



June 20, 2017

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*Via Email*

Re: Unconstitutional Viewpoint Discrimination at June 21, 2017 PWCS Board Meeting

Dear Ms. McGowan:

It has come to our attention that the Chairman of the Board has ordered the Clerk to act in violation of Board Regulation 133-1 II(B) and the United States Constitution by replacing citizens who signed up through the clerk's office to speak during citizen comment time with speakers who have contacted, or were selected by, the Chairman. The Chairman has stated his intent to follow Regulation 133-1 II(E) and limit the initial public comment time to ten speakers.<sup>1</sup> Thus, by placing the Chairman's speakers at the top of the public comment time, his actions have the effect of excluding those individuals who signed up with the Clerk from speaking until after all other business has been concluded.

This action violates both the Board's own regulations and the First Amendment. By way of introduction, Alliance Defending Freedom is an alliance-building, non-profit legal organization that advocates for the First Amendment rights of all people. Our attorneys have a long history of successful advocacy upholding the right to free speech as affirmed in the First Amendment.<sup>2</sup> The undersigned attorney resides in Prince William County and signed up as a resident of the Occoquan District to speak through the process proscribed by Board Regulation 133 and has been adversely affected by the Chairman's actions.

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<sup>1</sup> Jill Palermo, *Expanded Policy for LGBTQ Students, Staff Has Majority School Board Vote*, Prince William Times, June 16, 2017, [http://www.fauquier.com/prince\\_william\\_times/exclusive-expanded-policy-for-lgbtq-students-staff-has-majority-school/article\\_4f1063f4-52d5-11e7-a565-e32857e8065b.html](http://www.fauquier.com/prince_william_times/exclusive-expanded-policy-for-lgbtq-students-staff-has-majority-school/article_4f1063f4-52d5-11e7-a565-e32857e8065b.html).

<sup>2</sup> Alliance Defending Freedom has achieved successful results for its clients before the United States Supreme Court, including five victories before the highest court in the last six years. *See e.g. Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (per curiam) (successful result for religious colleges' free exercise rights); *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218 (2015) (unanimously upholding ADF's client's free-speech rights); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014) (striking down federal burden's on ADF's client's free-exercise rights); *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) (upholding a legislative prayer policy promulgated by a town represented by ADF); *Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011) (upholding a state's tuition tax credit program defended by a faith-based tuition organization represented by ADF).

### **Replacing Citizen Speakers with the Chairman's Own List Violates Regulation 133-1**

Regulation 133-1 II(B) states that “[s]peakers shall be placed on a list in the order in which they notify the Clerk.” The Chairman’s text to the Clerk orders her to put fourteen names “at the top of the list for 6/21.”<sup>3</sup> These speakers did not follow the proper procedures of contacting the Clerk. Thus, the Chairman’s direction to place them above citizens that did follow the proper procedures violates Regulation 133-1 II(B) in two ways: 1) by ordering the speakers according to the Chairman’s personal preferences rather than according to “the order in which they notify the Clerk” and 2) by placing speakers on the list who have not “notified the Clerk” in accordance with Rule 133-1 II(B).

### **Permitting the Chairman to Exercise Unbridled Discretion Over Speakers in a Designated Public Forum Violates the Free Speech Clause of the First Amendment**

Even if the Chairman’s actions were found to be within his discretionary authority, despite their violation of Regulation 133-1 II(B), permitting such discretion violates the First Amendment right to free speech.

#### **A. Citizen Comment Time is a Designated Public Forum for Speech in Which the Board is Obligated to Ensure Viewpoint Neutrality.**

Although the school board is not required to open the floor of every meeting for citizen comment time<sup>4</sup>, when it does, it creates a designated public forum in which it, as a government entity, must ensure viewpoint neutrality. “[W]hen the Government has intentionally designated a place or means of communication as a public forum speakers cannot be excluded without a compelling governmental interest.”<sup>5</sup> Here, the Regulations make it clear that the government has intentionally designated citizen comment time as a forum for public speech.<sup>6</sup> Thus, regardless of whether the forum is deemed to be “limited” or “designated,”<sup>7</sup> the Constitution equally requires that any restrictions be “reasonable and viewpoint neutral.”<sup>8</sup>

#### **B. Granting the Chairman (or any official) Discretion to Replace Speakers with His or Her Own Preferred Speakers Constitutes Prohibited Viewpoint Discrimination.**

Within “the prohibition on viewpoint discrimination is the principle that administrators may not possess unfettered discretion to burden or ban speech, because ‘without standards governing the exercise of discretion, a government official may decide who may speak and

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<sup>3</sup> See texts from Ryan Sawyers to Deborah Urban, attached as Exhibit 1.

