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 DANIEL GLEASON'S MOTION TO DISMISS

Now comes Defendant Daniel Gleason, in his individual and his official capacity as Principal of Huntington High School, 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 his Motion to Dismiss the Amended Complaint, does hereby state as follows:

I. BRIEF FACTS

Daniel Gleason is the principal at Huntington High School. The Plaintiffs filed the Complaint on February 17, 2022 and Amended Complaint on May 6, 2022. In their Amended

Complaint, Plaintiffs allege "[u]nless Cabell County Schools abandons its widespread custom and practice . . ." regarding the alleged promotion of religion and conducting religious activities and "undertakes policy changes, training and monitoring" additional alleged constitutional violations will occur. *Am. Compl.* ¶ 165. This follows Plaintiffs' allegation "[t]he Cabell County Board of Education has inadequate policies in place to prevent the Nik Walker Ministries assembly from occurring again at schools within Cabell County." *Id.* at ¶ 152. Further, Plaintiffs contend that the "Cabell County Board of Education has not mandated additional training . . . to any school employee" and "refused to adopt new policies concerning the training of Cabell County Schools employees" or "the impropriety of Cabell County Schools employee initiating, organizing, or otherwise facilitating adult and employee-led religious activity for students." *Id.* at ¶ 135-137.

The Amended Complaint seeks damages in the amount of $1 per Plaintiff along with injunctive relief requiring a change in the policies regarding sponsoring religious assemblies during the school day, conducting or promoting assemblies and other adult-led religious activities during the school day, and participating in Nik Walker Ministries assemblies and other religious activities during the school day.

Plaintiffs allege that an assembly approved by Cabell County Schools administrators occurred in which Nik Walker 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, *Am. Compl* at ¶ 24. Plaintiffs allege that C.M. and S.F., juniors at Huntington High School attending Becky Nibert's and Jeff Jones' classes, respectively, attended the assembly. *Id.* at ¶¶ 50, 58. 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. *Id.* at ¶¶ 10-12. A week after the assembly, Max Nibert organized and led an

anti-religion walkout during the homeroom COMPASS period, protesting the former assembly. *Id.* at ¶ 158.

LEGAL ANALYSIS

A. Legal Standard

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 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. Dan Gleason enjoys qualified immunity from Plaintiffs' suit for damages.

Daniel Gleason enjoys qualified immunity from Plaintiffs' claims for damages such that the Complaint, as to him, must be dismissed. The thrust of Plaintiffs' claims rests in an assembly that occurred on February 2, 2022.[1] Plaintiffs assert that having a voluntary assembly during non-instructional time of the school day which discusses religion and Christianity violates the Establishment Clause. Like other clubs, groups or organizations within the school system, the Fellowship of Christian Athletes holds meetings at non-instructional times during the school day. Further, individuals from outside the school often present to those clubs, groups or organizations. By permitting the same, Cabell County schools operates in a content neutral or viewpoint neutral manner which then demands dismissal of this Defendant based upon qualified immunity.

[1] In their Amended Complaint, Plaintiffs mention an event involving Nik Walker Ministries that occurred at Huntington East Middle School. Mr. Gleason, as principal at Huntington High School, would obviously have no involvement or even alleged oversight of that assembly. Plaintiffs further allege other incidents, some of which occurred years ago, and over which Mr. Gleason likewise would have had no control.

Generally, qualified immunity grants a governmental official immunity from suit unless the official violated a clearly established statutory or constitutional right which a reasonable person would have known. In *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), the Supreme Court established a two-step analysis for analyzing qualified immunity claims. There, the Court held that the trial court must (1) decide whether the facts alleged or shown by the plaintiff make out a violation of a constitutional right and, (2) if so, determine whether that right was clearly established at the time of the defendant's alleged misconduct. The Court subsequently withdrew the mandatory 1-2 sequencing required under *Saucier*, giving courts the discretion of asking the constitutional or law question first. *Pearson v. Callahan*, 555 U.S. 223, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009). As such, the Court can first consider whether the right claimed by Plaintiffs was clearly established before determining if there was a violation of a constitutional right.

