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

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

**DEFENDANT, PENNSBURY SCHOOL DISTRICT'S SUR-REPLY TO PLAINTIFFS' BRIEF IN RESPONSE TO PENNSBURY'S MOTION TO DISSOLVE THE PRELIMINARY INJUNCTION**

The parties agree that "the preliminary injunction no longer serves to restrain unconstitutional speech policies, whether facially or as applied." (ECF 81 at 6). New Policy 903 "avoids policing viewpoints and focuses instead on maintaining time limits, and preventing imminent threats of harm and legally obscene speech." (ECF 81 at 6).

And yet, Plaintiffs continue to fuel discourse between the community and the newly constituted School Board by arguing "the mootness doctrine is subject to potential manipulation by enjoined parties[.]" (ECF 81 at 8). They present this argument in complete disregard of controlling law which recognizes that "government officials are presumed to act in good faith." *Marcavage v. Nat'l Park Serv.*, 666 F.3d 856, 861 (3d Cir. 2012) (citing *Bridge v. U.S. Parole Comm'n*, 981 F.2d 97, 105 (3d Cir. 1992)).

## I. Plaintiffs' mischaracterization of the relevant "changed circumstances" should be rejected.

Notwithstanding Plaintiffs' agreement that the Court's preliminary injunction has grown moot, they now argue that "[c]onstitutional mootness is not present here because Defendants continue to defend their past behavior and could revert to speech policing[.]" (ECF 81 at 8). In so doing, Plaintiffs blatantly ignore the scope of the preliminary injunction, as well as their standing to challenge Revised Policy 903. They allege a remote and speculative "risk of harm" from revised Policy 903 while maintaining Pennsbury has "overstate[d] the changed circumstances[.]" (ECF 81 at 9). However, Plaintiffs' gross mischaracterization of the relevant arguments and facts should be rejected.

Plaintiffs begin by "laud[ing]" the revised Policy and again alleging the speculative harm that "it can always be replaced with another Policy 903, containing viewpoint policing terms[.]" (ECF 81 at 9). They also allege "even the New Policy 903 can be enforced, as-applied, in an unconstitutional manner[.]" (ECF 81 at 9). For the reasons stated in the principal motion (ECF 76), Pennsbury could not "*reasonably* be expected to engage in the challenged behavior again." *See Hartnett v. Pennsylvania State Educ. Ass'n*, 963 F.3d 301, 306 (3d Cir. 2020) (citation omitted and emphasis added). The present lawsuit does not give Plaintiffs standing *ad infinitum* to challenge any and all policies Pennsbury currently enforces or may adopt in the future. The present lawsuit concerns only former polices 903 and 922, and the consequences resulting from their enforcement.

Pennsbury is also accused of "overstat[ing] the so-called regime change[.]" (ECF 81 at 10). Plaintiffs highlight that "three board member-defendants remain *in power*[,]" (ECF 81 at 9) (emphasis added), which is curious in light of the fact that the Board is composed of nine total members. Assuming the Defendants remaining on the Board do act with the type and degree of bad faith Plaintiffs' claim, surely a one-third voting share is insufficient as a matter of

mathematical certainty to "remain in power[.]" (ECF 81 at 9). Furthermore, while the Solicitor and Assistant Solicitor Defendants continue to occupy their respective positions, Pennsbury now acts pursuant to the revised Policy 903, which has been deemed constitutional by all parties. In fact, Plaintiffs concede revised Policy 903 "avoids policing viewpoints and focuses instead on maintaining time limits, and preventing imminent threats of harm and legally obscene speech." (ECF 81 at 6). Given the concise and clear nature of revised Policy 903, it is not reasonably likely the newly constituted School Board will require the assistance of the Solicitor Defendants in enforcing its terms. Since the Court's issuance of the preliminary injunction, Plaintiffs have not alleged their constitutional rights have been infringed. Instead, they have been allowed to express any and all opinions, including extended braggadocio regarding their success in obtaining the preliminary injunction. (Ex. H).

