UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ST. VINCENT CATHOLIC CHARITIES,

Plaintiff,

v.

INGHAM COUNTY BOARD OF COMMISSIONERS,

Defendant.

Civil No. 1:19-CV-1050

Hon. Robert J. Jonker

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

St. Vincent's motion for partial summary judgment makes three principal arguments. First, because of unconstitutional religious targeting, the Board cut off St. Vincent's $4,500 Community Agency Grant and threatened to terminate (or halve) another refugee contract while denying a third's existence. The targeting here is on all fours with that in *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018). Second, the Board engaged in unconstitutional retaliation, because the Board's conduct was triggered by St. Vincent's defense of its religious beliefs in *Buck v. Gordon*. Third, the Board's hostility toward St. Vincent—hostility that has continued throughout this litigation—warrants a permanent injunction, declaratory relief, and monetary damages.

The Board's response accuses St. Vincent of "ethical misconduct" and "mendacity," and says the Board's "tolerance" for St. Vincent's defense of its religious exercise has "passed the breaking point"—and that's just the first two sentences. Doc. 32 at PageID.804. Building on its outlandish rhetoric from prior filings, Doc. 28-1 at PageID.612 (cataloguing such rhetoric), the Board claims that St. Vincent is "exploit[ing] its monopoly

position" on refugee services. Doc. 32 at PageID.811. And it calls St. Vincent's "monopoly" "undesirable," (*id.*) as St. Vincent is a "predat[or] on the county treasury" (*id.* at PageID.829). The "Answer" accompanying the Board's response (which no rule allows) doubles down: St. Vincent's lawsuit is "reprehensible," "redolent of desperation," (Doc. 31 at PageID.791), violates Rule 11 (*id.* at PageID.787), and is enabled by counsel "whose biases are patent" (*id.* at PageID.792). Elsewhere, the Board warns St. Vincent that its $40,000 Health Center Interpreting Contract—even though funded by federal and not County dollars—may not be renewed after the Board campaigns for re-election this year. Doc. 32 at PageID.815. If the Board's hostility toward St. Vincent was somehow veiled before, the veneer is gone now.

Nothing in the Board's response prevents this Court from granting summary judgment. Underneath the rhetoric, the response is laden with fatal concessions. The Board concedes there is no material fact dispute. As to St. Vincent's free exercise claim, the Board ignores the key "neutrality" case (*Masterpiece*), misunderstands "general applicability," and makes no argument under strict scrutiny. As to retaliation, the Board does not dispute that St. Vincent engaged in protected conduct, that its

Grant was denied, nor that its other contracts were threatened. Finally, as to St. Vincent's requested remedies, the Board fails to dispute the damages request, and its claims of "speculative" injury are belied by the Board's overt hostility.

St. Vincent's request is simple: The Board's unconstitutional behavior should be redressed, and further unconstitutional action should be enjoined. None of this restricts the Board from acting *constitutionally* toward St. Vincent. Because the Board identifies no material factual dispute and fails to engage with the applicable law, summary judgment is warranted.

I. The Board's response concedes all relevant material facts.

The Board admits that "the parties are, at long last, in agreement insofar as [St. Vincent] asserts there are 'no material disputes of fact.'" Doc. 31 at PageID.791. Indeed, the Board wants summary judgment granted in *its* favor—despite never moving for it, only asking for it after the dispositive motion deadline (*see* Doc. 26), and adding no material facts to the

record.[1] "Numerous district courts have stricken" such requests, *Marshall v. Grand Trunk W. R.R. Co.*, No. 1:09-cv-754, 2011 WL 13359596, at *1 (W.D. Mich. Mar. 22, 2011), and the Court should disregard it here. St. Vincent's summary judgment brief sets forth the material facts; the Board's response leaves them undisputed or outright conceded. Those facts justify summary judgment for St. Vincent.

A. The Board disputes neither the Grant's denial nor the threats to other contracts.

The Board does not dispute that it denied St. Vincent a $4,500 Community Agency Grant. Nor does it dispute that the Grant was recommended by the County Controller, awarded to St. Vincent last year (for the same services and based on the same budget), and denied this year. Doc. 28-1 at PageID.599-603.

