No. 22-10297

In the United States Court of Appeals for the Eleventh Circuit

MOMS FOR LIBERTY – BREVARD COUNTY, FL, et al.,

Plaintiffs-Appellants,

v.

BREVARD PUBLIC SCHOOLS, et al.,

Defendants-Appellees.

Appeal from an order of the United States District Court for the Middle District of Florida, The Hon. Roy B. Dalton, Jr. (Dist. Ct. No. 6:21-cv-01849-RBD-GJK)

APPELLANTS' REPLY BRIEF

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June 6, 2022

CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellants certify that the following is a complete list of interested persons as required by Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1:

1. Astor, Martha – Counsel for Appellants
2. Brevard County Public Schools Office of Legal Services – Counsel for Appellees
3. Brevard Public Schools – Appellee
4. Bridges, Gennifer – Counsel for Appellees
5. Burr & Forman LLP – Law firm representing Appellees
6. Campbell, Katye – Appellee
7. Cholewa, Joseph – Appellant
8. Dalton, Jr., Hon. Roy B. – United States District Judge
9. Delaney, Katie – Appellant
10. Gibbs, Paul – General Counsel for Brevard County School Board
11. Goldstein Law Partners, LLC – Law firm representing Appellants

12. Gura, Alan – Counsel for Appellants

13. Haggard-Belford, Misty – Appellee

14. Hall, Ashley – Appellant

15. Institute for Free Speech – Organization representing Appellants

16. Jenkins, Jennifer – Appellee

17. Kneessy, Amy – Appellant

18. Londono, Valerie – Assistant General Counsel for Brevard County School Board

19. Marks, Howard – Counsel for Appellee

20. McDougall, Cheryl – Appellee

21. Moms for Liberty – Brevard County, FL – Appellant

22. Moms for Liberty, Inc. – National affiliate of Appellant

23. Morrison, Ryan – Counsel for Appellants

24. Osborne, David – Counsel for Appellants

25. Susin, Matt – Appellee

26. Thakrar, Sheena – Counsel for Appellees

No publicly traded company or corporation has an interest in the outcome of this case or appeal.

/s/ Alan Gura
Alan Gura
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There is nothing reasonable and viewpoint neutral about allowing officials to ban speech they deem "abusive" or, in Defendants' idiosyncratic understanding of obscenity, not "clean." Nor is it reasonable and viewpoint neutral to empower officials' censorship of speech that mentions them by name. The only "abusive" conduct here is Defendants' treatment of First Amendment rights.

Defendants' primary censorship justification—they claim to fear disruptions by those who might react poorly to speech—is constitutionally invalid. The First Amendment prohibits government officials from banning protected speech because it might inspire disruption. Courts adjudicating largely identical school board speech policies—under current First Amendment standards—have had no trouble striking them down as vague and overbroad viewpoint restrictions. These decisions are consistent with Supreme Court and Eleventh Circuit precedent, the latter of which this Court reconfirmed shortly after the filing of Plaintiffs' opening brief, in *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 2022 U.S. App. LEXIS 11864 (11th Cir. 2022).

Neither can the potential presence of children justify the censorship of adults' speech. Parenting young children may require shielding them from some speech concerning issues of the day. But parenting is the task of parents, and adults who participate in school board meetings are not the school board's children.

Defendants rely on a number of decisions that have upheld partially similar policies as content neutral, but none of these are relevant. Most are no longer good law, as they predate the Supreme Court's current approach for evaluating content neutrality set out in *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), or, in one instance, rely on pre-*Reed* precedent. Notably, Defendants ignore this Court's post-*Reed* precedent for evaluating content neutrality, such as *Otto v. City of Boca Raton*, 981 F.3d 854 (11th Cir. 2020). And all of Defendants' cases along these lines are inapposite, involving instances of bad behavior or different types of fora. Defendants' attempts to distinguish "abusive" from "offensive" speech are likewise unavailing.

Unsurprisingly, Defendants' application of their defective speech restrictions also violates the First Amendment. It does not matter whether, as Defendants alternately claim, they censor everyone always

or Plaintiffs sometimes. Whatever Defendants let slide, viewpoint discrimination keeps popping up at their meetings. Defendants prohibit speech suggesting that their policies are "evil" or criticizing "the liberal left," or offending those who hold different views about gender. Defendants often stymie those who even utter their names. They interrupt speakers who quote school library books. Whether they let them finish or not, Defendants often interrupt and challenge speakers' use of words they find offensive. And Defendants' nearly 1,100 record pages contain not a single word of speech by people like Amy Kneessy, who are dissuaded from speaking altogether by Defendants' censorial practices.

