidentiary record and instead reflected Defendants' own interpretations at the time of the events at issue. For example, the district court sua sponte asked, "Does SB 129 prohibit a professor from assigning reading material that advocates for any divisive concept if the professor in the classroom does not himself/herself advocate for a divisive concept? And a spoiler

alert, I don't read the statute that way." Doc. 72 at 155. Defendants agreed with the district court's proffered reading. *Id.* This limitation is nowhere in the text of SB 129 and is just one example of the district court soliciting and crediting representations. The district court permitted these in-court representations even when it expressed its own confusion about the law. *Id.* at 155–56. Defendants' assertions of self-contained limitations were also credited even though they were not found in the text of SB 129 itself. *Id.* at 189–90; Doc. 73 at 331–34.

The Eleventh Circuit has disallowed such representations from defendants regarding future interpretations of a statute to cure potential constitutional infirmities related to vagueness, instead letting the record speak for itself. *Wollschlaeger*, 848 F.3d at 1322 ("[W]e cannot find clarity in a wholly ambiguous statute simply by relying on the benevolence or good faith of those enforcing it."). Contrary to Defendants' in-court representations, through their counsel, about how they would interpret SB 129—representations that the district court improperly considered as evidence—the record indisputably supports a finding of vagueness on the terms "compel assent" and "advocate for" that warrants a preliminary injunction.

3. The Term "Diversity, Equity, and Inclusion" Is Unconstitutionally Vague.

The district court concluded that SB 129's definition of "diversity, equity, and inclusion programs" was not impermissibly vague, underscoring that "[a]ny program, class, training, seminar, or other event where attendance is *based on* an

individual's race, sex, gender identity, ethnicity, national origin, or sexual orientation," including programs or events that "otherwise violate[] this act," would be in violation of the law. Doc. 79 at 136 (quoting Ala. Code § 41-1-90(3)). Yet, the district court's determination is erroneous because it ignores (i) the ambiguity caused by the residual provision "otherwise violates this article," which renders the definition of "diversity, equity, and inclusion" ("DEI") circular and meaningless; and (ii) clear evidence of arbitrary enforcement of this provision. *Infra* Section III(B).

The residual provision, "or that otherwise violates this article," creates a circular definition that is devoid of meaning or guidance. Indeed, courts have struck down similar residual clauses for vagueness. *See Johnson v. United States*, 576 U.S. 591, 594 (2015) (finding the clause "or otherwise" unconstitutionally vague). Because the definition of a diversity, equity, and inclusion program includes any program or event that "otherwise violates this act," a program or event that promotes a divisive concept may also constitute a prohibited DEI program. And, as explained below, the divisive concepts themselves are vague.

SB 129's vagueness is further demonstrated by its enforcement against Plaintiffs in this case. The BSU and Safe Zone spaces were open to all university students and thus should not be considered a "diversity, equity, and inclusion" program pursuant to SB 129's own text. Doc. 73 at 396, 410. Nevertheless, UA closed

the BSU and Safe Zone spaces because it interpreted SB 129's prohibition on "diversity, equity, and inclusion" to include these spaces. The vagueness of the term "diversity, equity, and inclusion" is not unique to SB 129. In fact, one court recently noted the amorphous nature of the term "DEI": "Does a school's Black Pre-law Student Union, open to all students, nonetheless treat black students differently on the basis of race? The challenged [prohibition] provide[s] no answer[] to [this] question[] and no clear 'boundaries of the forbidden areas' to guide schools' compliance." *NAACP v. U.S. Dep't of Educ.*, 779 F. Supp. at 66–67 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972)).

