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October 18, 2021

President Joseph R. Biden, Jr.
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20500

Merrick B. Garland, Attorney General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Re: Department of Justice's Suppression of the Free Speech Rights of Parents

Dear President Biden and Attorney General Garland,

Today, we write to you in our capacity as State Attorneys General, chief legal officers for our respective states. Over the last year, as legal officers, we have advised our constituencies of their constitutional right to free speech and encouraged public engagement to voice their opinions on important issues affecting their country, state, and communities, especially parents who have concerns about their children's education. Your recent action seeks to chill lawful dissent by parents voiced during local school board meetings by characterizing them as unlawful and threatening.

On October 4, 2021, Attorney General Garland issued a Memorandum¹ steering the Department of Justice toward combatting what he characterizes as a "disturbing spike in harassment, intimidation, and threats of violence against school administrators, board members, teachers, and staff", and directs the Federal Bureau Investigation ("FBI"), the United States Attorneys, and the Criminal Division to fan out throughout the United States to put an immediate stop to these activities. However, this Memorandum and the promised "series of measures designed to address" this purported crisis are unnecessary as they:

1. Are based upon a flawed premise, i.e. that there has been a nationwide spike in "threats of violence against school administrators, board members, teachers, and staff";
2. Violate the First Amendment rights of parents to address school administrators, board members, teachers, and staff on educational matters by seeking to criminalize lawful dissent and intimidate parents into silence; and

¹ Office of the Attorney General Memorandum, *Re: Partnership Among Federal, State, Local, Tribal, and Territorial Law Enforcement to Address Threats Against School Administrators, Board Members, Teachers, and Staff*, (October 4, 2021), <https://www.justice.gov/ag/page/file/1438986/download>.

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3. Intrude on the well-recognized First and Fourteenth Amendment rights of parents and guardians to direct the upbringing and education of their children by intimidating parents away from raising concerns about the education of their children.

1. **The October 4, 2021 Memorandum repeats the canard that “there has been a disturbing spike in harassment, intimidation, and threats of violence against school administrators, board members, teachers, and staff.”**

The October 4, 2021 Memorandum and its statement that “there has been a disturbing spike in harassment, intimidation, and threats of violence against school administrators, board members, teachers, and staff” appears to be based solely on a September 29, 2021 letter from the National School Boards Association (“NSBA”) to President Biden calling for him to invoke “the PATRIOT Act in regards to domestic terrorism,” arguing that as “acts of malice, violence and threats against public school officials have increased, the classification of these heinous actions could be the equivalent to a form of domestic terrorism and hate crimes.”²

To be sure, anyone who attacks or threatens violence against school administrators, board members, teachers, or staff should be prosecuted. However, in its letter demanding action, the NSBA fails to document a single legitimate instance of violence. And even if it did, there are sufficient criminal and civil remedies already available in all 50 states and territories.

Instead, the letter cites news articles about disruptions (“Protesters disrupt Poway Unified board meeting,” “Anti-mask crowd disrupts Gwinnett school board meeting,” “Grand Ledge school board goes into recess due to public ‘disruption’”); disorderly conduct (“Sarasota school board may limit public input after some meetings get disorderly”); and contentious behavior (“School board meeting turns contentious over COVID-19 policies”) all of which were handled quickly and effectively by local law enforcement. Several articles detail the fallacies contained in the NSBA letter.³ The fact is, the vast majority of incidents that NSBA cites involved disruptive

² National School Board Association Letter, *Re: Federal Assistance to Stop Threats and Acts of Violence Against Public Schoolchildren, Public School Board Members, and Other Public School District Officials and Educators* (September 29, 2021), <https://www.nsba.org/-/media/NSBA/File/nsba-letter-to-president-biden-concerning-threats-to-public-schools-and-school-board-members-92921.pdf?la=en&hash=642B7B91E0029BA4427D0F38D7054A007537160F>.

³ For a detailed analysis of the fallacies in the NSBA letter, *see e.g.*, Max Eden, *Concerned About Your Child's School? You Might Be a Domestic Terrorist*, Newsweek (October 6, 2021 6:30 AM), <https://www.newsweek.com/concerned-about-your-childs-school-you-might-domestic-terrorist-opinion-1635751>; and Lindsay Kornick, *AP's fact check falsely claims NSBA never requested protesting parents to be labeled as 'domestic terrorists'*, Fox News (October 7, 2021), <https://www.foxnews.com/media/ap-factcheck-claims-nsba-never-labeled-parents-domestic-terrorists>.

