**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF FLORIDA**
**TALLAHASSEE DIVISION**

EQUALITY FLORIDA, et al,

Plaintiffs,

CASE NO.: 4:22-CV-00134-AW-MJF

vs.

FLORIDA STATE BOARD OF EDUCATION, et al,

Defendants.
_____ /

**ST. JOHNS COUNTY SCHOOL BOARD'S AMENDED REPLY TO PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS**
**(Amended to Add Certificate of Compliance Only)**

The St. Johns County School Board ("St. Johns" or the "Board"), through its undersigned counsel, hereby replies to Plaintiffs' Memorandum of Law in Opposition to Defendants' Motions to Dismiss, Pursuant to the Court's Order Regarding Motions to Dismiss [DE 71], and states:

## INTRODUCTION

The thrust of Plaintiffs' claims in the First Amended Complaint ("Complaint") focus on their facial challenges to H.B. 1557. [D.E. 47]. Similarly, Plaintiffs' Memorandum of Law in Opposition to Defendants' Motions to Dismiss ("Omnibus Response") focuses almost entirely on their facial challenges. [D.E. 91]. St. Johns did not procure, obtain, endorse, vote, enact, sign, or solicit the statute, and

therefore, continues to defer to and to adopt the State Defendants' arguments in support of the constitutionality of H.B. 1557.

Beyond this, Plaintiffs' Omnibus Response does little, if anything, to rebut or refute the Board's arguments in support of its Motion to Dismiss. More specifically, Plaintiffs: (1) defend against the Board's standing argument by "clarifying," that the vast majority of Plaintiff's are not asserting claims against the Board; (2) failed to offer any substantive argument in support of their as-applied challenges to the Board; (3) failed to respond to the Board's dispositive motion to dismiss regarding economic damages claims; (4) failed to establish grounds to satisfy *Monell*; (5) have not offered a substantive rebuttal to the alleged pleading deficiencies; and (6) conceded the punitive damages claims are unsupported.[1] Plaintiffs' Omnibus Response fails to overcome the Board's Motion to Dismiss, and therefore, the motion should be granted.

[1] Plaintiffs' "clarification" as to the claims applicable to St. Johns and concession on the meritless punitive damages claims is curious. The Board served, but did not file, its Rule 11 motion directed to these issues. In response, Plaintiffs claimed the motion was "patently deficient," and "baseless," yet apparently have had a change of heart. When the recipient withdraws the meritless argument, the Rule 11 motion has "served its purpose." *Huggins v. Lueder, Larkin & Hunter, LLC*, ___ F.4th ___, No. 20-12957, 20-12959, 20-12961, 20-14320, 20-14318, 20-14319, 2022 WL 2679024, at *2 (11th Cir. July 12, 2022).

## ARGUMENT

A. *Plaintiffs Lack Standing – Facial[2] and As-Applied Challenges*

Plaintiffs' defense to the Board's standing argument continues to group all "Individual Plaintiffs" with all "Defendants."[3] [D.E. 91 at 30, 38]. Yet, Plaintiffs' catch-all section argues that they do not, and in doing so, contradicts the clear, plain, and unambiguous language of their own allegations. *See* [D.E. 91 at 72]. Unable to avoid taking a shot at the various school board Defendants, or perhaps doubling down in defense of the Board's now immaterial, but vindicated, Rule 11 motion, Plaintiffs argue:

> In any event, it is not the case that the Amended Complaint "asserts multiple claims against multiple defendants without specifying which of the defendants are responsible for which specific acts." Quite the opposite: the Amended Complaint attributes specific actions and connections to each Defendant. To the extent Defendants are confused (and there is no good reason why they should be), Plaintiffs hereby clarify that they all allege claims against the State Defendants and they each allege claims against their own local school boards.

[D.E. 91 at 72]. There is no confusion. Count I alleges claims by "all Plaintiffs against all Defendants," [D.E. 47 at 98], and Counts II–IV allege claims by a subset of enumerated Plaintiffs against "all Defendants." [D.E. 47 at 101, 104, 106].

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[2] To be clear, the Board concedes for the purposes of this motion only that the VanTice plaintiffs have alleged sufficient facts to establish standing to assert facial claims for declaratory and injunctive relief only. The Board denies they have alleged standing to assert any as applied claims against it.

