

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
HARRISBURG DIVISION**

KEVIN GAUGHEN and DAVID
KOCUR,

Plaintiffs,

v.

DAUPHIN COUNTY, a political
subdivision of the Commonwealth
of Pennsylvania and
ANTHEA STEBBINS, in her
individual capacity,

Defendants.

Civil Action No.: 1:23-cv-00077

Hon. _____

Mag. Judge Susan E. Schwab

**PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

ORAL ARGUMENT REQUESTED

Under Federal Rule of Civil Procedure 65(a), Plaintiffs Kevin Gaughen and David Kocur move for a preliminary injunction enjoining Defendants Dauphin County and Anthea Stebbins from enforcing a policy prohibiting members of the public from engaging in political activity in Fort Hunter Park. In support of this motion, Plaintiffs state as follows:

1. Plaintiffs are likely to succeed on the merits of their claims because Defendants' policy prohibiting political activity in Fort Hunter

Park constitutes an ongoing abridgement of Plaintiffs' free speech rights and unlawful content discrimination under the First Amendment.

2. The ongoing deprivation of Plaintiffs' First Amendment rights constitutes *per se* irreparable harm. *See Amalgamated Transit Union Local 85 v. Port Auth. of Allegheny Cnty.*, 39 F.4th 95, 108–09 (3d Cir. 2022).

3. Additionally, the balance of equities favors Plaintiffs, as Defendants cannot present any interest that outweighs Plaintiffs' interest in exercising their First Amendment rights.

4. Granting a preliminary injunction furthers the public interest because it protects the public's ability to engage in First Amendment activity in a traditional public forum.

5. In further support of their motion, Plaintiffs rely on the accompanying Brief in Support of Plaintiffs' Motion for Preliminary Injunction, and Exhibits A through J.

6. Plaintiffs respectfully request the Court grant their Motion and enter the attached order.

7. Pursuant to Middle District of Pennsylvania Local Rule 7.9, Plaintiffs request oral argument on this motion.

8. Pursuant to Middle District of Pennsylvania Local Rule 7.1, Plaintiffs' counsel Conor Fitzpatrick communicated via email with Dauphin County Assistant Solicitor Guy Beneventano on January 16, 2023. Mr. Fitzpatrick explained the nature of the motion, the specific relief requested, and requested concurrence. Mr. Beneventano did not respond.

Dated: January 17, 2023 Respectfully submitted,

By: /s/ Jeffrey D. Zeman
JEFFREY D. ZEMAN
PA Bar No. 328570
CONOR T. FITZPATRICK*
MI Bar No. P78981
FOUNDATION FOR INDIVIDUAL RIGHTS
AND EXPRESSION
510 Walnut Street; Suite 1250
Philadelphia, PA 19106
Tel: (215) 717-3473
jeff.zeman@thefire.org
conor.fitzpatrick@thefire.org

Attorneys for Plaintiff

**Pro Hac Vice Motion pending*

CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2022, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing upon all ECF filing Participants. I further certify that on the same day, I emailed a copy of the foregoing to Guy P. Beneventano, Esq., Assistant Solicitor for Dauphin County, at Guy@guyblaw.com, and that I dispatched a process server to personally serve the same on each Defendant:

Dauphin County
ADMINISTRATION BUILDING
2 South 2nd Street
Harrisburg, PA 17101

Anthea Stebbins
DAUPHIN COUNTY PARKS &
RECREATION DEPARTMENT
Tavern House in Fort
Hunter Park
100 Fort Hunter Road
Harrisburg, PA 17110

By: /s/ Jeffrey D. Zeman

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
HARRISBURG DIVISION**

KEVIN GAUGHEN and DAVID
KOCUR,

Plaintiffs,

v.

DAUPHIN COUNTY, a political
subdivision of the Commonwealth
of Pennsylvania and
ANTHEA STEBBINS, in her
individual capacity,

Defendants.

Civil Action No.: 1:23-cv-00077

Hon. _____

Mag. Judge Susan E. Schwab

ORDER GRANTING INJUNCTIVE RELIEF

This matter comes to the Court upon Plaintiffs' Motion for Preliminary Injunction. Based on the submissions of the parties and the Court being fully advised, the motion is **GRANTED**.

It is hereby ORDERED that:

1. Defendants are preliminarily enjoined from enforcing any policy or practice prohibiting political activity in Fort Hunter Park.
2. Plaintiffs are not required to provide a security bond under Fed. R. Civ. P. 65(c).

IT IS SO ORDERED.

Date: _____

Hon.

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
HARRISBURG DIVISION**

KEVIN GAUGHEN and DAVID
KOCUR,

Plaintiffs,

v.

DAUPHIN COUNTY, a political
subdivision of the Commonwealth
of Pennsylvania and
ANTHEA STEBBINS, in her
individual capacity,

Defendants.

Civil Action No.: 1:23-cv-00077

Hon. _____

Mag. Judge Susan E. Schwab

**BRIEF IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

JEFFREY D. ZEMAN
PA Bar No. 328570
CONOR T. FITZPATRICK*
MI Bar No. P78981
FOUNDATION FOR INDIVIDUAL
RIGHTS AND EXPRESSION
510 Walnut Street; Suite 1250
Philadelphia, PA 19106
Tel: (215) 717-3473
Fax: (215) 717-3440
jeff.zeman@thefire.org
conor.fitzpatrick@thefire.org

Attorneys for Plaintiffs

**Pro Hac Vice Motion pending*

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

ISSUES PRESENTED viii

INTRODUCTION 1

FACTUAL BACKGROUND 2

 I. Plaintiffs Form a New Political Party and Run for
 Office 2

 II. Fort Hunter Park Is a Public Park in Dauphin County. 3

 III. Defendants Prohibited Plaintiffs From Petitioning in
 Fort Hunter Park, Claiming Park Policy Bans All
 Political Activity 5

PROCEDURAL HISTORY 8

ARGUMENT 9

 I. Plaintiffs Are Likely to Succeed on the Merits of Claim
 III Because Prohibiting Peaceful Political Activity in a
 Public Park Violates a Century of Settled Supreme
 Court Law 10

 A. Collecting petition signatures is “core political
 speech.” 10

 B. Fort Hunter Park is a traditional public forum. 12

 C. The Fort Hunter Park Indenture does not trump
 the United States Constitution. 17

 D. Banning “political” expression is “presumptively
 unconstitutional.” 19

 E. A complete ban on political expression is not a
 reasonable time, place, or manner restriction. 21

II. The Remaining Factors Favor a Preliminary Injunction.23

III. Because Plaintiffs Seek Only to Enjoin an Unconstitutional Policy, the Court Should Waive the Bond Requirement.....25

CONCLUSION 26

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT... 27

CERTIFICATE OF SERVICE 28

TABLE OF AUTHORITIES

Page(s):

Cases:

ACLU v. Ashcroft,
322 F.3d 240 (3d Cir. 2003)..... 22, 25

Ark. Educ. Television Comm’n v. Forbes,
523 U.S. 666 (1998) 17

Bd. of Airport Comm’rs of City of L.A. v. Jews for Jesus, Inc.,
482 U.S. 569 (1987) 18

Boos v. Barry,
485 U.S. 312 (1988) 21

Brown v. Hartlage,
456 U.S. 45 (1982) 12

Buckley v. American Const. Law Found., Inc.,
525 U.S. 182 (1999).....11

Burton v. Wilmington Parking Authority,
365 U.S. 715 (1961).....19

Carey v. Brown,
447 U.S. 455 (1980).....14, 15, 24

Cohen v. California,
403 U.S. 15 (1971)22

Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.,
473 U.S. 788 (1985).....13

Council of Alt. Pol. Parties v. Hooks,
121 F.3d 876 (3d Cir. 1997).....25

Ctr. for Amalgamated Transit Union Loc. 85 v. Port Auth. of Allegheny Cnty., 39 F.4th 95 (3d Cir. 2022)24

Ctr. for Investigative Civ. Action Reporting v. SEPTA,
344 F. Supp. 3d 791 (E.D. Pa. 2018)25

Earnest by and through Kohler v. Mifflin Cnty. Sch. Dist.,
No. 1:20-cv-1930, 2020 WL 13132931 (M.D. Pa. Oct. 23,
2020).....26, 27

Elrod v. Burns,
427 U.S. 347 (1976).....24

Evans v. Newton,
382 U.S. 296 (1966).....3, 19, 21

Frisby v. Schultz,
487 U.S. 474 (1988).....17

Greater Phila. Chamber of Com. v. City of Phila.,
949 F.3d 116 (3d Cir. 2020).....10

Greer v. Spock,
424 U.S. 828 (1976).....3, 11, 14, 24

Hague v. CIO,
307 U.S. 496 (1939).....2, 13, 14, 24

*Int’l Soc’y For Krishna Consciousness, Inc. v. N.J. Sports and
Exposition Auth.*, 691 F.2d 155 (3d Cir. 1982).....18

K.A. v. Pocono Mountain. Sch. Dist.,
710 F.3d 99 (3d Cir. 2013)25

Krislov v. Rednour,
226 F.3d 851 (7th Cir. 2000)13

Libertarian Party of Va. v. Judd,
718 F.3d 308 (4th Cir. 2013)13

Marsh v. Alabama,
326 U.S. 501 (1946).....20

Mazo v. N.J. Sec’y of State,
52 F.4th 124 (3d Cir. 2022)13

McTernan v. City of York, PA,
564 F.3d 636 (3d Cir. 2009).....14

Meyer v. Grant,
486 U.S. 414 (1988).....2, 11, 12, 13

Miller v. Mitchell,
598 F.3d 139 (3d Cir. 2010).....10

Monell v. Dep’t of Social Services,
436 U.S. 658 (1978).....10

NAACP v. Button,
371 U.S. 415 (1963).....22

Ne. Women’s Ctr., Inc. v. McMonagle,
939 F.2d 57 (3d Cir. 1991).....23

Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n,
460 U.S. 37 (1983)..... *passim*

Reed v. Town of Gilbert, Ariz.,
576 U.S. 155 (2015).....20, 21

Temple Univ. v. White,
941 F.2d 201 (3d Cir. 1991).....26

United States v. Grace,
461 U.S. 171 (1983).....17, 18

Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.,
425 U.S. 748 (1976).....24

Verlo v. Martinez,
820 F.3d 1113 (10th Cir. 2016).....19

Ward v. Rock Against Racism,
491 U.S. 781 (1989).....14, 15, 23

Wilmoth v. Sec’y of N.J.,
731 F. App’x 97 (3d Cir. 2018).....13

Statutes:

25 Pa. Stat. § 2872.1(14)4
25 Pa. Stat. § 2872.1(9)9
25 Pa. Stat. § 2872.29
26 U.S.C. § 501(c)(3).....8

Rules:

F.R.C.P. 6526

Constitutional Provisions:

U.S. Const. amend. I..... *passim*

ISSUES PRESENTED

1. Should Defendants be preliminarily enjoined from prohibiting peaceful political petitioning in Fort Hunter Park since the Park is a traditional public forum and petitioning is core political speech protected by the First Amendment?

Plaintiffs' Answer: Yes.

Defendants' Answer: No.

2. Should Defendants be preliminarily enjoined from banning political activity in Fort Hunter Park on the basis that singling out political expression for unfavorable treatment constitutes unlawful content discrimination under the First Amendment?

Plaintiffs' Answer: Yes.

Defendants' Answer: No.

INTRODUCTION

Dauphin County is defying 80 years of settled Supreme Court precedent by banning political speech in a public park. The First Amendment prohibits this brazen act of censorship. Our public parks are “for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)). In short, public parks are for the people.

Plaintiffs Kevin Gaughen and David Kocur visited Dauphin County’s Fort Hunter Park in the summer of 2022, intending to speak with neighbors and gather signatures to place Kocur on the general election ballot for state representative. But the County’s Parks and Recreation Director, Defendant Anthea Stebbins, arrived with two guards and shut them down, telling them political activity is banned in the Park.

This was wrong. Circulating petitions is “core political speech.” *Meyer v. Grant*, 486 U.S. 414, 421–22 (1988). And it is a “long-established constitutional rule that there cannot be a blanket exclusion of First

Amendment activity from a municipality's open streets, sidewalks, and parks." *Greer v. Spock*, 424 U.S. 828, 835 (1976). Defendants say the owner who conveyed the Park to the County insisted on banning politics, and therefore the County must enforce the former owner's wishes. Wrong again. The Supreme Court rejected such an argument more than a half-century ago, holding that when the government operates a park, the Constitution follows. *See Evans v. Newton*, 382 U.S. 296, 302 (1966).

FACTUAL BACKGROUND

I. Plaintiffs Form a New Political Party and Run for Office.

Plaintiff Kevin Gaughen is a resident of Mechanicsburg, Pennsylvania, and former Executive Director of the Pennsylvania Libertarian Party. (Verified Compl. ¶ 11.) Gaughen left the party after the national Libertarian Party changed its platform in a way that no longer aligned with his political values. (*Id.*) So Gaughen, along with like-minded former Libertarians, formed the Keystone Party. (*Id.*)

Plaintiff David Kocur is a resident of Harrisburg, Pennsylvania, and was the Keystone Party's 2022 candidate for Pennsylvania House District 104, which includes parts of Dauphin and Lebanon counties. (*Id.* ¶ 12.) This was Kocur's first time running for public office. (*Id.*) Due to

the Keystone Party’s status as a “minor” political party, Kocur needed to collect 300 signatures to appear on the general election ballot. 25 Pa. Stat. § 2872.1(14); (Ex. D, 2022 Signature Requirements; Ex. E, 2022 Nomination Paper.) On June 11, 2022, Gaughen and Kocur decided to try and collect signatures for Kocur and other Keystone Party candidates at Fort Hunter Park (“the Park”). (Verified Compl. ¶¶ 3, 21.)

II. Fort Hunter Park Is a Public Park in Dauphin County.

Fort Hunter Park is a 40-acre public park along the Susquehanna River in Harrisburg, Pennsylvania. (*Id.* ¶ 23.) The Dauphin County Parks and Recreation Department (the “Department”) is headquartered at Fort Hunter Park. (Ex. F, *Parks & Recreation*, Dauphin County, <https://www.dauphincounty.gov/government/support-services/parks-recreation> [<https://perma.cc/X64M-SJHF>] (last visited Jan. 16, 2022).)

The Park website informs potential visitors that:

Fort Hunter Park is a part of the Dauphin County Parks and Recreation system. As such, the County of Dauphin has set rules and policies that govern the use of Fort Hunter Park. For everyone’s safety and enjoyment, all visitors are asked to abide by the following park rules and procedures. **Dogs are welcome but must be leashed!**

(Ex. G, *Park Rules, Fort Hunter Mansion and Park*, <https://forthunter.org/visit/park-rules> [<https://perma.cc/HYT5-BYY7>] (last visited Jan. 16, 2022).)

Additionally, the Dauphin County Board of Commissioners approves the allocation of County funds to assist the operation and maintenance of Fort Hunter Park. For example, on February 23, 2022, the Board approved \$150,000 toward the construction of a new playground in the Park. (Ex. H, 2022 Gaming Grant Awards at 2.)

Under Dauphin County Ordinance #2-95, which is displayed on the Fort Hunter Park website, “All County parks shall be open for public use on a year-round basis, unless otherwise designated.” (Ex. G.) Fort Hunter Park is open to the public daily from 8 a.m. until dusk. (Ex. I, Fort Hunter Mansion and Park, <https://forthunter.org> [<https://perma.cc/QR7Q-B6EF>] (last visited Jan. 13, 2022).) Occasionally, areas of the Park are reserved for private or ticketed events. On Saturday, June 11, 2022, the Department held its annual “Proudly PA!” event in Fort Hunter Park. (Verified Compl. ¶ 30.) The ticketed event occupied only a small part of the Park, with the rest remaining open to the public. (*Id.* ¶ 31.)

III. Defendants Prohibited Plaintiffs From Petitioning in Fort Hunter Park, Claiming Park Policy Bans All Political Activity.

