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' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

INTRODUCTION

Plaintiffs have pleaded plausible facts that confirm their entitlement to relief from Defendants' unconstitutional practices and policies. Defendants uniquely single out Francis Howell Families ("FHF") as an unacceptable name and informational source, while favoring other political organizations during patron comment. They have silenced and threaten to continue silencing Plaintiffs for referencing FHF. The alleged facts, and reasonable inferences drawn from them, show that Mary Lange acted with the other individual defendants' knowledge and approval. Moreover, the official capacity claims are not redundant, because it was Defendants who raised the need for such claims in the first place. Finally, none of the Defendants are entitled to qualified immunity because it was clearly established by 2021 that viewpoint discrimination is presumptively illegal in a limited public forum such as a school board meeting.

STANDARD OF REVIEW

The touchstone of the pleading standard is plausibility; that is, a complaint must contain sufficient facts, accepted as true, to state a plausible claim on its face. *McDonough v. Anoka Cty.*, 799 F.3d 931, 945 (8th Cir. 2015) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)). A plaintiff need only show the possibility, not probability of recovery. *Id.*

To evaluate plausibility, a court strips away any conclusory allegations in the complaint. *Id.* Second, it looks at the remaining factual allegations, assumes their veracity and makes reasonable inferences, and determines whether they make for a

plausible claim. *Id.* at 946. The last step is context specific and requires the application of experience and common sense. *Id.* at 945 (citing *Iqbal*, 556 U.S. at 679).

Plaintiffs' claims easily meet this standard.

ARGUMENT

I. THE OFFICIAL CAPACITY CLAIMS ARE NOT REDUNDANT.

Defendants initially objected that official capacity claims were essential for injunctive relief against the individual defendants, so Plaintiffs amended the complaint to add those claims. Having all but invited their inclusion, Defendants now assert that the official claims are redundant. They should be estopped from complaining about it.

As the masters of their own complaint, Plaintiffs may determine what relief to seek. *See e.g., Johnson v. Precision Airmotive, LLC*, No.4:07CV1695 CDP, 2008 U.S. Dist. LEXIS 28552, at *12–13 (E.D. Mo. Apr. 8, 2008) ("Plaintiffs are the masters of their complaint"); *Smith v. Am. Bankers Ins. Co.*, No.2-11-cv-02113, 2011 U.S. Dist. LEXIS 140881, at *9 (W.D. Ark. Dec. 7, 2011) ("As the master of his complaint, a plaintiff can choose what claims to bring of what claims to leave out"). Plaintiffs seek injunctive relief against all defendants, including the individual school board members and Superintendent Hoven. ECF No. 28 at 19, ¶ A.

On the eve of the preliminary injunction hearing, defense counsel asserted that even if "an injunction [was] issued, issuance would not be proper against FHSD Board members and the Superintendent in their individual capacities," ECF No. 25

at 1, because no official capacity claims were raised. *See Patterson v. Casalenda*, No. 18-cv-2081 (EB/SER), 2019 U.S. Dist. LEXIS 89908, at *14 (D. Minn. Apr. 23, 2019) (where defendants were solely sued in their individual capacities, injunctive relief was not appropriate under 42 U.S.C. § 1983).

To address that late-breaking concern, Plaintiffs added official capacity claims (ECF No. 43 at 2, 3), only to have defense counsel now turn around and assert that such additions are redundant and should be dismissed. Defendants cannot have it both ways and insulate themselves from an injunction. Indeed, they should be judicially estopped from raising this issue in such a contradictory manner. If official capacity claims are a necessary pre-condition to injunctive relief against the individual defendants, they are not redundant.

"Judicial estoppel operates to preclude a party from asserting a position that conflicts with a position earlier taken in the same or related litigation." *Ater v. Follrod*, 238 F. Supp. 2d 928, 947 (S.D. Ohio 2002). This rule generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in a different phase. *Gray v. City of Valley Park*, 567 F.3d 976, 981-82 (8th Cir. 2009). There is no mechanical test for judicial estoppel, but among the factors to consider are (1) whether the party's later position is inconsistent with its earlier position; (2) whether a party succeeded in gaining acceptance of its earlier position; and (3) whether allowing this inconsistency would give the party an unfair advantage over the opposing party. *Id.; see also Jones v. Bob Evans Farms, Inc.*, 811 F.3d 1030, 1032-33 (8th Cir. 2016).

Defendants here raised the lack of official-capacity claims as an impediment to issuing an injunction against the individual defendants triggering an order from this Court for the parties to confer on the issue; and causing Plaintiffs to amend their complaint to add such claims. ECF Nos. 24, 27. Having taken that position in the preliminary injunction phase of the case, they now take the opposite position in the motion to dismiss phase of the case. Moreover, this back and forth is unfair to the Plaintiffs.