[3] Plaintiffs exclude Equality Florida and Family Equality from the definition of "Individual Plaintiffs." [D.E. 91 at 30 n.4].

Further grounds to render Plaintiffs' criticism unwarranted may be found in their improper adoption by reference of each of the preceding paragraphs, which clearly runs afoul of this Circuit's prohibition on shotgun pleadings. *See Weiland v. Palm Beach Cnty. Sheriff's Off.*, 792 F.3d 1313, 1321–23 (11th Cir. 2015). It is thus "exceedingly difficult, if not impossible to know which allegations pertain to [which] count (according to its label), to separate wheat from the chaff." *Keith v. Dekalb Cnty.*, 749 F.3d 1034, 1045 n.39 (11th Cir. 2014). By Plaintiffs' own "clarification," all claims by individual Plaintiffs M.A., S.S., Ivonne and Carl Schulman, Moricz, McClelland, Jane Doe, Morrison, Houry, Casares, Feinberk, Shook, Volmer, Berg, and Washington against St. Johns should be dismissed.

Plaintiffs' "clarification" does nothing to address the lack of standing of the Organizational Plaintiffs, Equality Florida and Family Equality. The former sues St. Johns in its individual and organizational capacities and the latter in its individual capacity only. [D.E. 47 at 11–12]. In support of their individual claims, the Organizational Plaintiffs argue they have diverted funds to combat H.B. 1557, which St. Johns did not procure, obtain, endorse, vote for, enact, sign, or solicit, and that their abilities to attract members, raise revenue, or to fulfil their purpose have been impeded. [D.E. 91 at 40–42]. While the Board presumes for the purpose of this motion only, but does not concede, Equality Florida has established associational standing based on the VanTice's membership, neither it nor Family Equality have

offered *anything* to establish that any act or omission by St. Johns—rather than the State Defendants—caused or contributed to any alleged constitutional harm, because they cannot. It is axiomatic that the Board may not be held vicariously liable for the passage of laws by the Florida Legislature. Accordingly, the organizational claims brought by these defendants against the Board should be dismissed.

In addition to these standing deficiencies, the as-applied challenges for all claims against St. Johns, including those brought by the VanTice plaintiffs, fail as a matter of law, because they have not identified any cognizable injury in fact to support these claims. Nothing in the omnibus response identifies any actionable injury in fact arising from the Board's implementation of H.B. 1557 *as applied* to any Plaintiff. Succinctly stated, their fears, concerns, confusion, questions, whether reasonable or not, do not constitute grounds to assert as applied challenges against the Board.

Plaintiffs' Complaint against St. Johns should be dismissed, and they should be permitted the opportunity to amend the Complaint to comply with Rule 8 and the Eleventh Circuit's pleading requirements to identify which Plaintiffs are asserting which claims against the Board, and which facts they rely upon in order to establish them. Simply stated, they should be required to plead specific facts and claims against St. Johns because it is not required to divine which claims by which Plaintiffs apply to it or to parse through over 300 paragraphs incorporated by reference to

determine the allegations against it.[4] This is antithetical to the well-settled notice requirements.[5]

B. *Economic Damages are Unavailable*

St. Johns sought to dismiss Plaintiffs' monetary damages claims. [D.E. 66 at 11]. Plaintiffs failed to respond. Despite Plaintiffs' challenges, and the ultimate anticipated resolution of the constitutionality *vel non* of H.B. 1557, no court or judicial body has held the statute unconstitutional. To the extent Plaintiffs have asserted facial and as applied claims, the Board is "entitled to the presumption of constitutionality [of H.B. 1557], until [its] invalidity is judicially declared." *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 153 (1944); *Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211, 254 (5th Cir. 1974); *Fla. Educ. Ass'n v. State of Fla., Dep't of Edu.*, No. 4:17-cv-414-RH/CAS, ECF No. 142 (N.D. Fla. June 8, 2018). Plaintiffs' monetary damages claims against the Board should be dismissed with prejudice.

