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IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART III

AMY FROGGE, JILL SPEERING, and FRAN BUSH, individually, and in their official capacities as members of the Metropolitan Nashville Board of Public Education,	)	
Plaintiffs,	)	
vs.	)	**No. 20-420-IV(III)**
SHAWN JOSEPH, and THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, acting by and through THE METROPOLITAN NASHVILLE BOARD OF PUBLIC EDUCATION,	)	
Defendants.	)	

MEMORANDUM AND ORDER: (1) GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT; AND (2) DENYING MOTIONS TO DISMISS FILED BY EACH DEFENDANT

For the reasons detailed below, the Court finds that there is no material dispute that the Nondisparagement Clause contained in the Severance Agreement entered into by the Defendants 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 is granted.

It is therefore ORDERED that the Nondisparagement Clause contained in ex-Director Joseph's Severance Agreement is declared unenforceable as a matter of law on

the grounds that it is unconstitutional both facially and as applied to the Plaintiffs individually, and enforcement of the clause is permanently enjoined. The term "Nondisparagement Clause" is used in the above Order and herein to refer collectively to pages 1-2, paragraph 1(f) of the Severance Agreement attached as Exhibit 1 to the *Complaint*.

It is further ORDERED that the respective motions to dismiss filed by Defendant Joseph and Defendant Metro are denied.

It is also ORDERED that the Plaintiffs are entitled to recover their reasonable costs and attorney's fees pursuant to 42 U.S.C. § 1988, which the Plaintiffs state in their *Complaint* is to be donated to charitable purposes.

To quantify the fees and costs to be awarded to the Plaintiffs, it is ORDERED that by September 25, 2020 the Plaintiffs shall file their application to recover their fees and costs along with their fee statements required by Local Rule § 5.05. By October 9, 2020 the Defendants shall file their response to the fee application, and a Reply shall be filed by October 16, 2020.

The undisputed material facts and law on which this decision is based are as follows.

The content below quotes and paraphrases extensively from the Plaintiffs' filings, both in the interest of a timely issuance of this ruling and because of the comprehensiveness of the research and analysis provided by Plaintiffs' Counsel.

Standard for Summary Judgment and Burden of Proof

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 supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

Where the disputed issues turn on questions of law, summary judgment is 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 "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)).

As to the First Amendment, "'[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)). Further, when the Government restricts speech based on its content and the viewpoint expressed, the restriction 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))).

By its own motion, a party 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, in this case the Plaintiffs are entitled to summary judgment if they can demonstrate beyond material dispute that the Nondisparagement 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 Nondisparagement 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).

Undisputed Materials Facts

1. The Plaintiffs are elected officials who serve on the Metropolitan Nashville Board of Public Education. They represent the constituents of Metro School Districts 3, 6 and 9.

2, On April 17, 2019, the Metropolitan Nashville Board of Public Education (the "School Board") and Dr. Shawn Joseph, Metro's former Director of Schools, entered into the Severance Agreement that is attached to the Plaintiffs' Complaint as Exhibit #1.

3. Section 1(f) of the Severance Agreement provides as follows:

> 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.

4. Section 2(e) of the Severance Agreement provides as follows:

> e. (1) For purposes of the subsection (e), 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) 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. Dr. Joseph agrees that the Board does not waive any right to institute litigation and seek damages against him if he violates the terms and conditions of this Article of the agreement.

5. On April 9, 2019, the School Board voted 5–3 to terminate Joseph's employment contract and approve the terms of his Severance Agreement.

6. An accurate and authentic copy of the minutes of the School Board's April 9, 2019 meeting minutes is attached to the Plaintiff's Complaint as Exhibit #2.

7. Each of the Plaintiffs voted against the Resolution to accept the terms of the Severance Agreement with Defendant Joseph.

8. During his tenure as Metro's Director of Schools, Defendant Joseph was the subject of reporting on several alleged controversies.

9. During Defendant Joseph's tenure as Metro's Director of Schools, the Tennessee State Board of Education proposed a one-year suspension of his educator's license due to his alleged failure to report teacher misconduct.

