IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

ABBIE PLATT, ANNE MILLER, CARRI MICHON, JESSICA SMITH and SUZANNE SATTERFIELD, *Plaintiffs*, v. LOUDOUN COUNTY SCHOOL BOARD; and MELINDA MANSFIELD, individually and in her official capacity as Chairwoman of the Loudoun County School Board, *Defendant*s.	Case No. 1:24-cv-1873-MSN-IDD

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

On October 8, 2024, the Loudoun County School Board and Melinda Mansfield silenced parents who attempted to speak critically about an ongoing safety situation involving the school system and their children. At that point in time, the School Board flip-flopped between five different explanations for why parents were silenced. Two weeks later, the School Board finally settled on a new, sixth rationale: that the parents "targeted" or "attacked" a specific student. But even in the brief it filed a month after the October 8 meeting, the School Board rotates between three different explanations for the silencing—apparently still unable to decide which violation actually occurred, or what Policy 2520 actually prohibits. *See* Opp. Br., Doc. 22, at 16 ("[Plaintiffs] each targeted and attacked an individual student, in violation of Policy 2520(A)(3)"); *id.* at 24 ("[Plaintiffs] violated section (A)(3)(A) of Policy 2520 … [when] what they were saying disclosed personally identifiable information of a particular student."); *id.* at 29 ("[Plaintiffs] made comments specific to an individual student. This behavior is clearly prohibited by Policy 2520."). The very fact that the School Board itself can't make up its mind on what exactly Policy 2520(A)(3) prohibits or how exactly Plaintiffs violated that provision proves that the policy is unconstitutionally vague, neither giving speakers clear guidance on what is prohibited nor guardrails to protect against arbitrary enforcement.

This case is *not* about the abstract question of whether a school board can impose some reasonable limitations on speech that occurs in a limited public forum. A school board can enact reasonable viewpoint-neutral speech policies for its limited public forum. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-07 (2001). But the First and Fourteenth Amendments to the U.S. Constitution require that such policies still be both clear enough to satisfy the minimum standards of due process—i.e., not vague, *see Grayned v. City of Rockford*, 408 U.S. 104, 108

(1972)—and applied to all speakers equally and uniformly—i.e., not viewpoint discriminatory, *see Good News Club*, 533 U.S. at 106-07. The School Board failed both standards here.

Plaintiffs sought a preliminary injunction against the School Board's unconstitutional and unconstitutionally applied policies. This Court set the hearing on this motion for a date after the next public School Board meeting. Plaintiffs then sought a temporary restraining order for relief prior to the next meeting, and this Court granted a hearing, at which counsel for all parties appeared. *See* Minute Entry, Doc. 25. This Court then denied the temporary restraining order and the parties returned to the previously set briefing schedule for the motion for preliminary injunction. *See id.*; Order, Doc. 28. Defendants filed a response to the motion for preliminary injunction, which incorporated their previously filed opposition to a temporary restraining order. *See* Mem. in Opp., Doc. 27, at 2. Plaintiffs now file this reply in support of its original motion for preliminary injunction.

A preliminary injunction is warranted when Plaintiffs have demonstrated a likelihood of success on the merits, that they will suffer irreparable injury absent preliminary relief, and that the balance of equities and public interest favor such relief. Here, Defendants School Board and Mansfield have conceded that only the first factor is at issue. *See* Doc. 22, at 14. And while Plaintiffs originally sought a preliminary injunction under only one of the three legal theories presented in the complaint (unconstitutional vagueness), Defendants expanded their response to address all three First Amendment claims. This Court denied the temporary restraining order on all three claims as well.

Plaintiffs are, however, likely to prevail on all three of their legal claims. Defendants have now abandoned all arguments except that they silenced Plaintiffs for violating the "target, criticize, or attack" provision in Policy 2520(A)(3). *See, e.g.*, Doc. 22, at 2, 16, 24, 26. Yet the School

Board's shifting justifications, post-hoc invocation of Policy 2520(A)(3), and the evidence in the public record regarding the School Board's unequal application of this provision in the past all demonstrate that the School Board has engaged in as-applied viewpoint discrimination that violates Plaintiffs' rights to free speech and to freely petition the government. And at this point, Defendants claim that the words "target, criticize, or attack" mean (at least) four different things: (1) targeting, criticizing, or attacking a specific student; (2) indirectly discussing or referencing either a student or group of students; (3) indirectly discussing or referencing any specific incident occurring at school or to students; or (4) disclosure of personal identifiable information.[1] Under Defendants' own approach, when a specific phrase prohibits not only the things explicitly mentioned in that phrase but also several things not listed in the phrase, the phrase is vague. Here, if Defendants are to be believed that the phrase "target, criticize, or attack" actually also prohibits so many other things, Policy 2520(A)(3) fails to either let speakers clearly know what speech is prohibited or provide guidelines that will guard against manipulative and discriminatory enforcement.

