IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

DAVID NIELSEN, parent and next friend, on behalf of his minor child, **S.N.**, 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. Paul D. Borman

EXPEDITED CONSIDERATION REQUESTED

PLAINTIFFS' MOTION FOR AN EMERGENCY EX PARTE TEMPORARY RESTRAINING ORDER

Plaintiffs hereby move this court for an ex parte temporary restraining order. Fed. R. Civ. P. 65(b); E.D. Mich. L.R. 65.1. This motion is supported by Plaintiffs' Memorandum of Law in support of their Motion for Temporary Restraining Order. Plaintiffs rely on the statements contained in their Verified Complaint as the factual basis for their motion. ECF No. 1.

Plaintiff S.N. is a Senior at Skyline High School in Ann Arbor,

Michigan. He is the President of the Skyline Republican Club. Plaintiff Skyline Republican Club is a student-initiated, student-led, voluntary non-curriculum related club at Skyline High School. Plaintiffs file this Motion for an Ex Parte Temporary Restraining Order to immediately enjoin the policies, acts, and decisions of Defendants which led the rejection and non-inclusion of Plaintiffs' speech with the other students' and student clubs' announcements on the basis that Plaintiffs' proposed announcement espoused a political viewpoint. Plaintiffs would like to receive the same treatment, benefits, access, and privileges that other non-curriculum related student groups receive. Plaintiffs' speech should be met with fairness and equality. Defendants have a robust record of letting other political viewpoints dominate their student announcements, *see* ECF No. 1, Verified Compl. at ¶¶ 30-47. Defendants, however, expressly rejected Plaintiffs' proposed announcement due its political viewpoint, speech, and content. ECF No. 1, Verified Compl. at ¶¶ 48-65.

Plaintiffs want to receive the same right to free speech and equal protection afforded to other students, and not be forced into silence or forced to change the content or viewpoint of their speech. Plaintiffs want to receive the same access, treatment,

benefits, and privileges in their submissions of student announcements over the public address system that other non-curriculum related student groups and clubs receive.

Pursuant to E.D. Mich. L.R. 7.1, on October 26, 2022, Plaintiffs' counsel sent a letter to Defendants asking for a response by October 31, 2022. On October 31, 2022, Defendants' counsel responded by correspondence on October 31, 2022, denying Plaintiffs' concerns and confirming that Plaintiffs' announcement would not be shared by Defendants over the public address system.

On November 1, 2022, Plaintiffs' counsel sent to Defendants' counsel via electronic mail a copy of their filed Verified Complaint, ECF No. 1. Plaintiffs also explained the nature and legal basis of this motion and requested Defendants' position on the motion. As of the filing of this motion, Plaintiffs' counsel has not received concurrence from Defendants' counsel for the relief Plaintiffs seek under the First and Fourteenth Amendments of the United States Constitution and under the Equal Access Act.[1]

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[1] Pursuant to Rule 65(b)(1)(B) of the Federal Rules of Civil Procedure, Plaintiffs' counsel hereby certifies the above-stated efforts made to give notice to Defendants and their counsel why the Court should issue the

Expedited consideration of this motion is necessary because the harm to Plaintiffs is occurring now, and it is irreparable. This harm is set forth in greater detail below and in the accompanying Memorandum of Authorities. Time is of the essence because 1) this case involves the loss of First Amendment freedoms and 2) the subject matter that Plaintiffs' desire to speak about is time sensitive. Plaintiffs' seek to increase political discourse and community involvement prior to the November 8, 2022 election, which is only a week away. Accordingly, Plaintiffs request that the Court immediately issue the requested Ex Parte Temporary Restraining Order.

A. **Legal Standard.** In determining whether to grant a temporary restraining order, this court applies the same four factors used to consider whether to grant a preliminary injunction: " (l) the plaintiffs likelihood of success on the merits; (2) whether the plaintiffs could suffer irreparable harm without the injunction; (3) whether granting the injunction will cause substantial harm to others; and (4) the impact of the injunction on the public interest." *Connection Distrib. Co.*

requested Temporary Restraining Order immediately to protect Plaintiffs' First and Fourteenth Amendment rights and statutory right under the Equal Access Act without further notice to any party.

v. Reno, 154 F.3d 281, 288 (6th Cir. 1998); *Summit County Democratic Cent. & Executive Comm. v. Blackwell,* 388 F.3d 547, 550-51 (6th Cir. 2004).

B. **Plaintiffs have a substantial likelihood of succeeding on the merits of their claims.** Plaintiffs have raised four claims: (1). Defendants have violated the First Amendment by rejecting Plaintiffs' speech due to its viewpoint; (2) Defendants have violated the First Amendment by allowing a policy that gives final decision-making authority to its officials without any clear standards, allowing speech to be silenced on the basis of subjective, unfettered discretion; (3) Defendants have violated the Fourteenth Amendment equal protection rights of Plaintiffs; and (4) Defendants have violated the Federal Equal Access rights of Plaintiffs through their acts, decisions, and policies. Plaintiffs' likelihood of success on the merits of their claims is substantial, and this court should grant them a temporary restraining order.

