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

HONEYFUND.COM, INC., **PRIMO TAMPA, LLC**, **CHEVARA ORRIN**, and **WHITESPACE CONSULTING, LLC D/B/A COLLECTIVE CONCEPTS, LLC,**

Plaintiffs,

v.

RON DESANTIS, *in his official capacity as Governor of Florida*; **ASHLEY MOODY**, *in her official capacity as Attorney General of Florida*, **DARRICK MCGHEE**, *in his official capacity as the Chair of the Florida Commission on Human Relations,* et al.

Defendants.

Case No. 4:22-cv-227 (MW) (MAF)

Oral Argument Requested

PLAINTIFFS' REPLY MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

This Court recently reminded Defendants in an analogous litigation challenging the same statute of the "[u]ltimate futility of . . . attempts to compel coherence" to orthodoxy of thought, which inevitably "achieves only the unanimity of the graveyard." *Falls v. DeSantis*, No. 4:22-cv-166 (MW) (MJF), 2022 WL 2303949, at *10 (N.D. Fla. June 27, 2022) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943)). Here, unlike in *Falls*, Defendants make no argument about justiciability, and the Court may thus proceed directly to considering the merits of enjoining the Stop WOKE Act (the "Act").

Despite Defendants' acknowledgment that the Act was enacted "to condemn eight 'concepts'" and "prevent[] Florida employers from foisting [on employees] *speech that the State finds repugnant*," Opp. at 1, 18 (emphasis added), Defendants incongruously argue that the Act in fact regulates *conduct* rather than speech, stressing that it targets only *mandatory* trainings. But the Eleventh Circuit has repeatedly and decisively rejected such attempts to avoid First Amendment scrutiny by redefining a speech restriction as regulating conduct. No amount of dissembling by Defendants can obscure that whether one violates the Act turns solely on what "concepts" the employer communicates, and more specifically on the *viewpoint* expressed. Mandatory training that is neutral or criticizes the disfavored concepts is permitted, but mandatory training that "espouses" those disfavored views subjects

the speaker to governmental sanction. Defendants' attempt to invoke the captive audience doctrine likewise fails. That doctrine is inapposite where, as here, workplace speech concerns issues at the center of public discourse, and it is the viewpoint expressed, rather than the topic or any impact on the listener, which renders it unlawful. Moreover, the Act fails to survive any applicable standard of scrutiny, because it restricts far more speech than necessary. Anti-discrimination law has long prohibited the adverse employment effects that Defendants attempt to invoke, whereas a violation of the Act requires no adverse employment-related impact at all. Defendants, in their discomfort with Plaintiffs' ideas, push forward a narrative that is Orwellian in its doublespeak, attempting to paint Plaintiffs' anti-racism efforts as actually being racist. Nothing could be further from the truth.

The Act is also unconstitutionally vague and overbroad. The prohibited concepts are riddled with vague terms and phrases compounded by vague triggers (*e.g.*, "inculcat[ion]," "promot[ion]," and "endors[ement]"), casting an especially broad chill on employers' speech. Defendants suggest the Act is not vague because dictionaries define words in the Act, as they do most words. But the relevant test is whether it is clear what the Act prohibits. Here, it is not. Defendants' attempts to clarify only further muddy the murky waters. For similar reasons, the Act is overbroad, particularly as it has no legitimate sweep in the first place.

Finally, as Defendants fail to address Plaintiffs' arguments about the

irreparable harm they will suffer and the balance of equities in their favor, the Court should immediately enjoin the Act.

ARGUMENT

I. THE STOP WOKE ACT INFRINGES PLAINTIFFS' FREEDOM OF SPEECH, IN VIOLATION OF THE FIRST AMENDMENT.

A. Defendants' Arguments for a Lesser Standard of First Amendment Scrutiny Fail.

1. The Act regulates speech, not conduct.

The Eleventh Circuit "has already rejected the practice of relabeling controversial speech as conduct . . . [because] 'the enterprise of labeling certain verbal or written communications "speech" and others "conduct" is unprincipled and susceptible to manipulation.'" *Otto v. City of Boca Raton*, 981 F.3d 854, 861 (11th Cir. 2020) (quoting *Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293, 1308 (11th Cir. 2017) (en banc)). Defendants' Opposition exemplifies this.

Defendants argue that the Act "regulate[s] pure conduct: an employer's non-expressive, commercial action of imposing 'a condition of employment' that requires its employees to attend certain instruction or training activities." Opp. at 7. Defendants later belie that characterization, acknowledging that the Act "condemn[s] eight 'concepts'" to "prevent[] Florida employers from foisting [on employees] *speech that the State finds repugnant.*" Opp. at 1, 18 (emphasis added).