Gaughen and Kocur arrived at Fort Hunter Park on June 11 while the “Proudly PA!” event was underway. (*Id.* ¶ 32.) They stood in an open area of the Park near the event holding their ballot petitions. (*Id.* ¶ 33.) They canvassed for about an hour, speaking amicably with passers-by about the Keystone Party and the petitions to put Keystone Party candidates on the general election ballot. (*Id.* ¶¶ 34–35.)

Then, park security intervened. A guard instructed Gaughen and Kocur that they were not permitted to petition for ballot signatures in Fort Hunter Park. (*Id.* ¶¶ 35–36.) Gaughen politely informed the guard that the First Amendment guaranteed their right to do so. (*Id.* ¶ 37.) The guard replied that he would have to “verify” Gaughen’s statement and departed. (*Id.* ¶ 38.)

A few minutes later, a second guard approached Gaughen and Kocur and instructed them to leave the Park. (*Id.* ¶¶ 39–40.) As with the first guard, Gaughen politely informed him that the First Amendment protected their right to peacefully petition in a public park. (*Id.* ¶ 41.) The second guard departed, telling Gaughen and Kocur that he would

discuss the matter with Department Director Anthea Stebbins. (*Id.* ¶¶ 15, 42.)

Gaughen and Kocur resumed talking to passersby and collecting signatures for another half hour. (*Id.* ¶¶ 42–43.) Then, Director Stebbins arrived, flanked by both guards. (*Id.* ¶ 43.) Stebbins instructed Gaughen and Kocur their petitioning must cease because political activity is banned in Fort Hunter Park. (*Id.* ¶¶ 4, 44.)

Director Stebbins handed Gaughen and Kocur a copy of the 1980 Indenture conveying the land from the Fort Hunter Foundation to Dauphin County. (*Id.* ¶ 45.) The Indenture conveys Fort Hunter Park to the County “in trust, for use for historical, park and recreational purposes in accordance with the terms and conditions” set forth therein. (*Id.* ¶ 46; Ex. A, Indenture at 1.)

The Indenture directs the Trustees to operate the facility in “conformity” with “rules or regulations as to conduct of the public which may be promulgated by the Parks and Recreation Department of the County of Dauphin.” (Ex. A at 6.) Page 12 of the Indenture provides:

No part of the activities of this Trust shall be the participation in, or intervention in (including the publishing or distributing of statements), any

political campaign of any candidate for public office.¹

(Verified Compl. ¶¶ 47–48; Ex. A at 11–12.)

Director Stebbins told Gaughen and Kocur this provision means the Department can ban political activity in Fort Hunter Park, even though it is otherwise a typical public park operated by the Department. (*See* Verified Compl. ¶ 47.) Heeding Stebbins’s directive, Gaughen and Kocur ceased petitioning and departed the Park. (*Id.* ¶ 49.) Had Stebbins not intervened and enforced Dauphin County’s ban, Gaughen and Kocur would have continued collecting signatures from and speaking with Park visitors on June 11, would have returned to the Park before Election Day to do the same, and would have returned to the Park after Election Day to continue canvassing support for the Keystone Party. (*Id.* ¶ 50.)

Seeking to avoid litigation, Gaughen and Kocur sent a letter to Dauphin County (through the undersigned counsel) outlining the pertinent law and demanding that Dauphin County lift the ban. (*Id.* ¶ 56;

¹ The language contained on pages 11–12 of the Indenture mirrors, almost verbatim, the limitations 26 U.S.C. § 501(c)(3) places on non-profit organizations to remain exempt from federal taxation. The Friends of Fort Hunter, Inc., which solicits donations to support the operation and preservation of Fort Hunter Park, is a § 501(c)(3) organization.

Ex. B, Oct. 13, 2022 Demand Letter.) It refused. The County, responding through counsel, wrote, “For the reasons set forth in the Indenture, Fort Hunter Park is not open to political activity—by anyone! This has long been the policy of the Dauphin County Commissioners and their Parks and Recreation Department.” (Verified Compl. ¶¶ 57–58; Ex. C, Oct. 19, 2022 Response Letter at 3.)

On December 22, 2022, the Keystone Party nominated a candidate for Justice of the Pennsylvania Supreme Court in anticipation of the November 2023 election. (Verified Compl. ¶ 51.) In order for its candidate to appear on the general election ballot, the Keystone Party will have to collect and submit 1,000 ballot petition signatures. (25 Pa. Stat. § 2872.1(9); 25 Pa. Stat. § 2872.2.) Gaughen and Kocur wish to return to the Park to speak to fellow Pennsylvanians about the Keystone Party, solicit support for the Keystone Party, and gather signatures for Keystone Party candidates for the November 2023 and future elections. (Verified Compl. ¶ 53.)

PROCEDURAL HISTORY

Plaintiffs filed a Verified Complaint on January 16, 2023. (ECF No. 1.) The Verified Complaint’s three claims seek monetary damages

against Director Stebbins in her individual capacity (claim I), monetary damages against Dauphin County under *Monell v. Department of Social Services*, 436 U.S. 658 (1978) (claim II), and declaratory and injunctive relief against Dauphin County regarding the ban on political activity in Fort Hunter Park (claim III). This Motion seeks preliminary relief solely as to claim III.

ARGUMENT

Gaughen and Kocur are entitled to a preliminary injunction because they can demonstrate “(1) a likelihood of success on the merits; (2) [they] will suffer irreparable harm if the injunction is denied; (3) granting relief will not result in even greater harm to the nonmoving party; and (4) the public interest favors such relief.” *Miller v. Mitchell*, 598 F.3d 139, 147 (3d Cir. 2010) (granting preliminary injunction on First Amendment claim). Though the movant usually faces the burden to establish the likelihood of success on the merits, “[i]n First Amendment cases, the initial burden is flipped.” *Greater Phila. Chamber of Com. v. City of Phila.*, 949 F.3d 116, 133 (3d Cir. 2020). “The government bears the burden of proving that the law is constitutional,” and “plaintiff must

be deemed likely to prevail if the government fails to show the constitutionality of the law.” *Id.* (cleaned up).

I. Plaintiffs Are Likely to Succeed on the Merits of Claim III Because Prohibiting Peaceful Political Activity in a Public Park Violates a Century of Settled Supreme Court Law.

A preliminary injunction to prevent Defendants’ censorship of political activity in Fort Hunter Park is warranted because of the “long-established constitutional rule that there cannot be a blanket exclusion of First Amendment activity from a municipality’s open streets, sidewalks, and parks.” *Greer*, 424 U.S. at 835.

A. Collecting petition signatures is “core political speech.”

Circulating a petition “involves the type of interactive communication concerning political change that is appropriately described as ‘core political speech.’” *Meyer*, 486 U.S. at 421-22. *See also Buckley v. American Const. Law Found., Inc.*, 525 U.S. 182, 186 (1999) (citing *Meyer* and holding same).

In *Meyer*, which controls here, the Court explained that the First Amendment protects petitioning because it “involves both the expression of a desire for political change and a discussion of the merits of the proposed change.” 486 U.S. at 421. Petition circulators must “persuade

[the public] that the matter is one deserving of the public scrutiny and debate that would attend its consideration by the whole electorate.” *Id.* And “[t]his will in almost every case involve an explanation of the nature of the proposal and why its advocates support it.” *Id.*

Likewise, here, when Gaughen and Kocur asked neighbors to sign a petition to place Kocur and other Keystone Party candidates on the ballot, they (1) explained who Kocur is and what he stands for, (2) explained what the Keystone Party is and what it stands for, and (3) tried to convince the neighbors that Kocur and the Keystone Party are worthy of support and inclusion on the ballot. (Verified Compl. ¶ 34.) That is “core political speech” protected by the First Amendment. *Meyer*, 486 U.S. at 422.

True, *Meyer* addressed ballot initiative petitions, but candidates, “no less than any other person, ha[ve] a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates.” *Brown v. Hartlage*, 456 U.S. 45, 53 (1982) (citation omitted). Petitions to place a candidate on the ballot enjoy the same protections under *Meyer* as petitions for ballot initiatives. *See, e.g., Wilmoth v. Sec’y of N.J.*, 731 F. App’x 97, 102–

03 (3d Cir. 2018) (applying *Meyer* and explaining that circulating petitions on behalf of candidates is protected by the First Amendment); *Libertarian Party of Va. v. Judd*, 718 F.3d 308, 314 (4th Cir. 2013) (same); *Krislov v. Rednour*, 226 F.3d 851, 858 (7th Cir. 2000) (same).

Gaughen and Kocur’s petitioning “involve[d] both the expression of a desire for political change” and discussing the “merits” of proposed candidates to bring about that change. *Meyer*, 486 U.S. at 421. This sort of communication between citizens is the “lodestar for core political speech” and fully protected by the First Amendment. *Mazo v. N.J. Sec’y of State*, 52 F.4th 124, 142 at 9 (3d Cir. 2022) (quoting *Meyer*, 486 U.S. at 422).

B. Fort Hunter Park is a traditional public forum.

Using parks for political expression “has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.” *Hague*, 307 U.S. at 515. Accordingly, public parks are the quintessential “traditional public forum.” *Perry Educ. Ass’n*, 460 U.S. at 45. *See also Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985) (“Public streets and parks fall into th[e] category” of “traditional

public fora”); *McTernan v. City of York, PA*, 564 F.3d 636, 645 (3d Cir. 2009) (same).

“Speech in a traditional public forum is afforded maximum constitutional protection.” *McTernan*, 564 F.3d at 645. And “the rights of the state to limit expressive activity” in a traditional public forum “are sharply circumscribed.” *Perry Educ. Ass’n*, 460 U.S. at 45.

To that end, the Supreme Court has repeatedly held the government cannot ban political expression from a traditional public forum. “The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all . . . but it must not, in the guise of regulation, be abridged or denied.” *Hague*, 307 U.S. at 515–16. Indeed, “streets, sidewalks, parks, and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely.” *Carey v. Brown*, 447 U.S. 455, 460 (1980) (citation omitted). *See also Greer*, 424 U.S. at 835 (noting the “long-established constitutional rule that there cannot be a blanket exclusion of First Amendment activity from a municipality’s open

streets, sidewalks, and parks”); *Perry Educ. Ass’n*, 460 U.S. at 45 (“In these quintessential public forums, the government may not prohibit all communicative activity”).²

But Dauphin County “broadly and absolutely” bars all political activity at Fort Hunter Park. *Carey*, 447 U.S. at 460. Dauphin County proclaims, “Fort Hunter Park is not open to political activity – by anyone!” (Verified Compl. ¶ 58; Ex. C at 3.) The First Amendment prohibits this categorical ban on political speech in a traditional public forum.

In their response letter, Defendants mistakenly rely on *Perry*’s statement that “the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.” (Ex. C at 3) (quoting *Perry Educ. Ass’n*, 460 U.S. at

² In a traditional public forum like Fort Hunter Park, the government may enforce only “reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (cleaned up). As explained below in Sections D and E, Defendants’ ban on political activity in Fort Hunter Park is neither content-neutral nor a reasonable time, place, or manner restriction.

46). But that language addressed “public property *which is not* by tradition or designation a forum for public communication.” *Perry Educ. Ass’n*, 460 U.S. at 46 (emphasis added). Parks, *Perry* made clear, are *exactly* the type of public property “which by long tradition . . . have been devoted to assembly and debate.” *Id.* at 45.

Defendants’ response letter also relies on *Perry* to argue that “the existence of a right of access to public property and on the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue.” (Ex. C at 2) (quoting *Perry Educ. Ass’n*, 460 U.S. at 46). From this, Defendants conclude that the “character” of a property can be defined by “local circumstances” and “deed restriction[s].” *Id.* Not so. *Perry*’s reference to the “character” of a property simply means the type of forum. Indeed, the sentence upon which Defendants rely immediately precedes the Court’s explanation of the different types of forums and its explanation that public parks are traditional public forums, where the government’s power to regulate speech is at its most limited. *Perry Educ. Ass’n*, 460 U.S. at 45–46.

First Amendment rights on government property are determined by the nature of the property, not the government’s or prior property

owner's wishes. "Traditional public fora are defined by the objective characteristics of the property, such as whether, by long tradition or by government fiat, the property has been devoted to assembly and debate." *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 667 (1998) (cleaned up). As the Supreme Court explained, for the purpose of forum analysis, courts need not even make a "particularized inquiry" into the precise nature of a public street or park, given that "all" public streets and parks constitute traditional public forums. *Frisby v. Schultz*, 487 U.S. 474, 481 (1988).

The Supreme Court rejected in *United States v. Grace*, 461 U.S. 171 (1983), a position similar to that advanced by Defendants. *Grace* addressed the constitutionality of a federal statutory ban on demonstrations on sidewalks abutting the Supreme Court. The Court acknowledged that, owing to the statute, the sidewalks had "not been traditionally held open for the use of the public for expressive activities." *Id.* at 178–179. But the Court applied the same analysis applicable to any other sidewalk—that an "absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a

compelling governmental interest”—and struck down the ban. *Id.* at 177, 183.

Neither the federal government nor Dauphin County may declare that the “character” of a public street, sidewalk, or park is to be free from First Amendment expression. In fact, the Supreme Court held that even *nonpublic* forums may not impose *total* bans on First Amendment expression like the one Dauphin County enforces here. *Bd. of Airport Comm’rs of City of L.A. v. Jews for Jesus, Inc.*, 482 U.S. 569, 576 (1987). The First Amendment squarely protects Gaughen’s and Kocur’s core political speech in the traditional public forum of Fort Hunter Park.

C. The Fort Hunter Park Indenture does not trump the United States Constitution.

The Fort Hunter Park Indenture is irrelevant. Public parks “are stamped with a kind of First Amendment easement” allowing the public to use the land for expressive purposes. *Int’l Soc’y For Krishna Consciousness, Inc. v. N.J. Sports and Exposition Auth.*, 691 F.2d 155, 161 (3d Cir. 1982) (cleaned up). Governmental power to control speech in a traditional public forum “is circumscribed precisely *because* the public has . . . acquired, in effect, a ‘speech easement’ that the government property

owner must now honor.” *Verlo v. Martinez*, 820 F.3d 1113, 1146 (10th Cir. 2016).

The Supreme Court squarely held that the government may not rely on property conveyance restrictions to evade the commands of the Constitution. *Evans*, 382 U.S. at 302. *Evans* involved a will devising property to a city government to be “used as a park . . . for white people only.” *Id.* at 297. The Court barred enforcement of the property restriction, holding the park’s public nature rendered it subject to the requirements of the Constitution. The Court explained that even though the park remained under the control of private trustees, “a park . . . is more like a fire department or police department that traditionally serves the community.” *Id.* at 302.

Dauphin County operates Fort Hunter Park. The Park’s website says so. (Ex. G.) And when a government operates a park, or any other facility, the Constitution follows. *See, e.g., Evans*, 382 U.S. at 297 (park held in trust and operated by local government); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) (restaurant operated in building owned by government). Even privately owned company towns must allow protected First Amendment speech. *Marsh v. Alabama*, 326 U.S. 501,

505–06 (1946) (“The State urges in effect that the corporation’s right to control the inhabitants of Chickasaw is coextensive with the right of a homeowner to regulate the conduct of his guests. We cannot accept that contention.”).

This makes good sense. Were *Evans’s* approach not the law, the government could operate a segregated swimming pool, Christian-only recreation center, or ban proselytizing in a park, shielded by the excuse that some private owner who conveyed the property insisted the restriction run with the land. The law does not permit such an end-run around the Constitution.

D. Banning “political” expression is “presumptively unconstitutional.”

Dauphin County’s prohibition on political expression in Fort Hunter Park is also unlawful content discrimination. Under the First Amendment, “a government, including a municipal government vested with state authority, has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015) (cleaned up). The Supreme Court squarely held in *Reed* that an ordinance which distinguished (among

other characteristics) between “political signs” and non-political signs constituted “paradigmatic” content discrimination. *Id.* at 164–69.

So too, here, Defendants’ prohibition on political activity constitutes “paradigmatic” content discrimination. Defendants prohibit political expression, and only political expression, from Park grounds. Park policy places no subject-matter constraints on expression related to the arts, sciences, or religion. Defendants unlawfully “single[] out a specific subject matter for differential treatment.” *Id.* at 169.