1. **The First and Fourteenth Amendments.** Defendants have violated Plaintiffs' First and Fourteenth Amendment rights. Defendants have prevented Plaintiffs from sharing their speech based on

its political viewpoint and message. Defendants have prevented **and continue to prevent Plaintiffs from freely engaging in First Amendment activities in the limited open forum created by Skyline High School.** *Rosenberger v. Rector & Visitors of Univ. of Va.,* 515 U.S. 819, 829 (1995); *Police Dep't. of Chicago v. Mosley,* 408 U.S. 92, 96 (1972); *Healy v. James,* 408 U.S. 169, 181 (1972); *Connection Distrib. Co.,* 154 F.3d at 295. Defendants have no clear standards and allow these decisions to be made based on the subjective and unfettered whim of school officials. *Lowery v. Euverard*, 497 F.3d 584, 588 (6th Cir. 2007). Defendants have not only violated Plaintiffs' First Amendment rights, but they have also violated Plaintiffs' equal protection rights guaranteed by the Fourteenth Amendment. Defendants are treating Plaintiffs differently from how Defendants treat other non-curriculum related groups, based on Plaintiffs' political viewpoint and message. *Bible Believers v. Wayne Cnty.,* 805 F.3d 228, 256 (6th Cir. 2015) (*en banc*).

2. **The Federal Equal Access Act.** The Federal Equal Access Act applies here because Skyline High School is a public secondary school that receives federal funding and has established a "limited open forum" by allowing non-curriculum related student groups to make

announcements over the public address system during noninstructional time. 20 U.S.C. § 4071. Based on Plaintiffs' political viewpoint, message, and content, Defendants have not granted Plaintiffs the same access, benefits, treatment, and privileges that Defendants have granted other non-curriculum related student groups. *See* ECF No. 1, Verified Compl. at ¶¶ 30-65. Furthermore, Defendants stated that they are carrying out a policy which excludes all political viewpoints, speech, and content from its public address system. *See* Verified Compl. at ¶¶ 52, 54-55. Defendants through their acts, decisions, and policies have disallowed Plaintiffs to advertise their club, their club's position, and thwarted its work in the community, whereas other non-curriculum related student groups and clubs are so allowed to advertise freely. Equal access means equal access; Plaintiffs are not receiving equal access. Thus, it is substantially likely that Plaintiffs will succeed on their Federal Equal Access Act claim. 20 U.S.C. § 4071; *Board of Educ. v. Mergens,* 496 U.S. 226, 238-40 (1990).

C. **Irreparable harm will befall Plaintiffs without an injunction.** Plaintiffs are presently harmed since Defendants have denied them their constitutional and statutory rights. Plaintiffs'

message is time sensitive as they seek to engage in civic discourse and increase community involvement prior to the election that takes place in six days, on November 8, 2022. This harm will continue absent court action. It is well established that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373 (1976) (plurality opinion). Irreparable injury also applies to the deprivation of the statutory rights guaranteed by the Equal Access Act. *Hsu by v. Roslyn Union Free Sch. Dist. No. 3,* 85 F.3d 839, 872 (2nd Cir. 1996) (quoting *Elrod* and concluding that the denial of equal access to a Bible club constituted irreparable injury and entitled the plaintiffs to the issuance of a preliminary injunction so the injury would cease).

D. **An injunction will not cause substantial harm to others.** Plaintiffs only intend to exercise their constitutional and statutory rights to the same extent that other student speech and that other student clubs and groups do at Skyline High School. Permitting Plaintiffs to peacefully exercise their rights cannot cause substantial harm to others. *See Connection Distrib. Co.,* 154 F.3d at 288. Allowing Plaintiffs to be treated the same as other students and student clubs is

unlikely to cause substantial and material disruption to the educational process at Skyline High School, and there is no evidence to believe otherwise. The actual injury to Plaintiffs vastly outweighs any harm that the requested injunctive relief might cause Defendants or others. *See Gay-Straight Alliance v. School Bd. of Okeechobee County,* 483 F. Supp. 2d 1224, 1231 (S.D. Fla. 2007).

E. **An injunction will have no negative impact on the public interest.** The impact of the injunction on the public interest turns on whether Plaintiffs' constitutional rights have been violated, which they were and continue to be. As the Sixth Circuit has explained, "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n,* 23 F.3d 1071, 1079 (6th Cir. 1994). Allowing Plaintiffs to exercise their constitutional and statutory rights fully on the Skyline High School campus will not impair any interest held by Defendants or others. It will only serve the public interest. It is always in the public's interest to allow people to exercise the freedoms guaranteed by the constitution and by a statute premised on our First Amendment guarantees.

F. **No bond should be required.** Should this court grant Plaintiffs injunctive relief, this court should exercise its discretion and not impose any bond under Fed. R. Civ. P. 65(c). Any bond requirement would harm Plaintiffs' constitutional rights by causing them to have to pay to assert and defend their rights. Having Defendants comply with the governing law and allowing Plaintiffs free speech and to have the same access, treatment, privileges, and benefits that other non-curriculum related student clubs have, will not impose any monetary requirements on Defendants. *See Roth v. Bank of the Commonwealth,* 583 F.2d 527, 539 (6th Cir. 1978) (noting that courts have discretion regarding the imposition of a bond).

G. **Conclusion.** Accordingly, for the above-stated reasons and those set forth in the supporting Memorandum of Law, Plaintiffs respectfully request that this court enter a temporary restraining order and immediately require Defendants, their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise:

1. to enjoin them from prohibiting Plaintiffs' speech otherwise

allowed in the limited public forum that Defendants created,

2. to allow Plaintiffs' proposed announcement submitted to Defendants on October 21, 2022, to be read over Skyline High School's public address service during morning announcements,

3. to enjoin Defendants' policies, actions, and decisions that silence speech and access on the basis of political viewpoint and content, and

4. to provide Plaintiffs with the same access, treatment, benefits, and privileges other non-curriculum related student groups and clubs enjoy at Skyline High School.

