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.	)	**No. 20-420-IV (III)**
SHAWN JOSEPH, and THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, acting by and through THE METROPOLITAN NASHVILLE BOARD OF PUBLIC EDUCATION,	)	
Defendants.	)	

METROPOLITAN GOVERNMENT'S MEMORANDUM IN RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF ITS MOTION TO DISMISS

The Metropolitan Government hereby files this memorandum in opposition to Plaintiffs' Motion for Summary Judgment and in support of Metro's Motion to Dismiss.

FACTS

This lawsuit is brought by Plaintiffs Amy Frogge, Jill Speering, and Fran Bush. Complaint, ¶¶ 2-4. All three plaintiffs are elected members of the Metro Nashville Board of Public Education. *Id.*

The Complaint alleges that, in April 2018, the School Board voted to approve a severance agreement with Dr. Joseph, the former Director of Schools, which contained mutual non-disparagement provisions. *Id.*, ¶¶ 14-15. The Complaint further alleges that each of the three plaintiffs voted against approving the severance agreement. *Id*, ¶ 14.

The Board's non-disparagement provision states as follows:

f. (1) For purposes of this 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 Article of the agreement.

Compl., Ex. 1, Severance Agreement, § 1.f.

Plaintiffs bring a declaratory judgment action challenging the severance agreement's non-disparagement clause on the grounds that it violates their First Amendment rights and TENN. CODE ANN. § 8-50-602(a) (the Public Employee Political Freedom Act, or "PEPFA"). *Id.*, p. 9.

ANALYSIS

I. PLAINTIFFS DO NOT HAVE STANDING BECAUSE THEY ARE NOT PARTIES TO THE CONTRACT, AND THE CONTRACT DOES NOT AFFECT THEIR INDIVIDUAL SPEECH.

A. The terms of the contract.

First, the Severance Agreement was entered into by and between the Board and Dr. Joseph – not the Plaintiffs. The Plaintiffs are not parties to the contract:

This Severance Agreement is entered into on this 17 day of April, 2019, by and between the Metropolitan Nashville Board of Public Education ("Board") and Dr. Shawn Joseph ("Dr. Joseph"). Hereinafter, the Board and Dr. Joseph collectively will be referred to as the "Parties."

Compl., Ex. 1 (Severance Agreement).

Second, the contract provision at-issue states, "*The Board will not make* any disparaging or defamatory comments regarding Dr. Joseph and his performance as Director of Schools." Section 1.f.(2) (emphasis added). It says nothing about the Plaintiffs' speech. The Plaintiffs are not "the Board."

The next sentence of 1.f.(2) does indeed refer to individual board members, but it states, "This provision shall be effective for the Board collectively and binding upon each Board member individually." The phrase "This provision" refers back to the phrase "*The Board* will not make… ." Therefore, so long as the individual board members are not making comments as "*the Board*," or *on behalf of the Board*, then this contract does not come into play. Their own speech as individual members or as individual citizens is not affected.

In short, because the Board is the party to the contract and is the entity here being prohibited from making such comments, and because the Board is not a natural person, the First Amendment is not invoked. *E.g.*, "The Constitution was not intended to protect the government when expressing itself; it is long established that the government does not have First Amendment rights." 44 SUFFOLK U. L. REV. 703, 725, n. 81 (2011).

Plaintiffs are attempting to construe the contract in a manner that leads to the worst possible outcome for their free speech rights. Complaint, ¶¶ 22-23. However, the opposite attempt must be made. Every effort should be made to preserve the terms of a contract. If a contract may be read in keeping with the laws and Constitution, then it must be read that way. *See, e.g., Allmand v. Pavletic*, 292 S.W.3d 618, 631 (Tenn. 2009) (the goal is to "give effect to every part if possible"). This is because the laws and constitutional provisions in existence at the time of the formation of the contract must be read into it. *See* 17A AM. JUR. 2D CONTRACTS § 363 (footnotes omitted) ("Contracting parties are presumed to contract in reference to the existing law, and to have in mind all the existing laws relating to the contract, or to the subject

matter thereof. *All existing applicable or relevant statutes, and settled law of the land at the time a contract is made become a part of it and must be read into it just as if an express provision to that effect were inserted therein,* except where the contract discloses a contrary intention. By virtue of this rule, the laws which exist at the time and place of making a contract and at the place where it is to be performed, affecting its validity, construction, operation, performance, enforcement, and discharge, *enter into and form a part of it as if they were expressly referred to or incorporated in its terms.*") (emphasis added); *Cary v. Cary*, 675 S.W.2d 491, 493 (Tenn. Ct. App. 1984) ("It is well settled that laws affecting construction or enforcement of a contract existing at the time of its making form a part of the contract.").

