Case No. 23-10656-B

**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.*

On Appeal from the United States District Court
for the Middle District of Florida, No. 6:21-cv-1849-RBD-DAB (Dalton, J.)

# BRIEF OF AMICUS CURIAE SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT**

Case No. 23-10656-B,
*Moms for Liberty – Brevard County, FL, et al. v. Brevard Public Schools, et al.*

Pursuant to Federal Rule of Appellate Procedure Rule 26.1 and Eleventh Circuit Rule 26.1, the undersigned counsel of record certifies that the following listed persons and entities as described in have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

The following is a complete list of trial judge(s), attorneys, persons, associated persons, firms, partnership, or corporations known to amicus that have an interest in the outcome of this particular case or appeal:

Astor, Martha, Counsel for Plaintiffs-Appellants

Baker, Hon. David A., Magistrate Judge

Brevard Public Schools, Defendant-Appellee

Bridges, Gennifer Lynn, Counsel for Defendants-Appellees

Campbell, Katye, Defendant-Appellee

Cholewa, Joseph, Plaintiff-Appellant

Dalton, Jr., Hon. Roy B., Trial Judge

Delaney, Katie, Plaintiff-Appellant

Gura, Alan, Counsel for Plaintiffs-Appellants

Hall, Ashley, Plaintiff-Appellant

Haggard-Belford, Misty, Defendant-Appellee

Hermann, Kimberly S., Counsel for Amicus

Jenkins, Jennifer, Defendant-Appellee

Kneessy, Amy, Plaintiffs-Appellants

Marks, Howard S., Counsel for Defendants-Appellees

McDougall, Cheryl, Defendant-Appellee

Morrison, Ryan, Counsel for Plaintiffs-Appellants

Moms for Liberty – Brevard County, FL, Plaintiff-Appellant

Nolan, Brett Robert, Counsel for Plaintiffs-Appellants

Osborne, David Randel, Counsel for Plaintiffs-Appellants

O'Leary, Celia Howard, Counsel for Amicus

Southeastern Legal Foundation, Amicus Curiae

Susin, Matt, Defendant-Appellee

Thakrar, Sheena, Counsel for Defendants-Appellees.

Amicus Southeastern Legal Foundation (SLF) is a Georgia nonprofit corporation. Amicus SLF does not have any parent companies, subsidiaries, or affiliates. Amicus SLF does not issue shares to the public.

/s/ Celia Howard O'Leary

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## IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Southeastern Legal Foundation (SLF), founded in 1976, is a national, nonprofit legal organization dedicated to defending liberty and Rebuilding the American Republic. This case concerns Amicus because SLF has an abiding interest in the protection of our constitutional freedoms and civil liberties. This is especially true when the government suppresses public debate on current affairs and the redress of grievances. SLF educates and advocates on behalf of parents across our nation, and it is committed to defending their freedom of speech.

## STATEMENT OF THE ISSUES

I. Whether speakers have standing to challenge speech restrictions when they self-censor, by modifying their speech or refraining from speaking altogether, for fear of enforcement;

II. Whether civil rights plaintiffs have standing to seek nominal damages for past violations of their rights;

III. Whether regulations banning "abusive" and "personally directed" speech at school board meetings, on their face and as-applied by Defendants; and Defendants' prohibition of allegedly "unclean" speech as "obscenity," constitute viewpoint

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), no one other than amicus and their counsel wrote any part of this brief or paid for its preparation or submission.

discrimination in violation of the First Amendment rights of free speech and petition; and

IV. Whether regulations banning "abusive" and "personally directed" speech at school board meetings are unconstitutionally vague and overbroad.

## SUMMARY OF ARGUMENT

Since 1724, freedom of speech has famously been called the "great Bulwark of liberty[.]" 1 John Trenchard & William Gordon, *Cato's Letters: Essays on Liberty, Civil and Religious* 99 (1724), reprinted in Jeffrey A. Smith, *Printers and Press Freedom: The Ideology of Early American Journalism* 25 (Oxford University Press 1988). Our Founding Fathers recognized that different opinions would always accompany liberty. *See* The Federalist No. 10, at 73 (James Madison) (Clinton Rossiter ed., Signet Classics 2003). In "response to the repression of speech and the press that had existed in England" and to curb such tyranny in the future, the Founders established the First Amendment. *Citizens United v. FEC*, 558 U.S. 310, 353 (2010).

