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IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

AMY FROGGE, JILL SPEERING, and FRAN BUSH, individually, and in their official capacities as members of the Metropolitan Nashville Board of Public Education,	§	
Plaintiffs,	§	
v.	§	Case No.: 20-0420-IV
SHAWN JOSEPH,	§	
and	§	
THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, acting by and through THE METROPOLITAN NASHVILLE BOARD OF PUBLIC EDUCATION,	§	
Defendants.	§	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

"An individual's right to speak is implicated when information he or she possesses is subjected to 'restraints on the way in which the information might be used' or disseminated." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 568 (2011) (quoting *Seattle Times Co. v. Rhinehart,* 467 U.S. 20, 32 (1984)). Here, the Plaintiffs' right to speak has been restrained unlawfully by a 5–3 vote of the Metropolitan Nashville Board of Public Education to censor—under penalty of personal liability—the Plaintiffs' truthful criticism of Defendant Shawn Joseph, Nashville's former Director of Schools. Because, among

several other deficiencies, the government cannot lawfully use its contracting power to suppress criticism of government officials, and because imposing a speaker-based, content-based, and viewpoint-based prior restraint upon the Plaintiffs' constitutionally protected speech contravenes the First Amendment and deprives the Plaintiffs' constituents of their right to hear and receive information from their elected representatives, the School Board Censorship Clause in ex-Director Joseph's Severance Agreement should be declared unenforceable as a matter of law, and this Court should permanently enjoin its enforcement as a consequence.

II. FACTUAL BACKGROUND

The Plaintiffs are elected officials who serve on the Metropolitan Nashville Board of Public Education (the "School Board"). Collectively, they represent the constituents of Metro School Districts 3, 6, and 9.

Defendant Shawn Joseph is the former Director of Schools of Metropolitan Nashville and Davidson County. During his tenure as Director of Schools, Joseph's relationship with the School Board and several of its members became strained due to myriad reports of alleged misconduct and poor performance. *See, e.g.*, Phil Williams, *What you need to know about Shawn Joseph's controversies*, NEWSCHANNEL5 (updated Apr. 05, 2019), https://www.newschannel5.com/news/newschannel-5-investigates/what-you-need-to-know-about-shawn-josephs-controversies (detailing, *inter alia*, alleged mishandling of sexual harassment claims, findings of low employee morale and pay disparities after outside legal counsel was hired to investigate, allegations involving no-bid contracts, and changes in student discipline policy that left teachers with fewer tools to manage their classrooms). Joseph's alleged failure to report instances of

teacher misconduct also led the State of Tennessee to recommend suspension of his educator's license. *See* Phil Williams, *State proposes one-year suspension of Shawn Joseph's license*, NEWSCHANNEL5 (updated Mar. 26, 2019), https://www.newschannel5.com/news/newschannel-5-investigates/metro-schools/state-proposes-one-year-suspension-of-shawn-josephs-license. Given this controversial context, it is fair to say that during the Plaintiffs' terms of office, the School Board experienced a tumultuous relationship with Defendant Joseph, and as a result, that Defendant Joseph's employment was terminated prematurely by agreement pursuant to the Severance Agreement that is attached to the Plaintiffs' Statement of Undisputed Material Facts (hereafter, "SUMF") as Exhibit #1.

By design, the Severance Agreement at issue contains a School Board Censorship Clause that forbids the Plaintiffs from making "any disparaging or defamatory comments regarding Dr. Joseph and his performance as Director of Schools." *See id.* at p. 2, ¶ 1(f)(2). "Disparaging" and "defamatory" are also expressly defined by the Defendants' Severance Agreement, and as detailed below, the contractually-defined meaning of those terms is vastly broader than the First Amendment permits. Specifically, the School Board Censorship Clause—which purports to "be effective for the Board collectively and binding upon each Board member individually" (including all of the Plaintiffs, each of whom vote against adopting it, *see* Exhibit #2 to SUMF, p. 2)—provides that:

> f. (1) For purposes of the subsection (f), these terms have the following meanings:
>
> > "Disparaging" means a false and injurious statement that discredits or detracts from the reputation of another person.
> >
> > "Defamatory" means a statement or communication tending to harm a person's reputation by subjecting the person to public contempt, disgrace, or ridicule, or by adversely affecting the person's business.

> (2) The Board will not make any disparaging or defamatory comments regarding Dr. Joseph and his performance as Director of Schools. This provision shall be effective for the Board collectively and binding upon each Board member individually. Dr. Joseph does not waive any right to institute litigation and seek damages against any Board member in his/her individual capacity who violates the terms and conditions this [sic] Article of the agreement.

Exhibit #1 to SUMF, pp. 1–2, ¶ 1(f).

As part of the same Severance Agreement, the Defendant Metropolitan Government and School Board—government entities that are plainly subject to criticism under the First Amendment *and are legally incapable of being defamed*, *see 281 Care Comm. v. Arneson*, 638 F.3d 621, 634 (8th Cir. 2011) ("A government entity cannot bring a libel or defamation action." (citing *N.Y. Times v. Sullivan*, 376 U.S. 254, 291 (1964)))—also received reciprocal consideration that prevents *Defendant Joseph* from disparaging or defaming them "in any respect." *See* Exhibit #1 to SUMF, pp. 2–3, ¶ 2(e)(2) (providing that "Dr. Joseph will not make any disparaging or defamatory comments regarding Metro, the Board, individual members of the Board, and/or any METRO AFFILIATES, or their respective current or former officers or employees in any respect."). The Plaintiffs have thus commenced this action to secure a declaratory judgment invalidating the School Board Censorship Clause, which not only unlawfully restrains the Plaintiffs' own constitutionally protected speech, but which also infringes upon their constituents' concomitant right to hear and receive information from their elected representatives.

III. STANDARD FOR SUMMARY JUDGMENT

Tennessee Rule of Civil Procedure 56.01 provides that:

> A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of thirty (30) days from the commencement of the action or after service of a motion

> for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

More than 30 days having elapsed since this action commenced, the Plaintiffs now move for a summary declaratory judgment as to all claims.

Where, as here, the disputed issues turn on questions of law, summary judgment is virtually always appropriate. *See B & B Enters. of Wilson Cty., LLC v. City of Lebanon*, 318 S.W.3d 839, 844 (Tenn. 2010) ("Summary judgments are appropriate in virtually every civil case that can be resolved on the basis of legal issues alone." (citing *Green v. Green*, 293 S.W.3d 493, 513 (Tenn. 2009); *Fruge v. Doe*, 952 S.W.2d 408, 410 (Tenn. 1997); *Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn. 1993))). Summary judgment is also particularly appropriate where, as here, "the issues presented to this Court primarily involve the interpretation and construction of written instruments[,]" *Cellco P'ship v. Shelby Cty.*, 172 S.W.3d 574, 586 (Tenn. Ct. App. 2005), because "[i]ssues relating to the interpretation of written instruments involve legal rather than factual issues[,]'" *id.* (quoting *The Pointe, LLC v. Lake Mgmt. Ass'n, Inc.*, 50 S.W.3d 471, 474 (Tenn. Ct. App. 2000)).

