IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION

Herman Mays, Jr., on his own behalf and as next friend and parent of C.M.; Elizabeth Mays, on her own behalf and as next friend and parent of C.M.; Bethany Felinton, on her own behalf and as next friend and parent of S.F., E.F., and C.F.; Jana Tigchelaar, on her own behalf and as next friend and parent of C.T. and S.T., and Max Nibert,

Plaintiffs,

v. **Civil Action No. 3:22-cv-00085**

The Cabell County Board of Education; Ryan Saxe, in his official capacity as Superintendent of Cabell County Schools; and Daniel Gleason, in his individual and in his official capacity as Principal of Huntington High School, and Jeff Jones, in his individual capacity and in his official capacity as a Cabell County Schools teacher,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF CABELL COUNTY BOARD OF EDUCATION'S MOTION TO DISMISS AMENDED COMPLAINT

Now comes Defendant Cabell County Board of Education ("CCBOE") by counsel Perry W. Oxley, David E. Rich, Brian D. Morrison, Paula J. Roberts and the law firm Oxley Rich Sammons, PLLC, and in support of its Motion to Dismiss the Amended Complaint against it, does hereby state as follows:

I. BRIEF FACTS

The Plaintiff filed the Complaint on February 17, 2022. The Complaint alleges that an assembly occurred in which Nik Walker Ministries conducted a "religious revival" on February 2,

2022 at Huntington High School ("HHS") during homeroom, also called COMPASS, a non-instructional period during the school day. See, *Complaint* at ¶¶ 20 and 31. This assembly was sponsored by the school's chapter of Fellowship of Christian Athletes ("FCA") and included having a guest speaker present to students who had signed up for the assembly. While many students had signed up to attend the assembly, some had not. For reasons unalleged, the entire classrooms of two teachers, Becky Nibert and Jeff Jones, attended the assembly though some had not signed up for the same. This included students C.M.[1] and S.F.[2] The Plaintiffs allege that C.M. and S.F., juniors at Huntington High School attending Ms. Nibert's and Mr. Jones' classes, respectively, felt they could not abstain from attending the assembly as those teachers brought their entire classes. *Compl.* at ¶¶ 30-43. Plaintiffs E.F., C.T. and Max Nibert were, at all relevant times students of HHS but did not attend the assembly, while S.T. and C.F. do not attend HHS and, likewise, did not attend the assembly. *Compl.* at ¶¶ 8-10. A week after the assembly, Max Nibert organized and led an anti-religion walkout during the homeroom COMPASS period, protesting the former assembly. *Compl.* at ¶ 89.

II. LEGAL ANALYSIS

A. Legal Standard

[1] C.M.'s identity has been widely reported in the media. See, e.g., Christian revival at school prompts student walkout in W.Va. | AP News; Christian assembly leads to student walkout in West Virginia : NPR. Nonetheless, this Defendant identifies C.M. by his initials rather than by his name.

[2] Similarly, S.F.'s identity has also been widely reported in the media, with S.F. having apparently given interviews regarding the lawsuit. See, Lawsuit filed over Christian revival at high school | Local News | columbusjewishnews.com. Nonetheless, this Defendant identifies S.F. by his initials rather than by his name.

This motion is brought pursuant to Rule 12(b)(6) of the *Federal Rules of Civil Procedure*. A motion under this Rule functions to test the formal sufficiency of the Complaint or, in this instance, the Amended Complaint, and the statements of the claims for relief. *Henegar v. Sears, Roebuck & Co.*, 965 F. Supp. 833 (N.D. W.Va. 1997). Further, such a motion should be granted where the plaintiffs can prove no set of facts in support of their claim which would entitle them to relief. *Conley v. Gibson*, 355 U.S. 41 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

B. **Plaintiffs Requested Relief Seeking Declaratory Judgment and Permanent Injunction is Overly Broad and Must Fail as a Matter of Law**

Plaintiffs' requested relief seeking a declaratory judgment and permanent injunction is overly broad and, if granted, effectively displaces what Plaintiffs mistakenly characterize as a constitutional violation against the CCBOE in the instant matter with what the United States Supreme Court has repeatedly held would most assuredly be a constitutional violation through viewpoint discrimination. Hence, Plaintiffs' Amended Complaint seeking declaratory judgment and permanent injunction must be denied.