4. The Eight Enumerated "Divisive Concepts" Are Unconstitutionally Vague.

Among all the federal courts across the country that have examined the vagueness of "divisive concepts," similar to those enumerated in SB 129, the district court is the only one not to consider them unconstitutionally vague. *Local 8027 v. Edelblut*, No. 21-CV-1077-PB, 2024 WL 2722254, at *17 (D.N.H. May 28, 2024) (finding concepts similar to SB 129's divisive concepts (a), (b), and (d) unconstitutionally vague); *Honeyfund.com*, 622 F. Supp. 3d at 1181–82 (finding concepts similar to SB 129 divisive concepts (c) unconstitutionally vague); *Santa Cruz Lesbian and Gay Cmty. Ctr.*, 508 F. Supp. 3d at 543 (finding concept similar to SB 129's divisive concept (d) unconstitutionally vague); *Tenn. Educ. Ass'n*, 732 F. Supp. 3d at 808 (denying motion to dismiss where plaintiffs asserted plausible

theory that concepts making use of values-laden terms—specifically a concept similar to SB 129's divisive concept (h)—were unconstitutionally vague).

The district court's certainty about "what constitutes a violation of SB 129," Doc. 79 at 141, is contradicted by the record, which details Professor Plaintiffs' inability to understand how to avoid "divisive concepts" in their teaching. Doc. 73 at 226–28, 257–58, 263; Doc. 55-26 (Fording testimony about possibly violating divisive concepts (a), (b), and (c) when assigning course work and teaching about the "Eugenics Movement," advantages and benefits that accrue based on a person's race, and current forms of discrimination in election law); Doc. 73 at 231–32, 258–62; Doc. 55-31; Doc. 72 at 65–66, 133 (discussing possible violation of divisive concept (d) through assignments related to the Harvard Implicit Associations Test, which assesses and illustrates an individual's implicit biases); Doc. 72 at 74–76 (Patton expressing concern about how teaching implicit bias would likely violate concept (e), based on the subjective feelings of her students); Doc. 73 at 260–61 (Fording testifying that his *Understanding Poverty* course and use of "a group framework" to explain power relationships and dynamics could potentially violate divisive concept (e)); Doc. 73 at 261–62 (Fording describing how he might violate divisive concept (f) by incorporating "group level" analysis to describe social phenomena); Doc. 72 at 17–18, 74–76; Doc. 73 at 261–62 (Patton describing potential violation of divisive concept (g) when teaching about implicit bias or showing the documentary, *Slavery*

By Another Name); Doc. 72 at 157–60 (Simon expressing concerns that *Anti-Oppression and Social Justice* course readings on various forms of "privilege" might violate various divisive concepts, including concept (h)); Doc. 55-9 at 1–11; Doc. 73 at 262–63 (Fording expressing concerns of possibly violating divisive concept (h) when teaching how individuals' structural advantages and disadvantages impact their social mobility, countering the notion that meritocracy is based solely on hard work).

5. The Scienter Requirement, "Knowingly Violates," Does Not Obviate SB 129's Vagueness.

The district court found that the scienter requirement "actually reduces vagueness concerns because it limits liability under SB 129 to only those persons who act with awareness or intention." Doc. 79 at 142. But simply having a scienter requirement in a law does not absolve it of vagueness. *See, e.g.*, *Keyishian*, 385 U.S. at 599–600; *see also Forbes v. Woods*, 71 F. Supp. 2d 1015, 1021 (D. Ariz. 1999), *aff'd sub nom. Forbes v. Napolitano*, 236 F.3d 1009 (9th Cir. 2000), *amended*, 247 F.3d 903 (9th Cir. 2000), *and amended*, 260 F.3d 1159 (9th Cir. 2001). In fact, courts have found statutes similar to SB 129 to be vague even though they also had scienter requirements. *Local 8027*, 2024 WL 2722254, at *14–15; *Tenn. Educ. Ass'n*, 732 F. Supp. 3d at 813 n.18; *see also Pernell*, 641 F. Supp. 3d at 1285. Notably, when UA administrators investigated Professor Patton, the scienter requirement played no role in the investigation—whether she "knew" of SB 129's prohibitions was not a focus of the inquiry. Doc. 55-20; Doc. 55-21; Doc. 55-22.

