IN THE COURT OF CHANCERY OF 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.	)	

PLAINTIFFS' OPENING POST-TRIAL BRIEF

John W. Shaw (No. 3362)
Karen E. Keller (No. 4489)
David M. Fry (No. 5486)
Nathan R. Hoeschen (No. 6232)
SHAW KELLER LLP
300 Delaware Ave., Suite 1120
Wilmington, DE 19801
(302) 298-0700
jshaw@shawkeller.com
kkeller@shawkeller.com
dfry@shawkeller.com
nhoeschen@shawkeller.com

Richard H. Morse (No. 531)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF DELAWARE
100 West 10th Street
Wilmington, DE 19801
(302) 654-5326, ext. 103
rmorse@aclu-de.org
Attorneys for Plaintiffs

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Abbreviation	Term
"Baltz"	Austin D. Baltz Elementary School
"Brandywine Springs"	Brandywine Springs Elementary School
"Cab Calloway"	Cab Calloway School of the Arts
"FFEs"	family-focused events
"H.B. DuPont"	H.B. DuPont Middle School
"Heritage"	Heritage Elementary School
"Linden Hill"	Linden Hill Elementary School
"Marbrook"	Marbrook Elementary School
"McKean"	Thomas McKean High School
"North Star"	North Star Elementary School
"Op."	October 7, 2015 Opinion on Red Clay's Motion to Dismiss
"PTO"	parent–teacher organization
"Red Clay"	Red Clay Consolidated School District
"Referendum" or "the Referendum"	February 24, 2015 Referendum
"Richardson Park"	Richardson Park Elementary School
"Skyline"	Skyline Middle School
"Steering Committee"	Referendum steering committee
"Tr."	Trial Transcript

Preliminary Statement

This is a case in which a laudatory end—increased funding for schools—was achieved through unlawful means. In its zeal to obtain additional funds for education, Red Clay disregarded its obligation to comply at all times with the United States and Delaware Constitutions, regardless of its reasons for doing otherwise. Red Clay's Chief Financial Officer testified about the good Red Clay cannot do if the tax increase is voided, and Plaintiffs take no issue with her testimony. Tr. 690:24-693:2. But no matter how important a government agency's motives or worthwhile its goals, it must always adhere to the constitutions if ours is to remain a government of laws, not of men.

This Court should grant injunctive relief precluding Red Clay from collecting the additional taxes until and unless it prevails in a new, properly conducted referendum, and prohibiting Red Clay from repeating its constitutional violations in future referenda, if the trial evidence establishes that (1) Red Clay violated a constitutional provision, (2) "irreparable harm will result in the absence of an injunction," and (3) "the equities weigh in favor of issuing the injunction." *Harden v. Christina School Dist.*, 924 A.2d 247, 269 (Del. Ch. 2007).

Plaintiffs have proven all three elements. The trial evidence shows:

(1) Red Clay violated the United States and Delaware Constitutions. It used its control over 23 of the 25 polling places to discriminate in favor of the potential

voters it expected to support the tax increase, and against those it expected to oppose it, and to engage in electioneering during the Referendum. It also used its access to the parents and guardians of Red Clay students to employ impermissible targeted campaign speech and to enhance the opportunities for likely supporters to vote. These actions—which violated protections established to ensure free and equal elections—rendered the Referendum process fundamentally unfair.

(2) Red Clay's constitutional violations caused it to prevail in the Referendum—or, at the very least, made it impossible to determine whether Red Clay would have prevailed if it had not violated the law. That is irreparable harm that can only be remedied by voiding the Referendum and the tax increase.

(3) No matter how great Red Clay's need for additional funds, the residents of Red Clay may only be required to pay taxes that are approved by the voters in a legally conducted referendum. Governmental compliance with the law is an equity that outweighs all others.

Nature and Stage of the Proceedings

In October 2014, the Red Clay board decided to seek a tax increase to fund Red Clay's operating expenses. JX-324. It scheduled the statutorily required referendum for February 24, 2015, and Red Clay went to work on the campaign it believed it needed to win. *Id.*

Red Clay prevailed by a vote of 6,395 to 5,515. D.I. 139 at 4, ¶ 6. On March 10, 2015, the Board of Elections for New Castle County—lacking the authority to consider the types of election violations alleged by Plaintiffs—certified the result. *Id.*, ¶ 7; D.I. 34 at 1-2, 4. Plaintiffs filed suit on March 27, 2015. D.I. 1. Following decisions by this Court on motions to dismiss—granting the motion of the Board of Elections and denying Red Clay's motion (D.I. 34, 36)—and a period of discovery, a three-day trial was held from October 31, 2016 through November 2, 2016.

This is Plaintiffs' Opening Post-Trial Brief.

Statement of Facts

I. Red Clay Sought to Shape the Demographics of the Electorate in Its Favor

A. Red Clay understood that the key to prevailing was to increase voting by parents and guardians.

From the beginning of the Referendum campaign, Red Clay recognized that it was "at an extreme disadvantage[,]" Tr. 721:16-21, and it worked to shape the electorate by targeting its favored group of voters: parents and guardians of Red Clay students. It focused on parents and guardians because it believed they were more likely to support a school tax increase than others. This was confirmed by numerous fact witnesses, including Red Clay administrators and principals, the co-chair of the Referendum Steering Committee, and a Red Clay expert witness. *See, e.g.*, Tr. 497:24-498:6 (Richardson Park principal, Dr. Eric Mathis, stating "I

believe that if [parents] came out, they would vote yes."), 351:10-22 (Steering Committee co-chair Yvonne Johnson acknowledging, in connection with the events Red Clay held at all polling place schools during the Referendum, that she "wanted parents in the schools on the day of the referendum because [she] wanted them to vote" and she believed that "very few parents would oppose the tax increase"), 537:2-10 (Red Clay expert (and former superintendent) Robert Andrzejewski agreeing that "the purpose of the family friendly events in Red Clay was to get likely yes voters into the polling places"), 180:4-181:22 (Red Clay Public Information Officer Pati Nash agreeing that Red Clay "was targeting or prioritizing positive voters" with certain campaign efforts).

Red Clay's reasoning was supported by its pre-Referendum survey data, which showed that the overwhelming majority of parents who were contacted intended to vote "yes"—exactly as Red Clay expected. JX-303 (results from electronic survey of Red Clay parents); JX-87 (e-mail from principal of Skyline noting that parent calls yielded 66 expected "yes votes" and only 5 "no votes"); JX-99 (e-mail from secretary at Heritage to Ms. Johnson noting that parent calls had yielded 309 "yes votes"); JX-148 (e-mail to dean of Cab Calloway reporting that parent calls had yielded "9 definite yes votes" and "zero no votes"); JX-313 (e-mail from Ms. Johnson noting that "preliminary numbers we are getting from the schools look very positive").

B. Red Clay formed a district-led Steering Committee to communicate and implement its campaign strategy of increasing turnout of likely "yes" voters only.

Red Clay formed a Steering Committee comprised of district-level administrators, principals, teachers, and parents. JX-25 at D0002546 (PowerPoint slide listing committee members); JX-16 (e-mail from Red Clay Chief Financial Officer Jill Floore inviting potential committee members to first meeting); Tr. 324:15-23. The "core group" of the Steering Committee was its two co-chairs—Yvonne Johnson and Nate Schwartz—and three Red Clay administrators: Assistant Superintendent Ted Ammann, CFO Jill Floore, and Public Information Officer Pati Nash. *Id.*, 348:23-349:5. This core group "coordinated closely on every step of the referendum process." *Id.*, 349:6-8.

Red Clay's campaign strategy was presented at a Steering Committee meeting on November 6, 2014. Attendees were told that the plan was to "[i]nform and engage all parents" but avoid other voters. *See* JX-25 at D0002555 (campaign strategy slide advising to "[w]ork on the Yes not the No"). For example, one of the speakers gave the example of a senior citizen on a fixed income as a "no" voter with whom there was "no point" in engaging. Tr. 675:5-22. Consistent with that plan, Steering Committee co-chair Yvonne Johnson wrote to others on the core group that she believed the campaign would "not . . . reach out to [retired] folks as they could bring out the no vote." JX-310 at D008610.

All Red Clay principals were required to attend this November 6 meeting, where they were told that they "needed to have an event" on the day of the Referendum. JX-28; Tr. 114:3-15, 489:1-15. Each school was told to submit its plans for promoting the Referendum to Dr. Ammann using a district-created form. Tr. 351:1-12, 622:4-13; JX-307. Dr. Ammann would then review these plans, approve them (or request that the school make changes), and forward them to Ms. Johnson. Tr. 595:11-598:19; JX-307.

C. Red Clay held family-focused events to bring parents and guardians to the polls.

Every school that was a polling place did, in fact, hold at least one—and typically two or more—family-focused events ("FFEs") on the day of the Referendum. Tr. 625:15-21; JX-301. These were intended to bring parents and guardians into the schools to vote. JX-325, 203:2-10 (Superintendent Mervin Daugherty agreeing that the FFEs were "get out the vote events"); Tr. 351:13-19 (Ms. Johnson confirming that she "did not want any parents to come to an event and then leave without voting").

