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

CHRISTOPHER BROOKS, KEN GONTARZ, and KATHERINE RASH, Plaintiffs, vs. FRANCIS HOWELL SCHOOL DISTRICT, et al., Defendants.	)	Case No. 4:22-cv-00169-SRC

DEFENDANTS' MEMORANDUM IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

Defendants Francis Howell School District (the "District"); Mary Lange, Michael Hoehn, Janet Stiglich, Patrick Lane, Chad Lange, Doug Ziegemeier, and Michelle Walker (collectively, the "Board"); and Nathan Hoven (collectively, "Defendants"), by and through their counsel of record, submit the following for their Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction.

Introduction

The District is a public school district organized under the laws of the State of Missouri. Its Board of Education holds monthly regular meetings wherein the Board considers, conducts, and votes upon matters related to the operations and governance of the District. Though not legally required, the Board sets aside approximately thirty minutes of each meeting for patron comments by District residents for the express goal of giving the Board "the opportunity to listen to citizens" (District Policy 0412, Document 4-14, p. 2), and it has held true to this purpose. The allegation that Defendants imposed restrictions on Plaintiffs because they often vigorously express viewpoints in opposition to Board decisions simply holds no water. Plaintiffs, and numerous others, regularly voice views highly critical of the District and the Board during patron comments,

and—as Plaintiffs candidly state in the Complaint—have continued to do so even after the Defendants' alleged "silencing" of Plaintiffs' viewpoints.[1] (*See* Document 1, p. 5, 7-8, 11). Receiving such criticism falls within the Board's rationale for permitting patron comments in the first place, but the District is not obligated to subsidize the solicitation or advertisement of fundraising efforts of a political action committee which, by its very nature, exists for the purpose of soliciting monetary contributions to fund its political campaigning. As the parties agree that a limited public forum (a/k/a "nonpublic" forum)[2] exists in this case (Document 4, p. 6), the Board is entitled to enforce reasonable and viewpoint-neutral speech restrictions that serve the purpose of the patron comments section—for citizens to address and inform the Board on school district matters. Here, these restrictions primarily arise from Board Policies 1471 and 1455. (*See* Documents 4-5 and 4-6).

Plaintiffs are all current or former members of Francis Howell Families ("FHF"). (Document 4, p. 2). FHF is a political action committee that was formed in or around July of 2021. *Id*.; *see also* Defendants' Exhibit 4. As previously stated, the fundamental nature of a political action committee is to raise and distribute funds for political campaigns, and FHF is no exception. Almost immediately after its formation, it began selling FHF t-shirts on District property immediately prior to Board meetings. (Document 4, p. 2). Despite the characterization of the FHF

[1] *See e.g*, Jun. 17, 2021 Meeting, https://bit.ly/3pJKqeD at 11:22-17:45 (**Plaintiff Gontarz and Vivian Gontarz criticizing District's purported critical race theory curricula**), 38:06-41:01 (**Plaintiff Brooks criticizing District's Black History curriculum**); Nov. 18, 2021 Meeting, https://bit.ly/3CnEpJv at 30:38-33:37 (apparent FHF member opposing District's "equity" and "anti-racism" statement), 39:57-42:54 (**Plaintiff Gontarz criticizing the District's purported critical race theory position as "disingenuous," "uninformed," and "dishonest"**); Dec. 16, 2021 Meeting, https://bit.ly/34jQinh at 26:39-29:45 (**Plaintiff Brooks accusing the District of misrepresenting construction project costs**), 42:56-45:44 (District parent criticizing District mask mandates and quarantine procedures as "child abuse" and "illegal"); Jan. 20, 2022 Meeting, https://bit.ly/35RJduG at 26:37-29:36 (**FHF member Vivian Gontarz criticizing District book challenge procedures and calling for book restrictions**), 32:39-35:37 (District parent again challenging District mask mandate as "cruel," "child abuse," and "illegal" and District COVID reports as "hearsay" and unreliable).