Dated: November 2, 2022

Respectfully submitted,

THOMAS MORE LAW CENTER

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CERTIFICATE OF SERVICE

I hereby certify that on November 2, 2022, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, and I will send the electronically filed foregoing paper via First Class Mail and by electronic mail to:

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THOMAS MORE LAW CENTER

/s/ Erin Mersino
Erin Mersino

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DAVID NIELSEN, parent and next friend, on behalf of his minor child, **S.N.**, and the **SKYLINE REPUBLICAN CLUB**,

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EXPEDITED CONSIDERATION REQUESTED

PLAINTIFFS' MEMORANDUM OF AUTHORITIES IN SUPPORT OF THEIR MOTION FOR AN EX PARTE TEMPORARY RESTRAINING ORDER

Plaintiffs S.N. and Skyline Republican Club request that this Court enter an ex parte temporary restraining order pursuant to Fed. R. Civ. P. 65 and immediately enjoin 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.

CONCISE STATEMENT OF THE ISSUES PRESENTED

1. Whether Plaintiffs have demonstrated a substantial likelihood of success on the merits to warrant a temporary restraining order.

2. Whether Plaintiffs have demonstrated that they will suffer irreparable harm without obtaining a temporary restraining order.

3. Whether Plaintiffs have demonstrated that the granting of a temporary restraining order will not cause substantial harm to others.

4. Whether Plaintiffs have demonstrated that the granting of a temporary restraining order will not have a negative impact on the public interest.

5. Whether, if this Court enters a temporary restraining order, Plaintiffs have demonstrated that this Court should exercise its discretion and not impose a bond.

CONTROLLING OR MOST APPROPRIATE AUTHORITY FOR RELIEF SOUGHT

1. Whether plaintiffs have demonstrated a substantial likelihood of success on the merits to warrant a temporary

restraining order/preliminary injunction.

- *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).
- *Hansen v. Ann Arbor Pub. Schs*, 293 F. Supp. 2d 780, 795 (E.D. Mich. 2003).
- *Rosenberger v. Rector & Visitors of the Univ. of Va.,* 515 U.S. 819 (1995).
- *Bible Believers v. Wayne Cnty.,* 805 F.3d 228, 256 (6th Cir. 2015).
- *Board of Educ. v. Mergens,* 496 U.S. 226 (1990).
- *Boyd County High Sch. Gay Straight Alliance v. Board of Educ. of Boyd County,* 258 F. Supp. 2d 667 (E.D. Ky. 2003).
- *ALIVE v. Farmington Pub. Sch.*, No. 07-12116, 2007 U.S. Dist. LEXIS 65326 (E.D. Mich. Sep. 5, 2007).
- *Colin v. Orange Unified Sch. Dist.,* 83 F. Supp. 2d 1135 (C.D. Cal. 2000).
- *Donovan v. Punxsutawney Area Sch. Bd.,* 336 F.3d 211 (3rd Cir. 2003).
- *Healy v. James,* 408 U.S. 169 (1972).
- *Police Dep 't. of Chicago v. Mosley,* 408 U.S. 92 (1972).
- *Pope v. East Brunswick Ed. of Educ.,* 12 F.3d 1244 (3rd Cir. 1993).
- *Prince v. Jacoby,* 303 F.3d 1074 (9th Cir. 2002).

- *Straights & Gays for Equality (SAGE) v. Osseo Area Sch.*, 471 F.3d 908 (8th Cir. 2006).

2. Whether Plaintiffs have demonstrated that they will suffer irreparable harm without obtaining a temporary restraining order.

- *Boyd County High Sch. Gay Straight Alliance v. Board of Educ. of Boyd County,* 258 F. Supp. 2d 667 (E.D. Ky. 2003).
- *Connection Distrib. Co. v. Reno,* 154 F.3d 281 (6th Cir. 1998).
- *Elrod v. Burns,* 427 U.S. 347 (1976).
- *Hsu v. Roslyn Union Free Sch. Dist. No. 3,* 85 F.3d 839 (2nd Cir. 1996).
- *Straights & Gays for Equality (SAGE) v. Osseo Area Sch.*, 471 F.3d 908 (8th Cir. 2006).
- *Westfield High Sch. L.I.F.E. Club v. City of Westfield,* 249 F.Supp.2d 98 (D. Mass. 2003).

3. Whether Plaintiffs have demonstrated that the granting of a temporary restraining order will not cause substantial harm to others.

- *Boyd County High Sch. Gay Straight Alliance v. Board of Educ. of Boyd County,* 258 F. Supp. 2d 667 (E.D. Ky. 2003).
- *Connection Dist. Co. v. Reno,* 154 F.3d 281 (6th Cir. 1998).
- *Gay-Straight Alliance v. School Bd. of Okeechobee County,* 483 F. Supp. 2d 1224 (S.D. Fla. 2007).

- *Straights & Gays for Equality (SAGE) v. Osseo Area Sch.*, 471 F.3d 908 (8th Cir. 2006).
- *Westfield High Sch. L.I.F.E. Club v. City of Westfield,* 249 F.Supp.2d 98 (D. Mass. 2003).

4. Whether Plaintiffs have demonstrated that the granting of a temporary restraining order will not have a negative impact on the public interest.

