Record No. 210584

IN THE SUPREME COURT OF VIRGINIA

LOUDOUN COUNTY SCHOOL BOARD, **SCOTT A. ZIEGLER**, Interim Superintendent, in his official and personal capacity; and **LUCIA VILLA SEBASTIAN**, Interim Assistant Superintendent for Human Resources and Talent Development, in her official and personal capacity,

Petitioners/Defendants,

v.

BYRON TANNER CROSS,

Respondent/Plaintiff.

RESPONSE IN OPPOSITION TO PETITION FOR APPEAL

Tyson C. Langhofer
Virginia State Bar No. 95204
P. Logan Spena*
Missouri State Bar No. 69511
ALLIANCE DEFENDING FREEDOM
20116 Ashbrook Place, Suite 250
Ashburn, VA 20147
Telephone: (571) 707-4655
Facsimile: (571) 707-4656
Email: tlanghofer@ADFlegal.org
Email: lspena@ADFlegal.org

**Admitted Pro Hac Vice*

Attorneys for Plaintiff

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INTRODUCTION

Tanner Cross did what every citizen in this Commonwealth is free to do: peacefully address an issue currently under debate during the public comment period of the Loudoun County School Board meeting. Two days later, Petitioners retaliated against Tanner for his speech by suspending him from work, notifying the community of his suspension, and banning him from school property. Petitioners violated the First Amendment because Tanner spoke as a private citizen, on his own time, on a matter of significant public concern. And his speech did not cause a substantial disruption: Petitioners pointed only to (1) their own decision reassigning Tanner from one minor duty out of unsubstantiated "fear[]" of "a confrontation," Pet. at 2, and (2) five parents' email complaints, in a school of nearly 400 students, about Tanner's speech.

Tanner sued and was awarded a temporary injunction. Trial likely will be set for this coming fall. Petitioners now ask this Court for review because they dispute the outcome of two balancing tests: the *Pickering* balancing on the merits and the balancing of interests for preliminary relief. *See* Pet. at 1, 4, 6, 13. But on a temporary injunction, "this Court defers to the circuit court's ruling and does not reverse merely because it would have come to a different result." *May v. RA Yancy Lumber Corp.*, 297 Va. 1, 18, 822 S.E.2d 358, 367 (2019) (cleaned up). Because Petitioners merely ask this Court to redo those balancing tests and come to a different result, this Court should deny the petition.

STATEMENT

Tanner is a teacher at Leesburg Elementary, which Petitioners oversee. R. at 4. He was concerned about a policy the Board was considering. R. at 8–11. Along with other citizens, Tanner addressed the Board on May 25 during its public comment period, expressing his concern that the Policy would harm students, parents, and teachers and would violate teachers' constitutional rights. R. at 10–11.

The next day Tanner attended school and taught his students without any disruption. R. at 11. The school principal reassigned him from "morning duty" (greeting students as they arrive) because he was "[f]earing a confrontation" based on one email he had received. Pet. at 2. But no disruption materialized. R. at 11.

Nevertheless, Petitioners suspended Tanner the next day. No disruption to any school services occurred prior to his suspension. R. at 12, 27. Petitioners merely received emails from four additional families complaining about the content and viewpoint of Tanner's speech at the public meeting. R. at 102. Petitioners asserted an unsubstantiated expectation of future disruption based on these emails. R. at 90-92; Pet. at 10–11.

STANDARD OF REVIEW

This Court reviews a temporary injunction for abuse of discretion. *May*, 297 Va. at 18, 822 S.E.2d at 367. Abuse of discretion means "that the court has a range of choice, and that its decision will not be

disturbed as long as it stays within that range and is not influenced by any mistake of law." *Landrum v. Chippenham and Johnston-Willis Hosps., Inc.*, 282 Va. 346, 352, 717 S.E.2d 134, 137 (2011) (quotation omitted). Such a "mistake of law" can occur when a court "inaccurately ascertains its outermost limits," but that "does not mean abuse of discretion review is partially de novo." *Lawler v. Commonwealth*, 285 Va. 187, 213–14, 738 S.E.2d 847, 861–62 (2013).

ARGUMENT

The trial court acted within its discretion in balancing the *Pickering* factors and those for preliminary relief. Petitioners' assignments of error amount to claims that the trial court struck the wrong balance. Since "this Court defers to the circuit court's ruling and does not reverse merely because it would have come to a different result," it should deny the petition for review. *May*, 297 Va. at 18, 822 S.E.2d at 367 (cleaned up).

