UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

KIM COOK, *et al.*,

Plaintiffs,

v. Case No. 1:13-cv-00072-MW-GRJ

TONY BENNETT, in his official capacity
As Florida Commissioner of Education, *et al.*,

Defendants.
_____/

STATE DEFENDANTS' MOTION TO DISMISS
AND INCORPORATED MEMORANDUM OF LAW

Defendant Tony Bennett, in his official capacity as Florida Commissioner of Education, and members of the State Board of Education, Ada G. Armas, Sally Bradshaw, Gary Chartrand, John A. Colon, Barbara S. Feingold, John R. Padget, and Kathleen Shanahan, in their official capacities (the "State Defendants"), move to dismiss Plaintiffs' Complaint (DE 1) pursuant to Federal Rule of Civil Procedure 12(b). This Court should dismiss the Complaint because (i) Plaintiffs lack standing to assert the claims presented and (ii) even if they had standing, Plaintiffs have not stated a claim upon which relief can be granted.

BACKGROUND AND FACTS

In 2011, the Florida Legislature enacted Senate Bill 736 (the "2011 Act"), amending several provisions of the Florida K-20 Education Code. Although the Complaint focuses on certain teacher-evaluation provisions, the 2011 Act encompassed additional reforms, including, for example, ending teacher tenure for newly hired teachers, Ch. 2011-1, Laws of Fla. § 5, modifying substantive requirements for charter schools, *id.* § 6, changing the manner in which

the state board identifies "critical teacher shortage areas," *id.* § 9, ending certain benefits associated with teacher seniority, *id.* § 13, modifying rules for certain schools involved in the federal Race to the Top program, *id.* § 16, and repealing certain special acts and general laws of local application relating to teacher or administrator contracts, *id.* § 18. Plaintiffs' Complaint includes no allegations regarding these provisions, yet Plaintiffs ask this Court to invalidate the 2011 Act in its entirety. (Compl. ¶ 2, p. 35)

The legislative changes have been unpopular with some teachers and unions, and some already challenged the Act in state court, alleging violations of the Florida Constitution. *See Robinson v. Bennett*, Case No. 2011-CA-2526, Order Denying Plaintiff's Motion for Summary Judgment, Dismissing Plaintiff's Claims as a Matter of Law and Granting Judgment in Favor of Defendants (Fla. 2d Cir., May 2, 2013) (Cooper, J.). Now, Plaintiffs bring this federal challenge, asserting that the 2011 Act facially violates their federal rights of due process and equal protection. But Plaintiffs lack standing and fail to state a claim upon which relief can be granted, so this Court should dismiss.

ARGUMENT

I. PLAINTIFFS LACK STANDING AND THEIR CLAIMS ARE NOT RIPE.

Article III standing requires: (1) an injury-in-fact that is "actual or imminent, not 'conjectural' or 'hypothetical,'" (2) a causal connection between the injury and the complained-of conduct, and (3) a likelihood that a favorable decision will alleviate the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Plaintiffs bear the burden of pleading these three elements, and a failure on even one element deprives this Court of jurisdiction. *See id.*; *Elend v. Basham*, 471 F.3d 1199, 1206 (11th Cir. 2006) ("It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial

resolution of the dispute and the exercise of the court's remedial powers." (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975))); *Steele v. Nat'l Firearms Act Branch*, 755 F.2d 1410, 1414 (11th Cir. 1985) ("It is the plaintiff's burden to plead and prove injury in fact, causation, and redressability. The Supreme Court has required that these components be pleaded with a fair degree of specificity."). Plaintiffs fail on all three.

A. Plaintiffs Cannot Allege Concrete, Particularized, and Imminent Injury.

Because Plaintiffs seek injunctive and declaratory relief—as opposed to relief for past harm—they must allege a concrete threat of imminent future harm. *Elend*, 471 F.3d at 1207 ("[A] prayer for injunctive and declaratory relief requires an assessment, at [the pleading] stage in the proceeding, of whether the plaintiff has sufficiently shown a real and immediate threat of future harm."). Plaintiffs allege generally that the Act will subject teachers to harm in areas of pay, job security, and professional reputations. (Compl. ¶ 107) But these general allegations are insufficient to show a future injury that is "(a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *31 Foster Children v. Bush*, 329 F.3d 1255, 1263 (11th Cir. 2003); *see also O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) ("Abstract injury is not enough."):

> It is not enough that the plaintiff's complaint sets forth facts from which we could imagine an injury sufficient to satisfy Article III's standing requirements. Indeed, we should not speculate concerning the existence of standing, nor should we imagine or piece together an injury sufficient to give plaintiff standing when it has demonstrated none. If the plaintiff fails to meet its burden, this court lacks the power to create jurisdiction by embellishing a deficient allegation of injury.

