No. 23-10656-B

In the
United States Court of Appeals for the Eleventh Circuit

MOMS FOR LIBERTY - BREVARD COUNTY, FL, AMY KNEESSY, ASHLEY HALL, KATIE DELANEY, JOSEPH CHOLEWA, *Plaintiffs-Appellants*,

v.

BREVARD PUBLIC SCHOOLS, MISTY HAGGARD-BELFORD, CHAIR, BREVARD COUNTY SCHOOL BOARD IN HER INDIVIDUAL CAPACITY, MATT SUSIN, VICE CHAIR, BREVARD COUNTY SCHOOL BOARD IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES, CHERYL MCDOUGALL, MEMBER, BREVARD COUNTY SCHOOL BOARD IN HER OFFICIAL AND INDIVIDUAL CAPACITIES, KATYE CAMPBELL, MEMBER, BREVARD COUNTY SCHOOL BOARD IN HER OFFICIAL AND INDIVIDUAL CAPACITIES, ET AL., *Defendants-Appelees*,

Appeal from a Judgment 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-DAB)

BRIEF OF ADVANCING AMERICAN FREEDOM, INC., AMERICAN CORNERSTONE INSTITUTE, AMERICAN VALUES, EAGLE FORUM, FAITH AND FREEDOM COALITION, GLOBAL LIBERTY ALLIANCE, INTERNATIONAL CONFERENCE OF EVANGELICAL CHAPLAIN ENDORSERS, NATIONAL ASSOCIATION OF PARENTS, NATIONAL CENTER FOR PUBLIC POLICY RESEARCH, NATIONAL RELIGIOUS BROADCASTERS, PROJECT 21, STUDENTS FOR LIFE OF AMERICA, STUDENTS FOR LIFE ACTION, AND THE FAMILY FOUNDATION AS AMICI CURIAE IN SUPPORT OF PLAINTIFF-APPELLANTS AND REVERSAL

J. MARC WHEAT
Counsel of Record
ADVANCING AMERICAN FREEDOM, INC.
801 Pennsylvania Avenue, N.W., Suite 930
Washington, D.C. 20004
(202) 780-4848
MWheat@advancingamericanfreedom.com

April 17, 2023

Counsel for Amici Curiae

23-10656-B, *Moms for Liberty, et al. v. Brevard Public Schools, et al.*

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to the Eleventh Circuit rules, the following persons and corporation have an interest in the outcome of this appeal:

1) Advancing American Freedom, Inc., Amicus Curiae

2) American Cornerstone Institute, Amicus Curiae

3) American Values, Amicus Curiae

4) Eagle Forum, Amicus Curiae

5) Faith and Freedom Coalition, Amicus Curiae

6) Global Liberty Alliance, Amicus Curiae

7) International Conference of Evangelical Chaplain Endorsers, Amicus Curiae

8) National Association of Parents, Amicus Curiae

9) National Center for Public Policy Research, Amicus Curiae

10) National Religious Broadcasters, Amicus Curiae

11) Project 21, Amicus Curiae

12) Students for Life of America, Amicus Curiae

13) Students for Life Action, Amicus Curiae

14) The Family Foundation, Amicus Curiae

15) J. Marc Wheat, Counsel for Amicus Curiae

The amici curiae Advancing American Freedom, Inc., American Cornerstone Institute, American Values, Eagle Forum, Faith and Freedom Coalition, Global Liberty Alliance, International Conference of Evangelical Chaplain Endorsers, National Association of Parents, National Center for Public Policy Research, National Religious Broadcasters, Project 21, Students for Life of America, Students for Life Action, and The Family Foundation are nonprofit corporations. They do not issue stock and are neither owned by nor are the owners of any other corporate entity, in part or in whole. They have no parent companies, subsidiaries, affiliates, or members that have issued shares or debt securities to the public. The corporations are operated by volunteer boards of directors.

