STATE OF NORTH CAROLINA NEW HANOVER COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION FILE NO. 21 CVS 003915

DAVID A. PERRY, PLAINTIFF, vs. NEW HANOVER COUNTY BOARD OF EDUCATION; NEW HANOVER COUNTY SHERIFF'S OFFICE; DEFENDANTS;	BRIEF IN SUPPORT OF THE PLAINTIFF'S MOTION FOR SUMMARY JUDGEMENT

HERE COMES THE PLAINTIFF, who hereby submits this brief in support of its Motion for Summary Judgement, and in opposition to the Motion for Summary Judgement submitted by the Defendant, the New Hanover County Board of Education.

STATEMENT OF THE FACTS

All parties in this case completely agree on the relevant material facts of what has happened, and agree that summary judgment, as a matter of law, is warranted in this case. This is witnessed by the parties' agreement to, and joint submission of, the Proposed Joint Stipulations.

What has happened (and may happen again) is that the New Hanover County Board of Education has conducted in-person school board meetings and required that everyone in the meeting wear a mask during the entirety of the meeting, save when an individual is at a microphone and speaking during a public participation segment of the meeting. To enforce this requirement, the school board has enlisted the aid of deputies of the Defendant, the New Hanover County Sheriff's Office, who have denied entry to the meeting space to those not

wearing masks, and removed members of the public from the meeting space who (by observation of the school board Chair) took off their mask while in the meeting space, and who was not engaged in speaking during a public participation segment of the meeting. Finally, the parties agree that at certain times the school board has conducted electronic virtual meetings, and no physical location was provided to the public to hear and/or participate in these meetings.

The only dispute between the parties comes down to a matter of law. Do the actions of the Defendants violate North Carolina law and/or the state and federal constitutions? The Plaintiff will argue that they do, while the Defendants will argue that they do not. The Plaintiff will not regurgitate all the specific material facts in this case here and refers this Court to the Proposed Joint Stipulations for more details.

SCOPE OF THE CASE

Across the nation there has been an ongoing and vigorous debate regarding mask mandates in public schools. The sometimes-heated discussion on whether these mask mandates are necessary or whether they infringe on the rights of parents and impede learning, is an important one. However, this debate is outside the scope of this lawsuit. The Plaintiff is NOT arguing that the Defendants do not have a right to require masks within classroom and other scholastic settings. The Plaintiff's only contention is that they do not have the right to apply such restrictions to school board meetings.

INTRODUCTION

When people speak of the 1st Amendment they most often talk about freedom of religion or freedom of speech. However, there are actually 5 rights guaranteed in that amendment: freedom of speech, religion, press, assembly, and the right to petition our government. The recognition of the right to petition dates back to the Magna Carta in 1215. While modest in scope and applicable only to nobility, the right to petition was strengthened in the 17th century by the Petition of Right (1628) and the English Bill of Rights (1689) and became a recognized right of every English subject. The ability for every citizen to be able to redress their grievances by petitioning the crown was very important to the American colonists. So much so that it became a major justification for the American revolution.

> In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince, whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people.
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> - Declaration of Independence (1776)

The United States was formed on the unique ideological basis that human beings are created equally free and endowed with unalienable rights, that the purpose of government was to secure those rights, and that government "derives its just powers from the consent of the governed" (ibid). The notion of the "consent of the governed" means that a government "of the people, by the people, and for the people" (Gettysburg Address, 1863) has to be open, transparent, and responsive to the pleas of its citizens. That doesn't mean that our government is always going to respond in the way that we wish, but it does mean that its citizens can rely on the fact that its government will not act in secrecy and will at least listen to its concerns.

There is strength in numbers. The grievance of one sole citizen may not provoke a government body to act justly. That's why our US Constitution links the right to petition with the right of free assembly.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
>
> - US Constitution, Amendment I (1789)

The Founders fully expected that citizens would assemble together as a group and lobby their government together for maximum impact. The Founders of North Carolina held the same expectations.

> That the people have a right to assemble together, to consult for their common good, to instruct their Representatives, and to apply to the Legislature, for redress of grievances.
>
> - NC Constitution, Declaration of Rights, XVIII (1776)

The right to petition is not just an individual right, but a collective right as well.

The founders of our state and of our nation knew that men in power were corruptible. That's why they divided the power between the country and the states, and between the branches of government.

