UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

STEVEN ALAN CARR, DAVID G. SCHUSTER, JAMES SCHEURICH, and DAVID MCDONALD, Plaintiffs, v. TRUSTEES OF PURDUE UNIVERSITY, in their official capacities; TRUSTEES OF INDIANA UNIVERSITY, in their official capacities, Defendants.	Cause No. 1:24-cv-772-SEB-MJD

INTERVENOR STATE OF INDIANA'S
MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION
FOR PRELIMINARY INJUNCTION AND IN SUPPORT OF THE STATE'S
MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION

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INTRODUCTION

To enshrine the principles of "free inquiry, free expression, and intellectual diversity" in Indiana's public universities, Indiana's General Assembly and Governor enacted Senate Enrolled Act 202. The Act charges the boards of trustees of Indiana's public universities with establishing policies to promote these broad principles. As relevant here, the Act directs the boards of trustees for Indiana University and Purdue University to enforce these principles through each university's tenure and faculty discipline determinations.

Even before the Act took effect on July 1, 2024, Plaintiffs brought suit—asking this Court to take the extraordinary step of holding the Act unconstitutional on its face and enjoining all of its potential applications. That request is premature. The Act only applies to Boards of Trustees—not to individual educators like Plaintiffs—and at the time Plaintiffs filed suit, they presented no policies implementing the Act. And even today, no Board has yet enforced recently adopted policies—which neither the Amended Complaint nor Plaintiffs' motion for a preliminary injunction mentions—against other individual educators.

Faced with this reality, Plaintiffs resort to speculation. And Plaintiffs speculate the very worst. They cite outlandish examples—in some cases ignoring key terms of the statute or stretching the statute beyond its plain meaning—to speculate about how the statute *may* eventually be applied. But Plaintiffs have no basis to assume, at this premature stage, that the Boards of Trustees will enforce the Act's broad principles in the ways they fear. At the very least, this Court should not exercise federal jurisdiction to strike down a duly enacted state statute based on unsubstantiated and speculative fears. Further, Plaintiffs have evinced no intent to violate the broad terms of the Act. Quite the opposite—Plaintiffs candidly admit that they believe they already *comply* with the statute's requirements. Given the premature nature of Plaintiffs' facial challenge to a state statute that does not apply to them and in any case has not yet been fully implemented, they have failed to establish that this case presents a ripe case or controversy under Article III.

Even if Plaintiffs could overcome these insurmountable jurisdictional hurdles, they have failed to demonstrate an entitlement to extraordinary injunctive relief.

First, Plaintiffs have failed to establish a likelihood of success on the merits. Simply put, the Act does not restrict any individual's right to speak. It neither restrains nor compels any speech. The Act merely directs the Boards of Trustees to consider certain important aspects of a state educator's classroom management and educational environment (namely, free inquiry, free expression, and intellectual diversity) in tenure and discipline determinations. Were there any doubt, the Act requires that the Boards of Trustees' eventual policies *not* implicate any individual faculty member's ability to dissent, engage in research or public commentary, criticize the university, or engage in political activity.

To the extent these standards for the Boards of Trustees' eventual tenure and discipline policies will implicate educator speech at all, they only implicate state speech—that is, the curriculum used in state universities and instruction offered by state employees. Plaintiffs have no right to control how the State speaks.

Even if the First Amendment did somehow apply to state curricular speech, Plaintiffs agree that the Supreme Court's more permissive balancing test for regulating government employee speech would apply. And the State's interest in ensuring free expression and free inquiry in its own universities amply justifies any interest Plaintiffs may have in refusing to promote such classroom environments. The State has a strong interest in ensuring that its public institutions educate Hoosiers in accordance with these important values. And the professors lack any real interest in violating those principles—indeed, Plaintiffs contend that they *already* abide by them.

To the extent Plaintiffs' gesture toward a vagueness or overbreadth claim, those facial challenges likewise do not satisfy the high standard for injunctive relief. The Act is written in straightforward, ordinary terms that can reasonably be understood. If any of Plaintiffs' subjective doubts about the application of the statute's terms are reasonable—rather than assumptions about political motivations, misconstructions or omissions of key terms, or unsupported conjecture about how the statute might be *mis*applied—any uncertainty may reasonably be resolved by the universities' policies implementing the Act's broad terms or the application of those policies. At the very least, Plaintiffs must await the Act's implementation before jumping to conclusions about how the Act might, one day, be applied.

Finally, the equities counsel against an injunction. Plaintiffs' equitable interests rise and fall with their constitutional arguments, which fail on several fronts, and enjoining the Act would harm the State and its people.

This Court should dismiss for lack of jurisdiction, or in the alternative, deny the preliminary injunction.

