No. 18-10231

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RICHARD D. JACKSON, LORETTA S. JACKSON, and E.D.J., a minor child, by and through her parents RICHARD D. JACKSON and LORETTA S. JACKSON,
Plaintiffs-Appellants,

v.

DAVID McCURRY, in his individual and official capacities, and SANDI D. VELIZ, BO OATES, JOSH KEMP, and RYAN SMITH, in their individual capacities,
Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of Georgia, Columbus Division, Civil Action No. 4:17-cv-00017-CDL

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF GEORGIA, INC. IN SUPPORT OF PLAINTIFF-APPELLEE RICHARD D. JACKSON

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Amicus Curiae American Civil Liberties Union Foundation of Georgia, Inc. (ACLU of Georgia) provides the following Certificate of Interested Persons and Corporate Disclosure Statement pursuant to Eleventh Circuit Rules 26.1-1, 28-1(b), and 29-2. In addition to the persons and entities identified in the Certificate of Interested Persons and Corporate Disclosure Statement in the Brief of Appellants, the following are known to have an interest in the outcome of the case:

1. American Civil Liberties Union Foundation of Georgia, Inc., Amicus Curiae
2. Alston & Bird LLP, Counsel for Amicus Curiae
3. Dowell, Matthew L.J.D., Counsel for Amicus Curiae
4. Young, Sean J., , Counsel for Amicus Curiae

The ACLU of Georgia is not publicly traded. The ACLU of Georgia is not aware of any publicly traded company or corporation that has an interest in the outcome of the case or appeal.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is appropriate because this appeal involves important First Amendment issues. The ACLU of Georgia respectfully requests leave to participate in oral argument on the issue of whether the First Amendment prohibited Defendant-Appellee David McCurry from barring Plaintiff-Appellant Richard D. Jackson from speaking at public school board meetings. The ACLU of Georgia believes that its participation in oral argument may be helpful to the Court in addressing this important issue. Appellants do not object to the ACLU of Georgia's request to participate in oral argument. *See* Fed. R. App. P. 29(a)(8). Appellees also do not object so long as their time for argument is unaffected.

TABLE OF CONTENTS

TABLE OF CITATIONS

Page(s)

Cases

Other Authorities

INTEREST OF AMICUS CURIAE

The ACLU of Georgia is the Georgia affiliate of the national American Civil Liberties Union Foundation. The ACLU of Georgia has long been at the forefront of efforts to protect and defend the Constitution, and the First Amendment in particular, in the State of Georgia. The ACLU of Georgia advocates on behalf of more than 20,000 members and supporters in Georgia.

The ACLU of Georgia states that no party's counsel authored this brief in whole or in part, that no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and that no person (other than the ACLU of Georgia, its members, or its counsel) contributed money that was intended to fund preparing or submitting this brief.

The parties to this appeal consent to the ACLU of Georgia's filing of this amicus brief.

STATEMENT OF THE ISSUE

Whether, consistent with the First Amendment, public school administrators can preemptively ban a parent from speaking at a limited public forum solely because the parent has threatened litigation against the school.[1]

STATEMENT OF THE CASE

This case arises on a summary judgment posture, which requires that this Court construe all facts in favor of the non-moving party; on this issue, Plaintiff-Appellant Richard Jackson. According to the submissions of the parties below, school officials searched the cell phone of Mr. Jackson's daughter on August 17, 2016. Mr. Jackson complained about the search to Defendant-Appellee David McCurry, the school district superintendent, and others. *See, e.g.*, R:24 (McCurry Dep.) at 42:24–43:23. At one point, Mr. Jackson said that litigation was an "option." R:21 (R. Jackson Dep.) at 28:21–29:2, 32:23–33:1, 49:8–16. Shortly thereafter, Mr. Jackson called Superintendent McCurry to request to speak at an upcoming public school board meeting. *See id.* at 48:1–10; R:24 (McCurry Dep.) at 44:13–45:2. School board policy required that Mr. Jackson submit a written request to Superintendent McCurry before he would be allowed to speak at the public meeting. *Id.* But Superintendent McCurry told Mr. Jackson that "he did not need to send a

[1] The ACLU of Georgia only addresses the fourth issue listed in Plaintiffs-Appellants' Statement of the Issues. The ACLU of Georgia takes no position on the other issues raised in this appeal.

memo to request to speak to the board" because he would not be allowed to speak. R:24 (McCurry Dep.) at 45:20–46:13. Superintendent McCurry justified the ban on the basis that Mr. Jackson had threatened litigation. *See* R:21 (R. Jackson Dep.) at 47:19–24 ("[Superintendent McCurry] told me no, I was not allowed to speak at the school board, because I had threatened litigation.").