Nor does the Board dispute that, shortly after *Buck* was filed, Commissioner Sebolt (who led the charge to defund St. Vincent after the *Buck* preliminary injunction was entered) changed the "priority" on Grants

[1] The Board complains about being "forced to generate its own supplementation of the record . . . with Exhibits A and B." Doc. 31 at PageID.792 n.14. But the "supplements" are totally irrelevant. They describe the County's current budgetary situation given the pandemic. They have nothing to do with whether the Board unconstitutionally targeted St. Vincent (yes), or whether it may do so again (no).

without explanation. Doc. 28-1 at PageID.603-604. Now, "just in case," the Board would consider not only "basic needs" but also "non-discrimination" (a requirement St. Vincent satisfies). *Id.*; Doc. 28-1 at PageID.604, 617 (Sebolt admits no compliance issues). Nor does the Board dispute that, after the *Buck* preliminary injunction was entered, Board members sought to penalize St. Vincent. *Id.* at PageID.604-608 (attempt to cancel St. Vincent's Refugee Health Services Contract). Because there were, as the Board now puts it, "mixed concerns" about canceling that contract without an alternative lined up (Doc. 32 at PageID.807; *see also* Doc. 28-1 at PageID.609-610), the Grant became the next target—and a convenient one, because St. Vincent's Grant could simply be reallocated to other applicants.

After the Grant was denied, the Board does not dispute that St. Vincent sought a preliminary injunction to protect its $40,000 Health Interpreting Contract, up for renewal shortly after. Until the Board was faced with this potential preliminary injunction, the Board denied that contract's existence—even as it was up for renewal. *See* Doc. 22 at PageID.512-514 (recounting the Board's undisputed maneuvering).

Also undisputed are the hostile statements made by Board commissioners toward St. Vincent leading to the Grant's denial. Rather—for the first time—the Board *defends* them. The Board argues that Commissioner Stivers simply voiced "a legitimate *principled*—not religious" basis to deny St. Vincent County funds when she baselessly accused St. Vincent of forcibly separating children at the U.S.-Mexico border and sending them to "Christian white families." Doc. 32 at PageID.806 & n.5 (emphasis in original, while conceding that Stivers was "possibly ill-informed" and supposedly later apologized). Nor does the Board dispute that the Health Department was directed on November 4th to replace St. Vincent with another provider. *See* Doc. 28-1 at PageID.607-608. Instead, the Board's response says St. Vincent possesses an "undesirable" "monopoly position." Doc. 32 at PageID.811.

The Board's only evidentiary objections are unfounded. For example, Commissioner Randy Schafer told St. Vincent that the "votes" to deny its Grant "were lined up prior to the meeting." Doc. 28-3 at PageID.655. The Board calls this "groundless speculation," and "inadmissible hearsay." Doc. 32 at PageID.816 n.16. It is neither. Schafer is on the Board (which ultimately denied the Grant) and can provide relevant insight into his

colleagues' behavior. *See, e.g.*, *Carter v. Univ. of Toledo*, 349 F.3d 269, 275-76 (6th Cir. 2003) (rejecting argument "that only statements made by declarants who are direct decision-makers . . . can qualify as nonhearsay under Rule 801(d)(2)(D).").[2] Schafer's statement also constitutes an admission by a party-opponent. Fed. R. Evid. 801(d)(2); *see also Wilburn v. Robinson*, 480 F.3d 1140, 1148 (D.C. Cir. 2007) (statement made to plaintiff by deputy mayor is non-hearsay). Finally, "[s]ummary judgment is the 'put up or shut up' moment." *Siegel v. Shell Oil Co.*, 612 F.3d 932, 937 (7th Cir. 2010). The Board could have attached its own declaration, from any Board member on its Human Services Committee, denying Schafer's claim. Tellingly, it did not. Nor did it do so for any other argument.

The Board also comes up empty when striving to explain why it awarded St. Vincent the same Grant last year. The Board claims "clearly, the Controller overlooked" St. Vincent's proposed Grant budget for the past two years. Doc. 32 at PageID.810 n.8. So, apparently, did other Board members. *See id.* ("Commissioners . . . might easily miss important

[2] Because Schafer's statement has obvious relevance to § 1983 retaliation, the Board's claim that St. Vincent needed to bring a violation of Michigan's Open Meetings Act fails. *Carter*, 349 F.3d at 275.

details."). So, apparently, did the "staff." *Id.* These naked assertions are unaccompanied by evidence.

