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Case No. 10847-VCL

IN THE COURT OF CHANCERY IN THE STATE OF DELAWARE

REBECCA YOUNG, ELIZABETH H. YOUNG and JAMES L. YOUNG,	)	
Plaintiffs,	)	
v.	)	C.A. No.: 10847-VCL
RED CLAY CONSOLIDATED SCHOOL DISTRICT	)	
Defendant.	)	

DEFENDANT RED CLAY CONSOLIDATED SCHOOL DISTRICT'S POST-TRIAL CORRECTED ANSWERING BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Constitutional Provisions

NATURE AND STAGE OF PROCEEDINGS

Plaintiffs filed suit on March 27, 2015. (D.I. 1). Plaintiffs filed their Supplemental and Amended Verified Complaint on April 13, 2015 (the "Complaint"). (D.I. 11). The Court issued an Opinion on October 8, 2015, denying Defendant Red Clay Consolidated School District's ("RCCSD") Motion to Dismiss ("Opinion" or "Op."). (D.I. 36). Plaintiffs filed their Post-Trial Opening Brief ("Brief" or "OB") on December 19, 2016. This is RCCSD's Post-Trial Answering Brief.

STATEMENT OF FACTS

A. The Decision to Seek the Referendum

By the Spring of 2014, RCCSD's administration recognized that a referendum would be required to defray rising costs and to fund the Board's established five-year plan. (Tr. 562, 650). The first Board Workshop, a publicly noticed Board meeting, was held in August 2014. (Tr. 562, 651). Although the original intention was to present a proposal for a referendum in September 2014, the Board decided to delay action until October in order to obtain additional community feedback. (Tr. 564). Two additional community meetings were held, both of which were advertised on the RCCSD website and through its social-media outlets. (Tr. 564-66). As a result of its community-outreach efforts, the Board decided that a gradual increase was preferable and changed the proposal to $0.20 per $100 of assessed value in the first year, $0.10 in the second year, and $0.05 in the third year. (Tr. 323, 561, 567 JX-286).

The revised proposal was formally submitted to and approved by the Board during its regular October 2014 Board meeting, which was publicly noticed and advertised through RCCSD's website. (Tr. 568). The Referendum was scheduled for February 24, 2015. (Tr. 570).

B. The Department of Elections Conducts the Referendum

Following the Board's approval, Assistant Superintendent for District Operations Ted Ammann served as liaison between RCCSD and the Delaware

Department of Elections ("DOE"). (Tr. 569). DOE was responsible for the selection of the polling places, hiring and training the election officers, and conducting the Referendum. (Tr. 570; 380; 383-84; JX-10). DOE designated 25 polling places—23 of which were at RCCSD schools. (JX-178). RCCSD and DOE signed written agreements specifying the location of the polling place in each building.[1] (Tr. 392; 572-73; JX-282). Qualified voters also could vote by absentee ballot. (JX-168).

DOE poll workers are instructed to ensure that there are no signs advocating for or against a referendum within 50 feet of a polling place. (Tr. 388-89). Their training manual specifically describes conduct that is considered to be electioneering and notes that polling officials are to "stop any electioneering at once." (JX-261 at 17). The manual also instructs poll workers to "monitor the people outside and inside to be sure that people near the Polling Place are obeying the law," to monitor lines, and check outside for electioneering. (JX-261 at 17, 21). DOE representative Barbara Lippincott testified that the DOE asks its Inspectors to go outside periodically and look at the designated parking areas to make sure that "event attendees" move out of voter parking spaces. (Tr. 404-05).

DOE is aware that all school districts in New Castle County conduct events on the day a referendum is held. (Tr. 396). She was specifically aware that

[1] *See* 14 *Del. C.* § 1071.

events were held in RCCSD, Christina, and Brandywine School Districts. (Tr. 397). Ammann confirmed that he spoke with Lippincott regarding such events prior to the Referendum. (Tr. 597-98). For example, as early as November 26, 2014, three months before the Referendum, Lippincott confirmed the following in an email to Ammann:

> Please make sure that any voting room changes are made directly on the contract so we can avoid any last minute scrambling. I know you plan activities everywhere, but we really do need to have adequate space that doesn't involve parents/grandparents/students cutting through the voting area or having to maneuver around voting equipment. I figured if I get these out to you now your principals can plan their activities accordingly.

(JX-36; Tr. 400-01).

DOE also created a "Sign and Parking Plan" for each polling place. (JX-284). The plan set forth all DOE sign locations and designated voter parking, including reserved spots for handicapped voters at each polling place. (JX-284; Tr. 393-94, 395). DOE Inspectors were responsible for making sure that the signs were in place. (Tr. 396).

C. The Steering Committee

A Steering Committee consisting of community members, teachers, administrators, and parents was formed to educate the community and seek support for the passage of the Referendum. (Tr. 324). The Steering Committee was co-

chaired by citizen volunteers Yvonne Johnson and Nate Schwartz. (Tr. 322, 324). Johnson's children had attended school in RCCSD and Schwartz's children were enrolled at the time of the Referendum. (Tr. 319, 708).

The Steering Committee undertook numerous activities in advance of the Referendum, beginning with a kickoff meeting in early November 2014. (Tr. 325; JX-27). Johnson and Schwartz gave presentations at numerous schools, PTA/PTO, and community events, as well as to the Red Clay Education Association.[2] (Tr. 336; 326-27, 334-36).[3] Johnson, as well as students, parents, community members, and teachers, spoke about the Referendum on EdTV. (Tr. 330-31). Johnson gave a presentation to the GHADA community organization and appeared on the Rick Jensen radio show. (Tr. 333-35). Although typically opposed to school-district referenda, both publicly supported RCCSD's Referendum after she spoke. (Tr. 333-35). The Steering Committee also reached out to charter schools to seek their support. (Tr. 335). The Steering Committee made telephone calls to parents and guardians of RCCSD students ("Parents") in support of the Referendum. (Tr. 337). "Parent leads" organized volunteers to call Parents to inform them of the upcoming Referendum and to answer questions. (Tr.

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[2] AFSCME Local 81 also publicized its support for the Referendum. (JX-128).

[3] PTA/PTO sponsored and paid for some of FFEs and publicly supported the Referendum. (JX-235; JX-240; JX-241; JX-301; Tr. 618-19).

337-38; JX-274). The Steering Committee also used social media, including its own website, Facebook page, and Twitter account. (Tr. 328). It also placed a front page message in the February 2015 Red Clay Record. (JX 280).

The night before the Referendum, a pep rally was held at Dickinson High School in support of the Referendum. (Tr. 338). Governor Jack Markell, a RCCSD resident, attended the pep rally, spoke about the importance of the Referendum, and encouraged residents to vote. (Tr. 339-40).

D. RCCSD's Public-Outreach Efforts

RCCSD took many steps to publicize the Referendum. Notably, every one of Plaintiffs' community witnesses was well aware of the Referendum through numerous sources. (Tr. 16, 51-52, 79, 93, 101-02, 156, 172-73, 310).

1. Board Meetings

Each of the Board's regular meetings following the authorization of the Referendum included a report in the public session about the Referendum. (Tr. 584-85). The report was specifically identified in each Board meeting agenda to ensure that members of the public were informed. (*Id.*).

2. District Website

The District publicized the Referendum on its website. (Tr. 225, 565, 568, 577). There, RCCSD posted information about the Referendum, as well as Frequently Asked Questions, which were updated periodically in response to community inquiries. (Tr. 582).

3. Red Clay Record

RCCSD's newsletter, the Red Clay Record, was sent to all RCCSD residents. (Tr. 329, 579-80). The front page of the December 2014 and February 2015 editions of the newsletter specifically informed the public of the date, time, and locations of the Referendum. (JX-280; JX-281). Rep. Deborah Hudson and no less than four community witnesses, all non-Parents, confirmed that they received the Red Clay Record. (Tr. 51, 93, 101, 156, 172).

4. EdTV

RCCSD's educational TV channel, EdTV, is available to New Castle County residents through Verizon or Comcast cable services. (Tr. 583-84). In addition to the TV shows presented by the Steering Committee, RCCSD also presented general information regarding the Referendum on a show called "Red Clay This Month." (Tr. 226).

5. RC eNews

RCCSD also distributed information about the Referendum electronically through the "RC eNews," a free electronic subscription service available to members of the community. (Tr. 568-69).

6. The Resource Fair

Close to 1,000 community members attended RCCSD's annual Resource Fair, open to all members of the public. Ammann and CFO Jill Floore

attended on behalf of RCCSD to distribute flyers and answer questions about the Referendum. (Tr. 591-92).

7. Business-Community Outreach

RCCSD representatives engaged in outreach to the business community, as well. For example, RCCSD representatives attended a meeting of the Delaware Decision Makers, an organization for small business owners in New Castle County who have an interest in Delaware's economic future. RCCSD Superintendent Mervin Daugherty attended a meeting with local realtors to discuss the Referendum and distribute written materials. Daugherty also met with the New Castle County Chamber of Commerce. (Tr. 592-93).

8. Legislative Breakfast

RCCSD invited all of its state, local, and county elected officials to a legislative breakfast for the specific purpose of discussing the Referendum. Neither Peterson nor Hudson chose to attend. (Tr. 593-94).

9. Newspaper Publications

There is no dispute that RCCSD complied with the formal notice requirements for school district referenda by publishing the required notices in the *News Journal* once a week for four weeks prior to the Referendum. (OB at 16; Tr. 577-78; JX-271; JX-189 at p. 2). In addition, on February 23, 2015, the *News Journal* ran an article about the Referendum. (JX-154). Plaintiff Rebecca Young, Hudson, and community witnesses Mary Fitzpatrick, Sean Boyle, and Annette

McHugh each confirmed that they saw newspaper notices or articles about the Referendum. (Tr. 16, 51, 102, 173, 310).