- *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n,* 23 F.3d 1071 (6th Cir. 1994).
- *Gay-Straight Alliance v. School Bd. of Okeechobee County,* 483 F. Supp. 2d 1224 (S.D. Fla. 2007).
- *Westfield High Sch. L.l.F.E. Club v. City of Westfield,* 249 F.Supp.2d 98 (D. Mass. 2003).

5. Whether, if this Court enters a temporary restraining order, Plaintiffs have demonstrated that this Court should not impose a bond.

- Fed. R. Civ. P. 65(c).
- *City of Atlanta v. Metropolitan Rapid Transit Auth.,* 636 F.2d 1084 (5th Cir. Unit B Feb. 1981).
- *Roth v. Bank of the Commonwealth,* 583 F.2d 527 (6th Cir. 1978).

INTRODUCTION[1]

This case is about censorship of student speech. It asks whether *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, meant what it held, or whether public school students are actually "closed-circuit recipients of only that which the State chooses to communicate . . . confined to the expression of those sentiments that are officially approved." 393 U.S. 503, 511 (1969). Defendants allow student announcements over its public address system, but rejected an announcement submitted by Plaintiffs due to its political viewpoint, even though other student groups' announcements speak to the very issue. This Court should issue a temporary restraining order to protect Plaintiffs' First Amendment and statutory rights, the rights enjoyed by other students at Skyline High School—but impermissibly limited and withheld for Plaintiffs.

[1] *"If you don't want a man unhappy politically, don't give him two sides to a question to worry him; give him one. Better yet, give him none. . . . stand against the small tide of those who want to make everyone unhappy with conflicting theory and thought."* Ray Bradbury, Fahrenheit 451 90-91 (50th Anniversary ed. 2003).

STATEMENT OF FACTS

Plaintiffs incorporate by reference the facts as stated and filed with the Court in Plaintiffs' Verified Complaint at ECF No. 1. Plaintiffs additionally provide this non-exhaustive summary of relevant facts:

Plaintiff S.N. is a senior student at Skyline High School, which is located in the Ann Arbor, Michigan. S.N. is the president of the Skyline Republican Club. ECF No. 1, Verified Compl. at ¶ 13. Plaintiff Skyline Republican Club is an unincorporated voluntary association of students who attend Skyline High School. *Id.* at ¶ 14. Students formed the Skyline Republican Club to promote sound public policy, engage students in the political process, uphold constitutional principles, including the freedom of speech and freedom of religion, and promote public discourse. *Id.* at ¶ 15.

Skyline High School is a public secondary school within the Ann Arbor Public Schools. *Id.* at ¶ 19. Skyline High School provides public secondary education for students in grades nine through twelve. *Id.* at ¶ 30. It receives federal financial assistance. *Id.* And it has created a limited open forum for non-curriculum related student groups to use its public address system for morning announcements during non-

instructional time. *Id.* Defendants have allowed certain viewpoints to be expressed over its public address system. They have allowed the NOW student group to say, "[t]he National Organization For Women's Club would like to invite you to stand in solidarity by wearing pink in support of the 1973 Roe Vs. Wave court decision which allows women to keep abortioan rights." *Id.* at ¶ 33. They have allowed an announcement stating, "Planned Parenthood of Michigan Peer Educators are trained, trusted sources of information and support for their peers about their health: including topics like relationships, LGBTQ+ identities, contraceptive methods, abstinence, consent and reducing STIs and more!" *Id.* at ¶ 34. They have allowed the Skyline High School Democrats for America to announce, "Planned Parenthood makes to the health and well being of our society." *Id.* at ¶ 35.

Defendants have also allowed student clubs to promote Congresswoman Debbie Dingle's visit to the school three weeks before her election, to promote the importance of signing up to vote, to promote the viewpoints of the Black Student Union on the Black Lives Matter movement and current events, to promote the viewpoint of the Latine X Student Union and its thoughts on cultural names and gendering, to

promote the Environment Stability Club and its viewpoint on climate change, etc. *Id.* at ¶ 35. Many viewpoints are allowed over Defendants' public address system, but Plaintiffs' were not.

On October 21, 2022, Plaintiffs submitted an announcement asking if students would be interested in helping with the Skyline Republican Club's outreach regarding Proposal 3 with a brief descriptive sentence of the proposal. *Id.* at ¶ 50. The announcement did not ask students to "vote for" or "vote against" the proposal. At 9:11am, Plaintiffs received an email rejecting the announcement because of its "political nature." *Id.* at ¶ 51. The email cited Defendant Ann Arbor Public Schools' policy stating "any political parties, organizations, and/or candidates" are "expressly prohibited" "from promoting political activities and/or individuals on school property during school hours." *Id.*[2]

Plaintiffs went to the school office to obtain clarity where Defendant Bilsborrow adamantly stated that the announcement could not be read because it was "political." *Id.* at ¶56-65. He also stated that

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[2] Defendants allowed the NOW student club to pass out literature in support of Proposal 3 on school premises, during school hours. *Id.* at ¶ 98.

he made the final decisions on this issue and found Plaintiffs' announcement "subjective" and too political. *Id*. at ¶56-71. On October 28, 2022, Defendant McElmeel, principal of Skyline High School, ratified Defendant Bilsborrow's decision to reject Plaintiffs' proposed announcement. Since Defendants allow similar announcements from other student groups, allowing other viewpoints to use the public address system without being rejected or being forced to limit their messages, Plaintiffs filed this lawsuit to protect their rights under the First and Fourteenth Amendments and under the Equal Access Act.