Ms. Johnson and Dr. Ammann testified that the goal of these events was to showcase the district's activities and educate parents and guardians about the Referendum (rather than an effort to induce favorable voters to come to the polls and reward them for voting). Tr. 346:4-20, 621:12-15. This testimony was refuted by the testimony of Dr. Daugherty and Ms. Johnson (quoted above), and also by

other evidence. For example, the Referendum plan approved by Dr. Ammann for Central School—the only Red Clay school that was not a polling place[1]—explains that its leadership would support FFEs at other schools (rather than hold its own) because it was "not a polling site." JX-307 at D0003716 ("Since we are not a polling site, I will support Stanton Middle school for any activities."); Tr. 622:14-623:10. Red Clay has offered no contemporaneous evidence that the FFEs—held on the day of the Referendum in every school where voting was taking place—were anything other than a get-out-the-vote effort to bring parents and guardians into the polling places.

D. The FFEs provided parents and guardians with rewards for voting.

The FFEs provided parents and guardians with inducements to go to the polls that were of no interest to others in the community. For example, Baltz held a "Pajama Jammie Jam"—a pajama dance party with pizza and raffles. Tr. 120:4-22, 125:4-15. Other evening events were similarly targeted to students and their families, including "Fall and Winter Sports Banquet," "Bedtime Stories," and "Winter Blues Beach Bingo." JX-301, Rows 24, 43, 45. Although some of these events may have been nominally open to the public, Red Clay did not expect them to attract anyone other than students and their families. JX-185 at 2:36 (interview

[1] *See* D.I. 139 at 8, ¶¶ 27-28; JX-307 at D0003716.

with Ms. Nash, who acknowledged that "I don't know [that people without children in the district] would have a desire to come to family bingo night"); Tr. 186:17-187:23. In fact, in the list of 75 FFEs provided by Red Clay, only three schools identified the "community" or "public" as part of their event's target audience: a high school drama production, a middle school musical showcase, and an elementary school arts concert. JX-301, Rows 21, 71, 75. Of the 375 estimated people who attended those three events, Red Clay could only identify three attendees who were not students, family, or friends. *Id.* And at least some events, like the Pajama Jammie Jam, were closed to the public altogether due to student safety concerns. Tr. 123:1-12, 145:9-146:8.

The FFEs themselves acted as rewards for parents and guardians who came to the polls, but some schools also offered tangible rewards in exchange for voting. One example is the "no-uniform" passes offered at Richardson Park. Each student who brought a "voting adult" would receive a no-uniform pass, which entitled the student to come to school out of uniform on a particular day of the school year. *Id.*, 491:17-24. There was no limit on how many passes a child could accumulate—if they brought four voting adults, they would receive four passes. *Id.*, 494:14-495:11; JX-108. These passes rewarded not only students, but also their families—as Dr. Mathis wrote before the Referendum, one of the no-uniform days would be picture day, providing "a chance for families to get their child's picture out of

uniform!" JX-108; Tr. 495:12-21. Likewise, families at Baltz were given "I Ate, I Voted, I Danced" checklists, which doubled as entry tickets for a raffle held at the end of the night. JX-275; Tr. 124:2-125:15. Although Baltz principal Kelly Penoyer denied that families were required to have all three boxes checked before they could enter the raffle, Tr. 127:1-7, community witness Annette McHugh testified that adults near the voting area were asking Baltz children whether their parents voted before they entered the line for free pizza. Tr. 302:19-303:4.

E. Red Clay's selective get-out-the-vote efforts encouraged and facilitated voting by parents and guardians.

Although Red Clay issued some non-partisan public notices (as required by statute) and sent its newsletter, the Red Clay Record, to the community at large, it focused the vast majority of its get-out-the-vote efforts on encouraging and facilitating voting by parents, guardians, and other likely favorable voters—often with no indication that this targeted campaign speech was originating from Red Clay administrators.

1. Red Clay's Telephone Campaign

To promote the Referendum, Red Clay coordinated a telephone campaign using a pro-Referendum script written by Public Information Officer Pati Nash. Tr. 208:9-11, 209:8-14; JX-311. The purpose of this campaign was to find "goal yes

vote[r]s and remind them to vote."[2] JX-24; Tr. 208:1-8. Many calls were made by teachers to the parents and guardians of their students, using call lists supplied by the district and the script from Ms. Nash. JX-91 (e-mail from Baltz principal Kelly Penoyer to her staff "asking that each homeroom teacher be responsible for making all initial phone calls to their homeroom"); JX-325, 142:12-145:12; Tr. 208:24-210:1. The initial calls were made by teachers with the expectation that "most parents will listen to what teachers have to say." JX-66; Tr. 498:13-20; *see also* JX-325, 143:4-7 (Superintendent Daugherty agreeing that the district felt that "individual teachers would be better able to connect with voters"). Some calls were also made by parent volunteers using the same district-provided script and call lists. Tr. 208:24-209:11, 337:2-338:1; JX-311 (e-mail from Ms. Johnson telling recipients to "ask your building leader if you do not have this [call] list"). Red Clay provided the call lists to these non-staff volunteers even though they contain personal details about Red Clay students and their families, which Red Clay was required to safeguard to ensure that the information was only used by Red Clay employees for authorized purposes. *See* D.I. 149 (stipulated order sealing trial exhibits).

[2] Each school polling place was given a goal vote count at the November 2014 parent leader meeting, which—as discussed above—all principals were required to attend. *See* JX-27 at D0002608; Tr. 636:5-8; *see also* JX-81.

Parents and teachers making calls were asked to identify themselves as volunteers and follow the script. JX-311 ("I'm a Red Clay (*parent, teacher, other*) AND volunteer")) (emphasis in original); JX-325, 146:12-147:4 (Superintendent Daugherty stating that "we encouraged them to follow the script"); *see also* Tr. 338:2-11 (Ms. Johnson testifying that "we didn't want people to just, you know, randomly make phone calls without instructions"). The script itself is explicitly pro-Referendum, instructing callers to ask parents and guardians to vote for the tax increase. JX-311 ("Can we count on you supporting Red Clay schools on February 24th?").

The contention that this campaign was designed to educate parents and provide them with factual information about the Referendum[3]—not to find likely "yes" voters and bring them to the polls—is refuted not only by Ms. Nash's testimony (quoted above), but also by the fact that only "yes" voters were given polling information. JX-311 (telling "yes" voters but not others "that polls are open from 10 a.m. to 8 p.m. and that you can vote at any Red Clay school"); Tr. 209:19-211:10. Callers were also asked to follow up with "yes" voters on the Sunday or Monday before the referendum "to remind the 'yes' voters to vote[,]" and were reminded not to "call back folks that said they are voting 'no'." JX-313 (e-mail

[3] *See, e.g.,* Tr. 337:10-338:1; JX-325, 118:17-119:19.

from Ms. Johnson to the Red Clay school board, administrators, principals, teachers, and parents).

2. Red Clay's Ghostwritten Media Campaign

Without disclosing its role, Red Clay used a social media campaign—including Facebook and Twitter accounts—to promote the tax increase. Although the Facebook and Twitter accounts were called "Red Clay Parents for Students" and "RedClayParents," respectively, JX-25 at D0002558, Ms. Nash ghostwrote much of the content with no attribution to herself or the district. Tr. 197:15-199:2; JX-106 (sending suggested posts to the parent leaders of the Facebook group, and forwarding copies to Dr. Ammann and Ms. Floore with a note that "we can send suggested snippets of information"). Ms. Nash also offered to ghostwrite and "fl[e]sh out" letters to the editor for parents to send under their own names to local newspapers. JX-103; Tr. 199:3-201:13. This lack of attribution was intentional: as Ms. Nash agreed, "it was more real and would resonate more [with] voters if it came from parents . . . ." Tr. 194:4-8.

3. Red Clay's Targeted Campaign Speech in Schools

Red Clay directed its principals and teachers to deliver targeted campaign messages to parents and guardians in various forms. For example, Ms. Nash asked principals to have their teachers include pro-Referendum fact sheets in their students' report cards because "report cards are one piece of mail that parents look

at right away." JX-86. Other promotional efforts in the schools included attaching "Vote" stickers to elementary school children on the day before the Referendum, having district employees and parents pass out "push cards" at the drop-off and pickup lines on the day of the Referendum, and sending letters directly from principals to parents and guardians asking them to vote "yes." Tr. 214:23-215:1, 490:11-18, 628:24-631:1; JX-227; JX-247. Red Clay schools also used their automated alert system to remind parents and guardians to come to the schools on the day of the Referendum. Tr. 121:23-122:12.

4. Red Clay's Targeted Campaign Speech at the FFEs

The district also engaged in pro-Referendum campaign speech at the FFEs themselves. The clearest example is the "vote yes" sign at Baltz, which was placed on a table near the main entrance by the principal, Kelly Penoyer, despite knowing that the entrance was often used by voters. JX-162; Tr. 133:11-134:23, 136:9-20.[4]

Dr. Mathis knew that he and his staff at Richardson Park could not ask parents to vote "yes," but said it was acceptable to recruit parents to be present at the polling places to tell other parents to vote "yes" and ask them to bring other "positive voters" to the polls. Tr. 500:16-501:1, 505:8-17. He also instructed his teachers to "mingle" with parents "to make sure they voted" and to "say how

[4] One voter testified that she used this entrance because it had a "polling place" sign outside the door and she saw the sign on her way to the voting area. Tr. 301:1-19.

passing the referendum will help children" because "having someone ask if they voted yet and telling the importance of the vote and how little time it will take to make a difference for students is important." JX-140; Tr. 505:8-17, 507:3-16 (further agreeing that "it is harder to say no to someone who is directly asking you, essentially, '[i]s your child important enough to take 5 minutes to vote?'"). Dr. Mathis wanted four to six parents to "help steer people to the auditorium lobby to vote and encourage them to vote yes," JX-108, and planned to encourage parents at Richardson Park's bingo night to call another adult to get them to vote because "no one wants to be the person who didn't at least try and call someone to come support the schools." Tr. 507:18-508:1.