The Founders recognized that nowhere are the threats of censorship more dangerous than when a restriction prohibits public discourse on political issues. Therefore, they sought to ensure complete freedom for "discussing the propriety of public measures and political opinions." Benjamin Franklin's 1789 newspaper essay, reprinted in Smith, at 11. "Believing in the power of reason as applied through public

discussion, they eschewed silence coerced by law—the argument of force in its worst form." *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

As the United States Supreme Court has acknowledged, "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Brown v. Hartlage*, 456 U.S. 45, 52 (1982) (quoting *Mills v. Alabama*, 384 U.S 214, 218–19 (1966)). The First Amendment has "its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). It guards against prior restraint or threat of punishment for voicing one's opinions publicly and truthfully. *Meyer v. Grant*, 486 U.S. 414, 421 (1988) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 101–02 (1940)). It protects and encourages discussion about political candidates, government structure, and political processes. *Mills*, 384 U.S. at 218–19.

In addition to providing a check on tyranny, freedom of speech and the press ensure the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Id.* (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957) (internal quotation marks omitted)). Speech about public affairs is thus "the essence of self-government" because citizens must be well-informed. *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964). They must know "the identities of those who are elected [that] will inevitably shape the course that we follow as a nation." *Buckley v. Valeo*, 424 U.S. 1, 14–15 (1976); *see also Citizens United*, 558 U.S. at 349. For these reasons,

public discussion is not merely a right; "[it] is a political duty." *Whitney*, 274 U.S. at 376 (Brandeis, J., concurring).

The freedom to publicly speak on political issues, especially at open school board meetings, is critical to a functioning democracy. School boards are in the unique position of determining policies that will directly impact children and their families. The decisions made by school boards play a significant role in molding the future of our nation. To provide the public with an opportunity to hold their leaders accountable, and to ensure that students are being given the best possible chances to succeed, school boards should not only permit but *encourage* lively political discussion to develop a well-informed citizenry.

The members of Moms for Liberty – Brevard County ("M4L") want to engage in discussions about COVID policies, curriculum, LGBTQ issues, race, library books, and other matters that affect children of all ages. But because the Chair of the Brevard County School Board has unbridled discretion to silence them any time they become too "abusive" or too "personal" with their statements, they have self-censored.

It is imperative that speakers have access to courts of law when a government official can (and does) suppress political speech. The U.S. Supreme Court has consistently held that a plaintiff need not expose himself to prosecution before challenging the constitutionality of a speech-suppressive law. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158–61 (2014) (finding plaintiffs sufficiently alleged a threat of future enforcement when they showed "an intention to engage in a course of conduct

arguably affected with a constitutional interest"). To do otherwise would turn respect for the law on its head and force law-abiding Americans into self-censorship because they would face an unreasonable choice: either break the rules and face the consequences, or keep quiet out of fear of prosecution.

Ignoring these principles, the district court has refused to hear M4L's challenge against the Board's public participation policy unless the challengers first subject themselves to harsh and severe punishment. *See* Op. at 6 (rejecting chilling effect argument given the board's "respectful" and "light enforcement" of the policy). The district court's approach abridges the freedom of speech and suppresses open discussion of governmental affairs and debate on public issues, both of which are vital to America's civil and political institutions. To ensure the Board does not violate the Constitution through forced self-censorship, and to prevent it from robbing members of the public of their freedom to redress grievances and participate in the political process, this Court should reverse the district court's order granting summary judgment to Defendants.

## ARGUMENT

### I. Courts consistently recognize standing in First Amendment challenges, even when no actual prosecution or conviction has occurred.

Under typical standing law, an individual must violate a law and be punished before he can challenge the law.[2] But the First Amendment is different. It forbids putting speakers in a position where they are forced to choose between exercising their First Amendment rights—at the risk of some sort of punishment—or self-censoring. *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1120 (11th Cir. 2022) ("We have long emphasized that the injury requirement is most loosely applied—particularly in terms of how directly the injury must result from the challenged governmental action—where First Amendment rights are involved, because of the fear that free speech will be chilled even before the law, regulation, or policy is enforced.").

