UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MOMS FOR LIBERTY – BREVARD COUNTY, FL, et. al, *Plaintiffs*, v. BREVARD PUBLIC SCHOOLS, et. al, *Defendants*.	Case No. 6:21-cv-1849-RBD-DAB PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

ARGUMENT

Defendants admit that their perceptions of what would offend the audience drives their application of the Policy. That is textbook viewpoint discrimination. Because there is no question that Defendants have censored them before, Plaintiffs are entitled to nominal damages. And because there is no question that Defendants will continue applying the Policy in this manner, Plaintiffs are entitled to declaratory and injunctive relief.

I. PLAINTIFFS' STATEMENT OF MATERIAL FACTS ARE UNDISPUTED.

Defendants' Response (Doc. 95) failed to "include a distinctly identified section specifying the material facts" in dispute for trial. Doc. 52 at 10, § K(2). Therefore, Plaintiffs' Statement of Undisputed Material Facts, *see* Doc. 91 at

1-10, should be "deem[ed] admitted." *Comer v. Palm Bay*, 171 F. Supp. 2d 1307, 1313 (M.D. Fla. 2000).

II. THERE IS NO DISPUTE THAT PLAINTIFFS' SPEECH IS PROTECTED.

There is no dispute that Plaintiffs' speech is constitutionally protected. It is undisputed that Plaintiffs limit their speech "to only certain content," *i.e.*, school-related matters, in the meeting's limited public forum. *Barrett v. Walker Cty. Sch. Dist.*, 872 F.3d 1209, 1225 & n.10 (11th Cir. 2017).

But Defendants discriminate against viewpoints that they believe offend the audience, allegedly fearing that offended people would misbehave. "[A] review of Belford's testimony reveals that her discussion of audience reactions is tied to" her perceptions of decorum. Doc. 95 at 4. Indeed, Belford enforces the speech restrictions to maintain decorum and safety. Ex. 1, Belford Dep. at 185:10-15. And to that end, Belford admits that she enforces the Policy when she believes that the audience becomes offended, *id.* at 159:21-160:7, 161:2-24, 166:2-167:18, 169:1-13, 171:14-20, but does not when the audience is calm. *Id.* at 173:3-24; 188:1-9. In fact, the record shows that the more offended the audience becomes, the more strictly Belford enforces the Policy—imposing a heckler's veto. *See* Ex. 2, Susin Dep. at 87:3-24.

"[W]hen the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power."

Erznoznik v. Jacksonville, 422 U.S. 205, 209 (1975). "Listeners' reaction to speech is not a content-neutral basis for regulation." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992). "Speech cannot be … punished or banned, simply because it might offend a [crowd]." *Id.* at 134-35. "The Supreme Court has reiterated time and again—and increasingly of late—the 'bedrock First Amendment principle' that '[s]peech may not be banned on the ground that it expresses ideas that offend.'" *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1126 (11th Cir. 2022) (quoting *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017)). Indeed, "'the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.'" *Otto v. City of Boca Raton*, 981 F.3d 854, 872 (11th Cir. 2020) (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)).

"'The danger of viewpoint discrimination … is all the greater if the ideas or perspectives [the government is attempting to remove] are ones a particular audience might think offensive.'" *Speech First*, 32 F.4th at 1127 (quoting *Tam*, 137 S. Ct. at 1767 (op. of Kennedy, J.)). "[A] law disfavoring 'ideas that offend' discriminates based on viewpoint." *Iancu v. Brunetti*, 139 S. Ct. 2294, 2301 (2019) (quoting *Tam*, 137 S. Ct. at 1751).

Defendants' enforcement of the Policy based on whether people are offended is not an "evendhanded[]" Policy application "without regard to the particular message that the speaker seeks to convey," or "reasonable and

viewpoint-neutral" Policy enforcement as Defendants assert. Doc. 95 at 14. The Supreme Court (*Brunetti*, *Tam*) and the Eleventh Circuit (*Speech First*, *Otto*) ruled that this type of Policy enforcement is viewpoint discrimination. Defendants offer no response to these rulings. Their recitation of the facts from some cases cited in Plaintiffs' motion, (Doc. 95 at 7-11), does not refute or distinguish the application of these authorities' legal principles to this case. As applied by Defendants, the Policy is unconstitutional.

III. THERE IS NO DISPUTE THAT DEFENDANTS HAVE CENSORED PLAINTIFFS.

Defendants cannot and do not refute the basic fact that their acts of unlawful viewpoint discrimination—their silencing of protected political speech for an alleged fear of others' reaction—completed the constitutional tort, and thereby entitle Plaintiffs to damages. *See* Doc. 3-4; Ex. 1 at 165:18-167:18, 170:19-21, 171:22-172:9.

IV. THERE IS NO DISPUTE THAT PLAINTIFFS' SELF-CENSOR.

To determine whether a plaintiff has suffered a First Amendment chill, the Court must "ask whether the operation or enforcement of the government policy would cause a reasonable would-be speaker to self-censor—even where the policy falls short of a direct prohibition against the exercise of First Amendment rights." *Speech First*, 32 F.4th at 1120 (internal punctuation marks and citations omitted). Here, there is no factual dispute that Plaintiffs continue to self-censor their comments to avoid Policy enforcement.

