



December 3, 2025

Fayette County Public School Board  
c/o Superintendent's Office  
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Dear Board Members:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit that defends free speech nationwide, is concerned by the Fayette County Public School Board proposal that would prohibit, after the Board passes a measure, any dissenting Board member from talking to the press about their votes. Such a restriction would violate Board members' First Amendment rights to speak to the press in their individual capacity about matters of public concern—including Board affairs and dissenting votes—a principle underscored in a lawsuit FIRE recently filed on behalf of a school board member barred from speaking publicly about school issues.<sup>1</sup> We therefore call on the Fayette County School Board to withdraw its unconstitutional proposal.

Our concerns arise from a revision proposed to the section of the Board governance manual concerning media inquiries,<sup>2</sup> to add the following language:

Additionally, Board members who voted in the minority on a matter, yet where the motion was approved by majority vote, shall not use subsequent media

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<sup>1</sup> *LAWSUIT: New Jersey School Board Member Silenced for Asking Constituents About Proposed Tax Increase*, FIRE (Nov. 20, 2025), <https://www.thefire.org/news/lawsuit-new-jersey-school-board-member-silenced-asking-constituents-about-proposed-tax>.

<sup>2</sup> The policy currently states: "The Board Chair shall be the official spokesperson for the Board to the media/press on issues of media attention. Board members should forward media inquiries to the Chair, superintendent, and/or the superintendent's designee. As indicated in Section V of this manual, this does not preclude Board members from responding to media inquiries they receive in their individual capacity as elected officials. In such situations, they should refrain from responding in such a way that their statements could be construed as speaking on behalf of the Board." *School Board Governance Manual*, at 19, Fayette County Public Schools (rev. Jan. 2025), <https://resources.finalsite.net/images/v1740693719/fcpsnet/uklb3qmchcogjzbzqqq6m/governance.pdf>.

inquiries as a forum to reiterate or revive their dissenting position. The appropriate time for expressing opposing views is during Board discussion while the motion is under consideration. Once a vote is taken and a decision is made, Board members are expected to respect and support the collective decision of the Board. In such instances, if contacted by the media, individual Board members should issue no comment and direct inquiries to the Board Chair.<sup>3</sup>

Prohibiting Board members from speaking to the press about their dissenting votes after the Board has passed a measure violates their First Amendment rights.

### **I. Board Members Retain Robust Rights to Comment in Their Individual Capacity on Matters of Public Concern**

“First Amendment protection is at its zenith” in protecting “core political speech.”<sup>4</sup> The right thus conferred extends to Board members, as the “First Amendment surely promises an elected representative ... the right to speak freely on questions of government policy.”<sup>5</sup> The Supreme Court has emphasized that point, noting: “The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance.”<sup>6</sup> That is because the “manifest function of the First Amendment in a representative government” is to give elected officials “the widest latitude to express views on issues of social policy.”<sup>7</sup> This guarantee of freedom to discuss public affairs extends to Board members’ communications to the press about their votes. The Supreme Court has expressly protected the rights of elected officials to comment on matters of public concern as a fundamental function of their elected duties, even if their views are at odds with the majority of the governing body on which the official serves.<sup>8</sup>

It is thus the case that even after the Fayette County School Board has voted on an issue, the First Amendment fully protects the right of its individual members to, as the proposal puts it, use the press as a “forum to reiterate or revive their dissenting position.” Board members may want to opine on a measure even after passage for a multitude of reasons, such as criticizing how others voted, voicing opinions they neglected to express or adequately explain prior to a measure’s passage, or simply providing reassurance to constituents about their position. Whatever the case, disagreement with an official government action or policy—whether expressed by an elected official or an ordinary citizen—is not a legitimate basis for censorship; to the contrary, it is “at the very center of the constitutionally protected area of free discussion.”<sup>9</sup> It is for the individual Board

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<sup>3</sup> *Draft Proposed Changes to Governance Manual 2025*, Fayette County Public School Board, <https://portal.ksba.org/public/Meeting/Attachments/DisplayAttachment.aspx?AttachmentID=926355>.

<sup>4</sup> *Meyer v. Grant*, 486 U.S. 414, 425, 420 (1988) (cleaned up).

<sup>5</sup> *A Cmty. Coll. Sys. v. Wilson*, 595 U.S. 468, 478 (2022).

<sup>6</sup> *Wood v. Georgia*, 370 U.S. 375, 394–95 (1962).

<sup>7</sup> *Bond v. Floyd*, 385 U.S. 116, 135–36 (1966).