In the Amended Complaint, Plaintiffs seek a declaration that "Defendants' custom, policy and practice of permitting outside adults, as well as teachers, to conduct prayer and religious worship activities directed at students violates the Establishment Clause of the First Amendment." Plaintiffs also seek a declaration that the Defendants' "authorization and participation in Nik Walker Ministries assemblies, as described above, violates the Establishment Clause of the First Amendment." *Am. Compl*. at p. 26.

Yet, in their Amended Complaint, Plaintiffs do not articulate any policy of this Defendant which, they claim, was either violated or which violated the Constitution. Rather, their allegations stem from Defendant's alleged custom or practice. See, *Am. Compl.* ¶ 2 ("allowing this practice and custom to persist"); ¶ 3 (as a result of this longstanding custom"); ¶ 4 ("Parents and students

bring this suit to obtain injunctive relief to end Defendants' unconstitutional custom. . . .); ¶ 84 ("widespread custom and practice"); ¶ 85 ("widespread custom and practice"); ¶ 165 ("widespread custom and practice"); ¶ 168 ("widespread custom and practice"). Moreover, under Section H to their Amended Complaint, Plaintiffs once again point out a "custom and practice" *Am. Compl.* at p. 21.

While Plaintiffs claim to seek "significant policy changes," they don't identify any official policy that they desire to be changed. In reality, Plaintiffs do not look to change a policy but, rather, create a policy which is constitutionally unworkable by creating a prohibition against one type of speech while permitting all other types of speech.

In the past several decades, the Supreme Court has consistently overruled challenges under the Establishment Clause, such as that presented here, to neutral government policies that permit private religious speech on and within state educational facilities on the same terms as private secular speech. See, e.g., *Rosenberger v. Rector of University of Virginia*, 515 U.S.819, 115 S.Ct. 2510, 132 L.Ed. 700 (1995) (holding that a university's refusal to fund a student publication because the publication addressed issues from a religious perspective while paying for the cost of publication of other student newspapers violated the Free Speech Clause); *Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981) (holding that a content-based exclusionary policy violated fundamental principles that state regulation of speech be content neural); *Board of Educ. of Westside Comm'y Sch. v. Mergens*, 496 U.S. 226, 249, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990) (plurality) (holding that a high school could officially recognize a student religious club and afford it the same benefits as other student clubs); *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995) (plurality) (holding that a state could permit a private party to display a cross in a traditional public forum located next to the state's seat of

government pursuant to a 'religiously neutral' policy); *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993) (holding that exclusion of a private group from presenting films at school based solely on the films' discussions of family values from a religious perspective violates the Free Speech Clause of the First Amendment); *Good News Club v. Milford Central School*, 533 U.S. 98, 121 S.Ct. 2093, 150 l.Ed.2d 151 (2001) (holding that school's exclusion of Christian children's club from meeting at school based on its religious nature was unconstitutional viewpoint discrimination).

In that regard, schools are a limited public forum for distribution of a wide variety of ideas and social discussion. "[O]pening the schools for expressive conduct to community and student groups serves the secular purpose of providing a forum for an exchange of ideas and social intercourse." *Good News/Good Sports Club v. Sch. Dist.*, 28 F.3d 1501, 1508 (8th Cir. 1994), *cert. denied*, 515 U.S. 1173, 115 S.Ct. 2640, 132 L.Ed.2d 878 (1995). Thus, as a limited public forum, all student groups seeking to have a guest lecturer during non-classroom time are permitted to do so, and not just to Christian organizations.

Because the Constitution requires a "content-neutral" or "viewpoint neutral" approach to speech on public property, including schools, it would thus violate the First Amendment to restrict speech from any speaker based upon the content of that speech unless the school prohibits all speech from outside groups.[3] Plaintiffs seek to carve out only that constitutionally-protected

[3] Defendant recognizes that there are some instances when speech can be limited. These include instances where the speech incites imminent lawless action (*Bradenburg v. Ohio*, 395 U.S. 444 xxxxxxxxxxxxx (1975)); makes or distributes obscene materials (*Roth v. United States*, 354 U.S. 476 xxxxxxxxx (1957)); contradicts the school administration's objections as to certain articles in the school newspaper (*Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, xxxxxxx (1988)); makes an obscene speech at a school-sponsored event (*Bethel School Dist. #43 v. Fraser*, 478 U.S. 675 xxxxxxxxx (1986)); and, advocates illegal drug use at a school-sponsored event (*Morse v. Frederick*, xxxxxx (2007)). However, none of these, or other restrictions of speech which have been upheld by the United States Supreme Court are at issue here.

speech with which they disagree. Under their theory, then, a separate group could subsequently seek to ban the Future Farmers of America, the Future Homemakers of America, or some other school group, from having an adult speaker present at school all because the objector disagreed with the speech itself.

