

March 19, 2018



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**VIA USPS, FAX AND E-MAIL**

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**RE: Unconstitutional Punishment of Student for Engaging in Political Speech**

Dear Principal Marable and Superintendent Davis,

I write in hope of remedying the unconstitutional punishment inflicted on my client, Noah,<sup>1</sup> because he engaged in First Amendment protected political speech. As described in detail below, Noah was suspended for two (2) days from Robert McQueen High School (RMHS) because he allegedly used offensive language when he contacted Congressman Mark Amodei to advocate for stricter gun control laws. Noah's political speech occurred while he was participating in the national school walk-out on March 14th. This walk-out was not a school sponsored activity, and in fact, Noah received an unexcused tardy for participating. Moreover, Noah's activity did not disturb or impact any aspect of the educational environment. The only reason RMHS administration even discovered that Noah made this call is because someone from Congressman Amodei's office called the school in what can only be considered retaliation for expressing his political viewpoint to the Congressman. I also understand that RMHS is further punishing Noah by refusing to seat him as class secretary/treasurer.

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<sup>1</sup> Noah's last name is withheld in this letter for privacy purposes. I am sure you are aware of the student at issue, but if not, please contact me directly.



The punishment imposed on Noah’s political speech in this situation violates the First Amendment of the United State Constitution, and is unconstitutional viewpoint discrimination by RMHS. Moreover, disciplining a student and permanently damaging their future college prospects because they actively participated in democracy will have a chilling effect on other students who are considering engaging in the political process. In a time when students across the county are expressing their views about matters at the forefront of our national political discourse, schools should be especially mindful of their roles in educating young people as citizens and should not “strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.”<sup>2</sup>

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### **FACTUAL BACKGROUND**

The facts as I understand them are as follows:

Noah, a junior at Robert McQueen High School (RMHS), is an exemplary student. While at RMHS, Noah has participated in a number of clubs and extracurricular activities including the Chinese Club, the Spanish Club, the Debate Club, Academic Olympics, and Academic World Quest, where his team was the Nevada State Champion and placed 10<sup>th</sup> in the national finals. Noah’s Mock Trial team advanced to state championships both years he was on the team. Noah decided this year to devote his focus to excelling on the debate team. Noah serves on the prestigious travel debate team and travels across the country to compete. Next year he is planning to serve as captain of the debate team. Noah is also running for the position of Class Secretary/Treasurer. Noah has never received a detention and has never been disciplined for poor academic performance or behavioral concerns at RMHS. Noah has only been tardy twice this semester – once because he was a few minutes late to school in the morning and once, as described below, because he participated in the school walkout protesting a lack of gun control in the United States. Noah is not afraid to speak about matters of public concern and is the type of person that works to spark social change. He will be an alumnus any school would be proud to call their own.

RMHS, however, has shown a disturbing pattern of stifling Noah’s First Amendment rights and has engaged in viewpoint discrimination by punishing Noah for engaging in political speech.

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<sup>2</sup> *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

## **Noah Contacts His Congressman To Express His Political Viewpoint On Gun Control**



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Most recently, Noah decided to participate in the national school walkouts that occurred across the country on March 14, 2018. As you are aware, these walkouts were organized by students of all ages to protest the lack of gun control laws in the United States and were created in response to the recent Parkland school shooting where 17 students and teachers were tragically murdered while at school.

The walkout at RMHS was planned entirely by students and RMHS actively opposed the students' attempts to organize for the walkout. RHMS teachers notified their students that anyone participating in the walkout will receive an unexcused tardy. RHMS did not condone, support, or sponsor the walkout in anyway. This walkout was not a school sponsored activity, and as threatened, all students who participated in the walkout, including Noah, received an unexcused tardy

As part of this walkout, the student organizers at RMHS encouraged participants to call their elected representatives and make the case for laws restricting access to guns in America. Noah decided calling his congressman and senators was a great way for him to continue to engage in the political process.