ARGUMENT

I. PLAINTIFFS SATISFY THE STANDARD FOR A TEMPORARY RESTRAINING ORDER.

"In determining whether or not to grant a preliminary injunction, a district court considers four factors: (1) the plaintiffs likelihood of success on the merits; (2) whether the plaintiff could suffer irreparable harm without the injunction; (3) whether granting the injunction will cause substantial harm to others; and (4) the impact of the injunction on the public interest." *Connection Distrib. Co. v. Reno,* 154 F.3d 281, 288 (6th Cir. 1998); *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (same). The same four factors apply to a temporary

restraining order. *Summit County Democratic Cent. & Executive Comm. v. Blackwell,* 388 F.3d 547, 550-51 (6th Cir. 2004). Each factor favors the issuance of a temporary restraining order here, and Plaintiffs' motion should be granted.

A. PLAINTIFFS ARE SUBSTANTIALLY LIKELY TO SUCCEED ON THE MERITS

Plaintiffs have raised four claims: (1) Defendants have violated Plaintiffs' First Amendment right to speech through unconstitutional viewpoint discrimination, (2) Defendants have violated Plaintiffs' First Amendment right to free speech through their unconstitutional policies that allow one's constitutional rights to hinge on the subjective and unfettered discretion of one decision-maker, (3) Defendants have violated Plaintiffs' Fourteenth Amendment right to equal protection, and (4) Defendants have violated the Federal Equal Access rights of Plaintiffs by denying Plaintiffs all the same rights and privileges it gives to other student groups and, through its actions and written policy, disallowing announcements on the basis that they are political.

a. First Amendment- Viewpoint Discrimination: It is a well-established principle of constitutional law that students do not shed

their constitutional rights at the schoolhouse gate. *Tinker*, 393 U.S. 503, 506 (1969). This case presents concerns that the Supreme Court had in mind when it stated,

> **In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over students.** Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. **In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved.**

Id. at 511 (emphasis added). *See also Board of Educ. v. Pico*, 457 U.S. 853, 872 (1982) (holding that "school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion'"); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion"). In order to silence student speech, like the student speech expressed in Plaintiffs' proposed

announcement, "school officials . . . must be able to show that its action was caused by something more than a mere desire to avoid discomfort and unpleasantness that always accompany an unpopular viewpoint." Tinker, 393 U.S. at 509. Defendants instead must show that allowing Plaintiffs to share their political speech would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." *Id.* Defendants cannot establish this. First, after Plaintiffs' announcement was rejected by Defendants, a teacher allowed Plaintiff S.N. to read his announcement to a class. Plaintiffs' announcement did not disrupt or interfere with the class. ECF No, 1, Verified Compl. at ¶¶ 94-96. The students listened to the announcement and went back to their schoolwork without any issue. Second, Defendants allow multiple other students and student groups to speak on political matters, even on the issue of abortion, Planned Parenthood, contraceptives, *Roe v. Wade*, elections, and voting. Defendants were not concerned Plaintiffs' announcement would "materially or substantially interfere" with school—they simply did not like Plaintiffs' political viewpoint.

This case does not present a situation where the speaker's view would have been attributed to the school. The student clubs' names are read over the public address system immediately prior to their announcement, and Defendants invite the student clubs to express their speech in this forum. Nor was Plaintiffs' speech "lewd" or "indecent." *Bethel v. Fraser*, 478 U.S. 675, 685 (1986). And while a student's right to expression must be "applied in light of the special characteristics of the school environment," *Tinker*, 393 U.S. at 506, the Supreme Court has recognized that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). In fact, the public schools are supposed to be the "marketplace of ideas" because the "Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers the truth 'out of a multitude of tongues [rather] than through any kind of authoritative selections.'" *Keyshian v. Board of Regents*, 385 U.S. 589, 603 (1967).

Therefore, even if the Court were to find that the pure student speech standard from *Tinker* should not apply here (it should), Defendants' actions, policies, and decisions would still fail under the

standard set forth in *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988); *see also Poling v. Murphy*, 872 F.2d 757, 761 (6th Cir. 1989); *Hansen v. Ann Arbor Pub. Schs*, 293 F. Supp. 2d 780, 795 (E.D. Mich. 2003). Under the *Hazelwood* standard, a "school's restrictions on speech" must be "reasonably related to legitimate pedagogical concerns" and "must still be viewpoint-neutral." *Hansen*, 293 F. Supp. at 797; *see also Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 828-29 (1994) (holding that a university's denial of funding for the printing costs for a student newspaper with a Religious editorial viewpoint was unconstitutional viewpoint discrimination).[3] Defendants created a limited public forum by permitting non-curriculum related student groups to use the schools public address system for student announcements. When a limited public forum is created, as here, a public school may not discriminate among non-curriculum related

[3] *RAV v. City of St. Paul*, 505 US 377, 391-94 (1992) (striking down a hate speech ordinance prohibiting only "fighting words" that "communicate messages of racial, gender, or religious intolerance," as it would function as a viewpoint discrimination by "licens[ing] one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules"); *Castorina v. Madison Cnty. Sch. Bd.*, 246 F3d 536, 540 (6th Cir 2001) ("[V]iewpoint specific restrictions are an egregious violation of the First Amendment.").

student groups based on their viewpoint. *Donovan,* 336 F.3d at 225-26; *Prince,* 303 F.3d at 1090-92.

