IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

MOM FOR LIBERTY – WILSON COUNTY, TN, *et al.*,

Plaintiffs,

v.

WILSON COUNTY BOARD OF EDUCATION, *et al.*

Defendants.

Case No: 3:23-cv-211

Judge Eli Richardson

Magistrate Judge Alistair Newbern

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

The Wilson County Board of Education ordered Robin Lemons to stop speaking during its public-comment period for failing to follow a rule that the Board had virtually no history of enforcing. In fact, just minutes earlier the Board had allowed a different individual to speak uninterrupted despite breaking that very same rule. The rule, compelling speakers to publicly announce their home address, is unconstitutional. And its enforcement against Lemons was doubly so, as it was pretextual—the board invoked the rule because Lemons criticized school officials for mishandling an allegation of sexual misconduct involving her fourth-grade daughter. The Board's decision to censor Lemons—and only Lemons—violated the First Amendment.

Yet the Board's problems do not end with its pretextual enforcement. The Free Speech Clause forbids a school board from unreasonably restricting speech during its public-comment period or discriminating against speech based on viewpoint. The Wilson County Board of Education's various rules for speaking at its meetings do both. They not only unreasonably require individuals speaking on controversial or sensitive topics to disclose their home address to the public, but the rules also prohibit speakers from criticizing Board members or other school officials too harshly. These rules give the Board license to silence speakers who might offend the Board or oppose the actions of school officials—just as the Board did with Robin Lemons. The plaintiffs thus move for a preliminary injunction to prohibit the defendants from enforcing their unconstitutional speech restrictions.

FACTS

The public-comment period at Wilson County Board of Education meetings

The Wilson County Board of Education meets monthly to conduct its regular business. Ex. A, WCS Policy Manual 1.400; Lemons Decl. ¶ 5. Board meetings are open to the public. Tenn. Code Ann. § 8-44-102(a). The Board also streams its meetings online and posts videos of past meetings on its website.[1] Price Decl. ¶ 4. Anyone interested can watch meetings dating back to March 4, 2019.

Each meeting includes a period for public comment. The Board welcomes individuals and groups to speak about school policy and operations. *See* Ex. B, WCS Policy Manual 1.404; Lemons Decl. ¶ 6. Citizens have three ways of participating. First, an individual can ask for time on the meeting agenda, which requires contacting the Director of Schools ten business days before the meeting and seeking approval to discuss a specific topic. *Id.* Individuals going through these hoops get to speak for five minutes. *Id.* Second, individuals can sign up to speak for three minutes about items already on the agenda. And third, individuals can ask any Board member for permission to speak about an issue not on the agenda. *Id.*

A Board member can grant requests to speak on a non-agenda item only upon determining that doing so "is in the public interest." *Id.* The Board's Policy Manual provides no guidelines for deciding what comments are in the public interest. Nor

[1] The video archive of past Board meetings is available at http://bit.ly/3JhiYQ9 (last visited Mar. 20, 2023). Price Decl. ¶ 4.

does the Policy Manual provide a time limit for individuals speaking on non-agenda items. The Chairman typically limits these comments to three minutes.

The Board has adopted several rules for speaking at its meetings. Speakers must publicly announce their name, address, and topic of discussion before speaking. *Id.* And "[t]he Chairman shall have the authority to terminate the remarks of any individual who is disruptive or does not adhere to Board Rules." *Id.* The Policy Manual cites a criminal statute for support—suggesting that violating any of the Board's rules for speaking during the public-comment period could lead to a criminal charge. *Id.* (citing Tenn. Code Ann. § 39-17-306).

The Chairman emphasizes these rules by reading a warning at the beginning of each public-comment period. This warning also includes additional rules not found in the Policy Manual.

One of those rules prohibits "abusive" comments. The Chairman tells speakers that the Board reserves its right to terminate comments that are "abusive to an individual board member, the board as a whole, or the director of schools or any employee of the school system." *See, e.g.*, 10/3/22 Board Meeting at 35:38–53 (Exhibit K at 00:20–35).[2] The Board does not define "abusive" or give speakers guidance as to what kind of critical or offensive speech is not allowed.

An example of the Chairman's warning reads:

[2] A video of the October 3, 2022, meeting is available at http://bit.ly/3X1ZPop (last visited Mar. 13, 2023). Lemons Decl. ¶ 12. Because the Board's videos do not contain a timestamp, this brief provides citations to the time marker of the videos posted online, as well as the time marker for the video excerpts filed with the Court. The citations in the parenthetical refer to the video excerpts filed in the record.

