IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

BROOKE HENDERSON and JENNIFER LUMLEY, Plaintiffs, v. SCHOOL DISTRICT OF SPRINGFIELD R-12, ET AL., Defendants.	)	Case No. 6:21-cv-03219-MDH

RESPONSE TO DEFENDANTS' MOTION FOR ATTORNEY FEES

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STATEMENT OF FACTS

1. The parties stipulated that the District ("SPS") required all of its certificated and hourly staff, including Plaintiffs, to attend the Fall 2020 equity training. (Doc. 82 ¶ 14 (citing Stip. ¶ 8).)
2. The parties stipulated to the content of the slideshows, which were substantially the same throughout the training sessions, and related handouts. (Doc. 77-1 ¶¶ 1(g)-(h), 9, 17.)
3. Plaintiffs showed that before its districtwide equity training, SPS provided Plaintiffs with a handout that read, "[Equity and diversity] is more than a value, but now part of our work and job responsibilities . . . [W]e all are now accountable in this work as well. Growing a deeper sense of cultural consciousness is something we must commit to, not just for ourselves but for all our students. As with any presentation, I ask that you remain engaged and professional and provide our trainers complete attention and respect." (Id. ¶ 25.)
4. Plaintiffs showed that in the same handout, SPS said, "This is the second year SPS is going through the fall district-wide equity training and it's important we continue this significant work for our own personal and professional development." (Id. (citing Pls.' Ex. 9).)
5. Plaintiffs showed that in one of the handouts, SPS said that "white silence," "colorblindness," and "All Lives Matter" were forms of covert white supremacy. (Id. ¶ 27 (citing Pls.' Ex. 9).)
6. Plaintiffs showed that at the start of the equity training sessions, SPS asked that a school administrator or leader read the same statement to reinforce that equity was "now part of our work and job responsibilities" and that "we must commit to [it]." (Id. ¶ 41.)
7. Plaintiffs showed that SPS communicated the following guiding principles for the equity training in the "Guiding Principles" handout:
    a. Stay Engaged;
    b. Lean into your discomfort;
    c. Speak YOUR Truth and from YOUR Lived Experiences;

d. Acknowledge YOUR privileges;

e. Seek to Understand;

f. Hold YOURSELF accountable; and

g. Be Professional[.]

(Id. ¶ 31.)

8. Plaintiffs showed that the "Guiding Principles" handout was also repeated early in the slide presentation but with the addition of "Be Professional – Or be Asked to Leave with No Credit." (Id. ¶ 47.)

9. Plaintiffs showed that when the SPS trainers showed staff the Guiding Principles slide, they told staff to "Stay Engaged in the discussion," "stay locked into the conversations," "lean into that discomfort . . . don't try to push it down," "share your personal experiences, and "it is important that during this time we commit to the success of our district and our students, which is why we must commit to these following principles." (Id. ¶ 48.)

10. Plaintiffs showed that the equity training slide presentation also included an "Overview of Training" slide that stated that participants will "[e]ngage in identity development and understanding" and would "[r]eceive tools on how to become Anti-Racist educators, leaders and staff members at SPS," among other statements. (Id. ¶ 49.)

11. Plaintiffs showed that the presentation also included a Covert/Overt White Supremacy graphic, which indicated that "colorblindness," "All Lives Matter," and "white silence" constituted white supremacy. (Id. ¶ 74.)

12. Plaintiffs showed that through its equity training, SPS defined "anti-racism," and in turn being an anti- racist, to mean "bucking norms," and that SPS explained that "anti-racism" is a

"proactive element" that requires not being silent and "advocating for changes in political, economic, and social life." (Id. ¶ 50.)

13. Plaintiffs showed that SPS stated in its training, "The most important thing to reiterate here is that we will actively oppose racism by advocating for change. There is a proactive element in place to no longer remain silent or inactive." (Id. ¶ 94.)
14. Plaintiffs showed that through its equity training, SPS expected staff to commit to the concept of becoming "anti-racist" educators (Id. ¶ 51.)
15. Plaintiffs showed that throughout the equity training, SPS continuously taught that silence on the part of "white people" was a form of white supremacy. (Id. ¶ 45.)
16. Plaintiffs showed that SPS never told staff that silence was an option during the equity training. (Id. ¶ 44.)
17. Plaintiffs showed that throughout the training, SPS directed Ms. Henderson and Ms. Lumley to break into small discussion groups. (Id. ¶¶ 55, 58, 77.)
18. Plaintiffs showed that they could be called on if they did not speak out. (Id. ¶¶ 46, 62.)
19. According to Ms. Lumley, she spoke out during a large group discussion in her training session because of how SPS was assigning characteristics based on race. She stated that all humans are all equal. Ms. Lumley stated that she is not a racist, and that not all white people are racist; that racism is something that any person of a particular race could be guilty of; and that not just white people are racist. (Id. ¶ 79.)
20. According to Ms. Lumley, she also used a personal example of how racism can exist within any community by sharing that her nephew married a black woman, but that some black people had told her nephew's wife that she did not "count" as black anymore. Mr. Sode told Ms.

Lumley that black people cannot be racist. When she questioned his statement, he responded that black people can be prejudiced but not racist. (Id. ¶ 80.)

21. According to Ms. Lumley, she stated that she did not grow up in white privilege; that she came from a poor family, a broken home, and received government handouts; and that one of the SPS trainers responded that because Ms. Lumley is white, she was born into white privilege. (Id. ¶ 81.)

