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-SRC

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION

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REPLY ARGUMENT

Plaintiffs Ken Gontarz, Katherine Rash, and Christopher Brooks submit the following reply to Defendants' response memorandum:

1. Francis Howell Families is the only group whose name may not be spoken at school board meetings.

Throughout their response memorandum, Defendants expend a lot of effort attempting to distinguish FHF from other organizations listed in Plaintiffs' brief. Yet all these organizations are permitted to do something that FHF supporters aren't allowed to: say their name out loud.

Defendants have banned the words "Francis Howell Families" from being uttered at Board meetings. Indeed, it seems that the Francis Howell Board of Education has operationalized its own version of the "Voldemort Rule."[1]

Defendant Lange made clear that any reference to Francis Howell Families would result in the termination of speech rights:

> At future board meetings, if any speakers reference Francis Howell Families or the website, they will immediately be stopped and will forfeit the remainder of their time. They may also be prohibited from future opportunities to speak during patron comments.

ECF No. 4-7 at 2.

But Defendants have allowed the names of other groups, such as the Missouri School Board Association, Associated General Contractors of America, Francis Howell Education Association, Safe and Sound Schools, Black Voices Matter, Good Jobs First, and the Citizens for Francis Howell PAC all to be uttered aloud during

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[1] In the Harry Potter universe, a taboo condemns mentioning the evil wizard Voldemort by name. *See, e.g.,* J.K. Rowling, HARRY POTTER AND THE CHAMBER OF SECRETS 15 (1999) ("'Harry Potter speaks not of his triumph over He-Who-Must-Not-Be-Named—' 'Voldemort?' said Harry. . . . 'Ah, speak not the name, sir! Speak not the name!' 'Sorry,' said Harry quickly. 'I know lots of people don't like it . . . .'").

Board meetings without interference or incident. ECF No. 4 at 10, 11; ECF No. 4-1 at ¶ 11; FHSD, December 16, 2021 Meeting, https://bit.ly/35xkiwk, 29:04–29:16; ECF No. 4-2 at ¶¶ 18, 22; FHSD, June 17, 2021 Meeting, https://bit.ly/3G7GxFO, 48:26–50:23; FHSD, January 20, 2022 Meeting, https://bit.ly/3r4zCZE, 56:00–57:54. The FHEA, although ostensibly subject to the same rules as other patrons, has even been allowed to have one of its speakers accompanied by a group of sign wavers prominently bearing the name "FHEA." Rash Supp. Decl., ¶ 3; FHSD, February 4, 2021 Meeting, https://bit.ly/3IcABMx, 37:16–41:45.

2. Plaintiffs mischaracterize Plaintiffs' speech as fundraising, while Plaintiffs merely wish to promote their ideas about school policies on equal terms.

Defendants apparently hope to distract the Court from their unique prohibition on anyone referencing Francis Howell Families by repeatedly claiming that any reference to Francis Howell Families constitutes fundraising. But an examination of the video record shows that this claim is misleading. Plaintiffs promoted their viewpoints about district policies and never requested donations during speeches.[2] Rash Supp. Decl., ¶¶ 6, 8, 10; FHSD, August 19, 2021 Meeting, https://bit.ly/3gbIR3L, 26:03–26:30; FHSD, October 21, 2021 Meeting, https://bit.ly/3t76t18, 42:55–43:13; Brooks Supp. Decl., ¶¶ 3, 4; FHSD, November 18, 2021 Meeting, https://bit.ly/3AFzItU, 22:50–23:16; Gontarz Supp. Decl., ¶¶ 5, 11; August 19, 2021 Meeting, at 19:51–20:15; October 21, 2021 Meeting, at 39:03–39:29. In fact, the FHEA is apparently the *only* organization that has fundraised in

[2] Although Defendants suggest that a PAC's primary purpose, the very reason it exists, must be to solicit funds, Missouri law does not define a PAC in such a restrictive way. ECF No. 16 at 2. Under Missouri law, receiving contributions may merely be an incidental purpose of a PAC. § 130.011(10) R.S.Mo. Indeed, at the time of the speeches in question, no school board candidates had filed yet. Gontarz Supp. Decl., ¶ 13.

speeches during Board meetings when they promoted a GoFundMe link for their diversity book drive. ECF No. 4-3 at ¶ 33; FHSD, May 20, 2021 Meeting, https://bit.ly/3eUDfKF, 45:24–45:41.

Conversely, Plaintiffs mentioned FHF in the context of discussing their viewpoints about critical race theory, over-sexualized books available to children in schools, and First Amendment violations present in district policy. ECF No. 4-1 at ¶¶ 7, 8; FHSD, November 18, 2021 Meeting, https://bit.ly/3AFzItU, 22:50–23:16; ECF No. 4-2 at ¶ 12; FHSD, October 21, 2021 Meeting, https://bit.ly/3t76t18, 39:03–39:29; ECF No. 4-3 at ¶ 15. October 21, 2021 Meeting, at 43:09–43:13. Defendants have not pointed to one example of Plaintiffs fundraising during patron comment, as the FHEA explicitly did, with the Board's tacit approval.