10. The Severance Agreement states that it is "entered into . . . by and between" Metro and Defendant Joseph.

Parties' Positions

Seeking a declaration that the Nondisparagement Clause is unlawful, the Plaintiffs have moved for a summary declaratory judgment that the Nondisparagement Clause is unenforceable and void on several bases. As grounds, the Plaintiffs have specifically contended that:

1. The Nondisparagement Clause is a viewpoint-based speech restriction that presumptively contravenes the First Amendment and triggers strict scrutiny, *see Pls.' Mem. in Supp. of Their Mot. for Summ. J.*, pp. 11-13;

2. The Nondisparagement Clause is a content-based speech restriction that presumptively contravenes the First Amendment and triggers strict scrutiny, *id.* at 13-14;

3. The Nondisparagement Clause is a speaker-based speech restriction that presumptively contravenes the First Amendment and triggers strict scrutiny, *id.* at pp. 14-15;

4. The Nondisparagement Clause cannot withstand strict scrutiny because it does not further a compelling governmental interest, *id.* at pp. 15-19;

5. The Nondisparagement Clause cannot withstand strict scrutiny because it is not narrowly tailored to achieve any compelling governmental interest, *id.* at pp. 19-20;

6. The Nondisparagement Clause is unconstitutionally overbroad, *id.* at pp. 20-26;

7. The Nondisparagement Clause contravenes the substantially stronger provisions of art. I, section 19 of the Tennessee Constitution, *id.* at pp. 26-27;

8. The Nondisparagement Clause violates public policy—including, but not remotely limited to, statutory public policy established by Tennessee Code Annotated § 8-50-602(a), the Public Employee Political Freedom Act, *id.* at pp. 27–32;

9. The Nondisparagement Clause cannot be enforced against the Plaintiffs because they did not assent to be bound by it, *id.* at p. 32; and

10. The Nondisparagement Clause unlawfully purports to waive the Plaintiffs' absolute legislative immunity. *Id.* at pp. 33–34.

In opposition to the Plaintiffs' motion for summary judgment and in support of its motion to dismiss, Metro draws upon the wording of the Severance Agreement that:

— the Board is the party who entered into the Severance Agreement not the Plaintiffs, and

— the Board is the entity prohibited in the Severance Agreement from engaging in the prohibited speech.

Metro also relies upon the fact that it is not a natural person so the First Amendment does not apply.

From these facts Metro argues,

— the Plaintiffs do not have standing,

— the Plaintiffs' claims are speculative and not ripe for review,

— the *Complaint* fails to state a claim for violation of the First Amendment by the School Board, and

— the *Complaint* fails to state a claim under Tennessee Code Annotated section 8-50-602(a), the Public Employee Political Freedom Act ("PEPFA").

Defendant Joseph opposes summary judgment on the grounds that the Plaintiffs' claims are governed by *Garcetti v. Ceballos*, 547 U.S. 410 (2006), and under that case law the Plaintiffs bear the burden of proof on their First Amendment claims.

Analysis

State Action, Clause Applies to Plaintiffs, Strict Scrutiny

Beginning with Metro's opposition and its motion to dismiss, the Court, adopts the reasoning and authorities of the Plaintiffs as follows and rejects Metro's position.

With respect to Metro's argument that the Plaintiffs' claims are not a product of state action, rendering the First Amendment inapplicable to the parties' dispute, the undisputed facts are that the Nondisparagement Clause was adopted, agreed to, and approved by a formal School Board Resolution, and therefore it is a product of official state action as a consequence.