This is especially true here because the Plaintiffs were not signatories to the contract, and free speech rights, if they are to be waived at all, must be clearly waived. *See Williams v. Rigg*, 2020 WL 2114374, *8 (S.D.W. Va. May 4, 2020) (First Amendment) ("[A] waiver of constitutional rights in any context must, at the very least, be clear."), quoting *Fuentes v. Shevin*, 407 U.S. 67, 95 (1972).

B. Because the contract does not affect Plaintiffs' individual free speech rights, they do not have standing.

"The doctrine of standing is used to determine whether a particular plaintiff is entitled to judicial relief." *State v. Harrison,* 270 S.W.3d 21, 27 (Tenn. 2008) (citing *Knierim v. Leatherwood*, 542 S.W.2d 806, 808 (Tenn. 1976). "It requires the court to determine whether the plaintiff has a sufficiently personal stake in the outcome of the controversy to warrant a judicial resolution of the dispute." *SunTrust Bank Nashville v. Johnson,* 46 S.W.3d 216, 222 (Tenn. Ct. App. 2000). A plaintiff whose rights or interests have not been affected have no standing and are, therefore, not entitled to judicial relief. *Lynch v. City of Jellico,* 205 S.W.3d 384, 395 (Tenn. 2006).

"A declaratory judgment is not a ticket to bypass standing; standing must still be established in a declaratory judgment action." *Massengale v. City of East Ridge*, 399 S.W.3d 118, 127 (Tenn. Ct. App. 2012). To establish standing, a party must demonstrate (1) that it sustained a distinct and palpable injury, (2) that the injury was caused by the challenged conduct, and (3) that the injury is apt to be redressed by a remedy that the court is prepared to give. *Metro. Air Research Testing Auth., Inc. v. Metro. Government*, 842 S.W.2d 611, 615 (Tenn. Ct. App. 1992).

As discussed above, the Complaint contains no allegations explaining how Plaintiffs have any right to challenge a contract they are not parties to (or, for that matter, how Plaintiffs are bound by a contract they are not parties to). The Complaint states only:

> 22. The School Board Censorship Clause forbids the Plaintiffs—three duly elected officials who have a duty and obligation to their constituents—from speaking candidly and honestly with their constituents and with other elected officials, including one another, about matters essential to their offices and their official duties.
>
> 23. The Plaintiffs have thus commenced this action to secure a judgment invalidating the offending School Board Censorship Clause, which not only unlawfully restrains their own constitutionally protected speech, but which also infringes upon their constituents' concomitant right to hear and receive information from their elected representatives.

Complaint, ¶¶ 22-23.

Put simply, the Plaintiffs are not parties to this contract, and therefore, do not have standing to challenge it. *See Kemmons Wilson, Inc. v. Allied Bank of Texas*, 836 S.W.2d 104, 108 (Tenn. Ct. App. 1992) ("On its face, the agreement sued upon purports to be between Kemmons Wilson Companies and Bankers Trust Company and Allied Bank of Texas. Although the agreement states Kemmons Wilson Companies' intent to form a new corporation in affiliation with William E. Hayward to purchase the assets, neither Hayward nor the proposed

corporation was made a party to the agreement by its terms. … As we interpret the agreement, we fail to see how Hayward was made a party to the agreement or how the banks could have held Hayward liable under the contract.").