This Court should therefore grant Plaintiffs' motion for preliminary injunction, *see* Doc. 4, and enjoin the enforcement of the Defendants' unconstitutional and unconstitutionally applied policies against Plaintiffs for the duration of this litigation.

BACKGROUND

As described more fully in Plaintiffs' complaint and motion for preliminary injunction, *see* Doc. 1, ¶11-18; Mem. in Support, Doc. 4-1, at 2-3, the Loudoun County School Board holds

[1] Plaintiffs maintain that at no point did they share personal identifiable information, and Defendants have not explained under what applicable policy or law Plaintiffs' comments constituted personal identifiable information. But as relevant here, Defendants' assertion that "target, criticize, or attack" *also* means "personal identifiable information" illustrates just how vague "target, criticize, or attack" is.

bimonthly public meetings. The School Board "welcomes comments from the public and believes strong community engagement is important to a successful school system." Policy 2520, Doc. 4-2, at 4. The School Board permits concerned parents and community members to address and petition the School Board during a public comment period at each regularly scheduled public meeting. *See id.* The School Board also adopted a set of supposedly facially neutral provisions that restrict what speech may occur during the public comment period. *See id.* These restrictions are contained in School Board Policy 2520.

Plaintiffs now seek to enjoin three provisions of Policy 2520—(A)(1), (A)(2), and (A)(3). Both in the response in opposition and at the hearing on the temporary restraining order, Defendants abandoned all arguments but the one involving Policy 2520(A)(3). This provision states that "comments that target, criticize, or attack individual students are not permitted during public meetings." *See id.*

I. On October 8, 2024, the School Board Silenced Plaintiffs—But Failed to Provide a Consistent Reason.

On October 8, Plaintiffs and several other parents and concerned community members attended the School Board meeting with plans to speak to the School Board about their concerns for safety in school and how the School Board was handling past, ongoing, and future safety concerns. Before the public comment period, Mansfield stated that speakers could not "target, criticize, or attack individual students and/or individual division employees," and "request[ed] that comments on an individual student … not be shared … where the disclosure could violate applicable confidentiality requirements." October 8, 2024, Meeting, at 2:17:58.[2] At no point before

[2] Plaintiffs and the School Board agree that the recordings of the School Board's public comments period are within the public record and constitute evidence in this case. *See* Doc. 22, at 7 n.7. Recordings of all school board meetings are available at https://go.boarddocs.com/vsba/loudoun/Board.nsf/Public#, or https://perma.cc/26DW-9KYL, and

the public comment period did Mansfield claim that speakers could not otherwise indirectly reference, discuss, or talk about unidentified students in a way that did not disclose the student's identity—the conduct Defendants now claim also violates Policy 2520(A)(3). *Compare id.* at 2:16:38-19:44; *with id.* at 2:29:43 ("[R]efrain from talking about a student without parent consent to discuss circumstances." (emphasis added)); Joint Statement, Doc. 4-2, at 18, ¶2 ("*discuss[ing]* a specific student" (emphasis added)); *and* Doc. 22, at 29 ("ma[king] *comments specific to* an individual student" (emphasis added)).

During the public comment period, Plaintiffs Miller, Michon, and Platt all spoke, but were interrupted, admonished, and forced to self-censor by Mansfield. The functional effect of these interruptions is that Plaintiffs Miller, Michon, and Platt were unable to fully express their beliefs that the School Board was not providing a safe environment for students. The School Board ended the October 8 public comment period early, so Plaintiffs Smith and Satterfield were denied the opportunity to speak at all.

The School Board now claims that it silenced Plaintiffs because they "targeted and attacked" a specific student. Doc. 22, at 2, 16. Plaintiffs maintain that at no point did they target or attack a specific student. Every comment, as reflected in the public record, criticized the School Board broadly for its overall handling of student safety, and by way of context, indirectly referenced a specific past and perhaps-ongoing incident that illustrated the reason for the criticism of the School Board. But in any event, on October 8 itself, the School Board never said that Plaintiffs were improperly targeting or attacking a student. In fact, on October 8, the School Board invoked a panoply of other reasons.

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can be accessed by navigating to the video under the "Meetings" tab that corresponds to the specific date referenced.