BACKGROUND

On March 14, 2024, Indiana enacted Senate Enrolled Act 202. The Act directs the Boards of Trustees of listed Indiana public universities to enact policies promoting various forms of diversity on campus. As relevant here, the Act instructs "each board of trustees" to "establish a policy that provides that a faculty member may not be granted tenure or a promotion by the institution if" the Board of Trustees determines that the faculty member meets certain conditions. Ind. Code § 21-39.5-2-1(b). Those include: "the faculty member is: (1) unlikely to foster a culture of free inquiry, free expression, and intellectual diversity within the institution;" and "(2) unlikely to expose students to scholarly works from a variety of political or ideological frameworks that may exist within and are applicable to the faculty member's academic discipline;" *id.* The Act defines "intellectual diversity" as "multiple, divergent, and varied scholarly perspectives on an extensive range of public policy issues." § 21-39.5-1-5. The Act further instructs the Boards to adopt a tenure review process five years after a faculty member receives tenure and every five years thereafter, along with disciplinary measures if any tenured faculty member fails to comply with the Board's implementation of the Act. § 21-39.5-2-2.

Alongside these principles, the Act also protects faculty members' independence. Any policy the Boards enact "must provide that the board of trustees of an institution may *not* consider" certain faculty activity in making tenure determinations. Ind. Code § 21-39.5-2-1(c) (emphasis added). Those activities include: "(1) Expressing dissent or engaging in research or public commentary on subjects[;]" *id.* "(2) Criticizing the institution's leadership[;]" *id.*, and "(3) Engaging in any political activity conducted outside the faculty member's teaching or mentoring duties at the institution." *Id.*

Plaintiffs, four university professors at Purdue University or Indiana University, brought this suit on May 7, 2024, nearly two months *before* the Act was to take effect on July 1, 2024. Plaintiffs allege that certain provisions of Senate Enrolled Act 202 are unconstitutional, namely, "Indiana Code §§ 21-39.5-2-1(b)(1), (2) and Indiana Code §§ 21-39.5-2-2(a)(1), (2)." Dkt. 19 at 15 (Am. Compl.). Plaintiffs do not challenge any particular policies adopted by the Boards of their universities. They do not challenge (and have not introduced any evidence of) how the Boards have implemented the act, any Board policies, application of the Act to Plaintiffs, or explained how the Boards will apply the Act to Plaintiffs. Plaintiffs filed the present motion for preliminary injunction on July 8, 2024.[1]

[1] Since Plaintiffs' filed their operative complaint and motion for a preliminary injunction, the Boards of Trustees have begun taking preliminary steps to provide guidance related to their implementation the Act. *See Purdue Outlines Interim Policy Updates To Comply with Senate Enrolled Act 202*, Purdue University, https://bit.ly/3Y9B8uv; *Faculty and Librarian Tenure*,

The State of Indiana intervened as of right to defend the Act's constitutionality. *See* Dkt. 15; Dkt. 18.

STANDARD OF REVIEW

"Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte McCardle*, 74 U.S. 506, 514 (1868). Rule 12(b)(1) "allows a party to move to dismiss a claim for lack of subject matter jurisdiction." *Hallinan v. Fraternal Order of Police of Chi. Lodge No. 7*, 570 F.3d 811, 820 (7th Cir. 2009). "It is proper for the district court to look beyond the jurisdictional allegations in the complaint and to view whatever evidence has been submitted in determining whether subject matter jurisdiction exists." *Roman v. USPS*, 821 F.2d 382, 385 (7th Cir. 1987).

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20.

ARGUMENT

In mounting a pre-enforcement facial challenge to the Act, Plaintiffs have imposed an exceedingly difficult standard on their claims. "The Supreme Court has repeatedly stated that facial invalidation of legislation is disfavored," *United States v. Bonin*, 932 F.3d 523, 534 (7th Cir. 2019),

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Indiana University, http://bit.ly/3zP4bJM. Plaintiffs have not moved to amend their operative complaint or file an updated motion for preliminary injunction in light of these developments. Under this Court's order, moreover, "[n]o exhibits" or evidence may be considered that the parties did not file with the Court on July 3, 2024. Dkt. 42 at 2. The recently enacted interim policies were not part of the parties' evidentiary submission.

"[f]or a host of good reasons." *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2397 (2024). One reason the Supreme Court has made "facial challenges hard to win" is that they "threaten to short circuit the democratic process by preventing duly enacted laws from being implemented in constitutional ways." *Id.* (internal quotation marks omitted).

To succeed on a facial challenge, plaintiffs ordinarily "must establish that *no set of circumstances* exists under which the [Act] would be valid." *United States v. Hansen*, 599 U.S. 762, 769 (2023) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987) (emphasis added)). Even where a state statute implicates speech protected by the First Amendment, "[t]he question is whether a substantial number of the law's applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *NetChoice*, 144 S. Ct. at 2397 (cleaned up). Plaintiffs have fallen short of those demanding standards.