[2] *Victory Through Jesus Sports Ministry Found. v. Lee's Summit R-7 Sch. Dist.*, 640 F.3d 329, 334-35 (8th Cir. 2011).

website as a "repository of information about matters concerning district policy and school board actions," the most prominent feature one encounters when accessing the website's main page is FHF's "Donate" link. Declaration of Mary Lange (Defendants' Exhibit 5), ¶ 16; Francis Howell Families Website (Defendants' Exhibit 2). While the patron comments sections of the Board's meetings are one channel by which District constituents air their grievances to the Board, they are not platforms for the solicitation of monetary funds for organizations whose fundamental function is make such solicitations, no matter how ostensibly guised as informational resources. Moreover, there exist meaningful alternative forms of communication for Plaintiffs and others to provide informational resources and references to the Board if indeed the true intent is to fully petition or inform the Board. Accordingly, the District applied and enforced Policies 1471 and 1455 to (1) prohibit the sale of FHF t-shirts on District property in or around September of 2021; (2) give notice that FHF website references during patron comments on or about October 21, 2021 violated District policies; and (3) prohibit reference to the FHF website during patron comments on November 18, 2021.[3] (*See* Document 1, p. 6, 8-10; Document 4, p. 2-3). Plaintiffs now seek a preliminary injunction on the grounds that Defendants allegedly engaged in the selective enforcement of Policies 1471 and 1455 against Plaintiffs because their views ran contrary to the Board/District's, and/or because Policies 1471 and 1455 are facially unconstitutional.

Legal Standard

The granting of a preliminary injunction is an "extraordinary remedy," and the movant bears the burden of establishing the propriety of an injunction. *Watkins Inc. v. Lewis*, 346 F.3d 841, 844 (8th Cir. 2003). In deciding a motion for a preliminary injunction, the district court

[3] That the Board did not initially restrain Plaintiffs from their first advertisement of FHF and its website during the August 19, 2021 meeting, does not prejudice its ability to subsequently enforce its policies. "Past actions do not 'forever taint any effort [by a government entity] to deal with the subject matter.'" *Roark v. S. Iron R-1 Sch. Dist.*, 573 F.3d 556, 564 (8th Cir. 2009) (quoting *McCreary County v. ACLU*, 545 U.S. 844, 874 (2005)) (substitution in original).

evaluates: "(1) the likelihood of the movant's success on the merits; (2) the threat of irreparable harm to the movant in the absence of relief; (3) the balance between that harm and the harm that the relief would cause to the other litigants; and (4) the public interest." *Id*. The "likelihood of success on the merits" standard is a question of whether the movant has a "fair chance of prevailing" after discovery and a full trial. *Planned Parenthood Minn. v. Rounds*, 467 F.3d 716, 721 (8th Cir. 2006). However, in weighing the factors, "no single factor is determinative." *Dataphase Sys. v. C L Sys.*, 640 F.2d 109, 113 (8th Cir. 1981) (en banc). "[A] preliminary injunction does not follow as a matter of course from a plaintiff's showing of a likelihood of success on the merits, even in First Amendment cases, and the district court must still consider the other factors …." *Rodgers v. Bryant*, 942 F.3d 451, 466 (8th Cir. 2019) (internal citations and quotations omitted). The adjudication of a motion for preliminary injunction is subject to review for abuse of discretion. *Watkins Inc.*, 346 F.3d at 841.

Argument

I. LIKELIHOOD OF SUCCESS ON THE MERITS

A. The District's application of Board Policy does not violate the Free Speech Clause.

i. Board Policies 1471 and 1455.

Except as otherwise allowed by the Policy itself or its corresponding Regulation 1471, Policy 1471 prohibits "advertisement"[4] on District property. (Document 4-6, p. 2). Policy 1455 provides that "[p]artisan political campaign materials shall not be distributed to students or patrons or posted within a District facility, except for appropriate educational use in the classroom." (Document 4-5, p. 2).

[4] "Advertisement" includes "in-person solicitation; signage; verbal announcements using communication equipment; pamphlets; handouts; distribution through District technology; other distribution of information regarding products or services available or for sale; or the solicitation of information including, but not limited to, political campaigning."

ii. Nature of the Forum.[5]

"The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983). Again, here the parties agree that the Court is presented with a limited public/nonpublic forum. (Document 4, p. 6). Such a forum may be "limited to use by certain groups," "dedicated solely to the discussion of certain subjects," and/or subject to "restrictions on speech that are reasonable and viewpoint-neutral." *Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009).

iii. Reasonableness.