Defendants' call for this Court to ignore *Matal v. Tam*, 137 S. Ct. 1744 (2017) and *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019), and announce a new category of unprotected "abusive" speech, cannot be heeded.

As for Plaintiffs' allegations that Defendants provide their political allies preferential access to board meetings, this Court cannot weigh the evidence in the first instance. That was the district court's task, which it should perform on remand.

ARGUMENT

I. DEFENDANTS' PROHIBITIONS OF "ABUSIVE," "PERSONALLY DIRECTED," AND "OBSCENE" SPEECH ARE NOT REASONABLE TIME, PLACE, OR MANNER RESTRICTIONS.

Defendants contend that their prohibitions of so-called "abusive," "personally directed," and "obscene" speech, as they interpret these terms, do not actually target viewpoints or even the content of speech. Rather, per Defendants, these restrictions regulate only the time, place, and manner of speech consistent with the purposes of a school board meeting. Def. Br. 29-33. Per Defendants, banning "abusive" speech, for example, does not prohibit the expression of views that someone might find "abusive," but only prohibits speaking in a *manner* that others might find "abusive"—depending, of course, on the words employed.

This is not how reasonable time, place, and manner restrictions function. First, even though Defendants may impose content-based restrictions that are reasonably consistent with the purposes of their limited public forum, courts understand time, place, and manner restrictions to address only content-neutral concepts.

"The relaxed scrutiny for regulations of the time, place, and manner of speech applies only to regulations that are 'justified without reference

to the content of the regulated speech.'" *Henderson v. McMurray*, 987 F.3d 997, 1003 (11th Cir. 2021) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). And "[i]n order to determine whether a regulation of speech is content based, we must first consider whether, 'on its face,' it 'draws distinctions based on the message a speaker conveys.'" *Harbourside Place, LLC v. Town of Jupiter*, 958 F.3d 1308, 1317 (11th Cir. 2020) (quoting *Reed*, 576 U.S. at 163). Regulations might draw distinctions on the basis of a speaker's message and still be considered content neutral if they "require[] an examination of speech only in service of drawing neutral [distinctions]" and thus remain "agnostic as to content." *City of Austin v. Reagan Nat'l Adver. of Austin, LLC*, 212 L. Ed. 2d 418, 426 (2022).

Accordingly, valid time, place, and manner regulations are regulations that have "nothing to do with [the] content" of the message expressed. *Ward*, 491 U.S. at 792 (internal quotation marks omitted). These include content-neutral regulations of *when* speech may occur, *see, e.g., Bloedorn v. Grube*, 631 F.3d 1218, 1240-41 (11th Cir. 2011) (reserved, timed access to a heavily used forum); *where* speech may occur, *see, e.g., Bell v. City of Winter Park*, 745 F.3d 1318, 1322 (11th

Cir. 2014) (ban on demonstrations targeting particular homes); or *how* speech is expressed, *see, e.g., Harbourside*, 958 F.3d at 1316 ("[N]oise ordinances generally do not violate the First Amendment if they are content-neutral and do not single out any specific type of speech, subject-matter, or message").

But speech can only be described as "abusive," "personally directed," or "obscene" by reference to its content. The time at which Plaintiffs may speak—during board meetings, for their allotted minutes—is not at issue. Neither is the place at which Plaintiffs may speak—the board meetings' podium. Nor do Plaintiffs challenge restrictions on their manner of speech, such as by screaming, or with the use of amplification or visual aids, or through modes of expressive conduct such as dancing.

Rather, the restrictions here—"abusive," "personally directed," and "obscene"—are decidedly not "agnostic as to content." *Reagan Nat'l Adver.*, 212 L. Ed. 2d at 426. Defendants take issue with Plaintiffs' *words*, and thus the messages they convey. Indeed, Defendants concede this by way of example, offering that "My district's representative is doing a bad job and should resign" and "My district's representative is

doing a sh*tty job and we should put her head on a pike if she doesn't resign" convey the same viewpoint but in different manners. Def. Br. at 30-31. Not so. Both statements are critical, but the latter conveys a more emphatic view. Defendants would single it out not because of when, where, or how it is expressed, but because they would make a value judgment about the different views it reflects: that the representative's performance is not merely sub-optimal, but "sh*tty," and that she not merely "should resign," but do so under compulsion of vehement criticism, resistance, or even violence.

