

EXHIBIT A

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

BROOKE HENDERSON, et al,)	
)	
Plaintiffs,)	
)	
vs.)	Case No. 6:21-cv-03219-MDH
)	
SCHOOL DISTRICT OF)	
SPRINGFIELD R-12, et al.,)	
)	
Defendants.)	

ORDER

Before the Court are Defendants School District of Springfield R-12 (“Defendant SPS”), Superintendent Grenita Lathan (“Defendant Lathan”), Dr. Yvania Garcia-Pusateri (“Defendant Garcia-Pusateri”), and Lawrence Anderson’s (“Defendant Anderson’s”) (collectively “Defendants”) Motion for Summary Judgment (Doc. 74) and Plaintiffs Brooke Henderson and Jennifer Lumley’s (collectively “Plaintiffs”) Motion for Summary Judgment. (Doc. 76). The parties have fully briefed issues raised in the motions. The Court has reviewed all briefing and the matter is now ripe for review. For reasons herein, Plaintiffs’ Motion is **DENIED** and Defendants’ Motion is **GRANTED**. Summary judgment is entered in favor of Defendants.

BACKGROUND

Plaintiffs’ allegations stem from their participation in a professional development training during October 2020. Defendant SPS is an urban school district located in Springfield, Missouri with more than 24,000 enrolled students. At the time of the training, Defendant Garcia-Pusateri and Defendant Anderson were both employed by Defendant SPS in its Office of Diversity and

Equity. Defendant SPS has employed Defendant Lathan as superintendent since July 1, 2021. Defendant SPS has employed Plaintiff Lumley as a secretary since July 9, 2020, first in its Special Services Department and later in its Analytics, Accountability, and Assessment Department. Defendant SPS has employed Plaintiff Henderson at all times during this dispute as a 504 Process Coordinator in the Special Services Department. Plaintiffs remain employed by Defendant SPS. Plaintiff Henderson attended the training at issue virtually October 14, 2020. Plaintiff Lumley attended an in-person version of the same training October 6, 2020. The two training sessions were substantially similar. Defendant Garcia-Pusateri and Defendant Anderson both took part in the training sessions Plaintiffs attended. The training included distribution of written handouts, videos, and a variety of small and large group discussions. After the training, Plaintiff Henderson completed an online module and corresponding multiple-choice questions.

The professional training covered themes of “equity” and “anti-racism.” Plaintiffs generally took issue with some of the concepts presented during the training session and also during the online module. Plaintiffs found the concepts presented during the training to be at odds with their personal views. During the training sessions, Plaintiffs spoke openly about their disagreement with some of the content of the training session. The online module included videos and multiple-choice questions also related to themes of equity and anti-racism. Plaintiff Henderson selected certain credited answers on the online multiple-choice questions, even though those answers were at odds with her personal opinions. Plaintiff Henderson did this in order to receive credit for completing the online module. Defendant SPS informed Plaintiff Henderson completion of the online module was required. Similarly, Defendant SPS employees had to attend the training session to receive professional development credit and compensation. Plaintiffs received credit and compensation for attending the training. Plaintiffs have never faced any official discipline

throughout their employment with Defendant SPS. Plaintiffs suffered no adverse employment action arising out of their participation in the training program. They were not fired, demoted, suspended, transferred, or disciplined. The district did not fail to promote them or change their duties or work assignments in retaliation and there is no claim their participation in the training program, or any opinion they expressed during the training program, has in any way impacted the compensation or benefits of their employment with the district.

Plaintiffs' complaint alleges three counts of constitutional violations under the First Amendment of the United States Constitution and 42 U.S.C. § 1983. Plaintiffs seek a declaratory order from this Court finding as unconstitutional Defendants' equity and anti-racism professional training and permanently enjoining Defendants from conducting the training in the future. Plaintiffs also seek nominal damages for each day of training.

STANDARD OF REVIEW

Summary judgment is proper where, viewing evidence in the light most favorable to the non-moving party, there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Reich v. ConAgra, Inc.*, 987 F.2d 1357, 1359 (8th Cir. 1993). "Where there is no dispute of material fact and reasonable fact finders could not find in favor of the nonmoving party, summary judgment is appropriate." *Quinn v. St. Louis County*, 653 F.3d 745, 750 (8th Cir. 2011). Initially, the moving party bears the burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the movant meets the initial step, the burden shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby*,

Inc., 477 U.S. 242, 248 (1986). To satisfy this burden, the nonmoving party must “do more than simply show there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

ARGUMENT

The Constitution of the United States limits this Court’s jurisdiction to deciding “cases” and “controversies” between parties. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559 (1992). For a dispute to qualify as a justiciable case or controversy under the Constitution, plaintiffs must have standing to bring their claims. *Id.* at 560. Standing requires plaintiffs suffer an injury-in-fact that is traceable to the actions of the defendant and likely to be redressed by the Court’s favorable decision. *Id.* at 560-61. The Supreme Court has held that injury-in-fact, in turn, is “an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. *Id.* at 560 (citations omitted). The injury-in-fact requirement allows courts to avoid becoming involved in disputes of a political nature, unnecessarily injecting the judicial branch into politicized controversies. “Federal courts sit solely to decide on the rights of individuals...and must...refrai[n] from passing upon the constitutionality of an act...unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it.” *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 598–99 (2007) (citations omitted). Critics from both ends of the political spectrum have been quick to condemn activist judges’ decisions with results contrary to their preferences, even in cases where parties have actually suffered an injury-in-fact. Judicial intervention in cases without such injury would certainly receive, and more validly deserve, such criticism.

Defendants argue Plaintiffs lack standing because they failed to suffer an injury-in-fact. (Doc. 75 at 45). Plaintiffs' exact claims about injury-in-fact remain somewhat unclear. Plaintiffs argue they suffered an injury-in-fact when Defendant SPS, "presented [Plaintiffs] with three choices: (1) say what [Defendant] SPS wanted to hear by affirming anti-racism and equity; (2) refrain from speaking and risk being labeled white supremacists; or (3) speak out and risk losing professional development credit and pay." (Doc. 78 at 75). Plaintiffs reiterate this theory elsewhere, arguing Defendant SPS forced this choice upon Plaintiffs when they claimed the views expressed during training were part of employees' professional responsibilities. (Doc. 77 at 31). Plaintiffs then contend Defendants compelled Plaintiff Henderson's speech and discriminated against Plaintiff Henderson's viewpoints when Defendants required Plaintiff Henderson to complete online multiple-choice questions, which in turn required Plaintiff Henderson select certain credited responses inconsistent with Defendant Henderson's personal beliefs. (Doc. 77 at 37-40). The selection of the online questions' credited responses rather than alternative responses consistent with Defendant Henderson's personal beliefs, Plaintiffs argue, amounts to viewpoint discrimination and compelled speech. (Doc. 77 at 37-40). Taken altogether, the Court understands Plaintiffs to argue Plaintiffs suffered injury when Defendants' professional training and online questions: 1) compelled Plaintiffs' speech; 2) chilled Plaintiffs' speech; and 3) discriminated against Plaintiffs' viewpoints. Further injury occurred, Plaintiffs appear to argue, when Defendants required Plaintiffs to partake in the alleged unconstitutional training and online multiple-choice questions as part of their employment with Defendant SPS¹. The Court will address each of these theories in turn.

¹ Plaintiffs' compliant and motion for summary judgment tends to conflate separate legal theories, making it difficult to discern the full extent of Plaintiffs' claims. For example, Plaintiffs' Count One appears to allege both compelled disclosure of personal information and compelled speech. Count Two similarly seems to allege chilled speech, content discrimination, and viewpoint discrimination. Though these various legal theories remain separate in federal jurisprudence, Plaintiffs' allegations and argumentation fail to treat

I. Professional Training: Compelled Speech, Chilled Speech, Content and Viewpoint Discrimination

a. Compelled Speech

Compelled speech may constitute injury-in-fact for standing purposes. *Cressman v. Thompson*, 719 F.3d 1139, 1145 (10th Cir. 2013); *Jacobs v. Clark Cnty. Sch. Dist.*, 526 F.3d 419, 426 (9th Cir. 2008). Government compels speech when it takes action that is “regulatory, proscriptive, or compulsory in nature” that “punish[es], or threaten[s] to punish, protected speech.” *Phelan v. Laramie Cnty. Cmty. Coll. Bd. of Trustees*, 235 F.3d 1243, 1247 (10th Cir. 2000) (citing *Laird v. Tatum*, 408 U.S. 1, 11 (1972)). Such a threat may be “indirect discouragement” rather than direct punishment like “imprisonment, fines, injunctions or taxes.” *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1290 (10th Cir. 2004) (citing *Am. Communications Ass'n v. Douds*, 339 U.S. 382, 402, 70 S.Ct. 674, 94 L.Ed. 925 (1950)).

Plaintiffs appear to argue Defendants compelled speech in various ways. Plaintiffs characterize what they believe Plaintiffs were forced to do as “affirm,” “endorse,” “promote,” “adopt,” and “risk association with” Defendant SPS’ viewpoints, at odds with Plaintiffs’ personal opinions. (Doc. 77 at 29-30). Plaintiffs also appear to argue during the training Defendant SPS forced Plaintiffs to become “couriers” of a message about equity with which Plaintiffs disagree. (Doc 77 at 30). Plaintiffs also claim Defendants coerced “Plaintiffs into betraying their convictions and promoting ideas they find objectionable.” (Doc. 77 at 31). Specifically, Plaintiffs argue various written materials distributed to

these theories accordingly. To the extent Plaintiffs intend to raise claims and theories beyond those addressed here, this Court similarly finds Plaintiffs have not suffered an injury-in-fact and therefore lack standing.

Defendant SPS' employees before training compelled Plaintiffs to speak because the written materials made clear that Plaintiffs would be complicit in white supremacy if Plaintiffs remained silent. (Doc. 77 at 27). Plaintiffs argue that Defendant SPS compelled Plaintiff's speech when employees in the training were directed to remain "professional" and "engaged" or risk being asked to leave without credit. (Doc. 77 at 36). Plaintiffs also argue Defendants compelled Plaintiffs' speech when Defendant SPS told employees they "must commit to" Defendants' description of equity and anti-racism. (Doc. 77 at 32). Compulsion also occurred, Plaintiffs argue, when trainers defined anti-racism to include proactive advocacy against racism. (Doc. 77 at 32). Plaintiffs fail to argue Defendants implemented policy requiring Plaintiffs to actually express any viewpoint at odds with their personal opinions. Nor do Plaintiffs argue Defendants threatened punishment should Plaintiffs fail to actually express viewpoints at odds with their personal opinions.

Despite claims of compulsion, Plaintiffs concede they expressed their personal views during the training. (Doc. 77 at 33). Plaintiffs concede their personal views were at odds with Defendants' views. (Doc. 77 at 26). Plaintiff Henderson expressed during the training that BLM protests were at least in part riotous and that Kyle Rittenhouse acted in self-defense when he shot and killed people during protests in Wisconsin. (Doc. 77 at 33-34). Defendant Garcia-Pusateri responded by telling Plaintiff Henderson she was "confused and wrong." (Doc. 77 at 34). Defendants took no further action in response to Plaintiff Henderson's expression of her personal views during the professional training. Plaintiff Lumley expressed her view that, "[Defendant] SPS was improperly assigning characteristics based on race and that not all white people are racist." (Doc. 77 at 34). Plaintiffs concede, "Ms. Lumley disagreed with [Defendant] SPS's position that she was racist simply because she was white, and she shared a personal story about black people saying her relative did not count as black after marrying a white man." (Doc. 77 at 34). Plaintiff Lumley also expressed during training that she lacked white

privilege, “because she came from a poor, broken home.” (Doc. 77 at 34). In response to Plaintiff Lumley’s expression of her personal opinions, a facilitator informed Plaintiff Lumley, “black people can be prejudiced but not racist” and indicated Plaintiff Lumley needed additional self-reflection. (Doc. 77 at 34). Defendants took no further action in response to Plaintiff Lumley’s expression of her personal views during the professional training. Plaintiffs did not express any more of their own views during the training. (Doc. 77 at 34).

Plaintiffs liken their participation in the training to a Minnesota law requiring videographers “to speak favorably about same-sex marriage if they choose to speak favorably about opposite-sex marriage.” *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 752 (8th Cir. 2019); (Doc. 77 at 34-35). Unlike the *Telescope* plaintiff, Plaintiffs have not argued, and no evidence suggests, Defendants have implemented a law or policy requiring Plaintiffs to actually speak favorably about something Plaintiffs find objectionable. Plaintiffs also equate their participation in the training to state laws requiring drivers to display vehicle license plates with state mottos or images. *Wooley v. Maynard*, 430 U.S. 705, 717 (1977); *Cressman v. Thompson*, 719 F.3d 1139, 1156 (10th Cir. 2013). Unlike the *Wooley* and *Cressman* plaintiffs, Plaintiffs have failed to argue Defendants forced them to somehow affiliate or associate with a particular message Defendants find objectionable. Rather, facts not in dispute generally show the exact opposite: Plaintiffs voiced their personal objections to anti-racism and equity. Plaintiffs’ expression of their views makes clear they neither affirm, endorse, promote, nor adopt equity and anti-racism. Plaintiffs themselves acknowledge this when they argue that Plaintiff Lumley’s own coworkers berated her during training for opposing equity and anti-racism (Doc. 77 at 34). Simple logic dictates that Plaintiff Lumley’s coworkers cannot both berate her for opposing equity and anti-racism and simultaneously associate her with those concepts.

Plaintiffs also attempt to liken their participation in the professional training to a university professor who required a Mormon drama student to orally recite objectionable lines or be expelled from a class. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1282 (10th Cir. 2004). Specifically, Plaintiffs attempt to liken, on one hand, Defendants saying during the professional training that white people failing to speak out against racism constitutes white supremacy, and on the other, a professor telling a Mormon student she would be expelled from a drama class if she failed to orally recite specific, objectionable words. Plaintiffs also attempt, rather remarkably, to draw a parallel between the *Axson-Flynn* professor and Defendant SPS' facilitators telling employees facilitators would call on them randomly if no one volunteered to participate in the professional training. (Doc. 77 at 33). Such comparisons are grossly attenuated. Unlike the *Axson-Flynn* defendant, Defendants did not require Plaintiffs to articulate, orally or otherwise, viewpoints Plaintiffs found objectionable or face an undesirable consequence. No evidence suggests Defendants somehow required Plaintiffs to actually express a particular viewpoint.

Plaintiffs make much of their belief Defendants required Plaintiffs to attend the professional training to receive professional development credit and financial compensation. (Doc. 77 at 27).² Conditioning employees' professional development credit and pay upon their attending a professional training, however, is altogether different than conditioning credit and pay on the expression of a specific message Plaintiffs' find objectionable. Any vague assertion by Defendants during the training that equity and anti-racism generally require advocacy and proactivity, are wholly distinct from

² Though Plaintiffs claim employees of Defendant SPS told Plaintiffs they would lose pay if absent from training (Doc. 77 at 27), Defendants claim pay used to compensate employees for attending the training was "supplemental." (Doc. 80 at 12-17). Defendants also claim no employee who failed to attend the training was terminated for failure to attend the training. (Doc. 80 at 17). Any disagreement between the parties on this issue is immaterial because Plaintiffs fail to claim, and no evidence suggests, Defendants conditioned pay or professional development credit on Plaintiffs' expressing a specific viewpoint. Conditioning professional credit and pay on employees' attending a training fails to implicate First Amendment free speech protections.