<sup>8</sup> *See Bond*, 385 U.S. at 116 (state legislature violated the First Amendment when it refused to seat an elected representative after finding his comments criticizing the Vietnam War inconsistent with the state’s mandatory loyalty oath); *see also Libby v. Fecteau*, 145 S. Ct. 1378, 1378 (2025) (granting emergency injunction pending appeal, restoring a state representative’s voting and speaking rights that were suspended by the state legislature based on her criticism of a state policy; the appeal was later mooted after the legislature rescinded the sanction).

<sup>9</sup> *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966).

member, not the Board, to decide on the propriety, relevance, and merit of discussing their votes with the press.

## **II. The Policy Unconstitutionally Targets Speech Based on Viewpoint**

The proposed revision violates the First Amendment because it operates by restricting speech solely through viewpoint discrimination—targeting only *opposition* to a passed measure—which is an “egregious” form of censorship.<sup>10</sup> Expression of disfavored viewpoints is not a “harm” the Board has a legitimate interest addressing, as the government must “abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.”<sup>11</sup> Yet the proposed revision is limited to only dissenting opinions and does not prohibit Board members from discussing a vote approving a measure or praising its passage. While the policy purports to foster respect for official Board action, it necessarily employs unconstitutional viewpoint discrimination to do so.

The First Amendment’s core protection of the right to criticize public officials and governing bodies—and its bar on viewpoint discrimination—operate “against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open” and “may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”<sup>12</sup> As previously illustrated, this right to state opinions on matters of public concern, including criticism of government policies and actions—extends to Board members speaking in their individual capacities.

## **III. The Policy is Content-Based and Fails Strict Scrutiny**

Even setting aside constitutionally fatal viewpoint discrimination, the Board’s attempt to dictate the manner in which its members speak to the press, even in an individual capacity, is an impermissible content-based restriction on speech. The proposal is content-based in regulating speech based on “topic discussed or the idea or message expressed”<sup>13</sup>—that is, whether it concerns a dissenting position on a Board measure—and is thus “presumptively unconstitutional” and subject to strict scrutiny,<sup>14</sup> the “most demanding test known to constitutional law.”<sup>15</sup> And as explained by the U.S. Court of Appeals for the Sixth Circuit, whose decisions bind the Board, a content-based restriction survives strict scrutiny only if “narrowly tailored to be the least-restrictive means available to serve a compelling government interest.”<sup>16</sup> A compelling interest is one “of the highest order,”<sup>17</sup> like protecting national security,<sup>18</sup> and the government “must

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<sup>10</sup> *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995).

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

<sup>12</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); see also *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (“[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.”).

<sup>13</sup> See *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

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

<sup>15</sup> *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).

<sup>16</sup> *Bible Believers v. Wayne Cty.*, 805 F.3d 228, 248 (6th Cir. 2015) (*en banc*).

<sup>17</sup> *Reed*, 576 U.S. at 172.

<sup>18</sup> See, e.g., *In re Nat’l Sec. Letter v. Sessions*, 863 F.3d 1110, 1123 (9th Cir. 2017).

demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.”<sup>19</sup> The proposed revision fails this test.

The Board has no legitimate interest, let alone one of the highest order, in limiting public debate or hiding disagreement among Board members from the public. Any such “interest” would itself countermand the First Amendment’s central purpose of protecting the “free flow of ideas and opinions on matters of public interest and concern” including from the public’s representatives in government.<sup>20</sup> Public disagreement from Board members speaking in their individual capacities does not strip the Board of authority to act, and its decisions still carry the full force of law.

If the Board is concerned the public may confuse a member’s personal comments with an official Board stance (even assuming that is a real problem the Board has a compelling interest in addressing), its proposal is not narrowly tailored. First, it is difficult to see how a member speaking about their dissenting position—which, by definition, differs from that of the Board majority—would be confused for speech on behalf of the Board. Therefore, the proposal does not advance any interest in dispelling confusion. Moreover, there are obvious and far less restrictive means of addressing this issue—not least of which is the Board’s current policy that prohibits members from responding to media inquiries “in such a way that their statements could be construed as speaking on behalf of the Board.” And the Board is always free to issue its own statements in response to any public comments by dissenting members.<sup>21</sup>

#### **IV. Conclusion**

The proposal violates the robust First Amendment rights of Board members to speak on matters of public concern, is viewpoint discriminatory, and is a content-based speech restriction that fails strict scrutiny. The Board must withdraw its proposal to limit the speech of dissenting Board members. We respectfully request a response by December 17, 2025, indicating that it has done so.

Sincerely,



Stephanie Jablonsky  
Senior Program Counsel, Public Advocacy

Cc: Demetrus Liggins, Superintendent

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<sup>19</sup> *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994).

<sup>20</sup> *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988); *Bond*, 385 U.S. at 136–37.

<sup>21</sup> *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (When it comes to speech to which listeners object, “the remedy to be applied is more speech, not enforced silence.”)