The distinctions Defendants draw are content based. They justify their restrictions *only* with "reference to the content of the regulated speech," *Henderson*, 987 F.3d at 1003 (quoting *Ward*, 491 U.S. at 791). Their regulation "on its face . . . draws distinctions based on the message a speaker conveys.'" *Harbourside*, 958 F.3d at 1317 (quoting *Reed*, 576 U.S. at 163). If speech conveys an "abusive," "personally directed," or "obscene" message, Defendants forbid it.

Under Defendants' reasoning, the same game they play with "abusive," "personally directed," and "obscene" could be played with "offensive." A ban on "offensive" speech, as determined by the speaker's

choice of words, would be constitutional. It would not prohibit offensive speech as such, but merely restrict people from speaking in an "offensive manner." Speech would be delivered in an "offensive manner" if a person felt offended, much like, as under Defendants' argument, speech is delivered in an "abusive manner" if a person feels abused.

This is foreign to the First Amendment. Manner relates not to one's choice of words, but to the mode of delivery. A pair of Ninth Circuit cases draw out the distinction. In *White v. Norwalk*, 900 F.2d 1421 (9th Cir. 1990), plaintiffs challenged a speaking policy's "proscription against 'personal, impertinent, slanderous or profane remarks,'" but the city countered that its policy did not punish those who "merely" made such remarks, only those who did so while "acting in a way that actually disturbs or impedes the meeting." *Id.* at 1424. Accepting the city's narrowing construction, the court upheld the policy. But the court did not then allow a city to define "disturbance" so as to punish a man who gave the city council a silent Nazi salute following the speaking period. Rejecting the argument "that cities may define 'disturbance' in any way they choose," the Ninth Circuit stressed that

> [a]ctual disruption means actual disruption. It does not mean constructive disruption, technical disruption, virtual disruption,

> *nunc pro tunc* disruption, or imaginary disruption. The City cannot define disruption so as to include non-disruption to invoke the aid of *Norwalk*.

Norse v. City of Santa Cruz, 629 F.3d 966, 976 (9th Cir. 2010) (en banc).

There is no such thing as a "manner" restriction that allows the government to ban speech, without more, on grounds that the speaker's choice of words is inappropriate. In a limited public forum, content restrictions may confine speech to the forum's designated subject matter, but the government may not police words on the pretense that by doing so it polices conduct. Words convey views. Using different words conveys different views. Stronger language conveys a stronger view. It does not convey the same view expressed in a different manner. The First Amendment does not merely guarantee the right to anodyne or bland expression, nor does it allow the government to regulate the intensity, passion, flavor, or tone of one's opinions. Whatever else it is, Defendants' prohibition of "abusive," "personally directed," and "obscene" speech is not a content neutral time, place, or manner restriction.

Nor, in this case, is the regulation reasonable in light of the forum's purpose, which is to discuss and debate matters relating to the school

district's operation. That purpose includes criticizing the school board's performance, beseeching it for reform, offering controversial views—and that it is advanced by referring to Defendants by name (never mind addressing them directly), and to other people with regard to their impact on the schools. The purposes of the forum are defeated, not advanced, when the school board can silence discussion of themselves, of their performance, and of the school district's operation as "abusive," "personally directed," and "obscene."

II. DEFENDANTS' CLAIMED ANTI-DISRUPTION AND CHILD PROTECTION INTERESTS DO NOT ALLOW THEM TO CENSOR PROTECTED SPEECH.

Plaintiffs do not contest the "significant governmental interest in conducting orderly, efficient meetings of public bodies." Pl. Br. 29 (quoting *Rowe v. City of Cocoa Beach*, 358 F.3d 800, 803 (11th Cir. 2004) (per curiam)). Those who disrupt meetings can and should be removed. Nor do Plaintiffs question that the government has an interest in protecting children. But the First Amendment does not permit Defendants to pursue these interests by censoring protected speech.

Notwithstanding their much broader practice of forbidding the mere mention of individuals (mostly themselves) by name, Defendants justify their "personally directed" speech ban by claiming that "comments

directed specifically to individual Board members tend to result in audience members calling out and becoming disruptive." Def. Br. 6. They further claim that their speech policy on the whole aims to "maintain decorum and avoid inciting audience members in a manner that would create an unsafe situation or one that may adversely impact children, who are often physically present at Board meetings or observing via livestream or recorded video." *Id.*

Defendants may have other speech regulation interests not at issue in this case, but these are what they rely upon here, as they sum up under the heading, "Purposes of the Policy." Def. Br. 5. These asserted justifications for silencing Plaintiffs' political speech—averting disruptive reactions and protecting the sensibilities of children—are impermissible under the First Amendment.

