UNITED SATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DAVID NIELSEN, parent and next friend, on behalf of his minor child, S.N., and the SKYLINE REPUBLICAN CLUB,

Plaintiffs,

vs.

ANN ARBOR PUBLIC SCHOOLS, CORY McELMEEL, individually and in his official capacity as the principal of Skyline High School, and JEFFERSON BILSBORROW, individually and in his official capacity as a secretary at Skyline High School,

Defendants.

Case No. 5:22-CV-12632

Hon. Paul D. Borman

THOMAS MORE LAW CENTER
Richard Thompson (P21410)
Erin Mersino (P70886)
24 Frank Lloyd Wright Drive P.O. Box 393
Ann Arbor, MI 48106
734.827.2001 phone 734.930.7160 fax rthompson@thomasmore.org
emersino@thomasmore.org
Attorneys for Plaintiffs

ROBERT M. VERCRUYSSE (P21810)
ANNE-MARIE VERCRUYSSE WELCH (P70035)
STEPHANIE V. ROMEO (P83079)
CLARK HILL PLC
500 Woodward Avenue, Suite 3500
Detroit, MI 48226
(313) 965-8325 (313) 309-6958
rvercruysse@clarkhill.com
awelch@clarkhill.com
sromeo@clarkhill.com
Attorneys for Defendants

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR AN EMERGENCY EX PARTE TEMPORARY RESTRAINING ORDER

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I. Whether Plaintiffs have sufficient evidence to carry their burden of proof on the merits of his claims where Defendants have the right to regulate sponsored speech that advocates for a political initiative or candidate ?

Defendants Answer: No.

Plaintiffs Answer: Yes.

II. Whether Plaintiffs will carry their burden of proof to show that they will suffer irreparable harm without a temporary restraining order where Defendants have offered to allow Plaintiffs to announce a mutually agreeable message prior to election day that is not violative of Michigan law, where Defendants have never denied Plaintiffs the opportunity to meet, and where Plaintiffs' desired message has already been broadcasted by multiple new sources?

Defendants Answer: No.

Plaintiffs Answer: Yes.

III. Whether the issuance of an injunction will cause harm to Ann Arbor Public Schools and will not serve the public interest where it would require Defendants to violate Michigan's Campaign Finance Act, take away the District's right to regulate school sponsored political advocacy, and improperly subject captive audience students to Plaintiffs' political agenda?

Defendants Answer: Yes.

Plaintiffs Answer: No.

IV. Whether Plaintiffs' motion for TRO must be denied because Plaintiffs have failed to give security in an amount proper to pay the costs and damages sustained by the District if the District is wrongfully required to permit Plaintiffs to share their requested announcement through the PA system?

Defendants Answer: Yes.

Plaintiffs Answer: No.

V. Whether Defendants are entitled to attorneys' fees and costs under 42 U.S.C. § 1988 where Plaintiffs have brought a vexatious and non-meritorious lawsuit as they cannot succeed on the merits of any of their claims?

Defendants Answer: Yes.

Plaintiffs Answer: No.

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DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR AN EMERGENCY EX PARTE TEMPORARY RESTRAINING ORDER

Defendants Ann Arbor Public Schools ("District"), Cory McElmell and Jefferson Bilsborrow (jointly referred to as "Defendants"), by their attorneys Clark Hill PLC, respond to Plaintiffs' Motion for an Emergency Ex Parte Temporary Restraining Order ("Motion") as follows:

INTRODUCTION

Plaintiffs' request for a TRO is an improper and unnecessary waste of this Court's, Ann Arbor Public Schools', and the taxpayers' resources.

Plaintiffs allege that they "would like to hold a meeting regarding Proposal 3 and their community involvement in addressing the serious public policy concerns raised by the proposal in time to make a different, prior to November 8, 2022." *ECF 1, Par. 93.* Defendants have never denied Plaintiffs the opportunity to host such a meeting. In fact, Defendants have repeatedly offered Plaintiff the opportunity to modify their announcement and announce a meeting and the topics to be discussed, including Proposal 3. *Exhibit 1, Billsborrow Affidavit; Exhibit 2, McElmeel Emai1; Exhibit 3, Comsa letter.*

Moreover, since filing this lawsuit, Plaintiffs' views on Proposal 3 have been broadcasted to a much larger audience than students and teachers at Skyline High School, which removes the need for an "Emergency Ex Parte Temporary Restraining

Order" prior to Election Day. Indeed, there has been a media blitz of Plaintiffs' views on Proposal 3 and mass republication of their proposed announcement, including:

- MLive, https://www.mlive.com/news/ann-arbor/2022/11/school-discriminated-against-student-who-wanted-to-read-anti-prop-3-announcement-suit-claims.html (last visited November 3, 2022);
- The Detroit News, https://www.detroitnews.com/story/news/local/michigan/2022/11/02/ann-arbor-school-denied-gop-students-anti-proposal-3-message-lawsuit-says/69612015007/ (last visited November 3, 2022);
- National Public Radio/Michigan Radio, https://www.michiganradio.org/social-justice/2022-11-02/lawsuit-alleges-ann-arbor-public-schools-discriminated-against-student-based-on-views-on-prop-3 (last visited November 3, 2022);
- Click on Detroit/Channel 4: https://www.clickondetroit.com/topic/Skyline_High_School/ (last visited November 3, 2022).[1]

Even if there was such a need, which there clearly is not, this Court, nor Defendants, can grant the Skyline Republican Club's request to utilize Skyline High School's public address system to broadcast its message requesting students to join their "efforts" "to defeat Proposal 3," which, according to Plaintiffs' desired message "would eliminate health and safety regulations, legalize late term and

[1] Defense Counsel could likely locate more media on this topic, but due to the completely unnecessary "emergency" request for this "TRO," which resulted in counsel having less than 24 hours allotted to this briefing, it has opted to focus more on the legal arguments.

partial birth abortion, no longer require physicians to perform abortions, and eliminate informed consent laws." *[ECF No. 1, Page ID.22, ¶ 50]*.

Allowing Plaintiffs' desired message to air over the school sponsored public address system would violate the Michigan Campaign Finance Act, which prohibits Defendants from contributing to or expressly advocating for a ballot question or candidate for public office. *See MCL 169.257(1)*; Michigan Secretary of State, Interpretive Statement Issued November 14, 2005 (explaining that school districts are not authorized to expend public funds to influence the electorate in support of or in opposition to a particular ballot proposal . . . and that "it was never contemplated under the Constitution and statutes of this State that our boards . . . should function as propaganda bureaus.") (internal citations omitted).

Plaintiffs' falsely claim that the District and the High School Principal and Administrative Assistant "rejected an announcement submitted by Plaintiffs due to its political viewpoint, even though other student groups' announcements speak to the very issue." Absolutely none of the other announcements, which are described in Paragraphs 33- 35 of Plaintiffs' Complaint, advocate for a current candidate or ballot initiative. If they did, the District would not have been permitted to broadcast the message.

Even if not violative of Michigan law, the United States Supreme Court, the Sixth Circuit, and this Court have all opined that schools have the ability to regulate school sponsored speech, such as the announcement demanded by the Plaintiffs, that advocates for a political initiative or candidate. *Hazelwood School District v. Kuhlmeier,* 484 U.S. 260, 272 (1988) ("[a] school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to . . . associate the school with any position other than neutrality on matters of political controversy.").

Plaintiffs' claims are without merit and their request for a TRO should be denied.

I. UNDISPUTED FACTS

1. Plaintiffs are represented by the Thomas More Law Center, a free legal service whose mission is to defend the religious freedom of Christians.

2. Defendants are a Michigan public school district, a high school principal, and a high school administrative assistant, who are forced to use taxpayer money to uphold Michigan Campaign Finance Law and comply with their legal duty not to use a high school broadcasting system and website to advocate for or against ballot proposals in the upcoming November 8 election.

3. Between Friday, October 14, 2022, and Monday, October 17, 2022, upon the request of Laurie Adams, who manages the Skyline High School club list and the club approval process, the following message was included in Skyline's morning announcements:

> ***Skyline Club Update***
>
> Club Advisors were asked to verify the clubs they are in charge of. If your advisor did not reply, your club was removed from the list of approved clubs and organizations. In order to get your club reactivated,

> if it is still active, you will need to fill out the new club form again, have your advisor initial next to their name, and bring it down to the athletic office for RE-approval. Please add a note to the form that this is a reactivation. **Until your club is added back to the list on the website, you may not meet or request announcements.** Thank you.

See https://www.a2schools.org/domain/2249/.

4. On Friday, October 21, 2022, on behalf of Plaintiff Skyline Republican Club, Plaintiff S.N. submitted an announcement to be read over the public address system at Skyline High School during the morning announcements. *[ECF No. 1, ¶ 48]*.

5. Skyline High School's Daily Announcements are also published on Ann Arbor Public Schools' website, under Skyline Family Resources: https://www.a2schools.org/domain/2249. *[ECF No. 1, ¶ 33-35]*. As described on the website, the public, including District students, staff, and families, can subscribe to the announcements through RSS.

