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October 28, 2024

**VIA ELECTRONIC MAIL**

Mr. Allen Brooks
President
Merced City School District Board of Education
444 W. 23rd St.
Merced, California 95340
Email: AllenBrooks@mcsd.k12.ca.us

Re: Merced City School District Board of Education Defamation Threats

Dear Mr. Brooks:

The First Amendment Coalition ("FAC") is a nonprofit public interest organization dedicated to advancing free speech, more open and accountable government, and public participation in civic affairs. On behalf of FAC, I ask that you disavow the following statements that threatened freedom of speech, refrain from making similar statements in the future, and publicly affirm the Merced City School District Board of Education's ("Board") commitment to the First Amendment.

At the most recent Board meeting on October 22, 2024, you warned the public that the Board may characterize certain remarks from members of the public as defamatory, stating "it is important for members of the public to understand that derogatory comments against district employees or others made in a Board meeting can be actionable as defamation under certain circumstances." Video of MCSD Regular Board Meeting October 22nd 2024, https://www.youtube.com/live/MGsx76k-FHI?feature=shared&t=6926, at 1:55:26.

Based on my review of the Board's public meetings, the Board President has regularly read this statement, or a substantially similar warning, before public comment going back to at least March 8, 2022. Video of MCSD Regular Board Meeting March 8th 2022, https://www.youtube.com/live/_dSUstNUlvQ?feature=shared&t=7545, at 2:05:44 ("[I]t is important for members of the public to understand that derogatory comments against district employees or others made in board meetings can be actionable as defamation under certain circumstances. Derogatory comments made at a board meeting which are repeated outside of the context of the board meeting also may be actionable as defamation.")

I take no position on the substance of any disputes you may have with individual members of the public, but such threats of legal action chill protected speech, undermine the First Amendment, and attack the foundation of democracy.

As an initial matter, California law guarantees absolute immunity for statements made in legislative proceedings such as school board meetings whenever the statements have some relation or connection to the proceeding. Civil Code § 47(b); *Cayley v. Nunn*, 190 Cal. App. 3d 300, 303 (1987); *Scott v. McDonnell Douglas Corp.*, 37 Cal. App. 3d 277, 288 (1974) ("[T]he

privilege provided in [Civil Code] section 47 operates to promote the public interest that public officials remain accountable for their activities while in office. To some degree, a public official assumes his office subject to the vicissitudes of public opinion."). To be privileged under Civil Code section 47 as a statement made at an official proceeding, "the defamatory matter need not be relevant, pertinent or material to any issue before the tribunal; it need only have some connection or some relation" to the proceeding. *Ascherman v. Natanson*, 23 Cal. App. 3d 861, 865 (1972) (emphasis omitted) (citing *Thornton v. Rhoden*, 245 Cal. App. 2d 80, 90 (1966)).

By its plain language and the intent of its enactment, this absolute privilege applies regardless of the identities or positions of individuals who commenters mention during their remarks, as long their comments "have some connection or some relation" to the proceeding. *See Kelly v. Daro*, 47 Cal. App. 2d 418, 424 (1941) (holding that an allegedly false statement made about plaintiff, a private individual and news writer, was absolutely privileged where defendant made the statement during testimony before a committee of the California State legislature and it was connected to the committee's proceeding); *Imig v. Ferrar*, 70 Cal. App. 3d 48, 55–56 (1977) ("The policy underlying the privilege is to assure utmost freedom of communication between citizens and public authorities whose responsibility is to investigate and remedy wrongdoing. . . . 'That channel would quickly close if its use subjected the user to a risk of liability for libel.'") (quoting *King v. Borges*, 28 Cal. App. 3d 27, 34 (1972)).

More fundamentally, critique of government is democracy, not defamation. This is true whether the speech in these public meetings implicates elected officials, district employees, or even fellow community members. The First Amendment reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (citations omitted).

"Criticism of government is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized." *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966). We urge you to uphold this fundamental constitutional principle, as you are a public servant sworn into office with the responsibility to do so.