A. The First Amendment forbids censoring otherwise protected speech on grounds that it may elicit reaction.

Plaintiffs quoted *Otto*, 981 F.3d at 865, for the proposition that "[t]he government cannot regulate speech by relabeling it as conduct." Pl. Br. 29. Their speech, however much it rankles Defendants, does not itself constitute disruptive conduct. But Defendants' responsive brief ignored *Otto*.

Plaintiffs also quoted *Forsyth County. v. Nationalist Movement*, 505 U.S. 123, 134 (1992), for the proposition that "[l]isteners' reaction to speech is not a content-neutral basis for regulation." Pl. Br. 33. But Defendants' responsive brief ignored *Forsyth* and other cases Plaintiffs cited making the same point.

The law is clear: Defendants "may not regulate speech because it causes offense or makes listeners uncomfortable, or because it might elicit a violent reaction or difficult-to-manage counterprotests." *Fort Lauderdale Food not Bombs v. City of Fort Lauderdale*, 11 F.4th 1266, 1294 (11th Cir. 2021) (internal quotation marks and brackets omitted). Indeed, "a principal function of free speech under our system of government is to invite dispute," and speech "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Texas v. Johnson*, 491 U.S. 397, 408-09 (1989) (internal quotation marks omitted).

Defendants cannot silence speakers for alleged fear of how others may react to their views, or to their mere mention of school officials.[1]

[1] As videos show, Defendants' censorship tends to excite the audience.

B. Speech cannot be forbidden because it may be inappropriate for children.

Defendants' brief does not develop the child protection interest argument, and perhaps with good reason beyond its legal deficiency. Defendants may find it difficult to claim that they seek to shield children from inappropriate books that they make available in school libraries, while defending their efforts to suppress Plaintiffs' objections to the practice. In any event, Defendants' reliance on a child protection interest is not only ill conceived under the circumstances. It also fails as a matter of law.

The leading precedent on the intersection of child protection and First Amendment rights saw the Supreme Court strike down a general prohibition of allegedly immoral books that was justified on such grounds. The government may not "reduce the adult population . . . to reading only what is fit for children." *Butler v. Michigan*, 352 U.S. 380, 383 (1957). "[Q]uarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence . . . is to burn the house to roast the pig." *Id.* The Court suggested that a properly tailored solution would only restrict these books to children. Decades later, the Supreme Court struck down a

postal regulation forbidding the mailing of contraceptive advertisements. "The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox." *Bolger v. Youngs Drugs Prods. Corp.*, 463 U.S. 60, 74 (1983).

School board meetings concern the interests of children, but so do all government hearings. And political discourse often concerns topics that most parents would restrict from their young children, including war, disease, violent crime, and sex. News reports concerning the exploits of various politicians, including multiple Presidents, have long prompted parents to change the channel. Whether children should watch a school board hearing is a parental decision. Parents can review the evening's agenda before deciding whether a meeting is appropriate for their child.

But Defendants may not silence adults who wish to participate in civic affairs, and bar them from presenting their viewpoints, merely because a child might overhear. Unlike children, adults vote, and they are entitled to participate fully in the political conversation.

Defendants do not separately break out an obscenity interest, though one might imagine that an interest in blocking obscenity relates, at least in part, to the disruption avoidance and child protection interests

upon which Defendants rely. In any event, to the extent that Defendants have some anti-"obscenity" interest, the term's popular understanding differs markedly from the legal concept of the same name, as one judge admonished counsel for another school district. *Marshall v. Amuso,* No. 21-4336, 2021 U.S. Dist. LEXIS 222210, *29 n.9, 2021 WL 5359020 (E.D. Pa. Nov. 17, 2021). Some of the standard four-letter epithets may be "obscenities," but the First Amendment would not tolerate an obscenity prosecution for the publication of the innumerable books, magazines, songs, and movies that include such language based only on that ground. *Cf. Cohen v. California*, 403 U.S. 15 (1971). Neither does it tolerate Defendants' interruption of Plaintiffs' reading from books that are not *legally* obscene in the course of debating whether they belong on school library shelves.[2]

The Defendants' asserted disruption avoidance and child protection interests cannot sustain the challenged policy.

[2] Defendants can reduce the incidence of "unclean" language at their meetings by more closely regulating the language they introduce into the schools.

III. DEFENDANTS' CENSORSHIP POLICY LACKS VALID PRECEDENTIAL SUPPORT.

Given the strong, direct, and recent precedent condemning virtually identical speaking policies, *Ison v. Madison Local Sch. Dist. Bd. of Educ.*, 3 F.4th 887 (6th Cir. 2021); *Marshall, supra,* Defendants searched extensively for decisions upholding similar speech restrictions. The many cases they have located are neither persuasive nor even relevant, let alone controlling.

