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NBLSA is the largest student-run 501(c)(3) non-profit in the country with the mission to increase the number of culturally responsible Black and minority attorneys who excel academically, succeed professionally, and positively impact the community.

SFF is a youth-led organization dedicated to building a system of inclusivity and acceptance in the state of Florida through education.

Amici are united in their concern about the damage caused by laws—like the one at the heart of this case—that impose vague and politicized limitations on instruction in institutions of higher education. Such laws hamper the academic freedom of faculty and severely compromise the ability of students to receive a quality education.

ISSUE PRESENTED

Whether Fla. Stat. § 1000.05(4) is unconstitutional as applied to pub0.9412 -1064t(1 (.) 21694cm BT 0.0024 Ts) -oTm /TT5 1 Tf [4 Ts

as-vague as applied to public institutions of higher education and their faculties. Amici also write to elaborate on some of the harmful consequences that higher education faculty, students, and the state at large will face if the IFA is allowed to go into effect. To put it bluntly, the IFA is hopelessly vague, has already invited arbitrary and discriminatory enforcement, and has no place in higher education. This Court should affirm the district court's order preliminarily enjoining the IFA's enforcement in Florida's public colleges and universities.

ARGUMENT

I. THE IFA IS UNCONSTITUTIONALLY VAGUE

A "vague law is no law at all." *United States v. Davis*, 139 S. Ct. 2319, 2323 (2019). That is because vague enactments defy the "first essential of due process of law," which is that every person is entitled to "fair notice of what the law demands of them." *Id*. at 2325 (cleaned up). If a law cannot satisfy this baseline constitutional requirement, it is void and unenforceable. *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

IFA is deficient in almost every respect. The law fails to give fair notice of its requirements, appears to conflict with other state laws, and invites arbitrary and politicized enforcement.

A. This Court's Standards for Evaluating Vagueness

There are two grounds on which a law can be found void for vagueness. First, it can fail "to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits." *Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293, 1319 (11th Cir. 2017) (en banc). Second, it can "authorize or even encourage arbitrary and discriminatory enforcement." *Id.* at 1319–20 (cleaned up). Accordingly, a statute survives a vagueness challenge only when it can be shown to provide both reasonable notice of what is prohibited and explicit standards for the law's enforcement. *See id*.

The "degree of vagueness that the Constitution tolerates . . . depends in part on the nature of the enactment." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). Most importantly, "standards of permissible statutory vagueness are strict in the area of free expression." *NAACP v. Button*, 371 U.S. 415,

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and understanding . . . [,] our civilization will stagnate and die." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). Robust protection of academic freedom is therefore "of transcendent value to all of us and not

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S. Ct. at 1212–13. After all, protections against vague laws are "not to be avoided by the simple label a State chooses to fasten upon its conduct or its statute." *Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966); *see also Dimaya*, 138 S. Ct. at 1226 (Gorsuch, J., concurring) (noting the Founding Era history and tradition of declining to enforce vague civil laws). Here, because an educator's violation of the IFA can result in professional discipline or discharge—and therefore a loss of one's livelihood—the law's contours must be clearly defined to pass constitutional muster. *See Local 8027, Am. Fed'n of Teachers-N.H. v. Edelblut*, No. 21-CV-1077-PB, 2023 WL 171392, at *12 (D.N.H. Jan. 12, 2023) (applying "the most exacting vagueness review" to an enactment similar to the IFA because violators could "be stripped of their teaching credentials and thus deprived of their livelihoods"); *see also Dimaya*, 138 S. Ct. at 1212–13 (Gorsuch, J., concurring) (noting that heightened vagueness scrutiny is appropriate for laws that may "that strip persons of their professional licenses and livelihoods").