During the 17-minute walkout, as an act of petitioning his government, Noah called Congressman Mark Amodei's office and asked that Congressman Amodei vote to make bump stocks illegal and vote to raise the minimum wage to buy a gun from 18 years to 21 years. Noah was, and still is, angry at the failure of congress to engage in meaningful gun control reforms. In the heat of the moment, fueled by his anger and by his sincerely held belief that students and members of our community need protection, Noah used emphatic language when speaking to Congressman Amodei's staff. Noah said "congress people who are not acting on gun control reforms need to get off their fucking asses and do something." His plea, although marked with colorful language, was political speech and was said in connection with petitioning his government. Congressman Amodei's staff member thanked Noah for his time and hung up the phone. Noah ended the call feeling proud that he was acting to force change on an issue he was passionate about.

Noah did not engage in, nor threaten to engage in, nor did anyone as the result of his conduct in fact commit or threaten to commit any act of violence. Nor did the staff person seem offended by Noah's comment, or express any anger.

It is doubtful that Noah's call was overheard by other students. While Noah was making this call, many other students were making calls as well. The environment was noisy and full of protestors.



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### **RMHS Suspends Noah And Refuses to Seat Him As Class Secretary/Treasurer Because He Petitioned His Congressman**

Unbeknownst to Noah, a staff member from Congressman Amodei's office called RMHS to complain that he felt Noah had used disrespectful language while engaging in First Amendment protected activity.<sup>3</sup> RMHS then took the extreme measure of suspending Noah from school for two (2) days for "defiance/disrespect/insubordination."<sup>4</sup> Specifically, RMHS noted the reason for Noah's suspension was that he "contacted Congressman Amodei's office [] during the gun control protest and made offensive, disrespectful, and vulgar comments to the party on the other end of the line."<sup>5</sup> RMHS went on to note that they found out about this because "a staff member from the congressman's office contacted McQueen to advise and report the incident." *See* Exhibit B.

Noah protested this extreme disciplinary action and even offered to serve detention instead. RMHS refused to budge from the severe punishment of suspension.

RMHS also appears to have prohibited Noah from serving as class secretary/treasurer because of this incident. Noah was running unopposed for class secretary/treasurer, yet when the winners for all positions were announced (President, Vice President, Historian), no name was given for the position of class secretary/treasurer. And, although Noah has not been told directly that he cannot serve, RMHS administrators have indicated to other students in charge of the election process that Noah will not be seated as class secretary/treasurer because of this suspension.<sup>6</sup>

Noah is unaware of any other student who received such a harsh punishment for using profanity, in any context, political or otherwise. In fact, Noah often hears student using

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<sup>3</sup> Although not the purview of this letter, it is also important for you to understand that Congressman Amodei's attempt to punish Noah for engaging in political speech is an unconstitutional act of retaliation. The ACLU is working to hold Congressman Amodei and his staff responsible for these reprehensible and retaliatory actions that both violate Noah's First Amendment rights, and cause a horrible chilling effect to others who might want to petition their government.

<sup>4</sup> *See* Exhibit A

<sup>5</sup> *See* Exhibit B

<sup>6</sup> *See* Exhibits C, D, and E.



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profanity within earshot of teachers and administrators on campus. To his knowledge, these students have never faced consequences – and certainly not such a harsh punishment as suspension and removal from an elected position – for using inappropriate language.

Moreover, from conversations RMHS administration had with both Noah and his parents, it appears that RMHS may have also based Noah's suspension, in part, on his previous political speech. At the McQueen debate tournament earlier this year, instead of speaking about the assigned topic, Noah chose to talk about how President Trump's policy positions and divisive and often hateful rhetoric is harmful to the community. The other student Noah was debating was offended by his political statements and filed a bullying complaint. After investigation, the complaint was determined to be unfounded and Noah was never disciplined or suspended. Even though it was not required, Noah wrote a letter of apology to the other student explaining he did not mean to hurt her feelings.

Yet, when Noah met with the Principal and Vice Principal of RMHS to discuss his suspension, the both brought up the incident as an example of prior bad behavior. And, when Noah's mother called RMHS to discuss his suspension, the school said that Noah's political speech as the debate tournament should have been a learning experience to keep his emotions under control.

### **RMHS Engaged In A Pattern Of Trampling On Noah's First Amendment Rights**

This is not the first time that RMHS has sought to punish Noah for exercising his First Amendment Rights. During the fall of last year, Noah noticed that RMHS was implementing the dress code in a discriminatory manner – they were punishing the female students for baring their shoulders but not the male students. In protest of this discriminatory treatment Noah started a hashtag campaign called “#FreeTheShoulder.” Noah then wore a dress code approved shirt to school that said “Free the Shoulder.” The administration told him that he had to take shirt off or he would face disciplinary consequences. Not knowing at the time that he was well within his constitutional rights to wear this shirt, he complied with the school's request.