> Please state your name, address, and subject of your presentation. Your topic must be specific in nature dealing with only policies and procedures. We reserve the right to terminate remarks at any time if you fail to adhere to the guidelines or [if] your comments become abusive to an individual board member the board as a whole or the director of schools or any employee of the school system. The board shall have no obligation to respond. At the conclusion of your remarks, the board and the Director of Schools shall have the privilege to ask questions.

Id. at 35:30–36:02 (Exhibit K at 00:12–44).

Despite the warning, the Board does not consistently enforce its own rules. And it almost never enforces the requirement that individuals announce their address before speaking. Take the year 2022 as an example: The Board heard 45 public comments across its 12 regularly scheduled meetings.[3] Price Decl. ¶ 28. But in 26 of those comments, the speaker never disclosed his or her address. *Id.* Many speakers instead identified what district zone they live in (*i.e.*, "Zone 1" or "Zone 4"). *Id.* Others said nothing at all. *Id.* Yet the Chairman terminated a speaker's remarks for not following this rule on only one occasion: when Robin Lemons began criticizing the Director of Schools. *See* Lemons Decl. ¶¶ 24–27; Price Decl. ¶ 28.

Moms for Liberty

Amanda Price founded a local chapter of Moms for Liberty in 2021 after growing concerned about Wilson County's education policies. Price Decl. ¶ 2. She worried

[3] The videos of the Board's 2022 meetings are available at: http://bit.ly/40vkunR (January 11, 2022); http://bit.ly/40w1TYM (February 7, 2022); http://bit.ly/3JGs34X (March 14, 2022); https://bit.ly/3DB6u1S (April 4, 2022); http://bit.ly/3lbb8gL (May 2, 2022); https://bit.ly/3WZ5MCz (June 6, 2022); http://bit.ly/3JJoFX2 (July 11, 2022); http://bit.ly/3l6kHxn (August 1, 2022); http://bit.ly/3Y9vrtz (September 12, 2022); http://bit.ly/3X1ZPop (October 3, 2022); http://bit.ly/3DKlvyr (November 11, 2022); http://bit.ly/3RzbKsO (December 5, 2022). Price Decl. ¶¶ 7–18. Video excerpts of the public-comment period from each meeting are marked as Exhibits C, D, E, F, G, H, I, J, K, L, and M, respectively. *Id.*

about the school's response to the Covid pandemic and what she saw as an overly political curriculum. *Id.* So Price started a Wilson County chapter of Moms for Liberty to organize and lead parents toward the common goal of unifying, educating, and empowering parents to defend their parental rights. *Id.*

Soon after, Price and other members of Moms for Liberty began attending and speaking at Board meetings. *Id.* ¶¶ 4, 6, 21. They advocated for change on a variety of issues affecting Wilson County schools. Price has observed every Board meeting since the spring of 2021—either online or in person—speaking at several. *Id.* ¶¶ 6, 21. But Price and other members of Moms for Liberty have never felt comfortable speaking freely because of the Board's hostility to critical viewpoints implicit in its threat to terminate anyone's remarks if they become too "abusive." *Id.* ¶¶ 21–22, 27.

The Board censors Robin Lemons

Robin Lemons began watching Board meetings with other Moms for Liberty members in 2022. Price Decl. ¶¶ 2–3. For several months, she simply watched and listened. But Lemons eventually felt compelled to speak after experiencing firsthand the failures of several Wilson County school officials. *Id.* at ¶¶ 3–4, 13.

Lemons's fourth-grade daughter attended a Wilson County elementary school in the fall of 2022. *Id.* ¶ 1. One day, her daughter told Lemons that she had been sexually propositioned by another student at school. *Id.* ¶ 14. Lemons alerted the school principal, who is responsible for handling this problem. *Id.* But Lemons learned that the principal failed to investigate the incident or make the required report to Tennessee's Department of Children's Services, and that the Director of Schools lied about whether the incident had been reported when asked about it by a

member of the Board. *Id.* So Lemons decided to speak directly to the Board about these problems. *Id.* ¶¶ 13–15.