Defendants compelling Plaintiffs to express specific views they find objectionable. At most, Defendants' training encouraged Plaintiffs to adhere to Defendant SPS' description of equity and anti-racism. Such a request is wholly apart from compulsion or coercion, which necessarily involve some sort of incentive or disincentive to commit a specific act. Encouragement to follow general principles of equity and anti-racism, absent some incentive or disincentive to actually express a specific message, altogether fails to bestow injury-in-fact required for compelled speech. Such an incentive or disincentive to do or say a specific thing is what separates Plaintiffs' circumstances from precedent they cite. At times, Plaintiffs themselves appear to acknowledge they do not believe Defendants instructed Plaintiffs to do or say a specific thing, "Considering that political advocacy on school grounds violates the law, the most logical conclusion staff could draw here is that [Defendant] SPS intended staff to advocate for [political change] on their own time." (Doc. 78 at 81). Because Defendants' actions do not require a specific message from Plaintiffs, Defendants' actions fail to rise even to the level of "indirect discouragement." Plaintiff's compelled speech claim related to the professional training session fails because Plaintiffs lack the requisite injury-in-fact to show standing.

b. Chilled Speech and Content and Viewpoint Discrimination

It is a core tenant of First Amendment jurisprudence that "the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 828 (1995) (citations omitted). While viewpoint and content discrimination are closely related, viewpoint discrimination tends to focus on government prohibitions on speech from a particular person, while content discrimination focuses on government restrictions toward certain content areas. *Perry Educ. Ass'n v. Perry Loc. Educators'*

Ass'n, 460 U.S. 37, 59 (1983). Content-based discrimination by the government is presumptively unconstitutional. *Rosenberger* at 828. Further, regulation that “chills” someone’s First Amendment rights may under certain circumstances give rise to a constitutional violation. *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 417–18 (2013). A plaintiff asserting a chilling effect injury must, “establish that he would like to engage in arguably protected speech, but that he is chilled from doing so by the existence of the statute.” *281 Care Comm. v. Arneson*, 638 F.3d 621, 627 (8th Cir. 2011). A plaintiff’s self-censorship may evidence requisite injury-in-fact. *281 Care Comm. v. Arneson*, 638 F.3d 621, 627 (8th Cir. 2011). Standing for such a “subjective chill” theory, however, requires injury beyond the chill alleged by the plaintiff. *Clapper* at 417-18. Eighth Circuit courts consider whether the plaintiff’s decision to forego speech was “objectively reasonable,” given specific facts of the case. *Zanders v. Swanson*, 573 F.3d 591, 593-94 (8th Cir.2009).

Plaintiffs’ views about chilled speech and content and viewpoint discrimination appear conflated. The heading of Count Two of Plaintiff’s Complaint references content and viewpoint discrimination, while Count Two’s substance emphasizes a chilling effect. (Doc. 1 at ¶¶ 163-168). Plaintiffs’ argument, it appears, is that Defendants deterred Plaintiffs from challenging equity and anti-racism, which caused Plaintiffs to self-censor. (Doc. 77 at 40-42). Plaintiffs argue if they voiced their personal views on equity and anti-racism, they risked being labeled white supremacists and losing professional development and pay. (Doc. 78 at 75). As a basis for this concern, Plaintiffs argue, “[Defendant] SPS taught that white supremacy is not just a label for the KKK—it includes anyone who believes in colorblindness or says that all lives matter.” (Doc. 77 at 33). Plaintiffs also argue, “[Defendant] SPS warned staff that denying one’s white privilege is in itself white supremacy.” (Doc. 77 at 33). Plaintiffs do not argue Defendant SPS implemented or contemplated any policy or regulation whereby an expression about equity and anti-racism at odds with Defendant SPS would result in the

speaker being labeled a white supremacist. Defendants did not call Plaintiffs or other employees white supremacists. Similarly, Plaintiffs fail to argue Defendant SPS conditioned pay and professional development credit on Plaintiffs' suppression of opinions at odds with principles discussed during training. Plaintiffs argue Defendant SPS informed employees they must attend the training to meet professional development requirements and failure to attend the training would result in less pay. (Doc. 77 at ¶¶ 16, 17). As discussed more fully above, conditioning employees' professional development credit and pay upon their attending a professional training is altogether different than conditioning credit and pay on the expression or suppression of a specific message.

Plaintiffs also argue Defendants' verbal response to Plaintiffs' expression of personal views during the professional training constituted a rejection of Plaintiffs' opinions, which in turn caused Plaintiffs to forego further expression. (Doc. 77 at 42). The facilitator telling Plaintiff Lumley "she needed to work on herself" and Defendant Garcia-Pusateri telling Defendant Henderson that she was "wrong and confused" is not evidence something more than Plaintiffs' subjective perception of the situation motivated Plaintiffs' decision to forego further expression. Defendants' verbal response to Plaintiffs' personal views during training constitutes at most simple disagreement. Defendants' verbal response offers no evidence whatsoever Defendants would subject Plaintiffs to any sort of negative consequence, should Plaintiffs choose to reassert their personal views. Defendants have not enacted any policy requiring employees to adopt certain views or face undesirable professional consequences. There is no evidence Defendants even suggested to Plaintiffs or anyone else that undesirable consequences would flow from expression of certain views. This differentiates Plaintiffs from the plaintiffs in *281 Care Committee*, who challenged a Minnesota law making them vulnerable to criminal prosecution should they knowingly or recklessly disregard the truth when making public statements about proposed ballot initiatives. *281 Care Comm. v. Arneson*, 638 F.3d 621 (8th Cir. 2011). While

281 Care Committee plaintiffs had not actually faced criminal prosecution for any statements made, the Eighth Circuit emphasized the law prohibiting recklessly or knowingly making false statements remained active and prosecution remained plausible, albeit unlikely. *281 Care Comm.* at 627. Risk of prosecution, the Court reasoned, granted Plaintiffs standing for their chilled speech argument. *Id.* Here, Plaintiffs face no comparable threat.

Plaintiff Henderson’s professional training included an activity called the four corners exercise, wherein participants were asked to display a sign reading either “agree,” “disagree,” “strongly agree,” or “strongly disagree,” depending on participants’ beliefs about a particular prompt. (Doc. 78 at 53). Prompts included statements like, “I believe my identities and lived experiences are affirmed and supported by the District.” (Doc. 78 at 53). Regardless of Plaintiff Henderson’s actual beliefs, Plaintiff Henderson always displayed the sign that read, “agree.” Plaintiff Henderson in fact agreed with some of the prompts; however, others she disagreed with, even though she displayed the “agree” sign. (Doc. 78 at 53). Plaintiff Henderson’s participation in this specific exercise also fails to yield injury-in-fact. Plaintiffs do not argue, and no evidence suggests, Defendants encouraged Plaintiff Henderson to display certain signs actually at odds with her own beliefs. Defendants enacted no policy and made no statements indicating participants would suffer negative consequences if they expressed disagreement with a prompt. Though it may have been more popular and easier to agree with some prompts, this does not indicate Defendants actually encouraged Plaintiff Henderson to forego expressing her actual beliefs. Defendants’ provision of various signs reflecting differing levels of agreement, speaks to Defendants’ preference that participants express their genuine opinions.

Plaintiffs further argue, “simply calling equity programming mandatory—as SPS did—would lead staff to wonder what would happen if they did not attend. The mere appearance of authority is enough to chill speech and confer standing.” (Doc. 78 at 77). In support, Plaintiffs cite *Speech First*,

Inc. v. Schlissel, claiming, “a chilling effect exists even when an implicit threat causes a fear of harm.” (Doc 78 at 77). While this may be true, Plaintiffs do not face an implicit threat of harm in a manner comparable to the *Speech First* plaintiffs. In *Speech First*, the plaintiffs’ speech was chilled because the university implemented a bias response team initiative, tasked with intervening into student-reported “bias incidents.” *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 762 (6th Cir. 2019). Though meetings with the bias response team were voluntary for those accused of engaging in a “bias incident,” the very nature of the bias response team gave the impression that “failure to meet could result in far-reaching consequences, including reputational harm or administrative action.” *Id.* at 765. Plaintiffs do not allege, and evidence does not suggest, Defendant SPS has implemented any specific policy or initiative tasked with responding to reported incidents of bias, rendering *Speech First* of little if any precedential value. Plaintiffs’ mere speculation, without more, about what may happen should they fail to attend a training Defendant SPS labeled “mandatory” constitutes a textbook example of the “subjective chill” that lacks standing. *Clapper* at 417-418.

Lack of an identifiable threat of negative consequences following expression of certain personal views shows Plaintiffs’ decision to self-censor is not objectively reasonable. *Zanders v. Swanson*, 573 F.3d 591, 593-94 (8th Cir.2009) (standing requires the decision to forego speech be objectively reasonable). Lack of any specific, factual evidence showing Defendants targeted Plaintiffs or the viewpoints they expressed also show Plaintiffs failed to suffer requisite injury-in-fact for the viewpoint and content discrimination claim. No evidence suggests Defendants took action to regulate, stifle, or target Plaintiffs’ personal views. *See Police Dep’t of City of Chicago v. Mosley*, 408 U.S. 92, 94-95 (1972) (city ordinance regulating certain types of picketing more than others unconstitutional); *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994) (“government speech that stifles speech on account of its message” presumed unconstitutional); *R.A.V. v. City of*

St. Paul, Minn., 505 U.S. 377, 390, 112 S. Ct. 2538, 2547, 120 L. Ed. 2d 305 (1992) (ordinance specifically targeting bias-motivated disorderly conduct unconstitutional). Plaintiff’s chilled speech and content and viewpoint discrimination claims related to the professional training session fail because Plaintiffs lack the requisite injury-in-fact to show standing

II. Online Multiple-Choice Questions: Compelled Speech, Chilled Speech, and Content and Viewpoint Discrimination

Plaintiffs next argue Defendant SPS compelled speech when it required Plaintiff Henderson to answer online multiple-choice questions a certain way, though the credited responses reflected views at odds with Plaintiff Henderson’s personal views. (Doc. 77 at 39). Plaintiffs also allege the multiple-choice questions amount to content and viewpoint discrimination. (Doc. 77 at 42-43). Employees of Defendant SPS informed Plaintiff Henderson and others they were required to complete a certain number of canvas modules developed by Defendants. (Doc. 77-1 at ¶ 19). The online multiple-choice questions were titled “Quick Check” questions and appeared within a larger canvas module. (Doc. 77-1 at ¶ 19). Completing the canvas module required users to answer all Quick Check multiple-choice questions. (Doc. 77-1 at ¶ 23). Unlike multiple-choice questions on an exam or quiz, these Quick Check questions had only two possible answers and appeared in the canvas module following online video clips about equity and anti-racism. (Doc. 77 at 38-39).

Specifically, Plaintiffs take issue with the content of several specific multiple-choice questions. The first Quick Check question asked Plaintiff Henderson, “Acknowledging and addressing students’ social and emotional needs in relation to COVID-19 is whose responsibility?” (Doc. 77 at 38). The online module provided two possible responses: 1) “All caregivers and stakeholders,” or 2) “Guardians

and counselors.” (Doc. 77 at 38). Those who selected the first option received the following message, “Correct! In these trying times, we must all work together to ensure that all students are having their social emotional needs met.” (Doc. 77 at 38). Those who selected the second choice received the following response, “Incorrect! In these trying times, we must all work together to ensure all students are having their social emotional needs met.” (Doc. 77 at 38). Though Plaintiff Henderson disagreed with both options, she nonetheless selected the credited response to complete the module. (Doc. 77 at 38).

The second multiple-choice question Plaintiffs take issue with asked, “When you witness racism and xenophobia in the classroom, how should you respond?” (Doc. 77 at 38). The online module again provided two possible responses: 1) “Address the situation in private after it has passed,” or 2) “Address the situation in the moment you realize it is happening.” (Doc. 77 at 37-40). Those who selected the first option received the following response, “Incorrect! It is imperative adults speak up immediately and address the situation with those involved. Being anti-racist requires immediate action.” (Doc. 77 at 38). Those who selected the second, received the following, “Correct! Being an anti-racist requires immediate action.” (Doc. 77 at 38). Though Plaintiff Henderson generally agreed with the first option, she selected the credited option to complete the module. (Doc. 77 at 38-39).

Plaintiffs appear to argue compulsion occurred in two ways. First, Defendants compelled Plaintiff Henderson’s speech when it required Plaintiff Henderson to select the credited response to the multiple-choice question, even though Plaintiff Henderson personally disagreed with the content of the credited response. (Doc. 77 at 39). In effect, Plaintiffs argue, this caused Plaintiff Henderson to become a courier of the government’s viewpoint, at odds with Plaintiff Henderson’s personal viewpoint. (Doc. 77 at 39). Plaintiffs’ second point is less clear. Plaintiffs appear to argue Defendants compelled Plaintiff Henderson’s speech when Defendants’ Quick Check module labeled as “correct,” only those answers

consistent with Defendant SPS' description of equity and anti-racism. (Doc. 77 at 39). Because Defendants defined anti-racism as requiring support of systemic change, Plaintiffs appear to argue, Defendants suggesting that anti-racism is correct, requires Plaintiff Henderson to accept that she must take "immediate action" to combat racism. (Doc. 77 at 39). This reference to anti-racism requiring immediate action, Plaintiffs seem to argue, amounts *somehow* to compelled speech. (Doc. 77 at 39). Separately, Plaintiffs argue Defendants' Quick Check module unconstitutionally discriminated against Plaintiffs' viewpoints because they favored Defendant SPS' description of equity and anti-racism over other viewpoints. (Doc. 77 at 42-43).

As discussed before, the government compels speech when it takes action that is "regulatory, proscriptive, or compulsory in nature" that "punish[es], or threaten[s] to punish, protected speech." *Phelan v. Laramie Cnty. Cmty. Coll. Bd. of Trustees*, 235 F.3d 1243, 1247 (10th Cir. 2000) (citing *Laird v. Tatum*, 408 U.S. 1, 11 (1972)). Such a threat may be "indirect discouragement" rather than direct punishment like "imprisonment, fines, injunctions or taxes." *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1290 (10th Cir. 2004) (citing *Am. Communications Ass'n v. Douds*, 339 U.S. 382, 402, 70 S.Ct. 674, 94 L.Ed. 925 (1950)). It is a core tenant of First Amendment jurisprudence that "the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 828 (1995) (citations omitted).