Critically, "'[w]hen the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.'" *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 210 (2014) (quoting *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000)). Thus, Metro bears the burden as to the merits of this action. Further, because the Government has purported to restrict the Plaintiffs' speech based on its content and the viewpoint expressed, the School Board Censorship Clause is "presumptively unconstitutional and may be justified only if the government proves that [it is] narrowly tailored to serve compelling state interests." *Nat'l Inst. of Family & Life*

Advocates v. Becerra, 138 S. Ct. 2361, 2371 (2018) (quoting *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015)) (internal quotation marks omitted). *See also Playboy Entm't Grp.*, 529 U.S. at 817 ("'Content-based regulations are presumptively invalid,' and the Government bears the burden to rebut that presumption." (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992))).

Independently, a movant may demonstrate its entitlement to summary judgment "by affirmatively negating an essential element of the nonmoving party's claim . . . ." *Rye v. Women's Care Center of Memphis, MPLLC*, 477 S.W.3d 235, 264 (Tenn. 2015). Thus, the Plaintiffs are entitled to summary judgment if they can demonstrate beyond material dispute that the School Board Censorship Clause is not narrowly tailored to further a compelling governmental interest. *See Reed*, 135 S. Ct. at 2226 ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.") (collecting cases). The Plaintiffs are also entitled to summary judgment as to their overbreadth claim if they can demonstrate beyond material dispute that "'a substantial number of [the School Board Censorship Clause's] applications are unconstitutional, judged in relation to [its] plainly legitimate sweep.'" *United States v. Stevens*, 559 U.S. 460, 473 (2010) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008)) (internal quotation marks omitted).

For the reasons detailed below, there is no material dispute that the School Board Censorship Clause does not promote a compelling governmental interest, that it is unconstitutional, and that it is an overbroad and unenforceable speech restriction. Accordingly, the Plaintiffs' motion for summary declaratory judgment should be granted.

IV. APPLICABLE CONSTITUTIONAL STANDARDS

A. PRIOR RESTRAINTS

"[P]rior restraints on speech . . . are the most serious and the least tolerable infringements on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Prohibitions restricting the right to speak on a particular topic are especially disfavored, *see id.* at 558, and thus, "[a]ny system of prior restraints of expression comes . . . bearing a heavy presumption against its constitutional validity[,]" *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963) (collecting cases). The Supreme Court has additionally recognized that prior restraints on speech harm not only speakers themselves, but the listening public as well. *See, e.g.*, *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978) ("[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw."); *see also McCarthy v. Fuller*, 810 F.3d 456, 462 (7th Cir. 2015) ("An injunction against speech harms not just the speakers but also the listeners (in this case the viewers and readers).").

B. PLAINTIFFS' CONTENT DISCRIMINATION CLAIMS

1. Viewpoint Discrimination

Viewpoint discrimination is presumptively forbidden by the First Amendment, *see Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) ("[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others .") (collecting cases), and it is regarded as "an egregious form of content discrimination[,]" *see Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). Accordingly, viewpoint discrimination triggers

strict scrutiny, which requires the Government to demonstrate that the School Board Censorship Clause is "narrowly tailored to serve compelling state interests." *Reed*, 135 S. Ct. at 2226. *See also Bible Believers v. Wayne Cty.*, 805 F.3d 228, 248 (6th Cir. 2015) ("Both content- and viewpoint-based discrimination are subject to strict scrutiny." (citing *McCullen v. Coakley*, 134 S. Ct. 2518, 2530, 2534 (2014))). "No state action that limits protected speech will survive strict scrutiny unless the restriction is narrowly tailored to be the least-restrictive means available to serve a compelling government interest." *Id.* (citing *Playboy Entm't Grp.*, 529 U.S. at 813).

2. Content Discrimination Generally

"Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Regan v. Time, Inc.*, 468 U.S. 641, 648–49 (1984) (citation omitted). Such a defect triggers strict scrutiny, which only permits the Government to "regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest." *Sable Commc'ns of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989).

3. Speaker-Based Discrimination

"A law that allows a message but prohibits certain speakers from communicating that message is content-based" and triggers strict scrutiny. *Thomas v. Bright*, 937 F.3d 721, 731 (6th Cir. 2019) (citing *Turner Broadcasting Sys., Inc. v. F.C.C.*, 512 U.S. 622, 658 (1994); Greater New Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 173, 193–94 (1999)). The U.S. Supreme Court has also made clear that speaker-based discrimination—the governmental practice of permitting speech by some people, but not

others, based only on the identity of the speaker—is flagrantly, and perhaps insurmountably, unconstitutional in all cases. *See, e.g.*, *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 325 (2002) ("Granting waivers to favored speakers (or, more precisely, denying them to disfavored speakers) would of course be unconstitutional . . . ."); *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) ("[W]e have frequently condemned such discrimination among different users of the same medium for expression."); *Citizens United v. F.E.C.*, 558 U.S. 310, 340 (2010) ("Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others." (citing *First Nat'l Bank of Boston*, 435 U.S. at 784 (1978))); *Juzwick v. Borough of Dormont*, No. CIV.A. 01-310, 2001 WL 34369467, at *3 (W.D. Pa. Dec. 12, 2001) ("'Speaker' discrimination lies at the intersection of the First and Fourteenth Amendments. The Supreme Court, on numerous occasions, has condemned government actions that have discriminated based upon the identity of the speaker.") (internal citation omitted), *no app. filed*; *City of Madison, Joint Sch. Dist. No. 8 v. Wis. Employment Relations Comm'n*, 429 U.S. 167, 175–76 (1976) ("To permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees. Whatever its duties as an employer, when the board sits in public meetings to conduct public business and hear the views of citizens, it may not be required to discriminate between speakers on the basis of their employment, or the content of their speech." (citing *Mosley*, 408 U.S. 92, 96 (1972))); *Greater New Orleans Broad. Ass'n*, 527 U.S. at 194 ("[D]ecisions that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment.").

4. Article I, Section 19 of the Tennessee Constitution

Like its federal counterpart, article I, section 19 of the Tennessee Constitution compels strict scrutiny of content-based speech regulations. *See generally Doe v. Doe*, 127 S.W.3d 728, 732 (Tenn. 2004). Thus, where the Government fails to demonstrate that a content-based speech restriction is "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end[,]" the law must be invalidated as one that "violates free speech rights under Article I, section 19 of the Tennessee Constitution[.]" *Id.* at 737.

C. OVERBREADTH

Under the overbreadth doctrine established by the U.S. Supreme Court, "a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *Stevens*, 559 U.S. at 473 (quoting *Wash. State Grange*, 552 U.S. at 449 n.6). Accordingly, if the School Board Censorship Clause restricts a substantial amount of protected speech in relation to the speech that it may restrict legitimately, then this Court may invalidate it as unconstitutionally overbroad. *See id.*

V. ARGUMENT

A. THE PLAINTIFFS' FEDERAL CONSTITUTIONAL CLAIMS

The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. The Free Speech Clause has been incorporated against the states through the Due Process Clause of the Fourteenth Amendment, *see Gitlow v. New York*, 268 U.S. 652, 666 (1925)), and accordingly, it protects against State infringement of free speech

protections. The First Amendment's protections are also especially robust with respect to political speech, which lies at the core of the First Amendment and "must prevail against laws that would suppress it, whether by design or inadvertence." *Citizens United*, 558 U.S. at 340.