The district court granted Superintendent McCurry's motion for summary judgment and dismissed Mr. Jackson's First Amendment claim against the ban, concluding that preemptively banning anyone who threatens litigation against the school was "reasonable" and "viewpoint neutral." R:39 at 26–31.

Plaintiffs-Appellants thereafter filed a notice of appeal. The ACLU of Georgia now files the instant amicus brief in support of Mr. Jackson because it believes that the district court's conclusion is erroneous and urges that this Court not adopt it as the law of this Circuit.

SUMMARY OF ARGUMENT

Contrary to the district court's conclusion, it is a violation of the First Amendment for the government to preemptively and completely ban a concerned citizen from speaking at a limited public forum, solely because he or she threatened to sue the government (which is itself a constitutional right). A contrary rule would empower governmental entities to exclude speakers they disagreed with on the pretext that litigation might follow. That is anathema to the First Amendment.

Richard Jackson complained about the search of his daughter's cell phone at school. When his concerns were not addressed, he said that litigation was an "option" and tried to raise these concerns at an upcoming public school board meeting. Although school board policy invites parents to discuss "problem[s] that cannot be resolved" at public meetings, Superintendent McCurry instead issued an *ad hoc* ban prohibiting Mr. Jackson from speaking at school board meetings solely because Mr. Jackson had threatened litigation.

The district court's dismissal of this claim should be reversed for three, independent reasons. ***First***, and at a minimum, a reasonable juror could conclude that the ban was unconstitutionally motivated by viewpoint discrimination. Indeed, the ban constitutes viewpoint discrimination regardless of motive. ***Second***, the ban was unreasonable in light of the purposes of the forum: which included hearing citizen complaints. ***Third***, the ban was promulgated pursuant to written school board policy that is unconstitutional on its face. The written policy forces all concerned citizens to obtain approval of their comments before they are allowed to speak at the school board meeting, and there are no guidelines whatsoever on the approval process, other than whether the Board deems the comment to be in "the interest of the Board."

For any of these three independent reasons, summary judgment on Mr. Jackson's First Amendment claim should be reversed.

ARGUMENT AND CITATIONS OF AUTHORITY

Superintendent McCurry violated Richard Jackson's First Amendment rights when he banned Mr. Jackson from speaking at a public meeting because (i) the ban impermissibly discriminated on the basis of viewpoint, (ii) the ban was unreasonable, and (iii) the ban was the result of a facially unconstitutional school board policy. Any one of those three reasons independently justifies this Court's reversal of the district court's ruling on this claim.[2]

I. Superintendent McCurry's Ban Violates the First Amendment Because it Discriminates on the Basis of Viewpoint

Courts use a "forum analysis to evaluate government restrictions on purely private speech that occurs on government property." *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2250 (2015) (internal quotation marks omitted). The public school board meeting here is considered a limited public forum because the government "reserved a forum for certain groups or for the discussion of certain topics," *id.*—in this case, to hear "problem[s] that cannot be resolved" in a private meeting, R:39 at 29. *See also Barrett v. Walker Cty. Sch. Dist.*, 872 F.3d

[2] The ACLU of Georgia does not explicitly address Superintendent McCurry's entitlement to qualified immunity. But as shown below, the legal principles articulated below were well-established at the time of the alleged violation and Superintendent McCurry is therefore not entitled to qualified immunity. However the Court chooses to conduct the two-step qualified immunity analysis—and we request that it perform both steps—we especially urge this Court not to enshrine, as the law of this Circuit, the district court's flawed reasoning on this important First Amendment issue.

1209, 1225 (11th Cir. 2017) (holding that a school board meeting was a limited public forum because the government "limit[ed] discussion to certain topics and employ[ed] a system of selective access").[3]

Although the government has some ability to restrain speech in a limited public forum, that power "is not without limits." *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001). Restrictions on speech "must not discriminate against speech on the basis of viewpoint, and the restriction must be reasonable in light of the purpose served by the forum." *Id.* at 107 (internal quotation marks omitted). The prohibition on viewpoint discrimination is absolute because "[t]o permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees." *City of Madison, Joint Sch. Dist. No. 8 v. Wis. Emp't Relations Comm'n*, 429 U.S. 167, 175–76 (1976).