10. Other Public Notices

RCCSD posted a notice and a copy of the ballot in English and Spanish on the door of each polling place and on its website. (Tr. 577). Numerous witnesses testified that they saw signs at the schools and heard radio announcements about the Referendum. (Tr. 52, 79, 173, 311).

E. The Day of the Referendum

1. Family-Fun Events ("FFEs")

As it had done with previous referenda and as other districts across the state do, RCCSD held FFEs on the day of the Referendum. (Tr. 396-97, 522-23, 362-64; JX-264).[4] RCCSD regularly held similar FFEs during the school year to promote parent engagement. (Tr. 595, 362, 346). The Referendum FFEs were designed to showcase the schools and draw voters to the polling places. (Tr. 41, 346, 621, 623; JX-325 at 89-90). Participation was not contingent upon the elector's casting of a vote in the Referendum, and certainly not upon the casting of a favorable vote. (JX-176; Tr. 127-28).

In their Complaint, Plaintiffs alleged that "[s]tudents at one or more RCCSD schools were invited to pizza/dance parties and given a check off card

[4] No FFEs were held at Central because it is a special-needs school that was being phased out and had very few students. (Tr. 623, 640).

entitling them to pizza only if their parents voted." (Cmplt. at ¶¶ 29(h) and 40). The evidence at trial, however, showed that a "checklist" was used at only one school, Baltz. Baltz houses both an elementary school and RCCSD's administrative offices. The school and the offices are located in separate wings of the building and are separated by locking security doors. (Tr. 138-39; JX-299). As Baltz Principal Kelly Penoyer explained, the FFE was held in the school side of the building, while the polling place was located on the administrative side of the building. (Tr. 138-42; JX-284 at D0000415).

Penoyer created the checklist to remind attendees of the different activities held that night. The checklist put the events in the following order: "I Ate. I Voted. I Danced." (JX-275; Tr. 125). Penoyer testified that the list was, in her mind, "a cute thing to do" at the elementary level. (Tr. 125). Neither the order of the activities on the list nor the testimony supports the allegation that attendees were required to vote before participating in the activities or receiving pizza. (JX-275; Tr. 125, 127, 130).

Plaintiffs' only evidence to support their allegation is the testimony of one community witness, Annette McHugh. (OB at 9). McHugh's testimony, rife with internal contradictions, demonstrated that she lacked a clear recollection of the events. For example, she was uncertain about which referendum was at issue and did not believe there were security doors separating the building's two wings.

(Tr. 311-12). She also claimed that, while in line to vote, she observed "a woman":

> standing there talking as people came out with their children to make sure—I don't know the exact words, but something to the effect of, you know, "Did your parents vote?" You know, "Here's your ticket and"—to go in to get pizza.

(Tr. 302-03). She admitted that she did not know who the "woman" was or whether she was affiliated with RCCSD in any way and further contradicted herself when she testified that her son was the only child in the voting area. (Tr. 302-03, 312-13).

More fundamentally, her testimony was motivated by her displeasure about the voting process:

> I was infuriated with the whole process as far as what I witnessed when I was actually in the voting area. The person to my right didn't have the proper information. They let him vote. There was another person to my left who was not speaking English, and there was somebody else there [sic] help translating for them, but—and just helped—you know, walked them to the booth. So you don't know was the person legitimately living still in the Red Clay School District, because his address did not match what was in the book.

(Tr. 304).

2. Parking

In their Complaint, Plaintiffs alleged that they could not park in the handicapped spaces at the school, because they were blocked by empty school buses. (Cmplt. at 29(a)). Yet, at trial, this allegation was proven to be completely false when Plaintiff Young admitted that she never saw any school buses in the parking lot on the day of the Referendum. (Tr. 18).

Young testified that she drove to North Star, just two minutes from her home, twice on the day of the Referendum. (Tr. 16). During her first drive-by at 10 a.m., she did a "loop" around one of the parking lots and, when she did not see any available spots, she left. (Tr. 8, 17). She returned again around 3 p.m., did another "loop" through the same parking lot, and left. (Tr. 10, 18).

Neither time did she attempt to find parking at the school's two other parking locations—a circle driveway with "accessibility parking" and a larger parking area with parking spots designated expressly for voters. (JX-266). Neither time did she seek assistance from RCCSD officials or DOE representatives. (Tr. 20). She did not make any other attempts to vote, either on her own or with her parents, at North Star or at any other polling place. (Tr. 20).

Notably, when Floore voted at North Star at 10 a.m. (the same time as Plaintiffs' first attempt), the parking lot was not full. (Tr. 676-77). Likewise, when 75-year-old Richard Langseder and his wife drove to North Star at

approximately 1:30 p.m., they experienced no parking problems whatsoever. (Tr. 231-32). They were able to find parking in the DOE-designated parking spots in the larger parking area. (Tr. 232-33; JX-266). Langseder confirmed that he observed no buses or other obstructions to parking. (Tr. 233-34).

North Star had the highest turnout of any polling location. (JX-178). Young agreed that the voter turnout at North Star was "impressive" and that, as a result of the large turnout, "there would be a lot of cars in the parking lot for that many voters." (Tr. 22). She further testified that she did not know whether the handicapped parking spots were taken by handicapped voters. (Tr. 22). Of course, Plaintiffs adduced no testimony that any vehicle in the DOE-designated parking spots at North Star or any other polling location belonged to an FEE attendee. Testimony also shows that teachers at North Star were asked to park on the grass so as not to take up any parking spots.[5] (Tr. 601).

Only one other witness testified that she was unable to vote because of parking issues. Mary O'Neill-Hultberg testified that she was not feeling well on the day of the Referendum and she did not vote when she was unable to find a parking spot. (Tr. 90). Notably, O'Neill-Hultberg testified that she would have voted *for* the Referendum. (Tr. 94).

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[5] RCCSD also took steps to increase available parking at Linden Hill, Forest Oak, and Richardson Park by having teachers and staff park off-site. (Tr. 510, 601-02).

All other community witnesses, as well as Plaintiffs' experts, testified that they were able to vote. (Tr. 27, 77, 96, 147-48, 162, 299, 527; JX-328 at 9). Peterson experienced no parking problems when she voted at Stanton. (JX-328 at 46-47). It took Fitzpatrick and Russell Schnell no more than five minutes to find a parking space. (Tr. 103, 156-57). Boyle testified that it took him between five and ten minutes to park but that it "was not a big deal." (Tr. 171). Elizabeth LaSorte, who spent "a couple minutes" parking at Baltz, confirmed that there were as many as 50 voters in line to vote when she entered the polling place. (Tr. 527, 529-30).

On the day of the Referendum, Johnson visited five school polling places, including Cab Calloway at 12 p.m., Marbrook at 1:30 p.m., HB Middle School at 2 p.m., Brandywine Springs at 3 p.m., Linden Hill at 5:30 p.m., and North Star at 6:30 p.m. (Tr. 341-45). At each school, she observed vacant parking spaces. (Tr. 341-45).

3. The Baltz-Bear Sign

Plaintiffs alleged that, during the Referendum, persons entering Baltz "were met with signs telling them to vote for the referendum" and that, on "information and belief, that occurred at other Red Clay polling places as well." (Cmplt. at ¶ 29(d)). This allegation has been proven untrue. The polling place at Baltz was located on the administrative side of the building, not the school side. (Tr. 138-39; JX-299). There was a single, handmade sign at the greeter table on

the school side that read, "If you care for the Baltz Bear Vote Yes!" (JX-162). There is no evidence or testimony that there were signs inside any other schools or at any polling place.

Principal Penoyer took responsibility for the sign. She testified that it had been made by students and used at the pep rally the prior day. She put the sign up at the greeter table inside the school entrance as a decoration because she thought the table looked bare. (Tr. 136).

Just before the polls closed, a resident who had entered the building through the school entrance, complained about the sign to Penoyer, who contacted Ammann. Ammann asked for a description of the sign and its location. Because he works in the administrative wing of the building, he knew from her description that the sign was more than 50 feet away from the polling place and concluded that, particularly in light of the imminent closing of the polls, no action was required. (Tr. 606).

Ammann was later contacted by an investigator from the Delaware Department of Justice ("DOJ") about the sign. (Tr. 607). Together, they measured the distance between the security door and the location where the sign had been placed and determined that the sign was more than 100 feet from the security door. (Tr. 607; JX-323). DOJ independently confirmed that, while the sign was placed

within 50 feet of the school entrance, it was not the polling place entrance designated by the DOE. (JX-189; JX-190).

4. Telephone Calls

The Steering Committee organized volunteers to call potential voters about the Referendum prior to the election. The volunteers, who included off-duty teachers and Parents, were provided a script for the calls that explained RCCSD's reasons for requesting a tax increase, that an operating-tax increase had not occurred since 2008, and the potential consequences of the failure to pass the Referendum. (JX-274; Tr. 338). All of this information was truthful and accurate. (JX-274; Tr. 338).

There is no evidence about how many names on the call lists were actually called or how many callers were actually reached. Further, there is no evidence showing that the calls actually motivated any Parent to vote, let alone any evidence that they would not have voted but for the call. In addition, Defendant's expert, Karl Agne, testified that the value of such calls is highly suspect if not done by trained professionals operating from a professionally written script. (Tr. 476-77). Notably, of the 781 Parents on the Baltz call list, only 138 parents actually voted. (JX-63; JX-305). Of course, there is no evidence showing how those parents actually voted.

Plaintiffs also alleged that robocalls were made to Parents reminding them to vote on the day of the Referendum. (OB at 44). The script for the robocalls shows that it was a neutral, get-out-the-vote call advising Parents of the polling places, polling times, and identification requirements. (JX-159). The record also shows that opposition groups made 5,000 to 6,000 robocalls to voters urging them to vote *against* the Referendum. (JX-329, p. 27). Hudson testified that robocalls may actually be harmful. (Tr. 68). And Agne agreed that robocalls "can do more harm as good in the current environment." (Tr. 445).

