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Harrison County Circuit Clerk
Albert F. Marano

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

MITCHELL SCOTT GUTHRIE, as parent of KATRINA CHEYENNE GUTHRIE, a minor; DEBORAH SHRIVER, as parent of SABRINA SHRIVER, a minor; CLIFFORD POWELL, as parent of ALAWNA POWELL, a minor; and JESSICA BOWEN, as parent of MAKENNA EARNEST, a minor

Plaintiffs,

v.

Civil Action No. 24-c-104
Honorable Judge Bedell

HARRISON COUNTY BOARD OF EDUCATION,

Defendant.

BRIEF OF AMICUS CURIAE, THE STATE OF WEST VIRGINIA, IN SUPPORT OF VERIFIED COMPLAINT FOR TEMPORARY, PRELIMINARY, AND PERMANENT INJUNCTIVE RELIEF

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STATEMENT OF AMICUS CURIAE

The State of West Virginia respectfully files this *Brief of Amicus Curiae* in support of Plaintiffs' *Verified Complaint for Temporary, Preliminary, and Permanent Injunctive Relief* (the "Complaint"). The State submits this brief to highlight concerns relating to the situation presented in the Complaint. The State has multiple interests in this matter. Among other things, the State always wishes to see that its laws and rules are followed and applied in a consistent and fair manner. It also endeavors to ensure that the right to freedom of speech is always respected. Based on the Complaint, those interests are threatened here.

ARGUMENT

The Code of State Rules' provisions for handling a protest action do not justify the Defendants' actions here, and the Free Speech implications of the school's actions are deeply concerning.

At the April 18, 2024, Harrison County Middle School Championship track and field meet, Plaintiffs' minor children, along with a fifth unnamed teammate, "stepped out" out of a track-and-field event. The Complaint explains that the children acted "in protest of a court decision [allowing a biological male to compete against them] and the ongoing unfairness of permitting a biological male to compete in women's sporting events." Complaint ¶¶ 15, 30. According to the complaint, school officials said that the girls will not be permitted to compete in an upcoming meet because of their protest.

The West Virginia Code of State Rules includes many rules governing school sports, including rules specifically addressing protests like those described in the Complaint. *See* W. Va. Code State R. § 127-1-1 et seq. (Title 127 being titled "West Virginia Secondary Schools Activities Commission"). In particular, Series 3 presents "Provisions Governing Contests," which addresses,

among other things, protest actions and consequential forfeiture of an event or contest. *See* W. Va. Code State R. § 127-3-8.4. It provides that:

> If a team, or student participating in an individual contest, leaves the playing area in protest and fails to complete the contest, the contest is forfeited and the school principal or designee and the violator may be required to appear before the WVSSAC Executive Director to indicate why additional action should not be taken.

W. Va. Code State R. § 127-3-8.4.

The prudence of this rule is self-evident: it implicitly acknowledges the complications inherent to an athlete taking an action in protest within the sports context. It gives the WVSSAC Executive Director the sole power to investigate, evaluate, and ultimately decide whether any possible sanctions should issue as a result of a protest action. This process improves consistency in how protest actions are considered by having any follow-up handled by a single statewide official, with the institutional history and support of the WVSSAC at their disposal. Moreover, the process shows awareness and appropriate sensitivity to free-speech considerations, which are often at the core of sports-related protests (and, as indicated by the Complaint, are evidently present here). Practically speaking, this rule also leaves it to the WVSSAC Executive Director to determine whether to require protesting students to appear to explain themselves or, perhaps, to determine that no explanation is even needed. But in every case, the rule contemplates that consequences from such protests, if any, would only arise after the athletes have a chance to explain themselves and the WVSSAC Executive Director has then determined that consequences are, in fact, appropriate and legal.

Here, it appears that school officials have not complied with these processes. The Complaint states that "no action has been taken by the" WVSSAC. Complaint ¶ 47. Nevertheless, a decision has been made at some other level, presumably the school level, that the student-athletes that engaged in the protest and later engaged in further protected speech activities "would not be

permitted to compete in a scheduled track and field meet on April 27, 2024." Complaint ¶ 23. The athletes have not been provided a chance to explain their actions. And the Executive Director has not made a decision that their actions should be punished.

The actions taken here are inconsistent with the relevant rule for such situations—but this case implicates more than technical niceties. For one thing, the protesting student-athletes will suffer serious harm. WVSSAC did not direct that they be removed from rosters for tomorrow's track-and-field meet; even if it had, the sanction is beyond heavy-handed. This categorical bar is not a matter of team discipline; it is a matter of condemning protest behavior. Most anyone would acknowledge that coaches and schools have latitude in their handling of aspects of team management—after all, another rule allows principals "to exclude a contestant who would not represent the school in an appropriate manner." But these girls have done nothing to lead anyone to believe that they would represent their school in an inappropriate manner. Quite to the contrary: they have, in truth, represented their school exceptionally well by demonstrating their personal objections in a clear but nondisruptive protest action and then providing a clear, concise explanation for that protest at a public press conference. In these circumstances, the Court can act to prevent unreasonable application of these rules. *See State ex rel. W. Va. Secondary Sch. Activities Comm'n v. Hummel*, 234 W. Va. 731, 736, 769 S.E.2d 881, 886 (2015) (finding that the court has jurisdiction to review "unreasonable" implementation of athletics suspension rules).

Beyond the misapplication of the relevant rules, the State is always focused on the free-speech implications of any government action, be it at the municipal, county, or state level. And when it comes to the First-Amendment right, what has occurred here is deeply concerning. "The First Amendment affords protection to symbolic or expressive conduct as well as to actual speech." *Virginia v. Black*, 538 U.S. 343, 358, 123 S. Ct. 1536, 1547, 155 L. Ed. 2d 535 (2003). And

schools have long been an area of particular attention in the realm of free speech, as students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 527, 142 S. Ct. 2407, 2423, 213 L. Ed. 2d 755 (2022). So the student-athletes' rights in this situation are of paramount importance. Their actions at the earlier track meet were not disruptive or aggrandizing. They were the quiet demonstration of the student-athletes' evident unhappiness with the competitive consequences of a federal appellate court's decision. Even if school officials worry the protests might produce discomfort among some, "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression," even in schools. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508, 89 S. Ct. 733, 737, 21 L. Ed. 2d 731 (1969). What's more, the athletes have already been "punished" to some degree because they failed to receive points for the event. The athletes accepted that result and then provided a clear statement on "why" they engaged in the protest action. Rather than being punished for their conduct or being sidelined in an effort to score points, all should commend these young athletes for putting their personal performances aside to demonstrate their discontent with an unjust result that affects them personally and within that event. There can be no more direct and connected protest within the sports context. And that expression, along with their attendance at a press conference with political figures addressing their protests, are protected activities. *See, e.g.*, *Gonzales on behalf of A.G. v. Burley High Sch.*, 404 F. Supp. 3d 1269, 1293 (D. Idaho 2019) ("Retaliation for engaging in protected speech has long been prohibited by the First Amendment. This principle has also been clearly applied in the school sports setting." (cleaned up)).

CONCLUSION

The Court should grant the Plaintiffs' requests for relief in this matter.

Respectfully submitted,

STATE OF WEST VIRGINIA

By counsel,

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