None of Defendants' speaking policy cases stand for the propositions that the government may ban protected speech because others might react poorly to it, or because children might hear it. None validate interpreting content-based speech restrictions that turn on a speaker's message as content-neutral time, place, or manner regulations. To the extent these decisions follow a pre-*Reed* framework for determining content neutrality, they could not be decided the same way today.

And while some of these cases discuss policies directing speakers to address the hearing's chair, none involve blanket prohibitions on the uttering of government officials' names, let alone uphold such practices.

There is no point revisiting at length *Rowe*, *Jones v. Heyman*, 888 F.2d 1328 (11th Cir. 1989) (per curiam), or *Dyer v. Atlanta Indep. Sch.*

Sys., 852 F. App'x 397 (11th 2021) (per curiam). *Rowe* involved a residency requirement, and the government's ability to create a limited public forum. *Jones* involved a threat to fight the mayor, and the "failure to adhere to the agenda item under discussion." 888 F.2d at 1332. *Dyer*, an unpublished case litigated in *pro se*, upheld racially charged speech as constitutionally protected, but the speech's offensive nature was not the basis for the speaker's suspension. The real issues were his *conduct* in refusing to leave the podium and his shouting of curses, and the fact that his speech, offensive or not, was irrelevant to the forum's purpose of hosting "meaningful discourse" on the topics at hand. 852 F. App'x at 399, 402.

The pre-*Reed* reasoning of *Steinburg v. Chesterfield Cty. Planning Comm'n*, 527 F.3d 377 (4th Cir. 2008), which found a prohibition against "personal attacks" to be a manner regulation, is "outdated." *Draego v. City of Charlottesville*, No. 3:16-CV-00057, 2016 U.S. Dist. LEXIS 159910, at *3 (W.D. Va. Nov. 18, 2016). But even afforded full value, *Steinburg* does not aid Defendants. The Fourth Circuit took a narrow view of what constitutes a "personal attack," defining it as speech that is irrelevant to the topic at hand—unless personal attacks

are on the agenda: "[A]s an insult directed at a person *and not speech directed at substantive ideas or procedures at issue*, a personal attack is surely irrelevant—unless, of course, the topic legitimately at issue is the person being attacked, such as his qualifications for an office or his conduct." *Steinburg*, 527 F.3d. at 386-87 (emphasis added). And the court tied its concern that a "personal attack" might trigger a disruption to its view that "personal attacks" are "insult[s] directed at a person and not the issues at hand." *Id.* at 387. Accordingly, *Steinburg* would not authorize censoring the mere mention of Defendants' names, nor does it allow for a prohibition on "personal attacks" that are fair game in the context of a forum's content scope.

Steinburg's limited relevance is reflected by *Davison v. Rose*, 19 F.4th 626 (4th Cir. 2021). *Davison* followed *Steinburg* uncritically without considering whether that school's prohibition of "comments 'that are harassing or amount to a personal attack,'" *id.* at 635 (quoting policy), was content neutral and without mentioning *Reed*. But like *Steinburg*, *Davison* apparently upheld the school's policy as a content relevance rule. Davison ran afoul of the policy only "when he tried to talk about individual board members in a public hearing about the

elementary zoning process *and never seemed to address the designated topic of the hearing*." *Id.* at 636 (emphasis added). Unlike the practice in Brevard County, "Davison was allowed to speak uninterrupted, despite mentioning individual board members, when his comments focused on the topic of the board meeting." *Id.*

In the pre-*Reed* case of *Milestone v. City of Monroe*, 665 F.3d 774 (7th Cir. 2011), the city had a significant interest in ensuring that its senior center serve as a "home away from home" that was to be "positive," "dynamic," and "pleasant and upbeat." *Id.* at 784. Defendants here have no such interest with respect to school board meetings, the purpose of which is to host a frank exchange of views on political subjects. And *Milestone*'s pre-*Reed* understanding of the code's "abusive, vulgar, and demeaning language" prohibition and its requirement that center personnel be treated "with respect," *id.* at 783, as manner restrictions, was doubtless guided by the behavior that fomented the lawsuit. The plaintiff "engaged in a shouting match at a card game," "filed frivolous police complaints about other patrons," "yelled at patrons and staff," "threw playing cards across a table," "loudly complain[ed]," and "wagged her finger in [the director's] face" while issuing threats, *id.* at 779—all

instances of misconduct, not the expression of particular viewpoints. Defendants here have not applied their speech code against such conduct, or even defended it as necessary to address such problems.