Elend, 471 F.3d at 1206 (quoting *Miccosukee Tribe of Indians of Fla. v. Fla. State Athletic Comm'n,* 226 F.3d 1226, 1229-30 (11th Cir. 2000)) (citations and internal quotation marks omitted).

Plaintiffs do not allege that they are about to be fired, lose wages, or face other discipline. Nor do they allege any past harm that is likely to continue in the same form, *cf. O'Shea*, 414 U.S. at 496, alleging instead that the challenged evaluations routinely change. (*See, e.g.*, Compl. ¶ 78 ("Because of the public outcry over the results of teacher evaluations in many counties, the FL DOE granted school districts permission to retroactively adjust their cut off scores to generate different performance ratings. In December 2012 the School Board of Alachua County did so."); *id*. ¶¶ 77, 79 (alleging that Plaintiff Cook received a performance rating of "unsatisfactory" for the 2011-2012 school year but was reclassified as "effective" when the School Board revised its evaluation policy)). Plaintiffs acknowledge that the challenged testing processes constitute only part of teachers' overall evaluations, (Compl. ¶¶ 23-25), that administrators have discretion in compensation and promotion decisions, (*id.* ¶¶ 54, 58, 61, 65), and that the evaluation process will be subject to future, legislatively-mandated changes, (*id.* ¶¶ 34, 41)—all of which makes Plaintiffs' purported harm less concrete. And Plaintiffs appear to acknowledge that, despite the challenged processes, Plaintiffs may still receive the highest possible performance rating: "exceptional."

Furthermore, Plaintiffs do not allege that their future harm is imminent. "When a plaintiff cannot show that an injury is likely to occur *immediately*, the plaintiff does not have standing to seek prospective relief even if he has suffered a past injury." *31 Foster Children*, 329 F.3d at 1265 (emphasis added). Although Plaintiffs complain that they could suffer harms if, for example, they have two or three consecutive unsatisfactory evaluations, (*see* Compl. ¶¶ 53-67), this cannot constitute *immediate* harm. Indeed, Plaintiffs complain about some provisions that are not even effective until 2014. (*Id.* ¶¶ 61-62) And other challenged provisions are ameliorated

by an aggrieved party's right to an administrative hearing, (*id.* ¶ 55), making any ultimate harm more speculative and less immediate.

At best, Plaintiffs have alleged that one or more of them might—at some point in the future—face an unfair evaluation process that *might* result in a poor review that *might* have some adverse employment effect. This is not enough to invoke this Court's limited Article III jurisdiction. "To find that this somehow constitutes 'real and immediate' injury sufficient to confer standing would eviscerate the meaning of both words." *Elend*, 471 F.3d at 1209.[1] Because Plaintiffs have not alleged a concrete, particularized, and imminent injury, this Court lacks jurisdiction and need proceed no further.

B. Plaintiffs Cannot Allege a Causal Link Between the 2011 Act and Their Alleged Injury.

Even if the vague harms alleged were sufficient injuries-in-fact, the Complaint fails to establish causation between those injuries and the 2011 Act. If Plaintiffs' constitutional injury is evaluation "based on the test performance of students whom teachers did not teach and/or on subjects the teachers did not instruct," (Compl. ¶ 1), their injury does not flow directly from the 2011 Act, because the Act does not mandate such an evaluation. Plaintiffs offer no allegation that the 2011 Act *causes* counties to evaluate teachers on scores of students or topics not taught—much less that it causes counties to assign Plaintiffs less than "exceptional" evaluations. Instead, the Act mandates annual evaluations based upon appropriate measures, but leaves the precise details of those evaluations to each school district's discretion.

[1] The organizational plaintiffs do not allege standing on their own behalves; they only assert representational standing of the members. *See Warth*, 422 U.S. at 511 (comparing organizational and representational standing). Plaintiffs have not alleged any particular harm to any particular members, so the organizations lack standing for the same reasons the individual Plaintiffs do.