> Power tends to corrupt, and absolute power corrupts absolutely. Great men are almost always bad men, even when they exercise influence and not authority, still more when you superadd the tendency or the certainty of corruption by authority.
>
> - John Dalberg-Acton, Letter to Bishop Creighton (1887)

Government officials, if left to their own devices, often act in self-interest, instead of the interest of the people. To facilitate their corruption, many NC political bodies spent decades hiding government information and conducting secret meetings, so that the voting public would be none the wiser. The right to petition is meaningless if the public is unaware of what their government is doing, and if meetings of government bodies are closed and secretive.

Something had to be done, and starting in the 1960s, change finally came. Following the passage of the federal Freedom of Information Act, 5 USC 552 in 1967, a wave of legislative efforts to increase government transparency at the state level started to take off. Although NC originally passed the Public Records Law, G.S. 132-1 => 132.10 way back in 1935, the main purpose of the law was preservation of government records that were routinely lost. It wasn't until the law was amended in 1975 and 1995 that the majority of government records in NC were available to the general public. The NC Open Meetings Law, G.S. 143-318.9 => 143-318-18, was originally enacted in 1974. It was strengthened by amendments in 1979, 1991, and 1994. These amendments were necessary because government bodies within the state were still trying to meet secretly by using loopholes in previous versions. It was only due to the tenacity of the North Carolina Press and the strong desire of NC citizens for transparency and citizen input, that these two pillars of a state government operating" by the consent of the governed" are as strong as they are today. This lawsuit asserts that the actions of the Defendants have violated the clear mandates of the NC Open Meetings law. This is not a set of merely technical violations. The NC Open Meetings law has been designed to protect our fundamental individual and collective right to fully petition our government. These violations are serious.

N.C. OPEN MEETINGS LAW

The NC Open Meetings Law (G.S. 143-138.9 – 143-138.18) directly applies to meetings of the Defendant, the New Hanover County Board of Education. Clearly, the school board is a "public body" as defined in G.S. 143-138.10(b). As such, and because the school board does not meet any of the exceptions specified in G.S. 143-318.11, G.S. 143-318.14A, or G.S. 143-318.18, the board is subject to the requirement that their meetings "shall be open to the

public, and any person is entitled to attend such a meeting" (G.S. 143-318.10(a)). G.S. 143-318.10(a) also states that "Remote meetings conducted in accordance with G.S. 166A-19:24 shall comply with this subsection even if all members of the public body are participating remotely." Furthermore, G.S. 143-318.11 states that the "public body" may go into "closed session" for the permitted purposes that are delineated in G.S. 143-318.11(a). However, it is clear that the N.C. Open Meetings Law establishes a statutory right for the Plaintiff (and any other person) to physically attend a non-remote school board meeting that is in open session.

As the stipulated facts attest to, the school board has clearly operated many open sessions of non-remote meetings since August of 2021 and in most instances mandated that all attendees of these meetings must wear masks (except when speaking during a public comment segment of the meeting). They have created attendance requirements for their meetings that have no basis in the N.C. Open Meetings Law, or anywhere else in the General Statutes of North Carolina. In so doing, they have violated the statutory rights of the Plaintiff (and many others) to attend these meetings during open session.

The school board has also conducted a couple of remote electronic meetings since August of 2021. However, they have not complied with the requirements of G.S. 143-318.13(a) that demands that the school board "provide a location and means whereby members of the public may listen to the meeting." The Defendant, the New Hanover County Board of Education, argues that a "physical location" is not necessary to comply with this requirement, and that a link to their YouTube channel sufficiently complies with this section of the law. Considering that the N.C. Open Meetings Law was last amended in 1994, that internet bandwidth at that time was not fast enough to handle audio streaming, never mind video streaming, and that YouTube only began business in 2005, the clear intent of the NC General Assembly at the time was that G.S.

143-318.13(a) should require a physical location. The Plaintiff concedes that internet bandwidth has increased dramatically in most sections of North Carolina and that the requirement for a physical location may no longer be necessary under normal circumstances. However, the law is the law, and the Defendants have a duty to comply with it until it is updated by the NC General Assembly.