Advancing American Freedom, Inc., ("AAF") states under FRAP 29(a)(4)(E) that no counsel for a party other than AAF authored this brief in whole or in part, and no counsel or party other than AAF made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus or its counsel made a monetary contribution to its preparation or submission. Amici present this brief in support of the freedom of speech and the right to petition government for redress of grievances. Plaintiffs-Appellants have consented to the filing of this brief, Counsel for Defendants-Appellees have objected: "We do not consent. I am not sure what additional arguments or insight

your organization can provide to the court." We respectfully have asked leave of the Court to file this brief. FRAP 29(a)(2).

Respectfully submitted,

/s/ J. Marc Wheat
J. MARC WHEAT
Counsel of Record
ADVANCING AMERICAN FREEDOM, INC.
801 Pennsylvania Avenue, N.W., Suite 930
Washington, D.C. 20004
(202) 780-4848
MWheat@advancingamericanfreedom.com
Counsel for Amici Curiae

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT C-1

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT 7

ARGUMENT 10

I. Parents have a right to control the education of their children 10

II. Naming names of public officials is an important element of First Amendment freedom 11

III. Restrictions on Naming Names of Public Officials, Including the Restrictions at Issue in this Case, are Inherently Viewpoint-Based Restrictions and thus Unconstitutional 14

CONCLUSION 19

CERTIFICATE OF COMPLIANCE 20

CERTIFICATE OF SERVICE 21

TABLE OF AUTHORITIES

Cases

**Acosta v. City of Costa Mesa*,
718 F.3d 800 (9th Cir. 2013) 15

**Cooper ex rel. Child. A & B v. Fla.*,
140 F. App'x 845 (11th Cir. 2005)..11

Good News Club v. Milford Central School,
533 U.S. 98 (2001)..14

Hill v. Colorado,
530 U.S. 703 (2000)..18

**Matal v. Tam*,
582 U.S. 218 (2017).. 14, 15, 17

Meyer v. Nebraska,
262 U.S. 390 (1923)..10

**New York Times v. Sullivan*,
376 U.S, 254 (1964).. 7, 8, 13

Norse v. Santa Cruz,
629 F.3d 966 (9th Cir. 2010) (en banc) 16

Perry Ed. Assn. v. Perry Local Educators' Assn.,
460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983) 15

Pierce v. Society of Sisters,
268 U.S. 510 (1925)..11

Pleasant Grove City, Utah v. Summum,
555 U.S. 460 (2009)..14

Reed v. Gilbert,
576 U.S. 155 (2015).....17

Rosenberger v. Rector & Visitors of Univ. of Virginia,
515 U.S. 819 (1995).....15

Vlasak v. Super. Ct. of Cal. ex rel. Cnty. of L.A.,
329 F.3d 683 (9th Cir.2003).....16

W. Virginia State Bd. of Educ. v. Barnette,
319 U.S. 624 (1943)..... 8, 11, 12

White v. Norwalk,
900 F.2d 1421 (9th Cir. 1990)..... 15, 16

Constitution and Statutes

The Declaration of Independence para. 2 (U.S. 1776).....7

U.S. Const. Preamble.....7

*Fla. Stat. § 286.011.....13

Codes

Costa Mesa Municipal Code § 2–61.....16

Other Authorities

Brevard Sch. Bd. Policy Manual § 0000 Bylaws, Code po0169.1..... 8

Emily Brooks, *McAuliffe says parents shouldn't tell schools what to teach, handing Youngkin a campaign ad*, Yahoo News (September 29, 2021) https://news.yahoo.com/mcauliffe-says-parents-shouldn-t-173500644.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuYmluZy5jb20v&guce_referrer_sig=AQAAABMDFoL2VmvzaeBecfNqovsEJYRtVcjFlUZzVLscwi2dkbfOhUDNraapSgQR23VKoqbSWhCrVdCsw-Q02NQSFSQGXw2HD8uMVBvwkPMZw1K9ydDu-jogCc0Jps_N3nhoax01EJyiz8PsPzpYsk6xYYY7-tP5AYzm3Hq7a1-StSbd....... 9

*Authorities upon which we primarily rely are marked with asterisks.