First, Miller spoke, criticizing the School Board for "betray[ing] the trust of students and parents" and attempting to talk about "[how] the School Board continues to play Russian roulette daily with our children … like the reassignment of yet another student who poses a significant threat to the safety of students, a student with violent gang affiliation who was arrested…." *See* Oct. 8, 2024, Meeting, at 2:28:42. Mansfield then interrupted Miller and paused her time to speak. At that time, Mansfield did *not* say that Miller was violating the "target, criticize, or attack" provision of Policy 2520. Instead, Mansfield stated that Miller was interrupted for (1) violating "civility and decorum," (2) "*comment[ing]* on an individual student," and (3) disclosing "personally identifiable information." *See id.* at 2:29:11 (emphasis added).

Next, Michon spoke, criticizing the School Board for caring less about security within school than outside school: "All of your show perimeter security means nothing if within the walls the children aren't safe. Knowing that recently a student was carrying a concealed weapon walking to school…." *See id.* at 2:37:23. Mansfield then interrupted—again saying nothing about Michon "targeting" or "attacking" a student. Mansfield instead stated that Michon was violating the School Board's policies by (1) "disclosing personal identifiable information about a student" and (2) "*discuss[ing]* a particular student's circumstances." *See id.* at 2:37:44.

Last, Platt spoke. Her comments criticized the School Board, using broad and generalized language, for its handling of safety concerns: "Where's the protection and the safety for our children who are in school with other children who have known threats, who have been arrested, and who are back in the school." *See id.* at 2:40:16. She then linked the general criticism to a specific context, providing weight to the criticism: "And my daughter is terrified to go to school with him…." *See id.* at 2:40:16. Mansfield then interrupted Platt. Once again, Mansfield said

nothing about "targeting" or "attacking" a specific student. Instead, Mansfield said only that Platt was disclosing "personally identifiable information" about a student. *See id.* at 2:40:44.

On October 9, LCPS Superintendent Aaron Spence and Mansfield issued a joint statement on behalf of LCPS and the School Board. *See* Joint Statement, Doc. 4-2, at 18. In the statement, the School Board's explanations as to why it suppressed Plaintiffs' speech became even more disjointed. Yet again, the School Board said *nothing* about the "target, criticize, or attack" provision of Policy 2520. It instead offered a hodgepodge of different justifications for the suppression: (1) Plaintiffs' "discuss[ing] what was reported in the media" and "discuss[ing] a specific student," (2) the Board's "responsibility to call out misinformation," and disallowing "unverified information to spread in a public forum," and (3) preventing comments at Board meetings that "advance what appears to be a political agenda." *See id.* ¶2-5. Nowhere in this statement did the School Board quote or allude to Policy 2520(A)(3). Nor did it claim that Plaintiffs violated the "target, criticize, or attack" provision.

It was not until October 22, 2024—two weeks and five abandoned justifications later—that the School Board first implied that Plaintiffs had "criticize[d], target[ed], or attack[ed]" an individual student. *See* October 22, 2024, Meeting, at 2:21:38. And it was not until the School Board filed its first responsive brief in this case—on November 11, 2024—that the School Board first clearly invoked provision (A)(3) of Policy 2520 or directly accused Plaintiffs of violating that provision. *See* Doc. 22, at 2. Even then, the School Board couldn't keep its reasoning straight. It first claimed that it silenced Plaintiffs because they "each *targeted and attacked* an individual student, in violation of Policy 2520(A)(3)." *Id.* at 16. Then it claimed it silenced Plaintiffs because they "violated section (A)(3)(A) of Policy 2520 … [when] what they were saying disclosed personally identifiable information of a particular student." *Id.* at 24. And finally, the School Board

fell back to its original justification that Plaintiffs were silenced after they "made comments specific to an individual student," which "is clearly prohibited by Policy 2520." *Id.* at 29.

II. The Board's Past Unequal Application of its Policies Reveals As-Applied Viewpoint Discrimination.

In this preliminary posture, seeking immediate injunctive relief to prevent irreparable injury for the pendency of this litigation, Plaintiffs chose to pursue a preliminary injunction under one of their three legal theories: unconstitutional vagueness. *See* Doc. 4-1, at 1-2, 9-14.[3] The School Board chose to respond to all three of Plaintiffs' legal theories, including both claims of as-applied viewpoint discrimination. *See* Doc. 22, at 15-28; *see also* Doc. 1, ¶123-63. And at the hearing on the temporary restraining order, this Court asked for examples of when the School Board had unequally enforced its policies. A few of the more poignant examples, which also appear in the public record and were discussed at the hearing before this Court, are detailed below:

At the January 30, 2024, School Board meeting, one commentor spoke about mental health and addressed the mental health difficulties experienced by her son. During this speech, the commentor spoke about "one of [her son's] seventh-grade peers [who] tragically took his own life." *See* January 30, 2024, Meeting, at 2:51:11; *see also* Doc. 1, ¶108. This comment directly referenced and discussed an individual student (other than the commentor's own child) in the LCPS school system. And this comment referenced a specific incident and specific details that other people who knew of this child could doubtlessly use to identify which student the speaker

[3] While Plaintiffs did briefly discuss viewpoint discrimination and unequal enforcement in the motion for preliminary injunction, this was done to illustrate the "arbitrary and discriminatory enforcement" that resulted from Policy 2520(A)(3)'s lack of "explicit standards" for uniform enforcement. *Grayned*, 408 U.S. at 108; *see also* Doc. 4-1, at 11, 13.

was referring to.[4] The School Board said nothing and did not interrupt, chide, or silence the speaker.