<sup>4</sup> *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 799 (1985).

<sup>5</sup> *Id.* at 800.

<sup>6</sup> See e.g. Regulation 133-1.

<sup>7</sup> See *Child Evangelism Fellowship of MD, Inc. v. Montgomery Cty. Pub. Sch.*, 457 F.3d 376, 381-83 (4th Cir. 2006) for a discussion of the types of forums.

<sup>8</sup> *Id.* at 383.

who may not be based upon the content of the speech or view-point of the speaker.”<sup>9</sup> This is exactly what has occurred due to the Chairman’s abuse of discretion in ordering the Clerk to exclude the first ten citizens who contacted the clerk from speaking before the substantive meeting, and instead replacing those speakers with a list of his own. There is not simply a risk the viewpoint discrimination could occur, if the Chairman’s order is followed, it will occur tonight. The law is clear: “In sum, speech is not to be selectively permitted or proscribed according to official preference.”<sup>10</sup>

### Conclusion

“[I]f a policy ‘does not provide sufficient criteria to prevent viewpoint discrimination,’ then it ‘generally will not survive constitutional scrutiny.’”<sup>11</sup> Regulation 133-1 II(B) should be read to limit the Chairman’s discretion and prohibit him from replacing speakers who have signed up in accordance with the policy with speakers who have not followed the proper procedure. If it is read to grant him such discretion, however, the policy is unconstitutional and the Board may be liable for violating citizens’ constitutional rights.

This area of law is so clearly established that in addition to the Board members being liable in their official capacity, including for any damages or Plaintiffs’ attorneys fees that are accrued, the Chairman and individual members may also be personally liable. As courts have held when finding government officials personally liable for First Amendment violations, “[i]n engaging in this manifestly unlawful behavior, the individual [officials] could not have reasonably misapprehended the law, nor can it be said that they made a bad guess in a gray area. [The officials] are accordingly not entitled to qualified immunity.”<sup>12</sup>

In order to avoid liability, the Board should immediately enforce the plain meaning of Regulation 133-1 II(B) which requires that speakers be afforded a platform to speak in the order in which they contacted the Clerk. For the June 21, 2017 meeting and all further meetings, the speakers should be ordered according to the chronology in which they contacted the Clerk. Additionally, the Board should conduct a review of its policies to ensure that the Chairman is not granted unbridled discretion to favor or disfavor speech or speakers based on viewpoint.<sup>13</sup> Any such grant of discretion must be limited by content and viewpoint neutral criteria.<sup>14</sup>

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<sup>9</sup> *Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five*, 470 F.3d 1062, 1068 (4th Cir. 2006)

<sup>10</sup> *Id.* at 1070.

<sup>11</sup> *Id.* at 1069.


<sup>12</sup> *Swagler v. Sheridan*, 837 F. Supp. 2d 509, 537 (D. Md. 2011) (citations omitted).

<sup>13</sup> For example, multiple portions of regulation R133-1 permit the Chairman to change policy and practice “at the discretion of the School Board Chairman.” This discretion is only permitted if it is clearly limited by exhaustive and objective viewpoint neutral criteria. *See e.g. Forsyth Cty., Ga. v. Nationalist Movement*, 505 U.S. 123, 131 (1992) (“If the permit scheme ‘involves appraisal of facts, the exercise of judgment, and the formation of an opinion,’ by the licensing authority, ‘the danger of censorship and of abridgment of our precious First Amendment freedoms is too great’ to be permitted.”).

