

from the public livestream.” *Id.* at ¶ 12. Plaintiff alleges that “[t]he muting occurred precisely as Plaintiff began reporting whistleblower retaliation, threats, and documented misconduct[,]” which is notable given his simultaneous allegation that the audio was cut before he ever said a word. *Id.* at ¶ 15.

Despite the undisputed fact that Plaintiff was not inhibited in any way from addressing CISD’s Board during the meeting, Plaintiff sues CISD under (1) the First Amendment, (2) Article I, Section 8 of the Texas Constitution, and (3) the Texas Open Meetings Act on the grounds that the District’s livestream transmission of the meeting on YouTube did not capture the audio portion of his comments. Dkt. 18 at ¶¶ 35-47. Plaintiff has failed to state a claim for which relief may be granted. There is no affirmative obligation on the government to disseminate a private citizen’s speech beyond the forum where it is expressed. *See Houchins v. KQED, Inc.*, 438 U.S. 1, 15 (1978) (“There is no constitutional right to have access to particular governmental information, or to require openness from the bureaucracy. . . . Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government’s control.”) (citations and quotations omitted). For this reason and the reasons set forth below, all of Plaintiff’s claims should be dismissed pursuant to FRCP 12(b)(6).

Standard of Review

In order to survive a motion to dismiss under Rule 12(b)(6), “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v.*

Twombly, 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.*; see *Walker*, 938 F.3d at 734-35. “A complaint must include more than mere ‘labels and conclusions’ or ‘formulaic recitation[s] of the elements of a cause of action.’” *Kopp v. Klein*, 894 F.3d 214, 218-19 (2018) (quoting *Iqbal*, 556 U.S. at 678). Dismissal is also appropriate if an affirmative defense appears on the face of the complaint. *Alexander v. Verizon Wireless Services, LLC*, 875 F.3d 243, 249 (5th Cir. 2017).

Argument and Authorities

A. Plaintiff’s Claims Against CISD’s Board Members and Superintendent Should Be Dismissed as Redundant to His Claims Against CISD.

Plaintiff sues CISD’s Board members (including its Board President) and its Superintendent in their official capacities based on the same facts alleged against CISD and asserting the same claims against CISD. Plaintiff’s claims against CISD’s Board members and its Superintendent should be dismissed as redundant to his claims against CISD.

Official-capacity claims “generally represent only another way of pleading an action against an entity of which an officer is an agent.” *Kentucky v. Graham*, 473 U.S. 159, 165 (1985) (quoting *Monell v. New York City Dep’t of Soc. Servs.*, 436 U.S. 658, 690 n.55 (1978)). The claim is treated as one against the entity, which is the real party-in-interest. *Graham*, 473 U.S. at 166. When a government-official defendant is sued in his official capacity, and the governmental entity is also sued, “[t]he official-capacity claims and the

claims against the governmental entity essentially merge.” *Turner v. Houma Mun. Fire & Police Civil Serv. Bd.*, 229 F.3d 478, 485 (5th Cir. 2000).

Accordingly, Plaintiff’s claims against CISD’s Board members and its Superintendent should be dismissed as redundant to his claims against CISD. *See Marceaux v. Lafayette City-Parish Consol. Gov’t*, 614 F. App’x. 705, 706 (5th Cir. 2015) (affirming dismissal of official capacity claims against public officials as redundant to claims against municipality).

B. Plaintiff Fails to Plead the Elements of Municipal Liability to Support his First Amendment Claims.

In his Second Amended Complaint, Plaintiff makes a passing reference to 42 U.S.C. Section 1983 (Dkt 18 at p. 1) but otherwise fails to plead facts underlying the elements of municipal liability to support his First Amendment claims. Municipal liability under Section 1983 requires proof of a policymaker, an official policy, and a violation of constitutional rights whose “moving force” is the policy or custom. *See Rivera v. Houston Indep. Sch. Dist.*, 349 F.3d 244, 247 (5th Cir. 2003) (citations omitted). Plaintiff’s scant allegations are insufficient to establish the elements of municipal liability for the following reasons.

Policymaker

Plaintiff alleges that CISD’s Board of Trustees “is responsible for the operation of the livestream and in-room audio systems.” Dkt. 18 at ¶ 6. Plaintiff also alleges that the Board President “controls the microphone and livestream audio system, and has final authority during public comment periods.” *Id.* at ¶ 8. Finally, Plaintiff alleges that “[b]efore

[he] could say his first word, the Board President looked down, pressed a button on the dais, and Plaintiff’s audio was cut from the public livestream.” *Id.* at ¶ 12.