F. Voter Complaints

Although neither Plaintiffs nor any of the community witnesses made any complaints on the day of the Referendum, allegations of voting irregularities were made after the vote. (Tr. 19-20, 78, 90-91, 104, 155, 157-58, 168, 169, 173, 304). Peterson testified that she received several complaints about the Referendum from her constituents. (JX-328 at 15). Although Peterson admitted that she had no personal knowledge of these complaints and made no attempt to confirm their validity, she asked the Board of Elections ("BOE") not to certify the results of the Referendum. (JX-328 at 15, 52). After referring the objections to the DOJ for investigation, BOE certified the results of the Referendum on March 10, 2015, notwithstanding Peterson's objections. (JX-178; JX-328 at 55; JX-189; JX-190).

G. The DOJ Investigation

DOJ investigated the complaints, and determined that RCCSD had not engaged in any violation of state law or other wrongdoing. (JX-189; JX-190). DOJ found, as witnesses for RCCSD and DOE testified, that allegations that the Referendum "[had] not [been] properly noticed with the purpose of preventing those opposed from participating" were without merit. (JX-189 at 2; JX-190 at 2). DOJ also found to be without merit an allegation of widespread duplicate voting, finding that there had been only three instances of duplicate voting. (JX-189 at 4; JX-190 at 4). The DOJ investigation also found to be without merit allegations that voters were denied access to the polling places because of limited parking. The DOJ noted that the applicable statute does not provide specific requirements concerning the number of parking places at each polling location, and found that:

> [DOE], not the Red Clay School District, identified and marked off parking places, including handicapped parking places, at all of the schools used for voting that were to be reserved for voters. There are no express guidelines and we cannot conclude that Red Clay failed to provide access as required by the Code, as it provided all parking that was requested by the Department of Elections.

(JX-189 at 2-3; JX-190 at 2-3). DOJ's interviews of poll workers and bus drivers led it to conclude that "the allegations that school buses were used to block handicapped parking spaces were not substantiated." (JX-189 at 3; JX-190 at 3).

DOJ likewise concluded that the allegations of unlawful electioneering were unfounded. It noted that many of the restrictions applicable to general elections are not applicable to school referenda, and determined that, "[a]lthough numerous schools in the District hosted parent events while the election was being held, the OCRPT did not discover any instances when school district officials engaged in prohibited electioneering within 50 feet of the polling place." *(Id.).* DOJ specifically noted that the "Baltz Bear sign" did not violate the 50-feet requirement because the sign was not located at the polling place designated by the DOE. (*Id.*). DOJ therefore concluded that:

> the referendum election held on February 24, 2015 was properly noticed; the efforts made by the Department of Elections and Red Clay to provide access to the polls were legally sufficient; concrete instances of prohibited electioneering activities could not be substantiated; and, the voting controls used during the election complied with Delaware laws.

(JX-189 at 5; JX-190 at 5).

QUESTIONS PRESENTED

1. Did Plaintiffs fail to prove the material allegations of their Complaint?

2. Did Plaintiffs fail to prove a violation of either the federal Equal Protection Clause or the state Elections Clause?

3. Did Plaintiffs fail to prove that the Referendum result would have been different but for any illegal conduct that was proven?

4. If the Court finds that a constitutional violation occurred that changed the outcome of the election, did Plaintiffs fail to meet their burden to prove that a Permanent Injunction should be issued?

5. If Plaintiffs succeed on any claim, did they fail to prove that the Referendum should be overturned?

6. If the Court finds in Plaintiffs' favor, should any ruling be applied prospectively only?

ARGUMENT

After a year and a half of litigation, extensive discovery, and three days of trial, Plaintiffs' evidence fell woefully short of proving the sensational allegations asserted in their Complaint. Further, what little evidence they did present at trial does not establish that RCCSD violated either the state or federal constitutions, or that any alleged violation affected the outcome of the election. Consequently, Plaintiffs have failed to carry their burden and their requests for relief should be denied.

I. Plaintiffs' Complaint Contained Several Material Allegations That Were Untrue

In their Complaint, Plaintiffs made several sensational allegations that were demonstrably untrue. The Court relied upon those allegations in its Opinion denying RCCSD's Motion to Dismiss. (Op. at 7-8, 128). Young admitted that the only allegations about which she had personal knowledge were her attempts to vote at North Star. (Tr. 19). Even with respect to those allegations, her testimony revealed that the Complaint was materially misleading. Further, the record reveals a lack of due diligence in investigating many other assertions in the Complaint.[6]

[6] *See* Ch. Ct. R. 3(aa) (discussed in *Wayman Fire Prot., Inc. v. Prem. Fire & Security, LLC*, No. 7866-VCP, 2014 Del. Ch. LEXIS 33, at *121-23 (Del. Ch. Mar. 5, 2014)).

A. Allegation of Empty School Buses in Handicapped Parking Spaces

In their Complaint, Plaintiffs specifically alleged that Young could not park in the spots at North Star reserved for handicapped persons because empty school buses were blocking the spaces. (Cmplt. at ¶29(a); Op. at 7-8, 128). Plaintiffs alleged in their Complaint that this also occurred at other schools and that RCCSD intentionally parked buses in handicapped spots to prevent the elderly and disabled from voting. (*Id.*).

At trial, Rebecca Young admitted that she never saw "any school buses there at all." (Tr. 18). And Plaintiffs' other witnesses confirmed that there were no school buses blocking handicapped spots at other polling places. (Tr. 172, 233-34, 528). The only evidence regarding parked school buses was that a charter-school bus was parked at Marbrook Elementary in an area that was not a DOE-designated parking area from 4-6 p.m., and, perhaps, that a second bus was parked even farther from the school, near the street. (Tr. 35, 604, 631; JX-284 at D0000426; Tr. 75-76, 80-83; JX-319; JX-319a).

B. Allegation that RCCSD Did Not Send Notices to All District Residents

In their Complaint, Plaintiffs alleged that "Red Clay did not send notices of the referendum to all residents of the district." (Cmplt. at ¶ 29(c)).

Plaintiffs, however, are legally bound by their admission "that Red Clay had no legal duty to send notice of the Referendum to all residents." (JX-302, p. 8).

The testimony at trial, nevertheless, showed that RCCSD did, in fact, use multiple means to inform the entire electorate. For example, several of Plaintiffs' community witnesses (all non-Parents) confirmed that they received the Red Clay Record. (Tr. 51, 93, 101, 156, 172). As set forth above, the undisputed trial testimony shows that RCCSD sent its newsletter to all District residents. *See* Facts at D.3.

C. Allegation of Electioneering Inside the Polling Places

In their Complaint, Plaintiffs alleged that RCCSD caused:

> Persons entering A.I. DuPont Middle School at the time of the election [to be] met by two parents stationed at desks by the door telling them that if they did not vote for the tax increase their children would not have after-school activities. On information and belief, that occurred at other Red Clay polling places as well.

(Cmplt. at ¶ 28(f)).

At trial, Plaintiffs did not call a single witness to support this allegation, nor did they so much as mention it in their Brief. Indeed, Hudson, Peterson, and Schnell, each testified that no one suggested to them how they should vote at their chosen polling places. (Tr. 56, 157; JX-328 at 48).

D. Allegation that Principals Directed Staff to Remove Signs Opposing the Referendum from School Property

In their Complaint, Plaintiffs alleged that "Principals at Red Clay schools directed staff to remove from school property signs urging residents to vote against the tax increase, while leaving in place signs urging residents to vote for the tax increase." (Cmplt. at ¶ 29(g)).

At trial, Plaintiffs did not call a single witness to support this allegation, nor did they so much as mention it in their Brief.[7]

Ammann's testimony, which was supported by documentary evidence, plainly demonstrates that the allegation was made with no basis in fact. Ammann testified that, on the day of the Referendum, he was advised that there were signs in the right-of-way at Linden Hill. (Tr. 616). In response, he immediately sent an email to all school principals, reminding them that there are "strict guidelines for signs" and instructing them to remove any sign that was too close to the roadway. (Tr. 616-17). He also contacted the DOE to make sure that this was the proper procedure. (Tr. 616). Lippincott promptly responded that the

[7] Consequently, Plaintiffs waived this argument. *See, e.g., Emerald Pts. v. Berlin*, No. 9700, 2003 Del. Ch. LEXIS 42 (Del. Ch. Apr. 28, 2003) ("It is settled Delaware law that a party waives an argument by not including it in its brief"), *aff'd* 840 A.2d 641 (Del. 2003).

signs should be removed but only by poll workers. (*Id.*). Ammann thereafter advised the principals of this procedure. (*Id.*; JX-157).

E. Allegation that Students were Called Out of Class to Vote and Poll Workers Stopped Students at A.I. DuPont High School to Tell Them to Vote

In their Complaint, Plaintiffs alleged that "[e]ighteen year olds at McKean High School were called out of class to vote" and that "poll workers at A.I. DuPont High School stopped students in the school hallway to ask their ages and to tell them about voting if they were 18 years of age." (Cmplt. at ¶ 29(i)).

At trial, Plaintiffs failed to offer a single witness to support this allegation and, again, made no mention of it in their Brief.[8]

F. Allegation that FFEs Were Not Held During the Christina Referendum

In their Complaint, Plaintiffs alleged that the "probable effect" of RCCSD's conduct is shown by comparing the passage of the Referendum to the failure of the referendum, held on the same day, in Christina School District ("Christina"). Plaintiffs alleged that "Christina School District did not get-out [sic] the vote activities to parents while omitting the other eligible voters." (Cmplt. at ¶ 37).