22. According to Ms. Lumley, one of the SPS trainers also told Ms. Lumley that the training wasn't just singling out white people, but then she pointed to the screen that discussed white supremacy. The trainers responded by telling Ms. Lumley that she needed to reflect on herself some more. (Id. ¶ 82.)

23. According to Ms. Lumley, others disagreed with her. When other participants raised their voices and told Ms. Lumley that she didn't understand what the trainers were saying about oppression, systemic racism, and white supremacy, the SPS trainers did not stop or correct her fellow participants. As a result of this exchange with the trainers and co-participants, Ms. Lumley shut down and no longer participated in any of the discussions. (Id. ¶ 83.)

24. According to Ms. Henderson, in her large group, they discussed Kyle Rittenhouse; that she said that she had heard he was defending himself from the rioters, and that she thought he had been hired to defend a business; that Dr. Garcia-Pusateri told Ms. Henderson that she was wrong, and then told her that she was confused; and that Dr. Garcia-Pusateri then told Ms. Henderson that Mr. Rittenhouse murdered an innocent person. (Id. ¶ 63.)

25. Plaintiffs showed that SPS responded differently to participants depending on the participant's viewpoint. (Id. ¶ 86.)

26. Plaintiffs alleged that after each Plaintiff expressed her views once, she self-censored out of fear that further consequences would occur, including being asked to leave with no credit. (Doc. 77-2 ¶ 41; Doc. 77-3 ¶¶ 29-30.)

27. Plaintiffs showed that SPS concluded its equity training with the "Anti-Racist/Solo Write" or "Anti- Racist/Group Share," where SPS directed staff to answer three questions about being an anti-racist educator: "How does this statement impact your role at SPS? What steps will you take to become an Anti-Racist? What tools/support will you need to be Anti-Racist?" (Id. ¶ 97.)

28. The parties stipulated that Ms. Henderson was required to complete seven Canvas modules consisting of three Social Emotional Learning modules and four Cultural Consciousness modules. (Doc. 77-1 ¶ 19.)

29. The parties stipulated that the Cultural Consciousness modules required Ms. Henderson to watch several videos, including one called, "Debunking The Most Common Myths White People Tell About Race" video, which included statements like "I don't see color"; "I have black friends"; "Race has nothing to do with it. It's about class"; and "Focusing on race is what divides us." (Id. ¶ 22; Doc. 82 ¶ 105.)

30. The parties stipulated that a participant was required to give a "correct" answer in the Quick Check questions of the Canvas modules before receiving credit. (Doc. 77-1 ¶ 23; Doc. 82 ¶¶ 111-17.)

31. The parties stipulated that THE Cultural Consciousness modules included a "Cultural Competence Self- assessment Checklist" and a "Self-Assessment Reflection" which had to be completed to finish the module. (Doc. 77-1 ¶ 24; Doc. 82 ¶ 106.)

32. Ms. Henderson showed that Dr. Garcia-Pusateri advised her that the Cultural Competence modules' reflection questions were a requirement. (Doc. 82 ¶ 107.)

33. Ms. Henderson showed that the "Cultural Competence Self-assessment Checklist" stated that "[t]his self- assessment tool is designed to explore individual competence." On a scale from "Never" to "Always/Very Well," the assessment required Ms. Henderson to rate her "Awareness" of whether "I have a clear sense of my own ethnic, cultural, and racial identity," "I am aware of my stereotypes as they arise and have developed personal strategies for reducing the harm they cause," and "If I am a White person working with a person of color, I will likely be perceived as a person with power and racial privilege, and that I [may] not be seen as 'unbiased' or as an ally." (Id. ¶ 108.)

34. According to Ms. Henderson, even though she disagreed with the statement "If I am a White person working with a person of color, I will likely be perceived as a person with power and racial privilege, and that I [may] not be seen as 'unbiased' or as an ally," because she does not treat people differently based on their skin color, she answered with "Always/Very Well" or "Fairly Often/Pretty Well" because she thought SPS would review her responses and that was how it expected her to respond. (Id. ¶ 110.)

35. Regarding the equity training, Plaintiffs showed that an administrator notified Dr. Garcia-Pusateri that "[s]ome of the participants said they felt uncomfortable in speaking their own feelings and felt that it was not a safe environment to do so, and worried that doing so may cause issues in the workplace environment," and that after a staff member raised a concern with the training materials, "one of the trainers was very dismissive," causing the staff member to cry. (Doc. 82 ¶ 41 (citing Pls.' Ex. 17).)

36. Plaintiffs showed that at least four staff members felt unable to speak in the training because "if they said anything in the training they would have a 'target on their back' and that it would make for a hostile work environment as the topics were very political," and that staff also expressed that the training "was not a safe space for them to express their feelings/opinions as they were asked and expected to do." (Id.)

37. Plaintiffs showed that in response, Defendant Garcia-Pusateri said: "Its [sic] unfortunate that staff are rather taking the content personally and a challenge to their own beliefs and making this political rather than questioning why topics like systemic racism and white supremacy negatively impact them"; "I understand that the content is controversial in nature and some may be uncomfortable, but at the end of the day we are asking everyone to lean into their discomfort and explore different thinking and perspectives"; "Equity work is not easy and is meant to be difficult and at times uncomfortable"; and "Staff cannot support these students if they are not willing to address these issues and start the work of becoming antiracist educators." (Id.)

