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

Patti Hidalgo Menders; Scott Mineo; and Jane Does #1, #2, and #3, on behalf of themselves and their minor children R.M.; A.M.; Jane Does #4, #5, and #6; and John Does #1 and #2.

Plaintiffs,

v.

Loudoun County School Board,

Defendant.

Case No. 1:21-cv-00669

BRIEF OF PLAINTIFFS IN SUPPORT OF THEIR MOTION FOR A PRELIMINARY INJUNCTION

INTRODUCTION

"It is now a commonplace that students do not shed their constitutional rights at the schoolhouse gate." *Wofford v. Evans*, 390 F.3d 318, 322 (4th Cir. 2004) (cleaned up). This includes their right to equal treatment under the law and freedom of speech and thought. A public school may not deny educational opportunities to students because of the color of their skin or their viewpoints on contemporary issues.

Indeed, just this week the U.S. Supreme Court affirmed that "the school itself has an interest in protecting a student's unpopular expression," saying "America's public schools are the nurseries of democracy. Our representative democracy only works if we protect the 'marketplace of ideas.'" *Mahanoy Area School Dist. v. B.L.*, No. 20–255 (June 23, 2021), slip opinion at 7.[1] But here, Defendant Loudoun County School Board has crossed these constitutional red lines. Rather than treat students equally, they have categorized and classified them based solely on race. Rather than protect students' unpopular expression, the board has authorized a system for other students to anonymously report and review it.

As part of an effort to infuse the next generation of students in Loudoun County Public Schools ("LCPS") with a controversial, divisive ideology, it has created a new student leadership opportunity known as the Student Equity Ambassadors ("SEA") program. Originally only open to "students of color"—yes, it began with an explicit racial classification—LCPS now requires that participants "amplify the voices of students of color."

[1] https://www.supremecourt.gov/opinions/20pdf/20-255_g3bi.pdf.

Although LCPS dropped the requirement that participants be "students of color," simply changing a program so that is facially neutral fails to address the racist intentions behind the law. The principals who are charged with picking the ambassadors are in on the joke; the original criteria told them exactly who the main administration expects them to pick for the program. It thus violates the Equal Protection Clause. And discriminating on the basis of the viewpoints that "amplify the voices of students of color" is a First Amendment violation in and of itself. That's doubly true here, where principals are also told to only select students who have a demonstrated track record of "a passion for social justice." Thus, the Student Equity Ambassador Program must be preliminary enjoined because it still discriminates on the basis of race and amounts to viewpoint discrimination in violation of the First Amendment.

Not only that, LCPS has also instituted a companion to the SEA Program—the Bias Incident Reporting System. This system allows students to report their classmates for investigation by LCPS for engaging in conduct that "appears to be intentional and motivated by prejudice or bias." Additionally, the "bias incidents" are shared with Student Equity Ambassadors who name-and-shame their classmates who commit "microaggressions" like sharing their faith or views about politics. The Bias Reporting System is a way for students to rat each other out over their views and for LCPS to act as the Thought Police, where only students who are on-board with the new reigning ideology can speak up without fear of being reported and retaliation. Such overbroad definitions of "bias," combined with the

possibility of formal and informal sanctions for holding dissenting views, chills speech, encourages self-censorship, and violates the First Amendment. As such, the Bias Incident Reporting System must be preliminary enjoined as well.

FACTS

Around June 23, 2020, LCPS published its "Action Plan to Combat System Racism," which outlines a complex set of initiatives to implement a divisive and controversial new ideology across LCPS. App. 4. Those initiatives include prohibiting the "wearing/flying of flags, images, or symbols on LCPS property that represent racist or hateful ideology," *id.* at 1, 9,[2] "[f]inaliz[ing] the Protocol for Responding to Racial Slurs and Hate Speech in Schools," *id.* at 11, and "consider[ing] the potential renaming of the Loudoun County High School mascot, the Raiders." *Id.* at 19.

As Part of LCPS' Action Plan, it developed the "Student Equity Ambassador" ("SEA") program, which the Parents challenge here. The SEA program is a formal office the school endows with particular authority to speak on behalf of the student body. *Id.* at 28. Each school principal selects two to three students to serve in the SEA program. *Id.* Students are selected based on particular criteria, and they serve as a liaison collaborating with the district-wide Supervisor of Equity during regularly occurring student "*Share, Speak-up, Speak-out* meetings." *Id.* These

[2] Contrary to the holding of *Newsom v. Albemarle County School Board*, 354 F.3d 249, 261 (4th Cir. 2003), where the Fourth Circuit has held that students were likely to succeed on the merits of their claim that a school's dress code's overbreadth violated the First Amendment. Though that policy is not a part of this case, it shows LCPS's disregard for the First Amendment.

meetings and the program generally are "a forum to amplify the voices of Students of Color and those who have experienced or witnessed injustices, marginalization, or discrimination" according to an LCPS high school's "Equity Team." App. 134. The LCPS Equity Director also described the Program as "students coming together in this forum." EdEquityVA Webinar Series-Embracing and Incorporating Student Voice.[3]

Originally, the process for selecting student ambassadors included as its first guideline that "[t]his opportunity is open to all Students of Color." App. 126. And the LCPS' formal publication on the matter included a Frequently Asked Questions ("FAQ") section where the first entry read:

> [Question:] My child would like to participate as a Student Equity Ambassador and is not a student of color. Can they participate?
>
> [Answer:] Thank you for your interest but this opportunity is specifically for students of Color. However, students at each school have an option of creating an affinity group for students of Color who all share a similar racial identity and they may also include allies.