I. Plaintiffs' Claims Are Not Justiciable, Warranting Dismissal and Denial of the Preliminary Injunction

Plaintiffs' claims fail at the outset because Plaintiffs lack standing and their claims are unripe. The doctrines of standing and ripeness both "stem from Article III's requirement that federal courts have jurisdiction only over 'cases and controversies.'" *Smith v. Wisc. Dep't of Agric., Trade & Consumer Prot.*, 23 F.3d 1134, 1141 (7th Cir. 1994) Here, the Act took effect on July 1, 2024, and Plaintiffs admit that the Universities have not yet enforced the Act, as the Act directs them to do. Plaintiffs have suffered no injury, and no injury is imminent. Indeed, Plaintiffs have expressed no intent to violate the statute. Rather, Plaintiffs expressly state that they *already comply* with the statute's terms. Despite Plaintiffs' claimed compliance with the statute's terms, Plaintiffs speculate about the worst-case scenarios in which the Act's principles may be misapplied against them. Plaintiffs have no basis for that assumption, and their claims are not yet ripe in any case.

A. Plaintiffs have failed to establish standing

To have standing, a plaintiff must have (1) suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical—that (2) is fairly traceable to the challenged action of the defendant," and (3) redressable by a favorable judgment. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Standing is evaluated at the time suit is filed. *Pennell v. Global Tr. Mgmt., LLC*, 990 F.3d 1041, 1044 (7th Cir. 2021). Plaintiffs have failed to satisfy at least two requirements.

First, Plaintiffs have failed to establish an injury-in-fact. Of course, "[a] person need not risk arrest before bringing a pre-enforcement challenge under the First Amendment," *Schirmer v. Nagode*, 621 F.3d 581, 586 (7th Cir. 2010), "but to present a justiciable controversy, the person must assert more than a wholly speculative possibility of [disciplinary] consequences." *Id.* "To satisfy the injury-in-fact requirement in a preenforcement action, the plaintiff must show" two things. *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 590–91 (7th Cir. 2012). First, "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute[;]" and second, "a credible threat of prosecution thereunder." *Id.* (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)).

As an initial matter, Plaintiffs have not adequately alleged any threat of discipline or prosecution under the Act. The Act itself only applies to Boards of Trustees; directing them to establish policies implementing the Act's broad dictates. The Act does not apply to individual educators. Thus, any injury that Plaintiffs could *potentially* face would be attributable to a Board of Trustees' policy implementing the Act, not to the Act itself. Yet Plaintiffs failed to base their claims on any policies of the Boards of Trustees. Indeed, Plaintiffs do not even *cite* any implementing policy in their Amended Complaint or motion for a preliminary injunction. True, the Universities began taking interim steps to begin implementing the Act in mid-July. But "[i]t has long been the case that 'the jurisdiction of the court depends upon the state of things at the time of the action brought.'" *Grupo Dataflux v. Atlas Glob. Grp., L.P.*, 541 U.S. 567, 570 (2004) (quoting *Mollan v. Torrance,* 9 U.S. (9 Wheat.) 537, 539 (1824)). Standing must exist "at the *outset*" of the suit. *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 796 (2021) (emphasis added).

It follows as a matter of practical and legal reality that Plaintiffs cannot attack the Act itself with a "credible threat of prosecution *thereunder*" where Plaintiffs cannot be prosecuted or otherwise disciplined under the Act they challenge. *Babbitt*, 442 U.S. at 298 (emphasis added). After all, it is well established that "a plaintiff lacks standing to bring a pre-enforcement challenge if the plaintiff's conduct was clearly outside the statute's scope." *Schirmer*, 621 F.3d at 587 (quoting *Lawson v. Hill*, 368 F.3d 955, 957 (7th Cir. 2004)). Here, the Act's scope is limited to *universities*—with instructions, guidelines, and penalties *for the universities* if they fail to follow the Act's instructions. Individual educators are not subject to the Act, and thus Plaintiffs' challenge to the Act itself is "clearly outside the statute's scope." *Lawson*, 368 F.3d at 957.

Second, the Plaintiffs have stated no intent to violate the Act, a necessary element of a justiciable pre-enforcement suit of this kind. Quite the opposite—Plaintiffs have repeatedly stated that they believe they *already comply* with the policies the Act directs the universities to implement. *See* Dkt. 49-2 at 7 (Steven Carr Decl. ¶ 28) ("I certainly seek to foster my own conception of what could be called a culture of free inquiry and free expression within my classroom, insofar as I believe that the most effective teaching and learning occurs when all students feel welcome and able to express their questions and comments in a supportive environment."); Dkt. 49-4 at 6 (David Schuster Decl. ¶ 24) (same); Dkt. 49-6 at 8 (James Scheurich

Decl. ¶ 29) (same); *id.* ("Indeed, I strongly support different views among the students, even if they disagree with me or critique me."); *see* Dkt. 49-9 at 34:14–23 (David McDonald Dep. Tr.) (acknowledging that assigned readings for a previous course included multiple scholarly perspectives); *id.* at 50:25–51:5 (answering affirmatively to the question whether he "already seek[s] to foster a culture of free inquiry, free expression, and intellectual diversity in [the] classroom").