1. Plaintiffs' Content Discrimination claims

a. Viewpoint-Based Discrimination

"Viewpoint discrimination is censorship in its purest form[,] and government regulation that discriminates among viewpoints threatens the continued vitality of 'free speech.'" *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 62 (1983) (Brennan, J., dissenting). Despite being distinct in some respects, viewpoint discrimination is regarded as "an egregious form of content discrimination[,]" which triggers strict constitutional scrutiny. *See Rosenberger*, 515 U.S. at 829. *See also Reed*, 135 S. Ct. at 2230 ("Government discrimination among viewpoints—or the regulation of speech based on 'the specific motivating ideology or the opinion or perspective of the speaker'—is a 'more blatant' and 'egregious form of content discrimination.'" (quoting *Rosenberger*, 515 U.S. at 829)).

Here, the School Board Censorship Clause prohibits "disparaging or defamatory comments regarding Dr. Joseph and his performance as Director of Schools." *See* Exhibit #1 to SUMF, p. 2, ¶ 1(f)(2) (emphasis added). In particular, the School Board Censorship Clause prohibits any "false and injurious statement that discredits or detracts from the reputation of [Joseph]," and it additionally prohibits any "statement or communication tending to harm [Joseph's] reputation by subjecting [him] to public contempt, disgrace, or ridicule, or by adversely affecting [his] business." *Id.* at pp. 1–2, ¶(1)(f)(1) (emphases

modified).

Consequently, by its plain terms, the School Board Censorship Clause expressly regulates speech based on the viewpoint expressed, forbidding only specified speech that impugns Defendant Joseph and his performance as Director of Schools, while permitting the School Board and its elected members to say whatever they please on any other topic regarding him. *Id.* The fact that any and all *laudatory* statements—including *false* laudatory statements—about Defendant Joseph and his performance as Director of Schools are permissible under the School Board Censorship Clause, while virtually all statements—including *truthful* statements—that *impugn* Joseph's performance as Director of Schools are forbidden also conclusively demonstrates that the School Board Censorship Clause is a viewpoint-based speech restriction. *Id.*

As such, the School Board Censorship Clause is presumptively unconstitutional, and to overcome its presumptive unconstitutionality, Metro must demonstrate that the School Board Censorship Clause is narrowly tailored to further a compelling governmental interest. *See Bible Believers*, 805 F.3d at 248 (citing *McCullen*, 134 S. Ct. at 2530, 2534). As noted, however, the Supreme Court has repeatedly indicated that such a burden is all but insurmountable. *See supra,* pp. 7–8. *See also Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1936 (2019) (Sotomayor, J., dissenting) ("[W]hile many cases turn on which type of 'forum' is implicated, the important point here is that viewpoint discrimination is impermissible in them all." (citing *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001) ("The State's power to restrict speech, however, is not without limits. The restriction must not discriminate against speech on the basis of viewpoint[.]"))); *Matal v. Tam*, 137 S. Ct. 1744, 1766 (2017) (Kennedy, J., concurring in part and concurring in the judgment) (decrying that "the government has singled out a

subset of messages for disfavor based on the views expressed").

b. Content-Based Discrimination Generally

More broadly, the School Board Censorship Clause suffers from another fatal infirmity: In addition to its viewpoint restrictions, it applies based on content to speech "regarding Dr. Joseph and his performance as Director of Schools." *See* Exhibit #1 to SUMF, p. 2, ¶ 1(f)(2). By contrast, the Plaintiffs' speech regarding all topics that are not related to Joseph and his performance as Director of Schools is unregulated.

Thus, the School Board Censorship Clause is a content-based restriction on the Plaintiffs' speech, because by its express terms, it targets both the topic discussed and the message expressed. *See Reed*, 135 S. Ct. at 2227 ("Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." (citing *Sorrell*, 564 U.S. at 566; *Carey v. Brown*, 447 U.S. 455, 462 (1980); *Mosley*, 408 U.S. 92)). As a consequence, the School Board Censorship Clause is "presumptively unconstitutional and may be justified only if the government proves that [it is] narrowly tailored to serve compelling state interests." *Id.* at 2226. Here, however, the fact that the School Board Censorship Clause specifically silences criticism of a now former government official—perhaps the central reason for the First Amendment's existence—makes such a task Sisyphean. *See, e.g., 119 Vote No! Comm.*, 135 Wash. 2d at 626 ("[T]he First Amendment prohibits the State from silencing speech it disapproves, particularly silencing criticism of government itself. Threats of coerced silence chill uninhibited political debate and undermine the very purpose of the First Amendment." (citing *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. at 791 (1988); *Brown v. Hartlage,* 456 U.S. 45, 61 (1982); *Meyer v. Grant*, 486 U.S. 414, 419–20 (1988))); *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (collecting

cases)).

c. Speaker-Based Discrimination

By a 5–3 vote, the Defendant Metropolitan Government, through its School Board, resolved to adopt a "binding" measure to forbid "the Board collectively" and "each Board member individually"—and those speakers alone—from making certain critical statements about Joseph that are prohibited by the School Board Censorship Clause. *See* Exhibit #1 to SUMF, p. 2, ¶ 1(f)(2). *See also* Exhibit #2 to SUMF, p. 2 ("Final Resolution: Motion Passes"). The School Board Censorship Clause, however, does not restrict the speech of any speaker who is not a Member of the School Board. *See* Exhibit #1 to SUMF, p. 2, ¶ 1(f)(2).

As such, the School Board Censorship Clause is a speaker-based speech restriction that triggers strict scrutiny. *See Bright*, 937 F.3d at 731. As detailed above, however, the Supreme Court has intimated repeatedly that speaker-based speech restrictions can never be upheld under any circumstances. *See, e.g.*, *Chicago Park Dist.*, 534 U.S. at 325 ("Granting waivers to favored speakers (or, more precisely, denying them to disfavored speakers) would of course be unconstitutional . . . ."); *Mosley*, 408 U.S. at 96 ("[W]e have frequently condemned such discrimination among different users of the same medium for expression."); *Citizens United*, 558 U.S. at 340 ("Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others."); *Juzwick*, 2001 WL 34369467, at *3 ("'Speaker' discrimination lies at the intersection of the First and Fourteenth Amendments. The Supreme Court, on numerous occasions, has condemned government actions that have discriminated based upon the identity of the speaker.") (internal citation omitted); *City of Madison*, 429 U.S. at 175–76 ("To permit one side of a debatable public question to have a monopoly in expressing its views to the

government is the antithesis of constitutional guarantees. Whatever its duties as an employer, when the board sits in public meetings to conduct public business and hear the views of citizens, it may not be required to discriminate between speakers on the basis of their employment, or the content of their speech."); *Greater New Orleans Broad. Ass'n*, 527 U.S. at 194 ("[D]ecisions that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment.").