Also irrelevant is this Court's effectively pre-*Reed* decision in *Charnley v. Town of S. Palm Beach, Fla.*, 649 F. App'x 874 (11th Cir. 2016) (per curiam), all but summarily affirming *Charnley v. Town of S. Palm Beach*, No. 13-81203-Civ-Rosenberg/Hopkins, 2015 U.S. Dist. LEXIS 188326, 2015 WL 12999749 (S.D. Fla. Mar. 23, 2015), *report and recommendation adopted*, 2015 U.S. Dist. LEXIS 188327, 2015 WL 12999750 (S.D. Fla. Apr. 9, 2015). In *Charnley*, the *pro se* plaintiff challenged a "decorum statement" limiting speakers to three minutes, barring them from addressing particular officials, and forbidding "boisterous and interfer[ing] . . . behavior." 2015 U.S. Dist. LEXIS 188326, at *4.

Charnley's upholding of the time limit was correct, though not relevant here. As in Defendants' other cited cases, it does not appear that the *Charnley* policy was ever applied to prohibit, as Defendants do, the mere mention of public officials. But neither is it clear that *Charnley* adopted Defendants' "manner" theory. The facts might have

supported a *Davison*/*Steinburg*-type decision, viewing the policy as requiring speech to be relevant to the forum's designated content. But instead, *Charnley* announced that the speaker's "disparaging personal remarks [were] not protected [speech]," *id.* at *20, and that was plainly error. *See Dyer*, 852 F. App'x at 401.

Also irrelevant is the pre-*Reed* decision in *Fairchild v. Liberty Indep. Sch. Dist.*, 597 F.3d 747 (5th Cir. 2010), which stands for nothing more than the proposition that the government can declare subjects—in that case, "individualized personnel matters," *id.* at 759—off-topic in a limited public forum. The unpublished, pre-*Reed* disposition in *Ballard v. Patrick*, 163 F. App'x 584 (9th Cir. 2006) declaring a speech policy reasonable and viewpoint neutral does not explain its reasoning.

The largely unpublished, pre-*Reed* caselaw Defendants marshal does not support their policies and practices, and it neither responds to nor anticipates the controlling and persuasive authority that confirms their policies are unconstitutional.

IV. THERE IS NOTHING VIEWPOINT-NEUTRAL OR REASONABLE ABOUT DEFENDANTS' APPLICATION OF THEIR POLICIES.

Defendants cling to the idea that broadly applying an unconstitutional policy to everyone is somehow better than applying it

to a select few, while also offering the contrary assertion that they only occasionally enforce the policy. Neither claim is laudable. Defendants do not respond to the point that "prohibit[ing] all sides" from using offensive speech "makes a law more viewpoint based, not less so." Pl. Br. 34 (quoting *Tam*, 137 S. Ct. at 1766 (opinion of Kennedy, J.)). And however rare or common Defendants' interruptions, admonishments, threats, and expulsions may be relative to the entire volume of speech expressed by everyone who has ever attended a Brevard school board hearing, each incident—each interruption for saying some term of which Defendants disapprove or for mentioning the name of a board member—violates the First Amendment.

And these incidents keep happening. Indeed, the incidents are common enough that they alter people's choice of words and dissuade Plaintiff Amy Kneessy—herself a former board member well-accustomed to the slings and arrows of political discourse—from speaking altogether.

Whether it is reasonable to prohibit speakers from addressing individual board members other than the chair, in light of the forum's purpose, is at best debatable. The disruption avoidance rationale

Defendants offer for such a rule is unsupportable as a matter of First Amendment doctrine. *See discussion supra*. But even were that rule constitutional on its face, its arbitrary application in barring people from mentioning people by name cannot be constitutional. Likewise, Defendants may prohibit true obscenity that satisfies the *Miller* test, but that is not how Defendants apply their rule.

Defendants apply an unconstitutional policy in an unconstitutional manner, yielding predictably unconstitutional outcomes. They should be enjoined from doing so.

V. *TAM* AND *BRUNETTI* ARE NOT OPTIONAL. THE FIRST AMENDMENT FORBIDS THE SUPPRESSION OF "ABUSIVE" SPEECH.

Defendants' efforts to cabin *Tam* and *Brunetti* to their facts or distinguish them on grounds that "offensive" speech is somehow different from "abusive" speech are not only unavailing, but contradict the law's trend before this Court and at One First Street.