All legislation—including a governmental Resolution—is state action. This is expressly incorporated into the text of 42 U.S.C. § 1983 itself. *See* 42 U.S.C.A. § 1983 ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of

any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .”). *See, e.g., Garden State Equal. v. Dow*, 434 N.J. Super. 163, 204, 82 A.3d 336, 359–60 (Law. Div. 2013) (“[I]t defies common sense to suggest that the passage of a statute by the New Jersey Legislature is not state action.”); *U.S. Sound & Serv., Inc. v. Twp. of Brick*, 126 F.3d 555, 559 (3d Cir. 1997) (“[W]e conclude that the Board's resolution restricted protected speech in violation of U.S. Sound's right to free expression under the First Amendment.”); *Am. Humanist Ass'n v. Baxter Cty., Arkansas,* 143 F. Supp. 3d 816, 823 (W.D. Ark. 2015) (“There is no dispute that on December 10, 2014, Judge Pendergrass signed and approved a unanimous resolution of the Baxter County Quorum Court entitled ‘A RESOLUTION APPROVING THE DISPLAY OF A CRÈCHE ACCOMPANIED BY A DISCLAIMER TO BE PLACED ON THE COURTHOUSE PROPERTY DURING THE CHRISTMAS SEASON.’ . . . Defendants' argument that there is no state action fails.”).

The additional fact that the School Board itself is a party to the Severance Agreement renders it fundamentally different from speech restrictions set forth in “an agreement between two private parties” and therefore is a matter of the government’s involvement. *Overbey v. Mayor of Baltimore*, 930 F.3d 215, 229, n. 14 (4th Cir. 2019) (“[T]he enforcement of a generally applicable law governing an agreement between two

private parties—is fundamentally different from the state action challenged here."). Thus, when the government is a party to a contract, any content- and viewpoint-based speech restrictions included in the contract do not become "government speech," as Metro suggests; instead, they remain content- and viewpoint-based restrictions on speech. *See, e.g., Amawi v. Pflugerville Indep. Sch. Dist.*, 373 F. Supp. 3d 717, 748 (W.D. Tex. 2019) (finding that a speech restriction in Texas contracts prohibiting boycotts of Israel "is not 'government speech.' It is a content- and viewpoint-based restriction on speech."), *vacated and remanded as moot sub nom. Amawi v. Paxton*, 956 F.3d 816 (5th Cir. 2020).

With respect to Metro's argument that the Nondisparagement Clause does not apply to the Plaintiffs but only to the Board as a collective entity, the Court rejects this argument because the text of the Severance Agreement clearly states without ambiguity that it is "binding upon each Board Member"—and not merely as a collective body as Metro contends, but "individually" as well. "**This provision shall be effective** for the Board collectively **and binding upon each board member individually.**") (emphases added). It additionally references, with specificity, Joseph's "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," *id.* (emphases added)—a provision that would be unnecessary if the Nondisparagement Clause exclusively applied to the Board as a collective entity.

If the Nondisparagement Clause only applied to the School Board collectively, then the sentence that follows it—"This provision shall be effective for the Board collectively

and binding upon each board member individually"—would make no sense, and the words "each" and "individually" in that sentence would have to be ignored. *Id.* Neither would the threat of damages "against any Board member in his/her individual capacity . . . ." be comprehensible if the Nondisparagement Clause applied only collectively. *Id.* And although Metro makes strong arguments for why the provision ought to be subject to a contrary interpretation given the clearly unconstitutional result produced by the Nondisparagement Clause's otherwise unambiguously stated terms, "[t]he courts may not make a new contract for parties who have spoken for themselves," *Realty Shop, Inc. v. RR Westminster Holding, Inc*., 7 S.W.3d 581, 597 (Tenn. Ct. App. 1999) (citing *Petty v. Sloan*, 197 Tenn. 630, 640, 277 S.W.2d 355, 359 (1955)).

> It is well-settled that courts "may not make a new and different contract for the parties that they did not intend to make for themselves." *Ament v. Wynne*, No. M2004-01876-COA-R3-CV, 2007 WL 2376333, at *5 (Tenn. Ct. App. Aug. 20, 2007) (citing *Humphries v. West End Terrace, Inc*., 795 S.W.2d 128 (Tenn. Ct. App. 1990)). As such, courts are not permitted to "make new contracts for the parties under the guise of unwarranted interpretation." *Id.* (citing *Rogers v. First Tenn. National Bank Association*, 738 S.W.2d 635 (Tenn. Ct. App. 1987)). We must therefore construe contracts "fairly and reasonably, and we should avoid rewriting these agreements under the guise of "construing" them." *Id.* (citing *Elliott v. Elliott*, 149 S.W.3d 77, 84 (Tenn. Ct. App. 2004)).

