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

DOUGLAS MARSHALL, *et. al.*, *Plaintiffs*, v. PENNSBURY SCHOOL DISTRICT, *et. al.*, *Defendants*.	:	Civil Action No.: 2:21-cv-04336

ORDER

AND NOW, this day of , 2022, upon consideration of Defendant, Pennsbury School District's Motion to Dissolve the Preliminary Injunction, Memorandum of Law in support thereof, and any response thereto, it is hereby **ORDERED** and **DECREED** that said Motion is **GRANTED**. The Order entered on November 17, 2021, at ECF 53 is hereby **VACATED**.

BY THE COURT:

Hon. GENE E. K. PRATTER

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FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DOUGLAS MARSHALL, *et. al.*, *Plaintiffs*, v. PENNSBURY SCHOOL DISTRICT, *et. al.*, *Defendants*.	:	Civil Action No.: 2:21-cv-04336

DEFENDANT, PENNSBURY SCHOOL DISTRICT'S
MOTION TO DISSOLVE THE PRELIMINARY INJUNCTION

Defendant, Pennsbury School District, by and through the undersigned counsel, Marshall Dennehey Warner Coleman & Goggin, P.C., Joseph J. Santarone, Jr., Esquire, and Joshua W. Brownlie, Esquire, respectfully moves to dissolve the preliminary injunction entered on November 17, 2021, (ECF 53), requesting this Honorable Court enter the proposed Order for the reasons set forth in the attached Memorandum of Law, incorporated herein by reference.

Respectfully Submitted,

MARSHALL DENNEHEY WARNER COLEMAN & GOGGIN

Date: May 13, 2022 BY: _____

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DEFENDANT, PENNSBURY SCHOOL DISTRICT'S
MEMORANDUM OF LAW IN SUPPORT OF ITS
MOTION TO DISSOLVE THE PRELIMINARY INJUNCTION

Plaintiffs are four residents of the Pennsbury School District seeking to challenge the constitutionality of two school board polices regulating speech at public meetings. On November 17, 2021, following a two-day evidentiary hearing, this Honorable Court entered an Order granting Plaintiffs' request for a preliminary injunction, (ECF 53), thereby enjoining the District's enforcement of specific provisions contained in School Board Policy 903 and 922. However, given a substantial change in the factual predicates upon which this Court's decision rests, the continuation of the injunction is no longer equitable pursuant to Federal Rule of Civil Procedure 60(b)(5). For the following reasons, Pennsbury respectfully requests dissolution of the injunction.

I. Factual Overview

A. Current Proceedings

Plaintiffs initiated the present suit by complaint on October 1, 2021. (ECF 1). Therein, Plaintiffs assert, amongst other claims, their respective rights to Free Speech and Petition were infringed by the enforcement of School Board Policy 903 and 922 ("Policies"). By exercising authority pursuant to the Policies, Plaintiffs maintain "each individually-named defendant has

either perpetuated the censorship of Plaintiffs' speech, personally directed that censorship, or exhibited actual knowledge of and acquiescence in the censorship." (ECF 1 at ¶ 105). Plaintiffs now seek retributive money damages and other equitable relief for the violation of these First Amendment rights.

One week later, on October 8, 2021, Plaintiffs filed a Motion for Preliminary Injunction, (ECF 4), seeking to "enjoin Defendants from enforcing the subjective and view-point-discriminatory terms in Pennsbury School Board Policies 903 and 922, including 'personally directed,' 'abusive,' 'irrelevant,' 'offensive,' 'otherwise inappropriate,' 'personal attack,' 'inappropriate,' and 'intolerant,' as well as the address announcement requirement in Policy 903."[1] (ECF 4 at 1). They represented, "if not stopped by this Court, [Defendants] will continue to further their conspiracy through a variety of illegal means, including: censoring written comments that diverge from Pennsbury orthodoxy, memory holing and threatening to mute oral comments critical of their policies, and repeatedly interrupting and cutting short Plaintiffs' public comments that depart from the official narrative." (ECF 4 at 1). Plaintiffs assert irreparable harm from the "ongoing risk of self-censorship and of future rights violations[.]" (ECF 4 at 18).

On November 3, 2021, under the advice of prior counsel, Defendants filed both a Response to Plaintiffs' Motion For Preliminary Injunction (ECF 44) and a Motion to Dismiss (ECF 43).[2] An evidentiary hearing on Plaintiffs' Motion For Preliminary Injunction was then held on November 8th and 12th.