Recognizing this Catch-22, courts do not require plaintiffs to expose themselves to prosecution before raising a First Amendment challenge. *See id*; *Doe v. Bolton*, 410 U.S. 179, 188 (1973) (holding that a plaintiff "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief"); *Steffel v. Thompson*, 415 U.S. 452, 459 (1974) (finding that although the plaintiff had not been arrested for violating the contested law, he had standing to challenge the law because he claimed that it

[2] The basic inquiry made to determine whether a party has alleged a case or controversy under Article III of the Constitution "is whether the conflicting contentions of the parties . . . present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract." *Babbitt v. UFW Nat'l Union*, 442 U.S. 289, 297–98 (1979) (internal quotations omitted).

deterred his constitutional rights). Instead, a person may hold his tongue and challenge the law or policy immediately, for the harm of self-censorship is a harm that can be realized even without an actual prosecution. *See Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 392–93 (1988) (finding that the plaintiffs had standing to challenge the constitutionality of a criminal statute prohibiting the display of sexually explicit materials even though the plaintiffs were neither charged nor convicted of the crime). All that is needed is a "credible threat of enforcement." *Susan B. Anthony List*, 573 U.S. at 159.

The Supreme Court recognizes a credible threat of enforcement when a plaintiff alleges "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute." *Babbitt*, 442 U.S. at 298 (finding that the plaintiffs could challenge a statute imposing sanctions upon consumers who planned to boycott products through deceptive publicity because the statute was vague and plaintiffs reasonably feared prosecution); *see also Holder v. Humanitarian Law Project*, 561 U.S. 1, 15 (2010) (allowing plaintiffs to challenge a law that criminalized providing material support to terrorist organizations because plaintiffs had provided support in the past and planned to provide support again in the future).

Similarly, policies that give government officials unfettered discretion to approve or deny speech are presumptively unconstitutional because they pave the way for viewpoint discrimination. *See Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757 (1988). When a few individuals have authority to assess speech, without any limits on that

authority, there is a serious risk that they will rely on their own views and biases to determine whether to approve or reject a speaker. This risk of being forced to conform to government officials' preferences amounts to the very sort of "indirect pressure" this Court found unconstitutional in *Cartwright*. 32 F.4th at 1123; *accord Lakewood*, 486 U.S. at 757 ("[T]he mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused.").

The Board maintains a public comment policy that grants the Chair unlimited discretion to "interrupt, warn, or terminate a participant's statement when the statement is too lengthy, personally directed, abusive, obscene, or irrelevant."[3] Br. of Pls.-Appellants, Doc. 16 at 20. The Chair may also direct an individual to leave a school board meeting if the individual fails to demonstrate "decorum." *Id.* at 22. Nowhere does the Board actually define those terms, nor does it provide any additional guidelines to curb the Chair's discretion.

Indeed, not even the Chair herself can define what "abusive" means pursuant to Board policy. Br. of Pls.-Appellants, Doc. 16 at 25. If she cannot define it, how can a member of the public be expected to? The lack of clear guidelines thus gives the Chair unbridled discretion to insert her own views during public comment. This was apparent

[3] Although the policy changed during litigation to permit speech directed to Board members and to include a reference to FCC guidelines, "[t]his language does not reflect a new position," nor does it remedy the harm already done to the speakers. Br. of Pls.-Appellants, Doc. 16 at 21.

in her exchange with Plaintiff-Appellant Cholewa. When Mr. Chowela spoke on political matters including COVID, race, and the Democratic party, she interrupted him to warn that he "insult[ed] half of [the] audience." *Id.* at 30-31. And when other members of the public came to his defense, she threatened to have them all removed. *Id.* at 31. Based on this and similar exchanges, the Plaintiffs have been deterred from speaking further on political matters because they must guess whether their speech will be seen as "abusive" or "personally directed" at members of the audience. *Id.* at 34-35. This is the very type of harm for which pre-enforcement challenges exist to remedy.

The district court accepts the Chair's "light" and "respectful" enforcement of the policy as proof positive that there can be no objective chill on speech. *Id.* at 46. But it does not matter if a government official gently handcuffs a speaker while escorting him to jail, or politely shakes his hand while handing him a gag order; enforcement is still enforcement. *See, e.g.*, *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 68 (1963) (holding that reminders sent from obscenity commission to publishers about obscenity rules were unconstitutionally chilling, even though commission lacked enforcement authority); *Lamont v. Postmaster Gen.*, 381 U.S. 301, 306 (1965) (striking down law giving government official discretion to hold mail deemed communist propaganda because even though it did not punish speakers, it had a "deterrent effect" on speech).