Id. at 127.

> The next FAQ read:
>
> [Question:] Are there other opportunities for students to get involved?
>
> [Answer:] Students may reach out to their school's activity coordinator or the equity lead if they would like to be involved in other equity opportunities.

[3] See LCPS Equity Director Lottie Spurlock's comments at https://www.youtube.com/watch?v=wXXJoqablZ4&t=4968s (1:18:26).

Id. A flyer accompanying the FAQ document from the district explained that equity ambassadors must "amplify the voices of students of color" and "represent your peers of color." *Id.* at 128.

But LCPS revised the program's description after facing backlash over the "student of color" requirement and removed that requirement but did not change anything else or explain the change. *Id.* at 27-30. After this revision, a parent asked whether their child (who is not a student of color) can apply for the SEA program. *Id.* at 131-32. An LCPS official responded: "[t]hough all students (white or otherwise) are more than welcome to potentially serve as ambassadors, their focus is to raise the voice of their classmates of color during these meetings." *Id.* at 130-31.

The revised version retains other criteria upon which principals are supposed to select students, such as "[s]tudents who have a passion for social justice and are willing to serve." *Id.* at 29. The flyer inviting students to engage in the program similarly solicits applicants who "want to be a voice for social justice." *Id.* at 30. LCPS's equity director described the equity ambassadors as part of the district's work to "empower students to make meaningful contributions to their world through a social justice lens." EdEquityVA Webinar Series-Embracing and Incorporating Student Voice.[4] A LCPS high school announcing the SEA program told parents that having "a passion for social justice" is the first quality students "serving in th[e] role" of Student Equity Ambassador must possess. *Id.* at 134.

[4] See LCPS Equity Director Lottie Spurlock's comments at https://www.youtube.com/watch?v=wXXJoqablZ4&t=4968s (1:23:35).

The Plaintiffs' children would not have qualified for the SEA program as originally conceived or practically implemented. App. 117-18 (Decl. of Patti Hidalgo Menders ¶¶ 6, 10, 11); App. 120-21 (Decl. of Scott Mineo ¶¶ 6, 10, 11); App. 135-36 (Decl. of Jane Doe #1 ¶¶ 6, 10, 11); App. 138-39 (Decl. of Jane Doe # 2 ¶¶ 6, 10, 11); App. 141-42 (Decl. of Jane Doe #3 ¶¶ 6, 10, 11). None of them identify as students of color, and they and their children hold views about important public issues that they believe conflict with LCPS's definition of social justice. *Id.* They challenge the SEA Program on Equal Protection and First Amendment viewpoint discrimination grounds (Counts I and II).

Alongside the SEA Program, LCPS also implemented the Bias Incident Reporting System. LCPS distributed a form to parents and students to "capture incidents of bias in an anonymous manner." New LCPS Student Bias Incident Portal (Video of Submitting Incident), May 19, 2021.[5] The form includes check boxes for the "Type of Bias Incident" being reported, including "Harassment or Intimidation," "Racial Slur," "Offensive Language, Teasing or Taunting Language/Verbal Exchange," "Exclusion or victim of lack of inclusivity," "Gender Identity and Expression," "Ability Status," "Religious Practices," and "Sexual Orientation." *Id.* The LCPS equity director further explained that a "bias incident" is an "act of discrimination, harassment, [or] intimidation directed against any person or group that appears to be intentional and motivated by prejudice or bias."

[5] https://stoplcpscrt.com/2021/05/19/5-19-21-new-lcps-student-bias-incident-portal-video-of-submitting-incident/

EdEquityVA Webinar Series-Embracing and Incorporating Student Voice.[6] The equity director continued: "Such are usually associated with negative feelings and beliefs with respect to others [sic] race, ethnicity, national origin, religion, gender, gender identity, sexual orientation, age, social class, political affiliation, or disability." *Id.*

LCPS will investigate "bias incidents" if the person submitting the form provides his or her name and indicates on the form that they would like school administrators to investigate the "particular incident" they are reporting.[7] Also as part of its Action Plan, LCPS is finalizing a "LCPS Protocol for Responding to Racial Slurs and Hate Speech in Schools." App. 11. LCPS's equity office emphasizes in its messages about the bias response system, "Students should still report discipline incidents to a trusted adult or members of the administrative team."[8] The incidents reported on this form are also used in the "Share, Speak-up, Speak-out" meetings with the Student Equity Ambassadors.[9] Nothing about the form limits its application to only on-campus speech; students can report incidents involving other students for off-campus speech as well.

In addition to receiving the Bias Incident reports, Student Equity Ambassadors' role is to "work to identify microaggressions" within their school.

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[6] See LCPS Equity Director Lottie Spurlock's comments at https://www.youtube.com/watch?v=wXXJoqablZ4&t=4968s (Slide that appears at 1:18:22).
[7] https://stoplcpscrt.com/2021/05/19/5-19-21-new-lcps-student-bias-incident-portal-video-of-submitting-incident/
[8] *Id.*
[9] See LCPS Equity Director Lottie Spurlock's comments at https://www.youtube.com/watch?v=wXXJoqablZ4&t=4968s (Slide that appears at 1:18:22).

Kevin Myers, *The Ongoing Push for Equity In LCPS* (April 14, 2021).[10] Three Student Equity Ambassadors gave a presentation to the LCPS Board where they said: "Microaggressions are defined as the everyday, subtle, intentional — and often unintentional — interactions or behaviors that communicate some sort of bias toward historically marginalized groups." App. 42. Some example "microaggressions" they identified included: "denial[s] of racial reality" like 'I don't think that white privilege exists'" or asserting the value of "colorblindness," which sees people as individuals rather than members of a race. *Id.* at 43, 46.

