STATE OF NORTH CAROLINA NEW HANOVER COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION FILE NO. 21 CVS 3915
DAVID A. PERRY, Plaintiff, v. NEW HANOVER COUNTY BOARD OF EDUCATION; and NEW HANOVER COUNTY SHERIFF'S OFFICE, Defendants.	**DEFENDANT BOARD'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

Pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, Defendant New Hanover County Board of Education ("Board") offers this memorandum in support of its Motion for Summary Judgment as to all remaining claims.

STATEMENT OF THE CASE

Plaintiff filed this declaratory judgment action in New Hanover County Superior Court on October 14, 2021. The Board was served on or about October 19, 2021. In addition to his petition for declaratory judgment, Plaintiff also sought a preliminary injunction against all defendants. The Board timely filed a Motion to Dismiss the Complaint on October 27, 2021. After full briefing by the parties, the Court issued an order on November 2, 2021, denying Plaintiff's motion for a preliminary injunction and dismissing Plaintiff's official capacity claims against individual board members. The Board filed an Answer on December 17, 2021. Plaintiff filed supplemental pleadings on January 7, 2022. The Board timely filed a motion for summary judgment on February 24, 2022.

STATEMENT OF THE UNDISPUTED MATERIAL FACTS

On April 1, 2020, North Carolina entered a State of Emergency to coordinate the State's response to COVID-19.[1] As part of the Act to Provide Aid to North Carolinians in Response to the Coronavirus Disease 2019 (COVID-19) Crisis, the North Carolina General Assembly modified the rules governing meetings of public bodies.[2] This law, which became effective May 4, 2020, included a provision allowing public bodies, including the Board, to conduct remote meetings while North Carolina remains under a State of Emergency. N.C. Gen. Stat. § 166A-19.24 (Section 4.31 of SL 2020-3). Since that law has come into effect, the Board has utilized the remote meetings provision for many of its meetings. The Board broadcasts all of its meetings, remote and in-person, live on the district's YouTube channel. Stipulations ¶ 9.

When the Board resumed in-person meetings it required all meeting attendees to wear face coverings, although speakers giving public comment were allowed to remove their masks to address the Board. *Id.* ¶ 9, 10. As an additional means of providing public comment, members of the public can email the Board their comments or leave voicemail messages. *Id.* ¶10. The Board consistently enforced the face covering requirement without allowing for any exemptions and asked that members of the public who refused to comply with the requirement be removed or prevented from entering its meetings. *Id.* ¶ 8, 9. As noted above, as an alternative means of viewing its in-person meetings, the Board has livestreamed each of its meetings on the district's YouTube channel. *Id.* ¶ 9.

The Board held its October 5, 2021, meeting in person. *Id.* ¶ 8. Members of the public who refused to comply with the Board's mask mandate were required to leave the meeting. *Id.* The Board's meeting was broadcast on YouTube. *Id.* The Board also met in-person on October 19, 2021; November 9, 2021; and November 15, 2021, while maintaining the face covering requirement for in-person

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[1] *See* Executive Order No. 116, 34 N.C. Reg. 1744-1749 (April 1, 2020).
[2] *See* S.L. 2020-3, SB 704, https://www.ncleg.gov/Sessions/2019/Bills/Senate/PDF/S704v6.pdf.

attendees. *Id.* ¶ 5. At its meeting on December 7, 2021, the Board voted to make face coverings optional at its meetings. *Id.* ¶ 12.

On January 4, 2021, the Board voted 5-2 to reinstate the face covering requirement. *Id.* ¶ 13. Plaintiff attended this meeting in person and presented public comment. Pl.'s Supp. Pleadings ¶ 10. The Board held a special meeting on February 16, 2022, to address the mask mandate. Stipulations ¶ 14. At the meeting, the Board voted unanimously to make face coverings optional effective February 18, 2022. *Id.* Since February 18, 2022, the mask-optional policy has remained in place and the Board is not requiring face coverings at its meetings. Throughout the time period in question, the Board has consistently livestreamed its meetings and provided alternative mechanisms for the public to give comment. *Id.* ¶ 9.