For example, when called upon in *Wollschlaeger* to decide a vagueness challenge to a law requiring medical professionals to "refrain

from unnecessarily harassing a patient about firearm ownership during an examination," this Court was particularly concerned about the professional consequences that could result from violating the law. 848 F.3d at 1319 (cleaned up). This Court noted that the professional risks of violating the law were "staggering," as even "[w]ell-intentioned doctors may be hauled before disciplinary boards, their reputations diminished, and their medical careers tarnished." *Id.* at 1323. As a result, this Court concluded that the challenged harassment provision was unconstitutionally vague because "[d]octors deserve more notice before they are subjected to these consequences." *Id.*

The IFA presents a similar risk to faculty members of Florida public institutions of higher education. Regulations implementing the IFA require each institution to receive complaints and conduct investigations to determine if an accused faculty member has violated the law. *See* Fla. Bd. of Govs. Reg. 10.005(3). If such a violation did occur, the implementing regulations require the institution to take corrective action, up to and including "issuing disciplinary measures" and "remov[ing]" the offending employee. *Id*. Moreover, the IFA labels

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violations as acts of invidious “discrimination,” Fla. Stat. § 1000.05(4)(a), meaning that an educator found be in violation would carry a potentially career-ruining stigma.

Worse yet, Florida law and the IFA’s implementing regulations give institutions strong incentives to over-read and over-enforce the IFA against faculty members. That is because the institution’s own investigation and corrective measures can be flyspecked by the Board of Governors or a standing committee of the Legislature, resulting in significant financial losses to the institution. The Office of lt4 0 0 6W(f) e1 (osses)5

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"performance funding" for the next fiscal year.[3] *See id*; Fla. Stat. § 1001.92(5). Faced with such costly repercussions, institutions will naturally take a broad view of what the IFA proscribes and a harsh view of how severely to punish violators. In circumstances like these, more searching vagueness review is plainly required. *See Wollschlaeger*, 848 F.3d at 1320 ("Precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way.") (cleaned up).

3. The IFA contains no scienter requirement

Finally, the IFA is subject to heightened vagueness scrutiny because it lacks any scienter requirement for a violation. The Supreme Court "has long recognized that the constitutionality of a vague statutory standard is closely rel-1 (a) 1(em] TJ E634) 1 (i (g) 1 (u) 1694 1 ( )21 (i) e)

379, 395 (1979), *abrogated on other grounds*, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). The absence of a scienter element encourages "unscrupulous enforcement," *United States v. Panfil*, 338 F.3d 1299, 1301 (11th Cir. 2003), and chills otherwise lawful speech and conduct, *see Harrell v. Fla. Bar*, 608 F.3d 1241, 1255 (11th Cir. 2010) (noting that those subject to such a law will "steer wide of any possible violation lest they be unwittingly ensnared") (cleaned up).

This Court's en banc decision in *Wollschlaeger* is instructive on this point as well. In deciding the

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exception. However, “vagueness permeates the text” of the IFA at each of these levels. *City of Chicago v. Morales*, 527 U.S. 41, 55 (1999).

1. Vaguely defined conduct

Consider the conduct the IFA addresses. It prohibits educators from “subject[ing] any student . . . to training or instruction that espouses, promotes, advances, inculcates, or compels such student or employee to believe” the proscribed concepts. Fla. Stat. § 1000.05(4)(a). But what does it mean to “subject” a student to instruction on a topic? According to standard dictionary definitions, “subject,” when used as a transitive verb, means “to cause or force to undergo or endure (something unpleasant, inconvenient, or trying).” Merriam Webster Online Dictionary, “Subject,” https://www.merriam-webster.com/dictionary/subject. So, does the IFA only prohibit instruction on the proscribed concepts when students consider it

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others."); *see also Wollschlaeger*, 848 F.3d at 1322 (striking down as vague a regulation of medical practice that turned on the subjective perceptions of patients).

Likewise, what constitutes instruction that "advances" one of the IFA's proscribed concepts? Dictionary definitions would suggest that the term is capacious enough to include any mention of a proscribed concept—even it is only to criticize the concept as m

proscribed concepts. After all, students possess First Amendment rights that cannot be abridged by their professors, *see Doe v. Valencia Coll. Bd. of Trustees*, 838 F.3d 1207, 1211–12 (11th Cir. 2016), and principles of good pedagogy generally favor engaging with a student's sincere questions. Yet, the IFA provides no guidance as to whether a brief response to such a question would "advance" a proscribed concept in a way that imperils an educator's livelihood.