Restrictions in a limited public forum must be "reasonable in light of the purpose which the forum at issue serves." *Perry*, 460 U.S. at 49. However, the restriction "need not be the most reasonable or the only reasonable limitation." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 808 (1985). The existence of "substantial alternative channels" further supports a finding of reasonableness. *Victory Through Jesus Sports Ministry Found.*, 640 F.3d at 335. Here, the patron comments section of Board meetings was created for the sole purpose of allowing the Board to hear from its citizens regarding matters of district operations and governance under Policy 0412. (Document 4-14, p. 2). In light of this purpose, Policies 1471 and 1455 both present reasonable restrictions that prevent patron comments from being co-opted for the solicitation of funds or District property from being appropriated for the general sale of products. Substantial alternative channels of communication exist—Plaintiffs and others can provide all of their sources in handouts submitted to the Board during patron comments or in correspondences to the Board outside of

[5] To the extent that Plaintiffs claim that the District's prohibition on the sale of FHF t-shirts on District property immediately before school board meetings constituted viewpoint discrimination, Plaintiffs have failed to show the existence of a public forum at all. *See generally*, *United States v. Grace*, 461 U.S. 171, 178 (1983) (publicly owned property does not become a "public forum" merely because the public is permitted to come and go from said property).

meetings if they feel doing so is necessary to fully inform and petition the Board. *See* Declaration of Mary Lange (Defendants' Exhibit 5), ¶¶ 6-7; Jun. 17, 2021 Meeting, https://bit.ly/3pJKqeD at 40:55-41:01 (Plaintiff Brooks submits full position document to the Board via handout); Document 1, p. 8. "The First Amendment does not demand unrestricted access to a nonpublic forum merely because use of that forum may be the most efficient means of delivering the speaker's message." *Cornelius*, 473 U.S. at 809.

iv. Viewpoint Neutrality.

Viewpoint discrimination occurs where the rationale behind government regulation of speech is "the specific motivating ideology or the opinion or perspective of the speaker." *Gerlich v. Leath*, 861 F.3d 697, 707 (8th Cir. 2017). "Control over access to a nonpublic forum [a/k/a limited public forum] may be based on the subject matter of the speech, **on the identity or status of the speaker**, or on the practical need to restrict access for reasons of manageability or the lack of resources to meet total demand." *Victory*, 640 F.3d at 355 (**in a limited public forum, the school district's granting of preferred access to organizations with longtime ties to the local community or strong reciprocal ties to the district did not constitute viewpoint discrimination**) (emphasis added); *see also Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46-55 (1983) (granting exclusive bargaining representative for school district teachers exclusive access to the district's limited public forum was constitutional). Defendants again note that Plaintiffs and other patrons have been allowed to continue to vocally criticize District policy and decisions during patron comments—their viewpoints/ideology/opinion/perspective regarding matters such as critical race theory or the appropriateness of schoolbooks are plainly not at issue. *See* Note 1. Plaintiffs nonetheless insist that the District engaged in viewpoint discrimination

because it allows similar references to and speech by other organizations and patrons, but this is not accurate.

a. *Citizens for Francis Howell* ("CFFH"):

Plaintiffs contend that the District applies Policies 1471 and 1455 to censor disfavored views while letting Plaintiffs' "favored opponents" speak freely, pointing to CFFH. (Document 4, p. 10). First of all, while CFFH is also a form of political action committee, Plaintiffs have not established any speech by CFFH in a Board meeting. *See id*. Rather, they cite statements by the District and the Board merely thanking CFFH for its part in securing a bond issue for the District. Aug. 20, 2020 Meeting, https://bit.ly/3MFnEP0 at 3:53-5:21; 57:41. Notably, these statements occurred outside of the patron comments in sections of the Board meeting that were not open for comment by the citizenry. *Id*. This was Board/District speech at the Board's own meeting. Moreover, no one was directed to CFFH's website or otherwise called on to support the organization. *Id*. Even if the speech could have directed a listener to CFFH's website, there is no reasonable argument that the purpose would be for collecting donations to support the bond issue: the Court can judicially notice[6] that the bond election in question occurred at the June 2020 election, and the Complaint recites that the speech expressing gratitude to CFFH occurred at the Aug. 20, 2020 Board meeting (Document 1, p. 9). Finally, even if CFFH had made the statements in question, the District is permitted to have policies that grant preferred access to a limited public forum to speakers on the basis of their status. *Victory*, 640 F.3d at 355. Unlike FHF, CFFH has existed for nearly five years and is explicitly dedicated to supporting the District and raising awareness of the District's facility needs. (*See* Document 4-15, p. 2; Defendants' Exhibit 3).

