NO. 63001-6-I

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

vs.

DONNA GREEN,

Appellant.

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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I. INTRODUCTION

The American Civil Liberties Union of Washington ("ACLU") respectfully moves, pursuant to RAP 10.1(e) and 10.6, to file a brief as amicus curiae addressing whether the Constitution permits convicting a parent of the crime of trespassing for visiting her son's school when a school district's exclusion notice barring the parent from setting foot on the premises of her son's school violated her due process and free speech rights as well as her son's rights to due process and to an education. Amicus also requests that the Court accept this brief filed 28 rather than 30 days before the argument date, for the reasons set forth below.

II. IDENTITY AND INTEREST OF AMICUS

The ACLU is a statewide, nonpartisan, and nonprofit organization with more than 20,000 members that is dedicated to the preservation and defense of civil liberties, including due process and free speech rights. It has participated as amicus in numerous cases involving these issues. *See, e.g., City of Bremerton v. Widell*, 146 Wash.2d 561, 51 P.3d 733 (2002) (trespass conviction overturned because tenant had the right to invite fiancé to her home, despite housing authority's trespass notice issued to fiancé, which served as the basis for trespass); *Bellevue School Dist. v. E.S.*, 148 Wash. App. 205, 199 P.3d 1010, *rev. granted*, 166 Wash.2d 1011 (2009) (due process analysis in truancy case); *City of Bellevue v. Lorang*, 140 Wn.2d 19, 31, 992 P.2d

496 (2000) (individual's right to express criticism of government performance).

III. FAMILIARITY WITH THE ISSUES AND THE PARTIES' ARGUMENTS

As described in Part I above, ACLU has substantial experience litigating cases involving the constitutional rights to due process and free speech. ACLU has obtained copies of, and is familiar with, the briefing submitted to this Court by the parties, the ruling of the trial court at issue in this appeal, and the proceedings below. ACLU is also familiar with the scope of the arguments presented by the parties, and will not unduly repeat arguments previously raised.

IV. ISSUES TO BE ADDRESSED BY ACLU

ACLU will address how a trespass order issued by a school district barring a parent from going to her son's school, without any meaningful notice or opportunity to be heard to challenge the order, violates the due process rights of both parent and child. In addition, ACLU will address parents' rights to free speech and to petition the government for redress of grievances.

V. WHY BRIEFING BY ACLU WILL ASSIST THE COURT

ACLU believes that its extensive experience representing parties in matters involving free speech and other constitutional rights provides an important and independent perspective on the issues the brief will address. A fully informed decision is essential, and the additional argument provided by ACLU will be helpful to the Court. RAP 10.6(a).

VI. TIMING OF THIS MOTION

The ACLU received notice of the oral argument date set for this matter on April 21, 2010, only 35 days in advance of the oral argument. The ACLU has endeavored to complete this motion and amicus brief as soon as practicable. In order to avoid any undue delay or any prejudice to the Court or either party, we request only a two-day extension. For these reasons, we request that the Court grant leave to file based on this motion submitted 28 days in advance, rather than the usual deadline of 30 days in advance of oral argument.

VII. CONCLUSION

For the foregoing reasons, ACLU respectfully requests that the Court grant leave to appear as *amicus curiae* and file the attached brief.

DATED this 28th day of April, 2010.

AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON
FOUNDATION

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CERTIFICATE OF SERVICE

I, Stacy Maxwell, hereby certify under penalty of perjury under the laws of the State of Washington that on April 28, 2010 I caused the following documents to be served as noted on the persons listed below:

1. Motion for Leave to File Amicus Curiae Brief of the American Civil Liberties Union of Washington;
2. Brief of Amicus Curiae American Civil Liberties Union of Washington (attached to Motion); and
3. this Certificate of Service.

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Dated at Seattle, Washington, this 28th day of April, 2010.