Here, as in *Kemmons*, Plaintiffs' Complaint does not allege that they are parties to the severance agreement or explain how they could be held liable under a contract to which they are not parties.[1]

Because the Plaintiffs lack standing to challenge the severance agreement, summary judgment should be denied and their claims must be dismissed.[2]

II. PLAINTIFFS' CLAIMS ARE SPECULATIVE AND NOT RIPE FOR REVIEW.

"Tennessee's courts believe[] that 'the province of a court is to decide, not advise, and to settle rights, not to give abstract opinions.' Accordingly, they limit[] their role to deciding 'legal controversies.' A proceeding qualifies as a 'legal controversy' when the disputed issue is real and existing, and not theoretical or abstract, and when the dispute is between parties with real and adverse interests." *Norma Faye Pyles Lynch Family Purpose LLC v. Putnam County*, 301 S.W.3d 196, 203 (Tenn. 2009). "Although a showing of present injury is not required in a

[1] It is worth noting that the severance agreement does not give Dr. Joseph a new, contractual right to sue individual board members. Instead, it states that Dr. Joseph "does not waive any right." Plaintiff board members cannot be individually liable under a contract to which they did not expressly agree. *Warters v. Boswell*, 279 S.W. 793, 794–95 (Tenn. 1926) ("We think without a doubt it is a general rule that, when public agents, in good faith, contract with parties having full knowledge of the extent of their authority, or who have equal means of knowledge with themselves, they do not become individually liable unless the intent to incur personal responsibility is clearly expressed, although it should be found that, through ignorance of the law, they have exceeded their authority.").

[2] Plaintiffs purport to bring this lawsuit in both their individual and official capacities. As explained above, they are not parties to the contract at issue, so they do not have standing to challenge it in their individual capacities. Likewise, they do not have standing to challenge it in their official capacities. *See Ray v. Trapp*, 609 S.W.2d 508, 512 (Tenn. 1980) (finding that minority board members did not have standing to appeal a judgment when the real party in interest is the board itself); *Parker v. Lowery*, 2013 WL 1798958, *5–6 (Tenn. Ct. App. 2013) ("[The Board member] may not represent the Board's interests without establishing third-party standing.").

declaratory judgment action, a real 'case' or 'controversy' must nevertheless exist." *Thomas v. Shelby Cty.*, 416 S.W.3d 389 (Tenn. Ct. App. 2011).

Courts will not address issues that are not yet ripe for review. *City of Memphis v. Shelby Cty. Election Com'n*, 146 S.W.3d 531, 539 (Tenn. 2004). Ripeness requires a court to determine "whether the dispute has matured to the point that it warrants a judicial decision." *B & B Enters. of Wilson Cty., LLC v. City of Lebanon*, 318 S.W.3d 839, 848 (Tenn. 2010). "The central concern of the ripeness doctrine is whether the case involves uncertain or contingent future events that may or may not occur as anticipated or, indeed, may not occur at all." *Id.* at 848 (citing *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 479–80 (1990)).

Here, Plaintiffs are attempting to make a pre-enforcement challenge to the non-disparagement provision in the severance agreement. But such an attempt cannot be the basis of a lawsuit unless the probability of harm is *substantial* and of *sufficient immediacy and reality* to warrant a declaratory judgment:

> For pre-enforcement challenges, a case is ordinarily ripe for review "only if the probability of the future event occurring is substantial and of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Nat'l Rifle Ass'n of America v. Magaw*, 132 F.3d 272, 284 (6th Cir. 1997) (citations and internal punctuation omitted). In a First Amendment pre-enforcement challenge, the inquiry usually focuses on how imminent the threat of prosecution is and whether the plaintiff has sufficiently alleged an intention to refuse to comply with the statute. *Id.* at 285. Although the ripeness requirement is somewhat relaxed in the First Amendment context, there nonetheless must be a credible fear of enforcement. *Marchi v. Bd. of Coop. Educ. Servs. of Albany*, 173 F.3d 469, 479 (2d Cir. 1999).

Norton v. Ashcroft, 298 F.3d 547, 554 (6th Cir. 2002).

At this point, Plaintiffs' claims only contain fears about they believe might happen. Such fears are too speculative to be addressed by the courts. Plaintiffs' Complaint does not contain any allegations that the Plaintiffs intend to make any statements about Dr. Joseph at all. There are no allegations about the potential subject matter of such statements, or that such hypothetical

statements would violate the non-disparagement provision, or that Dr. Joseph would even attempt to enforce this provision against the Plaintiffs as individuals.

Furthermore, to constitute a cognizable claim under PEPFA, the Court must find that the School Board, or Metro, took action to "discipline, threaten to discipline or otherwise discriminate against an employee because such employee exercised that employee's right to communicate with an elected public official." TENN. CODE ANN. § 8-50-603; *see also, Todd v. Shelby County,* 407 S.W.3d 212, 226–27 (Tenn. Ct. App. 2012) (interpreting PEPFA to require that the discriminatory actions of the public employer must have resulted from the public employee's communication with an elected officer). The Complaint does not make any allegations to support an injury (or even the threat of an injury) under PEPFA or the First Amendment.