Plaintiffs' hypocrisy is shown through their support of the adult-led speech of Max Nibert who orchestrated a walkout during school, speaking out against religion or organized religion. In their Complaint, Plaintiffs contend students C.M., S.F. and C.T. participated in the adult-led walkout. See, e.g., *Compl*. ¶¶ 89-90. Thus, Max Nibert and the other Plaintiffs are not seeking to punish and prohibit the likes of adult Max Nibert, who exercised his First Amendment Right to adult-led expression of free speech against religion, but only to preclude school clubs from exercising their First Amendment rights in support of their religion.[4] The irony should not be lost upon this Court.

The content-based exclusionary policy which Plaintiffs seek and are asking this Court to judicially justify would, in effect, violate the First Amendment. See, e.g., *Widmar*, supra; *Mergens*, supra. See also, *Peck v. Upshur County Board of Education*, 155 F.3d 274 (4th Cir. 1998). As the Supreme Court pointed out in *Good News Club v. Milford*, when a public school system permits access to its facilities by one non-school related group (such as Plaintiff Max Nibert to conduct his anti-religion walkout), it cannot refuse access to another based on its religious nature or content, as that constitutes viewpoint discrimination. Thus, just as a school cannot establish a religion, it also cannot discriminate against one.

[4] While the CCBOE recognizes there are some time/place restrictions that can be placed on speech, especially in a school setting, the speech at issue in this instance occurred during a non-instructional time so as to prevent disruption during the school day. Likewise, this is the same time period that Max Nibert used for his adult-led anti-religion walkout.

In *Peck*, the Board of Education for Upshur County, West Virginia had an informal, unwritten policy which allowed non-student, private groups such as Little League, Boy Scouts, Girl Scouts, 4-H, and the Women's Christian Temperance Union to distribute literature in the Upshur County public schools. A group subsequently requested permission from the Board to distribute Bibles in the same manner and method used by other groups to distribute literature. Plaintiffs challenged the Board's permission to distribute the Bibles in the same manner and method as other groups who are permitted to distribute information.

The *Peck* court explained that by permitting the request for religious speech be allowed "at least limited access to the Upshur County open school forums, the Board did nothing more than affirm 'the right of religious speakers to use [the Upshur County school] forums on equal terms with others.'" 155 F.3d at 282, quoting *Widmar*, 454 U.S. 263, 102 S.Ct. 269, 272 n. 12. This open forum policy, including nondiscrimination against religious speech, has a secular purpose. *Widmar*, 454 U.S. at 271.

The *Peck* court went on to state "the Supreme Court has explicitly held that 'preventing discrimination against religious and other types of speech' in a school forum is an 'undeniably secular' purpose." 155 F.3d at 282, quoting *Mergens*, 496 U.S. at 249. Conversely, permitting all types of speech in the school forum, even of a religious nature, has a secular purpose behind it. In that sense, the *Peck* court further elaborated that the Board's policy was neutral because it had the secular purpose of opening a forum for speech. The "guarantee" of neutrality among policies is respected, and not offended, when the government applies neutral criteria and evenhanded policies, "extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Rosenberger*, 515 U.S. at 839.

The Plaintiffs' intended consequence is not to give equal footing to all forms of speech and clubs within the schools but, rather, to deny individuals their constitutional right to religious expression. Plaintiffs thus seek to place a restriction and limitation on one category of free speech while not imposing the same restriction or limitation on any other category or type of speech. This is, at its very core, content or viewpoint discrimination which the Supreme Court has struck down time and again.

1. Participating in prayer

Additionally, Plaintiffs seek to restrict and prohibit faculty "participation" in religious activities with students during the school day, even if it unnecessarily limits the employee's right to engage in private religious speech on his or her own time. While they do not define what they mean by "participation", one can reasonably assume that Plaintiffs intend this to be as broad as possible such to include any faculty member's attendance at any future FCA or similar events. Applying Plaintiffs' requested relief, this could prohibit a teacher from praying before having his or her lunch when students are also present, or a teacher supervising a club where conversation leads to a discussion on religion.