6. To be broadcasted/published, announcements must be approved by Defendants, and specifically Defendant Bilsborrow. *[ECF No. 1, ¶ 28, 43]*. The rules for announcements include the following: "School announcements are expected to be informational in nature, not persuasive. Announcement space is premium. Clubs and organizations may utilize other communication outlets for other types of communications such as club meetings, posters, flyers and club organized social media or other communication platforms." *Id.*

7. When Defendant Bilsborrow started in his position of Assistant to the Principal in August 2022, Defendant Principal Cory McElmeel instructed him that it is his responsibility, when vetting and arranging the daily announcements each morning, to treat student groups equally and fairly, and it is the District's responsibility as a public institution to maintain a position of neutrality. *Ex. 1, Bilsborrow Affidavit.*

8. Plaintiffs' proposed announcement stated:

> Attention Students
>
> Are you interested in **joining our efforts** to protect the health of women and children by joining us **in our fight to defeat Proposal 3?**

> If proposal 3 is passed it would eliminate health and safety regulations, legalize late term and partial birth abortion, no longer require physicians to perform abortions, and eliminate informed consent laws. If so email us at skylinerepublicanclub@gmail.com." *[ECF No. 1, ¶ 50] (emphasis added).*

9. The announcement request form admitted that the Skyline Republican Club had not yet completed the approval process. *Exhibit 1, Billsborogh Affidavit.*

10. Proposal 3, known as the Reproductive Freedom for All amendment, is on the ballot for Michigan's November 8, 2022 Election. https://www.house.mi.gov/hfa/PDF/Alpha/Ballot_Proposal_3_of_2022.pdf (last visited November 3, 2022).

11. The District did not run the announcement (1) because the Skyline Republican Club had not yet completed the approval process and (2) because the announcement was promoting a political position on a current ballot initiative. The District cited Board Policy 7250.R.01 – Use of Facilities, which provides, "The Superintendent shall notify any political parties, organizations, and/or candidates that they are expressly prohibited from promoting political activities and/or individuals on school property during school hours." *[ECF No. 1, ¶ 54-55].*

12. On the morning of Friday, October 21st, after the morning announcements had been read over the PA system, Plaintiff S.N. and one of his sisters came down to Defendant Bilsborrow's office to ask why his announcement was not read. *[ECF No. 1, ¶ 48]; Ex. 1, Bilsborrow Affidavit*

13. Defendant Bilsborrow told Plaintiff how he could submit an announcement that would be read, and a modified form of the announcement was suggested. Bilsborrow told Plaintiff that he would include date, time, and location details of any club meetings. Bilsborrow told Plaintiff that he would even include what topics would be discussed at meetings, just like he does with other clubs. *Ex. 1, Bilsborrow Affidavit.*

14. Plaintiffs expressed no interest in a modified announcement, and this lack of interest has continued ever since. *See Complaint, TRO,* and articles referenced in Paragraph 19, below.

15. On October 21, 2022, a teacher allowed Plaintiff S.N. to read the announcement out loud in the classroom. *[ECF No. 1, ¶ 94]*.

16. On October 24, 2022, the National Organization of Women club requested to run the following announcement:

> Hi Skyline!
>
> Considering that Roe v. Wade was recently overturned, the elections coming up on November 8th are very important. We encourage everyone capable to vote, to vote. You can still register online at Michigan.gov. For more information, including who the NOW club is supporting in the upcoming elections, you can visit our instagram @skylinenowclub!

See Ex. 1, Bilsborrow Affidavit.

17. Defendant Bilsborrow modified the announcement by removing the first sentence with the reference to Roe v Wade and posted the following announcement on October 25-27, 2022:

> ***Get Registered to Vote, Skyline!***
>
> The elections coming up on November 8th are very important, and we encourage everyone 18 and older to vote! You can still register online at Michigan.gov. For more information, including who Skyline's National Organization of Women are supporting in the upcoming elections, you can visit our instagram @skylinenowclub

https://www.a2schools.org/domain/2249.

18. The District has allowed the Skyline Republic Club to utilized the PA for announcements about meetings and other issues in the past. Including:

> Friday, September 17 - 21, 2021
>
> **"Republican Club**
> Interested in learning more about our government from a Constitutional and Conservative perspective? Interested in being a more active ,educated and concerned member of the community? The

Republican Club is for you! We are a place where Conservatives are free to express their views without fear of persecution. Our meetings will start in October and more information will be present at the Club Fair next Wednesday . If you have any questions feel free to email skylinerepublicanclub@gmail.com"

Monday, September 27, 2021

"Republican Club
Interested in Joining the Skyline Republican Club and learning what conservatives are all about ? Today we meet in room C408 from 2:55-3:10 for a short introductory meeting. Hope you can come, all we ask is that you remain open minded and civil."