The Plaintiffs are parents of children attending LCPS ("parents"). The parents raise their children to be active, engaged citizens in their community and country. The parents encourage and teach their children to also share their views with their peers. App. 117-18 (Decl. of Patti Hidalgo Menders ¶¶ 10, 11); App. 120-21 (Decl. of Scott Mineo ¶¶ 10, 11); App. 135-36 (Decl. of Jane Doe #1 ¶¶ 10, 11); App. 138-39 (Decl. of Jane Doe # 2 ¶¶ 10, 11); App. 141-42 (Decl. of Jane Doe #3 ¶¶ 10, 11).

As such, the parents and children are concerned that if their students share their views about political or social issues, including those touching on religion, race, and human sexuality, they will be reported and investigated for 'bias incidents. App. 118-19 (Decl. of Patti Hidalgo Menders ¶¶ 12-15); App. 121-22 (Decl. of Scott Mineo ¶¶ 12-15); App. 137 (Decl. of Jane Doe #1 ¶¶ 12-15); App. 139-40 (Decl. of Jane Doe # 2 ¶¶ 12-15); App. 142-43 (Decl. of Jane Doe #3 ¶¶ 12-15).

[10] https://dhspress.com/6434/showcase/the-ongoing-push-for-equity-in-lcps/

They fear such a report, investigation, or public disclosure could negatively impact their standing in the school community and ruin their children's college or career prospects. *Id.* They are aware that in other school settings nationwide, "bias incident" response or disciplinary systems have been invoked against students based on similarly worded standards for sharing their political or religious views. *Id.*

These parents' fears are well-founded. As demonstrated at much greater length in the Plaintiffs' motion to proceed anonymously, the environment in Loudoun County right now is toxic. And children are not exempt; the Anti-Racist Parents Facebook group has asked its members to use their children's social media accounts to investigate the social media accounts of children of Plaintiffs in a hunt for racial slurs. Luke Rosiak, *'Anti-Racists' Behind School Enemies List Now Gathering Info On Children As Top Prosecutor Joins In*, The Daily Wire (May 25, 2021).[11] Any comment at school, outside of school, or on social media even remotely relating to race or politics by any child of a Plaintiff or another parent involved in this issue will instantly prompt a bias report. These children are on a literal watch-list.

Given that these parents and their children believe that their views conflict with LCPS's definition of "social justice" and that their views may provoke a "heckler's report" by students or others who disagree with their views, they challenge the Bias Reporting System on First Amendment grounds (Count III).

ARGUMENT

[11] https://www.dailywire.com/news/loudoun-anti-racists-targeting-children-buta-biberaj

To issue a preliminary injunction, the court considers (1) whether a plaintiff "is likely to succeed on the merits," (2) whether a plaintiff "is likely to suffer irreparable harm in the absence of preliminary relief," (3) whether "the balance of equities tips in [plaintiff's] favor," and (4) whether "an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see Centro Tepeyac v. Montgomery Cty.*, 722 F.3d 184, 188 (4th Cir. 2013) (en banc). The third and fourth factors regarding the balance of equities and public interest "merge when the government is the opposing party." *See Nken v. Holder*, 556 U.S. 418, 435 (2009).

Here, each of the four factors heavily favors the parents. The SEA Program and Bias Incident Reporting System violate the U.S. Constitution, the parents will suffer significant and irreparable harm, the balance of hardships only falls on the parents, and the public interest is clearly in favor of enjoining LCPS' unconstitutional actions. A preliminary injunction is necessary to permit these students to attend school this year without showing up every day in fear that any comment taken out of context will launch a bias report and investigation, so the Plaintiffs may fully develop their case by discovery on the district's internal documents and staff.

I. The parents are likely to succeed on the merits of their claims.

A. The SEA Program violates the Equal Protection Clause because of its racist motives and its revisions did not meaningfully change the program.

When a state law interferes with "fundamental constitutional rights" or "involve[s] suspect classifications," the law is subject to strict scrutiny. *San Antonio*

Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16 (1973). The SEA Program does all of the above: it targets suspect classes (race). Racial classifications are inherently suspect under equal protection. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976).

A state may violate the Equal Protection Clause through a law that is targeted at a suspect class even if it does not use a formal racial classification, for "[t]he Equal Protection Clause is offended by sophisticated as well as simple-minded modes of discrimination." *United States v. Fordice*, 505 U.S. 717, 729 (1992). The Supreme Court has routinely reviewed the "original motivation" for laws impacting racial minorities in contexts such as jury selection, *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), voting, *Hunter v. Underwood*, 471 U.S. 222 (1985), or employment, *Washington v. Davis*, 426 U.S. 229 (1976), and struck them down for their racist intentions using the *Arlington Heights* analysis. "[W]hether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977).

How does a court determine whether racial discrimination was a motivating factor behind a law? The court undertakes a "sensitive inquiry" and uses a "holistic approach" that looks to "the historical background of the challenged decision; the specific sequence of events leading up to the challenged decision; departures from normal procedural sequence; the legislative history of the decision; and of course, the disproportionate impact of the official action—whether it bears more heavily on

one race than another." *N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204, 220-21 (4th Cir. 2016) (citing *Arlington Heights*). A plaintiff "need not show that discriminatory purpose was the sole or even a primary motive for the legislation, just that it was a motivating factor." *Id.* at 220 (cleaned up; emphasis original).