Moore v. Moore, No. E2019-00503-COA-R3-CV, 2020 WL 2511234, at *4 (Tenn. Ct. App. May 15, 2020).

For all of these reasons, this Court lacks the authority to judicially amend an unambiguous contract to conform to the meaning asserted by the Defendants. Thus, the Nondisparagement Clause—as it is written—restricts the Plaintiffs' constitutionally

protected speech on the basis of both viewpoint and content, and strict constitutional scrutiny applies.

But even if the Nondisparagement Clause is given Metro's interpretation, it is still unconstitutional. As members of the School Board that is collectively bound by the Nondisparagement Clause and given that the Plaintiffs remain subject to the threat of damages in their "individual capacity" for violations, the Plaintiffs remain "affected" by the Nondisparagement Clause within the meaning of Tenn. Code Ann. § 1-3-121 even under the Defendants' interpretation.

Neither Defendant has provided an explanation as to how an elected governmental body could lawfully contract away either its legislative authority or its latitude to express its views (whether collectively or otherwise) as part of an employee severance agreement. *Cf. Bond v. Floyd,* 385 U.S. 116, 135–36 (1966) ("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."). The Defendants have not explained how the School Board could do so in exchange for the employee's mutual agreement not to criticize the government, which evidences the bargain that the Defendants struck here and actively seek to preserve. *See* Plaintiffs' SUMF Exhibit #1, p. 2, ¶ 1(f)(2) (the Nondisparagement Clause); *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."). *But 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) (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.").

As stated by the Plaintiffs,

> Given these extreme constitutional defects, the Defendants' strategic litigation position and joint collusion to prevent even truthful criticism of one another—which the Defendants assert that no one has standing to challenge despite its transparent harm to third parties—is insufficient to eliminate the existence of a constitutional injury, to preclude judicial review of the illicit censorship clauses at issue in this controversy, or to foreclose this Court from awarding relief. *See Citizens United v. F.E.C.*, 558 U.S. 310, 356 (2010) ("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."); *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. 809, 812 (2000) ("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.").

Plaintiffs' Collective Reply to the Defendants' Responses to Plaintiffs' Motion for Summary Judgment, July 29, 2020, pp. 15-16

Accordingly, the challenged Nondisparagement Clause: (1) unambiguously applies to the Plaintiffs; (2) remains unconstitutional even under the Defendants' interpretation; and (3) still affects the Plaintiffs in several respects. For all of these reasons, this matter is fully justiciable.

Defendant Joseph opposes summary judgment on the grounds that the Plaintiffs' claims are governed by *Garcetti v. Ceballos*, 547 U.S. 410 (2006), and under that case law the Plaintiffs bear the burden of proof on their First Amendment claims. The Court again adopts the Plaintiffs' analysis and rejects Defendant Joseph's arguments.

First, whether or not *Garcetti* governs the Plaintiffs' claims, the government must still satisfy strict scrutiny when it restricts speech on the basis of viewpoint or content even within a framework that is accorded reduced First Amendment protection. Facial viewpoint discrimination, content discrimination, and speaker discrimination all nonetheless trigger strict scrutiny even where inferior and proscribable classes of speech are concerned. *See Valley Broad. Co.*, 107 F.3d at 1331, n.3 ("*R.A.V.* requires that the content-based regulation of proscribable classes of speech be subject to strict review").

The U.S. Supreme Court conclusively settled this matter in *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 383–84 (1992), while analyzing the propriety of government regulation of unprotected categories of speech. The Supreme Court explained as follows.