STANDARD OF REVIEW

Summary judgment is proper if the pleadings, depositions, other discovery materials, and any affidavits show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) ("the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment"). In reviewing the record, the Court must draw all inferences in favor of the party opposing summary judgment. *Dash v. Mayweather*, 731 F.3d 303, 310 (4th Cir. 2013); *Haavistola v. Community Fire Co. of Rising Sun*, Inc., 6 F.3d 211, 214 (4th Cir. 1993). The moving party bears the initial burden of identifying "those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). However, in addition to presenting evidence affirmatively on a material issue, the movant may also satisfy this burden by pointing out an "an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325.

Once the moving party has met this burden, the non-moving party cannot simply rest on the allegations of the pleadings; rather, the non-movant "must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256; *see also Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986). A scintilla of evidence, merely colorable evidence, unsupported speculation, or building one inference on another is not enough to defeat a summary judgment motion. *Dash*, 731 F.3d at 311 ("Although the court must draw all justifiable inferences in favor of the nonmoving party, the nonmoving party must rely on more than conclusory allegations, mere speculation, the building of one inference upon another, or the mere existence of a scintilla of evidence."); *Ennis v. National Ass'n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55, 62 (4th Cir. 1995); *Nguyen v. CNA Corp.*, 44 F.3d 234, 237 (4th Cir. 1995). "The nonmoving party may not rely on beliefs, conjecture, speculation, or conclusory allegations to defeat a motion for summary judgment." *Coleman v. United States*, 369 F. App'x 459, 461 (4th Cir. 2010). "[T]his standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson*, 477 U.S. at 247–49. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 587 (internal citation omitted).

ARGUMENT

I. PLAINTIFF'S OPEN MEETINGS LAW CLAIM IS SUBJECT TO DISMISSAL.

A. The Board took reasonable measures to provide for public access to its meetings.

Plaintiff argues that the Board violated the Open Meetings Law by requiring members of the public to wear face coverings in order to attend meetings in person. Under the Open Meetings Law, the Board is required "to take reasonable measures to provide for public access to its meetings." *Garlock v. Wake Cnty. Bd. of Educ.*, 211 N.C. App. 200, 174, 712 S.E.2d 158, 223 (2011) (internal

quotations omitted). Plaintiff further contends that it is both his preference not to wear a mask, and that an undisclosed medical condition prevents him from wearing a face covering, and that he was stopped from entering a meeting because he was not wearing a mask.

In *Garlock*, the controlling case on this issue, the North Carolina Court of Appeals considered whether school board meetings were "open to the public" when attendees were excluded from the meeting because the room was at legal capacity. *Id.* The board provided an overflow room where the meeting was livestreamed, streamed the meeting online, and created a process whereby members of the public could obtain tickets to attend in the main room. *Garlock*, 211 N.C. App. at 201-02. Plaintiffs argued that the "exclusion of even one person from a meeting" could constitute a violation of the Open Meetings Law. *Id.* at 217-18. The court disagreed, holding that the test for compliance with the Open Meetings Law is not whether any person was excluded from a meeting, but whether the board took "reasonable measures to provide for public access to its meetings." *Id.* at 223. In determining whether reasonable measures were taken, courts consider various factors, including "notice for meetings, distribution of agendas, preparation and availability of minutes of meetings, location and characteristics of the meeting place, recordation of minutes, and the like." *Id.* at 217 (internal citation omitted).

Therefore, what is "reasonable" is dependent on the circumstances. The *Garlock* court concluded that the school board failed to take reasonable measures to provide access to the public when it held the meeting in a smaller room when a larger room in the same building was available, for the sole reason that the smaller room was more convenient to the board. *Id.* at 226-27. According to the court, "as there was a larger room immediately available in the same building, [ ] a last-minute change in the location of the [board] meeting would not violate the statutory notice requirements as to the location of the meeting." *Id.* at 227. The court also held that while a ticketing system with advanced notice is reasonable even where not all members of the public will receive a ticket, on the facts the

board's ticketing system was unreasonable because the board did not provide sufficient notice of the process to the public. *Id.* at 226–27.

Under the framework set forth in *Garlock*, the Board here has taken reasonable measures to provide for public access by (1) allowing the public to attend meetings while wearing face coverings; (2) allowing members of the public to remove their masks when providing comment; (3) livestreaming meetings on YouTube; and (4) providing alternatives to giving comment in person, including voicemails, electronic comments, and email. The Board has consistently provided proper notice of meetings and locations (both in-person and virtual), and makes agendas and minutes available on its website. Plaintiff does not allege otherwise. Considering the context of the COVID-19 pandemic, the State of Emergency, and local orders addressing the safety of public gatherings, the Board's policy reasonably allowed access to meetings while also accounting for the public health. The exclusion of Plaintiff because he did not comply with the mask requirement does not equate to a violation of the Open Meetings Law. *See id.* at 223.