[1] In the alternative, "Plaintiffs request[ed] that this Court enjoin the enforcement of Policies 903 and 922 in their entirety." (ECF 4 at 1).

[2] On April 4, 2022, the Court entered an Order dismissing as duplicative the official capacity claims against the individual Defendants, as well as all other claims against Defendants Pallotta, Taylor, and Sanderson. (ECF 70).

Shortly thereafter, on November 17, 2021, the Court issued an Order granting Plaintiffs' Motion For Preliminary Injunction, thereby enjoining enforcement of "Policy 903's prohibitions of speech deemed 'personally directed,' 'abusive,' irrelevant,' 'offensive,' 'otherwise inappropriate,' or 'personal attacks;" "Policy 922's prohibitions of speech deemed 'offensive,' 'inappropriate,' intolerant,' 'disruptive,' and 'verbally abusive;'" as well as "Policy 903's requirement that speakers at public comment periods preface their remarks by announcing their address." (ECF 53) (footnote omitted).

The Court explained in an accompanying opinion, "[b]ecause the plaintiffs are likely to demonstrate that the challenged policy provisions violate the First Amendment's prohibition on viewpoint discrimination and because protecting free speech serves the public interest, the Court will grant a preliminary injunction[.]" (ECF 52 at 1). The Court then began with the threshold inquiry regarding whether Plaintiffs' were likely to succeed on the merits of their as-applied and facial challenges to the policies. Under the inverted burden specific to First Amendment cases, this Court found the terms "abusive" and "personally directed," as applied by Pennsbury, were "invoked to terminate [ ] offensive comments[.]" (ECF 52 at 10). Having determined that "giving offense is a viewpoint[,]" the Court then concluded the practice rose to "impermissible viewpoint discrimination." (ECF 52 at 8, 10) (citation omitted). Similarly, application of the term "irrelevant" was applied by Defendants with "a subjective interpretation of what arguments are acceptable to the Board and its representatives." (ECF 52 at 11). Finally, "[b]ecause the evidence shows the School Board applied the term 'disruptive' to disruptive *ideas* rather than disruptive *conduct*, this too constitute[d] viewpoint discrimination." (ECF 52 at 11). All of this in support of the Court's finding that Pennsbury did "not met its burden to show that the as-applied challenge is unlikely to succeed on the merits." (ECF 52 at 11).

With respect to Plaintiff's facial challenge, the Court found "Policies 903 and 922 are vague because they are irreparably clothed in subjectivity." (ECF 52 at 12). "Allowing little more than the presiding officer's own views to shape 'what counts' as irrelevant, intolerant, abusive, offensive, inappropriate, or otherwise inappropriate under the policies openly invites viewpoint discrimination." (ECF 52 at 13) (citation omitted). The Court also determined the challenged terms were likely unconstitutionally overbroad because the terms "reach too much protected speech under any reasonable interpretation of the language of the policies[.]" (ECF 52 at 15-16). Likewise, the address announcement requirement was equally likely to be facially unconstitutional because "[t]he right to free speech also encompasses the right to refrain from speaking[,]" and "the chilling effect of being forced to announce to all present one's actual home address before speaking on a hotly-contested issue is clear." (ECF 52 at 16, 17) (citing *Janus v. AFSCME*, 138 S. Ct. 2448, 2463 (2018)). Thus, under the inverted burden, this Court found Pennsbury had failed to establish the Policies were constitutional and therefore, Plaintiffs were likely to succeed on the merits of their as-applied and facial challenges. (ECF 52 at 7).

The Court then found irreparable injury caused by the loss of Plaintiffs' First Amendment freedoms. (ECF 52 at 18) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). "Given that the School Board has vigorously defended its applications of Policy 903 thus far and admits no wrongdoing, a future meeting certainly raises the spectre of more interruptions and terminations of speech based on Policy 903." (ECF 52 at 18). Regarding the address announcement requirement, the Court found "[t]here is also risk of irreparable harm in allowing the address announcement requirement to stay on the books[.]" (ECF 52 at 18). Finally, while recognizing that "the public interest leans even more toward granting an injunction[ ]" where the movant demonstrates a likelihood of success on the merits, the Court found "the preliminary injunction will [also] serve the public interest by

protecting First Amendment free speech rights." (ECF 52 at 21) (citations omitted). As a result, Plaintiffs' Motion for a Preliminary Injunction was granted and Pennsbury was enjoined from enforcing the challenged terms in Policies 903 and 922. (ECF 52 at 1).