> We have sometimes said that these categories of expression are "not within the area of constitutionally protected speech," *Roth, supra*, 354 U.S., at 483, 77 S.Ct., at 1308; *Beauharnais, supra*, 343 U.S., at 266, 72 S.Ct., at 735; *Chaplinsky, supra*, 315 U.S., at 571–572, 62 S.Ct., at 768–769; or that the "protection of the First Amendment does not extend" to them, *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 504, 104 S.Ct. 1949, 1961, 80 L.Ed.2d 502 (1984); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 124, 109 S.Ct. 2829, 2835, 106 L.Ed.2d 93 (1989). Such statements must be taken in context, however, and are no more literally true than is the occasionally repeated shorthand characterizing obscenity "as not being speech at all," Sunstein, Pornography and the First Amendment, 1986 Duke L.J. 589, 615, n. 146. What they mean is that these areas of speech can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content (obscenity, defamation, etc.)—**not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing only libel critical of the government.** We recently acknowledged this distinction in *Ferber*, 458 U.S., at 763, 102 S.Ct., at 3357–3358, where, in upholding New York's child pornography law, we expressly recognized that there was no "question here of censoring a particular literary theme...." *See also id.*, at 775, 102 S.Ct., at 3364 (O'CONNOR, J., concurring) ("As drafted, New York's statute does not attempt to suppress the communication of particular ideas").

Id. (emphases added).

Accordingly, following *R.A.V.* (which itself invalidated a regulation targeting fighting words—an unprotected category of speech—as facially unconstitutional in light of the regulation's content discrimination and viewpoint discrimination, *see id.*), courts have uniformly held that facial viewpoint discrimination and content discrimination still

trigger strict scrutiny even within wholly unprotected categories of speech—something that public employee speech decidedly is not. *See, e.g.*, *Hamilton v. City of San Bernardino*, 325 F. Supp. 2d 1087, 1090 (C.D. Cal. 2004) ("A governmental entity may not constitutionally proscribe a subclass of otherwise proscribable speech based on protected content elements"); *Coplin v. Fairfield Pub. Access Television Comm.*, 111 F.3d 1395, 1402 (8th Cir. 1997) ("Although the government can regulate such areas of speech on the basis of content, that regulation must be viewpoint-neutral"); *Animal Legal Def. Fund v. Kelly*, 434 F. Supp. 3d 974, 998 (D. Kan. 2020), *amended*, No. CV 18-2657-KHV, 2020 WL 1659855 (D. Kan. Apr. 3, 2020) ("[I]n a few limited categories, government may regulate speech consistently with the First Amendment. Importantly, however, the government may not use such categories as 'vehicles for content discrimination unrelated to their distinctively proscribable content.'") (quoting *R.A.V.*, 505 U.S. at 383, 112 S.Ct. 2538); *Nat'l Rifle Ass'n of Am. v. City of Los Angeles*, No. 219CV03212SVWGJS, 2019 WL 9042815, at *5 (C.D. Cal. Dec. 11, 2019) ("[E]ven if the City is regulating conduct or speech unprotected by the First Amendment, the Ordinance will still be subject to strict scrutiny if it discriminates on the viewpoint of the messenger."); *Walker v. Kiousis*, 93 Cal. App. 4th 1432, 1447, 114 Cal. Rptr. 2d 69, 81 (2001) ("[C]ontent-based regulations are invalid even where they target only speech which the government could prohibit entirely without offending the Constitution."); *People v. Stanistreet*, 29 Cal. 4th 497, 507, 58 P.3d 465, 471 (2002) ("The ordinance in R.A.V. was facially unconstitutional as content-based discrimination because it discriminated among fighting words based on race, color, creed,

religion, or gender."); *Hornell Brewing Co. v. Minnesota Dep't of Pub. Safety, Liquor Control Div*., 553 N.W.2d 713, 717 (Minn. Ct. App. 1996) ("The R.A.V. Court accepted the Minnesota Supreme Court's statement that the ordinance applies only to expressions that constitute "fighting words," and assumed, "arguendo, that all of the expression reached by the ordinance is proscribable under the 'fighting words' doctrine." *Id*. at 381, 112 S.Ct. at 2542. Nevertheless, the Court concluded the ordinance was facially unconstitutional because it applied only to "specified disfavored topics" and because it went "beyond mere content discrimination, to actual viewpoint discrimination." *Id*. at 391, 112 S.Ct. at 2547."); *State v. Boettger*, 450 P.3d 805, 809 (Kan. 2019) ("Outside those circumstances, a restriction targeting one of those categories of speech may be unconstitutional and will be if it discriminates based on content. Thus, for example, 'the government may proscribe libel; but it may not make the further content discrimination of proscribing only libel critical of the government.' 505 U.S. at 383-84, 112 S.Ct. 2538."), *cert. denied*, 140 S. Ct. 1956 (2020).

