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' POST-HEARING BRIEF

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ARGUMENT

1. Applying Regulation 1471 to patron comments amounts to a codification of viewpoint discrimination.

The Court several times inquired about the relationship between *Regulation* 1471 and *Policy* 1471. Plaintiffs submit that Regulation 1471 provides implementation guidance for Policy 1471; and in so doing, it explicitly imports viewpoint discriminatory terms into the policy, by favoring only speakers who "collaborate" or "work with" the district.

The Francis Howell School District Board of Education is responsible for the development and adoption of policies. Policy Development, Adoption and Review, FHSD Policy Manual § 0510, https://bit.ly/3gcYzvD (menu option Policies, book FHSD Policies, section 0000 Organization, Philosophy and Goals/ 0500 Policy Development and Review, code 0510). The superintendent is then authorized to "develop administrative guidelines in order to implement Board policy." *Id.*[1]

The legal weight given to policies versus regulations is unclear, as courts tend to either use the terms interchangeably, or at least not define each term individually.[2] Not every FHSD policy has a related regulation, but each regulation is mapped to the policy with the same code which it implements.

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[1] The organization of policies and regulations at FHSD is based on book (policy or regulation), section (x000), and code (#xxx), where the first numeric digit identifies the section, and the last three digits identify the document in the section.

[2] *See Lacks v. Ferguson Reorganized Sch. Dist., R-2*, 147 F.3d 718, 721 (8th Cir. 1998) (court interchangeably uses regulation and policy when analyzing whether a teacher broke state law by violating a board "regulation" when her employer accused her of violating a board "policy"); *M.Y. v. Copeland*, No.4:21-cv-00530-CDP, 2021 U.S. Dist. LEXIS 180360, *1, *15 (E.D. Mo. Sep. 22, 2021) (citing *Angarita v. St. Louis Cty.*, 981 F.2d 1537 (8th Cir. 1992) ("A policy may be either a policy statement, ordinance, regulation, or decision officially adopted and promulgated by the municipality's governing body")).

According to its own terms, Regulation 1471 serves as a "general guideline[]" for the District to "inform and assist students in learning about programs, activities or information" without "exploiting [them]." ECF No. 16-1 at 1, 2. Thus, it provides added details regarding the meaning and application of Policy 1471. This is also the way in which Defendants apparently rely on Regulation 1471, although they seek to use it in the non-student setting of patron comments and school board meetings.

Regulation 1471 mostly focuses on advertising targeted to students, during school hours or sports events, using district equipment and facilities such as intercoms, electronic marquee boards, gymnasiums, and athletic fields. The forum Plaintiffs wish to speak at, however, is a school board meeting that occurs on district property, after hours, with an audience primarily made up of adults. Thus, most of Regulation 1471 is irrelevant to this case, except for the section entitled "Groups Affiliated with the District," which Defendants have invoked to explain why they may, allegedly, favor some organizations over FHF, or speakers affiliated with FHF. *See* ECF 16-1 at 3.

Defendants attempt to justify their favoritism toward the Citizens for Francis Howell PAC, FHEA and MSBA by asserting that the groups hold special status as organizations that either "work[] collaboratively with the District" or are "created solely to work with the District." ECF Nos. 16 at 7, 8, 10; 16-1 at 3; Kolde Decl., ¶ 2; Ex. Y at 53:9–13, 53:23–54:2.

Given these requirements, Regulation 1471 amounts to a codification of viewpoint discrimination. If an organization is critical of the district or wants to advocate for change, it couldn't receive special status as a regime collaborator. Regulation 1471 is evidence of intent. It reduces to writing what Defendants wish to do: pick and choose favored speakers and viewpoints, with special rights for speakers who "collaborate" or "work with" the district. But a public entity cannot

use its regulations to alter the constitutional requirement of viewpoint neutrality in this way. Put simply, regulations do not trump the Constitution.