However, given a substantial change in the factual predicates upon which this Court's decision rests, the continuation of the injunction is no longer equitable pursuant to Federal Rule of Civil Procedure 60(b)(5).

B. Collateral Factual Developments

Regime Change

Pennsbury School District is now under new executive guidance. On August 1, 2021, Dr. Thomas A. Smith assumed the role of District Superintendent.[3] *See* Pennsbury School Board, *Board of School Directors*, Pennsburysd.org, https://www.pennsburysd.org/Superintendent.aspx, (last visited May 12, 2022), attached hereto as Exhibit A. Similarly, on November 2, 2021, the day immediately preceding prior counsel's filing of Defendants' Response to Plaintiffs' Motion For Preliminary Injunction (ECF 44) and a Motion to Dismiss (ECF 43), four school Board Members were replaced as a result of decisions not to seek re-election and Pennsylvania's general election, which include both the President and Vice-President of the School Board at the time of the relevant events. *See* Levittown Now Staff, *Democrats Sweep Pennsbury School Board Races*, levittownnow.com, (Nov. 3, 2021), https://levittownnow.com/2021/11/03/democrats-sweep-pennsbury-school-board-races/ (last visited May 12, 2021), attached hereto as Exhibit B; Pennsbury School Board, *Board of School Directors*, Pennsburysd.org, https://www.pennsburysd.org/SchoolBoard.aspx, (last visited May 12, 2022), attached hereto as

[3] Pursuant to the Complaint, Plaintiffs' allege their most recent injury occurred on June 17, 2021, one month before Dr. Smith assumed office. (ECF 1 at 37).

Exhibit C. Notably, Defendants Christine Toy-Dragoni, Howard Goldberg, Michael Pallotta, and Debra Wachspress are no longer members of the Pennsbury School Board. (Ex. C).

New Counsel

On December 10, 2021, the newly constituted School Board retained new representation. (ECF 61, 63, 67). Now, all Defendants are represented by the undersigned counsel, with the exception of Solicitor Michael Clarke and Assistant Solicitor Peter Amuso, who are represented by separate counsel. (ECF 38, 63).

Repeal of Enjoined Policies 903 and 922

The enjoined versions of Policy 903 and 922 have been repealed. At the March 17, 2022, School Board Action Meeting, Pennsbury moved to repeal the enjoined policy 922. *See* Agenda Item Details, "*Move that the Board delete current policy 922*," attached hereto as Exhibit D. At the same meeting, the Board also moved to "delete current policy 903 and approve revised policy 903." *See* Agenda Item Details, "*Move that the Board delete current policy 903 and approve revised policy 903*," attached hereto as Exhibit E. Both motions passed with unanimous support. *See* Approved Board Action Meeting Minutes of March 17, 2022, at 20, attached hereto as Exhibit F.

Revised Policy 903 was adopted on March 18, 2022. *See* Public Participation in Board Meetings – Policy 903 (adopted Mar. 18, 2022), attached hereto as Exhibit G. In accordance with the advice of new counsel and with the guidance of the Court's findings in the November 17, 2021, Memorandum Opinion (ECF 52), Pennsbury repealed the version of Policy 903 supplied by the Pennsylvania School Board Administration. Revised Policy 903 no longer contains "prohibitions of speech deemed 'personally directed,' 'abusive,' irrelevant,' 'offensive,' 'otherwise inappropriate,' or 'personal attacks[,]" nor does it "require[ ] that speakers at public comment

periods preface their remarks by announcing their address." (ECF 53); (Ex. G.). Instead, Revised Policy 903 relevantly provides:

> 6. Comments may be terminated by the Presiding Officer if they:
>
> > a. incite an immediate breach of the peace;
> >
> > b. make comments which are considered, as a whole, to prominently appeal to prurient interests or are otherwise obscene or constitute threats of bodily harm;
> >
> > c. go beyond the 5 minutes or violate either (a) or (b) will be asked to stop speaking and may be requested to leave the meeting;
>
> 7. The Presiding Officer may request the assistance of law enforcement officials to remove a disorderly person when that person prevents or interrupts a meeting, or acts to obstruct or interfere with the meeting.