3. The Board is not the only audience at a public school-board meeting.

Defendants err in claiming that all speech presented during a school board meeting is directed to the Board. The nature of such meetings, consistent with their purpose to foster public discourse, make it evident that the Board is not the only audience. Patrons speak on subjects that are easily recognizable as rebuttals and responses to statements made by other audience members with differing views. Gontarz Supp. Decl., ¶ 12; October 21, 2021 Meeting, at 58:23–58:39 (speaker addresses anti-mask policy audience members); Brooks Supp. Decl., ¶ 5; FHSD, November 18, 2021 Meeting, at 38:56–39:13 (speaker addresses conservative audience members).

School board meetings are conducted in front of a live audience and livestreamed for those not physically present. FHSD's website also directs people to its YouTube channel where years' worth of board meetings are publicly available for anyone to watch. If speech was only directed at the Board, there would be little reason to play MSBA videos, and FHEA would have no reason to promote its diversity book drive.

After all, the Board clearly knows where the MSBA videos are. They could watch them outside of board meetings, and FHEA could submit a written comment to the Board announcing its book drive. These forms of speech occur because the people who attend board meetings, and those who may watch online, are also the intended audience along with the school board.

Acknowledging this obvious reality, the court in *Teufel v. Princeton City Sch. Dis. Bd. of Educ.* recognized that "the intended audience of those participating and speaking at a [school board] meeting is not isolated to district personnel." No. 1:12-cv-355, 2013 U.S. Dist. LEXIS 4923, *1, *43 (S.D. Ohio Jan. 11, 2013); *see also Cyr v. Addison Rutland Supervisory Union,* 60 F. Supp. 3d 536, 549-50 (D. Vt. 2014) (citing *Teufel* and holding that telephonic participation at a school board meeting was constitutionally inadequate considering the nature of school board meetings). As a result, alternative channels of communication, such as emails and phone calls, are insufficient if the speaker is unable to reach his or her intended audience. *Teufel*, 2013 U.S. Dist. LEXIS 4923. at *43.

Moreover, physical participation in a school board meeting is a form of local governance protected by Plaintiffs' First Amendment rights to free expression. *Cyr,* 60 F. Supp. at 550. And in-person speech at a school board meeting may have a different effect on elected officials and community members than other forms of communication. *Id.* at 549. Indeed, thinkers at least as far back as Ancient Rome have noted the value of speech and rhetoric in public life. *See generally* Cicero, DE ORATORE (55 BCE).

Defendants have hung their argument on the incorrect notion that Plaintiffs have no right utter "Francis Howell Families" at Board meetings because Plaintiffs' audience is allegedly limited to the board itself. That simply is not true, and other organizations' audiences at the same meetings clearly include non-school-board

members. Plaintiffs and other FHF supporters are legally entitled to promote their views about school policy on equal terms to any other speaker, regardless of viewpoint.

4. Policies 1455 and 1471 apply to all district property including outside of patron comment.

Policy 1455 prohibits the distribution or posting of "partisan political campaign materials" within a District facility. ECF No. 4-5. Likewise, Policy 1471 prohibits "advertisement" on District property. ECF No. 4-6. Both policies make clear that that they apply to *all* District property.

Defendants take great lengths in their response memorandum to point out when speech occurred outside of patron comment, yet nothing limits the reach of Policies 1455 or 1471 to patron comments. Indeed, Defendants have indirectly illustrated that the application of these policies to Francis Howell Families is selective and inconsistent with the very terms of those policies.

Defendants claim that FHEA possesses special access rights for speech at school board meetings, such as fundraising for their diversity book drive, because the comments occur outside of patron comment. ECF No. 16 at 10. But the Board specifies that all FHEA and FHESPA comments must follow the same procedure as those speaking during patron comment, which includes following "other Board policies that apply to Board meetings, including but not limited to: 1431 – Code of Conduct for Adults; 1455 – Distribution of Materials; and 1471 – Public Solicitation/Advertising in District Facilities." Gontarz Supp. Decl., ¶¶ 2, 3; Exs. M, N. Thus, Defendants' argument that the FHEA's comments are different than patron comments is contradicted by their own stated practice and policy of allegedly subjecting FHEA speech to the same rules as patron comments.

And unlike FHF, these two organizations are allowed to state their names at school board meetings (and, for the FHEA, display signs bearing those names).

Apparently at the FHSD, all organizations are equal, but some are more equal than others.

5. Neither Plaintiffs nor Francis Howell Families seek to promote a religious sports camp through the use of backpack flyers.

