UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SOREN NIELSEN,
and the **SKYLINE REPUBLICAN CLUB**,

Plaintiffs,

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.

Case No. 22-cv-12632

Hon. Judge F. Kay Behm

Hon. Magistrate Curtis Ivy, Jr.

DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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CASES

I. PLAINTIFFS' CLAIMS FOR INJUNCTIVE AND DECLARATORY RELIEF ARE MOOT

Even if this Court were to award nominal damages, which it should not, nominal damages do not preserve Plaintiffs' claims for injunctive and declaratory relief. As the Sixth Circuit held in *Kanuszewski v. Mich. Dep't of Health & Hum. Servs.*, "[p]ast harm allows a plaintiff to seek damages, but it does not entitle a plaintiff to seek injunctive or declaratory relief." 927 F.3d 396, 406 (6th Cir. 2019). This is because past harm "does nothing to establish a real and immediate threat that it will occur in the future." *Id.*

There is no real and immediate threat that similar harm will occur in the future. Plaintiff Nielsen graduated high school, the 2022 election is over and Proposal 3 has passed, and Defendants changed the policy for student club announcement requests at the start of the 2023-2024 school year. Plaintiffs' repeated statements that this policy change was not "formal" or "substantive" is unsupported by the record. A new announcement request form was created specifically for the 2023-2024 school year. The form indicates it must be filled out by staff sponsors, which is a change from the prior student submission policy. *Compare ECF No. 64-24, PageID.1035, and ECF No. 64-10, PageID.984*. Current Skyline Principal Casey Elmore discussed the policy change with a student, who wrote a story about it in the school newspaper. *ECF No. 64-25, PageID.1037*. The policy change was formally announced to teachers during Professional Development ("PD") days. Unlike the university's suspicious behavior in *Speech First*, there is no evidence Defendants will return to the formal student-

submission policy or that the change was made in response to the lawsuit. 939 F.3d 756 (6th Cir. 2019). As Elmore explained to the student, the policy was implemented nearly a year after the lawsuit was filed to ensure all club sponsors are aware of and approving announcements. *See contra Philip Randolph Inst. v. Husted*, 838 F.3d 699, 713 (6th Cir. 2016) *rev'd on other grounds*, 584 U.S. 756 (2018) (issuance of new form *on same day* parties' final briefs were due made voluntary cessation appear less genuine).

II. THE LAW OF THE CASE DOCTRINE DOES NOT APPLY

The "law-of-the-case doctrine" is "primarily intended to enforce a district court's adherence to an appellate court's judgment" and is applied "only loosely" when a court reconsiders its own decisions. *Daunt v. Benson*, 999 F.3d 299, 308 (6th Cir. 2021). Plaintiffs' reliance on *Daunt*, which considered whether a prior appellate panel's ruling on a preliminary injunction was the law of the case on a subsequent appeal, is inapposite.

As a general rule, "a decision made on a party's motion for preliminary injunction does not constitute law of the case." *Guillermety v. Sec'y of Educ. of U.S.*, 241 F. Supp. 2d 727, 731 (E.D. Mich. 2002) (law-of-the-case doctrine inapplicable for purposes of deciding Plaintiffs' summary judgment motion as preliminary injunction was heard on accelerated basis and parties did not have a chance to completely develop all of their legal arguments prior to the hearing); *William G. Wilcox, D.O. v. United States*, 888 F.2d 1111, 1114 (6th Cir. 1989) (finding it was error to apply law of the case to dispose of summary judgment motion on basis of rulings on motion for preliminary injunction).

The Sixth Circuit recognizes preliminary injunctions are customarily granted on basis of procedures that are "less formal and evidence that is less complete than in trial on the merits." *Wilcox*, 888 F.2d at 1113. Given the lesser burden of proof required to support a Motion for TRO as opposed to a dispositive motion, a decision as to the "likelihood of success" on a motion for preliminary injunction "does not equate to a decision as to the success of the merits of a party's claim." *Guillermety*, 241 F. Supp. 2d at 732.