At the same meeting, another commentor spoke about the medical emergencies in school cafeterias. During this speech, this speaker said: "[W]e've had at least one [student] this year that required [emergency medical services] in our cafeteria." *See* January 30, 2024, Meeting, at 3:07:34; *see also* Doc. 1, ¶109. This comment specifically discussed an individual student, shared details about an incident involving a specific student, and even disclosed an event that happened to a specific student while on school property. But again, the School Board did not interrupt the speaker or ask her to refrain from such comments.

And at the June 25, 2024, School Board meeting, one commentor chose to speak about students who were "wearing stoles bearing the Palestinian flag" at "the Stonebridge High School graduation." *See* June 25, 2024, Meeting, at 2:49:50; *see also* Doc. 1, ¶110. Again, these comments discussed and referenced specific students, included information pertaining to the circumstances of these individuals, and addressed a specific incident that occurred at a *named* school—something no Plaintiff did at the October 8 meeting. Yet the School Board did not interrupt, silence, or admonish this speaker.

ARGUMENT

A party seeking a preliminary injunction must establish (1) "that he is likely to succeed on the merits," (2) "that he is likely to suffer irreparable harm in the absence of preliminary relief," (3) "that the balance of equities tips in his favor," and (4) "that an injunction is in the public

[4] To be clear, Plaintiffs' position is that this comment does *not* disclose personally identifiable information under any applicable legal definition—primarily because even with the specific details included, someone who does not *already* know about the incident would not be able to identify the student. *See* 34 C.F.R. §99.3.

interest." *Centro Tepeyac v. Montgomery Cnty.*, 722 F.3d 184, 188 (4th Cir. 2013). Defendants School Board and Mansfield have conceded that the only factor at issue in this particular case is the first factor: the likelihood of success on the merits. *See* Doc. 22, at 14. Here, Plaintiffs are likely to succeed on the merits of all three claims presented.

I. The School Board Mistakenly Invokes *Davison*, *Steinberg*, and Other Inapplicable Cases.

The School Board has invoked a variety of precedents that it mistakenly claims bind this Court's hands in resolving this matter. In particular, the School Board points to *Davison v. Rose*, 19 F.4th 626 (2021), *Steinburg v. Chesterfield Cnty. Planning Comm'n*, 527 F.3d 377 (4th Cir. 2008), *Ison v. Madison Local Sch. Dist. Bd. of Educ.*, 3 F.4th 887 (6th Cir. 2021), and *Dyer v. Atlanta Indep. Sch. Sys.*, 852 F. App'x 397 (11th Cir. 2021) (per curiam). But none of these cases foreclose vagueness challenges to school board speech policies or provide any other rationale for denying Plaintiffs' requested relief.

In *Davison*, the Fourth Circuit reviewed and rejected a facial challenge to a speech restriction called Policy 2-29, which was the precursor to the Loudoun County policy at issue here. *Davison*, 19 F.4th at 635, 643. *Davison* did not involve as-applied viewpoint discrimination where similar speakers were treated differently or a vagueness challenge. Policy 2-29 prohibited comments that "are harassing or amount to a personal attack against any identifiable individual," *id.* at 635, rather than the current language of "target, criticize, or attack individual students." The Fourth Circuit held that the prohibition on harassing comments was not inherently viewpoint discriminatory, concluding instead that the policy was "viewpoint neutral" and was "reasonable in light of the purpose served by the forum." *Id.* at 635-36. *Davison* therefore provides no guidance on either of the arguments Plaintiffs advance here: that a facially neutral policy has been applied

in a discriminatory fashion because similarly speakers were treated differently, and that a natural policy is inherently vague in violation of the minimum standards of due process.[5]