Each of Plaintiffs' theories relies heavily on *C.N. v. Ridgewood Bd. of Edu.*, a Third Circuit case holding a voluntary survey asking students questions about personal issues including substance use, sexuality, and mental health, did not violate students' protections against compelled disclosure of private information. *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159 (3d Cir. 2005). The *Ridgewood* plaintiffs sued the school district and others claiming, *inter alia*, administration of

the survey compelled students to reveal personal information about themselves. *Id.* at 189. The Third Circuit reasoned the survey's voluntary nature, anonymity, and the lack of threat or punishment directed toward any student who declined to take the survey, showed absence of compulsion to disclose private information. *Id.* The Court also considered whether *Ridgewood* defendants required students to select certain survey answers. *Id.* The Third Circuit acknowledged the relevance of the issue of whether the act of completing a survey constitutes speech, though specifically withheld ruling. *Ridgewood* at n. 27. Plaintiffs argue *Ridgewood* is distinguishable from the present matter because Defendant SPS informed Plaintiff Henderson that the canvas module was required and because Plaintiff Henderson had to select the Quick Check's single credited answer, which reflected a view at odds with Plaintiff Henderson's, to complete the canvas module. (Doc. 77 at 39).

Plaintiffs reliance on *Ridgewood* is misguided. *Ridgewood* deals with a survey that asks students questions about deeply personal matters including sexuality, drug use, and mental health. *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 164 (3d Cir. 2005). The *Ridgewood* plaintiffs' specific claim deals with whether the school board compelled the plaintiffs to disclose private information. *See C.N. v. Ridgewood Bd. of Educ.*, 146 F. Supp. 2d 528, 538 (D.N.J.), *aff'd in part, rev'd in part*, 281 F.3d 219 (3d Cir. 2001) ("Plaintiffs contend their First Amendment claim falls under the category of 'compelled disclosure' cases"); *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 189 (3d Cir. 2005) ("the disclosure required for a constitutional violation of the First Amendment's protection against compelled disclosure of private information simply has not been shown"). In the instant matter, however, Defendants have not asked Plaintiff Henderson questions about personal information like sexuality, drug use, and mental health. Rather, the Quick Check questions asked Plaintiff Henderson questions about general issues like whose responsibility it is

to address students' needs and how to respond to xenophobia in the classroom. Further, these multiple-choice questions appeared following videos discussing equity and anti-racism. The multiple-choice questions functioned to assist in grasping concepts presented during videos. This is of course why each of the questions was labeled, "Quick Check." Plaintiff Henderson's selection of the credited response suggests no personal affirmation of or affiliation with that response. Rather, choosing the credited response at most reflects an ability to grasp the material presented during the video. In this sense, the Quick Check questions are akin to multiple-choice exam questions in *Sabra v. Maricopa County Community College District*, where the Ninth Circuit upheld a district court's finding that a student's answer on a multiple-choice exam did not force a student to, "choose between denouncing his religion by selecting the 'correct' answer or receiving a lower grade...[but only required the student to] demonstrate an understanding of the material taught." *Sabra v. Maricopa Cnty. Cmty. Coll. Dist.*, 479 F. Supp. 3d 808, 818 (D. Ariz. 2020), *aff'd*, 44 F.4th 867 (9th Cir. 2022).

Citing the First Amendment's establishment and free exercise clauses, the *Sabra* plaintiff argued multiple-choice exam questions that asked students about materials presented during class, "forced [the plaintiff] to agree to [defendant professor's] radical interpretation of Islam." *Sabra v. Maricopa Cnty. Cmty. Coll. Dist.*, 479 F. Supp. 3d 808, 813 (D. Ariz. 2020), *aff'd*, 44 F.4th 867 (9th Cir. 2022). Discussing qualified immunity, the Ninth Circuit found it was "plausible," as the district court had, to interpret the plaintiff's multiple-choice answers as simply a reflection of the plaintiff's command of the course's subject matter. *Sabra v. Maricopa Cnty. Cmty. Coll. Dist.*, 44 F.4th 867, 892 (9th Cir. 2022). The plausibility of the lower court's finding, the Ninth Circuit reasoned, entitled the defendant professor to qualified immunity. *Id.* The Ninth Circuit did not substantively address whether the completion of a multiple-choice exam implicates First

Amendment free exercise protection. Despite these departures from the present matter, *Sabra* remains more instructive than *Ridgewood* because of the nature of the multiple-choice questions at issue. The present matter and *Sabra* both concern multiple-choice questions plainly designed to test command of subject matter, while *Ridgewood* concerns a survey with questions about matters personal to the survey taker. Because it is wholly unreasonable to suggest Plaintiff Henderson's selection of the credited response amounts to something beyond a mere grasp of the taught materials, or lack thereof, Plaintiffs have failed to demonstrate any corresponding injury whatsoever.

Plaintiffs further cite a variety of precedent in support of claims about the multiple-choice questions. None persuades. Specifically, Plaintiffs cite *W. Virginia State Bd. of Educ. v. Barnette*, in which the Supreme Court affirmed unconstitutionality of a regulation requiring students salute the American flag. *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). Unlike the act of saluting a flag, however, answering an online multiple-choice question does not suggest "affirmation of a belief and an attitude of mind." *W. Virginia State Bd. of Educ.* at 633. Similarly, unlike operating a motor vehicle with a license plate publically displaying a state motto, Plaintiff Henderson selecting the credited response on an online multiple-choice question fails to render Plaintiff Henderson a "'mobile billboard' for the State's ideological message." *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). This is true even where Plaintiff Henderson had to complete the multiple-choice questions to receive credit for completing the module and when Plaintiff Henderson's superiors were aware of her completion of the module. Finally, unlike enforcing a state law to require inclusion of certain minority groups in a parade, requiring Plaintiff Henderson to select certain credited responses at odds with Plaintiff Henderson's views does not violate Plaintiff Henderson's "autonomy to choose the content of [her] own message." *Hurley v. Irish-*

Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 573 (1995). This is, of course, because one's selection of credited responses on an online multiple-choice question reflects at most a belief about how to identify the question's credited response. This is especially true where, as here, the multiple-choice questions ask about general rather than personal issues, are labeled "Quick Check," and focus on the content of a video presented during the same module. The fact that one of the Quick Check questions asked, "how should *you* respond?" (emphasis added), does not change the nature of Plaintiff Henderson answering the question. Nor does the labeling of one answer as "correct" and another "incorrect." Because Plaintiff Henderson's selection of a certain answer on Defendant's online multiple-choice question indicates nothing more than belief about a credited response vis-à-vis others, Plaintiffs' claims regarding the online multiple-choice questions fail due to lack of injury-in-fact.

III. Unconstitutional Employment Condition

Count Three of Plaintiffs' complaint argues, because the online multiple-choice questions and professional training were unconstitutional, requiring Plaintiffs to complete the professional training and online multiple-choice questions constitutes an unconditional condition of Plaintiffs' employment with Defendant SPS. Because, however, Plaintiffs have failed to show the training and multiple-choice questions were unconstitutional and resulted in injury, Plaintiffs also fail to show the requisite injury required for standing to assert their unconstitutional employment conditions claim.

IV. The Employment Context

It is significant that Plaintiffs' action arises in an employment context. An essential element of the employee-employer relationship is an understanding that an employee will be expected to comply with the rules and policies of an employer as a condition of employment. While no employee is required to comply with any illegal employer directive, or in even rarer cases, directives that violate sincerely held religious beliefs, employees are not free to disregard policy simply because of disagreement. This is generally the basis of the Supreme Court's opinion in *Pickering*, 391 U.S. 563, and its progeny. See *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2473 (2018) ("*Pickering* is based on the insight that the speech of a public-sector employee may interfere with the effective operation of a government office.>").

The professional training in question related to important but inherently controversial issues facing all public entities, and in particular, school districts. Issues of race discrimination, inequality, and prejudice have confounded policymakers throughout our country's history. It started with the framers of the Constitution, continued with debates about whether to admit states as slave states or free states, led to a bloody Civil War, and persisted through Jim Crow laws, the rise of the Ku Klux Klan, racially-motivated lynchings and massacres, controversy over the separate but equal doctrine, race riots, enactment of the Civil Rights Acts, and claims of inverse discrimination. None of these developments have put the controversy to rest.

Here, Defendant SPS' professional training endeavored to address, increase, and enhance employees' understanding and sensitivity to race issues likely to be confronted by minority students served by Defendant SPS. The training, however, did not require by means of compulsion or coercion Plaintiffs or anyone else to express a specific message after encountering examples of discrimination

or xenophobia. This Court has found nothing in the professional training, or policy suggested by the training, requiring an employee to violate the Constitution or federal law. A person could act in exact accord with the suggestions of the trainers, even if considered a requirement of employment rather than merely a suggested approach, and avoid violating the law. Defendant SPS, therefore, was not requiring any employee to engage in illegal activity. Plaintiffs are correct that Defendant SPS, as a public employer, may run afoul of the Constitution should it somehow require Plaintiffs to articulate a specific message on issues of public interest *unrelated* to employees' official duties. *See Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2473 (2018) ("Of course, if the speech in question is part of an employee's official duties, the employer may insist that the employee deliver any lawful message...Otherwise, however, it is not easy to imagine a situation in which a public employer has a legitimate need to demand that its employees recite words with which they disagree.") (citations omitted). Lack of compulsion to express a specific message in the present case, renders these principles irrelevant, given Plaintiffs' specific claims.

Plaintiffs contend they should not have to listen to, learn, or follow Defendants' description of equity and anti-racism discussed during the training because they personally disagree. The problem with such a theory is, particularly in areas of controversy like racial policy, a government entity would be unlikely to find any approach all employees find agreeable. For example, if the training were to teach and recommend action and conduct consistent with Plaintiffs' personal opinions, other employees with different opinions would certainly find that training offensive. Because employees have diverse opinions on politics and policy, especially in areas of controversy, it is the right and duty of the elected school board of the school district, acting by and through a school superintendent and administration, to determine a single, unified, districtwide approach to policy issues. If that approach does not require an employee to engage in illegal behavior, the employee is appropriately expected to

comply. Similarly, if that approach does not compel an employee, apart from her official job duties, to express specific, objectionable words with which the employee disagrees, the employee is expected to comply. Plaintiffs do not argue, and no evidence suggests, the training somehow implemented a specific policy of the district which could lead to consequences for the employee if not followed. Rather, the training relates more to enhancing awareness of racial issues and suggesting an increased sensitivity to deal with issues of discrimination when identified. Further, no evidence suggests Defendants expected employees to personally believe or appreciate the policy, approach, or underlying principles. At most, they were required to demonstrate they understood the approach suggested by the training. The claim that the district should not conduct training for them to attend on policies applicable at work involving their employment because they disagree with them, however, is untenable. Such a ruling would make administration of a governmental unit such as a large, urban school district wholly unworkable. It would distort the employer-employee relationship. It is a frivolous claim and theory.

For the reasons described, even if plaintiffs could demonstrate injury-in-fact, which they cannot, this court would enter summary judgment on behalf of Defendants and would deny Plaintiffs' motion for summary judgment.

V. Attorney's Fees

Citing 42 U.S.C.A. § 1988, Defendants request this Court award attorney's fees. (Doc. 75 at 63). In response, Plaintiffs argue attorney's fees are appropriate for defendants only when plaintiffs' claims are frivolous, lacking a basis in law or fact. (Doc. 78 at 89). Plaintiffs further argue Defendants have failed to allege Plaintiffs have brought their claims without bases in law or fact. (Doc. 78 at 89). Plaintiffs are once again incorrect. The thrust of Defendants' argument is that Plaintiffs lack standing

because of failure to suffer injury-in-fact. This may constitute an allegation that Plaintiffs' claims lack a factual basis. Lack of injury-in-fact does not on its own constitute a frivolous claim. However, Plaintiffs' total lack of injury, especially related to Plaintiffs' claims of compelled speech, may suggest a groundlessness that trivializes the important work of the federal judiciary. *See Williams v. City of Carl Junction, Mo.*, 523 F.3d 841, 843 (8th Cir. 2008) (award of attorney's fees for 1983 lawsuit appropriate where plaintiffs' claims are groundless); *Morrison v. Bd. of Educ. of Boyd Cnty.*, 521 F.3d 602, 611 (6th Cir. 2008) (lack of standing works to "trivialize...the important business of the federal courts"). The court is mindful Defendants have incurred substantial legal fees in defending this claim. Taxpayer dollars which could have been devoted to enhancing the educational opportunity of the students served by the district have instead been diverted to the defense of this lawsuit. The students of the district deserve better. So too do the taxpayers whose hard-earned money is taxed by the district for the purpose of educating the children of the district in which they reside. Accordingly, this Court will entertain a separate motion for attorney's fees on behalf of Defendants.

CONCLUSION

For foregoing reasons, summary judgment is granted in Defendants' favor. Accordingly, Defendants' Motion for Summary Judgment (Doc. 64) is **GRANTED** in its entirety. Plaintiffs' Motion for Summary Judgment is **DENIED**. It is **FURTHER ORDERED** Defendants have until February 17, 2023 to move for attorney's fees, should they desire.

IT IS SO ORDERED.

Dated: January 12, 2023

/s/ Douglas Harpool
DOUGLAS HARPOOL
United States District Judge

EXHIBIT B

United States Court of Appeals
For the Eighth Circuit

No. 23-1374

Brooke Henderson; Jennifer Lumley,

Plaintiffs - Appellants,

v.

Springfield R-12 School District; Board of Education, of the Springfield R-12
School District; Grenita Lathan,

Defendants - Appellees,

Martha Doenning,

Defendant,

Yvania Garcia-Pusateri; Lawrence Anderson,

Defendants - Appellees.

Americans for Prosperity Foundation; Alliance Defending Freedom; Foundation for Individual Rights and Expression; Defense of Freedom Institute for Policy Studies; Reason Foundation; American Civil Liberties Union of Missouri; State of Missouri; State of Arkansas; State of Georgia; State of Idaho; State of Iowa; State of Kansas; State of Kentucky; State of Montana; State of Nebraska; State of North Dakota; State of South Carolina; State of Tennessee; State of Texas; State of Utah; State of Virginia; State of West Virginia; Institute for Free Speech; Manhattan Institute; Parents Defending Education; Pacific Legal Foundation; Cato Institute; Center of the American Experiment; Goldwater Institute; Kansas Justice Institute; Mississippi Justice Institute; Show Me Institute; America First Legal Foundation;

Hamilton Lincoln Law Institute; Mountain States Legal Foundation; Texas Public Policy Foundation,

Amici on Behalf of Appellant(s),

Missouri School Boards' Association,

Amicus on Behalf of Appellee(s).

No. 23-1880

Brooke Henderson; Jennifer Lumley,

Plaintiffs - Appellants,

v.

Springfield R-12 School District; Board of Education, of the Springfield R-12 School District; Grenita Lathan,

Defendants - Appellees,

Martha Doenning,

Defendant,

Yvania Garcia-Pusateri; Lawrence Anderson,

Defendants - Appellees.