The Act requires individual districts to establish evaluation systems that provide "appropriate instruments, procedures, and criteria" for professional improvement, "examine performance data from multiple sources," and "indentify those teaching fields for which special evaluation procedures and criteria are necessary." § 1012.34(2)(a)-(d), Fla. Stat. (2011). The evaluation data are "not limited to . . . solely . . . student performance," *id.* § 1012.(3), and "must be based upon sound educational principles and contemporary research in effective educational practice." *Id.* § 1012.(3)(a)1.

The Act does require that teacher evaluations incorporate some data representing student growth or achievement. *Id.* § 1012.34(3)(a)1. For all courses associated with statewide assessments, this data is calculated using a set student growth data formula. *Id.* For other courses and grade levels, districts should establish alternative assessments measures based upon "an equally appropriate formula." *Id.* In addition to student performance data, evaluations must include other measures, as determined by the local districts, such as the personnel's professional and job responsibilities, a teacher's instructional practice, or an administrator's instructional leadership. *Id.* § 1012.34(3)(a)2.-4.

Therefore, although the 2011 Act establishes requires evaluations generally, and although it specifies that student performance cannot be ignored, each district's evaluation process is a product of that district's discretion and determination. *See id.* §§ 1012.34(1)-(3), (7)(b)-(e). Plaintiffs do not allege any use of student data in evaluations is unconstitutional—or that the 2011 Act requires school districts to use student data in the particular manner the district Defendants have elected. Because the 2011 Act did not *mandate* the particular policies the defendant counties selected, the Act could not have caused the alleged injury, *see Lujan*, 504

U.S. at 560 ("[T]here must be a causal connection between the injury and the conduct complained of . . . ."), so Plaintiffs lack standing to challenge the 2011 Act.

C. Plaintiffs Cannot Allege Redressability.

A related requirement for standing is that the injury will likely be "redressed by a favorable decision." *Id.* at 561. For the same reason that Plaintiffs cannot demonstrate causation, they cannot demonstrate redressability. As Plaintiffs acknowledge, the individual county policies they challenge were implemented by the local school districts. (Compl. ¶¶ 1, 18-20) And as a general matter, local school districts enjoy substantial autonomy to the extent their actions are not regulated by state law. *See* Art. IX, § 4, Fla. Const. (establishing that each district's school board "shall operate, control and supervise all free public schools within the school district . . . ."). Therefore, even if this Court enjoined enforcement of the 2011 Act, it is speculative whether individual counties would immediately change policies. *Tennessee Valley Auth. v. U.S. E.P.A.*, 278 F.3d 1184, 1205 (11th Cir. 2002), *opinion withdrawn in part*, 336 F.3d 1236 (11th Cir. 2003) (noting that although redressability need not be certain, it "must not be speculative"). And the fact that Plaintiffs separately challenge the individual district policies only underscores the missing causal link between the 2011 Act and the alleged harms. Whether or not this Court enjoins the 2011 Act in its entirety, Plaintiffs may or may not face local teacher evaluation plans they find satisfactory.[2]

[2] Even if districts would change policies immediately—or if this Court ordered them to do so—it would remain speculative whether Plaintiffs' evaluations would turn out differently. Some teachers who receive "unsatisfactory" evaluations under the challenged policies would receive "unsatisfactory" evaluations even if judged only on their own students and their own subject-matter areas. Some teachers might receive worse evaluations if the challenged policies ended. Therefore, it is speculative whether the change in law would ultimately benefit Plaintiffs.

D. Plaintiffs' Claims Are Not Ripe.

Finally, Plaintiffs' claims are not ripe. Like standing, ripeness is a threshold jurisdictional issue grounded in the courts' limited Article III power to adjudicate actual cases and controversies. *Elend*, 471 F.3d at 1204-05; *Nat'l Adver. Co. v. City of Miami*, 402 F.3d 1335, 1339 (11th Cir. 2005) ("Strict application of the ripeness doctrine prevents federal courts from rendering impermissible advisory opinions and wasting resources through review of potential or abstract disputes."). Although they are distinct prerequisites, "the standing and ripeness inquiries may tend to converge" in pre-enforcement challenges like this one. *Elend*, 471 F.3d at 1205. In this case, Plaintiffs' claims are not ripe for the same reason Plaintiffs lack standing: there is no imminent harm.

The ripeness doctrine's basic rationale "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967). To avoid adjudicating unripe claims, courts consider both the hardship plaintiffs would face without adjudication and the "fitness of the issues for judicial decision." *Id*. at 1515. In this case, both considerations favor dismissal.