(Ex. G. at 2). To date, the newly constituted Board has not invoked its authority under Revised Policy 903 to regulate the speech or conduct of any public commenter. *See* Video, School Board Action Meeting, November 18, 2021, attached hereto as Exhibit H.

Efforts to Obtain New Solicitors

The School Board has also circulated a Request For Proposals seeking a new General and Assistant Solicitor. *See* Pennsbury School District Request For Proposals Legal Services, RFP#2223-029, attached hereto as Exhibit I. Pennsbury "is soliciting proposals from qualified licensed full-service law firms to represent the District in basic legal matters and litigation[.]" (Ex. I). After proper vetting and with the experience of the present litigation, the District "anticipates entering into an agreement with the selected law firm beginning on or about July 1, 2022 after the June School Board Meeting review with the Board of School Directors." (Ex. I).

II. Argument

The Court's issuance of the preliminary injunction would serve no purpose today. The controversies giving rise to the issuance of the preliminary injunction are no longer live as a result of a substantial change in the facts upon which the Order rests. The controversy has failed to survive through all stages of the litigation, and Plaintiffs' entitlement to injunctive relief may therefore properly be dismissed as moot.

A. Mootness[4]

Article III of the Constitution empowers federal courts to adjudicate actual cases or controversies. U.S. Const. Art. III, § 2. "[A]n 'actual controversy' must exist not only 'at the time the complaint is filed,' but through 'all stages' of the litigation." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90–91 (2013) (quoting *Alvarez v. Smith*, 558 U.S. 87, 92 (2009)). An actual case requires the existence of:

> (1) a legal controversy that is real and not hypothetical, (2) a legal controversy that affects an individual in a concrete manner so as to provide the factual predicate for reasoned adjudication, and (3) a legal controversy with sufficiently adverse parties so as to sharpen the issues for judicial resolution.

Rendell v. Rumsfeld, 484 F.3d 236, 240 (3d Cir. 2007) (citation and internal quotations omitted). However, the justiciability doctrine of mootness counsels against the continued enforcement of an equitable judgment in favor of a party who is no longer subject to an "actual and imminent" threat of harm. *Marcavage v. Nat'l Park Serv.*, 666 F.3d 856, 862 (3d Cir. 2012); *compare Hartnett v. Pennsylvania State Educ. Ass'n*, 963 F.3d 301, 306 (3d Cir. 2020) ("Standing and mootness are 'two distinct justiciability doctrines.'" (citation omitted)). "The central question of all mootness

[4] In the final Federal Rule of Civil Procedure 26(f) report submitted to the Court, Plaintiffs explain, "[s]ome time after this Court granted Plaintiffs' motion for preliminary injunction, Defendants abolished Policy 922 and significantly amended Policy 903, *which the parties agree moots the request for injunctive relief* because the old policies are no longer in effect."

problems is whether changes in circumstances that prevailed at the beginning of the litigation have forestalled any occasion for meaningful relief." *Rendell*, 484 F.3d at 240. Mootness may occur at any stage of the litigation. *Id*. The inquiry may begin by simply asking, "would the District Court's declaration 'serve any purpose today?'" *Id.* at 241 (quoting *Khodara Envtl., Inc. v. Beckman*, 237 F.3d 186, 193 (3d Cir. 2001)) (internal alterations omitted).

1. Plaintiffs' entitlement to injunctive relief is constitutionally moot.

The doctrine of mootness contains two distinct components. *Marcavage*, 666 F.3d at 862 n.1; *see also Int'l Bhd. of Boilermakers v. Kelly*, 815 F.2d 912, 915 (3d Cir. 1987) ("In addition to its threshold constitutional dimension, mootness doctrine incorporates prudential considerations as well.")). First, and more popular, is the Article III case or controversy jurisdictional limitation. *Rendell*, 484 F.3d at 240 ("[T]he exercise of judicial power depends upon the existence of a case or controversy." (citation omitted)). There, "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome[,]" an actual case or controversy no longer exits, and the asserted claim has become constitutionally moot. *Already, LLC*, 568 U.S. at 91 (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (*per curiam*)). In the context of equitable relief, a plaintiff "must show that he is under threat of suffering 'injury in fact' that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical." *Marcavage*, 666 F.3d at 862 (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009)). Where such a threat does not continue "through 'all stages' of the litigation[,]" claims for "declaratory and injunctive relief [are] therefore properly dismissed as moot." *Id.*; *see also Already, LLC*, 568 U.S. at 91 (citation omitted).