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 when said speech is permitted 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); *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); *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); *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).

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, student clubs, groups or organizations seeking to have a guest lecturer during non-classroom time are generally permitted to do so.[2] In conformity with multiple Supreme Court opinions, this includes religious-based clubs as well.

To show that the law was "clearly established", Plaintiffs must point to an existing judicial decision binding upon the Southern District of West Virginia substantially similar facts to the

[2] This Defendant recognizes there are some instances where a guest speaker, for safety reasons, may be denied permission to speak. However, the exclusion of that speaker is not as a result of the content of what is being said but, rather, the safety factors. Regardless, that is not alleged or at issue in this matter.

instant matter. The clearly established standard ensures that government officials are subject to liability only when the law provides "fair and clear warning" of what the Constitution requires. *United States v. Lanier*, 520 U.S. 259, 271, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997). The invoked right must be defined with sufficient clarity so that a reasonable official would understand what he is doing violates that right. *Hope v. Pelzer*, 536 U.S. 730, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002).

The "clearly-established right" at issue here is whether Mr. Gleason can permit a speaker, sponsored by a Christian club, to present to students in an assembly sponsored by that Christian club, talking about religious principles during non-instructional time of the school day. Without a doubt, he could not do anything of the like as an individual, as the only authority he would have to permit any speakers at school would be in his capacity as principal. Regardless, the assembly, occurring during non-instructional time, satisfies the requirements of a "content-neutral" or "viewpoint neutral" approach to speech permitted at the schools in adherence to Supreme Court precedent.

However, to the extent that the assembly did not adhere to the Supreme Court's requirements, the law which excepts the Supreme Court's multiple opinions regarding content-neutral or viewpoint neutral speech is not clearly established. As noted above, the Supreme Court has held time and again that entities such as the Cabell County schools cannot legally restrict speech based upon its content or viewpoint without being guilty of improper discrimination. Thus, there is no way that the right sought to be enforced by Plaintiffs here was "clearly-established."

"If the law at the time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." *Harlow v. Fitzgerald*, 457 U.S.

800, 818, 102 S. Ct. 2727, 73 L.Ed.2d 396 (1982). Further, where an official's duties require action which do not implicate clearly established rights, the public interest may be better served by permitting the official's action without fear of consequences. *Pierson v. Ray*, 386 U.S. 547, 554, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967).

In the instant matter, Mr. Gleason, individually or as principal, did not violate any of Plaintiffs' clearly-established rights. He did not request, nor require, the attendance of the assembly. The assembly was held during non-instructional time as part of an event where students voluntarily signed up for the same. There are no allegations that he was aware that any of the students who presented in the assembly did not voluntarily sign up for the same. As such, the assembly does not rise to the level of a violation of a clearly-established right based upon the mountain of Supreme Court precedent. As such, the claims against Mr. Gleason must be dismissed.

C. **Complaint has insufficient allegations that Dan Gleason caused a deprivation of Plaintiffs' rights.**

To maintain a civil action against Mr. Gleason individually, Plaintiffs must allege that, while acting under color of state law, he caused the deprivation of a federal right. See, *Ashcroft v. al-Kidd*, 563 U.S. 731, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011). However, when analyzing the Complaint, it seems clear that the Complaint fails to assert any facts which rise to the level necessary to sustain such a cause of action.

The assembly was a voluntary assembly hosted by FCA. Students who wished to attend the assembly were required to sign up for the same. While Becky Nibert and Jeff Jones both took their entire classes to the assembly, there are no allegations that Mr. Gleason directed either of them to bring their entire class to the event, nor even an allegation that Mr. Gleason was aware that both Ms. Nibert and Mr. Jones had brought their entire classes. Plaintiffs do not allege that

any of them approached Mr. Gleason seeking permission to leave the assembly or that he prohibited any of the students from leaving the assembly. Thus, there is no federal right of which Plaintiffs were deprived and, certainly, not which are attributable to Mr. Gleason.