## LEGAL ANALYSIS OF LIABILITY

### I. FIRST AMENDMENT VIOLATIONS

RMHS punished Noah for exercising his First Amendment right to engage in political speech. As explained below, the discipline imposed is unconstitutional and must be overturned immediately.

#### *a. RMHS Violated Noah's First Amendment Rights By Punishing Him For Contacting His Congressman Outside of School*

There is no doubt that Noah was engaging in First Amendment protected activity when he asked his congressman to implement gun control measures. Political speech is “at the core of what the First Amendment is designed to protect.”<sup>7</sup> And Noah is well within his constitutional rights to use emphatic language in expressing his views when contacting Congressman Amodei's office, as “governmental bodies may not prescribe the form or content of individual expression.”<sup>8</sup>

Importantly, Noah's use of profanity in his impassioned plea for gun control legislation did not occur during school or at a school sanctioned or school sponsored event. As noted above, RMHS actively discouraged students from participating in the nationwide walkout, and teachers informed their students that anyone who walked out would receive an unexcused tardy. RMHS followed through with this threat by marking Noah tardy after he walked out of class in protest. RMHS cannot simultaneously mete out punishment to Noah for not attending class yet also claim that Noah's activities during that time were considered to have occurred during school.

The United State Supreme Court has indicated that schools have do not necessarily have the power to punish lewd or profane *out-of-school* speech. In *Morse v. Frederick*, 551 U.S. 393, 405 (2007) the court observed that although a school could punish a student for giving a sexually suggestive speech during a school assembly, had the student “delivered the same speech in a public forum outside the school context, it would have been protected [speech].”<sup>9</sup>

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<sup>7</sup> *Morse v. Frederick*, 551 U.S. 393, 403 (2007)(quoting *Virginia v. Black*, 538 U.S. 343, 365)

<sup>8</sup> *Cohen v. California*, 403 U.S. 15 (1971).

<sup>9</sup> The concurrence in *Bethel Sch. Dist. No. 403 v. Fraser*, also discussed that if the student at issue had given a similar sexually suggestive “speech outside of the school environment, he could not have been penalized simply because government officials considered his



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The Ninth Circuit has suggested that schools may only regulate out-of-school speech when there is a sufficient nexus to the school or it is reasonably foreseeable that the speech will “spill over into the school environment.” Neither of these predicates exist here.<sup>10</sup>

In *C.R. v. Eugene School District*, the Ninth Circuit found that a sufficient nexus existed to the school when a middle school student followed two other students on their way home and directed sexually harassing speech at them, noting, among other factors, that the speech occurred exclusively between students.<sup>11</sup> Here, however, Noah placed the phone call at issue during a protest the school had specifically disavowed, and expressed his comments not to another student, but to an employee of an elected official. There is not a sufficient nexus between Noah’s conduct and the school for RMHS to justify punishing him for his speech.

Nor is it reasonably foreseeable that Noah’s out-of-school phone call to his elected representative’s office would “spill over into the school environment.” In *C.R. v. Eugene School District*, the court in that case found that it was foreseeable that the student’s out-of-school conduct at issue would spill over into the school environment because the conduct occurred between students and the harassment was likely to continue into school hours.<sup>12</sup> Yet, here, Noah’s speech was very unlikely to have ever reached the school environment, absent the unconstitutional retaliation by Congressman Amodei’s office.<sup>13</sup> Again, Noah’s speech was expressed to his congressman’s employee, not another student. It is unreasonable to believe that a single phone call with a congressman’s employee would ever reach the school environment, let alone jeopardize the work or learning of his classmates.

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language to be inappropriate.” 478 U.S. 675, 688 (1986)(Brennan, J. Concurring)(citing *Cohen v. California*, 403 U.S. 15, (1971). See also *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 932 (3d Cir. 2011)(noting that “*Fraser* does not apply to off-campus speech” and holding that *Fraser* did not justify a school’s punishment for “profane language outside the school, during non-school hours.”).