Tuesday, September 28, 2021

"**Republican Club**
Interested in learning more about our government from a constitutional and conservative perspective? Interested in being a more active, educated and concerned member of the community? The Republican Club is for you! We are a place where conservatives are free to express their views in a safe place. Our meetings will start regularly in November in Room C408 . If you have any questions feel free to email skylinerepublicanclub@gmail.com"

Tuesday, October 26, 2021

"Republican Club
Interested in defending our personal freedoms and the freedoms of others? Interested in learning more about our wonderful Constitution and what makes America so special? The Republican club is for you! We meet TODAY in room C408 right after school! Come see what our club is all about. If you have any questions please feel free to email us at Skylinerepublicanclub@gmail.com and follow us on Instagram @skylinerepublicanclub . We can't wait to see you there!"

Thursday, November 4 - 5, 2021

"Republican Club

Due to the multiple republican victories on election day, the Skyline Republican Club invites you all to join us this Monday in Ms.Deans room C408 for a snack and discussion."

Thursday, November 11, 2002

"Republican Club
Interested in learning more about what conservatives stand for? Interested in learning more about our Constitution and how it makes America so great? Interested in understanding why we believe in what we believe such as limited Government? Come to the Skyline Republican Club in room C408 and follow us on Instagram @skylinerepublicanclub. We can't wait to meet you!"

Thursday, December 16, 2021

"Republican Club
Today is our last meeting until break! In this meeting we will talk about congressional redistricting .We meet in room C408 at 3pm hope to see you there!"

Thursday, February 17, 2022

"Republican Club
In honor of Presidents day the Skyline Republican club would like you to join us in honoring our past and current presidents by wearing RED White and BLUE this Friday. (Note please do not wear an actual American flag as it is a sign of disrespect.) We can't wait to see all of our fellow students showing off their patriotism!"

See https://www.a2schools.org/domain/2249

19. Since filing this lawsuit, Plaintiffs' views regarding Proposal 3 have been published via MLive, https://www.mlive.com/news/ann-arbor/2022/11/school-discriminated-against-student-who-wanted-to-read-anti-prop-3-announcement-suit-claims.html (last visited November 3, 2022); The Detroit News, https://www.detroitnews.com/story/news/local/michigan/2022/11/02/ann-arbor-school-denied-gop-students-anti-proposal-3-message-lawsuit-says/69612015007/ (last visited November 3, 2022); National Public

Radio/Michigan Radio, https://www.michiganradio.org/social-justice/2022-11-02/lawsuit-alleges-ann-arbor-public-schools-discriminated-against-student-based-on-views-on-prop-3 (last visited November 3, 2022); Click on Detroit/Channel 4: https://www.clickondetroit.com/topic/Skyline_High_School/ (last visited November 3, 2022).

II. LEGAL STANDARD

Judge Maloney recently outlined the legal standard for a TRO:

> The decision to grant or deny a temporary restraining order falls within the discretion of a district court. *See Ohio Republican Party v. Brunner*, 543 F.3d 357, 361 (6th Cir. 2008) ("The district court's decision to grant a temporary restraining order, when appealable, is reviewed by this court for abuse of discretion.").
>
> * * *
>
> In addition, the court must consider each of four factors: (1) whether the moving party demonstrates a strong likelihood of success on the merits; (2) whether the moving party would suffer irreparable injury without the order; (3) whether the order would cause substantial harm to others; and (4) whether the public interest would be served by the order. *Ohio Republican Party*, 543 F.3d at 361 (quoting *Northeast Ohio Coalition for Homeless and Service Employees Int'l Union v. Blackwell*, 467 F.3d 999, 1009 (6th Cir. 2006)). The four factors are not prerequisites that must be met, but are interrelated concerns that must be balanced together. *See Northeast Ohio Coalition*, 467 F.3d at 1009.

Norris v. Stanley, 558 F. Supp. 3d 556, 558 (W.D. Mich. 2021).

The first factor, likelihood of success on the merits, is the most important factor in the case of an alleged constitutional violation and is typically determinative. *Obama for America v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012).