First, a later adjudication would not impose any hardship on Plaintiffs. To the extent Plaintiffs are ever harmed by unconstitutional employment determinations, they can seek redress after the fact. As Plaintiffs allege, the statutes afford administrative rights and remedies before termination or discipline, (Compl. ¶¶ 54-55), and in some instances counties revise unfavorable evaluations without formal action, (*see, e.g., id*. ¶¶ 76-79). Plaintiffs offer no allegations as to why adjudication later—as opposed to now—would impose hardship.

Second, the issues are not fit for judicial resolution. As the Complaint establishes, the challenged policies and practices are changing, meaning the purported harms are changing too. For example, after alleging substantial deficiencies relating to the FCAT, Plaintiffs acknowledge that the state "is phasing out the FCATs by the end of the 2013-14 school year" after which student success "will be measured with new assessments that are currently under development." (*Id.* ¶ 34) Plaintiffs also allege that in some districts, the "school board substantially changed how it calculated teacher's performance ratings for the previous school year . . . so as to significantly alter the performance ratings provided to teachers." (*Id.* ¶ 71) And, as discussed more fully below, legislation that became effective last week will require additional changes to district evaluation policies. *See* Section III.B (discussing newly enacted provision requiring evaluation "based upon learning growth or achievement of the teacher's students"). Plaintiffs nonetheless ask this Court to finally adjudicate all of these policies now.

Plaintiffs' allegations regarding past changes illustrate the ripeness problem. Plaintiffs allege that under a county's evaluation process, Plaintiff Cook "initially received a performance rating of 'unsatisfactory'"—but that the county later reclassified the rating. (Compl. ¶¶ 77-79) Had this Court waded into the constitutionality of that process and result, it would have wasted judicial resources (since the rating changed anyway) and interfered with the law's applicability before a "decision ha[d] been formalized and its effects felt in a concrete way by the challenging parties," *Abbott Labs.*, 387 U.S. at 49. Because those claims were not ripe then, inviting review would have only entangled the Court "in abstract disagreements over administrative policies." *Id.* The same is true now. The recent legislation will require changes to the challenged policies. The precise nature of those changes is currently unknown, and challenges to these unknown policies are not ripe.

II. THIS COURT SHOULD NOT CONSIDER PLAINTIFFS' DECLARATORY JUDGMENT CLAIMS.

Even if this Court had jurisdiction, it should not exercise it over Plaintiffs' declaratory judgment claims. "The Declaratory Judgment Act provides that a court *may* declare the rights and other legal relations of any interested party, not that it *must* do so." *MedImmune, Inc. v. Genentech, Inc*., 549 U.S. 118, 136 (2007) (emphasis in original) (citation and internal quotation marks omitted). This Court therefore has "unique and substantial discretion in deciding whether to declare the rights of litigants." *Wilton v. Seven Falls Co*., 515 U.S. 277, 286 (1995). The same factors addressed regarding ripeness, above, counsel against exercising this discretionary jurisdiction. *See Lampkin v. Connor*, 360 F.2d 505, 511 (D.C. Cir. 1966) ("It has been thought the better part of judicial wisdom to withhold declaratory relief when 'it appears that a challenged 'continuing practice' is, at the moment adjudication is sought, undergoing significant modifications so that its ultimate form cannot be confidently predicted.'" (quoting *A.L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324, 331 (1961))). Therefore, even if this Court finds the claims to be ripe for Article III purposes, the Court should decline to consider the claims for declaratory relief.

III. PLAINTIFFS' DUE PROCESS AND EQUAL PROTECTION CLAIMS CANNOT SURVIVE THE RATIONAL BASIS TEST.

Even if Plaintiffs' claims were appropriate for resolution, they cannot survive on the merits. Plaintiffs claim the 2011 Act violates due process and equal protection. But because the Act satisfies the deferential rational-basis test as a matter of law, Plaintiffs' claims fail.

A. The Deferential Rational-Basis Review Applies.

Because the claims do not involve any suspect class or other factor requiring heightened scrutiny, the deferential rational-basis standard applies. *City of Cleburne, Tex. v. Cleburne Living*

Ctr., Inc., 473 U.S. 432, 440-41 (1985).[3] And "[a]lmost every statute subject to the very deferential rational basis scrutiny standard is found to be constitutional." *Williams v. Pryor*, 240 F.3d 944, 948 (11th Cir. 2001); *accord id*. ("Only in an exceptional circumstance will a statute not be rationally related to a legitimate government interest and be found unconstitutional under rational basis scrutiny.").