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SEA_DOCS:957774.1

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BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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I. INTRODUCTION

The question for the Court in this case is whether the Constitution permits convicting a parent of the crime of trespassing for visiting her son's school when a school district's exclusion notice barring the parent from setting foot on the premises violated her due process and free speech rights as well as her son's rights to due process and to an education. The well-established test for evaluating compliance with due process starts with the Court's consideration of the private interests affected by the government's action. This brief explains the numerous fundamental constitutional rights that were at stake when Ms. Green was banished from her son's school after she raised questions about the school's performance at a public meeting to which she was invited.

This brief also explains why the District's actions violated Ms. Green's rights to free speech and to petition the government for redress of grievances. The District's own trespass order did not simply object to the time, place, or manner of Ms. Green's speech; rather, one of the cited grounds for its trespass order was Ms. Green's "making disrespectful comments toward school staff regarding the curriculum."[1] This fails to comply with the constitutionally required level of "disruption" that might support the District taking action to interfere with Ms. Green's rights.

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[1] CP 138.

The American Civil Liberties Union of Washington (the "ACLU") respectfully requests that the Court reverse Ms. Green's criminal trespass conviction, which is predicated solely upon the District's unlawful trespass notice. In so doing, the Court should hold that a parent's right to access her child's school may not be revoked without due process of law and may not be revoked because the District does not like what the parent has to say about the quality of the education afforded.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

The ACLU's identity and interest in this matter are set forth in its Motion for Leave to File an Amicus Curiae Brief filed concurrently with this brief.

III. STATEMENT OF THE CASE

Donna Green is the mother of a child who attended Carriage Crest Elementary School in the Kent School District from the first through sixth grades.[2] On September 26, 2006, when her son was in the sixth grade, Ms. Green was invited and as his parent attended a Curriculum Night at his school.[3] After hearing a presentation by her son's teacher, Ms. Green asked questions about curriculum, district policies, textbooks, and lesson plans.[4]

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[2] Appellant's Opening Brief ("AOB") at 9.
[3] *Id.* at 9-10.
[4] *Id.* at 10.

The school did not ask Ms. Green to leave at any time during the program.[5] On September 29, 2006, according to the District, Ms. Green spoke with a student in the school parking lot, directing him to cross the lot to his parents' vehicle, while a school staff person had reportedly instructed the student to wait to be picked up.[6] With no prior notice or opportunity to contest these factual assertions, on October 2, 2006, the District "trespassed" Ms. Green from the premises of Carriage Crest Elementary School.[7] The District cited the two above incidents as the basis for indefinitely excluding Ms. Green from entering or being on the premises of her son's elementary school and threatened criminal prosecution for any violation.[8] When Ms. Green subsequently tried to attend a program sponsored by her son's Cub Scouts program, school staff called law enforcement to remove her from the school grounds.[9] When Ms. Green wrote a letter to the District's School Board of Directors asking for a hearing to challenge the trespass order, her request was summarily denied.[10]

On November 21, 2006, the police cited Ms. Green for trespass after she tried to attend a parent-teacher conference at her son's school and

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[5] *Id.*
[6] *Id.* at 11.
[7] *Id.* at 10-12.
[8] *Id.*
[9] *Id.* at 12.
[10] *Id.* at 12-13.

purchased a book at her son's book fair.[11] On February 8, 2007, after picking up her son from a Science Fair held at the school, she was met in the school parking lot by a Sheriff's Deputy and again cited for trespass.[12] With no fair opportunity to contest the District's unlawful trespass notice, Ms. Green was charged and convicted because of that notice for engaging in lawful and non-disruptive conduct.

IV. ARGUMENT

A. The District's Trespass Order, upon which the Criminal Conviction was Predicated, Violated Ms. Green's Due Process Rights Under the *Mathews v. Eldridge* Balancing Test

The Fifth and Fourteenth Amendments to the federal Constitution, and Article I, § 3 of the Washington Constitution, provide that the State shall not deprive any person of "life, liberty, or property without due process of law."[13] The court below erred in concluding that due process was satisfied under the *Mathews v. Eldridge*[14] three-part balancing test. Taken in turn, each prong of the *Mathews* test demonstrates that the District's trespass admonition, which was the basis for the subsequent criminal prosecution, infringed on Ms. Green's rights to direct the upbringing and education of her child and to access school property, and on her son's rights to an education