Americans for Prosperity Foundation; Alliance Defending Freedom; Foundation for Individual Rights and Expression; Defense of Freedom Institute for Policy Studies; Reason Foundation; American Civil Liberties Union of Missouri; State of

Missouri; State of Arkansas; State of Georgia; State of Idaho; State of Iowa; State of Kansas; State of Kentucky; State of Montana; State of Nebraska; State of North Dakota; State of South Carolina; State of Tennessee; State of Texas; State of Utah; State of Virginia; State of West Virginia; Institute for Free Speech; Manhattan Institute; Parents Defending Education; Pacific Legal Foundation; Cato Institute; Center of the American Experiment; Goldwater Institute; Kansas Justice Institute; Mississippi Justice Institute; Show Me Institute; America First Legal Foundation; Mountain States Legal Foundation; Texas Public Policy Foundation,

Amici on Behalf of Appellant(s),

Missouri School Boards' Association,

Amicus on Behalf of Appellee(s).

Appeals from United States District Court
for the Western District of Missouri - Springfield

Submitted: February 15, 2024
Filed: September 13, 2024

Before LOKEN, COLLOTON,* and KELLY, Circuit Judges.

COLLOTON, Circuit Judge.

In 2020, the Springfield R-12 School District required its employees to attend “equity training.” Two employees who attended the training sued the school district and several school officials under 42 U.S.C. § 1983. The plaintiffs alleged that

*Judge Colloton became chief judge of the circuit on March 11, 2024. *See* 28 U.S.C. § 45(a)(1).

during the training, the defendants compelled them to speak as private citizens on matters of public concern, and engaged in viewpoint discrimination in violation of the First and Fourteenth Amendments. The district court granted summary judgment for the school district on the ground that the plaintiffs did not suffer an injury in fact and thus lacked standing to sue. The court also found that the lawsuit was frivolous and awarded attorney's fees to the school district. The plaintiffs appeal. Because we agree that the plaintiffs did not establish an injury in fact, we affirm the dismissal. We conclude, however, that the fee award was unwarranted and reverse that portion of the judgment.

I.

During the 2020-21 school year, the school district required employees to attend a presentation entitled, "Fall District-Wide Equity Training." Attendees were paid for their time and received professional-development credit.

The school district provided in-person and virtual training. At the in-person training, school officials instructed the attendees on how to become "Anti-Racist educators, leaders and staff members." The district defined "anti-racism" as "the work of actively opposing racism by advocating for changes in political, economic, and social life." The presenters cautioned that actions like practicing color-blindness and remaining silent about racism perpetuated white supremacy. The presenters stated, "We want to stress that we are not calling you as an individual a white supremacist. That being said, certain actions or statements . . . can support that structural system of white supremacy." The presenters also displayed an "Oppression Matrix" that categorized various social groups as a privileged, oppressed, or border group. For example, within the category of race, the matrix identified white people as a privileged social group, biracial people as a border group, and Asian, Latina/o, black, and native people as oppressed social groups. At the virtual training, the school district provided similar instruction.

Some employees were also required to complete online modules in which they watched videos, read articles, and answered multiple-choice questions relating to equity and diversity. For example, one question asked: “When you witness racism and xenophobia in the classroom, how should you respond?” Employees could select one of two options: (1) “Address the situation in private after it has passed”; or (2) “Address the situation the moment you realize it is happening.” The module deemed the second option the correct answer. If the employee selected the first option, then a message appeared explaining why the choice was “incorrect.” To complete the module, employees had to select the “correct” answer.

The training sessions were interactive. At the in-person training, attendees were asked to speak with one another about specific prompts related to the presentation’s content. In the online training, participants were similarly required to speak with other virtual attendees. Both training sessions included an exercise called “Four Corners,” in which attendees had to hold up a sign stating whether they agreed or disagreed with various prompts, such as “I believe my students or staff feel safe in Springfield” and “I believe [the school district] provides an engaging, relevant and collaborative learning and working environment.

At both training sessions, instructors displayed a slide entitled “Guiding Principles” in which one line read: “Be Professional – Or be Asked to Leave with No Credit.” No attendee was asked to leave, denied pay, or refused credit because of his or her conduct during the sessions. No employee discipline resulted from these sessions.

Brooke Henderson attended the virtual training. Henderson is a Section 504 Process Coordinator. At the training, Henderson expressed her view that Kyle Rittenhouse acted in self-defense during a Black Lives Matter protest in 2020. The presenter responded that Henderson was “confused” and “wrong.” Henderson alleges that after this dialogue with the presenter, she stopped speaking out of fear that she

would be asked to leave for being unprofessional. She also alleges that during the “Four Corners” exercise, she responded that she agreed with some prompts solely because she feared that if she disagreed, she would be asked to leave without receiving credit or pay. Henderson also completed the virtual modules. She alleges that she selected answers with which she did not agree so that she would receive credit for the training.

Jennifer Lumley attended the in-person training. Lumley is a secretary. At the training, Lumley stated that she did not believe that all white people were racist, and that people of other races could be racist. She shared a personal anecdote about her niece-in-law, a black woman who married a white man, and how “some black people had told her she did not ‘count’ as black anymore.” The presenter responded that black people could be prejudiced, but not racist. Lumley also stated that she did not believe that she was privileged because she grew up in a low-income household. The presenter responded that Lumley “was born into white privilege.” Like Henderson, Lumley alleges that after this interaction, she stopped speaking because she feared that she would be asked to leave.

In 2021, the plaintiffs sued the school district and several district employees. The plaintiffs alleged that in the training sessions and online modules, the defendants compelled them to speak at times and chilled their speech at other times, in violation of the First and Fourteenth Amendments. The plaintiffs also alleged that the requirement to participate in the equity training program constituted an unconstitutional condition of employment.

The defendants moved for summary judgment and argued that the plaintiffs lacked standing because they did not establish an Article III injury. The district court agreed, granted the motion, and invited the defendants to move for attorney’s fees under 42 U.S.C. § 1988. When the defendants moved for fees, the district court granted the motion and awarded fees of \$312,869.50 against the plaintiffs. The

plaintiffs appeal. We review a grant of summary judgment *de novo*, viewing the facts in the light most favorable to the plaintiffs.

II.

No matter how passionately a plaintiff believes in her position or how salient her cause may be, a federal court has jurisdiction only if she has standing to sue under case-or-controversy requirement of Article III of the Constitution. To demonstrate Article III standing, a plaintiff “must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). A plaintiff who invokes federal jurisdiction must support each element “in the same way as any other matter” on which it bears the burden of proof. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). To defeat a motion for summary judgment, the plaintiff “must ‘set forth’ by affidavit or other evidence ‘specific facts,’ which for purposes of the summary judgment motion will be taken to be true.” *Id.* (citation and internal quotation omitted). The district court concluded that the plaintiffs lacked standing because they were not injured. [R. Doc. 88, at 24]. On appeal, the plaintiffs argue that they suffered two injuries: chilled speech and compelled speech.

Chilled speech can be an injury in fact. *See Virginia v. Am. Booksellers Ass’n*, 484 U.S. 383, 393 (1988). To establish a chilling injury, the plaintiffs must show that they self-censored to avoid a credible threat of prosecution or other adverse action. *Missourians for Fiscal Accountability v. Klahr*, 830 F.3d 789, 794 (8th Cir. 2016). The decision to self-censor in light of the potential penalties “must be objectively reasonable.” *Zanders v. Swanson*, 573 F.3d 591, 594 (8th Cir. 2009).

Compelled speech in violation of the First Amendment is also an injury in fact. *Cressman v. Thompson*, 719 F.3d 1139, 1145 (10th Cir. 2013); *see Jacobs v. Clark*

Cnty. Sch. Dist., 526 F.3d 419, 426 (9th Cir. 2008). To trigger an injury based on compelled speech, the governmental entity “must punish, or threaten to punish, protected speech by governmental action that is ‘regulatory, proscriptive, or compulsory in nature.’” *Phelan v. Laramie Cnty. Cmty. Coll. Bd. of Trustees*, 235 F.3d 1243, 1247 (10th Cir. 2000) (quoting *Laird v. Tatum*, 408 U.S. 1, 11 (1972)). Such punishment may come in the form of an “indirect discouragement,” such as requiring adherents of a particular political party to wear arm-bands, *Am. Commc’ns Ass’n v. Doubs*, 339 U.S. 382, 402 (1950), but it cannot be minimal, subjective, or speculative. *United States v. Ramsey*, 431 U.S. 606, 624 (1977); *Phelan*, 235 F.3d at 1247-48.

The plaintiffs were not directly punished by the school district. Henderson and Lumley received full pay and professional-development credit for attending the training. They were never disciplined for any of their remarks or actions during the training.

The plaintiffs suggest, however, that they were punished because they were “shamed” and “forced to assume the pejorative white supremacist label for their ‘white silence.’” They rely on *Gralike v. Cook*, 191 F.3d 911 (8th Cir. 1999), *aff’d*, 531 U.S. 510 (2001), where this court held unconstitutional a Missouri law requiring that state election ballots identify any candidates who opposed or refused to express a view on congressional term limits. We concluded that the law “threaten[ed] a penalty that is serious enough to compel candidates to speak—the potential political damage of the ballot labels.” *Id.* at 918. We explained that the labels were “phrased in such a way” that they were “likely to give (and we believe calculated to give) a negative impression not only of a labeled candidate’s views on term limits, but also of his or her commitment and accountability to his or her constituents.” *Id.* The plaintiffs here argue that by associating silence and dissenting views with white supremacy during the training, the school district imposed a similar punishment.

We decline to adopt the plaintiffs’ broad reading of *Gralike*. Unlike the State in *Gralike*, the school district’s presenters did not assign an epithet to the plaintiffs akin to a label next to a person’s name on an election ballot. Instead, they chose to “stress that we are not calling you as an individual a white supremacist,” while explaining their view that “certain actions or statements . . . can support that structural system of white supremacy.” Nor did the training program “threaten a penalty” comparable to the “political damage” inflicted on candidates who disfavored term limits or remained silent on the issue in *Gralike*. The plaintiffs were required to endure a two-hour training program that they and others thought was misguided and offensive. But they were not forced to wear an arm-band classifying them as white supremacists or to suffer any comparable penalty.

The plaintiffs also argue that the defendants indirectly discouraged them from remaining silent or voicing dissenting views, both during the training sessions and in their private lives. To establish an injury from chilled or compelled speech based on the school district’s indirect discouragement, the plaintiffs must show that their fear of punishment was credible and not merely speculative. *Zanders*, 573 F.3d at 594; *see C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 189 (3d Cir. 2005). The plaintiffs rely primarily on the presenters’ guidance to “Be Professional – Or be Asked to Leave with No Credit.” They also refer to statements by the presenters telling attendees to “speak [their] truth,” “turn and talk” to nearby colleagues, and share thoughts with the group.

We conclude that the plaintiffs’ fear of punishment was too speculative to support a cognizable injury under the First Amendment. While the presenters warned that unprofessional conduct during the session could result in an attendee receiving no credit, they never said that expressing opposing views or refusing to speak was “unprofessional.” The plaintiffs’ reliance on *Speech First, Inc. v. Cartwright*, 32 F.4th 1110 (11th Cir. 2022), is thus misplaced. In *Cartwright*, the court concluded that a university’s policy on “bias-related incidents” objectively chilled speech in part

because the team responsible for investigating these “incidents” could refer students for discipline, even if the team could not directly punish students. *Id.* at 1122-24. Critically, the university stated that the team would investigate, monitor, and refer students for discipline *because of* the students’ speech. *Id.* at 1117. Here, the school district’s presenters did not state or insinuate that an employee’s silence or dissenting views would be considered “unprofessional” and a basis to deny credit for attendance at the training.

To the contrary, the evidence shows that when the plaintiffs and others expressed views different from those of the school district, they received pushback from the trainers on the substance, but they were not asked to leave, and they were not called unprofessional. Attendees other than the plaintiffs largely remained silent and exhibited “very low participation.” Yet the plaintiffs cite no evidence that anyone was disciplined, denied pay, or refused credit after attending the training. Therefore, the plaintiffs’ subjective fear that dissent or silence would be considered “unprofessional” and grounds for denial of credit was too speculative to establish an Article III injury.

The plaintiffs’ alleged fear that they would be punished for failing to advocate for the school district’s view of “anti-racism” in their personal lives was speculative. They cite the district’s definition of “anti-racism” as “the work of actively opposing racism by advocating for changes in political, economic, and social life.” They refer to a greeting at the outset of training that referred to “this significant work for our own personal and professional development.” But there is no evidence that the presenters purported to dictate what employees could say or do on their own time outside of work. Nor did the trainers communicate that the plaintiffs would be penalized for making particular statements or keeping quiet in their private lives.

Of course, the same conclusions would hold true if the district’s training had aligned more closely with the views of the plaintiffs. Suppose the district’s “anti-

racism” training had emphasized that “[o]ur Constitution is color-blind,” *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), that persons should “not be judged by the color of their skin but by the content of their character,” Martin Luther King, Jr., I Have a Dream Speech (Aug. 28, 1963), and that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007). But suppose that some employees believed that practicing color-blindness perpetuated white supremacy, and that society is stratified in accordance with the “Oppression Matrix.” So long as these employees, like Lumley and Henderson, were not punished or threatened with punishment for remaining silent or expressing disagreement with the district’s program, they could not establish an injury from required attendance at a two-hour color-blind anti-racism training session.

Henderson raises a separate claim based on the requirement that she complete online modules. To receive credit for completing the modules, she eventually had to select the “correct” answers to multiple-choice questions if her first selections were deemed “incorrect.” Henderson argues that she was compelled to speak when she selected the answers that she thought the school district would prefer, rather than the answers that she preferred to some questions.

We agree with the district court that in this type of training module, an employee’s “selection of credited responses on an online multiple-choice question reflects at most a belief about how to identify the question’s credited response.” There may be room for debate about whether Henderson lacks an injury or whether she technically was injured but has no claim on the merits—a public employer can require employees to demonstrate as part of their official duties that they understand the employer’s training materials. *See Altman v. Minn. Dep’t of Corr.*, 251 F.3d 1199, 1203 (8th Cir. 2001) (“[A] public employer may decide to train its employees, it may establish the parameters of that training, and it may require employees to participate.”); *cf. Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 585

U.S. 878, 908 (2018) (“Of course, if the speech in question is part of an employee’s official duties, the employer may insist that the employee deliver any lawful message.”). But we are aware of no authority holding that simply requiring a public employee to demonstrate verbally an understanding of the employer’s training materials inflicts an injury under the First Amendment, so we decline to construe Henderson’s completion of the modules as an injury in fact.

Because we conclude that the plaintiffs did not establish a cognizable constitutional injury, they also lack standing to pursue their related claim that the school district imposed an unconstitutional condition on their employment. The district court thus did not err by granting summary judgment for the defendants. The plaintiffs have a forum in the democratically accountable local school board where they can present objections to the district’s “equity training.”

III.

After dismissing the action, the district court found that the plaintiffs’ claims were frivolous and awarded attorney’s fees of \$312,869.50 to the school district. We conclude that the award was an abuse of discretion.