Plaintiffs thus fail to satisfy either of the prerequisites for bringing a pre-enforcement challenge. Plaintiffs have expressed the *opposite* of "an intention to engage in a course of conduct . . . proscribed by a statute." *Babbitt*, 442 U.S. at 298.

Separately, Plaintiffs have also failed to establish causation, a necessary element of standing. "[T]here must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action." *Lujan*, 504 U.S. at 560 (cleaned up). Here, *even if* the Plaintiffs could ever establish an injury, that injury would be traceable to the enforcement policy implemented by the university trustees, not the statute that Plaintiffs challenge. Currently, however, Plaintiffs have not explained how any universities policies might adversely impact Plaintiffs in any way.

Instead, Plaintiffs base their suit on speculation that unnamed third parties might weaponize the Act to retaliate against professors they wish to harm, even if the professor complies with the Act, *see* Dkt. 49-9 at 70:2–6 (David McDonald Dep. Tr.) ("But yet it also creates a measure where if I teach a diverse or multiple perspective that students or employees of the university find to be insufficient, they can still complain and have access to direct retaliatory consequence against my employment here."), or the perceived political motivations underlying the Act's passage, *see* Dkt 49-7 at 53:7–15 (James Scheurich Dep. Tr.) ("I mean, this is a political document. It's written by a particular party. . . . And I feel like it tries to force me into the same ideological framework. And if I don't, then I can be fired, my salary can be reduced, whatever."). Standing, however, requires an imminent, concrete injury.

B. Plaintiffs' claims are not ripe

Even if the Plaintiffs could establish injury-in-fact sufficient to confer standing, their claims must nevertheless be dismissed because they are not yet ripe.

A court must only adjudicate ripe claims "to avoid the premature adjudication of cases when the issues posed are not fully formed, or when the nature and extent of the statute's application are not certain." *Triple G Landfills, Inc. v. Fountain Cnty. Bd. of Comm'rs*, 977 F.2d 287, 288–89 (7th Cir. 1992); *see Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580–81 (1985). A claim is not fit for judicial resolution "if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (cleaned up).

The principles of ripeness bar this suit, which Plaintiffs have based on the Act itself, not any policy implementing the Act's broad principles. Here again, the Act has no force against Plaintiffs, individual educators. Rather, the Act requires the university Board of Trustees to enact policies implementing the Act's broad instructions. *See* Ind. Code § 21-39.5-2-1(b). Those policies, in turn, will apply to individual educators like the Plaintiffs. But Plaintiffs have not sued to enjoin any implementing policies—and they would face an uphill battle in doing so, as the implementing policies have not yet been enforced. Plaintiffs admit that "[n]one of the professors has been provided guidance from his university regarding application of the statute." Dkt. 50 at 7 (Plfs.' Br.).

At this premature stage, Plaintiffs can provide nothing but subjective fears about how the Act *might* be applied by the Boards. By definition, "the nature and extent of the statute's application" here "are not certain." *Triple G Landfills*, 977 F.2d at 288–89. This Court cannot know whether, how, and to what extent, an implementing policy may eventually implicate Plaintiffs' alleged First Amendment right to academic freedom. Future policies likewise may clarify what it means to teach multiple divergent perspectives or foster a culture of free inquiry, providing the precise guidance that Plaintiffs claim to need. This suit is premature.

II. Plaintiffs Have Not Established a Likelihood of Success on the Merits

Plaintiffs are not entitled to any injunction in any event. They have failed to demonstrate a likelihood of success on their constitutional claims against the Act.

A. To the extent the Act's provisions about learning environment implicate speech at all, public curricular speech is government speech not subject to the First Amendment

Plaintiffs argue that the Act's enforcement will chill their speech and compel speech with which they disagree. *See* Plfs.' Br. at 12. Plaintiffs' free speech claims fail at the outset because the Act does not regulate speech at all.[2] The Act does not restrain or restrict any particular speech—it regulates the actions of university trustees, providing them a standard by which to evaluate how educators contribute to a holistic educational environment. This important difference serves to distinguish virtually all of Plaintiffs' cited cases. *See, e.g.*, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505–06 (1969) (punishing student speech of wearing symbolic armbands); *Keyishian v. Bd. of Regents of Univ. of N.Y.*, 385 U.S. 589, 592 (1967) (faculty members punished for failing to sign a specific statement about Communist affiliations); *Sweezy v. New Hampshire*

[2] Plaintiffs assert that the Act constitutes a "prior restraint," and invoke caselaw on the heightened standards for prior restraints on speech. But Plaintiffs do not explain their assertion that the Act creates a "prior restraint," and it is unclear how the concept has any relevance here. The term "prior restraint" generally "refers to requiring governmental permission to engage in specified expressive activity, in contrast to punishing the activity after it has taken place." *Blue Canary Corp. v. City of Milwaukee*, 251 F.3d 1121, 1123 (7th Cir. 2001). The concept does not encompass "all rules" regarding "curricula." *Piggee v. Carl Sandburg Coll.*, 464 F.3d 667, 673–74 (7th Cir. 2006).

ex rel. Wyman, 354 U.S. 234, 246 (1957) (professor punished for refusing to answer specific questions about subversive activities of himself and family members).