As such, regardless of whether or not the Plaintiffs' speech as elected officials is subject to regulation under *Garcetti*, given that the Nondisparagement Clause is a facially viewpoint-based, content-based, and speaker-based speech restriction, it must nonetheless satisfy strict constitutional scrutiny in order to be enforceable. *See id. Cf. Buttaro* 2016 WL 4926179, at *10 ("While the *Pickering* balancing discussed above may justify the FDNY's decision to bar firefighters from wearing expressive t-shirts in lieu of department-

authorized clothing, it does not justify enforcing that policy in a way that favors one controversial or potentially disruptive viewpoint over another.").

Separately, because the overwhelming majority of courts have rejected the notion that the speech of elected public officials—which the Supreme Court has protected for decades, *see Bond*, 385 U.S. at 135–36 ("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.")—is subject to regulation under *Garcetti's* less protective framework,[1] *see Werkheiser*, 210 F. Supp. 3d at 638 ("The majority of courts . . . have

[1] *Nordstrom v. Town of Stettin*, No. 16-CV-616-JDP, 2017 WL 2116718, at *3 (W.D. Wis. May 15, 2017) ("Neither the Supreme Court nor the Seventh Circuit has directly addressed whether *Garcetti* applies to elected officials' political speech, *Siefert v. Alexander*, 608 F.3d 974, 991 (7th Cir. 2001) (Rovner, J., dissenting in part and arguing that "[n]either this court nor the Supreme Court . . . has ever held that the[ ] decisions limiting the speech of public employees can be applied to elected officials' speech"), but most of the courts that have addressed the question have held that *Garcetti* does not apply. This court will follow the majority.") (citing *Werkheiser v. Pocono* Twp., 210 F. Supp. 3d 633, 640 (M.D. Pa. 2016) ("*Garcetti* does not apply to publicly elected officials."); *Hoffman v. Dewitt County*, 176 F. Supp. 3d 795, 811 (C.D. Ill. 2016) (declining to apply *Garcetti* to an elected official); *Melville v. Town of Adams*, 9 F. Supp. 3d 77, 102 (D. Mass. 2014) ("*Garcetti* does not apply to elected officials' speech, at least to the extent it concerns official duties."); *Alsworth v. Seybert*, 323 P.3d 47, 57-58 (Alaska 2014) ("Limiting elected officials' speech protections runs counter to the jurisprudence of the U.S. Supreme Court...."); *Blair v. Bethel Sch. Dist.*, 608 F.3d 540, 543 (9th Cir. 2010) (noting, without discussing *Garcetti*, that the parties did not contest that an elected official's votes and statements to reporters "were protected by the First Amendment"); *Van De Yacht v. City of Wausau*, 661 F. Supp. 2d 1026, 1033-36 (W.D. Wis. 2009) (assuming that an elected official's "political speech on behalf of her constituents was constitutionally protected" but holding that "the right of elected officials to be free from retaliation for political speech was not clearly established at the time of the alleged conduct"); *Jenevein v. Willing*, 493 F.3d 551, 558 (5th Cir. 2007) ("We are persuaded that the preferable course ought not draw directly upon the *Pickering–Garcetti* line of cases for sorting the free speech rights of employees elected to state office."); *Conservation Comm'n of Town of Westport v. Beaulieu*, No. CIV.A. 07-11087-RGS, 2008 WL 4372761, at *4 (D. Mass. Sept. 18, 2008) ("There is, however, a significant difference with *Garcetti*—plaintiffs in this case are appointed *public officials*, not public employees. . . . Thus, *Garcetti* does not dispose of plaintiffs' retaliation claims."); *Willson v. Yerke*, No. 3:10-CV-1376, 2013 WL 6835405, at *10–11 (M.D. Pa. Dec. 23, 2013) ("Since *Bond*, the Supreme Court has maintained the importance of preserving the free speech rights of publicly elected officials . . . . The Court finds such reasoning sound and will adopt the portion of Judge Mehalchick's R & R which concluded that *Garcetti* does not apply to Plaintiffs speech."); *aff'd*, 604 F. App'x 149 (3d Cir. 2015); *Zerla v. Stark Cty., Illinois*, No. 119CV01140JESJEH, 2019 WL 3400622, at *3 (C.D. Ill. July 26, 2019) ("In this district, we have treated county board members as legislators subject to the First Amendment protections