Likewise, in *Steinburg*, the plaintiff challenged a county planning commission's policy that prohibited "personal attacks." 527 F.3d at 386. Like in *Davison*, the Fourth Circuit never conducted a vagueness analysis or reached a conclusion on whether the policy was unconstitutionally vague or not. Instead, the Fourth Circuit held that a "policy against personal attacks is not facially unconstitutional" because it is "content-neutral." *Id.* at 387. Again, this type of holding provides no guidance on whether a given policy is too vague to provide clear guidance to speakers or enforcers. The Fourth Circuit itself acknowledged that "this holding does not preclude a challenge premised on misuse of the policy to chill or silence speech in a given circumstance." *Id.*[6]

Defendants also cite cases from outside the Fourth Circuit, but these do not offer any help. The School Board argues that the court in *Ison* upheld a "decorum" provision in the face of a vagueness challenge. *See* Doc. 22, at 28. Not only have Defendants abandoned any defenses based

[5] The *Davison* court did reject arguments that "the policy was not used in a viewpoint-neutral way," but only because the plaintiff had been "talking about particular board members[and] discussing their children," while his only evidence of other speakers showed that "none of [those] speakers made comments about individual board members" and were merely reading "explicit words" from "book quotations." 19 F.4th at 636. The same cannot be said here, where Plaintiffs' evidence shows that other speakers were permitted to indirectly reference individual students but Plaintiffs were not. *See supra*, at 5-9.

[6] In *Steinburg*, the Fourth Circuit also based its holding on the determination that a neutral policy against "personal attacks" was also a "reasonable" restriction, because "an insult directed at a person and not speech directed at substantive ideas or procedures at issue, a personal attack is surely irrelevant[.]" 527 F.3d at 386-87. But it noted that any restriction on criticism would not be reasonable, even if facially neutral, when "the topic legitimately at issue is the person being attacked, such as his qualifications for an office or his conduct." *Id.* at 387. This differentiates both *Steinburg* and *Davison* (which upheld a policy prevent "harass[ment]" and "personal attacks) from the present case, where the criticism was aimed at how the School Board managed safety within schools and involved a passing reference to the "conduct" of one individual that was directly related to the relevant "topic … at issue." *Id.*

on the Board's decorum provision by now only arguing that its speech suppression was justified under its "target, criticize, or attack" policy,[7] but Defendants fail to note that *Ison* itself struck down as unconstitutional a similar speech restriction. "The restrictions on 'antagonistic,' 'abusive' and 'personally directed' speech prohibit speech … in violation of the First Amendment." *Ison*, 3 F.4th at 895.

The School Board also points to *Dyer*, where the Eleventh Circuit ruled that speech policies "prohibiting disruption[] and requiring decorum" were "content-neutral policies." 852 F. App'x at 402. Once again, this sort of holding offers no insight into a facial vagueness challenge or the discriminatory application of a facially neutral policy. And in any event, *Dyer* was an unpublished per curiam opinion and has now been overruled by the Eleventh Circuit in *Moms for Liberty – Brevard Cnty., Fla. v. Brevard Cnty. Schs.*, 118 F.4th 1324 (11th Cir. 2024). In *Moms for Liberty*, the Eleventh Circuit considered a constitutional challenge to a school board's speech policies prohibiting comments that were "personally directed, abusive, obscene, or irrelevant." *Id.* at 1328. The Eleventh Circuit ruled that these policies were facially unconstitutional, in part because the school board's "enforcement was so inconsistent that it is impossible to discern the standard used to assess which speech was permitted at any given meeting," and this "unpredictable and haphazard enforcement" reflected that there were "no boundaries beyond the presiding officer's real-time judgment about who to silence." *Id.* at 1336-37.

[7] Nowhere in either of the School Board's briefs or Mansfield's declaration do Defendants still claim that it applied Policy 2520(A)(1)-(2)'s decorum provisions or that Plaintiffs' speech violated these decorum provisions. *See* Doc. 22, at 13-29; Doc. 27, at 1-2; *see also* Mansfield Decl., Doc. 22-11, ¶5 ("The *only* reason I interrupted Plaintiff Miller was due to her targeting and attack of a specific, individual student." (emphasis added)); *id.* ¶6 ("The *only* reason I interrupted Plaintiff Michon was due to her targeting and attack of a specific, individual student." (emphasis added)); *id.* ¶7 ("The *only* reason I interrupted Plaintiff Platt was due to her targeting and attack of a specific, individual student." (emphasis added)).

In sum, none of the cases cited by the School Board bind this Court's hands. Applicable precedents from the Fourth Circuit and other courts all point to the same inescapable conclusion that the School Board's policies are unconstitutionally vague and, here, unconstitutionally applied in a discriminatory manner.

II. The School Board Enforces Its Policies Inconsistently and Departed From Normal Procedure, Proving Viewpoint Discrimination.