[3] Other types of recognized forums are the traditional public forum (a place that has "immemorially been held in trust for the use of the public . . . for purposes of assembly . . . and discussing public questions,"), the designated public forum (a place that has otherwise been opened as a public forum), and the nonpublic forum (a place where the government acts "as a proprietor, managing its own operations"). *Walker*, 135 S. Ct. at 2250–51. As this Court recently noted, however, what historically was called a "nonpublic forum" is now sometimes called a "limited public forum." *Barrett*, 872 F.3d at 1226 ("And the Supreme Court has indicated that it has, in the past, used the term 'nonpublic forum' when it should have employed the term 'limited public forum.'"). Some courts have not applied this change in nomenclature uniformly. Consistent with *Barrett* and to avoid confusion, the ACLU of Georgia will use the term "limited public forum" throughout this brief even if a cited case uses the outmoded "nonpublic forum" nomenclature.

Applying those long-standing principles regarding viewpoint discrimination to the facts in this case, summary judgment regarding the public school board meeting ban should be reversed for one of two reasons. First, a question of fact exists as to whether the ban was motivated by viewpoint discrimination, i.e., because Superintendent McCurry disagreed with Mr. Jackson. Second, the ban also discriminated on the basis of viewpoint on its face, by censoring all viewpoints having anything to do with threatened litigation.

A. At a Minimum, a Genuine Issue of Material Fact Exists as to Whether Superintendent McCurry's Ban Was Motivated by Disagreement with Mr. Jackson's Viewpoint

It has long been well-established, and indeed, "axiomatic," "that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). Viewpoint discrimination occurs when the government regulates speech based on the "opinion or perspective of the speaker." *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2230 (2015) (internal quotation marks omitted); *see also Rosenberger*, 515 U.S. at 829 (holding that viewpoint discrimination occurs "when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the [government's] restriction").

In addition, even a speech restriction that is facially neutral is unconstitutional if it was passed with the intent to suppress viewpoints. "The existence of reasonable

grounds for limiting access to a nonpublic forum, . . . will not save a regulation that is in reality a facade for viewpoint-based discrimination." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 811 (1985). That is because "the government rarely flatly admits it is engaging in viewpoint discrimination." *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 86 (1st Cir. 2004). Indeed, "[s]uspicion that viewpoint discrimination is afoot is at its zenith" when speech critical of the government is restricted "because there is a strong risk that the government will act to censor ideas that oppose its own." *Id.*; *see also Pittsburgh League of Young Voters Educ. Fund v. Port Auth. of Allegheny Cty.*, 653 F.3d 290, 297 (3d Cir. 2011) (holding that under the circumstances the lack of "direct evidence of discrimination" was "hardly surprising"). Even when the government puts forward a seemingly reasonable, seemingly viewpoint neutral justification for banning speech, courts must consider the "practical operation" of that restriction. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 391 (1992).

As with any factual inquiry focusing on intent, a "smoking gun" is not required, and circumstantial evidence is sufficient to create a reasonable inference of unlawful intent. *Cf. United States v. Manoocher Nosrati-Shamloo*, 255 F.3d 1290, 1292 (11th Cir. 2001) ("A defendant's intent is often difficult to prove and often must be inferred from circumstantial evidence."); *Holzemer v. City of Memphis*, 621 F.3d 512, 525 (6th Cir. 2010) (holding that proof of intent in First Amendment

retaliation case "rarely will be supported by direct evidence of such intent" and that, as a result, such claims "seldom lend themselves to summary disposition").

To the extent Defendants argue that courts will not "'strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive,'" *In re Hubbard*, 803 F.3d 1298, 1312 (11th Cir. 2015) (quoting *United States v. O'Brien*, 391 U.S. 367, 383 (1968)), that general rule does not apply here. Neither *Hubbard* nor *O'Brien* raised the dangerous specter of *viewpoint* discrimination, which is almost always unconstitutional. *See Reed*, 135 S. Ct. at 2230 ("Government discrimination among viewpoints . . . is a 'more blatant' and 'egregious form of content discrimination'" (citing *Rosenberger*, 515 U.S. at 829)). As *Cornelius* long established, motive is important when a seemingly neutral policy is actually intended to be viewpoint discriminatory. *See, e.g.*, *Grossbaum v. Indianapolis-Marion County Bldg. Auth.*, 100 F.3d 1287, 1296 (7th Cir. 1996) (discussing *Cornelius* and *O'Brien* and concluding that "[m]otive becomes keenly relevant in cases that involve content discrimination because the line between viewpoints and subjects is such an elusive one.").

