IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CHRISTOPHER BROOKS, *et al.*, *Plaintiffs*, *v.* FRANCIS HOWELL SCHOOL DISTRICT, *et al.*, *Defendants*.	Civil Action No. 4:22-cv-169-RWS PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

PLAINTIFFS' BRIEF IN SUPPORT OF
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INTRODUCTION

Francis Howell School District ("FHSD") claims to be dedicated to the development, improvement, and preservation of all democratic ideals, but has apparently forgotten that those ideals include tolerance for dissenting views. At its school board meetings, FHSD allows some political groups to promote their names, viewpoints and websites, while labeling Plaintiffs' views and preferred website as "advertising." This selective enforcement of otherwise neutral policies against regime critics constitutes illegal viewpoint discrimination under the First Amendment.

Plaintiffs regularly attend school board meetings and criticize school board policies. In support of their views, they have uploaded supporting information to the Francis Howell Families PAC ("FHF") website for public access. After first letting Plaintiffs speak freely at some meetings, the Board started asserting that any mention of FHF's name or website constitutes "advertising," and banned all such references from school board meetings. The Board also threatened to ban any speaker from talking at future board meetings if they referenced FHF or its website.

But the Board selectively enforces its so-called advertising prohibition, allowing allied groups, such as the teacher's union or the Missouri School Boards' Association ("MSBA") to promote their organizations and websites while terminating political speech that mentions FHF. All district residents deserve the First Amendment's protection when participating at school board meetings. Accordingly, this Court should grant Plaintiffs' motion for preliminary injunction.

FACTS

Francis Howell's Policies 1455 and 1471

Defendant Francis Howell School District is a public school district located in suburban St. Louis. The district is governed by an elected school board. The board

holds meetings open to patron (or public) comment on the third Thursday of every month. Board Meeting Schedule, FHSD, https://bit.ly/32SHMen. Ex. J. During these meetings, thirty minutes are allotted to patron comment, where district residents may speak for up to three minutes per speaker. Meetings-Participation by Public, FHSD Policy Manual § 0412. Ex. K.

On their face, Policies 1471 and 1455 apply to all District property. Policy 1471 prohibits advertising, including "in-person solicitation; signage; . . . or the solicitation of information including, . . . political campaigning." Public Solicitations/Advertising in District Facilities, FHSD Policy Manual § 1471 ("Policy 1471). Ex. C. The District does not define what qualifies as "political campaigning." Policy 1455, in turn, forbids the distribution of "partisan political campaign materials." Distribution of Materials in Schools, FHSD Policy Manual § 1455 ("Policy 1455"). Ex. B. The District does not define what qualifies as "partisan political campaign materials."

Francis Howell Families PAC and its website

Francis Howell Families PAC formed in July 2021 by district constituents concerned with the direction of the Francis Howell School Board. Gontarz Declaration ¶ 6. Plaintiff Gontarz is FHF's president. *Id.* at ¶ 5. Plaintiff Brooks is a member of the FHF Executive Board. Brooks Decl. ¶ 3. Plaintiff Rash is a former member of the FHF Executive Board who still supports its views and mission. Rash Decl. ¶ 3.

FHF frequently opposes Board action that it perceives as contrary to FHF's views. Gontarz Decl. ¶¶ 6, 11–13; Rash Decl. ¶¶ 10–12. FHF seeks to persuade the Board and public that the District should pursue policies that "support academic excellence, transparent accountability, and fiscal responsibility while encouraging in students a strong work ethic, good character, and respect for our Nation's founding principles." About Us, FHF, https://bit.ly/3fCsrS4. FHF broadly opposes

what it views as the application of critical race theory (CRT) in education and the promotion of pornographic material in schools. Gontarz Decl. ¶¶ 6, 11–13; Rash Decl. ¶¶ 10–12, 14, 15; "What is Critical Race Theory? (and why it matters)," FHF, https://bit.ly/3IOsC97; "Pornography in Francis Howell schools," FHF, https://bit.ly/3HjiYLE.