A prevailing defendant in an action under 42 U.S.C. § 1983 may recover attorney’s fees from a plaintiff only in limited circumstances: when the claims were “frivolous, unreasonable, or groundless,” or “the plaintiff continued to litigate after it clearly became so.” *Hughes v. Rowe*, 449 U.S. 5, 14-15 (1980) (internal quotation omitted). Although we held in *Keene Corp. v. Cass*, 908 F.2d 293, 298 (8th Cir. 1990), that a defendant has not “prevailed” when a complaint is dismissed for lack of subject matter jurisdiction, we will assume for the sake of analysis that *CRST Van Expedited, Inc. v. EEOC*, 578 U.S. 419 (2016), superseded that holding. *See Ranieri v. Microsoft Corp.*, 887 F.3d 1298, 1305-06 (Fed. Cir. 2018).

Even so, we cannot agree with the district court that the claims here were frivolous. The doctrines of compelled speech, chilled speech, and Article III standing are nuanced and often difficult to apply. The parties cite no apposite authority on how those doctrines apply to training of public employees—especially controversial training of the sort at issue here. Constitutional law in this area is unsettled and developing. *See* Martin H. Malin, *Janus and the First Amendment in the Workplace*, 24 *Emp. Rts. & Emp. Pol’y J.* 9 (2020). The matter of an employee’s standing to sue in this context is fairly described as an issue of first impression with room for plausible disagreement, although we ultimately agree with the district court’s decision on that issue.

The district court expressed concern that the “political undertones” of the lawsuit “trivialized the important work of the federal judiciary.” But plaintiffs long have pressed the limits of the case-or-controversy requirement in disputes relating to issues of the day. *E.g.*, *FDA v. Alliance for Hippocratic Med.*, 602 U.S. 367 (2024); *Clapper v. Amnesty Int’l USA*, 568 U.S. 398 (2013); *Raines v. Byrd*, 521 U.S. 811 (1997); *Allen v. Wright*, 468 U.S. 737 (1984); *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974); *Ex Parte Levitt*, 302 U.S. 633 (1937) (per curiam). It is the judiciary’s responsibility to reiterate the properly limited role of the courts in a democratic society, but a plaintiff’s unsuccessful effort to push the boundaries does not warrant an award of fees without a stronger showing of frivolity than the defendants presented here.

* * *

For these reasons, we affirm the judgment dismissing the action, but reverse the award of attorney’s fees.

EXHIBIT C

United States Court of Appeals
For the Eighth Circuit

No. 23-1374

Brooke Henderson; Jennifer Lumley

Plaintiffs - Appellants

v.

Springfield R-12 School District; Board of Education, of the Springfield R-12
School District; Grenita Lathan

Defendants - Appellees

Martha Doenning

Defendant

Yvania Garcia-Pusateri; Lawrence Anderson

Defendants - Appellees

Americans for Prosperity Foundation; Alliance Defending Freedom; Foundation for Individual Rights and Expression; Defense of Freedom Institute for Policy Studies; Reason Foundation; American Civil Liberties Union of Missouri; State of Missouri; State of Arkansas; State of Georgia; State of Idaho; State of Iowa; State of Kansas; State of Kentucky; State of Montana; State of Nebraska; State of North Dakota; State of South Carolina; State of Tennessee; State of Texas; State of Utah; State of Virginia; State of West Virginia; Institute for Free Speech; Manhattan Institute; Parents Defending Education; Pacific Legal Foundation; Cato Institute; Center of the American Experiment; Goldwater Institute; Kansas Justice Institute; Mississippi Justice Institute; Show Me Institute; America First Legal Foundation; Hamilton Lincoln Law Institute; Mountain States Legal Foundation; Texas Public

Policy Foundation

Amici on Behalf of Appellant(s)

Missouri School Boards' Association

Amicus on Behalf of Appellee(s)

No. 23-1880

Brooke Henderson; Jennifer Lumley

Plaintiffs - Appellants

v.

Springfield R-12 School District; Board of Education, of the Springfield R-12
School District; Grenita Lathan

Defendants - Appellees

Martha Doenning

Defendant

Yvania Garcia-Pusateri; Lawrence Anderson

Defendants - Appellees

Americans for Prosperity Foundation; Alliance Defending Freedom; Foundation
for Individual Rights and Expression; Defense of Freedom Institute for Policy
Studies; Reason Foundation; American Civil Liberties Union of Missouri; State of
Missouri; State of Arkansas; State of Georgia; State of Idaho; State of Iowa; State
of Kansas; State of Kentucky; State of Montana; State of Nebraska; State of North
Dakota; State of South Carolina; State of Tennessee; State of Texas; State of Utah;
State of Virginia; State of West Virginia; Institute for Free Speech; Manhattan

Institute; Parents Defending Education; Pacific Legal Foundation; Cato Institute; Center of the American Experiment; Goldwater Institute; Kansas Justice Institute; Mississippi Justice Institute; Show Me Institute; America First Legal Foundation; Mountain States Legal Foundation; Texas Public Policy Foundation

Amici on Behalf of Appellant(s)

Missouri School Boards' Association

Amicus on Behalf of Appellee(s)

Appeals from United States District Court
for the Western District of Missouri - Springfield

Submitted: January 15, 2025

Filed: December 30, 2025

Before COLLTON, Chief Judge, LOKEN, SMITH, GRUENDER, BENTON, SHEPHERD, KELLY, ERICKSON, GRASZ, STRAS, and KOBES, Circuit Judges, En Banc.

ERICKSON, Circuit Judge, with whom GRUENDER, BENTON, STRAS, and KOBES, Circuit Judges, join, and GRASZ, Circuit Judge, joins in all but part II.C.

Two employees of the Springfield R-12 School District brought this action pursuant to 42 U.S.C. § 1983 after they were required to attend a program in 2020 entitled, “Fall District-Wide Equity Training,” which they assert demanded affirmation of the school district’s views of equity in violation of the First Amendment. The district court concluded that the employees lacked standing because they had not shown an injury in fact and awarded attorney’s fees to the school district. On appeal, a panel of this Court affirmed the dismissal for lack of standing but reversed the award of attorney’s fees. Henderson v. Springfield R-12 Sch. Dist., 116 F.4th 804 (8th Cir. 2024), reh’g en banc granted, opinion vacated,

Nos. 23-1374, 23-1880, 2024 WL 4899801 (8th Cir. Nov. 27, 2024). Sitting *en banc*, we reverse the district court’s dismissal of the claims, vacate the award of attorney’s fees, and remand for further proceedings.

I. BACKGROUND

When the complaint was filed in August 2021, Plaintiff Brooke Henderson had been employed by the school district for 12 years and served as a 504 Process Coordinator. Plaintiff Jennifer Lumley, a second year employee, was working as a records secretary for the Special Services Department. The plaintiffs alleged that while attending a mandatory district-wide equity training program for staff, the school district engaged in viewpoint discrimination, caused attendees to self-censor, and/or forced attendees to accept beliefs with which they did not agree. The facts giving rise to the claims in this litigation are generally not in dispute. As outlined in the following paragraphs, ample evidence was developed in the district court record to support the plaintiffs’ allegations and demonstrate standing.

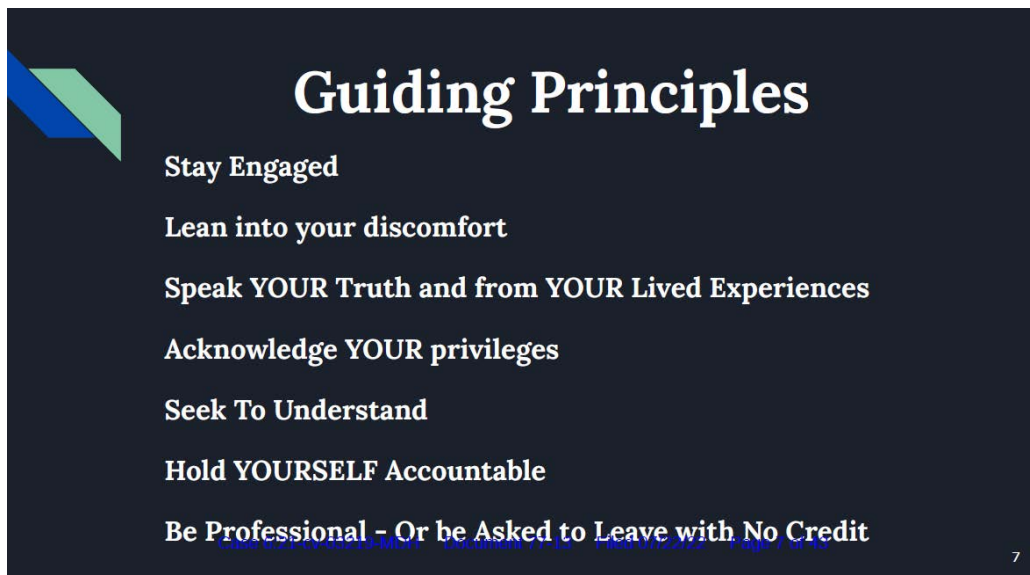
The mandatory training at the center of this dispute was offered in-person and online, with both forms providing similar ideas and instructions. Except for leadership staff, the school district required all certificated and hourly staff, including the plaintiffs, to attend equity training in the Fall of 2020. Lumley attended the training in person on October 6, 2020, and Henderson attended a virtual session on October 14, 2020.

When the training was announced, the school district communicated to Henderson that she would not receive credit if she did not attend the mandatory training, which she understood to mean that she would not receive full pay if she did not attend the training. Participants attending the online session, like Henderson, were required to have their cameras turned on during the entire program, even if they were feeling uncomfortable, so the school district could ensure full participation. The trainers told staff that it was “disrespectful” if they did not have their cameras on. Yvania Garcia-Pusateri, the school district’s chief equity and diversity officer,

testified that it was “board policy” for staff to “act professional” and be accounted for at the training to receive their credits.

At the beginning of each session, school district staff, including Lumley and Henderson, were provided several documents, including one entitled “Guiding Principles.” The principles listed in this handout directed staff to “Stay Engaged,” “Lean into your discomfort,” “Speak YOUR Truth and from YOUR Lived Experiences,” “Acknowledge YOUR privileges,” “Seek to Understand,” “Hold YOURSELF accountable,” and “Be Professional.” The “Guiding Principles” were repeated by the trainers early in the power point slide presentation.¹ When the slide was published, the trainers explained to Henderson that she “needed to have ‘courageous conversations;’ that [she] must stay engaged; that the topics of the training can be uncomfortable, but [she] must ‘lean into [her] discomfort;’ that [she] should share [her] personal experiences and identities; and that [she] must acknowledge [her] privileges and hold [herself] accountable.” In addition to the comments made by the trainers, the power point slide contained an explicit warning that the plaintiffs took note of: “Be Professional — Or be Asked to Leave with No Credit.” Also, during the introduction, the trainers told staff during the session

¹The entire slide is in the record and is consistent with the plaintiffs’ assertions:



Henderson attended that they “had to agree or [they] would lose credit and that [they] had to be an ally and it was part of [their] job duty to be an anti-racist educator.”

Like Henderson, Lumley was required to attend the school district’s equity training as well. The school district informed Lumley that she would not receive credit if she did not attend the equity training session on October 6, 2020, which she understood meant that she would not receive full pay if she did not complete the training. Employees signed an attendance sheet to receive credit, not at the beginning of the program, but at the end of the session. Those attending the in-person session along with Lumley were instructed by the trainers, as Henderson was, that they needed to “have ‘courageous conversations;’ that [they] must ‘stay engaged’ that the topics of the training can be uncomfortable, but that [they] must ‘lean into [their] discomfort;’ that [they] should share [their] personal experiences and identities; that [they] must acknowledge [their] privileges and hold [them]selves accountable; and that [they] must speak [their] truths.” Attendees at the in-person training were shown the same power point slide as Henderson that warned staff to “Be Professional — Or be Asked to Leave with No Credit.”

The record reflects that the training program contained a variety of formats, including statements from the facilitators, videos, power point slides, interactive exercises, large group discussion, small group discussion, and written exercises. An additional component of the program consisted of online training modules that certain employees were required to complete on their own time. Henderson was one such employee, Lumley was not. Henderson was required to complete seven equity-based modules, consisting of three Social Emotional Learning modules and four Cultural Consciousness modules. The modules were developed by a planning team that consisted of current and former school district employees, including, among others, Defendants Garcia-Pusateri as well as Lawrence Anderson, the school district’s office of equity and diversity coordinator.

The school district could track participation and completion of the modules. To move to the next question, the pre-programmed “correct” answer had to be

selected. As an example, in the “Overview of Social Emotional Learning from an Equity Lens” module, which Henderson completed, a question asked, “How does the addition of Focus Area V impact how you serve the students and staff of SPS [the school district]?” The module offered two choices: (1) “It provides suggested guidance regarding equity and diversity issues,” or (2) “It cements equity and diversity as a district priority that must be followed by all staff.” To complete the module, Henderson had to select the second choice. When Henderson selected the first choice, the following message was displayed: “Incorrect! This is not suggested guidance. It is required policy and job responsibility.” Henderson disagreed with both choices because, unlike the school district’s concept of equity, she believes “all people should be treated the same regardless of their race.” Despite her belief, Henderson was compelled to select the “correct” answer as determined by the school district so she could complete the module and receive credit.

Henderson identified other instances when she was forced to accept the school district’s viewpoint and felt compelled to answer a question in a way that she disagreed with. For instance, as part of the “Elementary and Secondary Social Emotional Learning as it Relates to Racial Injustice” modules, a question stated: “When you witness racism and xenophobia in the classroom, how should you respond?” The two choices listed were: (1) “Address the situation in private after it has passed,” or (2) “Address the situation the moment you realize it is happening.” When Henderson selected the first choice, she received the following message: “Incorrect! It is imperative adults speak up immediately and address the situation with those involved. Being an anti-racist requires immediate action.” To complete the module, Henderson had to select the second choice, which the school district deemed the “correct” answer. After selecting that option, the following message appeared: “Correct! Being an anti-racist requires immediate action.” Henderson disagreed with the “correct” answer because, based on her experience working with students and in special education for over 20 years, it is her view that the response must be tailored to the situation and the student.

The “Cultural Consciousness” modules included a self-assessment checklist. Based on the responses provided by the school district employee, the module calculated a score for how “culturally competent” the employee was. Because Henderson believed the assessment might be reviewed by the school district, she felt compelled to tailor her responses to obtain a higher score, even though some of the answers she gave were inconsistent with her views. In addition, these modules contained a self-assessment reflection and a graphic organizer that asked employees to list their vulnerabilities, strengths, and needs, which Henderson believed would be available for the school district to review. In response to an email Henderson sent to Garcia-Pusateri asking whether the reflection portion of the module was part of the mandatory training, Garcia-Pusateri told Henderson that completion of the reflection questions was required.