A public employee's right to speak on matters that lie at the core of the First Amendment, or matters of public concern, is protected as long as the speech does not interfere with the "effective functioning of the public employer's enterprise." *Rankin v. McPherson*, 483 U.S. 378, 388, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987); see also, *Pickering v. Board of Educ. of Will County, Illinois*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). Yet, Plaintiffs still seek to prohibit CCBOE employees from participating in their right to free speech. Thus, what Plaintiffs are actually seeking is a declaration and injunction that, while the Plaintiff students have no obligation or duty

to attend whatever voluntary club function, assembly or speech which is being held on school property, they want to make sure that no one else has the right to attend any such club, either.

2. Sponsoring

Plaintiffs also contend that the CCBOE has "sponsored" the religious assembly for which they should be prohibited from doing. However, contrary to their implied assertion, merely allowing an organization access to school property does not render the assembly a school-sponsored event or that the same is then "sponsored" by the school. For example, in *Lamb's Chapel*, the Supreme Court noted that because the school property had been used by a wide variety of private organizations, "there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed." *Lamb's Chapel*, 508 U.S. at 394. Similarly, the Establishment Clause is not violated by allowing religious clubs access to school property for meetings. See, e.g., *Widmar*, 454 U.S. 263. In other words, CCBOE no more "sponsored" this event as it does meetings of the Leo Club, Beta Club, ROTC or Key Club. In fact, FCA is one of several clubs or groups not even listed on the CCBOE's website as a club, and none of the clubs listed are religious clubs! Thus, to say that the CCBOE "sponsors" religious clubs is without merit.

Further, simply because speech occurred at school does not equate that the speech was sponsored by the CCBOE. To determine if speech is school-sponsored, the court must examine whether it has been so closely connected to the school that it appears that the school is somehow sponsoring the speech, as well as the level of involvement the school had in organizing or supervising the contested speech. *Lee v. York County School Div.*, 484 F.3d 687, 698 (4th Cir. 2007) (citing *Fleming v. Jefferson County School Dist. R-1*, 298 F.3d 918 (10th Cir. 2002). While the court found that a teacher's postings on his classroom wall, present for viewing by students in a compulsory classroom setting, constituted school-sponsored speech, those facts are not present here where, as alleged, the assembly occurred during non-instructional time and not in a classroom

but, rather, in an all-purpose auditorium used for a wide array of functions and events. However, as noted in *Lee*, the court in *Fleming* pointed out that "expressive activities that do not bear the imprimatur of the school could include a variety of activities conducted by outside groups that place on school facilities" as compared to "expressive activities that the school allows to be integrated permanently into the school environment and that students pass by during the school day." 298 F.3d at 925.

Moreover, simply providing a neutral forum for clubs to share a wide array of ideas or beliefs is not sponsoring or promoting a religion. Indeed, as the Supreme Court held in *Capitol Square*, "[w]e find it peculiar to say that government 'promotes' or 'favors' [religious speech] by giving it the same access to a public forum that all other [speech] enjoys." 115 S.Ct. at 2447.

Interestingly, Plaintiffs seemingly take no issue with a non-theist student walkout such as what plaintiff Max Nibert did on February 10, nor do they seem to take issue with or seek to exclude any secular assemblies held at school. Likewise, Plaintiffs do not seek to have any school "sponsorship" of any other clubs prohibited. Rather, they only wish to discriminate against a single viewpoint in clear violation of the United States Constitution and a plethora of case law applying the same.

3. Conducting and promoting

Plaintiffs also seek an injunction to prevent the CCBOE from "conducting and promoting assemblies. . . ." Under this prospective relief, the plaintiffs seek to prohibit the CCBOE from conducting any assemblies at any school or promoting the same. This would then prohibit schools from having pep rallies or any other assembly at school.

Likewise, Plaintiffs seek to limit adult-led religious activities, but do not seek to restrict adult-led non-religious activities.

Nik Walker Ministries and other adult-led religious activities or promoting the same." Plaintiffs do not define what they mean by "conducting" but taking that word at its it must be assumed that they seek to prohibit the CCBOE from *performing* a religious activity. In that regard, there are no allegations in the Amended Complaint that the CCBOE performed or conducted a religious activity. Rather, the Amended Complaint clearly alleges that the assembly in question was conducted by Nik Walker Ministries. *Am. Compl*. ¶¶ 38-46 (Walker preached, Walker said, Walker instructed, Walker sent, Walker prayed, Walker presented). Thus, in that the CCBOE has not conducted any religious assemblies, and there is no allegation or assertion that the CCBOE intends to conduct any such assemblies, there is no basis, or need, for an injunction regarding the same.