If Defendants would just unequivocally concede that the Court has jurisdiction to enter an injunction against all the defendants, including the individuals, perhaps they would have a viable case for merger. But they were the ones that raised this objection and if they continue to hedge or equivocate, they have proven that separate official-capacity claims are not redundant in this situation.

It should also be noted that defense counsel repeatedly asserted that the Board members are merely civilian volunteers,[1] so this arguably leaves open some question as to whether they are "employees" of the district who would necessarily be enjoined by an injunction against FHSD.[2] Defense counsel has not publicly or

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[1] ECF No. 44 at 10; ECF No. 44-2, 56:22–24.

[2] At least one E.D. Mo. case also held that the board and school district were legally distinct entities, preventing merger of official capacity claims. *McClaskey v. La Plata R-II Sch. Dist.*, No. 2:03CV00066 AGF, 2006 U.S. Dist. LEXIS 54035, at *3 (E.D. Mo. Aug. 3, 2006). While Defendants have not asserted such legal separation, they have also not conceded that they would all be bound by an injunction against the district.

unequivocally conceded that an injunction against FHSD would enjoin all other listed defendants, whether they are named in the injunction or not. If all Defendants concede that they can be named in an injunction in this case, then that would cut in favor of merger. On the other hand, if they do not so concede, the official-capacity claims are necessary and a direct result of defenses they have raised.

II. DEFENDANTS HOEHN, STIGLICH, LANE, CHAD LANGE, ZIEGEMEIER, WALKER, AND HOVEN ACQUIESCED TO THE SUPPRESSION OF SPEECH IN VIOLATION OF THE FIRST AMENDMENT.

The individual defendants can be liable here even if they did not personally send the threatening emails or cut-off Christopher Brooks during patron comments, because Plaintiffs plausibly allege that they had knowledge of Lange's actions and approved of them.

To the extent that this knowledge and approval is disputed, Plaintiffs are entitled to have the inferences drawn in their favor at this stage. If further discovery or evidentiary development proves otherwise, Defendants may bring a motion for summary judgment.

Personal involvement in a § 1983 civil rights violation can be shown through allegations of personal direction or of knowledge and acquiescence. *See, e.g., Andrews v. Fowler*, 98 F.3d 1069, 1078 (8th Cir. 1996) (supervisor may be held individually liable under § 1983 if he was "deliberately indifferent to or tacitly authorized the offending acts."); *Howard v. Adkison*, 887 F.2d 134, 138 (8th Cir. 1989) (jailhouse unit supervisor violated inmate's Eighth Amendment rights under § 1983 because he knew or should have known of the constitutional violations);

Headley v. Bacon, 828 F.2d 1272, 1274–75 (8th Cir. 1987) (court implicitly recognized a § 1983 action against supervisors for permitting sexual harassment in the workplace); *Woodward v. Worland*, 977 F.2d 1392, 1400 (10th Cir. 1992) (adopting Third Circuit standard of § 1983 liability under allegations of personal direction or of knowledge and acquiescence); *OSU Student All. v. Ray*, 699 F.3d 1053, 1071–1075 (9th Cir. 2012) (allegations of knowledge and acquiescence are sufficient to state claims for speech-based First Amendment violations); *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1135 (9th Cir. 2003) (school board members act with deliberate indifference when they respond to known harassment in a manner that is clearly unreasonable); *Riley's Am. Heritage Farms v. Claremont Unified Sch. Dist.*, No. EDCV 18-2185 JGB (SHKx), 2019 U.S. Dist. LEXIS 153838, at *26–27 (C.D. Cal. Mar. 6, 2019) (complaint plausibly alleged facts supporting supervisory liability for school board members when they endorsed the school district's prohibition of future field trips to a politically disfavored business and failed to prevent the alleged injury).

The FHSD school board members, like other supervisors, perform managerial tasks for the District by "exercis[ing] full legislative rule and management authority . . . by adopting policy and directing all procedures necessary for the governance of District educational and administrative responsibilities." School Board Purpose and Roles, FHSD Policy Manual § 0310, https://bit.ly/3gcYzvD (menu option Policies, book FHSD Policies, section 0000 Organization, Philosophy and Goals/ 0300 School Board Organization, code 0310).

The allegations here show that before Mary Lange sent Plaintiffs Gontarz and Rash the censorial emails, she sought help from Defendant Hoven in wording the threat, and he escalated the penalty for mentioning Francis Howell Families from limited future speaking opportunities to a complete ban on speaking during patron comment.[3] ECF No. 28 at 9 ¶ 37; ECF No. 32; Ex. S. [4] After ratcheting up the threat to Gontarz and Rash, Hoven was carbon copied on the emails and referenced as a contact point for Gontarz and Rash if they had any questions. ECF No. 32; Ex. S.