Here, the history, sequence of events leading up to the SEA Program's current iteration, and legislative history all show this program was motivated by an explicit classification based on race.[12]

The history and legislative history are clear: this program was adopted with explicit racial classifications baked into the purpose. Before the 2020 Action Plan was adopted, a 2019 report was commissioned by an outside consultant, The Equity Collaborative. One of the consultant's observations about the campus climate within LCPS was that "[t]here are limited opportunities for Black/African-American and Muslim students to convene in a network of social and cultural support." App. 97. Based on that observation, the consultant recommended that LCPS "[e]stablish student affinity groups at all levels to support the social and cultural identities of students of color. *Id.* at 101. This recommendation is important because it . . . [c]reates a formal structure that serves as a network of care for marginalized student populations and establishes a safe place for students to unpack feelings and emotions in times of social or cultural conflict." *Id.* The need for a "formal structure"

[12] Plaintiffs expect in discovery to find that the racial backgrounds of student participants is also substantially disproportionate, but these facts are not available at this time.

that "support[s] the social and cultural identities of students of color" became the Student Equity Ambassadors program.

No wonder, then, that the Student Equity Ambassador Program started off with an explicit racial classification. LCPS originally stated that the leadership position "is open to all Students of Color." App. 126. The packet clarified this further by stating that the "opportunity is specifically for students of Color" in an FAQ document, one of which asked if a student can participate if they are "not a student of color." *Id.* Another answer on the FAQ document doubled down on the racial classification by explaining that there are "other equity opportunities" for students that did not satisfy the SEA Program's racial classification. *Id.* LCPS also explained that equity ambassadors' purpose is to "amplify the voices of students of color" and "represent your peers of color." *Id.* at 128. Elsewhere in the FAQs, LCPS stated that the SEA Program is focusing on race instead of other forms of minority status, like faith or disability, because it is important to "recognize students who have been marginalized." *Id.* at 127.

LCPS dropped the SEA's explicit racial classification after facing an outcry from parents that it was engaging in explicit racial discrimination. Despite the revisions, in an email exchange between a parent and LCPS administrator, the administrator stated: ""[t]hough all students (white or otherwise) are more than welcome to potentially serve as ambassadors, their focus is to raise the voice of their classmates of color during these meetings." *Id.* at 131.

Finally, the work of the ambassadors is thoroughly race-based. One LCPS "equity lead" described the equity ambassadors' role to a student newspaper as to "work to identify microaggressions" within their school." Myers, *supra.*[13] An LCPS high school sent a letter to parents describing the SEA program's goal as "provid[ing] a forum to amplify the voices of Students of Color and those who have experienced or witnessed injustices, marginalization, or discrimination." App. 134. During a presentation to the LCPS Board, three student equity ambassadors described microaggresions as "denials of racial reality" and gave examples such as ""I don't think that white privilege exists" and asserting a framework of "colorblindness" which sees people as individuals rather than members of a race. App. 42, 43, 46.

Thus, even with the sudden modification to the criteria, three things remain true: (1) This program was adopted to create a forum for only students belonging to particular racial groups to have an exclusive pipeline of access to senior LCPS administrators; (2) even with the explicit racial classification removed, the LCPS principals who are selecting the students understand exactly who they are supposed to pick for the program; the central administration's desire that they only pick students of color has been made very clear; and (3) white students are *still* not full participants in the program; they are expected to attend and listen and only speak up if they agree with what their classmates of color are saying. It is still a program infected by racial motives, top to bottom.

[13] https://dhspress.com/6434/showcase/the-ongoing-push-for-equity-in-lcps/

Plus, the Supreme Court's precedent for revisions to a law adopted with racist motives requires more than just a silent change to a previous policy. A government cannot must "grapple[] with the laws' sordid history in reenacting them." *Ramos*, 471 U.S. at 1410 (Sotomayer, J., concurring). A revised law is only "free of discriminatory taint" if the legislature "actually confronts a law's tawdry past in reenacting it." *Id.* Getting caught with criteria that overtly violate the Equal Protection Clause, and then dropping the racial criteria after a public outcry without any comment, while retaining and perpetuating all the other race-based aspects of the program, does not purge the policy of its racism.

Given these facts, and the Program's history of containing a racial classification, there is ample evidence under *Arlington Heights* that racial discrimination was and still is a motivating factor for the SEA Program. As the Supreme Court warned in that case, once it's established that race was one of the motivating factors for a decision, judicial deference to legislators' prerogative to balance competing factors for a decision is no longer warranted. 429 U.S. at 266.

B. The SEA Program violates the First Amendment because it discriminates on the basis of viewpoint.

Choosing students for the SEA forum based on their viewpoint violates the First Amendment. "Viewpoint discrimination targets not subject matter, but particular views taken by speakers on a subject." *Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019) (cleaned up). The Supreme Court has held that viewpoint discrimination is "an egregious form of content discrimination." *Judson v. Bd. of Supervisors*, 436 F. Supp. 3d 852, 865 (E.D. Va. 2020) (quoting *Rosenberger v.*

Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995)); *see also Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 394 (1993) ("The First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others."). "The First Amendment is a kind of Equal Protection Clause for ideas." *Barr v. Am. Ass'n of Political Consultants*, 140 S. Ct. 2335, 2354 (2020) (plurality) (quoting *Williams-Yulee v. Florida Bar*, 575 U. S. 433, 470 (2015) (Scalia, J., dissenting)).