At trial, Christina's Public Information Officer, Wendy Lapham, described in detail the get-out-the-vote activities that Christina schools held in its

[8] Thus, this claim has been waived. *See id.*

polling places. (JX-264; Tr. 363-372). Those activities were very similar to RCCSD's FFEs and included lunch with parents, literacy events, bingo nights, dinners, carnivals, and family-fun nights. (*Compare* JX-264 with JX-197).

Having presented no evidence at trial in support of the allegation that Christina should be used as a comparator, and having made no mention of it in their Brief, Plaintiffs are deemed to have abandoned this argument.[9]

II. Plaintiffs' Burden of Proof and the Applicable Standards of Law

Plaintiffs advance two legal theories. First, they allege that RCCSD violated their rights to equal protection and due process in violation of the Fourteenth Amendment to the United States Constitution.[10] Second, they allege that RCCSD violated the Elections Clause of the Delaware Constitution, which provides that "[a]ll elections shall be free and equal."[11] Plaintiffs seek an order declaring the Referendum void and permanently enjoining RCCSD from collecting the approved tax increases. (Cmplt. at 19; OB at 56-57).

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9 *Id.*

10 U.S. Const. amend. XIV. In just three sentences of their Brief, Plaintiffs contend that RCCSD violated the Due Process Clause. (OB at 42-43). This Court addressed this issue in its Opinion and concluded that Plaintiffs' claims are properly evaluated in the lens of the Equal Protection Clause—*not* the Due Process Clause. (Op. at 77). Nevertheless, as the Court pointed out, the standard of review is the same under both Clauses. (Op. at 77-78, n.49).

11 Del. Const. art. I, § 3.

A. The Standard of Law Applicable to Plaintiffs' Federal Constitutional Claims

As an initial matter, Plaintiffs must prove that they are part of an identifiable group recognized by the Equal Protection Clause.[12] Only if they meet this burden will the Court conduct a constitutional analysis. The standard of review in a case involving the right to vote has developed into a "more flexible standard of review that is more deferential to government actors."[13] First, the court must decide whether the challenged action "severely burdens the right to vote."[14] The alleged burden must go "beyond the merely inconvenient."[15] "Ordinary and widespread burdens" are not severe.[16] Next, the court "must identify and evaluate the precise interest put forward by the state as justifications for the burden imposed by its rule."[17] If the burden imposed is "severe," then strict scrutiny applies and the state's intervention must be narrowly tailored.[18] If the burden imposed is not severe, then the state's action need only have served a "legitimate interest" and

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12 *See Gordon v. Lance*, 403 U.S. 1, 5 (1971).

13 Op. at 79.

14 Op. at 80 (quoting *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 205 (2008) (Scalia, J., concurring)).

15 *Id.*

16 *Id.*

17 Op. at 80 (quoting *Anderson v. Elebrezze*, 460 U.S. 780, 789 (1983)).

18 *Id.*

represent "a reasonable way of accomplishing this goal."[19] Where the intervention is determined not to be severe, "then the challenge is likely to be rejected."[20]

B. The Standard of Law Applicable to Plaintiffs' Delaware Constitutional Claim

The Elections Clause of the Delaware Constitution mandates that elections be "free and equal."[21] As explained in *Abbott v. Gordon*, conduct that may have affected the voters' decision but that does not affect the outcome of the election does not constitute a violation of the Elections Clause.[22] Absent evidence in the record that proves that, but for the defendant's challenged conduct, the outcome of the election would have been different, the election must be said to have been free and equal.[23]

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19 *Id.* (internal citations omitted).

20 Op. at 81.

21 Del. Const. art. I, § 3.

22 No. 04C-09-055 PLA, 2008 Del. Super. LEXIS 103 (Del. Super. Mar. 27, 2008) (cited in Op. at 90).

23 *See, e.g.*, *Files v. Hill*, 594 S.W.2d 836 (Ark. 1980) (explaining that there is no valid objection in an election contest if legal votes were not counted if they were not numerous enough to overcome the majority); *Jackson v. Maley*, 806 P.2d 610 (Okla. 1991) ("when irregularities are shown to exist, but they are not of such a character in either quality or quantity to prove the outcome of an election cannot be determined an election will be upheld"); *Kimmell's Appeal*, 52 Pa. D. & C. 279, 283 (Pa. C.P. 1944) ("The invalidation of a public election is a judicial act of serious import, and is justified only by circumstances of the most compelling nature."); *Smith v. Saye*, 125 S.E. 269 (S.C. 1924) (upholding election because any potential illegalities would not have affected the result); *State ex rel. Davis v. State*

C. The Standard for Overturning an Election

Plaintiffs face another, far higher, standard in order to have the Referendum invalidated.[24] "Voiding an election and ordering a new one represents one of the most extreme remedies available to a court sitting in equity and is not a necessary response to all unconstitutional practices."[25] Because "[n]othing is so profoundly destabilizing to the local political process," there is a "soaring"

Bd. of Canvassers, 68 S.E. 676 (S.C. 1910) (upholding election where illegal votes did not affect the result of the election); *Abbott v. Hunhoff*, 491 N.W.2d 450 (S.D. 1992) (upholding election while noting that the party seeking to overturn it has the burden of proving that "but for" improper votes, the challenger would have won); *Taylor v. Armentrout*, 632 S.W.2d 107 (Tenn. 1981) (upholding referendum that passed by 6 votes where there was evidence that 2 individuals were unable to vote and noting that those votes would not have changed the outcome); *Whalum v. Shelby Cty. Election Comm'n*, No. W2013-02076-COA-R3-CV, 2014 Tenn. App. LEXIS 612 (Tenn. Ct. App. Sept. 30, 2014) (upholding school-board election when removal of any improper or illegal votes would not have affected the outcome); *Page v. Letcher*, 39 P. 499 (Utah 1895) (holding that a voting irregularity that did not affect the outcome is not grounds for overturning an election); *Falls Church Taxpayers League v. Falls Church*, 125 S.E.2d 817 (Va. 1962) (upholding a special election where an inaccurate voter-registration book was used where the irregularity would not have affected the outcome of the vote); *Hill v. Howell*, 127 P. 211 (Wash. 1912) (upholding election where the removal of improper votes would not have affected the outcome of the election); *Reitveld v. N. Wyo. Cmty. Coll. Dist.*, 344 P.2d 986 (Wyo. 1959) ("[W]e look to the record to ascertain whether any electors deprived of their vote would have altered the result of the election had they been allowed their ballot").

[24] *See, e.g., Huggins v. Super. Court*, 788 P.2d 81, 84 (Ariz. 1990) (declining to order a second election even though the margin of victory was exceeded by the number of illegal votes); *Kimmell's Appeal*, 52 Pa. D. & C. at 283.

[25] *Office of Hawaiian Affairs v. Cayetano*, 6 P.3d 799, 804 (Haw. 2000) (citing *Putter v. Montpelier Pub. Sch. Sys.*, 697 A.2d 354, 357 (Vt. 1997)).

threshold for the "drastic, if not staggering equitable remedy of election invalidation."[26] As the Supreme Court of Vermont explained:

> Invalidation of an election requires more than merely a claim of election irregularity, even one of constitutional dimensions. The fact that the invalidation power is rooted in equity is the key to the usefulness of this remedy, for it means that the determination of illegality in the electoral process does not automatically invoke the new-election remedy. The judge sitting in equity may detect malfeasance, perhaps of an egregious nature, but nonetheless stay his hand in providing full relief.[27]

This high threshold may not be met by inference alone. "Suspicion and speculation are insufficient to set aside an election. Rather, there must be clear and convincing tangible, positive proof presented that the irregularities were so pervasive that it cannot be reasonably determined who was elected."[28]

As the Delaware Supreme Court held in *Brennan v. Black*, "irregularities in the conduct of an election unaccompanied by fraud or unfair

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[26] *Id.* (internal citations omitted). *See also Gjersten v. Bd. of Election Comm'rs*, 791 F.2d 472, 478 (7th Cir. 1986) (court need not exercise equitable power of invalidation in response to all unconstitutional election practices).

[27] *Id*.

[28] *Adair Cty. Bd. of Elections v. Arnold*, No. 2015-CA-000661-MR, 2015 Ky. App. Unpub. LEXIS 656, at *18-19 (Ky. Ct. App. Sept. 11, 2015).

dealing, *and not affecting the result*, will not void an election otherwise valid."[29] In *State ex rel. Green v. Holzmueller*, a case cited by Plaintiffs, the Delaware Superior Court explained that "Courts are always disposed to give effect to elections when possible; and it is only where there is such uncertainty arising from the reception of supposedly illegal votes as to make it impossible to ascertain the true expression of the opinion of the voters, that an election is to be declared void."[30] Absent actual proof that the result would have been different, the election must stand.[31] Again, the court made clear that, "[m]ere inference of fact cannot be indulged" in meeting this burden.[32]

In *State ex rel. Wahl v. Richards*, also cited by Plaintiffs, the Delaware Supreme Court makes the same important point:

> Courts are always reluctant to reject the entire vote of an election district in counting the ballots because of some

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29 104 A.2d 777, 789 (Del. 1954) (emphasis added). In their Brief, Plaintiffs state that "*Brennan* implicitly recognizes that flaws in the electoral process will mandate voiding the election when they "could possibly have affected the result." (OB at 50-51). This is not the holding, implied or otherwise. The full quotation actually states: "We think the election should not be set aside on this ground. There is no suggestion of any fraud or unfairness in the voting, or any suggestion that the departure from the statutory mandate could possibly have affected the result." *Id.* at 789.

30 5 A.2d 251, 255 (Del. Super. 1939).

31 *Id.* at 256.