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[11] *Id.* at 13-14.
[12] *Id.* at 14-15.
[13] U.S. CONST. amend. V, U.S. CONST. amend. XIV; Const. art. I, § 3.
[14] *Mathews v. Eldridge*, 425 U.S. 319, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976).

and to due process. First, *Mathews* requires consideration of the private interest at stake.[15] As described below, multiple, significant interests were at stake when Ms. Green was excluded from her child's school. Second, the Court must review of the risk of a mistaken deprivation of those interests in the absence of procedural protections. *Id.* Finally, *Mathews* requires consideration of any countervailing government interests justifying the existing process. *Id.*

Here the District failed to provide even the most basic procedural protections, creating an unacceptable risk of error. The District's own asserted interest - in providing a safe and effective educational environment - is not served by indefinitely banning a parent from her son's school based on the parent's critical but constitutionally protected expression without any due process. Because the subsequent criminal conviction was premised on the District's unconstitutional trespass order, it also violated Ms. Green's due process rights.

1. Indefinitely Banning a Parent from her Child's Public School Implicates the Parent's Constitutional Liberty Interest in Directing the Education of Her Child and Her Statutory Right to Access Her Child's School. It Also Intrudes on the Child's Constitutional Rights to the Parental Relationship and to an Education

[15] *Bellevue Sch. Dist. v. E.S.*, 148 Wn. App. 205, 212-213, 199 P.3d 1010, *rev. granted*, 166 Wn.2d 1011 (2009).

The requirements of due process are triggered when the government seeks to deprive a citizen of a liberty or property interest. There can be no question the District's order implicated several such interests of Ms. Green and her son.

That due process protects parents' fundamental liberty interest in the care, custody and control of their children is beyond debate.[16] Included within this long-recognized interest is a parent's fundamental right to participate in and direct her child's education.[17] In *Meyer v. Nebraska*,[18] the U.S. Supreme Court held that the Due Process Clause protects the right of parents to "engage" their children's teacher in matters of instruction.[19]

In addition to this constitutional right, parents in Washington also have a statutory right to access their child's school.[20] The statute affords a parent the right to "access ... [her] child's classroom and/or school sponsored activities for purposes of observing class procedure, teaching material, and class conduct."[21]

A student in Washington, meanwhile, has a "paramount" right to have the State make ample provision for his education as well as a property interest in obtaining an education that may not be denied without due

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[16] *Troxel v. Granville,* 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000).
[17] *Troxel v. Granville,* 530 U.S. at 65.
[18] *Meyer v. Nebraska,* 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923).
[19] *Id.*
[20] RCW 28A.605.020.
[21] *Id.*

process.[22] Children also have a special interest in the preservation of the parent-child relationship.[23] In order to access the constitutionally guaranteed education and to ensure that their rights are afforded in the process, children, who "'lack the experience, judgment, knowledge and resources to effectively assert their rights,'" must rely on their parents and guardians.[24]

Accordingly, the State must afford a parent due process of law before it deprives her or her child of these important liberty interests.

2. The District's Trespass Order Infringed on Ms. Green's and Her Son's Constitutional and Statutory Rights

Indefinitely banishing a parent from her child's elementary school significantly infringes on the parent's right to direct the education of her child and the child's corresponding right to have his parent direct his education. It also significantly infringes on the child's right to receive an ample education.

Researchers and policymakers alike have identified parental involvement and presence in the classroom as a crucial ingredient in a child's

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[22] *Seattle Sch. Dist. No. 1 of King County v. State*, 90 Wn.2d 476, 511-512, 585 P.2d 71, 91 (1978); *see* Const. art. IX, § 1; *Stone v. Prosser Consolidated Sch. Dist. No. 116*, 94 Wn. App. 73, 76, 971 P.2d 125 (1999) (Washington law creates a property right in education that is protected by the Due Process Clause); *see also Goss v. Lopez*, 419 U.S. 565, 573-74, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975) (Ohio law created property interest in public education that was protected by the Due Process Clause).