The Supreme Court has explained that “*content-based* restriction[s] on *political speech* in a *public forum* must be subjected to the most exacting scrutiny.” *Boos v. Barry*, 485 U.S. 312, 321 (1988). Under this “exacting scrutiny,” content-based regulations are “presumptively unconstitutional” and “justified only if the government proves they are narrowly tailored to serve compelling state interests.” *Reed*, 575 U.S. at 163.

Both on its face and as applied against Plaintiffs, Defendants’ prohibition on political activity fails strict scrutiny and is unconstitutional. First, the County does not have a legitimate (much less compelling) interest in suppressing all political speech in a public park.

Indeed, the government does not even have a legitimate state interest in preventing offensive political messages inside government buildings. *See Cohen v. California*, 403 U.S. 15, 24–25 (1971).

Second, the restriction is not narrowly tailored. “Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone.” *NAACP v. Button*, 371 U.S. 415, 438 (1963) (cleaned up). But Defendants’ policy prohibits all political activity in Fort Hunter Park, no matter the time, place, or manner of expression.

Defendants may argue they are merely enforcing a provision in the Indenture, rendering the ban “tailored” to meet that “interest.” Putting aside that that argument is foreclosed by *Evans*, *see supra* Section C, the state’s “interest” cannot be an unconstitutional end. *See ACLU v. Ashcroft*, 322 F.3d 240, 251 n.11 (3d Cir. 2003).

Because Defendants’ ban constitutes unlawful content discrimination, Plaintiffs are likely to succeed on the merits and the Court should grant Plaintiffs’ requested injunction.

E. A complete ban on political expression is not a reasonable time, place, or manner restriction.

Defendants’ letter insists their ban on political activity in Fort Hunter Park is a permissible time, place, or manner restriction. (Ex. C

at 2.) Defendants are wrong. Closing a park at 10 p.m. is a “time, place, or manner” restriction. Completely prohibiting political expression is not.

A time, place, or manner restriction governs *how* First Amendment expression may take place, not *whether* it may take place. As the Third Circuit explained, a time, place, and manner analysis is appropriate only if a law “regulates when, where, and how [a citizen] may speak, but not what he may say.” *Ne. Women’s Ctr., Inc. v. McMonagle*, 939 F.2d 57, 63 (3d Cir. 1991) *See also Ward*, 491 U.S. at 799 n.7 (explaining the difference between a time, place, or manner restriction and a “total ban”).

Here, Defendants do not permit political activity in Fort Hunter Park at any time, in any place, or in any manner. Instead, Defendants regulate *what* Park guests “may say.” *Ne. Women’s Ctr.*, 939 F.2d at 63. That is a content-based ban, not a reasonable restriction on when, where, and how Plaintiffs and other Pennsylvanians may engage in political expression in Fort Hunter Park.

The Supreme Court has been crystal clear that a regulation “which singles out speech of a particular content and seeks to prevent its dissemination completely” “plainly exceed[s]” the “proper bounds of time, place, and manner restrictions.” *Va. State Bd. of Pharmacy v. Va. Citizens*

Consumer Council, Inc., 425 U.S. 748, 771 (1976). And, as explained above, the Supreme Court has repeatedly held that the First Amendment prohibits outright bans on expression in traditional public forums. *Hague*, 307 U.S. at 515–16; *Carey*, 447 U.S. at 460; *Greer*, 424 U.S. at 835; *Perry Educ. Ass’n*, 460 U.S. at 45.

Plaintiffs are likely to succeed on the merits of Claim III and the Court should issue Plaintiffs’ requested injunction.

II. The Remaining Factors Favor a Preliminary Injunction.

Plaintiffs have suffered and continue to suffer irreparable harm due to loss of their First Amendment right to engage in political activity in a public park. “The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). *See also Ctr. for Amalgamated Transit Union Loc. 85 v. Port Auth. of Allegheny Cnty.*, 39 F.4th 95, 107–08 (3d Cir. 2022) (holding same). Defendants’ prohibition on Gaughen and Kocur from collecting petition signatures and discussing the Keystone Party in a public park therefore “unquestionably constitutes irreparable injury.” *Elrod*, 427 U.S. at 373.

The balance of harms likewise favors Plaintiffs. In a First Amendment injunction analysis, “neither the government nor the public generally can claim an interest in enforcement of an unconstitutional law.” *Ashcroft*, 322 F.3d at 251 n.11 (cleaned up). Because, as explained above, Defendants’ ban on political speech in Fort Hunter Park violates Plaintiffs’ First Amendment liberties, the balance of harms favors Plaintiffs.

Finally, the public interest supports granting an injunction. “The public interest clearly favors the protection of constitutional rights” *Council of Alt. Pol. Parties v. Hooks*, 121 F.3d 876, 884 (3d Cir. 1997). Relatedly, “enforcement of an unconstitutional law vindicates no public interest.” *K.A. v. Pocono Mountain Sch. Dist.*, 710 F.3d 99, 114 (3d Cir. 2013). And there is “an obvious and great public interest in the free exchange of views on political, social, and economic issues,” an exchange public parks in the United States have facilitated for centuries. *Ctr. for Investigative Civ. Action Reporting v. SEPTA*, 344 F. Supp. 3d 791, 803 (E.D. Pa. 2018).

The public interest favors protecting Plaintiffs’ (and all Pennsylvanians’) core First Amendment right to peacefully petition and

discuss politics in a public park. The Court should grant Plaintiffs' requested injunction.

III. Because Plaintiffs Seek Only to Enjoin an Unconstitutional Policy, the Court Should Waive the Bond Requirement.

The Court should exercise its discretion to waive the bond requirement under F.R.C.P. 65. District courts “may waive the bond requirement of Rule 65(c) under certain circumstances.” *Earnest by and through Kohler v. Mifflin Cnty. Sch. Dist.*, No. 1:20-cv-1930, 2020 WL 13132931, at *6 (M.D. Pa. Oct. 23, 2020) (Ex. J). “When considering whether to waive the bond requirement, a court should consider (1) ‘the possible loss to the enjoined party together with the hardship that a bond requirement would impose on the applicant’; and (2) ‘the impact that a bond requirement would have on enforcement’ of an important federal right.” *Id.* (quoting *Temple Univ. v. White*, 941 F.2d 201, 220 (3d Cir. 1991)). “Where the balance of these equities weighs overwhelmingly in favor of the party seeking the injunction,” a district court may waive the bond requirement. *Id.* (internal quotation omitted).

Courts often decline to require a bond in First Amendment cases because a bond “would effectively force [the movant] to pay a monetary cost to enforce” their First Amendment rights. *Id.* (waiving bond

requirement for plaintiff seeking to enjoin unconstitutional school speech policy). This Court should, too. Complying with the First Amendment costs Defendants nothing. The status quo costs Pennsylvanians their freedom of speech.

CONCLUSION

Plaintiffs respectfully request that the Court grant Plaintiffs' motion.

Respectfully submitted,

FOUNDATION FOR INDIVIDUAL RIGHTS AND
EXPRESSION

By: /s/ Jeffrey D. Zeman
Jeffrey D. Zeman (Pa. 328570)
Conor T. Fitzpatrick* (Mich. P78981)
FOUNDATION FOR INDIVIDUAL RIGHTS
AND EXPRESSION
510 Walnut Street; Suite 1250
Philadelphia, PA 19106
Tel: (215) 717-3473
jeff.zeman@thefire.org
conor.fitzpatrick@thefire.org

Attorneys for Plaintiffs

**Pro Hac Vice Motion pending*

Dated: January 17, 2023

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

1. This document complies with the word limit of LR 7.8(b)(2) because, excluding the sections of the document exempt from the word count per the Clerk's instructions, this document contains 4,996 words.
2. This document complies with the typeface and type-style requirements of LR 5.1(c) because: this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook.

Date: January 17, 2022

/s/ Jeffrey D. Zeman

Jeffrey D. Zeman

FOUNDATION FOR INDIVIDUAL
RIGHTS AND EXPRESSION

CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2022, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing upon all ECF filing Participants. I further certify that on the same day, I emailed a copy of the foregoing to Guy P. Beneventano, Esq., Assistant Solicitor for Dauphin County, at Guy@guyblaw.com, and that I dispatched a process server to personally serve the same on each Defendant:

Dauphin County
ADMINISTRATION BUILDING
2 South 2nd Street
Harrisburg, PA 17101

Anthea Stebbins
DAUPHIN COUNTY PARKS &
RECREATION DEPARTMENT
Tavern House in Fort
Hunter Park
100 Fort Hunter Road
Harrisburg, PA 17110

By: /s/ Jeffrey D. Zeman

**Brief in Support of Plaintiffs' Motion for Preliminary
Injunction - Exhibit List**

Gaughen, et al. v. Dauphin County, et al.
Middle District of Pennsylvania

Exhibit	Description
A	Indenture conveying Fort Hunter Park from Fort Hunter Foundation to Dauphin County
B	October 13, 2022 Demand Letter from Plaintiffs' Counsel
C	October 19, 2022 Response Letter from Defendants' Counsel
D	2022 Signature Requirements for Representative in the General Assembly
E	2022 Nomination Paper, Commonwealth of Pennsylvania
F	<i>Parks & Recreation</i> , Dauphin County, https://www.dauphincounty.gov/government/support-services/parks-recreation
G	<i>Park Rules</i> , Fort Hunter Mansion and Park, https://forthunter.org/visit/park-rules
H	2022 Gaming Grant Awards, Dauphin County Office of County Commissioners
I	Fort Hunter Mansion and Park, https://forthunter.org
J	<i>Earnest by and through Kohler v. Mifflin County Sch. Dist.</i> (unpublished case)

Gaughen, et al. v. Dauphin County, et al.
Case No. 1:23-cv-00077-SES

Exhibit A
to Brief in Support of
Plaintiffs' Motion for
Preliminary Injunction

10878
Re-recording
 RECEIVED
 RECORDER'S OFFICE
 OCT 7 3 17 PM '80
 DAUPHIN COUNTY
 PENNA.
INDENTURE

735/
 RECEIVED
 RECORDER'S OFFICE
 JUL 21 4 13 PM '80
 DAUPHIN COUNTY
 PENNA.

This Indenture, made this 8th day of July, ~~1979~~ ¹⁹⁸⁰, by and between the Fort Hunter Foundation (hereinafter called "Settlor") and the County of Dauphin (hereinafter called "County"), witnesseth that:

WHEREAS, it is the intention of the parties hereto that the real estate and personal property to be transferred under the terms and conditions of this Indenture by Settlor to County shall be held by County in perpetuity to be used for park, recreational and historical purposes so long as the same shall be used in accordance with the terms of this Indenture, and in accordance with the purposes and restrictions set forth in the Charter of the Fort Hunter Foundation, a copy of which is attached hereto as Exhibit "A".

NOW, THEREFORE, for and in consideration of the sum of One (\$1.00) Dollar and the undertaking of the County to continue the operations of the museum in accordance with the Charter of Fort Hunter and to supply personnel, materials and maintenance; and to pay rental under conditions hereinafter stated on Page 7 of this Indenture, Settlor hereby grants and conveys to County, in trust, for use for historical, park and recreational purposes in accordance with the terms and conditions of this Indenture all that certain tract or parcel of land situate in Susquehanna Township, Dauphin County, Pennsylvania, known

as the Fort Hunter Museum property, more particularly described in Exhibit "B" hereto.

TOGETHER with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining and the remainders, rents, issues and profits thereof; and all the estate, right, title, interest, property, claim and demand whatsoever of the said Settlor, its successors and assigns, in law, equity or otherwise of, in, and to the same and every part thereof.

TO HAVE AND TO HOLD the above described premises with the appurtenances under the said County of Dauphin, its successors and assigns, for use for historical, park and recreational purposes in accordance with the terms and the conditions of this Indenture.

Settlor also transfers and grants the personal property set forth on Exhibit "C" hereto and all of the tangible personal property on the premises to the County of Dauphin as Trustee, in trust nevertheless, to be managed, invested and expended in accordance with the terms of this Indenture for the uses and purposes set forth herein.

County, by its acceptance of the above, grants and by the execution of this instrument, agrees to abide by the terms and conditions of this Indenture and to the appointment of trustees to manage the Trusts herein set forth in accordance with the terms of this instrument.

County has inspected the property and agrees to accept the same in its present condition without representation or warranty of any kind from Settlor as to the present condition of the premises.

Legal title to the real estate and personal property shall be held by the County of Dauphin as Trustee, but the management of the said premises and the personal property herein conveyed shall be vested in a Board of Trustees to be appointed as follows:

Three (3) trustees shall be selected by the County from a list of not less than five (5) names submitted to it by the Friends of Fort Hunter, Inc., provided that in the event no trustee be nominated by the Friends of Fort Hunter, Inc. within forty-five (45) days of written request for the same from the County, then the County shall be free to designate persons to act as trustees free from this restriction.

Three (3) trustees shall be selected by the County Commissioners of the County of Dauphin, or their successors, or designees.

The seventh member of the Board of Trustees shall be selected by the Trustees so selected and shall act as Chairman and shall serve as Chairman not more than two (2) terms.

The terms of the Trustees shall be for a period of three (3) years or until their successors are elected. Subsequent Trustees to replace Trustees nominated by the Friends of Fort Hunter, Inc. shall be selected by the County from a slate of two more nominees than the number of Trustees for such positions to be selected. In the event the County fails to appoint a Trustee within ninety (90) days of the occurrence of a vacancy in office, the majority of the remaining Trustees shall be entitled to appoint a person to fill the vacancy under the same terms and conditions as would have been required of the County to fill such vacancy. The first Trustees in each group shall be selected for one, two and three year terms and those selected for one year terms may serve two additional three year terms. Otherwise, Trustees shall not serve for more than two consecutive terms.

The corpus of the personal property in the Trust shall be maintained as a fund in perpetuity and only the income thereof shall be used for the purposes herein set forth. The following shall be treated as corpus and not as income:

- (1) All dividends declared upon corporate stock payable otherwise than in cash.

(2) All profits realized from corporate stock either upon its sale or upon the sale or dissolution of the issuing corporation, or otherwise, irrespective of the form or character of such profits, whether in cash, securities, or otherwise, howsoever.

(3) All shares of stock of whatsoever class or character received by the Trustee in connection with or as part of any reorganization or recapitalization of any corporation or any reclassification of the capital stock of any corporation.

(4) Dividends or receipts from regulated investment companies or any other company or corporation which represent capital gains realized from the sale of securities or property by such company or corporation.

(5) The proceeds from any sale or condemnation of any part of the real estate herein conveyed, but this provision shall not be construed as a right in the Trustees to sell any of the real estate without approval of Court.

The Trustees shall make such rules and regulations as they deem appropriate for the use of said premises, having in mind that the premises have been transferred for use primarily for historical and museum purposes appropriate for the site, and such rules and regulations shall be in conformity with the regulations applicable to Fort Hunter's structures and foundations resulting from its being registered in the National Registry, and in conformity with the regulations of the Pennsylvania Historical Museum Commission by reason of its official recognition of Fort Hunter as a facility of historical significance and in conformity with such rules and regulations as the County of Dauphin may create for the regulation of the conduct of the public at such or similar facilities, including rules or regulations as to conduct of the public which may be promulgated by the Parks and Recreation Department of the County of Dauphin, or any succeeding agency of the County in charge of park and recreational or historical facilities relating to such conduct.

It is further understood and agreed that so long as it shall stand or be restorable, the mansion house and the lands in the premises shall be devoted to the purposes of a museum to display and preserve its architecture and appropriate interior furnishings (of a period of 1745 to 1855) to the public and that

such use and object is the primary purpose of the trusts hereby established. In addition to the primary purpose, it is the intent of this Indenture that the tavern, spring house, ice house and barns be maintained at least as to outward appearances insofar as possible, and expenditures for such purposes may be made by the Trustees.

Should the County occupy buildings, or portions thereof, east of River Road for park and recreation purposes, a reasonable rental shall be paid into the operating funds of the Trustees sufficient to carry the maintenance and operating costs for such buildings.

The Trustees shall manage such funds as come into their hands under this Indenture or by subsequent gifts or bequests by Settlor or others for Fort Hunter, and shall have all the power and duties of Trustees relating to such funds provided that should the County of Dauphin create or designate a public foundation for the investment and management of funds of the County for park, recreational or historical purposes, the Trustees shall turn full control of the management of such funds, and in such event, the Trustees herein provided shall, as to such funds, control only the use and expenditure of the income therefrom.