Regarding the second factor – irreparable harm – the "key word" in determining the extent of an injury sufficient to support the award of injunctive relief is "irreparable." *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 154 (6th Cir. 1991). "Issuing a preliminary injunction based only on a *possibility* of irreparable harm is inconsistent with [the Supreme Court's] characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 28 (2008) (citing *Mazurek v. Armstrong,* 520 U.S. 968, 972 (1997) (*per curiam*)). Mere injuries, however substantial, are not enough. *Id.* Rather, "the harm alleged must be both certain and immediate, rather than speculative or theoretical." *Id.* "In order to substantiate a claim that irreparable injury is likely to occur, a movant must provide some evidence that the harm has occurred in the past and is likely to occur again." *Id.* (internal citations omitted).

To determine if an injunction would result in harm to others, a court "must balance the competing claims of injury" and "consider the effect on each party of the granting or withholding of the requested relief." *Winter,* 555 U.S. at 24.

Here, Plaintiffs are requesting a TRO requiring the District to permit Plaintiffs to broadcast their requested announcement at Skyline High School, which is also published on its website. Plaintiffs are not seeking to maintain the status quo but,

instead, are seeking a mandatory injunction requiring the District to take an affirmative action. "A TRO that requests an affirmative act, like the one [Plaintiffs] request here, is 'tantamount to a mandatory injunction [and] **requires a higher—yet undefined—burden to issue than required of an order merely preserving the status quo**.'" *Albino-Martinez v Adducci*, 454 F.Supp.3d 642, 646 (E.D. Mich., 2020) (quoting *Shelby Cty Advocates for Valid Elections v Hargett*, 348 F.Supp.3d 764, 769 (W.D. Tenn., 2018)). A TRO requesting an affirmative act still requires consideration of the four factors discussed above, "taking into consideration the higher burden [Plaintiffs] bear due to the nature of their requested TRO." *Id*. at 647.

Plaintiffs are also seeking a TRO to enjoin "Defendants' policies, actions, and decisions that silence speech and access on the basis of political viewpoint and content," which is, according to Plaintiffs, essentially a mandate to follow the First Amendment. The Sixth Circuit has noted that "[t]he Supreme Court has warned against 'sweeping injunction[s] to obey the law' and has cautioned courts about their 'duty to avoid' such orders . . . Injunctions that seek no more than obedience to the law aw written are deserving of scrutiny under Rule 65(d)." *Perez v Ohio Bell Telephone Co*, 655 F Appx 404, 410-11 (CA 6, 2016), quoting *Swift & Co v United States*, 196 US 375, 401 (1905).

Plaintiffs' evidence is insufficient to carry their burden of proof to satisfy the high standard to obtain the extraordinary order they seek.

III. PLAINITFFS' REQUEST FOR A TEMPORARY RESTRAINING ORDER FAILS

A. Plaintiff Will Not Succeed On The Merits

1. *Plaintiffs' Announcement is Not Free Speech Protected by the 1st Amendment*

First, Plaintiffs allege that Defendants are permitted to restrict school sponsored political advocacy on a pending ballot initiative as a matter of law. Indeed, the Michigan Campaign Finance Act requires such a restriction.

In *Hazelwood School Dist. v. Kuhlmeier,* 484 U.S. 260 (1988), the Supreme Court of the United States distinguished pure student speech, as was the case in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.,* 393 U.S. 503 (1969), from school sponsored speech. The Court held that

> The question whether the First Amendment requires a school to tolerate particular student speech the question that we addressed in *Tinker* is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.
> *Hazelwood,* 484 U.S. at 270–71.

"Educators are entitled to exercise greater control over this ... form of student expression to assure . . . that the views of the individual speakers are not erroneously

attributed to the school." *Id.* "With respect to political controversy, the Court stated that, "**[a] school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to . . . associate the school with any position other than neutrality on matters of political controversy."** *Hazelwood,* 484 U.S. at 272. "School-sponsored" speech, therefore, may be restricted without offending the First Amendment provided the educator's "actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273. *Corlett v. Oakland Univ. Bd. of Trustees*, 958 F. Supp. 2d 795, 806 (E.D. Mich. 2013). *Curry ex rel. Curry,* 513 F.3d at 577 and n. 1 (6th Cir. 2008) (providing that "[f]or speech to be perceived as bearing the imprimatur of the school does not require that the audience believe the speech originated from the school" and finding that students and parents reasonably would have perceived a student's sale of candy canes with a religious card as bearing the imprimatur of the school where products had to be approved by the school prior to sale and this fact was known to parents and students).

Citing to Supreme Court precedent, this Court routinely recognizes that school officials, and not federal courts, are best situated to determine what is appropriate for children in school.

