IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION, AT NASHVILLE

AMY FROGGE, *et al.*	§	
	§	
Plaintiffs-Appellees,	§	
	§	
v.	§	Case: M2020-01422-COA-R3-CV
	§	
SHAWN JOSEPH, *et al.*	§	Davidson County Chancery Court
	§	Case No. 20-420-IV
Defendants-Appellants.	§	

BRIEF OF APPELLEES AND CROSS-APPELLANTS AMY FROGGE, JILL SPEERING, AND FRAN BUSH

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(1) Citations to the Technical Record are abbreviated as "R. at [bottom-right Bates stamp number]."

(2) Defendant Metro's Brief is cited as "Metro's Brief at [page number]."

(3) Defendant Joseph's Brief is cited as "Joseph's Brief at [page number]."

IV. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

A. PLAINTIFFS' ISSUES AS APPELLEES

Pursuant to Tennessee Rule of Appellate Procedure 27(b), the Plaintiffs submit their own Statement of the Issues Presented for Review:

(1) Whether the trial court correctly determined that the Plaintiffs had prudential, statutory, and/or individualized standing to maintain their claims.

(2) Whether the Defendants' failure to raise an argument on appeal regarding the trial court's rulings that the Plaintiffs had prudential standing to maintain their facial overbreadth claim and statutory standing to seek a declaration forecloses the Defendants' claims regarding the Plaintiffs' individualized standing.

(3) Whether the trial court correctly determined that the Plaintiffs had individualized standing to maintain their claims.

(4) Whether the trial court abused its "wide" discretion to issue a declaration regarding the constitutionality of the legislatively ratified School Board Censorship Clause in Joseph's severance agreement.

(5) Whether the Defendants' failure to appeal three grounds upon which the trial court invalidated the School Board Censorship Clause forecloses the Defendants' merits arguments.

(6) Whether Joseph's merits arguments are waived because they are presented for the first time on appeal.

(7) Whether the trial court erred in declaring the School Board Censorship Clause unconstitutional and illegal due to its facial overbreadth; its content-, viewpoint-, and speaker-based speech

restrictions; its contravention of article I, § 19 of the Tennessee Constitution; or its violations of Tennessee public policy.

(8) Whether either Defendant appealed the trial court's November 25, 2020 order on attorney's fees.

(9) Whether Metro may adopt Joseph's argument regarding the trial court's November 25, 2020 order on attorney's fees when Joseph's position cannot apply to Metro.

(10) Whether Joseph's claim regarding the trial court's November 25, 2020 order on attorney's fees is waived because he failed to advance it below and took a conflicting position before the trial court.

(11) Whether the allegations in the Plaintiffs' Complaint are admitted due to the Defendants' failure to deny them in a responsive pleading.

B. PLAINTIFFS' ISSUES AS CROSS-APPELLANTS

The Plaintiffs submit the following issue as Cross-Appellants pursuant to Tennessee Rules of Appellate Procedure 3(h) and 13(a):

(12) Whether the Plaintiffs should recover their attorney's fees regarding this appeal.

V. APPLICABLE STANDARDS OF REVIEW

(1) Whether the Plaintiffs had standing to seek a declaration under Tennessee Code Annotated § 1-3-121, the Declaratory Judgment Act, and/or 42 U.S.C. § 1983 are questions of law that this Court reviews de novo,[1] but all jurisdictional facts found by the trial court regarding the Plaintiffs' standing are reviewed for clear error.[2]

(2) Whether to issue a declaratory judgment under Tennessee law is a decision subject to the trial court's "wide" discretion.[3] Thus, "[a]bsent an abuse of discretion, a trial court's decision to grant or deny declaratory judgment should not be disturbed on appeal."[4]

(3) Whether to issue a declaratory judgment under 42 U.S.C. § 1983 "is reviewed deferentially, for abuse of discretion."[5]

(4) Whether the School Board Censorship Clause is

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[1] *Irvin v. Green Wise Homes, LLC*, No. M2019-02232-COA-R3-CV, 2021 WL 709782, at *3 (Tenn. Ct. App. Feb. 24, 2021), *no app. filed*.

[2] *Thomas v. City of Memphis*, 996 F.3d 318, 323 (6th Cir. 2021); *Pederson v. Louisiana State Univ.*, 213 F.3d 858, 869 (5th Cir. 2000).

[3] *State ex rel. Moncier v. Jones*, No. M2012-01429-COA-R3CV, 2013 WL 2492648, at *3 (Tenn. Ct. App. June 6, 2013) (citing *State ex rel. Earhart v. City of Bristol*, 970 S.W.2d 948, 954 (Tenn. 1998); *Tenn. Farmers Mut. Ins. Co. v. Hammond*, 290 S.W.2d 860 (Tenn. 1956)), *app. denied* (Tenn. Nov. 13, 2013). *See also Oldham v. ACLU*, 910 S.W.2d 431, 435 (Tenn. Ct. App. 1995) (collecting cases).

[4] *Moncier*, 2013 WL 2492648, at *3 (citing *Timmins v. Lindsey*, 310 S.W.3d 834, 839 (Tenn. Ct. App. 2009)).

[5] *Dow Jones & Co. v. Harrods Ltd.*, 346 F.3d 357, 359 (2d Cir. 2003) ("The Supreme Court has also made it clear that this broad discretion is reviewed deferentially, for abuse of discretion.").

unconstitutional or illegal are questions of law reviewed de novo.[6]

(5) The scope of a defendant's notice of appeal is a matter determined by this Court in the first instance.[7]

[6] *TSEL v. Tenn. Bureau of Ethics & Campaign Fin.*, No. M2018-01967-COA-R3-CV, 2019 WL 6770481, at *13 (Tenn. Ct. App. Dec. 12, 2019), *no app. filed*.

[7] *Howse v. Campbell*, No. M1999-01580-COA-R3-CV, 2001 WL 459106, at *3 (Tenn. Ct. App. May 2, 2001), *no app. filed*.

VI. INTRODUCTION

This case arises out of a 5–3 vote by the Metro Nashville Board of Public Education to censor—under penalty of personal liability—the Plaintiffs' truthful criticism of Shawn Joseph, Nashville's ex-Director of Schools.[8] In the midst of scandal, Joseph made a corrupt bargain with a slim majority of the School Board that prohibited both the School Board's members and Joseph from criticizing one another regarding matters of public concern. Specifically, Joseph's legislatively ratified severance agreement contained mutual "disparaging or defamatory comments" clauses that included definitions so broad that they forbade School Board members from expressing even *truthful* criticism "regarding Dr. Joseph and his performance as Director of Schools" if such criticism would "harm [Joseph's] reputation by subjecting [him] to public contempt, disgrace, or ridicule, or by adversely affecting [his] business."[9] Joseph agreed not to "make any disparaging or defamatory comments regarding Metro, the Board, individual members of the Board, and/or any METRO AFFILIATES" in return.[10]

The censorship clause that applied to the School Board (the "School Board Censorship Clause") was made "effective for the Board collectively and binding upon each Board member individually."[11] It also emphasized that "Joseph does not waive any right to institute

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[8] R. at 319–20.

[9] R. at 319.

[10] R. at 320.

[11] R. at 319.

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."[12]

Given this context, the Plaintiffs—the three dissenting School Board Members who were involuntarily bound by the School Board Censorship Clause and had voted against adopting it[13]—filed suit. As relief, the Plaintiffs sought a declaratory judgment that the clause was unenforceable and a permanent injunction forbidding its enforcement.

Upon review, the trial court rejected the Defendants' invitation to ignore the unambiguous terms of the School Board Censorship Clause and to dismiss the Plaintiffs' claims based on the Defendants' proposed misreading of it.[14] The trial court accordingly granted the Plaintiffs summary judgment as to all of their claims,[15] three of which the Defendants did not even oppose and which remain waived on appeal as a consequence. *See* R. at 339 ("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. Accordingly, the Defendants' opposition to these claims is waived, and the Nondisparagement Clause is invalidated on each of

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[12] *Id.*

[13] R. at 320.

[14] R. at 326 ("[T]his Court lacks the authority to judicially amend an unambiguous contract to conform to the meaning asserted by the Defendants.").

[15] R. at 315–341.

these grounds.") (citation omitted).

In particular, the trial court found "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."[16] Thus, the trial court declared the clause "unenforceable as a matter of law on the grounds that it is unconstitutional both facially and as applied to the Plaintiffs individually" and enjoined its enforcement.[17]

On appeal, the Defendants raise several arguments. None is persuasive. Metro's claims are contingent upon this Court ignoring the actual, unambiguous terms of the School Board Censorship Clause and then finding that the clause yields no injury as Metro reimagines it. However, this Court lacks authority to judicially amend either an unambiguous contract or the School Board's legislative resolution ratifying that contract simply because defense counsel decided—on the eve of summary judgment—that the Defendants would prefer to avoid the consequences of their unconstitutional conduct.

Defendant Joseph's claims fare no better. Most are raised for the first time on appeal, and they are waived as a consequence. Others misstate the relevant law or—worse—are premised upon factual misrepresentations that conflict with Joseph's previous positions before the trial court. None of them merits relief, either.

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[16] R. at 315.

[17] R. at 315–16.

Thus, the trial court did not err by issuing a judgment declaring the School Board Censorship Clause unconstitutional—let alone abuse its "wide" discretion by doing so. *See Moncier*, 2013 WL 2492648, at *3. The trial court's judgment should accordingly be affirmed. As prevailing parties in this constitutional litigation, the Plaintiffs should also be awarded their appellate attorney's fees pursuant to 42 U.S.C. § 1988(b).

VII. STATEMENT OF FACTS

The Defendants do not contest the trial court's factual findings regarding either the Plaintiffs' standing or the merits of this action, which are set forth at pages 319–21 of the record. On several fronts, the facts of this case also were not disputed below.

To begin, all of the allegations in the Plaintiffs' Complaint[18] were admitted due to both Defendants' failure to Answer them. *See* Tenn. R. Civ. P. 8.04 ("Averments in a pleading to which a responsive pleading is required are admitted when not denied in the responsive pleading[.]"). Thus, the Defendants have conclusively admitted, for example, each of the following allegations:

> 1. [T]he Metropolitan Nashville Board of Public Education [voted] to censor—under penalty of personal liability—the Plaintiffs' truthful criticism of Defendant Shawn Joseph, Nashville's former Director of Schools.
>
> 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

[18] R. at 1–8.

officials, including one another, about matters essential to their offices and their official duties.