Furthermore, Plaintiff's contention that the board's lack of exemptions for individuals with medical conditions that prevent mask-wearing is a violation of the Open Meetings Law fails under *Garlock*. The *Garlock* court explicitly held "that The Open Meetings Law does not include any provision regarding accommodation at public meetings of a disabled member of the public as opposed to a non-disabled member of the public. For purposes of the Open Meetings Law, all members of the public are treated the same." *Id.* at 228. Although, as recognized in *Garlock*, there may be other laws governing access for people with disabilities, Plaintiff does not allege violations of other such laws, and likely would not be able to maintain such a claim on the facts presented. *See id.*

B. The Board was not required to provide a physical location for the public to listen to electronic meetings.

Plaintiff further complains that the Board violated the Open Meetings Law by not providing a physical location for the public to listen to its electronic meeting on August 3, 2021. Given the context of the State of Emergency due to the COVID-19 pandemic, the Board is not required by the Open Meetings Law to hold in-person meetings, much less in-person meetings with unmasked attendees. *See* N.C. Gen. Stat. § 166A-19.24. The August 3, 2021, meeting was held in accordance with the remote meetings law, which permits public bodies to conduct remote meetings upon a declaration of emergency. *Id.* Plaintiff does not contest the fact that North Carolina has been in a State of Emergency since April 1, 2020, nor does Plaintiff provide any facts to indicate that the remote meeting did not follow the requirements of the statute. That statutory provision does not require that a physical location be provided; in fact, providing such would contravene the purpose of the remote meetings. The remote meetings law is clear that "[c]ompliance . . . establishes a presumption that a remote meeting is open to the public". *Id.*

Furthermore, the Open Meetings Law expressly permits the Board to hold "an official meeting by use of conference telephone or other electronic means," provided that the Board "shall provide a location and means whereby members of the public may listen to the meeting and the notice of the meeting required by this Article shall specify that location." N.C. Gen. Stat. § 143-318.13(a). Indeed, even if the remote meetings law were not to apply, the Board has provided "a location and means" for the public to listen and view its meetings live: the District's YouTube page. The statute does not require the Board to provide a physical, in-person location for the electronic meeting. To the extent that Plaintiff argues that the Board is required to provide an additional in-person location from which to livestream the meeting for those who will not or cannot wear masks, this is not supported by the statute and the fact that the Board is offering meetings in person.

B. Plaintiff's request that this Court vacate the Board's actions is overbroad and unnecessary.

Plaintiff asks this Court to declare any and all actions taken by the Board within the 45 days prior to the filing of his Complaint. Even if Plaintiff could somehow demonstrate that the Board had violated the Open Meetings Law, which it has not, vacating all the Board's actions would be unnecessary and overbroad. The Open Meetings Law sets forth factors for the Court's consideration when this remedy is sought:

> (1) The extent to which the violation affected the substance of the challenged action;
> (2) The extent to which the violation thwarted or impaired access to meetings or proceedings that the public had a right to attend;
> (3) The extent to which the violation prevented or impaired public knowledge or understanding of the people's business;
> (4) Whether the violation was an isolated occurrence, or was a part of a continuing pattern of violations of this Article by the public body;
> (5) The extent to which persons relied upon the validity of the challenged action, and the effect on such persons of declaring the challenged action void;
> (6) Whether the violation was committed in bad faith for the purpose of evading or subverting the public policy embodied in this Article.

N.C. Gen. Stat. § 143-318.16A(c). The statute further provides that a court may enter a declaratory judgment as an alternative or in addition to an injunction. *Id.* § 143-318.16A(d). In *Garlock*, although the court found that the school board engaged in multiple violations of the Open Meetings Law, it concluded that the factors weighed heavily in the board's favor and found no basis for invalidating the board's actions. *Garlock*, 211 N.C. App. at 232–33.