The Trustees shall review annually plans for the development, restoration and use of the premises, and determine priorities and expenditures of Trust funds in view of funds available for historical and museum purposes and make final decisions on the development, restoration and purposes to be carried out with such funds.

EX 16071172

~~BOOK 140 PAGE 89~~

The County and the Trustees agree to keep the premises and the buildings conveyed hereby in good repair and condition fit for museum and recreation purposes, and that the quality of maintenance shall not be less than that given to the contiguous land conveyed to the County.

In the event the Friends of Fort Hunter, Inc. or any other person shall believe that the Trustees or the County have failed to comply with the provisions of this Indenture or the purposes and restrictions of the Charter of the Fort Hunter Foundation, they may petition the Orphans' Court of Dauphin County to require the County or the Trustees to meet the terms and conditions of the Indenture and/or Charter; and County, by acceptance of this Trust, agrees to the jurisdiction of said Court over the properties herein conveyed as having been dedicated to charitable purposes, and in the event it is found that this Indenture has been breached and/or that the terms and conditions of this Indenture and/or the Charter cannot be complied with, the Court may dispose of the properties herein conveyed in such manner as it deems appropriate under the terms and conditions of this Indenture to carry out its intent provided, however, that any personal property remaining in the hands of the Trustees shall be transferred to the recipient of the premises provided that it is then subject to continued use for historical and/or museum purposes at the time of such Order. No action taken by the County or the Trustees shall be deemed a violation of this Indenture or of the purposes or restrictions of the Charter of the Fort Hunter Foundation if such action is taken with the written consent of the Friends of Fort Hunter, Inc.

The County of Dauphin agrees to recognize the Friends of Fort Hunter, Inc. as a supporting organization in the operation of the site and particularly the museum, and agrees not to create another voluntary citizens group for support of the museum without the written consent of the Friends of Fort Hunter, Inc. The County agrees that to obtain funding support from the Friends of Fort Hunter, Inc. for projects to be financed by them, the County shall request funds for a particular project and shall certify to the Friends of Fort Hunter, Inc. that the project could not commence or continue without their support. Upon receipt of such certification, the Friends of Fort Hunter, Inc. may make payments for such projects.

The County herewith requests funds for the following traditional projects and activities. These projects could not commence or continue without the support of the Friends of Fort Hunter, Inc.

- (1) Opening Day Ceremonies
- (2) Membership Annual Meeting
- (3) Walking Tour and Brunch
- (4) Fort Hunter Day
- (5) Autumn Candlelight Dinner
- (6) Christmas at Fort Hunter

or such changes therein as may be agreed to by the County and the Friends of Fort Hunter, Inc. The Friends of Fort Hunter, Inc. shall sponsor these traditional projects, and/or others as may be agreed to from time to time.

The Friends of Fort Hunter, Inc. shall be asked by the County to provide volunteer services at the museum and to develop innovative and historical projects and programs for the museum subject to approval by the Trustees. The Friends of Fort Hunter, Inc. may initiate plans for restoration or programs; secure estimates and present plans and estimates to the Trustees for their approval or rejection. In all events, their activities upon the premises shall be subject to all rules and regulations promulgated by the Trustees in accordance with this Indenture. The Trustees shall have authority to permit such admissions fees as they deem appropriate to be collected and retained by the Friends of Fort Hunter, Inc.

The Trustees shall maintain the present museum (originally the home of Archibald McAllister), and the structures appurtenant to it on both sides of River Road as public historical buildings, but may permit other uses and renovations of the tavern presently containing apartments, the spring house, the stone barn, the large barn on River Road, and the foundation on the south corner of the large barn; provided that any remodeling or restoration of the same shall maintain the historical character of these buildings to outward appearance and buildings used for

BOOK 160 PAGE 175

non-historical purposes shall bear signs identifying their historical significance. The bed of the Pennsylvania Canal on the site shall be maintained for its historical importance, and, if funds permit, shall be restored to its original character.

The County of Dauphin will adopt by appropriate resolution the provisions of this Indenture to utilize the site in perpetuity for park, recreational and historical purposes, subject to the right of re-entry for condition broken herein set forth. As part of its resolution, the County shall adopt the following:

"In view of the foresight, dedication and generosity of Margaret Wister Meigs in preserving the Fort Hunter property, the facility shall be named the 'Fort Hunter Park maintained in Memory of Margaret Wister Meigs', and it is agreed that the sculpture designed and executed by the internationally known artist and sculptor, Henry Varnum Poor, shall be preserved in perpetuity on the river side of River Road as a memorial to Margaret Wister Meigs."

The net income from the corpus of the Trust of personal property shall be currently distributable by the Trustees for the purposes herein set forth.

No part of the net earnings of this Trust shall inure or be payable to or for the benefit of any individual and no substantial part of the activities of this Trust shall be the

carrying on of propaganda, or otherwise attempting to influence legislation. No part of the activities of this Trust shall be the participation in, or intervention in (including the publishing or distributing of statements), any political campaign of any candidate for public office.

Notwithstanding any other provision of this Indenture, the Trust shall not carry on any other activities not permitted to be carried on (a) by a corporation exempt from Federal income tax under Section 501(c)(3) of the Internal Revenue Code of 1954 (or the corresponding provision of any future United States Internal Revenue Law) or (b) by a corporation, contributions to which are deductible under Section 170(c)(2) of the Internal Revenue Code of 1954 (or the corresponding provision of any future United States Internal Revenue Law).

Notwithstanding any other provision of this Indenture, the Trust shall not engage in any other activities which would give rise to a tax imposed under Sections 4941, 4943, 4944 or 4945 if such Trust were a private foundation.

Notwithstanding any other provision of this Indenture, upon the dissolution or termination of the Trust for any reason the Trustees shall, after making provision for all liabilities of the Trust dispose of all of the assets of the Trust Estate

exclusively for the purpose of the Trust to the Friends of Fort Hunter, Inc. or if they no longer exist, in such manner or to such organization or organizations willing to undertake to maintain and preserve the property organized and operated exclusively for charitable, historical, educational, and recreational or park purposes as shall at the time qualify as an exempt organization or organizations under Section 501(c)(3) of the Internal Revenue Code of 1954 (or the corresponding provision of any future United States Internal Revenue Law) and which are described in Section 170(c)(2) and Section 509(a) of the Internal Revenue Code of 1954 (or the corresponding provision of any future United States Internal Revenue Law), as the Trustees shall determine. Any of the assets not so disposed of shall be disposed of by the Court of Common Pleas of Dauphin County exclusively for such purposes or to such organization or organizations as said Court shall determine which are organized and operated exclusively for such purposes.

The County is an organization described in Section 170(b)(1)(A)(vi) of the Internal Revenue Code of 1954, and, therefore, it is assumed that the project described in the Indenture is exempt from Federal taxation, can be the recipient of the deductible gifts under Section 170(a), and not considered a private foundation under Section 509 because it organized pursuant to the trust powers of the County. In the alternative,

the Trust, itself, as a supporting organization of the County is intended to qualify as an organization described in Section 509(a)(3). The Indenture is also intended to set forth the requisite relationship between the County and the Friends of Fort Hunter, Inc., so that the latter, as a supporting organization of the County, is one described in Section 509(a)(3).

The Indenture may be amended by instrument signed and sealed by five (5) or more Trustees, acknowledged by one of its members and accepted by the Trustees if such an amendment is deemed necessary by the Trustees to conduct the affairs of the Trust in a manner which conforms to the provisions of Section 501(c)(3), Section 509(a)(3) or Section 170(a) of the Internal Revenue Code as now in force or hereafter amended. All instruments amending the Indenture shall be attached to the executed originals held by the Trustees.

The Trustees shall hold and manage the Trust Estate during the existence of this Trust upon the following terms and conditions with the following persons and authorities:

A. To take, hold and retain all or part of the Trust hereby created in the form in which it may be acquired as long as it deems advisable and to receive all the income, increments, rents and profits therefrom;

B. To sell, exchange, partition, lease or otherwise dispose of any property or part thereof, real or personal, which may at any time form part of this Trust Estate (except the real estate herein conveyed) at public or private sale for the purposes

and upon the terms, including sales on credit with or without security, in such manner and at such prices as it may determine, including the right to lease real estate (except for the real estate herein conveyed) for periods in excess of five years and for a term expiring after the termination of the Trust. In the event of a sale, exchange, partition or lease of any of the property of this Trust Estate (except for the real estate herein conveyed) there shall be no liability on the part of the purchaser or purchasers to see to the application of the purchase money, but the same shall be held and disposed of by such purchaser or purchasers, free and clear of any of the provisions of any trust created hereby;

C. To continue any investment which may form a part of this Trust Estate or to invest or reinvest the same in any property, real or personal, of any kind or nature, including stocks, bonds, mortgages, and other securities without being limited or restricted to investments as now or may hereafter be prescribed for Trustee by the laws of the Commonwealth of Pennsylvania or any other state;

D. To cause securities which may from time to time comprise any part of this Trust Estate to be registered in the name of the County of Dauphin, Trustee and the County of Dauphin by acceptance of this Trust hereby irrevocably appoints the Trustees under this Indenture as attorneys-in-fact to transfer such securities on its behalf for the purposes of the Trust, without liability on the part of any transfer agent or purchaser

in dealing with the Trustees herein appointed to deal with such securities;

E. To retain the principal or corpus of any part thereof of this Trust Estate in the form of cash;

F. To vote, in respect to any securities which may at any time form a part of this Trust Estate, upon any proposition or election at any meeting and to grant proxies, discretionary or otherwise; to vote at any such meeting; to join in or become a part of any reorganization, readjustment, merger, voting trust, consolidation or exchange and to deposit any such securities with any committee, depository, trustee or otherwise and to pay out of this Trust Estate any fees, expenses, and assessments incurred in connection therewith; to exercise conversion, subscription or other rights, or to sell or abandon such rights and to receive and hold any new securities issued as a result of such reorganization, readjustment, merger, voting trust, consolidation, exchange or exercise of subscription, conversion or other rights; and generally take all action in respect to any such securities as it might or could do as absolute owner thereof;

G. To divide or distribute, whenever it is required or permitted, this Trust Estate and to make such division or distribution in kind or in money or partly in kind and partly in money, and that for such purposes the judgment of the Trustees as to the value of the different items shall be conclusive and final upon the beneficiaries;

H. To determine, in connection with making investments, whether to amortize premiums in whole or in part;

I. To engage attorneys, investment counsel, accountants, agents, and such other persons as they may deem advisable in the administration of the Trust created hereby and to make such payments therefor as they may deem reasonable and to charge the expenses thereof to income or principal as they may determine and to delegate to such persons any discretion which they may deem proper. The Trustees shall not be liable for any negligence, omission, or wrongdoing of such counsel or agents, providing reasonable care was exercised in their selection;

J. To make reports at least annually to the County and the Friends of Fort Hunter, Inc. setting forth a description of the assets of the Trust and the report to the County shall include a detailed list of the assets and the income produced by such assets, to assist the County in assuring that the Trust

has invested its endowment in assets producing a reasonable rate of return (taking appreciation into account) and has not engaged in any activity which would give rise to liability for a tax imposed under Section 4941, 4943, 4944 or 4945 if the Trust were a private foundation.



ATTEST:

Ardena V. McKinnon
Secretary

FORT HUNTER FOUNDATION

By *J. Wister Meigs*



ATTEST:

Leroy C. Lease

COUNTY OF DAUPHIN

By *John E. Murrich*

Norman P. Heltman
Stephen J. Colwell

Commissioners

Gaughen, et al. v. Dauphin County, et al.
Case No. 1:23-cv-00077-SES

Exhibit B
to Brief in Support of
Plaintiffs' Motion for
Preliminary Injunction

**FIRE**Foundation for Individual
Rights and Expression

October 13, 2022

Sent Via FedEx Overnight Shipping and Email

Mike Pries, Dauphin County Board of Commissioners Chairman
Chad Saylor, Dauphin County Board of Commissioners Vice Chairman
George P. Hartwick, III, Dauphin County Board of Commissioners Secretary
Dauphin County Commissioners Office
2 South Second Street, 4th Floor
Harrisburg, PA 17101
mpries@dauphinc.org
csaylor@dauphinc.org
ghartwick@dauphinc.org

Re: Prohibition on Political Activity in Fort Hunter Park

Dear Commissioners:

The Foundation for Individual Rights and Expression (FIRE)¹ is deeply concerned by a recent incident in which Dauphin County Parks and Recreation Director Anthea Stebbins prohibited Pennsylvanians, including our clients Kevin Gaughen and Dave Kocur, from peacefully exercising their core First Amendment rights in Fort Hunter Park.

Mr. Gaughen is a board member of Pennsylvania's Keystone Party, a newly formed political party. Mr. Kocur is the Keystone Party's candidate for Pennsylvania House District 104. On Saturday, June 11, 2022, Mr. Gaughen and Mr. Kocur arrived at Fort Hunter Park intending to collect signatures to place Mr. Kocur on the ballot for November's general election. Two security guards approached Mr. Gaughen and Mr. Kocur and instructed them to leave the park because they were engaging in "political" activity. Mr. Gaughen and Mr. Kocur respectfully declined to leave, citing their First Amendment right to peacefully engage in political speech and petition activity in a public park. But Director Stebbins arrived and ordered them to cease collecting signatures, telling the pair that "no political activity" is permitted in Fort Hunter Park.

¹ FIRE is a nonpartisan, nonprofit organization dedicated to defending the individual rights of all Americans to free speech and free thought—the essential qualities of liberty.

Commissioners Pries, Saylor, and Hartwick, III
Oct. 13, 2022
Page 2 of 4

Director Stebbins’s actions violated the First Amendment. The Supreme Court has clearly established that the “public retain[s] strong free speech rights when they venture into public streets and parks, ‘which have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.’” *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469 (2009) (quoting *Perry Ed. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 45 (1983)). “[T]he circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as ‘core political speech.’” *Meyer v. Grant*, 486 U.S. 414, 421–22 (1988). Mr. Gaughen and Mr. Kocur had every right to be in a public park on a Saturday peacefully collecting signatures for their political cause.

In ejecting our clients from the park, Director Stebbins pointed to language in the indenture conveying the park in trust to Dauphin County as purportedly banning political activity in the park. Director Stebbins is wrong. The indenture provides in pertinent part on pages 11–12:

No part of the net earnings of this Trust shall inure or be payable to or for the benefit of any individual and no substantial part of the activities of this Trust shall be the carrying on of propaganda, or otherwise attempting to influence legislation. No part of the activities of this Trust shall be the participation in, or intervention in (including the publishing or distributing of statements), any political campaign of any candidate for public office.²

By its plain text, the indenture prohibits the *Trust* from engaging in political activity (unsurprising, considering the Trust is managed by a 501(c)(3) organization). It does not prohibit *the public* from using the park to peacefully petition their neighbors.

Even if Director Stebbins were interpreting the indenture correctly, her actions still violate the First Amendment. The Supreme Court long ago made clear that the government may not rely on property conveyance restrictions to evade the commands of the Constitution. *Evans v. Newton*, 382 U.S. 296, 297 (1966) (holding the Fourteenth Amendment barred enforcement of a “for white people only” condition in a will devising property to the government for use as a park); *see also Marsh v. Alabama*, 326 U.S. 501, 506 (1946) (“The more an owner, for his

² Emphasis added. A copy of the indenture is enclosed.

Commissioners Pries, Saylor, and Hartwick, III

Oct. 13, 2022

Page 3 of 4

advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it”).

Dauphin County’s prohibition on political activity in Fort Hunter Park is an ongoing violation of our clients’ First Amendment right to peacefully engage in political activity in a public park. At Director Stebbins’s instruction, Mr. Gaughen and Mr. Kocur have not returned to the park to engage in political activity. They would, however, like to return to Fort Hunter Park to solicit support for the Keystone Party before and after the November general election. Unless and until Dauphin County ceases this unconstitutional abridgment of Pennsylvanians’ First Amendment rights, they cannot.