Lemons planned to speak at the October 3, 2022, board meeting. *Id.* ¶ 13. She spent significant time writing—and re-writing—her planned remarks because she worried that the Board would dislike her message and interrupt her or cut her time off. *Id.* ¶ 16. She did not want the Board to prevent her from speaking by labeling her comments "abusive." *Id.* So Lemons carefully tailored her message to avoid stepping over whatever line the Board might arbitrarily enforce against her. *Id.*

At the beginning of the October 3, 2022, public-comment period, Defendant Farough read the usual warning. *Id.* ¶ 18; 10/3/22 Board Meeting at 35:30–36:02 (Exhibit K at 00:12–44). The individual who spoke immediately before Lemons declined to give her address. Lemons Decl. ¶ 19. Farough allowed that individual to speak without interruption. *Id.* As Lemons approached the podium, Farough asked Lemons whether she needed to repeat the warning. 10/3/22 Board Meeting at 1:13:52–1:14:00 (Ex. K at 38:34–42). Lemons answered, "No." Farough responded, "Okay, name and address please." *Id.* at 1:14:00–02 (Ex. K at 38:40–44).

Lemons explained that "for privacy concerns and my situation, I'm not going to disclose my address." *Id.* at 1:14:04–08 (Ex. K at 38:46–50). But Defendant Farough did not stop Lemons from speaking. Instead, and just like every other time an individual declined to give his or her address during 2022, the Chairman allowed Lemons to continue.

Lemons began by describing the incident in which her young child was propositioned for sex by another student. She spoke for almost a full minute—about a third of her allotted time:

> On August 30, 2022, my fourth-grade daughter was propositioned sex by another fourth-grade child in the restroom stall at Springdale Elementary School. My daughter was missing for 30-plus minutes and I wasn't notified until four hours later. I went and picked my child up from school immediately because this was completely out of character and behavior of my daughter, and I knew that something wasn't right. When I got home my child disclosed to me what had happened that day at first writing it on paper because she was embarrassed to say it out loud, then said that the other child had her meet her in the restroom stall and then asked her to "do sex." This is completely inappropriate behavior for any child. At that moment, my child could only think to play rock, paper, scissors, hoping to win so that, in her words, she didn't have to do sex. I went back to the school again—

Id. at 1:14:10 (Ex. K at 38:52); Lemons Decl. ¶ 20.

At this point, Mike Jennings, the county attorney and legal advisor to the Board, interrupted. Lemons Decl. ¶ 21. "Let me, let me interrupt here if you don't mind," he said. "Is this not, and I have to be careful here with confidentiality, is this not something that has been referred to the appropriate agency to look into?" 10/3/22 Board Meeting at 1:14:54–15:11 (Ex. K at 39:36–53) (cross-talk omitted). He continued: "It doesn't need to be discussed here openly, then." *Id.* at 1:15:17–19 (Ex. K at 39:59–40:02).

Lemons clarified that she would not disclose any names in her comments so there would be no privacy concerns. *Id.* at 1:15:20–27 (Ex. K at 40:02–09). She explained that the principal, who serves as the child-abuse coordinator for the school, "failed to report it to [the Department of Children's Services], failed to investigate it whatsoever." *Id.* at 1:15:32–43 (Ex. K at 40:14–25). Lemons then

turned her criticism toward the Director of Schools, Jeff Luttrell: "Mr. Luttrell was told about this, lied about it being reported—" *Id.* 1:15:43–47 (Ex. K at 40:24–29).

Defendant Farough cut Lemons off. She invoked Lemons's earlier refusal to disclose her address as an excuse for terminating her speaking time: "Ms. Lemons, you also refused to adhere to the guidelines of giving your address, so we've asked you to stop talking today, because there's, from my understanding there's more than one involved. And so we've asked that you stop, for now, and let this process continue." *Id.* at 1:15:46–16:03 (Ex. K at 40:28–45); Lemons Decl. ¶ 25. Farough identified no other rule or policy that Lemons "refused to adhere to" other than failing to announce her address.

The next month, only two of the ten individuals who spoke during the Board's public-comment period announced their address. *Compare* 11/7/22 Board Mtg. at 1:22:28–32 & 1:26:22–33[4] (Ex. L at 47:25–29 & 51:19–30) (stating an address) *with id.* at 36:12–24, 45:41–45, 51:42–45, 57:00–02, 1:12:16–18, 1:29:05–09, 1:32:33–34, & 1:34:47–49 (Ex. L at 01:09–21, 10:38–42, 16:39–42, 21:57–59, 37:13–17, 54:02–06, 57:30–32, & 59:44–46) (not stating an address). Defendant Farough did not terminate any of the other eight individual's remarks.

