INSTITUTE FOR FREE SPEECH

July 15, 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

Response to notice of Supplemental Authority, Fed. R. App. P. 28(j), via ECF

Dear Mr. Smith:

The decision upholding the Lanham Act's "names clause," *Vidal v. Elster*, 602 U.S. 286 (2024), does not support the constitutionality of Defendants' prohibition of "personally directed" comments.

Plaintiffs appeal not only the district court's dismissal of their facial challenge to this provision (and others), but also its later grant of summary judgment to Defendants on their as-applied challenges. Even if the "personally directed" prohibition is, like *Vidal*'s "names clause," facially viewpoint-neutral, the record establishes that Defendants apply it in a viewpoint-discriminatory fashion. Appellants' Br. 12-14. *Vidal* lacked that as-applied issue, *Vidal*, 602 U.S. at 294 & n.2, and thus does not "undermine" Plaintiffs' reliance on *Tam* and *Brunetti* with respect to their as-applied challenge to the "personally-directed" prohibition.

Vidal establishes that content-based speech discrimination, when not viewpoint-based, is uniquely tolerated in trademark law, which inherently restricts speech based on content. The government has strong interests in protecting consumers from fraud and confusion, and ensuring people's rights in their own names. "[H]eightened scrutiny need not always apply in this unique context." *Id.* at 299; *id.* at 300 (distinguishing "uniquely content-based nature of trademark regulation and the longstanding coexistence of trademark regulation with the First Amendment" from other regulations).

Vidal did not overrule the Supreme Court's public forum framework, supplanting it with trademark doctrine, just because three Justices joined Justice Barrett's opinion drawing an analogy to limited public forum rules. President Trump's ability to stop others from commercially exploiting his name does not suddenly enable the government to silence discussion of his performance in public forums. Indeed, Defendants overstate Justice Barrett's commitment to her own analogy. *Id*. at 317 n.2 (Barrett, J., concurring).

Vidal has no bearing on Plaintiffs' as-applied challenge to the "personally directed" prohibition. And even if that prohibition is facially viewpoint neutral, it still—like *Vidal*'s "names clause"—discriminates based on content. Were Defendants' public comment period a designated public forum, it would fail strict scrutiny for lack of a compelling interest and narrow tailoring; were Defendants' public comment period a limited public forum, the "personally directed" prohibition would be unconstitutionally unreasonable considering that forum's purpose. Appellants' Br. 39.

Sincerely,

Alan Gura
Alan Gura
Counsel for Appellants

The body of this letter contains 350 words as measured by Microsoft Word.

cc: All counsel (via ECF)