As demonstrated in the next subsection below (Part I.B), any reasonable interpretation of the facts demonstrates—as a matter of law—that Superintendent McCurry impermissibly banned Mr. Jackson from speaking at school board meetings because of his viewpoint. But at a minimum, the facts in the record create

a jury question on whether Superintendent McCurry banned Mr. Jackson from speaking—not because of some generally applicable policy against people who threaten litigation—but simply because of the school board's disagreement with Mr. Jackson over the legality of the search of his daughter's phone. The district court's ruling that there was "no evidence" that Superintendent McCurry banned Mr. Jackson from speaking because of that disagreement (R:39 at 30) was error. Resolving all issues of material fact and reasonable inferences in favor of Mr. Jackson, a reasonable jury could find that the ban was impermissibly motivated by that disagreement.[4]

Here, a reasonable juror could conclude based on the circumstantial evidence available that Mr. Jackson was banned because of his viewpoint. The promulgation and timing of the alleged policy of banning potential litigants is exceedingly suspect, since there is nothing in the record revealing a written school board policy requiring the exclusion of potential litigants from public school board meetings. To the contrary, the actual written policy encouraged parents with a "problem that cannot

[4] The district court's determination regarding the existence or non-existence of certain facts is not entitled to deference. *See Seamon v. Remington Arms Co.*, 813 F.3d 983, 987 (11th Cir. 2016) ("We review the district court's ruling on a motion for summary judgment de novo, applying the same legal standards that bound the district court."); *Marine Coatings of Ala., Inc. v. United States*, 932 F.2d 1370, 1375 (11th Cir. 1991) ("Our standard of review with respect to an appeal of the granting of summary judgment is that we reverse if the nonmoving party has designated specific facts . . . to show that a genuine issue of material fact exists.").

be resolved" to bring their concerns to the school board, without exceptions for people who threaten lawsuits. R:39 at 29. The facts show that it was not until Mr. Jackson threatened litigation on August 17, 2016, R:24 (McCurry Dep.) at 42:24–43:23; *id.* Ex. 1, and asked on August 19 to speak at the next school board meeting, R:21 (R. Jackson Dep.) at 48:1–10, that the Board suddenly banned him from appearing or speaking at that public meeting only days later on August 23 on the basis of some apparently *ad hoc* unwritten policy about banning potential litigants. R:24 (McCurry Dep.) at 45:20–46:13. Indeed, Superintendent McCurry told Mr. Jackson not to even bother submitting a written memo describing what he wanted to discuss at the public school board meeting, even though written school policy expressly requires it. *See* R:24 (McCurry Dep.) at 44:13–46:13. Such procedural deviations are further probative of improper intent. *Cf. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977) ("Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role.").

A reasonable juror could find that, despite a policy that seemingly encouraged Mr. Jackson to speak at the school board meeting, Superintendent McCurry deviated from proper procedure to quickly create an *ad hoc* exclusion just for Mr. Jackson days after he expressed criticism of the school and its administrators. Even the ban itself—banning public discussion of matters involved in potential or actual

litigation—can be seen as an unconstitutional attempt to avoid public embarrassment. Resolving all issues of material fact and reasonable inferences in favor of Mr. Jackson, a reasonable jury could conclude that Superintendent McCurry's purported justification for the ban was a mere pretext for viewpoint discrimination. *See, e.g.*, *Chiu v. Plano Indep. Sch. Dist.*, 260 F.3d 330, 352 (5th Cir. 2001) ("This question regarding Defendants' motivation creates a genuine issue of material fact that cannot be decided on this appeal."); *Heaney v. Roberts*, 846 F.3d 795, 802 (5th Cir. 2017) ("If Roberts acted with improper motive, he violated Heaney's clearly established First Amendment right to be free from viewpoint discrimination in a limited public forum.").

Thus, for example, in *Cornelius v. NAACP*, the Supreme Court explained that the federal government's exclusion of legal defense funds that happened to be primarily left-of-center from a charity drive for federal employees could be a pretext for viewpoint discrimination. *See* 473 U.S. at 811. The government argued that this exclusion was viewpoint-neutral "because litigation is a means of promoting a viewpoint, not a viewpoint in itself." *Id.* at 812. Even if that were true, the Supreme Court held that the ban would be struck down if it was actually intended to "suppress a particular point of view" or "conceal[ed] a bias against the viewpoint advanced by the excluded speakers." *Id.* at 812. Importantly, the Supreme Court remanded with

instructions to consider "whether the exclusion of respondents was impermissibly motived by a desire to suppress a particular point of view." *Id.* at 812–13.