[23] *Santosky v. Kramer*, 455 U.S. 745, 760, 102 S.Ct. 1388, 71 L. Ed. 2d 599 (1982).

[24] *Bellevue Sch. Dist. v. E.S.*, 148 Wn. App. at 214 (quoting *DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 146, 960 P.2d 919 (1998)).

scholastic success.[25] "When schools, families, and community groups work together to support learning, children tend to do better in school, stay in school longer, and like school more."[26]

The U.S. Congress recognized the physical presence of parents in the classroom and on campus as a critical—and obvious—component of increased parent participation. For example, the No Child Left Behind Act calls on schools to adopt a "school-parent compact" that addresses the "importance of communication between teachers and parents on an ongoing basis through, at a minimum ... reasonable access to staff, opportunities to volunteer and participate in their child's class, and observation of classroom activities."[27]

Likewise, Washington lawmakers mandated that "[e]very school district ... shall ... adopt a policy assuring parents access to their child's classroom and/or school sponsored activities for purposes of observing class procedure, teaching material, and class conduct... ."[28] In 2010, the state

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[25] For a general study concerning the importance of parental engagement in their children's learning, see JOYCE EPSTEIN, SCHOOL, FAMILY, AND COMMUNITY PARTNERSHIPS: YOUR HANDBOOK FOR ACTION (2009).
[26] ANNE T. HENDERSON & KAREN L. MAPP, A NEW WAVE OF EVIDENCE: THE IMPACT OF SCHOOL, FAMILY, AND COMMUNITY CONNECTIONS ON STUDENT ACHIEVEMENT 7 (2002).
[27] 20 U.S.C. § 6318 (d)(2)(C).
[28] RCW 28A.605.020. RCW 28A.605.020 also vests Ms. Green with a property interest in continued access to her son's school. The Supreme Court has long recognized that state laws can create property interests protected by the Due Process Clause. *Bd. of Regents v. Roth*, 408 U.S. 564, 577,

legislature again acknowledged the critical role of parents and families in ensuring that each child receives a basic education.[29] Keeping in line with the latest research and laws, the District has also published policies encouraging cooperation and involvement from parents in the education process, and other policies "welcom[ing] and encourag[ing] visits to school by parents . . . ."[30] The parent's and child's interest in this interaction is recognized not only in instances where a parent might contribute as a volunteer or the school might report on the student's progress, but also in situations where a parent wishes to challenge a school's decision. *See e.g.* WAC 392-400 (detailing parents' right to notice and a hearing in school discipline matters).

The District's trespass admonishment violated due process not because it violated a general or "unfettered" right to access school property but because it significantly infringed on Ms. Green's constitutional and statutory rights to access her son's school and her son's rights to receive an

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92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972) ("Property interests ... are created and their dimensions are defined ... from an independent source such as state law....").

[29] See An Act Relating to Education Reform, Chapter 235, Laws of 2010 § 704, SB 6696 (2009-10), adding a new section to RCW 28A.300.

[30] Kent School District Policy Nos. 4130, 4311Available at http://www.boarddocs.com/wa/ksdwa/Board.nsf/Public?OpenFrameSet (follow "Policies" hyperlink; then follow "Community Relations" hyperlink).

education and to have his parent direct his education.[31] The District's trespass notice not only restricted Ms. Green's access to the school, it also led to a criminal conviction when Ms. Green attempted to assert her right to guide her son's education and prepare him for the rigors of school.

3. In Spite of the Significant Interests at Stake, Ms. Green was Denied Even the Basic Procedural Safeguards of the Due Process Clause Resulting in an Unacceptable Risk of Erroneous Deprivation

The multiple significant constitutional rights at stake here required ample procedural safeguards. However, the Kent School District issued a so-called "trespass" order that prohibited Appellant Donna Green from setting foot on her son's school property—without any time limit and without any meaningful opportunity for Ms. Green to contest the sanction or the basis for issuing it. This violated due process.

