IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
BLUEFIELD DIVISION

FREEDOM FROM RELIGION FOUNDATION, INC., et al.,

Plaintiffs,

vs.

MERCER COUNTY BOARD OF EDUCATION, et al.,

Defendants.

Civil Action No. 1:17-cv-00642

Hon. David A. Faber

SURREPLY MEMORANDUM
IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

A two-part analysis is required to resolve Defendants' mootness defense. First, as a threshold matter, the Court must determine what standard and burden of proof apply to its inquiry. Second, the Court must determine whether the burdened party has satisfied the applicable standard of proof based upon the relevant facts. While the parties agree that the relevant facts for this second step consist of Defendants' conduct throughout the case, Def. Reply 4, disagreements abound as to the conclusions that should be drawn from these facts.

The threshold burden of proof inquiry turns on whether Defendants' actions are evaluated within the traditional voluntary cessation framework. To prevent manipulative litigants from gaming courts' jurisdiction, this framework requires Defendants ceasing challenged conduct to bear a "heavy burden of persuading" courts that their subsequent actions make it "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Wall v. Wade*, 741 F.3d 492, 497 (4th Cir. 2014). The court imposes this heavy burden upon a government defendant unless the defendant takes swift and unequivocal legislative action to

repeal or substantially amend the very statute, ordinance, or policy a plaintiff challenges. *E.g.*, *Brooks v. Vassar*, 462 F.3d 341, 348 (4th Cir. 2006) (imposing burden on plaintiff to show a likelihood that the challenged statute where defendant amended the statute and plaintiffs "all but agreed" that a reenactment was unlikely). Only in such clear cases will courts impose the burden on plaintiffs to demonstrate a likely return of the challenged practice or policy. *See City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (applying the voluntary cessation framework in a case involving legislative amendment where surrounding circumstances casted doubt on defendant's intentions and motivations). Thus, unless Defendants' drawn-out, incremental actions on BITS, occurring against the backdrop of manipulation and gamesmanship, warrant departure from the voluntary cessation framework, they must meet the heavy burden of proving with absolute clarity that BITS will never return.

Defendants' Reply largely ignores this key threshold issue in favor of presuming Plaintiffs bear the burden of proof. Defendants do not even attempt to present argument that they can satisfy the heavy voluntary cessation burden, consistently framing the Court's inquiry as whether BITS is likely to return. *See, e.g.*, Def. Reply 4 (presenting without argument that Plaintiffs must prove it is likely BITS will return). Because Defendants have placed all their eggs in the legislative repeal basket, it is no surprise Defendants' fail to meaningfully respond to Plaintiffs' voluntary cessation arguments, many of which point the Court to facts that would substantially undercut any claims of "absolute clarity" that BITS is gone for good.

Instead of offering pointed responses to Plaintiffs' challenges, Defendants obfuscate and mischaracterize much of the factual record and *yet again* employ the strategy of introducing new

legal arguments[1] and new evidence in a reply brief. As was the case in Defendants' prior reply brief, the introduction of new legal argument should be seen as a tacit admission that Plaintiffs' Opposition met the original arguments presented in Defendants' motion. Similarly, the remarkable attempt to introduce a three-page declaration from a witness to whom Plaintiffs were denied access in discovery should be viewed as a last-ditch attempt to save Defendants from the obvious implications arising from their conduct in this case and the damaging deposition testimony of the Mercer County Board's appointed designee and other fact witnesses.

Defendants are not entitled to the benefit of the doubt they are seeking from the Court. In presuming that the Court will burden the Plaintiffs with proving BITS is likely to return, Defendants implicitly ask the Court to ignore everything that happened leading up to the acceptance of Board Memo # 171. But the voluntary cessation doctrine has developed to ensure that a blind eye will not be turned to the revealing circumstances leading up to that point. Because those circumstances suggest a desire to defend BITS and see it one day return, the Court must deny Defendants' motion to dismiss this case as moot.

I. Because Board Memo # 171 does not constitute legislative repeal, Defendants bear the burden of proving with absolute clarity that BITS is gone for good.

