No. 24-5056

In the United States Court of Appeals for the Sixth Circuit

MOMS FOR LIBERTY – WILSON COUNTY, TN;
ROBIN LEMONS; AMANDA DUNAGAN-PRICE

Plaintiffs-Appellants

v.

WILSON COUNTY, TN
BOARD OF EDUCATION, *et al.*

Defendants-Appellees

On Appeal from the United States District
Court for the Middle District of Tennessee
The Hon. Eli Richardson, District Judge
(Dist. Ct. No. 3:23-cv-211)

REPLY BRIEF FOR THE APPELLANTS

John I. Harris
SCHULMAN, LEROY & BENNETT PC
3310 West Avenue
Suite 460
Nashville, Tennessee 37203
615-244-6670

Brett R. Nolan
INSTITUTE FOR FREE SPEECH
1150 Connecticut Ave., N.W.
Suite 801
Washington, DC 20036
202-301-3300
bnolan@ifs.org

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Counsel for Plaintiffs-Appellants

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INTRODUCTION

The Court should reverse the district court's decision denying a preliminary injunction because the Board's rules for public comment—both past and present—violate the First Amendment. In arguing otherwise, the Board mostly ignores the real issues at stake. It argues that voluntary cessation mooted two of Plaintiffs' claims—but it never mentions the actual standard for proving mootness. And it argues that the public-interest rule is constitutional if construed as a relevance limitation—but it never explains why that interpretation is a permissible reading of the text. On issue after issue, the Board assumes its own conclusions and dodges Plaintiffs' arguments to the contrary. Perhaps that's because the Board has no answer. Its policies unconstitutionally restrict speech, and the Board cannot avoid judicial review by last-minute revisions to rules it has used to violate the First Amendment for years.

ARGUMENT

I. PLAINTIFFS ARE ENTITLED TO AN INJUNCTION AGAINST THE ADDRESS RULE AND ABUSIVE-SPEECH RULE.

A. The Board's voluntary cessation does not moot Plaintiffs' request for an injunction.

For the address rule and abusive-speech rule, the Board rests its entire merits argument on voluntary cessation. So it's remarkable that the Board never acknowledges the standard that governs such a defense. After all, it is well established that "a defendant cannot automatically moot a case simply by ending its unlawful conduct once sued." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013). Rather, a defendant must show that "it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *West Virginia v. EPA*, 142 S. Ct. 2587, 2607 (2022) (cleaned up). This is a "heavy burden" for those claiming that voluntary cessation mooted a claim. *Id.* And yet, the Board has barely even tried to meet it.

Consider the three factors that Plaintiffs argue weigh against mootness here. *See* Appellants' Br. at 39–44. Does the Board disagree? Apparently not. Its brief does not respond to Plaintiffs' argument or explain why the Court should reach a different conclusion. Indeed,

much of the Board's brief only reinforces the point that no part of this case is moot.

Start with the timing of the Board's change of heart. As Plaintiffs explained in their opening brief, timing weighs against the Board because it rescinded the unlawful policies right after Plaintiffs asked for an injunction. Appellants' Br. at 39–41. This is a common reason for rejecting a mootness defense because it "raises suspicions that [the] cessation is not genuine." *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 769 (6th Cir. 2019). Yet the Board does not even try to dispel that suspicion. It acknowledges that the unlawful rules existed "[p]rior to the filing of the Plaintiffs' lawsuit," Appellees' Br. at 13, and that it changed the rules at the first meeting after Plaintiffs moved for a preliminary injunction, *id.* at 14 (citing to the Board's meeting on April 3, 2023). Rather than offer a different explanation for the change, the Board embraces the fact that it abandoned the address rule and abusive-speech rule "in response to this lawsuit." *See Resurrection School v. Hertel*, 35 F.4th 524, 529 (6th Cir. 2022) (en banc). That cuts against applying the voluntary-cessation doctrine here. *See id.*

Nor has the Board repudiated the lawfulness of its policies. *See* Appellants' Br. at 41–42. While the Board does not argue the merits in this appeal, its brief makes clear that it "disagree[s] with Plaintiffs' assertions regarding" the constitutional limits on the Board's public-comment period. Appellees' Br. at 5. In fact, the Board suggests that these rules are necessary to stop meetings from "routinely descend[ing] into utter anarchy." *Id.* at 4. That kind of "vigorous[]" (if not hyperbolic) defense only further weakens the case for mootness. *See Speech First*, 939 F.3d at 770.