At a minimum, due process requires notice and an opportunity to be heard "at a meaningful time and in a meaningful manner."[32] The U.S.

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[31] *Goss v. Lopez*, 419 U.S. at 576; *see also Crescent Convalescent Ctr. v. DSHS*, 87 Wn. App. 353, 359, 942 P.2d 981 (1997) ("As long as a property or liberty deprivation is not de minimis, its gravity is irrelevant to the question whether account must be taken of the due process clause.") (citing *Goss*, 419 U.S. at 576); *Fuentes v. Shevin*, 407 U.S. 67, 90 n.21, 92 S. Ct. 1983; 32 L. Ed. 2d 556 (1972) ("The relative weight of liberty or property interest is relevant, of course, to the form of notice and hearing required by due process. But some form of notice and hearing—formal or informal— is required before deprivation of a property interest that 'cannot be characterized as de minimis.'") (citations omitted).

[32] *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), *see Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313, 70 S. Ct. 652, 94 L.

Supreme Court has described the "root requirement of the Due Process Clause as being that an individual be given an opportunity for a hearing **before** he is deprived of any significant [liberty] or property interest."[33] Exceptions to the basic principle of notice prior to the deprivation are justified only in extraordinary circumstances.[34] Providing notice and a meaningful opportunity to be heard before a parent is excluded from her child's public school would reduce the risk of erroneous exclusion.

Even after the trespass order was entered, however, the District refused to provide any opportunity for a hearing at which Ms. Green could have challenged the order. The trespass admonishment Ms. Green received from the District was hopelessly inadequate if it was intended to serve as a post-deprivation notice. When the state seeks to terminate or withdraw certain rights, the U.S. Supreme Court has required that the notice given provide the recipient with specific information regarding the remedies and procedures available for challenging the threatened government action so that the individual can fully protect their interests.[35] The District presented its decision to Ms. Green as absolute with no formal channels through which

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Ed. 865 (1950).

[33] *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985) (emphasis added).

[34] *See U.S. v. James Daniel Good Real Prop.*, 510 U.S. 43, 62, 114 S. Ct. 492, 126 L. Ed. 2d 490 (1993).

[35] *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14-16, 98 S. Ct. 1554, 56 L. Ed. 2d 30 (1978).

to seek redress in spite of the fact that a statutory appeals process existed under Washington law.[36]

Moreover, Ms. Green was denied a hearing of **any** kind. The "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society."[37] This principle requires "some kind of a hearing" prior to the derivation of a property or liberty interest.[38]

Because the District made no attempt to inform Ms. Green of the available avenues for redress and because she received no hearing of any kind, Ms. Green was deprived of the process she was constitutionally due.

Even if a post-deprivation criminal-trespass trial could cure this serious defect after the fact —a doubtful proposition given the adverse consequences to the parent that such a trial threatens—Ms. Green's trial failed to do so. No first-hand witnesses testified to the events that allegedly gave rise to the District's trespass order. Instead, the trial court limited the trial to determining whether Ms. Green had violated the order, pretermitting any inquiry into whether the trespass order was appropriate. The only

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[36] RCW 28A.645.010.
[37] *Joint Anti-Fascist Comm. v. McGrath*, 341 U. S. 123, 168, 71 S. Ct. 624, 95 L. Ed. 817 (1951) (Frankfurter, J., concurring).
[38] *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. at 542; *Melton v. City of Ok. City*, 879 F. 2d 706, 721 (10th Cir. 1989).

testimony the State proffered regarding the issuance of the District's trespass order came from the District's general counsel, who was not a District employee when the alleged events giving rise to the order took place nor when the order itself was issued.[39]

4. The Governmental Interest in Ensuring a Safe and Effective Educational Environment Is Not Served by Indefinitely Banning a Parent from Her Child's School Without Due Process

The District is charged with providing each of its students with the ample basic education guaranteed by our state's constitution. No one questions that in meeting this charge, the State has a legitimate interest in regulating access to public school properties and "authority to restrict ... access" during the hours of instruction in order to ensure a safe and productive educational environment.[40] For instance, the State has a clear interest in keeping child molesters and drug dealers off school grounds. Also, the District may lock up school grounds after hours, thus denying parents and others access to school property, or it may limit classroom visits by community members.