[6] Election results from the St. Charles County election authority, showing the passage of Proposition S are available at https://www.sccmo.org/Archive.aspx?ADID=4220.

Additionally, Board Regulation 1471, by operation of its language, allows District affiliated groups[7] to advertise in District forums. (Defendants' Exhibit 1).

b. *Missouri School Boards Association* ("MSBA"):

MSBA is statewide association created by § 162.011, RSMo, that is comprised of various public school boards who have, as political subdivisions of the State, determined and declared it to be in the public interest to join said association. Declaration of Mary Lange (Defendants' Exhibit 5), ¶ 9. The District is a member of MSBA and specifically authorized to join MSBA under Missouri law. *Id*. at ¶ 10. As a MSBA member, the Board views MSBA videos, *directed to the Board*, containing information regarding relevant school-related issues in the course of conducting its business during regular meetings.[8] At most, this is speech by the Board itself, plainly distinguishable from Plaintiffs' attempts to solicit monetary contributions from patrons via the FHF website during meetings. Perhaps most importantly, all Plaintiffs' cited instances of supposed "promotion" of MSBA consist of the Board's presentation of these videos in a separate agenda item ("Reports") outside of patron comments. (*See* Note 6; Document 1, p. 10-11; Document 4, p. 5-6). Even disregarding the foregoing factors, MSBA's special relationship with the District would warrant preferred access to a limited public forum and qualify it as a District-affiliated group under Regulation 1471. (Defendants' Exhibit 1).

c. *NIH, St. Charles County, and Board Websites:*

Plaintiffs complain that patrons are allowed to reference various government websites in addressing the Board while being restricted from referencing websites such as FHF's. (*See*

[7] A group "recognized by the Board and 1) is working collaboratively with the District, such as a business partner, or 2) is a group that is created solely to work with the District, its staff, students and parents and to raise funds for District activities …."

[8] Feb. 18, 2021 Meeting, https://bit.ly/34lw0Kj at 22:45-29:25; Mar. 18 Meeting, https://bit.ly/3tyr3q8 at 35:05-41:02; Jun. 17, 2021 Meeting, https://bit.ly/3pJKqeD at 45:50-53:03; Nov. 18, 2021 Meeting, https://bit.ly/3CnEpJv, 53:20-57:40; Dec. 16, 2021 Meeting, https://bit.ly/34jQinh at 58:58-1:03:38; Jan. 20, 2022 Meeting, https://bit.ly/35RJduG at 53:10—59:14.

Document 1, p. 9-10). However, none of the government websites Plaintiffs refer to solicit monetary funds for political campaigning purposes, nor were they invoked in such a manner during Board meetings.[9] *See id*. Referencing these websites is simply not comparable to referencing a political action committee or website whose very purpose is to solicit contributions to support a political candidate or political cause.

d. *Francis Howell Education Association* ("FHEA")

The FHEA is the officially recognized exclusive bargaining representative for District teachers, and is exclusively authorized to represent and speak on behalf of the District's teachers on matters regarding salary, benefits and working conditions. Declaration of Mary Lange (Defendants' Exhibit 5), ¶ 11. Due to its organizational status, FHEA has its own separate agenda item through which it can address the Board. FHEA does not have its own website, but does maintain accounts on Facebook and Twitter.[10] Neither of these accounts, however, solicit monetary funds. *See id*.

1. *May 20, 2021 Meeting*:

As suggested in the Complaint, the patron was not a FHEA member himself and explicitly called upon the Board to support FHEA. May 20, 2021 Meeting, https://bit.ly/3ISd4lp at 27:09-30:18; *see also* Document 1, p. 6. Moreover, the patron did not refer to or promote any FHEA website. *See id*.