2. <u>The School Board Censorship Clause cannot withstand strict scrutiny.</u>

Given the First Amendment's "heightened protections for political speech[,]" Metro has no legitimate—much less compelling—interest in allowing "government censors to vet and penalize political speech about . . . individual [government officials]." *Rickert v. Pub. Disclosure Comm'n*, 168 P.3d 826, 829–30 (Wash. 2007) (en banc). Further, even if such an interest existed, the School Board Censorship Clause would not be sufficiently narrowly tailored to achieve it. *Cf. Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 474–76 (6th Cir. 2016) (finding Ohio false campaign statements law could not withstand strict scrutiny for six independent reasons). Accordingly, the School Board Censorship Clause cannot survive strict scrutiny as a matter of law.

a. The School Board Censorship Clause does not further a compelling governmental interest.

"The manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy." *Bond v. Floyd*, 385 U.S. 116, 135–36 (1966). Put another way: "The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance." *Wood v. Georgia*,

370 U.S. 375, 395 (1962). *See also Wilson v. Houston Cmty. Coll. Sys.*, 955 F.3d 490, 497 (5th Cir. 2020) ("The Supreme Court has long stressed the importance of allowing elected officials to speak on matters of public concern."). Thus, the Supreme Court has explained:

> Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes. . . . Suppression of the right . . . to praise or criticize governmental agents and to clamor and contend for or against change . . . muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free.

Mills v. Alabama, 384 U.S. 214 (1966).

Rather than *promoting* a compelling governmental interest, though, by restricting the Plaintiffs—three elected officials—from speaking out about matters of significant public importance "regarding Dr. Joseph and his performance as Director of Schools," *see* Exhibit #1 to SUMF, p. 2, ¶ 1(f)(2), the School Board Censorship Clause egregiously *undermines* the "manifest function of this First Amendment[,]" *Bond*, 385 U.S. at 135–36. Put simply: Such a restriction not only abridges the Plaintiffs' own First Amendment rights, *see, e.g.*, *Peeper v. Callaway Cty. Ambulance Dist.*, 122 F.3d 619, 623 (8th Cir. 1997) ("Restrictions on a public official's participation necessarily affect that individual's First Amendment associational rights and Fourteenth Amendment equal protection rights.")—it strikes directly at the heart of representative government itself by preventing the Plaintiffs from meaningfully representing the voters who elected them. *See id.* at n.5 ("Limitations on an officeholder, by contrast, provide voters no opportunity to be heard through an alternative representative. If the restrictions prevent the officeholder from meaningfully representing the voters who elected the official, such restrictions are subject

to strict scrutiny." (citing *Bullock v. Carter*, 405 U.S. 134, 143 (1972))).

As such, Metro's attempt to muzzle criticism of an ex-government official is not even a legitimate interest—much less a compelling one. *Cf. Bridges v. California*, 314 U.S. 252, 270 (1941) ("The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions."); *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2464 (2018) ("Free speech serves many ends. It is essential to our democratic form of government, *see, e.g.*, *Garrison v. Louisiana*, 379 U.S. 64, 74–75, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964), and it furthers the search for truth, *see, e.g.*, *Thornhill v. Alabama*, 310 U.S. 88, 95, 60 S. Ct. 736, 84 L. Ed. 1093 (1940). Whenever the Federal Government or a State prevents individuals from saying what they think on important matters or compels them to voice ideas with which they disagree, it undermines these ends.") (emphases added); *N.Y. Times*, 376 U.S. at 270 ("[D]ebate on public issues should be uninhibited, robust, and wide-open, and [] it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." (citing *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949); *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937))). *See also United States v. Marchetti*, 466 F.2d 1309, 1315 (4th Cir. 1972) ("the First Amendment protects criticism of the government"); *Garrison*, 379 U.S. at 74–75 ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government."). Indeed, as the Fourth Circuit recently explained in a similar case rejecting the government's unlawful attempt to suppress criticism of the government and government officials through a contract:

[T]he City urges that both it and the officers involved have an interest in

> avoiding "harmful publicity." Appellees' Br. at 34. It is well-established that "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials" can play a valuable role in civic life and therefore enjoy the protections of the *First Amendment*. *N.Y. Times*, 376 U.S. at 270, 84 S. Ct. 710. **Enforcing a waiver of First Amendment rights for the very purpose of insulating public officials from unpleasant attacks would plainly undermine that core First Amendment principle. Thus, the City's asserted interest in enforcing the non-disparagement clause to avoid harmful publicity stumbles out of the gate, and we find it unpersuasive.**

Overbey v. Mayor of Baltimore, 930 F.3d 215, 226 (4th Cir. 2019) (emphasis added).

Further still, even when restricted to the far narrower category of false and legally defamatory speech—and to be sure, the School Board Censorship Clause contains absolutely no such limitation[1]—the Government's interest cannot be prior restraint and government-imposed censorship. *See, e.g.*, *McCarthy*, 810 F.3d at 462 ("An injunction against speech harms not just the speakers but also the listeners (in this case the viewers and readers)."); *e360 Insight v. The Spamhaus Project*, 500 F.3d 594, 606 (7th Cir. 2007) ("The usual rule is that equity does not enjoin a libel or slander and that the only remedy

[1] *See* Exhibit #1 to SUMF, p. 2, ¶ 1(f)(2) (prohibiting, *inter alia*, truthful defamation, and defining defamation far more broadly than the First Amendment permits). Further, even if the School Board Censorship Clause were limited to false speech alone, because false speech generally enjoys First Amendment protection, the Government cannot plausibly have a compelling interest in restricting even that. *See United States v. Alvarez*, 567 U.S. 709, 722 (2012). ("The Government has not demonstrated that false statements generally should constitute a new category of unprotected speech . . . ."). Indeed, expressly acknowledging the value of false speech—"the Supreme Court has recognized that to sustain our constitutional commitment to uninhibited political discourse, the State may not prevent others from 'resort[ing] to exaggeration, to vilification of men who have been, or are, prominent in church and state, and *even to false statement*.'" *State ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm.*, 135 Wash. 2d 618, 625 (1998) (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940)). *See also N.Y. Times Co. v. Sullivan, 376 U.S. 254,* 279 n.19 (1964) ("Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'" (quoting JOHN STUART MILL, ON LIBERTY 15 (Oxford: Blackwell 1947))); *Alvarez*, 567 U.S. at 723 ("Permitting the government to decree this speech to be a criminal offense, whether shouted from the rooftops or made in a barely audible whisper, would endorse government authority to compile a list of subjects about which false statements are punishable. That governmental power has no clear limiting principle. Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth." (citing G. ORWELL, NINETEEN EIGHTY–FOUR (1949) (Centennial ed. 2003))); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 54 (1988) ("Despite their sometimes caustic nature, from the early cartoon portraying George Washington as an ass down to the present day, graphic depictions and satirical cartoons have played a prominent role in public and political debate.").