Red Clay presented no evidence to suggest that these were the actions of two rogue principals. To the contrary, Dr. Mathis's recruitment of parents to promote the tax increase was consistent with the Steering Committee's efforts to drive pro-Referendum speech through parent volunteers. *See* Tr. 194:4-15, 198:6-199:2, 199:3-201:13. Likewise, Ms. Penoyer's placement of the "vote yes" sign at an entrance used by voters was approved by Dr. Ammann himself. Tr. 606:8-22 (testifying that he told Ms. Penoyer that the sign was "certainly more than 50 feet [away from the polling place]").[5]

[5] Dr. Ammann's advice is inconsistent with Red Clay's agreements with the Department of Elections (all of which he signed), which define the entire building

F. Red Clay addressed targeted speech to groups it expected to favor the tax increase and avoided provoking other groups.

When Red Clay voluntarily reached beyond parents and guardians, it focused on groups it believed were more likely to support the tax increase than others. For example, Red Clay promoted the Referendum with parents of future Red Clay students and recent Red Clay graduates. JX-50; JX-104. Ms. Floore also distributed an e-mail for educators who worked with student teachers at various colleges, telling them that the funds to be raised by the Referendum would "pay for the very positions you are training young professionals to enter." JX-120 at D0007905. It included a link so that Red Clay residents could easily request absentee ballots. *Id.*

Red Clay also specifically avoided drawing the attention of anyone in the community who was not viewed as part of the favorable group. JX-25 at D0002555 (describing Red Clay's strategy as "Work on the Yes not the No"); Tr. 203:16-204:3. For example, when Ms. Johnson expressed concern about a planned "bus trip to retired folks[,]" Ms. Floore reassured her that the bus trip would target "retired red clay educators who support us," not "random retirees." Tr. 352:13-354:13; JX-309 (Ms. Floore further responding that she "wanted to make sure you knew we weren't going rogue").

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as the "polling place." JX-282 ("We hereby agree to permit the above named building to be used as a polling place . . . ."); Tr. 398:24-399:2.

Likewise, Ms. Nash avoided publicizing the Referendum in certain media outlets because Red Clay wanted to avoid triggering a public debate on the tax increase. Tr. 201:14-202:23 (testifying that Red Clay stayed away from certain forums to avoid alerting "no" voters), 217:21-219:7 (testifying that the Steering Committee decided against having residential yard signs to avoid alerting "no" voters to the Referendum), 219:8-220:16 (agreeing that she refused to appear on a specific talk show that she perceived as having an "anti vote" audience).

Plaintiffs do not dispute that Red Clay published the statutorily required notices in local newspapers and sent two issues of the Red Clay Record that included discussion of the Referendum to residents of the district. *See* JX-271; JX-280; JX-281; 14 *Del. C.* § 1074(b). But those public notices were infrequent and limited, particularly when compared to the extensive, targeted campaign speech discussed above. Again, this was intentional: Red Clay always intended to focus its campaign on likely "yes" voters and avoid sparking a public debate that could bring out the "no" vote. JX-25 at D0002555; Tr. 201:14-202:23, 217:21-219:7, 219:8-220:16, 221:12-22, 352:4-354:14. That Red Clay engaged in some limited efforts to publicize the Referendum more broadly does not change the fact that it directed most of its campaign speech toward parents and guardians of students in the district.

G. Red Clay's efforts to target its favored voters hindered access to the polling places for everyone else.

Red Clay's targeted campaign worked: thousands of students and their family members attended FFEs at schools across the district, with many evening events drawing hundreds of people.[6] JX-301, Rows 5 (301 people at Baltz from 6:00-8:00 PM), 40-41 (200 people at Heritage from 5:30-7:15 PM); Tr. 499:8-10 (300 adults attended bingo night at Richardson Park). The FFEs also had the effect of hindering access to the polling places.

Plaintiffs presented evidence of parking congestion at eight different schools from eight witnesses, along with evidence that this congestion prevented would-be voters from casting their ballots. For example, Plaintiff Rebecca Young twice attempted to vote with her elderly, mobility-impaired parents at North Star—once around 10:00 AM (when the polls opened) and again around 3:00 PM. Tr. 7:18-10:14. Both times, she arrived to find that every parking spot was taken—including handicapped spaces—which prevented her from parking close enough to the school to enable her parents to walk to the polls. *Id.* She did not feel it was safe to leave them in the car while she parked away from the school and walked back, so none of them voted. *Id.* Other Red Clay community members reported full parking

[6] According to Red Clay, at least 6,383 people attended the FFEs, and this figure does not include attendees at the 20 events whose attendance is listed as "Unknown." *See* JX-301, Column E.

lots and problems parking at seven other schools. *Id.*, 96:20-97:21 (Mary Fitzpatrick at Linden Hill), 73:13-16, 74:3-13, 74:22-75:1 (David Pickering at H.B. DuPont, Skyline, and Marbrook), 163:12-164:24 (Sean Boyle at Brandywine Springs), 529:16-20 (Elizabeth LaSorte at Baltz), 89:7-90:10 (Mary O'Neal at Marbrook), 34:10-36:18 (Deborah Hudson at Marbrook), 148:19-149:7 (Russell Schnell at McKean). The lack of available parking prevented Ms. O'Neal from voting at Marbrook and caused Mr. Pickering's handicapped parents to stay home instead of voting at H.B. DuPont. *Id.*, 73:17-74:2, 90:14-16.

Red Clay—which had employees at every school that was a polling place—presented no evidence showing that the parking situation at other schools was any better, and its witnesses who were presumably intended to give contradictory testimony did not do so. Richard Langseder testified that he had no difficulty voting at North Star around 1:30 PM. *Id.*, 231:19-232:5. But that was not when the Youngs made their two attempts to park, and Red Clay presented no evidence that North Star was holding an FFE at that time. *See* JX-301, Rows 54-60 (showing the times of all North Star events as "Unknown"). Similarly, Red Clay presented no evidence that an event was taking place when Jill Floore voted at North Star at 10:00 AM. *See id.*; *see also* Tr. 676:16-677:12. Finally, while Yvonne Johnson testified that she visited six schools on the day of the Referendum, Tr. 340:12-345:13, Red Clay's evidence shows only one event (with 23 attendees) at those

schools while she was present. *See* JX-301, Rows 18-20 (no daytime event at Cab Calloway), 48 (event drawing 23 people at Marbrook), 32-33 (times unknown for both events at H.B. DuPont), 7-17 (no known event at Brandywine Springs from 3:00-4:30 PM), 45 (evening events at Linden Hill were just beginning when Ms. Johnson left around 6:15), 54-60 (times unknown for all events at North Star).

Red Clay also did not comply with its obligation to monitor voter-only parking spots to ensure they were not taken by parents who voted and then stayed for the FFEs. *See* Tr. 404:6-12. Dr. Ammann said he would have told the building custodians to monitor the designated voter parking spaces, Tr. 632:6-633:1, but that testimony directly conflicts with that of Red Clay Superintendent Mervin Daugherty, who testified that the district is "not supposed to monitor" voter-only parking spaces to ensure that they are not used by parents attending the FFEs. JX-325, 205:5-19. Moreover, Dr. Ammann's practice for communicating with employees regarding an action to be taken at every school was to use e-mail, *see, e.g.*, JX-145 (e-mail to Red Clay staff regarding sign placement for the Referendum); JX-157 (email to all Red Clay principals regarding Referendum signage rules), and Red Clay did not present any e-mails showing that Dr. Ammann told custodians to monitor the voter-only parking spaces.

II. Red Clay Succeeded in Shaping the Demographics of the Electorate as It Intended

By conducting a campaign designed to bring parents and guardians to the polls (and, in the process, hindering access for other voters), Red Clay changed the demographics of the electorate. In addition to the testimony of community witnesses who saw the polling places filled with students and their families throughout the day, the data produced by Red Clay shows that (1) parents and guardians voted at a higher rate than other voters, and (2) senior citizens comprised a smaller percentage of the electorate than they did in comparable elections.

A. The data produced by Red Clay shows that parents and guardians voted at much higher rates than other voters.

The data produced by Red Clay shows that the voting rate for parents and guardians who were registered voters was 2 to 3.8 times the rate of other registered voters. There were 93,905 active registered voters in Red Clay on the date of the Referendum. *See* JX-207. During discovery, Red Clay produced partial "call lists" from four different schools, which identified the parents and guardians of the children on the lists. JX-33, JX-34, JX-63, JX-111. The call lists contained the names of 1,849 students and 2,660 parents and guardians, of whom 757 (or 28.5%) were registered voters who voted in the Referendum. JX-279. Extrapolating from this data—along with Red Clay data on the districtwide number of students and publicly available data from the Department of Elections—Plaintiffs calculated the

voting rates of registered voters who were, and were not, parents and guardians. *See* D.I. 109. After the Court denied Red Clay's motion *in limine* to preclude Senator Peterson from giving trial testimony referring to that calculation (D.I. 104, 113), Red Clay produced additional information: a list identifying all 19,793 parents and guardians, and a list of 3,985 parents and guardians who voted in the Referendum. JX-305; JX-306. 3,677 of the 3,985 were registered voters.[7] JX-305.