"The Supreme Court has reiterated time and again—and increasingly of late—the 'bedrock First Amendment principle' that '[s]peech may not be banned on the ground that it expresses ideas that offend.'" *Speech First, Inc.*, 2022 U.S. App. LEXIS 11864, at *35 (quoting *Tam*, 137 S. Ct. 1744, 1751 (2017)). *Tam* is not just for

trademarks, and *Speech First* is not just for higher education. The Supreme Court's pronouncements as to the scope of the First Amendment's protection do govern Defendants.

Defendants' arguments that this Court can or should decline to apply *Tam*, "a trademark case," and by extension *Brunetti*, "as persuasive in the context of this school board case" involving a limited public forum, Def. Br. 51, comes too late. This Court has already applied *Tam* in the limited public forum context. It did so in a case that is otherwise inapposite, but on which *Defendants* heavily rely: *Dyer*, 852 F. App'x at 401 (quoting *Tam*, 137 S. Ct. at 1751). *Speech First*'s reliance on *Tam*, in the campus speech context, confirms that the *Tam* genie will not be returning to the trademark bottle.

Of course, Defendants would like to exclude *Tam* and *Brunetti* as controlling precedent, because they must understand that there is no difference between banning, without more, "offensive" and "abusive" speech. As Defendants concede, the statutes struck down in *Tam* and *Brunetti* did not employ the term "offensive," but the terms they used were close enough: "disparage," 137 S. Ct. at 1751, "immoral" and "scandalous," 139 S. Ct. at 2298. In *Brunetti*, after recounting a variety

of different words that all relate the same idea, including "wicked," "vicious," "disgraceful," "disreputable," and yes, "offensive," the Court explained that the statute "distinguishes between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them; those inducing societal nods of approval and those *provoking* offense and condemnation." *Brunetti*, 139 S. Ct. at 2299-2300 (emphasis added). "Abusive" is just another name for "offensive."

Defendants disagree. And while it is not every day that federal courts create a new category of unprotected speech, Defendants ask this Court to take the occasion of this case to do just that and declare that the First Amendment does not protect "abusive" speech. Indeed, setting aside *Tam, Brunetti*, and any every other case that precludes such an outcome, Defendants argue that the Supreme Court has already defined "abusive" speech as an unprotected category when it referenced the concept in *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

The argument is novel. Unprotected speech may include perjury, defamation, obscenity, copyright infringement, blackmail, incitement, true threats, criminal solicitation, child pornography, and "fighting words," but there is no "abusive speech" doctrine, and *Cantwell* did not

create one. *Cantwell* used the term, among others, in describing what the government may proscribe as inciting a breach of the peace. It did not set out "abusive" speech as the sine qua none of that crime, constitutionally defined. Indeed, the Supreme Court later explained that "[t]he language of the political arena, like the language used in labor disputes, is often vituperative, *abusive*, and inexact." *Watts v. United States*, 394 U.S. 705, 708 (1969) (emphasis added); *see also Elonis v. United States*, 575 U.S. 723, 751 (2015).

Brevard Public Schools' board meetings are "the political arena." *Watts*, 394 U.S. at 708. Defendants should get used to "abusive" speech.

Indeed, *Cantwell* reveals the incredible reach of Defendants' efforts to target so-called "abusive" speech. Because in contrast to what Defendants claim about Plaintiffs' school board speech, the Supreme Court held that the First Amendment *protected* Cantwell's highly provocative speech from a charge of inciting a breach of the peace.

Cantwell approached Catholics to play them a record entitled "Enemies," "which attacked the [listeners'] religion and church." *Cantwell*, 310 U.S. at 303. The record "embodies a general attack on all organized religious systems as instruments of Satan and injurious to

man," but "singles out the Roman Catholic Church for strictures couched in terms which naturally would offend not only persons of that persuasion, but all others who respect [them]." *Id.* at 309. "The hearers were in fact highly offended. One of them said he felt like hitting Cantwell and the other that he was tempted to throw Cantwell off the street," and "told Cantwell he had better get off the street before something happened to him." *Id.*

Defendants do not suggest that *Cantwell* was wrongly decided. Rather, they suggest that while approaching Catholic strangers on the street to directly attack their faith as Satanic is not too provocative to lose the First Amendment's protection, Joey Cholewa can be expelled from a political forum for addressing comments to a government official that criticize a political party, and unspecified parents who seek to change their children's gender. Defendants further suggest that the same fear of disruption that justifies Cholewa's expulsion justifies silencing speakers for mentioning Defendants by name.