<sup>14</sup> *Id.*

Mary McGowan, Esq.  
June 21, 2017

Respectfully submitted,



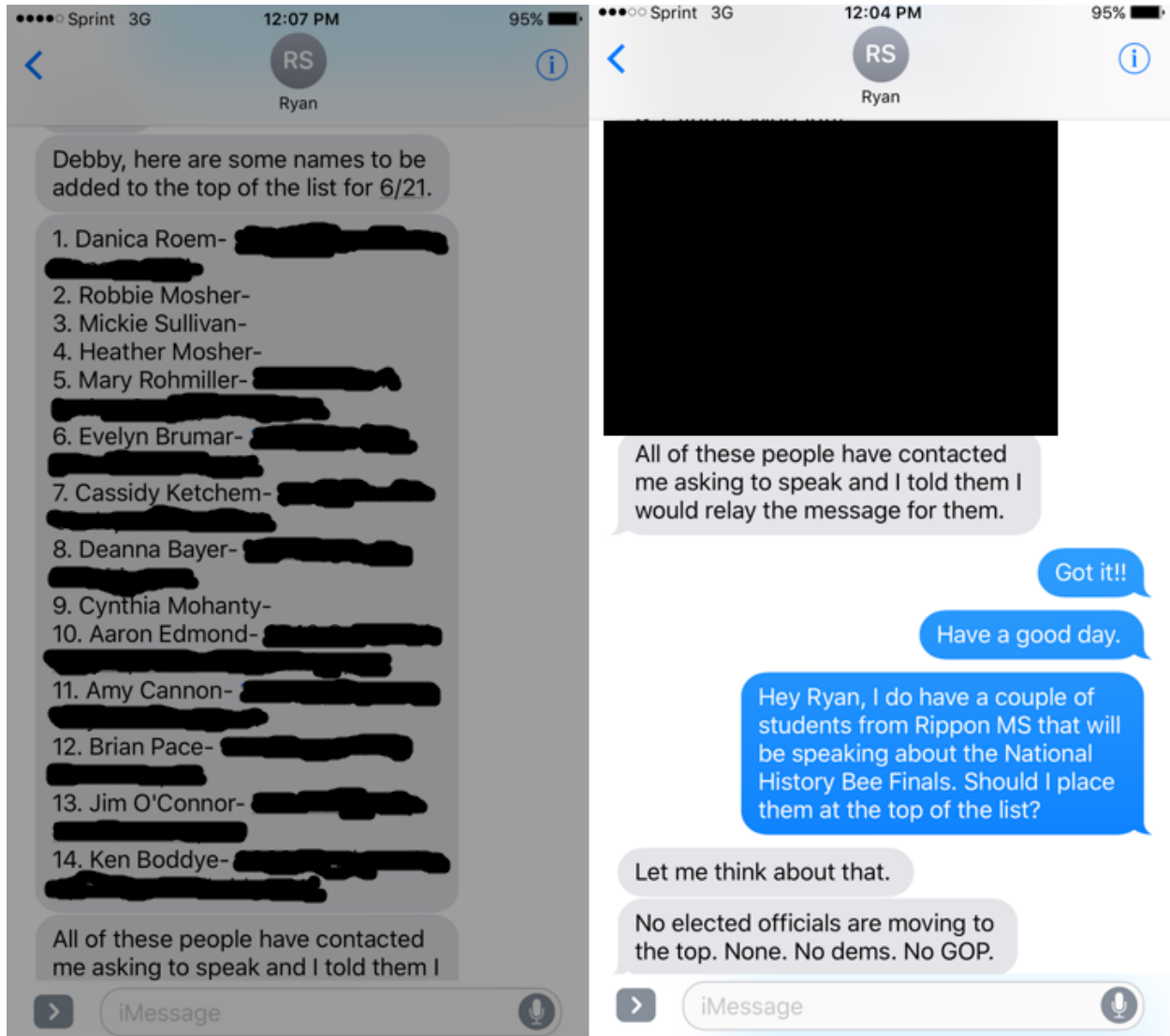
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Exhibit 1<sup>15</sup>



<sup>15</sup> The private information listed in this exhibit has been redacted. An unreacted copy is available upon request.

**Exhibit 2: Board Regulation 133-1**