This Court was faced with similar circumstances in *Searcey v. Harris*, 888 F.2d 1314 (11th Cir. 1989). In that case, a school board excluded a group from participating in career day programs after the group received negative publicity. *Id.* at 1316. Key in proving a First Amendment violation, the school board only developed a policy to justify the exclusion after kicking the group out. *Id.* This Court expressed serious doubts about this "abrupt change in policy" and concluded that the school board's ad hoc exclusion of the group "support[ed] an inference that the Board intended to suppress the [group's] views." *Id.* at 1325.

Because it has long been well-established that even facially neutral policies are unconstitutional if motivated by viewpoint discrimination, and because a reasonable juror could conclude that Superintendent McCurry's policy, even if facially neutral (and it is not, as explained below), was "impermissibly motived by a desire to suppress a particular point of view," 473 U.S. at 812–13, summary judgment should be reversed for a jury to resolve this matter. Reversal is justified on this basis alone.

B. Superintendent McCurry's Ban Constituted Viewpoint Discrimination as a Matter of Law

Regardless of motive, Superintendent McCurry's ban on its face constitutes viewpoint discrimination as a matter of law, contrary to the district court's reasoning.

As the Supreme Court has long established, viewpoint discrimination does not just include discrimination against a single point of view, but also discrimination against an "entire class of viewpoints," or viewpoints emanating from a "specific premise, a perspective, [or] a standpoint from which a variety of subjects may be discussed and considered." *Rosenberger*, 515 U.S. at 831. Thus, in *Rosenberger*, the Supreme Court held that a public university's ban on newspapers expressing opinions of a religious nature constituted viewpoint discrimination—even though religious opinions obviously include a "vast area of inquiry" of countless viewpoints, and even viewpoints that conflict with one another. *See id.* at 831–32 ("It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one [or] the other . . . ."). Similarly, in *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993), the Court struck down a school policy that allowed after hour use of school facilities by a "wide variety of social, civic, and recreational" programs but excluded all groups providing a "religious perspective," because excluding an entire class of viewpoints or perspectives was viewpoint discrimination. *See Rosenberger*, 515 U.S. at 830 (describing *Lamb's Chapel*).

Here, as the district court put it, Superintendent McCurry banned people from "raising complaints to the school board that are the subject of [threatened or actual] litigation." R:39 at 28–29. That amounts to a ban on an "entire class of viewpoints"

emanating from a "specific premise," *Rosenberger*, 515 U.S. at 831—viewpoints critical of the school that arise from a posture of potential or actual litigation. The "premise" underlying all these banned viewpoints is that the alleged misconduct complained of is so serious that it has led to threatened or actual litigation.

Further reinforcing the conclusion that Superintendent McCurry's ban was viewpoint discriminatory is the Supreme Court's explanation in *Rosenberger* about the danger of selective enforcement. The Supreme Court's warning is directly applicable here: "The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them. The second, and corollary, danger is to speech from the chilling of individual thought and expression." 515 U.S. at 835.

The danger to liberty here lies in granting the State the power to determine whether some casual phrase spoken in the heat of an argument constitutes "threatened litigation," thus triggering instant banishment from public school board forums. That is not a clear cut inquiry, especially when it comes to passionate parents speaking out to protect their children. For instance, does the phrase, "You punished my daughter for walking out of school to protest school shooting in violation of her First Amendment rights" carry an implied threat of litigation, or is it just a layperson's interpretation of the Constitution? Does the analysis change if the parent is a lawyer? A civil rights lawyer? Does the phrase, "If you don't reform your cell

phone search policies I might call my lawyer" constitute threatened litigation, or a mere statement that they might consult a lawyer about the possibility of litigation? And is "might" enough of a threat?—Is the phrase, "If you don't allow my transgender son to use the boys' bathroom I am going to sue you" a threat to sue the school (banned), or a threat to sue the employee in their individual capacity (presumably not banned)? Does the phrase, "If you don't allow my Christian book club to use your facilities after school, I am going to sue you, your family, the governor, and your dog" constitute threatened litigation, or exaggerated hyperbole that cannot possibly convey a real threat? As *Rosenberger* warned, giving the government power to classify arbitrarily such ambiguous statements for purposes of banning speech is a serious threat to liberty. Those concerns are particularly acute here because it is not even clear from the record in this case whether, at the time he was banned from speaking at school board meetings, Mr. Jackson had threatened to sue. Rather, he testified repeatedly that he merely told school officials that suing was "an option." *See* R:21 (R. Jackson Dep.) at 28:21–29:2, 32:23–33:1, 49:8–16.