PUBLIC COMMENT

The N.C. Open Meetings Law does not specifically demand that government bodies allow members of the public to address the public body. However, G.S. 115C-51 demands that local boards of education are required to hold a period of public comment during any month that they hold a regular meeting. While this statute enables the local school board to adopt reasonable rules on who can speak, the examples given clearly suggest that these rules would be strictly there to ensure that the segment doesn't eat up the entire meeting and that order and decorum are maintained. So while there may not be an explicit individual statutory right for every person to speak at a particular school board meeting, the General Assembly certainly did not intend to grant the power to local school boards to discriminate against segments of the population who might like to speak, but who can't or will not wear a mask.

The joint stipulations demonstrate that this is exactly what has been happening. It is true that speakers are allowed to take their mask off when in the act of speaking, but they must wear one in order to enter the meeting space, continue to wear it while they wait for their turn to speak, and then place it back on after speaking until they leave the meeting space. This clearly discriminates against people who have medical issues that are aggravated by mask wearing. It also constitutes viewpoint discrimination towards those who would consider it an ethical lapse to

simply go along with a mask mandate they consider an infringement on their personal liberty just so they can have an opportunity to speak. Parents should not have to choose between participating in local school board meetings for the benefit of their children or teaching those children that its ok to give into tyranny.

It could be argued that a member of the public could watch the meeting on their mobile phone from outside the meeting space, wait for their time to speak, and then quickly leave the meeting and watch the remainder of the meeting on their mobile phone. It could be argued that the amount of time a person would actually have to wear a mask in this scenario would be quite limited. There are several problems with this argument. First, it assumes that every member of the public wishing to speak has a mobile smartphone with access to the school district's YouTube channel. Some people can't afford a smartphone. Others might have one, but their service might be interrupted. Secondly, the weather outside might be inclement. During a cold, rainy, or snowy evening, does anyone think it's fair that we require people who can't or won't wear masks to wait and get sick before they are allowed to speak? If they don't want to get sick, then they could leave a voicemail on the school district's voicemail system or email school board members. But, as jointly stipulated, these messages would not be played at the school board meeting or read into the record.

However, the largest problem with this argument is that lessens the ability for these people to join together with other like-minded individuals and petition their government collectively. As mentioned before, the Founders clearly envisioned that the right to petition was not only an individual right, but when used in conjunction with our right to assembly, was a collective right as well. Groups of people who share a viewpoint are simply going to be more influential if they work closely together when at a school board meeting. Based on what has been

said so far and the reaction of the board and the public, they can ask their speakers to tailor their message, or change the order of speakers. Individuals can also identify and connect with others that share their viewpoints, even if they were complete strangers before. As a result, they can work together to plan a larger and more concerted effort at a future school board meeting. All these collective benefits are denied to individuals if they are forced to wait outside until it's their turn to speak.

STATUTORY VIOLATIONS

It is clear the Defendant, the New Hanover County Board of Education has violated the N.C. Open Meetings Law (N.C.G.S. Chapter 143, Article 33C) and the state's Elementary and Secondary Education Statute (N.C.G.S. Chapter 115C, Article 5) by requiring that masks be worn at school board meetings. By enlisting the aid of deputies of the Defendant, the New Hanover County Sheriff's Office, they have denied entry to the Plaintiff (and many others) who cannot (for medical reasons) or will not wear a mask to their school board meetings. The Plaintiff has a statutory right to attend such meetings, and nothing in the statutes of North Carolina allows them to place arbitrary restrictions on that right.

The Defendants may argue that by providing a YouTube channel that the public can utilize to watch their meetings is enough. It is not. Nothing in the general statutes allows them to do that. If the Defendants have a problem with the general statutes, then they should take it up with the General Assembly. The fact is that a YouTube channel is one-way communication, while a live in-person meeting allows members of the public to not only see and hear what has been said, but grants them the opportunity to directly communicate with the board, the press, and the community.

STRICT SCRUTINY

Even if this Court finds that the Defendants have not violated North Carolina's general statutes, the school district's mask mandate (as applied during school board meetings) still violates the Plaintiff's right to assembly and petition as guaranteed by the US Constitution (1st Amendment) and the NC Constitution (Article 1, Sec. 12). The US Supreme Court has recognized the importance and fundamental nature of these rights.