found *Garcetti* inapplicable to elected officials.") (collecting cases), this Court similarly rejects Defendant Joseph's claim to the contrary.

Having rejected the Defendants' opposition to application of strict scrutiny, the Court concludes from the case law cited above that it is the Government who bears the burden of proving the unconstitutionality of its actions.

Applicable Constitutional Standards

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

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set forth in *Bond*. *See Hoffman v. Dewitt County*, 176 F. Supp. 3d 795, 811–12 (C.D. Ill. 2016). The Seventh Circuit appears to agree that elected legislative actors are subject to different First Amendment analyses than "public employees" writ large . . . . The Court concludes that Plaintiff was acting in his capacity as a legislator on the Stark County Board in attempting to speak on the budget issue, and the First Amendment protected his right to participate in legislative functions."); *Butler v. Bridgehampton Fire Dist*., No. 14-CV-1429(JS)(AYS), 2017 WL 4402465, at *3 (E.D.N.Y. Sept. 30, 2017) ("Judge Shields considered Plaintiff's argument that *Garcetti* does not apply because Plaintiff was an elected official and not an employee of the District. . . . Judge Shields reviewed cases outside the Second Circuit and adopted the rule promulgated by the majority of courts that have considered the issue—that *Garcetti* does not apply to the speech of elected officials."); *Hedquist v. Patterson*, No. 14-CV-0045-J, 2017 WL 10831413, at *12 (D. Wyo. Apr. 14, 2017) ("The case before the Court is more akin to *Bond*, where the plaintiff suffered retaliation from his legislative peers. *Bond*, 385 U.S. at 136. This Court does not see the value in restricting the debate on public issues as it pertains to elected officials. A debate, the U.S. Supreme Court in *Bond* said, 'should be uninhibited, robust, and wide-open.' *Id.*") *aff'd sub nom. Hedquist v. Beamer*, 763 F. App'x 705 (10th Cir. 2019); *Marchman v. Crawford*, 237 F. Supp. 3d 408, 430 (W.D. La. 2017) ("[T]he majority of courts that have addressed this issue have at least partially agreed with *Jenevein* and *Rangra* by holding that *Garcetti's* 'as a citizen' requirement does not apply to First Amendment retaliation claims by elected officials."), *aff'd*, 726 F. App'x 978 (5th Cir. 2018); *Wilson v. Houston Cmty. Coll. Sys*., 955 F.3d 490, 498 (5th Cir. 2020) ("Breaking from *Scott*, we held that the Pickering balancing test did not apply to elected employees of the state. Instead, we adopted strict scrutiny to assess the government's regulation of an elected official's speech to his constituency.") (citing *Jenevein v. Willing*, 493 F.3d 551, 557–58 (5th Cir. 2007)); *Zimmerlink*, No. 10–237, 2011 U.S. Dist. LEXIS 53186, at *6–7, 8–11 (denying defendants' motion to dismiss because "governmental interest in regulating speech of public employees to promote efficient operations does not apply to speech of an elected official"); *Carson v. Vernon Twp*., Civ. No. 09–6126, 2010 WL 2985849, at *14 (D.N.J. July 21, 2010) (denying motion to dismiss claim of deprivation of free speech, at least in part, because elected official's political expression on township matters was "unquestionably protected under the First Amendment.").

(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).").

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 Nondisparagement 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).

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).

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.").

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.