Red Clay's list of parent and guardian voters shows that 92.3% were registered voters. JX-305 (3,677/3,985 = 92.3%). If the percentage of parents and guardians who were registered was the same as the percentage who voted, then the 19,793 parents and guardians in Red Clay included 18,269 active registered voters (92.3% of 19,793). Accepting Red Clay's evidence that 3,677 of the 11,300 registered voters in the Referendum were parents and guardians (so that 7,623 were not), basic arithmetic shows that registered parents and guardians voted at twice the rate of other registered voters.[8]

[7] Red Clay's data expert, Eric Rutter, recognized that the list of parents and guardians did not list all who voted because it only includes exact matches (and misses, for example, last names that were hyphenated in one list and not hyphenated in the other). Tr. 553:6-9, 556:7-17.

[8] 20.13% of registered parents and guardians voted in the Referendum (3,677/18,269). 10.08% of other registered voters voted in the Referendum (7,623/75,636). 20.13/10.08 = 1.997. The calculations are based on registered voters—although non-registered voters may vote in school referenda—because the total number of unregistered voters in Red Clay is unknown, so their voting rate

This calculation understates the amount by which the voting rate of parents and guardians exceeded the rate of others who voted, because it is based on an understatement of the number of parents and guardians who voted. Using Plaintiffs' Rule 1006 Summary of Call List Voter Data (JX-279), which is not limited to exact name matches, shows a ratio of 3.8:1.[9] But whether the ratio is 2 to 1, 3.8 to 1, or something in between, the data shows that parents and guardians voted at a much higher rate than other eligible voters.

B. Senior citizens comprised a smaller percentage of the electorate than would have been expected from other elections.

The descriptions of the schools teeming with parents and guardians during the FFEs[10]—coupled with the greater voting rate of parents and guardians (who generally are not seniors)—indicate that Red Clay was successful in changing the

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cannot be determined. All but 610 of the 11,910 Referendum voters were registered. JX-161.

[9] Applying the voting rate for registered voters from the partial call lists summarized in JX-279 (28.5%) to the total number of parents and guardians in the district (19,793) indicates that 5,641 registered parents and guardians voted in the Referendum. Subtracting this number from the 11,300 registered voters who voted (JX-161) yields 5,662 non-parent and guardian registered voters. Subtracting the total number of registered parents and guardians in the district (18,269) yields 75,636 non-parents and guardians on the list of registered voters. This shows a voting rate for non-parent and guardian registered voters of 7.5% (5,662/75,636), which may be compared to the 28.5% voting rate for parents and guardians. 28.5%/7.5% = 3.8.

[10] *See, e.g.*, Tr. 28:11-29:1 ("[b]ig crowds"), 100:4-10 ("full of people"), 165:21-166:11 ("a lot of folks"), 302:7-14 ("a lot of children and noise and activities").

electorate so that elderly voters were a smaller percentage than they otherwise would have been.

Red Clay retained a statistician, Edward Ratledge, to dispute that conclusion, and he said there was no suppression of the elderly vote. Tr. 316:14-22. But the details of his testimony show otherwise. He used Referendum voter data to determine that 25.91% of registered voters who voted were 65 or older. *Id.*, 252:16-253:21. Because there was no data on other Red Clay referenda, he supported his conclusion by comparing this percentage to the percentage of voters in the 2012 presidential election who were 65 or older (26.5%). *Id.*, 257:6-11, 262:10-20, 263:17-264:7.

In performing his comparison, Mr. Ratledge disregarded voting rates from the 2014 mid-term election, even though he believed it was preferable to compare data that was closer in time, and he knew that the voting population older than 65 is generally higher in off-year elections than in presidential elections. *Id.*, 260:2-261:13, 265:10-18, 266:10-19. He had no plausible explanation for ignoring this data. Instead, he testified "I just don't recall." *Id*., 261:13.

When asked whether it sounded correct that approximately 33% of the Red Clay voters in the 2014 election were 65 or older, he responded: "[d]oesn't surprise me." *Id*., 267:4-9. Then, in response to the Court's question about the significance

of the 7% delta (26% to 33%), he indicated that he could not answer because of a lack of data. *Id*., 273:6-275:7.

However, Mr. Ratledge twice recognized the significance of a 7% delta. Shortly after indicating that he could not answer the Court's question, he testified that a referendum percentage of 25% with a comparison number of 32% "would give you some question" about whether there was suppression, even though the comparison number was not from a referendum. *Id.*, 277:16-23. Before trial, he was more definite. At deposition he was asked:

> If you look at the relevant other situation and you see that voters age 65 and older were 32 percent of the voters, and then you look at the Red Clay referendum and you see that 25 percent of the voters were—of the voters were 65 and older, your conclusion as a statistician is that something—you aren't saying what—skewed the vote away from older people; is that accurate?

Id., 279:23-280:8. He responded, "I think that's probably accurate[.]" *Id.* At trial, he did not deny giving that answer. *See id.*, 280:9-283:15.

Mr. Ratledge testified on his second day in court that senior citizens made up 33.7% of the electorate in 2014 and 32.31% of the electorate in 2010, compared to 26% in the Referendum. *Id.*, 315:4-316:13. Likewise, data from Red Clay Board of Education elections shows the percentage of voters 65 or older in those elections

to have been 31.63% in 2012, 31.65% in 2013, 30.42% in 2014, and 29.73% in 2015,[11] always at least 4% higher than in the Referendum.

The only election where the senior voting population was close to that of the Referendum was the 2012 presidential election. But as Mr. Ratledge acknowledged, the percentage of the voting population older than 65 is higher in off-year elections. Tr. 266:10-19. The fact that the senior percentage was not higher in the Referendum than in the 2012 presidential election provides one more reason to find that the effect of the parking congestion that prevented Ms. Young

[11] JX-6; JX-8; JX-13; JX-187. These calculations were performed using the method outlined in Mr. Ratledge's expert report and testimony. This method first requires sorting the list of voters by birth year and allocating the number of voters born in the 65th year before the election based on the day of the election. *See* Tr. 248:20-250:6. This yields the following table:

Election	**Total number of voters**	**# of voters born more than 65 years before election date**	**# of voters born in the 65th year before the year of the election**	**Fraction of the year occurring before that date**	**Total voters over 65**	**% of voters over 65**
2015 School Board	555	158	19	132/365 (.362)	165	29.73%
2014 School Board	572	167	19	133/365 (.364)	174	30.42%
2013 School Board	1719	529	42	134/365 (.367)	544	31.65%
2012 School Board	2735	843	64	129/366 (.352)	865	31.63%

and her parents, Ms. O'Neal, and Mr. Pickering's parents from voting, *id.*, 7:2-14, 73:17-74:2, 90:14-16, was not limited to them. Thus, Red Clay succeeded in shaping the demographics of the electorate.

III. Red Clay Prevailed by Shaping the Demographics of the Electorate

Three expert witnesses testified about the effect of Red Clay's Referendum campaign on the outcome of the vote. Two—experienced campaigners called by Plaintiffs—testified that Red Clay prevailed because of the FFEs and Red Clay's other actions at issue in this case. The third—a political consultant retained by Red Clay to rebut the testimony of Plaintiffs' experts—testified that he could neither confirm nor refute their conclusions. Tr. 447:17-24 (agreeing that he "basically had no idea whether or not" the passage of the tax increase was due to Red Clay's "get-out-the-vote activities and their effect on voters and potential voters").

Senator Karen Peterson testified by deposition. JX- 328.[12] At the time of her deposition, she had been a state senator for 14 years from a district that includes portions of Red Clay and two other school districts. *Id.*, 3:23-4:15. She had previously been president of the New Castle County Council for eight years. *Id.*, 4:16-21. In total, she was a candidate in seven elections, winning six times, and managed approximately eight other campaigns. *Id.*, 4:22-5:3, 7:4-9.

[12] She was away at the time of trial on a previously scheduled retirement trip. *Id.*, 44:2-6.

Senator Peterson explained that in any election, "you want to get people out to vote who will support the outcome you want." *Id.*, 27:8-28:7. Relatedly, candidates want to keep down the voting by people likely to support the opposition. *Id.*, 26:22-27:7. This applies to referenda, just as it does to contests between candidates. *Id.*, 27:8-28:7.

Senator Peterson also testified that someone seeking to obtain approval of the tax increase "would do everything in their power to get as many of the parents and guardians to the polls as possible, because they would be the people who would likely be voting for the referendum, because their children would be the beneficiaries of the outcome." *Id.*, 29:15-30:4.[13] This is what the FFEs accomplished. Some attracted parents directly. *See* Tr. 495:16-21, 498:21-499:1. Others were activities that children would want to attend—such as pizza parties and pajama parties—and by attracting children, they drew their parents into the polling places. JX-328, 24:6-21.

Noting that seniors tend to oppose tax increases, Senator Peterson also testified that parking difficulties at polling places would increase Red Clay's chances of success in the Referendum. *Id.*, 30:13-31:18, 33:22-35:3. Those who were likely to support the tax increase (parents and guardians of Red Clay

[13] She was explicitly *not* testifying about what is or is not legally permissible in that regard. *Id.*, 30:5-12.

students) would not have had the difficulties in physically accessing the polling places that elderly voters had. *Id.*

As a result of these facts, Senator Peterson concluded that the FFEs resulted in Red Clay's winning the Referendum. *Id.*, 40:6-9. She further explained why the combination of the FFEs and Red Clay's additional campaign activities had the desired effect: a "disproportional number of likely supporters of the referendum were able to vote as compared with those who would not be as likely to support the referendum." *Id.*, 40:10-41:7. She explained that "if luring the parents in, clogging the parking lots, having signs posted vote yes for your kids, which meant if you voted no, I guess you were voting against your kids, all of those things really served to lock out—to draw in their supporters and lock out those who would not likely be as supportive." *Id.*

Plaintiffs' other expert, Representative Deborah Hudson, has represented a district located mostly in Red Clay for the past 22 years and successfully run in 12 elections. Tr. 25:21-26:23. Leaving aside the legal questions that are for this Court, she testified that it would be logical for someone seeking to prevail in a tax increase referendum to want to increase voting by parents and guardians and to decrease voting by the elderly. *Id.*, 45:17-46:15. Based on her work over the years, she testified that the parents of students tend to support school tax increases and the elderly tend not to want those increases. *Id.*, 44:18-45:16.