2. *November 18, 2021 Meeting*:

[9] NIH, https://www.nih.gov/, accessed March 7, 2022; St. Charles County, Missouri Dashboard, https://www.sccmo.org/2105/COVID-19, accessed March 7, 2022; FHSD https://www.fhsdschools.org/, accessed March 7, 2022; FHSD Board eGovernance, https://go.boarddocs.com/mo/fhsdmo/Board.nsf/Public, accessed March 7, 2022.

[10] *See* FHEA Facebook, https://www.facebook.com/FrancisHowellEA, accessed March 7, 2022; FHEA Twitter, https://twitter.com/wearefhea, accessed March 7, 2022.

Here, the patron in question directly called upon the Board to repair its relationship with FHEA and did not promote or reference any FHEA website. Nov. 18, 2021 Meeting, https://bit.ly/3CnEpJv at 47:29-47:40.

3. *December 16, 2021 Meeting*:

Here, the patron criticized the Board for disrespecting the FHEA. Dec. 16, 2021 Meeting, https://bit.ly/34jQinh at 41:31-42:23. This patron also did not promote or reference any FHEA website. *See id.*

The remaining FHEA references Plaintiffs point to as proof of viewpoint discrimination, including the FHEA president's reference to a future GoFundMe account, occurred outside of the patron comments section reserved for speech by District residents.[11] (*See* Document 1, p. 6-7; Document 4, p. 5). Furthermore, like CFFH and MSBA, FHEA's dedicated portion of the Board's meetings and speaking privileges are warranted by its unique relationship with the District and its status as a District affiliated group under Regulation 1471. (Defendants' Exhibit 1).

e. *Black Voices Matter* ("BMV"):

Here, the patron referencing BMV during the Board's September 16, 2021 meeting merely noted that the organization had held a march for equality. Sep. 16, 2021, https://bit.ly/3sNpXYc at 1:07:57-1:08:26. The patron did not promote BMV's website nor solicit funds, and—as Plaintiffs note—was addressing the Board/District. *See id.*; Document 4, p. 5.

f. *FNHtoday.com:*

FNHtoday.com is the District's own student news website and is plainly affiliated with the District under Regulation 1471. Dec. 16, 2021 Meeting, https://bit.ly/34jQinh, at 8:03-11:49; *see also* Defendants' Exhibit 1; https://fhntoday.com/about-us/, accessed March 7, 2022. As admitted

[11] May 20, 2021 Meeting, https://bit.ly/3ISd4lp at 43:03-45:41; Jun. 3, 2021 Meeting, https://bit.ly/3sMT0uT at 23:16-25:45; Jun. 17, 2021 Meeting, https://bit.ly/3pJKqeD at 41:13-44:36.

by Plaintiffs, the Board itself gave recognition to the website for achievements during the recognition section of the Board meeting, not patron comments. Dec. 16, 2021 Meeting, https://bit.ly/34jQinh, at 8:03-11:49. Again, this was Board speech at the Board's own meeting. This instance is further distinguished by the fact that FNHtoday.com's website does not solicit monetary funds, nor are such solicitations a core aspect of its organizational function. *See* https://fhntoday.com/, accessed March 7, 2022.

In light of the above, Plaintiffs' reliance on *Gerlich, Bus. Leaders in Christ, and Intervarsity Christian Fellowship* is plainly misplaced in that here FHF and its solicitations are organizationally distinct from the organizations and statements that Plaintiffs claim are comparable.

B. The District's application of Board Policy does not violate the Petitions Clause.

As noted by Plaintiffs, the right to petition contemplates the ability of 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) (emphasis added). Plaintiffs' assertion that the Board's advertisement and political campaigning restrictions impede their ability to effectively petition the Board for redress of their grievances simply does not pass muster. As previously noted, Plaintiffs and others have continued to express strong criticisms and opposition to various Board decisions and policies without being interrupted—it is clearly not dissenting or critical viewpoints to which the District takes exception. *See* Note 1. There are again alternative channels of communication through which Plaintiffs can fully lay out their positions and sources to the Board. Declaration of Mary Lange (Defendants' Exhibit 5), ¶¶ 6-7. As demonstrated above, the Board's restrictions are both reasonable in light of the purpose of the patron comments section and viewpoint neutral. Accordingly, Plaintiffs have failed to sufficiently demonstrate the existence of a violation of the Petitions Clause of the First Amendment.