Rational basis determinations require a two-fold inquiry. First, the court must determine whether there exists "a legitimate government purpose—a goal—which the enacting government body *could* have been pursuing." *Bannum, Inc. v. City of Ft. Lauderdale, Fla.*, 157 F.3d 819, 822 (11th Cir. 1998) (emphasis in original). Second, there must be "a rational basis . . . for the enacting governmental body to believe that the legislation would further the hypothesized purpose." *Id.* Here, the Act satisfies both prongs.

Rational basis review demands substantial deference to the legislative process, and legislative enactments have a "strong presumption" of constitutionality. *Heller v. Doe*, 509 U.S. 312, 319 (1993). A legislature is not required "to articulate its reasons for enacting a statute," so it is irrelevant what actually motivated the legislature. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993). It is equally irrelevant whether the legislature based its determination on actual evidence. *Id.* (absence of "legislative facts" "has no significance in rational-basis analysis," and legislative reasoning "is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data"); *Panama City Med. Diagnostic Ltd. v. Williams*, 13 F.3d 1541, 1546 (11th Cir. 1994) ("it is entirely permissible to rely on rationales that were not contemplated by the legislature at the time of the statute's passage"). Instead, the

[3] The rational-basis analysis for equal protection and due process claims is "virtually identical." *In re Wood*, 866 F.2d 1367, 1371 (11th Cir. 1989).

issue is whether there was "*any* plausible reason" for the legislation. *In re Wood*, 866 F.2d 1367, 1371 (11th Cir. 1989) (emphasis in original); *see also Beach Commc'ns, Inc.*, 508 U.S. at 313 (1993) ("any reasonably conceivable state of facts" satisfies rational basis review).

Therefore, Plaintiffs bear the burden of showing that *no conceivable basis* exists for the law. *Beach Commc'ns, Inc.*, 508 U.S. at 315; *Bd. of Trustees v. Garrett*, 531 U.S. 356, 367 (2001) (the challenging party must "negative any reasonably conceivable state of facts that could provide a rational basis"). Plaintiffs cannot satisfy this burden because the 2011 Act is supported by more than a conceivable rational basis.

B. The 2011 Act Satisfies The Rational Basis Test.

The crux of the Complaint is that the 2011 Act and district policies infringe Plaintiffs' federal due process and equal protection rights "in that they evaluate teachers based on the test performance of students whom teachers did not teach and/or subjects the teacher did not instruct." (Compl. ¶ 1; *see also id.* ¶¶ 39-40, 47, 49-50, 67, 72-75, 81, 83-84, 86-87, 89-90, 92, 94-95, 97, 99-102, 107-10, 114-15, and 121-22). But the Act's performance-evaluation requirements are valid because they rationally relate to the State's goal of revising and modernizing Florida's education system to increase student success. *Cf.* Fla. S. Budget Comm., SB 736 (2011) Staff Analysis 4 (rev. Mar. 24, 2011) [hereinafter SB 736 Staff Analysis].

As the 2011 Act's bill analysis noted, "[a] consensus of research finds that the single greatest indicator of student achievement is the quality of the teacher in the classroom." SB 736 Staff Analysis at 3. It was therefore rational for the Legislature to determine that student achievement measures are useful in assessing teacher quality. Accordingly, the Act requires that "[a]t least 50 percent of a performance evaluation must be based upon data and indicators of student learning growth assessed annually by statewide assessments or, for subjects and grade levels not measured by statewide assessments, by school district assessments." § 1012.34(3)(a)1.,

Fla. Stat. (2011); *see also* Ch. 2013-185, Laws of Fla., § 3. ("At least 50 percent of a classroom teacher's . . . performance evaluation, or 40 percent if less than 3 years of student performance data are available, shall be based upon learning growth or achievement of the teacher's students. . . ."). The Legislature could have rationally believed that, in measuring teacher effectiveness, a student's annual performance on an assessment is a quantifiable gauge of the amount of learning and academic growth taking place.