It is well-settled in the Fifth Circuit that final policymaking authority for a Texas public school district rests with its board of trustees. *See Rivera v. Houston Indep. Sch. Dist.*, 349 F.3d 244, 247 (5th Cir. 2003) (citations omitted). Importantly, Texas law provides that public school boards may only act as a corporate body—acts by individual board members do not constitute acts on behalf of the board:

(a) An independent school district is governed by a board of trustees who, **as a body corporate**, shall: (1) oversee the management of the district; and (2) ensure that the superintendent implements and monitors plans, procedures, programs, and systems to achieve appropriate, clearly defined, and desired results in the major areas of district operations.

(a-1) **Unless authorized by the board, a member of the board may not, individually, act on behalf of the board.** The board of trustees may act only by majority vote of the members present at a meeting held in compliance with Chapter 551, Government Code, at which a quorum of the board is present and voting. The board shall provide the superintendent an opportunity to present at a meeting an oral or written recommendation to the board on any item that is voted on by the board at the meeting.

Tex. Educ. Code § 11.051 (emphasis added). Final policymaking authority can be delegated, but only where the delegate is granted authority for setting the final policy in a given area of the governmental entity’s operation. *See Doe v. Burlison Cty.*, 86 F.4th 172, 176 (5th Cir. 2023).

At most, Plaintiff alleges that CISD’s Board President “controls the microphone and livestream audio system, and has final authority during public comment periods.” Dkt. 18 at ¶ 8. These allegations are insufficient to identify the requisite final policymaking authority to support municipal liability as to CISD. School boards may only act as a body

corporate absent specific board authorization to the contrary regarding a particular area of the school district's operations. Plaintiff's Second Amended Complaint is devoid of these factual allegations and Plaintiff's First Amendment claims should accordingly be dismissed.

Official Policy

The word "policy" appears once in Plaintiff's Second Amended Complaint: "Defendant Board of Trustees of Comal ISD governs district policy, conducts public meetings, and is responsible for the operation of the livestream and in-room audio systems." Dkt. 18 at ¶ 8. The word "custom" does not appear anywhere in Plaintiff's Second Amended Complaint. Plaintiff cannot satisfy his burden of pleading an official policy where he fails to use the words policy (other than once) or custom.

Moreover, Plaintiff's claims hinge on the Board President's act of pressing a button on the dais. As an initial matter, that act—pressing a button on the dais—is not even capable of being the product of final policymaking authority. "Official policy is ordinarily contained in duly promulgated policy statements, ordinances or regulations." *Piotrowski v. City of Houston*, 237 F.3d 567, 579 (5th Cir. 2001). Plaintiff does not plead, and cannot plead, that CISD maintains a policy governing the use of "the button" on the dais. In sum, Plaintiff has failed to plead facts demonstrating a custom or policy supporting municipal liability as to CISD.

Moving Force

Finally, Plaintiff fails to plead facts demonstrating a violation of his constitutional rights whose "moving force" is the policy or custom. As stated above, Plaintiff fails to

plead a policy or custom in the first place. Moreover, Plaintiff does not plead that CISD's Board members collectively decided to cut the audio from the livestream transmission in an effort to quell his comments from the livestream transmission (as his comments were fully audible to the Board members and in-person audience members). This is also fatal to his claim as Plaintiff must plead that a majority of the Board held a retaliatory animus in order to charge the Board with such retaliatory animus and thus establish the "moving force" element of his claim. *See Griggs v. Chikasaw Cty., Miss.*, 930 F.3d 696, 704 (5th Cir. 2019).

C. Plaintiff's Free Speech Claims Under the First Amendment and Article I, Section 8 of the Texas Constitution Must Be Dismissed.

Even if Plaintiff had plead facts supporting the element of municipal liability, which he has not, his claims under the First Amendment and Article I, Section 8 of the Texas Constitution should still be dismissed. Three principles of free speech rights are relevant to this inquiry. First, the essence of First Amendment viewpoint discrimination is that the government may not discriminate against speech based on the ideas or opinions it conveys. *See Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829–830 (1995). Second, a prior restraint is an order "forbidding certain communications when issued in advance of the time that such communications are to occur." *Alexander v. U.S.*, 509 U.S. 544, 550 (1993) (quotations omitted). Third, in order for speech to be protected under the First Amendment, it must involve a matter of public concern. *See Chiu v. Plano Indep. Sch. Dist.*, 260 F.3d 330, 344 (5th Cir. 2001).

Plaintiff's viewpoint discrimination claim is fundamentally flawed as it is undisputed that Plaintiff freely spoke to CISD's Board during the meeting in question without any interruptions whatsoever by CISD. Plaintiff does not allege, and cannot allege, that CISD prevented him from speaking to that governmental body, much less doing so because of the content of his comments. Instead, Plaintiff claims that CISD failed to separately broadcast his comments to anyone who may have been viewing the livestream via YouTube. That's not viewpoint discrimination. While Plaintiff had the right to address CISD's Board during the public comment portion of the meeting, CISD was under no constitutional obligation to amplify, broadcast, or disseminate Plaintiff's speech through social media or any other broadcasting platform. *See Houchins v. KQED, Inc.*, 438 U.S. 1, 15 (1978) ("There is no constitutional right to have access to particular governmental information, or to require openness from the bureaucracy. . . . Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control.") (citations and quotations omitted).