FHF's website serves as a repository of information about matters concerning district policy and school board actions, and FHF's viewpoints about those topics. Gontarz Decl. ¶ 7; FHF, www.francishowellfamilies.org (last visited Jan. 31, 2022). It contains news articles discussing decisions made by the Board as well as opinion pieces on the damaging effects of those decisions. News, FHF, https://bit.ly/3GlKR4s (last visited Jan. 31, 2022); Issues, FHF, https://bit.ly/3ALmZFV (last visited Jan. 31, 2022). Much of the content is critical of district policy or board actions. *Id.*

People who come to speak before the Board often present their political views on how it should govern, and sometimes reference material included in online sources to support their arguments. FHSD, December 16, 2021 Meeting, https://bit.ly/35xkiwk, 27:43–29:16, 31:23–31:28. In addition, referring to online resources allows speakers to cover more ground in the limited three-minute speaking period. Rash Decl. ¶ 42; FHSD, October 21, 2021 Meeting, https://bit.ly/3t76t18, 30:03–39:29, 42:55–43:09.

FHF's website offers information and viewpoints that Plaintiffs would like to share with the public at board meetings. Gontarz Decl. ¶ 12; Rash Decl. ¶¶ 14-15.

Francis Howell School District's Silencing of Francis Howell Families

Plaintiff Rash mentioned FHF and its website for the first time at the August 19, 2021 board meeting. Rash Decl. ¶ 12; FHSD, August 19, 2021 Meeting, https://bit.ly/3gbIR3L, 26:10–26:12. She described FHF's website as a place to learn how to start helping build a better future for the school district. *Id.* The Board allowed Rash to speak and did not give her any negative feedback at that time. *Id.*

To help promote its speech and viewpoints, FHF started selling t-shirts prior to school board meetings during the summer of 2021. Gontarz Decl. ¶ 8. In late September 2021, Defendant Hoven called Gontarz claiming that selling the t-shirts on district property violated Policies 1455 and 1471, and that FHF would no longer be permitted to sell them at that location. *Id.* at ¶ 9. FHF then relocated its sales table across the street to private property. *Id.*

At the October 21, 2021 board meeting, Plaintiffs Gontarz and Rash both criticized school board actions and mentioned that more information could be found at FHF's website. Gontarz Decl. ¶ 12; Rash Decl. ¶ 15; October 21 Meeting, at 30:03–39:29, 42:55–43:13.

Five days later, on October 26, 2021, Defendant Mary Lange emailed Plaintiffs Rash and Gontarz, threatening to cut off their microphone and possibly ban them from speaking at future patron comment sessions if they referenced FHF or its website again. Gontarz Decl. ¶ 14; Ex. D; Rash Decl. ¶ 17; Ex. E. Lange claimed that they were violating the District's against so-called "advertising" and the distribution of "partisan political campaign material" policies.

At the November 18, 2021 school board meeting, Plaintiff Brooks referenced two websites, including the Board's website, without issue, but was immediately silenced and had his speech terminated when he referenced FHF's website. Brooks Decl. ¶¶ 7, 8; FHSD, November 18, 2021 Meeting, https://bit.ly/3AFzItU, 22:50–23:16

Francis Howell's Selective Application of its Advertising Policy

Throughout the past year, numerous speakers have mentioned political groups or referenced online resources, other than FHF or its website, without being cut-off, silenced, or threatened by the Board. Brooks Decl. ¶¶ 12, 14; Rash Decl. ¶¶ 22, 25, 28, 37–41; FHSD, September 16, 2021 Meeting, https://bit.ly/3IF1jhw, 1:07:57–

1:08:43; November 18, 2021 Meeting, at 22:40–23:02; December 16, 2021 Meeting, at 8:53–11:49, 27:43–29:16, 31:23–31:28.

The Board has allowed the local teachers union, Citizens for Francis Howell PAC, the unions' supporters, the Missouri School Boards Association ("MSBA"), and other speakers to promote their organizations by name, and also reference their websites or social media.

For example, at the September 16, 2021 meeting the Board allowed a patron to reference Black Voices Matter, a political group that promotes anti-racism in the FHSD, while she complimented the Board for editing its resolution and response to racism and discrimination. Rash Decl. ¶ 25; September 16 Meeting, 1:07:57-1:08:33.

At the May 20, November 18, and December 16, 2021 meetings, the Board allowed pro-teachers' union speakers to reference the local teachers union, Francis Howell Education Association ("FHEA" or "the Union"), without repercussions. Rash Decl ¶¶ 37–41; FHSD, May 20, 2021 Meeting, https://bit.ly/3eUDfKF, 29:10–29:27; November 18, 2021 Meeting, at 47:29–47:40; December 16 Meeting at 41:31–42:23.