M4L's injury arose the moment the Chair interrupted its members to prevent them from sharing their views, and it remains ongoing as long as the policy lacks guidelines to prevent such interruptions from happening again. For this same reason,

holding that there is no credible threat of enforcement because members of M4L have spoken uninterrupted since then "misses the point. The lack of discipline . . . could just as well indicate that speech has *already* been chilled." *Speech First v. Schlissel* 39 F.3d 756, 766 (6th Cir. 2019) (emphasis added). As this Court held in *Cartwright*, when the breadth and "slipperiness" of a policy could lead a reasonable person to believe "that he'd be better off just keeping his mouth shut," speech is objectively chilled, even without enforcement. 32 F.4th at 1122.

Because the Chair has unfettered discretion to monitor and silence members of the public who are exercising their freedom of speech, and because the Board fails to provide citizens like the members of M4L with any clear guidelines regarding how their speech will be regulated, the policy is unconstitutional.

## II. Reversal and remand is necessary to prevent forced self-censorship and ensure parents and concerned citizens can partake in open political discourse.

Self-censorship is exactly the type of harm First Amendment challenges like this one seek to eliminate. *See Bankshot Billiards, Inc. v. City of Ocala*, 634 F.3d 1340, 1350 (11th Cir. 2011) (listing Supreme Court cases allowing pre-enforcement challenges against laws that impose a chilling effect on speech); *see also Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965) (noting an "exception to the usual rules governing standing" when an overly broad statute imposes a chilling effect on the exercise of speech).

The Supreme Court has reaffirmed these standards time and time again, especially related to First Amendment challenges. *See, e.g.*, *Am. Booksellers Ass'n.*, 484

U.S. at 392–93; *Babbitt*, 442 U.S. at 299–302; *Dombrowski*, 380 U.S. at 486. "First Amendment standards . . . must give the benefit of any doubt to protecting rather than stifling speech." *Citizens United*, 558 U.S. at 327 (internal quotations omitted).

Unique standing considerations associated with the First Amendment are even more critical when, as here, policies tend to suppress political speech. Given the nature of school boards, it is inevitable that matters addressed during public comment will include politics, current affairs, and controversial topics. It is imperative that members of the public, especially parents, be given an opportunity to address their elected officials who have direct influence over the books their children read, the lessons they are taught, and the policies they must follow.

Circuit courts of appeal have consistently found injury where laws censor political speech. *See St. Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481, 487 (8th Cir. 2006) (permitting pre-enforcement challenge of a campaign finance law even though the plaintiffs did not violate the law); *see also Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003) (permitting pre-enforcement challenge of a criminal law regulating the content of election speech even though the plaintiffs were never charged, let alone convicted of the crime); *Vermont Right to Life Comm. v. Sorrell*, 221 F.3d 376, 382 (2d Cir. 2000) (permitting pre-enforcement challenge of civil campaign finance laws even though no prior suit was brought against the plaintiffs). These courts recognize that to find otherwise would force self-censorship of political speech, which is exactly what the district court has done here.

The district court's entry of summary judgment against Plaintiffs should not be allowed to stand. Here, the mere threat of prosecution is tantamount to forced censorship of parents and members of the public who wish to partake in public discourse and redress their grievances before the government. "[P]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence." *Citizens United*, 558 U.S. at 340. If allowed to stand, the district court's ruling will scare parents and members of the public who would otherwise partake in political debate into self-censorship. This Court's reversal of the district court and its remand are imperative to protecting political speech and ensuring that all Americans—especially concerned citizens looking out for the best interests of their children—will continue to be free to partake in the democratic process.

## CONCLUSION

This Court should reverse the district court's order granting summary judgment and vacate its order granting Defendants' motion to dismiss.

Respectfully submitted,

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April 17, 2023

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Eleventh Circuit Rule 29 because it contains 2912 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Eleventh Circuit Rule 32(b) and the type style requirements of Fed. R. App. P. 32(a)(6) and Eleventh Circuit Rule 32(c) because it was prepared using Microsoft Word and uses a proportionally spaced typeface, Garamond, in 14-point font.

April 17, 2023 /s/ Celia Howard O'Leary

## CERTIFICATE OF FILING AND SERVICE

On April 17, 2023, I filed this Brief of Amicus Curiae Southeastern Legal Foundation in Support of Plaintiffs-Appellants and Reversal using the CM/ECF System, which will send a Notice of Filing to all counsel of record.

April 17, 2023 /s/ Celia Howard O'Leary