26. The School Board Censorship Clause prohibits the Plaintiffs from truthfully criticizing Defendant Joseph or commenting upon official proceedings and other matters regarding him if their truthful commentary would "harm [Joseph's] reputation by subjecting [him] to public contempt, disgrace, or ridicule or "adversely affect[] [his] business."

29. The School Board Censorship Clause prohibits the Plaintiffs from truthfully communicating with their constituents, with one another, and with other elected officials about matters essential to their offices and their duties as elected representatives.

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.[19]

Further, regarding the jurisdictional facts that conferred standing—neither Defendant raised a competent factual challenge to the Plaintiffs' jurisdictional allegations below, and neither Defendant introduced evidence to contest the Plaintiffs' jurisdictional allegations.[20] Despite the fact that the Defendants failed to introduce "competent evidentiary materials challenging the plaintiff's jurisdictional allegations," though, *see Staats v. McKinnon*, 206 S.W.3d 532, 543 (Tenn. Ct. App. 2006), the Plaintiffs introduced uncontested jurisdictional evidence supporting their claims through the Affidavit of Plaintiff Amy Frogge. *See* R. at 171–75 (detailing ten examples of self-censorship that had resulted from the School Board Censorship Clause).

[19] *Id.*

[20] *See generally* R. at 136–41.

Accord Staats, 206 S.W.3d at 543 (holding that when a plaintiff's factual claims regarding jurisdiction are competently challenged, a plaintiff may "present evidence by affidavit or otherwise that makes out a prima facie showing of facts establishing jurisdiction").

Finally, in response to the Plaintiffs' motion for summary judgment, both Defendants admitted that all of the Plaintiffs' asserted material facts were undisputed.[21] Accordingly, none of the material facts of this action is in dispute.

VIII. STATEMENT OF THE CASE

A. THE PLAINTIFFS' COMPLAINT, AND THE DEFENDANTS' FAILURE TO FILE AN ANSWER

The Plaintiffs filed their Complaint on May 4, 2020.[22] Both Defendants were served promptly, and the Defendants' first answer deadline was June 5, 2020.[23]

Through counsel, both Defendants requested an extension—until July 1, 2020—to respond to the Plaintiffs' Complaint.[24] The Plaintiffs granted the request.[25] Given the time-sensitive nature of the case, though, the Plaintiffs moved for summary judgment in the interim and set their motion for hearing on July 24, 2020.[26]

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[21] R. at 125–27, 188–90.

[22] R. at 1.

[23] R. at 100.

[24] R. at 103, 105.

[25] *Id.*

[26] R. at 22–24.

On July 1, 2020, both Defendants requested another extension—until July 17, 2020—to respond to the Plaintiffs' Complaint.[27] Again, the Plaintiffs afforded it to them.[28]

The Defendants did not meet their third answer deadline. Instead, on July 17, 2020, the Defendants filed a "Joint Motion to Reschedule the Response Dates" regarding their "responses to the complaint and responses to Plaintiffs' motion for summary judgment[.]"[29] Neither the Plaintiffs nor the trial court agreed to extend the Plaintiffs' answer deadline a fourth time, though. The trial court did, however, reschedule the hearing on the Plaintiffs' Motion for Summary Judgment to July 27, 2020, and it entered a scheduling order regarding it.[30]

Instead of answering the Plaintiffs' Complaint by their July 17, 2021 Answer deadline, Metro filed an untimely motion to dismiss the Plaintiffs' Complaint on July 24, 2020,[31] and Joseph filed an untimely motion to dismiss the Plaintiffs' Complaint on July 27, 2021.[32] Neither Defendant ultimately filed an Answer within 15 days of their respective motions being denied, either. *But see* Tenn. R. Civ. P. 12.01. Accordingly, there is no Answer in the record from either Defendant.

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[27] R. at 106.

[28] *Id.*

[29] R. at 96.

[30] R. at 108–09.

[31] R. at 123–24.

[32] R. at 192–93.

B. THE PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND THE DEFENDANTS' UNTIMELY MOTIONS TO DISMISS

The Plaintiffs moved for summary judgment on June 17, 2020.[33] The Plaintiffs' Motion for Summary Judgment was supported by a Statement of Undisputed Material Facts[34] and a Memorandum.[35] The Plaintiffs' motion was initially set for hearing on July 24, 2020.[36]

On July 21, 2020, the trial court entered an order resetting the hearing on the Plaintiffs' Motion for Summary Judgment to July 31, 2021.[37] Metro filed a timely response to the Plaintiffs' Motion for Summary Judgment.[38] Metro also filed a Response to the Plaintiffs' Statement of Undisputed Material Facts, in which Metro admitted that all of the Plaintiffs' asserted material facts were undisputed.[39]

Joseph responded to the Plaintiffs' Motion for Summary Judgment on July 27, 2020.[40] Joseph's response certified that it had been timely served on July 27, 2020,[41] but service was actually withheld until the following day.[42] In contravention of the trial court's scheduling order

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[33] R. at 22.

[34] R. at 60–94.

[35] R. at 25–59.

[36] R. at 24.

[37] R. at 108–09.

[38] R. at 110–22.

[39] R. at 125–27.

[40] R. at 179–87.

[41] R. at 187.

and Tennessee Civil Procedure Rule 56.04, Joseph also filed an untimely Response to Plaintiffs' Statement of Undisputed Material Facts, which nonetheless admitted that all of the Plaintiffs' identified facts were undisputed.[43]

In conjunction with their responses to the Plaintiffs' Motion for Summary Judgment, Metro and Joseph filed untimely motions to dismiss the Plaintiffs' Complaint on July 24, 2020,[44] and July 27, 2020,[45] respectively, with Joseph again withholding service of his motion until the following day.[46] The Defendants' Motions were set for hearing on July 31, 2021—just four days later, and the same day as the hearing on the Plaintiffs' Motion for Summary Judgment—in contravention of Local Rule 26.03(a), which required litigants to afford responding parties at least 14 days to respond.[47] In lieu of enabling the Defendants' increasingly evident bad faith and efforts to delay litigation, though, the Plaintiffs filed responses to the Defendants' motions[48] and argued them on July 31, 2021.

C. THE TRIAL COURT'S SEPTEMBER 15, 2021 MERITS ORDER

The trial court held a hearing on all Parties' motions on July 31,

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[42] R. at 244.

[43] R. at 188–91.

[44] R. at 123–24.

[45] R. at 192–94.

[46] R. at 244.

[47] R. at 124, 193. *See also* R. at 197, R. at 238.

[48] R. at 197–237, 238–43.

2021. After taking the Parties' motions under advisement, on September 15, 2020, the trial court entered a *Memorandum and Order: (1) Granting Plaintiffs' Motion for Summary Judgment and (2) Denying Motions to Dismiss Filed by Each Defendant*.[49] The trial court's Memorandum and Order granted summary judgment to the Plaintiffs as to all of their claims—including multiple federal constitutional claims—several of which the Defendants did not even contest.[50] Because the Defendants have since abandoned or changed many of the arguments they raised below, the trial court's Memorandum and Order adjudicates many more—and different—issues than the Defendants now present on appeal.

D. THE TRIAL COURT'S NOVEMBER 25, 2020 ATTORNEY'S FEES ORDER

Because the Plaintiffs prevailed on federal constitutional claims, the Plaintiffs were entitled to an award of attorney's fees pursuant to 42 U.S.C. § 1988(b). Accordingly, the trial court 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

[49] R. at 315–41.

[50] R. at 339.

response to the fee application, and a Reply shall be filed by October 16, 2020.[51]

The Plaintiffs timely filed a motion for attorney's fees on September 25, 2020.[52] Neither Defendant responded by October 9, 2020 as ordered. Instead, the Defendants filed premature Notices of Appeal regarding the trial court's September 15, 2020 order.[53]

On October 15, 2020, Metro filed a *Motion for Extension of Time to Respond to Plaintiffs' Application for Fees and Costs*.[54] Metro's motion asserted, among other things, that defense counsel "had a family vacation during the week that the response was due."[55] Joseph filed a similar motion on October 16, 2020, contending, among other things, that "counsel failed to see that the dates for response were properly calendared."[56] The Plaintiffs opposed the Defendants' motions on the basis that they did not demonstrate excusable neglect.[57]

Without obtaining an extension, both Defendants filed untimely responses to the Plaintiffs' motion for attorney's fees. As relevant to this appeal, Joseph—at that time—argued that he should not be subject to a fee award because he was not acting as a government official

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[51] R. at 316.

[52] R. at 342–463.

[53] R. at 458–59, 460–62.

[54] R. at 463–64.

[55] R. at 463.

[56] R. at 485–86.

[57] R. at 465–72, 491–98.

regarding the matters at issue in this litigation.[58] Specifically, Joseph argued that: "Plaintiffs have not set forth any evidence to support the allegation that Dr. Joseph acted under color of law. Therefore, an award of attorney's fees against Dr. Joseph would be inappropriate under 42 USC § 1988."[59] Joseph's response accordingly made no mention of qualified immunity,[60] which is only available to those who act under color of law.

The trial court granted the Plaintiffs' motion for an award of attorney's fees and costs on November 25, 2020.[61] Its order noted the Defendants' failure to comply with the trial court's response deadline.[62] Because the Plaintiffs' motion was granted, though, the trial court "further ORDERED that the Court issues no ruling on the motions for an extension of time filed by Metro and Defendant Joseph and on whether there was or was not excusable neglect by these Defendants[,]" because "[t]he ruling herein renders those motions moot."[63]

E. THE DEFENDANTS' POST-JUDGMENT MOTION FOR A STAY

On December 18, 2020, the Defendants jointly moved for a stay of

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[58] R. at 547.

[59] *Id.*

[60] R. at 546–53.

[61] R. at 580–611.

[62] R. at 580–81 ("This Court had ordered the Defendants to file any opposition to Plaintiffs' fee application by October 9, 2020. They failed to do so but did file an appeal.").

[63] R. at 581.

the trial court's judgment pending appeal.[64] That motion is relevant to this appeal in two respects.