The ongoing impact of the Board's censorship on the plaintiffs

Since Defendant Farough censored her, Lemons has refrained from speaking at Board meetings altogether. Lemons Decl. ¶ 28. She intends to speak again and

[4] A video of the November 7, 2022, board meeting is available at http://bit.ly/3DKlvyr (last visited Mar. 20, 2023). The video excerpt of the public-comment period is marked as Exhibit L. Price Decl. ¶ 17.

would like to continue discussing her view that the school principal and the Director of Schools failed to properly handle a serious allegation of sexual misconduct at an elementary school. *Id.* But she cannot discuss such a sensitive and controversial topic if the Board requires her to first announce her home address. *Id.* ¶¶ 17, 28. Lemons does not want to publicly expose private information about where she lives with her family. *Id.* ¶ 17. And she fears reprisal from those who disagree with her criticism and who would discover her home address by listening. *Id.*

Because Farough demonstrated a willingness to selectively enforce the Board's rules against speakers who criticize school officials, Lemons also worries that Defendant Farough will invoke the policy against "abusive" speech to censor her remarks if Lemons continues criticizing the Director of Schools or other school officials. *Id.* ¶ 29. Accordingly, Lemons has refrained from speaking since October 3, 2022. *Id.*

Price has likewise limited her speech out of fear that Defendant Farough will censor her. Price Decl. ¶¶ 23, 25. Price intends to continue speaking at Board meetings, as she has done in the past, to criticize the Board and other school officials for adopting harmful policies. *Id.* ¶ 25. But the Board's policies and Defendant Farough's censorship of Lemons has caused Price to censor her own remarks. *Id.* Like Lemons, Price refuses to disclose her address before speaking because she fears a backlash against herself and her family from those who disagree with her views about controversial issues. *Id.* ¶¶ 23, 25. But that means Price must modify her speech to avoiding provoking the Board's ire. *Id.* She refrains

from criticizing school officials too harshly so that Farough will not invoke the address-disclosure requirement to terminate her remarks, just as Farough did with Lemons. *Id.* Price also modifies her speech because she worries that Defendant Farough will censor harsh criticism of school officials as "abusive." *Id.* ¶ 26.

Other members of the public, including Moms for Liberty members, are modifying their speech before the Board or foregoing speaking altogether because they fear disclosing their address to the public and they fear that the Board will censor their remarks if they criticize school officials or Board members. *Id.* ¶ 27.

SUMMARY OF ARGUMENT

All three challenged rules prevent Wilson County citizens from freely speaking at the Board's public meetings. The requirement that individuals publicly announce their address serves no legitimate purpose. Instead, it intimidates people from speaking on controversial or sensitive topics. It thus unreasonably regulates speech in violation of the First Amendment.

The prohibition on so-called "abusive" speech impermissibly discriminates against people's viewpoints, and is in any event hopelessly vague and subjective, inviting discriminatory enforcement. These defects also plague the Board's rule that speakers must prove their speech would serve the "public interest." And that requirement is unconstitutional for an additional reason: it acts as a prior restraint unbounded by any limitations on officials' discretion.

The plaintiffs are entitled to a preliminary injunction because there is no question that they will prevail on the merits. In the First Amendment context, that factor all but resolves this motion.

ARGUMENT

The plaintiffs are entitled to a preliminary injunction because (1) they will likely succeed on the merits, (2) they will continue suffering irreparable harm absent an injunction, (3) the balance of equities tips in their favor, and (4) an injunction will serve the public interest. *Online Merchs. Guild v. Cameron*, 995 F.3d 540, 546 (6th Cir. 2021). All four factors favor the plaintiffs here. But "as in many First Amendment cases, the key inquiry is the first one: Who is likely to prevail on the constitutional claim?" *Sisters for Life, Inc. v. Louisville-Jefferson Cnty.*, 56 F.4th 400, 403 (6th Cir. 2022). The plaintiffs' likelihood of success suffices to warrant a preliminary injunction.

I. THE PLAINTIFFS WILL SUCCEED ON THE MERITS.

A. The First Amendment forbids the defendants from unreasonably regulating speech or discriminating against speech on the basis of viewpoint during Board meetings.

"The Free Speech Clause limits the government's power to regulate speech on public property." *Am. Freedom Def. Initiative v. Suburban Mobility Auth.*, 978 F.3d 481, 485 (6th Cir. 2020). Those limits "var[y] depending on the forum where the speech occurs." *Ison v. Madison Local Sch. Dist. Bd. of Educ.*, 3 F.4th 887, 893 (6th Cir. 2021). A limited public forum exists where the government opens its property "for certain groups or for the discussion of certain topics." *Id.* (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)). The public-comment period of a school board meeting is a limited public forum. *See Lowery v. Jefferson Cnty. Bd. of Educ.*, 586 F.3d 427, 432 (6th Cir. 2009); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 & n.7 (1983).