2. Vaguely defined concepts

Vagueness also permeates the IFA's various proscribed concepts. To take one example, the IFA prohibits advancing the concept that "members of one race, color, national origin, or sex cannot and should not attempt to treat others without respect to race, color, national origin, or sex." Fla. Stat. § 1000.05(4)(a)(4). As the district court below noted, this concept is "mired in obscurity," "bordering on the unintelligible," and nothing more than a "a cacophony of confusion" that leaves a reader "unclear what is prohibited and even less clear what is permitted." *Pernell*, 2022 WL 16985720, at *44.

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Other proscribed concepts may be less of a word salad, but they still leave faculty in an impossible bind. Among them is the concept that a "person's . . . status as either privileged or oppressed is necessarily determined by his or her race, color, national origin, or sex." Fla. Stat. § 1000.05(4)(a)(3). No reasonable or intelligent person would dispute that American history is rife with examples of privilege and oppression being necessarily determined by race, color, national origin, or sex. To state the obvious, prior to the passage of the Fifteenth Amendment

amendments to the United States Constitution and their historical contexts without violating the law.[4]

Still other concepts leave key terms undefined, forcing educators to guess at their meaning. For example, the IFA proscribes instruction on the concept that a "person, by virtue of his or her race, color, national origin, or sex, should be discriminated against or receive adverse treatment to achieve diversity, equity, or inclusion." Fla. Stat. § 1000.05(4)(a)(6). But there is no settled definition of "diversity, equity, or inclusion" that would allow people of common intelligence to know exactly what this concept includes. *See* Conor Friedersdorf, *What Does DEI Even Mean?*, THE ATLANTIC (Apr. 6., 2023), https://www.theatlantic.com/newsletters/archive/2023/04/what-does-dei-even-mean/673657/.

[4] Or, to take another example, how could a law professor attempting to comply with the IFA discuss Justice Gorsuch's recent concurring opinion in *Haaland v. Brackeen*, No. 21-376, 2023 WL 4002951 (U.S. June 15, 2023), which details the painful history of Native American children being systematically taken from their family homes, housed in abusive boarding schools, or put up for adoption—all for the avowedly racist purpose of isolating Indian children from their "savage antecedents"? *Id.* at *20–25 (Gorsuch, J., concurring).

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And yet other concepts make violations turn on the subjective

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(emphasis added). The text of the IFA provides no clear answers to this and so many other questions.

3. One vaguely defined exception

If an educator engages in prohibited conduct in relation to one of the IFA's proscribed concepts, the law provides but a single exception for "discussion of the [proscribed] concepts . . . as part of a larger course of training or instruction, provided such training or instruction is given in an objective manner without endorsement of the concepts." Fla. Stat. § 1000.05(4)(b). But this exception provides no real solace or predictability for faculty who must comply with the IFA on pain of discipline or firing.

After all, how much larger does the "larger course of . . .

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Moreover, this exception seems incompatible with the main rule. Recall that the conduct element of the IFA requires instruction that does things such as “espous[es],” “promot[es],” “inculcat[es],” or “compel[s] a student or employee to believe” one of the proscribed concepts. Fla. Stat. § 1000.05(4)(a). In other words, the conduct element of the IFA already appears to be written in a way that generally wouldn’t reach

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D. Compliance with the IFA is Made Even More Insoluble by the Need to Comply with Other Laws that Are Currently in Force

As we have explained in detail above, it is already impossible for faculty at public colleges and universities to know what conduct is prohibited or permitted by the IFA. But that task becomes even more

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member can “obtain declaratory and injunctive

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classroom? Where the Campus Free Expression Act says “go,” the IFA seemingly says “stop.” And where the IFA places the faculty member in fear of professional ruin for allowing certain “uncomfortable,

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teachers in kindergarten classrooms as it does on professors in doctoral programs and law schools.