As discussed above, Red Clay held FFEs in all school polling places during the Referendum in order to attract parents and guardians. Not only did the FFEs draw people into the schools, but, as Representative Hudson explained, they "increase[d] the likely event that more people will vote positive." *Id.*, 66:8-14. Representative Hudson found that the FFEs resulted in Red Clay's winning the Referendum, just as Red Clay intended. *Id.*, 46:16-22.

Red Clay, which had the resources to engage four expert witnesses, did not introduce contrary evidence. Karl Agne, who was retained to rebut Senator Peterson and Representative Hudson, *id.*, 424:23-425:3, could not do so. In addition to agreeing that he had "no idea" about whether "Red Clay won approval for the tax increase because of its get-out-the-vote activities and their effect on voters and potential voters," *id.*, 447:8-24, he testified that he had no "opinion on whether or not parents and guardians were more likely to support the tax increase than other voters," *id.*, 449:20-450:2, and "no idea how seniors might have voted on [the Referendum] one way or the other." *Id.*, 455:18-456:2.

In response to a question by the Court, Mr. Agne testified that he tried to create what he "thought was supportable, and there just wasn't much data available." *Id.*, 424:16-18. When asked why he had not prepared a scatter plot and regression line, he said that "[t]here were not enough variables to do a reliable

regression, because this is the only data we have available."[14] *Id.*, 421:2-20. He indicated that he might have been able to do that "[i]f there was more data available vis-à-vis percentage of parents . . . ." *Id.*

In fact, Red Clay had data showing how many parents and guardians voted at each polling place, which was prepared at Dr. Ammann's request by an employee at the technology center Red Clay operates with another school district. *Id.*, 538:10-14, 540:16-23, 546:4-14, 549:5-550:20; JX-305. But Red Clay never gave this information to Mr. Agne, so he could not compare it against the success at each polling place.[15] If it had, Mr. Agne testified that he could have used this data and a list of vote counts at each polling place to prepare a scatter plot. Tr. 465:4-19. He also testified that he could have used the data in JX-194 to prepare a scatter plot similar to PDX-2 ("No vote . . . v. Senior %"). *Id.*, 462:6-463:2.

Mr. Agne was the only witness in this case with the technical ability to look at the data and social science information to see if it was consistent or inconsistent with the conclusions of Senator Peterson and Representative Hudson. Yet Red Clay repeatedly spurned the opportunity to give him the data or to have him do the

[14] The document he was able to create, JX-194, lists for each polling place the percentage of voters older than 65 and the percentage of "yes" and "no" votes. *See* Joint Exhibit List at JX-194 (noting that this document was originally Exhibit A to Mr. Agne's report).

[15] During his direct examination, Mr. Agne identified all of the information available to him and never mentioned JX-305. *See* Tr. 447:1-7.

social science research. This left unchallenged the testimony of Senator Peterson and Representative Hudson—based on their knowledge of voter preference with regard to school tax referenda from years of interacting with senior citizens and parents and guardians of children in the district—that the FFEs and Red Clay's other campaign activities affected the result.

IV. Absent Judicial Action, Red Clay Will Employ the Same Campaign Strategy in Future Referenda

Red Clay will continue to conduct tax referenda—either to reinstate the $0.35 increase if the Referendum result is voided, or for additional increases if it is not. Tax referenda are a fact of life for Delaware school districts. Tr. 645:2-647:7 ("It's inevitable."). And Red Clay has given every indication that it will repeat the conduct that led to this action when it faces the next one.

Long before the FFEs became a litigation issue, Red Clay's superintendent wrote legislators that he was "proud of the Referendum campaign we ran" and that "[g]et out the vote activities were planned at our schools on February 24 as they have been for every referendum." JX-176 at D0014657-76. The trial testimony was consistent with this letter. Red Clay views each referendum as an "uphill battle[,]" and its CFO testified that "using every available opportunity to get voters is important." Tr. 721:8-722:14.

Dr. Daugherty's statements and Ms. Floore's testimony show that the next time Red Clay believes it needs more local money to provide good education, it will, if left to its own devices, repeat the actions that led to its success in 2015.

Questions Involved

1. Did Red Clay violate the Equal Protection Clause of the Fourteenth Amendment by favoring parents and guardians of Red Clay students in the Referendum?

2. Did Red Clay violate the Equal Protection Clause by disfavoring the elderly and persons with mobility disabilities?

3. Did Red Clay violate the Due Process Clause of the Fourteenth Amendment because the FFEs and its other actions to shape the demographics of the electorate rendered the Referendum fundamentally unfair?

4. Did Red Clay violate Article I, § 3 of the Delaware Constitution (the "Elections Clause") by holding the FFEs, using confidential information and its relationship with students to conduct selective get-out-the-vote efforts, and electioneering in the schools?

5. Did Red Clay's violations affect the result of the Referendum, or were they so pervasive that it cannot be reasonably determined whether Red Clay would have prevailed without the violations?

6. Will irreparable harm result from Red Clay's constitutional violations if it is permitted to continue levying the higher tax rate without prevailing in a new referendum?

7. Will irreparable harm result if Red Clay is not prevented from repeating its illegal conduct in future referenda?

8. Does the balance of the equities weigh in favor of issuing an injunction?

Argument

I. Red Clay Violated the Equal Protection Clause of the Fourteenth Amendment by Favoring Families with Children and Disfavoring the Elderly and Disabled

A. Legal Standards

Voting is a fundamental right safeguarded by the Equal Protection Clause. *Bartlett v. Strickland*, 556 U.S. 1, 10 (2009) (describing the right to vote as "one of the most fundamental rights of our citizens"); *Dunn v. Blumstein*, 405 U.S. 330, 352 (1972).

Consideration of an equal protection claim begins with a determination of the appropriate level of scrutiny. *See* Op. at 77 (citing *Belitskus v. Pizzingrilli*, 343 F.3d 632, 643 (3d Cir. 2003)). The "rigorousness of [the] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens" the rights in issue. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). When

the "rights are subjected to 'severe' restrictions,[16] the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" *Id.* (citation omitted). If "a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id.* (citation omitted).

There is no "litmus test for measuring the severity of a burden that a state law imposes on a political party, an individual voter, or a discrete class of voters." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008). "However slight that burden may appear, . . . it must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" *Id.* (citation omitted).

When restrictions "'have discriminatory effects, there is increasing cause for concern that those in power may be using electoral rules to erect barriers to electoral competition.'" Op. at 86 (quoting *Clingman v. Beaver*, 544 U.S. 581, 603 (2005)). "Where the facts suggest discriminatory intent, the state's intervention is more likely to be viewed as imposing a significant burden." *Id.* The burden may be imposed by making it harder for one side, or easier for the other side, to prevail in the election. *See* Op. at 87.

[16] I.e., if the restrictions "go beyond the merely inconvenient." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 205 (2008) (Scalia, J., concurring).

In denying Red Clay's motion to dismiss, this Court tentatively recognized that "providing rewards designed to appeal to a particular segment of the electorate" is "discriminatory conduct that severely burdens the right to vote." Op. at 17, 87. This observation follows from the general principal that under the Equal Protection Clause, a "selective incentive . . . encounter[s] the same constitutional barrier" as a selective burden. *Hooper v. Bernalillo Cty. Assessor*, 472 U.S. 612, 619 n.8 (1985). Even benign and non-partisan aid given to distinct voter groups requires justification when it is denied to other distinct groups. *See, e.g.*, *Harlan v. Scholz*, No. 16 C 7832, 2016 WL 5477103, at *4 (N.D. Ill. Sept. 27, 2016) (preliminarily enjoining implementation of a law that would require urban counties to provide same-day voter registration, but not requiring low-population counties to do the same, noting that "[t]he equal protection under the United States Constitution does not disappear or evaporate just because a legislation might be a benefit to certain United States citizen voters in a certain geographic area"); *Garza v. Smith*, 320 F. Supp. 131, 137 (W.D. Tex. 1970), *vacated on other grounds*, 401 U.S. 1006 (1971) (holding that a statute allowing blind and other disabled persons to have an assistant in the voting booth, but not extending the same allowance to illiterate voters, violated the Equal Protection Clause). Creating a disadvantage for a distinct voter group also violates the Equal Protection Clause. *See, e.g.*, *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) (affirming entry of a

preliminary injunction enjoining enforcement of a statute that imposed a shorter early voting period for non-military voters, finding that the state "proposed no interest which would justify reducing the opportunity to vote by a considerable segment of the voting population").

When "broad-gauged unfairness [] infect[s] the results of a local election[,]" it is a violation of both equal protection and due process. *Griffin v. Burns*, 570 F.2d 1065, 1078 (1st Cir. 1978) (voiding election on due process grounds where new interpretation of absentee ballot provisions unfairly prevented numerous votes from being counted); *Ury v. Santee*, 303 F. Supp. 119, 126 (N.D. Ill. 1969) (voiding results of election on both due process and equal protection grounds where the government reduced the number of polling places shortly before the election, resulting in long lines). By using its control over its employees and the polling places to offer aid and rewards to its favored voters that were unavailable to—or unwanted by—the public at large, Red Clay engaged in the type of broad-gauged unfairness forbidden by the Fourteenth Amendment.