1. *LCPS may not discriminate on the basis of viewpoint in this nonpublic forum.*

The Equity Ambassadors program is best categorized as a nonpublic forum. The LCPS Equity Director described the SEA Program as "students coming together in this forum." EdEquityVA Webinar Series-Embracing and Incorporating Student Voice.[14] One LCPS high school also said that "[t]he goal is to provide a forum to amplify the voices of Students of Color and those who have experienced or witnessed injustices, marginalization, or discrimination." App. 134. LCPS's Equity Ambassadors program is part of a larger national movement to emphasize "student voice" in education, one component of which is providing students a forum to discuss issues within the school community with administrators. *See, e.g.,* Dr. Michelle McGrath, Student Voice is a Necessary Piece to Safe Schools, Assoc. of Wisconsin School Administrators (undated) ("Effective student voice doesn't just happen, it

[14] See LCPS Equity Director Lottie Spurlock's comments at https://www.youtube.com/watch?v=wXXJoqablZ4&t=4968s (1:18:26).

entails a great deal of mindful planning, mentoring, and the necessary training and student advocacy forums to guide change.").[15]

As a nonpublic forum occurring outside the classroom, LCPS may not discriminate based on viewpoint. Admittedly, "Neither the Supreme Court nor [the Fourth Circuit] has decided whether restrictions on school-sponsored student speech must be viewpoint neutral under *Hazelwood [Sch. Dist. v. Kuhlmeier,* 484 U.S. 260 (1988)], and other circuits are split on this question." *Robertson v. Anderson Mill Elem. Sch.*, 989 F.3d 282, 290 (4th Cir. 2021).[16]

This Court should follow the majority of circuits in holding that *Hazelwood* does not permit viewpoint discrimination in school-sponsored programs, for three reasons. First, though the Fourth Circuit has not taken a formal position on the issue, it has leaned one way in the debate. In *Child Evangelism Fellowship of Maryland, Inc. v. Montgomery County Public Schools*, the Fourth Circuit held that "even in a nonpublic forum, government regulation must be not only reasonable but also viewpoint neutral." 457 F.3d 376, 384 (4th Cir. 2006). It also noted that "viewpoint neutrality requires not just that a government refrain from explicit viewpoint discrimination, but also that it provide adequate safeguards to protect against the improper exclusion of viewpoints." *Id.*

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[15] https://awsa.memberclicks.net/update-article--student-voice-is-a-necessary-piece-to-safe-schools.

[16] Though the Supreme Court perhaps more recently suggested that political viewpoints are protected for students in *Mahanoy Area School Dist. v. B.L.*, 594 U. S. ____ (2021), decided just this month. Slip op. at 10, 13 (Alito, J., concurring), and 5 (Thomas, J., dissenting).

Second, the majority of circuits have concluded that schools cannot discriminate based on viewpoint in school-sponsored fora.[17] The Second, Ninth, and Eleventh Circuits have held that *Hazelwood* requires viewpoint neutrality. *See Peck ex rel. Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 632-33 & n.9 (2d Cir. 2005); *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1011 (9th Cir. 2000); *Planned Parenthood of S. Nev., Inc. v. Clark Cty. Sch. Dist.*, 941 F.2d 817, 829 (9th Cir. 1991)*; Searcey v. Harris*, 888 F.2d 1314, 1319 n.7 (11th Cir. 1989). A number of other circuit judges, writing in instances where their colleagues avoided the question, concluded that viewpoint neutrality applies to student speech in school fora. *C.H. v. Oliva,* 226 F.3d 198, 210-12 (3d Cir. 2000) (Alito, J., dissenting); *Busch v. Marple Newtown Sch. Dist.*, 567 F.3d 89, 109 (3d Cir. 2009) (Hardiman, J., concurring/dissenting); *Morgan v. Swanson*, 659 F.3d 359, 390 n.1 (5th Cir. 2011) (en banc) (Jones, C.J., concurring); *Matter of Macula v. Bd. of Educ.*, 75 A.D.3d 1118, 1120, 906 N.Y.S.2d 193, 194 (App. Div. 4th Dept.). Moreover, in *Hazelwood* itself, the Petitioners conceded that the school had to act in a viewpoint neutral way, a point that Justice Brennan noted in his concurrence. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 287 n.3 (1988) (Brennan, J., concurring). Conversely, the First and Tenth Circuits have held that *Hazelwood* does not require viewpoint neutrality. *See Fleming v. Jefferson Cty. Sch. Dist.*, 298 F.3d 918, 926-28 (10th Cir. 2002); *Ward v. Hickey*, 996 F.2d 448, 452 (1st Cir. 1993).

[17] A school-sponsored forum for student speech is different from the school's own curricular speech, where obviously the school may control exactly what viewpoint is expressed under the government speech doctrine.

Third, the majority of circuits have the rule right for simple matters of doctrine and constitutional law: "if schools could impose viewpoint-based restrictions on all student speech that might be perceived as school-sponsored, the promise of *Tinker*—that students 'do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate'—would mean very little." *Busch*, 567 F.3d at 108 (Hardiman, J., concurring/dissenting). In sum, this court should follow most other courts in recognizing that students' First Amendment rights, including their protection against viewpoint discrimination, remain in force in school-sponsored fora.

2. *LCPS is engaged in viewpoint discrimination with the SEA.*

In order to become a student equity ambassador, a candidate must check two explicitly ideological boxes. He or she must promise to "amplify the voices of students of color" and he or she must have a proven track record of "passion for social justice." App. 29, 134.

LCPS now says that white students qualify for the program, but only if their "focus is to raise the voice of their classmates of color during these meetings." *Id.* at 130-31. LCPS says that the ambassadors must "represent [their] peers of color" and "amplify the voices of students of color." *Id.* 30. The expectation that any student who comes to the forum must "amplify" or "represent" or "raise" "the voices of students of color" is a viewpoint-check at the admission gate to this forum.