32 *Id.*

> irregularities committed by election officers unless there is a clear statutory provision requiring it. Ordinarily, ignorance, inadvertence, mistake, or even intentional wrong on the part of such officers should not be permitted to disfranchise voters who are innocent of any wrongdoing, if it can be avoided.[33]

Thus, Plaintiffs cannot meet their burden merely by claiming that there is a *possibility* that RCCSD's actions affected the outcome. Instead, they must put forth affirmative and specific evidence demonstrating that the outcome *was* affected and that the result would have been different but for RCCSD's conduct.[34]

The South Dakota Supreme Court applied this standard in refusing to overturn a referendum.[35] The contestants had presented evidence that there were long lines and insufficient parking, causing some voters to have to park a block and

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[33] 64 A.2d 400, 406 (Del. 1949).

[34] *See, e.g., Grimm v. Wagoner*, 77 P.3d 423 (Alaska 2003); *Spires v. Compton*, 837 S.W.2d 459 (Ark. 1992) ("This court has held many times that elections will not be invalidated for alleged wrongs committed unless those wrongs were such to render the result doubtful"); *Arras v. Reg'l Sch. Dist. No. 14*, 125 A.3d 172, 180 (Conn. 2015); *Buckley v. Town of Easton*, No. CV136039323S, 2013 Conn. Super. LEXIS 2721, at *26 (Conn. Nov. 25, 2013); *Speigel v. Knight*, 224 So. 2d 703 (Fla. Dist. Ct. App. 3d Dist. 1969); *Suessmann v. Lamone*, 862 A.2d 1, 13 (Md. 2004) (finding that "even a probability of 51%, of 'more likely than not' or 'reasonable likelihood,' will not suffice to overturn an election result").

[35] *In re Election Contest as to Watertown Special Referendum Election of October 26, 1999*, 628 N.W.2d 336 (S.D. 2001).

a half from the polling place.[36] The court held that the contestants "must show not only voting irregularities, but also show those irregularities to be so egregious that the will of the voters was suppressed."[37] Even though the contestants presented affidavits from 104 potential voters who did not vote because of the long lines—a number that would have changed the result—the trial court refused to invalidate the election, finding that it had "resulted in a free and fair expression of the will of the voters."[38]

The Court found that, even if it were to assume that voting irregularities occurred and even if they had arisen to the level of not being a "free and fair expression of the voters," counsel for the contestants conceded at argument that "who knows how many people showed up on election day."[39] Thus, the Court concluded to mean that the contestants did not know how many potential voters left the lines without voting or how they would have voted.[40] Thus, the

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36 *Id.* at 338.

37 *Id.*

38 *Id.* at 337.

39 *Id.* at 399, n.1.

40 *Id.* at 339, n.1.

Court explained, the "mere mathematical possibility that the results could have been changed" is insufficient to warrant the overturning of an election.[41]

D. The Standard for a Permanent Injunction

If a constitutional violation is found, to obtain a permanent injunction, Plaintiffs must prove that: (1) they will suffer irreparable harm if the requested injunctive relief is not granted; and (2) the harm to them outweighs the harm to RCCSD if an injunction were granted.[42] A permanent injunction is extraordinary relief, and the standard is "onerous."[43] Plaintiffs cannot meet this burden with speculation or supposition. Nor can they meet this burden with evidence of harm to persons other than themselves.

III. Plaintiffs Failed to Prove that RCCSD Violated Either the Federal or State Constitutions

A. Plaintiffs Failed to Prove that RCCSD Violated the U.S. Constitution

Plaintiffs argue that RCCSD discriminated against them in two ways. First, they contend that FFEs "provide[d] benefits at the polls that were only of interest to [P]arents" and, therefore, they conclude, such "benefits" must be an unconstitutional burden to non-Parents. Second, they contend that RCCSD's "get-

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41 *Id.*

42 *Cantor Fitzgerald, L.P. v. Cantor*, 724 A.2d 571, 587 (Del. Ch. 1998).

43 *N. River Ins. Co. v. Mine Safety Appliances Co.*, 105 A.3d 369, 382 (Del. 2014).

out-the vote [sic] efforts enhanced the participation of parents and guardians to the disadvantage of other [non-Parent] voters." (OB at 37). This argument is fundamentally flawed for several reasons.

1. Plaintiffs Failed to Prove that They Are Members of an Identifiable Class Protected by the Fourteenth Amendment

The Equal Protection Clause protects voters from being "denied access to the ballot because of some extraneous condition, such as race, wealth, tax status, or military status," but the complained-of conduct must target a "discrete and insular minority."[44] Thus, to succeed on their federal constitutional claim, Plaintiffs must prove that they are members of an "identifiable class."[45] The term "class,"

> unquestionably connotes something more than a group of individuals who share a desire to engage in conduct that the [] defendant disfavors. Otherwise, innumerable plaintiffs would be able to assert constitutional causes of action by simply defining the aggrieved class as those who oppose the defendant's position or policy.[46]

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44 *Gordon*, 403 U.S. at 6. (internal citations omitted).

45 *Id.* at 7.

46 *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 269 (1993). *See also Farber v. City of Paterson*, 440 F.3d 131, 138 (3d Cir. 2006) ("When determining whether an independently identifiable class exists, there are differences between being discriminated against because of membership in a political party and being discriminated against because of support for the policies of a politician who also happens to be a member of the party.").

Here, Plaintiffs contend that RCCSD "discriminate[d] in favor of the potential voters it expected to support the tax increase, and against those it expected to oppose it." (Cmplt. at ¶ 1; *id*. at ¶¶ 3, 16, 17, 31, 53; OB at 36, 38). Even if Plaintiffs had proven this contention, which they have not, their claim does not invoke the protections of the Fourteenth Amendment.

In *Lee v. Virginia State Board of Elections*, the plaintiffs sought to invalidate a law that they claimed was enacted to suppress and "fence out" the vote of Democrats "because of the way they are expected to vote."[47] The court rejected the claim, which, it explained, "necessarily assumes that all voters identifying themselves as Democrats vote similarly."[48] Even if partisan advantage had been a "latent motive" in enacting the law, the court held, it would not offend the Fourteenth Amendment.[49]

Plaintiffs' case is based on the false assumption that Seniors and non-Parents were more likely to vote against the Referendum. Plaintiffs have categorically failed to adduce any evidence to show that this stereotype is actually

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47 No. 15-357-HEH, 2016 U.S. Dist. LEXIS 67707, at *85-86 (E.D. Va. 2016), *aff'd*, 843 F.3d 592 (4th Cir. 2016).

48 *Id.* at *86.

49 *Id. See also Gordon*, 403 U.S. 1; *Armstrong v. Allain*, 893 F. Supp. 1320 (S.D. Miss. 1994) ("Where there is no independently identifiable group or category that favors school bond referenda such that there is no sector of the population that may be said to be 'fenced out' from the franchise because of the way they will vote, there can be no equal protection violation.").

true and, in fact, the record makes clear that it is not. The absence of any protected class of voters was proven when, at trial, Plaintiff Young admitted that her status as a Senior or non-Parent does not determine how she votes in referenda. (Tr. 20). There can be no doubt that Plaintiffs' federal constitutional claim must fail.

2. FFEs Did Not Constitute a Burden

a. Plaintiffs Failed to Prove that RCCSD Intended to or Did Fill the Polling Places and Parking Lots to the Disadvantage of Seniors or Persons With Disabilities

RCCSD denies that it intended to fill the polling places or parking lots for the purpose of excluding Seniors or persons with disabilities. (Tr. 602). The record shows that RCCSD took affirmative steps to make additional parking available to voters at numerous locations, including North Star. *See* Facts E.2. The record is devoid of any evidence that RCCSD intended to create parking difficulties or congestion at polling places for the purpose of creating a barrier preventing Seniors, disabled persons, or anyone else from voting. Indeed, thousands of emails were produced in this litigation. Many of those are trial exhibits. Not one supports the claim that RCCSD created parking problems to block out Seniors, the disabled, or anyone else.

Further, the evidence of alleged parking congestion that Plaintiffs presented through their community witnesses was, at most, of minor delays at only

a limited number of polling places.[50] This evidence falls far short of the quantum of proof required to establish a severe burden on voting. Indeed, parking issues at polling places far greater than those alleged here were found to constitute only a minor inconvenience.[51]

b. Plaintiffs Did Not Prove That FFEs Were a "Benefit" to Parents or That They Were a Severe Burden to Non-Parents

There is no evidence that anyone was prevented from attending an FFE. Hudson, who is both a Senior and a non-Parent, testified that, upon entering Marbrook, she was greeted and asked if she came to vote, to participate in the winter carnival, or both. (Tr. 28, 50-51). She did not have a child with her and observed many Seniors at the event. (Tr. 30, 33). At trial, Hudson commended RCCSD for making "great effort to have activities to involve parents and children and grandparents." (Tr. 40; JX-301).

Plaintiffs now concede that the only "benefit" of FFEs, with the exceptions of Baltz and Richardson Park, was the "intangible reward" of spending time in a positive atmosphere. (OB at 45). Plaintiffs cite no authority for the

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50 Plaintiffs contend that Red Clay did not monitor parking at the schools that were polling places. (OB at 19). To the contrary, Ammann testified that he communicated with the custodians at the various schools to monitor the parking spots. (Tr. 632-33). Daugherty likewise confirmed that Red Clay requires its chief custodians to work with DOE in making parking available. (JX-325 at 18, 29-30, 205).

51 *In re Watertown*, 628 N.W.2d 336.

proposition that a "positive atmosphere" constitutes a burden on the right to vote. Indeed, it would seem anomalous that a school district's effort to impress its constituency with the value of the education it is providing could be seen as a burden of any kind.