Regardless, to the extent the Act may be interpreted to indirectly implicate speech, it only implicates curricular speech performed in the course of a state educator's role *as* a state educator—that is, core government speech. "When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says." *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. at 207. "Were the Free Speech Clause interpreted otherwise, government would not work," as the government would be unable to "effectively" implement policies if it "had to voice the perspective of those who oppose" its policies. *Id.* at 207–08. Thus, "government actions and programs that take the form of speech"—generally do not "trigger the First Amendment rules designed to protect the marketplace of ideas." *Id.* at 207. The Constitution instead "relies first and foremost on the ballot box, not on rules against viewpoint discrimination, to check the government when it speaks." *Shurtleff v. City of Boston*, 596 U.S. 243, 252 (2022).

So it is here. The classroom curriculum of a public university is government speech set in accordance with State law. As the Supreme Court held in *Rosenberger v. Rector and Visitors of University of Virginia*: "When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message." 515 U.S. 819, 833 (1995). When the government "determines the content of the education it provides" in public universities, it is thus the government speaking, *id.*, and its determination does not implicate the Free Speech Clause, *Walker*, 576 U.S. at 207–08.

The instruction offered by state-employed educators at public universities is likewise government speech. When "public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes." *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). Therefore, "the employee has no First Amendment cause of action." *Id.* at 418. Further, in this context, "the Constitution does not insulate their communications from employer discipline." *Id.* at 421. "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen." *Id.* at 421–22.

Thus, this Court has "already confirmed" that "authorities charged by state law with curriculum development" may require "the classroom teacher" to teach (or not teach), *Webster v. New Lenox Sch. Dist. No. 122*, 917 F.2d 1004, 1007 (7th Cir. 1990), both "subject matter" and "perspective[s]" prescribed by state law, *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 479 (7th Cir. 2007). This makes good sense. Were it otherwise, the State would have no power to ensure basic standards of education for its citizens through commonplace curricular standards. All curricular requirements—for example, requiring that law professors teach the case method—would constitute, in Plaintiffs' world, unconstitutional compelled speech.

Fortunately, that is not the law. Although the First Amendment protects teachers' speech when made as "private citizens," "none of this means the speech rights of public school employees are so boundless that they may deliver any message to anyone anytime they wish." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 527 (2022). Quite the opposite: any speech pursuant to the teacher's "official duties" and "professional responsibilities" is subject to state direction. *Garcetti*, 547 U.S. at 421, 426. Under the Supreme Court's reasoning in *Garcetti*, educators do not have a First Amendment right to control curriculum.

The Seventh Circuit has consistently applied these principles. For example, the Court held that *Garcetti*'s reasoning applies to public-school teachers providing instruction to students.

Because "teachers hire out their own speech," the Court explained, applying *Garcetti* to a public-school teacher's in-class speech was "an easier case for the employer than *Garcetti*" itself, "where speech was not what the employee was being paid to create." *Mayer*, 474 F.3d at 479. In *Mayer*, the school board chose neutrality on contentious issues, instructing Mayer, a teacher, that "she could teach the controversy about policy toward Iraq, drawing out arguments from all perspectives, as long as she kept her opinions to herself." *Id.* at 480. Mayer chose not to comply; expressing her own views to the students. As the Court explained, the First Amendment does not sanction public educators "when conducting the education of captive audiences, to cover topics, or advocate viewpoints, that depart from the curriculum adopted by the school system." *Id.*

In a similar case, the Seventh Circuit rejected a public educator's First Amendment challenge where the alleged speech related directly to classroom management. *Brown v. Chi. Bd. of Educ.*, 824 F.3d 713, 715 (7th Cir. 2016). The Court explained that "maintaining classroom order is one of [the] most basic duties as a teacher," and so "[t]o the extent that [the teacher's] discussion of [forbidden content] was an attempt to quell student misbehavior, it was still pursuant to his official duties." *Id.* Ultimately, where the educator "made his comments as a teacher, not a citizen," any discipline—including suspension—"does not implicate his First Amendment rights." *Id.* at 716. Whether or not a public educator's speech is spontaneous, rather than prescribed by curriculum, makes no difference. Even "impromptu" comments, *id.* at 715–16, "answer[s]" to pupils' questions, *Mayer*, 474 F.3d at 478–79, and speech "at school outside of class" can constitute "unprotected employee speech," *Brown*, 824 F.3d at 715 (citing *Piggee*, 464 F.3d at 671–72).