In order to qualify to participate in the forum, students are equally expected to be youthful social justice warriors. LCPS materials tell principals to appoint

students "who want to be a Voice for Social Justice," and "who have a passion for social justice." *Id.* 29, 30, 66. One school's "equity lead" teacher says Student Equity Ambassadors "are promoting cultural awareness and growth by . . . be[ing] a voice for social justice." *Id.* at 66. The LCPS Equity Director also described equity ambassadors as part of the district's work to "empower students to make meaningful contributions to their world through a social justice lens." EdEquityVA Webinar Series-Embracing and Incorporating Student Voice.[18] Another LCPS document identified the student equity ambassadors program as a "Student Leaders of Color network division-wide" with the purpose of "build[ing] forward motion in using student voice" to use a "Social-Justice lens to develop greater awareness and build student empathy, leadership and advocacy skills." App. 22. In other words, to qualify for this program, a student must be on board with LCPS's vision for social justice. That is viewpoint discrimination in access to a nonpublic forum.

In *Rosenberger*, the Supreme Court rejected the dissent's argument that the nonpublic forum at issue in that case was viewpoint neutral by excluding all religious viewpoints because "[i]f the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one." 515 U.S. at 831. Here, LCPS excludes any student with a viewpoint on the question of racism in our schools that varies from LCPS's preferred viewpoint. That sort of discrimination cannot stand.

[18] *See* LCPS Equity Director Lottie Spurlock's comments at https://www.youtube.com/watch?v=wXXJoqablZ4&t=4968s (1:23:35).

C. LCPS' Bias Incident Reporting System violates the First Amendment because it is overbroad and chills student speech.

"[I]t is clear that students 'cannot be punished merely for expressing their personal views on the school premises—whether in the cafeteria, or on the playing field, or on the campus during the authorized hours.'" *Crozier v. Westside Cmty. Sch. Dist.*, 973 F.3d 882, 891 (8th Cir. 2020) (quoting *Hazelwood*, 484 U.S. at 266).

Yet this is precisely what LCPS intends to do—to subject students who share their personal views on school premises (or off-campus, as far as we know) to reporting, investigation, and naming-and-shaming by the equity cops. This is unconstitutional. "[T]he mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'" *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 670 (1973). Or as the Supreme Court said more recently, "the school itself has an interest in protecting a student's unpopular expression. . . That protection must include the protection of unpopular ideas, for popular ideas have less need for protection." *Mahanoy Area School Dist.*, slip op. at 7. *Accord id.* at 2-3 (Alito, J., concurring) ("public school students, like all other Americans, have the right to express 'unpopular' ideas on public issues, even when those ideas are expressed in language that some find 'inappropriate' or 'hurtful.'"). That is especially so when much of the ideas labeled offensive or indecent micro-aggressions are actually mainstream positions in the body politic.

Simply maintaining a broad speech code can violate the First Amendment when it chills speech by encouraging self-censorship. *Cooksey v. Futrell*, 721 F.3d

226, 235 (4th Cir. 2013). To establish a First Amendment overbreadth claim, "'a claimant need not show [they] ceased those activities altogether to demonstrate an injury in fact.'" *Id.* (quoting *Benham v. City of Charlotte*, 635 F.3d 129, 135 (4th Cir. 2011)). Instead, it is enough to show that the government action is "likely to deter a person of ordinary firmness from the exercise of First Amendment rights." *Id.* (quoting *Benham*, 635 F.3d at 135). In this case, the question is how a middle- or high-school student of ordinary firmness would react in this situation. *Crozier*, 973 F.3d at 891.

Here, the Plaintiff students wish to speak out on Critical Race Theory, race, and gender identity, and other controversial political issues. App. 118 (Menders Decl. ¶ 10); App. 121 (Mineo Decl. ¶ 10); App. 136 (Doe #1 Decl. ¶ 10); App. 139 (Doe # 2 Decl. ¶ 10); App. 142 (Doe #3 Decl. ¶ 10). They would not describe their views as "social justice" as LCPS uses that term. App. 117-18 (Menders Decl. ¶¶ 6-7); App. 120-21 (Mineo Decl. ¶¶ 6-7); App. 135-36 (Doe #1 Decl. ¶¶ 6-7); App. 138-39 (Doe # 2 Decl. ¶¶ 6-7); App. 141-42 (Doe #3 Decl. ¶¶ 6-7). Indeed, they oppose the new ideology taking hold across LCPS, which they view as teaching "that white people are evil or oppressors and that our nation's institutions are inherently racist." *Id.* Instead, they believe that "everyone is equal and that we should strive for a color blind society." *Id.*

But LCPS' Bias Incident Reporting System sweeps in speech of this viewpoint because it defines a "bias incident" as an "act of discrimination, harassment, [or] intimidation" that "appears to be intentional and motivated by

prejudice or bias."[19] LCPS notes that "[s]uch [acts] are usually associated with negative feelings and beliefs with respect to others [sic] race, ethnicity, national origin, religion, gender, gender identity, sexual orientation, age, social class, political affiliation, or disability." *Id.* "Bias incidents" are shared with Student Equity Ambassadors who work to "identify microaggressions" within LCPS, which three ambassadors defined as opinions like "I don't think that white privilege exists," "society should be colorblind," or "we should see people as individuals rather than members of a race." *See* Myers, *supra*; App. 42, 43, 46. Thus, if Plaintiff Students express their views on these issues, their speech will fall within the definition of a "bias incident."