38. Plaintiffs showed that SPS informed Ms. Henderson and Ms. Lumley that if they did not attend the equity training, they would not receive the required hours of professional development credit. (Id. ¶ 16.)

39. Plaintiffs alleged that they understood this to mean that if they did not attend the equity training, SPS would withhold their pay. (Id. ¶ 17.)

INTRODUCTION

The underlying case is one of first impression about whether a school district can induce its employees to become couriers for its messages on anti-racism and equity. Following a mandatory training session on controversial topics like white privilege and oppression, where SPS called on staff to "commit" to anti-racism and to proactively advocate for political, social, and economic change, Plaintiffs alleged that SPS violated the First Amendment by compelling their speech and discriminating against their views. Now, for the first time,[1] Defendants assert that Plaintiffs' claims were frivolous and had no basis in law or fact. But because viewpoint discrimination and compelled speech are settled legal doctrines, Defendants cannot meet their high burden of proving that Plaintiffs had *no* basis in law to bring such claims in such a novel context. And because Defendants have not claimed that a single key fact on which Plaintiffs relied was false or delusional, Plaintiffs had a basis in fact to bring those claims. Although Plaintiffs did not prevail on the merits of their claims, Defendants are not entitled to the rare award of attorney fees.

ARGUMENT

I. The burden is on Defendants to show that Plaintiffs' claims has no basis in law or fact.

When requesting attorney fees in a Section 1983 case, a defendant must prove that a plaintiff's claim is "frivolous, unreasonable, or without foundation." *Williams v. City of Carl Junction*, 523 F.3d 841, 842, 844 (8th Cir. 2008) (reversing decision to award fees to defendant when plaintiff presented *some* evidence which created "at least a colorable argument" that injury could be "inferred"); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 423-24 (1978) (upholding order denying defendant's request for fees because plaintiff's lawsuit was one of first

[1] Defendants never even moved to dismiss Plaintiffs' claims. Although "it may sometimes be necessary" to engage in discovery to determine whether a claim is frivolous, *Flowers v. Jefferson Hospital Ass'n*, 49 F.3d 391, 393 (8th Cir. 1995), that is not the case here; as explained below, discovery never revealed that the facts on which Plaintiffs relied were unfounded.

impression). "[S]o long as the plaintiff has 'some basis' for [her] claim, a prevailing defendant *may not* recover attorneys' fees." *Marquart v. Lodge 837, Int'l Ass'n of Machinists & Aerospace Workers*, 26 F.3d 842, 853 (8th Cir. 1994) (finding plaintiff's claim was not frivolous because she "alleged and continued to allege throughout discovery" each of the elements of her claim, even though she did not ultimately succeed on the merits) (emphasis added), *overruled in part on different grounds by CRST Van Expedited, Inc. v. EEOC*, 578 U.S. 419, 421 (2016).

Indeed, attorney fees are granted to defendants only in "rare circumstances," *Clajon Production Corp. v. Petera*, 70 F.3d 1566, 1581 (10th Cir. 1995), where a claim "lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). A claim lacks an arguable legal basis only when it "is based on an indisputably meritless legal theory." *Martinez v. Turner*, 977 F.2d 421, 423 (8th Cir. 1992). And a claim only lacks a factual basis if the "allegations . . . are fanciful, fantastic, and delusional[.]" *Denton v. Hernandez*, 504 U.S. 25, 32-33 (1992) (quotation and citations omitted). Just because a plaintiff does not succeed on the merits, it does not mean her lawsuit was frivolous. *See Williams*, 523 F.3d at 843. This is especially true in cases of first impression. *See Christiansburg*, 434 U.S. at 423-24 (upholding order that *because* a claim involved an issue of first impression, it "*cannot* be characterized as unreasonable or meritless") (emphasis added); *Clajon*, 70 F.3d at 1581 (rejecting fee request because "the instant case presents novel and difficult legal questions"). No precedent has ever addressed training of the sort at issue, which is itself new. Defendants must do more than show that Plaintiffs did not succeed on the merits. They have a high burden to show that Plaintiffs entirely lacked a legal or factual basis to bring their compelled speech and viewpoint discrimination claims, which they cannot do.

On the rare occasions when courts have found that defendants met their high burden, typically "either the plaintiff's conduct was egregious or . . . his or her case was patently baseless

for objective reasons." *Cummings v. Benco Bldg. Servs.*, 11 Cal. App. 4th 1383, 1389-90 (1992) (collecting cases). Indeed, in most of the cases Defendants cite, exacerbating factors *beyond* baselessness were present such that courts found attorney fees were warranted. *See Bond v. Keck*, 629 F. Supp. 225, 227 (E.D. Mo. 1986); *Animal Welfare Inst. v. Feld Ent., Inc.*, 944 F. Supp. 2d 1, 15 (D.D.C. 2013); *Whitson v. LM Servs.*, 2003 U.S. Dist. LEXIS 10820, at *3-5 (E.D. Mo. Feb. 20, 2003); *Steelman v. Crib*, 2012 U.S. Dist. LEXIS 129905, at *16 (W.D. Mo. Sept. 12, 2012); *Van Nguyen v. Foley*, 2022 U.S. Dist. LEXIS 64118, at *5-6 (D. Minn. Apr. 6, 2022); *Grant v. Farnsworth*, 869 F.2d 1149, 1152 (8th Cir. 1989); *Garmong v. Cty. of Lyon*, 807 F. App'x 636, 638 (9th Cir. 2020); *Wilson v. Cont'l Mfg. Co.*, 599 F. Supp. 284, 286-87 (E.D. Mo. 1984). Plaintiffs respect this Court's ruling, but Defendants have not met their burden for fees.