Moreover, withholding judicial relief in this case would not work an undue hardship on the Plaintiffs. *See Norton,* 298 F.3d at 555. In the event the Plaintiffs make a disparaging statement against Dr. Joseph -- and then Dr. Joseph decides to file suit against them over such statements, the Plaintiffs can still challenge the enforceability of the non-disparagement provision at that time, once their claims are ripe.

Because the Complaint does not describe an imminent threat against the Plaintiffs, their summary judgment motion should be denied, and this lawsuit should be dismissed on ripeness grounds.

III. THE COMPLAINT FAILS TO STATE A CLAIM FOR A VIOLATION OF THE FIRST AMENDMENT BY THE SCHOOL BOARD.

Plaintiffs contend that the non-disparagement clause in the severance agreement constitutes an unconstitutional "prior restraint" on their First Amendment right to free speech. Compl., ¶ 17.

The Sixth Circuit has described the term "prior restraint" to include "administrative and judicial orders that block expressive activity before it can occur. Under a system of prior restraint, the lawfulness of speech turns on the advance approval of government officials." *Polaris Amphitheater Concerts, Inc. v. City of Westerville*, 267 F.3d 503, 506 (6th Cir. 2001) (internal citations omitted).

Here, as discussed above, the non-disparagement provision at issue states, "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 Article of the agreement."

First, it should be noted that this is not a "prior restraint" at all – if anything, it is more properly characterized as a "subsequent punishment." And there is a difference between the two. *See Novak v. City of Parma*, 932 F.3d 421, 432 (6th Cir. 2019) ("An action taken after the speech is expressed, like a punishment for disfavored speech, is not a prior restraint."); *see also, Ostergren v. Frick*, 2020 WL 1501918, at *6 (W.D.Mich., 2020) ("To the extent that the NDA affects speech, it is more properly considered a restriction that imposes subsequent punishment rather than a prior restraint, as it specifies that an assessor who violates its provisions may be subject to discipline, including revocation of his MCAO certification."); *Kesterson v. Kent State University*, 345 F.Supp.3d 855, 880 (N.D. Ohio 2018) ("Similarly here, several of the key requirements for a prior restraint are missing. Linder did not require Kesterson to seek her permission before she commented on the assault, she did not reserve a right to screen or censor any statements, and she did not require Kesterson to wait for approval before she would be permitted to speak on the topic.").

Similar to *Ostergren and Kesterson,* the severance agreement here restricts the School Board's speech and suggests a "punishment" of a potential lawsuit if a Board member violates this provision. It does not require that the Plaintiffs first obtain approval of their statements from the School Board (a key element of a "prior restraint" case).

But more importantly, the Plaintiffs' lawsuit against the School Board fails because it challenges a provision which threatens liability from a private individual, Dr. Joseph, and the First Amendment only prohibits *governmental* interference with freedom of speech:

> Ratified in 1791, the First Amendment provides in relevant part that "Congress shall make no law ... abridging the freedom of speech." Ratified in 1868, the Fourteenth Amendment makes the First Amendment's Free Speech Clause applicable against the States: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law ...." § 1. The text and original meaning of those Amendments, as well as this Court's longstanding precedents, establish that the Free Speech Clause prohibits only *governmental* abridgment of speech. The Free Speech Clause does not prohibit private abridgment of speech. See, e.g., *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC,* 518 U.S. 727, 737, 116 S.Ct. 2374, 135 L.Ed.2d 888 (1996) (plurality opinion); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 566, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995); *Hudgens v. NLRB,* 424 U.S. 507, 513, 96 S.Ct. 1029, 47 L.Ed.2d 196 (1976); cf. *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241, 256, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974).

Manhattan Community Access Corporation v. Halleck, 139 S.Ct. 1921, 1928 (U.S. 2019).

Here, if such circumstances were to arise, it would not be the School Board interfering with Plaintiffs' speech. Rather, it would be Dr. Joseph who might cause any such interference. Therefore, the Complaint fails to state a claim under the First Amendment, and summary judgment should be denied and this claim dismissed.