Accordingly, Plaintiffs fear that their speech will be reported as a "bias incident" given the definition of a "bias incident" and that many other young people in Loudoun County do not share the Plaintiff students' perspective on these issues. App. 118-19 (Menders Decl. ¶¶ 11-15); App. 121-22 (Mineo Decl. ¶¶ 11-15); App. 136-37 (Doe #1 Decl. ¶¶ 11-15); App. 139-40 (Doe # 2 Decl. ¶¶ 11-15); App. 142-43 (Doe #3 Decl. ¶¶ 11-15). Indeed, they are aware that speech codes at other schools systems with similar wording have been "used against those supporting former President Trump, saying "Make America Great Again," or celebrating the Second Amendment." *Id.* They are also aware that "when others have shared views similar to [theirs] on CRT, race, gender identity, and other controversial political issues,

[19] LCPS Equity Director Lottie Spurlock's comments at https://www.youtube.com/watch?v=wXXJoqablZ4&t=4968s (Slide that appears at 1:18:22).

that speech has prompted vitriolic, threatening, and persecutorial responses from others in Loudoun County, including within the LCPS community." *Id.*

As a result, the Plaintiffs fear that the Bias Incident Reporting System will be used to discipline or shame them for their views. *Id.* Indeed, the reports will be reviewed and logged by the equity supervisors and ambassadors, who are handpicked student social-justice warriors. LCPS also invites students to report discipline incidents to members of the administrative team.[20]

The case law establishes that Plaintiffs' fears are reasonable and that LCPS' actions would deter a student of ordinary firmness from speaking. *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 770 (6th Cir. 2019); *Abbott v. Pastides*, 900 F.3d 160, 169-70 (4th Cir. 2018). *See Speech First, Inc. v. Killeen*, 968 F.3d 628, 652 (7th Cir. 2020) (Brennan, J., dissenting). *See also Speech First, Inc. v. Fenves*, 979 F.3d 319 (5th Cir. 2020).

This Court's consideration of this claim will likely start with the Fourth Circuit's ruling in *Abbott*. In that case, officials from the University of South Carolina approved two student groups to hold an event on campus about free expression. The fact that they intended to include visual materials often considered offensive in their event prompted complaints to the university from other students, which led a University official to hold a mandatory meeting with a student organizer of the event "to review the complaints and determine whether an

[20] https://stoplcpscrt.com/2021/05/19/5-19-21-new-lcps-student-bias-incident-portal-video-of-submitting-incident/

investigation was warranted. A few weeks later, he notified Abbott that there was no cause for investigation and that the matter had been dropped." *Id.* at 163.

Though the court later determined that the plaintiffs should lose because they could not prove damages (their claim for injunctive relief was moot), the court first held, "we do not doubt that a college student reasonably might be alarmed and thus deterred by an official letter from a University authority referring to an attached 'Notice of Charge' (even if no such notice actually is attached), raising the prospect of an investigation and ultimate recommendation to the University Provost and President, directing his attendance at a meeting, and prohibiting him from discussing the matter with others." *Id.* at 171.[21] So too here with LCPS: all students and parents are now on notice that any classmate can anonymously report their speech, which will generate a review by the equity supervisor, referral to the equity ambassadors, and potentially discipline.

The Fourth Circuit's conclusion about a college student of ordinary firmness is reinforced by subsequent decisions of the Fifth and Sixth Circuits, which

[21] Other sections of the *Abbott* decision rejecting an overbreadth challenge to a university's harassment policy are distinguishable. First, the university's speech code there had limits. It defined harassment as "conduct that is 'sufficiently severe, pervasive, or persistent so as to interfere with or limit the ability'" of another student to receive the university's benefits. 900 F.3d at 164. Plaintiffs have not challenged LCPS's anti-bullying policy (§ 8-41) or "Protocol for Responding to Racial Slurs and Hate Speech in Schools," which are the two policies analogous to the USC speech code, because they require persistent action (bullying) or overt racial slurs. The "bias incident" policy, by contrast, covers an individual comment advancing a mainstream view about politics, society, or religion. The harassment policy in *Abbott* also only extended to "behavior and speech that is not constitutionally protected and which limits or denies the rights of students to participate or benefit in the educational program." *Id.* (internal quotations omitted). Again, LCPS' definition of "bias incident" includes no such carve outs.

considered formalized "bias response systems" even more analogous to LCPS than the informal meeting at issue in *Abbott*. The Fifth Circuit in *Fenves* and Judge Brennan in *Killeen* recognized that the reporting system *in and of itself* chilled speech. *Fenves*, 979 F.3d at 338 ("That the CCRT invites anonymous reports carries particular overtones of intimidation to students whose views are 'outside the mainstream.'"); *Killeen*, 968 F.3d at 652 (Brennan, J., dissenting) ("potential 'offenders' may not speak at all if they fear that University officials are monitoring them for biased speech.").

The Sixth Circuit considered a similar "bias response team" system of student reporting in *Schlissel*, which that court found would chill the speech of an ordinary college student. CITE. The Bias Response Team in *Schlissel* did not have "direct punitive authority," but it could "make referrals to police, [the Office of Student Conflict Resolution], or other school resources such as counselling services." *Id.* at 763. The Sixth Circuit in *Schlissel* held this objectively chilled speech, and thus, the students had standing to sue. Although it remanded the case for the district court to consider the students' likelihood of success on the merits, the court's reasoning is pertinent here because standing often overlaps with the merits in First Amendment overbreadth challenges. Specifically, the court reasoned that the Bias Response Team's "ability to make referrals—i.e., to inform OSCR or the police about reported conduct—is a real consequence that objectively chills speech." *Id.* at 765. It explained that "referral subjects students to processes which could lead to" "criminal conviction or expulsion." *Id.* "The referral initiates the formal

investigative process, which itself is chilling even if it does not result in a finding of responsibility or criminality." *Id.*

So too here with LCPS' Bias Incident Reporting System. The possibility that those running the system have the ability to refer the case to school administrators for possible discipline objectively chills speech. 939 F.3d at 762. Just as the observation and investigation process themselves chilled speech in these cases, the mere possibility that a LCPS student will be observed and investigated chills their speech.