This case is not about whether a school board can impose reasonable content-neutral policies to speech that occurs in a government-controlled limited public forum. A school board need not permit "every type of speech" and may implement "reasonable" restrictions in a limited public forum, but there remains an important guardrail—any such "restriction must not discriminate against speech on the basis of viewpoint." *Good News Club*, 533 U.S. at 106-07; *see Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys."); *Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five*, 470 F.3d 1062, 1067-68 (4th Cir. 2006). "Viewpoint-based discrimination occurs when a government official 'targets not subject matter, but particular views taken by speakers on a subject.'" *Robertson v. Anderson Mill Elementary Sch.*, 989 F.3d 282, 290 (4th Cir. 2021) (quoting *Rosenberger*, 515 U.S. at 829). And viewpoint discrimination can be proved through "disparate treatment towards people or things sharing the characteristic that was the nominal justification for the action," "departures from normal procedures," and "post hoc rationalization" for the discrimination. *St. Michael's Media, Inc. v. Mayor & City Council of Baltimore*, 566 F. Supp. 3d 327, 367 (D. Md. 2021), aff'd, 2021 WL 6502219 (4th Cir. Nov. 3, 2021).

Here, there exists each type of evidence of viewpoint discrimination. The School Board now insists that Policy 2520(A)(3)'s prohibition on comments that "target, criticize, or attack"

individual students must be expanded to also prohibit less offensive things such as "talking about a student," October 8, 2024, Meeting, at 2:29:43, "comment[ing] on an individual student" in a way "that could violate applicable confidentiality requirements," *id.* at 2:29:20, "discuss[ing] a specific student," Joint Statement, Doc. 4-2, at 18, ¶2; Doc. 22, at 24, or making "comments specific to an individual student," Doc. 22, at 29. Yet if the three words in Policy 2520(A)(3) do indeed cover this expansive list of unenumerated things as well, then the public record demonstrates that the School Board has engaged in "disparate treatment towards people" who have made the exact same type of comments in the past. *St. Michael's Media*, 566 F. Supp. at 367. Indeed, the School Board's "normal procedure[]" with regard to speech that talks about, comments on, discusses, or makes comments specific to individual students is simply to allow the speakers to finish their remarks without interruption. *Id.* It was not until Plaintiffs sought to criticize the School Board over its handling of an ongoing school safety concern that the School Board departed from this normal procedure and silenced the disfavored speakers. And while the School Board now focuses on Policy 2520(A)(3)'s "target, criticize, or attack" provision, this provision was the *sixth* justification offered for the School Board's silencing of Plaintiffs and was first mentioned *weeks after* Plaintiffs were silenced—an obvious post-hoc rationalization.

Consider first the disparate treatment and departure from normal procedures. Over the course of the year during which this School Board has been in office, it has engaged in a consistent practice of permitting speakers to directly and indirectly reference specific students in Loudoun County schools and discuss details of incidents involving those students. Commentators have been permitted to discuss, without interruption or admonishment, how a "seventh-grade [student] tragically took his own life," how there has been "at least one [student] this year that required [emergency medical services] in our cafeteria," and even how certain students wore "stoles bearing

the Palestinian flag" at "the Stonebridge High School graduation." *See supra*, at 7-9. Yet on October 8, Plaintiffs were cut off after saying equally indirect, unidentified, and innocuous factual comments such as "a student with violent gang affiliation who was arrested," "recently a student was carrying a concealed weapon walking to school," and "other [students] who have been arrested, and who are back in the school." *See supra*, at 5-7.

The School Board has not explained how Plaintiffs' comments "target, criticize, or attack" individual students but the previous comments do not. Nor can it. Both sets of comments are factual descriptions, providing information about incidents that happened at school or to students, and that include details that vaguely allude to—but do not identify—individual students. The commentators who did not attempt to criticize the School Board about an ongoing safety issue were not silenced. The commentators who did attempt to criticize the School Board about an ongoing safety issue were silenced. This shows both disparate treatment of similarly situated people and a departure from normal procedures when it came to these Plaintiffs. Both prove unconstitutional as-applied viewpoint discrimination. *See St. Michael's Media*, 566 F. Supp. 3d at 367.[8]

This conclusion is further supported by the fact that the School Board's current sole justification—that Plaintiffs' violated Policy 2520(A)(3)'s "target, criticize, or attack" provision—is nothing more than a clear post hoc rationalization. On October 8, 2024, the School Board and Mansfield said that the Plaintiffs were violating speech policies by violating "civility and

[8] The School Board has not attempted to distinguish between the factual statements indirectly referencing students that were permitted and those that were prohibited by way of the speaker's intent—i.e., ruling on factual statements concerning students based on whether the School Board itself thought the speaker's subjective *intent* was to "target" or "attack." Nor could it lawfully do so. "The government is ill-equipped in any event to decide what is or is not offensive…. enduring speech that irritates, frustrates, or even offends is a 'necessary cost of freedom.'" *Moms for Liberty*, 118 F.4th at 1335 (quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 575 (2011)).