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and disorderly conduct rather than threats.⁴⁵ In fact, in no known instance, has there been anything like the burning, looting, police assaults, vandalism and other criminal activity that occurred in the summer of 2020. We note that to date your administration has done nothing to bring those thousands of perpetrators to justice and we could not find where the NSBA condemned any of that outright and documented criminal behavior.⁶

Indeed, in its letter, the NSBA seems more concerned about suppressing speech with which it disagrees than real threats of violence. For example, it notes that it is concerned that “[o]ther groups are posting watchlists against school boards and spreading misinformation that boards are adopting critical race theory curriculum and working to maintain online learning by haphazardly attributing it to COVID-19.”⁷

The bottom line is that actual threats and violence towards school administrators, board members, teachers, or staff are rare, and there are already existing criminal and civil legal remedies available if individuals threaten or conspire to commit violence against public officials in person, by U.S. mail, by email or otherwise. A physical assault on a school administrator, board member, teacher, or staff is just that, a criminal assault and will be addressed under state law. Even the NSBA letter itself acknowledges that in the rare instances where there were physical escalations, local law enforcement immediately intervened.

The falsity of the NSBA narrative which forms the basis of the DOJ’s actions are also being challenged by leaders in Congress. For example, Senators Tom Cotton and Josh Hawley questioned Deputy Attorney General (“DAG”) Lisa Monaco in an October 5, 2021 Senate hearing.⁸ During the Senate hearing, DAG Monaco walked back portions of the Memorandum that relied on the NSBA’s domestic terrorism assertions:

⁴ Caroline Downey, *Vast Majority of Incidents Cited by School-Board Group to Justify Federal Intervention Didn’t Involve Threats*, National Review (October 8, 2021 11:04 AM), https://www.nationalreview.com/news/vast-majority-of-incidents-cited-by-school-board-group-to-justify-federal-intervention-didnt-involve-threats/?utm_source=email&utm_medium=breaking&utm_campaign=newstrack&utm_term=25277587.

⁵ One such parent was arrested for “disorderly conduct” after he attempted to bring to the school board’s attention during discussions of their transgender bathroom policy that their daughter has been raped in the girl’s bathroom by a boy “wearing a skirt.” Jennifer Smith, *Loudon County father who was dragged out of work school board meeting reveals his daughter was ‘raped’ in the girls’ bathroom by a ‘skirt-wearing’ male student who was arrested for assaulting the SECOND girl months later – but staff did nothing*, Daily Mail (October 12, 2021 10:19 AM), <https://www.dailymail.co.uk/news/article-10083783/Loudoun-County-father-arrested-school-meeting-says-daughter-raped-boy-girls-bathroom.html>.

⁶ NSBA discussed how the protests and pandemic pointed to the need to address systemic racism, but clearly omitted any denouncement of violence. *The Time is Now*, NSBA (August 1, 2020), <https://www.nsba.org/ASBJ/2020/August/the-time-is-now>.

⁷ *Supra*, fn. 2 at 5.

⁸ Michael Ginsberg, *Republicans Pepper Deputy AG With Questions About Treating American Parents AS Domestic Terrorists*, Daily Caller (October 5, 2021 5:00 PM), <https://dailycaller.com/2021/10/05/tom-cotton-josh-hawley-lisa-monaco-memorandum-fbi-local-law-enforcement/>.

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“The association is asking the administration to use the PATRIOT Act, a law that this Congress passed and has repeatedly reauthorized, primarily to stop the threat of Islamic Jihadists, to bring criminal charges for domestic terrorism against parents who attend school boards to oppose things like Critical Race Theory or mask mandates resulting in a recess being called. Ms. Monaco is it domestic extremism for a parent to advocate for their child’s best interests?” Cotton asked. “What you have described, no I would not describe as domestic extremism,” Monaco responded after initially dodging the question.⁹

Nevertheless, she continued to defend the DOJ and FBI actions in seeking to intervene in what is a quintessential local issue. We would assure you and DAG Monaco that state and local law enforcement are perfectly capable of handling a ruckus at a school board meeting, as well as more serious threats. They do so every day without the specter of FBI involvement.

