

UNITED STATES 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,

Case No. 22-cv-12632

Plaintiffs,

Paul D. Borman
United States District Judge

v.

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.

_____/

**ORDER GRANTING PLAINTIFFS' MOTION FOR AN EMERGENCY EX
PARTE TEMPORARY RESTRAINING ORDER (ECF NO. 2), REQUIRING
DEFENDANTS TO BROADCAST PLAINTIFFS' MODIFIED REQUEST
REGARDING PROPOSAL 3 ON MONDAY, NOVEMBER 7, 2022**

This matter is before the Court on Plaintiffs' Motion for an Emergency Ex Parte Temporary Restraining Order. (ECF No. 2.) Defendants have filed a response to Plaintiffs' Motion. (ECF No. 9.) An expedited hearing was held in this matter on November 4, 2022, because of the time sensitive nature of the request. For the

reasons stated on the record, the Court grants Plaintiffs' Motion for a Temporary Restraining Order.

BACKGROUND

Plaintiffs have brought a civil rights complaint alleging that Defendants have violated their rights under the First and Fourteenth Amendments to the Constitution and Title 42 U.S.C. § 1983, challenging Defendants' acts, policies, practices and/or procedures which deprived Plaintiffs S.N. and Skyline Republican Club of the right to freedom of speech and the equal protection of the laws.

According to Plaintiffs' Verified Complaint, on Friday, October 21, 2022, Plaintiff S.N. submitted the following proposed announcement to be read over the Skyline High School's public address system, which also announces proposals from other student groups:

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, Verified Compl. ¶ 50.)

Laurie Adams, an employee of the Defendant high school, responded that same morning, via email, that the announcement would not be read due to its

“political nature” and that the school is “not allowed to advertise political activities per AAPS School Board Policy” 5.5, 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.

(*Id.* ¶¶ 51-52.)

Defendant Jefferson Bilsborrow, a secretary at the high school, also told Plaintiff S.N. that same day that he is “the one who controls the announcements” and that the announcement was rejected due to being “political” and that the proposed announcement was “subjective.” (*Id.* ¶¶ 58, 62, 67.)

On October 28, 2022, Defendant Principal Cory McElmeel emailed Plaintiff S.N., ratifying the decision not to allow Plaintiffs’ announcement, and stating that “on the advice of counsel,” the announcement was not allowed “due to campaign finance law.” (*Id.* ¶¶ 72-73.)

On November 1, 2022, Plaintiffs filed a Verified Complaint against Defendants in this Court, seeking a declaration that Defendants violated Plaintiffs’ rights under the First and Fourteenth Amendments to the United States Constitution, and the Equal Access Act, an injunction permitting Plaintiffs to share their announcement over the school’s public address system, and requiring that Plaintiffs receive equal treatment as other students and other non-curriculum student clubs, and a judgment awarding nominal damages. (ECF No. 1, Verified Compl.) Plaintiffs

also seek an award of the reasonable costs of litigation, including attorneys' fees and costs, pursuant to 42 U.S.C. § 1988 and other applicable law. (*Id.*)

On November 2, 2022, Plaintiffs filed a Motion for an Emergency Ex Parte Temporary Restraining Order, requesting a temporary restraining order enjoining Defendants from unconstitutionally restricting their speech under the First Amendment, denying the equal protection of the laws under the Fourteenth Amendment, and denying equal access, treatment, benefits, and privileges that other student clubs enjoy at Skyline High School. (ECF No. 2, Pls.' Mot. TRO.)

On November 4, 2022, Defendants filed a Response opposing Plaintiff's Motion for an Emergency Ex Parte Temporary Restraining Order. (ECF No. 9, Defs.' Resp.) Defendants contend that Plaintiffs' announcement is not free speech protected by the First Amendment, but that Plaintiffs' announcement as written would violate the Michigan Campaign Finance Act, Mich. Comp. Laws § 169.257(1), which they assert prohibits Defendants from contributing to or expressly advocating for a ballot question or candidate for public office. Defendants argue that Plaintiffs are not entitled to a temporary restraining order, and Defendants request their fees and costs in defending against Plaintiff's motion.