The same rationale would apply here. There is no evidence to suggest that had the Board operated the meetings differently, its decisions at those meetings would have differed. The Board considered data regarding COVID-19 at each meeting and received public comment through various mediums. In fact, even where Plaintiff did attend a meeting in person and spoke during public comment, the Board voted to reinstate the mask mandate. Thus, there is no indication that the Board's decisions would have differed had Plaintiff attended prior meetings in person. Additionally, even if

this Court were to find that access was impaired—which it was not—Plaintiff still had the opportunity to watch meetings virtually and provide comment online or through voicemail, which lessens the impact restrictions. In the same vein, because members of the public could access and engage in meetings through these alternative forums, and agendas and minutes were provided online, public knowledge was not impaired.

The final three factors also weigh in the Board's favor. Plaintiff's challenge is limited to the Board's actions over a brief period of time in the context of a global pandemic, and, subject to circumstances outside of the Board's control, there is no suggestion that the Board will continuously implement such measures in the future. Although Plaintiff and other individuals certainly relied on the Board's decisions at these meetings, declaring them void at this point would have no effect, as the policies are no longer in place and there is no actual way to undo the past requirements that masks be worn on school system property. Finally, Plaintiff does not allege, and the Board denies, that the decisions to require face coverings were made in bad faith. To the contrary, the Board took the issue very seriously and revisited the requirement on a monthly basis, considering scores of data from health officials and receiving comment from the public. Accordingly, Plaintiff has not provided any reason as to why the facts would warrant such a remedy and thus, this claim cannot survive summary judgment.

II. PLAINTIFF'S FIRST AMENDMENT RIGHTS HAVE NOT BEEN VIOLATED.

Plaintiff argues that by enforcing a rule requiring meeting attendees to wear a mask in order to mitigate the spread of Covid-19, the Board has infringed upon his First Amendment rights to assembly and to petition the Board regarding his views on masks and other matters. Plaintiff is incorrect. While Plaintiff has the right to speak his mind as to whether masks should be required at school board meetings, in schools, or elsewhere, the First Amendment does not give him or any other citizen the right to violate those rules in order to protest them. Plaintiff was capable of wearing a mask to school

board meetings to protest the Board's mask requirement just as he did when he was worn a mask for prolonged periods to attend hearings in this case. The First Amendment gives Plaintiff the right to speak in opposition to school system rules but does not give him the right to violate them. That distinction is essential to the rule of law.

To the extent the Board's mask requirement places any limitation on Plaintiff's ability to assemble and petition the Board, the requirement is a reasonable time, place, and manner restriction and must be upheld.

A. The mask requirement did not burden Plaintiff's right to assembly or petition.

Plaintiff's claim that the Board policy violated his First Amendment rights to assembly and petition fails because "[the policy] does not prohibit assemblies [or petition]; rather it places a minor restriction on the way they occur." *Oakes v. Collier Cnty.*, 515 F.Supp.3d 1202, 1215 (M.D. Fla. 2021). While Plaintiff asserts that he was prevented from entering a meeting because he was not wearing a mask, this is insufficient to find that he was prevented from exercising his rights assembly or petition. First, Plaintiff could have worn a mask into the meeting despite his objection to the mask requirement. Second, Plaintiff would have been permitted to remove his mask to give comment in person and he also had an option to provide comment through electronic means. Plaintiff cannot establish that his rights were burdened. *See Desrosiers v. Governor*, 158 N.E.3d 827, 844–47 (Mass. 2020) (holding that the Governor's prohibition of most gatherings of more than ten people was sufficiently narrowly tailored to support the finding that the prohibition did not unconstitutionally burden the right to free assembly where all in-person assembly was not banned and there was an option for virtual assembly).

In the alternative, the Board's mask requirement was a reasonable time, place, and manner restriction on the right to assemble and petition. The Board "may impose reasonable restrictions on the time, place, or manner of [First Amendment expression], provided the restrictions are justified without reference to the content of the regulated [activity], that they are narrowly tailored to serve a

significant government interest, and that they leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

The purpose of mask requirement is unrelated to Plaintiff's objection to masks and is content-neutral. *See Ross v. Early*, 746 F.3d 546, 552 (4th Cir. 2014). See *Hill v. Colorado*, 530 U.S. 703, 735-738, 120 S. Ct. 2480, 2500-2501 (2000) ("It is important to recognize that the validity of punishing some expressive conduct, and the permissibility of a time, place, or manner restriction, does not depend on showing that the particular behavior or mode of delivery has no association with a particular subject or opinion. Draft card burners disapprove of the draft, . . . and abortion protesters believe abortion is morally wrong. . . . There is always a correlation with subject and viewpoint when the law regulates conduct that has become the signature of one side of a controversy. But that does not mean that every regulation of such distinctive behavior is content based as First Amendment doctrine employs that term.").