First, the Defendants asserted that "[t]he attorneys' fees awarded in this matter, as a money judgment, are to be 'paid in effect by state and local taxpayers . . . .'"—"the Metropolitan taxpayers[,]" specifically.[65] The Defendants obtained a stay of execution regarding the court's attorney's fees award on that basis, and thus, Joseph was not required to post an appeal bond.[66]

Second, regarding the trial court's injunction, the trial court denied the Defendants' motion because "a stay of this part of the judgment" would "place[] the Plaintiffs at risk and irreparably harm[]" their First Amendment rights.[67] The evidentiary record overwhelmingly supported that conclusion. Under the protection of the trial court's injunction, for example, two of the Plaintiffs—Ms. Frogge and Ms. Bush—spoke out critically regarding Joseph and his tenure after the School Board Censorship Clause was declared unconstitutional and enjoined.[68]

The trial court's order denying the Defendants' motion to stay the trial court's injunction was not appealed by either Defendant. This

[64] R. at 617–20.

[65] R. at 618–19.

[66] R. at 623–24.

[67] R. at 624–25.

[68] R. at 537–38, 539–42.

appeal of the trial court's September 15, 2020 order followed.[69]

IX. ARGUMENT

A. THE TRIAL COURT'S RULING THAT THE PLAINTIFFS HAD STANDING SHOULD BE AFFIRMED.

The trial court's September 15, 2020 Memorandum and Order[70] correctly determined that the Plaintiffs had standing to maintain this action on prudential, statutory, and individualized grounds. Two of those grounds are not even contested by the Defendants on appeal. Accordingly, the trial court's ruling regarding the Plaintiffs' standing should be affirmed.

1. Neither Defendant has appealed the trial court's adverse ruling regarding the Plaintiffs' facial overbreadth claim, which is subject to a "prudential" standing inquiry.

The U.S. Supreme Court has "fashioned [an] exception to the usual rules governing standing" in facial overbreadth challenges to governmental actions that restrict First Amendment freedoms. *See Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965) (citing *United States v. Raines*, 362 U.S. 17, 20 (1960)). *See also Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) ("[T]he Court has altered its traditional rules of standing to permit—in the First Amendment area—'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'" (quoting *Dombrowski*, 380

[69] R. at 458–59, 460–61.

[70] R. at 315–43.

U.S. at 486)). Consequently, in facial overbreadth cases—which this case is—litigants have "standing to challenge a statute on grounds that it is facially overbroad, regardless of whether [their] own conduct could be regulated by a more narrowly drawn statute[.]" *Bigelow v. Virginia*, 421 U.S. 809, 816 (1975) (citing *NAACP v. Button*, 371 U.S. 415, 433 (1963)). This relaxed standard is allowed "for the benefit of society[.]" *Sec'y of State v. Joseph H. Munson Co.*, 467 U.S. 947, 958 (1984). As a result, "[a]nticipatory constitutional challenges should not lightly be dismissed for lack of a justiciable controversy because . . . they 'play a most vital role in modern efforts to enforce constitutional rights.'" *Red Bluff Drive-In, Inc. v. Vance*, 648 F.2d 1020, 1034 n.18 (5th Cir. 1981) (quoting *Int'l Society for Krishna Consciousness v. Eaves*, 601 F.2d 809, 817 (5th Cir. 1979)). *See also Speech First, Inc. v. Schlissel*, 939 F.3d 756, 766–67 (6th Cir. 2019) ("The distinction between facial and as-applied challenges bears legal significance when assessing standing. In *Dambrot v. Central Michigan University*, 55 F.3d 1177, 1182, 1192 (6th Cir. 1995), the court found that Central Michigan students had standing to challenge their university's discriminatory-harassment policy. The students hadn't been punished under the policy, nor had the university acted concretely so as to threaten them with punishment. *Id.* at 1182. Yet, because the students were bringing a facial overbreadth challenge, the court found that the students had standing, even if they had 'not yet been affected by the policy.'") (cleaned up).

Here, the Plaintiffs raised a facial overbreadth challenge to the

legislatively ratified School Board Censorship Clause.[71] During the proceedings below, the Plaintiffs also moved for summary judgment regarding their facial overbreadth claim and fully briefed it.[72] In response, however, neither Defendant "addressed, responded to, or constructed any argument to oppose" the Plaintiffs' overbreadth claims.[73] As a result, the trial court ruled that "opposition to these claims is waived, and the Nondisparagement Clause is invalidated on each of these grounds." R. at 339 (citing *Sneed v. Bd. of Prof'l Resp. of Supreme Ct.*, 301 S.W.3d 603, 615 (Tenn. 2010)).

Significantly, neither Defendant's brief mentions the trial court's adverse ruling regarding the Plaintiffs' facial overbreadth claims. Certainly, neither Defendant advances an argument explaining why the trial court's facial overbreadth ruling should be reversed. Nor does either Defendant contest the trial court's determination that the Defendants' "joint collusion to prevent even truthful criticism of one another" resulted in "transparent harm to third parties"[74]—a fact based on which the Plaintiffs had asserted prudential standing. Given both Defendants' failure to file an Answer denying the Plaintiffs' allegations, the Defendants have also conclusively admitted the Plaintiffs'

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[71] R. at 7, ¶ 30 (asserting that, in violation of the First and Fourteenth Amendments: "The School Board Censorship Clause forbids a vast amount of constitutionally protected and non-tortious speech and is unconstitutionally overbroad.").

[72] R. at 44–50.

[73] R. at 339.

[74] R. at 328.

allegation that the School Board Censorship Clause "deprives the Plaintiffs' constituents of their right to hear and receive information from their elected representatives."[75] *See* Tenn. R. Civ. P. 8.04 ("Averments in a pleading to which a responsive pleading is required are admitted when not denied in the responsive pleading[.]"). *See also Vanderschaaf v. Bishara*, No. M2017-00412-COA-R3-CV, 2018 WL 4677455, at *6 (Tenn. Ct. App. Sept. 28, 2018) (holding that a responding party "neither admitted nor denied these allegations; thus they are deemed admitted"), *app. denied* (Tenn. Jan. 16, 2019); *Dyer v. Farley*, No. 01-A-01-9506-CH00229, 1995 WL 638542, at *10 (Tenn. Ct. App. Nov. 1, 1995), *no app. filed*.

Thus, the trial court's grant of summary judgment regarding the Plaintiffs' facial overbreadth claim—including its ruling that the School Board Censorship Clause harms the legal rights or interests of third parties—was actually litigated below. Both Defendants also waived opposition to the claim, and the trial court's adverse ruling regarding it has not been challenged by either Defendant on appeal. The facts underlying the Plaintiffs' claim for prudential standing have also been conclusively admitted by both Defendants. Accordingly, on several bases, the issue—including the jurisdictional question of the Plaintiffs' standing to maintain a facial overbreadth claim based on injuries to third parties—is not reviewable on appeal. *See Goeke v. Woods*, 777 S.W.2d 347, 350 (Tenn. 1989) ("*Res judicata* applies to questions of jurisdiction, if jurisdiction is litigated or determined by the court."

[75] R. at 1, ¶ 1.

(citing *Am. Surety Co. v. Baldwin*, 287 U.S. 156, 166 (1932))). *See also June Medical Services LLC v. Russo*, 140 S. Ct. 2103, 2117 (2020) (holding that because standing is "prudential" when a plaintiff asserts standing based on the legal rights or interests of third parties, a defendant's standing defense "can be forfeited or waived") (citation omitted); *Metro. Gov't of Nashville & Davidson Cty. v. Jones*, No. M2020-00248-COA-R3-CV, 2021 WL 1590236, at *2 (Tenn. Ct. App. Apr. 23, 2021) ("'Matters not raised at the trial level are considered waived.'" (quoting *Eagles Landing Dev., LLC v. Eagles Landing Apartments, LP*, 386 S.W.3d 246, 254 (Tenn. Ct. App. 2012)), *no app. filed*.

The Defendants' failure to contest the trial court's ruling regarding the Plaintiffs' facial overbreadth claim is also dispositive of the Parties' standing dispute. *Cf. Augustin v. Bradley Cty. Sheriff's Off.*, 598 S.W.3d 220, 226–27 (Tenn. Ct. App. 2019) ("Appellant's initial brief contains no properly supported argument responsive to the trial court's dispositive ruling in this case. This failure would generally result in a waiver on appeal.") (citation omitted). As this Court recently held:

> Generally, where a trial court provides more than one basis for its ruling, the appellant must appeal all the alternative grounds for the ruling. *See* 5 Am. Jur. 2d Appellate Review § 718 ("[W]here a separate and independent ground from the one appealed supports the judgment made below, and is not challenged on appeal, the appellate court must affirm."). Based on this doctrine, this Court has at least twice ruled a party waived its claim of error on appeal by appealing less than all of the grounds upon which the trial court issued its ruling.

Lovelace v. Baptist Memorial Hosp.–Memphis, No. W2019-00453-COA-R3-CV, 2020 WL 260295, at *3 (Tenn. Ct. App. Jan. 16, 2020) (collecting cases), *no app. filed*.

Here, the Plaintiffs prevailed below regarding their facial overbreadth claim, which is subject to a separate—and relaxed—prudential standing inquiry. Neither Defendant has appealed that ruling or contested the facts underlying it, and both Defendants waived opposition to it below. The trial court's ruling that the Plaintiffs could maintain their meritorious facial overbreadth claim based on injuries to third parties should accordingly be affirmed.

2. <u>The Plaintiffs had statutory standing to seek declaratory relief.</u>

"When a statute creates a cause of action and designates who may bring an action, the issue of standing is interwoven with that of subject matter jurisdiction . . . ." *Osborn v. Marr*, 127 S.W.3d 737, 740 (Tenn. 2004) (citation omitted). "The question of whether a particular plaintiff has a cause of action under a statute has been referred to as 'statutory standing.'" *Town of Collierville v. Town of Collierville Bd. of Zoning App.*, No. W2013-02752-COA-R3-CV, 2015 WL 1606712, at *4 (Tenn. Ct. App. Apr. 7, 2015) (citation omitted), *app. denied* (Tenn. Nov. 24, 2015). This Court has also explained that statutory standing falls "within the 'rubric' of prudential standing." *Id.* (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 (2014)).