Please provide confirmation no later than the close of business on Wednesday, October 19, 2022, that Dauphin County has ceased enforcing its prohibition on engaging in political activity inside Fort Hunter Park. If we do not receive such confirmation, FIRE will commence litigation and seek the full array of remedies including punitive damages and attorney’s fees.

Thank you for your prompt attention to this matter. Please do not hesitate to contact me with any questions.

Sincerely,



Conor T. Fitzpatrick*

Attorney

Jeffrey D. Zeman**

Staff Attorney

FOUNDATION FOR INDIVIDUAL RIGHTS

AND EXPRESSION

510 Walnut Street, Suite 1250

Philadelphia, PA 19106

Tel: (215) 717-3473

conor.fitzpatrick@thefire.org

jeff.zeman@thefire.org

**Member of the Michigan bar.*

***Member of the Pennsylvania bar.*

Commissioners Pries, Saylor, and Hartwick, III

Oct. 13, 2022

Page 4 of 4

cc: Joseph A. Curcillo, III, Esq., Chief Solicitor, Dauphin County Solicitor's Office, *via* FedEx Overnight and email to jcurcillo@dauphinc.org

Anthea Stebbins, Director Dauphin County Parks and Recreation Department, *via* FedEx Overnight and email to astebbins@dauphincounty.gov

Encl.

Gaughen, et al. v. Dauphin County, et al.
Case No. 1:23-cv-00077-SES

Exhibit C
to Brief in Support of
Plaintiffs' Motion for
Preliminary Injunction

Board of Commissioners

MIKE PRIES, Chairman
CHAD SAYLOR, Vice Chairman
GEORGE P. HARTWICK III, Secretary

DAUPHIN COUNTY
SOLICITOR'S OFFICE



DAUPHIN COUNTY
PENNSYLVANIA
2 SOUTH SECOND STREET
P. O. BOX 1295
HARRISBURG, PA 17108
(717) 780-6300

Solicitor
JOSEPH A. CURCILLO III, ESQ.

Assistant Solicitors
FREDRICK W. LIGHTY, ESQ.
GUY P. BENEVENTANO, ESQ.
TUCKER R. HULL, ESQ.

October 19, 2022

Via Email and Regular Mail

Conor T. Fitzpatrick, Esq.
Jeffrey D. Zeman, Esq.
Foundation for Individual Rights and Expression
510 Walnut Street, Suite 1250
Philadelphia, PA 19106

RE: Fort Hunter Park

Gentlemen:

By letter dated October 13, 2022, you wrote to the Dauphin County Commissioners concerning the use of Fort Hunter Park. Specifically, your letter begins as follows: “The Foundation for Individual Rights and Expression (FIRE) is deeply concerned by a recent incident in which Dauphin County Parks and Recreation Director Anthea Stebbins prohibited Pennsylvanians, including our clients Kevin Gaughen and Dave Kocur, from peacefully exercising their core First Amendment rights * * * .” (Footnote omitted.)

At the direction of our client, the Dauphin County Commissioners, the Solicitor’s Office has undertaken a review of the relevant facts and the sum and substance of your letter. Please consider this correspondence to be the county’s official response.

You state that “[o]n Saturday June 11, 2022, Mr. Gaughen and Mr. Kocur arrived at Fort Hunter Park intending to collect signatures to place Mr. Kocur on the ballot for November’s general election.” However, “[t]wo security guards approached Mr. Gaughen and Mr. Kocur and instructed them to leave the park because they were engaging in “political” activity”. (Internal quotation marks included.) You then add: “* * * Director Stebbins arrived and ordered [Gaughen

and Kocur] to cease collecting signatures, telling the pair that “no political activity” is permitted in Fort Hunter Park.” (Internal quotation marks included.)

On the basis of the foregoing facts, you accuse Director Stebbins of violating Gaughen and Kocur’s First Amendment rights. In support of the accusation, you cite three decisions of the U.S. Supreme Court: (1) Meyer v. Grant, 108 S. Ct. 1886 (1988); (2) Perry Education Assn. v. Perry Local Educators’ Assn., et al., 103 S. Ct. 948 (1983); and (3) Pleasant Grove City, Utah v. Summum, 129 S. Ct. 1125 (2009). Each case, in its own way, is inapposite.

You correctly cite Meyer v. Grant for the general proposition that “* * * [t]he circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as core political speech.” 108 S. Ct. at 1892. (Internal quotation marks and footnote omitted.) However, the Court’s reference to a “petition” involved a Colorado ballot initiative – not a candidate petition – and the case’s specific holding (i.e., the state constitution’s prohibition against “paying” circulators violates the First Amendment) has nothing at all to do with Fort Hunter Park.

Likewise you cite Pleasant Grove City in support of your argument even though that case – involving the placement of a permanent monument in a public park – dealt with **government speech**, and not with restrictions placed on government by the Free Speech Clause.

In fact, your reliance upon Pleasant Grove City is most inappropriate because your use of Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, supra, is completely taken out of context. Specifically, you use Pleasant Grove City, quoting Perry Educ. Ass’n, for the general proposition that the public retains free speech rights in streets and parks “which have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” 103 S. Ct. at 954-955. (Internal quotation marks and citation omitted.) But you completely ignore Justice White’s clear, unequivocal admonition that “[t]he existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated **differ depending on the character of the property at issue.**” (Emphasis added.) 103 S. Ct. at 954.

By ignoring Justice White’s admonition, you create the erroneous impression that Perry supports your claims, whereas Justice White is actually acknowledging that local circumstances and the “character” of the property (e.g., the deed restriction on the political use of Fort Hunter Park) will determine what limits can be constitutionally placed on access to public property.

You also completely ignore Perry’s clear reaffirmation of the principle that “[t]he state may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.” 103 S. Ct. at 955. Given the tone of your letter and the threat you make, your failure to address that settled principle of law is a point that really must be discussed.

Perry is an Indiana case involving a union's challenge to certain collective bargaining provisions, whereby the school district granted the "exclusive" bargaining representative "exclusive" access to teacher mailboxes and the interschool mail system. It has nothing whatsoever to do with what happened last summer at Fort Hunter.

That said, in addition to the point I've already made about Perry's acknowledgment of the importance of local circumstances (i.e., the character of the property), there is more language in Justice White's opinion that essentially supports the county's position in the dispute at hand. I am referring to this:

Public property which is not by tradition or designation a forum for public communication is governed by different standards. We have recognized that the First Amendment does not guarantee access to property simply because it is owned or controlled by the government. In addition to time, place, and manner regulations, **the state may reserve the forum for its intended purposes, communicative or otherwise**, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. **As we have stated on several occasions, the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.** (Emphasis added; internal quotation marks and citations omitted.)

Perry Educ. Ass'n, supra, 103 S. Ct. at 955.

Given Fort Hunter's history, a history of which your letter evinces some awareness, it is frankly irresponsible advocacy to distort Perry in support of your accusation without acknowledging Justice White's admonitions, and then attempting to draw some reasonable distinctions. Instead, your letter leaves a casual reader with an inaccurate impression of what the Court did and said in Perry.

For the reasons set forth in the Indenture, Fort Hunter Park is not open to political activity – by anyone! This has long been the policy of the Dauphin County Commissioners and their Parks and Recreation Department. The county's policy will not change in response to the threat made in your letter.

Finally, mention must be made of FIRE's treatment of Anthea Stebbins, the county's Director of Parks and Recreation. In addition to your letter's allegations against her, I have reviewed an email message and a voice message sent to Director Stebbins on October 13th.

In the email message, Robert Becker of FIRE wrote: “Very disappointed a public servant, whom [sic] is sworn to uphold the U.S. Constitution and the PA Constitution, does not know the rights within each Constitution.”

The voice message is worse. As accurately transcribed, a FIRE supporter said this:

Hello, miss Stebbins, I’m very disappointed that you seem to believe that the freedom of speech. [sic] The first amendment doesn’t apply in Dauphin county Parks [sic] and doesn’t apply to you [,] that you can demand people to stop talking politics, and a public forum [,] shame on you [,] resign your job. Thank you.

Anthea Stebbins is a valued county employee and a respected department director. She follows the law at all times, and her actions last summer are consistent with clear direction given to her. You and your representatives score no points with the Dauphin County Commissioners or the Solicitor’s Office by unfairly attacking and belittling a fine public servant.

In conclusion, the Dauphin County Commissioners take a backseat to no one in their support of the U.S. Constitution and its Bill of Rights, including the First Amendment. The county’s policy against political activity at Fort Hunter Park is a reasonable time, place, and manner restriction based upon the terms of the Indenture (i.e., the character of the property) and the time-honored tradition against such activity at the park. No one at Dauphin County is attempting to silence FIRE. You have ample opportunities at other places, including other county property, to exercise your constitutional rights.

Thank you for your attention to this letter.

Sincerely,



Guy P. Beneventano

cc: Joseph A. Curcillo, III, Esq., Chief Solicitor

GPB/db

Gaughen, et al. v. Dauphin County, et al.

Case No. 1:23-cv-00077-SES

Exhibit D
to Brief in Support of
Plaintiffs' Motion for
Preliminary Injunction

MINOR POLITICAL PARTY AND POLITICAL BODY
SIGNATURE REQUIREMENTS FOR REPRESENTATIVE IN THE GENERAL ASSEMBLY
GENERAL ELECTION - NOVEMBER 8, 2022

District	Previous Needed	Updated Needed	Difference	District	Previous Needed	Updated Needed	Difference	District	Previous Needed	Updated Needed	Difference	District	Previous Needed	Updated Needed	Difference
1	300	300	0	52	300	300	0	103	300	300	0	154	300	300	0
2	300	300	0	53	300	300	0	104	300	300	0	155	300	300	0
3	300	338	38	54	300	300	0	105	300	300	0	156	300	300	0
4	300	300	0	55	300	300	0	106	300	300	0	157	300	300	0
5	300	300	0	56	300	300	0	107	300	300	0	158	300	300	0
6	300	300	0	57	300	300	0	108	300	300	0	159	300	300	0
7	300	300	0	58	300	300	0	109	300	300	0	160	300	300	0
8	300	300	0	59	300	300	0	110	300	300	0	161	300	300	0
9	300	300	0	60	300	300	0	111	300	300	0	162	300	300	0
10	300	300	0	61	300	331	31	112	300	300	0	163	300	300	0
11	300	300	0	62	300	305	5	113	300	300	0	164	300	300	0
12	300	300	0	63	300	300	0	114	300	300	0	165	300	300	0
13	300	300	0	64	300	300	0	115	300	300	0	166	300	300	0
14	300	300	0	65	300	300	0	116	300	300	0	167	300	300	0
15	300	300	0	66	300	300	0	117	300	300	0	168	300	300	0
16	300	300	0	67	300	300	0	118	300	300	0	169	300	300	0
17	300	300	0	68	300	300	0	119	300	300	0	170	300	300	0
18	300	300	0	69	300	316	16	120	300	300	0	171	300	300	0
19	300	300	0	70	300	300	0	121	300	300	0	172	300	300	0
20	300	300	0	71	300	300	0	122	300	300	0	173	300	300	0
21	300	300	0	72	300	300	0	123	300	300	0	174	300	300	0
22	300	300	0	73	300	300	0	124	300	300	0	175	300	300	0
23	300	300	0	74	300	300	0	125	300	300	0	176	300	300	0
24	300	300	0	75	300	300	0	126	300	300	0	177	300	300	0
25	300	300	0	76	300	300	0	127	300	300	0	178	300	300	0
26	300	300	0	77	300	300	0	128	300	300	0	179	300	300	0
27	300	300	0	78	300	300	0	129	300	300	0	180	300	300	0
28	300	300	0	79	300	300	0	130	300	300	0	181	300	300	0
29	300	300	0	80	300	300	0	131	300	300	0	182	300	300	0
30	300	300	0	81	300	300	0	132	300	300	0	183	300	300	0
31	300	300	0	82	300	300	0	133	300	300	0	184	300	300	0
32	300	300	0	83	300	300	0	134	300	300	0	185	300	300	0
33	300	300	0	84	300	300	0	135	300	300	0	186	300	300	0
34	300	300	0	85	300	300	0	136	300	300	0	187	300	300	0
35	300	300	0	86	300	300	0	137	300	300	0	188	300	300	0
36	300	300	0	87	300	300	0	138	300	300	0	189	300	300	0
37	300	300	0	88	300	300	0	139	300	300	0	190	300	300	0
38	300	300	0	89	300	300	0	140	300	300	0	191	300	300	0
39	300	300	0	90	300	300	0	141	300	300	0	192	300	300	0
40	300	300	0	91	300	300	0	142	300	300	0	193	300	300	0
41	300	300	0	92	300	300	0	143	300	300	0	194	300	300	0
42	300	300	0	93	300	300	0	144	300	300	0	195	300	300	0
43	300	300	0	94	300	300	0	145	300	300	0	196	300	300	0
44	300	300	0	95	300	300	0	146	300	300	0	197	300	300	0
45	300	300	0	96	300	300	0	147	300	300	0	198	300	300	0
46	300	300	0	97	300	300	0	148	300	328	28	199	300	300	0
47	300	300	0	98	300	300	0	149	300	300	0	200	300	325	25
48	300	300	0	99	300	300	0	150	300	300	0	201	300	300	0
49	300	300	0	100	300	300	0	151	300	300	0	202	300	300	0
50	300	300	0	101	300	300	0	152	300	300	0	203	300	300	0
51	300	300	0	102	300	300	0	153	300	300	0				

Gaughen, et al. v. Dauphin County, et al.

Case No. 1:23-cv-00077-SES

Exhibit E
to Brief in Support of
Plaintiffs' Motion for
Preliminary Injunction

NOTE: You must fill in all information in A, B & C before you begin collecting for signatures.

A. PREAMBLE

TO THE SECRETARY OF THE COMMONWEALTH:

We, the undersigned, all of whom are qualified electors of Pennsylvania, of the County, and of the electoral district(s) designated below, hereby nominate the persons designated in "B" below as candidates representing the political body named herein, and also appoint the persons designated in "C" below as the committee authorized to fill any vacancy caused by the death or withdrawal of any such candidates.

1. **Name of Political Body** _____
 (No more than 3 words)

2. **County of Signers** _____

B. CANDIDATE INFORMATION

OFFICE TITLE	DISTRICT	NAME OF CANDIDATE	PLACE OF RESIDENCE			OCCUPATION
			House No.	Street or Road	City, Boro or Twp.	

C. COMMITTEE TO FILL VACANCIES (Required)

Must name 3, 4 or 5 committee members

	PLACE OF RESIDENCE		
	House No.	Street or Road	City, Boro or Twp.
1.			
2.			
3.			
4.			
5.			

D. SIGNATURES OF ELECTORS

SIGNATURE OF ELECTOR	PRINTED NAME OF ELECTOR	PLACE OF RESIDENCE			DATE OF SIGNING
		House No.	Street or Road	City, Boro or Twp.	
1.					
2.					
3.					
4.					
5.					
6.					
7.					
8.					
9.					
10.					
11.					
12.					
13.					
14.					
15.					
16.					
17.					
18.					
19.					
20.					

D. SIGNATURES OF ELECTORS (Continued)

SIGNATURE OF ELECTOR	PRINTED NAME OF ELECTOR	PLACE OF RESIDENCE			DATE OF SIGNING
		House No.	Street or Road	City, Boro or Twp.	
21.					
22.					
23.					
24.					
25.					
26.					
27.					
28.					
29.					
30.					
31.					
32.					
33.					
34.					
35.					
36.					
37.					
38.					
39.					
40.					
41.					
42.					
43.					
44.					
45.					
46.					
47.					
48.					
49.					
50.					

E. STATEMENT OF CIRCULATOR

I state that my residence is as set forth below; that the signers to the foregoing nomination paper signed the same with full knowledge of the contents thereof; that their residences are correctly stated therein; that they all reside in the county specified below; that each signed on the date set opposite his or her name; and that to the best of my knowledge and belief, the signers are qualified electors of the electoral districts designated in this nomination paper.

By signing below, I agree to submit to the jurisdiction of the Commonwealth of Pennsylvania, regarding any case or controversy arising out of my activities while circulating papers, which shall be governed by the laws of the Commonwealth of Pennsylvania.