Here, the Court's issuance of the preliminary injunction would not "serve any purpose today[.]" *See Rendell*, 484 F.3d at 240. The controversies giving rise to the issuance of the preliminary injunction are no longer live. *See Already*, LLC, 568 U.S. at 91; *Philadelphia Vietnam*

Veterans Mem'l Soc'y v. Kenney, 509 F. Supp. 3d 318 (E.D. Pa. 2020) (Section 1983 action alleging First Amendment violation based on mayor's moratorium was moot where subsequent executive orders explicitly rescinded the moratorium's restrictions), *aff'd sub nom. Philadelphia Vietnam Veterans Mem'l Soc'y v. Mayor Philadelphia*, No. 21-1125, 2022 WL 866285 (3d Cir. Mar. 23, 2022). Plaintiffs' sought injunctive relief to "enjoin Defendants from enforcing the subjective and view-point-discriminatory terms in Pennsbury School Board Policies 903 and 922, including 'personally directed,' 'abusive,' 'irrelevant,' 'offensive,' 'otherwise inappropriate,' 'personal attack,' 'inappropriate,' and 'intolerant,' as well as the address announcement requirement in Policy 903." (ECF 4 at 1). They also asserted irreparable harm in the form of an "ongoing risk of self-censorship and of future rights violations[.]" (ECF 4 at 18). Simply put, the harm giving rise to the necessity of the preliminary injunction is no longer "actual and imminent" because the terms cited by both the Plaintiffs and Court have been repealed. *See Marcavage*, 666 F.3d at 862; *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 699 (3d Cir. 1996) ("[A]ppellants must demonstrate some injury, or threat thereof, 'of sufficient immediacy and ripeness to warrant judicial intervention.'" (citation omitted)); (Ex. G).

The discrimination against "offensive" viewpoints resulting from the "subjective interpretation" of the complained-of terms is also no longer an imminent harm because Revised Policy 903 allows for termination of public comments only where speech or conduct: (1) "incite[s] an immediate breach of the peace; (2) "is considered, as a whole, to prominently appeal to prurient interests or are otherwise obscene[;]" (3) "constitute[s] threats of bodily harm;" or (4) the speaker exceeds the 5 minute time allotment. (ECF 52 at 11); (Ex. G). The categories of speech to which Revised Policy 903 applies remedies the Court's concern that the enjoined terms "reach[ed] too much protected speech [.]" (ECF 52 at 15-16). The categories of speech and types of conduct

subject to Revised Policy 903's regulation are not entitled to first Amendment protection.[5] The repeal of enjoined policies 903 and 922, as well as the March 18, 2022, adoption of Revised Policy 903 constitute a change to those circumstances prevailing "at the beginning of the litigation" and have thus "forestalled any occasion for meaningful relief." *See Rendell*, 484 F.3d at 240; *see also Blanciak*, 77 F.3d at 699 ("Past exposure to illegal conduct does not in itself show a present case or controversy . . . if unaccompanied by any continuing, present adverse effects." (citation omitted)). The controversy has failed to survive "through 'all stages' of the litigation[,]" and Plaintiffs' entitlement to "injunctive relief [may] therefore properly [be] dismissed as moot." *Marcavage*, 666 F.3d at 862; *see also Already, LLC*, 568 U.S. at 91 (citation omitted).

a. It is absolutely clear Pennsbury's allegedly wrongful behavior could not reasonably be expected to recur.