Thus, to have statutory standing, a plaintiff's claim must "'arguably fall within the zone of interests to be protected or regulated

by the statute or constitutional guarantee in question.'" *Id.* (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)) (cleaned up). As the U.S. Court of Appeals for the Sixth Circuit recently explained:

> [*Lexmark*] clarified that prior decisions invoking the "prudential standing" label had really asked a statutory-interpretation question: Does the specific statute give the specific plaintiff a right to bring the specific suit? *Lexmark*, 572 U.S. at 128, 134 S. Ct. 1377. If the statute does so, courts lack discretion to decline to hear the claim: Just as courts do not have a "prudential" license to open the courthouse doors when the statutory text has closed them, *Lexmark* reasoned, so too they lack a "prudential" license to close the courthouse doors when the statutory text has opened them. *Id.* (citing *Alexander v. Sandoval*, 532 U.S. 275, 286–87, 121 S. Ct. 1511, 149 L.Ed.2d 517 (2001)).

In re Cap. Contracting Co., 924 F.3d 890, 896 (6th Cir. 2019).

Notably, where a declaration regarding a contract is concerned, falling within the "zone of interests" of Tennessee's Declaratory Judgment Act is a simple matter, given that Tennessee Code Annotated § 29-14-104 provides that a contract may be construed even before there has been a breach. *Id.* ("A contract may be construed either before or after there has been a breach thereof."). Further, where the constitutionality of "governmental action"—in this case, a legislative resolution ratifying the School Board Censorship Clause—is challenged, Tennessee Code Annotated § 1-3-121 broadly confers statutory standing to any "affected person[.]"

Based on these statutes, the trial court had little difficulty concluding that the Plaintiffs had statutory standing to maintain their

claims. Specifically, the trial court held that: "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."[76] The trial court further explained that even if Metro's atextual interpretation of the challenged clause were adopted, the Plaintiffs would *still* have statutory standing to challenge it under § 1-3-121, holding that:

> [E]ven 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.**[77]

Yet again, the Defendants have not developed an argument on appeal regarding the trial court's ruling on statutory standing. Regardless, though, the trial court's ruling was correct. Accordingly, for the reasons detailed below, the trial court's ruling that the Plaintiffs had statutory standing to prosecute their claims should be affirmed.

a. The Defendants have waived any claim of error regarding the Plaintiffs' statutory standing.

Neither Defendant has developed an argument on appeal contesting the trial court's ruling that the Plaintiffs had statutory

[76] R. at 329.

[77] R. at 327 (emphasis added).

standing. Metro's brief does not mention Tennessee Code Annotated §§ 29-14-104 or 1-3-121 even once. By contrast, Joseph's contains passing references to §§ 29-14-104 and 1-3-121, but he contends only in conclusory fashion that standing is a "viable defense[]" in declaratory judgment actions.[78]

Thus, neither Defendant attempts to engage with the trial court's actual rulings on statutory standing. Nor do the Defendants dispute that the Declaratory Judgment Act and § 1-3-121 establish causes of action and designate who may bring them, or that the Plaintiffs' claims fall within both statutes' zones of interest. *Cf. Town of Collierville*, 2015 WL 1606712, at *4. Accordingly, any challenge to the trial court's ruling that the Plaintiffs had statutory standing to maintain their claims is waived. *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.").

b. The Plaintiffs had statutory standing to seek a declaration.

Regardless of waiver, the trial court's ruling regarding the Plaintiffs' statutory standing was correct. "[T]o afford relief from uncertainty[,]" Tenn. Code. Ann. § 29-14-113, Tennessee's Declaratory Judgment Act facilitates declaratory judgments precisely like the one the trial court issued here. *See* Tenn. Code Ann. § 29-14-103. As the

[78] Joseph's Brief at 18–19.

Tennessee Supreme Court explained in *Colonial Pipeline,* declaratory judgments have also "gained popularity as a ***proactive*** means of ***preventing*** injury to the legal interests and rights of a litigant." *See Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 836 (Tenn. 2008) (emphases added). They accordingly permit parties "to settle important questions of law ***before*** the controversy has reached a more critical stage." *Id.* at 837 (citing 26 C.J.S. Declaratory Judgments § 3 (2001)) (emphasis added). That includes enabling litigants to settle disputes regarding a "statute," or in this case, a legislative resolution approved by Metro's School Board. *See* Tenn. Code Ann. § 29-14-103; *see also Sanders v. Lincoln Cty.*, No. 01A01-9902-CH-00111, 1999 WL 684060, at *6 n.6 (Tenn. Ct. App. Sept. 3, 1999) ("[T]he Declaratory Judgment Act . . . specifically authorizes trial courts to hear declaratory judgment actions seeking the construction of a statute or challenging a statute's validity.") (cleaned up), *no app. filed*. It also enables litigants to obtain declarations regarding a contract "either before or after there has been a breach thereof." *See* Tenn. Code Ann. § 29-14-104.

Tennessee's Declaratory Judgment Act is "construed broadly" to accomplish its purpose. *See Colonial Pipeline Co.*, 263 S.W.3d at 837. *See also Hodges v. Hamblen Cty.*, 277 S.W. 901, 902 (Tenn. 1925) ("This court is committed to a liberal interpretation of the Declaratory Judgments Act so as to make it of real service to the people and to the profession."). And as the Tennessee Supreme Court has made clear, facilitating the resolution of constitutional questions is a *feature* of the Declaratory Judgment Act, not a bug. *Colonial Pipeline Co.*, 263 S.W.3d at 844–45 ("The importance of correctly resolving constitutional

issues suggests that constitutional issues should rarely be foreclosed by procedural technicalities.") (cleaned up). Further, "a plaintiff in a declaratory judgment action need not show a present injury[.]" *Id.* at 837–38 (citing *Cardinal Chem. Co. v. Morton Int'l*, 508 U.S. 83, 95 (1993)). Instead, a plaintiff need only "allege facts which show he has a real, as contrasted with a theoretical, interest in the question to be decided and that he is seeking to vindicate an existing right under presently existing facts." *Grant v. Anderson*, No. M2016–01867–COA–R3–CV, 2018 WL 2324359, at *5 (Tenn. Ct. App. May 22, 2018) (citing *Burkett v. Ashley*, 535 S.W.2d 332, 333 (Tenn. 1976)), *app. denied* (Tenn. Oct. 10, 2018).

The Plaintiffs "allege[d]" such facts here. *See id.* For example, the Plaintiffs' Complaint alleges that the School Board voted "to censor—under penalty of personal liability—the Plaintiffs' truthful criticism of Defendant Shawn Joseph, Nashville's former Director of Schools."[79] The Plaintiffs also alleged that:

> 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.
>
> 26. The School Board Censorship Clause prohibits the Plaintiffs from truthfully criticizing Defendant Joseph or commenting upon official proceedings and other matters regarding him if their truthful commentary would "harm [Joseph's] reputation by subjecting [him]

[79] R. at 1, ¶ 1.

to public contempt, disgrace, or ridicule or "adversely affect[] [his] business."

29. The School Board Censorship Clause prohibits the Plaintiffs from truthfully communicating with their constituents, with one another, and with other elected officials about matters essential to their offices and their duties as elected representatives.

R. at 6–7.

As noted, these allegations are conclusively admitted as a result of the Defendants' failure to deny them. *See* Tenn. R. Civ. P. 8.04. Further, in the event that either Defendant's Motion to Dismiss could be construed as a competent challenge to the factual allegations underlying the Plaintiffs' asserted injury, the Plaintiffs introduced uncontested jurisdictional evidence through the Affidavit of Plaintiff Amy Frogge in response.[80] That affidavit detailed ten separate examples of injurious self-censorship caused by the School Board Censorship Clause, and it further asserted that: "If present restrictions on our ability to speak out were invalidated, I and my fellow Board Members would make—and intend to make—true statements that would have the tendency to harm, discredit, and detract from Defendant Joseph's reputation, would subject Defendant Joseph to contempt, disgrace, and ridicule, and would adversely affect his business."[81] Given this context, Joseph's representation that: "Nowhere in the record do the Plaintiffs claim to have expressed a desire or intention to speak publicly about Dr. Joseph's employment with

[80] R. at 171–75.

[81] R. at 171–72, ¶ 4.

Metro"[82] is risibly false, as is Joseph's claim that "[i]t is undisputed that Plaintiffs have not suffered a past injury caused by the non-disparagement clause."[83]

The Plaintiffs also claimed statutory standing under Tennessee Code Annotated § 1-3-121.[84] In straightforward terms, § 1-3-121 provides:

> Notwithstanding any law to the contrary, **a cause of action shall exist under this chapter for any affected person who seeks declaratory or injunctive relief in any action brought regarding the legality or constitutionality of a governmental action.** A cause of action shall not exist under this chapter to seek damages.

Id. (emphasis added).

Upon review, the trial court correctly held—in yet another unappealed ruling—that the School Board's resolution adopting the School Board Censorship Clause was "governmental action" within the meaning of § 1-3-121. *See* R. at 323 (holding that "[a]ll legislation—including a governmental Resolution—is state action" and collecting cases). The trial court also correctly determined that the Plaintiffs were "affected" by the clause even under the Defendants' proposed interpretation of it. *See* R. at 327 ("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

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[82] Joseph's Brief at 13.

[83] *Id.* at 12.

[84] R. at 2, ¶ 7; 7–8, ¶ 35.

Nondisparagement Clause within the meaning of Tenn. Code Ann. § 1-3-121 even under the Defendants' interpretation.").

These rulings were correct. The Defendants' briefing also offers no hint as to why they would not be. Accordingly, the trial court correctly determined that the Plaintiffs had statutory standing to seek a declaration under Tennessee's broad, remedial declaratory judgment statutes, and it did not abuse its "wide" discretion to entertain this action as a result. *See Moncier*, 2013 WL 2492648, at *3.

3. The trial court's ruling that the Plaintiffs have individualized standing should be affirmed.

The trial court also correctly determined that the Plaintiffs had standing to maintain their claims individually. Several considerations support this conclusion.

a. The Plaintiffs have individualized standing to maintain their claims.