Beyond the observation, review of complaints by the equity office, referral to the equity ambassadors, and possible investigation by the disciplinary authorities, the LCPS' Bias Incident Reporting System would chill a student of ordinary firmness from speaking because of the damage to their personal reputation and college admission prospects. Judge Brennan on the Seventh Circuit rightly recognized that "[b]ecause reputational damage can impair a student's prospects for academic and professional success, objectively reasonable students may be expected to behave in ways that mitigate their exposure to any allegation that might trigger a bias investigation." *Killeen*, 968 F.3d at 652 (Brennan, J., dissenting). But "[n]o educational institution should force students to balance academic and professional success against the free expression of political viewpoints." *Id.*

Lastly, the situation here is much more coercive than was present in the three preceding higher education cases. There, courts asked whether an objectively reasonable young adult would feel his speech chilled. Here, we ask whether

students in middle and high school would self-censor rather than risk reporting, investigation, and review by the equity ambassadors. The Supreme Court has reasoned that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." *Lee v. Weisman*, 505 U.S. 577, 592 (1992). Although the Fourth Circuit has hinted that *Lee's* reasoning may not apply beyond school prayer cases, *Lee's* concern with the vulnerability of school age children, like those in this case, is apt nonetheless. *See Myers v. Loudoun Cty. Pub. Sch.*, 418 F.3d 395, 407 (4th Cir. 2005). Quite simply, an ordinary sixth or seventh grader is more likely to be chilled by a school district policy publicly condemning and banning certain viewpoints than an adult college student subject to a bias response system.

In sum, LCPS' Bias Reporting System chills student speech on controversial topics through its use of an overbroad definition of "bias incidents" that sweeps in protected speech and the implicit threat of discipline.

II. Plaintiffs will suffer irreparable harm if the SEA Program and Bias Incident Reporting System are allowed to stand.

"[I]t is well settled that any deprivation of constitutional rights 'for even minimal periods of time' constitutes irreparable injury." *Condon v. Haley*, 21 F. Supp. 3d 572, 588 (D.S.C. 2014) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *see also Johnson v. Bergland*, 586 F.2d 993, 995 (4th Cir. 1978) ("Violations of first amendment rights constitute per se irreparable injury."); *Hernandez v. Sessions*, 872 F.3d 976, 982, 994 (9th Cir. 2017) (in considering an equal protection claim,

stating "the deprivation of constitutional rights unquestionably constitutes irreparable injury").

Here, if this Court does not preliminary enjoin the SEA Program and Bias Reporting Incident System before the school year starts on August 26, 2021, the parents' children will suffer the irreparable harm of having their constitutional rights violated. They will face an inevitable, unenviable choice: to self-silence their views on a wide range of political and social topics or to risk a bias report.

III. The balance of equities and public interest are both in Plaintiffs' favor.

While the parents suffer and will continue to suffer deprivations of constitutional rights, LFPS experiences no burden here. Given that the parents are likely to succeed on the merits of their claims, LCPS "is in no way harmed by issuance of a preliminary injunction which prevents it from enforcing" two programs that "are likely to be found unconstitutional." *Newsom v. Albemarle County Sch. Bd.*, 354 F.3d 249 (4th Cir. 2003). Additionally, "upholding constitutional rights serves the public interest." *Id.*; *see also ACLU of Ill. V. Alvarez*, 679 F.3d 583, 589 90 (7th Cir. 2012) (same).

CONCLUSION

In concluding its decision in *Abbott*, the Fourth Circuit said, "[W]hile we are mindful of universities' obligations to address serious discrimination and harassment against their students, we also are attentive to the dangers of stretching policies beyond their purpose to stifle debate, enforce dogma, or punish dissent." 900 F.3d at 180.

This is precisely the situation we find ourselves in here: a policy that at first glance is nothing more than an anti-discrimination protocol is instead being used to stifle debate and enforce dogma. Any comments about race or other topics that stray from the company line can and will be used against you in a kangaroo court of hand-picked equity ambassadors. LCPS may say its goals are diversity and inclusion, but the reality is the opposite: students who hold views LCPS's board does not approve are not welcome to share those views out loud or to be leaders in the school community.

In the Supreme Court's decision in *Mahanoy*, the majority, concurrence, and dissent all pointed to the school district's responsibility to respect students' speech rights on political and social topics. Slip op. at 7-8, 13 (Alito, J., concurring), and 5 (Thomas, J., dissenting). As Justice Breyer puts it for the Court, "[S]chools have a strong interest in ensuring that future generations understand the workings in practice of the well-known aphorism, 'I disapprove of what you say, but I will defend to the death your right to say it.'" Slip op. at 8. LCPS is teaching the opposite lesson to its students: if you disapprove of a classmate's comments about race, religion, politics, or culture, report it for investigation as a bias incident.

To protect the First and Fourteenth Amendment rights of Loudoun's students, this Court should grant Plaintiffs' motion for a preliminary injunction.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 25, 2021, a copy of the foregoing was sent via email to the address below pursuant to the parties' agreement:

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