C. Policy's 1471 and 1455 are not unduly vague.

In order to facially invalidate a speech statute or regulation for vagueness, a plaintiff must demonstrate that it is impermissibly vague in a substantial number of cases in which it could apply. *United States v. Warsame*, 537 F. Supp. 2d 1005, 1020 (D. Minn. 2008) (citing *United States v. Marzook*, 383 F. Supp. 2d 1056, 1066 (N.D. Ill. 2005). The mere fact that a statute or regulation requires interpretation or provides discretion to public officials does not make it vague. *Minn. Majority v. Mansky*, 789 F. Supp. 2d 1112, 1126 (D. Minn. 2011) (reversed in part on other grounds) (citing *Ridley v. Mass. Bay Trans. Auth.*, 390 F.3d 65, 93 (1st Cir. 2004). Only where the statute or regulation "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or "encourages arbitrary and discriminatory enforcement" is it unconstitutionally vague. *Hill v. Colorado*, 530 U.S. 703, 732 (2000). However, "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism*, 491 U.S. 781, 794, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989).[12] Indeed, the Eighth Circuit has recognized that "a school has latitude and discretion in its formulation of rules and regulations and of general standards of conduct"—"meticulous specificity" is not required; "flexibility and reasonable breadth" are sufficient.[13] *Esteban v. Cent. Mo. State Coll.*, 415 F.2d 1077, 1088 (8th Cir. 1969).

[12] Courts do not require "mathematical certainty" in the expression of language, even in the context of the First Amendment's speech protections. *Duhe v. City of Little Rock*, 902 F.3d 858, 863 (8th Cir. 2018).

[13] Other circuits have also noted that schools present a unique context where broad discretion can be granted to school officials under policy without being considered unconstitutionally vague. *See generally*, *Hirt v. Unified Sch. Dist. No. 287*, No. 2:17-CV-02279-HLT, 2019 U.S. Dist. LEXIS 70477, at *32-33 (D. Kan. Apr. 24, 2019) (while school access policy could be interpreted to prohibit a vast array of conduct, discretion for officials was necessary in the school context and district was not constitutionally required to produce an itemized list of situations "disruptive" or "disturbing" to school functions); *Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 50 (10th Cir. 2013); *Brandt v. Bd. of Educ. of Chi.*, 480 F.3d 460, 467 (7th Cir. 2007) (policy prohibiting "inappropriate" attire was an appropriately broad limit on school official discretion).

Here, Plaintiffs have failed to show that either Policy 1471 or 1455 is unconstitutionally vague in a substantial number of situations where they could be applied. Defendants would submit that the term "partisan political campaign materials," and certainly the word "advertisement," are commonly understood terms that are sufficiently comprehensible to an ordinary person exercising his common sense. *See e.g., Green v. Anthony Clark Int'l Ins. Brokers, Ltd.*, No. 09 C 1541, 2010 U.S. Dist. LEXIS 8744, at *13-15 (N.D. Ill. Feb. 1, 2010) (lack of statutory definitions for "advertising" and "advertisement" did not render statute unconstitutionally vague because the terms were "commonly understood words"). Moreover, Policy 1471 does provide guidance in interpreting for "advertisements"—"in-person solicitation; signage; verbal announcements using communication equipment; pamphlets; handouts; distribution through District technology; other distribution of information regarding products or services available or for sale; or the solicitation of information including, but not limited to, political campaigning." (Document 4-6, p. 2). It is not difficult to see how a political action committee's members soliciting monetary contributions by promoting their organization and its website would be violative of the District's "advertisement" policy, particularly in patron comments meant to allow citizens to communicate with the Board. It is equally plain that selling political action committee t-shirts or promoting a website that prominently solicits political campaigning funds would run afoul of Policy 1455's prohibition on the distribution of "partisan political campaigning materials." These acts stand in stark contrast to the mere referencing of non-solicitous organizations or government resources by other patrons.[14] They are also plainly distinguishable from the Board's own speech at meetings. Finally, Policies 1471 and 1455 have many applications beyond the patron comments section of District Board

[14] As previously noted, District affiliated groups such as FHEA or MSBA do not speak during patron comments and are permitted under District Regulation 1471 to advertise on District property. Again, this granting of preferred access to a limited public forum does not constitute viewpoint discrimination. *Victory*, 640 F.3d at 355.

meetings that Plaintiffs have neither alleged nor demonstrated are unconstitutional. Accordingly, facial invalidation of these policies in their entirety would be excessive, not to mention highly disruptive of District operations.