"[I]n a pre-enforcement review case under the First Amendment (like this one), courts do not closely scrutinize the plaintiff's complaint for standing when the plaintiff 'claims an interest in engaging in protected speech that implicates, if not violates,'" a challenged provision. *Platt v. Bd. of Comm'rs on Grievances & Discipline*, 769 F.3d 447, 451 (6th Cir. 2014) (citing *Carey v. Wolnitzek*, 614 F.3d 189, 196 (6th Cir. 2010)). Indeed, courts *assume* a credible threat of enforcement where non-moribund speech regulations are concerned. *See N.H. Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 15 (1st Cir. 1996) ("When dealing with pre-enforcement challenges to recently enacted (or, at least, non-moribund) statutes that facially restrict expressive activity

by the class to which the plaintiff belongs, courts will assume a credible threat of prosecution in the absence of compelling contrary evidence.").

Thus, plaintiffs can establish standing on an individualized basis by asserting that "but for the . . . provision they seek to challenge, they would engage in the very acts that would trigger the enforcement of the provision." *Clements v. Fashing*, 457 U.S. 957, 962 (1982). That is also precisely what the Plaintiffs did here—first, in their Complaint, and second, through an uncontested affidavit to the extent that the Plaintiffs' jurisdictional allegations in their Complaint were challenged.[85]

Accordingly, when a case presents a pre-enforcement challenge to a speech restriction, Article III's "case or controversy" requirement—which Tennessee's Constitution does not have—contemplates lenient standards. *See, e.g.*, *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006) ("An injury-in-fact may simply be the fear or anxiety of future harm."); *Speech First, Inc. v. Killeen*, 968 F.3d 628, 638 (7th Cir. 2020) ("[A] plaintiff may show a chilling effect on his speech that is objectively reasonable, and that he self-censors as a result.") (citation omitted); *Lopez v. Candaele*, 630 F.3d 775, 781 (9th Cir. 2010) ("First Amendment cases raise 'unique standing considerations,' *Ariz. Right to Life Political Action Comm. v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003), that 'tilt dramatically toward a finding of standing,' *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1155 (9th Cir. 2000).") (cleaned up); *Gardner*, 99 F.3d at 14 ("To establish the conflict needed to animate this principle,

[85] R. at 171–75.

however, a party must show that her fear of prosecution is 'not imaginary or wholly speculative.' . . . This standard—encapsulated in the phrase 'credible threat of prosecution'—is quite forgiving. *Babbitt* illustrates how readily one can meet it." (citing *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 300 (1979))); *Cooksey v. Futrell*, 721 F.3d 226, 235 (4th Cir. 2013) ("The leniency of First Amendment standing manifests itself most commonly in the doctrine's first element: injury-in-fact."); *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988) ("[T]he alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution."). At least five independent, fact-specific considerations also supported the Plaintiffs' pre-enforcement challenge here.

First, pre-enforcement challenges are favored where, as here, a "member of the public"—in this case, Joseph[86]—can "initiate an enforcement action[.]" *See McKay v. Federspiel*, 823 F.3d 862, 869 (6th Cir. 2016) (citing *Platt*, 769 F.3d at 452).

Second, pre-litigation threats of enforcement support pre-enforcement review, *id.,* and here, a threat of enforcement was ominously integrated into the School Board Censorship Clause itself, which warned that: "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]

[86] Joseph's severance agreement was ratified while Joseph was a government official and provided that he would remain so for a short time, but it also contemplated that he soon would not be. *See* R. at 10.

Article of the agreement."[87] Joseph's two claims to the contrary—both of which are raised for the first time on appeal—are simultaneously waived and unpersuasive.[88]

Third, if the Plaintiffs' interpretation of the School Board Censorship Clause was correct—and the trial court concluded that it was—then the Plaintiffs were required to comply with it or risk costly liability for violating it. This alone suffices to confer standing in First Amendment cases. *See Am. Booksellers Ass'n*, 484 U.S. at 392 ("That

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[87] R. at 319.

[88] Joseph insists that the School Board Censorship Clause's enforcement statement "cannot be" construed as a threat. *See* Joseph's Brief at 13–14. As grounds, Joseph contends that the "language precisely mirrors the language in Dr. Joseph's Agreement. Both parties to the agreement simply reserved the right to enforce the agreement." *Id.* at 14. This claim is raised for the first time on appeal, though, resulting in waiver. *See Metro. Gov't of Nashville*, 2021 WL 1590236, at *2. It also overlooks a central problem, which is that the Plaintiffs never made such an agreement. Without the Plaintiffs' consent, though, the Defendants colluded to bind the Plaintiffs to the School Board Censorship Clause and expose the Plaintiffs to the threat of liability in their "individual capacity" if they violated it. *See* R. at 11.

Joseph's related argument that "a reservation of rights clause for terminated employees is considered best practice for severance agreements[,]" leading "many employers to include explicit reservation of rights clauses in their severance agreements[,]" Joseph's Brief at 14–15, is similarly waived, having been raised for the first time on appeal as well. *See Metro. Gov't of Nashville*, 2021 WL 1590236, at *2. And it, too, glosses over a glaring problem, which is that the Plaintiffs did not employ Joseph in their "individual capacity"—even though the Defendants ratified an agreement that purported to be "binding upon each [Plaintiff] individually" and subject each Plaintiff to damages in "her individual capacity" for violating it. *See* R. at 11.

requirement is met here, as the law is aimed directly at plaintiffs, who, if their interpretation of the statute is correct, will have to take significant and costly compliance measures or risk criminal prosecution.") (citations omitted). *Cf. Steffel v. Thompson*, 415 U.S. 452, 459 (1974) ("it is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights."). Simply put: "The law recognizes . . . that a plaintiff need not make costly futile gestures simply to establish standing, particularly when the First Amendment is implicated." *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Mich. Gaming Control Bd.*, 172 F.3d 397, 406 (6th Cir. 1999) (citing *Am. Booksellers Ass'n*, 484 U.S. at 392–93).

Fourth, the Plaintiffs were laboring under a prior restraint against their speech—the "most serious and the least tolerable infringement[] on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). This injury, too, sufficed to confer standing. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 568 (2011) ("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." (quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984))). And it did so with particular force here, given the Plaintiffs' rights and duties as elected officials to speak candidly about Joseph's checkered tenure as Director of Schools—a matter of surpassing public importance. *Cf. Wood v. Georgia*, 370 U.S. 375, 395 (1962) ("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.").

"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) (citing *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969)). "Nondisparagement orders are, by definition, a prior restraint on speech." *Shak v. Shak*, 144 N.E.3d 274, 661 (Mass. 2020) (citation omitted). And here, because the Metro School Board Members' Code of Conduct forbade "any Board member to speak for the Board except to repeat explicitly-stated Board decisions[,]"[89] the fact that Metro—through its School Board—ratified a legislative resolution that prohibited the School Board and its members from making even truthful statements that were harmful to Defendant Joseph's reputation forbade the Plaintiffs from doing so individually, either. *Cf. Ostergren v. Frick*, No. 20-1285, 2021 WL 1307433, at *5 (6th Cir. Apr. 8, 2021) ("More informal actions by government officials may also constitute prior restraints, such as . . . informal directives that share the same functional characteristics of more traditional prior restraints.") (citing *Novak v. City of Parma*, 932 F.3d 421, 432–33 (6th Cir. 2019); *Whitney v. City of Milan*, 677 F.3d 292, 295–99 (6th Cir. 2012)), *no app. filed*. Put another way: Through a combination of legislation and Board policy, Metro proscribed the Plaintiffs from making truthful, critical statements about Defendant Joseph, and lacking approval from Metro to make such statements, the Plaintiffs

[89] R. at 177.

were subject to an injurious prior restraint. *Cf. Polaris*, 267 F.3d at 506.

Fifth, the School Board Censorship Clause—a legislatively ratified speech restriction—was recent. This fact, too, militates heavily in favor of pre-enforcement standing. *See Bryant v. Woodall*, 1 F.4th 280, 286 (4th Cir. 2021), *as amended* (June 23, 2021) ("[L]aws that are 'recent and not moribund' typically do present a credible threat. *Doe v. Bolton*, 410 U.S. 179, 188 (1973); *Kenny v. Wilson*, 885 F.3d 280, 288 (4th Cir. 2018). This is because a court presumes that a legislature enacts a statute with the intent that it be enforced." (citing *Mobil Oil Corp. v. Att'y Gen. of Com. of Va.*, 940 F.2d 73, 76 (4th Cir. 1991); *Doe*, 410 U.S. at 188)).

For all of these reasons, the Plaintiffs had individual standing to seek pre-enforcement review of the censorship clause that unconstitutionally and unlawfully gagged them.

b. The Defendants' justiciability arguments are unpersuasive.

Metro and Joseph make various counterarguments regarding the justiciability of this action. Each is unpersuasive.

To begin, Metro's gripe that "the Board and Dr. Joseph filed a joint reply in support of their motion to dismiss explaining that they did not intend for the Agreement to be interpreted as infringing upon anyone's free speech rights"[90] does not affect the Plaintiffs' pre-enforcement standing, for several reasons. For one thing, Joseph

[90] Metro's Brief at 10.

maintained a contrary position below that he has since abandoned—that the School Board Censorship Clause *did* restrict the Plaintiffs' speech, but that it did so lawfully, because the Plaintiffs should be treated as public employees whose speech could be substantially curtailed. *See* R. at 182–85 (arguing that as public employees, Plaintiffs' speech could be lawfully circumscribed); R. at 329 ("Defendant Joseph opposes summary judgment on the grounds that the Plaintiffs' claims are governed by *Garcetti v. Ceballos*, 547 U.S. 410 (2006) . . . ."). For another, the Defendants themselves—as opposed to their attorneys—never actually took this position, whether via affidavit, resolution, or otherwise.

Instead, the position that the Defendants "did not intend for the Agreement to be interpreted as infringing upon anyone's free speech rights[,]"[91] was advanced exclusively by defense counsel in unsworn filings on the eve of summary judgment in a transparent effort to evade a judgment. But counsel's statements "are not evidence." *See In re Estate of Dunlap*, No. W2009-00794-COA-R3-CV, 2010 WL 681352, at *3 (Tenn. Ct. App. Feb. 26, 2010) (collecting cases), *no app. filed*. Defense counsel's position was also adopted only *after* the Plaintiffs filed suit, which matters. *See Planned Parenthood Ass'n v. Cincinnati*, 822 F.2d 1390, 1395 (6th Cir. 1987) (emphasizing that the city's policy disclaiming enforcement had been drafted "only after Planned Parenthood initiated the instant suit" and "did not alter the actual terms of the Ordinance[,]" and that "[s]ince there is no requirement

[91] *Id.* at 14.

under the Ordinance that the City retain the current version of the permit application form, Planned Parenthood's fear of prosecution is reasonably founded in fact"). Defense counsel's position also did not alter the actual terms of the School Board Censorship Clause, which restricted the Plaintiffs' speech and were not ambiguous. *Cf. id.* at 394 (finding pre-enforcement standing where plaintiff's intended actions fit within the law, even though the defendant had disclaimed enforcement and represented that the plaintiff's actions would "not give rise to prosecution under the Ordinance").