> Local school officials are best situated to determine what is appropriate for children in school, and constitutional claims have consistently been given a less rigorous review in school settings. *Blau v. Fort Thomas Pub. Sch. Dist.,* 401 F.3d 381, 393 (6th Cir.2005) ("The Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent

> with fundamental constitutional safeguards, to prescribe and control conduct in the schools.") (quoting *Tinker,* 393 U.S. at 507, 89 S.Ct. 733). The *Blau* court went on to state that "[i]n the First Amendment arena and other arenas as well, the Supreme Court thus has frequently emphasized that public schools have considerable latitude in fashioning rules that further their educational mission and in developing a reasonable fit between the ends and means of their policies." *Id.* " 'The very complexity of the problems of ... managing a statewide public school system suggests that there will be more than one constitutionally permissible method of solving them.' " *Evans–Marshall v. Bd. of Educ.,* 428 F.3d 223, 237 (6th Cir.2005) (Sutton, J., concurring) (quoting *San Antonio Indep. Sch. Dist. v. Rodriquez,* 411 U.S. 1, 42 (1973)). It is often the case that "the determination of what manner of speech in the classroom ... is inappropriate properly rests with the school board rather than with the federal courts." *Id.* (quoting *Hazelwood,* 484 U.S. at 267, 108 S.Ct. 562).

Curry ex rel Curry v. Hensiner, 513 F.3d 570, 578 (6th Cir. 2008).

> *Hazelwood* dictates that "It is only when the decision to censor ... student expression has no valid educational purpose that the First Amendment is so directly and sharply implicated as to require judicial intervention to protect students' constitutional rights." *Id.* At 273 (citation omitted). Further, this Court holds that "*Hazelwood* does not require balancing the gravity of the school's educational purpose against [a student's] First Amendment right to free speech, only that the educational purpose behind the speech suppression be valid." *Curry ex rel Curry v. Hensiner*, 513 F.3d 570, 579 (6th Cir. 2008).

Applying the law to the facts here, the speech at issue would clearly have been school sponsored as it (1) was well known that it must be submitted using a request form and approved by the school; (2) was broadcasted over the school PA system to students; (3) was placed on the District's website and part of its RSS feed. As such, Plaintiffs' do not have a First Amendment right to advocate against Proposal 3 on

the November 8, 2022 ballot over Skyline High School's PA system, on it's website, and on its' RSS feed. Instead, the District has a valid (and, in accordance with Michigan Campaign Finance Laws, necessary) right to restrict school sponsored political advocacy for a current ballot initiative. Teaching students about the requirements of the Campaign Finance Act and state laws related to the election process is also a legitimate pedagogical concern and does not involve viewpoint discrimination.

2. Defendants did Not Engage in Viewpoint Discrimination, Plaintiffs' Viewpoint Discrimination, Equal Access, and Equal Protection Act Claims Will Not Succeed

Control over access to a nonpublic forum can be based on subject matter and speaker identity "so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius v. NAACP Legal Def. & Educ. Fund,* 473 U.S. 788, 797 (1985). Thus, in determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, courts have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations. *Youkhanna v. City of Sterling Heights*, 934 F.3d 508, 519 (6th Cir. 2019).

To curb student speech, school officials must be able to show that its action was caused by something more than a mere desire to avoid discomfort or unpleasantness that always accompanies an unpopular viewpoint. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969). A school is not required to accept speech that intrudes upon the work of the schools or the rights of other students. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 680 (1986).

Avoiding the appearance of political favoritism is a valid justification for limiting speech in a nonpublic forum. *Cornelius,* 473 U.S. at 809. Other courts have held that a school's refusal to publish advertisements advocating a particular position is viewpoint neutral, particularly in the context of abortion rights.

> The schools' refusal to publish Planned Parenthood's advertisements was viewpoint neutral. Planned Parenthood's advertisements were rejected, and schools enacted guidelines excluding advertising that pertains to "birth control products and information," in order to maintain a position of neutrality on the sensitive and controversial issue of family planning and **avoid being forced to open up their publications for advertisements on both sides of the "pro-life"-"pro-choice" debate.** In addition to believing the copy and Planned Parenthood to be controversial, some principals felt that parents would object to the advertisement. The school district also viewed Planned Parenthood's advertisements as implicating its statutorily prescribed sex education curriculum and sought to avoid conflict with the state requirements regarding the manner sex education is presented to students.

Planned Parenthood of S. Nevada, Inc. v. Clark Cnty. Sch. Dist., 941 F.2d 817, 829 (9th Cir. 1991) (emphasis added).