D. **Plaintiffs' Requested Relief Seeking Declaratory Judgment and Permanent Injunction action must fail as Dan Gleason has no policy-making authority for Cabell County Schools**

In their Amended Complaint, Plaintiffs seek declaratory judgment and injunctive relief against Cabell County schools, asserting a facial challenge to some phantom policy regarding the promotion of evangelical Christianity, a policy that has never been adopted, recognized or implemented by him or, as far he knows, Cabell County schools. However, there are no allegations in the Complaint that Mr. Gleason creates, establishes or even suggests policy for Cabell County schools, and consistently, Mr. Gleason does not establish any policy for Cabell County, nor can he establish a custom throughout the county. Yet, Plaintiffs' Amended Complaint seeks to establish a new policy for Cabell County schools, and not for Mr. Gleason. Because the requested relief seeking declaratory judgment and injunctive relief against this Defendant is thus improper, seeking relief from this Defendant which he cannot legally provide and over which he has no oversight, the Amended Complaint must be dismissed.

E. **Dan Gleason has not established a policy promoting one religion over another, or religion over non-religion.**

The Amended Complaint, to the extent it seeks declaratory and injunctive relief against this Defendant, must also be dismissed, as Mr. Gleason has not established a policy promoting one religion over another, or religion over non-religion. In fact, Plaintiffs allege no official policy of Mr. Gleason, and understandably so, as there is no such official policy that he has ever adopted, recognized or implemented. Thus, seeking injunctive relief against Mr. Gleason for the same is akin to making a declaration that running a stop sign is illegal and then seeking an injunction which

likewise prohibits a party from running a stop sign. There is already a law applicable to this: the court need not make a further declaration and enter a permanent injunction on a matter for which there is already a law against the Establishment of religion.

What Plaintiffs seek, on the face of the Amended Complaint, is something to which there is no dispute: Like all persons, Mr. Gleason must adhere to the United States Constitution and, in particular, the First Amendment protections affording the free exercise of religion and the prohibition against the establishment of a religion. Plaintiffs have identified no official policy of Mr. Gleason that does not afford the free exercise of religion or the free exercise of forgoing the practice of any religion, or that he has attempted to establish a religion. In fact, Plaintiffs allege that Max Nibert, a student at HHS, organized and led what amounted to an anti-religion walkout. *Am. Compl.* ¶ 158. Plaintiffs do not allege that Mr. Gleason attempted to prevent or otherwise prohibit such display by Mr. Nibert and those other students who joined in the same. In other words, Mr. Gleason remained content neutral, as the United States Constitution and Supreme Court of Appeals, requires. As such, Plaintiffs' Amended Complaint must fail and, as to the relief requested seeking declaratory judgment and permanent injunction, must be dismissed.

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

Additionally, 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 Mr. Gleason 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.

As noted above, the Supreme Court has consistently overruled challenges under the Establishment Clause 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, supra; Capitol Square Review, supra*; *Lamb's Chapel supra*; *Good News Club v. Milford Central Schooll supra*; *Widmar, supra*; *Mergens, supra*. Further, opening schools to community and student groups serves the secular purpose of providing a forum for exchange of ideas and social intercourse. *Good News/Good Sports Club v. Sch. Dist.*, supra. Thus, as a limited public forum, all student groups seeking to have an adult speaker during non-classroom time are permitted to do so with very limited restrictions, and not just Christian groups.

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 of a religious nature while, at the same time, permitting speech of a secular nature. For instance, the physics club could not host an adult speaker during the school day to speak about physics or the Future Farmers of America could not invite a local farmer to speak during the school day if the same latitude and forum access were not also provided to the FCA or other religious groups or clubs.

Yet, Plaintiffs do not seek to preclude the FFA from having adult farmer speak to club-members about better ways or aspects of farming or a physics presenter talk about advances in the science. Rather, Plaintiffs seek to prohibit only one category of speech - religious - while permitting all other types, including the well-publicized anti-religion student walkout organized and led by Max Nibert, an adult, speaking out regarding religion and in which non-adults C.M., S.F., C.T. and others participated. See, e.g., *Am. Compl*. ¶¶ 158, 161. Thus, Max Nibert and the other Plaintiffs are not seeking to punish and prohibit the likes of speech of Max Nibert and others

who exercised their First Amendment Rights to expression of free speech against religion, but only to preclude school clubs from exercising their First Amendment rights in support of their religion. The irony should not be lost upon this Court.