> The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental. As this Court said in United States v. Cruikshank, 92 U.S. 542, 552, 23 L.Ed. 588: 'The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.'
>
> - De Jonge v. Oregon, 299 U.S. 353 (1937)

Even if the NC Constitution did not also protect our fundamental rights of assembly and petition, the privileges and immunities clause of the 14th Amendment to the US Constitution would still require the states to uphold our federal rights of assembly and petition.

Beginning with Footnote 4 of United States v. Carolene Products Company, 304 U.S. 144 (1938), the US Supreme Court developed the strict scrutiny standard that the Court has used ever since when evaluating restrictions upon fundamental rights, whether they are specifically guaranteed in the Bill of Rights (such as assembly and petition are), or whether they be prenumbral in nature (right to travel, marital privacy, marriage, etc.). It is clear from the stipulated facts that the assembly and petition rights of the Plaintiff are being restricted upon. The Board of Education provides some virtual alternatives to members of the public who wish to view and participate in school board. But it is obvious that these "separate and unequal" alternatives are nonetheless restrictions. The only legal question that remains is whether these restrictions are constitutionally permissible. Since the rights of assembly and petition are fundamental rights, the Court should evaluate it under the strict scrutiny standard.

In order for a government restriction on a fundamental right to survive strict judicial it must pass the following test that the US Supreme Court has authorized:

1. That the restriction is necessary to achieving a "compelling state interest"
2. That the restriction is the "least restrictive means" available to achieve that interest.
3. That the restriction is "narrowly tailored" to address the specific compelling interest alone.

This is not an easy test to pass! Unlike rational basis review, the government (and not the Plaintiff) has the burden of proving that the restriction passes this test.

As of yet, the Defendants have not even attempted to prove that the restriction should survive strict scrutiny. However, given the fact that they might attempt to, the Plaintiff will demonstrate that the restrictions the Defendants have imposed can't possibly survive review under the strict scrutiny standard.

The Defendants might argue that they have a "compelling state interest" in stopping the spread of COVID-19 amongst the local population. Even though the coronavirus has killed a lot less people than cancer and a lot of other diseases, it still accounts for many tragic deaths across the state and the country. Therefore, the Plaintiff will concede, for sake of argument, that the first throng of the strict scrutiny test has been met.

However, strict scrutiny also requires that the restriction be the "least restrictive means" possible to achieve the "compelling state interest." If less restrictive means are available, then the restriction in question fails this part of the test. While some scientific studies have shown that masks can be an effective means to stop the spread of COVID-19, nobody would claim that it is foolproof, or that there aren't other measures available to combat the coronavirus. First and foremost, are vaccinations. Studies have shown that vaccinated people are far less

likely to be infected with, get seriously ill or die from, or spread the COVID-19 virus. The school board could certainly have made an exception to its mask mandate attendance policy for those who can show proof of a COVID-19 vaccination. Yet, as is jointly stipulated, they have not. Another alternative means revolves around testing for the virus. People who have had a negative COVID-19 test in the last 1-2 days are very unlikely to be infected, at least to the extent where they can spread the virus to others. The school board could have made an exception to its mask mandate attendance policy for those who could show a recent negative COVID-19 test. As is jointly stipulated, they have not. Finally, there are many social distancing and other types of measures that the school board could have taken to mitigate the spread of COVID-19 during its meeting. Here are a few examples:

1. Limit the attendance capacity of the meeting space and spread out chairs so that 6-foot social distancing can be maintained.
2. Choose a larger meeting space and spread out the chairs so that 6-foot social distancing can be made.
3. Create a separate seating area, speaking microphone, and entrance for those who are not wearing masks
4. Set up more hand sanitizing stations throughout the meeting space to stop the spread of the virus.
5. Choose to use an outdoor meeting space.

It is understood that the Plaintiff has not presented evidence that these possible measures would work just as well as the mask mandate. However, these measures definitely sound plausible, and this Court should remember that it is the burden of the government to prove that these lesser restrictive means would not be sufficient in stopping the spread of COVID-19.