Defendants cannot reasonably assert that rejecting Plaintiffs' speech served a "legitimate pedagogical concern" or was not based on the message and viewpoint of the speech. Defendants already informed Plaintiffs by email and during a meeting on October 21, 2022 that there was one basis for rejecting Plaintiffs' proposed announcement: its political message and viewpoint. ECF No. 1, Verified Compl. at ¶¶ 51-65. Accordingly, Defendants have violated Plaintiffs' clearly established First Amendment right. Plaintiffs are substantially likely to succeed on the merits of this claim.

b. First Amendment - Subjective and Unfettered Discretion: "A school district does not have the unfettered discretion" to restrict Plaintiffs' speech at whim. *Hansen*, 293 F. Supp. at 797. Defendants' policies and practices allow Defendant Bilsborrow to make subjective decisions whether or not to restrict student speech, not based on clear and objective criteria, but based on his personal opinion. Such

a policy cannot stand.[4] Plaintiffs are substantially likely to succeed on the merit of this claim.

c. Equal Protection: When the government treats an individual disparately "as compared to similarly situated persons and that such disparate treatment . . . burdens a fundamental right, targets a suspect class, or has no rational basis," such treatment violates the equal protection guarantee of the Fourteenth Amendment. *Bible Believers v. Wayne Cnty.,* 805 F.3d 228, 256 (6th Cir. 2015) (internal quotations and citation omitted). "In determining whether individuals are 'similarly situated,' a court should not demand exact correlation, but should instead seek relevant similarity." *Bench Billboard Co. v. City of Cincinnati*, 675 F.3d 974, 987 (6th Cir. 2012) (internal quotation marks omitted).

As set forth in Plaintiffs' Verified Complaint and in this Memorandum, Defendants burdened Plaintiffs' fundamental right to

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[4] Defendants impose a prior restraint on Plaintiffs' speech and "forbid[] certain communications . . . in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993). "Any system of prior restraints of expression . . . bear[s] a heavy presumption against its constitutional validity" and can only be upheld where there are adequate judicial safeguards. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (citations omitted).

free speech protected under the First Amendment. This unequal treatment of Plaintiffs' fundamental right to free speech violated the equal protection guarantee of the Fourteenth Amendment. Defendants' acts, decisions, and policies, burdening Plaintiffs' political speech should not pass any level of scrutiny, and lacking even a rational basis. Accordingly, Defendants' unequal treatment has harmed Plaintiffs' interests and violates the Equal Protection Clause of the Fourteenth Amendment. There is a substantial likelihood of success on this claim.

d. Equal Access Act: The Federal Equal Access Act "guarantees public secondary school students the right to participate voluntarily in extracurricular groups dedicated to religious, political, or philosophical expressive activity protected by the First Amendment when other student groups are given this right." *Prince v. Jacoby,* 303 F.3d 1074, 1078 (9th Cir. 2002). "The impetus for its enactment in Congress was anecdotal evidence that secondary school students suffered discrimination at the hands of school administrators, sanctioned by federal district courts, who believed that the First Amendment precluded equal access for religious student groups to the public school." *Id.* at 1078-79; *accord Pope v. East Brunswick Ed. of*

Educ., 12 F.3d 1244, 1248 (3rd Cir. 1993). "The Act was designed to transport the right of equal access to religious activities to limited open forums established with respect to college level students ... to the secondary school level." *Prince,* 303 F.3d at 1079. The Equal Access Act was upheld by the Supreme Court in *Board of Educ. v. Mergens,* 496 U.S. 226, 238-40 (1990), in which the Court explained that the purpose of granting equal access is to prevent discrimination against religious, political, or other student groups and in which the Court explained that the Act is to be broadly construed.[5]

For the Act to be triggered, three factors must exist, all of which are present here. 20 U.S.C. § 4071. First, the Act only applies to a public secondary school, and Defendants' Skyline High School is such

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[5] The Act is broadly interpreted and include a non-curriculum student group's right to equal access of the school's public address system when the school has opened that forum to other groups. *Colin ex rel. Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1147, 1149 (C.D. Cal. 2000) (holding that a school "must give Plaintiffs **all the same rights and privileges** that it gives to other student groups" which 1) must be accomplished "**in the same way** that the District provides access to all clubs" and 2) includes access to "publicize the group at [activity fairs], post flyers, make announcements over the public address system, and have a group picture in the yearbook.") (emphasis added); *see also ALIVE v. Farmington Pub. Sch.*, No. 07-12116, 2007 U.S. Dist. LEXIS 65326, at *12-13 (E.D. Mich. Sep. 5, 2007).

a school. Second, the public secondary school must receive federal funding, and Defendants receive such funding. Third, and final, the public secondary school must have established a "limited open forum" by allowing other non-curriculum related student groups to engage in the access during noninstructional time. Defendants have a long history of allowing student groups and clubs to make announcements over the public address system at Skyline High School, and as such established a limited open forum for non-curriculum related student clubs to share their announcements during noninstructional time.

As the Supreme Court has explained, "if a public secondary school allows only one 'noncurriculum related student group' to meet, the Act's obligations are triggered and the school may not deny other clubs, on the basis of the content of their speech, equal access to meet on school premises during noninstructional time." *Mergens,* 496 U.S. at 236.