for defamation is an action for damages.") (cleaned up); *Sindi v. El-Moslimany*, 896 F.3d 1, 33 (1st Cir. 2018) (noting that an "[a]n injunction that prevents in perpetuity the utterance of particular words and phrases after a defamation trial" may still be unconstitutional *even after* the words and phrases have been found defamatory in cases involving public figures). *See also Tory v. Cochran*, 544 U.S. 734, 738 (2005); *Metro. Opera Ass'n, Inc. v. Local 100, Hotel Employees & Rest. Employees Int'l Union*, 239 F.3d 172, 177 (2d Cir. 2001) ("[F]or almost a century the Second Circuit has subscribed to the majority view that, absent extraordinary circumstances, injunctions should not ordinarily issue in defamation cases."). Instead, the appropriate remedy must be counterspeech. *See, e.g.*, *Susan B. Anthony List*, 814 F.3d at 472 ("*Alvarez* confirms that the First Amendment protects the 'civic duty' to engage in public debate, with a preference for counteracting lies with more accurate information, rather than by restricting lies." (citing *Alvarez*, 567 U.S. at 727)).

In other words: When the Government wishes to address false speech, "the remedy to be applied is more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring), *overruled on other grounds by Brandenburg v. Ohio*, 395 U.S. 444 (1969). Thus, by imposing a prior restraint against the Plaintiffs' speech, the Defendants have negotiated a remedy that the First Amendment forbids.

b. The School Board Censorship Clause is not narrowly tailored to achieve a compelling governmental interest as a matter of law.

As noted above, the School Board Censorship Clause not only fails to promote any compelling governmental interest; it specifically advances constitutionally prohibited interests. *See supra*, pp. 15–19. As a consequence, it cannot plausibly be the least restrictive means of promoting a compelling governmental interest as a matter of law.

See, e.g., *United States v. Doe*, 968 F.2d 86, 88 (D.C. Cir. 1992) ("Whether [a challenged] regulation meets the 'narrowly tailored' requirement is of course a question of law . . . ."); *Hoevenaar v. Lazaroff*, 422 F.3d 366, 368 (6th Cir. 2005) ("[T]he district court's analysis of whether the prison regulations were the least restrictive means is a question of law, subject to de novo review." (citing *Lawson v. Singletary*, 85 F.3d 502, 511–12 (11th Cir. 1996); *Hamilton v. Schriro*, 74 F.3d 1545, 1552 (8th Cir. 1996))).

Further, because the School Board Censorship Clause restricts truthful speech that is critical of Defendant Joseph but permits false speech that praises him, the School Board Censorship Clause is both fatally underinclusive and overinclusive and cannot be narrowly tailored to achieve any compelling governmental interest as a matter of law for that reason as well. *See, e.g., Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 802 (2011) ("Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.") (citations omitted); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 578 (1993) (Blackmun, J., concurring in the judgment) ("A State may no more create an underinclusive statute, one that fails truly to promote its purported compelling interest, than it may create an overinclusive statute, one that encompasses more protected conduct than necessary to achieve its goal."). In any event, however, because it is Metro's burden to demonstrate that the School Board Censorship Clause is narrowly tailored to achieve a compelling interest, Metro must satisfy this burden to avoid summary judgment. *See Rye*, 477 S.W.3d at 264.

3. Plaintiffs' Overbreadth Claim

"[A] law may be invalidated as overbroad if 'a substantial number of its

applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *Stevens*, 559 U.S. at 473 (quoting *Wash. State Grange*, 552 U.S. at 449 n.6). Here, for the reasons detailed below, the School Board Censorship Clause restricts a substantial amount of protected speech in relation to the far narrower category of speech that it may restrict legitimately. Accordingly, the School Board Censorship Clause is unconstitutionally overbroad, *see id.*, and it should be invalidated accordingly.

a. The Government cannot lawfully prohibit truthful defamation.

The School Board Censorship Clause is not restricted to the legally recognized definition of defamation that state and federal courts have developed over decades of constitutional jurisprudence. Instead, by agreement, the School Board Censorship Clause expressly defines a "defamatory" statement far more broadly as follows: "'Defamatory' means a statement or communication tending to harm a person's reputation by subjecting the person to public contempt, disgrace, or ridicule, or by adversely affecting the person's business." Exhibit #1 to SUMF, p. 2, ¶ 1(f)(1).

Under this definition, even truthful defamation is prohibited by the School Board Censorship Clause. *Id.* Accordingly, the Defendants' agreed definition of "defamatory" under the School Board Censorship Clause imposes liability based on an ancient and long-since-reformed version of English common law defamation in which "truth was no defense," *see Garrison*, 379 U.S. at 67–68. As the Tenth Circuit has explained:

> [T]o concede that a statement is defamatory is just to say it hurts. It says nothing about the truth of the matter. In fact, long ago English *criminal law* took the view that the truth was not only not a defense to a defamation charge but an aggravating circumstance—so that it was actually (if remarkably to contemporary ears) said, "the greater the truth the greater the libel." *See* Laurence H. Eldredge, The Law of Defamation § 64 (1978). Truth was no defense to a criminal defamation charge because the law cared less about the niceties of personal reputations and free speech than with

> keeping a lid on public violence and civil unrest. *Id.* Even truthful defamation demanded punishment because of its tendency, in the Star Chamber's estimation, to "incite[ ] . . . quarrels and breach of the peace, and [to] be the cause of shedding of blood, and of great inconvenience." De Libellis Famosis Case, 77 Eng. Rep. 250, 251 (Star Chamber 1606).

Bustos v. A & E Television Networks, 646 F.3d 762, 763 (10th Cir. 2011). *See also Curtis Pub. Co. v. Butts*, 388 U.S. 130, 151 (1967) ("The history of libel law leaves little doubt that it originated in soil entirely different from that which nurtured these constitutional values. Early libel was primarily a criminal remedy, the function of which was to make punishable any writing which tended to bring into disrepute the state, established religion, or any individual likely to be provoked to a breach of the peace because of the words. Truth was no defense in such actions and while a proof of truth might prevent recovery in a civil action, this limitation is more readily explained as a manifestation of judicial reluctance to enrich an undeserving plaintiff than by the supposition that the defendant was protected by the truth of the publication.").

In this respect, the School Board Censorship Clause restricts far more speech than modern defamation law—which has long since been "constitutionalized" by the U.S. Supreme Court, *see Press, Inc. v. Verran*, 569 S.W.2d 435, 440 (Tenn. 1978) ("the Supreme Court of the United States has constitutionalized the law of libel")—permits. "The law of libel has, of course, changed substantially since the early days of the Republic, and this change is the direct consequence of the friction between it and the highly cherished right of free speech." *Curtis Pub. Co.*, 388 U.S. at 151 (cleaned up). Thus, "the defense of truth **is constitutionally required** where the subject of the publication is a public official or public figure." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 490 (1975) (emphasis added). By contrast, however, the School Board Censorship Clause makes truthful defamation of Joseph actionable. *See* Exhibit #1 to SUMF, p. 2, ¶ 1(f)(1).

b. The Government cannot lawfully expand liability for speech beyond what the First Amendment permits.