Voluntary cessation does not always render a controversy moot. *Hartnett*, 963 F.3d at 306. Unilateral action taken after the commencement of litigation will moot an otherwise live controversy "only if it is 'absolutely clear that the allegedly wrongful behavior could not

[5] *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include . . . 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." (footnotes omitted)); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." (footnote omitted)); *Miller v. California*, 413 U.S. 15, 23–24 (1973) ("[R]egulat[ion of] obscene materials must be carefully limited . . . to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value."); *Virginia v. Black*, 538 U.S. 343, 359 (2003) ("'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." (citations omitted)); *Eichenlaub v. Twp. of Indiana*, 385 F.3d 274, 281 (3d Cir. 2004) (holding, removal of landowner from limited public forum when he became repetitive, truculent, and repeatedly interrupted the chairman, did not violate landowner's free speech rights; allowing a speaker to try to hijack the proceedings, or to filibuster them, would have impinged on First Amendment rights of other would-be participants).

reasonably be expected to recur.'" *Id.* (quoting *Fields v. Speaker of the Pa. House of Representatives*, 936 F.3d 142, 161 (3d Cir. 2019)). The "key question" is whether the enjoined party "could reasonably be expected to engage in the challenged behavior again." *Id.* (citing *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)); *see also Marcavage*, 666 F.3d at 861 (citation omitted). An enjoined party's rationale for changing its behavior "is often probative of whether it is likely to change its behavior again." *Id.* at 306. A claim of mootness by a defendant who submits to a court order, but "maintains that its conduct was lawful all along[,]" is subject to a stricter standard of scrutiny than one who acknowledges the unlawfulness of their actions and concedes to the court's determinations. *Id.* Particularly in the context of state action where "government officials are presumed to act in good faith." *Marcavage*, 666 F.3d at 861 (citing *Bridge v. U.S. Parole Comm'n*, 981 F.2d 97, 105 (3d Cir. 1992)). Comparatively, "if the defendant ceases because of a new statute or a ruling in a completely different case, its argument for mootness is much stronger." *Id.* at 307. In either circumstance, "[v]oluntary cessation is just a recurring situation in which courts are particularly skeptical of mootness arguments." *Id.*

The facts presented here "present an especially strong case of mootness by voluntary cessation." *See Hartnett*, 963 F.3d at 307. Until the Court's findings with respect to Plaintiffs' request for the preliminary injunction, Pennsbury "had every reason to believe[ ]" their conduct was lawful. *See id.* The Board was supplied the repealed policies by the Pennsylvania School Board Administration, which were then enforced with approval by both the Solicitor and Assistant Solicitor. Since the Court's findings, "they have conceded" the likeliness that the repealed polices are unconstitutional and have stricken them from the books. *See Hartnett*, 963 F.3d at 307.

The District also does "not contest[ ] the determination . . ." of this Court that the repealed policies are likely unconstitutional. *See Marcavage*, 666 F.3d at 861. In fact, Revised Policy 903 was adopted with the guidance of the Court's Memorandum Opinion and the advice of new counsel. Although the Court's findings in the context of Plaintiffs' request for a preliminary injunction were not a "definitive determination" of the constitutionality of the repealed policies, Pennsbury has treated the findings as such. *See id.* Pennsbury also has not engaged in a "continued defense of . . ." the policies under the advice of new counsel and has instead repealed both, and *substantially* revised Policy 903 to conform with the current state of the law. *See id.*; *Hartnett*, 963 F.3d at 306.

Revised Policy 903 no longer contains "prohibitions of speech deemed 'personally directed,' 'abusive,' irrelevant,' 'offensive,' 'otherwise inappropriate,' or 'personal attacks[,]" nor does it "require[ ] that speakers at public comment periods preface their remarks by announcing their address." (ECF 53); (Ex. G.). As such, there is no threat that the public might be subject to the complained-of conduct in the future. *See Marcavage*, 666 F.3d at 861 (citing *United States v. Gov't of Virgin Islands*, 363 F.3d 276, 285 (3d Cir. 2004)). Indeed, Pennsbury is now under the governance of a newly elected Superintendent and School Board, has repealed the enjoined policies, *substantially* revised Policy 903, has retained new representation in the present case, and is now actively seeking new solicitors. Importantly, the School Board is "presumed to act in good faith." *See id.* "This presumption and the changes to . . ." Policy 903 "make it unreasonable to expect that future constitutional violations will recur." *See Marcavage*, 666 F.3d at 861. Therefore, the controversy giving rise to the preliminary injunction is constitutionally moot.