2. The First Amendment does not permit special treatment for labor groups during school board meetings.

Labor organizations such as FHEA may possess certain statutory protections to bargain for wages and working conditions, but nothing in labor law overrides the First Amendment. *See Janus v. AFSCME, Council 31,* 138 S. Ct. 2448, 2480-81 (2018) (bargaining with a public employer involves inherently political speech). Defendants contend that FHEA may receive special speaking privileges over Plaintiffs because the FHEA holds the special status of a teachers' union. Kolde Decl., ¶ 2; Ex. Y at 49:9–24, 53:9-10 ("So I believe a district could provide preferred status to an organization like that."); ECF No. 16 at 6. But Defendants' reliance on *Perry Education Association v. Perry Local Educations' Association*, 460 U.S. 37 (1983), for this proposition is misplaced.

In *Perry*, a competing teachers' union sought to use a school district's internal mail system on equal terms as the established union. The restriction was found reasonable, in part, "because of the two unions' different obligations and responsibilities — one exclusively represented all the school district's teachers, and the other was a rival vying for support." *Turning Point USA at Ark. State Univ. v. Rhodes*, 973 F.3d 868, 879 (8th Cir. 2020). The union already serving as the teachers' exclusive bargaining representative had a compelling reason to reach its members through the school's mailroom, while the other union did not. *Id.*

But the forum at issue in this case is not an employee mailroom (or perhaps the modern-day equivalent: a district's email system) and the audience is not limited to teachers and potential union members. In contrast, the forum in this case is school board meetings (including patron comment time), which are part of local governance and consist of meetings open to the public. *See* § 610.010(4)(c) R.S.Mo. (school

districts are a "public governmental body"); § 610.011(1) R.S.Mo. ("It is the public policy of this state that meetings, records, votes, actions, and deliberations of public governmental bodies be open to the public unless otherwise provided by law").

Moreover, the audience, as is obvious to any observer, is much wider, comprising board members, school officials, parents, taxpayers, and audience members present at the meeting; as well as those who might livestream the video or later watch an archived copy on the district's YouTube channel. Thus, *Perry* does not help Defendants here. And it most certainly does not authorize viewpoint discrimination in favor of unions at school board meetings.

3. Speakers were allowed to reference FHEA during patron comment.

FHEA's name was invoked during both patron comments and the FHEA comment portions of school meetings. When pressed, Defendants acknowledged that "references to FHEA, if handled outside of the FHEA portion of the agenda could be addressed similarly to how Plaintiffs have been addressed in this case." Kolde Decl., ¶ 2; Ex. Y at 55:13–23.

"Could be," perhaps, but they weren't and that's part of the problem here. Defendants' position is confusing, because speakers were allowed to reference FHEA during patron comment without consequence. That they were not cut-off illustrates selective enforcement.

In addition, the district claims to hold FHEA's own comments to the same rules as patron comment, but FHEA has repeatedly been allowed to reference its name. ECF No. 22-3 at ¶¶ 2, 3; ECF No. 22-4; ECF No. 22-5.[3] FHEA members and non-

[3] FHEA regularly endorses school board candidates on its Facebook page. Kolde Decl., ¶ 2; Ex. Y at 54:14–19; ECF No. 4-12. Such endorsements would appear to conflict with federal law, however, since 501(c)(3) corporations cannot endorse

member allies have mentioned FHEA during patron comment without censorship, including after Plaintiff Brooks was cut off for mentioning Francis Howell Families. ECF No. 4-3 at ¶¶ 37–41; FHSD, May 20, 2021 Meeting, https://bit.ly/3eUDfKF, 27:19–27:23, 28:26–28:44; FHSD, November 18, 2021 Meeting, https://bit.ly/3AFzItU, 47:25–47:40; FHSD, December 16, 2021 Meeting, https://bit.ly/35xkiwk, 39:31–39:40, 41:31–41:38, 42:19–42:23.[4] Defendants have shown that when enforcement is left to their discretion, unequal treatment results.