Turning to the training session, at one point during the program, Henderson expressed her view that Kyle Rittenhouse was defending himself against rioters and that she believed he had been hired to defend a business. In response, Garcia-Pusateri told Henderson that she was wrong and confused because Rittenhouse “murdered an innocent person” who “was an ally of the Black community.” Subsequently, Henderson did not publicly express her disagreement with statements made by the trainers during the program because she knew that the school district did not accept alternate viewpoints. And if she voiced her true opinions, she would be corrected or considered unprofessional. Henderson feared being written up or terminated from her job if she expressed her true beliefs during the training, explaining: “I felt like we weren’t safe to give our opinion or we would be removed from the district.” She went on to state that during the training her voice was not heard, and she was told to agree or be seen as disrespectful.

Lumley also submitted “specific facts” to support her claim that she self-censored during the training. Following a video that was played regarding the George Floyd incident, Lumley expressed her opinion in a small group setting that Floyd’s death was not a commentary on all law enforcement and that, in her view, not all cops were bad. Another individual, Amber Hawkins, disagreed with Lumley

and appeared upset by Lumley's views. When Hawkins spoke during the larger group discussion, she shared her opinion but did not give voice to the views offered by Lumley. During a subsequent interactive exercise, Lumley did not express her views that were at odds with Hawkins or the school district's teachings out of concern about how her comments would be received by the school district.

When Lumley eventually decided to voice her views again in response to how the school district was assigning characteristics based on race, her views were not accepted. Lumley expressed her opinions that she did not believe every white person is racist and that she did not believe she is "privileged" because she was raised in poverty and worked hard to accomplish her goals. One of the trainers, Jimi Sode, a former coordinator in the school district's office of equity and diversity, told Lumley that black people cannot be racist. When she questioned his statement, Sode told Lumley that black people can be prejudiced but not racist. Lumley was then directed to reflect on herself more. As Hawkins and other school district staff members at the training raised their voices to disagree with Lumley, the trainers did not intervene. Lumley described the next breakout session as "very hostile." Lumley "shut down" out of fear and did not express her views again because after speaking up, "it became very clear that everyone's opinion was not welcome, and it became even more hostile." Lumley contends that even though the school district indicated everyone could speak about their experiences, "that was not the case."

After a virtual training session, four staff members from one of the elementary schools in the district expressed concerns to their principal about their feelings that "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." These concerns were forwarded to Garcia-Pusateri, who responded, in part: "I know [the trainers] are providing a safe space for the staff to engage." It's "unfortunate" the staff are "taking the content personally" and not "questioning why topics like systemic racism and white supremacy negatively impact them." Garcia-Pusateri reiterated that the training is "not an invitation to participate in, it is a requirement for staff to participate in which they are also compensated for."

The training defined “anti-racism” as “the work of actively opposing racism by advocating for changes in political, economic, and social life.” The most important message that the trainers sought to “reiterate” at the trainings is that “there is a proactive element in place to no longer remain silent or inactive.” Throughout this litigation, the plaintiffs have asserted that the training was essentially an indoctrination focused on the school district’s views and its interpretation of white supremacy. In particular, the school district expected staff to accept its definition of “white supremacy,” which it defined as “the all-encompassing centrality and assumed superiority of people defined and perceived as white.” It instructed staff that we live in a culture “which positions white people and all that is associated with them (whiteness) as ideal.” The school district acknowledged in this litigation that it continuously instructed throughout the trainings that silence from white people is a form of “white supremacy.” One slide published during the training characterized forms of “white supremacy” as overt and socially unacceptable and covert and socially acceptable.²

²The entire slide stated:

White	Supremacy
OVERT WHITE SUPREMACY	COVERT WHITE SUPREMACY
Socially Unacceptable	Socially Acceptable
LYNCHING HATE CRIMES BLACKFACE THE N-WORD SWASTIKAS NEO-NAZIS BURNING CROSSES KKK RACIST JOKES RACIAL SLURS	MASS INCARCERATION BIPOC AS HALLOWEEN COSTUMES PRIORITIZING WHITE VOICES AS EXPERTS NOT BELIEVING EXPERIENCES OF BIPOC ENGLISH-ONLY INITIATIVES COLORBLINDNESS WHITE SAVIOR COMPLEX RACIAL PROFILING SCHOOL-TO-PRISON PIPELINE TREATING KIDS OF COLOR AS ADULTS
CALLING THE POLICE ON BLACK PEOPLE EDUCATION FUNDING FROM PROPERTY TAX CULTURAL APPROPRIATION	DISCRIMINATORY LENDING HIRING DISCRIMINATION BLAMING THE VICTIM TOKENISM TONE POLICING WHITE SILENCE CLAIMING REVERSE-RACISM RACIST MASCOTS ALL LIVES MATTER EUROCENTRIC CURRICULUM

In addition, the plaintiffs have pointed to an image containing an “oppression matrix,”³ which listed under the first column “types of oppression”—racism, sexism, transgender oppression, heterosexism, classism, ableism, religious oppression, and ageism/adultism—and in the other columns three “social groups” labeled as “privileged,” “border,” or “oppressed.” Individuals were classified within the matrix according to their characteristics. According to the chart, individuals in the “privileged” social group consisted of white birth-assigned males who are gender conforming adults, heterosexual, able-bodied, Protestant, and rich/upper class. At the other end of the matrix, “oppressed” social groups included: the working class and poor; elderly and young; birth-assigned females; transgender, genderqueer, and intersex individuals; Jews/Muslims/Hindus/Sikhs; lesbians and gay men; and disabled people. The plaintiffs contend that staff were required to accept (or acquiesce to) the information in the matrix. If staff did not voluntarily share their reactions to the matrix or other videos or charts, they were warned that they could be called on.

The plaintiffs maintain that the school district “made clear” at the training that it would not tolerate Henderson’s or Lumley’s views. Both Henderson and Lumley submitted evidence recounting their experiences at the training when they expressed

³The full graphic is below:

TYPE OF OPPRESSION	PRIVILEGED SOCIAL GROUP	BORDER SOCIAL GROUPS	OPPRESSED SOCIAL GROUPS	SOCIAL IDENTITY CATEGORY
RACISM	White People	Biracial People	Asian, Black, Latina/o, Native People	Race
SEXISM	Male assigned at birth	Intersex People	Female assigned at birth	Sex
TRANSGENDER OPPRESSION	Gender conforming cis- men and women	Gender ambiguous cis- men and women	Transgender, Genderqueer, Intersex People	Gender
HETEROSEXISM	Heterosexuals	Bisexuals	Lesbians, Gay men	Sexual Orientation
CLASSISM	Rich, Upper Class People	Middle Class People	Working Class, Poor People	Class
ABLEISM	Able-bodied People	People with Temporary Disabilities	Disabled People	Ability/Disability
RELIGIOUS OPPRESSION	Protestants	Roman Catholic (historically)	Jews, Muslims, Hindus, Sikhs	Religion
AGEISM/ADULTISM	Adults	Young Adults	Elders, Young People	Age

a view contrary to the school district’s teachings and when and why they felt forced to self-censor. Regarding one of the incidents, when asked why the trainers in Lumley’s session discounted and refused to accept Lumley’s viewpoint, the school district claimed there was a difference between “racism as a structure” and being “racist” and Lumley did not understand the difference. Despite expressly telling the staff to share their personal experiences during the training, the school district likened Lumley’s opposition to the school district’s views on oppression and racism as “having a conversation about football and you bring up baseball.”

The plaintiffs have asserted that they have shown an objectively reasonable fear of negative consequences sufficient to demonstrate an injury in fact based on the trainers’ responses to their opposing views and the school district’s warning that if they did not complete the training, they would not receive the mandatory professional development credit. On appeal, the school district did not take issue with many of the underlying facts the plaintiffs have relied on but instead asserted that a public employer can require employees to attend equity and diversity training, and the plaintiffs’ claims fail because they received credit and pay for attending the training, despite voicing objections to the principles presented. Because we find the plaintiffs have presented sufficient details and evidence to establish standing, we reverse the dismissal of their claims and remand to the district court.

II. DISCUSSION

A. Plaintiffs’ Claims

This is a challenging case involving the intersection of First Amendment principles with the advancement of the critical mission of understanding, educating, and creating an environment where all people, regardless of race, creed, or status are welcomed. It is important to note at the outset what this case is not about. It is not about the ability of the school district to take issues regarding race and discrimination seriously or to educate students about those issues. It is not about, as claimed by the dissenters, whether telling employees to “be professional” amounts to a

constitutional injury or whether a school district can enforce “basic expectations of every conversation in our society” without fear of a federal lawsuit. It is also not about whether we believe the views expressed by either party are appropriate or distasteful. It is not about an employer’s ability to confirm employees understand the material being taught. Nor does it turn every personal belief held by an employee or a student that may be at odds with her employer or teacher into a federal cause of action. It is about whether the plaintiffs have proffered sufficient evidence, when viewed in their favor, to show they suffered a concrete and particularized injury by being chilled from speaking during the training or by being compelled to speak due to a credible threat of an adverse consequence by the school district.

Over seventy-five years ago, the Supreme Court noted that one of the functions of free speech is to invite discussion and even dispute. “It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.” Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949).

While schools may speak openly about issues regarding race and discrimination, neither students nor teachers “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969). After all, “the Nation’s future depends upon leaders trained through wide exposure to [a] robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritative selection.” Id. at 512 (cleaned up). At this stage, the Court’s task is not to assess the school district’s teaching methods, analyze the details of the school district’s training, or decide whether the plaintiffs have a meritorious claim because “standing is a ‘threshold inquiry’ that ‘eschews evaluation on the merits.’” City of Clarkson Valley v. Mineta, 495 F.3d 567, 569 (8th Cir. 2007) (quoting McCarney v. Ford Motor Co., 657 F.2d 230, 233 (8th Cir. 1981)).

Standing is an issue that we review *de novo*, Dakotans for Health v. Noem, 52 F.4th 381, 385 (8th Cir. 2022), and the burden rests with the plaintiffs. Animal Legal Def. Fund v. Reynolds, 89 F.4th 1071, 1077 (8th Cir. 2024). To have standing, a plaintiff must show three elements: (1) she suffered an injury in fact, (2) that is fairly traceable to the defendant, and (3) is likely redressable by a favorable decision by the court. Spokeo, Inc. v. Robins, 578 U.S. 330, 338 (2016). At this stage, we accept as true the evidence in the record detailing the “specific facts” supporting a plaintiff’s claim when assessing whether a plaintiff has demonstrated standing. Lujan v. Defs. of Wildlife, 504 U.S. 555, 561 (1992).

Article III standing presents a question of justiciability and must be decided first. Miller v. Redwood Toxicology Lab’y, Inc., 688 F.3d 928, 934 (8th Cir. 2012). Unlike in the Court’s recent decision in Huber v. Westar Foods, Inc., 139 F.4th 615 (8th Cir. 2025) (en banc), where the issue before us was whether summary judgment was appropriate, if a plaintiff lacks standing to pursue a claim, there is no subject matter jurisdiction over the claim. *Id.* Because jurisdiction is always the “first and fundamental question,” we are required to address the issue of standing. Franklin for Estates of Franklin v. Peterson, 878 F.3d 631, 635 (8th Cir. 2017) (citation omitted).

As to the first element, the Supreme Court has defined an injury in fact as “‘an invasion of a legally protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.’” Spokeo, 578 U.S. at 339 (quoting Lujan, 504 U.S. at 560). An injury is particularized if it affects the plaintiff in a “personal and individual way,” *id.*, and concrete if it has “a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts”—such as physical harm, monetary harm, a harm specified by the Constitution, and intangible harms including reputational harm, disclosure of private information, and intrusion upon seclusion. TransUnion LLC v. Ramirez, 594 U.S. 413, 425 (2021).

Whether a plaintiff has shown an injury in fact “often turns on the nature and source of the claim asserted, though it is important not to conflate Article III’s requirement of injury in fact with whether a plaintiff has stated a cause of action because the concepts are not coextensive.” Pratt v. Helms, 73 F.4th 592, 594 (8th Cir. 2023) (citing Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 591 (8th Cir. 2009)). While this Court has sometimes described the standing inquiry as more lenient and forgiving in the context of First Amendment claims, see e.g., GLBT Youth in Iowa Schs. Task Force v. Reynolds, 114 F.4th 660, 667 (8th Cir. 2024); Dakotans for Health, 52 F.4th at 386, we do not resolve or debate the correctness of the Court’s precedent because there is no need to apply a more lenient standard in this case. Because the record contains specific facts supported by evidence showing the plaintiffs were subjected to a credible threat of adverse consequences by the school district (which was more than minimal or wholly subjective) if they opposed the school district’s views on racism, their showing is sufficient to confer Article III standing.

1. Chilled Speech

Notwithstanding the difficulties posed by chilled speech claims, this Court has recognized that chilled speech can give rise to a constitutional injury. Rodgers v. Bryant, 942 F.3d 451, 455 (8th Cir. 2019). Other courts have noted “the inherent difficulty of showing an injury-in-fact on a chilled speech claim, because such injuries are, by definition, inchoate: the speech has not yet occurred and might never occur[.]” See, e.g., Rio Grande Found. v. Oliver, 57 F.4th 1147, 1160 (10th Cir. 2023) (cleaned up). Self-censorship is sufficient to give rise to an injury in fact if the plaintiff shows: (1) an intention to engage in conduct arguably implicating a constitutional interest, and (2) the existence of a credible threat of an adverse consequence. Rodgers, 942 F.3d at 455 (quoting 281 Care Comm. v. Arneson, 638 F.3d 621, 627 (8th Cir. 2011)). It is the “‘chilling effect’ [that] can create standing.” Id. (quoting 281 Care Comm., 742 F.3d at 627-28).

In First Amendment claims, one type of injury that confers Article III standing occurs when “a plaintiff is chilled from exercising her right to free expression or foregoes expression in order to avoid enforcement consequences.” Mangual v. Rotger-Sabat, 317 F.3d 45, 57 (5th Cir. 2003) (quotation and citation omitted); see Kilborn v. Amiridis, 131 F.4th 550, 565 (7th Cir. 2025) (stating Article III injury exists if there is an objectively reasonable chilling effect on the plaintiff’s speech and she self-censors as a result). The inquiry is whether the government official’s conduct would cause a person of “ordinary firmness” to self-censor. Naucke v. City of Park Hills, 284 F.3d 923, 928 (8th Cir. 2002) (citations omitted).

Here, as noted by the dissenters, the plaintiffs, at times, expressed views and beliefs that did not align with the school district’s teachings during the training program. But that is only part of what happened. The school district’s response to those views and the plaintiffs’ reaction is not to be ignored. The record contains evidence indicating the plaintiffs stopped voicing their opinions and self-censored when it became apparent that their opposing views were considered unacceptable by the school district and were not only being rejected by the trainers but met with hostility from the trainers, who were employed by the school district. The plaintiffs self-censored to avoid negative consequences that the school district itself repeatedly said it would impose—the employee would be asked to leave the training; the employee would not receive credit; and Henderson and Lumley understood that if this happened, their pay would be docked because completion of the training was mandatory. The specific consequences identified by the school district for not agreeing with the school district’s views on being an anti-racist educator caused an objectively reasonable chilling effect on the plaintiffs’ speech.