<sup>10</sup> See *C.R. v. Eugene Sch. Dist.* 4J, 835 F.3d 1142, 1149 (9th Cir. 2016); *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir. 2001); *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1068-69 (9th Cir. 2016); see also *Shen v. Albany Unified Sch. Dist.*, No. 3:17-CV-02478-JD, 2017 WL 5890089, at \*4 (N.D. Cal. Nov. 29, 2017)(acknowledging the framework for out-of-school speech in *C.R. v. Eugene*)

<sup>11</sup> *C.R. v. Eugene Sch. Dist.* 4J, 835 F.3d 1142 (9th Cir. 2016).

<sup>12</sup> *Id.*

<sup>13</sup> See supra, footnote 3.





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Yet, even if Noah's conduct was susceptible to regulation by the school, the Ninth Circuit applies "*Tinker* to evaluate the constitutionality of the school's imposition of discipline" for out-of-school conduct.<sup>14</sup> As you should be aware, "[u]nder *Tinker*, schools may restrict speech that 'might reasonably lead school authorities to forecast substantial disruption of or material interference with school activities' or that collides 'with the rights of other students to be secure and to be let alone.'"<sup>15</sup> There is no evidence that Noah's conduct would disrupt or interfere with school activities, or collide with the rights of other students. Noah's phone call did not interrupt school activities. Indeed, the point of the walkout was to leave the classroom and abandon the normal school day for seventeen minutes. Noah's phone call did not involve any students, and it is doubtful that other students even heard Noah make the call.

"Whatever the legal test ultimately applied, courts consistently engage in a circumstance-specific inquiry to determine whether a school permissibly can discipline a student for off-campus speech."<sup>16</sup> The circumstances here simply don't warrant any discipline by the school, let alone the harsh punishments of suspension and ineligibility for elected office at the school.

***b. Even If Noah's Speech Occurred "On-Campus," His Punishment Is Still Unconstitutional.***

Even if Noah's speech is considered to have occurred at school, it is a well settled principle that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>17</sup> Courts may regulate and limit on-campus student speech in certain circumstance, however, Noah's speech is not of a character that the school can impose punishment on without running afoul of the Constitution.

The Supreme Court specifically addressed the issue of lewd and vulgar on-campus speech in *Bethel School District v. Fraser*.<sup>18</sup> In *Fraser* the Court found that it was constitutionally permissible to punish a student who delivered a sexually suggestive speech

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<sup>14</sup> *C.R. v. Eugene Sch. Dist. 4J*, 835 F.3d 1142, 1150 (9th Cir. 2016).

<sup>15</sup> *Wynar*, 728 F.3d at 1070 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969)).

<sup>16</sup> *C.R. v. Eugene Sch. Dist. 4J*, 835 F.3d 1142, 1150 (9th Cir. 2016).

<sup>17</sup> *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969); *Behymer-Smith ex rel. Behymer v. Coral Acad. of Sci.*, 427 F. Supp. 2d 969, 972 (D. Nev. 2006)

<sup>18</sup> *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986).





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to a captive audience at a mandatory school assembly of about 600 students, and that schools have the ability to determine whether lewd speech would undermine the school's basic educational mission.<sup>19</sup> Noah's speech however, differs from that at issue in *Fraser* in several significant ways. Unlike *Fraser*, Noah did not conduct his speech in front of a captive audience of students, rather he made an individual phone call to his congressman's office. Noah's speech used emphatic language for that very reason -- to emphasize his passion in a political context. He did not engage in elaborate sexual innuendo for the sake of attention, like the speech at issue in *Fraser*. And, while *Fraser* suggests that profanity falls in the same category as speech that is lewd or obscene, it is extremely doubtful that profanity alone (if this was even profane), as used in this context with political speech, would justify punishment.

***c. Noah's Overly Harsh Punishment Indicates Constitutionally Impermissible Viewpoint Discrimination.***

Here, it appears that the RMHS inflicted a harsher punishment on Noah than it has inflicted on other students who have expressed purported vulgar comments or disrespectful behavior. The Constitution does not permit a school administrator to punish a student more harshly for conduct that is associated with political speech than it would otherwise.<sup>20</sup> Giving a harsher punishment to Noah because he engaged in political activism gives rise to the concern that the school is engaged in viewpoint discrimination.<sup>21</sup>

Nevada statutes describe a number of severe offenses as warranting a mandatory suspension, including, battery on an employee of a school, possession of a firearm or dangerous weapon, the sale or distribution of controlled substance, and a habitual disciplinary problem.<sup>22</sup> A relatively minor offense of using coarse language in connection

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<sup>19</sup> *Id.* at 677.