INTEREST OF AMICI CURIAE[1]

Advancing American Freedom (AAF) is a nonprofit organization that promotes and defends policies that elevate traditional American values, including the uniquely American idea that all men are created equal and endowed by their Creator with unalienable rights to life, liberty, and the pursuit of happiness. American freedom, particularly the freedom of speech and the right to petition government for redress, has created the greatest and most prosperous country in the history of the world, and if future generations are going to enjoy those blessings, we must secure our individual rights in our own time. There are 257 families in Brevard County, Florida, who generously support the work of AAF and wish to have this brief considered over the objection of counsel to Defendants-Appellees.

The American Cornerstone Institute is a nonpartisan, not-for-profit organization founded by world-renowned pediatric neurosurgeon and 17th Secretary of the Department of Housing and Urban Development Dr. Benjamin S. Carson. The Institute's mission is to educate the public on the importance of Faith,

---

[1] No counsel for a party authored this brief in whole or in part. No person other than *Amicus curiae* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief. Plaintiffs-Appellants have granted consent to the filing of this brief. Counsel for Defendants-Appellees has declined to consent via electronic mail: "We do not consent. I am not sure what additional arguments or insight your organization can provide to the court." Because respondent has declined to consent, Advancing American Freedom, which is generously supported by 257 families in Brevard County who cherish our First Amendment freedoms, presented a motion for leave of the Court to file the appended amici curiae brief.

Liberty, Community, and Life to the continued success of the United States of America. The Institute believes the liberty interest of a parent to guide their child's education is a fundamental right and an enduring American tradition.

American Values (AV) is a non-profit organization committed to uniting the American people around the vision of our Founding Fathers; a vision rooted in the self-evident truth that we are all ‘endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness.’ Our vision is a nation that embraces life, marriage, family, faith, and freedom. We work for streets without bullets, schools that prepare our children for success, laws that protect our people and governments at every level that serve its citizens. To achieve these goals, American Values works with policy makers and grassroots from local school boards to state legislatures and Congress. American Values is organized under section 501(c)(3) of the IRS Code.

The mission of Eagle Forum is to empower conservative and pro-family men and women to participate in the process of self-government and public policy-making so that America will continue to be a land of individual liberty, with respect for the nuclear family, public and private virtue, and private enterprise. Its network of state based chapters share the mission of mobilizing and mentoring grassroots conservative activists to impact public policy at all levels of

government; from Congress to state legislatures, to local commissions and boards. Eagle Forum is organized under section 501(c)(4) of the IRS Code.

Faith & Freedom Coalition was founded in 2009 as a nonpartisan, non-profit, tax-exempt, social welfare organization as defined by I.R.C. section 501(c)(4). Its mission is to educate, equip, and mobilize people of faith and like-minded individuals to be effective citizens and to enact public policy that strengthens families, protects individuals, promotes time-honored values, protects the dignity of life and marriage, lowers the tax burden on small business and families, and requires government to live within its means. Today, it has grown to over 2.5 million members nationwide. Faith & Freedom Coalition is a leader at the state and federal level in advocating for the interests and rights of the family, a natural society, which exists prior to the State and possesses inherent, inalienable rights. The family is uniquely suited to teach and transmit cultural, ethical, social, spiritual, and religious values, essential for the development and well-being of its own members and of society. Faith & Freedom Coalition's membership is concerned that these rights are being steadily eroded.

The Global Liberty Alliance is a nonprofit organization based in Alexandria, Virginia, and an office in Melbourne, Florida (Brevard County), that defends and advocates for fundamental rights, free enterprise, and the rule of law. The Global Liberty Alliance defends religious liberty, private property, and human rights in the

legal and public policy space in the U.S. and with lawyers in other countries. It has and will continue to team with like-minded organizations in the U.S. and foreign countries through litigation, advocacy, and filing amicus curiae briefs to defend equality and freedom for individuals.

The International Conference of Evangelical Chaplain Endorsers (ICECE) is a conference of evangelical organizations that endorse Christian clergy to be chaplains to provide for the free exercise of religion in the military and other limited-access organizations. ICECE's most important issue is protecting and advancing religious liberty for all chaplains and military personnel. That includes defending and emphasizing the right of chaplains and religious organizations to proclaim and exercise their faith in their daily lives and business transactions. ICECE supports challenges to government encroachments and/or restrictions on religious organizations' autonomy, operations, and internal governance of their affairs.