I. The trial court correctly determined that Tanner is likely to succeed on the merits of his claim.

Because Tanner is a public employee, the school's ability to restrict his speech is cabined by the balancing test from *Pickering*. Under *Pickering*, Tanner prevails if he was (1) speaking as a citizen (2) on a matter of public concern, and (3) his interest in speaking outweighs Petitioners' interest in restricting his expression. *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 574 (1968).

Petitioners only argue part three of the *Pickering* balancing test. *See* Pet. at 4–11. They do not contest that Tanner spoke as a private citizen or that his speech at the public Board meeting was "the highest protected level of speech." *See* Supp. App. at 2.[1] *See also Connick v. Meyers*, 461 U.S. 138, 145 (1983) ("the Court has frequently reaffirmed that speech on public issues occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection") (cleaned up). Instead, Petitioners argue the trial court abused its discretion when it found that their evidence "lacked the persuasiveness that would weigh in support of [Petitioners'] actions" when balanced against Tanner's own weighty interests. R. at 102. This Court should decline Petitioners' invitation to reweigh that evidence at this early stage of the case.

A. The trial court correctly found that Tanner's strong interest in speaking outweighed any of Petitioners' claimed interests in punishing him for his speech.

Petitioners ask this Court to strike a new balance between Tanner's exercise of core First Amendment rights and the "de minimis" disruption found by the trial court. Petitioners also ask this Court to conclude that Tanner jeopardized their interest to "comply with the law and maintain a safe and inclusive learning environment for its

[1] The attached Supplemental Appendix to Record includes a few pages from the temporary injunction hearing transcript that were not included in the excerpts in Petitioners' Record. The full transcript has been filed with the trial court and is a part of the official case record.

students." Pet. at 4. This Court should reject both arguments and leave it to the trial court to weigh and balance the competing interests here.

Petitioners begin by citing the nine factors laid out in *Ridpath v. Bd. of Governors Marshall Univ.*, 447 F.3d 292, 317 (4th Cir. 2006), claiming the court "did not discuss or consider any of them." Pet. at 5–6. But that's wrong. The trial court identified the factors and said, "The Court, *in weighing all factors*, notes that for many of them, there was simply an absence of evidence. For others, the evidence lacked the persuasiveness that would weigh in support of Defendants' actions." R. at 102 (emphasis added).

The court was right: the only claimed evidence of "disruption" Petitioners offered was (1) the school's hurried reassignment of morning duty, and (2) emailed complaints from five families. Weighing that evidence against Tanner's interest in speaking, which occupies "the highest rung of the hierarchy of First Amendment values," *Connick* 461 U.S. at 145, the court ruled for Tanner. R. at 103.

Petitioners' attempts to connect Tanner's speech to the other *Ridpath* factors also fail. *See* Pet. at 6–9. They claim Tanner's speech "'impairs the maintenance of discipline' because he publicly declared that he not only condemned the proposed policy but also that he would not affirm a transgender student's identity." Pet. at 6. Petitioners cite no law for their claim that speaking against a *proposed* policy "impairs the maintenance of discipline," nor can they. Such a rule would

undermine the purpose of free speech in a representative government, which includes persuading elected officials whether to adopt a proposed policy.

Tanner's speech also does not undermine any interest in enforcing existing policies. The trial court asked whether existing policy would force a teacher to use certain pronouns. Supp. App. at 5. Petitioner's counsel contended that declining to use pronouns for transgender-identifying students while using them for others would violate existing policy against harassment and discrimination. Supp. App. at 5–6. But Tanner never said he would do that. R. at 11. The trial court observed that Tanner could use no pronouns and correctly found that Petitioner's fear of a future violation of existing policy was "misplaced." R. at 104.

That misplaced fear underpins many of the other interests Petitioners invoke on appeal, including maintaining an "inclusive" environment, preserving the "mission of the institution," enforcing "the responsibilities of the employee," and stewarding "authority and public accountability." Those arguments fall away, though, because Tanner never violated—or even threatened to violate—existing policy.

The trial court did not abuse its discretion by concluding that Tanner's strong interest in speaking outweighed Petitioners' asserted interests. R. at 103.

B. The trial court acted within its discretion in finding insufficient evidence of future disruption to outweigh Tanner's strong interest in speaking.

Petitioners next try to reframe the trial court's balancing as an error of law, claiming the court failed to weigh the disruption that they "reasonably anticipated." Pet. at 9. But that misrepresents the law and mischaracterizes the trial court's opinion.

Petitioners cite *Connick* for the proposition "that there was no need 'for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action.'" Pet. at 9–10 (quoting *Connick*, 461 U.S. at 151–52). But Petitioners omit the critical next sentence: "We caution that a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern." 461 U.S. at 152.