<sup>20</sup> See, e.g., *Pinard v. Clatskanie Sch. Dist.* 6J, 467 F.3d 755, 770 (9th Cir. 2006) (explaining that a school official is liable for First Amendment retaliation if students would not have been similarly punished if they had not engaged in the protected speech); *Rolf v. City of San Antonio*, 77 F.3d 823, 827 (5th Cir. 1996) ("It is clear that state action designed to retaliate against and chill political expression strikes at the heart of the First Amendment."); see also *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

<sup>21</sup> "Viewpoint discrimination ... occurs when the specific motivating ideology or the opinion or perspective of the speaker is the *rationale* for the restriction .... [W]here the government is plainly motivated by the nature of the message rather than the limitations of the forum or a specific risk within that forum, it is regulating a viewpoint rather than a subject matter." *Eagle Point Educ. Ass'n/SOBC/OEA v. Jackson Cty. Sch. Dist. No. 9*, 880 F.3d 1097, 1106 (9th Cir. 2018).

<sup>22</sup> See NRS 392.466.



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with political speech pales in comparison. Yet Noah was not only subjected to a suspension, RMHS also took away his chance to serve as class secretary/treasurer. This means that he has lost the ability to engage and learn from serving in a leadership position. Both the suspension and the refusal to seat Noah as class secretary/treasurer will detrimentally impact his future chances of college admission, only because he petitioned his congressman. This overly harsh discipline, coupled with RMHS's previous threats of discipline to Noah for engaging in politically motivated speech only further demonstrate that RMHS is treating Noah differently because of the substance of his speech.

## **II. Noah's Harsh Discipline and Unconstitutional Punishment is Antithetical to Educational Goals and is Bad Policy**

It is dismaying that RMHS appears to be determined to stifle Noah's civic participation. The ability to criticize your government without reprisal is "the central meaning of the First Amendment."<sup>23</sup> And, punishing Noah for engaging in democracy is antithetical to the Washoe County School District's guiding principle of "encouraging, protecting and ensuring student freedom of speech, press and express, and rights under the U.S. Constitution."<sup>24</sup> Noah's harsh punishment is also in contravention to the District's stated policy of striving to "reduce out of school suspension and emergency suspension by increasing the use of positive behavior interventions and supports in schools."<sup>25</sup> Noah was not given any other opportunity to correct the behavior that the school purportedly found concerning. Instead it rushed to impose one of the most serious disciplinary tools available. This not only discourages Noah from continuing to speak up on matters of public concern, but it creates a chilling effect and send a message to all other students that if they petition their government, they may face consequences at school.

As the Supreme Court has explained, public schools are the mechanism by which we prepare "individuals for participation as citizens" and preserve "the values on which our society rests."<sup>26</sup> I hope that RMHS will recognize its mistake in punishing Noah and instead work to teach students about the value of civic engagement

## **CONCLUSION**

Noah engaged in political speech, petitioned his government about a matter of public concern and as a result was unconstitutionally punished by RMHS. In order to resolve this matter, we request that you immediately overturn Noah's suspension and erase any

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<sup>23</sup> *New York Times v. Sullivan*, 376 U.S. 254, 273 (1964).

<sup>24</sup> Washoe County School District's Board Policy 5100, Student Behavior.

<sup>25</sup> *Id.*

<sup>26</sup> *Ambach v. Norwick*, 441 U.S. 68, 76 (1979)

indication of this discipline from his student record, and immediately seat Noah in his elected position as class secretary/treasurer. Please respond to me by close of business on **March 26, 2018** with whether you intend to remedy Noah's unconstitutional discipline. If we do not hear from you by then, we reserve the right to pursue all appropriate legal remedies. Feel free to contact me with any questions or concerns at [rose@aclunv.org](mailto:rose@aclunv.org), or 702-366-1902.



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Best,

Amy Rose

A handwritten signature in blue ink that reads "Amy Rose". The signature is written in a cursive, flowing style.

Legal Director  
ACLU of Nevada