Further heightening that danger is the fact that speech that is the subject of threatened or actual litigation will almost certainly be highly critical of the school, speech that ought to be given the most breathing room under the First Amendment. The danger is heightened further still by the fact that threatening litigation is itself protected First Amendment activity. *Cf. Mirabella v. Villard*, 853 F.3d 641, 649 (3d

Cir. 2017) (threatening litigation exercises both the "right to free speech and the[] right to petition the government for redress of grievances").

The chilling effect forewarned by *Rosenberger* is real in this case. Under the Superintendent's policy, angry parents protective of their children must tread carefully when presenting their grievances to school officials. They must be watchful of their every word, lest a stray, passionate remark be construed as threatened litigation, resulting in immediate restrictions on their First Amendment rights. This is anathema to the First Amendment and to the prescient warning issued in *Rosenberger* over 20 years ago.

The fact that (as the district court observed) the ban here applied only to threatened litigants—as opposed to more broadly on topics of potential litigation—makes no difference. For example, no reasonable jurist would conclude that under *Rosenberger*, a public university may still ban all newspapers providing a religious perspective if they only allowed an exception for Jewish perspectives. The exception does nothing more than worsen the existing viewpoint discrimination.[5] *See*

[5] To the extent that the ban may be characterized instead as a ban on *all speech* emanating from the mouths of actual or potential litigants at public school board meetings, even on speech having nothing to do with litigation, a reasonable juror could conclude that that the target of such a draconian policy is still speech discussing matters of actual or potential litigation. Using a sledgehammer to kill a fly can still constitute viewpoint discrimination if the policy bluntly suppresses other kinds of speech in an attempt to target particular viewpoints. *See, e.g.*, *Cornelius*, 473 U.S. at 811–12 (holding that a "decision to exclude all advocacy groups" could be viewpoint discriminatory if it was "in fact based on the desire to suppress a

Cornelius, 473 U.S. at 806 (holding that the "government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject."); *City of Madison*, 429 U.S. at 175 (striking down school board ban on one citizen that allowed other citizens to "present[] precisely the same points and provide[] the board with the same information").

For these reasons, the ban was viewpoint-based and therefore unconstitutional.

II. Superintendent McCurry's Ban Violates the First Amendment Because it Was Unreasonable In Light of the Purpose of the Forum

This Court should decline to adopt the district court's reasoning not only because the ban was viewpoint-based, but for the independent reason that the ban was unreasonable. It is well-established that even if a ban does not discriminate on the basis of viewpoint, restrictions on speech in a limited public forum must still be

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particular point of view"). In any case, an absolute ban on speech or a single speaker in a limited public forum is unconstitutional. *See*, *e.g.*, *Bd. of Airport Comm'rs. v. Jews for Jesus*, 482 U.S. 569, 574–75 (1987) (holding that city ordinance "prohibiting *all* protected expression" at an airport violated the First Amendment); *Huminski v. Corsones*, 396 F.3d 53, 92–93 (2d Cir. 2004) ("Such broad restrictions are generally frowned upon even in nonpublic forums."); *Reza v. Pearce*, 806 F.3d 497, 505 (9th Cir. 2015) (holding that a total ban on appearing or speaking in a state house building because of a single disputed incident "clearly exceed[ed] the bounds of reasonableness"); *Walsh v. Enge*, 154 F. Supp. 3d 1113, 1132 (D. Or. 2015) (invalidating 60-day ban on appearing or speaking at city council meetings).

"reasonable in light of the purpose served by the forum." *Good News Club*, 533 U.S. at 107; *see also Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983) ("The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves."); *NAACP v. City of Phila.*, 834 F.3d 435, 448 (3d Cir. 2016) (holding that reasonableness must be determined "on a case-by-case basis in light of the facts and circumstances of each particular forum").[6]

The district court speculated that the ban was reasonable on the basis of three justifications (that were never proffered by Defendant below).[7] Specifically, the district court found that the ban on speaking about the topics of threatened or filed litigation was reasonable because (a) it prevented a "potentially hostile engagement between potential litigants," (b) it "eliminate[d] the opportunity for one party in pending or potential litigation to gain an advantage based upon discussion at a school board meeting," and (c) public comment at the public school board meeting was limited to "allow[ing] the school board an opportunity to resolve issues that

[6] The reasonableness test is more stringent than the traditional rational basis test. *See, e.g.*, *Tucker v. State of Cal. Dep't of Educ.*, 97 F.3d 1204, 1215 (9th Cir. 1996); *Multimedia Pub. Co. of S.C., Inc. v. Greenville-Spartanburg Airport Dist.*, 991 F.2d 154, 159 (4th Cir. 1993); *NAACP v. City of Phila.*, 834 F.3d at 443–44.