With regard to Baltz, it is not disputed that pizza was available at the FFE. There is no credible evidence that attendees were required to vote and certainly no evidence that they were required to vote in favor of the Referendum as a condition to attendance. At Richardson Park, students who attended the FFE with an adult received a uniform pass. There was no requirement, however, that the adult vote in favor of the Referendum. Such minor actions, isolated to two schools, do not constitute a severe restriction on voting.[52]

3. RCCSD Has a Legitimate Interest in FFEs

RCCSD, like other districts in the state, holds FFEs throughout the school year for the benefit of students, faculty, Parents, and the community at large. (Tr. 40, 595). These events further several legitimate interests. (Tr. 598-600). First, they serve to showcase and highlight the accomplishments of the schools, which is critical to developing and maintaining the community's confidence. (Tr. 41). Second, FFEs further the educational purpose of engaging

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[52] *Crawford*, 553 U.S. at 200; *Ohio Dem. Party v. Husted*, 834 F.3d 620 (6th Cir. 2016).

parents and grandparents of students with school faculty and staff. (Tr. 599-600). Third, under the Limited Advocacy principle, RCCSD has an interest in advocating in connection with its core mission. (Op. at 107).

Given Plaintiffs' failure to meet their burden to prove that any of the challenged conduct affected the outcome of the Referendum, *see* Section IV, the Court should decline Plaintiffs' invitation to rule on whether an intangible benefit, such as FFEs alone, constitutes an unconstitutionally severe burden on the right to vote. As this Court noted in its Opinion, governmental entities, including RCCSD, have a limited right to advocate on issues that affect their core mission. (Op. 107-19). Whether FFEs alone constitute an unconstitutional burden on voting is not material to the outcome and should not be decided now.

B. Plaintiffs Failed to Prove that RCCSD Violated the Delaware Constitution

Plaintiffs cannot succeed on their claim under the Elections Clause unless they prove that Defendant's conduct affected the outcome of the Referendum.[53] (Op. at 127). Plaintiffs claim that RCCSD skewed the outcome of the Referendum through: (1) FFEs; (2) phone calls made by teachers and volunteers giving notice of how and when to vote; (3) automated calls to Parents on the day of the Referendum; and (4) RCCSD's "stealth media campaign." (OB

[53] *See also* Section I(B), *infra*, and cases cited therein.

at 44). They also contend that RCCSD violated the Anti-Electioneering Statute and conclude that a violation of that statute also is a *per se* violation of the Delaware Constitution. (OB at 44-48). As discussed in Section IV, below, Plaintiffs failed to prove any of those actions affected the outcome of the Referendum.

1. Pre-Election Calls Are Protected By the Limited Advocacy Principle

Having failed to prove many of the allegations in their Complaint, Plaintiffs are left with the allegation that pre-election calls by Parents, teachers, and other volunteers constituted impermissible advocacy. As this Court explained, such claims are best analyzed under the Limited Advocacy principle. (Op. at 107-119). As shown on the call script, voters were not asked to vote yes in a particular way. Such advocacy falls within the principle, particularly in light of the contemporary standards noted in this Court's Opinion. (Op. at 115-19).

In addition, there is no evidence reflecting how many voters were reached by the calls or that they affected the Referendum. Agne testified that, unless done by properly trained and supervised professionals, he advises his clients that making such calls can do more harm than good. (Tr. 445, 476-77).

2. Automated Calls Were Protected by the Limited Advocacy Principle

In its Opinion, this Court concluded that Daugherty's and the principals' use of the automated messenger system to remind Parents to vote was likely to pass muster under the Limited Advocacy principle. (Op. at 124-25).

Trial testimony confirms that the use of RCCSD's automated messenger systems to inform families about the Referendum was reasonable and well within the Limited Advocacy principle. The script for Daugherty's call is neutral in content and tone. (JX-158; JX-159). A sample of the scripts sent to families in Dickinson shows that the message was likewise neutral in tone and content, advising voters of the voting times, polling places, and voter-eligibility requirements. (JX-223).

Hudson and Agne both agreed that such calls may be counterproductive. (Tr. 68, 445). Moreover, an opposition group dispatched approximately 5,000 automated calls on the day of Referendum, encouraging residents to vote against the Referendum. (JX-329 at 27).

3. There Was No "Stealth Media Campaign"

Plaintiffs' claim that RCCSD ran a "stealth media campaign" is particularly disturbing in light of the wealth of evidence in the record—including from each of Plaintiffs' own witnesses—that the Referendum was advertised to the public at large on multiple occasions. Each of Plaintiffs' witnesses testified that

they were aware of the Referendum through various media outlets. Plaintiffs failed to call a single witness to testify that they did not vote because they were not aware of the Referendum.

4. RCCSD Did Not Violate the Electioneering Statute

Plaintiffs argue that RCCSD engaged in illegal electioneering on the day of the Referendum because, they contend, FFEs were gatherings and the "Baltz Bear" sign was within 50 feet of "an entrance that was often used by voters." (OB at 48). DOJ, however, conducted an investigation and concluded that no electioneering had occurred.

Plaintiffs admit that FFEs are commonplace within Delaware's public-school districts and are regularly conducted in conjunction with school-tax referenda. (JX-203 at No. 30). Additionally, Lippincott, Lapham, and Robert Andrzejewski testified that FFEs are part of a long-standing practice throughout the state. (Tr. 362-64, 396-97, 522-23). As suggested in the Court's Opinion, this evidence of Delaware's custom and practice strongly supports the conclusion that the conduct was not unlawful under the statute. But, in all events, a violation of an anti-electioneering statute is not *per se* a violation of the Elections Clause.

IV. Plaintiffs Failed to Prove that the Referendum Results Would Have Been Different But For the Complained-of Conduct

The Referendum passed by 880 votes. (JX-178). Thus, for Plaintiffs to prove their Elections Clause claim, and for the Court to consider whether the Referendum should be invalidated, Plaintiffs must prove by clear and convincing evidence that, absent the complained-of conduct, the Referendum would not have passed. Or, put differently, that at least 881 voters would have voted against the Referendum but for RCCSD's actions. Even assuming that RCCSD acted as alleged, the evidence shows that a net of *one vote* less was cast in favor of the Referendum. Thus, Plaintiffs seek to have this Court invalidate the Referendum, thereby "disfranchising voters who are innocent of any wrongdoing," based on no more than inference and speculation without reference to facts and with disregard to the evidence in the record.[54]

A. Plaintiffs Put Forth No Direct Evidence that the Referendum Would Have Failed But For the Actions of RCCSD

At trial, Plaintiffs failed to present a single witness to testify that he or she would have voted against the Referendum but for some action by RCCSD. Not a *single witness*. Although Rebecca Young claims that she and her parents did not vote because of the lack of parking, she never testified that, had she voted, she would have voted *against* the Referendum. (Tr. 19, 4-24). Instead, she testified

[54] *State ex. rel. Wahl*, 64 A.2d at 405.

that she (and her parents) vote based on the merits of issue, *not* based on age or Parent status. (Tr. 20). The only other witness to testify that she did not vote due to parking was O'Neill-Hultberg, who testified that she would have voted *for* the Referendum.[55] (Tr. 94).

B. The Opinions of Plaintiffs' Experts Are Biased, Unreliable, Inherently Inconsistent, and Contradicted by the Evidence

In the absence of any direct testimony that RCCSD's actions affected the outcome of the Referendum, Plaintiffs are left to rely on the opinions of their expert witnesses. Peterson opined that Parents were more inclined to vote in favor of a school referendum, and that Seniors were more likely to vote against a school referendum based on their short-term, self-interested desire to avoid tax increases. (JX-328 at 24, 29-31). Hudson opined that FFEs and other so-called marketing activities in support of the Referendum brought "persuadables" out to vote. (Tr. 31-32, 44-46, 59, 61). Both concluded that RCCSD's activities "skewed" the voting pool. (JX-328 at 43; Tr. 45-46). These "opinions" are nothing more than a theory based on "conjecture, anecdote, conventional wisdom," speculation, and

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[55] In their Brief, Plaintiffs state that David Pickering's parents "stay[ed] home" because of a lack of parking. (OB at 18). Pickering *actually* testified that he told his parents he was going to try another school but that they did not want him to pick them up. (Tr. 73). In any event, the testimony is inadmissible hearsay and should, in accordance with the Court's Motion *In Limine* ruling, be stricken. (D.I. 137).

subjective beliefs and, even then, their theory is inherently contradictory and contradicted by the evidence in the record. (Tr. 412).

1. Plaintiffs' Experts Are Biased And Their Opinions Are Unreliable

Peterson and Hudson have personal interests in this litigation and, consequently, their testimony is biased and unreliable. Peterson recruited her friend, Rebecca Young and her parents to serve as plaintiffs, (Tr. 14-15; JX-328 at 45-46; JX-183). Peterson even testified that she was "happy" that RCCSD had been sued. (JX-328 at 46). These "expert witnesses" are not disinterested and whatever weight is afforded their testimony should be significantly discounted in light of these admitted and substantial biases.[56]

Putting aside their lack of independence, the record reveals that Peterson's and Hudson's opinions lack the requisite support and are therefore unreliable.[57] For example, neither witness attempted to parse out the effect of the various conduct they considered. Peterson testified that, in forming her opinion, she considered a variety of factors, such as the weather, the alleged lack of notice to voters (the so-called "stealth media campaign"), public-service announcements,

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[56] *Findelstein v. Liberty Dig., Inc.*, C.A. No. 19598, 2005 Del. Ch. LEXIS 53 (Del. Ch. Apr. 25, 2015).

[57] *See Minner v. Am. Mortg. & Guar.*, 791 A.2d 826, 843 (Del. Super. 2000) (the burden of the proffering party is to establish the "relevance, reliability, and admissibility by a preponderance of the evidence" of their expert's testimony).

signage, people in the lobby at polling places, parking, and FFEs. (JX-328 at 33-36). Some of those "factors" have been proven untrue. But, because neither Peterson nor Hudson attempted to assign any value to each factor or even distinguish them by lawful or unlawful, they do not help Plaintiffs meet their burden of proof. (Tr. 67-68; JX-328 at 71-78).