Surely the FBI and the Department of Justice have more pressing matters to attend to, like the massive spike in murders in major cities throughout the United States. According to figures released by the FBI, “The United States experienced its biggest one-year increase on record in homicides in 2020,” with an “additional 4,901 homicides in 2020 compared with the year before.”¹⁰ Our country’s law enforcement efforts should be focused on this rise in crime instead of harassing and intimidating parents that petition local governments to better serve their children. These parents want the best for their children and are willing to challenge school leaders who seek to supplant their God-given authority to raise their children according to their values.

2. The October 4, 2021 Memorandum violates American parents’ First Amendment rights by seeking to intimidate parents into silence via the threat of federal agents coming to their homes to “investigate” their attempts to effectively participate in and freely discuss the education of their children.

For many Americans, their first, live personal interaction with their government is with their local public school board. Parents or other taxpayers may be aggrieved by what happened at school and/or they want more information about some issue or school practice. For example, a kindergarten parent is upset their child has to wear a mask in school. The parents targeted for suppression by the NSBA letter and the DOJ Memorandum are not lobbyists or politicians or others used to speaking in public—they are simply ordinary Americans who in many cases are, for the first time, speaking in a public forum to express their concerns. This is likely intimidating to parents. We as a country should celebrate their participation in our system of self-government, not

⁹ See *Id.* Following the hearing. On October 6, 2021, Senator Cotton issued a [letter to Attorney General Garland](#) specifically requesting the information underpinning the DOJ’s reliance on the debunked NSBA’s allegations of widespread threats of violence that undergirded his Memorandum.

¹⁰ Neil MacFarquhar, *Murders Spiked in 2020 in Cities Across the United States*, New York Times (September 27, 2021), <https://www.nytimes.com/2021/09/27/us/fbi-murders-2020-cities.html>. (“The year-to-year increase in homicides from 2019 was the largest since national record-keeping began in 1960.”)

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silence them by accusing them of “domestic terrorism”¹¹ and threaten them with the prospect of the FBI knocking on their door to investigate their activities. “Domestic Terrorism” for the FBI’s purposes is defined as activities that:

- (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;
- (B) appear to be intended—
 - (i) to intimidate or coerce a civilian population;
 - (ii) to influence the policy of a government by intimidation or coercion; or
 - (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
- (C) occur primarily within the territorial jurisdiction of the United States

18 U.S.C. § 2331(5). Concerned parents at public school board meetings do not meet this definition of “domestic terrorism.” Using federal security apparatuses to quiet individuals is the hallmark of oppressive regimes and has all the characteristics of McCarthyism.

In *Globe Newspaper Co. v. Superior Ct. for Norfolk Cty.*, the Supreme Court recognized both the vital role that citizen participation in government plays and the guarantee of that participation that the First Amendment provides:

[It] is the common understanding that “a major purpose of that Amendment was to protect the free discussion of governmental affairs,” *Mills v. Alabama*, 384 U.S. 214, 218 (1966). By offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government. See *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S., at 587–588 (BRENNAN, J., concurring in judgment). See also *id.*, at 575 (plurality opinion) (the “expressly guaranteed freedoms” of the First Amendment “share a common core purpose of assuring freedom of communication on matters relating to the functioning of government”).

457 U.S. 596, 604 (1982). In *City of Madison, Joint Sch. Dist. No. 8 v. Wisconsin Emp. Rels. Comm’n*, the Supreme Court specifically noted these protections in the context of school board meetings which are open to the public. 429 U.S. 167, 174-175 (1976).

School board meetings are thus “a ‘designated’ and ‘limited’ public forum: ‘designated’ because the government has ‘intentionally open[ed]’ it ‘for public discourse,’ and ‘limited’ because ‘the State is not required to . . . allow persons to engage in every type of speech’ in the forum.” *Lowery v. Jefferson Cty. Bd. of Educ.*, 586 F.3d 427, 432 (6th Cir. 2009) (citing *Cornelius v. NAACP Legal Defense and Ed. Fund, Inc.*, 473 U.S. 788, 802 (1985); *Good News Club v.*

¹¹ *Supra*, fn. 2 at 2.

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Milford Cent. Sch., 533 U.S. 98, 106 (2001)). While school boards are granted some discretion in these limited public fora, “[a]t the same time . . . we have necessarily recognized that the discretion of the States and local school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives of the First Amendment.” *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987) (citing *Board of Education, Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853, 864 (1982)).