B. Red Clay's selective get-out-the-vote efforts and FFEs benefited the members of one group and imposed a severe burden on the members of another group.

1. Red Clay Burdened and Benefited the Voting Rights of Different Identifiable Groups

Parents and guardians of Red Clay students are an identifiable group, as are non-parents and guardians (including the elderly and disabled). Red Clay violated

the equal protection rights of persons other than parents and guardians in two ways. First, by using the FFEs to provide benefits at the polls that were only of interest to parents and guardians, Red Clay imposed a severe burden on others, particularly the elderly and disabled. Second, Red Clay's selective get-out-the vote efforts enhanced the participation of parents and guardians to the disadvantage of other voters. *See* Statement of Facts, Section I(A), (B), *supra*.

The FFEs provided parents and guardians with rewards for going to the polls that were of no interest to others in the community. *See id.*, Section I(D). With extremely limited exceptions, they were not open to anyone other than students and their families, and Red Clay did not expect them to attract others. *See id.*

All of the FFEs acted as rewards for parents and guardians who came to the polls. *See* JX-301. Some also provided tangible rewards, such as the no-uniform passes given at Richardson Park for students who brought voting adults, Tr. 491:17-24, and raffle tickets and pizza at Baltz. JX-275; Tr. 124:2-125:15, 302:19-303:4.[17]

[17] That this reward was intended only for voters Red Clay expected to support the tax increase is shown by the testimony of Ms. McHugh, who testified that her son, who was with her when she voted, was not offered pizza. He was wearing a Catholic school shirt, so it appeared his mother was not a Red Clay parent or guardian. Tr. 303:12-304:1. Similarly, Richardson Park principal Eric Mathis stated in an e-mail that he had worded his invitation to a free lunch on election day to avoid bringing in "people who were just there for that and probably wouldn't even vote[.]" JX-150.

The selective get-out-the-vote efforts and FFEs burdened all other voters, especially the elderly and disabled, by packing the polling places and parking lots with parents and guardians. Some—including the Youngs, Ms. O'Neal, and Mr. Pickering's parents—were unable to vote at all. Tr. 7:2-14, 73:17-74:2, 90:14-16. Others were forced to circle the parking lot until they found a spot; one witness had to drive to three different schools before he could park and vote. *Id.*, 34:10-45:8, 73:13-16, 74:3-13, 74:22-75:1, 96:20-97:21, 148:19-149:19, 163:12-164:24, 529:16-530:1.

The burden created by Red Clay's selective get-out-the-vote efforts and FFEs was not an isolated burden that affected only a few voters, nor was it a minor inconvenience. Plaintiffs presented unrebutted evidence of parking congestion at eight different schools. *See* Statement of Facts, Section I(G), *supra*. And despite having employees at every school, Red Clay presented no evidence that the parking situation was better at other schools during the FFEs. Its failure to do so leads to the conclusion that the situation was at least as bad at those schools. *Cf. Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1118 n.7 (Del. 1994).

2. These Discriminatory Burdens Were Intentional

From day one, Red Clay's goal was to appeal to "yes" voters and avoid "no" voters. *See* Statement of Facts, Sections I(B), (C), (E), (F), *supra*. "Yes" voters were anyone Red Clay identified as likely to vote in favor of the tax increase—

primarily the current and future parents of Red Clay students, but also recent Red Clay graduates, student teachers, and retired Red Clay educators. *Id.* "No" voters were everyone else—including senior citizens. *Id.*, Sections I(B), (E), (F); *see also*, *e.g.*, JX-309 (CFO Jill Floore confirming that the Steering Committee would not be reaching out to "random retirees"); Tr. 675:5-22 (recalling discussion at the first Steering Committee meeting that there was "no point" in talking to a senior citizen on a fixed income). The FFEs and selective get-out-the-vote efforts achieved exactly what Red Clay intended: enhanced participation by likely "yes" voters and suppression of likely "no" voters. Statement of Facts, Section II, *supra*.

C. The interests advanced by Red Clay are not sufficient to justify the discriminatory burdens imposed on non-parent and guardian voters.

Once a court has "consider[ed] the character and magnitude of the asserted injury[,]" it "must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed . . . ." *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). In doing so, "the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.*

Red Clay has advanced two interests for its selective get-out-the-vote efforts and FFEs: (1) educating parents and guardians about the Referendum, and (2) showcasing the district's activities. Def. Pretrial Br. (D.I. 132) at 12; Tr.

181:11-18 (Ms. Nash testifying that the district intended to "put out general information to the community"), 346:4-20 (Ms. Johnson testifying that "the purpose of the family events" was "to prove to the community [what] we're doing for our children" and "showcase your things and your school").

The evidence shows that these justifications are pretextual. The purpose of these campaign activities was to bring favorable voters to the polls to pass the tax increase. Tr. 351:13-352:3, 624:6-625:6; JX-325, 203:2-10. Aside from the after-the-fact testimony of a few Red Clay witnesses, there is no evidence that these campaign activities were meant to educate parents and guardians about the Referendum or showcase the district's activities. *See* JX-301 (listing numerous activities with no apparent educational component).

But assuming that these were Red Clay's true interests, it could have achieved them without imposing discriminatory burdens on the right to vote. For example, Red Clay could have showcased the district's activities any time before the Referendum. Or, following the example of other school districts, it could have used some schools as polling places and other schools for FFEs. Tr. 533:18-536:11 (Red Clay expert Robert Andrzejewski acknowledging that the "standard get-out-the-vote events" he identified in the Smyrna and Caesar Rodney school districts were held in locations that were not polling places).

In fact, Red Clay took advantage of other opportunities to showcase the district's activities and educate parents. The night before the Referendum, Red Clay held a pep rally at Dickinson High School that all schools in the area were invited to attend. Tr. 206:18-207:24, 338:21-339:11, 589:10-21. That event showcased many of the district's activities, including band, choir, and cheerleading—"anything that a school wanted to highlight . . . ." *Id.*, 338:21-340:5. It also gave the district and its supporters one last opportunity to educate parents and guardians about the Referendum. *Id.*, 589:10-21 (Dr. Ammann describing the pep rally as "sort of a culminating activity of a lengthy period of time of sharing information").

Red Clay also had numerous other avenues available to educate voters without burdening anyone's rights. For example, as the evidence demonstrates, it could—and did—hold town halls, PTO meetings, and other events before the Referendum where parents, guardians, and anyone else could attend, ask questions, and voice their concerns. *See* JX-307 (identifying each school's plans "for the time leading up to the 2015 Referendum[,]" including "parent meetings, PTO meetings, community meetings, etc."); Tr. 589:22-590:8.

Regardless of whether the discriminatory burdens caused by Red Clay are found to be severe, they cannot withstand scrutiny under *Burdick*. If the burdens are found to be severe, they violate the Equal Protection Clause because they were

not "'narrowly drawn to advance a state interest of compelling importance.'" *Burdick*, 504 U.S. at 434 (citation omitted). And if they are not found to be severe, Red Clay still violated the Equal Protection Clause because the burdens had a discriminatory purpose—they enhanced the participation of one identifiable group (parents and guardians) and burdened the rights of another (non-parents and guardians, including the elderly and disabled). *See N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 222-23 (4th Cir. 2016).

There was no need for Red Clay to impose *any* burden on the ability of would-be voters to access the polls. These burdens are not justified by any "'sufficiently weighty'" "relevant and legitimate state interests[,]" and therefore the Court should find that Red Clay's actions violated the Equal Protection Clause. *Crawford*, 553 U.S. at 191 (citation omitted).

II. Red Clay Violated the Due Process Clause Through the FFEs, Selective Get-Out-the-Vote Efforts, and Electioneering

By using the FFEs and its selective get-out-the-vote procedures to shape the demographics of the electorate to its liking, Red Clay also violated the Due Process Clause of the Fourteenth Amendment.

The Due Process Clause bars the state from making the election process fundamentally unfair. *See, e.g.*, *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 478 (6th Cir. 2008) (affirming denial of motion to dismiss due process claims where plaintiffs alleged that the voting system at issue was "fundamentally

unfair"); *Griffin v. Burns*, 570 F.2d 1065, 1077-78 (1st Cir. 1978) ("a violation of the due process clause may be indicated" where an election process "reaches the point of patent and fundamental unfairness"); *see also Marks v. Stinson*, 19 F.3d 873, 889 (3d Cir. 1994) (endorsing Griffin's "conclu[sion] that rejection of a ballot where the voter has been effectively deprived of the ability to cast a legal vote implicates federal due process concerns").[18] Because the discriminatory burdens created by the FFEs and Red Clay's selective get-out-the-vote efforts rendered the Referendum fundamentally unfair, Red Clay violated the Due Process Clause in addition to the Equal Protection Clause.

III. Red Clay's Selective Get-Out-the-Vote Efforts, FFEs, and Electioneering Violated the Elections Clause of the Delaware Constitution

The Elections Clause states that "[a]ll elections shall be free and equal." Del. Const. art. 1, § 3. As this Court recognized, because of the breadth of the terms "free" and "equal"—and the dearth of case law applying the Elections Clause—it is useful to consider other Delaware statutory and constitutional provisions and longstanding doctrines of common law when interpreting the Elections Clause. Op.