The censorial emails also used terminology indicating that Mary Lange was acting collectively, not on her own. She stated that "the Board" appreciates hearing from patrons, and used the collective "we," indicating that Lange was not speaking only for herself, but also for Hoven[5] and other Board members as well. *Id.*

Lange also notified the other board members *before* sending the threatening emails, giving them an opportunity for input. ECF No. 32; Ex. T. She also

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[3] Without citing any authority, defense counsel proposes that Plaintiffs must show no constitutional violation existed before Hoven's involvement, but that is not the standard. The question is whether Plaintiffs plausibly allege that Hoven was involved in at least some of the constitutional violations, and they do.

[4] Mary Lange's emails to Hoven and the other board members may be considered in deciding a Rule 12 motion to dismiss because the emails are "necessarily embraced by the complaint" meaning its "contents are alleged in a complaint and [its] authenticity no party questions." *Ashanti v. City of Golden Valley*, 666 F.3d 1148, 1151 (8th Cir. 2012); *see also Powell v. Casey*, No. 20-cv-1142 (PJS/HB), 2021 U.S. Dist. LEXIS 171111, at *11 (D. Minn. Sep. 9, 2021); ECF No. 28 at 9 ¶¶ 37, 38. The emails were admitted into evidence at the preliminary injunction hearing and their authenticity is not disputed. ECF No. 32; Exs. S, T.

[5] Defendants continue to suggest that there is no viable § 1983 claim with respect to the sale of FHF t-shirts on District property. ECF Nos. 16 at 5, 42 at 5. Plaintiffs have never made a claim that there is a First Amendment right to sell t-shirts and Defendants' repeated discussion of these issues is confusing and frivolous.

referenced that the previous meeting (where Gontarz and Rash mentioned FHF) "wasn't the best time" due to angry patrons and that they "are working on any possible solutions to help curb a few of the issues" because "no one likes sitting up there listening to that or being associated with it." *Id.* These statements raise reasonable inferences that Mary Lange was seeking to address collective concerns that the entire Board shared with respect to perceived criticism.

Defendant Patrick Lane even subsequently provided feedback that Lange's responses were "great" and thanked her. *Id.* This raises an inference of both knowledge and approval of her actions.

After the censorial emails were sent, all individual defendants were also present at the November 18, 2021 board meeting where Plaintiffs Brooks was silenced, showing that they had knowledge of the threat being operationalized. ECF No. 28 at 10 ¶ 40.

> By tolerating Defendant Lange's threats to Plaintiffs Gontarz and Rash, and her censorship of Brooks during an open meeting, all other Defendants acquiesced to allowing Policies 1455 and 1471 to be selectively enforced against disfavored views while not enforcing it against favored views.

Id. at 12, ¶ 46.

Indeed, no pleadings or evidence shows that any Defendant objected to her cutting Brooks off, again supporting the inference that they all approved of Mary Lange's actions on their behalf. Nor do any pleadings indicate that any defendant requested that the "advertising" policies also be enforced against favored groups

such as the MSBA, FHEA or Black Voices Matter. In fact, Defendants proudly claim that they have a right to favor those groups.

Defendants themselves have also asserted that they engage in communal decision-making. "[T]he Board process ensures that restrictions are not simply imposed off-the-cuff by the presiding officer in the moment at meetings . . . [but] allow[] the Board to properly evaluate . . . situations and then act accordingly" ECF No. 44 at 10. For this reason, their reliance on *Wilkinson v. Bensalem Twp.*, 822 F. Supp. 1154 (E.D. Pa. 1993) is misplaced. In *Wilkinson*, the court emphasized that two council members could not be found liable for a deprivation of First Amendment rights because the power to allow someone to speak at a meeting "lay solely with [the Council President]." 822 F. Supp. at 1160. By Defendants' own admission, decisions on whether a speaker will be banned from speaking do not lay solely with Defendant Lange, but rather involve the whole Board. *See* ECF No. 44 at 10. Moreover, the allegations plausibly show that they all had prior knowledge that Mary Lange was sending the censorial emails, using collective terminology indicating that she was speaking on behalf of the board. At this stage, drawing all reasonable inferences in Plaintiffs' favor, this Court should deny the motion to dismiss the individual defendants, other than Mary Lange (who did not join the motion).