An expert, regardless of qualification, does not have "license to express *ipse dixit* rather than [a] properly supported expert opinion."[58] In forming their opinions, neither witness employed any scientific methodology, relied upon (or even reviewed) research, statistical data about voter behavior, or the voting-result data from the Referendum. (Tr. 66-67; JX-328 at 57-59, 70-72). Instead, they relied exclusively upon their experience running for state-wide political office. (Tr. 67; JX-328 at 25, 58-59). Their opinions are not those of an expert but those of individuals biased by their personal motivation, interests, and involvement, without any indication of reliability and, consequently, should be excluded.[59]

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[58] *Jones v. AstraZeneca LP*, No. 07C-01-420-SER, 2010 Del. Super. LEXIS 128, at *33-34 (Del. Super. Mar. 31, 2010).

[59] *Id*.

2. Plaintiffs' Experts' Opinions Are Inherently Contradictory and Wholly Unsupported

Plaintiffs' experts categorized potential voters as Parents and non-Parents, and included Seniors in the latter category. (Tr. 46, 61, 68; JX-328 at 31-32, 66). They opined that Seniors, as a class, vote against referenda because they are on a fixed income. (JX-328 at 30-31; Tr. 45). Yet, they admit that their opinions about voter behavior are mere generalizations. (Tr. 59; JX-328 at 61, 66). Plaintiff Rebecca Young contradicted the opinions of her own experts when she testified that she, as a Senior and non-Parent, *supports* public education. (Tr. 20, 7). In fact, when asked if she was the kind of referendum voter who voted based on her status as a Parent or non-Parent, she answered, "Good heavens, no, no." (Tr. 20). She also testified that her parents view educational referenda not based on whether or not they have children who attend school in RCCSD, but on the merits of the proposed referendum.[60] (Tr. 20).

Similarly, Peterson and Hudson each conceded that referendum voters vote on substantive considerations, such as whether they believe RCCSD is providing a good education, has supported its rationale for the requested increase, and has been a good steward of taxpayer funds. (Tr. 61-62; JX-328 at 66-68). And, in direct contradiction with their "expert" opinions, both witnesses conceded

[60] Such testimony is not being proffered for the proof of the matter asserted and is therefore not inadmissible hearsay. *See* Del. R. Evid. 803.

that many Seniors do *not* vote strictly in their economic self-interest. (Tr. 61-62; JX-328 at 66-68).

Plaintiffs' experts also admitted that some Seniors are grandparents of students and have the same voting motivations as Parents. (Tr. 32, 40, 42, 47; JX-328 at 66). Likewise, some Seniors also are Parents. (Tr. 61). Peterson and Hudson made no attempt to account for the effects of these allegedly conflicting motivations. (Tr. 61; JX-328 at 66).

Agne further highlighted the inherent contradictions in their opinions, pointing out that, on one hand, they claim that Parents are highly motivated to vote for the Referendum, but, on the other, they claim that those "highly motivated" Parents would not have come out to vote at all had they not been lured in by the FFEs. (Tr. 436). Plaintiffs' experts' testimony supports, rather than repudiates, Agne's testimony that the characterization of voting behavior as two dimensional (Parents for and Seniors against), is overly simplistic and incorrect. (Tr. 413).

3. Plaintiffs' Experts' Opinions Were Refuted at Trial

Agne refuted the fundamental underlying assumption in Plaintiffs' Experts' opinions that Seniors generally vote against a tax increase because it would be against their "short-term economic interest" when he testified that the idea that economic self-interest drives voting behavior has been disproven and is not an accepted principal in social science. (Tr. 430). Agne testified that what *is*

the single most important predictor of voter behavior is partisanship, which "would be much more significant than any demographic factor other than potentially race, which correlates very highly with partisanship." (Tr. 427, 432-33). Socioeconomic status, homeownership, crime, and perceived value are better predictors than whether a voter is a Parent or Senior. (Tr. 480, 433-34, 431). In his expert opinion, Agne could not conclude that status as a Parent or Senior would be in any way indicative of voter behavior. (Tr. 427).

Plaintiffs attempt to offer their own statistical acrobatics to prove that Seniors voted in lower numbers in the Referendum than in other elections. (OB at 20-22). These efforts are wasted because Plaintiffs must first prove that RCCSD prevented Seniors from voting. Plaintiffs have failed to do so. Nevertheless, the actual data shows that Seniors were, if anything, *overrepresented* in the Referendum vote. (Tr. 254). There is no statistical evidence that even suggests—nevertheless actually *proves*—that Seniors would have voted in larger numbers but for RCCSD's conduct. Plaintiffs' use of school-board-election data is inappropriate. There is no basis to believe that a school-board election is comparable to a tax referendum and Plaintiffs did not lay a proper foundation through an expert witness.

The voting results by polling place show that there is no correlation between the outcome of the Referendum and the percentage of Senior voters. (Tr.

415). The data shows that there is *no* correlation between the number of Senior voters and the outcome of the Referendum. (Tr. 419-20, 425). Further refuting Plaintiffs' experts' assumption that FFEs must have affected the outcome of the Referendum, Agne pointed out that absentee voters and voters at the two non-school polling places overwhelmingly voted in favor of the Referendum. (Tr. 440, 443-44). Notably, Agne explained, absentee voters tend to be older, thereby refuting the contention that Seniors vote against referenda. (Tr. 444-45).

Plaintiffs take particular issue with the FFEs at Baltz and Richardson Park. (OB at 7-9). Even if *all* votes (for and against) at those two schools were excluded, the Referendum would have passed by 792 votes. (JX-178). (*See* Op. at 73). Further, if, for each of the two schools, the number of *yes* votes was reduced by the number of Parents who voted (thereby making the patently unreasonable assumption that all Parents voted in favor of the Referendum), Plaintiffs still would fall short of meeting their burden by 505 votes.[61] (JX-178; JX-305). (*See also* Op. at 73).

4. Plaintiffs' Hypothetical Proves Nothing

Peterson's expert testimony included an answer to a hypothetical question from Plaintiffs' counsel postulating that registered Parents voted at 2.75

[61] 138 Parents voted at Baltz and 237 Parents voted at Richardson Park. (JX-305).

times the rate of other registered voters. (JX-328 at 43). Plaintiffs concede that this extrapolation yields a conclusion that 5,641 registered Parents voted in the Referendum, when, in fact, the actual number of parents is 3,985.[62] (OB, p. 22, n.9; Tr. 543). Plaintiffs thus now admit that the ratio of Parent registered voters to non-parent and non-guardian registered voters is 2 to 1. (OB at 22). The raw number proves nothing without testimony showing that it constituted an unusually high parent voter turn-out.[63] Further, the raw number does not establish that the ratio of Parents to non-Parents was attributable to any conduct by Defendant.

The hypothetical is misleading and does not support any conclusion helpful to Plaintiffs. The record shows that, at most, 3,985 of the 11,910 voters (34%) were Parents. (JX-305; JX-178). Likewise, there is no dispute that approximately 25% of the voters were Seniors. (Tr. 252-53; DDX-002).

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[62] Brian Rutter used a reporting tool to match Parent names to the Red Clay Referendum Voter List. (Tr. 541-42; JX-161). He noted that this figure likely overstated the actual number of Parents voting because if a name appeared on the Parents list and there were duplicates on the voting list, he counted all of the votes as being Parents even though only one of the multiple votes could have been by a Parent. In addition, the merged list (JX-306) includes the birth year of the voter taken from the Red Clay Voter File. (JX-161). JX-306 reveals 265 names with birth years between 1923 and 1955. Given that the age of someone born in 1955 would have been 60 at the time of the Referendum, it seems likely that most of these names were not Parents.

[63] The ratio is inaccurate also because it is based on registered, instead of eligible voters.

Accordingly, non-Parents (including Seniors) made up two-thirds of the actual voters. (JX-305; JX-178). If Plaintiffs were correct, that is, that non-Parents and Seniors are "likely" to vote against a tax referendum, the vote should have been close to two-thirds to one-third vote against the Referendum.

V. Plaintiffs Failed to Meet Their Burden to Prove that a Permanent Injunction Should Be Issued

Plaintiffs failed to prove that they will be irreparably harmed absent an injunction or that the balance of the equities weighs in favor of an injunction. Consequently, a permanent injunction should not be issued.

A. Plaintiffs Failed to Prove that They Will Be Irreparably Harmed Absent an Injunction

In their Brief, Plaintiffs tacitly concede that they will not be irreparably harmed if RCCSD is not enjoined from holding FFEs at polling places and engaging in limited-advocacy speech in future referenda because they admit that declaratory relief is sufficient to address any future conduct.[64] (OB at 46-47; 47, n.23). Consequently, Plaintiffs must persuade the Court that they will be irreparably harmed absent an injunction overturning the Referendum and invalidating the tax rate thereunder.

Plaintiffs offered no evidence of any irreparable harm that will befall them if the tax is collected. They state that "[d]eprivation of the right to vote is

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64 Of course, Defendant would comply with any final order.

always an irreparable harm."[65] Of course, RCCSD does not disagree with this principle in the abstract. However, Plaintiffs do not contend that they will be deprived of the right to vote absent an injunction. The Referendum has occurred. There is no law or threatened action that, absent a permanent injunction, would prevent Plaintiffs from casting their votes in future referenda. Injunctive relief is appropriate "only to prevent harm that is imminent, unspeculative, and genuine."[66]

B. Plaintiffs Failed to Prove that the Equities Weigh In Favor of an Injunction

Plaintiffs do not dispute that RCCSD would be effectively ruined if it had to return the taxes already collected and the tax rate rolled back.[67] Nor do Plaintiffs dispute Floore's testimony that RCCSD would be "gutted" if it were able to keep the taxes already collected but prohibited from collecting the tax in years to come. (OB at 1). If prohibited from collecting the final year of the tax increase, RCCSD would face a deficit of $18.5 million, requiring the elimination of virtually all of its non-staff expenses. (Tr. 681; 687-88; 75; 691-92). Massive cuts would

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65 OB at 49.

