INSTITUTE FOR
FREE SPEECH

October 26, 2024

Hon. Kelly L. Stephens, Clerk
United States Court of Appeals for the Sixth Circuit
540 Potter Stewart U.S. Courthouse
100 E. Fifth Street
Cincinnati, Ohio 45202

Via CM/ECF

Re: Response to Appellees' 10-25-24 Rule 28(j) supplemental citation of authority in *Moms for Liberty – Wilson County, TN v. Wilson County, TN Board of Education*, No. 24-5056

Dear Ms. Stephens:

The Court should strike Appellees' Rule 28(j) because it relies on extra-record evidence that this Court cannot take judicial notice of and that has been in Appellees' possession for nearly two years. Still, the emails change nothing.

The emails do not show the Board intended to modify its policies. The most they show is Jamie Farough wanted the Board to consider unspecified changes that never happened. She mentions discussing this at a meeting on January 23, 2023—but the Board never acted. And she doesn't mention the address rule—the only written policy the Board eventually changed.

While Farough does refer to *Ison v. Madison Local School District*, 3 F.4th 887 (6th Cir. 2021), suggesting she thought about the abusive-speech rule, that only undermines Appellees' brand-new claim that they intended to change the rule all along. The abusive-speech rule has never been a formal policy. *See* Appellants' Br. at 43. If Farough wanted to change it, all she had to do was stop reading her script. Yet she continued enforcing it, stopping only when Appellants sued.

Contrast that with *Davis v. Colerain Township*, 51 F.4th 164 (6th Cir. 2022), where "meeting minutes show[ed] that the board adopted [a policy] change" because of *Ison* only one week after the decision. *Id.* at 175. Farough knew about *Ison*, didn't need a Board vote to change the rule, but did nothing.

This Court rejected a similar ploy in *Speech First v. Schlissel*, 939 F.3d 756 (6th Cir. 2019). There, the government argued it considered changes before litigation, but it couldn't show that its "review would have resulted in changing" the policy. *Id.* at 769. Nor could it "explain the expedient timing of the [change]." *Id.* at 770. So too here.

Finally, Appellees claim Appellants sued "upon learning" the Board intended to change its policies. Nevermind how astonishing it would be to discover the Board planned on modifying its policies right before litigation but forgot to mention that during three rounds of briefing spanning more than a year. The evidence-free allegation that Appellants sued "to preserve" a voluntary-cessation argument is baseless and inappropriate.

Sincerely,
/s/ Brett R. Nolan
Brett R. Nolan
Counsel for Appellants

The body of this letter contains 349 words.

cc: All counsel (via ECF)