Here, similar to the school district in *Planned Parenthood*, Defendants did not reject Plaintiffs' proposed announcement to be read over the public address system because of its viewpoint. Rather, the District did not air the announcement as written because (1) the Skyline Republican Club had not yet completed the approval process and (2) because the announcement was promoting a political position on a current ballot initiative and would violate Michigan law. This decision had nothing to do with the specific political position being promoted. A message promoting any political position would have been rejected as such a message would not allow the District to maintain a position of neutrality.

In fact, shortly after Plaintiffs' announcement was rejected, the National Organization of Women Club ("NOW") requested to run an announcement. The proposed announcement addressed the overturn of *Roe v. Wade* by stating "Considering that Roe v. Wade was recently overturned, the elections coming up on November 8th are very important." Given the reference to Roe v. Wade was a nod to the current ballot initiative, and could be construed to advocate for a particular candidate or issue, Defendant Bilsborrow modified the announcement to remove the reference to *Roe v. Wade*. The modified announcement was posted on October 25-27 and contained no political undertones or the promotion of a particular candidate or position. Similar modifications were proposed to Plaintiffs for their announcement, but they would not entertain them. It is clear from the mandated

modifications to the National Organization of Women club's announcement, which addressed the same issue as Plaintiff's announcement, that the Defendants actions towards Plaintiffs were viewpoint neutral.

B. Plaintiffs Would Not Suffer Irreparable Harm Without the Order

Plaintiffs' goal, as set forth in Paragraph 93 of their Complaint, is to hold a meeting regarding Proposal 3 . . . in time to make a difference, prior to November 8, 2022." Plaintiffs' desired message does not even mention such a meeting and the District has never denied Plaintiffs' the ability to hold a meeting. Indeed, the District suggested that it could broadcast an alternative message advertising the very meeting sought by Plaintiffs.[2] And, the District has allowed the Skyline Republican Club to advertise its meetings numerous times in the past. Plaintiffs' have steadfastly refused to engage in discussions about any alternative messages. It is Plaintiffs, not Defendants, that are standing in the way of their desired meeting.

Yet, even without the meeting, as detailed in the facts, Plaintiffs' message advocating against Proposal 3, including the very message it seeks to order the District to broadcast, has been broadcasted and received by hundreds, if not millions, of Michiganders via their media campaign pertaining to this lawsuit. Since filing this lawsuit, Plaintiffs' views regarding Proposal 3 – the subject of the Plaintiffs'

[2] Plaintiff S.N. also alleges his teacher allowed him to read his message in the classroom, which is akin to a meeting.

proposed and rejected announcement – have been published via MLive, the Detroit News, National Public Radio/Michigan Radio, and Click on Detroit/Channel 4. Plaintiffs certainly are not hindered form sharing their views in the absence of a TRO. Moreover, Plaintiffs' disingenuous argument that they will suffer irreparable harm if they are not able to speak and take action on this issue in the same way that NOW and other student organizations have already ignores that NOW agreed to a modification of their announcement, which did not share or express their views on this issue, yet Plaintiffs still insist on sharing their controversial political views in an explicit and detailed manner.

Plaintiffs would suffer zero harm without the order.

C. The Issuance of A TRO Will Cause Harm to the District and Would Not Serve the Public Interest

If Defendants were ordered to broadcast Plaintiffs' desired message requesting students to join them in "defeating" Proposal 3 and espousing Plaintiffs' beliefs about what would happen if Proposal 3, it would be sponsoring political advocacy about a current ballot initiative and violating the Michigan Campaign Finance Act.[3] It would also strip the District of its right to "regulate school sponsored speech that might reasonably be perceived to . . . associate the school with

[3] Going a step further, the injunction requested would open Michigan's public schools, in violation of Michigan law, to sponsored political advocacy in favor of partisan political positions.

any position other than neutrality on matters of political controversy." *Hazelwood, supra.* Moreover, it would result in the Skyline Republican Club receiving different treatment than NOW, who was required to modify its announcement regarding the same issue.

Such an order would not serve the public interest and instead would be harmful to students at Skyline High School who are a "captive audience," and cannot "effectively avoid further bombardment of their sensibilities" by simply averting their ears. *See Bonnell v. Lorenzo,* 241 F.3d. 800 (6th Cir. 2001). The message would be posted on the District's family resources webpage and a part of its RSS feed. Parents and students who do not believe, as they should, that schools should not be advocating for or against pending ballot initiatives would likely distrust and leave the District, which would take away from the District's and other students' resources. Parents and students may also share the announcement with family and friends, which could damage the District's reputation.