Plaintiff's prior restraint claim fails for the same reasons. Plaintiff does not plead, and cannot plead, that CISD's Board of Trustees issued an edict in advance of the Board meeting at issue prohibiting Plaintiff from speaking at the meeting. Of course, Plaintiff readily admits that he spoke freely at the meeting and makes it a point to inform the Court that he presented to CISD's Board "[f]or twelve consecutive months[.]" Dkt. 18 at ¶ 9. Plaintiff's allegations demonstrate the antithesis of prior restraint.

Finally, Plaintiff has not plead facts demonstrating that his comments during the meeting in question involved matters of public concerns protected by the First Amendment. At most, Plaintiff alleges that he “began reporting whistleblower retaliation, threats, and documented misconduct.” Dkt. 18 at ¶ 16. Such conclusory allegations do not constitute facts demonstrating that Plaintiff’s message involved a matter of public concern.¹

D. Plaintiff’s Petition Claims Under the First Amendment and Article I, Section 8 of the Texas Constitution Must Be Dismissed.

Plaintiff alleges the following as “Count Three” of his Complaint: “Plaintiff was petitioning the government for redress of grievances. Defendants cannot silence citizens who report government wrongdoing.” Dkt. 18 at ¶¶ 43-44. It is apparent that Plaintiff’s petition clause claim is redundant to his free speech claims and should be dismissed for the same reasons. CISD addresses the claim out of an abundance of caution.

The First Amendment provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. Const. amend I. In order to invoke the protections of the Petition Clause, the contents of the individual’s petition must involve a matter of public concern. *See Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 398-99 (2011).

¹ The dismissal of Plaintiff’s First Amendment claims compels the dismissal of his claims brought under the freedom of speech provision set forth in the Texas Constitution, article I, sec. 8. *See Operation Rescue Nat’l v. Planned Parenthood of Houston and Southeast, Texas, Inc.*, 975 S.W.2d 546, 559-60 (Tex. 1998).

The Texas Constitution provides that “citizens shall have the right . . . [to] apply to those invested with the powers of government for redress of grievances or other purposes, by petition, address[,] or remonstrance.” Tex. Const. art. I, § 27. The powers of government have an obligation to “stop, look[,] and listen” and must “consider the petition, address[,] or remonstrance,” but there is “no requirement that those trusted with the powers of government must negotiate or even respond to complaints filed by those being governed.” *Pro. Ass’n of Coll. Educators v. El Paso Cnty. Cmty. Dist.*, 678 S.W.2d 94, 96 (Tex. App.—El Paso 1984, writ ref’d n.r.e.); see *Corpus Christi Indep. Sch. Dist. v. Padilla*, 709 S.W.2d 700, 704 (Tex. App.—Corpus Christi-Edinburg 1986, no writ). Simply allowing the opportunity to approach the entity with a grievance is sufficient. See *Padilla*, 709 S.W.2d at 703-05 (holding that school board’s open forum part of meeting provided sufficient opportunity to address government under Article I, Section 27).

Plaintiff’s petition claim must be dismissed for two reasons. First, Plaintiff admits that he addressed CISD’s Board of Trustees during the public meeting in question and that the Board heard his comments. The Petition Clause in the state and federal constitutions do not provide Plaintiff with any additional rights other than to be heard by the government, and Plaintiff’s claim should accordingly be dismissed. Particularly, the Petition Clause does not obligate the government to broadcast a petitioner’s message to the public via the Internet. Second, Plaintiff fails to plead that his comments involved a matter of public concern. At most, Plaintiff alleges that he “began reporting whistleblower retaliation, threats, and documented misconduct.” Dkt. 18 at ¶ 16. Such conclusory allegations do not constitute facts demonstrating that Plaintiff’s message involved a matter of public concern.

E. Plaintiff's Texas Open Meetings Act Claim is Frivolous.

Plaintiff alleges that CISD violated the Texas Open Meetings Act (“TOMA”) but does not bother pleading the statutory provision CISD purportedly violated. The entirety of Plaintiff’s claim in this regard is as follows:

The Texas Open Meetings Act requires truthful and complete public access to public comments rendered at official meetings. By muting Plaintiff’s audio on the livestream while allowing in-room audio, CISD materially altered the public record in violation of TOMA’s transparency requirement. The livestream is the public’s primary method of attending meetings, and muting it constitutes concealment of public testimony.

Dkt. 18 at ¶¶ 29-31.