Also on November 4, 2022, Plaintiff S.N. filed a Supplemental Declaration in support of Plaintiffs' motion. (ECF No. 7, S.N. Supp. Decl.) Plaintiff S.N. states that "[i]t is widely recognized that the student club, the National Organization of Women

(NOW), will host a walk-out this Monday, November 7, 2022 in support of voting yes on Proposal 3” and that school “[o]fficials and employees have organized this with NOW.” (ECF No. 7, Decl. of S.N. ¶¶ 18-19.) S.N. declares that “[d]igital flyers have been shared over email and throughout the school day,” and he provided an image of the flyer inviting students to a “WALKOUT TO SUPPORT YES ON PROP 3! JOIN US MONDAY THE 7TH @ 9AM IN FRONT OF THE SHS STUDENT ENTRANCE.” (*Id.* ¶ 20.) (See Ex. 1, Copy of Flyer.)

DISCUSSION

When considering a motion for injunctive relief, the Court must balance the following factors: (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury absent preliminary injunctive relief; (3) whether granting the preliminary injunctive relief would cause substantial harm to others; and (4) whether the public interest would be served by granting the preliminary injunctive relief. *Certified Restoration Dry Cleaning Network*, 511 F.3d at 542. These same factors are considered in evaluating whether to issue a temporary restraining order. *Ohio Republican Party v. Brunner*, 543 F.3d 357, 361 (6th Cir. 2008).

“Although no one factor is controlling, a finding that there is simply no likelihood of success on the merits is usually fatal.” *Gonzales v. Nat’l Bd. of Medical Examiners*, 225 F.3d 620, 625 (6th Cir. 2000). The Sixth Circuit Court of Appeals

recently stated that, “in First Amendment cases, only one question generally matters to the outcome: Have the plaintiffs shown a likelihood of success on the merits of their First Amendment claim?” *Fischer v. Thomas*, --- F.4th ---, No. 22-5938, 2022 WL 15562885, at *3 (6th Cir. Oct. 28, 2022) (citing *Monclova Christian Acad. v. Toledo-Lucas Cnty. Health Dep’t*, 984 F.3d 477, 482 (6th Cir. 2020); *Bays v. City of Fairborn*, 668 F.3d 814, 819 (6th Cir. 2012)). “This is so because ... the issues of the public interest and harm to the respective parties largely depend on the constitutionality of the [state action].” *Hamilton’s Bogarts, Inc. v. Michigan*, 501 F.3d 644, 649 (6th Cir. 2007) (citations omitted).

As stated above, Plaintiffs initially sought to have the following announcement read over the Skyline High School’s public address system:

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, Verified Compl. ¶ 50.)

At the November 4, 2022 expedited hearing on Plaintiffs’ motion, Plaintiffs agreed to revise the requested announcement, eliminating the words “by joining us in our fight to defeat Proposal 3,” to state as follows:

Attention Students

Are you interested in joining our efforts to protect the health of women and children?

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

Defendants nevertheless rejected this proposal.

The Court finds, as stated at the hearing, that Plaintiffs have shown a likelihood of success on the merits of their First Amendment claim, and that they therefore have satisfied the requirements for obtaining a temporary restraining order at this early stage of the case. *See Fischer*, 2022 WL 15562885, at *2. Defendants are well aware of the planned walkout from classes by students on behalf of the NOW student organization in support of Proposal 3, that is scheduled to take place on school property and during school hours on Monday, November 7th. In light of the upcoming election on Tuesday, November 8, 2022, the Court notes exigency of the circumstances and grants Plaintiffs' motion to have the announcement agreed to by Plaintiffs in Court on the record at the November 4, 2022 hearing made on the Skyline High School's morning announcements on Monday, November 7, 2022.

CONCLUSION

Accordingly, the Court GRANTS Plaintiffs' Motion for an Emergency Ex Parte Temporary Restraining Order and ORDERS Defendants to read the following

announcement over the Skyline High School's public address service during ordinary morning announcements on Monday, November 7, 2022:

Attention Students

Are you interested in joining our efforts to protect the health of women and children?

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

The Court finds that Defendants seek to silence Plaintiffs' appropriate speech as to Proposal 3 by refusing to broadcast it with their morning announcements, while permitting students in favor of Proposal 3 to cut classes, and to demonstrate on school property in favor of Proposal 3.

The Court will issue a more fulsome Opinion and Order at a later date.

IT IS SO ORDERED.

s/Paul D. Borman
Paul D. Borman
United States District Judge

Dated: November 4, 2022

Attachment 1