To the contrary, St. Vincent specifically called its FY2019 program to the County's attention before the Grant was signed. *See* Doc. 28-4 at PageID.709. While the Grant's scope of work accurately reflected the new program, the title referenced the old program. The County told St. Vincent it "can simply cross out the title on the Scope of Work, rewrite it to the correct title, and initial the change." *Id.* The Board has no response.[3] It also cannot explain why, for the first time ever, the Board disregarded the Controller's recommendation and denied funding to a timely, eligible Grant applicant. *See* Doc. 28-1 at PageID.601.

B. St. Vincent was indisputably singled out.

St. Vincent explained that its Grant denial was unprecedented—both in comparison to the Board's prior treatment of St. Vincent and the

[3] The Board claims St. Vincent was the only Grant recipient to provide direct services through personnel. Doc. 32 at PageID.808. But "merely asserting" this is not the "concrete evidence" required to defeat summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). The "evidence" the Board cites on this point does not support this assertion. Rather, it shows something else: As discussed further below, one of the two agencies funded in St. Vincent's place planned to spend over 90% of its Grant on salaries and benefits. *See* Doc. 19-5 at PageID.482 (budget of Refugee Development Center).

Board's treatment of all other Grant requests. *See* Doc. 28-1 at PageID.599-603. The Board leaves these material facts undisputed.

To avoid the material facts, the Board launches its response with a two-page aside about the pandemic (Doc. 32 at PageID.804-805). Its actions, however, occurred *before* anyone even heard of coronavirus. The relevant facts remain undisputed: The Board authorized an unprecedented sum out of its contingency fund ($17,300) to maximize FY2020 Grant funding, while still refusing to fund St. Vincent—and only St. Vincent. *See* Doc. 28-1 at PageID.602.

Nor does the Board dispute that its FY2020 treatment of St. Vincent's Grant request is unprecedented. There is no dispute that St. Vincent's FY2020 Grant denial was the first time—ever—that St. Vincent's refugee services were not considered "basic needs." Rather, the Board now argues that St. Vincent's services cannot be "basic needs" because the grant money would fund personnel. *See* Doc. 32 at PageID.808. But refugee services are provided through people, and people get paid to provide services. This is especially true for St. Vincent's services: assisting with buying and maintaining homes, business development, computer literacy, and English language proficiency. Doc. 1-1 at PageID.44. And the Board's

argument cannot be squared with its actions: The Board admits that, by denying St. Vincent a Grant and re-allocating part of that money to Refugee Development Center, it was explicitly funding personnel salaries and benefits. Doc. 32 at PageID.824 ("True."). *See also* Doc. 16-7 at PageID.207 (Refugee Development Center to spend over 90% on salaries and benefits). Only with St. Vincent was the Board's contrived line between "direct services" and "personnel" enforced—that's the material fact, and it is not disputed.

St. Vincent demonstrated that the Board followed the Controller's recommendation—or awarded the applicant *more* money—387 times out of 390 grants over ten years. Doc. 28-1 at PageID.600-601. Two applicants were ineligible, and the third was St. Vincent. *Id.* Rather than dispute this evidence, the Board suggests St. Vincent violated Federal Rule of Evidence 705 because it "fail[ed] to disclose or provide the underlying data" behind adding up the number of times the Board followed the Controller's recommendation. Doc. 32 at PageID.809 n.7. But Rule 705 applies to "data" used by an "expert," not to simple math. St. Vincent did disclose the "data": The Board's own, publicly available, resolutions. And St. Vincent explained its "calculations": Addition. Doc. 28-3 at

PageID.652. Nor, contrary to the Board's statements, is there any relevance to either how many times the Board departed from the Controller's recommendation to *exceed* Grant funding, or whether the other two (ineligible) agencies which the Board funded less than the Controller recommended are religious. Doc. 32 at PageID.810. The relevant question is whether *St. Vincent* was singled out. The answer is "yes."

Further, the Board strives to create a factual dispute by attributing its denial of St. Vincent's Grant to the Establishment Clause. *See* Doc. 32 at PageID.808. This argument is baseless, as St. Vincent explained in its response to the Board's Motion to Dismiss. *See* Doc. 24 at PageID.552-554. Nor can this argument be squared with the County's previous grants to St. Vincent, or the parties' continuing contracts. Indeed, the Board's response now confirms that this Establishment Clause "concern" never occurred to the Board until it needed litigation arguments. *See, e.g.*, Doc. 32 at PageID.808 ("[The Board] *would* have acted properly *if* it had refused to appropriate public funds to aid an establishment of religion.") (emphasis added); *id.* at PageID.817 ("[The Board] *may well have also*

recognized that allocating County funds to pay . . . for [St. Vincent] personnel would" violate the Establishment Clause) (emphasis added). Baseless, *post-hoc* rationalizations are no ground to deny summary judgment.