Plaintiff’s TOMA claim is frivolous for at least four independent reasons. First, Plaintiff’s representation of TOMA is false. Plaintiff fails to identify any TOMA provision that supports his representation as to what the statute requires, which is not surprising since there are no such provisions. Second, the “public testimony” portion of the statute provides in pertinent part:

(b) A governmental body shall allow each member of the public who desires to address the body regarding an item on an agenda for an open meeting of the body to address the body regarding the item at the meeting before or during the body’s consideration of the item.

(c) A governmental body may adopt reasonable rules regarding the public’s right to address the body under this section, including rules that limit the total amount of time that a member of the public may address the body on a given item.

Tex. Gov’t Code § 551.007(b), (c). Nothing in this statutory provision relates to Plaintiff’s allegations against CISD except for the fact that CISD permitted Plaintiff to address the Board during the meeting in question, which shows that CISD complied with the TOMA.

Third, the TOMA does not require governmental entities to livestream public meetings—instead, the TOMA provides that governmental entities “*may* broadcast an open meeting over the Internet.” Tex. Gov’t Code § 551.128(b) (emphasis added). Simply put, Plaintiff did not have a right to have his comments livestreamed by CISD and CISD did not have a legal obligation to do so.

Finally, the only mechanism by which Plaintiff may bring a claim under the Texas Open Meetings is through the mandamus provision set forth in Texas Government Code Section 551.142(a), which provides: “An interested person, including a member of the news media, may bring an action by mandamus or injunction to stop, prevent, or reverse a violation or threatened violation of this chapter by members of a governmental body.” This remedy is wholly inapplicable to the facts of this case as there is nothing for the Court to stop, prevent, or reverse.

F. Plaintiff’s Requests for Declaratory and Injunctive Relief are Superfluous and Improper.

Plaintiff states in a single sentence, “Plaintiff seeks a declaration that the muting violated his constitutional rights.” Dkt. 18 at ¶ 48. Plaintiff does not identify the source of law under which he seeks declaratory relief. Plaintiff also seeks “an injunction preventing Defendants from muting or altering public comments in any format and ensuring future compliance with the First Amendment, Texas Constitution, and TOMA.” *Id.* at ¶ 49. Plaintiff’s requests are superfluous and inappropriate.

In *Bauer v. Texas*, 341 F3d 352 (5th Cir. 2003), the Fifth Circuit addressed the standing requirement a plaintiff must demonstrate to seek declaratory and injunctive relief:

In order to demonstrate that a case or controversy exists to meet the Article III standing requirement when a plaintiff is seeking injunctive or declaratory relief, a plaintiff must allege facts from which it appears there is a substantial likelihood that he will suffer injury in the future. Based on the facts alleged, there must be a substantial and continuing controversy between two adverse parties. The plaintiff must allege facts from which the continuation of the dispute may be reasonably inferred. Additionally, the continuing controversy may not be conjectural, hypothetical, or contingent; it must be real and immediate, and create a definite, rather than speculative threat of future injury. Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects. To obtain equitable relief for past wrongs, a plaintiff must demonstrate either continuing harm or a real and immediate threat of repeated injury in the future. Similar reasoning has been applied to suits for declaratory judgments.

Bauer, 341 F.3d at 358. (citations and quotations omitted).

Plaintiff alleges that “[f]or twelve consecutive months [he] delivered public comments at CISD board meetings concerning matters of significant public interest” Dkt. 18 at ¶ 9. And yet, Plaintiff claims that during one unidentified Board meeting, the Board President pressed a button on the dais and his comments were cut from the livestream transmission. Plaintiff does not plead any facts remotely suggesting there is a “substantial likelihood” that he will suffer an injury in the future, or that the continuation of the dispute may be reasonably inferred. Instead, Plaintiff merely speculates that Defendants “remain capable of repeating it.” *Id.* at ¶ 50. Plaintiff’s allegations are wholly insufficient to merit declaratory or injunctive relief. Moreover, Plaintiff’s request for a “follow the law” injunction is not proper in the first place. Plaintiff’s claims are properly addressed by an analysis of the elements of his claims—his independent requests for declaratory and injunctive relief should be dismissed.

Prayer

Defendants request that the Court grant their Motion to Dismiss Plaintiff's Second Amended Complaint and dismiss all of Plaintiff's claims with prejudice.

Respectfully submitted,

SPALDING NICHOLS LAMP LANGLOIS

/s/ Paul A. Lamp

PAUL A. LAMP

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ATTORNEY FOR DEFENDANTS

CERTIFICATE OF SERVICE

I certify that on this the 26th day of January 2026, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, and that I served the foregoing on Plaintiff via email as addressed below:

Kevin Samuelson

/s/ Paul A. Lamp

Attorney for Defendants