II. Defendants cannot show that Plaintiffs' compelled speech claim is baseless.

Defendants cannot meet their high burden to show that Plaintiffs' compelled speech claim lacked a foundation in law because the "right to refrain from speaking" is settled law. *See Wooley v. Maynard*, 430 U.S. 705, 714 (1977). And Defendants cannot meet their high burden to show that Plaintiffs' compelled speech claim was baseless in fact because none of the facts Plaintiffs offered in support of their claim were "fanciful" or "delusional." Whether those facts rose to the level of establishing a constitutional violation is a question of merit, *see Telescope Media Group v. Lucero*, 936 F.3d 740, 750-58 (8th Cir. 2019), but Defendants do not point to any facts Plaintiffs relied on that were delusional. (*See* Doc. 98 at 9 (listing facts that Plaintiffs did not contest or raise because they were not material to their theory).)

A. Plaintiffs' compelled speech claim has a basis in law.

When the government "tries" to "compel affirmance of a belief with which the speaker disagrees," it provides a legal basis for a compelled speech claim. *Meriwether v. Hartop*, 992 F.3d 492, 503 (6th Cir. 2021) (quoting *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515

U.S. 557, 573 (1995)); *accord W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); *Wooley*, 430 U.S. at 717.[2] The Supreme Court has "held time and again that freedom of speech 'includes both the right to speak freely and the right to refrain from speaking at all.'" *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2463 (2018). Plaintiffs claimed that through its equity training, SPS coerced them into becoming "courier[s] for its message" on anti-racism and related topics. *See Wooley*, 430 U.S. at 717. Although this Court ruled that SPS's words and actions during the equity training did not rise to the level of compulsion, that does not mean that Plaintiffs had no basis in *law* to bring a compelled speech claim.

There is a basis in law to bring a compelled speech claim when the government creates an "inducement" to abandon one's sincerely held beliefs. *Elrod v. Burns*, 427 U.S. 347, 356 (1976). A basis in law exists where a plaintiff alleges that the government did something, "however slight," that could lead a reasonable person to affirm the government's message. *Bantam Books*, 372 U.S. at 67; *see also Elrod*, 427 U.S. at 358 n.11 ("This Court's decisions have prohibited conditions on public benefits, in the form of jobs or otherwise, which dampen the exercise generally of First Amendment rights, *however slight the inducement* to the individual to forsake those rights.") (emphasis added).

What it takes to show inducement is still unsettled, and whether a speaker presents enough evidence to succeed on her claim is a question of merit—often one of first impression. *See, e.g.*, *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1290 (10th Cir. 2004); *Telescope Media*, 936 F.3d at 750-

[2] Plaintiffs are *not* claiming that they had a right not to hear or attend the training and agree that such a claim would be baseless. They are *not* claiming that they had a right not to treat students equally; they fully support treating all individuals equally. (See Doc. 82 at 128.) Plaintiffs also do not dispute that local school boards have wide latitude to set anti-discrimination policies regulating conduct. But Plaintiffs alleged that SPS went beyond regulating employment-related conduct when it required staff to affirm SPS's views during and beyond the training. (See Doc. 78 at 78.)

58; Nat Stern, *The Subordinate Status of Negative Speech Rights*, 59 Buffalo L. Rev. 847, 849 (2011) (describing the settled legal basis but "uncertain application" of the compelled speech doctrine). But under the First Amendment, a basis exists for such a claim whenever the government "tries" to compel speech by inducement. *Meriwether*, 992 F.3d at 503. Likewise, a claim that the government cannot dictate its employees' speech on anti-racism in equity training or in their personal lives raises issues of first impression, but it is not baseless to say that SPS crossed the line into coercion. *See Christiansburg*, 434 U.S. at 423-24; *Clajon Prod. Corp.*, 70 F.3d at 1581. Courts have grappled with the role of the government as employer for decades, and even at the time of briefing, the Supreme Court was addressing "the complexity associated with the interplay between free speech rights and government employment[.]" *Kennedy v. Bremerton Sch. Dist*., 142 S. Ct. 2407, 2423 (2022). Just because the law is still unsettled in some regards does not render legal theories based on that law indisputably meritless. Plaintiffs' claim that SPS went too far as an employer by pressuring them to adopt anti-racism may be novel, but it is not frivolous.

B. Plaintiffs' compelled speech claim has a basis in fact.

Plaintiffs respect this Court's ruling that their facts did not rise to the level of unconstitutional compulsion, but they presented a factual *basis* to support their claim. In *Flowers*, the Eighth Circuit awarded defendant attorney fees when a plaintiff only offered his own opinion, unsupported testimony, and some statistical evidence that did not support his claim. 49 F.3d at 392-93. Unlike in *Flowers*, Plaintiffs did not base their claims solely on opinion and unsupported testimony; the parties stipulated to most of the key facts on which Plaintiffs relied, and the remaining facts are materially undisputed. (*See* Doc. 77-1; Doc. 82); *accord Williams*, 523 F.3d at 843-44 (reversing decision to award fees because even though the plaintiff only presented some circumstantial evidence, there was "at least a colorable argument that [his claim] could be

inferred"). And this Court considered at least some facts Plaintiffs presented in support of their claim. (Doc. 88 at 7-8, 11, 15-17); *accord Cummings*, 11 Cal. App. 4th at 1388 (reversing lower court decision to grant attorney fees because even though plaintiff did not succeed on the merits of her claim, the lower court "nevertheless recognized [plaintiff] presented *some* evidence" in support) (emphasis added). Thus, Defendants cannot call Plaintiffs' facts "delusional" such that they had *no* basis in fact.