[18] The *Griffin* and *Marks* courts faced a burden in addressing the unfairness that this Court does not have. They are federal courts, and therefore necessarily reticent to intervene where "a fully adequate state corrective process" is available. *See Griffin*, 570 F.2d at 1077. This Court, of course, is in a different position. In fact, only the Court can provide a state corrective process, since the General Assembly did not give the Department of Elections that authority. *See* D.I. 34.

at 96 & n.64. Applying that information to the record shows that Red Clay has engaged in widespread violations of the Elections Clause.

First, the citizenry is entitled to an election that will provide "'a full, fair, and free expression of the popular will upon the matter, whatever it may be, submitted to the people for their approval or rejection[.]'" Op. at 126 (quoting *Wallbrecht v. Ingram*, 175 S.W. 1022, 1026 (Ky. 1915)). An election is not free and equal when the government "skews the outcome of an election by encouraging and facilitating voting by favored demographic groups." Op. at 127. That is precisely what Red Clay accomplished through the FFEs, the scripted telephone calls by teachers and volunteers giving supportive parents and guardians notice of how and when to vote, automated calls to parents and guardians on the day of the Referendum, and Red Clay's stealth media campaign. *See* Statement of Facts, Sections I(C), (D), (E), *supra*.

Second, the Elections Clause prohibits Red Clay from providing anything of value as an inducement for voting. Article V, § 7 of the Delaware Constitution provides that "[e]very person who . . . pay[s], transfer[s] or deliver[s] . . . any money or other valuable thing as a compensation, inducement or reward for the giving or withholding, or in any manner influencing the giving or withholding, a vote at any general, special, or municipal election . . . shall be deemed guilty of a misdemeanor[.]" Similarly, 14 *Del. C.* § 1079 prohibits voting by any person who

"receives . . . any money or other valuable thing as a compensation, inducement or reward for giving or withholding or in any manner influencing the giving or withholding a vote at any public school election[.]"

Consistent with these prohibitions, this Court observed that "an election in which certain voters received money or other valuable things for their votes is not 'free and equal.'" Op. at 104. Through the FFEs, Red Clay provided parents and guardians with value to induce them to go to the polls and vote. *See* Statement of Facts, Sections I(C), (D), *supra*. Red Clay may not have required that a parent or guardian vote in a particular way, but that does not render its conduct permissible. The constitutional and statutory provisions reflecting the meaning of the Elections Clause prohibit not only rewards to influence a vote, but also rewards for the act of voting itself.

Some of Red Clay's incentives took the form of tangible rewards, like the no-uniform passes at Richardson Park or the pizza at Baltz. JX-108; JX-275; Tr. 124:2-125:15, 302:19-303:4, 491:17-24, 495:12-21. But all of the FFEs offered parents and guardians an intangible reward: the opportunity to spend quality time with their children and their children's educators in a safe, fun, family-friendly environment. The events created a positive atmosphere that would encourage parents and guardians to vote in favor of the tax increase, and Red Clay worked to ensure that they did not leave the event without voting. JX-325, 203:2-10; Tr.

351:13-23, 503:5-8. The FFEs also gave parents and guardians an extra incentive to put up with any parking difficulties they encountered.

To the extent that FFEs were open to adults not related to students, Red Clay knew they would not be interested in them. Tr. 187:13-23; JX-185. An election in which the government offers selective rewards to its favored group of voters is not free or equal. *See Smith v. Dorsey*, 599 So. 2d 529, 539-40 (Miss. 1992) (affirming lower court's ruling that holding a "fish fry" to promote a referendum went beyond "an unbiased, nonpartisan presentation of the facts").

Third, a purpose of the Elections Clause "is to ensure that the right of citizens to vote in an election is unfettered." *Abbott v. Gordon*, C.A. No. 04C-09-055 PLA, 2008 WL 821522, at *19 (Del. Super. Ct. Mar. 27, 2008) (citation omitted). Red Clay was obligated not to interfere with the "right of citizens . . . to have free and equal access to the polls[,]" *id.*, not to effectively deny the right to vote by making voting overly difficult, *see* Op. at 93 (citing *Asher v. Arnett*, 132 S.W.2d 772, 776 (Ky. 1939)), and not to discriminate against the elderly or persons with disabilities by disturbing their access to the polls, *see* Op. at 104-05 (citing 6 *Del. C.* § 4504(a)), 127-28 (citing *Abbott*, 2008 WL 821522, at *20). Red Clay failed to satisfy these obligations by depriving seniors and persons with mobility difficulties from reasonable access to the polling places.

Fourth, Red Clay violated the Elections Clause by electioneering during the Referendum. Title 15 of the Delaware Code states that "[t]he purpose of this title is to assure the people's right to free and equal elections, as guaranteed by our state Constitution." 15 *Del. C.* § 101A. As part of assuring the people's right to free and equal elections, 15 *Del. C.* § 4942(a) provides that no "person within the polling place or within 50 feet of the entrance to the building in which the voting room is located shall electioneer during the conduct of the election."[19] The statute thus serves the Elections Clause by protecting voters from intimidation or improper influence. Op. at 126 ("'[a]n election is free where the voters are exposed to no intimidation or improper influence and where each voter is allowed to cast his ballot as his own conscience dictates'") (quoting *Moran v. Bowley*, 179 N.E. 526, 531 (Ill. 1932)); *see also Davidson v. Rhea*, 256 S.W.2d 744, 746 (Ark. 1953) ("The test of the constitutional freedom of elections is the freedom of the elector to deposit his vote as the expression of his own unfettered will, guided only by his own conscience . . . .").

[19] The statute defines electioneering to include "political discussion of issues, candidates or partisan topics, the wearing of any button, banner or other object referring to issues, candidates or partisan topics, the display, distribution or other handling of literature or any writing or drawing referring to issues, candidates or partisan topics, the deliberate projection of sound referring to issues, candidates or partisan topics from loudspeakers . . . ." 15 *Del. C.* § 4942(d).

The FFEs were a form of electioneering. These were pro-Referendum gatherings of likely "yes" voters where voting was both encouraged and rewarded. For example, at Richardson Park, Dr. Mathis asked his teachers to mingle with parents at the school's lunchtime FFE to encourage them to vote and bring other "positive voters" to the school. JX-140; Tr. 505:8-17, 507:3-17. He also planned to have parents in the schools on the day of the Referendum to tell other parents to vote "yes" because he knew that he and his staff could not do so directly. Tr. 500:16-501:1, 505:8-17.

Another example of Red Clay's electioneering was the "vote yes" sign at Baltz, which the school's principal placed inside an entrance that was often used by voters. JX-162; Tr. 133:11-134:23, 136:9-20.[20] As Barbara Lippincott of the Department of Elections testified, even seemingly innocuous displays in a polling place—"like bulletin boards with signs or student drawings saying 'Pass the Referendum' so that the school can buy books or have other activities"—are a prohibited form of electioneering. Tr. 407:15-20.

[20] Notwithstanding Dr. Ammann's testimony that the district side of the building (which contained the voting machines) was separated from the school side by a locking door, the main entrance of the school building had a "polling place" sign outside the door. Tr. 301:1-9.

IV. Voiding the Referendum Is Necessary to Reduce the Irreparable Harm Caused by Red Clay

A. Legal Standards

Irreparable harm is harm "for which there can be no adequate recompense at law." Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 12.02[e] at 12-28 (2007) (citation omitted). Deprivation of the right to vote is always an irreparable harm. *See Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986) (finding that the plaintiffs "would certainly suffer irreparable harm if their right to vote were impinged upon"); *Steele v. Stevenson*, C.A. No. 1412-S, 1990 WL 114218, at *2 (Del. Ch. July 31, 1990) ("[E]quitable jurisdiction exists to declare a referendum election void 'where some positive and material requirement of the law has been disregarded or ignored.'") (citation omitted). Likewise, being subjected to discrimination during an election—even if one is able to vote—or having an election rendered not free and equal by government action, is irreparable harm. Delaware provides no remedy at law for these harms. *Cf.* D.I. 34 (opinion and order granting motion to dismiss of the New Castle County Board of Elections).

Under federal law, "where there is substantial wrongdoing in an election, the effects of which are not capable of quantification but which render the apparent result an unreliable indicum of the will of the electorate, courts have frequently declined to allow the apparent winner to exercise the delegated power." *Marks v.*

Stinson, 19 F.3d 873, 887 (3d Cir. 1994). In *Marks*, the Third Circuit ruled that if a district court found a constitutional violation, it would "have authority to order a special election, whether or not it is able to determine what the results would have been in the absence of that violation."[21] *See, also, e.g.*, *Griffin v. Burns*, 570 F.2d 1065, 1077-79 (1st Cir. 1978) (affirming trial court's decision to order a new primary election); *Coal. for Ed. in Dist. One v. Bd. of Elections of City of N.Y.*, 370 F. Supp. 42, 57 (S.D.N.Y. 1974) (voiding results of an election where instances of voter discrimination were so substantial that "they could very well have modified the outcome of the election"), *aff'd*, 495 F.2d 1090 (2d Cir. 1974).

Injunctive relief is also available for violations of the Delaware Constitution where the evidence shows "fraud or unfairness in the voting" or "that the departure from the statutory mandate could possibly have affected the result." *See Brennan v. Black*, 104 A.2d 777, 789 (Del. 1954). In contrast, "minor irregularities in the conduct of an election unaccompanied by fraud or unfair dealing, and not affecting the result, will not void an election otherwise valid." *Id.* (refusing to void an election where voters were given two ballots instead of one, a clear statutory

[21] *Marks* was an appeal from a preliminary injunction. In returning the case to the trial court, the appellate court ruled that at the conclusion of the case it could either order a new election or declare the position open and leave the decision on a special election to the local authorities, depending on the circumstances at that time. *Id.* at 889-90.

violation that did not affect the outcome); *see also State ex rel. Wahl v. Richards*, 64 A.2d 400, 406 (Del. 1949) ("When illegal ballots have been voted in an election district in such numbers as to affect the result, or at least to make it uncertain, and cannot be identified and separated from the valid ballots, there are cases where justice requires that the entire vote of that election district be rejected in making the count."); *State ex rel. Green v. Holzmueller*, 5 A.2d 251, 255 (Del. Super. Ct. 1939) (an election should be voided "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").

