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May 6, 2020

Deborah S. Hunt, Clerk of Court
Office of the Clerk
United States Court of Appeals for the Sixth Circuit
540 Potter Stewart U.S. Courthouse
100 E. Fifth Street
Cincinnati, Ohio 45202-3988

Re: *NLRB v. Marburn Academy, Inc.*,
Nos. 19-2062 & 19-2159

Dear Ms. Hunt:

Last week, this Court rejected a plaintiff's wrongful-termination claim using reasoning that applies equally to this case. Marburn thus submits that case, *Lemon v. Norfolk S. Ry. Co.*, ___ F.3d ___, 2020 WL 2078985 (6th Cir. Apr. 30, 2020), as supplemental authority under Rule 28(j).

In Marburn's case, we argued that the National Labor Relations Board's theory "immunized" the employee at issue "from the consequences of her *unprotected* activity"—namely violating the school's Core Values in several ways—simply because the employee "engaged in *some* protected activity." Reply Br. 3. That theory, Marburn pointed out, "is not how the National Labor Relations Act works." *Id.* Instead, under the Act's burden-shifting and causation framework, an employer like Marburn may "discipline [an employee] and decide not to renew her contract based on [her] unprotected behavior," even if the employee engaged in some protected behavior around the same time. Opening Br. 4.

This Court last week, under an analogous burden-shifting framework, rejected a plaintiff's theory for precisely this reason. *Lemon*, 2020 WL 2078985 at *2–3. That theory, the Court explained, "would authorize employees to engage in banned behavior so long as it occurs during protected conduct." *Id.* at *3. But that is not how it works. The employee's protected behavior in that case did not "immunize[] the employee from discipline for [a] rule violation." *Id.* Neither does it in this case.

Respectfully submitted,

/s/ James R. Saywell
James R. Saywell
Counsel for Marburn Academy

cc: Counsel of Record via CM/ECF