Here, similar to the circumstances in *Guillermety*, the record and legal arguments have been significantly developed since the TRO hearing. Judge Borman's Opinion granting Plaintiffs' Motion for TRO addressed Plaintiffs' First Amendment claim *only*. The parties exchanged voluminous written and electronic discovery and took 5 depositions, nearly all of which lasted the full 7 hours permitted under the federal rules. Plaintiffs filed a Motion to Compel Discovery in March of 2024, emphasizing the incomplete nature of the record at the time of the TRO hearing. Due to the expedited briefing schedule (Defendants had merely one day to prepare their Response to Plaintiffs' Motion for TRO), Defendants have significantly expanded and developed their legal arguments in their Motion for Summary Judgment, including citations to the record and additional citations to supportive case law. Notably, Defendants were unable to address the Proposal 3 walkout in their Response to Plaintiffs' Motion for TRO as the walkout was not addressed in Plaintiffs' Motion or Complaint and Defendants were unaware of Plaintiffs' concerns related to the walkout.

Judge Borman's decision was also issued under the time pressures associated with preliminary injunction motions and the hearing was held on an accelerated basis. The preliminary decision was issued just hours after the TRO hearing on a Friday afternoon and the "more fulsome opinion" was issued the following Monday. The rushed nature of the decision is buttressed by the short 12-page length of the opinion. It is abundantly clear that the record and legal arguments have developed over the past two and a half years. The law-of-the-case doctrine does not apply.

III. DEFENDANTS' DECISION NOT TO AIR PLAINTIFFS' ORIGINAL ANNOUNCEMENT REMAINS THE "FOCUS" OF THIS LAWSUIT

Plaintiffs never amended their Complaint and the issue before the Court remains whether Defendants' refusal to air Plaintiffs' original announcement violated Plaintiffs' First and Fourteenth Amendment rights and the Equal Access Act. Contrary to Plaintiffs' representation, Judge Borman never stated argument about the wording of Plaintiffs' original announcement submission should have ceased "a long time ago." Rather, Judge Borman referred to certain language Plaintiffs agreed to remove during the TRO hearing while he was attempting to facilitate a resolution. Judge Borman's statement does not indicate the entire scope of the lawsuit would be changed after the hearing or because of his proposal. Indeed, to obtain a permanent injunction, as Plaintiffs now seek, Plaintiffs must demonstrate "actual success" on the merits of their claims. *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 546 n. 12 (1987). Judge Borman's decision to order Defendants to air

a modified version of the announcement and his conclusion that the original announcement contained "fighting words that give a basis for not allowing it" demonstrate Plaintiffs cannot establish actual success on the merits of their claims.

IV. PLAINTIFFS IGNORE OR MISCHARACTERIZE EVIDENCE DEMONSTRATING EQUAL TREATMENT AMONG STUDENT CLUBS AND VIEWPOINT NEUTRALITY

Plaintiffs' Response provides very little argument as to how Defendants have violated the First or Fourteenth Amendments. Plaintiffs' conclusory statements, including that "unequal treatment of their fundamental right [to free speech] violated the equal protection guarantee of the Fourteenth Amendment," are insufficient to defeat summary judgment. *See Alexander v. CareSource*, 576 F.3d 551, 560 (6th Cir. 2009) ("Conclusory statements unadorned with supporting facts are insufficient to establish a factual dispute that will defeat summary judgment.")