Board Memo # 171 poses no legislative obstacle to the return of BITS. Opp. Ex. (Hodges Dep. 44:4-45:4); Opp. Ex. (Akers Dep. 66:2-67:5). The current and any future Board may freely reimplement BITS without regard for Board Memo # 171. In fact, at some point in the future,

[1] Defendants' original Motion to Dismiss relies exclusively upon Memo # 171 to support their mootness argument, and thus, Plaintiffs' limited discovery on mootness related primarily to issues surrounding Memo # 171. Defendants now seek to introduce new facts in support of this mootness defense. Def. Reply 10. Moreover, Defendants now argue that Deal's challenge is moot specifically because she is in seventh grade. Def. Reply 13. This new legal argument is baseless because the FAC clearly challenges the first-through-eighth-grade BITS program. ECF No. 21 ¶¶ 25-26, 61, 93, 108.

Mercer County Schools will cease retaining Board Memo # 171 and discard it from the Schools' files. As a Board resolution adopting a Board Memo, Board Memo # 171 is nothing more than an expression of the view of a majority of the then-present Board members on the subjects embodied in the memo. As such, it simply does not matter whether Board Memo # 171 is "set in stone," as Defendants argue. Def. Reply 8. While no future Board can ever change the January 3, 2019 expression of a three-fifths majority of the Board, what matters is that every future Board is free to reimplement BITS despite the existence of Board Memo # 171.

Defendants' attempt to characterize Board Memo # 171 as something more than a historical artifact is obfuscation at best and misrepresentation at worst. Much of Defendants' rejoinder to Plaintiffs' arguments about the limitations of Board Memos stems from a mischaracterization of the testimony of Paul Hodges, regarding the difference between Board policies and resolutions. Hodges testified that Board policies are more long-ranging than resolutions, yet based upon a punctuation error in the transcript, Defendants have contorted the testimony to support the opposite proposition.[2] Incredibly, Defendants' have doubled down on this misinterpretation of Hodges' testimony by supplying a declaration from Mercer County Schools' long-tenured superintendent, Defendant Akers, in which she reinforces the patently absurd proposition that resolutions are more long-ranging than policy.

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[2] Q: What do you understand the difference, if any, to be between board policy and a board resolution?
A: My understanding would be a resolution would be more a specific situation that you're just making a statement on that policy, would be more long ranging.

Hodges Dep. 8:10-8:14. The only reasonable meaning to attribute to this answer is that Hodges believed that a resolution "would be a more specific situation that you're just making a statement on that" and that policy "would be more long-ranging" than the specifics dealt with by resolutions. Defendants' reading of this testimony is nonsensical.

Policies, not *resolutions*, provide long-ranging guidance to schools. The Schools' policy on "Policy Development, Enactment and Revisions" states as much:

> The Board of Education develops and enacts written policies to: Comply with laws . . . regulate its own affairs; guide the action of those to whom it delegates authority; and establish its expectations of those who are involved in the operation of the county's schools.

Opp. Ex. E. 1.0. This MCS policy regarding policy creation includes specific procedures regarding the creation and amendment of polices that ensure significant public involvement and opportunity for debate, discussion, and comment. Pl. Opp. 12. Unsurprisingly, it also includes requirements governing the perpetual maintenance of Board policies. Opp. Ex. E. 4.2.

As the mechanism for legislating the conduct of future Boards and school administrators, adoption of a policy *prohibiting* BITS instruction would pose an obstacle to the reimplementation of the program. While a policy change may not necessarily constitute "legislative repeal," unlike Board Memo # 171, such a policy would restrain the conduct of future Boards and school administrators. Even though the policy could be amended or rescinded to allow for BITS instruction, such action would be limited by the Board's rules pertaining to policy changes. Similarly, since any BITS action relates to curriculum, the Board's curriculum policies would likely also apply to require a formal, thorough process before any changes can be made—something else Defendants were able to avoid by acting on BITS in the context of an unannounced Board Memo. *See* Opp. Ex. R. Because Defendants did not utilize these policy processes available to them, their actions do not constitute legislative repeal.

II. Because the facts and circumstances preceding and surrounding the acceptance of Board Memo # 171 cast doubt on the purported cessation of BITS, the voluntary cessation framework applies.