To the extent Plaintiffs complain that the law requires their evaluations to include performance of students they did not teach, a recent legislative amendment actually requires otherwise. On June 14, 2013, after Plaintiffs filed the Complaint, the Governor signed into law Senate Bill 1664, which specifies that, effective July 1, 2013:

> Notwithstanding any provision to the contrary in ss. 1012.22 and 1012.34, Florida Statutes, regarding the performance salary schedule and personnel evaluation procedures and criteria:
>
> (1) At least 50 percent of a classroom teacher's or school administrator's performance evaluation, or 40 percent if less than 3 years of student performance data are available, shall be based upon learning growth or achievement *of the teacher's* students . . . .
>
> (2) The student performance data used in the performance evaluation of nonclassroom instructional personnel shall be based on student outcome data that reflects the actual contribution of such personnel to the performance of the students assigned to the individual in the individual's areas of responsibility.
>
> (3) For purposes of the performance salary schedule in s. 1012.22, Florida Statutes, the student assessment data in the performance evaluation must be from statewide assessments or district-determined assessments as required in s. 1008.22(8), Florida Statutes, in the subject areas taught.

Ch. 2013-185, Laws of Fla., § 3, at 15 (emphasis added).[4]

[4] Even before this amendment, the 2011 Act limited the manner in which a teacher's evaluation could rely on the performance of students the teacher did not instruct. The Act did, however, allow "[a] district school superintendent [to] assign to instructional personnel in an

This amendment forecloses Plaintiffs' claim that the Act requires evaluations based on the performance of students they did not teach. But to the extent Plaintiffs contend otherwise, they cannot disprove every conceivable rational basis for including a student body's overall progress in teacher evaluations. It is not irrational to consider other students' performance in a teacher's evaluation. It is conceivable that the Legislature believed that professional teachers could positively impact all students at their schools by fostering an encouraging learning environment, influencing and inspiring other teachers, exhibiting leadership, participating in school-wide strategic efforts, or otherwise making efforts to improve overall student learning. Even if the Plaintiffs disagree and insist that a professional teacher's entire sphere of influence is limited to students formally assigned to his or her classroom, it was not irrational for the Legislature to believe otherwise.

There is likewise a rational basis for districts' evaluating teachers on their students' performance in subject matters those teachers did not teach. Again, Plaintiffs might insist that they offer students absolutely no educational benefits beyond the precise subject matter they

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instructional team the student learning growth of the instructional team's students on statewide assessments." § 1012.34(7)(e), Fla. Stat. According to the Complaint, "many school districts including Defendant School Boards are complying with the mandates of the Act . . . by utilizing the option provided by section 1012.34(7)(e)" and "typically have designated all instructors at the school as the 'instructional team.'" (Compl. ¶¶ 43, 46) As a result, Plaintiffs allege, the districts evaluate many teachers on the basis of *all* the school's students instead of on those teachers' students. The statutory provision Plaintiffs blame for this result, section 1012.34(7)(e), applied only "[f]or classroom teachers of courses for which the district has not implemented appropriate assessments under s. 1008.22(8) or for which the school district has not adopted an equally appropriate measure of student learning growth under paragraphs (b)-(d)." § 1012.34(7)(e), Fla. Stat. Therefore, Plaintiffs' allegation was not so much that the statute directly caused the constitutional violation, but that the violation arose "[s]ince it is not feasible for most districts to develop district level assessments along with the required value added formulas." (Compl. ¶ 43) *See* Section I.B, above (regarding causation). In any event, the Section at issue is now controlled by the new law, which states that "[n]otwithstanding any provision to the contrary in . . . 1012.34," teacher evaluations "shall be based upon learning growth or achievement of the teacher's students . . . ." Ch. 2013-185, Laws of Fla., § 3, at 15.

taught. Plaintiffs might believe, for example, that it is categorically impossible for a math teacher to have a positive impact on students' science or foreign-language performance. And they might argue that learning in the visual or musical arts yields no potential benefit in other academic studies. But it would not have been irrational for the Legislature to take a more optimistic view of Florida's teachers and to conclude that student learning in one subject benefits students in all subjects. Plaintiffs may disagree with that assessment, and Plaintiffs may even hope to prove that they are wholly ineffective in benefitting student test scores in other subjects. But that cannot undermine the rationality of the legislative decision. The possibility that the Legislature believed professional teachers could broadly improve their schools and their students' overall success is more than a conceivable legitimate basis.[5]