66 *H.F. Ahmanson & Co. v. Great W. Fin. Corp.*, 1997 Del. Ch. LEXIS 84, at *37 (Del. Ch. June 3, 1997); *Weldin Farms, Inc. v. Glassman*, 414 A.2d 500, 505 (Del. 1980); *Calagione v. City of Lewes Planning Comm'n*, No. 2814-CC, 2007 Del. Ch. LEXIS 157, at *9 (Del. Ch. Nov. 13, 2007) (internal quotations omitted).

67 *See, e.g., Cantor Fitzgerald, L.P. v. Cantor*, 724 A.2d at 587 ("It is also appropriate to consider the impact an injunction will have on the public and on innocent third parties.").

need to be made to curriculum, technology, books, performing arts, extra-curricular activities, substitute teachers, school-resource officers, personnel, maintenance, operations, and transportation. (Tr. 691-94).

1. The Refund Statute Would Cause Debilitating Fiscal Instability

Plaintiffs contend that, because they are not seeking a refund of the taxes already collected, RCCSD would not face financial ruin. As the Court noted at trial, this ignores the existence of 14 *Del. C.* § 1921(2) (the "Refund Statute"), which provides that a taxpayer who has paid school taxes in error may seek a refund by filing a sworn statement. (Tr. 698-702). The Refund Statute does not provide any further procedural instruction, nor does it provide for a time by which such refund requests must be submitted.

Thus, if the Court were to invalidate the Referendum as Plaintiffs request, RCCSD could be faced with a deficit of up to $44.9 million—an amount equal to 59% of its operating budget, even though 85% of its operating budget is fixed. (Tr. 680-81, 688). As a result, RCCSD would be unable to operate. (Tr. 695). Of course, RCCSD would have no way to know how many taxpayers might invoke the Refund Statute.[68] Such fiscal instability would constitute an

[68] *See* OB at 55, n.24. Plaintiffs seek to have the Court "take judicial notice" of a law-review article regarding class-action settlements. Judicial notice would not be appropriate. *See* Del. R. Evid. 201(b)(2).

unconscionably high burden not only to RCCSD but, also, to the community that it serves.

2. Even If a New Election Could Be Conducted Immediately, the Referendum Cannot Be Recreated

Plaintiffs' argument that a new referendum would be a viable way to proceed ignores the obvious realities of an election. As the Supreme Court of Connecticut explained, an election is essentially and necessarily a "snapshot" in time.[69] The election records the votes of the electors who voted on the day of the election, whether at the polling place or by absentee ballot.[70] And, because an election is a snapshot in time, it can never be duplicated.

As the *Arras* court recognized, voters "are motivated by a complex combination of personal and political factors that may result in particular combinations of votes."[71] Similarly, as Jill Floore explained, voting Parents especially have many reasons to vote for or against a referendum at any particular time and those reasons change over time. (Tr. 723-24). For example, if a Parent's child was not accepted to Conrad, the Parent may be highly unlikely to vote in

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69 *Arras*, 125 A.3d at 180.

70 *Id.*

71 *Id.*

favor of a referendum. However, now, two or more years later, that same Parent may not feel so strongly or vote on his or her "grudge." (Tr. 724).

In *Huggins v. Superior Court*, the Arizona Supreme Court discussed the significant problems inherent in the nullification of a contested election:

> A second election is costly, and the costs are not limited to the heavy fiscal expense of running an election another time. Some votes will be lost in a second election that were properly recorded in the first; these include voters who have died, voters who have moved, and voters whose interest in the office or electoral issue is too attenuated to pull them to the polls a second time. Additionally, there may be identifiable biases in second elections. Candidates with ready access to financing and with strong and continuing party organizations will be able to mobilize a second campaign in the short time available much more effectively than opponents who lack such advantages. Candidates with support concentrated among less active voters may be disadvantaged in a second election if such supporters do not turn out to cast ballots when only one office is at stake.[72]

The court went on to explain that "[t]hese costs and biases make us hesitant to nullify first elections automatically upon proof that the winner's margin of victory was exceeded by the number of illegal votes."[73] A "do over," as Plaintiffs seek

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72 788 P.2d at 84.

73 *Id.*

here, would necessarily result in a *different election* and would disfranchise all those who voted in Referendum.[74]

3. A New Referendum Could Not Be Held In Time

Contrary to Plaintiffs' contention that RCCSD merely needs to have another referendum prior to the start of the 2018 fiscal year ("FY2018"), this is not possible. First, the planning would need to occur well before the end of June 2017 to fund the FY2018 tax collection. (Tr. 705). RCCSD, like all public-school districts in Delaware, must, by May 15, notify teachers who will not be rehired the following school year.[75] Thus, a new referendum would have to be held prior to that time to enable RCCSD to determine which staff members would have to be let go in the event a new referendum did not pass.[76] Because a minimum of six months is required to plan a referendum, the process could not be initiated in time. (Tr. 704-05).

VI. Any Ruling Should Be Applied Prospectively Only

If the Court were to find a constitutional violation, its decision should be made to apply prospectively only. The Delaware Supreme Court adopted the

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74 *Arras*, 125 A.3d at 185.

75 14 *Del. C.* § 1410(a).

76 Even if the May deadline could be ignored (which, by statutory mandate, it cannot), a new referendum would have to occur prior to the end of June 2017 in order to fund the FY2018 budget. (Tr. 705).

test established by the U.S. Supreme Court in *Chevron Oil Co. v. Huson*, for determining whether a decision should be applied prospectively.[77] The *Chevron* analysis has been invoked in numerous cases across the country in which a court's decision would "lead to or necessitate tax refunds resulting from invalidation of a tax law under which taxes have been collected."[78] For example, in *Borough of Neptune City v. Borough of Avon-by-the-Sea*, the Supreme Court of New Jersey

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[77] *Stoltz Mgmt. Co. v. Consumer Affairs Bd.*, 616 A.2d 1205, 1210-11 (Del. 1992) (adopting *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971)). *See also GMC v. New Castle Cty.*, 701 A.2d 819, 822 (Del. 1997).

[78] *MAPCO Ammonia Pipeline v. State Bd. of Equalization & Assessment*, 494 N.W.2d 535, 538 (Neb. 1993) (Shanahan, J., dissenting). *See, e.g., Carrollton-Farmers v. Edgewood Indus.*, 826 S.W.2d 489 (Tex. 1992) (finding the retroactive effect of the decision would damage the school system in a manner that could not further the purpose of the constitution); *Metro. Life v. Comm'r of Dept. of Ins*., 373 N.W.2d 399 (N.D. 1985) (refusal to order a refund of an unconstitutional tax, since the state had relied on a tax system that had existed for decades and compulsory refunds would cause financial hardship to the state); *Foss v. City of Rochester*, 480 N.E.2d 717 (N.Y. Ct. App. 1985 (invalidation of a tax was prospectively applied to prevent the city from suffering an undue fiscal burden from tax refunds); *Bond v. Burrows*, 690 P.2d 1168 (Wash. 1984) (refusing to require refund of unconstitutional sales tax that would result in great financial and administrative hardship to the state); *Rio Algom Corp. v. San Juan Cty.*, 681 P.2d 184 (Utah 1984); *Salorio v. Glaser*, 461 A.2d 1100 (N.J.1983); *Strickland v. Newton Cty.*, 258 S.E.2d 132 (Ga. 1979) (decision invalidating sales tax was prospectively applied to avoid unjust results); *Soo Line R. Co. v. State*, 286 N.W.2d 459 (N.D. 1979) (notwithstanding that a system for taxing centrally assessed property was unconstitutional, the judicial decision declaring unconstitutionality of the tax system was prospectively applied to prevent chaos); *Jacobs v. Lexington-Fayette Urban Cty. Gov't.*, 560 S.W.2d 21(Ky. 1977) (invalidating an unconstitutional personal property tax, was prospectively applied lest there be a hardship on all citizens of local government and a chaotic disruption of services).

declined to give retroactive effect to its decision invalidating discriminatory beach-use fees because to do so "would only create hopeless practical confusion and some unfairness to the municipality and its taxpayers."[79]

Similarly, in *Gulesian v. Dade County School Board*, Florida's Supreme Court affirmed the prospective-only application of a ruling that a tax law was unconstitutional and upheld the trial court's decision not to order refunds on the tax levied. The court explained that $7.3 million "had been collected and expended for school purposes" and concluded that, to require refunds in small amounts to taxpayers "would impose an intolerable burden on the School Board; would result in great expense; further complicated its budgetary problems, and cause immense administrative difficulties."[80]

Consequently, to the extent any relief is awarded at all, it should be prospective, and not retroactive.[81] To the extent the referendum process causes concern, it is the purview of the Delaware General Assembly to address those concerns through the legislative process.[82]

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79 294 A.2d 47, 55 (N.J. 1972).

80 281 So.2d 325, 326-27 (Fla. 1973).

81 *See, e.g., State ex rel. Stabler* v. *Whittington*, 290 A.2d 659, 663 (Del. Super. 1972); *Kelley v. Mayor & Council of the City of Dover*, 300 A.2d 31,37 (Del. Ch. 1972).

82 *In re: Adoption of Swanson*, 623 A.2d 1095, 1097 (Del. 1993).

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that the Court enter judgment in its favor.

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