The content-based exclusionary policy which Plaintiffs seek and are asking this Court to judicially establish 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 group, it cannot refuse access to another based on its religious nature, as that constitutes viewpoint discrimination. Thus, just as a school cannot establish a religion, it also cannot discriminate against one.

In *Peck*, the Upshur County Board of Education 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. Thus, 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 which "extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Rosenberger*, 515 U.S. at 839. 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.

1. Participating in religious activities

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.

Assemblies such as the one at issue must be attended to by adults supervising the same. As principal, Mr. Gleason attends a large number of events and assemblies, and not just ones with

religious overtones. To the extent his attendance is considered speech, 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). Plaintiffs make no claim that Mr. Gleason's attendance at the event or assembly interfered with his effective functioning of his job.

2. Sponsoring

Plaintiffs also contend that Mr. Gleason has "sponsored" the religious assembly for which he 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, Mr. Gleason no more "sponsored" this event as he does meetings of the Leo Club, Beta Club, ROTC or Key Club. Thus, to say that he "sponsors" religion such to infringe upon the Establishment Clause is without merit.

Further, simply because speech occurred at school does not equate that the speech was sponsored by Mr. Gleason. If that is the case, then Plaintiffs have an unworkable dilemma in that Mr. Gleason would then be considered to have "sponsored" not only the assembly in question but also Max Nibert's anti-religion walkout a week later, as both occurred on school property during

the school day during the same non-instructional COMPASS period. Of course, "[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." *Capitol Square,* 115 S.Ct. at 2447.

Additionally, Plaintiffs seemingly take no issue with a non-theist student walkout such as what Plaintiff Max Nibert organized and led on February 10, nor do they seem to take issue with or seek to exclude any secular assemblies or preclude Mr. Gleason, from "sponsoring" any secular or non-theist 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 Mr. Gleason from "conducting and promoting assemblies. . . ." Under this relief, Mr. Gleason would be prohibited from conducting or promoting any assembly of any club for any purpose whatsoever. Huntington High would be precluded from having pep rallies, school plays or concerts, or arguably even student orientation or any other type of assembly, regardless of its origin and topic. While this would be content-neutral, it also then impedes upon educational opportunities with the band or choir, or assemblies needed for the furtherance of education and orientation.

Regardless, there are no allegations in the Amended Complaint that Mr. Gleason performed or conducted a religious assembly from which they seek to have him enjoined. 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 Mr. Gleason has not conducted any religious assemblies, there is no basis, or need, for an injunction regarding the same.

As for the relief seeking to enjoin Mr. Gleason from promoting adult-led religious activities, Mr. Gleason does not promote any assembly or religious activity. Any announcement of such an assembly is the same as that which other clubs, groups or assemblies are given – that is, the clubs are given the same platform, being content neutral. 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."

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 make announcements for all recognized clubs and groups. There are no allegations that Mr. Gleason performs or directs these announcements, and no allegations that all recognized clubs and groups do not have their meetings announced. This is the epitome of viewpoint neutral treatment in accordance with the directives of the Supreme Court.

G. Plaintiffs C.F., E.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 C.F., E.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 event 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.

Finding standing for individuals who did not attend the subject assembly, nor even attend the school where the assembly was held, would open the door for every parent and/or student to challenge Mr. Gleason's decisions, 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 Mr. Gleason 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. *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.

II. CONCLUSION

Based upon the foregoing, Daniel Gleason is entitled to dismissal of this civil action against him. He is entitled to qualified immunity from this civil action, Plaintiffs have identified no official policy which he has allegedly violated, and regarding the request for declaratory judgment and injunctive relief, he does not establish or create policy for Cabell County schools which, as the Complaint contends, is the basis for the county-wide relief sought. Accordingly, the Complaint must be dismissed as to him.

DAN GLEASON,
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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 DANIEL GLEASON'S MOTION TO DISMISS**" via electronic filing upon the following counsel of record on this 20th day of May 2022.

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