Where a change in policy, practice, or statute bearing upon a challenge is equivocal and surrounding circumstances call the likelihood or sincerity of permanent cessation into question,

courts apply the voluntary cessation framework. *See Aladdin's Castle*, 455 U.S. at 289; *Porter v. Clarke*, 852 F.3d 358, 364-65 (4th Cir. 2017) (rejecting a straightforward legislative repeal analysis based upon government's ability to revert to old policy and refusal to commit unequivocally to changes). In *Porter*, the Fourth Circuit observed that courts impose the voluntary cessation doctrine's heavy burden on defendants in cases where a defendant is reluctant to change a policy and refuses to acknowledge the prior constitutional violation. 852 F.3d at 365 (citation omitted). Thus, even if the Court concludes Board Memo # 171 rises to the level of "legislative repeal," the voluntary cessation framework should still apply to this case.

Contrary to Defendants' attempts to gloss over the circumstances surrounding their actions on BITS since this case has been filed, this case cries out for application of the voluntary cessation doctrine to ensure Defendants' gamesmanship is not rewarded with unwarranted dismissal of this case. Throughout their Reply, Defendants cursorily summarize the actions they have taken since the case was filed and make claims without record citation. *See, e.g.*, Def. Reply 3-4. In particular, for the first time, Defendants' claim, without record citation, that they "immediately submitted the BITS program to review" following service of this suit. Def. Reply 4. This unsupported claim is part of Defendants' broader attempt to support their portrayal of their actions as "immediate and decisive" and "intentional, deliberate, and earnest."

The actual facts tell a different story. Defendants only decisive acts have been in response to Plaintiffs' filing of their original brief in opposition to Defendants' first motion to dismiss—which prompted the "suspension and review" of BITS—and in response to the Fourth Circuit's adverse ruling—which prompted the Board's acceptance of Board Memo # 171. In between these events, Defendants have drug their feet, avoiding any decisive action on BITS until litigation strategy demanded action. The most obvious example of this delay is Defendants'

refraining from definitive action on BITS between June 2017, when the review committee declared the program inappropriate to Defendant Akers, and January 3, 2019, when the Board finally acted. While Plaintiffs highlighted this delay in their Opposition as a cause for suspicion, it is notable that Defendants offered no explanation for the delay in their Reply. The implication warranted from Defendants' lack of engagement on this challenge is abundantly clear: Defendants had no intention of taking any action on BITS unless and until the Fourth Circuit granted Plaintiffs' appeal.

Nor does the record reveal Defendants' actions to be earnest. Regarding Defendants' conduct occurring before the acceptance of Board Memo # 171, the Fourth Circuit has already assessed Defendants' attempts to characterize their actions as earnest to be "dubious" based upon their public statements suggesting an intent to defend this litigation in the hopes of retaining BITS. *Deal*, 911 F.3d at 191. Facts discovered since the Fourth Circuit's analysis cast more doubt over the intention behind Defendants' "suspension and review" of the program: while maintaining that BITS was suspended and without adherence to relevant Board policies, Defendants were developing and eventually offering bible classes to the same middle school students to whom BITS would have been available.

Under the circumstances surrounding the Defendants' actions on BITS, the Court should apply the traditional voluntary cessation framework, regardless of the legislative import of Board Memo # 171. The circumstances surrounding this legislative act are sufficiently suspicious that the Court should not shift the burden of proof to plaintiffs on the issue of mootness. On the contrary, the Court must closely examine Defendants' conduct, holding them to the heavy burden to show with absolute clarity that BITS will not return, as it almost certainly would have had the Fourth Circuit denied Plaintiffs' appeal.

III. Defendants' Reply does not help them to satisfy their heavy burden to show that BITS will never return.

The Court should exclude or look askance at Defendant Akers' declaration provided in support of Defendants' Reply. Plaintiffs sought to depose Defendant Akers on issues related to mootness, but Defendants refused to make Defendant Akers available for deposition. *See* Exhibits V, W (correspondence between counsel on the deposition of Defendant Akers). Yet Defendants have now proffered a self-serving declaration from Defendant Akers, primarily on issues relevant to mootness (although also to improperly offer averments contesting the presumed-true allegations of Plaintiffs' Amended Complaint). While Defendants' counsel seems to acknowledge the necessity of making witnesses who Defendants will use to support their mootness defense available for deposition, *see* Ex. W (agreeing to the deposition of Mr. Hodges following Plaintiffs' counsel's argument that Mr. Hodges had supplied information in support of Defendants' Motion to Dismiss), they recruited an individual specifically made unavailable to Plaintiffs to attempt to modify or correct the testimony of their other witnesses, including the testimony of Akers in her capacity as a designee for the Board. Such conduct further highlights the aura of gamesmanship surrounding Defendants' defense of this litigation.