II. The Board cannot dispute it violated the Free Exercise Clause.

As St. Vincent explained, under *Masterpiece*, the Board's treatment of St. Vincent's religious exercise was neither neutral nor generally applicable. Doc. 28-1 at PageID.616-626. And the Board cannot satisfy strict scrutiny. *Id.*

In response, the Board never once mentions *Masterpiece*, misunderstands "general applicability," and offers no strict scrutiny defense. Summary judgment for St. Vincent is warranted.

A. The Board's conduct was not neutral.

The Board's members disparaged St. Vincent's religious beliefs and its decision to judicially protect them. The Board does not dispute or disavow these statements—indeed, it now defends some (*supra* p. 6). Instead, the Board tries to hide the evidence by arguing the Court can only consider Board resolutions. Doc. 32 at PageID.812.

But that view is impossible to square with *Masterpiece*—where never-disavowed religious hostility from just two Commissioners out of a

"seven-member Commission" was held to infect an entire proceeding, including subsequent appeals. *See* 138 S. Ct. at 1729. The same is true here. *See* Doc. 28-1 at PageID.618-622 (applying *Masterpiece* neutrality factors). Tellingly, *Masterpiece* goes unmentioned by the Board—either in its response or its illicit "Answer."

Nor does *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), change the proper free-exercise analysis (Doc. 32 at PageID.823-824). For one, the case is distinguishable: statements there were made by a candidate, not an elected official (138 S. Ct. at 2417); they occurred in contexts "largely immune from judicial control"; and no free exercise claim was at issue (*id.* at 2418). For another, *Trump* does not mean that an individual official's statements go unanalyzed—to the contrary, the Court found them highly relevant. *Id.* at 2417-18. They are here, too.

The full Board denied St. Vincent a $4,500 Grant. These statements help explain why. This is the proper free exercise analysis, as shown in both *Masterpiece* and *Lukumi*. *See* Doc. 28-1 at PageID.618-622. Summary judgment is warranted.

B. The Board did not apply a generally applicable standard.

General applicability is "a second requirement of the Free Exercise Clause," independent from neutrality, and it separately supports summary judgment. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993); Doc. 28-1 at PageID.622-624. Here, the Board did not deny the Grant because of any generally applicable policy.

The Board incredibly claims that it completely defunded St. Vincent because "available funds were exhausted and hard decisions had to be made." Doc. 32 at PageID.823 n.23. No, the Board just reallocated St. Vincent's funding to others. *Supra* p. 10.

Equally implausible is the Board's explanation that denying St. Vincent the Grant followed from its "basic needs" policy. Doc. 32 at PageID.823. The Board offers no principled basis to distinguish St. Vincent's refugee services from funded "'emotional support' hotlines," navigating systems for ex-convicts, reassurance services for the elderly, increasing college attainment rates, and supporting "Y Achievers" at the YMCA. *See* Doc. 28-1 at PageID.602-603. All of these, including St. Vincent's refugee services, further "well-established [Board] goal[s]." Doc. 32

at PageID.818-819. Its only explanation is its newly minted, unsupported Establishment Clause argument. *Supra* pp. 11-12.

The Board's next argument, that St. Vincent's application was denied because it did not fund "direct services," is also pretextual. St. Vincent provides a *service*, not a *good*; funding St. Vincent's teachers and interpreters *is* directly funding refugee services. Nor is there any explanation as to how the other funded-services (like answering an emotional-help hotline) are performed without funding personnel. Or why other refugee services agencies—including one that planned to spend over 90% of its Grant on salaries and benefits—could receive *additional* funding in St. Vincent's place. *Supra* p. 10.

A law is not generally applicable when it treats religiously motivated conduct worse than non-religiously motivated conduct that undermines the government's goals to "a similar or greater degree." *See Lukumi*, 508 U.S. at 543. The Board has no argument that survives this standard. St. Vincent is entitled to summary judgment.