In the alternative, if this Court is inclined to dismiss some or all of the individual capacity claims against Defendants Hoehn, Stiglich, Lane, Chad Lange,[6] Ziegemeier, Walker or Hoehn, Plaintiffs request that the dismissal be without prejudice to preserve the ability to add their individual claims back in after discovery. *See Sorenson v. Minn. Dep't of Human Servs.*, No. 20-cv-501 (NEB/LIB), 2020 U.S. Dist. LEXIS 239491, at *27-28 (D. Minn. Nov. 13, 2020) (dismissing § 1983 claims without prejudice on 12(b)(6) motion); *Mendiola v. Koberlein*, No. 4:12-cv-00006-KGB, 2013 U.S. Dist. LEXIS 34734, at *10 (E.D. Ark. Mar. 13, 2013) (dismissing claim for injunctive relief without prejudice). Since this case will be proceeding against Mary Lange and the district regardless, there will inevitably be discovery about the involvement of the other individually named members.

III. DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY BECAUSE VIEWPOINT DISCRIMINATION VIOLATES A CLEARLY ESTABLISHED RIGHT.

The defendants are not entitled to qualified immunity because it was clearly established long before 2021 that viewpoint discrimination is presumptively illegal in a limited public forum. Moreover, the fact that there is not a reported decision where a school board banned the speaking of the name of just some groups and websites illustrates just how far Defendants are outside of First Amendment norms. Put simply, few would dare to do what they did, because it's so obviously illegal.

It is axiomatic that viewpoint discrimination is presumptively illegal, even in limited public forums. *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515

[6] There are two defendants with the surname Lange in this case.

U.S. 819, 829 (1995). To overcome qualified immunity, "the question is whether the law gave the officials 'fair warning that their alleged conduct was unconstitutional." *Schnekloth v. Deakins*, No.21-CV-5131, 2022 U.S. Dist. LEXIS 64856, at *16 (W.D. Ark. Apr. 7, 2022) (quoting *Bonner v. Outlaw*, 552 F.3d 673, 678 (8th Cir. 2009)).

Under both the Supreme Court and Eighth Circuit precedent, Defendants had more than fair warning that viewpoint discrimination is impermissible in a limited public forum. In addition to the Supreme Court's 1995 *Rosenberger* decision, the Eighth Circuit explained a decade ago that a school board "could not discriminate against a speaker based on his viewpoint." *Green v. Nocciero*, 676 F.3d 748, 754 (8th Cir. 2012).

Likewise, several sister circuits mirror the Eighth Circuit's conclusion that viewpoint discrimination is impermissible in a limited public forum. *See e.g.*, *Ison v. Madison Local Sch. Dist. Bd. of Educ.*, 3 F.4th 887, 893 (6th Cir. 2021) (holding that a school board meeting is a limited public forum and "the government may not engage in . . . viewpoint discrimination."); *Galena v. Leone*, 638 F.3d 186, 199 (3d Cir. 2011) (finding that a County Council meeting is a limited public forum and "there is a First Amendment violation if the defendant applied [a] restriction [on speech] because of the speaker's viewpoint"); *Steinburg v. Chesterfield Cnty. Plan. Comm'n*, 527 F.3d 377, 385 (4th Cir. 2008) (holding that a County Planning Commission is a limited public forum and "restrictions may not discriminate on the basis of a speaker's viewpoint"); *Norse v. City of Santa Cruz*, 629 F.3d 966, 975 (9th Cir. 2010) (finding that a public city council meeting is a limited public forum, and

attendees have a "First Amendment right to be free from viewpoint discrimination").

Defendants also had ample warning that selective enforcement of an otherwise neutral policy constitutes viewpoint discrimination. *See Gerlich v. Leath*, 861 F.3d 697, 705, 715 (8th Cir. 2017) ("[D]iscriminatory motive is evidenced by . . . unique scrutiny . . . imposed on [plainitffs]. . . . From no other group does [the Board] require the sterility of speech that it demands of [FHF]. . . . This is blatant viewpoint discrimination."); *Bus. Leaders in Christ v. Univ. of Iowa*, No. 3:17-cv-00080-SMR-SBJ, 2018 U.S. Dist. LEXIS 221969, at *44 (S.D. Iowa Jan. 23, 2018) (a pattern of selective enforcement established "the requisite fair change of prevailing on the merits . . . under the Free Speech Clause."); *InterVarsity Christian Fellowship/USA v. Univ. of Iowa*, 408 F. Supp. 3d 960, 979 (S.D. Iowa 2019) ("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.").

The law in this area was clearly established by 2021 and none of the Defendants are entitled to qualified immunity.

CONCLUSION

Defendants' partial motion to dismiss should be denied.

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Respectfully submitted,

s/ Endel Kolde

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