ParentsUSA is the collective voice of parents, all parents! The National Association of Parents, Inc. d/b/a ParentsUSA focuses the power of parents behind three important missions.

ParentsUSA's core objective is to preserve and support the parent-child relationship. By advocating for the rights of parents as protected by the U.S. Supreme Court, ParentsUSA works to support parents' rights to raise their children

as they see fit, so long as they are not harmed. Through strategic litigation, education, and lobbying, we will reshape public policy to be in alignment with your rights as a parent.

The National Center for Public Policy Research is a communications and research foundation supportive of a strong national defense and dedicated to providing free market solutions to today's public policy problems. We believe that the principles of a free market, individual liberty and personal responsibility provide the greatest hope for meeting the challenges facing America in the 21st century.

National Religious Broadcasters (NRB) is a non-profit, membership association that represents the interests of Christian broadcasters throughout the nation. Most of its approximately 1100 member organizations are made up of radio stations, radio networks, television stations, television networks, and the executives, principals, and production and creative staff of those broadcast entities. NRB member broadcasters are both commercial and non-commercial entities. Since 1944, the mission of NRB has been to help protect and defend the rights of Christian media and to maintain access for Christian communicators. Additionally, NRB seeks to effectively minister to the spiritual welfare of the United States of America through the speech it advances to the public.

Project 21, a national leadership network for black conservatives, promotes the views of black citizens whose entrepreneurial spirit, dedication to family, and commitment to individual responsibility have not traditionally been echoed by the nation's civil rights establishment.

Students for Life of America ("SFLA") and is the nation's largest pro-life youth organization that uniquely represents the generation most targeted for abortion. SFLA, a 501(c)(3) charity, exists to recruit, train, and mobilize the Pro-Life Generation to abolish abortion and provide policy, legal, and community support for women and their children, born and preborn. SFLA has thousands of student groups across the nation; many of these students volunteer to engage in lobbying, ballot measure advocacy and political advocacy with Students for Life Action ("SFL Action"), the advocacy arm of the SFL movement. Both SFLA and SFL Action and the tens of thousands of people who join with them in their work have an interest in ensuring First Amendment protections remain in place, especially including at the local level.

The Family Foundation (TFF) is a Virginia non-partisan, non-profit organization committed to promoting strong family values and defending the sanctity of human life in Virginia through its citizen advocacy and education. TFF serves as the largest pro-family advocacy organization in Virginia. Its interest in

this case is derived directly from its concern to advance a culture in which children are valued, religious liberty thrives, and marriage and families flourish.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Governments, which are "instituted among men" to secure "unalienable rights," "deriv[e] their just powers from the consent of the governed." The Declaration of Independence para. 2 (U.S. 1776). Consistent with this principle, the Constitution speaks on behalf of "We the people of the United States." U.S. Const. Preamble. The people are sovereign, and the government and its officials are answerable to them. *See New York Times v. Sullivan*, 376 U.S, 254, 274 (1964) In response to the Alien and Sedition Acts, "[James Madison's] premise was that the Constitution created a form of government under which 'The people, not the government, possess the absolute sovereignty.'"

This responsibility to the people applies at every level of governance, from local boards to the federal government. "Boards [of Education] are numerous and their territorial jurisdiction often small. But small and local authority may feel less sense of responsibility to the Constitution . . . There are village tyrants as well as village Hampdens, but none who acts under color of law is beyond reach of the Constitution." *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). The Brevard County School Board attempted to squelch criticism from the very parents to whom it is beholden, as if it were not accountable to the parents in

the community it serves nor responsible to the Constitution. When the Supreme Court ruled in *New York Times*, it recognized the vital importance of the people's freedom to criticize public officials. 376 U.S. at 272.

Contrary to that principle, the school board's speaker policy at issue in this case allows speakers to direct statements at the presiding officer or other members of the board, but they may not name "staff members or other individuals."[2] Further, "The presiding officer may: interrupt, warn, or terminate a participant's statement when [it] is too lengthy, personally directed (except as allowed above), abusive, obscene, or irrelevant."[3] Finally, at the time of the events which gave rise to this case, the policy did not allow speakers to address by name members of the board. This restriction on parents' ability to criticize by name those responsible for the education of their children is contrary to both the letter and the spirit of the First Amendment.