Defendants' use of the Akers declaration to support their argument that the Board properly convened and accepted Board Memo # 171 on January 3, 2019 is especially troubling. Plaintiffs argued in their Opposition that the January 3, 2019 assembly and vote on Board Memo # 171 were improper because, among other things, the assembly was a "work session" and Defendants failed to produce evidence establishing that the public was made aware of the session. Pl. Opp. 11. Acting in her capacity as designee for the Board, in which she was obligated pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure to be prepared to answer questions regarding the January 3, 2019 meeting, Akers testified that she did not know

whether the public was made aware of the January 3, 2019 work session. *Id.* (citing Akers Dep. 77:10-78:14). Yet in her individual declaration Defendant Akers was able to definitively testify that the public was made aware pursuant to Defendants' routine policies. Def. Reply 6; Akers Decl. ¶ 4. Akers' new-found certainty on this issue comes despite the fact that Defendants have been wholly unable to produce evidence proving that the January 3, 2019 public notice was circulated. *See* Opp. Ex. F.

In their attempt to rescue the January 3, 2019 work session from Plaintiffs' challenge, Defendants also misrepresent that it was scheduled as both a work session and "special session." Def. Reply 6. In reality, both the public notice and the Board agenda identify the meeting solely as a work session. Opp. Exs. I, J. The Board does not identify the meeting as a combined special/work session until the *minutes* from the meeting were created. Opp. Ex. K. Defendants' after-the-fact characterization does not rewind the clock and provide the public with advanced notice that the Board could vote on new business at its January 3, 2019 assembly. Even assuming Defendants distributed the public notice, the public would have had no way to know that the January 3, 2019 meeting would involve an effort to act in regard to this much-discussed litigation and the longstanding BITS program.

Defendants' discussion of the newly-created middle school bible courses is similarly misrepresentative of the record before the Court. In an effort to uncouple the development and implementation of the middle school courses from the suspension of BITS, Defendants falsely represent that the middle school classes did not begin for two years following the suspension of BITS. In reality, the classes began the very next school year (the 2017-2018 school year). Aliff Dep. 34:11-35:4. While Defendants try to create this temporal distance between the two bible classes, the mere creation of the middle school classes during the BITS suspension bears on the

issue of mootness, especially given the involvement of individuals associated with BITS in the curriculum-creation process. Moreover, the nuances of the curriculum—of which there is no record evidence—and any difficulty there is in comparing the classes to BITS cuts against Defendants' argument in favor of mootness. Defendants bear the burden of showing that BITS is forever gone, yet, on the record before the Court, they cannot even prove that the current middle school classes are so materially different from BITS that their presence does not undo Defendants' attempts at voluntary cessation. Ever willing to supplement the record to support their attempts to dismiss this case, Defendants' failure to present the Court with concrete evidence regarding the curriculum of the new middle school classes, along with their attempts to misrepresent the start date of the classes, provide yet another basis for the Court to question Defendants' willingness to completely terminate BITS (and its potential replacements).

A final deficiency in Defendants' Reply to Plaintiffs' Opposition further supports reasonable doubt over the future of BITS. While MCS representatives have previously made statements suggesting a desire to see BITS survive this case, Defendants have yet to represent to the Court that there has been a change of heart in this regard, even in response to Plaintiffs' Opposition's direct challenge on this point. Pl. Opp. 28. Despite the relevance of Defendants' position on the constitutionality of BITS and their intentions regarding the defense of the program should this case go forward, *see Porter v. Clarke*, 923 F.3d 348, 366 (4th Cir. 2019), *as amended* (May 6, 2019) (holding that the lack of "repentan[ce]" and continued argument that challenged practices were constitutional undercut a professed intent not to return to the practices), Defendants did not use the Reply as an opportunity to assure the Court that they are no longer defending BITS. Again here, the Court should comfortably infer that Defendants will defend and have not given up on the possible return of BITS.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 27, 2019, the foregoing Surreply Memorandum in Opposition to Defendants' Motion to Dismiss was filed electronically. Notice of this filing will be sent to counsel for all parties by operation of the Court's electronic case filing system and constitutes service of this filing under Rule 5(b)(2)(E) of the Federal Rules of Civil Procedure.

/s/ Marcus B. Schneider, Esquire
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