But it does not follow from this proposition that the State may prohibit an individual parent from accessing the school during the hours the

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[39] AOB at 10, 15.
[40] Respondent's Br. at 14-16.

school is open, without first affording the parent a fundamentally fair opportunity to contest the State's asserted reasons for doing so.

By suggesting that a school's authority to exclude a "disruptive" parent justified the trespass order, the State assumes the very facts that due process requires be proven: that a parent indeed was "disruptive" to school operations. The whole point of Due Process is to provide a fundamentally fair hearing on the question of whether Ms. Green's continued access to school grounds, in fact, posed a disruptive threat to educational purposes that required some form of remedy. To this day, that hearing has never taken place. Moreover, even if Ms. Green were guilty of misconduct justifying the denial of her liberty interests, that guilt would not vitiate her right to due process. As the Supreme Court observed in connection with state attempts to terminate the parental rights of individuals believed to be incapable of adequate parenting: "The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."[41]

The State's interest in maintaining a safe and productive educational environment is not served by permitting Districts to issue broad, indefinite

[41] *Santosky,* 455 U.S. at 753.

trespass orders against an individual parent without affording even the basic due process protections of notice and an opportunity to be heard.

B. The District's Trespass Order was Constitutionally Invalid and Cannot Serve as the Basis for the Trespass Conviction Because Ms. Green's Speech at the Curriculum Night and on other Occasions was Protected by the First Amendment

Freedom of speech is a fundamental right protected by the First Amendment and the Washington State Constitution.[42] "[A] function of free speech under our system of government is to invite dispute,"[43] and this right may not be denied merely because the speech is considered defiant or contemptuous.[44]

Schools are not enclaves immune from the sweep of First Amendment rights.[45] Indeed, school administrators must exercise their discretion in matters of education "in a manner that comports with the transcendent imperatives of the First Amendment."[46] Thus, speech

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[42] U.S. CONST. Amend. I., Const. art. I, § 5.
[43] *Ashton v. Kentucky*, 384 U.S. 195, 199-200, 86 S. Ct. 1407, 16 L. Ed. 2d 469 (1966).
[44] *Street v. New York*, 394 U.S. 576, 593, 89 S. Ct. 1354, 22 L. Ed. 2d 572 (1969) (holding that defiant or contemptuous speech concerning the American flag was protected by the First Amendment)
[45] *Healy v. James*, 408 U.S. 169, 180, 92 S. Ct. 2338, 33 L. Ed. 2d 266 (1972).
[46] *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 864, 102 S. Ct. 2799, 73 L. Ed. 2d 435 (1982).

involving debate over public school curriculum and criticism of school administrators are protected expressions under the First Amendment.[47]

Ms. Green appears to have been a tireless campaigner for classroom curriculum change and an outspoken critic of the District and School.[48] Even before the school year began, she stated her resolve "to remain a pro-active parent advocating for [her] child's right to an education ... [and to] ask for what [she] need[ed] to help him at home, while ... continu[ing] to advocate for district wide changes to help all the students receive a fairer education."[49]

One of the two asserted bases for the District's October 2, 2006 trespass admonishment was Ms. Green's expression at the Curriculum Night at her son's school. As the District's letter sets forth, parents were invited to the school to participate in Curriculum Night and were invited to speak with school staff regarding curriculum matters. Ms. Green attended this public meeting as a parent and spoke about curriculum matters on issues of concern

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[47] *See e.g., Jenkins v. Rock Hill Local Sch. Dist.*, 513 F.3d 580, 588-89 (6th Cir. 2008) (parental speech about school officials is constitutionally protected, even if the speech is not about matters of public concern); *Tierney v. Vahle,* 304 F.3d 734, 742 (7th Cir. 2002) (Parents' complaint about sexual improprieties allegedly committed by a high school swimming coach was a matter of sufficient public interest to be protected by the First Amendment); *Chiu v. Plano Indep. Sch. Dist.*, 260 F.3d 330, 343-44 (5th Cir. 2001) (Expressions concerning change in public school curriculum were protected by the First Amendment);

[48] VRP 79:3-16, 92:8-15.