That takes us to the Board's third problem: how easily it changes its rules. As with the other factors weighing against mootness, the Board does not dispute this. Nor could it. The Board did not even hold a vote to rescind its abusive-speech rule, *see* Appellees' Br. at 14, and the votes it did hold to remove the address rule involved no discussion, no "lengthy internal process" whatsoever. *See Speech First*, 939 F.3d at 768. In fact, the Board apparently abandoned the address rule even before it formally changed the policy. The chair stopped requiring speakers to state their address as soon as Plaintiffs moved for a preliminary

injunction, *two months before* the Board voted to rescind the rule.[1] That change in protocol—without adopting a new rule—only reinforces the "ad hoc, discretionary, and easily reversible" nature of the Board's action. *See id.* at 770; *see also* Appellants' Br. at 42–43, 49–50. Given such a record, the Board cannot now plausibly argue that it is "absolutely clear that [it] could not revert to [the unlawful policies]" once the threat of an injunction passes. *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 457 n.1 (2017) (holding that the Governor's decision to stop enforcing an illegal policy did not moot the case).

One more point. Although the Board does not address any of the traditional factors for deciding whether voluntary cessation moots a case, it urges the Court to consider one issue that the Supreme Court has repeatedly dismissed: the fact that the defendant has refrained from re-engaging in unlawful conduct while under threat of an injunction. *See* Appellees' Br. at 15, 37. The Board notes that these changes have been in place for a year, which (the Board argues) shows

[1] *See* Appellees' Br. at 17 (citing 04/03/23 Bd. Mtg. at 49:50–50:45, available at https://bit.ly/3SN5kHr).

that they "were not momentary revisions intended to hoodwink the Plaintiffs." *Id.* at 39. But *of course* the Board has not reverted to its old policies during the past year—that's how long Plaintiffs' request for an injunction has been pending. If the worry with voluntary cessation is that a defendant might "suspend its challenged conduct after being sued," it makes no difference that the defendant continues to avoid acting unlawfully while a request for an injunction remains live. *See FBI v. Fikre*, 601 U.S. ---, 2024 U.S. LEXIS 1379, at *15 (Mar. 19, 2024).

The bottom line is this: Voluntary cessation moots a case only if the defendant meets its "heavy" burden to show it is "absolutely clear" it will not return to its old ways. *West Virginia*, 142 S. Ct. at 2607. The Board *does not even try* to do so. It does not cite the relevant legal standard. It does not show why any of the ordinary factors weigh in its favor. It ignores the rule and burden of proof entirely. Rather, the Board rests only on the fact that it stopped acting unlawfully—but decades of case law make clear that this alone is not enough. *See id.*

B. Voluntary cessation does not eliminate the risk of irreparable harm.

Piggybacking off the district court, the Board also argues against a preliminary injunction because its voluntary cessation means that Plaintiffs cannot show irreparable harm. Appellees' Br. at 18–19, 39. That is wrong for all the reasons Plaintiffs explained in their opening brief. *See* Appellants' Br. at 44–50. Not only is this argument contrary to this Court's precedent, if accepted it would nullify the voluntary-cessation doctrine for preliminary injunction cases. The Court already rejected that argument in *Speech First*, and it should do so again here. *See* 939 F.3d at 770.

Even still, the Board does not respond to the other, ongoing threat of irreparable harm caused by its discriminatory enforcement. No one denies that the Board chair "has the apparent authority to enforce any rule she wants," Appellants' Br. at 49, and so Plaintiffs continue to worry about being censored going forward. *See, e.g.*, Lemons Decl., R.17-1, PageID#117 (¶29). That chilling effect "constitutes a present injury in fact." *McGlone v. Bell*, 681 F.3d 718, 729 (6th Cir. 2012) (quotation omitted). And any First Amendment injury, no matter how fleeting, is irreparable. *Sisters for Life v. Louisville-Jefferson Cnty.*, 56 F.4th 400,

408 (6th Cir. 2022) (quoting *Roman Cath. Diocese v. Cuomo*, 141 S. Ct. 63, 67 (2020) (per curiam)).

Because Plaintiffs face irreparable harm, the Court must weigh the likelihood of success on the merits. *See Speech First*, 939 F.3d at 770. And that likelihood is overwhelming: The abusive-speech rule is indistinguishable from the rule this Court invalidated in *Ison v. Madison Local School District Board of Education*, 3 F.4th 887 (6th Cir. 2021), and the Board has not explained the reason for the address rule even though it bears the burden to do so under *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018). On the merits, the Board cannot succeed. Thus, even if the Court agrees with the district court that the risk of irreparable harm is small, the strength of Plaintiffs' claims on the merits warrants an injunction.

II. THE PUBLIC-INTEREST RULE VIOLATES THE FIRST AMENDMENT.

Rather than defend the text of Policy 1.404, the Board re-writes the public-interest rule and argues that this fictional version of the policy is constitutional. But this Court must analyze "what the [rule] say[s]," not what the Board wishes it said. *Maryville Baptist Church, Inc. v.*

Beshear, 957 F.3d 610, 613 (6th Cir. 2020). And what the rule says is unconstitutional.