The mere words and actions of government officials are enough to establish a factual basis for a compelled speech claim, even without a formal law or policy. *Zieper v. Metzinger*, 474 F.3d 60, 66-67 (2d Cir. 2007) (holding that an FBI agent's failure to tell a speaker that he would *not* face consequences for speaking, together with the agent's appearance of authority, was sufficient to establish a claim) (citing *Bantam Books*, 372 U.S. at 67). And when government officials present a speaker with two or more untenable choices that could lead the speaker to abandon her views, the basis for compulsion is even stronger. *Meriwether*, 992 F.3d at 517; *Cressman v. Thompson*, 719 F.3d 1139, 1145 (10th Cir. 2013); *Axson-Flynn*, 356 F.3d at 1290.

Plaintiffs provided a factual basis for their claim. First, the parties stipulated that attendance at the equity training was mandatory. (Doc. 82 ¶ 14.) Plaintiffs showed that SPS issued various directives before the training that could be reasonably construed as commands to speak, including commands to "stay engaged" and "be professional" or risk being removed from a session with no credit. (Id. ¶¶ 25, 31, 47, 48.) Plaintiffs pled that they understood these commands to mean that pay and professional development credit hinged on a staff member's active participation. (Id. ¶¶ 17, 47.) Plaintiffs alleged that SPS made its views known when it provided handouts and presented a slideshow with statements that staff "must commit to" anti-racism and "become" anti-racist, which required proactive advocacy in their personal and professional lives. (Id. ¶¶ 25, 41, 48, 50,

94.) They showed that SPS told them that silence would be viewed as a form of white supremacy, never saying staff could remain silent during the exercise, (id. ¶¶ 27, 44, 45, 74) which Ms. Lumley alleged caused her to speak. (Doc. 77-3 ¶ 16). Plaintiffs also showed that SPS "directed" staff to participate and make statements during small and large group discussions or risk being called on. (Id. ¶¶ 31, 46, 55, 58, 62, 77.)

Plaintiffs also showed that when they did try speaking their truth, as required (id. ¶ 6), the trainers told them that they were wrong and even told Ms. Lumley to work on herself more. (Id. ¶¶ 63, 79-83.) Thus, Plaintiffs had a factual basis to plead that they understood SPS accepted only one viewpoint—anti-racism—among its staff, and that SPS was not merely offering a "suggested approach" to the political topics discussed. (*See* Doc. 98 at 10.) Plaintiffs also established that SPS presented each with a copy of the Anti-Racist Solo Write at the end of the training, where SPS asked staff about the steps they would take to become anti-racist beyond the training, solidifying their commitment to anti-racism going forward. (Id. ¶ 97.) And Ms. Henderson completed the Canvas self-assessment checklist, stating things that she affirmatively did not believe because she objectively feared consequences based on Defendant Garcia Pusateri's statement that responses were required. (Id. ¶¶ 106-117.) Finally, Plaintiffs presented evidence that their concerns were objectively reasonable because they were not the only staff members to fear some sort of consequence for failing to adopt SPS's message; others worried that if they contradicted the trainers "they would have a 'target on their back'" which would create "a hostile work environment as the topics were very political." (Id. ¶ 41 (citing Pls.' Ex. 17).)

Because the mere words of government officials establish a factual basis to support a compelled speech claim, Plaintiffs did not need to show actual consequences. *281 Care Comm. v. Arneson*, 638 F.3d 621, 629 (8th Cir. 2011) (finding chill even though plaintiffs were never

punished); *Axson-Flynn*, 356 F.3d at 1283 (finding plaintiff was never asked to leave acting program but "believed that it was only a matter of time"). Plaintiffs never claimed they were penalized with adverse employment action; such a penalty would support an inference of post-hoc retaliation—a claim Plaintiffs did *not* bring. (Doc. 98 at 9.) But adverse action is irrelevant because Plaintiffs completed the training, ultimately self-censoring. And in Ms. Henderson's case, she ultimately even agreed with things that she did not support.

The lack of adverse action does not mean that Plaintiffs lacked a factual basis to show that they were harmed. Plaintiffs had a reasonable basis to allege that SPS presented them with a choice: (1) become anti-racist and forsake their own beliefs; (2) share their true views and risk potential consequences; or (3) remain silent and risk potential consequences. Plaintiffs showed that when they first chose to "speak [their] truth," trainers said that their views about current events and racism—*not* SPS anti-discrimination policy—were wrong. (Doc. 82 ¶¶ 63, 80-83.) Then they showed that they opted for self-censorship. They pled that this was objectively reasonable because a reasonable person would also self-censor after such an argument, especially once an employer said to "reflect on [your]self more" (id. ¶ 82), out of a concern that continuing to press would incur the penalty of being viewed as "unprofessional" and being asked to leave with no credit. (Doc. 77-2 ¶ 41; Doc. 77-3 ¶¶ 29-30.) Next, when Plaintiffs chose silence, they assumed the label of white supremacists, affirming SPS's message that white people are "oppressors." (Id. ¶¶ 30, 68.) And Ms. Henderson showed that after leaving the training, she adopted the District's message against her conscience when she agreed in a self-assessment that she would be seen as biased and having racial privilege. (Id. ¶ 110.) Thus, even if Plaintiffs needed to show some harm to establish coercion, Defendants cannot show that the facts on which Plaintiffs relied were "fanciful" or "delusional" such that their compulsion claim was void of a factual basis.