Nor did Defendants' counsel have any authority to bind a legislative body like the Metro School Board or modify the unambiguous terms of a legislative resolution ratifying the School Board Censorship Clause as written. *See Vittitow v. City of Upper Arlington*, 43 F.3d 1100, 1106 (6th Cir. 1995) ("[W]e know of nothing that *requires* us to accept representations from the City's counsel under the circumstances presented here. To begin with, it is not at all clear what representations we received, if any. Second, it is not clear that counsel can bind either the legislative body of the City or its police department."). Given what the trial court properly recognized was the Defendants' "strategic litigation position"[92]—which the Defendants conveniently adopted for the purpose of evading an imminent judgment—the fact that defense counsel could not permanently bind the School Board matters as well. *See Kucharek v. Hanaway*, 902 F.2d 513, 519 (7th Cir. 1990) (holding that interpretation of statute offered by

[92] R. at 328.

Attorney General was not binding, because "he may change his mind about the meaning of the statute; and he may be replaced in office"). That concern is also particularly salient where Metro is concerned, which has something of a history. *See, e.g.*, *Fraternal Ord. of Police v. Metro. Gov't of Nashville*, 582 S.W.3d 212, 216 (Tenn. Ct. App. 2019), *app. denied* (Tenn. May 20, 2019) ("Metro reverses direction like a boomerang . . .").

Joseph separately contends that this matter was non-justiciable because the trial court's declaration and injunction do not benefit the Plaintiffs. As grounds, Joseph insists that "[i]nvalidating and enjoining enforcement of the non-disparagement clause does not insulate Plaintiffs from suit for false and disparaging speech."[93] Joseph's argument is misguided in every respect. For one thing, the definitions in the School Board Censorship Clause were not limited to false speech; they also defined "defamatory" in a manner that restricted the Plaintiffs' *truthful* speech if it was harmful to Joseph's reputation.[94] Further, contrary to Joseph's apparent belief that mere "disparaging" speech is illegal,[95] the First Amendment protects that and more. *See, e.g.*, *Taubman Co. v. Webfeats*, 319 F.3d 770, 778 (6th Cir. 2003) ("[A]lthough economic damage might be an intended effect of Mishkoff's expression, the First Amendment protects critical commentary when there is no confusion as to source, even when it involves the criticism of

[93] Joseph's Brief at 15–16.

[94] R. at 319.

[95] Joseph's Brief at 15–16.

a business.").

Last, Metro raises a cursory ripeness claim, arguing generally that the Plaintiffs should not have been permitted to file a pre-enforcement challenge.[96] Metro's argument conflates pre-enforcement injury and ripeness principles, though, and to that extent, the Plaintiffs incorporate the preceding sections by reference. Metro's ripeness argument also fails on several grounds.

First, Metro's claim is premised upon its position that the School Board Censorship Clause "does not bind" the Plaintiffs.[97] This is a merits argument, though, not a ripeness argument that implicates subject matter jurisdiction. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89–90 (1998) ("It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional power to adjudicate the case. . . . Here, respondent wins under one construction of EPCRA and loses under another[.]"). Further, Metro's claim that the School Board Censorship Clause "does not bind"[98] the Plaintiffs is a ludicrous one that its counsel outright fabricated. With unmistakable clarity, the actual terms of the legislatively ratified clause state that it is "**binding upon each Board member individually**."[99] And given the plain text of that clause—

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[96] Metro's Brief at 20–22.

[97] *Id.* at 15.

[98] *Id.*

[99] R. at 319 (emphasis added).

which also purported to expose the Plaintiffs to damages liability in their "individual capacity"[100]—Metro's ripeness argument evaporates.

Second, far from being unripe, the Plaintiffs' lawsuit presented the "prototypical case of hardship[,]" involving Plaintiffs who faced "a choice between immediately complying with a burdensome law" or risking penalties for violating it. *See State v. Price*, 579 S.W.3d 332, 338 (Tenn. 2019) (citation omitted).

Third, the Plaintiffs sought a construction of a legislatively ratified contract, which courts may resolve on a pre-breach basis. *See* Tenn. Code Ann. § 29-14-104. And notwithstanding Metro's attempt to shoehorn Article III restrictions into Tennessee state courts' ability to adjudicate the Plaintiffs' claims,[101] the U.S. Supreme Court has

> recognized often that the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law, as when they are called upon to interpret the Constitution or, in this case, a federal statute.

ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989) (collecting cases). Indeed, where, as here, First Amendment rights are at stake, federal jurisdictional constraints—including ripeness—are relaxed under Article III itself. *See, e.g.*, *Currence v. City of Cincinnati*, 28 F. App'x 438, 441 (6th Cir. 2002) ("Ripeness analysis is relaxed for First Amendment cases involving a facial challenge to a regulation because courts see a need to prevent the chilling of expressive activity.")

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[100] *Id.*

[101] Metro's Brief at 20 n.9.

(citation omitted); *Lawrence v. Welch*, 531 F.3d 364, 370 (6th Cir. 2008) ("[A]pplying the relaxed standard of ripeness under First Amendment jurisprudence, Lawrence's second claim for relief is ripe for consideration.").

B. THE TRIAL COURT'S ORDER DECLARING THE SCHOOL BOARD CENSORSHIP CLAUSE ILLEGAL AND ENJOINING ITS ENFORCEMENT SHOULD BE AFFIRMED.

1. Neither Defendant has appealed or contested several of the trial court's adverse, case-dispositive merits rulings.

Turning to the merits of this action, the trial court correctly declared the School Board Censorship Clause illegal and unconstitutional on several bases. Significantly, three of those bases were not even opposed. *See* R. at 339 ("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. Accordingly, the Defendants' opposition to these claims is waived, and the Nondisparagement Clause is invalidated on each of these grounds."). Neither Defendant asserts an argument regarding these three unopposed claims on appeal, either, which the Plaintiffs fully briefed below.[102]

Given this context, the trial court's unappealed rulings regarding three separate merits claims—including a federal constitutional claim that yielded an attorney's fee award under 42 U.S.C. § 1988(b)—are

[102] *See* R. at 44–50, 50–51, & 57–58, respectively.

dispositive of the merits of this appeal. *See Lovelace*, 2020 WL 260295, at *3 ("Generally, where a trial court provides more than one basis for its ruling, the appellant must appeal all the alternative grounds for the ruling.") (citation omitted). Accordingly, the trial court's merits judgment should be affirmed.

2. The trial court's declaration that the School Board Censorship Clause is unconstitutional and illegal should be affirmed.

Both Defendants give short shrift to the trial court's other merits rulings and the constitutional doctrines that undergird them. Nonetheless, the Plaintiffs will address them thoroughly, because the issues presented in this case—an effort to censor elected officials in their individual capacity regarding matters of overwhelming public concern—carry outsized public importance. *See 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 School Board Censorship Clause is a presumptively unconstitutional content-based, viewpoint-based, and speaker-based speech restriction that must satisfy strict scrutiny to survive review. With respect to content discrimination, "[g]overnment regulation of speech is content-based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (collecting cases). "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." *Id.* (collecting cases).

Viewpoint discrimination is presumptively forbidden by the First Amendment as well. *See Members of City Council 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). Viewpoint discrimination is regarded as "an egregious form of content discrimination." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). Viewpoint discrimination thus triggers strict scrutiny, which, again, requires the government to demonstrate that a challenged regulation is "narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 155.

Finally, speaker-based discrimination—the governmental practice of permitting speech by some people, but not others, based on the identity of the speaker—is presumptively, 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 . . . ."). *See also Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972); *Citizens United v. F.E.C.*, 558 U.S. 310, 340 (2010) (citing *First Nat'l Bank of Boston*, 435 U.S. 765, 784 (1978)); *City of Madison, Joint Sch. Dist. No. 8 v. Wis. Employment Relations Comm'n*, 429 U.S. 167, 175–76 (1976) (citing *Mosley*, 408 U.S. at 96); *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 194 (1999) ("[D]ecisions that select among speakers conveying virtually identical

messages are in serious tension with the principles undergirding the First Amendment.").

Here, after defining "defamatory" in a way that prohibited even truthful criticism, *see* R. at 319 ("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."), the School Board Censorship Clause provides that: "The Board will not make any disparaging or defamatory comments regarding Dr. Joseph and his performance as Director of Schools[,]" *id.* Thus, the clause is a content-based, viewpoint-based, and speaker-based speech restriction.

The School Board Censorship Clause is content-based because it "applies to particular speech because of the topic discussed or the idea or message expressed[,]" *see Reed*, 576 U.S. at 163—in this case, Defendant Joseph "and his performance as Director of Schools."[103]

Similarly, the School Board Censorship Clause is viewpoint-based because it "regulate[s] speech in ways that favor some viewpoints or ideas at the expense of others." *See Members of City Council*, 466 U.S. at 804 (collecting cases). In particular, laudatory statements about Defendant Joseph and statements that would benefit his business are permitted, while even truthful statements "tending to harm [Joseph's] reputation" or which would "adversely affect[Joseph's] business" are forbidden.[104]

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[103] R. at 319.

[104] *Id.*

Finally, the School Board Censorship Clause is speaker-based because it applies exclusively to a specific subset of speakers—"each Board member" of the Metro School Board, and not just collectively, but also "individually"[105]—thereby "distinguishing among different speakers, allowing speech by some but not others." *See Citizens United*, 558 U.S. at 340 (citation omitted).