Henderson identified an additional negative consequence, which is also in the record. She feared that if she continued to express her views, she would be written up or terminated by the school district. Henderson further explained: “I felt like we weren’t safe to give our opinion or we would be removed from the district.”

The plaintiffs have shown the presence of a threat in this case that is more than subjective fear. The dissenters' conclusion that the plaintiffs failed to show a credible threat is belied by the evidence in the record. Unlike in Naucke, the potential consequences for school district employees to express their views at the training went beyond merely being subjected to harassing or unprofessional comments from government officials. See 284 F.3d at 928 (determining “offensive, unprofessional and inappropriate” harassing comments from government officials were not, as a matter of law, sufficient to objectively deter someone from speaking). The adverse consequences identified by the school district, which included being removed from the training program and not getting paid, for speaking out against the school district's views gave the plaintiffs an objectively reasonable basis for self-censoring.

On these facts, it is of little consequence that ultimately no one was forced to leave the training, and the school district did not reduce anyone's pay because a plaintiff is not required to first suffer a consequence before she may bring a claim. See Speech First, Inc. v. Schlissel, 939 F.3d 756, 764 (6th Cir. 2019) (“Even if an official lacks actual power to punish, the threat of punishment from a public official who *appears* to have punitive authority can be enough to produce an objective chill.”); Kilborn, 131 F.4th at 565 (refraining from using relevant cases in class out of fear that they may be too racially charged and violate the school's nondiscrimination policy is enough for the professor to establish an injury in fact). This makes logical sense as the harm is in the suppression of the speech itself, and one is not subjected to punishment for self-censorship.

This case also does not involve the type of speculative fear of punishment that this Court found insufficient to constitute an injury in fact in Zanders v. Swanson, 573 F.3d 591, 594 (8th Cir. 2009). The plaintiffs in Zanders claimed their right to make truthful, or not knowingly false, claims of police misconduct were chilled by a statute making it a crime to knowingly file a false report of police misconduct. Id. While recognizing that general factual allegations of injury could be sufficient to establish standing, because the statute did not punish the type of speech the plaintiffs

claimed was chilled, and the possibility that law enforcement might manipulate the statute was too speculative, the Court found the plaintiffs lacked standing. *Id.* Here, the plaintiffs wanted to speak out against the views expressed during the training program, but the evidence shows they self-censored based on the school district's warning and environment that were openly hostile to opposing views.

Judge Shepherd acknowledges in his dissent that “[t]he animating principle behind the First Amendment is to ‘preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.’” Lumley and Henderson proffered evidence demonstrating the trainers created an environment where views opposing the school district's teachings were not welcome. Contrary to the dissenters' characterization, the facts establish more than mere disagreement with a viewpoint or the requirement that attendees act professionally. It's about suppression of viewpoints. A court's role at this stage is not to weigh the evidence, approve or disapprove of the contents of the program, or determine the merits of the plaintiffs' claims. The narrow issue before the Court is whether the evidence, when viewed in the plaintiffs' favor, is sufficient to show the plaintiffs self-censored due to an objectively reasonable credible threat of an adverse consequence, which is more than minimal or wholly subjective. The plaintiffs have satisfied this standard. That the school district ultimately did not act on its threat by deciding not to ask anyone to leave the training early or reduce anyone's pay does not obviate the existence of a credible threat. Likewise, the subsequent discontinuation of the training program by the school district does not nullify the plaintiffs' alleged injuries.

Because there is sufficient evidence in the record demonstrating an objectively reasonable chilling effect on speech that would cause a person of ordinary firmness to self-censor, and the plaintiffs did self-censor, the evidence in the record is sufficient to give rise to an injury in fact. The district court erred when it determined otherwise.

2. *Compelled Speech*

The plaintiffs have also alleged that they were injured when they were deprived of their First Amendment right to be free from compelled speech. The doctrine of compelled speech is concerned about “the government putting particular messages in the mouths of private speakers.” Cressman v. Thompson, 798 F.3d 938, 951 (10th Cir. 2015) (quotation marks and citation omitted). The Supreme Court has explained that “the First Amendment does not leave it open to public authorities to compel a person to utter a message with which he does not agree.” Johanns v. Livestock Mktg. Ass’n, 544 U.S. 550, 557 (2005) (quoting West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 634 (1943)).

To state a claim for compelled speech, a plaintiff is required to establish three elements: (1) speech; (2) to which she objects; that is (3) compelled by some governmental action. Cressman, 798 F.3d at 951. The last element—compulsion—requires some punishment or consequence or threat of punishment or consequence to deter the exercise of First Amendment rights, which is more than “minimal” and “wholly subjective.” Semple v. Griswold, 934 F.3d 1134, 1143 (10th Cir. 2019) (citation omitted). Put another way, mere disagreement with a speaker’s views that causes discomfort, angst, or hurt feelings is not enough.

Compelled speech in violation of the First Amendment is an injury in fact. Cressman v. Thompson, 719 F.3d 1139, 1145 (10th Cir. 2013); Jacobs v. Clark Cnty. Sch. Dist., 526 F.3d 419, 426-27 (9th Cir. 2008); see Wooley v. Maynard, 430 U.S. 705, 715 (1977) (compelling speech “invades the sphere of intellect and spirit which it is the purpose of the First Amendment” to protect (cleaned up)).

Some facts supporting a compelled speech injury are like those supporting the chilled speech injury. The plaintiffs have asserted throughout this litigation that they held views and beliefs in opposition to the content of the training. The school district warned them that if they acted “unprofessional”—and the context at the training made it apparent to the plaintiffs that this included expressing views that failed to

conform with the school district's views on equity and diversity—then they would be asked to leave the training, lose the professional development credit, and their pay would be reduced. The evidence in the record, and as detailed in the preceding paragraphs, contains specific facts by way of declarations, deposition testimony, emails, training materials, etc. that show how the school district forced the plaintiffs to accept the school district's views under threat of punishment. A fear of punishment cannot be “wholly subjective” or “not credible” when the school district tells staff that they must complete the training to get paid and publishes a warning that they will be told to leave the training with no credit if they act “unprofessional.” The implications of this were made evident when Henderson or Lumley expressed opposing viewpoints and the trainers made plain that the views contrary to the school district's views were wrong, confused, and unacceptable. Given all these facts, a person in Lumley's and Henderson's position had an objective basis to conclude that continued disagreement with the school district's views could lead the school district to determine they were acting unprofessional with all its attendant consequences.

Henderson has proffered additional evidence supporting her compelled speech claim that is based on the modules she was required to complete. The school district has admitted in this litigation that to move to the next question in the modules, the employee had to select the “correct” answer, which was determined by the school district and pre-programmed by the school district. Henderson submitted detailed facts during the summary judgment proceedings explaining why she disagreed with the school district's “correct” answer as to some of the questions. Nonetheless, it is undisputed that it was impossible for Henderson to complete the module without accepting the school district's view. Henderson contends that this format created by the school district compelled her to agree with the school district's views in violation of the First Amendment.

The evidence in the record, which we must accept as true and view in the plaintiffs' favor, is sufficient to show an injury in fact. See Semple, 934 F.3d at 1143 (explaining that a plaintiff can show government compulsion without identifying a direct threat rising to the level of imprisonment or a fine, but a

discouragement that is minimal and wholly subjective does not impermissibly deter the exercise of a plaintiff's First Amendment rights). The structure of the modules did more than test an employee's understanding of the material. The creation of a format that precluded employees from proceeding to the next question (and completing the module) unless they selected the "correct" answer as deemed by the school district forced acceptance or adoption of the school district's views.

As an alternate basis for its grant of summary judgment, the district court assumed the plaintiffs sufficiently alleged a compelled speech injury and then held that the school district may require this speech as part of the plaintiffs' official duties. When the speech is the product of the employee's official duties, the employee is not speaking as a citizen for First Amendment purposes. Garcetti v. Ceballos, 547 U.S. 410, 421 (2006). The speech at issue must be "ordinarily within the scope of an employee's duties" and not merely concern the employee's official duties. Lane v. Franks, 573 U.S. 228, 240 (2014).

The plaintiffs dispute that the speech required by this training session was pursuant to their official duties. The district court's opinion did not consider whether there were genuine issues of material fact as to whether the speech was pursuant to official duties as opposed to merely concerning their duties. Cf. Garcetti, 547 U.S. at 421 (noting the plaintiff conceded that he wrote the memorandum pursuant to his official duties). There remains an unresolved dispute on the issue of whether the compelled speech, which was part of the training program, was pursuant to the plaintiffs' official duties. "If a district court has not addressed an issue, we ordinarily remand to give that court an opportunity to rule in the first instance." Huizenga v. Indep. Sch. Dist. No. 11, 149 F.4th 990, 999 (8th Cir. 2025). The district court, not this Court, should consider this unresolved disputed issue in the first instance. MPAY Inc. v. Erie Custom Comput. Apps., Inc., 970 F.3d 1010, 1021 (8th Cir. 2020) ("We are a court of appellate review, not of first view." (cleaned up)). Without resolving the disputed issues, the district court's grant of summary judgment on the

compelled speech claim on this basis was inappropriate.⁴ See Yang v. Robert Half Int'l, Inc., 79 F.4th 949, 966 (8th Cir. 2023) (determining a factual dispute rendered summary judgment on the claim improper).

B. Attorney's Fees

After dismissing the action for lack of standing, the district court found that the plaintiffs' claims were frivolous. The court stated the plaintiffs' "total lack of injury . . . may suggest a groundlessness that trivializes the important work of the federal judiciary." The court ultimately awarded the school district attorney's fees in the amount of \$312,869.50.

The Court's decision to hear this case *en banc* undermines the rationale of the district court. Some may consider Article III standing as applied in First Amendment claims, particularly those involving chilled and compelled speech, as complex and evolving. Others might find the issues present in the case well-established and consistent with Supreme Court precedent dating back over 60 years. See Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 67 (1963) (describing how even "informal censorship" can actionably chill speech). As the foregoing discussion demonstrates, the standing issues presented in this case are by no means frivolous or groundless, so we reverse and vacate the district court's award of attorney's fees.

C. Request for Reassignment

The plaintiffs have requested reassignment to a different district judge based on allegations that the judge is hostile to their claims and awarded attorney's fees in an amount more than the school district requested. This Court has explained that

⁴Judge Shepherd's dissent also discusses Garcetti in the context of the plaintiffs' chilled speech claim. The same unresolved factual dispute is present in both contexts and our reasoning for finding the grant of summary judgment inappropriate applies with equal force to the plaintiffs' chilled speech claim.

reassignment is only warranted to avoid a miscarriage of justice. Burton v. Nilkanth Pizza Inc., 20 F.4th 428, 434 (8th Cir. 2021). “Judicial rulings alone almost never constitute a valid basis for a bias or partiality motion, and judicial remarks that are critical or disapproving of, or even hostile to a party, ordinarily do not support a bias or partiality challenge.” Id. (cleaned up). Here, the district court’s rulings and comments are not of such a nature to establish actual bias, nor would they cause a reasonable person to question the judge’s impartiality. We deny the plaintiffs’ request for reassignment to a different district judge.

III. CONCLUSION

For the foregoing reasons, we reverse the district court’s dismissal of the plaintiffs’ claims for lack of standing and remand this case for further proceedings. We also reverse and vacate the district court’s award of attorney’s fees. We decline the plaintiffs’ request to order the case be reassigned to a different district judge.

COLLTON, Chief Judge, with whom LOKEN, SMITH, SHEPHERD, and KELLY, Circuit Judges, join, dissenting.

The issue in this case is not whether the school district’s “equity training” program was inappropriate, misguided, or offensive. That is a policy question for the local school board or other elected body. We were informed at oral argument that the local governance process has worked as it should: employees complained about the training; school board elections resulted in new board membership; and the training program has been discontinued.

The question on this appeal is whether the employees can also make a federal case out of it. To establish a case or controversy in federal court, a plaintiff must establish an injury in fact. A public employee is not injured in a constitutional sense by enduring a two-hour training program with which the employee disagrees. Plaintiffs Henderson and Lumley suffered no tangible harm as a result of the training. They received full pay and professional development credit for attending.

They continued in their employment without incident. Lumley earned a promotion soon thereafter.

In an effort to establish a case or controversy, the plaintiffs advanced various theories of injury. Like the majority here, the employees featured select images from controversial training materials that may inflame the passions of the reader but do not advance the legal inquiry. The district court found the legal arguments frivolous. On appeal, the three-judge panel was more forgiving on sanctions but explained why each theory of injury was wanting. *Henderson v. Springfield R-12 Sch. Dist.*, 116 F.4th 804 (8th Cir. 2024). The majority here understandably does not endorse some of the far-reaching arguments that were advanced by the plaintiffs and rejected by the district court and the panel. The reader is thus referred to the panel opinion for a discussion of those contentions.

The majority seeks refuge in a strained theory that Henderson and Lumley as trainees were allegedly “chilled” from speaking during a portion of the two-hour training program because they were directed at the outset to “Be Professional – Or be Asked to Leave with No Credit.” Both employees spoke up freely in the training and expressed disagreement with the trainers. But the employees claim that after initially engaging in discussion, they declined to speak further because their dissenting views were not accepted by the trainers.

The court’s theory of “chill” founders in part because the record does not support that the district’s directive to “be professional” ever deterred Lumley from speaking. Lumley instead asserts that she refrained from further discussion at the training because she was concerned about how her comments would be received and did not want to experience more rebuttal from fellow trainees and trainers who disagreed with her. But her choice about optimizing peer relations does not show that the school district intimidated her. And a speculative wonder about how the school district would receive her comments is not an allegation of credibly threatened sanctions. *See 281 Care Comm. v. Arneson*, 638 F.3d 621, 627 (8th Cir. 2011). An employee who has not been subjectively chilled by a public official does

not suffer an injury in fact. *Colombo v. O'Connell*, 310 F.3d 115, 117 (2d Cir. 2002) (per curiam); *Spear v. Town of West Hartford*, 954 F.2d 63, 68 (2d Cir. 1992).

The theory also fails because assuming that Henderson (or Lumley), after initially engaging in discussion with the trainers, was subjectively “chilled” from further conversation in the session, the decision to self-censor based on supposed threat of sanctions was not objectively reasonable. *See Zanders v. Swanson*, 573 F.3d 591, 594 (8th Cir. 2009); *Naucke v. City of Park Hills*, 284 F.3d 923, 928 (8th Cir. 2002). An employer may direct its employees to “be professional” without causing constitutional injury. A reasonable employee would not construe a requirement of professionalism to forbid a civil discussion or debate about training materials with which the employee disagrees. Henderson and Lumley engaged in such a discussion without any retribution from the employer, either during or after the training. There is no evidence that the trainers, in response to Henderson’s remarks, threatened that she would be written up or terminated for continuing to express disagreement.

The majority also opines that the school district “compelled” speech from Henderson and Lumley, but this theory fails for similar reasons. Lumley does not identify any speech that was allegedly compelled. Henderson claims that her speech was compelled in certain instances because she was required to “be professional.” But any fear that she would be punished as unprofessional for stating her views is speculative and insufficient. *See Semple v. Griswold*, 934 F.3d 1134, 1143 (10th Cir. 2019).