While the government can restrict the topics discussed at a limited public forum (*i.e.*, "school policies and procedures"), any speech restrictions must be "reasonable in light of the purpose served by the forum" and viewpoint neutral. *Ison*, 3 F.4th at 893. That means the government "must be able to articulate some sensible basis" for its rule. *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1888 (2018). And regardless of its rationale, the government cannot "disfavor[] certain points of view." *Ison*, 3 F.4th at 893 (quotation omitted).

B. The address-disclosure requirement violates the First Amendment.

The address-disclosure requirement violates the First Amendment because "no conceivable governmental interest" justifies requiring individuals to publicly announce their home address before speaking. *See Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569, 575 (1987). That likely explains why the Board almost never enforced this rule before Lemons. And when combined with the rule's "clear" chilling effect, *see Marshall v. Amuso*, 571 F. Supp. 3d 412, 426 (E.D. Pa. 2021), the Board cannot overcome its burden to articulate a "sensible basis" for imposing this restraint, *Mansky*, 138 S. Ct. at 1888.

To start, a rule compelling speech "is subject to the same analysis as prohibitions from speaking." *Marshall*, 571 F. Supp. 3d at 426 (citing *Riley v. Nat'l Fed'n of Blind of N.C., Inc.*, 487 U.S. 781, 796–97 (1988)). That's because the right to free speech includes the right to refrain from speaking. *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2463 (2018). And so the Board's rule "command[ing]" individuals to announce their address is subject to the same constraints as any other content-

based regulation. *See Riley*, 487 U.S. at 796–97. It must be "reasonable in light of the purpose of the forum." *Ison*, 3 F.4th at 893 (quotation omitted).

The problem here lies in the public nature of the disclosure. Perhaps the Board would justify its rule as necessary to ensure that speakers reside in Wilson County. There's good reason to doubt that justification, as the Board allows non-residents to speak. *See, e.g.*, 11/7/22 Board Mtg at 36:10–26[5] (Ex. L at 01:09–21) ("I reside in Nashville, Tennessee."). But suppose that's the Board's rationale. The Board's desire to verify a speaker's residential status would not justify its requirement that individuals *publicly* disclose their home address to everyone listening.

A recent decision from another federal court explains why. In *Marshall*, the district court enjoined enforcement of a similar public-comment policy requiring individuals to "preface their comments by an announcement of their name, address, and group affiliation." 571 F. Supp. 3d at 418, 426. "While the right to speak at [school board] meetings is limited to students, employees, and residents within the District," the court explained, "requiring the speaker to announce their specific home address is an unreasonable restriction." *Id.* at 426. That's because "[e]ach speaker's address can be collected when they sign up for their speaking slot." *Id.* And gathering that information privately avoids the obvious "chilling effect of being forced to announce to all present one's actual home address before speaking on a hotly[] contested issue." *Id.*

[5] A video of the November 7, 2022, meeting is available at http://bit.ly/3DKlvyr (last visited Mar. 20, 2023). Price Decl. ¶ 17.

The same analysis applies here. The Board already requires that individuals sign up to speak before each meeting. *See* Ex. B. So if the Board wants to verify residential status, "[e]ach speaker's address can be collected when they sign up for their speaking slot." *See Marshall*, 571 F. Supp. 3d at 426. The additional requirement that individuals publicly announce their address "bears little relationship" to the forum's purpose. *See Miller v. City of Cincinnati*, 622 F.3d 524, 536 (6th Cir. 2010). And so the rule violates the First Amendment. *See id.*

The lack of any good reason for requiring public disclosure dooms the rule. But the chilling effect further compounds the problem. *See Marshall*, 571 F. Supp. 3d at 426. The plaintiffs reasonably fear a backlash for criticizing school officials over sensitive and controversial topics. Lemons Decl. ¶¶ 17, 28; Price Decl. ¶¶ 23, 25. Some of that comes with the territory—an individual deciding to speak about a contentious issue should expect pushback. But requiring the plaintiffs to publicly announce their home address adds a new dimension. It exponentially multiplies the fear of reprisal for taking unpopular positions on controversial matters. *See Marshall*, 571 F. Supp. 3d at 426. That effect is real: Lemons has refrained from speaking at the Board's meetings since Defendant Farough censored her for refusing to disclose her address. Lemons Decl. ¶ 28. And Price has self-censored her harshest criticism of public officials to avoid the same fate. Price Decl. ¶ 25. The rule thus undermines "the purpose served by the forum" because it needlessly prevents some citizens from speaking on matters of public concern. *See Ison*, 3 F.4th at 893. It is unreasonable under the First Amendment.

