INSTITUTE FOR FREE SPEECH

February 1, 2024

The Hon. David J. Smith, Clerk of Court
United States Court of Appeals, Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, GA 30303

Re: *Moms for Liberty—Brevard County, Fla. v. Brevard Public Schools*, U.S. Court of Appeals, Eleventh Cir. No. 23-10656

Notice of Supplemental Authority, Fed. R. App. P. 28(j), via ECF

Dear Mr. Smith:

At argument, Judge Grant asked about the relevance of *McDonough v. Garcia*, No. 22-11421, 2024 U.S. App. LEXIS 696 (11th Cir. Jan. 10, 2024).

Per *McDonough,* the Supreme Court now examines speech restrictions in limited public forums for reasonableness and content-neutrality. *Id.* at *15. However, this Court has held that a city council meeting's public comment period is a designated public forum governed by heightened scrutiny, including strict scrutiny for content-based speech restrictions. *Jones v. Heyman,* 888 F.2d 1328 (11th Cir. 1989). *Jones* applies in factually indistinguishable cases—including this one. *McDonough*, at *22-*23.

Ultimately, however, it makes no difference whether school board public comment periods are designated or limited public forums. "[V]iewpoint restrictions are impermissible in any forum." *Ctr. for Investigative Reporting v. SEPTA*, 975 F.3d 300, 313 (3d Cir. 2020) (citation omitted); *see* Pl. Br. at 36-37. Defendants' "abusive" and "personally directed" speech restrictions discriminate against viewpoints, facially and as-applied. Pl. Br. at 40-41. Defendants' idiosyncratic application of their "obscenity" prohibition likewise discriminates based on viewpoint. Pl. Br. at 50-52.

Even were Defendants' restrictions not viewpoint-discriminatory, they would be unconstitutional content-based restrictions. These rules "draw[] distinctions based on the message a speaker conveys,'" *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (citation omitted), or at least "cannot be justified without reference to the content of the regulated speech,'" *id.* at 164 (internal quotation marks omitted). Defendants' asserted justifications are to afford a heckler's veto and protect children's sensibilities, Pl. Br. at 6-7, but these rationales are unconstitutional, *id.* at 48-49, 53-55. And forum analysis does not impact vagueness and overbreadth claims.

McDonough also provides a useful factual contrast. While Sergeant Wright immediately understood McDonough's comments as threatening, nobody viewed Cholewa's remarks that way. Belford expelled Cholewa because he allegedly offended Democrats, who she allegedly feared might react violently. Pl. Br. at 15-16; Reply Br. at 7; Doc. 20, ¶ 229. His last words accused Defendants of disliking freedom, liberty, and the Constitution. Doc. 3-4, ¶ 10.

The district court's dismissal of Plaintiffs' facial challenges, and its judgment against Plaintiffs' as-applied challenges, should be reversed.

Sincerely,

Alan Gura
Alan Gura
Counsel for Appellants

The body of this letter contains 348 words as measured by Microsoft Word.

cc: All counsel (via ECF)