The majority finally discerns injury on a separate claim based on the requirement that Henderson complete online training modules. To receive credit for completing the modules, Henderson eventually had to select the “correct” answers to multiple-choice questions if her first selections were deemed “incorrect.” Henderson contends that she was compelled to speak when she selected answers that she thought the school district would prefer, rather than answers that she preferred.

In this type of training module, as the district court explained, an employee’s “selection of credited responses on an online multiple-choice question reflects at most a belief about how to identify the question’s credited response.” The majority cites no authority holding that simply requiring a public employee to demonstrate verbally an understanding of the employer’s training materials inflicts an injury under the First Amendment. See *Altman v. Minn. Dep’t of Corr.*, 251 F.3d 1199, 1203 (8th Cir. 2001) (“[A] public employer may decide to train its employees, it may establish the parameters of that training, and it may require employees to participate.”); cf. *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 908 (2018) (“Of course, if the speech in question is part of an employee’s official duties, the employer may insist that the employee deliver any lawful message.”). Acceptance of this novel theory will make it impractical for public employers to test employees on their knowledge of organization policy without facing lawsuits for supposedly compelling employee speech.

A public employer is entitled to maintain policies with which some employees disagree. An employer does not injure an employee by failing to “welcome” opposition to its policies when, as here, the employee does not face a credible threat of adverse consequences for expressing disagreement. A public school, for example, may train its teachers to lead the Pledge of Allegiance before class. The school is not required to welcome the views of a teacher who complains that the Pledge amounts to unconstitutional religious indoctrination. The school may, without causing injury, reiterate its policy that the Pledge is constitutional, patriotic, and proper. Or a public employer may train its employees that subordinates may not be used for personal business. The employer is not required to acknowledge merit in the views of an employee who thinks it proper to use staff for private errands, and the employer may restate its policy that public employees must be assigned exclusively to public business. An employer does not cause Article III injury by declining to acquiesce in the contrary views of dissenting employees.

The majority’s conclusion portends a host of litigation over public employee training. If the next “equity training” program proceeds from a color-blind

perspective in the tradition of Justice Harlan’s famous dissent, and requires trainees to be professional, then the silent employee who favors modern-day diversity, equity, and inclusion will have standing to sue the school district for violations of the First Amendment. Or if a public employer trains its employees about patriotism and the sacred and cherished symbol of the American flag, and requires trainees to be professional, then the silent employee who favors flag burning as a means of protest will have standing to sue the employer for violations of the First Amendment. If it is apparent that the employer considers racial preferences or flag desecration to be unacceptable, then the court authorizes litigation by dissenting employees who claim to have “self-censored” during a training session.

Public employee training will now be fraught with uncertainty. An employer who trains on any subject from any point of view, while requiring employees to be professional, is subject to a federal lawsuit by an employee who disagrees with the training and keeps quiet. Only time will tell how the court elects to manage this new font of litigation. If the court’s opinion turns out merely to reflect disapproval of one tendentious training program that judges dislike, then the decision might be good for this day and this ship only. But if the court is true to its word, then the floodgates are open.

For these reasons, I would reinstate the panel decision to resolve the appeal.

SHEPHERD, Circuit Judge, with whom LOKEN and KELLY, Circuit Judges, join, dissenting.

I fully concur in Chief Judge Colloton’s dissenting opinion. I write separately to underscore the failure of the plaintiffs’ complaint to allege an injury sufficient to establish standing. The question before the Court is whether the plaintiffs can point to a genuine dispute of material fact as to whether they suffered an Article III injury-in-fact. Self-censorship and compelled speech qualify as such only when a person is chilled from speaking or compelled to speak by “a credible threat of an adverse consequence.” See ante, at 15 (citing Rodgers v. Bryant, 942 F.3d 451, 455 (8th Cir.

2019)); ante, at 19 (citing Semple v. Griswold, 934 F.3d 1134, 1143 (10th Cir. 2019) (requiring a consequence or threat that is more than “minimal” or “wholly subjective”)). The presence of such a threat is critical, as any self-censorship or submission to compulsion “must be objectively reasonable.” See Zanders v. Swanson, 573 F.3d 591, 594 (8th Cir. 2009); Semple, 934 F.3d at 1143 (noting that “wholly subjective” fears are insufficient). The plaintiffs do not meet this standard.

As in business and government organizations the nation over, the plaintiffs, employees of the school district, participated in mandatory training. The majority states that during the training the plaintiffs were “forced . . . to accept the school district’s views under threat of punishment.” Ante, at 20. The record contains no such evidence. While the district did caution that failure to *complete* the training would result in loss of credit, that statement does not contain even a hint that dissenting views might be punished. The closest the majority gets is a line from Henderson’s deposition where she said she was told “[she] had to agree or [she] would lose credit.” That line does not provide the support the majority claims for multiple, independent reasons. First, only Henderson stated as much, so the statement could have no impact on Lumley’s decision to speak or not. Second, the plaintiffs *never* identified this purported threat in moving for summary judgment, resisting summary judgment, or on appeal. It is not the Court’s role to identify facts in support of an argument. Even apart from the local rules requiring litigants to identify material facts, see W.D. Mo. L. R. 56.1, principles of party presentation mandate that courts take the arguments and facts as they are presented, see United States v. Sineneng-Smith, 590 U.S. 371, 375 (2020). The parties are the ones “responsible for advancing the facts and arguments entitling them to relief,” not the Court. Castro v. United States, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in judgment).

Henderson claims that she was told she “had to agree” during the training’s introduction. But all parties agree what that introduction actually included: general directions to “give [the] trainers your full attention” and statements that the school district endorsed the views expressed in the training. There is nothing in the

introductory script supporting Henderson’s claim, nor is it even clear what Henderson purportedly “had to agree” with. We are not required to accept as true a claim so “blatantly contradicted by the record . . . that no reasonable jury could believe it,” particularly where the non-moving party did not even advance such a claim. See Scott v. Harris, 550 U.S. 372, 380 (2007). Context is key, and we cannot pull a lone, unsupported statement from the context in which it was made.

What the record does show is that the plaintiffs were told to “[s]tay [e]ngaged,” “[l]ean into [their] discomfort,” “[a]cknowledge [their] privileges,” give the trainers their “complete attention and respect,” and “[b]e [p]rofessional.” These directions are neither explicit warnings nor implicit threats. Most are basic expectations of every conversation in our society. And there is no evidence—zero—that the school district *ever* used these rules to dock pay from or exclude participants who voiced dissenting views. True, the plaintiffs need not have actually suffered consequences to bring a claim. See ante, at 14-15. But the fact that nobody was ever dismissed from the training, docked pay, or stripped of development credit severely undermines the argument that they faced any “credible threat” of adverse consequences. See Zanders, 573 F.3d at 594; Republican Party of Minn., Third Cong. Dist. v. Klobuchar, 381 F.3d 785, 793 (8th Cir. 2004) (concluding that plaintiff was not “subject to ‘a credible threat of prosecution’” under a statute that did not proscribe plaintiff’s intended conduct (citation omitted)); cf. Telescope Media Grp. v. Lucero, 936 F.3d 740, 750 (8th Cir. 2019) (concluding plaintiffs challenging a statute that arguably compelled their speech were subject to a credible threat of enforcement where state officials had “already pursued a successful enforcement action” against similar entities).

After being directed to stay engaged and be professional, both Lumley and Henderson “participated in the discussion[s] by sharing [their] beliefs.” While both plaintiffs eventually stopped voicing their opinions, neither Henderson nor Lumley did so because of any perceived threat *from the school district*. See Naucke v. City of Park Hills, 284 F.3d 923, 927-28 (8th Cir. 2002) (noting that a First Amendment retaliation claim requires adverse action *from a government official*); Kilborn v.

Amiridis, 131 F.4th 550, 565 (7th Cir. 2025) (reiterating that any “chilling effect” must be “caused by the [government] officials’ conduct” (emphasis added)); Cressman v. Thompson, 798 F.3d 938, 950 (10th Cir. 2015) (describing compelled speech as “the government putting particular messages in the mouths of private speakers” (emphasis added) (citation omitted)). Henderson admits that she declined to share her views further not because of anything the school district did, but because she “feared that debating these issues would polarize [her] *co-workers* and compromise [their] work relationship.” Although Henderson claimed she “feared being written up or terminated,” that purported fear was not tied to anything besides her *subjective and personal* belief that the school district did not share her views, entirely separate and apart from anything the school district indicated. Likewise, Lumley only refrained from continuing to share her views “because [she] did not want to experience any more backlash” from her coworkers. The majority recounts at length how the plaintiffs felt but fails to tie those feelings to an objective threat of adverse consequences from the school district.

The plaintiffs were told that they were “wrong” and “confused” and that they needed to “reflect” on their views. These are not threats. “Mere disagreement” is not enough, as the majority says, even where that disagreement “causes discomfort, angst, or hurt feelings.” Ante, at 19. Litigants must demonstrate an objectively reasonable fear of negative consequences. The plaintiffs’ choices to withhold their views in this case were not based on any objective evidence of reprisal by the school district, and their fears are properly characterized as “wholly subjective.” See Semple, 934 F.3d at 1143 (citation omitted). No matter how negative, personal, or powerful those subjective feelings are, they do not constitute injury-in-fact.

The majority claims the plaintiffs were injured because the school district created an “environment that was openly hostile to [the plaintiffs’] views.” Ante, at 18. But this theory and its application boil down to treating disagreement as injury-in-fact. Although purporting to disclaim that outcome, the majority offers no principled reason why the plaintiffs faced anything other than disagreement. Focusing on the trainers’ conduct, describing the plaintiffs’ views as “wrong” or

“confused” is, by definition, mere disagreement. See Disagree, Merriam-Webster’s Collegiate Dictionary (11th ed. 2020) (“to differ in opinion”). At most, this is an endorsement of a particular viewpoint, something well within the school district’s prerogative. See, e.g., Walls v. Sanders, 144 F.4th 995, 1004 (8th Cir. 2025) (noting that “the government is permitted to engage in viewpoint discrimination when it speaks”). Setting that disagreement to the side—as the majority apparently does—we are left with the (perhaps vitriolic) criticism from the plaintiffs’ fellow attendees. That is not enough to show “a credible threat” of an adverse consequence from the school district. See Rodgers, 942 F.3d at 455. Further, if a contentious environment and disagreement with one’s peers is enough, even those attendees who *agreed* with the training would have standing, as they too were subjected to views with which they disagreed vehemently—those of the plaintiffs themselves. That the majority’s reasoning permits this anomalous result is further proof that the theory should be rejected.

More fundamentally, though, the majority’s theory of standing is ultimately self-defeating. For the plaintiffs’ claims to succeed on the merits, the plaintiffs must have been compelled to speak or chilled from speaking in their personal capacities, i.e., not in the course of their official duties. See, e.g., Garcetti v. Ceballos, 547 U.S. 410, 421 (2006). Assuming the plaintiffs were acting as private citizens during this training, the other attendees were as well. Any disagreement or opposition from the other attendees, then, does not flow from the school district. On the other hand, if their fellow attendees *were* somehow speaking “within the scope of [their] duties,” see Lane v. Franks, 573 U.S. 228, 240 (2014), so too were the plaintiffs, and their claim necessarily fails on the merits. The majority’s reasoning assumes the other attendees were speaking as part of their job duties while simultaneously assuming the plaintiffs were merely present as private citizens. Both assumptions cannot be true. Either the attendees were all speaking as part of their employment with the school district and the plaintiffs’ claims fail on the merits, or all attendees were speaking as private citizens and the plaintiffs lack standing. Because the plaintiffs continue to assert that they attended this training as private citizens, they must lack standing.

The animating principle behind the First Amendment is to “preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.” Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969). The government is free to place its views into that marketplace for consideration, see Pleasant Grove City v. Sumnum, 555 U.S. 460, 467 (2009), as “[i]t is the very business of government to favor and disfavor points of view,” Nat’l Endowment for the Arts v. Finley, 524 U.S. 569, 598 (1998) (Scalia, J., concurring in judgment). As even the majority recognizes, this “high purpose” is often served by creating “condition[s] of unrest, . . . dissatisfaction with conditions as they are, or even stir[ring] people to anger.” Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949). Nothing in the First Amendment prohibits the government from participating in that contentious discourse; it only prohibits “government regulation of private speech.” See Pleasant Grove City, 555 U.S. at 467. But under the majority’s reasoning, the exercise of First Amendment rights is *ipso facto* injury-in-fact; exposure to any differing views suffices to confer standing. So long as someone disagrees with the government’s opinions and is subject to some form of disagreement from another individual, the federal courts are obliged to weigh in. In my view, such reasoning does not find support in the First Amendment. See Terminiello, 337 U.S. at 4 (“[A] function of free speech under our system of government is to invite dispute.”). Instead, the First Amendment creates an open market for new ideas, it does not provide a set of earplugs keeping opposing views from reaching people’s ears.

The majority also suggests that Henderson has adequately shown an injury based on the modules she completed after the training. This holding is untenable. Does every public employee now suffer First Amendment injury if they are required to complete a training module by selecting answers with which they personally disagree? Surely not. See Altman v. Minn. Dep’t of Corr., 251 F.3d 1199, 1203 (8th Cir. 2001). But the majority does nothing to dispel this concern, and, as Chief Judge Colloton demonstrates, such reasoning applies to all sorts of benign scenarios.

Those sharing the plaintiffs’ disapproval of the content of the school district’s employee training should take no satisfaction in today’s decision. Here, the

plaintiffs disagreed with the content of the school district's training. However, with the new school board, next time the training curriculum may change, and the plaintiffs' views may actually be endorsed in the subject matter taught. With the majority's reasoning as authority, the school district may again be hauled into court by employees who merely disagree. Article III standing is, and remains, a mandatory requirement that all plaintiffs must satisfy. The plaintiffs here did not do so, and I would reinstate the panel opinion on that basis. Because the majority forges a different and erroneous path, I respectfully dissent.

EXHIBIT D

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 23-1374

Brooke Henderson and Jennifer Lumley

Appellants

v.

Springfield R-12 School District, et al.

Appellees

Martha Doenning

Yvania Garcia-Pusateri and Lawrence Anderson

Appellees

Americans for Prosperity Foundation, et al.

Amici on Behalf of Appellant(s)

Missouri School Boards' Association

Amicus on Behalf of Appellee(s)

No. 23-1880

Brooke Henderson and Jennifer Lumley

Appellants

v.

Springfield R-12 School District, et al.

Appellees

Martha Doenning

Yvania Garcia-Pusateri and Lawrence Anderson

Appellees

Americans for Prosperity Foundation, et al.

Amici on Behalf of Appellant(s)

Missouri School Boards' Association

Amicus on Behalf of Appellee(s)

Appeal from U.S. District Court for the Western District of Missouri - Springfield
(6:21-cv-03219-MDH)
(6:21-cv-03219-MDH)

ORDER

The petition for rehearing en banc is denied.

March 02, 2026

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Susan E. Bindler