_____ County
 County of Paper Signers' Residence

I, _____, state that I am the person whom I represent myself to be herein, and I state that the information set forth in this section is true and accurate and made subject to the criminal penalties imposed by law for violation of 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities).
 Printed Name of Circulator

Signature: _____ Date: _____
 MM/DD/YY

Address of Circulator: _____
 Number Street

 City, Boro or Twp. State Zip Code

NOTE: THIS STATEMENT MUST BE COMPLETED AFTER ALL SIGNATURES HAVE BEEN OBTAINED.

Gaughen, et al. v. Dauphin County, et al.

Case No. 1:23-cv-00077-SES

Exhibit F
to Brief in Support of
Plaintiffs' Motion for
Preliminary Injunction

MEET THE COMMISSIONERS

Mike Pries, Chad Saylor, George P. Hartwick III



Home

- > [Find a Department](#)
- > [Department Directory](#)
- > [Parks & Recreation :](#)

Parks & Recreation

Tavern House in Fort Hunter Park

100 Fort Hunter Road
Harrisburg, PA 17110
Phone: (717) 599-5188

Dauphin County Security Phone: (717) 780-6333

Hours of Operation:

Monday - Friday
8:00 a.m. to 4:30 p.m.

Director:

Anthea Stebbins
astebbins@dauphincounty.gov
Phone: (717) 599-5188 ext. 2111



Dauphin County Parks and Recreation elevates the region making it a better place to live, work, and play by preserving and protecting natural, cultural, and historic resources and recreation opportunities. The Dauphin County Park system includes eight areas: Detweiler Park, Fort Hunter Park, Fort Hunter Conservancy, Henninger Farm Covered Bridge, Lykens Glen Park, Sassafras Island, Wiconisco Creek Park, and Wildwood Park.

Featured Actions



Festivals & Special Events



Parks and Recreation Calendar



Facility Rentals



Weekly Updates



Get Involved!



Search



PARKS & RECREATION

Parks

Get Involved!

Rentals

Festivals & Special Events

Calendar

Programs

Plans & Studies

Contact Us

FIND A DEPARTMENT

PUBLICLY ELECTED OFFICIALS



COURT DEPARTMENTS



COURTS



HUMAN SERVICES



PARKS AND RECREATION

DEPARTMENT DIRECTORY



Area Agency on Aging

Budget & Finance

Children and Youth

Community and Economic Development

Conservation District

Cooperative Extension

Criminal Investigation Division

Dauphin County Planning Commission

Drugs & Alcohol Services

Human Resources

Human Services

Information Technology

Judicial Center

Mental Health/Autism/Developmental Programs

Northern Dauphin Human Services Center

Parks & Recreation

Prison

Tax Assessment & Tax Claim

Public Safety

Registration & Elections

Solicitor's Office

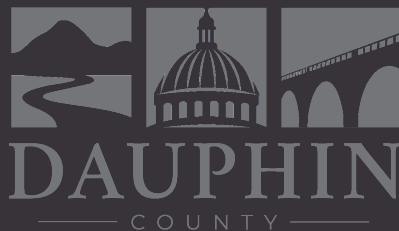
Solid Waste Management & Recycling

Veterans Affairs

Victim Witness

Facility Maintenance

Public Defender



Administration Building

2 South 2nd Street
Harrisburg, PA 17101

Courthouse

101 Market Street
Harrisburg, PA 17101



Contact

FIND A DEPARTMENT 

PUBLIC SERVICES 

HUMAN SERVICES 

OPPORTUNITIES 

COURTS & PRISON 

LICENSES 

©2023 Dauphin County. All rights reserved.

[ADA/Website General Policies](#)

[Login](#)

Gaughen, et al. v. Dauphin County, et al.
Case No. 1:23-cv-00077-SES

Exhibit G
to Brief in Support of
Plaintiffs' Motion for
Preliminary Injunction

COVID-19 Update: Fort Hunter Mansion is reopening with limits to help protect the safety of our visitors and staff. Advance tour tickets are now required. [Learn more...](#)

[DOWNLOAD A WALKING MAP](#) | [PARK RULES](#) | [DIRECTIONS](#)



Built on a bluff overlooking the Susquehanna River, Fort Hunter Mansion and Park has served as a war fort, a hub for frontier commerce, and an exclusive private estate. Now preserved and open to the public, Fort Hunter Mansion and Park invites you to explore Pennsylvania's rich history.

[Park Rules](#)

Visit us

[HOME](#) | [VISIT US](#) | [RENTAL OPPORTUNITIES](#) | [NEWS & EVENTS](#) | [HISTORY](#) | [SUPPORT the FORT](#)

PARK HOURS

Every Day:
8am–Dusk

MANSION HOURS

Tuesday-Saturday:
10am–4:30pm

Sunday:
Noon–4:30pm

Monday:
Closed

Mansion closed December 23rd through April 30th

[Download a
WALKING MAP](#)

[WEDDINGS at
FORT HUNTER](#)

[Take a Tour of
Fort Hunter »](#)

[READ PARK RULES](#)

Fort Hunter Park is a part of the Dauphin County Parks and Recreation system. As such, the County of Dauphin has set rules and policies that govern the use of Fort Hunter Park. For everyone's safety and enjoyment, all visitors are asked to abide by the following park rules and procedures. **Dogs are welcome but must be leashed!**

County of Dauphin, PA Ordinance # 2-95

An ordinance providing for the establishment of rules and regulations pertinent to the recreational facilities operated by the county through the Parks and Recreation Department of the County of Dauphin.

WHEREAS, the Board of Commissioners of the County of Dauphin, Pennsylvania, has established, by Resolution, a Parks and Recreation Advisory Board; and

WHEREAS, the Board of Commissioners of the County of Dauphin, Pennsylvania, has hired and retained a Director for Parks and Recreation purpose; and

WHEREAS, it has been recommended to the Board of Commissioners by the Dauphin County Parks and Recreation Advisory Board that rules and regulations for the operation of the recreational facilities supervised by the County be enacted and enforced.

NOW, THEREFORE, pursuant to the provisions of Sections 2510, 2511, and 2512 of the County Code, Be It Enacted and Ordained, by the Board of Commissioners of Dauphin County as follows:

Section 1

1. All County parks shall be open for public use on a year-round basis, unless otherwise designated.
2. No persons are permitted in any park during the hours of darkness except in those areas designated for extended use activities or unless written permission is obtained from the Director of Parks and Recreation for after dark programs.

SUPPORT

the Friends of Fort Hunter and help ensure the Park's preservation.

3. The Director of Parks and Recreation may temporarily close or curtail activities upon any lands or waters, or any portions thereof, when it has been deemed necessary to be in the best interest of public safety, conduct, health, order or park resource.
4. The operation of power-watercraft is prohibited on waters under the supervision of the Parks and Recreation Department of the County of Dauphin; watercraft shall not be anchored, moored, beached, stored or left unattended in excess of 24 hours within any park. No persons shall swim from any watercraft, raft or similar device at any time.
5. Swimming is prohibited in all parks except on facilities expressly designed for the purpose. Personal bathing is prohibited.
6. No person shall ride in or drive any motor vehicle which is self-propelled upon any parkland, except upon open roads or on areas which are designed and provided for such purposes. It is prohibited for any persons to commit any act, by use or operation, of any motor vehicle on any parkland, which if committed upon a public highway or street, in the State of Pennsylvania, would be prohibited and unlawful. Speed limits within all parks shall be ten (10) miles per hour unless otherwise posted. No one shall test, repair, wash any vehicle or mechanical device in any park. There shall be no parking at any time except in areas designated for such purposes.
7. No person shall, without written permission of the Director of Parks and Recreation, erect, paint, paste, or otherwise affix or distribute any signs, advertisements, or circulars on park property. The sale of anything or the solicitation of funds or donations within any park is forbidden, except upon written permission of the Director of Parks and Recreation.
8. The sale, consumption, or possession of intoxicating liquors or beverages and dangerous or narcotic drugs, or gambling of any kind is prohibited in any park.
9. No person shall cut, break, move, take or otherwise injure, destroy or deface any trees, shrubs, plants, turf, rock or any building, fence, bridge, sign or other structures, or foul any stream, or dump any earth, rubbish or other substances or material in or upon any park.
10. No person shall make or kindle any open fire except in fireplaces and grills provided for this purpose or in private portable grills, approved as safe by the Department of Parks and Recreation. Grills provided for public use shall be on a first come first served basis.
11. No person shall, in any park set a trap or snare, or shoot, injure, annoy, disturb, poison any wild animal or bird, or injure or destroy any nest, unless deemed necessary or desirable in the best interest of the park and its users, by the Director of Parks and Recreation.
12. All persons are forbidden to use threatening, abusive, insulting or indecent language, or commit any obscene or indecent act or fight in any park.
13. Domestic animals and pets are prohibited in any park only if posted. Horseback riding is prohibited, except on facilities or locations expressly designated for that purpose.
14. No person shall carry a knife upon their person having a blade of 3 inches or longer in length, possess any bow and arrow, prohibited offensive weapon, or discharge any BB gun, air rifle, pistol or firearm in any park, except on facilities expressly designate or provided for that purpose.
15. Using park areas for golf and archery is prohibited, except on facilities expressly designated or provided for such purposes.
16. No entertainment, demonstration, or exhibition shall be given in any park except under the supervision of the Director of Parks and Recreation or with the written permission of the Director of Parks and Recreation.
17. Permits for playing league or casual athletic games on park fields or courts may be secured on first come first served basis from the Director of Parks and Recreation. All permits that are granted must be produced upon demand, in order to avoid conflicts in the use of the facilities.
18. Reservation permits for group picnic shelter facilities or for exclusive, temporary group use of park facilities may be obtained for a nominal fee upon request from the Director of Parks and Recreation.
19. No person or persons shall willingly encroach upon lands administered by the Parks and Recreation Department of the County of Dauphin.
20. Fishing shall be permitted in all waters and from all lands during regular park hours, in compliance with Pennsylvania Fish and Boat Commission Laws, except those areas designated for other activities or extended use.
21. Parking of motor vehicles for non-park use (carpooling) is prohibited.
22. Feeding of wildlife is prohibited.

23. The use of metal detectors and subsequent digging and removal of artifacts on any park lands is prohibited.

24. Where the aforementioned rules requiring written permission to be obtained, require, such written permits must be carried and produced upon demand.

Section 2

The aforesaid rules and regulations shall be enforced by appropriate law enforcement officials, police and/or guards employed by the County of Dauphin as part of its Parks and Recreation Department, and the staff and employees of the Parks and Recreation Department of the County of Dauphin.

Section 3

Any person violating any terms or provisions of this Ordinance and the rules and regulations provided herein shall be guilty of a summary offense and shall pay a fine of not less than Five Dollars (\$5.00) nor more than Fifty Dollars (\$50.00) for the first offense, and not less than Fifty Dollars (\$50.00) or more than Six Hundred Dollars (\$600.00) for each subsequent offense. Each violation shall be a separate offense.

Section 4

Jurisdiction of any complaints or actions brought in relation to violation of this Ordinance shall be vested in the District Justice in whose jurisdiction the offense occurs or in the event said District Justice is not available, then the closest available District Justice in the County. All applicable statutes of the Commonwealth of Pennsylvania and ordinances of the County of Dauphin shall have full force and effect upon any and all County parks or recreation areas.

Section 5 Repealer

All ordinances or parts of ordinances inconsistent herewith are hereby repealed.

Section 6 Severability

If any sentence, clause, section or part of this Ordinance is found for any reason to be unconstitutional, illegal or invalid, such unconstitutionality, illegality, or invalidity shall not affect or impair any of the remaining provisions, sentences, clauses, sections, or parts of this Ordinance. It is hereby declared, to be the intent of the Board of Commissioners of the County of Dauphin that this Ordinance would have been adopted had such unconstitutional, illegal or invalid sentence, clause, section or part thereof not been included herein.

Gaughen, et al. v. Dauphin County, et al.
Case No. 1:23-cv-00077-SES

Exhibit H
to Brief in Support of
Plaintiffs' Motion for
Preliminary Injunction



DAUPHIN COUNTY

OFFICE OF COUNTY COMMISSIONERS

2 SOUTH SECOND STREET
HARRISBURG, PA 17101
(717) 780-6300
(717) 257-1604 FAX

BOARD OF COMMISSIONERS
MIKE PRIES, *CHAIRMAN*
CHAD SAYLOR, *VICE CHAIRMAN*
GEORGE P. HARTWICK III, *SECRETARY*

CHIEF CLERK/CHIEF OF STAFF
J. SCOTT BURFORD

February 23, 2022

George Connor, Director
Dauphin County Economic Development
112 Market St.
Harrisburg, PA 17101

Dear George:

Please be advised that the Dauphin County Board of Commissioners approved, at the Meeting held on Wednesday, February 23, 2022, the following:

- A. Approval of the Dauphin County Gaming Advisory Board recommendations, including all proposed conditions, and award, allocation and appropriation of gaming funds to the following recipients, in the following amounts, and subject to any additional noted conditions, and each, where appropriate, to be memorialized in a grant agreement in a form to be approved by the Commissioners:

Host & Contiguous

- 1. East Hanover Twp. (Fire hose and nozzles, park improvements and remainder to annual road maintenance and repair) - \$700,000
- 2. Derry Twp. (\$157,070 Police and Public Works radios; \$100,000 Hershey Vol. Fire Co. radio replacements; \$75,000 Derry Township School District safe school renovation project; \$50,000 Cocoa Packs food and supplies; \$75,000 Linlo Governor Crossing, LLC construction of mixed-use commercial business park) - \$457,070
- 3. Middle Paxton Twp. (\$124,000 Debt service for DCIB loan; \$70,000 Elevator installation at municipal bldg. condition that CDBG must be used, if available, for elevator installation; \$55,000 Dauphin Middle Paxton Fire debt service on emergency response vehicle) - \$249,000
- 4. West Hanover Twp. (Debt reduction for new fire station) - \$300,000
- 5. South Hanover Twp. (Municipal Complex debt reduction) - \$300,000

Other Awards

- 1. Berrysburg Municipal Authority (Debt Service for Sewage Treatment Plant System project) - \$34,000
- 2. Conewago Township (Construct two pickleball courts) - \$90,000
- 3. Court Administration for Magisterial District Judges (Debt reduction on construction of new MDJ facilities) - \$175,000
- 4. Dauphin County Court Appointed Special Advocates (Operations – equipment, recruiting and training) - \$50,000