Additionally, the Board permits the Union to "advertise" itself even though it publicly publishes policy viewpoints on its Facebook page, and engages in political advocacy during school board meetings. Rash Decl ¶¶ 28, 33, 36; Ex. H; May 20 Meeting, at 45:24–45:41; FHSD, June 3, 2021 Meeting, https://bit.ly/3GcIKQb, 24:05–25:45; FHSD, June 17, 2021 Meeting, https://bit.ly/33Zz9iv, at 42:12–44:36). The Union is also able to reference itself without violating the distribution of "partisan political campaign materials" policy even though it publicly endorses school board candidates on its Facebook page. Rash Decl. ¶¶ 31, 32; Ex. I.

The Board routinely presents videos created by the Missouri School Boards Association ("MSBA") at its meetings. Rash Decl. ¶ 22; Gontarz Decl. ¶ 15. The videos bring attention to MSBA's issue-advocacy and ally issue-advocacy groups,

address a range of legislative proposals, and advertise that more information can be found through its electronic newsletter, Twitter feed, Critical Issue Alerts, webinars—and the MSBA website. Gontarz Decl. ¶¶ 15–24; June 17, 2021 Meeting, at 48:26–50:23; November 18, 2021 Meeting, at 57:35–57:40; FHSD, January 20, 2022 Meeting, https://bit.ly/3r4zCZE, 56:00–58:55.

And notably, at the August 20, 2020 school board meeting, the Board and the District's Chief Operating Officer praised the Citizens for Francis Howell PAC whose efforts secured a $244 million bond issue for the district. FHSD, August 20, 2020 Meeting, https://bit.ly/3shwo4z , 3:53–5:21, 57:29–57:47; Rash Decl. ¶¶ 6–8. The Board did not raise any concerns about political advertising or mentioning a PAC by name at that meeting.

The continuing impact of Defendants' censorial policies on plaintiffs' speech

Brooks, Gontarz, and Rash continue to speak at some Francis Howell meetings, but they avoid mentioning FHF or its website, and are more cautious in their word choice to avoid running afoul of Defendants' selective application of Policies 1455 and 1471. Gontarz Decl. ¶ 27; Rash Decl. ¶ 42; Brooks Decl. ¶¶ 14-15. Plaintiffs fear that at any reference to FHF or its website would be deemed an advertisement or political material and result in a permanent ban from speaking at Board meetings. *Id.*

SUMMARY OF ARGUMENT

Defendants have found a novel, but illegal, way to censor their critics through the selective application of their blanket advertising and political-campaign materials prohibition. They label sources of information they disapprove of as "advertisements" or "partisan political campaign materials" and ban those from the discourse, while other speakers are allowed to promote outside groups or online resources. Such viewpoint discrimination is always unconstitutional in a limited public forum such as a school board meeting.

With no concrete definition as to what "advertising" or "partisan political campaign materials" entail, the policies invite subjective and viewpoint-discriminatory application. For the same reasons, the policies are also vague and overbroad.

ARGUMENT

"A district court considering injunctive relief evaluates the movant's likelihood of success on the merits, the threat of irreparable harm to the movant, the balance of equities between the parties, and whether an injunction is in the public interest." *Turtle Island Foods, SPC v. Thompson*, 992 F.3d 694, 699 (8th Cir. 2021) (internal quotation marks omitted). "[T]he Eighth Circuit has rejected a requirement that a 'party seeking preliminary relief prove a greater than fifty per cent likelihood that he will prevail on the merits.'" *Phelps-Roper v. Nixon*, 509 F.3d 480, 485 (8th Cir. 2007) (quoting *Dataphase Sys. Inc. v. CL Sys., Inc.,* 640 F.2d 109, 113 (8th Cir. 1981) (en banc)). The question is whether Plaintiffs have a "fair chance of prevailing." *Heartland Acad. Cmty. Church v. Waddle*, 335 F.3d 684, 690 (8th Cir. 2003).

"When a plaintiff has shown a likely violation of his or her First Amendment rights, the other requirements for obtaining a preliminary injunction are generally deemed to have been satisfied." *Libertarian Party of Ark. v. Thurston,* 962 F.3d 390, 405 (8th Cir. 2020) (internal quotation marks omitted). A "likely First Amendment violation further means that the public interest and the balance of harms (including irreparable harm to [plaintiffs]) favor granting the injunction." *Child Evangelism Fellowship of Minn. v. Minneapolis Special Sch. Dist. No. 1*, 690 F.3d 996, 1004 (8th Cir. 2012) (citation omitted). Moreover, considering that following constitutional requirements cannot injure Defendants, the Court should not require a bond to secure the injunction.