Plaintiffs also point to Pennsbury's Requests for Proposals which seek bids for new legal service providers. (ECF 81 at 10). They assert the process "is incomplete, and there is no indication that the Rudolph Clarke firm is precluded from competing for the work."[1] (ECF 81 at 10). Plaintiffs insist "it is speculative to imply that defendants Amuso or Clarke will be replaced." (ECF 81 at 10). However, it is equally speculative that Rudolph Clarke would submit such a proposal in light of the present litigation, or that the newly constituted School Board and newly elected Superintendent would entertain any such bid.

In an endeavor designed to mislead the Court, Plaintiffs also attempt to pervert Pennsbury's argument by disingenuously asserting the district "continue[s]" to defend their past actions. (ECF 81 at 10). They assert the undersigned used "hedging language ('Pennsbury's allegedly wrongful

[1] Rudolph Clarke, LLC, is the law firm at which the Defendant Solicitor and Assistant Solicitor are currently partners. *See* Rudolph Clarke, *Meet Our Attorneys*, https://rudolphclarke.com/meet-our-attorneys/ (last visited May 31, 2022).

behavior') and avoided any admission of past wrongdoing." (ECF 81 at 11). However, the premise upon which Plaintiffs rest their assertion is faulty. "[A]voind[ing] any admission of past wrongdoing" is not equivalent to engaging in the defense of past actions. (ECF 81 at 11). Contrary to Plaintiffs' assertion, the case law does not require "admission[s] of past wrongdoing" in the context of a voluntary cessation analysis. Instead, the "key question" is whether the enjoined party "could *reasonably* be expected to engage in the challenged behavior again." *See Hartnett*, 963 F.3d at 306 (citation omitted and emphasis added). Far from defending its past actions, Pennsbury represented in the principal motion that "[a]lthough 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." (ECF 76 at 15) (quoting *Marcavage*, 666 F.3d at 861). Moreover, the "hedging language" to which Plaintiffs' cite is pure rule statement from *Hartnett v. Pennsylvania State Educ. Ass'n*, 963 F.3d 301, 306 (3d Cir. 2020) (holding, 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 reasonably be expected to recur.'" (quoting *Fields v. Speaker of the Pa. House of Representatives*, 936 F.3d 142, 161 (3d Cir. 2019) (emphasis added)). Plaintiffs' counsel knows this, and still attempts to mischaracterize Pennsbury's actions, thereby deepening the chasm between the Board and the community it serves.

Given this alleged "continued defense," Plaintiffs unsuccessfully attempt to distinguish *Marcavage*, 666 F.3d 856, by laser focusing on the fact that the change in the Park Service Policy "came before the case commenced." (ECF 81 at 11). Again, another mischaracterization. In *Marcavage*, the Third Circuit emphasized that 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. 666 F.3d at 861. Here, Pennsbury has accepted as true the Court's preliminary determinations that former Policies 903 and 922 were likely unconstitutional. (ECF 76 at 15). By repealing former policies 903 and 922, and subsequently enacting a *substantially* revised version of Policy 903, Pennsbury has conceded to the Court's determinations. *See Marcavage*, 666 F.3d at 861. All that is left is Plaintiffs' meritless pursuit of retributive money damages.

## II. Plaintiffs' reliance on *People Against Police Violence v. City of Pittsburgh*, 520 F.3d 226 (3d Cir. 2008) is misplaced.

Plaintiffs also maintain, "the repeal of a challenged policy does not necessarily moot a challenge to the constitutionality of that policy, if the policy, or one with similar constitutional infirmities, might be reenacted." (ECF 81 at 7) (citing *People Against Police Violence v. City of Pittsburgh*, 520 F.3d 226, 231 n.2 (3d Cir. 2008)). However, while arguing Pennsbury has "overstate[d] the changed circumstances[,]" (ECF 81 at 8), Plaintiffs have understated the Third Circuit's discussion of the facts in *People Against Police Violence*, 520 F.3d at 231 n.2.