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 Nondisparagement 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.*

Application of Law to Summary Judgment Record

Neither Defendant argues that the Nondisparagement Clause furthers a compelling governmental interest. *See generally Defendant Joseph's Response in Opposition to Plaintiffs' Motion for Summary Judgment* ("Joseph's Response"); *Metropolitan Government's Memorandum in Response to Plaintiffs' Motion for Summary Judgment* ("Metro's Response"). Additionally, neither Defendant argues that the Nondisparagement Clause is

narrowly tailored to achieve any governmental interest. *Id.* Nor has either Defendant introduced any evidence in response to the Plaintiffs' Motion for Summary Judgment. *Id.* Metro, then, has failed to meet its burden of proving that the Nondisparagement Clause satisfies strict scrutiny, and the clause must be invalidated accordingly.

As to the Plaintiffs' overbreadth claims, and their claims with respect to art. I, section 19 of the Tennessee Constitution, and their legislative immunity claims, neither Defendant has addressed, responded to, or constructed any argument to oppose those claims. *See* Joseph's Response; *see* Metro's Response. Accordingly, the Defendants' opposition to these claims is waived, and the Nondisparagement Clause is invalidated on each of these grounds. *See Sneed*, 301 S.W.3d at 615 ("It is not the role of the courts, trial or appellate, to research or construct a litigant's case or arguments for him or her, and where a party fails to develop an argument in support of his or her contention or merely constructs a skeletal argument, the issue is waived.").

Remaining Opposition

The remaining arguments of the Defendants in opposition to summary judgment and in support of their motions to dismiss are addressed as follows.

Metro argues that because the Plaintiffs are not Parties to the contract, their claims cannot be maintained. *See* Metro's Response, p. 2. However, the opposite is true. The Plaintiffs can maintain their claims, individually, because the contract that they are challenging expressly states that it binds them, and it still affects them and purports to subject them to individual damages liability. Yet, because the Plaintiffs did not assent to

be bound by the Nondisparagement Clause, the Clause cannot lawfully be enforced against them or subject them to damages in any regard. *See Pls.' Mem. in Supp. of Their Mot. for Summ. J.*, p. 32 (citing *Johnson v. Hunter*, No. M1998- 00314-COA-R3-CV, 1999 WL 1072562, at *6 (Tenn. Ct. App. Nov. 30, 1999) ("[O]ne of the elements essential to the formation of a contract is a manifestation of agreement or mutual assent by the parties to its terms . . . .").

With respect to the Plaintiffs' PEPFA claim, both Defendants perceive the claim to be one concerned with "liability" for a "cause of action" for damages. *See* Metro's Response, p. 10; Joseph's Response, p. 4. In their filings, however, the Plaintiffs have clarified that the PEPFA claim is, instead, a (small) component of the Plaintiffs' much broader claim for declaratory relief that the Nondisparagement Clause violates public policy. *See Pls.' Mem. in Supp. of Their Mot. for Summ. J.*, pp. 31–32. Other than Defendant Joseph's argument that the Plaintiffs should be considered public employees for First Amendment purposes but not for PEPFA purposes, neither Defendant explains how the Nondisparagement Clause—which substantially prohibits the Plaintiffs, three elected officials, from communicating with one another and their fellow Board Members regarding the former Director of Schools—could be compatible with Tennessee's established public policy that "[n]o public employee shall be prohibited from communicating with an elected public official for any job-related purpose whatsoever." Tennessee Code Annotated § 8-50-602(a). The Defendants do not respond to the several additional arguments that the

Plaintiffs advanced to support their public policy claims, either. *See Pls.' Mem. in Supp. of Their Mot. for Summ. J.*, pp. 27–31.

For the foregoing reasons, the Court has granted the Plaintiffs' Motion for Summary Judgment; has declared the Nondisparagement Clause unconstitutional, both facially and as applied to the Plaintiffs individually; has ordered that the Nondisparagement Clause's continued enforcement is permanently enjoined; and has denied the Defendants' respective motions to dismiss.

s/ Ellen Hobbs Lyle
ELLEN HOBBS LYLE
CHANCELLOR

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