Given these defects, the trial court correctly determined that 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.'" *See* R. at 317–18 (quoting *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 816 (2000)). *See also Reed*, 576 U.S. at 163. Accordingly, the trial court correctly held that to avoid summary judgment, "it is the Government who bears the burden of proving" that it acted constitutionally.[106]

In response to the Plaintiffs' motion for summary judgment, though, Metro did not meet its burden. Indeed, it did not even attempt to do so. As the trial court noted:

> 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

[105] *Id.*

[106] R. at 334.

> 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.[107]

Given this context, no ruling *other than* granting the Plaintiffs' motion for summary judgment was possible. Other than proposing an alternative reading of the School Board Censorship Clause that was incompatible with its unambiguous text, Metro failed to meet its burden with either argument or evidence. Metro makes no attempt to do so on appeal, either.

Notably, the Plaintiffs also demonstrated that beyond just failing to further compelling governmental interests, the School Board Censorship Clause furthered *prohibited* interests. *See* R. at 39–43. It also did so unlawfully in exchange for Joseph's agreement not to criticize Metro in return. *See* R. at 327 (detailing why the Defendants' mutual non-disparagement agreement was legally forbidden). Under these circumstances, the trial court did not err by granting the Plaintiffs' Motion for Summary Judgment, and its judgment should be affirmed.

C. THE DEFENDANTS' MERITS ARGUMENTS ARE UNPERSUASIVE.

The Defendants make several contrary merits arguments. Each is unpersuasive, and many are waived.

1. Joseph's merits argument is waived and meritless.

Joseph raises one merits argument on appeal, though it is not

[107] R. at 338–39.

identified as an issue in his statement of the issues and is waived accordingly. *See Brock v. Fed Loan Serv.*, No. M2019-00722-COA-R3-CV, 2020 WL 1488581, at *2 (Tenn. Ct. App. Mar. 26, 2020) (issues argued in briefing are waived if not raised in a party's statement of the issues) (collecting cases), *no app. filed*. Regardless of waiver, though, it is meritless.

Joseph's lone merits argument is that the "very fact pattern" that the Sixth Circuit considered in *Ostergren v. Frick*, 2021 WL 1307433—in which a plaintiff signed a non-disclosure agreement with the government in exchange for receiving confidential materials—"is present before this Court."[108] The instant case and *Ostergren* do not even resemble one another, though. For one thing, unlike the plaintiff in *Ostergren*—who voluntarily relinquished his First Amendment rights by signing a non-disclosure agreement, *id.*—the Plaintiffs here did not agree to be bound by the School Board Censorship Clause. For another, Joseph's suggestion that the Plaintiffs have a comparable "fiduciary obligation" to Metro not to criticize him—and that they "came by information regarding Dr. Joseph's performance as Director of Schools not by happenstance, but through their role as his employer"[109]—is farcical.

In reality, Joseph's scandals were not private matters. He was a public official, and news coverage of his many controversies appears

[108] Joseph's Brief at 17.

[109] *Id.* at 17–18.

throughout the record.[110] The Plaintiffs—singularly and specifically—were prohibited from speaking about those scandals, though, and not because they had any "fiduciary obligation" to Metro, but due to what the trial court correctly recognized was the Defendants' "joint collusion to prevent even truthful criticism of one another[.]"[111] Neither were the Plaintiffs Joseph's "employer[s]" in their individual capacities, though the Defendants subjected each Plaintiff to the threat of personal liability in "her individual capacity" for criticizing Joseph regardless.[112] Accordingly, this case does not present the "very fact pattern" that the Sixth Circuit considered in *Ostergren*[113]—or anything like it.

2. Metro's merits arguments are meritless.

Metro, for its part, raises four merits arguments, though two of them are presented as standing arguments. Regardless, each is unpersuasive.

First, Metro contends that "Plaintiffs are not bound by the Severance Agreement[,]"[114] and thus, that the Plaintiffs cannot challenge it. Because the agreement states in the clearest possible terms that it is "effective for the Board collectively and binding upon each Board member individually[,]"[115] though, the trial court easily

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[110] *See, e.g.*, R. at 67–87.

[111] R. at 328.

[112] R. at 319.

[113] Joseph's Brief at 17.

[114] Metro's Brief at 12–13.

[115] R. at 19.

dispatched this claim, holding that:

> 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.[116]

Consequently, notwithstanding Metro's curious characterization that the trial court "effectively agreed with Defendants' position" on the matter,[117] in reality, "the opposite is true."[118]

Second, Metro contends that while "Plaintiffs ask this Court to construe the Agreement in a manner that leads to the worst possible outcome for their free speech rights[,]" "[t]he law on contract interpretation requires the opposite. Courts must read contract provisions in a manner that preserves them as lawful and reasonable."[119] This argument, too, is wrong, for several reasons.

To begin, the Plaintiffs did not "ask this Court to construe the Agreement in a manner that leads to the worst possible outcome for

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[116] R. at 339–40.

[117] Metro's Brief at 19.

[118] R. at 339.

[119] Metro's Brief at 13.

their free speech rights."[120] Instead, they asserted that based on the School Board Censorship Clause's unambiguous text, the clause was unconstitutional and illegal.[121] As the trial court correctly determined, Metro's proposed reading—which not only tortures the clause's text, but amputates it—is also hopelessly incompatible with the provision's actual terms, and courts do not have the authority to judicially amend unambiguous contracts. In particular, the trial court explained:

> 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

[120] *Id.*

[121] *See* R. at 256–58.

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.

R. at 325–27.

This analysis is unimpeachable, and Metro makes no effort to

contest it. The "intention of the parties to a contract" is determined not by an attorney's post-hoc claims, but by reference to what is "actually embodied and expressed in the contract as written." *See Forrest Const. Co., LLC v. Laughlin*, 337 S.W.3d 211, 220 (Tenn. Ct. App. 2009) (citation omitted). *See also Wilson v. Moore*, 929 S.W.2d 367, 373 (Tenn. Ct. App. 1996) ("Contracting parties' intent is embodied in their written agreements.") (citation omitted); Tenn. Code Ann. § 47-50-112(a) ("the contract contains the true intention of the parties, and shall be enforced as written[.]"). That remains especially true where, as here, the unambiguous text of the agreement was legislatively ratified. *See Wallace v. Metro. Gov't of Nashville*, 546 S.W.3d 47, 52 (Tenn. 2018) ("Legislative intent is first and foremost reflected in the language of the statute. . . When a statute's text is clear and unambiguous, we need look no further than the language of the statute itself.") (citation omitted). As a consequence, notwithstanding defense counsel's strategic litigation position that the Defendants "did not intend for the Agreement to be interpreted as infringing upon anyone's free speech rights[,]"[122] the Defendants' actual intent is determined by reference to the School Board Censorship Clause's unambiguous terms, and the actual terms of that provision made the Defendants' true intentions clear. Thus, the trial court lacked authority to supply an alternative, atextual reading that requires excising inconvenient portions of the clause simply to protect the Defendants from the consequences of their flagrantly unconstitutional conduct.

[122] Metro's Brief at 14.

Third, Metro contends that the Plaintiffs failed to state a claim for a violation of the First Amendment because the School Board Censorship Clause was not an unconstitutional prior restraint.[123] As previously explained, Metro is wrong. But it also makes no difference; a prior restraint problem was not the only First Amendment violation that the Plaintiffs asserted—it was one of several—and in arguing that the "[t]he Complaint fails to state a claim for a violation of the First Amendment by the School Board[,]"[124] Metro fails to mention the rest of the Plaintiffs' First Amendment claims, including the Plaintiffs' claims regarding the clause's unconstitutional overbreadth, opposition to which both Defendants waived. *See* R. at 339.

Fourth and finally, Metro insists that the Plaintiffs' Complaint "fails to state a claim under [Public Employee Political Freedom Act (PEPFA)]."[125] On this point, Metro is correct. As the Plaintiffs explained repeatedly below, however, the Plaintiffs were not asserting a PEPFA claim. Instead, the Plaintiffs argued that "[b]y its express terms, the Clause prohibits the Plaintiffs from communicating certain critical information about Defendant Joseph either to one another or to other elected officials." *See* R. at 133. *See also* R. at 340 ("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. In their filings, however, the Plaintiffs have clarified that the PEPFA claim is,

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[123] *Id.* at 22–24.

[124] *Id.* at 22.

[125] *Id.* at 24.

instead, a (small) component of the Plaintiffs' much broader claim for declaratory relief that the Nondisparagement Clause violates public policy.") (citations omitted).

Accordingly, the Plaintiffs asserted that the School Board Censorship Clause "violate[d] public policy" established by PEPFA, *see id.*, which "provides that [n]o public employee shall be prohibited from communicating with an elected public official for any job-related purpose whatsoever[,]" *id.* (citing Tenn. Code Ann. § 8-50-602(a)). As such, the Plaintiffs argued, the contract was unenforceable and violated public policy because it contravened a state statute. *See* R. at 55. *See also Blackburn & McCune, PLLC v. Pre-Paid Legal Servs., Inc.*, 398 S.W.3d 630, 651 (Tenn. Ct. App. 2010) (holding that "[a] contract will be deemed unenforceable as against public policy if it 'tends to . . . conflict with Tennessee's . . . laws . . . .'" (quoting *Vintage Health Res., Inc. v. Guiangan*, 309 S.W.3d 448, 465 (Tenn. Ct. App. 2009))).

This defect is fatal. More importantly, though, the School Board Censorship Clause's PEPFA problem was not the only defect that rendered it unenforceable against public policy. Instead, the provision also unlawfully purported to strip the Plaintiffs of their absolute legislative immunity without their consent—an independent ground upon which the trial court invalidated the clause, and which Metro did not oppose below and has not appealed. *See* R. at 339 ("As to the Plaintiffs' . . . legislative immunity claims, neither Defendant has addressed, responded to, or constructed any argument to oppose those claims. . . . Accordingly, the Defendants' opposition to these claims is waived, and the Nondisparagement Clause is invalidated on each of

these grounds." (citing *Sneed*, 301 S.W.3d at 615)). The Plaintiffs accordingly stated a claim that the School Board Censorship Clause was void on non-constitutional grounds, including—but not limited to—contravening PEPFA.

For all of these reasons, the trial court's merits judgment should be affirmed.