4. Defendants' standard for determining who is too political to be mentioned at a school board meeting is too subjective.

Defendants' selective enforcement of their policies is the natural consequence of policies that rest on the presiding officer's *ad hoc* determinations. *See* Kolde Decl., ¶ 2; Ex. Y at 66:1–67:21. "I mean, I would say that the presiding officer of the board and the board of education necessarily has discretion to make those determinations." *Id.* at 67:18–21.

If a policy is not guided by "objective, workable standards," then the presiding officer's "own politics may shape his views on what counts as" a violation. *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1891 (2018). And the risk of viewpoint discrimination is at its peak "when the determination of who may speak and who may not is left to an official's unbridled discretion." *Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 763 (1988); *see also Marshall v. Amuso*, No.21-4336, 2021 U.S. Dist. LEXIS 222210, *1, *18-*20 (E.D. Pa. Nov. 17, 2021) (court found two school

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political candidates. *See* IRS TAX EXEMPT ORGANIZATION SEARCH, https://bit.ly/364IXZN (last visited March 29, 2022) (FHEA tax Form 990 listing it as a tax-exempt 501(c)(3) corporation); *see* EXEMPTION REQUIREMENTS - 501(C)(3) ORGANIZATIONS, https://bit.ly/3LlYXWj (last visited March 29, 2022). Something is off with the FHEA, but they still enjoy special speaking rights at school board meetings.

[4] Longtime FHSD teacher speaks during patron comments, calls for reinstating FHEA's release president position.

board policies unconstitutionally vague because they were "irreparably clothed in subjectivity" that allowed "the presiding officer's own views to shape 'what count[ed]' . . . openly invit[ing] viewpoint discrimination.").

Defendants have demonstrated that they use no discernable standard to classify speech as political campaigning. During argument, defense counsel repeatedly fell back on the presiding officer's discretion. Kolde Decl., ¶ 2; Ex. Y at 66:1–67:21. "[T]hat's going to be a determination that the presiding officer of the board is going to have to make when that instance presents itself." *Id.* at 66:12–14. That amounts to no standard at all.

In *Mansky*, the Supreme Court invalided a state statute because the term "political" was ill-defined and vested too much discretion in the election judges who enforced the rule. The same problem arises here.

For example, while a speaker referencing Francis Howell Families qualified as "political campaigning" that resulted in immediate censorship, speakers who disagreed with FHF's viewpoints were permitted to repeatedly encourage audience members to vote for and against implied (described, but not named) school board candidates. FHSD, March 17, 2022 Meeting, https://bit.ly/3JRXUgl, 24:09–24:29, 37:37–38:13, 39:00–39:18.

As a result, this Court should partially facially invalidate Policies 1455 and 1471 to allow for unfettered political speech about school-related issues at school board meetings. Doing so would not subject students to political campaigning in the classroom or cafeteria and it would promote local self-governance and free expression.

5. Defendants claim the right to censor speech that would criticize school employees by name.

At oral argument, defense counsel even claimed that if a district staff member's name was mentioned during patron comment, the board could route the meeting

into a closed session. Kolde Decl., ¶ 2; Ex. Y at 62:17–23. This admits to a disturbing impulse to censor criticism.

A policy that prohibits negative speech against a person, "facially distinguishes between two opposed sets of ideas: those that promote the [person] and those that disparage [him]" which "necessarily discriminates between viewpoints." *Am. Freedom Def. Initiative v. Suburban Mobility Auth.*, 978 F.3d 481, 500 (6th Cir. 2020) (internal quotations omitted). Speech at school board meetings that is banned "purely because it disparages or offends" is impermissible viewpoint discrimination. *Ison v. Madison Local Sch. Dist. Bd. of Educ.*, 3 F.4th 887, 895 (6th Cir. 2021); *see also Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017).