A. The public-interest rule is not a relevance requirement.

1. The Board's entire defense of the public-interest rule depends on recasting it as a relevance restriction. As the Board sees it, requiring that comments be "in the public interest" means that they must be "germane to the reason that the board meeting is even happening: the operation of the Wilson County primary public school system." Appellees' Br. at 21. And thus, the Board argues, the rule fits neatly within this Court's precedent upholding public-comment restrictions that require speakers to limit their remarks to specific topics. *Id.* at 22–26 (citing *Youkhana v. City of Sterling Heights*, 934 F.3d 508, 519 (6th Cir. 2019)).

But how does the phrase "in the public interest" translate to "germane to the meeting's purpose of guiding the operation of the public school system?" Appellees' Br. at 26. The Board never says. It does not engage with the ordinary meaning of the phrase. It cites no legal support or linguistic authority for its conclusion. Rather, the Board simply asserts *ipse dixit* that the phrase "in the public interest" here

takes on a novel meaning—a meaning detached from any of the words that appear in the policy.

Most (if not all) of the Board's defense of this rule can thus be disregarded. Plaintiffs have not challenged a rule that limits speakers to talking about matters related to Wilson County schools. And if that's all the public-interest rule does, the Court should affirm.

But that's not what the rule does. This Court must "look to the Policy's text and determine whether it unconstitutionally burdens speech." *Ison*, 3 F.4th at 893. That text says nothing about comments being "germane" or "relevant" to Wilson County schools. It instead includes a phrase commonly used to make a value judgment about whether something is good or bad for the public. *See* Appellants' Br. at 31.

That distinguishes this case from *Youkhanna*, where this Court upheld a rule that limited speakers to discussing matters relevant to a specific topic. 934 F.3d at 519–20. The rule in *Youkhanna* required speakers to "stay on point" and talk about issues "related to [a specific] agenda item." *Id.* at 518. The chair, in fact, used the term "relevant"

when enforcing the rule, informing speakers that they cannot talk about issues "not relevant to what's going on tonight." *Id.*

The public-interest rule does nothing of this sort. It does not cabin speakers to a particular agenda item or topic. In fact, the rule seems to allow speakers to talk about *any* issue that is "in the public interest," which is presumably why the Board chair has also admonished speakers that their comments "must be specific in nature dealing with only policies and procedures." Lemons Decl., R.17-1, PageID#114–15 (¶18); Script, R.21-1, PageID#193. The public-interest rule contains no such limitation.

Not even the district court went as far as the Board does here in rewriting this rule. In a footnote, the lower court tacitly acknowledged that the public-interest rule itself does not limit speakers to talking about Wilson County schools. Mem. Op. & Order, R.30, PageID#255 n.9. The public might have an interest in, "for example, U.S. foreign policy." *Id.* So what about the text of the public-interest rule limits speakers to talking about Wilson County schools and not the conflict in the Middle East? The Board never says.

That makes the Board's worry about the floodgates so misplaced. The Board argues that, without the public-interest rule, people "could speak on any imaginable topic at a Board meeting, regardless of the topic's relevance to matters involving the school system." Appellees' Br. at 27. But what stops them now? Is the U.S.'s support for Israel not a topic "that concern[s] the public at large?" *See* Appellees' Br. at 26. What about immigration reform—surely "that concern[s] the public at large" as well. *See id.* No part of the public-interest rule says anything about limiting comments to matters relevant to Wilson County schools, and the Board's argument otherwise requires the Court to re-write the entire rule.

This Court should decline the Board's invitation to write a new policy and instead "analyze the [rule] under the First Amendment as written." *Bevan & Assocs., LPA v. Yost*, 929 F.3d 366, 377 (6th Cir. 2019). Doing so makes this case easy. The public-interest rule "as written" has nothing to do with relevance or a particular subject matter. Rather, it allows Board members to prevent speakers from making public comments based on the Board member's own subjective view about what is good or bad for the public. That kind of viewpoint

discrimination violates the First Amendment. *See Iancu v. Brunetti*, 139 S. Ct. 2294, 2299–300 (2019).

2. One last point. The Board points out that the public-interest rule only applies to some speakers (those who want to address topics not already on the Board's agenda). This, the Board argues, makes the rule less problematic because speakers could opt out of the public-interest rule by taking a different route to the podium. Appellees' Br. at 20–21. But the public-interest rule applies to anyone who wants to talk about items not already on the agenda—so if a speaker falls into that camp, there is no alternative. And even if that were not true, the availability of an alternative channel of communication matters only if a speech restriction is content neutral, which the public-interest rule is not. *See Ison*, 3 F.4th at 893.