B. SB 129 Invites Arbitrary and Discriminatory Enforcement.

To avoid "arbitrary and discriminatory enforcement, . . . laws must provide explicit standards for those who apply them." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The U.S. Supreme Court has made clear that "[t]he problem with standardless statutes . . . evaluate[d] under the rubric of vagueness, is that they 'authorize[] or even encourage[] arbitrary and discriminatory enforcement.'" *Hill*, 530 U.S. at 732. However, the legislative authors and supporters of SB 129 have left university decisionmakers with "the job of shaping a vague statute's contours through their enforcement decisions," devoid of any guidance. *Sessions v. Dimaya*, 584 U.S. 148, 182 (2018) (Gorsuch, J., concurring); *see also NAACP v. U.S. Dep't of Educ.*, 779 F. Supp. 3d at 66–67. This lack of adequate standards or guidance has led to arbitrary and discriminatory enforcement against Professor Simon and Professor Patton.

Professor Simon and Professor Patton experienced arbitrary enforcement by UA officials, without a clear explanation about how they were allegedly violating SB 129. Professor Simon was accused of potential violations of SB 129 due to a student-led class project and was threatened with termination if the project was not canceled. Doc. 72 at 136–40, 142–47. When pressed about how the project violated SB 129, UA could not point to a specific provision that applied. Doc. 55-11 at 2–3. When Professor Patton was similarly accused of violating SB 129, UA did not

identify the provisions or "divisive concepts" at issue. Doc. 72 at 72. Arbitrary enforcement is also demonstrated by Professor Patton receiving a complaint about the documentary *Slavery by Another Name*, although both Professor Patton and Professor Simon showed the film in their respective classes.

Student Plaintiffs have also experienced arbitrary enforcement, given the absence of any definition or guidance of what constitutes "diversity, equity, and inclusion programs." "D[iversity,]E[quity, and]I[nclusion] as a concept is broad: one can imagine a wide range of viewpoints on what the values of diversity, equity, and inclusion mean when describing a program or practice." *Nat'l Educ. Ass'n v. U.S. Dep't of Educ.*, 779 F. Supp. 3d 149, 188 (D.N.H. 2025). For example, after SB 129's passage, UAB deemed some cultural student groups, such as the Indian Cultural Organization, to be ineligible for university funding under SB 129, thus requiring them to rely on private funding to support their organizational events and activities. Doc. 73 at 326. However, other cultural groups, like the Eastern European Association, remained fully eligible for university funding. Doc. 1 at 71.

Finally, UA's own contradictory guidance highlights the inability to understand the boundaries of SB 129. None of UA's published guidance clarifies the meaning of "divisive concepts." UA has offered legal training to professors and advised them to "talk, don't test" on anything that could be considered a divisive concept, but then prepared another written guidance specifically asserting that assignments and testing

on divisive concepts were allowed but not providing other additional guidelines for how to interpret SB 129. Doc. 72 at 202; Doc. 73 at 291–92; Doc. 55-25 at 98. Further, as described *supra*, UA's attorneys have provided interpretations of the law that contradict the plain statutory text.

IV. The Remaining Preliminary Injunction Factors Are Satisfied and Warrant Reversal.

The balance of equities favors granting a preliminary injunction. Defendants have not articulated any harm from a preliminary injunction, and the ongoing, irreparable injury to Plaintiffs from violations of their First Amendment speech and Fourteenth Amendment due process rights outweighs any hypothetical injury to Defendants. Indeed, Defendants do not risk any irreparable damage from a preliminary injunction. *See KH Outdoor*, 458 F.4d at 1272. Similarly, Defendants have no legitimate interest in enforcing a law that is unconstitutional. Finally, a preliminary injunction would serve the public interest because "constitutional rights are protected." *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1327 (11th Cir. 2019).

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's denial of a preliminary injunction.

Dated: December 15, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I hereby certify that the foregoing Brief contains 12,911 words, consistent with the length limitation in Fed. R. App. P. 27(d)(2). This brief has been prepared using a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman, consistent with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type styles requirements of Fed. R. App. P. 32(a)(6).

Dated: December 15, 2025

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CERTIFICATE OF SERVICE

I certify that on December 15, 2025, I electronically filed this document using the Court's CM/ECF system, which will serve all counsel of record.

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