I. PLAINTIFFS WILL SUCCEED ON THE MERITS.

A. Defendants' selective use of Policies 1455 and 1471 to censor Plaintiffs violates the Free Speech Clause.

The First Amendment, applied to the states via the Fourteenth Amendment, embodies "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964). Speech cannot be silenced because it criticizes the ideas of government officials or employees, including public schools and their boards.

Government entities create limited public forums when they reserve a forum for certain groups or for the discussion of certain topics. *Gerlich v. Leath*, 861 F.3d 697, 705 (8th Cir. 2017). A school board meeting at which the public is allowed to speak is a designated public forum limited to discussing school operation and governance. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 & n. 7 (1983).

In these forums, content-based restrictions on speech are only permissible if they are reasonable in light of the purpose served by the forum and are viewpoint neutral. A school board may not regulate speech when "the rationale for its regulation of speech is the specific motivating ideology or the opinion or perspective of the speaker." *Gerlich,* 861 F.3d at 705. (internal quotations omitted). Viewpoint discrimination is presumptively unconstitutional. *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 830 (1995).

Once the Francis Howell School Board opened a limited public forum, it was required to "respect the lawful boundaries it ha[d] itself set." *Rosenberger*, 515 U.S. at 819. "Participants in a [limited public] forum, declared open to speech *ex ante*, may not be censored *ex post* when the sponsor decides that particular speech is unwelcome." *Gerlich*, 861 F.3d at 714 (concurring op.) (quoting *Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005)). If the government allows speech on a certain subject, it

must accept all viewpoints on the subject, *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985), even those that it disfavors or that are unpopular, *Rosenberger*, 515 U.S. at 829; *see also Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (government could not deny access to those wishing to discuss the subjects from a religious standpoint).

Defendants enforce, or threatened to enforce, Policies 1455 and 1471 against FHF, while letting other speakers promote their organizations and online resources during school board meetings. Such selective enforcement of government policies against disfavored speech or speakers cannot be reconciled with the First Amendment. "When a regulation governs what speech is permitted in a limited public forum—and thus establishes the forum's limitations—the disparate application of that regulation can constitute viewpoint discrimination." *InterVarsity Christian Fellowship/USA v. Univ. of Iowa*, 408 F. Supp. 3d 960, 979 (S.D. Iowa 2019). "To sustain an as-applied challenge based on viewpoint discrimination, [a plaintiff] must establish a 'pattern of unlawful favoritism' by showing that [he or she] 'was prevented from speaking while someone espousing another viewpoint was permitted to do so." *Phelps-Rogers v. Ricketts*, 867 F.3d 883, 897 (8th Cir. 2017) (citations omitted).

Several courts in this circuit have found the selective application of facially neutral policies to amount to impermissible viewpoint discrimination. In *Gerlich v. Leath*, Iowa State University applied its trademark policy selectively, and sought to preclude the use of the university logo by a pro-marijuana legalization student group under the pretext that it would cause confusion. 861 F.3d at 703. It changed its approval process in response to negative publicity about the pro-marijuana legalization student group and perceived political pressure. *Id.* at 706. Indeed, before the group's licensing denial, the school had never "rejected a student group's design application due to confusion over endorsement of the group's cause." *Id.* at

707. The Eighth Circuit upheld the district court's finding that the university's special treatment of the student group amounted to unconstitutional viewpoint discrimination. *Id.*

Similarly, in *Bus. Leaders in Christ v. Univ. of Iowa*, No. 3:17-cv-00080-SMR-SBJ, 2018 U.S. Dist. LEXIS 221969, at *38-44 (S.D. Iowa Jan. 23, 2018), the district court held that a Christian student organization had sufficiently shown that the University of Iowa had a pattern of selective enforcement of its human rights policy against religious student organizations. "In light of this selective enforcement, the Court finds BLinC has established the requisite fair chance of prevailing on the merits of its claims under the Free Speech Clause." *Id.* at *44.