decorum," "comment[ing] on an individual student," and disclosing "personally identifiable information." *See supra*, at 5-7. On October 9, 2024, the School Board and Mansfield said that the Plaintiffs were silenced because they were "discuss[ing] a specific student," spreading "misinformation," and engaging in speech that advances "a political agenda." *See supra*, at 7. It was not until October 22, 2024, that the School Board first implied that Plaintiffs "criticize[d], target[ed], or attack[ed]" a specific student." *See id.*

Mansfield stated in her sworn declaration that Policy 2520(A)(3) "is not complicated." *See* Mansfield Decl., Doc. 22-11, ¶11. But if it is not complicated, it should not have taken her two weeks and six attempts to settle on that provision as the justification for silencing Plaintiffs. In the same affidavit, Mansfield also claimed that she "explained Policy 2520, and specifically section (A)(3) … each time I had to interrupt and redirect a speaker." *Id.* Yet a review of Plaintiffs' transcription, Defendants' transcription, and the public record itself shows that Mansfield never invoked or explained Policy 2520(A)(3) at any point on October 8, 2024.

Contrary to the School Board's assertion, the public record indisputably shows that the School Board and Mansfield have engaged in disparate treatment, departure from normal procedures, and post-hoc rationalizations regarding the decision to silence Plaintiffs. This evidence proves that the School Board applied its policies against Plaintiffs in an unconstitutionally discriminatory fashion. This Court should find that the Plaintiffs are likely to prevail on the merits of all three claims.

III. If the Phrase "Target, Criticize, or Attack" Prohibits All the Many Varied Types of Speech the School Board Claims it Covers, it is Unconstitutionally Vague.

The School Board mistakenly claims that *Davison*, *Steinberg*, *Ison*, and *Dyson* provide binding precedent on vagueness challenges, when in fact none of those cases considered a vagueness challenge to a provision like Policy 2520(A)(3). But this is not the only mistake of law

the School Board commits. The test for unconstitutional vagueness is whether the regulation "chills" a "substantial amount of protected speech." *United States v. Williams*, 553 U.S. 285, 304 (2008). In deciding this question, the Court must consider whether the challenged provision: (1) gives "the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly," and (2) prevents "arbitrary and discriminatory enforcement" by "provid[ing] explicit standards for those who apply them." *Grayned*, 408 U.S. at 108. Failing either inquiry renders a speech restriction unconstitutional.

The School Board seeks to add a new component to the legal test. "To succeed in a facial constitutional challenge, a movant 'must establish that no set of circumstances exists under which the Act would be valid.'" Doc. 22, at 25 (first quoting *United States v. Hosford*, 843 F.3d 161, 165 (4th Cir. 2016), then citing *United States v. Salerno*, 481 U.S. 739, 745 (1987), then citing *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008)). Yet none of the cases the School Board cites deal with *vagueness* facial challenges, much less vagueness facial challenges brought under the First Amendment. Where the "no set of circumstances" language is used, *Hosford* involves Second Amendment challenge, 843 F.3d at 165,[9] *Salerno* involves Eighth Amendment challenge, 481 U.S. at 745-46, and *Washington State Grange* involves a challenge to nonpartisan primaries, 552 U.S. at 447-49. While the "no set of circumstances" component does apply to many types of facial challenges, it has no bearing on a facial *vagueness* challenge. The essence of a vagueness challenge is derived from "a basic principle of due process" and examines whether "prohibitions are not clearly defined." *Grayned*, 408 U.S. at 108. Unconstitutionally vague provisions still cover what might be valid prohibitions. The constitutional infirmity comes from

[9] Notably, the *Hosford* court later addressed a vagueness challenge in the same opinion, but did not invoke the "no set of circumstances" language when conducting that analysis. *See* 843 F.3d at 170.

the fact that the regulated individuals simply can't know for sure what is validly prohibited and what is not.