5. Dauphin Co. Crisis Response Team (Acquire mobile command center conditioned upon exhausting all standard funding sources first) - \$153,000
6. Dauphin County General Authority (Golf course irrigation system debt payment) - \$141,200
7. Dauphin County Library System (Integration of historic property at 27 N. Front St. to main library space) - \$100,000
8. Dauphin Co. Parks & Recreation Department (Fort Hunter Park – design and construct inclusive playground conditioned on full funding) - \$150,000
9. Dauphin County Sheriff's Office (Debt reduction of new portable and mobile police radios) - \$50,000
10. Elizabethville Borough/ Reliance Hose Co. No. 1 (Replace self-contained breathing apparatus) - \$72,000
11. Gratz Area Fire Co. No. 1/Lykens Twp. (Replace airpicks on engine and rescue engine) - \$72,000
12. Halifax Borough (Upgrade to Deppen Park restrooms) - \$100,000
13. Halifax Swim Club (Construct pavilion) - \$42,200
14. Halifax Township (Fort Halifax Park entry road improvements at railroad crossing) - \$100,000
15. Hummelstown Borough (\$56,960 Municipal and Public Safety Building debt reduction; \$40,000 Construction of Bullfrog Valley Stream Restoration; \$50,000 Ladder truck replacement project) - \$146,960
16. Jackson Township/Fisherville Vol. Fire Co. (Fire Station addition construction debt) - \$37,000
17. Londonderry Township (Final component of water/sewer infrastructure extension project) - \$150,000
18. Lower Paxton Township/Parks & Rec Department (Parks & Recreation Master Plan and renovations for Brightbill Park) - \$150,000
19. Lower Swatara Township (\$122,000 Annual DCIB loan payments and PennVest loan repayment; \$75,000 Lower Swatara Twp. Vol. Fire Dept. debt reduction on 2018 Pierce Pumper/Tanker; \$25,000 Lower Swatara Lions Club Refurbish kitchen, bathrooms and roof/window repair) - \$222,000
20. Lykens Borough/Lykens Borough Authority (\$100,000 Water System Improvements – Phase II; \$30,000 Liberty Hose Co. No. 2 /Lykens Borough replacement of 15 sets of turnout gear and new gear rack) - \$130,000
21. Middletown Swim Club (Repairs and upgrades to pool facility) - \$ 10,000
22. Middletown Volunteer Fire Dept. (Pumper Truck debt reduction) - \$75,000
23. Millersburg Area School District (Security and accessibility upgrades at schools) - \$25,000
24. Penbrook Borough (\$100,000 Asylum Run sewer project debt reduction; \$40,000 Little Valley Park Revitalization access for handicapped; \$25,000 Citizen's Fire Co. No. 1 of Penbrook debt relief on 2021 Pierce Fire Engine) - \$165,000
25. Reed Township/Duncannon Vol. Fire Co. #1(Debt reduction for aerial unit and radio replacement for Fire Co.) - \$46,000
26. Royalton Borough (Debt service on 2020 roadway and drainage project) - \$150,000
27. Steelton Borough (\$75,000 Brickyard Community Park construction; \$17,585 Steelton Volunteer Fire Dept. purchase radio equipment and saw; \$75,000 Steelton-Highspire School District revitalize War Memorial Field for community use) - \$167,585
28. Susquehanna Township (\$150,000 Playground rehab project and public safety radio replacement project; \$7,500 Susquehanna High School Baseball Team field safety improvements) - \$ 157,500
29. Swatara Township (Bishop Park pickleball court project and pavilion) - \$ 179,800
30. Washington Township (Municipal building improvements) - \$75,000
31. Wiconisco Fire Engine Co. No. 1 (Debt reduction on new fire rescue) - \$33,000
32. Williamstown Borough (\$83,875 Truck replacement; \$26,000 Williamstown American Legion Post 239 renovations to restrooms and install air conditioning) - \$109,875

33. 3Actrical Productions (Marketing initiative "Film Dauphin County" conditioned on full funding) - \$75,000
34. Affordable Housing Assoc. of Dauphin Co. (Purchase and install back-up generator for Cherry Orchard Place) - \$60,000
35. Breaking the Chainz (Repairs to apartment building for displaced families working with Dauphin Co. CYS and other agencies) - \$50,000
36. Bethel Village Assoc. LLC (Construct a 49-unit affordable rental community conditioned on full funding) - \$75,000
37. Camp Curtin YMCA (Cornerstone Uptown Project Phase II - Rehab of 6th Street homes conditioned on PHARE grant) - \$50,000
38. Campbell Associates (Develop and construct 4 to 8 Lykens Cottages conditioned on full funding) - \$75,000
39. Catholic Charities (Saint Samuel Center upgrades – door replacements) - \$13,000
40. Civic Club of Harrisburg (Restoration of Overlook mansion) - \$14,500
41. Colonial Park Fire Co. No. 1 (New electronic signage for public safety messaging) - \$36,000
42. Community Aid (Debt relief) - \$45,000
43. D&H Distributing (Reimbursement for Flex-Forward program) - \$25,000
44. Driven from Within / Next level Preparation LLC (Support for after-school programs, youth tutoring, college tours and classes *No salaries) - \$8,700
45. Downtown Daily Bread (Funds for emergency shelter, meals and human services) - \$20,000
46. Ecumenical Community of Harrisburg (Install door security system) - \$35,000
47. Fox's Wash & Go (Purchase new washer/dryer equipment) - \$75,000
48. Friends of Midland Cemetery (Restoration and preservation of Midland Cemetery) - \$25,000
49. Gamut Theatre (Debt reduction on building renovation) - \$30,000
50. Girl Scouts in the Heart of Pennsylvania (Camp Small Valley construction of 2 new yurt platforms) - \$65,000
51. GreenWorks Development (Mixed-use redevelopment project in Midtown Harrisburg conditioned upon matching funds obtained after March 1, 2022 and no grant application submissions for soft costs but only for construction) - \$50,000
52. Habitat for Humanity of Greater Harrisburg Area (Home construction in Steelton Borough) - \$75,000
53. Hamilton Health Center (Create a satellite primary care medical office in Steelton Borough) - \$130,000
54. Harrisburg Area Riverboat Society (Repair and refurbish the Pride of the Susquehanna conditioned on full funding) - \$75,000
55. Harrisburg University of Science and Technology (HUE Festival for esports) - \$50,000
56. Hawthorne SPE (Susquehanna Union Green – new town center/development) - \$75,000
57. Heroes Fund, Inc. (Construct a Welcome Building, accessible restrooms and concession conditioned on 10-year stay-out period and providing reasonable accommodation of County use) - \$75,000
58. Hidden Still (Construction of restaurant, distillery and tasting and tour areas) - \$75,000
59. H.I.S. Ministry (Provide behavioral health services to men/fathers in one permanent location and transportation) - \$43,000
60. Historic Harrisburg Association (Install new HVAC system) - \$75,000
61. Homeland Center (Install interior security equipment) - \$35,000
62. Hospice of Central PA (Family bereavement room and training room renovations) - \$20,000
63. Keystone Human Services (Capital Area Head Start outdoor education space) - \$75,000
64. Koons Memorial Park Swim Club (Relocate and replace diving board) - \$30,000

65. Macedonia Missionary Baptist Church (Renovation, repair and restoration of Church facility conditioned on match) - \$32,500
66. The National Civil War Museum (Reduction of long-term debt) - \$15,000
67. National Coalition of 100 Black Women (Funding for "Together, We Rise! – Empowering and Educating Women and Girls for Success" Project) - \$15,000
68. The Nativity School (Completion of Phase III renovation project) - \$40,000
69. Panther Ram Foundation (CDSN Nutripacks) - \$50,000
70. Partnership for Hope (Purchase two vans conditioned on full funding) - \$15,000
71. Penn Colonial Swim Club (Repair/replace wastewater disposal system) - \$10,000
72. Penn State University – Harrisburg (Phase III of Harrisburg Innovation Park planning project) - \$50,000
73. Phase 4 Learning (Van acquisition and equipment upgrade) - \$42,000
74. Pop's House (Debt reduction on acquisition of home for veterans at 316-318 Carlisle St.) - \$15,000
75. The Program, It's About Change (Reduction of debt on Phase II renovations to 16-bed transitional house facility) - \$75,000
76. RB Development (Cornish Heights 30-unit mixed income housing in Allison Hill conditioned on full funding/City funding) - \$150,000
77. The Salvation Army (Resilience and Transformation facilities renovations project) - \$60,000
78. SCOPE (Free mobile clinic operated by Penn State medical students) - \$26,000
79. Shalom House (Two-phase church conversion project with elevator installation) - \$25,000
80. St. Stephen's Episcopal School (Phase III of security upgrades – install intercom system) - \$35,000
81. Summit Terrace Neighborhood Association (Upgrade and revitalize community building and fund technology upgrades) - \$10,000
82. Susquehanna Area Regional Airport Authority (Fire Department equipment (radios, air cylinders) and turnout gear purchases) - \$22,000
83. Community Action Commission d/b/a Tri- County Community Action (Cyber school learning academy sprinkler project) - \$75,000
84. Veterans Outreach of Pennsylvania (Construction of tiny homes community for veterans conditioned upon obtaining matching funds within one year) - \$50,000
85. Vision Resources (Purchase a used forklift) - \$15,000
86. Whitaker Center for Science and the Arts (Debt reduction for laser projector) - \$50,000
87. WITF, Inc. (Upgrade primary broadcasting tower) - \$100,000
88. PA STEAM Academy Charter School (Comprehensive literacy program) - \$12,850

Gaughen, et al. v. Dauphin County, et al.

Case No. 1:23-cv-00077-SES

Exhibit I
to Brief in Support of
Plaintiffs' Motion for
Preliminary Injunction

COVID-19 Update: Fort Hunter Mansion is reopening with limits to help protect the safety of our visitors and staff. Advance tour tickets are now required. [Learn more...](#)

[DOWNLOAD A WALKING MAP](#) | [PARK RULES](#) | [DIRECTIONS](#)



Built on a bluff overlooking the Susquehanna River, Fort Hunter Mansion and Park has served as a war fort, a hub for frontier commerce, and an exclusive private estate. Now preserved and open to the public, Fort Hunter Mansion and Park invites you to explore Pennsylvania's rich history.



[HOME](#) | [VISIT US](#) | [RENTAL OPPORTUNITIES](#) | [NEWS & EVENTS](#) | [HISTORY](#) | [SUPPORT the FORT](#)

Welcome,

PARK HOURS

Every Day:
8am–Dusk

MANSION HOURS

Tuesday-Saturday:
10am–4:30pm

Sunday:
Noon–4:30pm

Monday:
Closed

Mansion closed December 23rd through April 30th

What's New at Fort Hunter?

12/22/22 - The Mansion is Open

The weather outside is frightful but a tour of Fort Hunter Mansion is delightful. Open until 4:30 Thursday, December 22 and last chance for 2022, open Friday from 10:00am –... [MORE »](#)

11/29/22 - Christmas at Fort Hunter

Catch the holiday Spirit! Visit the Mansion decorated in holiday finery, Don't miss Craft Reunion, the Toy Trains, Festival of Trees, Fort Couture, Saint Thomas Dulcimer Concert, Mrs. Santa and... [MORE »](#)

10/04/22 - Check out the Mansion's Little Library

Fort Hunter Mansion and Park is the perfect place to sit back, relax, and enjoy a good book. If you're visiting the park and would like to



EVENTS CALENDAR

[02/11/23 - Sweethearts Tea and Craft](#)

Spend the afternoon with your special someone, whether that's your sweetheart, grandchild, or an old friend. Enjoy a hearty cup of tea and some sweet treats before making a craft... [MORE »](#)

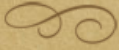
[02/25/23 - Indoor Game Day Family Program](#)

Kaleidoscopes, whirligigs, and tiddlywinks, oh my! Break out of the winter doldrums with a day of play. Participate in indoor games and toys from the Colonial and Civil War eras, some... [MORE »](#)

share a story... [MORE »](#)

Download a
WALKING MAP

WEDDINGS at
FORT HUNTER



Take a Tour of
Fort Hunter »

READ PARK RULES

SUPPORT

the [Friends of Fort Hunter](#) and help ensure the Park's preservation.



FORT HUNTER MANSION AND PARK is a division of [Dauphin County Parks and Recreation](#)

[Department](#), which is host to a diversity of natural, historic and cultural resources. DCPR includes seven areas – the Community Gardens, Fort Hunter Park, Fort Hunter Conservancy, Henninger Bridge, Lykens Glen Park, Wiconisco Creek Park and Wildwood Park.

FORT HUNTER MANSION AND PARK | 5300 NORTH FRONT STREET | HARRISBURG, PA 17110 | PHONE: (717) 599-5751 | FAX: (717) 599-5397
| INFOFORTHUNTER@DAUPHINC.ORG

[HOME](#) | [DOWNLOAD A WALKING MAP](#) | [WEDDINGS](#) | [TAKE A TOUR](#) | [PARK RULES](#) | [SUPPORT THE FORT](#) | [DIRECTIONS](#) | [CONTACT US](#)



Gaughen, et al. v. Dauphin County, et al.

Case No. 1:23-cv-00077-SES

Exhibit J
to Brief in Support of
Plaintiffs' Motion for
Preliminary Injunction

2020 WL 13132931

2020 WL 13132931

Only the Westlaw citation is currently available.
United States District Court, M.D. Pennsylvania.

Morgan EARNEST, a minor, BY AND
THROUGH her mother, Linda KOHLER, Plaintiff,

v.

MIFFLIN COUNTY SCHOOL DISTRICT, Defendant.

Civil No. 1:20-CV-01930

1

Signed 10/23/2020

Attorneys and Law Firms

David S. Gaines, Jr., John W. Lhota, Miller, Kistler & Campbell, State College, PA, for Plaintiff.

Sharon M. O'Donnell, Marshall Dennehey Warner Coleman and Goggin, Camp Hill, PA, for Defendant.

ORDER

JENNIFER P. WILSON, United States District Court Judge

*1 Before the court is Plaintiff's motion for a temporary restraining order and preliminary injunction filed October 20, 2020. (Doc. 3.) For the reasons that follow, **IT IS ORDERED THAT** the motion for temporary restraining order is **GRANTED**.

BACKGROUND

Plaintiff, Morgan Earnest ("Earnest"), is a 15-year-old high school student attending Mifflin County School District ("the District"). (Doc. 1, pp. 1, 4.)¹ Earnest is a student who asserts that she is engaged and interested in the 2020 presidential election. (*Id.* at 3.) From the start of the 2020-21 academic school year, Earnest wore a mask supporting President Donald Trump's reelection campaign every day that she attended school.² (*Id.*; Doc. 1-3.) Earnest's mask depicted the words "Women for Trump." (Doc. 1-3.) On two occasions, Earnest also wore a t-shirt supporting President Trump's reelection campaign to school. (Doc. 1, p. 3.) The front of this shirt bore the words "Trump 2020 Keep America Great," and the back of the shirt contained the words "Trump 2020 The Sequel Make Liberals Cry Again". (*See* Doc. 1-4.)

Earnest asserts that there were no disruptions to the school environment when she wore these articles of clothing. (Doc. 1, p. 3.)

1 For ease of reference, the court utilizes the page numbers from the CM/ECF header.

2 It is immaterial to the court's analysis that Earnest supports President Trump's reelection campaign. The issue in this lawsuit is whether Earnest's right to free speech under the First Amendment was violated by the District's policy restricting political speech. Earnest possesses a right to free speech regardless of which presidential candidate she chooses to support.

On or around October 1, 2020, the District emailed the following message to families of students within the District:

Dear Parents/Guardians:

This information is going to be shared with students and staff today.

Starting Monday October 5, 2020, no masks, articles of clothing or other items may be worn or otherwise brought on to Mifflin County School District property, which contain political speech or symbolize a particular political viewpoint, including but not limited to confederate flags and swastikas, as well as BLM logos or phrases associated with that movement.

This action is being taken due to complaints that have been received about such items and how those items have disrupted the education of students within the Mifflin County School District.

Thanks for your attention on this matter.

MCS D Administration

(*Id.* at 2; Doc. 1-2, p. 1.)

Between October 2 and October 9, 2020, the District did not offer in-person learning due to the COVID-19 pandemic. (Doc. 1, p. 3.) School reopened on October 12, 2020, and Earnest decided to attend school wearing her mask and t-shirt supporting President Trump's campaign. (*Id.*) That morning, at around 9:00 a.m., Earnest was sent to the administrator's office and asked to either turn her mask and shirt inside-out or go home for the remainder of the school day because her articles of clothing were in violation of the District's new

2020 WL 13132931

policy. (*Id.* at 4.) Earnest declined to turn her mask or t-shirt inside-out, and was therefore sent home for the remainder of the school day. (*Id.*) She was also warned that she would be sent home again if she wore a mask or t-shirt expressing a political viewpoint in the future. (*Id.*)

*2 On October 20, 2020, Earnest, through her mother, Linda Kohler, filed the instant lawsuit, seeking redress for alleged violations of her First and Fourteenth Amendment rights. (Doc. 1.) On the same day, Earnest filed a motion for a temporary restraining order and a preliminary injunction against the District to enjoin it from enforcing the portions of its October 1, 2020 policy which prohibited all clothing expressing political speech. (Doc. 3.) This motion was accompanied by a supporting brief. (Doc. 3-1.) On October 21, 2020, the court issued a scheduling order setting a telephonic status conference for the next day, October 22, 2020, during which the parties would discuss the pending motion and the possibility of an expedited briefing schedule on Earnest's request for injunctive relief. (Doc. 4.) Earnest's counsel was also directed to immediately effect service of the complaint, provide the court with proof of service, and exercise best efforts to identify the District's counsel prior to this status conference. (*Id.*) The District's counsel had not entered an appearance at the time of this status conference, and the District's solicitor appeared on behalf of the District.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 65 allows a district court to enter a temporary restraining order. The Court of Appeals for the Third Circuit has applied one standard to a motion for both a temporary restraining order and a preliminary injunction. *United States v. Bell*, 414 F.3d 474 (3d Cir. 2005). To obtain a preliminary injunction, a plaintiff must establish: (1) that they are likely to prevail on the merits of the case; (2) that they would suffer irreparable harm if relief were denied; (3) that the harm defendants would suffer would not outweigh the harm plaintiff would suffer if relief were denied; and (4) that the public interest weighs in favor of granting the injunctive relief. *Holland v. Rosen*, 895 F.3d 272, 285–86 (3d Cir. 2018) (citing *Del. Strong Families v. Att'y Gen. of Del.*, 793 F.3d 304, 308 (3d Cir. 2015)).