Truth as an absolute defense to defamation is not the only constitutional mandate that the U.S. Supreme Court has imposed in constraining common law defamation liability. *See Cox Broad. Corp.*, 420 U.S. at 490. In addition, the Supreme Court has famously held that a "defamed public official or public figure must prove not only that the publication is false but that it **was knowingly so or was circulated with reckless disregard for its truth or falsity**." *Id.* (emphasis added).

The School Board Censorship Clause unmistakably contravenes these constitutional requirements as well—eschewing any such actual malice requirement for liability or, indeed, any mental state requirement at all. *See* Exhibit #1 to SUMF, p. 2, ¶ 1(f)(1). So, too, are countless other constitutional requirements of defamation liability ignored, including well-established protections for rhetorical hyperbole,[2] parody and satire.[3] The liability that the School Board Censorship Clause purports to impose additionally eschews well-recognized privileges against defamation liability, including the absolute legislative privilege, *see Miller v. Wyatt*, 457 S.W.3d 405, 409 (Tenn. Ct. App. 2014), the absolute litigation privilege, *see Simpson Strong-Tie Co., Inc. v. Stewart, Estes & Donnell*, 232 S.W.3d 18, 22 (Tenn. 2007), the absolute testimonial privilege, *Wilson v. Ricciardi*, 778 S.W.2d 450, 453 (Tenn. Ct. App. 1989), and any number of other established privileges that prohibit the liability that the School Board Censorship Clause

[2] *See, e.g.*, *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17 (1990); *Old Dominion Branch No. 496, Nat. Ass'n of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 286 (1974); *Greenbelt Co-op. Pub. Ass'n v. Bresler*, 398 U.S. 6, 14 (1970).

[3] *See, e.g.*, *Hustler Magazine*, 485 U.S. at 57. *See also Farah v. Esquire Magazine*, 736 F.3d 528, 536 (D.C. Cir. 2013) ("Despite its literal falsity, satirical speech enjoys First Amendment protection.").

aims to impose, *see, e.g.*, *Jones v. State*, 426 S.W.3d 50, 56 (Tenn. 2013), all of which carry special relevance given the controversial circumstances surrounding Defendant Joseph's early termination. *See, e.g.*, Exhibits ## 3 & 4 to SUMF. Further, by imposing liability for statements that merely "tend[] to harm a person's reputation by . . . adversely affecting the person's business," *see* Exhibit #1 to SUMF, p. 2, ¶ 1(f)(1), the School Board Censorship Clause hopelessly contravenes the rule that "although economic damage might be an intended effect of [a speaker's] expression, the First Amendment protects critical commentary when there is no confusion as to source, even when it involves the criticism of a business." *Taubman Co. v. Webfeats*, 319 F.3d 770, 778 (6th Cir. 2003). In all of these respects, the essential conclusion is that School Board Censorship Clause prohibits "defamatory" statements based on an agreed definition of defamation that imposes liability far beyond what the First Amendment permits.

So, too, is it unlawful for Metro to prohibit mere "disparaging" comments regarding Joseph—a public figure and former government official—that do not satisfy the constitutional strictures of defamation. *See, e.g.*, *Gasparinetti v. Kerr,* 568 F.2d 311 (3rd Cir. 1977) (invalidating, on First Amendment overbreadth grounds, a "disputed 'Public Disparagement' (ch. 6:7) regulation provid[ing] that a Department member shall not 'publicly disparage or comment unfavorably or disrespectfully' on the official actions of superior officers or on the orders of the Department."); *Matal*, 137 S. Ct. at 1751 ("The Patent and Trademark Office (PTO) denied the application based on a provision of federal law prohibiting the registration of trademarks that may 'disparage . . . or bring . . . into contemp[t] or disrepute' any 'persons, living or dead.' 15 U.S.C. § 1052(a). We now hold that this provision violates the Free Speech Clause of the First Amendment. It offends a bedrock First Amendment principle: Speech may not be banned on the ground that it

expresses ideas that offend."); *Shak v. Shak*, 144 N.E.3d 274, 280 (Mass. 2020) ("[B]ecause there was no showing of an exceptional circumstance that would justify the imposition of a prior restraint, the nondisparagement orders issued here are unconstitutional."); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 210 (3d Cir. 2001) ("By prohibiting disparaging speech directed at a person's 'values,' the Policy strikes at the heart of moral and political discourse—the lifeblood of constitutional self government (and democratic education) and the core concern of the First Amendment."); *Yanosik v. Amazulu Transp. Inc.*, No. 217CV385FTM29MRM, 2017 WL 5125884, at *2 (M.D. Fla. Oct. 3, 2017) ("[T]his Court has previously noted that 'provisions in a FLSA settlement agreement that call for . . . prohibiting disparaging remarks contravene FLSA policy and attempt to limit an individual's rights under the First Amendment.'" (quoting *Housen v. Econosweep & Maint. Servs., Inc.*, No. 3:12-CV-461-J-15TEM, 2013 WL 2455958, at *2 (M.D. Fla. June 6, 2013) (in turn citing *Valdez v. T.A.S.O. Props., Inc.*, No. 8:09-cv-2250-T-23TGW, 2010 WL 1730700, at *1 n.1 (M.D. Fla. Apr. 28, 2010) (holding that the FLSA settlement agreements including non-disparagement provisions "contemplate judicially imposed 'prior restraint[s]' in violation of the First Amendment")))), *report and recommendation adopted*, No. 217CV385FTM29MRM, 2017 WL 5069051 (M.D. Fla. Nov. 3, 2017).

In sum: The School Board Censorship Clause prohibits a substantial amount of constitutionally protected speech, while its legitimate sweep is far narrower. In particular, the School Board Censorship Clause can only legitimately be applied—at most—to damages claims arising from false statements of fact that are made with actual malice, are neither true nor substantially true, and constitute a serious threat to Joseph's reputation while demonstrably harming it, with applicable exclusions for rhetorical

hyperbole, parody, and satire. Further, even then, its proscription against defamation must bend to applicable privileges like the absolute legislative privilege, which will necessarily apply whenever the Plaintiffs make statements as elected officials "relating to matters within the scope of [the School Board's] authority." *Miller*, 457 S.W.3d at 410 (quotation marks omitted). Consequently, relative to its legitimate sweep, the School Board Censorship Clause is significantly, hopelessly, and unconstitutionally overbroad. As such, it should be declared unconstitutional and enjoined as a matter of law. *See Stevens*, 559 U.S. at 473.