In *People Against Police Violence*, the district court enjoined the enforcement of a City ordinance "regulating expressive activities in public forums." 520 F.3d at 228. The court also ordered the parties to meet and confer regarding the City's revisions to the ordinance. *Id.* The City then submitted proposed revisions, which the court and challengers found "constitutionally problematic[.]" *Id.* at 230. The court "gave the City a 'clear signal' that at least one aspect of it 'would make [the ordinance] facially unconstitutional.'" *Id.* (citation omitted). Before submitting a second draft, the City formally repealed the challenged ordinance, and then filed motions seeking to lift the preliminary injunction and dismiss the case as moot. *Id.* The City then submitted a second draft ordinance that "failed to address some of [plaintiffs'] core complaints[.]" *Id.* "The [c]ourt

denied the City's motion to dismiss, finding that, because the City had merely repealed [the ordinance] but had yet to adopt any procedures to take its place, the action was not moot." *Id.* Following denial of its motion to dismiss, the City "enacted a new ordinance and implementing regulations which, the parties agreed, complied with the Constitution." *Id.* As a result, the district court "lifted the injunction[,] and closed the case with the agreement of the parties." *Id.*

On appeal of the issue of attorney's fees, the City argued the district court's involvement exceeded its jurisdiction under Article III of the Constitution. *People Against Police Violence*, 520 F.3d at 231 n.2. The Third Circuit rejected the argument, and citing to the voluntary cessation exception to Article III mootness, highlighted that "repeal of a challenged ordinance does not necessarily moot a challenge to the constitutionality of that ordinance if the ordinance, or one with *similar constitutional infirmities*, might be reenacted." *Id.* (citation omitted and emphasis added). The court then recognized that neither the City's representation that it would no longer enforce the ordinance, nor its formal repeal of the ordinance, was sufficient to overcome the voluntary cessation doctrine because the district court had "concern that a new ordinance would have similar constitutional infirmities." *Id.* Given the City's initial proposals were "constitutionally problematic" and "failed to address some of [plaintiffs'] core complaints[,]" the Third Circuit agreed "similar constitutional infirmities" may have been reenacted. *People Against Police Violence*, 520 F.3d at 230, 231 n.2 (citation omitted).

Here, the facts are entirely distinguishable from those in *People Against Police Violence*. First, Plaintiffs' "core concerns" were founded upon "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). Revised Policy 903 contains no such terms or conditions, and neither did the first draft proposal submitted to Plaintiffs' for review. *See* Email with Attachment, from Joseph J. Santarone, Jr. Esquire, Attorney for Pennsbury School Board, to Del Kolde, Attorney for Plaintiffs, January 30, 2022, attached hereto as Exhibit I. Thus, unlike *People Against Police Violence*, every draft proposal, and ultimately the enacted revised Policy 903, addressed every one of Plaintiffs' concerns. *See People Against Police Violence*, 520 F.3d at 230, 231 n.2. Second, unlike *People Against Police Violence* where "the City had merely repealed [the ordinance] but had yet to adopt any procedures to take its place," Pennsbury seeks dissolution of the preliminary injunction ***following*** the district's enactment of revised Policy 903, thus rebutting Plaintiffs' assertion that Pennsbury may be attempting to "manipulate[e]" the mootness doctrine. (ECF 81 at 8). Lastly, and most importantly, Pennsbury has "enacted a new [policy] which, the parties agree[ ], complie[s] with the Constitution." *See People Against Police Violence*, 520 F.3d at 230. Accordingly, the evidence of record does not reasonably suggest a policy "with similar constitutional infirmities[ ] might be reenacted." (ECF 81 at 7) (citing *People Against Police Violence*, 520 F.3d at 231 n.2). Plaintiffs reliance on *People Against Police Violence* is therefore misplaced.

## CONCLUSION

Again, 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. 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 v. Rumsfeld*, 484 F.3d 236, 240 (3d Cir. 2007). 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 861. Moreover, the School

Board is "presumed to act in good faith." *Id.* "This presumption and the changes to . . ." Policy 903 "make it unreasonable to expect that future constitutional violations will recur." *Id.* Therefore, the controversy giving rise to the preliminary injunction is constitutionally moot.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I, Joseph J. Santarone, Esquire, hereby certifies that on the date set forth below I served the foregoing Sur-Reply To Plaintiffs' Brief in Response to Pennsbury's Motion to Dissolve the Preliminary Injunction upon all parties via ECF.

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