A recurring theme keeps emerging: Defendants want to insulate themselves, and their employees and allies, from unwanted criticism, or at least make such criticism more difficult to present. But even if a speaker is allowed to offer his viewpoint "on some occasions without interruption[, that] does not prove the policy is viewpoint neutral." *Amuso*, 2021 U.S. Dist. LEXIS 222210 at *13. If positive personally directed comments are allowed, critical personally directed comments may not be prohibited. Otherwise, that is "viewpoint discrimination regardless of whether speakers are at other times allowed to make a verbal personal attack." *Id.* at *14.

While Plaintiffs were never censored for naming a district employee, they should be allowed to do so, if called for by the circumstances, and defense counsel's statements at oral argument is further evidence of intent to discriminate based on viewpoint.

6. The government speech doctrine does not allow the Board to celebrate favored PACs or violate its own political-neutrality requirements.

On its face, Policy 1471 applies to all advertising on district property, yet the Board promoted a favored active PAC at a board meeting. Exhibit X (video highlight reel); ECF No. 4-6.

Section 115.646 of the Missouri Revised Statues prohibits the expenditure of public funds by any agent of a school district to "advocate, support, or oppose the passage or defeat of any ballot measure." § 115.646 R.S.Mo., https://bit.ly/3JOC6SM. Similarly, FHSD Board Policy 380 specifically prohibits District employees from "engag[ing] in political activities (promoting, advocating or opposing any issue or candidate) while engaged in the performance of their duties." Electioneering Guidelines Regarding Board Governance, FHSD Policy Manual § 0380, https://bit.ly/3gcYzvD (menu option Policies, book FHSD Policies, section 0000 Organization, Philosophy and Goals/ 0300 School Board Organization, code 0380). Regulation 380, in turn, provides that District resources may not be used to "advocate, support or oppose any ballot measure or candidate for public office." Electioneering Guidelines Regarding Board Governance, FHSD Regulation Manual § 0380, https://bit.ly/3gcYzvD (menu option Policies, book FHSD Regulations, section 0000 Organization, Philosophy and Goals/ 0300 School Board Organization, code 0380).

Even if board members are volunteers, running a school board meeting (and presenting awards) undoubtedly involves the use of some school district resources; and by celebrating the Citizens for Francis Howell PAC, the Board arguably violated its own political-neutrality requirements. Defendants should not be allowed to hide behind the government speech doctrine in order to override state law and their own policies.

Even if Defendants are able to claim a permissible *de minimis* use of district resources here, the Board was plainly not maintaining political neutrality. At a minimum, their celebration of the Citizens for Francis Howell PAC further illustrates that Defendants seek to, and do, play favorites. And if some political speakers can claim *de minimis* use of district resources to promote their messages, then all political speakers should get that benefit.

7. A neighboring school district's advertising policy does not contain the same political restrictions.

The neighboring Rockwood School District demonstrates that the inclusion of "political campaigning" in Policy 1471 is unnecessary to prevent inappropriate advertising on district property. Rockwood maintains an advertising policy, also numbered Policy 1471, that bans advertisements without encroaching on political speech: "For the purposes of policy and regulation 1471, advertisement includes, but is not limited to, in-person solicitation, signs and banners, pamphlets, handouts, distribution through district technology, or other distribution of information regarding products or services available or for sale." Advertising in the Schools, Rockwood School District Policy Manual § 1471, https://bit.ly/3wKwa9K (menu option Policies, book FHSD Policies, section 1400 School/Community Relations, code Policy 1471). The wording is very similar to FHSD's Policy 1471, except for the absence of a "political campaigning" advertising prohibition. Given that a workable alternative exists which prohibits advertisements irrelevant to the forum, but preserves political speech, the Court should partially facially invalidate FHSD's Policy 1471 in the school-board-meeting context, so as to allow political statements during patron comments. What appears to work in the Rockwood School District can also work in the FHSD.

CONCLUSION

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

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Respectfully submitted,

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