Moms for Liberty members and the other Plaintiffs have either had the Policy enforced against them or seen the Policy enforced against likeminded individuals. *See* Ex. 3, Hall Dep. at 18:13-19:7; Ex. 4, Delaney Dep. at 13:16-25, 16:9-15, 27:1-28:13; Ex. 5, Cholewa Dep. at 40:21-41:24; Ex. 6, Kneessy Dep. at 23:5-24, 25:17-27:23, 29:3-18, 38:3-14, 39:9-24, 40:6-14; Doc. 3-1; Doc. 3-2; Doc. 3-3; Doc. 3-4. Consequently, Plaintiffs self-censor their comments or refrain from speaking at all due to the Policy. *Id*.

Specifically, Plaintiff Hall explains that after the Policy was enforced against her, *see* Doc. 3-2 at 5, she "altered [her] speeches some to try to comply with the[] Policy." Ex. 3 at 18:19-22. She wants to say board members' names to specifically "address certain things that happened throughout the [school] year," and discuss the appropriateness of "books that are in the [school] libraries." *Id*. at 19:1-2. But she self-censors herself to comply with the Policy. *Id*. at 18:19-22; Doc. 3-2 at 5.

Plaintiff Delaney self-censored "what [she] was wanting to talk about" at a Board rule making workshop, when Belford "cut [ ] off" her comments. Ex. 4 at 27:18-28:8. "[B]ecause of the threats that [Belford] had made against [public speakers]," Delaney "didn't continue on with what [she] want[ed] to talk about." *Id*. at 28:9-11.

Plaintiff Cholewa self-censors because Defendants enforced the Policy against him multiple times. *See* Doc. 3-4 at 2-6; Ex. 5 at 41:22-24. "When

[Belford] stopped [his] speeches," he started writing them like he was on "pins and needles," because he knew that he "had to be very selective with the words that [he] used to avoid being stopped." Ex. 5 at 41:4-8. Cholewa believed that he could not "just write what [he] want[ed] to write" for his speeches. *Id*. at 41:13-14. He "caution[ed] [his] speech more because [he] knew [Belford] would be [ ] focused on trying to find ways to stop [him] from speaking." *Id*. at 41:22-24. Thus, he self-censored to "avoid being stopped in the middle of [his] speech." *Id*. at 41:16-21.

Plaintiff Kneessy self-censors the most because she decided to not speak at all to avoid Policy enforcement. *See* Ex. 6 at 23:5-24, 25:17-26:23, 29:3-18, 38:3-14, 39:9-40:12, 41:2-44:16; Doc. 3-1 at 2-3. She watches each Board meeting online. Ex. 6 at 23:19-24. But Kneessy wants to attend the meetings and "speak to [her] elected official, …, Jennifer Jenkins. And [she] want[s] to identify what it is [she is] not happy with, be able to call [Jenkins] by name, and what I think she needs to do differently." *Id*. at 26:5-10; Doc. 3-1 at 2-3. She wants to speak to Belford "by name" and tell her "what she needs to be doing differently." Ex. 6 at 26:8-10; Doc. 3-1 at 2-3. She "would personally call out a couple other school board members." Ex. 6 at 43:20-21; Doc. 3-1 at 2-3. "[She] want[s] to be able to talk about individual senior staff members, [and] programs that they're implementing." Ex. 6 at 26:10-12. And she wants to say all of this "in that boardroom and not worry about being [charged with

trespassing after violating the Policy], being arrested, and being forced out of the room." *Id.* at 26:12-15.

Plaintiffs self-censor their speech due to Defendants' past "operation [and] enforcement" of the Policy. *Speech First*, 32 F.4th at 1120 (internal quotation marks omitted). The Policy enforcement consequences that Plaintiffs fear include alterations to their speech, being interrupted during their comments, being ejected from the meeting, the knowledge that what they want to say is prohibited by the Policy, and possibly arrest and criminal process. Therefore, "the challenged policy 'objectively chills' [their] protected expression." *Id.*

As explained *supra*, Plaintiffs fear censorship under the Policy for good reason. Defendants enforced the Policy to censor Hall and Cholewa and now they self-censor to comply with the Policy and avoid enforcement. Kneessy only wants to say what the Policy forbids—making Policy enforcement against her certain—thus she does not speak at all to avoid enforcement. And Delaney's knowledge "of the threats [of enforcement] that [Belford] had made against [public speakers]," Ex. 4 at 28:9-11, combined with the fact that Belford had cut her off, is enough to cause Delaney to self-censor and establish a First Amendment chill. *See Speech First*, 32 F.4th at 1123.

CONCLUSION

Plaintiffs' motion for summary judgment should be granted.

Dated: October 6, 2022

Respectfully submitted,

/s/ Ryan Morrison

David Osborne
GOLDSTEIN LAW PARTNERS, LLC
4651 Salisbury Rd., Suite 400
Jacksonville, FL 32256
610-949-0444
dosborne@goldsteinlp.com

Ryan Morrison (*pro hac vice*)
INSTITUTE FOR FREE SPEECH
1150 Connecticut Ave., NW, Suite 801
Washington, DC 20036
202-301-3300
rmorrison@ifs.org

CERTIFICATE OF SERVICE

On October 6, 2022, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all attorneys of record.

/s/ Ryan Morrison
Ryan Morrison (*pro hac vice*)
Lead Counsel for Plaintiffs