Returning to the proper legal standard for a First Amendment vagueness challenge, it is clear that people "of common intelligence must necessarily guess at" Policy 2520(A)(3)'s "meaning and differ as to its application." *Citizens United v. FEC*, 558 U.S. 310, 324 (2010). At every step, the School Board has not only denied the clear implication of these three words, but it has actively expanded the phrase to cover many things that are *not* written in Policy 2520(A)(3). As demonstrated throughout its comments at the public comment period, its joint statement, and its briefing in this case, the School Board believes that the words "target, criticize, or attack" actually prohibit (at least) all the following things: (1) targeting, criticizing, or attacking a specific student, (2) indirectly discussing or referencing either a student or group of students without including any personally identifiable information, (3) indirectly discussing, commenting on, or referencing any specific incident occurring at school or to students, or (4) disclosing personal identifiable information.[10]

If Policy 2520(A)(3) really covers all these other things that appear nowhere in the text of Policy 2520(A)(3), then it does not give a reasonable person the ability to know what is prohibited nor does it provide explicit standards to prevent arbitrary discrimination against disfavored

[10] The "request" at the beginning of the public comment period to not "violate applicable confidentiality requirements" did not clearly inform Plaintiffs or any other reasonable person that indirectly referencing an unidentified student would lead to speech suppression. Loudoun County School Board Policy 8640 generally incorporates the definition of "personally identifiable information" from federal law and regulations. *See* Policy 8640(A)(2), https://perma.cc/9STV-ZVTB; *see also* 20 U.S.C. §1232h(c)(6)(E); 34 C.F.R. §99.3. None of Plaintiffs' comments include the types of speech listed there—particularly since even a careful review of all of Plaintiffs' comments does not reveal the identity of the still-anonymous referenced student, so none of Plaintiffs' comments would "allow a reasonable person in the school community, who *does not have personal knowledge* of the relevant circumstances, to identify the student with reasonable certainty[.]" Policy 8640(A)(2)(f).

speakers. A person who simply reads Policy 2520(A)(3) and then attends a School Board meeting will have no idea that the policy *also* prohibits indirectly "discussing" or "talking about" students, even if such references are simply to provide context to comments directed at the School Board, or that it prohibits mentioning a few nonidentifying factual details about a student that still preserve the student's privacy. This alone renders Policy 2520(A)(3) unconstitutionally vague.

But even more incriminating evidence comes from the School Board's briefing. At first, the School Board claims that the Plaintiffs "targeted and attacked" a student, which violated Policy 2520(A)(3). *See* Doc. 22, at 16. Then the School Board claimed that Plaintiffs "disclosed personally identifiable information of a particular student," which violated Policy 2520(A)(3). *Id.* at 24. And finally, the School Board argued that Plaintiffs "made comments specific to an individual student," which is prohibited by Policy 2520(A)(3). *Id.* at 29. If the Board itself can't keep straight what Policy 2520(A)(3) means, or how exactly Plaintiffs violated it, Plaintiffs or any other reasonable individual should not be expected to know what Policy 2520(A)(3) prohibits. Policy 2520(A)(3) is thus unconstitutionally vague and violates Plaintiffs' First Amendment rights.

CONCLUSION

Plaintiffs wish to continue attending School Board meetings to speak about ongoing issues involving school safety and any other pressing matters of public concern. But the School Board currently represents that it will continue to enforce its unconstitutionally vague policies in an expanded fashion that departs from the text of the policy itself and permits the School Board to silence speakers it does not want to hear. And based on the past record of the School Board's discriminatory and uneven enforcement of these policies, Plaintiffs reasonably fear that if they attempt to speak again, the Board may seek to impose legal repercussions. No matter what—whether Plaintiffs self-silence by avoiding public comment periods, or attempt to speak and are again silenced by the Board's commitment to enforce the unconstitutional policies—Plaintiffs will

suffer an irreparable injury to their First Amendment rights. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976).

This Court should therefore grant Plaintiffs' motion for summary judgment, *see* Doc. 4, and enjoin the enforcement of Policy 2520(A)(1), (A)(2), and (A)(3) against Plaintiffs during the pendency of this case.

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Respectfully submitted,

/s/ *Andrew Block*
Andrew Block
(VA Bar No. 91537)
Ian Prior*
AMERICA FIRST LEGAL FOUNDATION
611 Pennsylvania Ave. SE #231
Washington, D.C. 20003
(202) 836-7958
andrew.block@aflegal.org
ian.prior@aflegal.org

/s/ *Rachael C. T. Wyrick*
Thomas R. McCarthy
(VA Bar No. 47154)
Rachael C. T. Wyrick
(VA Bar No. 99763)
Cody Ray Milner*
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Suite 700
Arlington, Virginia 22209
(703) 243-9423
tom@consovoymccarthy.com
rachael@consovoymccarthy.com
cody@consovoymccarthy.com

* *Pro hac vice*

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2024, I served the foregoing document with the Clerk of Court using the Court's ECF system, thereby serving all counsel who have appeared in this case.

/s/ *Rachael C. T. Wyrick*
Rachael C. T. Wyrick
(VA Bar No. 99763)
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Suite 700
Arlington, Virginia 22209
(703) 243-9423
rachael@consovoymccarthy.com