Whether one violates the Act turns not on whether a diversity, equity, and inclusion ("DEI") training session is mandatory, but on what viewpoint is

communicated at that session. Mandatory training that is neutral about or criticizes the concepts Florida "finds repugnant" is permitted, but *espousing* those views is strictly prohibited. Speaking the words that espouse the disfavored views is what violates the Act, regardless of any effect those words might have. That is quintessential speech regulation. *See Otto*, 981 F.3d at 865-66.

Even assuming the Act did regulate conduct, the "conduct triggering coverage under the statute consists of communicating a message," which means the First Amendment is implicated. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010). This is true both because (1) an employer triggers the Act not by holding mandatory training sessions, but by espousing a particular message; and (2) because making the trainings mandatory is *itself* expressive, as it signals the priority the employer puts on the content. "In determining whether conduct is expressive, we ask whether the reasonable person would interpret it as *some* sort of message . . . . [and] [i]f we find that the conduct in question is expressive, any law regulating that conduct is subject to the First Amendment." *Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc.*, 6 F.4th 1247, 1254 (11th Cir. 2021). A reasonable person would interpret the mandatory requirement to attend DEI training as *some* sort of message about the importance to the employer of the topics discussed.

In *NetChoice, LLC v. Att'y Gen., Fla.*, the Eleventh Circuit struck down a Florida statute ostensibly regulating conduct—social media platforms' ability to

"use post-prioritization or shadow banning algorithms"—because the statute was triggered by "content . . . posted by or about . . . a [political] candidate." 34 F.4th 1196, 1206 (quoting Fla. Stat. § 501.2041(2)(h)). The Eleventh Circuit explained that platforms' choices regarding prioritization were "unquestionably" expressive, and that the "driving force behind [the statute] seems to have been a perception (right or wrong) that some platforms' content-moderation decisions reflected a 'leftist' bias against 'conservative' views—which, for better or worse, surely counts as expressing a message." *Id.* at 1214. The Stop WOKE Act is motivated, as Defendants acknowledge, by the same governmental objective, *see* Opp. at 1, 18, and Defendants' attempt to relabel protected speech as conduct should likewise fail.

None of Defendants' authorities suggest otherwise. Defendants invoke *Wollschlaeger*, *id.* at 9, but without avail. There, the en banc Eleventh Circuit struck down nearly every provision imposing speech-based restrictions on doctors (notwithstanding Florida's attempt to recharacterize them as conduct restrictions), *see* 848 F.3d at 1319, and upheld one anti-discrimination provision *only after* imposing a limiting construction that the provision could apply only to *non-expressive conduct*. The provision was explicitly "limited" in such a way that "there is no First Amendment problem," as the *Wollschlaeger* plaintiffs agreed. *Id.* at 1317. Here, there is no construction that could limit the Stop WOKE Act to only non-expressive conduct.

FAIR is likewise inapposite. The Solomon Amendment squarely addressed only universities' *conduct* barring military recruiters from their campuses, by focusing exclusively on "the result . . . of access . . . provided" and "not . . . on the content of a school's recruiting policy." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 57 (2006). The law mentioned no speech or content, and any impact on speech was purely incidental. *See NetChoice*, 34 F.4th at 1216. In contrast, the Stop WOKE Act explicitly targets forbidden "concepts." Fla. Stat. § 760.10(8)(a) (2022).

2. The captive audience doctrine does not apply to the Act, which is on its face viewpoint-discriminatory.

Defendants argue that the Act should be subject to lesser scrutiny under the captive audience doctrine. But contrary to the decades-old cases Defendants cite, the Supreme Court has more recently explained that the captive audience doctrine has been applied "[a]s a general matter . . . only sparingly," pointing largely to examples concerning the home (*e.g.*, delivery of offensive mail, picketing outside an individual's home), because the doctrine is based on privacy interests. *Snyder v. Phelps*, 562 U.S. 443, 459 (2011) (holding that even a father attending his son's funeral was not captive to picketers of the ceremony). '"The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that *substantial privacy interests* are being invaded in an *essentially intolerable manner*." *Id.* (emphases added) (quoting

Cohen v. California, 403 U.S. 15, 21 (1971)). Workplace trainings—even if a condition of employment—hardly meet this description. Defendants ignore *Wollschlaeger*'s decree that "where adults are concerned[,] the Supreme Court has never used a vulnerable listener/captive audience rationale to uphold speaker-focused and content-based restrictions on speech." 848 F.3d at 1315.