Likewise, two years later, in *InterVarsity Christian Fellowship,* the district court found that the University of Iowa had selectively enforced its human rights policy against another Christian group, by allowing other student groups to limit membership and leadership positions based on protected characteristics such as gender, race, and veteran status. 408 F. Supp. 3d at 980. "The University's decision to deregister InterVarsity based on the Human Rights Policy is viewpoint discriminatory and is subject to strict scrutiny." *Id.*

Like the trademark policy at issue in *Gerlich*, or the human rights policy in *Bus. Leaders in Christ* and *InterVarsity Christian Fellowship*, Defendants use Policies 1455 and 1471 selectively to censor disfavored views, while letting Plaintiffs' favored opponents speak freely. For example, Defendants used part of the meeting thank the Citizens for Francis Howell PAC for its successful campaign to pass Proposition S which secured a $244 million bond issue for the district. August 20, 2022 Meeting, 3:53-5:21, 57:29-57:47. The Board also allowed Francis Howell School District's Communications Director to praise how "the commitment and expertise of the Citizens for Francis Howell Committee . . . . helped voters understand the current state of our facilities and the positive long-term impact Prop S funding

would have," and as a result, the PAC's "efforts will ensure quality and equitable facilities across the district." *Id.* at timestamp 3:53-5:21.

"[D]iscriminatory motive is evidenced by . . .unique scrutiny . . . imposed on [plaintiffs]." *Gerlich,* 861 F.3d at 705. While Policies 1455 and 1471, on their faces, apply to everyone on district property, Defendants permit school board meeting speakers to reference various organizations or websites other than FHF and its website, that actively engage in legislative advocacy and publicize endorsements for Francis Howell School Board elections.

For example, a patron referenced Black Voices Matter without interruption from the Board when she was praising the "positive progress [the] district has taken in equitable and anti-racist actions." Rash Decl. ¶ 25; September 16 Meeting, 1:07:57–1:08:22. The Board also permitted FNHtoday.com to be advertised during a recognition segment that commented on prestigious awards that a FHSD high school received. Brooks Decl. ¶ 14; December 16 Meeting, 8:53-11:49. The Board also allows references to the Union, even though it endorses school board candidates, and the MSBA even though it engages in political advocacy before the state legislature.

Organizations and website references that, in the Board's eyes, are more aligned with the work of the Board are not subjected to "advertising" and "partisan political campaign material" violations. "From no other group does [the Board] require the sterility of speech that it demands of [FHF]. . . . This is blatant viewpoint discrimination." *Gerlich*, 861 F.3d at 715. (quoting *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 124 (2001) (Scalia, J., concurring)).

Defendants' selective enforcement of their policies constitutes viewpoint discrimination subject to strict scrutiny, a standard they cannot meet. Plaintiffs Brooks, Gontarz, and Rash have already been censored and continue to self-censor

for fear of Defendants' selective enforcement and are suffering an ongoing violation of their rights.

B. The Defendants' selective use of Policies 1455 and 1471 toward Plaintiffs violates the Petition Clause.

"The right 'to petition for a redress of grievances [is] among the most precious of ... liberties'" *Calzone v. Summers*, 942 F.3d 415, 422 (8th Cir. 2019) (quoting *United Mine Workers of Am., Dist. 12 v. Ill. State Bar Ass'n*, 389 U.S. 217 (1967)). It is "integral to the democratic process. . . . The right to petition allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives." *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 388 (2011). The rights to petition and free speech are not "identical in their mandate or their purpose and effect," but they share "substantial common ground." *Guarnieri*, 564 U.S. at 388.

By denying Plaintiffs the ability to mention FHF or its website, the Board restricts their ability to effectively petition for a redress of their grievances, while allowing other groups to exercise those rights. Rash Decl. ¶¶ 37–41. For the same reasons that Defendants' selective enforcement of Policies 1455 and 1471 violate the Speech Clause, they also violate the Petition Clause.

C. Policies 1455 and 1471 are unduly vague.

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly identified." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). A statute or regulation fails for vagueness "if it fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Musser v. Mapes*, 718 F.3d 996, 1000 (8th Cir. 2013). And "where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far

wider of the unlawful zone . . . then if the boundaries of the forbidden areas were clearly marked." *Grayned*, 408 U.S. at 109 (internal punctuation marks and citations omitted).

When a regulation implicates First Amendment rights, "a more stringent vagueness test" applies. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 19 (2010). That is because "[s]peech is an activity particularly susceptible to being chilled, and regulations that do not provide citizens with fair notice of what constitutes a violation disproportionately hurt those who espouse unpopular or controversial beliefs." *Stahl v. City of St. Louis, Mo.*, 687 F.3d 1038, 1041 (8th Cir. 2012).