Other Federal Circuits agree. The Sixth Circuit similarly recognized that *Garcetti* applies to in-class instruction. *Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist.*, 624 F.3d 332 (6th Cir. 2010). Otherwise, the Court reasoned, "[c]ould a teacher continue to assign materials that members of the community perceive as racially insensitive even after the principal tells her not to?" *Id.* at 341. Similarly, in an opinion by then-Judge Alito, the Third Circuit held that "a public university professor does not have a First Amendment right to decide what will be taught in the classroom." *Edwards v. Cal. Univ. of Penn.*, 156 F.3d 488, 491 (3d Cir. 1998). The Fourth Circuit held that "speech" that "is curricular in nature" is unprotected because it is not on "a matter of public concern" within the meaning of the balancing test established by *Pickering v. Board of Education of Township High School District 205, Will County*, 391 U.S. 563 (1968). *See Lee v. York Cnty. Sch. Div.*, 484 F.3d 687, 697 (4th Cir. 2007). And the Fifth Circuit likewise held "that public school teachers are not free, under the first amendment, to arrogate control of curricula" because they do "not speak out as a citizen" when teaching in class. *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 800–02 (5th Cir. 1989).

Plaintiffs seek to avoid this precedent by claiming a brand new, state-university specific "First Amendment right to academic freedom." Plfs.' Br. at 13–14. Plaintiffs do not expound on the contours of this purported carve-out, which the Seventh Circuit has not "directly addressed" it. *Id*. at 16.

To be sure, it is true that the Seventh Circuit in *Mayer* noted that it "need not be resolved today," *Mayer*, 474 F.3d at 480, "[h]ow much room is left for constitutional protection of scholarly viewpoints in post-secondary education," *id.* But the Seventh Circuit's reservation of the question of "scholarly viewpoints" has no bearing here. *Id.* The Act specifically *exempts* from consideration any speech in which the educator engages "in research or public commentary." Ind. Code § 21-39.5-2-1(c). And the Act *encourages*—not discourages—multiple "scholarly viewpoints." *Mayer*, 474 F.3d at 480; *see* Ind. Code § 21-39.5-1-5 (defining "[i]ntellectual diversity" as "multiple, divergent, and varied *scholarly perspectives*" (emphasis added)). What is more, the reasoning of the Seventh Circuit's extensive opinions on other public-school teachers applies just as well here. The Court was concerned with students in a classroom functioning as a "captive audience." *Mayer*, 474 F.3d at 480. The same concerns underly the Act, which focuses on ensuring a freer classroom culture, not on limiting any scholarly view.

In any case, to the extent any purported right to academic freedom exists, the right belongs to universities as institutions, not to individual state employees. *See Urofsky v. Gilmore*, 216 F.3d 401, 410–14 (4th Cir. 2000) (en banc). As Justice Frankfurter put it in his classic statement on academic freedom: "the four essential freedoms *of a university*—[are] to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring) (cleaned up) (emphasis added).

Moreover, to the extent public universities possess an institutional right of academic freedom, that right runs against interference from the judiciary, not against the State that chartered the university, governs it, and provides its funding. *See, e.g.*, *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985) (citing the Court's "reluctance to trench on the prerogatives of state and local educational institutions"). Further, it is unclear "how the Universities," the bearers of any right to academic freedom, "as subordinate organs of the State," could ever "have First Amendment rights against the State or its voters." *Coal. to Def. Affirmative Action v. Granholm*, 473 F.3d 237, 247 (6th Cir. 2006). Tellingly, Plaintiffs have cited not a single case holding that a public university employee possesses a right to academic freedom capable of rejecting and overriding the State's educational standards and curriculum.

At bottom, the Act simply directs the adoption of standards for educational culture and norms. To the extent the Act implicates any speech at all, it only regulates the content of curriculum in public universities—state speech that does not implicate any individual's First Amendment rights. In any case, even if public university teachers did maintain some First Amendment right in rejecting curricular standards, and even if the Act did implicate that purported right, Plaintiffs have not demonstrated—as they must in this facial challenge—that a "substantial number" of the law's First Amendment applications are unconstitutional when compared to the Act's "plainly legitimate sweep." *NetChoice*, 144 S. Ct. at 2397.

B. Even if some degree of heightened scrutiny applies, Plaintiffs' claims fail under *Pickering* balancing

If the Court reaches the merits of Plaintiffs' claims *and* determines that the Act regulates individual speech rather than state speech, the Act is still constitutional. Since Plaintiffs are state employees, Plaintiffs agree that any restriction must be evaluated under the *Pickering* balancing test. *See* Plfs.' Br. at 17–18. Under *Pickering*, a court must balance an employee's interest against the State's interest, as employer, in promoting the efficiency of its programs. *Lane v. Franks*, 573 U.S. 228, 236 (2014).