[7] In the briefing below, Superintendent McCurry did not provide any justification for the ban other than a conclusory statement that it was a "time, place and manner" restriction. R:37 at 8.

administrators have failed to resolve." R:39 at 29. None of those justifications are meritorious.

First, a speculative concern that a "hostile engagement" might "potentially" ensue if Mr. Jackson merely spoke at a public school board meeting (R:39 at 29) cannot justify the ban, especially when the basis of that fear is the exercise of core First Amendment activity: threatening the government with litigation. *See Mirabella*, 853 F.3d at 649 (threatening litigation exercises both the "right to free speech and the[] right to petition the government for redress of grievances"). It has long been well-established that "'undifferentiated fear or apprehension of disturbance'" arising from the expression of controversial views "'is not enough to overcome the right to freedom of expression.'" *Cohen v. California*, 403 U.S. 15, 23 (1971) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969)). Although "[a]ny departure from absolute regimentation may cause trouble," the "Constitution says we must take this risk," *Tinker*, 393 U.S. at 508, whether the speech involves hostile curse words in a courthouse, *see Cohen*, 403 U.S. at 23, or controversial black armbands at school, *see Tinker*, 393 U.S. at 508–09. Superintendent McCurry cannot "prospectively exclude individuals from future public meetings" just because they might be disruptive. *Walsh*, 154 F. Supp. 3d at 1119. Otherwise, Superintendent McCurry would be easily empowered to ban any controversial viewpoint under the guise of maintaining decorum. The First

Amendment requires more. *See, e.g.*, *San Diego Minutemen v. Cal. Bus., Transp. & Hous. Agency's Dept. of Transp.*, 570 F. Supp. 2d 1229, 1252 (S.D. Cal. 2008) (rejecting reasonableness arguments in support of revoking an Adopt-A-Highway permit because the government's "fears of highway confrontation and commotion are speculative").

Second, banning litigation opponents from speaking for fear of losing a litigation advantage is nonsensical on its face. No school policy forces school board members to verbally respond to everything that is said; to the contrary, the policy states that school board members "usually [do] not respond to comments or questions posed by the citizens" (Chattahoochee County Schools, Policy BCBI: Public Participation in Board Meetings[8]), and Superintendent McCurry testified that he and school board members had been instructed by counsel not to speak about the litigation (R:24 (McCurry Dep.) at 45:20–46:13). If anything, it was more likely that Mr. Jackson—and not the school board—would make damning admissions, as any experienced lawyer knows that the party who speaks publicly about a potential case is usually the one that ends up hurting *themselves*, not their opponent.[9]

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[8] *Available at* https://simbli.eboardsolutions.com/ePolicy/policy.aspx?PC=BCBI&Sch=4032&S=4032&C=&RevNo=1.24&T=A&Z=P&St=ADOPTED&PG=6&SN=true

[9] To the extent that Defendants intend to argue that allowing Mr. Jackson to speak would risk violating Georgia Rule of Professional Conduct 4.2, which generally prohibits lawyers from communicating with represented parties, that argument fails.

Third, the district court reasoned that public school board meetings are only intended to provide "an opportunity to resolve issues that administrators have failed to resolve." R:39 at 29. It is unclear why that justifies the ban. Mr. Jackson wanted to speak to the school board to resolve a dispute. Indeed, he testified that he would *not* have brought this lawsuit if his concerns were heard and "some disciplinary action" was taken against the school officials that searched his daughter's phone. R:21 (R. Jackson Dep.) at 38:3–17, 41:20–42:14. If public school board meetings are intended to help "resolve issues," Mr. Jackson should have been allowed to speak.

For those reasons, the ban was unreasonable and the district court's decision to grant Superintendent McCurry's motion for summary judgment should be reversed.

III. The School Board's Unchecked Discretion to Approve or Deny Speakers at Public School Board Meetings is Unconstitutional

There is still another independent basis of reversal: the Superintendent's ban was imposed pursuant to a school policy that is unconstitutional on its face. Under written school policy, anyone wishing to speak at public school board meetings must

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Mr. Jackson is not a lawyer, and the rule does not prohibit "a party to a controversy with a government entity [from] speak[ing] with government officials about the matter." Rule 4.2, comment 1; *see also Mirabella*, 853 F.3d at 652 (holding that Pennsylvania's equivalent rule did not justify government's ban on potential litigant from speaking at public meeting).