C. The Board concedes strict scrutiny.

The Board does not even attempt to satisfy strict scrutiny. Doc. 32 at PageID.824. Nor could it. Doc. 28-1 at PageID.624-626. Strict scrutiny

applies, and the Board's concession confirms summary judgment is warranted.

III. The Board engaged in First Amendment retaliation.

The Board concedes that (1) St. Vincent engaged in protected conduct, (Doc. 32 at PageID.821), and the undisputed facts show that the Board (2) took adverse action against St. Vincent (3) based at least in part on that protected conduct. *See Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999) (en banc). Summary judgment is warranted.

The Board argues that St. Vincent "has suffered no adverse action." Doc. 32 at PageID.821 (double emphasis in original). But the Board *admits* it denied St. Vincent a $4,500 Grant. That was an adverse action. *E.g., Bd. of Cty. Comm'rs, Wabaunsee Cty., Kan. v. Umbehr*, 518 U.S. 668, 685 (1996) (refusing to renew government contract). Board members also threatened to withdraw additional refugee funding and instructed the Health Department to find an alternative refugee provider. Doc. 17-11 at Page ID.356-358. Just as the actual denial of a government grant qualifies as an adverse action, so too the threat. *See Fritz v. Charter Twp. of Comstock*, 592 F.3d 718, 726 (6th Cir. 2010).

The Board does not dispute the temporal proximity between the threats against St. Vincent's contracts, the Grant's denial, and the Board's escalating hostility after St. Vincent filed suit. *See, e.g., Hill v. Lappin*, 630 F.3d 468, 476 (6th Cir. 2010) (temporal proximity between statements and the action shows retaliation). The Board's threats continue—including Rule 11 sanctions for bringing this lawsuit and canceling the $40,000 Health Center Interpreting Contract after the Board's election campaign (*supra* pp. 1-2).

To avoid responsibility, the Board again claims legislative immunity. Doc. 32 at PageID.822. However, as explained in St. Vincent's dismissal opposition, (*see* Doc. 24 at PageID.541-551), the Board is categorically ineligible for legislative immunity, and denying St. Vincent's Grant was not a legislative action. *Id.* at PageID.547.

Finally, the Board argues that members' statements are irrelevant because "[St. Vincent] simply cannot understand 'the Board' consists of 14 Commissioners and acts only formally, by majority vote." Doc. 32 at PageID.812. This is a smokescreen. The *entire Board* took adverse action: it denied St. Vincent a $4,500 Grant. The individual Board members'

statements—combined with temporal proximity, unprecedented treatment, and common sense—confirm *why* the entire Board took that action. The Court should grant summary judgment for St. Vincent on its unconstitutional retaliation claim.

IV. The Board does not dispute St. Vincent's monetary loss, and its conduct confirms the need for injunctive and declaratory relief.

St. Vincent seeks three forms of relief: money damages, declaratory relief, and a permanent injunction. Doc. 28-1 at PageID.637. The Board does not contest—and thereby concedes—St. Vincent's monetary relief request. *See Id.* at PageID.640-641.[4] Rather, the Board only argues against St. Vincent's requests for declaratory and injunctive relief. Those arguments fail.

The Board fails to address—or even cite—applicable law. *See Id.* at PageID.637-644. Instead, the Board challenges St. Vincent's standing to obtain prospective relief, claiming that any impending harm is "entirely speculative." Doc. 32 at PageID.831-832. But this claim is belied by the

[4] The Board recycles its motion to dismiss argument that St. Vincent lacks an injury-in-fact and, thus, Article III standing. Doc. 32 at PageID.831. St. Vincent already rebutted this. Doc. 24 at PageID.554-557.

Board's ongoing hostility toward St. Vincent. *Supra* pp. 1-2; Doc. 28-1 PageID.603-611. The Grant was denied. The Refugee Health Services Contract was nearly canceled or halved (and only renewed because an alternative to St. Vincent could not be found in time). Doc. 28-1 at PageID.608, 610. Now—even as the Board concedes that St. Vincent's $40,000 Health Center Interpreting Contract is "solely contingent on federal funding," Doc. 32 at PageID.833—it says the Board may decide to terminate it after the November election. *Id.* at PageID.815 n.13 ("renewal will not be entirely 'automatic.'"). And, the Board's *post-hoc*, litigation-crafted, Establishment Clause argument is a transparent pretext to end all contractual relationships with St. Vincent. *Supra* pp. 11-12.