Reduced scrutiny under the captive audience doctrine is particularly unwarranted because the Stop WOKE Act discriminates based on viewpoint and content. Defendants mischaracterize Plaintiffs' viewpoint-discrimination argument as being "primarily base[d]" on "[t]he circumstances of the Act's enactment," Opp. at 20-21, ignoring Plaintiffs' argument about the Act's text, *see* Br. at 21-22. By explicitly prohibiting "espous[ing], promot[ing], advanc[ing], inculcat[ing], or compel[ling] to believe" the concepts while *not* "prohibit[ing] discussion of the concepts . . . given in an objective manner *without endorsement*," Fla. Stat. § 760.10(8)(b) (2022) (emphasis added), the Act is viewpoint-discriminatory on its face. As this language applies to all eight concepts, none are severable. And because viewpoint-discriminatory regulations are virtually per se unconstitutional, Defendants' argument that intermediate scrutiny applies is simply wrong.

B. Viewed Under Any Standard, the Act Fails First Amendment Scrutiny.

Setting aside viewpoint discrimination, the Stop WOKE Act is, at minimum, a content-based restriction. *See* Br. at 23-27. Consequently, the Act is

"presumptively unconstitutional and may be justified only if the government proves that [it is] narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015) (strict scrutiny).

Defendants articulate two purported state interests: (1) "preventing Florida employers from foisting speech that the State finds repugnant on . . . employees"; and (2) "stamping out invidious discrimination." Opp. at 18. As to the former, the Supreme Court has made clear that "a bedrock principle underlying the First Amendment . . . is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *see also Snyder*, 562 U.S. at 458 ("[S]peech cannot be restricted simply because it is upsetting or arouses contempt.").

As to the latter, while "stamping out invidious discrimination" would surely in the abstract be a compelling state interest, Defendants make no showing that the Stop WOKE Act is narrowly tailored to achieving that interest. Beyond generalities about "eradicating discrimination in the workplace," Opp. at 18, Defendants fail to explain how any of the provisions of the Act serve this aim.

Nor do Defendants attempt to show why existing anti-discrimination law is inadequate. For the reasons Plaintiffs have shown in detail, *see* Br. at 23-27, the Stop WOKE Act is not narrowly tailored to achieve compelling government interests

and therefore fails strict scrutiny, a "demanding test" which "[l]aws or regulations *almost never* survive." *Otto*, 981 F.3d at 862 (emphasis added).

Even if some lesser scrutiny applied, such as Defendants' proffered "intermediate scrutiny," *see* Opp. at 14, Defendants would still have to show that "the regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation," and "the means chosen are not substantially broader than necessary to achieve the government's interest." *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 11 F.4th 1266, 1295 (11th Cir. 2021) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799-800 (1989)). Defendants disregard that both federal and Florida law *already* prohibit discriminatory employment practices, including discriminatory workplace speech that is sufficient to create a hostile work environment and that results in adverse employment action based on an individual's race, sex, national origin, or other protected characteristics. *See* Br. at 26. These protections, which do not target specific speech based on viewpoint, undermine any argument that the Stop WOKE Act is narrowly tailored to achieve a substantial government interest. The only proper governmental interest identified, "stamping out invidious discrimination," is already served by the existing protections. This mismatch, discussed further in Section II *infra*, is strong evidence that the Act is aimed at silencing ideas, not at serving legitimate governmental purposes.

II. THE STOP WOKE ACT VIOLATES THE FOURTEENTH AMENDMENT BY ITS VAGUENESS AND THE FIRST AMENDMENT BY ITS OVERBREADTH.

Defendants offer little, beyond listing dictionary definitions, to rebut the Act's unconstitutional vagueness. *See* Br. at 27-30. At the outset, the Defendants are wrong to suggest that a "less strict vagueness test" applies to the Act. Opp. at 25. Even assuming the Act regulates "commercial speech," it is viewpoint-based and therefore subject to "a more stringent vagueness test." *Wollschlaeger*, 848 F.3d at 1320; *see also Sorrell v. IMS Health Inc.,* 564 U.S. 552, 566 (2011). But that is not an assumption the Court need make, for the Act does not in the constitutional sense regulate commercial speech, which is defined as "speech that does no more than propose a commercial transaction." *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001). The speech the Act regulates hardly fits into this category.

On the merits, the Act is vague for the same reasons the enjoined Executive Order on which it is based was vague. *Santa Cruz Lesbian & Gay Cmty. Ctr. v. Trump*, 508 F. Supp. 3d 521, 544 (N.D. Cal. 2020). The State attempts to distinguish the Order because "the perceived vagueness largely resulted from the difficulty of determining when a training 'implied' that a concept is true." Opp. at 30. But the Order didn't use the term "implied." It was enjoined because, like the Act, it prohibited "inculcat[ing]" or "promot[ing]" the same types of prohibited concepts at issue here. *Santa Cruz*, 508 F. Supp. 3d at 543. The Order's vague text led the Court

to find "wholly unpersuasive the Government's assertions" that the Order was not vague and "that any ambiguities [could] be easily resolved." *Id.* at 545. The same is true here. Like the Order, the Act does not define "inculcat[ing]" and "promot[ing]." The State attempts to distinguish "discussion and endorsement" by pointing to a definition of "[e]fficient and faithful teaching" in an obscure Florida Board of Education regulation, *which is itself vague*. Opp. at 30-31. Setting aside that employers would have no reason to consult it, the education regulation offers no clarity on what it means to "attempt to indoctrinate or persuade" or whether a trainer may convey information tracking their personal view without identifying it as their personal view. *See* Fla. Admin. Code 6A-1.094124 (2022). The Act's vague triggers and the State's exacerbation of that vagueness is sufficient to enjoin the statute. *Santa Cruz*, 508 F. Supp. 3d at 544-45.