C. *Plaintiffs Have Failed to State a Claim Pursuant to Monell*

[4] This is particularly true in light of the as applied claims brought by all Plaintiffs.
[5] Plaintiffs' argument that the Board's ability to move to dismiss the Complaint establishes sufficient notice is unpersuasive. To fully credit this argument would be to abrogate all pleading requirements and bar any challenge to the sufficiency of the Complaint. This is not the law.

Plaintiffs have argued that the Board's intent to follow a law that has yet been determined to be constitutionally infirm satisfies their obligation to plead a custom, policy, or practice to entitle them to assert as-applied claims for damages. [D.E. 46 at 46]. This argument is unavailing.

Citing no authority, Plaintiffs argue that by merely identifying H.B. 1557 and the Board's intent to follow it, they have identified a relevant policy or custom sufficient to impute *Monell* liability against the Board. In doing so, however, Plaintiffs have not alleged an unlawful policy or custom *of the Board*. *See Sewell v. Town of Lake Hamilton*, 117 F.3d 488, 489 (11th Cir. 1997) ("A policy is a decision that is officially adopted by the municipality, or created by an official of such rank that he or she could be said to be acting on behalf of the municipality . . . . A custom is a practice that is so settled and permanent that it takes on the force of law."). Simply pointing to H.B. 1557 as a custom or policy for *Monell* purposes misses the mark. *See, e.g.*, *Lewis v. Eufaula City Bd. of Educ.*, 922 F. Supp. 2d 1291, 1308 (M.D. Ala. 2012) (plaintiff adequately alleged "that the board itself, as controlled through the board member defendants" had unlawful retaliation policy); *Smith v. Atl. Indep. Sch. Dist.*, 633 F. Supp. 2d 1364, 1373–74 (N.D. Ga. 2009) (school board's passage of report which included teacher's requirement request was official action for § 1983 purposes).

Municipal liability under §1983 "is incurred only where 'a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.'" *Teagan v. City of McDonough*, 949 F.3d 670, 675 (11th Cir. 2020) (quoting *Owens v. Fulton Cnty.*, 877 F.2d 947, 949 (11th Cir. 1989)). Here, the Board has not made a "deliberate choice," nor does it have any alternatives. Instead, the Board is "obligated to obey the legislature's duly enacted statute until the judiciary passes on its constitutionality." *Sch. Dist. of Escambia Cnty. v. Santa Rosa Dunes Owners Ass'n*, 274 So. 3d 492, 494 (Fla. 1st DCA 2019). This applies not only to statutes but also to regulations that public officials have "a clear statutory duty to comply with." *Dep't of Rev. v. Markham*, 396 So. 2d 1120, 1121 (Fla. 1981); *see also* Op. Att'y Gen. Fla. 2021-01 (2021). In signaling its intent to comply with H.B. 1557, the Board is thus merely indicating its intent to follow what is currently a presumptively valid law and that which is has no legal authority to disregard. The Board would certainly fall within the purview of any statewide injunctive relief and will follow any order of this Court restricting or preventing the implementation of H.B. 1557. Therefore, its inclusion as a party defendant in Plaintiffs' facial challenge claims are surplusage, and serves only to unnecessarily expand the scope of discovery and this litigation.

D. *Punitive Damages Should be Dismissed*

After alleging punitive damages in two versions of the Complaint, Plaintiffs have now conceded that their claims for punitive damages are unsupported. [D.E. 70 at 70 n.25]. Therefore, the demand for punitive damages against the Board should be dismissed with prejudice.

WHEREFORE, the St. Johns County School Board respectfully requests an order dismissing the First Amended Complaint, and where appropriate, dismissing the claims with prejudice, and for an order extending the existing stay until resolution of the pleadings.

**CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(I)**

I HEREBY CERTIFY that this Motion complies with the requirements of Local Rule 7.1(I), because it contains 1,927 words, excluding the parts exempted by said rule.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on August 10, 2022, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following: **Roberta Ann Kaplan at rkaplan@kaplanhecker.com, D. Brandon Trice at btrice@kaplanhecker.com, John Charles Quinn at jquinn@kaplanhecker.com, Joshua Adam Matz at jmatz@kaplanhecker.com, Kate Linsley Doniger at kdoniger@kaplanhecker.com, Valerie Lynn Hletko at vhletko@kaplanhecker.com, Christopher Stoll at CStoll@nclrights.org,**

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