The hostility is undisguised. Earlier Board filings called St. Vincent a "predat[or] on the public fisc" and this lawsuit an act of "vengeance." Doc. 28-1 at PageID.612 (listing these and other insults). The Board's response accuses St. Vincent (and its counsel) of "ethical misconduct" and notes that its "tolerance" for such behavior has "passed the breaking point." Doc. 32 at PageID.804. The Board continues to call St. Vincent a "predat[or]" on public funds, *id.* at PageID.829, accusing it of "exploit[ing]" its ministry, *id.* at PageID.811. Now, the Board even defends

admittedly "ill-informed" insults against St. Vincent. *Id. at* PageID.806 n.5 (defending Commissioner Stivers' comments). The Board even hints that St. Vincent is acting "at its peril," *id.* at PageID.829, and warns that the agency would be "well served to be attentive" to the Board's policies in future applications, *id.* at PageID.832.

But—just a few sentences later—the Board tries to claim St. Vincent's fear that it will lose future contracts with the Board is "entirely speculative." *Id.* The Board's not-so-subtle threats and ongoing hostility leave little to "speculat[ion]." *Id.* The message is clear.

The Board asserts that any statements it makes in litigation proceedings are "absolutely privileged." Doc. 31 at PageID.791. This is misleading. The one case the Board cites stands for a far-afield proposition: an attorney was immune from defamation liability when, in defending his client, he republished defamatory statements. *Theiss v. Scherer*, 396 F.2d 646, 649 (6th Cir. 1968). Instead, "oral representations by counsel in the course of litigation constitute binding judicial admissions." *E.g.*, *Rowe v. Marietta Corp.*, 172 F.3d 49, *4 n.2 (6th Cir. 1999) (unpublished) (citations omitted). Here, the Board's briefs and litigation position evidence clear, ongoing, escalating hostility toward St. Vincent's religious beliefs

and its willingness to defend them. The Court is justified in considering this hostility.

Continuing its penchant for overstatement, the Board wrongly contends that St. Vincent requests an injunction locking-in perpetual County contracts. *See* Doc. 31 at PageID.780 ("SVCC seeks a permanent injunction requiring the ICBC to forever fund SVCC's community agency grant requests."); *see also* Doc. 32 at PageID.821. False. St. Vincent is not demanding that the County can never, for any reason, cancel a St. Vincent contract or deny St. Vincent a grant. *See* Doc. 28-2 at PageID.647-649. Rather, as St. Vincent has made clear from the beginning, the Board must be enjoined from canceling St. Vincent's contracts or denying grant funding *for unconstitutional reasons*. The Board's failure to grasp this basic point further evidences why such relief is justified.

The continuation of St. Vincent's refugee services ministry turns on the Board's willingness to bargain with St. Vincent in good faith. The Board, by contrast, is outraged at St. Vincent for protecting its First Amendment rights, *see* Doc. 32 at PageID.834—the denial of which is always irreparable, Doc. 28-1 at PageID.643. Only a permanent injunction

will set the boundaries of the parties' relationship going forward. *See id.* at PageID.643-644.

Perhaps to put its hyperbole about "frivolous" litigation to use, the Board throws in a claim for attorney's fees. Doc. 32 at PageID.832. Overheated rhetoric cannot surmount this high bar. *See Riddle v. Egensperger*, 266 F.3d 542, 547 (6th Cir. 2001) (lawsuit must be "frivolous, unreasonable, or without foundation"). And in any event, the Board cannot tack-on a claim for attorney's fees to its response. Requests for attorney's fees "must be made by motion." Fed. R. Civ. P. 54(d)(2)(A). Until the merits are resolved, any discussion of attorney's fees is premature. Raising it now is illustrative, however. It confirms the Board's desire to set an example with St. Vincent: Protect First Amendment rights "at [your] peril." Doc. 32 at PageID.829.

CONCLUSION

Unable to pound either the facts or the law, the Board simply pounds the table. This is no basis for attorney's fees, denying summary judgment, or opposing an injunction. The Court should grant St. Vincent's motion.

Dated: May 11, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This memorandum complies with the word limit of L. Civ. R. 7.2(b)(i) because, excluding the parts exempted by L. Civ. R. 7.2(b)(i), it contains 4,224 words. The word count was generated using Microsoft Word 2019.

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