IV. THE COMPLAINT FAILS TO STATE A CLAIM UNDER PEPFA.

TENN. CODE ANN. § 8-50-602(a) states, "No public employee shall be prohibited from communicating with an elected public official for any job-related purpose whatsoever[.]" In order to impose liability under PEPFA, discriminatory actions by the public employer must have

resulted from the public employee's communication with an elected officer." *Todd v. Shelby County*, 407 S.W.3d 212, 227 (Tenn. Ct. App. 2012).

The Complaint makes only vague allegations related to Plaintiffs' PEPFA claim:

> 22. The School Board Censorship Clause forbids the Plaintiffs—three duly elected officials who have a duty and obligation to their constituents—from speaking candidly and honestly with their constituents and with other elected officials, including one another, about matters essential to their offices and their official duties.
>
> 37. Notwithstanding Tennessee Code Annotated § 8-50-602(a), the School Board Censorship Clause prohibits the Plaintiffs from communicating with other elected public officials and one another for job-related purposes regarding Defendant Joseph.
>
> 38. The School Board Censorship Clause inhibits the flow of information between the Plaintiffs and public officials and prevents the Plaintiffs from doing the jobs that they were elected to do.

Complaint, ¶¶ 22, 37-38.

As explained above, Plaintiffs' claims are not ripe, but even if we were to assume for purposes of this motion that the Plaintiffs intend to make statements to public officials[3] about Dr. Joseph that would be "defamatory" pursuant to the non-disparagement provision, none of the conduct that might follow (e.g., a lawsuit from Dr. Joseph) would be fairly traceable to the School Board / Metro. The Metropolitan Government has not taken any steps to enforce the

[3] It should be noted that any statements Plaintiffs might make to other School Board members or to each other must be made in a public meeting in order to comply with the Open Meetings Act, TENN. CODE ANN. § 8-44-102(a). Plaintiffs have not alleged that they have been stifled in such discussions. Further, Plaintiffs' communications about Dr. Joseph are not for "job-related purposes" given Dr. Joseph is a private citizen and has not been the Director of Schools for over a year. *See Pewitt v. Buford*, 1995 WL 614327, *6 (Tenn. Ct. App. Oct. 20, 1995) (finding "a communication by an employee of the trustee's office regarding criminal misconduct occurring at the trustee's office" to be for a "job-related purpose"); *Robbins v. City of Johnson City, Tenn.*, 2001 WL 767020, *5 (Tenn. Ct. App. July 3, 2001) (finding a police officer's letter purporting to "expose allegations of sexual harassment and an ensuing coverup by the Chief of Police" to be for a "job-related purpose").

terms of the severance agreement against the Plaintiff Board members as individuals, and in fact, Metro's position is that the severance agreement is only enforceable against the parties to the contract, i.e., the School Board and Dr. Joseph.

Because the Complaint fails to demonstrate how Metro by and through the School Board has discriminated against Plaintiffs for their statements to public officials, summary judgment should be denied, and the PEPFA claim should be dismissed.

CONCLUSION

Plaintiffs do not have standing to challenge the severance agreement between the School Board and Dr. Shawn Joseph because they are not parties to the agreement. Furthermore, Plaintiffs' Complaint fails to make any allegations that demonstrate their claims are ripe. Finally, Plaintiffs cannot make a First Amendment claim or PEPFA claim when the possible interference with their speech is made by a private party (Dr. Joseph), not the School Board. For all these reasons, summary judgment should be denied and the lawsuit should be dismissed.

Respectfully submitted,

THE DEPARTMENT OF LAW OF THE
METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY
ROBERT E COOPER, JR. (#010934)
DIRECTOR OF LAW

/s/ J. Brooks Fox
J. Brooks Fox, ##16096
Attorney for the Metropolitan Government
108 Metropolitan Courthouse
P.O. Box 196300
Nashville, Tennessee 37219
(615) 862-6375

Certificate of Service

I hereby certify that a true and correct copy of the foregoing has been emailed to:

Daniel A. Horwitz
1803 Broadway, Suite #531

Nashville, TN 37203

Charles W. Cagle
424 Church St., Suite 2500
P.O. Box 198615
Nashville, TN 37219

on July 24, 2020.

/s/ J. Brooks Fox
J. Brooks Fox