As for the relief seeking to enjoin the CCBOE from promoting Nik Walker Ministries assemblies and other adult-led religious activities, CCBOE does not promote any assembly or religious activities. Any announcement of such an assembly is the same as that other clubs, groups or assemblies are given. Plaintiffs' request that secular clubs and assemblies be promoted while religion-based assemblies be excluded is viewpoint and/or content discrimination which is prohibited by the Supreme Court. See, *Rosenberger*, supra; *Capitol Square*, supra; *Lamb's Chapel*, supra; *Good News Club v. Milford Central School*, supra; *Widmar*, supra; *Mergens*, supra. Justice Kennedy wrote in *Rosenberger*, "viewpoint discrimination is thus an egregious form of content discrimination." In current vernacular, it is essentially a "cancel culture" mentality.

Of course, it is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. *Police Dept. of Chicago v. Mosely*, 408 U.S. 92, 96, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972). Likewise, one cannot discriminate against speech because its message is presumed to be unconstitutional. *Turner Broadcasting System, Inc. v. FCC*,

512 U.S. 622, 641-643, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994). Thus, in the realm of private speech or expression, government regulation may not favor one speaker over another. *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984).

More recently, a unanimous Supreme Court upheld the prohibition against viewpoint discrimination. *Iancu v. Brunetti*, ___ U.S. ___, 139 S.Ct. 2294 (2019). Justice Alito wrote in a concurring opinion "[a]t a time when free speech is under attack, it is especially important for this Court to remain firm on the principle that the First Amendment does not tolerate viewpoint discrimination." *Id.* at 2302-03.

Schools makes announcements for all recognized clubs and groups. By providing said equal access, it cannot be said to be favoring, sponsoring or promoting one religion, or one idea, over another. See, *Capitol Square*, 115 S.Ct. at 2447. There are no allegations to the contrary. This is the epitome of viewpoint neutral treatment in accordance with the directives of the Supreme Court.

C. Plaintiffs E.F., C.F., C.T., S.T. and Max Nibert do not have standing to bring this action

It is well-settled that "a plaintiff must demonstrate standing separately for each form of relief sought. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). In doing so, a plaintiff must establish three requirements for standing: (1) that s/he has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual and imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Id.* at 180-81, 120 S.Ct. 693.

A §1983 action, such as in the instant matter, provides no redress for a mere "violation of federal law." *Blessing v. Freestone*, 520 U.S. 329, 340, 117 S.Ct. 1353, 137 L.Ed.2d 569 (1997) (to seek redress through § 1983, a plaintiff must assert each violation of a federal right, and not merely the violation of a federal law.). Plaintiffs thus cannot use it to enforce a broader interest in assuring obedience to the law. See, *Gonzaga Univ. v. Doe*, 536 U.S. 273, 285 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002). In that regard, §1983 merely provides a mechanism for enforcing individual rights secured elsewhere, as §1983 does not protect anyone against anything. *Id.*, quoting *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617, 99 S.Ct. 1905, 60 L.Ed.2d 508 (1979). Rather, standing to bring the action requires the invasion of a "legal right." *Tennessee Elec. Power. Co. v. Tennessee Valley Auth.*, 306 U.S. 118, 59 S.Ct. 366, 83 L.Ed. 543 (1939).

Further, the legal right that is invaded must be personal to each particular plaintiff. See, *Whitmore v. Arkansas*, 495 U.S. 149, 160, 59 S.Ct. 366, 83 L.Ed. 543 (1990) (denying standing in a suit to prevent another's execution based on the public interest protection of the Eighth Amendment); *Valley Forge Christian Coll v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 483, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982) (asserting a right to a particular kind of government conduct, which the government has violated by acting differently, cannot alone satisfy the requirement of Article III without draining those requirements of meaning).

In the instant matter, Plaintiffs E.F., C.F., C.T., S.T., individually and by and through their parents, and Max Nibert, individually, allege no compensable, or redressable, injury to support standing to bring this matter. This civil action arises out of an events that occurred at Huntington High School on February 2, 2022 and, as alleged in the Amended Complaint, or on February 1, 2022 at Huntington East Middle School. The only Plaintiffs alleged to have attended these events

were C.M. and S.F. None of the other Plaintiffs attended the assembly at issue, and some did not even attend Huntington East Middle School or Huntington High School at all.