Defendants' policies set no boundaries for its prohibitions on speech that is deemed "advertising" or "partisan political campaign materials." They provide no "objective workable standards," but instead allow Defendants' "own politics" to shape their views on what is prohibited. *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1891 (2018).

In *Mansky*, the Supreme Court invalidated a state statute that prohibited wearing a political badge, button, or insignia at polling places because the term "political"—a term the Board relies on to silence Plaintiffs—was ill-defined and vested too much discretion in election judges who enforced the rule. The uncertain meanings in Policies 1455 and 1471 has caused individuals to steer further from the unlawful speech zone than necessary, which consequently, consumes lawful speech at Board meetings. Rash Decl. ¶ 19. And attempts to nail down what exactly causes a phrase to become prohibited have been met with tactical silence and stifling speech that is critical of the school board and its policies. Rash Decl. ¶¶ 20, 21.

D. Policies 1455 and 1471 are overbroad.

The vagueness doctrine is similar, but not identical to the overbreadth doctrine. *See Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983) (explaining that "traditionally viewed vagueness and overbreadth as logically related and similar doctrines"). The

"overbreadth doctrine" permits "the facial invalidation of laws which inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when judged in relation to the statute's plainly legitimate sweep." *Snider v. City of Cape Girardeau,* 752 F.3d 1149, 1157 (8th Cir. 2014). "The aim of facial overbreadth analysis is to eliminate the deterrent or 'chilling' effect an overbroad law may have on those contemplating conduct protected by the First Amendment." *Turchick v. United States*, 561 F.2d 719, 721 (8th Cir. 1977) (footnote omitted).

Policies 1455 and 1471, as applied by the Board, would produce a categorical ban on mentioning any website or organization name. After all, by the very nature of mentioning a website or organization, the speaker is advertising to others that the aforementioned website or organization exists. Yet such speech will often enjoy heightened First Amendment protection, especially when someone, such as Plaintiffs, is criticizing school board actions or policies. This makes the ban overbroad, especially because it has already been used to silence government critics.

These policies are subject to a complete facial invalidation, but this Court can avoid that step for Policy 1471 by imposing a limiting construction on the term "advertisement" to limit its application to speakers who are addressing matters wholly unrelated to school board business. *See Ways v. City of Lincoln*, 274 F.3d 514, 519 (8th Cir. 2001) (An overbroad regulation may be saved by a limiting construction "that removes the threat to constitutionally protect speech . . . . [but] cannot be supplied unless an ordinance is readily susceptible to such an interpretation.") (internal citations and quotations omitted).

II. THE VIOLATION OF PLAINTIFFS' FIRST AMENDMENT RIGHTS INFLICTS IRREPARABLE HARM.

"It is well-established that '[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Powell v.*

Noble, 798 F.3d 690, 702 (8th Cir. 2015) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

III. THE BALANCE OF EQUITIES, AND THE PUBLIC INTEREST, FAVOR PLAINTIFFS.

"The remote chance" that Defendants might later prevail "cannot be held sufficient to overcome the public's interest in protecting freedom of expression under the First Amendment [as] it is always in the public interest to protect constitutional rights[,] and [t]he balance of equities . . . generally favors the constitutionally-protected freedom of expression." *Rodgers v. Bryant*, 942 F.3d 451, 458 (8th Cir. 2019) (internal quotation marks omitted).

IV. THE COURT SHOULD NOT REQUIRE PLAINTIFFS TO POST A BOND.

Although Fed. R. Civ. P. 65(c) requires the Court to set a bond as a condition of issuing a preliminary injunction, the "amount of the bond rests within the sound discretion of the trial court." *Richland/Wilkin Joint Power Auth v. United States Army Corps of Eng'rs*, 826 F.3d 1030, 1043 (8th Cir. 2016) (citation omitted). Courts have used this discretion to set the amount at zero, dispensing with the bond entirely "where the damages resulting from a wrongful issuance of an injunction have not been shown." *Id.* "[I]t [i]s permissible for the district court to waive the bond requirement based on its evaluation of public interest in [a] specific case." *Id.*

Plaintiffs would not ordinarily be required to post a bond as a condition of exercising their fundamental First Amendment rights. Nor would the district be damaged merely by being required to allow Plaintiff's speech and dispense with its unconstitutional "advertising" speech prohibition. Accordingly, the Court should not require the posting of a bond.

CONCLUSION

Plaintiffs' motion for preliminary injunction should be granted.

Dated: February 14, 2022

Respectfully submitted,

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