IV. PLAINTIFFS TRO SHOULD BE DENIED WITHOUT A BOND

Plaintiffs' motion for TRO must be denied because Plaintiffs have failed to give security in an amount proper to pay the costs and damages sustained by the District if the District is wrongfully required to permit Plaintiffs to share their requested announcement through the PA system. A court may issue a TRO "only if the movant gives security in an amount that the court considers proper to pay the

costs and damages sustained by any party found to have been wrongfully enjoined or restrained." FRCP 65(c).

If the District were mandated to allow Plaintiffs to run their requested announcement, the District would be in violation of the Campaign Finance Act, subjecting the District and its administrators to the following penalty:

> A person who knowingly violates this section is **guilty of a misdemeanor** punishable, if the person is an individual, by a **fine of not more than $1,000.00** or imprisonment for not more than 1 year, or both, or if the person is not an individual, by 1 of the following, **whichever is greater**:
> **(a) A fine of not more than $20,000.00.**
> (b) A fine equal to the amount of the improper contribution or expenditure. [MCL 169.257(4).]

Therefore, Plaintiffs' requested TRO may not be granted until Plaintiffs give security in an amount proper to pay the costs of the fines to which the District and its administrators may be subjected for violation of the Campaign Finance Act.

V. DEFENDANTS ARE ENTITLED TO FEES AND COSTS

A plaintiff must be a "prevailing party" to recover an attorney's fee under 42 U.S.C. § 1988. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). To be considered a "prevailing party" for attorney's fees purposes, the plaintiff must succeed on any "significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Id.* Here, as described in Section III(A), *supra*, Plaintiffs will not succeed on the merits of any of their claims.

Instead, Defendants in the circumstances of this case should be awarded costs and attorney fees against Plaintiff and his counsel for having filed and persisted in pursuing a vexatious and non-meritorious claim. 28 U.S.C. § 1927; *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978) (the court has discretion to award defendants attorneys' fees when the plaintiff's action was frivolous, unreasonable, or groundless). *CRST Van Expedited, Inc. v. EEOC*, 136 S. Ct. 1642; 194 L. Ed.2d 707 (2016) (a defendant need not prevail on the merits to be a prevailing defendant and eligible for an attorneys' fees award); 42 U.S.C. § 1998; *Hughes v. Rowe*, 449 U.S. 5, 14-15 (1980) (attorneys' fees and costs are available to defendants in Section 1983 cases under the same standards applicable to Title VII); *Bidasaria v. Cent. Michigan Univ.*, No. 10-15079, 2012 WL 3077211, at *2 (E.D. Mich. July 30, 2012), *aff'd* (Mar. 25, 2013) (granting sanctions to Defendant and holding that Section 1927 does not require a showing of subjective bad faith but, rather, is satisfied "when an attorney knows or reasonably should know that a claim pursued is frivolous, or that his or her litigation tactics will needlessly obstruct the litigation of nonfrivolous claims.")

Because Plaintiffs clearly cannot succeed on the merits of their claims, because Plaintiffs and their counsel knew their lawsuit was frivolous, and because this Motion for An Emergency Ex Parte Temporary Restraining Order was

completely unnecessary and inappropriate, Defendants are entitled to attorneys' fees and costs under 42 U.S.C. § 1988; 28 U.S.C. § 1927; *Hughes v. Rowe, supra*.

CONCLUSION

WHEREFORE, Defendants respectfully request that this Court dismiss Plaintiffs' claim for failure to state a claim based on the cases cited or alternatively allow this case to proceed with Defendants filing an Answer, participating in the discovery process as well as other motion practice and that the parties submit to a trial before a Jury before any remedy is issued. Defendants further request this Court to award Defendants their costs and attorney fees under 42 U.S.C. § 1988 and any other relief this Court deems reasonable.

Respectfully submitted,

CLARK HILL PLC

By: s/Robert M. Vercruysse
Robert M. Vercruysse (P21810)
Anne-Marie Vercruysse Welch (P70035)
Stephanie V. Romeo (P83079)
Attorneys for Defendants
500 Woodward Avenue, Suite 3500
Detroit, MI 48226
(313) 965-8325 (313) 309-6958
rvercruysse@clarkhill.com
awelch@clarkhill.com
sromeo@clarkhill.com

Dated: November 4, 2022

CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2022, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to all attorneys of record.

By: s/Robert M. Vercruysse
Robert M. Vercruysse (P21810)
Attorneys for Defendants
500 Woodward Avenue, Suite 3500
Detroit, MI 48226
(313) 965-8325 (313) 309-6958
rvercruysse@clarkhill.com