Finally, it would have been rational for the Legislature to conform with a major federal education grant the state received from the $4.3 billion Race to the Top Fund (RTT Fund). *See* Am. Recovery & Reinvestment Act of 2009 (ARRA), Public Law 111-5, §14005(d)(2), (3), (4), and (5); *see also* § 14006 (providing incentive grants to state that have made significant progress in meeting the objectives in Section 14005(d)(2), (3), (4), and (5)); *see also* SB 736 Staff Analysis at 3-4 (discussing the RTT Fund). Congress designed the RTT Fund to encourage and reward states that implement innovative education reforms in four key areas, one of which addresses the recruiting, developing, rewarding and retaining of effective teachers and

[5] Plaintiffs also complain that the 2011 Act and the district policies "create separate classes of teachers in Florida: those whose evaluations are based on student growth data for students assigned to the teacher and subjects taught by the teacher, and those whose evaluations are based on student growth data for students and/or subjects they do not teach." (Compl. ¶ 114) The rational basis for this differing treatment is obvious on the face of the Complaint: there are not standardized tests for every subject and every grade level.

administrators.[6] RTT grants are contingent upon a state's showing baseline data regarding the four key reform areas, along with the state's assurance that it will increase student achievement and teacher effectiveness. *See id.*

Because the challenged law rationally relates to the State's legitimate goal of improving and modernizing its education system, this Court should dismiss Plaintiffs' Complaint for failing to state a claim upon which relief can be granted.

IV. THE FACIAL CHALLENGE FAILS BECAUSE PLAINTIFFS CANNOT SATISFY *SALERNO*'S RIGOROUS REQUIREMENTS.

Related to the rule that Plaintiffs must negative every conceivable basis that could support the law, *Beach Commc'ns,* 508 U.S. at 315, is the rule that a facial challenge can succeed only if "no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *accord Jacobs v. Fla. Bar*, 50 F.3d 901, 906 n. 20 (11th Cir. 1995) ("[W]hen a plaintiff attacks a law facially, the plaintiff bears the burden of proving that the law could never be constitutionally applied.").[7]

It is unclear the extent to which Plaintiffs' claims against the 2011 Act are tied to the alleged infirmities in the challenged district policies. *See* Section VI, below. But it is clear that Plaintiffs ask this Court to facially invalidate the Act after alleging that three (of sixty-seven) county school districts have unfair teacher evaluation systems. And it is equally clear that a

[6] The key reform areas include: (1) standards and assessments which prepare students for higher education and the workforce; (2) data systems which measure student growth and inform teachers on ways to improve instruction; (3) recruiting, developing, rewarding and retaining effective teachers and administrators; and (4) support for low-achievement schools. *See* U.S. Dep't of Edu., *Race to the Top Program Executive Summary* 2 (2009), *available at* http://www2.ed.gov/programs/racetothetop/executive-summary.pdf.

[7] *Salerno* and its no-set-of-circumstances rule have faced some criticism, but the Eleventh Circuit recently confirmed that "its holding remains binding precedent." *GeorgiaCarry.Org*, 687 F.3d 1244, 1255 n.19 (11th Cir. 2012).

single constitutional application of the 2011 Act ends Plaintiffs' facial claim. *See Harris v. Mexican Specialty Foods, Inc*., 564 F.3d 1301, 1313 (11th Cir. 2009) ("[M]ere possibility of a constitutional application is enough to defeat a facial challenge").

According to the United States Supreme Court, "a facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *see also Horton v. City of St. Augustine*, 272 F.3d 1318, 1329 (11th Cir. 2001). Judicial reluctance to facially invalidate statutes is well founded:

> Facial challenges are disfavored for several reasons. Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of premature interpretation of statutes on the basis of factually barebones records. Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. Finally, facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution. We must keep in mind that a ruling of unconstitutionality frustrates the intent of the elected representatives of the people.

Wash. State Grange v. Wash. State Rep. Party, 552 U.S. 442, 450-51 (2008) (marks and citations omitted).

Under *Salerno*'s strict limitations, this Court can invalidate the 2011 Act only if it considers the universe of factual situations and concludes that "*no set of circumstances* exists under which the Act would be valid." *Salerno*, 481 U.S. at 745 (emphasis added).

The Eleventh Circuit recently applied this principle in rejecting a facial challenge to a state law. In *GeorgiaCarry.Org, Inc. v. Georgia*, Plaintiffs brought a facial challenge against a Georgia law prohibiting firearms in certain places, including houses of worship. 687 F.3d 1244, 1249 (11th Cir. 2012). The Court easily found a common application in which the law could operate constitutionally: "when a license holder wants to carry a firearm in a place of worship

where management of the place of worship prohibits carrying." *Id.* at 1261. Because of the possibility for constitutional application, it necessarily followed that the law was not invalid in all of its applications. *Id.* at 1266 ("Plaintiffs' facial challenge fails because the Carry Law is capable of numerous constitutional applications.").