Defendants are not the only ones with opinions as to what might incite a breach of the peace. Although they claim that the Brevard County Sheriff's Office suggested they begin threatening speakers with

arrest for disrupting a board meeting, Def. Br. 24, the Sheriff may have had a change of heart since the filing of their brief. News reports indicate that on May 23, 2022, Brevard Sheriff Wayne Ivey wrote Defendant School Board Chair Misty Belford a letter using "very terse language" declaring that his office "will not be enforcing any 'unconstitutional' speaker policies." Bailey Gallion, *Sheriff Ivey to Belford: Deputies won't enforce Brevard School Board speaking policies*, Florida Today (May 28, 2022), https://bit.ly/3mjhc4c. Sheriff Ivey reportedly wrote that Defendants' potentially unconstitutional requests for law enforcement may include those based on the prohibitions challenged here, and that he would be reluctant to have his office address a speaker "unless his or her conduct is actually disorderly threatening or disruptive pursuant to (Florida statute) or other law." *Id.*

In other words, it appears that the law enforcement official that Defendants would task with their policy's ultimate enforcement has doubts as to its constitutionality.

Ison and *Marshall* were right, and Defendants are wrong. The First Amendment forbids the censorship and punishment of "abusive" speech.

VI. DEFENDANTS CONFIRM THAT THEIR POLICY IS VAGUE AND OVERBROAD.

Defendants' efforts to distinguish permissible "offensive" speech from impermissible "abusive" speech confirms the arbitrary nature of their alleged standard. When does speech become not merely offensive, but so injurious to one's dignity as to be "abusive" and thus unprotected by the First Amendment? No magic line between the two concepts might be identified with any precision. An overly sensitive person, or one who looks to prosecute his ideological opponents, might claim that any disagreeable speech is not just "offensive" but "abusive." People living under such a legal regime would be advised to just keep silent.

Claiming that "the Policy as a whole" clarifies the standard and eliminates subjectivity, Defendants set out the entire section describing their presiding officer's enforcement powers. Def. Br. 59. They do so in seeking to draw a contrast with the policy struck down in *Marshall* for lacking "guidance or other interpretive tools to assist in properly applying" the restrictions. *Id.* at 58 (quoting *Marshall*, 2021 U.S. Dist. LEXIS at *19-*20). But nothing in Defendants' "Policy as a whole" sheds any light on what constitutes "abusive," "personally directed," or "obscene" speech. And Defendants should have read the *Marshall*

policies. Their four-piece "Policy as a whole" is almost a verbatim copy of the first four provisions of the presiding officer section of Pennsbury School District's Policy 903 struck down in *Marshall*. *See* Exhibit A to Plaintiffs' Preliminary Injunction Motion, *Marshall v. Amuso*, E.D. Pa. No. 2:21-cv-04336-GEKP, ECF Dkt. 4-7, at 2 ("Guidelines").[3]

Moreover, since the Supreme Court understands "[t]he language of the political arena" and "language used in labor disputes" to "often" be "abusive," *Watts*, 394 U.S. at 708, Defendants' policy *is* substantially overbroad, ensnaring large amounts of protected political and labor speech, among other forms of protected expression.

VII. THE DISTRICT COURT PLAINLY ERRED IN ADOPTING DEFENDANTS' NARRATIVE REGARDING THE PREFERRED ACCESS CLAIM WITHOUT A HEARING.

The parties' dispute as to which standard of review governs Plaintiffs' appeal with respect to the preferred access claim ultimately makes no difference. The District Court's error in declining to hold a hearing was plain.

[3] School boards often buy form policies off-the-shelf. The *Marshall* school bought its unconstitutional policy from the Pennsylvania School Boards Association, which apparently studied together with Defendants' policy supplier.

True, Plaintiffs might have done more to insist on an evidentiary hearing, but the question is not what Plaintiffs could or should have done differently.[4] The question is whether the Court erred in adopting one side's contested factual narrative without an evidentiary hearing.

The law on this point is clear: it erred. When facing a factual dispute at the preliminary injunction stage, courts cannot pick a side absent an evidentiary hearing. *Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr, S.A.*, 320 F.3d 1205, 1211 (11th Cir. 2003).

CONCLUSION

The district court's order should be vacated.

Dated: June 6, 2022

Respectfully submitted,

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[4] In stating that the court was not required to resolve this particular factual dispute to grant the motion, Def. Br. 63, trial counsel referred to Plaintiffs' challenges to the speech policy, which do not involve any factual dispute.

CERTIFICATE OF COMPLIANCE WITH TYPE VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

This brief complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because it contains 5,932 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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Dated: June 6, 2022

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