Even outside a legislative meeting, a statement that is "derogatory" is not necessarily actionable as defamation, especially in the political context. Only a substantially false assertion of fact, not opinion, can be considered defamatory, and in the political context, courts take a wide view of what is protected opinion. Political debate is prone to the "use of epithets, fiery rhetoric or hyperbole" that cannot be treated as defamatory. *Fletcher v. San Jose Mercury News*, 216 Cal. App. 3d 172, 191 (1989) (quoting *Gregory* v. *McDonnell Douglas Corp.*, 17 Cal. 3d 596, 601 (1976)). The First Amendment "afford[s] a wide berth to the free exchange of ideas," and "[h]yperbole, distortion, invective, and tirades are as much a part of American politics as kissing babies and distributing bumper stickers and pot holders." *Issa v. Applegate*, 31 Cal. App. 5th 689, 704 (2019).

Therefore, as courts have long held, "one who seeks or holds public office may not be thin of skin. One planning to engage in politics, American style, should remember the words credited to Harry S. Truman – 'If you can't stand the heat, get out of the kitchen.'" *Desert Sun Publ'g Co. v. Superior Ct.*, 97 Cal. App. 3d 49, 52 (1979). Our nation's "dedication to basic principles of liberty and freedom of expression" protects the right to "heap invective" on those who hold public office, no matter how "distasteful, offensive and unpleasant" it may be, because the "alternative is censorship and tyranny." *Id.* at 51, 54.

Even if a person makes a substantially false and defamatory assertion of fact about a public official or figure outside a legislative meeting, the official or figure cannot recover for defamation without proving by clear and convincing evidence that the speaker knew the statement was false or acted with reckless disregard for the truth. *N.Y. Times*, 376 U.S. at 279–80; *Masson v. New Yorker Mag.*, 501 U.S. 496, 510 (1991).

This element is independent of whether the statement is objectively false. *Harte-Hanks Commc'ns v. Connaughton*, 491 U.S. 657, 681 (1989). It is "a subjective test, under which the defendant's actual belief concerning the truthfulness of the publication is the crucial issue. This test directs attention to the defendant's attitude toward the truth or falsity of the material published," not "the defendant's attitude toward the plaintiff." *McGarry v. Univ. of San Diego*, 154 Cal. App. 4th 97, 114 (2007) (cleaned up) (citations omitted). A "mere failure to investigate" or "gross or even extreme negligence" are insufficient to show reckless disregard for the truth. *Christian Rsch. Inst. v. Alnor*, 148 Cal. App. 4th 71, 90 (2007) (citations omitted). This exceptionally demanding standard guarantees the breathing room necessary for robust debate to survive in a free society.

Threatening legal action for so-called "derogatory" comments improperly chills speech before members of the public have the opportunity to give critical comment. A "policy that deters individuals from speaking out on an issue of public importance violates the First Amendment" in the context of the public comment portion of a school board meeting. *Bach v. Sch. Bd. of Va. Beach*, 139 F. Supp. 2d 738, 743 (E.D. Va. 2001); *see also Leventhal v. Vista Unified Sch. Dist.*, 973 F. Supp. 951, 962 (S.D. Cal. 1997) (holding school board violated First Amendment by prohibiting criticism of specific officials or staff).

FAC has not comprehensively reviewed the public comments at every meeting where the Board President has read this warning, so it takes no position on whether other First Amendment violations may have occurred. That said, to the extent that the Board may have relied on this warning or intends to rely on it in the future to actually interrupt, prohibit, or threaten legal action against any specific criticism from a member of the public that complies with otherwise valid rules such as reasonable and generally applicable time limits, the District may face further exposure to First Amendment and Brown Act claims on that basis. *See White v. Norwalk*, 900 F.2d 1421, 1425 (9th Cir. 1990) ("[A] speaker may not be stopped from speaking because the moderator disagrees with the viewpoint he is expressing."); Gov't Code § 54954.3(c) ("The legislative body of a local agency shall not prohibit public criticism of the policies, procedures, programs, or services of the agency, or of the acts or omissions of the legislative body.").

A public official's first duty is to uphold the Constitution. An official's threat of legal action against critics violates the First Amendment and undermines democracy. I ask that you immediately disavow your statements about "derogatory comments against district employees or others made in board meetings" as "actionable as defamation" and publicly affirm the board's commitment to respecting freedom of speech.

Sincerely,

FIRST AMENDMENT COALITION

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Legal Fellow

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