In this case, it is likewise easy to find a common constitutional application. Even if the Act were hypothetically unconstitutional to the extent it demanded teachers be evaluated on students they "did not teach and/or on subjects the teachers did not instruct," (Compl. ¶ 1), it would not be unconstitutional to the extent it demanded teachers be evaluated on students they *did* teach and on subjects they *did* instruct. This constitutional application ends the inquiry.

Indeed, the Complaint implicitly acknowledges the existence of constitutional applications, suggesting only that constitutional violations exist in "many" school districts, that non-FCAT teachers are "typically" evaluated on FCAT performance, and that "most teachers in Florida" are evaluated based on students "they do not teach and/or in subjects they do not teach." (*Id.* ¶¶ 40-43, 45). And this is to say nothing of the numerous provisions within the 2011 Act that are not even addressed in the Complaint, such as the elimination of teacher tenure, which are more than capable of constitutional application. *See* Section I, above. Plaintiffs have failed to establish the 2011 Act's facial invalidity.

V. PLAINTIFFS CANNOT ALLEGE IRREPARABLE HARM NECESSARY FOR AN INJUNCTION.

Plaintiffs are not entitled to an injunction for the same reason they are not entitled to other relief. To obtain an injunction, "a plaintiff must be able to articulate a basis for relief that would withstand scrutiny under Fed. R. Civ. P. 12(b)(6) (failure to state a claim)." *Klay v. United Healthgroup, Inc.* 376 F.3d 1092, 1097 (11th Cir.2004). But even if Plaintiffs stated a claim for relief otherwise, they have not stated a claim for injunctive relief. "[B]ecause it is an extraordinary remedy, [an injunction] is available not simply when the legal right asserted has

been infringed, but only when that legal right has been infringed by an injury for which there is no adequate legal remedy and which will result in irreparable injury if the injunction does not issue." *Alabama v. U.S. Army Corps of Engineers*, 424 F.3d 1117, 1127-28 (11th Cir. 2005).

Plaintiffs do not even begin to allege that they will suffer harm that is irreparable or for which there is no adequate legal remedy. Even if Plaintiffs suffer demotions, invalidated contracts, or other harms they purportedly fear, they have offered no allegations suggesting that those injuries cannot be addressed without an injunction. Therefore, even if Plaintiffs were entitled to relief, they are not entitled to the dramatic relief they seek.

VI. IF THIS COURT DOES NOT DISMISS THE COMPLAINT, IT SHOULD ORDER A MORE DEFINITE STATEMENT.

Finally, if this case continues, Plaintiffs should file a more precise pleading. Plaintiffs' Complaint comprises three counts, the first two of which claim the "Act and the District Evaluation Policies" violate the Fourteenth Amendment. (Compl. ¶¶ 111, 116)[8] Although the county policies and the 2011 Act are different things, each count incorporates all of the preceding paragraphs, making it impossible to understand which facts Plaintiffs rely on to support which claims against which Defendants. Nor does the Complaint identify the particular provisions within the 2011 Act that allegedly yield the asserted harms. *Cf. Anderson v. Dist. Bd. of Trustees of Cent. Florida Cmty. Coll.*, 77 F.3d 364, 366 (11th Cir. 1996) ("Anderson's complaint is a perfect example of 'shotgun' pleading, in that it is virtually impossible to know which allegations of fact are intended to support which claim(s) for relief.") (citation omitted). As described above, the 2011 Act is a comprehensive reform, addressing far more than teacher evaluations.

[8] The third count challenges only the Alachua County policy and does not include claims against the State Defendants.

Because the Complaint does not sufficiently allege standing or ripeness, because it is clear that Plaintiffs cannot support a facial challenge, and because the 2011 Act is supported by a rational basis, this Court should dismiss. But if the Court allows the case to continue, it should require Plaintiffs to amend their Complaint to plead more precise claims.

WHEREFORE, this Court should dismiss the Complaint or, alternatively, order a more precise statement.

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of July, 2013, a copy of the foregoing was served on counsel of record through the Court's CM/ECF Notice of Electronic Filing system.

/s/ *Rachel Nordby*