III. Defendants cannot show that Plaintiffs' viewpoint discrimination claim is baseless.

While Plaintiffs do not seek to relitigate their case, Defendants also cannot meet their high burden to show that Plaintiffs' viewpoint discrimination claim was baseless. It is settled that the government cannot treat viewpoints differently. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 822 (1995); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984); *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 96 (1972). Plaintiffs' claim that SPS discriminated against their views on equality and colorblindness has a settled basis in law. And Plaintiffs offered factual support from which viewpoint discrimination could be inferred. Whether discrimination occurred is a question of merit, *see Telescope Media*, 936 F.3d at 750-58, but Defendants cannot show that Plaintiffs' viewpoint discrimination claim was frivolous.

A. Plaintiffs' viewpoint discrimination claim has a basis in law.

Viewpoint discrimination has a settled basis in law; it occurs any time the government treats speech differently "because of the speaker's specific motivating ideology, opinion, or perspective." *Rosenberger*, 515 U.S. at 822; *accord Vincent*, 466 U.S. at 804 ("[T]he First Amendment *forbids* the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.") (emphasis added).

Just as the legal theory that the government cannot target viewpoints for praise or exclusion is settled, it is also settled that the government may not value certain viewpoints at the expense of others among its employees, unless it involves lawful speech that is part of an employee's official duties.[3] *Janus*, 138 S. Ct. at 2473; *Kennedy*, 142 S. Ct. at 2424-25. While it may be novel to assert that SPS engaged in viewpoint discrimination by favoring anti-racism and equity over equality and colorblindness, such a claim has a basis in law that is not indisputably meritless. And while SPS

[3] As Plaintiffs pled in their briefs, the speech at issue was not lawful or related to their official duties. (*See* Doc. 1 ¶ 22; Doc. 78 at 75-80; Doc. 82 at 134-35.)

may expect its employees to understand certain policies, Plaintiffs had a basis to allege that it crossed the line into viewpoint discrimination when it intentionally raised provocative discussions on controversial issues, then told dissenters they were wrong. Plaintiffs' claim is not frivolous.

B. Plaintiffs' viewpoint discrimination claim has a basis in fact.

There is a factual basis to assert viewpoint discrimination when a plaintiff produces evidence showing that the government targeted or elevated a certain viewpoint. *Rosenberger*, 515 U.S. at 829; *Vincent*, 466 U.S. at 804. A claim of discrimination is even stronger when plaintiffs produce facts showing that the government chilled their speech when it treated views differently. *See Rosenberger*, 515 U.S. at 835 (describing chill as a "corollary" danger of viewpoint discrimination); *accord Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 393 (1988) (self-censorship is a harm "even without an actual prosecution"); *Arneson*, 638 F.3d at 627. Like with compelled speech, a factual basis for discrimination exists when plaintiffs show that a government official merely *appears* to have authority to censor them. *Speech First Inc. v. Cartwright*, 32 F.4th 1110, 1123-24 (11th Cir. 2022); *Speech First Inc. v. Schlissel*, 939 F.3d 756, 764 (6th Cir. 2019). If the mere words and actions of government officials could lead a reasonable person to self-censor, it is enough to establish a claim, even without any formal law or policy. *Zieper*, 474 F.3d at 66-67.

Plaintiffs alleged that the purpose of the equity training was to urge staff "to become anti-racist educators." (Doc. 82 ¶¶ 49, 51, 97.) They alleged that through its slideshow, SPS declared that colorblindness and believing that all lives matter are forms of white supremacy. (Id. ¶¶ 27, 74.) They alleged that SPS defined anti-racism to mean "proactive[ly]" *advocating for political, economic, and social change*. (Id. ¶¶ 50, 94.) They showed that SPS declared that equity and diversity "is more than a value, but now part of our work and job responsibilities" to which staff "must commit[.]" (Id. ¶ 25.) Each Plaintiff alleged that when she "spoke her truth," trainers told

her that her viewpoint was wrong. (Id. ¶¶ 63, 80-82.) Each Plaintiff alleged that after those exchanges, she self-censored out of fear that further consequences would occur, including being asked to leave with no credit. (Doc. 77-2 ¶ 41; Doc. 77-3 ¶¶ 29-30.) Plaintiffs also established that SPS urged them to "continue this significant work" personally and professionally (id. ¶ 25 (citing Pls.' Ex. 9)), and it presented each with a copy of the Anti-Racist Solo Write at the end of the training to ensure that staff adopted its views on anti-racism going forward. (Id. ¶ 97.) And SPS's 30(b)(6) witness even acknowledged that SPS responded *differently* to participants based on their viewpoints on controversial topics like whether America has woven systems of oppression into its fabric, providing a factual basis for a viewpoint discrimination claim. (Id. ¶ 86.)