D. Policy's 1471 and 1455 are not overbroad.

Facial overbreadth challenges to restrictions on speech are granted "sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). Indeed, they are disfavored. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008). In order to proceed on a facial overbreadth challenge, a plaintiff must show "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the [c]ourt." *Jacobsen v. Howard*, 109 F.3d 1268, 1274 (8th Cir. 1997) (quoting *Bd. of Airport Comm'rs of L.A. v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987)). "It is inappropriate to entertain a facial overbreadth challenge when the plaintiff fails to adduce any evidence that third parties will be affected in any manner differently from herself." *Havlak v. Vill. of Twin Oaks (In re Josephine Havlak Photographer, Inc.)*, 864 F.3d 905, 912 (8th Cir. 2017). Here, Plaintiffs merely reiterate their complaints regarding the District's application of Policies 1471 and 1455 as opposed to explaining how said policies are supposedly overbroad on their face or would affect the rights of any third parties differently. The Court should therefore reject their facial overbreadth challenge. Defendants again repeat that Policies 1471 and 1455 have many applications beyond the specific circumstances raised here and complete facial invalidation has not been shown to be warranted.

II. PLAINTIFFS HAVE NOT DEMONSTRATED IRREPARABLE HARM

As Plaintiffs have not fulfilled their burden to establish a sufficient likelihood of a Constitutional violation, they cannot demonstrate any irreparable harm arising from the same. Admittedly, Plaintiffs can continue to vigorously criticize District policy and decisions, and they

have substantial alternative channels of communication with which to convey the restricted speech at issue to the Board.

III. THE BALANCE OF EQUITIES AND PUBLIC INTEREST FAVOR DEFENDANTS

As demonstrated above, Plaintiffs' have not shown a fair chance of prevailing on the merits in this matter nor irreparable harm in the absence of relief. Accordingly, the balance of equities under the specific facts of this case weigh against the extraordinary remedy of a preliminary injunction that would restrict the Board's legitimate, legal authority to exercise control over the patron comments section of its own meetings.

IV. THE COURT SHOULD REQUIRE BOND UNDER FED. R. CIV. P. 65(C)

Rule 65(c)'s mandate is unequivocal—"[t]he court may issue a preliminary injunction …**only if the movant gives security**…." (Emphasis added). Plaintiffs' own cited case law acknowledges that the courts of the Eighth Circuit have "almost always required a bond before issuing a preliminary injunction." *Richland/Wilkin Joint Powers Auth. v. United States Army Corps of Eng'rs*, 826 F.3d 1030, 1043 (8th Cir. 2016).[15] Accordingly, Plaintiffs should be required to post bond in an amount the Court considers proper.

Conclusion

Plaintiffs' Motion for Preliminary Injunction wholly fails to demonstrate that Plaintiffs are likely to prevail on the merits, that Plaintiffs will be irreparably harmed, or that the balance of equities favors Plaintiffs. For all of the reasons above, the Court should deny Plaintiffs' Motion for Preliminary Injunction.

[15] Indeed, there are sound policy reasons for doing so. "[T]he defendant who has been wrongfully enjoined has no recourse for damages in the absence of a bond." *Interbake Foods, L.L.C. v. Tomasiello*, 461 F. Supp. 2d 943, 979 (N.D. Iowa 2006) (citations omitted). Additionally, "because a preliminary injunction proceeding is both expedited, resulting in only provisional findings of fact, and interlocutory, there is a higher chance that the district court will err in granting the preliminary injunction." *Id.* (citations omitted).

Respectfully submitted,

EDCOUNSEL, LLC

By: /s/ *Matthew D. Wilson*

J. Drew Marriott, #63059
dmarriott@edcounsel.law
Matthew D. Wilson #59966
mwilson@edcounsel.law
2833B E. Battlefield St., Ste. 100
Springfield, Missouri 65804
(417) 755-7190
(855) 876-4740 (facsimile)
ATTORNEYS FOR DEFENDANTS

Dated: March 7, 2022