Of *the People*, parents are the most interested and most relevant speakers in local decisions about public schooling in their communities. There are those who believe that parents have no business telling public schools how they should operate. During the 2021 Virginia gubernatorial campaign, former Governor Terry McAuliffe said, "I don't think parents should be telling schools what they should

---

[2] Brevard Sch. Bd. Policy Manual § 0000 Bylaws, Code po0169.1, ¶ E

[3] Brevard Sch. Bd. Policy Manual § 0000 Bylaws, Code po0169.1, ¶ H(1)

teach."[4] That is wrong. Parents do not cede their parental authority to the state when they send their children to a public school. While as a practical matter, parents cannot expect to have full control of their children's education when they employ the services of the government-run educational establishment, they retain ultimate parental authority. Parental authority includes the authority to publicly criticize the actions of school officials, including calling out those officials by name for impairing the sound education of their children. The restrictions imposed by the Brevard County School Board on parents' ability to engage in that criticism run contrary to both basic parental rights and the First Amendment's protection of individual free speech. This Court should overturn the district court's dismissal and rule for the parents against the school board.

ARGUMENT

I. Parents have a right to control the education of their children.

Concomitant with parents' duty to raise and educate their children is the right to make decisions about the performance of that duty. When parents send their children to a school and thereby delegate some of their authority to that

[4] Emily Brooks, *McAuliffe says parents shouldn't tell schools what to teach, handing Youngkin a campaign ad*, Yahoo News (Septemberapp 29, 2021) https://news.yahoo.com/mcauliffe-says-parents-shouldn-t-173500644.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuYmluZy5jb20v&guce_referrer_sig=AQAAABMDFoL2VmvzaeBecfNqovsEJYRtVcjFlUZzVLscwi2dkbfOhUDNraapSgQR23VKoqbSWhCrVdCsw-Q02NQSFSQGXw2HD8uMVBvwkPMZw1K9ydDu-jogCc0Jps_N3nhoax01EJyiz8PsPzpYsk6xYYY7-tP5AYzm3Hq7a1-StSbd.

school for a time, they do not expect their family's values to be undermined and would not knowingly send their children to such a school if they were able to do otherwise. That expectation is well-founded in law. The Supreme Court has clearly recognized the right of parents to control the education of their children.

In *Meyer v. Nebraska*, the Court struck down a state law prohibiting the teaching of children in any language other than English before the eighth grade. 262 U.S. 390, 403 (1923). It based its decision, in part, on "the right of control," and the corresponding "natural duty of the parent to give his children education suitable to their station in life." *Id.* at 400. The Court contrasted the American understanding of parental liberty with that of Sparta, where children were taken from parents at age seven and raised by the state. *Id.* at 402. That approach, the Court said, represented a "wholly different" view of "the relation between individual and state . . . from those on which our institutions rest." *Id.* In America, parents, not the state, retain primary responsibility for the upbringing of children.

Two years later, the Court struck down an Oregon law requiring parents to send their children to public schools, writing "we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925). Further, "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled

with the high duty, to recognize and prepare him for additional obligations." *Id*. at 535.

Finally, this Court has also recognized the principle established by the Supreme Court, that "The Due Process Clause of the Constitution protects the fundamental right of parents to direct the education of their children." *Cooper ex rel. Child. A & B v. Fla.*, 140 F. App'x 845, 846 (11th Cir. 2005). Thus, the right of parents to control the education of their children is well established in precedent.

II. Naming names of public officials is an important element of First Amendment freedom.

The Brevard County School Board's policy prohibiting the public from referring by name to school board members or school officials blocks important First Amendment activity. Parent speech at a school board meeting is political speech. Political speech is core to the First Amendment's protection. *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. at 642 ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."). Further, parental speech at school board meetings is political speech in one of the important arenas of government action on which rests the future of our republic. Parents go to school board meetings with the hope of influencing education policy or bringing attention to some deficiency. Cutting through the fog of unaccountability, that

effort to bring problems to light will often require being clear about who has caused the problem.