D. THE TRIAL COURT'S AWARDING THE PLAINTIFFS ATTORNEY'S FEES SHOULD BE AFFIRMED.

1. Metro has not challenged the Plaintiffs' fee award.

Metro does not contest the trial court's fee award on appeal. *See* Metro's Brief at 7. Metro "adopts by reference under Tenn. R. App. P. 27(j) the arguments made in the co-Defendant/Appellant's brief," though,[126] and Joseph does contest the trial court's fee award.[127] Joseph does so, however, on the basis that he deserves qualified immunity[128]—a claim that cannot apply to Metro.

The U.S. Supreme Court long ago "reject[ed] a construction of § 1983 that would accord municipalities a qualified immunity for their good-faith constitutional violations[.]" *See Owen v. City of Indep.*, 445 U.S. 622, 650 (1980). Thus, "[q]ualified immunity does not apply to a municipal defendant regardless of whether it is specifically named as a defendant or issued through municipal officials who are named in their official capacities." *Lyles v. George*, No. 1:13-0135, 2016 WL 675505, at

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[126] *Id.* at 8.

[127] Joseph's Brief at 20–25.

[128] *Id.* at 23.

*3 (M.D. Tenn. Jan. 26, 2016), *report & rec. adopted*, No. 1-13-00135, 2016 WL 676436 (M.D. Tenn. Feb. 8, 2016) (collecting cases).

Thus, Metro cannot "adopt" Joseph's argument regarding the trial court's attorney's fees order, because Joseph's argument does not and cannot apply to Metro. *See, e.g., State v. Reynolds*, No. 03C01-9201-CR-00020, 1994 WL 440249, at *1 (Tenn. Crim. App. Aug. 16, 1994) ("Given the nature of the defendant's appeal, we are compelled to add that although the defendant was entitled to 'adopt by reference any part of the brief of another party,' *see* T.R.A.P. 27(j), it remained his responsibility to insure that the adopted part was fully relevant to his case. Wholesale adoption of another party's brief without providing some explanation about how such brief applies to the adopting party's stance in the case is rarely, if ever, appropriate."), *no. app. filed*. As to Metro, then, the argument is waived.

2. Neither Defendant appealed the trial court's November 25, 2020 order awarding the Plaintiffs attorney's fees.

On October 14, 2020, the Parties filed separate notices of appeal. Both Notices were expressly restricted to the trial court's September 15, 2020 order.[129] The Defendants' Notices of Appeal having been filed on October 14, 2020, they also "[did] not, and indeed could not, state that [the Defendants] desire[d] to appeal from" the trial court's subsequent November 25, 2020 order. *Cf. Howse*, 2001 WL 459106. The Defendants also did not file supplemental notices of appeal regarding the trial court's November 25, 2020 fee award thereafter.

[129] R. at 458, 460.

Under these circumstances, the trial court's unappealed order is not within the Court's subject matter jurisdiction. *See id.* at *3 ("In accordance with Tenn. R. App. P. 4(d), we will treat Mr. Howse's October 18, 1999 notice of appeal regarding his claims against Dr. Butler as being timely filed. However, because this notice of appeal does not, and indeed could not, state that Mr. Howse desires to appeal from the March 22, 2000 order dismissing his claims against the remaining defendants, it applies only to Mr. Howse's claims against Dr. Butler. Therefore, Mr. Howse has not filed a timely notice of appeal from the March 22, 2000 order dismissing his claims against the defendants other than Dr. Butler as required by Tenn. R. App. P. 4(a). Because compliance with Tenn. R. App. P. 4(a) is mandatory and jurisdictional in civil cases . . . we cannot use Tenn. R. App. P. 2 to excuse Mr. Howse from this oversight. Accordingly, we have determined that **Mr. Howse has not properly perfected an appeal from the March 22, 2000 dismissal** of his claims against all the defendants except Dr. Butler.") (emphasis added) (internal citations omitted).

Thus, neither Defendant perfected an appeal of the trial court's November 25, 2020 order, and this Court lacks subject matter jurisdiction to consider it. This Court's decisions in other cases where an appellant's notice of appeal expressly designates an order other than the trial court's final judgment as the order being appealed are in accord. *See, e.g.*, *Cox v. Shell Oil Co.*, 196 S.W.3d 747, 760 (Tenn. Ct. App. 2005) (citing *Goad v. Pasipanodya*, No. 01A01–9509–CV–00426, 1997 WL 749462, at *2 (Tenn. Ct. App. Dec. 5, 1997)), *no app. filed*; *Hall v. Hall*, 772 S.W.2d 432, 436 (Tenn. Ct. App. 1989); *Crook v.*

Despeaux, No. W2007-00941-COA-R3-CV, 2008 WL 4936526, at *4 n.6 (Tenn. Ct. App. Nov. 19, 2008), *reh'g denied* (Dec. 19, 2008)).

3. Joseph's argument regarding attorney's fees is waived.

Joseph raises one issue on appeal regarding the trial court's November 25, 2020 order: "Whether qualified immunity should be extended to a former government employee in a suit initiated by his former employers to effectuate the policy rationale underpinning the doctrine of qualified immunity."[130] The issue is not cognizable, though, because it is raised for the first time on appeal. *Black v. Blount*, 938 S.W.2d 394, 403 (Tenn. 1996) ("Under Tennessee law, issues raised for the first time on appeal are waived."). This mandate also applies with special force to new constitutional issues raised for the first time on appeal. *Richardson v. Tenn. Bd. of Dentistry*, 913 S.W.2d 446, 457 (Tenn. 1995) ("issues of constitutionality should not first surface on appeal") (citation omitted).

Joseph's response to the Plaintiffs' motion for an award of attorney's fees did not assert that Joseph was entitled to qualified immunity as a government official.[131] Indeed, Joseph advanced *the opposite* argument before the trial court. Specifically, Joseph claimed that the Plaintiffs had not proved that Joseph acted as a government official, thereby precluding an award under 42 U.S.C. § 1988. *See* R. at 547 ("Here, Plaintiffs have not set forth any evidence

[130] Joseph's Brief at 6.

[131] *See* R. at 546–53.

to support the allegation that Dr. Joseph acted under color of law. Therefore, an award of attorney's fees against Dr. Joseph would be inappropriate under 42 USC § 1988."). That argument failed at the trial level, and Joseph has since abandoned it. An appeal, however, "is not an opportunity for a litigant to assert new arguments not raised before the trial court or change its strategy or theory in midstream, and advocate a different ground or reason in this Court." *Cooper v. Bd. of Parole*, No. M2018-01392-COA-R3-CV, 2019 WL 6320508, at *4 (Tenn. Ct. App. Nov. 26, 2019) (cleaned up), *no app. filed*. Accordingly, Joseph's qualified immunity argument is waived.

4. <u>Joseph's argument regarding attorney's fees lacks merit.</u>

Joseph's qualified immunity claim also lacks merit. As Joseph concedes, qualified immunity applies only to claims for damages, which this is not.[132] Thus, qualified immunity has no application here. *See, e.g.*, *Meredith v. Fed. Mine Safety & Health Rev. Comm'n*, 177 F.3d 1042, 1050 (D.C. Cir. 1999) ("qualified immunity applies only to actions seeking monetary damages").

More importantly, though, Joseph's argument is premised upon a false factual claim. In particular, Joseph asserts that with respect to the court's fee award, "he stands without the protection of his former employer."[133] This assertion, however, cannot be reconciled with the Defendants' *Joint Motion for a Stay Pending Appeal*, in which the

[132] Joseph's Brief at 23.

[133] *Id.*

Defendants jointly sought and obtained a stay of execution regarding the fee award by telling the trial court that "Metro has the funds to pay this judgment" and "[t]he attorney's fees awarded in this matter . . . are to be 'paid in effect by . . . taxpayers"—"the Metropolitan taxpayers" specifically.[134] This is not the first time that Joseph has made a provably false factual claim regarding a matter relevant to the Plaintiffs' fee award, either, *compare* R. at 550 (representing that: "Joseph did not participate in drafting the agreement at issue in this matter"), *with* R. at 14, § 14 ("This Severance Agreement has been drafted and reviewed jointly by the Parties and their respective counsel . . . ."), providing yet another example of why strategically developed claims made by attorneys in pleadings are not evidence.

E. THE PLAINTIFFS SHOULD BE AWARDED THEIR ATTORNEY'S FEES REGARDING THIS APPEAL.

The Plaintiffs prevailed in this action because the law required that outcome. And having prevailed on federal constitutional claims, the Plaintiffs are entitled to an award of attorney's fees on appeal. *See, e.g.*, *Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 761 (1989) ("[I]n absence of special circumstances a district court not merely 'may' but *must* award fees to the prevailing plaintiff[.]"); *Bloomingdale's By Mail Ltd. v. Huddleston*, 848 S.W.2d 52, 56 (Tenn. 1992) (same) (collecting cases); *Riley v. Kurtz*, 361 F.3d 906, 915 (6th Cir. 2004) (affirming award of appellate fees to prevailing party as part of the costs (citing *Hutto v. Finney*, 437 U.S. 678, 693–98 (1979)));

[134] R. at 618–19.

Weisenberger v. Huecker, 593 F.2d 49, 54 (6th Cir. 1979) (finding abuse of discretion in failing to award appellate attorney's fees to prevailing party).

Consequently, having raised their entitlement to an appellate fee award in their Statement of the Issues, *cf. Killingsworth v. Ted Russell Ford, Inc.*, 205 S.W.3d 406, 410 (Tenn. 2006); *see also Nandigam Neurology, PLC v. Beavers*, No. M2020-00553-COA-R3-CV, 2021 WL 2494935, at *14 (Tenn. Ct. App. June 18, 2021), *no app. filed*, and having defended meritorious constitutional claims in this appeal, this Court should remand with instructions that the Plaintiffs be awarded their appellate attorney's fees.

X. CONCLUSION

For the foregoing reasons, the trial court's judgment should be **AFFIRMED**, and the Plaintiffs should be awarded their appellate attorney's fees.

Respectfully submitted,

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CERTIFICATE OF ELECTRONIC FILING COMPLIANCE

Pursuant to Tennessee Supreme Court Rule 46, § 3.02, this brief (Sections III-X) contains 14,931 words pursuant to § 3.02(a)(1)(a), as calculated by Microsoft Word, and it was prepared using 14-point Century Schoolbook font pursuant to § 3.02(a)(3).

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of September, 2021, a copy of the foregoing was served via the Court's electronic filing system upon:

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