The term "noncurriculum related student group" is not defined in the Equal Access Act, but was defined by the Supreme Court in *Mergens*. There, the Court held that the term is read broadly and comes with a "low threshold" for triggering the requirements of the Act. *Mergens,* 496

U.S. at 239-40. Any student club or group that does not directly relate to the body of courses offered by the school is considered a non-curriculum related student group. *Id.* at 239.

A student group does not directly relate to the body of courses offered by the school unless (1) "the subject matter of the group is actually taught, or will soon be taught, in a regularly offered course," (2) "the subject matter of the group concerns the body of courses as a whole," (3) "participation in the group is required for a particular course," or (4) "participation in the group results in academic credit." *Id* at 239-40. It is important to remember that to satisfy the test, the group must have "more than just a tangential or attenuated relationship" to the school's curriculum. *Id.* at 238. It is the burden of the school to establish that a group is not a non-curriculum related student group. *Id.* at 240; *Pope,* 12 F.3d at 1253 ("The burden of showing that a group is directly related to the curriculum rests on the school district.").

Here, Skyline Republican Club is a non-curriculum related student group like so many other groups at Skyline High School who are, unlike Plaintiffs, allowed to voice announcements, opinions, and information over its public address system, such as the Black Student

Union, NOW, SAS, NHS, the Latine X Student Union, the Skyline High School Democrats for America, etc. ECF No. 1, Verified Compl. at ¶¶ 31-47.[6]

Here, Plaintiff Skyline Republican Club has not received the same treatment, access, privileges, or benefits that the other non-curriculum related student clubs have received at Skyline High School. Although Plaintiff Skyline Republican Club is able to hold meetings before or after school, Defendants did not allow Plaintiff to participate in announcements for its meetings and seeks to severely constrict the content of Plaintiffs' announcements. Defendants do not put these restrictions on other non-curriculum related student groups as evidenced by the numerous announcements allowed to promote *Roe v. Wade* as the court decision that protects women's rights, to promote a visit with Congresswoman Debbie Dingell as she is running for office, to

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[6] *See Straights & Gays for Equality (SAGE) v. Osseo Area Schools.,* 471 F.3d 908 (8th Cir. 2006) (finding diversity, non-discrimination clubs to be non-curriculum related student clubs); *see also Boyd County High Sch. Gay Straight Alliance v. Board of Educ. of Boyd County,* 258 F. Supp. 2d 667 (E.D. Ky. 2003); *Colin v. Orange Unified Sch. Dist.,* 83 F. Supp. 2d 1135, 1143-46 (C.D. Cal. 2000); *Donovan v. Punxsutawney Area Sch. Bd.,* 336 F.3d 211, 221 (3rd Cir. 2003); *Garnett v. Renton Sch. Dist.,* 772 F. Supp. 531, 533-34 (W.D. Wa. 1991); *Donovan,* 336 F.3d at 221; *Colin,* 83 F. Supp. 2d at 1143.

promote viewpoints of the Black Student Union and the Latine X Student Union, to promote Planned Parenthood as making contributions to the "health and wellbeing of society" and recruiting students to work for Planned Parenthood and learn more about the work they do for LGBTQ+ identities and with contraceptives, and to "encourage everyone 18 and older to vote." ECF No. 1, Verified Compl. at ¶¶ 31-47.

Defendants allow non-curriculum student clubs to use student announcements for many reasons but denied Plaintiffs that same privilege based on the political viewpoint and content of Plaintiffs' message. And admitted to doing so. ECF No. 1, Verified Compl. at ¶¶ 51-53, 56-58. When public school officials, such as Defendants here, allow a non-curriculum related student group to meet on campus, but do not provide them with all the other benefits received by other non-curriculum related groups, the school officials still violate the Equal Access Act. The reason is quite simple: Equal access means equal access.

For example, in *Mergens,* the school officials denied the plaintiffs' request to form a Christian Bible club but allowed the students to meet

informally on campus. Regardless of this *partial* accommodation of the students' request, the Supreme Court still determined that the school officials had violated the Equal Access Act because the students did not receive the *full* access that other non-curriculum related student groups received. As explained by the Supreme Court, even if a school permits a Bible club to meet informally on campus, the school defendants still violate the Equal Access Act by not allowing the club to be part of the student activities program or have access to the school newspaper, bulletin boards, or the public address system as defendants are doing here. *Mergens,* 496 U.S. at 247.[7] Plaintiffs have not been given equal access to the school's public address system, as the school has limited their use far beyond what it has allowed for other student clubs, as evidenced by the numerous announcements allowed by Defendants.

Accordingly, Plaintiffs are substantially likely to succeed on their Federal Equal Access Act claim. This court should enter an injunction

[7] *See also Straights & Gays for Equality (SAGE) v. Osseo Area Schools,* 471 F.3d 908 (8th Cir. 2006) (granting a preliminary injunction even though the student club was allowed to meet at school and allowed *partial access* to the limited open forum).

and require Defendants to provide Plaintiff Skyline Republican Club and its members, including S.N., the same access, treatment, benefits, and privileges received by the other non-curriculum related student clubs.[8]

B. IRREPARABLE HARM WILL BEFALL PLAINTIFFS WITHOUT AN INJUNCTION

Plaintiffs have suffered irreparable harm. It is well established that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," *Elrod v. Burns,* 427 U.S. 347, 373 (1976) (plurality opinion). Irreparable injury also applies to the deprivation of the statutory rights guaranteed by the Equal Access Act: "The Equal Access Act protects free speech rights. . . . [T]he Act protects 'expressive liberties,' and we therefore take guidance from the Supreme Court's oft-quoted statement that '[t]he loss of First Amendment freedoms, for even minimal periods of time unquestionably