submit a written request to Superintendent McCurry. *See* Chattahoochee County Schools, Policy BCBI: Public Participation in Board Meetings; *see also* R:24 (McCurry Dep.), Ex. 6 at 3. The policy then gives school administrators unfettered latitude to decide if the person's proposed testimony is "appropriate" and in the "interest of the Board." Chattahoochee County Schools, Policy BCBI: Public Participation in Board Meetings. The policy provides almost no guidelines to help administrators decide what meets those vague criteria. *Id.* Thus, the Board has the apparent (and unconstitutional) power to only approve comments that praise the Board, while censoring any comments they do not like. *See*, *e.g.*, *Lamb's Chapel*, 508 U.S. at 394 ("[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others."); *Police Dep't of City of Chi. v. Mosley*, 408 U.S. 92, 96 (1972) ("[G]overnment may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.").

Worse, the policy sets no time limit during which administrators must approve or deny a citizen's request to speak:

> Persons desiring to communicate with the Board shall submit a written request to the Superintendent stating their name, home address, the topic about which they wish to speak and the group they represent, if applicable, no later than 12 o'clock noon on the Thursday prior to the scheduled Board meeting.

> The Board vests it its chairperson or other presiding officer authority to determine whether it is the interest of the Board to allow any individual or group to make an oral presentation before the Board. Persons who are granted the opportunity to speak will be recognized by the chairperson at the appropriate time during the meeting. Speakers will be limited to three minutes. If there are numerous requests to address the Board, the chairperson may select representatives to speak on each side of the issue. The Board also vests in its chairperson or other presiding officer authority to terminate the remarks of any individual who does not adhere to the guidelines established by the Board. Personal complaints of school employees should follow the Complaints and Grievances procedures established by the Board.

Chattahoochee County Schools, Policy BCBI: Public Participation in Board Meetings; *see also* R:24 (McCurry Dep.), Ex. 6 at 3.

It is well established that forcing all speakers to get pre-approval of their message (i.e., a prior restraint) while vesting full discretion in the government to accept or reject any such message is unconstitutional. *See Saia v. People of State of N.Y.*, 334 U.S. 558, 562 (1948) ("When a city allows an official to ban them in his uncontrolled discretion, it sanctions a device for suppression of free communication of ideas."); *Café Erotica of Fla., Inc. v. St. Johns Cty.*, 360 F.3d 1274, 1284 (11th Cir. 2004) (invalidating ordinance that "lack[ed] specific and definite statutory checks on the County Administrator's discretion, thereby impermissibly creating the potential for content-based discrimination"). Thus, for instance, this Court recently held that a substantively similar school policy was unconstitutional, noting the

danger of policies that give government officials "unbridled discretion" while providing "no standards by which the official's decision must be guided." *Barrett*, 872 F.3d at 1221. Such policies are unconstitutional because they cause "speakers to self-censor" and because "it is difficult for courts to determine whether an official's standardless [] decision was impermissibly based on content or viewpoint." *Id.* This Court therefore held that a school policy that—like here—required pre-approval but did not set objective standards for approval was facially unconstitutional "because it pose[d] enough of a risk that speech will be chilled or effectively censored on the basis of content or viewpoint." *Id.* at 1229. In addition, the policy impermissibly failed to require that the superintendent approve or deny a request to speak within a reasonable time period. *Id.* For the same reasons, the policy at issue here was unconstitutional and any restriction of Mr. Jackson's speech rights based on that policy was impermissible.

CONCLUSION

Superintendent McCurry's ban on Mr. Jackson speaking at public school board meetings simply for threatening litigation constituted discrimination on the basis of viewpoint, was unreasonable in light of the purpose of the forum, and was issued pursuant to a school policy that is unconstitutional on its face. The district court's grant of summary judgment in favor of Superintendent McCurry on that issue should be reversed.

Respectfully submitted this 12th day of March, 2018.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the word limit of Federal Rule of Appellate Procedure 32(a) because, excluding the portions of the brief exempted by Federal Rule of Appellate Procedure 32(f) and 11th Circuit Rule 32-4, this conduct contains 6,169 words.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman

This 12th day of March, 2018.

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CERTIFICATE OF SERVICE

The undersigned counsel for the American Civil Liberties Union Foundation of Georgia, Inc. hereby certifies that this day he electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit using the CM/ECF system, which will send notice and an electronic copy of the same to participating counsel for the parties, and that he also sent (i) via UPS Next Day Air the seven copies to the Clerk of Court and (ii) via UPS Next Day Air to lead counsel for Plaintiffs-Appellants and Defendants-Appellees as follows:

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