As a practical reality, individual parents who send their children to public schools cannot expect to exercise granular control over the school's curricular decisions. Nonetheless, they can and should challenge questionable or offensive aspects of a schools teaching and management of their children. Part of the value of such public criticism is that it allows an individual parent to rally to the cause support of other parents to make desired changes in the curriculum. The school board's policy in this case unnecessarily hinders the effectiveness of those communications in their most natural environment, the school board meeting.

The State of Florida recognizes the importance of public engagement with government function through its Open Meetings Act, which requires that "All meetings of any board or commission of any state agency or authority . . . at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meetings." Fla. Stat. § 286.011. The school board meeting is not merely an opportunity to reach the school board. It is an opportunity to bring to the attention of other parents an issue that may be of great public interest. The school board meeting is a platform for speech on issues that affect schooling and, for some parents, will be the most effective platform to which they

have access. Restricting the free flow of speech by channeling it into the miasmic swamp of murky unaccountability is contrary to the basic First Amendment principle of allowing criticism of public officials.

The school board's restriction on referring to school board members and school officials by name is contrary to America's "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (citations omitted). Further, there is no place better for direct criticism of school board members and school officials' actions than the public meeting that exists for the hashing out of such issues. By prohibiting the use of specific names, the board here unnecessarily and unconstitutionally limits the important political speech of parents, and the reach of speech, that calls out potentially problematic government behavior. For that reason, the school board's policy should be struck down and the district court's summary judgment reversed.

III. Restrictions on Naming Names of Public Officials, Including the Restrictions at Issue in this Case, are Inherently Viewpoint-Based Restrictions and thus Unconstitutional.

The school board policy restricting the naming of names is necessarily a viewpoint-based restriction on speech. It goes beyond the school board's legitimate

power to regulate the *content* of speech for relevance and disruption, encroaching on First Amendment-protected viewpoint expression.

To determine the types and degree of restrictions on speech the government may employ in particular venues, the Court asks what type of forum is at issue. Even in the narrowest type of forum the school board could be, a limited public forum, the government's restrictions on speech must be "reasonable and viewpoint neutral." *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 470 (2009) (citing *Good News Club v. Milford Central School*, 533 U.S. 98, 106-07 (2001)). Although for such fora, "some content- and speaker-based restrictions may be allowed," "'viewpoint discrimination' is forbidden." *Matal*, 528 U.S. at 243 (citations omitted). Further, "the government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995) (citing *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46, 103 S.Ct. 948, 955, 74 L.Ed.2d 794 (1983). Thus, if the school board's policy in this case constitutes viewpoint-based discrimination, it is constitutionally suspect.

"The distinction [between viewpoint discrimination and content-based restrictions] is not a precise one." *Rosenberger*, 515 U.S. at 831. However, the fact that multiple views on a topic are restricted is not enough to move something from

the category of viewpoint-based discrimination to content-neutrality. *Id*. at 831-32. The Supreme Court's "cases use the term 'viewpoint' discrimination in a broad sense." *Matal v. Tam*, 582 U.S. 218, 243 (2017).

The Ninth Circuit has struck down a law similar to the policy at issue in this case, recognizing that these types of restrictions on speech at public meetings are impermissible under the First Amendment. In *Acosta v. City of Costa Mesa*, the court held that because the City Council's rule for speech at meetings, "fail[ed] to limit proscribed activity to only actual disturbances," it was facially invalid. 718 F.3d 800, 807 (9th Cir. 2013). The court reasoned that "while a speaker may be stopped 'if his speech becomes irrelevant or repetitious,' even in a limited public forum 'a speaker may not be stopped from speaking because the moderator disagrees with the viewpoint he is expressing.'" *Id*. at 816 (quoting *White v. Norwalk*, 900 F.2d 1421, 1425 (9th Cir. 1990). The relevant statutory language in that case prohibited speakers from engaging in "disorderly, insolent, or disruptive behavior." *Id.* at 811 (quoting Costa Mesa Municipal Code § 2–61). The statute also prohibited "any personal, impertinent, profane, insolent, or slanderous remarks." *Id*. The court found the law to be facially unconstitutional "because it unnecessarily sweeps a substantial amount of non-disruptive, protected speech within its prohibiting language." *Id*. (citing *Vlasak v. Super. Ct. of Cal. ex rel. Cnty. of L.A.*, 329 F.3d 683, 689 (9th Cir.2003)). While the court recognized that a