Thus, the parents targeted by the NSBA, the DOJ, and the FBI, have a clearly established First Amendment right to “effectively participate in” school board meetings and express their opinions on issues relating to their children’s education. School boards may not appreciate or agree with parents’ spirited concerns, but the remedy for speech we don’t like is “more speech, not enforced silence.” *U.S. v. Alvarez*, 567 U.S. 709, 728 (2012). “[T]he public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.” *Street v. New York*, 394 U.S. 576, 592 (1969). *See also Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”) The NSBA letter and the subsequent October 4, 2021 Memorandum, however, are clearly designed to, and will have the effect of, suppressing these parents’ First Amendment rights.

The Supreme Court has repeatedly noted that task forces, investigations, and inquiries of the type ordered in the October 4, 2021 Memorandum by their very nature intimidate citizens into foregoing their First Amendment rights. “[W]hen a State attempts to make inquiries about a person’s beliefs or associations, its power is limited by the First Amendment. Broad and sweeping state inquiries into these protected areas. . . discourage citizens from exercising rights protected by the Constitution.” *Baird v. State Bar of Ariz.*, 401 U.S. 1, 6 (1971) (citing *Shelton v. Tucker, supra*; *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963); *Cf. Speiser v. Randall*, 357 U.S. 513 (1958)).

Just three months ago the Supreme Court reaffirmed the chilling nature that actions of this kind have on Americans’ exercise of their First Amendment rights: “When it comes to ‘a person’s beliefs and associations,’ ‘[b]road and sweeping state inquiries into these protected areas . . . discourage citizens from exercising rights protected by the Constitution.’” *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2384 (2021) (citing *Baird v. State Bar of Ariz.*, 401 U.S. 1, 6 (1971)).

3. The October 4, 2021 Memorandum proposing a Federal Task Force to coordinate the fight against parents expressing concerns about their children’s education at school board meetings also violates their First Amendment Rights and also their Fourteenth Amendment rights.

As noted above, the NSBA’s letter focused on disputes between parents and their local schools over educational issues impacting their children such as school boards adopting critical

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race theory curriculum and disagreements over whether young children should be forced to wear masks at school. These are issues where the Supreme Court has clearly and unequivocally held that parents have constitutionally protected rights to advocate about, and indeed, to direct the education of their children.

In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court noted that “this primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition” citing *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) and noting that under *Pierce* “the values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society.” The Court quoted the following passage from *Pierce*:

“Under the doctrine of *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042, 29 A.L.R. 1146, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.” 268 U.S., at 534—535, 43 S.Ct., at 573.

Yoder, 406 U.S. at 233.

These parental rights are also protected under the 14th Amendment: “In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the ‘liberty’ specially protected by the Due Process Clause includes the righ[t] . . . to direct the education and upbringing of one’s children.” *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citing *Meyer* and *Pierce*). “In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.” *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

Congress has also recognized the primary role parents play in the education of their children. For example, the United States Department of Education Organization Act’s preamble states that “parents have the primary responsibility for the education of their children, and States, localities, and private institutions have the primary responsibility for supporting that parental role.”¹² The federal government does not have any such role. In the Department of Education

¹² 20 USC § 3401(3)&(4) (Pub. L. 96–88, title I, § 101, Oct. 17, 1979, 93 Stat. 669).

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Organization Act Statement in October of 1979, former President Jimmy Carter reiterated that the “[p]rimary responsibility for education should rest with those States” and warned of the dangers of federal intrusion: “Instead of assisting school officials at the local level, it [the Federal Government] has too often added to their burden.”¹³

Despite the “primary role of the parents” in “direct[ing] the education and upbringing of [their] children” the NSBA letter and the October 4, 2021 Memorandum seek to intimidate parents under the threat of being investigated as “domestic terrorists” from exercising their rights.

To that end we request that you immediately withdraw the October 4, 2021 Memorandum, to immediately cease any further actions designed to intimidate parents from expressing their opinions on the education of their children, and demand that you respect their First Amendment rights to freedom of speech and to raise their children.

Sincerely,



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¹³ “Department of Education Organization Act Statement on Signing S. 210 Into Law,” *American Presidency Project*, October 17, 1979, <https://www.presidency.ucsb.edu/documents/department-education-organization-act-statement-signing-s-210-into-law>.

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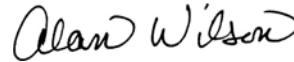
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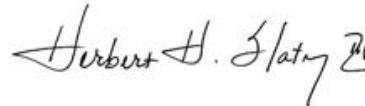
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