In their response memorandum, Defendants repeatedly cite *Victory through Jesus Sports Ministry Foundation v. Lee's Summit R-7 School District*, 640 F.3d 329 (8th Cir. 2011) to support the proposition that a government entity may discriminate between groups without running afoul of First Amendment free speech protections. ECF No. 16. That reliance is misplaced.

First, neither Plaintiffs, nor FHF, seek to promote student participation in a religious sports camp by sending flyers home in student backpacks. Second, the plaintiff in *Victory* acknowledged that its appeal was *not* based upon a claim of religious discrimination. 640 F.3d at 336–37. In contrast, Plaintiffs here are alleging viewpoint discrimination, making this case fundamentally different.

Without a discrimination claim present, the *Victory* court did not engage in a selective-enforcement analysis. The Francis Howell School Board has allowed speakers to reference other organizations, such as the Missouri School Board Association, Associated General Contractors of America, Francis Howell Education Association, Safe and Sound Schools, Black Voices Matter, Good Jobs First, and the Citizens for Francis Howell PAC. ECF No. 4 at 10, 11; ECF No. 4-1 at ¶ 11; FHSD, December 16, 2021 Meeting, https://bit.ly/35xkiwk, 29:04–29:16; ECF No. 4-2 at ¶¶ 18, 22; FHSD, June 17, 2021 Meeting, https://bit.ly/3G7GxFO, 48:26–50:23; FHSD, January 20, 2022 Meeting, https://bit.ly/3r4zCZE, 56:00–57:54. Enforcement of Policies 1455 and 1471 is uniquely reserved for anyone who dares mention Francis Howell Families or its website.

This Court should instead follow the selective-enforcement analysis found in *Gerlich*, *InterVaristy Christian Fellowship*, and *Business Leaders in Christ* to guide its examination of Plaintiffs' viewpoint discrimination claim.[3]

Third, the *Victory* plaintiff was suing over the frequency of access, not a complete ban. *Victory,* 640 F.3d at 335–36. The organization was not being excluded from distributing flyers to elementary students; rather, the school limited the number of times they could distribute after parents complained about the number of flyers coming home with children. *Id.*

In the present case, any mention of Francis Howell Families or its website is completely forbidden. Moreover, to the extent that Defendants cite *Victory* for the proposition that public entities can grant preferential access based on viewpoint, that conflicts with binding Supreme Court precedent requiring viewpoint neutrality in limited public fora. *Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-07 (2001). Indeed, it seems that Defendants want to be allowed to discriminate based on viewpoint. ECF No. 16 at 7 ("[T]he district is permitted to have policies that grant preferred access to a limited public forum to speakers on the basis of status"). Their effort to use *Victory* in this way admits that discrimination is their goal and that they seek to have this Court approve viewpoint discrimination.

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[3] *Gerlich v. Leath*, 861 F.3d 697 (8th Cir. 2017); *InterVarsity Christian Fellowship/USA v. Univ. of Iowa*, 408 F. Supp. 3d 960 (S.D. Iowa 2019); *Bus. Leaders in Christ v. Univ. of Iowa*, No. 3:17-cv-00080-SMR-SBJ, 2018 U.S. Dist. LEXIS 221969 (S.D. Iowa Jan. 23, 2018).

6. FHEA and MSBA are separate organizations from the FHSD or its Board and their messages do not qualify as government speech.

Attempting to exempt any speech by FHEA or MSBA from a selective-enforcement analysis, Defendants posit that the speech is simply board speech. But these are clearly separate organizations, even if they promote messages that the current board majority agrees with. Categorizing FHEA or MSBA speech as board speech would grossly expand the government speech doctrine.

There is a three-factor test for determining whether speech qualifies as government speech. *Gerlich*, 861 F.3d at 708. First, whether the government has long used the particular medium to speak. Second, whether the medium is often closely identified in the public mind with the state. Third, whether the state maintains direct control over the messages conveyed. *Id.*

When the Supreme Court determined that license-plates constituted government speech, it noted that since as early as 1917, license plates have "conveyed more than state names and vehicle identification numbers," but also "messages from the State." *Walker v. Tex. Div. Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 210–11 (2015). The Court also noted that a license plate design is closely identified in the public mind with the state because "license plates are, essentially, government IDs." *Id.* at 212. They contain the name of the state, are issued by the State, and the designs are owned by the State. *Id.* And "persons who observe designs on IDs routinely—and reasonably—interrupt them as conveying some message on the [issuer's] behalf." *Id.* (quoting *Pleasant Grove City,* 555 U.S. at 471) (internal quotations omitted). Finally, the State maintained direct control over the message on the plate because a State Board "must approve every specialty plate design proposal before the design can appear on a Texas plate." *Id.* at 213.