city council could remove speakers for "actually disturbing or impending a meeting," "a municipality cannot merely define disturbance 'in any way it chooses,' e.g., it may not deem any violation of its rules of decorum to be a disturbance." *Id*. at 811 (quoting *Norse v. Santa Cruz*, 629 F.3d 966, 976 (9th Cir. 2010) (en banc)). The court found the statute to be overbroad because none of the city's proposed limiting constructions of the statute "would prevent city officials from enforcing § 2–61 against" viewpoints with which the moderator disagrees. *Id*. at 816

A school board's ability to restrict the content of a school board meeting thus is the ability to restrict content for relevance and actual disruption. A speaker may not object to the county's road maintenance, for example, unless it is somehow related to school issues. Similarly, a speaker may not act in such a way as to actually disrupt the meeting. Restrictions against naming public officials are not necessary for either of these goals and restrict the expression of information important to the public debate that naturally centers around the school board meeting.

Speech-restrictive regulations that prohibit speakers at public meetings from naming public officials is inherently viewpoint-discriminatory. The Court in *Matal* recognized that the law challenged in that case, "evenhandedly prohibit[ed] disparagement of all groups. It applie[d] equally to marks that damn Democrats

and Republicans, capitalists and socialists, and those arrayed on both sides of every possible issue. It denies registration to any mark that is offensive to a substantial percentage of the members of any group." *Matal*, 582 U.S. at 243. Nevertheless, it was viewpoint discrimination because "Giving offense is a viewpoint." *Id*.

That a speech-restrictive policy was not intended to discriminate based on viewpoint is also irrelevant. In *Reed v. Gilbert*, the Court wrote, "Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech. That is why the First Amendment expressly targets the operation of the laws—i.e., the 'abridgement of speech'—rather than merely the motives of those who enacted them." 576 U.S. 155, 167 (2015). Further, "'The vice of content-based legislation ... is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes.'" *Id*. (alteration in original) (quoting *Hill v. Colorado*, 530 U.S. 703, 743 (2000) (Scalia, J. dissenting)). Restrictions on naming public officials will always allow for petty tyrants to limit speech with which they disagree while allowing speech they like. It is too easy for such policies to be enforced discriminatorily.

The Court's capacious reading of the term viewpoint discrimination easily encompasses the school board's policy's restrictions on speech here. The restriction on speakers naming school officials, and board members from which

this case arose, have been and can continue to be the basis for restriction of viewpoints the board finds objectionable. Important viewpoints will always be kept out of the school board meeting, the most natural and effective place to engage in debates of important education issues, as long as this type of speech restriction is in place because the salience of certain views depends on the person being criticized. Because the standard established by the school board policy is not limited to actual disruption, it is unconstitutionally broad. The purpose of calling out a school board member or school official by name is to express a particular viewpoint related to their work in education. As a result, any restriction on the naming of officials who work in the school districts covered by the school board will inevitably be viewpoint-based and thus unnecessarily limits constitutionally protected speech.

CONCLUSION

For the forgoing reasons, this court should reverse the lower court's judgment and the School Board's motion to dismiss should be vacated.

Respectfully submitted,

/s/ J. Marc Wheat

J. MARC WHEAT
Counsel of Record
ADVANCING AMERICAN FREEDOM, INC.
801 Pennsylvania Avenue, N.W., Suite 930
Washington, D.C. 20004
(202) 780-4848
MWheat@advancingamericanfreedom.com

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

The foregoing Brief complies with the type-volume limit of Fed. R. App. P. 29(a)(5), because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 4,257 words.

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

/s/ J. Marc Wheat
J. Marc Wheat

CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2023, an electronic copy of the foregoing brief was filed with the Clerk of this Court using the CM/ECF system, which will serve all counsel of record.

/s/ J. Marc Wheat
J. Marc Wheat