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[8] If the Court decides there is a substantial likelihood of success on Plaintiffs' Equal Access Act claim and issues a temporary restraining order on that basis, it need not examine Plaintiffs' constitutional claims. See *Bowman v. Tennessee Valley Auth.*, 744 F.2d 1207, 1211 (6th Cir. 1984) ("If we are able to decide this appeal on non-constitutional grounds we will do so and will not reach the First and Fifth Amendment issues."); *ALIVE v. Farmington Pub. Sch.*, No. 07-12116, 2007 U.S. Dist. LEXIS 65326, at *7 (E.D. Mich. Sep. 5, 2007).

constitutes irreparable injury.'" *Hsu v. Roslyn Union Free Sch. Dist. No. 3,* 85 F.3d 839, 872 (2nd Cir. 1996) (quoting *Elrod* and concluding that the denial of equal access to a student club constituted irreparable injury and entitled the plaintiffs to the issuance of a preliminary injunction so the injury would cease); *Boyd County High Sch. Gay Straight Alliance,* 258 F. Supp. 2d at 692.

As stated by the Sixth Circuit, "when reviewing a motion for preliminary injunction," or here a motion for a temporary restraining order, "if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury **is mandated**." *Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir. 2001) (emphasis added).[9]

Defendants rejected Plaintiffs' proposed announcement on October 21, 2022. The subject of the announcement to which Plaintiffs seek to invoke civic engagement will be decided on November 8, 2022, just 6 days from now. Plaintiffs would like to speak and take action on this issue, the same way that NOW and other student organization have

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[9] *See also Newsome v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) ("The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief.").

already. ECF No. 1, Verified Compl. at ¶¶ 4, 32-45. Without injunctive relief, Plaintiffs will continue to suffer irreparable injury to their constitutional and statutory rights. They will not receive equal access, and they will be unable to fulfill their mission of engaging in community outreach and civic discourse.

C. AN INJUNCTION WILL NOT CAUSE SUBSTANTIAL HARM TO OTHERS

Plaintiffs only intend to exercise their constitutional rights and statutory rights to the same extent that other student clubs and groups do at Skyline High School. Permitting Plaintiffs to peacefully exercise their rights cannot cause substantial harm to others. *Connection Distrib. Co.,* 154 F.3d at 288. Any legitimate interest Defendants assert is fully protected by existing law. 20 U.S.C. § 4071(f). No legitimate government interest exists in violating the clearly established constitutional and statutory rights of any student or student group, including Plaintiffs. Allowing Plaintiffs to be treated the same as other students or student clubs is unlikely to cause substantial and material disruption to the educational process, and there is no evidence to believe otherwise. The actual injury to Plaintiffs vastly outweighs any harm

that the requested injunctive relief might cause Defendants or others.[10]

D. AN INJUNCTION WILL HAVE NO NEGATIVE IMPACT ON THE PUBLIC INTEREST

As the Sixth Circuit has explained, "[l]t is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n,* 23 F.3d 1071, 1079 (6th Cir. 1994). Allowing Plaintiffs S.N. and the Skyline Republican Club to exercise their constitutional and statutory rights fully at Skyline High School will not impair any interest held by Defendants or others. Indeed, the public interest will only be served once Plaintiffs receive the same access, treatment, benefits, and privileges as other non-curriculum related student clubs at Skyline High School. *Gay Straight Alliance,* 483 F. Sup. 2d at 1231; *Westfield High Sch. L.I.F.E. Club.,* 249 F. Supp. 2d at 128.

E. NO BOND SHOULD BE REQUIRED

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[10] *See Gay-Straight Alliance v. School Bd. of Okeechobee Cnty*., 483 F. Supp. 2d 1224, 1231 (S.D. Fla. 2007); Boyd , 258 F. Supp. 2d at 692; Westfield High Sch. L.I.F.E. Club , 249 F. Supp. at 128.

Should this court grant Plaintiffs an injunction, this court should exercise its discretion and not impose any bond under Fed. R. Civ. P. 65(c). Any bond requirement would harm Plaintiffs' constitutional rights by causing them to have to pay to assert and defend their rights. Having Defendants comply with the governing law and allowing Plaintiffs to have the same access, treatment, privileges, and benefits that other non-curriculum related student clubs have will not impose any monetary requirements on Defendants.[11]

CONCLUSION

Plaintiffs are substantially likely to prevail on the merits of their claims. Perpetuating discriminatory treatment until a resolution on the merits would only continue a harm for which there is no adequate remedy. Granting injunctive relief will end the irreparable injury to Plaintiffs while the case proceeds to the merits. Plaintiffs respectfully request that this court grant their motion for a temporary restraining order and grant them the requested relief.

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[11] *Roth v. Bank of the Commonwealth,* 583 F.2d 527, 539 (6th Cir. 1978) (courts have discretion whether to impose a bond); *City of Atlanta v. Metropolitan Rapid Transit Auth.,* 636 F.2d 1084, 1094 (5th Cir. Feb. 1981) (courts have discretion not to a impose bond, especially in public interest litigation).

Dated: November 2, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 2, 2022, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, and I will send the electronically filed foregoing paper via First Class Mail and by electronic mail to:

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