Brennan implicitly recognizes that flaws in the electoral process will mandate voiding the election when they "could possibly have affected the result." 104 A.2d at 789. And Red Clay's pretrial brief explicitly acknowledges that an election may be set aside when there is "'clear and convincing tangible, positive proof presented that the irregularities were so pervasive that it cannot be reasonably determined who was elected.'" D.I. 132 at 9 (quoting *Adair Cty. Bd. of Elections v. Arnold*, 2015-CA-000661-MR, 2015 Ky. App. Unpub. LEXIS 656, at *18-19 (Ky. Ct. App. Sept. 11, 2015) (applying Kentucky constitutional provision identical to Delaware Elections Clause) (emphasis in brief omitted)).

B. The Referendum should be voided because the selective get-out-the-vote activities and FFEs created unfairness in the voting and likely affected the result.

The trial testimony of all three political experts shows that Red Clay's Referendum activity either affected the outcome or prevented a reasonable determination of what the outcome would have been. Senator Peterson and Representative Hudson both testified that the more onerous standard was satisfied: Red Clay prevailed in the Referendum because of the FFEs and Red Clay's other work to shape the demographics of the electorate. *See* Statement of Facts, Section III, *supra*; Tr. 46:16-22; JX-328, 40:6-42:22. Mr. Agne did not agree or disagree on that point. *See* Statement of Facts, Section III, *supra*; Tr. 447:8-24. Instead, when asked if one could fairly determine whether the FFEs and related get-out-the vote activities changed the result, he testified: "the lack of data prevents us from saying reliably just about anything about what would or would not have happened in an alternate universe." Tr. 446:10-19.

As discussed above, substantial evidence shows that Red Clay's efforts to fill the polling places with parents and guardians affected the outcome of the Referendum. *See* Argument, Section I(B), *supra*. Red Clay filled the schools with voters who were more likely to support the increase, simultaneously hindering access to the polls for other voters. *Id.*; *see also* Statement of Facts, Section II(A), *supra* (showing that parents and guardians voted at 2 to 3.8 times the rate of other

voters). It also wanted to keep voting by seniors down, which it successfully did. *See* Statement of Facts, Section II(B), *supra*. Seniors comprised approximately the same percentage of the Referendum electorate as they did in the 2012 presidential election, even though they would be expected to comprise a larger percentage under normal circumstances. *Id.* Seniors voting in the Referendum were also a smaller percentage of the electorate than in every other election in the record. *Id.*; Tr. 315:4-316:13.

These efforts affected the result: at all 13 polling places where 37% or more of voters were parents and guardians, the tax increase was approved. JX-305; JX-194.[22] In contrast, the tax increase was approved at only 3 of the 12 other polling places, where parents and guardians comprised a smaller percentage of the electorate. *Id.* Similarly, the tax increase was rejected at all 6 polling places where seniors comprised more than 30% of the electorate and was approved at 16 of the other 19 polling places. *See* Tr. 460:10-18; JX-194.

V. Red Clay Should Be Prevented from Holding FFEs at Polling Places and Engaging in Targeted Campaign Speech in Future Referenda.

Injunctive (or declaratory) relief is necessary to prevent irreparable harm in future referenda. Red Clay is proud of its successful efforts to shape the demographics of the Referendum electorate, and it has every economic incentive to

[22] JX-305 notes the polling place where each parent and guardian voted, allowing for the calculation of their percentage of the electorate at each location.

employ the same successful tactics in future referenda. *See* Statement of Facts, Section IV, *supra*; JX-176 at D0014676; Tr. 645:2-647:7, 721:8-722:14. Judicial action is therefore necessary to prevent a repetition of the challenged conduct.[23] Plaintiffs and others in the community will suffer irreparable harm—the impingement on their right to vote—if Red Clay is not prevented from engaging in similar campaign activities in future referenda. *Williams*, 792 F.2d at 326; *Steele*, 1990 WL 114218, at *2 (meritorious claims of election misconduct "require that the referendum be nullified for failure to follow a material requirement of the law").

VI. The Balance of the Equities Weighs in Favor of an Injunction

Red Clay has asserted that even if it violated the federal and state constitutions, and even if the legal standard for voiding an election is satisfied, it should be allowed to continue levying the increased taxes because it needs the money for an important purpose. Def. Pretrial Br. (D.I. 132) at 14. This argument fails for at least two reasons.

[23] Declaratory relief should be sufficient with regard to future referenda, since it may be presumed that if this Court declares conduct to be impermissible, Red Clay will comply with the declaration in the future. *See Gladney v. City of Wilmington*, C.A. No. 5717-VCP, 2011 WL 6016048, at *4-5 (Del. Ch. Nov. 30, 2011) (quoting *Christiana Town Ctr., LLC v. New Castle Cty.*, C.A. No. 20215, 2003 WL 21314499, at *4 n.19 (Del. Ch. June 6, 2003), *aff'd*, 841 A.2d 307 (Del. 2004)). That presumption would evaporate, of course, if Red Clay is unwilling to commit to acting in accordance with a declaration of this Court.

First, the Court is not being asked to direct return of any of the additional $26.3 million in taxes levied in 2016 and 2017. Tr. 701:1-15; Pretrial Order (D.I. 139) at 20, ¶ 2.[24] Red Clay has more than enough time to conduct another referendum before July 2017 (the beginning of fiscal year 2018). Tr. 704:22-705:18 (CFO Jill Floore testifying that Red Clay's preferred referendum cycle is four to six months). If Red Clay holds a lawfully conducted referendum and the residents ratify the tax increase, it will remain in effect.

Second, permitting Red Clay to rely upon the result of its actions in the Referendum would encourage violations of law. A school district may increase local taxes to fund operating expenses only when the increase is approved in a referendum. 14 *Del. C.* § 1903. Red Clay's citizens have the right to refuse to increase taxes, no matter how badly the district needs the money. If Red Clay

[24] Neither side presented evidence on the expected take-up rate for taxpayers who are eligible for refunds under 14 *Del. C.* § 1921. *See* Tr. 682:5-687:7. Plaintiffs request that the Court take judicial notice of a recent working paper from Vanderbilt University that summarizes the body of empirical research on take-up rates in the analogous context of class-action claim forms. Brian T. Fitzpatrick & Robert C. Gilbert, *An Empirical Look at Compensation in Consumer Class Actions* (Vanderbilt Univ. Law School March 6, 2015) (attached as Exhibit A).

The authors found data from seven settlements that required class members to submit claim forms (rather than distributing refunds automatically). *Id.* at 7, 11, 15. Of those, four involved average payouts ranging from $1,478.89 to $100,000—much higher than the amount at issue here. *Id.* at 7; *see* JX-135 (Dr. Ammann noting that the average household tax increase after three years would be $280). For the three remaining cases, the take-up rates were 1.76%, 4%, and 7.39%. Ex. A at 11, 15. There is no reason to expect the take-up rate in this case to be higher.

cannot legally obtain voter approval, it may ask the General Assembly to eliminate the referendum requirement, or it may seek the additional funding from the state. But in a nation of laws, Red Clay should not be requesting judicial approval for constitutional violations, and this Court must not grant it:

> Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.

Olmstead v. United States, 277 U.S. 438, 468 (1928) (Brandeis, J., dissenting).

Red Clay's good motives cannot entitle it to violate the state and federal constitutions. To hold otherwise would encourage all local school districts to employ Red Clay's poll-packing tactics in future referenda. More generally, it would encourage government entities with noble ends to achieve them by violating the law when necessary. To ensure that these unconstitutional campaign tactics are never employed again, and to protect the rights of *all* Red Clay citizens in future elections, this Court should void the tax increase and permanently bar Red Clay from engaging in similar activities in the future.

Conclusion

For the foregoing reasons, Plaintiffs respectfully request that this Court:

1. Declare that the result of the Referendum is void and of no effect;

2. Enjoin Red Clay, and all persons acting in concert with it, from levying any portion of the $0.35 tax increase approved in the Referendum unless that increase is approved in a referendum conducted in accordance with the ruling in this case;

3. Enjoin Red Clay, and all persons acting in concert with it, from taking any actions similar to the actions taken by or on behalf of Red Clay in connection with the Referendum that this Court finds violated the rights of voters under the Fourteenth Amendment of the United States Constitution or Article I, § 3 of the Delaware Constitution; and

4. Award costs and disbursements of this action, and reasonable attorneys' fees, in accordance with 42 U.S.C. § 1988 and the rules of this Court.

/s/ David M. Fry

John W. Shaw (No. 3362)
Karen E. Keller (No. 4489)
David M. Fry (No. 5486)
Nathan R. Hoeschen (No. 6232)
SHAW KELLER LLP
300 Delaware Ave., Suite 1120
Wilmington, DE 19801
(302) 298-0700
jshaw@shawkeller.com
kkeller@shawkeller.com
dfry@shawkeller.com
nhoeschen@shawkeller.com

Richard H. Morse (No. 531)
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF DELAWARE
100 West 10th Street
Wilmington, DE 19801
(302) 654-5326, ext. 103
rmorse@aclu-de.org
Attorneys for Plaintiffs

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