Plaintiffs also provided evidence that their fear was objectively reasonable; at least four staff members felt unable to speak in other training sessions because they worried that "they would have a 'target on their back[.]'" (Id. ¶ 41 (citing Pls.' Ex. 17).) Plaintiffs showed that SPS was trying to make staff feel "uncomfortable." (Id. ¶ 48.) And when one staff member expressed a dissenting view, a trainer was so dismissive that she cried. (Id. ¶ 41 (citing Pls.' Ex. 17).) Plaintiffs showed that in response to hearing this, Defendant Garcia-Pusateri acknowledged that "Equity work is not easy and is meant to be difficult and at times uncomfortable," and Defendants did not change the training because staff must "start the work of becoming antiracist educators." (Id.)

Together with the rest of the facts alleged in their briefs, these facts suggest at least a plausible inference of viewpoint discrimination that chilled Plaintiffs' speech. Whether Plaintiffs have satisfied the merits of their viewpoint discrimination claim is a question for a court. But none of the facts Plaintiffs offered in support of their viewpoint discrimination claim were so "delusional" as to render their claim baseless.

IV. Defendants' billing includes clerical work and vague and excessive entries.

Defendants bear the burden of appropriately documenting the hours "expended and hourly rates." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). The Court must reduce from these totals all "excessive, redundant, or otherwise unnecessary" hours. *El-Tabech v. Clarke*, 616 F.3d 834, 842 (8th Cir. 2010) (quoting *Hensley*, 461 U.S. at 434). Although Plaintiffs do not contest the rates requested by defense counsel, many of their billing entries are vague, excessive, and unnecessary.

Defendants here employ "block billing," which involves "enter[ing] the total daily time spent working on a case, rather than . . . specific tasks." *McDannel v. Apfel*, 78 F. Supp. 2d 944, 946 n.1 (S.D. Iowa 1999) (quotation omitted). Block billing is acceptable so long as entries are not so generalized that it hinders the ability to conduct meaningful review. *See Miller v. Woodharbor Molding & Millworks, Inc.*, 174 F.3d 948, 949-50 (8th Cir. 1999). Clerical tasks—including making photocopies, scanning exhibits, calendaring dates, organizing files, filing documents, scheduling, and ordering transcripts—are not billable. *See Ladd v. Pickering*, 783 F. Supp. 2d 1079, 1094 (E.D. Mo. 2011); *Madden v. Lumber One Home Ctr., Inc.*, 2013 U.S. Dist. LEXIS 183748, at *14 (E.D. Ark. May 22, 2013); *Betton v. St. Louis Cnty*, 2019 U.S. Dist. LEXIS 49312, at *21 (E.D. Mo. May, 19, 2010).

Defendants' block billing inhibits meaningful review because many entries combine clerical tasks. Their billings include: calendaring dates (Doc. 98-1 at Sep-21-21, Nov-06-21, Nov-08-21, Nov-15-21, Nov-18-21); filing pleadings (id. at Sep-20-21, Nov-09-21, May-25-22, Jun-22-22, Jul-22-22, Aug-12-22); organizing and pulling files (id. at Sep-06-21, Nov-23-21, Nov-25-21, Nov-29-21, Mar-14-22, Jun-17-22); and copying documents (id. at Nov-24-21). They bill ordering transcripts (id. at Nov-17-21), routine scheduling functions like "email[ing] Zoom information," (id at Jan-26-22), and arranging "for telephone conference with carrier." (Id. at Jul-20-22.) They bill preparing tables of contents and authorities, (id. at Aug-11-22, Jul-20-22), "a

clerical task at best." *Cortes v. Kern Cnty. Superintendent of Sch.*, 2019 U.S. Dist. LEXIS 144863, at *14 (C.D. Cal. Aug. 23, 2019) (quotation omitted). They also bill preparing exhibits and email batches. (Id. at May-06-22, May-07-22, May-08-22, May-09-22, May-10-22, May-11-22, May-12-22, May-24-22, May-25-22, Jul-12-22, Jul-19-22, Jul-21-22, Aug-09-22; Aug-10-22.) Other tasks "could have easily been performed by a paralegal," *Nelson v. Metro. Life Ins. Co.*, 2009 U.S. Dist. LEXIS 128438, at *28 (D. Minn. Dec. 22, 2009). (*See* Doc. 98-1 at Nov-24-21 ("Prepare forms for use"), Aug-04-22 (listing deposition references), Aug-06-22 (finalizing the same)). As most of the entries are block billed, they cannot be severed from total time entries. The Court should apply a percentage reduction. *See Beckler v. Rent Recover Sols., LLC*, 2022 U.S. Dist. LEXIS 225547, at *8 (D. Minn. Dec. 15, 2022).

Defendants' block billing also contains entries too vague to assess whether the time spent was reasonable. *Nelson*, 2009 U.S. Dist. LEXIS 128438, at *30. They bill for email reviews with no description of subject matter.[4] (Doc. 98-1 at Sep-02-21, Sep-07-21, Sep-09-21, Sep-16-21, Sep-18-21, Oct-18-21, Nov-01-21, Nov-06-21, Nov-29-21, Dec-17-21, Dec-22-21, Mar-24-21, May-22-22, Jun-27-22, Jul-19-22, Jul-23-22, Aug-04-22.) Defendants bill for calls without explaining why they are case-related. (*See id*. Sep-02-21 (Dr. Mulford), Sep-20-21 (Dr. Lehnert), Sep-21-21 (Dr. Taylor), Nov-15-21 (Dr. Lehnert), Nov-18-21 (Board member Crist), Dec-06-21 (Jeff Vogge), May-09-22 (Dr Lathan), Jul-07-22 (Joe Thurston), Jul-19-22 (same), Aug-11-22 (John Mulford).) The entry, "Review documents," is also too vague. (Id. at Oct-18-21). Defendants also have vague entries for traveling to meet with "witnesses." (Doc. 98-1 at Oct-05-21, Oct-06-21.) They fail to explain who the witnesses are or why they are case-related; even entries that do identify witnesses

[4] Plaintiffs do not challenge emails with Plaintiffs' counsel or ones with case-related descriptions. (*See, e.g.*, Doc. 98-1 at Sep-20-21 (email to Dr. Lathan, Mulford, and Ms. Rector re: mediation).)