One last point. As explained above, the disclosure requirement is a content-based regulation because it "command[s]" individuals to speak on a subject they would not otherwise speak. *See Riley*, 487 U.S. at 796–97. But if the Court disagrees and determines the rule is content neutral, it still violates the First Amendment.

Content-neutral restrictions on speech must be narrowly tailored to serve a significant government interest. *Ison*, 3 F.4th at 893. That means a rule cannot burden "substantially more speech than necessary." *Sisters for Life*, 56 F.4th at 404 (cleaned up). "A critical feature of this inquiry turns on whether the [government] seriously undertook to address the problems it faces with less intrusive tools readily available." *Id.* (quotation marks omitted). "[M]ere convenience" cannot save a rule burdening speech when effective alternatives exist. *Id.* So the government must show that its "interest would be achieved less effectively absent the regulation." *Ison*, 3 F.4th at 896 (quotation marks omitted).

Under this framework, the Board runs into the same problem. The Board can verify a speaker's residence just as "effectively" in private. *See id.* In fact, public disclosure might be a *less* effective measure. The Board does not pause to confirm an individual's address once they get up to the podium to speak. And so the public disclosure does not give the Board any meaningful opportunity to verify someone's address. If the Board relies on this rule to limit the public-comment period to Wilson County residents, it could do that much more effectively by collecting this information privately before a meeting starts. Thus, the Board cannot show that its

"interest would be achieved less effectively absent the [disclosure rule]." *See id.* (quotation marks omitted).

C. *The restriction against abusive comments violates the First Amendment because it discriminates against speech based on viewpoint.*

The plaintiffs will also prevail on their challenge to the Board's rule prohibiting "abusive" comments. This restriction "plainly" violates the First Amendment because it discriminates against speech based on viewpoint. *See Ison*, 3 F.4th at 894.

"The First Amendment's viewpoint neutrality principle protects more than the right to identify with a particular side." *Matal v. Tam*, 137 S. Ct. 1744, 1764–65 (2017) (Kennedy, J., concurring in part). It also includes "the right to create and present arguments for particular positions *in particular ways*, as the speaker chooses." *Id.* (emphasis added). So laws prohibiting "offensive" or "disparaging" speech violate the First Amendment even if those laws "evenhandedly prohibit[] disparagement of all groups, whether Democrats or Republicans, capitalists or socialists, or those arrayed on both sides of any other topic." *Am. Freedom Def. Initiative*, 978 F.3d at 499–00 (cleaned up). In other words, "[g]iving offense is a viewpoint." *Ison*, 3 F.4th at 894 (quotation marks omitted). And so the government cannot restrict speech merely because it offends or disparages some people. *Id.*

The Board's restriction against "abusive" speech falls in the same camp. In fact, the Sixth Circuit settled this issue just two years ago in *Ison*. There, a school board opened a public-comment period and enacted a speech code like the one here: it prohibited "abusive" statements (among other things). *Id.* at 891. The court

explained that the ordinary definition of "abusive" is "harsh and insulting." *Id.* at 893; *see also id.* at 894. And so a restriction against "abusive" speech "plainly fit[s] in the 'broad' scope of impermissible viewpoint discrimination because . . . [it] prohibit[s] speech purely because it disparages or offends." *Id.* at 894 (quoting *Matal*, 137 S. Ct. at 1763).

Ison stands directly on point and thus controls. The Board's restriction against "abusive" speech is indistinguishable from the rule invalidated in *Ison*. It discriminates based on viewpoint by singling out speech that "disparages or offends." *See id.* The rule is facially invalid.

D. The restriction against abusive comments is unconstitutionally vague.

The prohibition on abusive speech is also unconstitutionally vague. A law or regulation is void-for-vagueness when "a person of ordinary intelligence" cannot "readily identify" how it applies. *Miller*, 622 F.3d at 539. This rule serves two purposes. It "ensures that laws provide fair warning of proscribed conduct." *Id.* (quotation marks omitted). And "it also protects citizens against the impermissible delegation of basic policy matters for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Id.* (quotation marks omitted).

"Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (quotation marks omitted). That kind of chilling effect cannot stand when it "abuts upon sensitive areas of basic First Amendment freedoms." *See id.* at 109 (cleaned up). So while "perfect clarity

and precise guidance have never been required even of regulations that restrict expressive activity," *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989), those regulations must contain "objective, workable standards" to guide enforcement, *Mansky*, 138 S. Ct. at 1891.

The rule forbidding "abusive" comments is unconstitutionally vague because it lacks "objective, workable standards" that a person of ordinary intelligence can understand. *See Marshall*, 571 F. Supp. 3d at 424 (quoting *Mansky*, 138 S. Ct. at 1891). The term is "irreparably clothed in subjectivity." *Id.* This subjectivity renders the rule unconstitutionally vague because it "fails to constrain [the] official's decision to limit speech with objective criteria." *Miller*, 622 F.3d at 539 (quotation marks omitted).

Marshall again proves instructive. The *Marshall* court held that a similar restriction against abusive speech is unconstitutionally vague because it is not "capable of reasoned application." 571 F. Supp. 3d at 424 (quotation marks omitted). The problem lies in the term's inherent subjectivity. "What may be considered . . . 'abusive' . . . varies from speaker to speaker, and listener to listener." *Id.* So whether speech falls on the permissible or impermissible side of the line will inevitably turn on the opinion of whoever is enforcing it. *Id.* Yet "[a]llowing little more than the presiding officer's own views to shape what counts as . . . abusive . . . under the policies openly invites viewpoint discrimination." *Id.* The void-for-vagueness doctrine prohibits speech restrictions that risk such a "danger of arbitrary and discriminatory application." *Miller*, 622 F.3d at 540 (quotation marks omitted).

The term "abusive" lacks any objective criteria that a person of ordinary intelligence can understand. It is thus unconstitutionally vague. *See id.* at 539–40.

E. The public-interest requirement violates the First Amendment because it discriminates against speech based on viewpoint.

The plaintiffs will also succeed on their challenge to the public-interest requirement. A rule requiring that individuals prove their comments are in the public interest plainly "favor[s] some viewpoints or ideas at the expense of others." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (quotation omitted). The Board already limits comments to those related to school policy and procedure—a permissible restraint for a limited public forum. *Ison*, 3 F.4th at 893. "But the government may not go further by [restricting] specific viewpoints on the topics that it allows." *Am. Freedom Def. Initiative*, 978 F.3d at 498. Yet that is what this rule does: it prohibits speech on an otherwise permissible topic if the Board does not agree that the message is "in the public interest"—a decision that turns entirely on the speaker's viewpoint. It thus violates the First Amendment.

The Supreme Court's recent decision in *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019) illustrates this point well. *Brunetti* held that the Lanham Act's prohibition against "immoral or scandalous" trademarks discriminates based on viewpoint. *Id.* at 2299. The Court explained the problem: "So the Lanham Act allows registration of marks when their messages accord with, but not when their messages defy, society's sense of decency or propriety." *Id.* at 2300. This "is viewpoint-based" discrimination. *Id.* at 2299.

The Board's public-interest requirement runs into the same problem. It allows speakers to discuss issues of school policy and procedure if their comments "accord with, but not when their messages defy," what the Board considers "the public interest." *See id.* This distinction discriminates based on viewpoint and thus facially violates the First Amendment.

F. The public-interest requirement violates the First Amendment by imposing an impermissible prior restraint.

The public-interest barrier also violates the First Amendment by imposing an impermissible prior restraint. "A prior restraint is any law forbidding certain communications when issued in advance of the time that such communications are to occur." *McGlone v. Bell*, 681 F.3d 718, 733 (6th Cir. 2012) (quotation marks omitted). "Any system of prior restraints of expression bears a heavy presumption against its constitutional validity, and a party who seeks to have such a restraint upheld thus carries a heavy burden of showing justification for the imposition of such a restraint." *County Sec. Agency v. Ohio Dep't of Commerce*, 296 F.3d 477, 485 (6th Cir. 2002) (cleaned up).

To survive scrutiny, any prior restraint "must contain narrow, objective, and definite standards to guide the [government]." *Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123, 131 (1992) (quotation marks omitted). A rule fails this test when it allows public officials to decide whether to grant individuals access to a government forum based on only "their own ideas of 'public welfare.'" *See Shuttlesworth v. Burmingham*, 394 U.S. 147, 150–51 (1969).