B. The public-interest rule is not a content-neutral time, place, and manner restriction.

After arguing that the public-interest rule should be reimagined as a relevance restriction, the Board then shifts to say that "it is clear that the public-interest requirement is a reasonable time, place, and manner restriction." Appellees' Br. at 36; *id.* at 28–32. That plainly cannot be.

Whatever one thinks the public-interest rule means, it does not regulate the time or the place or the manner of delivering public comments. It instead "draws distinctions based on the message a speaker conveys." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). The rule is thus content based. *Id.*[2]

The Board's apparent problem is its reliance on *Lowery v. Jefferson County Board of Education*, 586 F.3d 427 (6th Cir. 2009), a decision that pre-dated the Supreme Court's clarification of this issue in *Reed*. In *Lowery*, this Court held that whether a speech restriction is content neutral depends on the government's purpose for enacting it. *See Lowery* at 433. Thus, the Court concluded, a rule designed to ensure orderly and efficient meetings is content neutral because those "justifications [have] nothing to do with the subject of an individual's proposed speech." *Id.*

The Supreme Court repudiated that reasoning in *Reed*. "Government regulation of speech is content based," the Court explained, "if a law

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[2] The Board never reckons with the contradiction in arguing that the public-interest rule is about relevance (a content-based distinction), while also arguing it is "clear" that the rule is content neutral. No matter. Both arguments are wrong.

applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 576 U.S. at 163. And as for the argument that a content-neutral justification can save an otherwise facially content-based rule? "That is incorrect." *Id.* at 166. *Lowery*'s holding otherwise thus no longer applies, and the Board cannot save the public-interest rule by relying on it.

C. The public-interest rule is an impermissible prior restraint.

Following a similar track, the Board invokes *Lowery* to argue that the public-interest rule is not an impermissible prior restraint. But the flaw with that argument is the same as that discussed above: *Lowery*'s holding about whether speech restrictions at a school board meeting are a prior restraint depended on its conclusion that those restrictions were content neutral. *See Lowery*, 586 F.3d at 434 (contrasting a "prior restraint" with "a permissible time, place and manner regulation"). Given that *Reed* makes clear that the public-interest rule is content based, it follows that *Lowery*'s holding about prior restraints in this context no longer applies.

Thus, the Board must show that the public-interest rule "contain[s] narrow, objective, and definite standards to guide the [government

officials]" responsible for enforcing it. *Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123, 131 (1992) (quotation omitted). But the Board makes no argument on this front. Even if it did, the discussion above should end any thought that the public-interest rule "contain[s] narrow, objective, and definite standards." *Id.* The Board has had to reimagine what the rule says just to argue that it is viewpoint neutral. If the meaning of the rule can be so easily manipulated, what "definite" or "concrete" standard limits each Board member's discretion to decide what kind of speech is "in the public interest?" No such limits exist.

This Court should reverse the district court and hold that the public-interest rule is an impermissible prior restraint.

Conclusion

The Court should reverse the district court's decision denying Plaintiffs' motion for a preliminary injunction.[3]

[3] The Board argues at the tail-end of its brief that this Court should not waive Rule 65(c)'s bond requirement if it reverses the district court's decision. In doing so, the Board acknowledges that a trial court's decision to require security against an injunction depends on "factors such as the strength of the movant's case and whether a strong public interest is present." Appellees' Br. at 42 (citing *Moltan Co. v. Eagle-Picher Indus., Inc.*, 55 F.3d 1171, 1176 (6th Cir. 1995)). While "the district court possesses discretion over whether to require the posting of

Respectfully submitted by,

/s/ Brett R. Nolan
Brett R. Nolan
INSTITUTE FOR FREE SPEECH
1150 Connecticut Ave., N.W.
Suite 801
Washington, DC 20036
202-301-3300
bnolan@ifs.org

Counsel for Plaintiffs-Appellants

John I. Harris
SCHULMAN, LEROY & BENNETT PC
3310 West Avenue
Suite 460
Nashville, Tennessee 37203
615-244-6670

April 19, 2024

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security," *Moltan Co.*, 55 F.3d at 1176, any decision in Plaintiffs' favor would require holding that Plaintiffs are likely to succeed on an issue implicating a strong public interest.

Certificate of Compliance

As required by Federal Rule of Appellate Procedure 32(g) and 6th Cir. R. 32, I certify that this brief complies with the type-volume limitation in Fed. R. App. P. 32(a)(7)(B) because it contains 3,176 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 6th Cir. R. 32(b)(1).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced Serif typeface, Century Schoolbook, in 14-point font using Microsoft Word.

/s/ Brett R. Nolan

Certificate of Service

I certify that on April 19, 2024, I electronically filed this brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Brett R. Nolan