Because Tanner's speech "substantially involved matters of public concern," *id.*, a court should not "give deference to" the government's "predictions of disruption." Pet. at 10. Instead, their "generalized and unsubstantiated allegations of 'disruptions,' *and predictions thereof*, must yield to the specific allegations" of the employee. *Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337, 355 (4th Cir. 2000) (emphasis added). The trial court did not fail to consider the possibility of future disruption; it correctly found that Petitioners' unsubstantiated predictions based on five parental complaints in a school of nearly 400 students did not justify restricting speech at the "highest rung" of

constitutional protection.[2] *Connick v. Meyers*, 461 U.S. at 145. That finding is within the "range of choice" this Court will not reverse for abuse of discretion. *Landrum*, 282 Va. at 352, 717 S.E.2d at 137.

II. The trial court did not abuse its discretion in finding Tanner would suffer irreparable harm absent an injunction.

The trial court correctly found irreparable harm because it found Tanner was likely to succeed on the merits. R. at 105. Petitioners agreed at the hearing this is the correct legal standard for this element, Supp. App. at 8–9, and they agree again in their petition. Pet. at 13.

III. The trial court did not abuse its discretion in focusing on likelihood of success when assessing the balance of harms.

Petitioners' third assignment of error—that the trial court ignored the "totality of the circumstances"—has a similar flaw: it does not allege an independent legal error. Instead, it depends entirely on whether the court erred in finding a likelihood of success. The trial court rightly stated that entering the injunction would not harm Petitioners and would serve the public interest. R. at 105. *See also Intern. Refugee Assistance Project v. Trump*, 857 F.3d 554, 604 (4th Cir. 2017) ("upholding the Constitution undeniably promotes the public interest").

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[2] Petitioners cite two cases about anticipated disruption. Pet. at 10–11. But both involved very different facts based on actual evidence. *See Melzer v. Bd. of Educ.*, 336 F.3d 185, 189 (2d Cir. 2003) (high school teacher was a "self described pedophile"); *Craig v. Rich Twp. High Sch. Dist.*, 736 F.3d 1110, 1113–15, 1119–20 (7th Cir. 2013) (high school guidance counselor and girls sports coach published "hypersexualized" book professing his "inability to refrain from sexualizing females").

None of the other interests Petitioners invoke matter if Tanner is likely to prevail because Petitioners have no interest in accomplishing any goal through unconstitutional means. As the trial court rightly stated, "[g]overnmental bodies being held in check for violating a citizen's constitutional rights, serves the public interest." R. at 105.

Petitioners ultimately disagree with the balance the trial court struck, but they identify no legal error in the decision below. They now ask this Court to strike a different balance. But "this Court defers to the circuit court's ruling and does not reverse merely because it would have come to a different result." *May*, 297 Va. at 18, 822 S.E.2d at 367.

CONCLUSION

The petition for review should be refused.

Dated: June 30, 2021

s/ *Tyson C. Langhofer*
Tyson C. Langhofer
Virginia State Bar No. 95204
P. Logan Spena*
Missouri State Bar No. 69511
ALLIANCE DEFENDING FREEDOM
20116 Ashbrook Place, Suite 250
Ashburn, VA 20147
Telephone: (571) 707-4655
Facsimile: (571) 707-4656
Email: tlanghofer@ADFlegal.org
Email: lspena@ADFlegal.org

*A*dmitted Pro Hac Vice*

Attorneys for Plaintiff

CERTIFICATE OF COMPLIANCE

This brief complies with the length requirement set forth in Rule 5:17(f), because this brief is fewer than 12 pages and contains 2,083 words.

s/ *Tyson C. Langhofer*
Tyson C. Langhofer
Virginia State Bar No. 95204
ALLIANCE DEFENDING FREEDOM
20116 Ashbrook Place, Suite 250
Ashburn, VA 20147
Telephone: (571) 707-4655
Facsimile: (571) 707-4656
Email: tlanghofer@ADFlegal.org

CERTIFICATE OF SERVICE

I certify that on June 30, 2021, pursuant to Rule 5:1B(b)(c), I electronically filed the foregoing and the Supplemental Appendix to Record via VACES and emailed a true and correct copy of same to Defendants' Counsel as below:

Stacy L. Haney
Virginia State Bar No. 71054
Andrew P. Selman
Virginia State Bar No. 91060
HANEY PHINYOWATTANACHIP PLLC
11 South 12th Street, Suite 100B
Richmond, VA 23219
Telephone: (804) 500-0310
Facsimile: (804) 500-0309
shaney@haneyphinyo.com
aselman@haneyphiny.com

s/ *Tyson C. Langhofer*
Tyson C. Langhofer