Indeed, finding standing for individuals who did not attend the event, nor even attend the school where the event was held, would open the door for every parent and/or student to challenge decisions, events, issues or policies of the CCBOE, regardless of that child's attendance at any CCBOE school. In other words, an elementary school student from Hite Saunders Elementary could, by and through her parents, assert a claim against the CCBOE for something that occurred at Milton Middle School.

In their Amended Complaint, Plaintiffs allege C.F. attends Southside Elementary School. *Am. Compl*. ¶ 10. S.T. attends Huntington Middle School. *Id*. ¶ 11. Moreover, Plaintiffs C.T. and Max Nibert simply disapprove of what happened but do not allege any specific claims, or damages. See, *Am. Compl*. generally. Meanwhile, other than being identified as parties, E.F., C.F. and S.T. make no allegations in any way that they were deprived of any rights.

None of these Plaintiffs – C.F., E.F., C.T., S.T., by and through their parents, and Max Nibert - have standing to bring the claims which they have asserted, as they could not have had, nor did they allege, that their rights were violated. Accordingly, as to these Plaintiffs, the Complaint must be dismissed.

III. CONCLUSION

Based upon the foregoing, Cabell County Schools is entitled to dismissal of the specific performance claims and claims made by C.F., E.F., C.T., S.T., by and through their parents, and Max Nibert. Plaintiffs failed to allege the violation of the United States Constitution through any official policy or custom of this Defendant and, moreover, there is no policy sponsoring religion. The declaratory judgment and injunctive relief sought by Plaintiffs is overly broad and, if granted, creates a constitutional issue pertaining to content or viewpoint discrimination which the United States Supreme Court has prohibited on numerous occasions. Further, several Plaintiffs, including C.T., S.T., E.F., C.F., and Max Nibert and, where applicable, their respective parent bringing suit on their behalf, lack standing to bring this action, as none of the foregoing have alleged to have had any constitutional rights deprived.

CABELL COUNTY BOARD OF EDUCATION,
By Counsel

/s/ Perry W. Oxley
Perry W. Oxley (WVSB #7211)
David E. Rich (WVSB #9141)
Brian D. Morrison (WVSB #7489)
Paula J. Roberts (WVSB#13457)
Oxley Rich Sammons, PLLC
P.O. Box 1704
Huntington, WV 25718
304-522-1138
poxley@oxleylawwv.com
drich@oxleylawwv.com
bmorrison@oxleylawwv.com
proberts@oxleylawwv.com

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION

Herman Mays, Jr., on his own behalf and as next friend and parent of C.M.; Elizabeth Mays, on her own behalf and as next friend and parent of C.M.; Bethany Felinton, on her own behalf and as next friend and parent of S.F., E.F., and C.F.; Jana Tigchelaar, on her own behalf and as next friend and parent of C.T. and S.T., and Max Nibert,

Plaintiffs,

v. **Civil Action No. 3:22-cv-00085**

The Cabell County Board of Education; Ryan Saxe, in his official capacity as Superintendent of Cabell County Schools; and Daniel Gleason, in his individual and in his official capacity as Principal of Huntington High School, and Jeff Jones, in his individual capacity and in his official capacity as a Cabell County Schools teacher,

Defendants.

CERTIFICATE OF SERVICE

The undersigned counsel for Defendant Daniel Gleason served the foregoing "**MEMORANDUM OF LAW IN SUPPORT OF CABELL COUNTY BOARD OF EDUCATION'S MOTION TO DISMISS**" via electronic filing upon the following counsel of record on this 20th day of May 2022.

Marcus B. Schneider
Steele Schneider
420 Ford Duquesne Blvd., Suite 500
Pittsburgh, PA 15222

Patrick C. Elliott
Christopher Line
Freedom From Religion Foundation, Inc.
10 N. Henry Street
Madison, WI 53703

Kristina Thomas Whitaker
The Grubb Law Group
1114 Kanawha Boulevard East
Charleston, WV 25301

/s/ Perry W. Oxley
Perry W. Oxley (WVSB #7211)
David E. Rich (WVSB #9141)
Brian D. Morrison (WVSB #7489)
Paula J. Roberts (WVSB#13457)
Oxley Rich Sammons, PLLC
P.O. Box 1704
Huntington, WV 25718
(304) 522-1138
poxley@oxleylawwv.com
drich@oxleylawwv.com
bmorrison@oxleylawwv.com
proberts@oxleylawwv.com