Here, Plaintiffs' interest in not promoting a classroom environment of free inquiry, free expression, and intellectual diversity is relatively weak. The Act regulates only activities of professors relevant to employment requirements. *See* Ind. Code §§ 21-39.5-2-1, 21-39.5-2-2; *see also* Ind. Code § 21-39.5-4-3. The Act specifically exempts Plaintiffs' research, criticism of the institution, and advocacy efforts from any tenure and discipline determinations. Ind. Code § 21-39.5-2-1(c). The Professors have no real interest in avoiding a requirement to do what they claim they already strive to do. *See supra* at 12 (collecting citations). Here again, Plaintiffs' interests are largely in avoiding possible *mis*applications of the Act, which have not come to pass.

On the other hand, permitting individual educators to enforce whatever classroom environment they wish—no matter how biased, unfriendly to free expression and free inquiry, or contrary to the State's enacted public policy—would certainly "impede[] the teacher's proper performance of his daily duties in the classroom." *Pickering*, 391 U.S. at 572–73. Indeed, Plaintiffs provide no limiting principle to their vision of unbridled, unregulated control of classroom environment and curriculum. If an educator could spend valuable class time—for which students and their families pay the State—on any topic of his choosing with any level of bias he may prefer, the professor would subvert the university's foundational duty to educate students. "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. That is precisely what the Act seeks to secure. Here, it is the *State's* interest—not Plaintiffs'—that is consistent with the Supreme Court's articulated principles of academic freedom.

Finally, to the extent that Plaintiffs style their claims as sounding in vagueness or overbreadth, *see* Plfs.' Br. at 20–22, they have failed to make the required showings under these "extraordinary doctrine[s]" that "permit[] facial challenges to some regulations of expression." *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989). Plaintiffs invoke vagueness and overbreadth not as stand-alone claims, but instead—relying on out-of-Circuit authority—assert that the doctrines should "merge" with the question of First Amendment tailoring. Plfs.' Br. at 20–22. Plaintiffs provide no basis for importing that novel approach to this Circuit.

In any case, Plaintiffs make no showing on vagueness or overbreadth, regardless of where in the analysis those concepts properly fall. "Invalidation for overbreadth is strong medicine that is not to be casually employed." *Hansen*, 599 U.S. at 770 (quoting *United States v. Williams*, 553 U.S. 285, 293 (2008)) (cleaned up). Courts accordingly apply a rigorous standard, only imposing "facial invalidation" if a law "'prohibits a substantial amount of protected speech' relative to its 'plainly legitimate sweep.'" *Id.* (quoting *Williams*, 553 U.S. at 292). Further, "a law's unconstitutional applications must be realistic, not fanciful, and their number must be *substantially disproportionate* to the statute's lawful sweep." *Id.* (emphasis added). "In the absence of a lopsided ratio, courts must handle unconstitutional applications as they usually do—case-by-case." *Id.* Plaintiffs do not undertake that comparison.

As for vagueness, the Due Process Clause requires that laws give people of ordinary intelligence fair notice of what is prohibited. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Lack of fair notice "raises special First Amendment concerns because of its obvious chilling effect on free speech." *Reno v. ACLU*, 521 U.S. 844, 871–72 (1997). That said, even where a statute implicates protected speech, "standards" may be "undoubtedly flexible," "the officials implementing them [may] exercise considerable discretion," and "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward*, 491 U.S. at 794.

Plaintiffs hardly even attempt to make these required showings. They simply assert in a conclusory fashion that the Act is vague and/or overbroad and list their own preemptive actions taken based on their speculation about how the Act *might* be implemented. *See* Plfs.' Br. at 22. Plaintiffs have thus fallen far short of the high showing required for this Court to strike the Act on its face.

In fact, the Act is neither vague nor overbroad. Here again, the premature nature of the Plaintiffs' suit precludes a finding of facial vagueness. In *Ward*, the Supreme Court rejected a vagueness challenge where "the officials charged with [the statute's] enforcement" "provide[d] additional guidance." 491 U.S. at 795–96. "Administrative interpretation and implementation of a regulation are, of course, highly relevant to [the Court's] analysis, for in evaluating a facial challenge to a state law, a federal court must consider *any* limiting construction that a state court or enforcement agency has proffered." *Id.* (cleaned up) (emphasis added). This Court cannot evaluate any claim of facial vagueness before the implementing constructions—which, unlike in *Ward*, are here *required* by the Act itself—even exist. It is the universities' policies, not the Act, that will be enforced against plaintiffs. In any case, the Act uses ordinary language that a person of ordinary intelligence could understand.

Further, although it is too soon to know all the ways the Act will ultimately be implemented by the Boards of Trustees, Plaintiffs' more outlandish predictions of how the Act may apply are likely foreclosed by the text of the Act itself. For example, Plaintiffs worry that they might be forced to teach: that "slavery ultimately benefitted African-American people," Plfs.' Br. at 12; "the rise of a 'homosexual agenda,'" *id.* at 11; and "denial that the Holocaust occurred," *id*. But the Act is not as boundless as Plaintiffs suggest.