Plaintiffs avoid addressing the abundance of evidence demonstrating Plaintiffs were treated the same as other students and clubs. Plaintiffs ignore, mischaracterize, or claim the following evidence is immaterial because it does not suit their narrative:

- Defendants aired multiple announcements for the Republican club that promoted the club and its viewpoints, which were strikingly similar to the announcements aired for the NOW club. *ECF No. 64-13, PageID.997-1005; 64-14, PageID.1007-1008.*
- Defendants did not approve any announcements advocating for or against a current ballot initiative, which allowed Defendants to avoid violating the Michigan Campaign Finance Act. *ECF No. 64-4, PageID.852, 860; 64-2, PageID.721; ECF No. 68-4, PageID.1930-1937.*
- The District's representative did not testify Plaintiffs' announcement was

student speech, but that a student *may think* that Plaintiffs' announcement was a message from the Republican Club. Regardless, a lay witness cannot testify to a legal conclusion. *See ECF No. 68, PageID.1889-1890.*

- As reflected in the recording of Bilsborrow's conversation with Nielsen, Bilsborrow offered to air an announcement for the Republican Club that identified the date and time for club meetings and the "topics [they]'ll be discussing." *ECF No. 65-9, PageID.1839-1841*.

- While Defendants aired an announcement for the NOW Club that referenced the Club's Instagram, which included a link to a "Voting Guide," the NOW Club's political preferences were not shared over the PA System. A student needed to take an affirmative step and actively visit and access the NOW Club's Instagram to review the Voting Guide and those preferences. *ECF No. 64-19, PageID.1022-1024; 64-5, PageID.939.*

- McElmeel's testimony that approximately 70 students received unexcused absences for participating in the Proposal 3 walkout is evidence Defendants did not facilitate or encourage the walkout. *ECF No. 64-4, PageID.847*.

Plaintiffs' attempts to disregard the parallels between the NOW Club and Republican Club announcements regarding Proposal 3, as well as the walkouts pertaining to Proposal 3 and anti-masking, are equally unavailing. Defendants removed the NOW Club announcement's references to *Roe v. Wade* when Proposal 3 was on the ballot. Despite being offered a similar modification, Plaintiffs refused it. There is no evidence Defendants "helped to facilitate" any of the referenced walkouts to establish school sponsored speech. *See M.C. Through Chudley v. Shawnee Mission Unified Sch. Dist. No. 512*, 363 F. Supp. 3d 1182, 1200 (D. Kan. 2019). Rather than "pass[] along information" regarding the Proposal 3 walkout, Bilsborrow asked students what the walkout was about. *ECF No. 64-12, PageID.994.* Regardless, both NOW Club/GSRA and the Republican Club were equally permitted to plan, promote, and hold walkouts.

V. PLAINTIFFS CANNOT ESTABLISH A VIOLATION OF THE EQUAL ACCESS ACT AS ANNOUNCEMENTS OCCUR DURING INSTRUCTIONAL TIME

The Equal Access Act's obligations are not triggered because announcements occur during *instructional time*. *ALIVE v. Farmington Pub. Sch.*, 2007 WL 2572023, at *3 (E.D. Mich. Sept. 5, 2007). Plaintiffs' self-serving assertion that "announcements are made during non-instructional time" is not supported by the record. McElmeel provided unrebutted testimony that announcements occur during instructional time:

> Q: The school knows those six minutes are not going to be spent on math, right, that those six minutes are going to be spent on announcements?
>
> A: Our pupil accounting office is well apprised on what counts as instructional minutes . . . so they are submitting our times and our schedules based on state allocations for instructional minutes and they are aware that all announcements occur during instructional time . . . *ECF No. 64-4, PageID.845-846.*

There is nothing in the record that contradicts this testimony. Second period being "77 minutes to accommodate announcements" only buttresses the conclusion that announcements occur during instructional time within the regular school day. *See Prince v. Jacoby*, 303 F.3d 1074, 1088 (9th Cir. 2002) (taking student attendance, as required during 2nd period at Skyline before announcements are read, indicates the beginning of instructional time); *ECF No. 65, Ex. 11, Video Recording* (teacher begins class before announcements start; "I don't hear any announcements so we're gonna get going"). Defendants' Motion should be granted.

Respectfully Submitted,
By: */s/ Stephanie V. Romeo*
Stephanie V. Romeo (P83079)

Date: March 21, 2025

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was electronically filed with the clerk of the Court and served upon counsel of record via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on March 21, 2025.

s/Jordynn St. John
Jordynn St. John