Finally, the government has the burden of demonstrating that the restriction is "narrowly tailored" to address the "compelling state interest." At this point we need to examine what that interest is specifically. Before the advent of the COVID-19 vaccine a good number of people being infected by the virus got seriously ill and died. Stopping the spread of the virus across the entire population could be considered a legitimate and compelling state interest. But once the vaccines were developed, approved, and became freely available to every resident, that interest must be reevaluated. Numerous studies have shown that while vaccinated individuals can still be infected with the COVID-19 virus, they are nonetheless at least 10X less likely to be hospitalized or die from the virus. As a result, the only remaining and possible legitimate "compelling state interest" is to stop the spread the spread of the virus to the unvaccinated. One could go back to the first prong of the strict scrutiny test and question whether even that interest is legitimate. Afterall, the COVID-19 vaccine is freely available to every American. Does the government truly have a legitimate interest in ensuring the life and health of those who have freely chosen not to be vaccinated? However, even if we accept the premise that such a government interest is legitimate, it demonstrates that school board meeting mask mandate was not "narrowly tailored." There were no exceptions provided for those, like the Plaintiff, who have been vaccinated.

THE HUBRIS OF THE DEFENDANTS

As is jointly stipulated, the New Hanover County Board of Education first voted to enforce their mask mandate on August 3, 2021. This was weeks before the New Hanover County Board of Health & Human Services (NHC DHHS) found it necessary to impose a mask mandate upon the county, starting on August 31, 2021. Nevertheless, when the school board

voted to retain their mask mandate in September and October of 2021, they claimed that they were simply following the sound medical advice of the NHC DHHS. At their November 9, 2021 meeting, the school board voted to delay their vote on retaining the school mask mandate until November 15, 2021. The NHC DHHS was meeting on November 12, 2021 to consider dropping the countywide mask mandate, and the school board said it wanted to delay its vote until after NHC DHHS had decided on whether to continue their mask mandate.

The fact is that NHC DHHS did decide on November 12, 2021 to drop its mask mandate. While the NHC DHHS met again on January 18, 2022 to consider reinstituting their mask mandate, they ultimately decided that this was not necessary. No countywide mask mandate has been in effect since November 12, 2021. Yet, the school board decided at their November 15, 2021 meeting to ignore what the NHC DHHS had decided was best and continue the school mask mandate. Although the school board dropped its mask mandate at their December 7, 2021 meeting, they reinstituted it at their January 4, 2020 meeting and voted to retain it again at their February 1, 2022 meeting. It was not until the school board conducted a special meeting on February 16, 2022 that they decided to go with a mask optional policy.

It should be noted that NHC DHHS mask mandate contained exceptions. Most notably it exempted people like the Plaintiff who have a medical issue when wearing masks for long periods of time. The school board's rigid mask mandate contained no exemptions. Apparently, they think its ok to make people decide on whether to risk their health or fully participate in school board meetings. It is hubris to think that the school board knows more than the NHC DHHS does when it comes to whether mask mandates are necessary and whether exemptions should be provided.

OTHER DEFENSE ARGUMENTS

In the Defendant's Answer to Complaint, the New Hanover County Board of Education lays out other possible defenses that they might assert; most notably Mootness, the form of the Plaintiff' Complaint, Standing, and Statutes of Limitation. The Plaintiff responded to some of these asserted defenses when filing its Reply to the Defendant's Answer to Complaint. Instead of regurgitating those responses here, the Plaintiff simply urges the Court to review that document. At this time, the Defendants have not filed a brief in support of their Motion for Summary Judgement. If they do, the Plaintiff will file a reply to it that will deal with any new defenses or legal arguments made.

CONCLUSION

The right of the people to assemble together and petition their government is deeply engrained in the federal and state constitutions and in our history. The importance of these rights led our General Assembly to pass, amend, and strengthen the NC Open Meetings Law. While the COVID-19 virus has and continues to be a serious problem we must deal with, we must never succumb to fear or ignore the liberties our state and our country has cherished from their inception. The Defendants in this case have done just that, and the Plaintiff urges this Court to put a permanent stop to it. The Plaintiff humbly requests that this Court grant the relief sought in its Complaint, and any other relief this Court finds to be in the interest of justice and individual liberty.

Dated this 4th day of March, 2022.

David A. Perry, Pro Se

CERTIFICATE OF SERVICE

I certify that a copy of the attached **BRIEF IN SUPPORT OF THE PLAINTIFF'S MOTION FOR SUMMARY JUDGEMENT** was served upon all Defendants in this case on this date, via USPS Priority Mail and electronic mail addressed to:

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Dated this 4th day of March, 2022.

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