The first concerning action involves the State Department of Education's highly publicized rejection of the College Board's proposed Advance Placement African-American Studies curriculum. *See* Patricia

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concept.[5] *Id*. Diaz also openly acknowledged that certain lessons were deemed unlawful under the IFA because of the political beliefs of the groups studied or even of the authors of the readings used in the curriculum. *See id.* (rejecting a lesson on the Movement for Black Lives because it "is an organization with stated objectives that include eliminating prisons and jails" and "ending pretrial detention"); *id.*

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See Fla. Dep't of Educ., *Specifications for the 2022-2023 Florida Instructional Materials Adoption, K-12 Social Studies* (July 2022) https://www.fldoe.org/core/fileparse.php/5574/urlt/SocialStudies-IM-Spec.pdf. Again, this action appears to weaponize the IFA in arbitrary and politicized fashion. For example, the textbook standards prohibit the teaching of a broad range of topics and ideas that are not referenced in the IFA itself. *See id.* at 23 (prohibiting references to "Critical Race Theory, Social Justice, Culturally Responsive Teaching, Social and Emotional Learning, and any other unsolicited theories that may lead to student indoctrination"). The textbook standards also assert that the IFA does not allow instruction on the ideas of "[s]eeking to eliminate undeserved disadvantages for selected groups" or the notion that "[u]ndeserved disadvantages are from mere chance of birth and are factors beyond anyone's control, thereby landing different groups in different conditions." *Id*. at 24. These standards even indicate that the IFA prohibits lessons aimed at "[m]anaging emotion," "[d]eveloping

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When a law is as vague as the IFA, those who must attempt to comply with it look for guidance to the behavior of public officials and agencies that enforce it. Yet, no one aware of the IFA would have predicted that that law could or would be bent to prohibit the discussion of topics as disparate as ending pretrial detention and managing emotions. To put it bluntly, actions like this have validated and amplified every fear that the vagueness doctrine is meant to protect against. The IFA not only could be—but is now—being wielded to "encourage arbitrary and discriminatory enforcement." *Wollschlaeger*, 848 F.3d at 1319–20 (cleaned up). Its enforcement must remain enjoined.

II. ALLOWING THE IFA TO GO INTO EFFECT WILL HAVE FAR-REACHING NEGATIVE CONSEQUENCES FOR HIGHER EDUCATION IN FLORIDA

Allowing a law as incorrigibly vague as the IFA to go into effect will harm more than just the faculty who must try to abide by it. The law will damage the quality of higher education in the state and degrade the economic and political vitality of its citizenry.

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A. The IFA Will Diminish the Ability of Florida's Public Colleges and Universities to Attract and Retain Faculty

As we have

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evaluate, to gain new maturity and understanding," *id*., it stands to reason that they will seek out opportunities elsewhere.

Indeed, there is anecdotal evidence of this occurring already. A recent report from the American Association of University Professors relates preliminary indications that "faculty members of color and those teaching in the humanities and social sciences in particular are seeking to leave" and that "filling . . . positions with any qualified candidates is

The second is the IFA's manifest vagueness. Making sense of what the IFA restricts and then implementing the institution's understanding of the law in a consistent way will require significant administrative oversight and intervention.

The third is that the IFA's enforcement mechanisms expose institutions to costly repercussions for violations. *See supra* at 10–13. As a matter of risk management, institutions will have to institute compliance monitoring and will likely adopt overly restrictive policies to steer far clear of possible violations.

C. The IFA Will Leave Graduates of Florida's Public Colleges and Universities Ill-Equipped to Participate in the Workforce and in Our Democracy

Above all else, allowing the IFA to go into effect will do an enormous disservice to students at Florida's public colleges and universities, who will be left less prepared to participate in both the workplace and the polity.

"Nothing less than the nation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples." *Grutter*, 539 U.S. at 324

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IFA would operate. Not only will individual educators and university

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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June 23, 2023

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 6,440 words excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32–4.

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word with Century Schoolbook 14-point font.

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I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on June 23, 2023. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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