First, the Act only instructs the Boards to require that tenured professors promote multiple "*scholarly* perspectives." Universities already set standards for what counts as "scholarship"—usually including some element of peer-review. *See, e.g.*, Dkt. 49-14 at 3 (Purdue Faculty Handbook) ("Scholarship is work that is innovative or breaks new ground, and is judged to be meritorious and significant by the scholar's peers."); Dkt. 49-18 at 1 (Purdue School of Nursing Tenure Guidance) (scholarship "can be peer-reviewed through various methods"). Even Plaintiffs admit that not just any writing can be "scholarly." *See* Dkt. 49-9 at 60:1–4 (David McDonald Dep. Tr.) (admitting that view regarding the Israeli-Palestinian conflict that he opposes teaching would not qualify as a "scholarly perspective"); *id.* at 60:16–18 (scholarly views involve "credible research, peer review, collaborative and aggregative research practices"); Dkt. 49-5 at 22:16–17 (David Schuster Dep. Tr.) (a scholarly perspective "would have been accepted by people within the field”).

Second, the Act does not direct, as Plaintiffs seem to assume, that a tenured professor teach *all* scholarly perspectives on any given topic. *See* Dkt. 49-6 at 9 (James Scheurich Decl. ¶ 31) (“If I have to honor every possible viewpoint, no matter whether it is scholarship or research based, I will not be able to cover the required content of the course.”). A tenured professor need only teach some combination of “multiple, divergent, and varied” scholarly perspectives. Ind. Code § 21-39.5-1-5. The statute’s language provides ample room for a professor to choose which scholarly viewpoints to include. *See* Dkt. 49-9 at 61:2–6 (David McDonald Dep. Tr.) (Professor McDonald agreeing “it would be possible to teach multiple scholarly perspectives on the Israeli-Palestinian conflict without teaching” those he opposes).

In sum, Plaintiffs have not demonstrated that the Act prohibits protected speech at all, much less that the number of unconstitutional applications would be *substantially greater* than the number of legitimate ones. Legitimate applications of the Act abound. For example, the Act’s guidelines would encourage educators to call on students equally, hold open discussions in class, and permit student disagreement on important topics. Here again, this determination is impossible to make where the Act’s terms have not yet been implemented. But if the Court were to accept Plaintiffs’ invitation to speculate, it would be clear that the Act’s likely applications are largely constitutional—only requiring the Plaintiffs to continue doing what they claim they already do.

III. Equitable Considerations Further Counsel Against Injunctive Relief

Plaintiffs do not assert any irreparable injury or public interest independent of their alleged constitutional claims. Accordingly, Plaintiffs have failed to establish those requirements for the same reasons they have failed to establish a likelihood of success on the merits.

In fact, the balance of hardships tilts in the State’s favor. Plaintiffs claim they already strive to comply with the Act's principles, so they will face little or no hardship from continued compliance. But "[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers [] irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (cleaned up). Plaintiffs ignore the public interest in ensuring that Indiana's public universities are places of free inquiry for all—including the harm that would befall Indiana's students.

IV. Any Injunction's Scope Should Be Limited

In all events, any injunction "should be no greater than necessary to protect the rights of the prevailing litigants." *Doe v. Rokita*, 54 F.4th 518, 519 (7th Cir. 2022). At a minimum, this means that any relief must be limited to the two sub-sections of the Act challenged in Plaintiffs' complaint. Dkt. 19 at 15 (Am. Compl.) (referencing Ind. Code §§ 21-39.5-2-1(b)(1), (2), and §§ 21-39.5-2-2(a)(1), (2)). Plaintiffs' request that this Court enjoin the Act *itself*, *id.*, finds no basis in the long-settled rules of equity. This Court can enjoin persons, not things or statutes. *See Whole Woman's Health v. Jackson*, 595 U.S. 30, 44 (2021). This follows from the limited jurisdiction of federal courts. "The first prerequisite to obtaining a binding injunction is that the court must have valid in personam jurisdiction over the defendant. If so, a court may compel the performance of acts or restrict activity within its jurisdiction on the basis of its power over that *individual*." Wright & Miller, 11A Fed. Prac. & Proc. Civ. § 2956 (3d ed.) (emphasis added).

Finally, the individual Plaintiffs have only presented facts limited to their own understandings, objections, and individual plans for classroom instruction at two of the States' universities. *See, e.g.*, Plfs.' Br. at 22 (collecting citations). And Plaintiffs fail to make any showing of facial vagueness or overbreadth. *See id.* Accordingly, any injunction should be limited only to the individual Plaintiffs. Plaintiffs have provided this Court no basis for *any* injunction—nor any judicial action besides dismissal—but certainly not one an injunction that would, in effect, nullify an important state statute. The Court should decline to "short circuit the democratic process." *Moody*, 144 S. Ct. at 1297 (citation omitted).

CONCLUSION

This Court should dismiss for lack of subject-matter jurisdiction. In the alternative, the Court should deny Plaintiffs' request for a preliminary injunction.

Respectfully submitted,

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