B. PLAINTIFFS' TENNESSEE CONSTITUTIONAL CLAIMS

The Tennessee Constitution provides, in pertinent part, that "[t]he free communication of thoughts and opinions, is one of the invaluable rights of man, and every citizen may freely speak, write, and print on *any* subject, being responsible for the abuse of that liberty." TENN. CONST. art. I, § 19 (emphasis added). "Article I, Section 19 is 'a substantially stronger provision than that contained in the First Amendment to the Federal Constitution.'" *State v. Smoky Mountain Secrets, Inc.*, 937 S.W.2d 905, 910 n.4 (Tenn. 1996) (quoting *Press, Inc.*, 569 S.W.2d at 442). In all cases, however, "Article 1, section 19 provides protection of free speech rights at least as broad as the First Amendment." *Doe*, 127 S.W.3d at 732 (citing *Leech v. Am. Booksellers Ass'n, Inc.*, 582 S.W.2d 738, 745 (Tenn. 1979)).

As noted above, like the First Amendment, article I, section 19 compels strict scrutiny of content-based speech regulations. *See id.* at 737. As additionally noted above, the School Board Censorship Clause cannot plausibly survive strict scrutiny, because rather than promoting any compelling governmental interest, it instead promotes

interests that are well-recognized to be both illegitimate and illegal, and it is not narrowly tailored to achieve any compelling interest at all. *See supra*, pp. 15–20. As such, under the more protective provisions of article I, section 19 of the Tennessee Constitution, the School Board Censorship Clause should be declared unconstitutional and enjoined.

C. PLAINTIFFS' CONTRACT CLAIMS

The School Board Censorship Clause cannot lawfully be enforced against the Plaintiffs for non-constitutional reasons as well. Specifically, the School Board Censorship Clause: (1) violates public policy; (2) unlawfully purports to bind the Plaintiffs even though they did not assent to it; and (3) unlawfully purports to strip the Plaintiffs of their absolute legislative immunity both without their consent and, in fact, over their express objections.

1. The School Board Censorship Clause violates public policy.

Where contracts that bear upon federally protected rights are concerned, "[t]he relevant principle is well established: A promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987). Similarly, under Tennessee law, "[t]he authority of the courts to invalidate the bargains of parties on grounds of public policy is unquestioned and is clearly necessary," *Baugh v. Novak*, 340 S.W.3d 372, 382 (Tenn. 2011) (cleaned up). As a consequence, "Tennessee courts have long recognized and exercised this authority" where overriding state interests are implicated. *Id.*

Here, the Defendants—a bare majority of a governmental body and Defendant Joseph personally, all of whom were government officials at the time the contract at issue

was executed—purported to agree by contract not to criticize one another. *See* Exhibit #1 to SUMF, p. 2, ¶ 1(f)(2); *id*. at pp. 2–3, ¶ 2(e)(2) ("Dr. Joseph will not make any disparaging or defamatory comments regarding Metro, the Board, individual members of the Board, and/or any METRO AFFILIATES, or their respective current or former officers or employees in any respect."). As noted above, such provisions are patently unconstitutional with respect to the speech restrictions they impose upon elected School Board Members, whose right to speak to and on behalf of their constituents with the widest possible latitude is well-established. *See supra,* pp. 15–19.

Critically, though, the mutuality of the Severance Agreement's speech restrictions significantly exacerbates the constitutional affront. It merits emphasizing that *government entities are legally incapable of being defamed*. *See 281 Care Comm.*, 638 F.3d at 634 ("A government entity cannot bring a libel or defamation action." (citing *N.Y. Times*, 376 U.S. at 291 (noting no court "of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence" (internal quotations omitted)))). *See also Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966) ("[C]riticism of government is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized."). Notwithstanding this clear principle, however, the Defendants unlawfully colluded to suppress—by mutual agreement—criticism of one another through an employment severance contract. *See* Exhibit #1 to SUMF, p. 2, ¶ 1(f)(2); *id*. at pp. 2–3, ¶ 2(e)(2).

Such an "agreement" represents nothing less than a corruption of the political process itself. As the Ninth Circuit has explained:

> To treat political rights as economic commodities corrupts the political process. Just as we would not enforce a contract stating that voter X will vote for candidate Y in exchange for a sum of money, so too we will not enforce an agreement whereby a citizen receives money in exchange for a promise not to exercise his right to run for office. As harmful as such agreements are in general, they are particularly offensive where, as here, the parties authorizing the payment are elected officials and the recipient is a potential political opponent. This sort of arrangement is a serious abuse of the power of incumbency.

Davies v. Grossmont Union High Sch. Dist., 930 F.2d 1390, 1398–99 (9th Cir. 1991).

Simply stated: Enforcing the Defendants' mutual non-disparagement provisions strips the public of two essential rights. *First*, it denies the public their right to elected officials who are "'allowed freely to express themselves on matters of current public importance.'" *Wilson*, 955 F.3d at 497 (quoting *Rangra v. Brown*, 566 F.3d 515, 524 (5th Cir.) (citation omitted), *dismissed as moot en banc*, 584 F.3d 206 (5th Cir. 2009)). *Second*, it robs the public of its right to hear and receive information about government affairs that either Defendant considers damaging. *But see Citizens United*, 558 U.S. at 356 ("When Government seeks to use its full power . . . to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves."); *City of San Diego v. Roe*, 543 U.S. 77, 82 (2004) ("Underlying the decision in *Pickering* is the recognition that public employees are often the members of the community who are likely to have informed opinions as to the operations of their public employers, operations which are of substantial concern to the public. Were they not able to speak on these matters, the community would be deprived of informed opinions on important public issues. The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it." (internal citation omitted)); *Playboy Ent. Grp.*, 529 U.S. at 812 ("To

prohibit this much speech is a significant restriction of communication between speakers and willing adult listeners, communication which enjoys First Amendment protection."); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 756 (1976) ("[W]here a willing speaker exists, . . . the protection afforded [by the First Amendment] is to the communication, to its source and to its recipients both."); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas" and that this right is "is fundamental to our free society.").

Where censorship of statements regarding Defendant Joseph are concerned, the offending School Board Censorship Clause additionally abridges extensive statutory restrictions. For example, it would prevent the Plaintiffs and the School Board from disseminating any information that they discovered about illegal conduct in which Joseph was involved—a matter that is beyond a theoretical concern. *See, e.g.*, Phil Williams, *What you need to know about Shawn Joseph's controversies*, NEWSCHANNEL5 (updated Apr. 05, 2019), https://www.newschannel5.com/news/newschannel-5-investigates/what-you-need-to-know-about-shawn-josephs-controversies (detailing, *inter alia*, alleged mishandling of sexual harassment claims, findings of pay disparities after outside legal counsel was hired to investigate, and allegations involving no-bid contracts); Phil Williams, *State proposes one-year suspension of Shawn Joseph's license*, NEWSCHANNEL5 (updated Mar. 26, 2019), https://www.newschannel5.com/news/newschannel-5-investigates/metro-schools/state-proposes-one-year-suspension-of-shawn-josephs-license (noting that Joseph's alleged failure to report instances of teacher misconduct led the State of Tennessee to recommend suspension of his educator's license). Such provisions are routinely deemed unenforceable. *See, e.g.*, *Alderson v.*