[49] CP 136.

to her and her son. It was speech about the District's policies, curriculum guidelines, and teaching materials that lead to the District's trespass admonishment.[50]

Ms. Green's speech and expressive activities at the curriculum night and on other occasions are instances of "pure speech" protected by the First Amendment. Her probing questions at curriculum night, although uncomfortable at times, were part of the classroom discourse and informed other parents of the state of their children's education. That Ms. Green's comments may have caused discomfort on the part of school staff, or may have been the subject of disagreement among other parents cannot justify governmental restriction or suppression based on those comments. Before restricting or prohibiting a particular expression of opinion, the District must have more.[51] "[A]n urgent wish to avoid [] controversy," will not suffice.[52]

1. The District May Not Exclude a Parent From Her Child's School Simply Because it Disagrees with the Parent's Viewpoint

The government may impose reasonable restrictions on the time, place, or manner of protected speech, but "[i]t is axiomatic that the

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[50] CP 138.

[51] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509, 89 S. Ct. 733, 21 L.Ed.2d 731 (1969) (holding that "[i]n order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.").

[52] *Id.*

government may not regulate speech based on its substantive content or the message it conveys."[53] This type of "viewpoint" discrimination is a violation of the First Amendment in any forum.[54]

Based on Ms. Green's pointed questioning at Curriculum Night and her statement to a student in the school parking lot which purportedly contradicted the direction of a school staff person, the District issued a trespass order indefinitely banning her from the school grounds. This is precisely the kind of viewpoint discrimination that is prohibited.

Moreover, in prohibiting Ms. Green from addressing the District's curriculum at future curriculum nights, the District chilled her right to petition the State for redress of her grievances concerning the quality of her son's education. "The First Amendment guarantees 'the right of the people . . . to petition the Government for a redress of grievances.' The right to petition is cut from the same cloth as the other guarantees of that

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[53] *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828, 829, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995).

[54] *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-07, 121 S. Ct. 2093, 150 L. Ed. 2d 151 (2001); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 391-93, 113 S. Ct. 2141, 124 L. Ed. 2d 352 (1993); *see also Hobbs v. Hawkins*, 968 F.2d 471, 481 (5th Cir. 1992) ([V]iewpoint discrimination violates the First Amendment regardless of the forum's classification.") The U.S. Supreme Court has identified three separate genus of fora: (1) the traditional public forum, (2) "limited" or "designated" public forum, and (3) the nonpublic forum. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800-02, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985).

Amendment, and is an assurance of a particular freedom of expression."[55] This denial constitutes yet another violation of Ms. Green's First Amendment rights.

Because the trespass order was issued in violation of Ms. Green's rights to freedom of speech and to petition the government, the criminal trespass conviction premised on that order also violates her rights and should be reversed.

V. CONCLUSION

For the reasons stated above, the ACLU respectfully requests this Court to reverse Ms. Green's criminal trespass conviction and hold that a parent's right to access her child's school may not be revoked absent due process of law, or in violation of the parent's rights to free speech and to petition the government.

DATED this 28th day of April, 2010.

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[55] *McDonald v. Smith*, 472 U.S. 479, 482, 105 S. Ct. 2787; 86 L. Ed. 2d 384 (1985).

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CERTIFICATE OF SERVICE

I, Stacy Maxwell, hereby certify under penalty of perjury under the laws of the State of Washington that on April 28, 2010 I caused the following documents to be served as noted on the persons listed below:

1. Motion for Leave to File Amicus Curiae Brief of the American Civil Liberties Union of Washington;
2. Brief of Amicus Curiae American Civil Liberties Union of Washington; and
3. this Certificate of Service.

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Dated at Seattle, Washington, this 28th day of April, 2010.

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