The policy promotes a substantial government interest in protecting the health of meeting attendees, particularly in the context of a global pandemic, and should be upheld. *See S. Bay United Pentecostal Church v. Newson*, 140 S. Ct. 1613, 1613 (2020) ("Our Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States to guard and protect . . . When those officials undertake to act in areas fraught with medical and scientific uncertainties, their latitude must be especially broad." (internal quotations omitted)). Furthermore, the mask requirement did not burden substantially more of Plaintiff's right than necessary to further the interest. *Clark v. Comm. for Creative Non-Violence*, 468 U.S. 288, 294 (1984). *See Givens v. Newsom*, 459 F.Supp.3d 1302, 1313 (E.D. Cal. 2020) ("'Narrow' in the context of a public health crisis is necessarily wider than usual."). Additionally, the Board left open ample alternative channels for communication. Individuals who wanted to give comment in person but did not or could not wear a mask could enter the meeting with a mask on only while walking up to the microphone. Once the individual began speaking, they could remove the mask to give public comment. The individual would

then leave the meeting, wearing a mask during the brief walk to the exit. Plaintiff has not alleged that he would be unable to abide by this policy for the brief period that a mask is required. Additionally, the public could livestream meetings on the District's YouTube channel from any location. Plaintiff has not alleged that he was unable to access the YouTube channel. Finally, the Board offered myriad alternative methods of providing public comment to doing so in person, including emails and voicemails. Plaintiff has not alleged that he was unable to provide comment through these channels. *Ward*, 491 U.S. at 791. Therefore, the policy was a reasonable restriction that should be upheld.

B. The Board policy is neutral and generally applicable; thus, it does not constitute viewpoint discrimination.

The Board implemented a neutral and generally applicable face covering requirement to reduce the transmission of the COVID-19 virus and protect public health. Petitioner suggests that the policy deprives individuals who hold specific viewpoints from attending public meetings. The policy does not distinguish between citizens based on their perspective or intended message. Furthermore, the Board does not have unfettered discretion in enforcing the policy, as there are no exemptions. *See Fulton v. City of Phila.*, 141 S. Ct. 1868, 1878 (2020). While Plaintiff argues that the Board should have provided for exemptions from the policy, it is the very lack of exemptions that makes the policy generally applicable. *Id.* at 1877 ("A law is not generally applicable if it invite[s] the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." (internal quotations omitted)). Indeed, a requirement that *all* attendees wear face coverings is a straightforward example of a viewpoint neutral policy. Although the health policy at issue here happens to be in opposition to a viewpoint held by Plaintiff, "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers of messages but not others." *Ward*, 491 U.S. at 791.

Plaintiff's viewpoint on face coverings is irrelevant to the justification of the Board's policy, which has no basis in speech. To accept Plaintiff's supposition would be to conclude that virtually all policies are content or viewpoint based, simply because someone disagrees. The Supreme Court has addressed this premise, and concluded that the fact that "petitioners all share the same viewpoint [ ] does not in itself demonstrate that some invidious content- or viewpoint-based purpose motivated the order...In short, the fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based." *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994). This is precisely contrary to the argument that Plaintiff asserts in his Complaint. Similarly, the Board policy at issue in this case draws no distinction based on groups and applies for the benefit of all attendees. *See Resurrection Sch. v. Hertel*, 11 F.4th 437, 456 (6th Cir. 2021) ("[B]ecause the requirement to wear a facial covering applied to students in grade K-5 at both religious and non-religious schools, it was neutral and of general applicability.").

CONCLUSION

For the reasons stated above, Defendant respectfully requests that this Court grant its Motion for Summary Judgment as to all of Plaintiff's claims, dismiss all claims against it with prejudice, and grant such other relief as the Court deems just and proper.

Respectfully submitted, this the 17th day of March 2022.

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CERTIFICATE OF SERVICE

I certify that a copy of the attached **MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** was served upon plaintiff this date via electronic mail addressed to:

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This the 17th day of March 2022.

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