A temporary restraining order is “an extraordinary remedy never awarded as of right.” *Benisek v. Lamone*, 138 S. Ct. 1942, 1943 (2018) (quoting *Winter v. NRDC, Inc.*, 555 U.S. 7, 24 (2008)). Thus, a temporary restraining order should

only be awarded in the “limited circumstances” where “the movant, by a clear showing, carries the burden of persuasion.” *Holland*, 895 F.3d at 285. Ultimately, the decision of whether to issue a preliminary injunction is left to the sound discretion of the district court. *Pennsylvania v. President of United States*, 930 F.3d 543, 565 (3d Cir. 2019) (citing *Winter*, 555 U.S. at 24).

DISCUSSION

A. Earnest Has a Likelihood of Success on the Merits.

Earnest alleges that the District's October 1, 2020 policy prohibiting students from wearing attire that contains, *inter alia*, political speech violates her right to free speech protected by the First Amendment to the United States Constitution. Earnest is challenging the District's policy both on its face and as applied to her desire to wear attire indicating her support for a particular candidate running for President of the United States. At this stage, the court is only evaluating the likelihood of success on the merits of Earnest's as-applied challenge to the District's policy.

As an initial matter, school districts have more latitude to regulate the conduct of their students in school than the state is typically allowed under the First Amendment. *See Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986) (holding that a school is a non-public space and the First Amendment does not protect students' freedom of expression in a school to the same extent that it would protect the same expression in a public space, i.e. a courthouse). Nonetheless, students are still “persons” under the Constitution and do not “shed their constitutional rights to freedom of speech and expression at the schoolhouse gate.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). As such, a school's authority to regulate the conduct of its students is not unlimited—its interest in avoiding material and substantial disruptions in learning must be balanced against the students' rights which such regulation may seek to abridge. *Id.*

*3 Indeed, the school district's ability to demonstrate substantial disruption is often determinative in cases challenging a restriction on students' right to free speech. *See, e.g., Tinker*, 393 U.S. at 514 (holding that students wearing black armbands in protest of the Vietnam war was protected by the First Amendment since the school did not reasonably “forecast substantial disruption ... and no disturbances or disorders ... in fact occurred”); *Cohen v. Cal.*, 403 U.S. 15, 23 (1971) (“[U]ndifferentiated fear or apprehension of

2020 WL 13132931

disturbance is not enough to overcome the right to freedom of expression.”); *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 219 (3d Cir. 2011) (allowing restriction on speech where a substantial disruption resulted from the student's speech); *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 257 (3d Cir. 2002) (finding that a school must have a “well-founded fear of genuine disruption in the form of substantially interfering with school operations” in order to suppress student speech); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 215 (3d Cir. 2001) (“[T]he mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it.”) (citations omitted); *B.W.A. v. Farmington R-7 Sch. Dist.*, 554 F.3d 734, 739–40 (8th Cir. 2009) (holding that the school could reasonably limit speech based on a reasonable forecast of disruption resulting from students displaying the confederate flag because there had been numerous instances of violence and racial slurs that occurred at the school surrounding the flag's display); *Guiles v. Marineau*, 461 F.3d 320, 330–31 (2nd Cir. 2006) (concluding that the student was allowed to wear a t-shirt depicting then-President George W. Bush in an unflattering light because no disruption was caused); *Castorina ex rel. Rewt v. Madison Cnty. Sch. Bd.*, 246 F.3d 536, 542 (6th Cir. 2001) (reversing summary judgment for school officials where there was no showing of disruption); *Denno v. Sch. Bd. of Volusia Cnty., Fl.*, 182 F.3d 780, 785 (11th Cir. 1999) (“noting the absence of any facts in the complaint that would suggest a reasonable fear of disruption”), *vacated and decided on other grounds*, 218 F.3d 1267 (11th Cir. 2000).

Moreover, cases that have addressed the issue of student speech in the context of attire have likewise focused on the disruptive effects, if any, that the attire had on the school district's learning environment. *See, e.g., Tinker*, 393 U.S. at 514 (holding that students' wearing of black armbands in protest of the Vietnam war was protected by the First Amendment since the school did not reasonably “forecast substantial disruption ... and no disturbances or disorders ... in fact occurred”); *Sypniewski*, 307 F.3d at 254–58 (finding that despite a history of racial tension and harassment, the student was allowed to wear a t-shirt depicting “redneck” themes since it was not “sufficiently ‘similar’ ... to permit an inference of substantial disruption”); *Guiles*, 461 F.3d at 330–31 (concluding that the student was allowed to wear a t-shirt depicting then-President George W. Bush's face superimposed on the body of a chicken surrounded by images of oil rigs, dollar signs, lines of cocaine, and a martini glass because no disruption was caused).

In this case, Earnest is likely to prevail on the merits of her as-applied challenge to the constitutionality of the District's policy. Earnest arrived at school wearing a t-shirt and mask endorsing a candidate for President of the United States. As the Supreme Court has repeatedly held, wearing articles of clothing are akin to “pure speech,” which “is entitled to comprehensive protection under the First Amendment.” *Tinker*, 393 U.S. at 505–06; *see also Sypniewski*, 307 F.3d at 254 (“Like the armbands at issue in *Tinker*, the wearing of the T-shirt was ‘akin to “pure speech,”’ targeted for its expressive content.”) (quoting *Tinker*, 393 U.S. at 508). In addition, there is no evidence that Earnest's choice of attire during the school day resulted in any disruption that would cause the District to have a “well-founded fear of genuine disruption in the form of substantially interfering with school operations.” *Sypniewski*, 307 F.3d at 257.

The court takes note, however, of the District Solicitor's proffer during the conference with the court that the District received a number of complaints regarding students wearing masks bearing the confederate flag and masks supporting the “Black Lives Matter” movement. In addition, the District Solicitor noted that there was an incident of violence between two students on October 1, 2020, one of whom was wearing a mask relating to the “Black Lives Matter” movement, and one of whom was wearing a mask relating to President Trump. Earnest was not involved in this altercation.

*4 The court also recognizes that the District Solicitor did not dispute that Earnest wore her mask to school every day during the 2020-21 academic year before the October 1, 2020 policy was implemented, and had worn her t-shirt on two prior occasions without the occurrence of any disruptive incident. (Doc. 1, pp. 3–4, 6.)

The court views the Third Circuit's decision in *Sypniewski v. Warren Hills Regional Board of Education*, 307 F.3d 243 (3d Cir. 2002), as controlling precedent in this case. In *Sypniewski*, the school was presented with a history of racial tensions between black students and students who had formed a gang known as “the Hicks.” *Id.* at 247. In response to outbreaks of violence and threatened violence between these students, the school issued a policy which stated:

District employees and student(s) shall not racially harass or intimidate other student(s) or employee(s) by name calling, using racial or derogatory

slurs, wearing or possession of items depicting or implying racial hatred or prejudice. District employees and students shall not at school, on school property or at school activities wear or have in their possession any written material, either printed or in their own handwriting, that is racially divisive or creates ill will or hatred. (Examples: clothing, articles, material, publications or any item that denotes Ku Klux Klan, Arayan [sic] Nation-White Supremacy, Black Power, Confederate flags or articles, Neo-Nazi or any other “hate” group. This list is not intended to be all inclusive.)

Id. at 249. After the issuance of this policy, Sypniewski sought to wear a t-shirt depicting the humor of comedian Jeff Foxworthy, known for the phrase “You Might Be a Redneck if.” *Id.* at 250. The t-shirt listed the “Top 10 reasons you might be a Redneck Sports Fan.” *Id.* at 249–50. The shirt did not depict a confederate flag, the court did not find that Sypniewski was part of the Hicks gang, and Sypniewski had worn the shirt on multiple prior occasions without incident. *Id.* at 250. Despite the absence of disruption arising from Sypniewski wearing the shirt, Sypniewski was found to be in violation of the school’s policy and was suspended for wearing the shirt. *Id.*

The Third Circuit disagreed with the school’s decision, noting that there was “little or no evidence that the word ‘redneck’ had been used to harass or intimidate, or otherwise to offend.” *Id.* at 256. In other words, the court determined that the “mere association” that may follow from the use of the word “redneck” was insufficient to justify a ban on its use. *Id.* at 257. The court also noted that the “First Amendment would have little meaning” if schools could justify prohibition of content that amounts “to a promotion of values consistent with the items and activities that had caused racial unrest.” *Id.* at 257. Thus, the court held that:

[w]here a school seeks to suppress a term merely related to an expression that has proven to be disruptive, it must do more than simply point to

a general association. It must point to a particular and concrete basis for concluding that the association is strong enough to give rise to well-founded fear of genuine disruption in the form of substantially interfering with school operations or with the rights of others.

Id.

Much like Sypniewski, Earnest had worn her t-shirt and mask on prior occasions without incident; there was no evidence that she was involved in any altercations relating her to attire; and she was not involved in the violent incident that the District Solicitor asserts occurred on October 1, 2020. Earnest’s attire expresses support for a candidate for President of the United States. Some may associate a presidential candidate with certain views that they find offensive. But the reactions of some based on the perceived association of a presidential candidate with views with which they disagree is not a valid reason to prohibit passive political speech in school. “The Supreme Court has held time and again, both within and outside of the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it.” *Saxe*, 240 F.3d at 215.

*5 It is equally true today in our tumultuous political environment as it was in the turbulent time during the Vietnam conflict that:

Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our constitution says we must take this risk, ... and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious society.

Tinker, 393 U.S. at 508–09 (citation omitted). Moreover,

[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools..... The classroom is peculiarly the ‘marketplace of ideas.’ The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, (rather) than through any kind of authoritative selection.’

Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (citations omitted).

Thus, consistent with the holding in *Sypniewski*, the court finds that Earnest is likely to prevail on her claim that she was denied her constitutional right to free speech when she was sent home after she refused to turn her mask and t-shirt inside-out to comply with the District’s October 1, 2020 policy. (Doc. 1, p. 4.) Accordingly, the court finds that Earnest is likely to prevail on the merits of her as-applied challenge to the constitutionality of the District’s policy.

B. Earnest Would Suffer Irreparable Injury if a Temporary Restraining Order Were Denied.

Next, the court must consider whether Earnest would suffer irreparable harm if injunctive relief were denied. *Holland*, 895 F.3d at 285–86. To demonstrate irreparable harm, Earnest “must demonstrate potential harm which cannot be redressed by a legal or an equitable remedy following a trial.” *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 801 (3d Cir. 1989).

Here, Earnest would suffer irreparable injury because she is effectively forced to choose between forfeiting her right to free speech or attending school in person to further her education. Indeed, she was informed that she would be sent home if she chose to wear clothing expressing a political viewpoint in the future, and was in fact sent home after she wore her mask and t-shirt in support of a presidential candidate. (Doc. 1, p. 4.) The Supreme Court has held that “the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Accordingly, because Earnest’s First Amendment rights would be burdened in the absence of injunctive relief, the court finds that she has established irreparable injury.

C. The Balancing of Harms and Public Interest Weigh in Favor of Granting a Temporary Restraining Order.

Having concluded that Earnest has established the first two elements of the temporary restraining order analysis, the court must now weigh the remaining factors—whether Earnest’s irreparable harm is outweighed by the harm the District would suffer by the imposition of a temporary restraining order and whether the public interest weighs in favor of granting the injunction. *Holland*, 895 F.3d at 285–86. The court finds that these factors also weigh in favor of granting a temporary restraining order. Although an injunction would clearly interfere with the District’s ability “to prescribe and control conduct in the schools[.]” *Tinker*, 393 U.S. at 507, this cost does not outweigh the irreparable injury Earnest would suffer to her fundamental right to free speech and expression. *Elrod*, 427 U.S. at 373. Similarly, because the right to free speech “is entitled to comprehensive protection under the First Amendment[.]” *Tinker*, 393 U.S. at 505–06, the court finds that a temporary restraining order protecting Earnest’s right to free speech would be in the public interest.

*6 Accordingly, because Earnest has shown that she is likely to succeed on the merits of her as-applied challenge to the constitutionality of the District’s policy, that she would suffer irreparable harm in the absence of injunctive relief, that her irreparable harm is not outweighed by the potential harm to the District, and that the public interest weighs in favor of granting relief, the court will grant Earnest’s motion for a temporary restraining order.

D. The Bond Requirement is Waived.

Earnest requests that the court waive the requirement to post bond because she is financially unable to do so. Under Federal Rule of Civil Procedure 65(c), “[t]he court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.” However, a district court may waive the bond requirement of Rule 65(c) under certain circumstances. *Elliott v. Kiesewetter*, 98 F.3d 47, 59–60 (3d Cir. 1996). When considering whether to waive the bond requirement, a court should consider (1) “the possible loss to the enjoined party together with the hardship that a bond requirement would impose on the applicant”; and (2) “the impact that a bond requirement would have on enforcement” of an important federal right. *Temple Univ. v. White*, 941 F.2d 201, 220 (3d Cir. 1991). “Where the balance of these equities weighs

2020 WL 13132931

overwhelmingly in favor of the party seeking the injunction, a district court has the discretion to waive the Rule 65(c) bond requirement.” *Elliott*, 98 F.3d at 60.

Here, because the temporary restraining order seeks protection of Earnest's important right to free speech, the court will waive the bond requirement. Imposing a bond requirement on Earnest in this case would effectively force her to pay a monetary cost to enforce her right to voice her support for a presidential candidate in school. Additionally, Earnest's status as a 15-year-old high school student impedes her ability to post bond at this time. In contrast, the District's Solicitor has stated that he is unaware of any financial hardship that the District would suffer from its inability to enforce its October 1, 2020 policy against Earnest. Accordingly, the court will waive the bond requirement in this instance.

CONCLUSION

For the foregoing reasons, Earnest's motion for a temporary restraining order is **GRANTED**. (Doc. 3.) Accordingly, a temporary restraining order is entered as follows:

1. Plaintiff's motion for a temporary restraining order, Doc. 3, is granted to the extent that it seeks to enjoin the District from enforcing its policy to prevent Earnest from wearing the attire she has worn in the past (as depicted in her complaint at Docs. 1-3 and 1-4) indicating her support for a political candidate. The court grants this limited relief at this stage without prejudice to Earnest seeking a broader injunction at a preliminary

injunction hearing or the District providing evidence that a preliminary injunction should not issue.

2. This temporary restraining order shall remain in effect for **14 days**. At the end of this prescribed time period, this temporary restraining order shall expire unless extended by the court pursuant to Federal Rule of Civil Procedure 65(b)(2).
3. Beginning immediately, the District shall not enforce its October 1, 2020 policy against Earnest to the extent that she wears the attire she has worn in the past (as depicted in her complaint at Docs. 1-3 and 1-4) indicating her support for a political candidate during the period of time that this order remains in effect.
- *7 4. The filing of bond is waived.
5. The parties shall follow an expedited briefing schedule for disposition of Earnest's motion for a preliminary injunction as follows: the District's brief in opposition shall be filed on or before **October 28, 2020**. If Earnest wishes to file a reply brief, she shall file such brief on or before **November 2, 2020**.
6. The court will hold a preliminary injunction hearing on **November 3, 2020**, at 1:00 p.m. in courtroom 4 on the 8th floor of the Ronald Reagan Federal Building and United States Courthouse, at which time the parties shall be prepared to present evidence and arguments on the merits of Earnest's motion for a preliminary injunction.

All Citations

Slip Copy, 2020 WL 13132931