B. This Honorable Court has the authority to dissolve the mooted preliminary injunction.

Federal Rule of Civil Procedure 60(b)(5) governs the legal standard concerning the vacation of a duly imposed injunction. *Bldg. & Const. Trades Council of Philadelphia & Vicinity, AFL-CIO v. N.L.R.B.,* 64 F.3d 880, 888 (3d Cir. 1995) (citing Fed. R. Civ. P. 60(b)(5)). There, a previously issued judgment may be vacated where the judgment's prospective application "is no longer equitable[.]" *Id.* Because "equity demands a flexible response to the unique conditions of each case[,]" a court "must evaluate a number of potentially competing considerations to determine whether to modify or vacate an injunction[.]" *Id.* Indeed, the standard for vacating an injunction does not "depend on whether the case is characterized as an institutional reform case, a commercial dispute, or private or public litigation." *Id.* The analysis instead requires consideration of various factors, which include:

> the circumstances leading to entry of the injunction and the nature of the conduct sought to be prevented; the length of time since entry of the injunction; whether the party subject to its terms has complied or attempted to comply in good faith with the injunction; and the likelihood that the conduct or conditions sought to be prevented will recur absent the injunction.

N.L.R.B., 64 F.3d at 888. Moreover, "[a] subsequent change in the controlling facts on which the injunction rested . . ." may also call into question the equity of the injunctive relief. *Id.* (citation omitted). More specifically, where dissolution of the injunction "would work no harm to the one for whom the injunction ran and would serve a beneficial purpose for the movant[,]" prospective application of the injunction is no longer equitable. *Id.* (citation omitted). In weighing these considerations, "the court must balance the hardship to the party subject to the injunction against the benefits to be obtained from maintaining the injunction[,]" while also "determin[ing] whether the objective of the decree has been achieved." *Id.*

Here, the objective of the preliminary injunction has been achieved. *See N.L.R.B.*, 64 F.3d at 888. The preliminary injunction was issued to disable the vehicle through which censorship of offensive comments was being effectuated. (ECF 52 at 10). It was also issued to prevent the relegation of differing viewpoints on the basis of subjective interpretation, as well as to rein-in the over encompassing reach of the policy terms. (ECF 52 at 11-13, 15-16). Revised Policy 903 grants no such power to the School Board, addresses each of the Court's primpary conerns, and provides members of the public the constitutional protections they are entitled to under the First Amendment. Moreover, consistent with "the right to refrain from speaking[,]" the revised policy does not contain an address announcement requirement, thereby insultating the public from the chilling effects resulting therefrom. (ECF 52 at 16, 17) (citing *Janus v. AFSCME*, 138 S. Ct. 2448, 2463 (2018)).

Although the former School Board once "vigorously defended its applications of Policy 903 . . ." under leadership of its Solicitor, Assistant Solicitor, and former counsel, the newly constituted School Board has changed course, both as a result of this Honorable Court's findings and the advice of newly retained counsel. Because Pennsbury is now under the governance of a newly elected Superintendent and School Board, has repealed the enjoined policies, *substantially* revised Policy 903, has retained new representation in the present case, and is now actively seeking new solicitors, "the spectre of more interruptions and terminations of speech based on Policy 903[ ]" is not reasonably likely. (ECF 52 at 18); *Marcavage*, 666 F.3d at 861. Pennsbury has not only "compl[ied] in good faith[,]" but it has taken the extra step to remedy the institutional policies giving rise to the present lawsuit. *See N.L.R.B.*, 64 F.3d at 888. The "subsequent change in the controlling facts on which the injunction rested . . ." are such that the dissolution of its prohibitions "would work no harm to the one for whom the injunction ran[.]" *See id.* Therefore, the judgment's

prospective application "is no longer equitable[,]" and Pennsbury respectfully requests dissolution of the preliminary injunction. *See id.* (citing Fed. R. Civ. P. 60(b)(5)).

CONCLUSION

Ultimately, "[t]he character of every act depends upon the circumstances in which it is done." *Schenck v. United States*, 249 U.S. 47 (1919) (Oliver Wendell Holmes, Jr., J.). Under the circumstances of the present case, Pennsbury has acted in good faith.

The District therefore respectfully requests dissolution of the preliminary injunction.

Respectfully Submitted,

MARSHALL DENNEHEY WARNER COLEMAN & GOGGIN

Date: May 13, 2022 BY: _____

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CERTIFICATE OF SERVICE

I, Joseph J. Santarone, Esquire, hereby certify that a true and correct copy of the foregoing Entry of Appearance was electronically filed with the Court this date and is available for viewing and downloading from the ECF System. All counsel of record was served via electronic notification.

MARSHALL DENNEHEY WARNER COLEMAN & GOGGIN, P.C.

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