A. FHEA speech does not qualify as government speech.

Under the *Walker* analysis, FHEA speech during school board meetings does not qualify as government speech. First, it is fairly obvious that the FHEA is a labor union representing the interests of teachers, in their negotiations with the FHSD over employee pay and working conditions and is a legal entity separate from the FHSD. *See* IRS TAX EXEMPT ORGANIZATION SEARCH, https://bit.ly/364IXZN (last visited March 16, 2022) (FHEA tax Form 990 listing it as a tax-exempt 501(c)(3) corporation). As such, these are two distinct organizations that bargain with each other and may even have open legal conflicts over working conditions or teacher discipline. It would be a patent conflict of interest for the FHEA to represent the interests of both line employees and the district administration. While the FHEA and FHSD may agree on some contested issues and disagree on others, it would contort the government-speech doctrine to assert that that when the FHEA speaks, the Board of Education is also speaking.

Similarly, the FHEA's statements of disagreement with the school district at board meetings show that the school district has no direct control over the FHEA's messaging. For example, the FHEA openly contradicted the district's messaging to the public that the Elementary and Secondary School Emergency Relief Fund saved district jobs when FHEA asserted at the June 17, 2021 board meeting that district jobs were actually secured because of FHEA's negotiation and pay sacrifice. ECF No. 4-2 at ¶ 17; FHSD, June 17, 2021 Meeting, https://bit.ly/3G7GxFO, 41:47–42:12.

Taken together, the three *Walker* factors cut decisively against the FHEA's speech qualifying as government speech.

B. MSBA speech does not qualify as government speech.

MSBA is a private, non-profit organization, that is distinct from the Francis Howell School District and its Board of Education. MSBA, NONPROFIT CORPORATION

DETAILS, https://bit.ly/3CNiD25 (last visited Mar. 16, 2022). While the FHSD chooses to play MSBA's videos at its board meetings each month, that does not convert the MSBA's videos into government speech. The videos are not like license plates. They do not mention FHSD by name, FHSD does not create or own the videos, and FHSD accesses the videos from MSBA's YouTube channel.

MSBA creates their board report videos to promote their own state-level advocacy and give updates about the general state of public education developments throughout Missouri. The independent nature of MSBA also demonstrates that the FHSD does not have control over the message that MSBA puts out. There is no indication that MSBA must receive permission from FHSD before it publishes a video to its YouTube account or displays it on the MSBA website.

Defendants attempt to blur the line between government and private, non-profit speech to avoid unwanted First Amendment implications, but a clear distinction between the two is necessary because the government-speech doctrine is susceptible to dangerous misuse. "If private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints." *Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017). Similarly, this Court should not allow Defendants to pass off the FHEA's and MSBA's speech as their own, just so they can promote the messages of groups that they agree with; and discriminate against their critics.

7. This Court can partially invalidate Policies 1455 and 1471.

In their response memorandum, Defendants claim that facial invalidation of these policies "in their entirety would be excessive[.]" ECF No. 16 at 14. But this Court also has the option to use the facial vagueness and overbreadth doctrines to facially invalidate the provisions of Policies 1455 and 1471 that limit lawful political expression at school board meetings. *See, e.g., Broadrick v. Oklahoma*, 413 U.S. 601,

613 (1973) (overbroad statute may not be enforced "unless a limiting construction *or partial invalidation* so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression.") (emphasis added); *Willson v. City of Bel-Nor*, 924 F.3d 995, 1004 (8th Cir. 2019) (courts may impose a limiting construction on a statute where susceptible, but will not rewrite laws to conform with the constitution); *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, 691 (8th Cir. 1992) (rejecting narrowing construction in case of a vagueness challenge to statute regulating distribution of violent videos).

As an alternative to invalidating the policies in their entirety, Plaintiffs would propose the Court partially invalidate Policy 1455 (ECF No. 4-5) by facially striking the "Political Materials" component of that policy as vague and overbroad.[4] Similarly, Plaintiffs propose that this Court invalidate Policy 1471's (ECF No. 4-6) prohibition on "political campaigning" and the last sentence of the policy that provides: "The District will not accept any advertising relating to any political, religious, or philosophical beliefs, positions, or subject matters."

Indeed, this last sentence is so patently overbroad as to reach the expression of any opinion on anything of import, including religious views on sex education, progressive views on union rights, or stoic views on personal resilience. If that provision were enforced in an even-handed manner, there would be almost nothing to talk about at school board meetings.

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[4] Defendants have not proffered any limiting construction that would save either of these policies. *See Turtle Island Foods SPC v. Soman,* 424 F. Supp. 3d 552, 569 (E.D. Ark. 2019) (state did not offer narrowing construction that would avoid constitutional problems). As a result, this Court should rely on partial invalidation.

CONCLUSION

Plaintiffs respectfully request that the Court grant their motion for preliminary injunction.

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Respectfully submitted,

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