The Board's public-interest rule does precisely that. First, it imposes a prior restraint: individuals must obtain Board approval before speaking on a non-agenda item. Ex. B. But the criteria for approval (whether comments are "in the public interest") gives the Board members "virtually unbridled and absolute power" to decide what to do. *See Shuttlesworth*, 394 U.S. at 150. That's because whether an individual's comments are in the "public interest" is a "subjective standard[]" that "does not contain 'narrow, objective, and definite'" criteria to guide Board members approving requests. *See Int'l Outdoor, Inc. v. City of Troy*, 361 F. Supp. 3d 713, 717 (E.D. Mich. 2019) (quoting *Forsyth Cnty.*, 505 U.S. at 131). It is thus facially invalid.

G. The policies violate the plaintiffs' right to petition for the same reasons they violate the Free Speech Clause.

The First Amendment right to petition the government for a redress of grievances "extends to all departments of the Government." *EJS Props., LLC v. City of Toledo*, 698 F.3d 845, 863 (6th Cir. 2012) (quotation marks omitted). And generally speaking, claims under the Petition Clause "are viewed in kind with right-to-speech claims." *Id.* at 864. (evaluating a right-to-petition claim using the standards that apply to the Free Speech Clause).

Appearing before an elected school board to advocate for change in governmental policy constitutes "seeking redress from a government official" and thus "qualifies as petitioning." *Id.* at 863. So for the same reasons that the Board's rules violate the Free Speech Clause by inhibiting speech, they also violate the plaintiffs' right to petition. *See id.* at 864.

II. PLAINTIFFS WILL CONTINUE TO SUFFER IRREPARABLE HARM WITHOUT AN INJUNCTION.

"'The loss of First Amendment freedoms, for even minimal periods of time,' amounts to irreparable injury." *Sisters for Life*, 56 F.4th at 408 (quoting *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 67 (2020) (per curiam)). Thus, because the Board's policies "likely violate[] the First Amendment, applying [those policies] to [the plaintiffs] would irreparably injure them." *Id.*

III. AN INJUNCTION ENFORCING THE FIRST AMENDMENT IS IN THE PUBLIC INTEREST AND HARMS NO OTHER PARTIES.

The last two factors "merge when the Government is the opposing party" to a motion for a preliminary injunction. *Wilson v. Williams*, 961 F.3d 829, 844 (6th Cir. 2020) (quoting *Nken v. Holder*, 556 U.S. 418, 435 (2009). And because "the public's true interest lies in the correct application of the law," *Kentucky v. Biden*, 23 F.4th 585, 612, (6th Cir. 2022), the plaintiffs' likelihood of success drives the outcome here, *see Online Merchs. Guild*, 995 F.3d at 560. The last two factors thus favor an injunction because the plaintiffs are likely to prevail on the merits and "it is always in the public interest to prevent violation of a party's constitutional rights." *ACLU Fund of Mich. v. Livingston Cnty.*, 796 F.3d 636, 649 (6th Cir. 2015) (quotation omitted).

IV. THE COURT SHOULD WAIVE RULE 65(C)'S BOND REQUIREMENT.

The Sixth Circuit considers Rule 65(c)'s bond requirement as discretionary. *Moltan Co. v. Eagle-Picher Indus.*, 55 F.3d 1171, 1176 (6th Cir. 1995). To decide whether to require security, courts consider factors such as "the strength of [the plaintiff's case] and the strong public interest involved." *See id.* Both factors weigh

against requiring a security here. And "[g]iven that Defendants are unlikely to incur damages or costs from this injunctive relief," the plaintiffs should be "excused from posting security as a condition of obtaining injunctive relief." *See Planned Parenthood Tenn. & N. Miss. v. Slatery*, 523 F. Supp. 3d 985, 1006 (M.D. Tenn. 2021).

CONCLUSION

The Court should grant the plaintiffs a preliminary injunction and prohibit the defendants from enforcing the Board's policies (1) requiring that individuals speaking at Board meetings disclose their address, (2) prohibiting speakers from making allegedly "abusive" comments, and (3) requiring that individuals prove that their comments are "in the public interest" before speaking.

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CERTIFICATE OF SERVICE

I certify that the above document and the attached exhibits were served electronically through the Court's CM/ECF system upon counsel for the defendants on March 21, 2023. I further certify that the video exhibits submitted with this filing were served via mail pursuant to Administrative Order No. 205 upon the same counsel on March 21, 2023.

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