(id. at Sep-08-21, Nov-16-21), fail to show why they required travel. *See Nelson*, 2009 U.S. Dist. LEXIS 128438, at*28-29 (striking entries for travel when "counsel could have attended by phone"). These entries should all be stricken or, when block billed, reduced at a percentage rate. *See Ascentium Cap. LLC v. Littell*, 2022 U.S. Dist. LEXIS 66276, at **9-10 (W.D. Mo. Apr. 11, 2022) (striking email entries when court cannot determine subject matter or purpose of reviewing).

Defendants bill other time that was not case-related. (*See* Doc. 98-1 at Sep-07-21 (meeting with Board of Education).) Mr. Ellis represents the school district in other matters. (Id. at 2, ¶ 6.) If attendance at this meeting was case-related, the records fail to show it. Mr. Ellis also billed 6.5 hours for the parties' mediation session. (Id. at Jan-28-22.) But in the middle of mediation, Defendants and Mr. Ellis virtually attended an actual board meeting that lasted one hour and fourteen minutes.[5] This entry appears to include that time and should be reduced by 1:14.

Defendants have entries totaling 123.6 hours that include tasks relating to preparing and responding to Plaintiffs' statement of undisputed material facts. (Doc. 98-1 at Jun-09-22 (5.5h), Jun-12-22 (6.5h), Jun-13-22 (4.8h), Jun-17-22 (4.8h), Jun-23-22 (7.5h), Jun-30-22 (9h), Jul-03-22 (7.5), Jul-07-22 (7h), Jul-08-22 (8h), Jul-09-22 (4h), Jul-19-22 (3.8h), Jul-20-22 (3.6h), Jul-25-22 (7.5 + 2.5h), Jul-26-22 (7h), Jul-27-22, Jul-28-22 (7.2h), Jul-29-22 (6 + 4.2h), Jul-30-22 (8 + 1.7h). This is excessive given the stipulation (Doc. 77-1) and what Defendants chose to dispute, most of which was unnecessary. They disputed based on terminology, like that the term "SPS" was argumentative, or that Plaintiffs' wording deviated slightly from the stipulations, or that the testimony of Defendant Garcia-Pusateri was inadmissible "opinion," even though they designated her to speak for SPS as its 30(b)(6) witness. (*See* Doc. 82 ¶¶ 13, 23-24, 28-29, 31, 36, 38, 41-45, 50-54, 57, 59, 64-67, 69-71, 73, 76-77, 86, 92, 94-97, 100.) Defendants rarely disputed the actual

[5] Beginning at appx. 17:28. *Available at* https://tinyurl.com/2p9bkea2.

facts or substance of the statement. (*See, e.g.*, id. ¶¶ 30 (disputing as "opinion" the contents of "Oppression Matrix" handout), 24 (disputing that SPS provided substantially the same handouts to employees before training) 33-34 (disputing who conducted Plaintiffs' training).) The hours spent on the SUMFs should be reduced as the hours were unnecessary and excessive.

V. If Defendants succeed in meeting their burden, the award should be reduced.

Even if Defendants can show that an award is proper, a reduced amount would achieve the purpose of deterrence. *See Bond*, 629 F. Supp. at 226. Congress enacted Section 1983 with a "remedial purpose," and so excessive attorney fee awards "may discourage plaintiffs from seeking a judicial remedy in all but the most airtight claims." *Id*. at 227. For that reason, courts commonly reduce fees to the amount sufficient to "deter the filing of frivolous or groundless civil rights suits, not to make the defendant whole." *Id*. at 228 (reducing fee 91%, from $23,040 to $2,000 (citing *Christiansburg*, 434 U.S. at 420); *see Koester v. YMCA Greater St. Louis*, 2018 U.S. Dist. LEXIS 757732, at*3 (E.D. Mo. May 4, 2018) (Request of "nearly $200,000 in attorneys' fees would undoubtedly have [] chilling effect"; reduction to $25,000 (87%) "strikes the balance"). Plaintiffs appreciate the Court's sensitivity to the parties' financial status. (*See* Doc. 99 at 2.) There is little need to deter in the first place given that Plaintiffs never sought more than $1.00 in damages. *C.f. Farrar v. Hobby*, 506 U.S. 103, 114 (1992) ("[W]here recovery of private damages is the purpose of … civil rights litigation, a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought.") (quotation omitted). Here, a proportional reduction of 90% from any award strikes the right balance.

CONCLUSION

Because Defendants failed to show that Plaintiffs' claims are frivolous, they are not entitled to attorney fees under 42 U.S.C. § 1988. Plaintiffs request that their motion be denied or reduced.

March 3, 2023.

/s/ Braden H. Boucek

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CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2023 a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. Mail and/or facsimile. Parties may access the filing through the Court's electronic filing system.

/s/ Braden H. Boucek
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