United States, 718 F. Supp. 2d 1186, 1200 (C.D. Cal. 2010) ("Courts have consistently refused to enforce post-employment confidentiality agreements that sought to prevent a former employee from revealing harmful information about the employer's illegality." (citing *Lachman v. Sperry–Sun Well Surveying Co.*, 457 F.2d 850, 853–54 (10th Cir. 1972) (refusing to enforce oil company's confidentiality agreement because it would have the effect of concealing evidence of tortious and/or criminal slant-drilling into competitor's oilfield))), *aff'd*, 686 F.3d 791 (9th Cir. 2012); *McGrane v. Reader's Digest Ass'n*, 822 F. Supp. 1044, 1052 (S.D.N.Y.1993) ("Disclosures of wrongdoing do not constitute revelations of trade secrets which can be prohibited by agreements binding on former employees.") (collecting cases); *Bowman v. Parma Bd. of Educ.*, 542 N.E.2d 663, 667 (Ohio 1988) ("The non-disclosure clause was illegal *per se* in the respect that it purported to suppress information concerning the commission of felonies.").

Similarly, although Tennessee Code Annotated § 8-50-602(a) states unmistakably that "[n]o public employee shall be prohibited from communicating with an elected public official for any job-related purpose whatsoever[,]" the School Board Censorship Clause prohibits the School Board's members—including the Plaintiffs—from communicating with one another, with District employees, and with other elected officials "regarding Dr. Joseph and his performance as Director of Schools" if the communication will "tend[] to harm [Joseph's] reputation by subjecting [him] to public contempt, disgrace, or ridicule, or by adversely affecting [his] business." *See* Exhibit #1 to SUMF, p. 2, ¶ 1(f)(1)–(2). *But see Blackburn & McCune, PLLC v. Pre-Paid Legal Servs., Inc.*, 398 S.W.3d 630, 651 (Tenn. Ct. App. 2010) ("A contract will be deemed unenforceable as against public policy if it 'tends to harm the public good or conflict with Tennessee's constitution, laws or judicial decisions.'" (quoting *Vintage Health Res., Inc. v. Guiangan*, 309 S.W.3d 448, 465

(Tenn. Ct. App. 2009))).

For the foregoing reasons, the School Board Censorship Clause contravenes public policy. This Court should declare the clause void and unenforceable as a consequence.

2. The School Board Censorship Clause unlawfully purports to bind the Plaintiffs individually, even though they did not assent to it.

Because an element "essential to the formation of a contract is a manifestation of agreement or mutual assent by the parties to its terms," *Johnson v. Hunter*, No. M1998-00314-COA-R3-CV, 1999 WL 1072562, at *6 (Tenn. Ct. App. Nov. 30, 1999) (cleaned up), *perm. to app. denied* (Tenn. May 8, 2000), it is elementary that a party that does not assent to a contract's terms cannot be bound by them. *See, e.g.*, *Brown v. Styles*, No. M2010-02403-COA-R3CV, 2011 WL 3655158, at *3 (Tenn. Ct. App. Aug. 18, 2011) ("a person cannot be forced to arbitrate disputes under an arbitration provision to which he has not assented") (collecting cases), *petition to rehear denied* (Sept. 8, 2011).

Here, however, despite the indisputable fact that all three of the Plaintiffs voted against being bound by the contract at issue, *see* Exhibit #2 to SUMF, p. 2 ("No: Jill Speering, Fran Bush, Amy Frogge"), the School Board Censorship Clause nonetheless purports to "be effective for the Board collectively and binding upon each Board member individually," and, further, to enable Joseph "to institute litigation and seek damages against any Board member in his/her individual capacity who violates the terms and conditions this [sic] Article of the agreement[,]" *see* Exhibit #1 to SUMF, p. 2, ¶ 1(f)(2) (emphasis added). Because there is no material dispute that the Plaintiffs did not agree to be bound by the School Board Censorship Clause or any other provision of the Defendants' Agreement, however, the School Board Censorship Clause is and should be declared unenforceable against any of the Plaintiffs individually.

3. The School Board Censorship Clause unlawfully purports to waive the Plaintiffs' absolute legislative immunity.

It is well-established that "[q]ualified official immunity and absolute legislative immunity are doctrines that protect individuals acting within the bounds of their official duties, not the governing bodies on which they serve." *Minton v. St. Bernard Par. Sch. Bd.*, 803 F.2d 129, 133 (5th Cir. 1986) (collecting cases). *See also Sable v. Myers*, 563 F.3d 1120, 1123 (10th Cir. 2009) (holding that legislative immunity applies "to legislators sued in their individual capacities, not to the legislative body itself" (citing *Minton*, 803 F.2d at 133)); *Wilson*, 955 F.3d at 500 ("[U]nder Supreme Court precedent, absolute legislative immunity is a doctrine that protects individuals acting within the bounds of their official duties, not the governing bodies on which they serve.") (cleaned up). As a result, the absolute legislative privilege "is a personal one and may be waived or asserted by each individual legislator." *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 298 (D. Md. 1992).

Notwithstanding the "individual" and "personal" nature of the absolute legislative privilege, however, *see id.*, the School Board purports to have entered into a contract—over the express objection of each individual Plaintiff—that waives the Plaintiffs' legislative privilege without their consent. *Compare* Exhibit #1 to SUMF, p. 2, ¶ 1(f)(2) (indicating that the School Board Censorship Clause "shall be effective for the Board collectively and binding upon each Board member individually") (emphasis added), *with* Exhibit #2 to SUMF, p. 2 ("No: Jill Speering, Fran Bush, Amy Frogge"). As such, the School Board Censorship Clause directly conflicts with applicable judicial decisions recognizing the personal and individual nature of the legislative privilege, which applies to the Plaintiffs individually rather than the governing body on which they serve. *See*

Minton, 803 F.2d at 133; *Sable*, 563 F.3d at 1123; *Wilson*, 955 F.3d at 500.

As such, as applied to the Plaintiffs, the School Board Censorship Clause purports to waive a privilege on the Plaintiffs' behalf that belonged to the Plaintiffs personally and which only the Plaintiffs themselves could waive. *See id.* Consequently, the School Board Censorship Clause violates public policy, *see Blackburn*, 398 S.W.3d at 651 ("A contract will be deemed unenforceable as against public policy if it 'tends to . . . conflict with Tennessee's . . . judicial decisions.'" (quoting *Vintage Health Res.*, 309 S.W.3d at 465)), and this Court should declare it unenforceable against the Plaintiffs accordingly.

VI. CONCLUSION

For the foregoing reasons, there is no genuine dispute that the School Board Censorship Clause is unconstitutional and violates public policy. Accordingly, the Plaintiffs' Motion for Summary Judgment should be **GRANTED**, the School Board Censorship Clause should be **DECLARED** unconstitutional, both facially and as applied to the Plaintiffs, and the School Board Censorship Clause's continued enforcement should be permanently **ENJOINED.**

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of June, 2020, a copy of the foregoing was sent via the Court's electronic filing system and/or via email to the following parties:

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