But the ambiguities of the Act do not stop there. In myopically defining words in the Act, the State misses the forest for the trees. Vagueness, in the constitutional sense, does not turn on whether dictionaries define words in a statute, because invariably they do. Otherwise, no statute would be vague. Instead, a statute is vague when it "is unclear as to what fact must be proved" to demonstrate a violation. *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). Plaintiffs already detail various sources of vagueness, *see* Br. at 29-30, which Defendants' dictionary definitions do little to rebut. For example, one critical source of vagueness is the

"statute's dichotomy between allowing 'discussion' of [the eight] concepts but prohibiting 'endorsement' of them," *id.* at 30, which essentially requires anyone providing a mandatory training to self-censor whenever they perceive themselves to be crossing that murky line. Defendants' "explanation" of that dichotomy involves a dictionary definition reading "without distortion by . . . interpretation," Opp. at 29, which itself is vague and clears nothing up. A training that attempts to "discuss" a concept may well *interpret* that same concept, but according to Defendants even this may run afoul of the Act. The Act's sources of vagueness leave individuals without notice and invite discriminatory enforcement. *See Wollschlaeger*, 848 F.3d at 1293. As the Supreme Court has warned, the vagueness of content-based regulation of speech "raises special First Amendment concerns because of its *obvious chilling effect* on free speech." *Reno v. ACLU*, 521 U.S. 844, 871-72 (1997) (emphasis added). The Act's vagueness chills a far wider range of speech, inflicting far greater damage. *See Wollschlaeger*, 848 F.3d at 1320.

The Act is also overbroad, particularly because it has no legitimate sweep. *See* Br. at 31-32; *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003). But even assuming that the Act is not an impermissible viewpoint restriction and that its legitimate sweep is coterminous with existing prohibitions on discrimination, the Act is substantially overbroad. The Act prohibits employers and trainings from stating that individuals of color and women are unavoidably faced with disadvantages in the

workplace and from "endorsing the idea that 'unconscious bias' or 'implicit bias' exist." McBroom Decl. ¶ 24. By its terms, the Act sweeps far broader still, prohibiting endorsement of views such as: "America is the greatest nation on Earth" and Americans are morally superior to Russians; men should be handicapped when competing with women in sports; and Germans should feel guilty and remorseful for the Holocaust. Nor are the terms in the Act like "promotes" cabined in ways that render them permissibly narrow. There is no scienter requirement in the Act, the list surrounding promotion does not consist of narrower terms, and the prohibited conduct includes no subjective requirement. And contrary to the State's contention, the Act's vagueness renders it even more overbroad. *See Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 495 n.6 (1982).

III. DEFENDANTS FAIL TO REBUT PLAINTIFFS' SHOWING OF IRREPARABLE HARM AND THE BALANCE OF EQUITIES.

Defendants barely address, let alone rebut, Plaintiffs' showing that the Act irreparably harms Plaintiffs, *see* Br. at 32-35, and that the balance of equities strongly favors Plaintiffs, *see id.* at 35-36.

Defendants state that Plaintiffs "briefly assert that Act harms their 'business interests,' but they make no effort to detail that harm or explain why it is irreparable." Opp. at 33-34 (citing Br. at 34). Yet Plaintiffs' declarations catalog a broad array of harms in the form of chilling effects on legitimate speech. *See* Br. at 34 (citing

Margulis Decl. ¶¶ 7-8, 17, 19, 24; McBroom Decl. ¶¶ 16-19, 25-27; Orrin Decl. ¶¶ 13, 29-30, 32-33). This continuing harm cannot be abated without an injunction.

Defendants further fail to rebut Plaintiffs' arguments regarding the balance of equities and do not substantiate any harm to legitimate governmental or public interests resulting from an injunction. *See supra* Section I.B. On the other hand, Plaintiffs have already explained in great detail their threatened injuries. *See* Br. at 34. These injuries far outweigh the minimal damage to governmental or public interests were the Act to be enjoined.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' motion for preliminary injunction.

Local Rule 7.1(F) Certification

The undersigned hereby certify that Plaintiffs' Reply Memorandum of Law in Support of Their Motion for Preliminary Injunction contains 3,190 words.

Dated: July 29, 2022

Respectfully submitted,

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