

RICHARD J. DURBIN, ILLINOIS, CHAIR

PATRICK J. LEAHY, VERMONT
DIANNE FEINSTEIN, CALIFORNIA
SHELDON WHITEHOUSE, RHODE ISLAND
AMY KLOBUCHAR, MINNESOTA
CHRISTOPHER A. COONS, DELAWARE
RICHARD BLUMENTHAL, CONNECTICUT
MAZIE HIRONO, HAWAII
CORY A. BOOKER, NEW JERSEY
ALEX PADILLA, CALIFORNIA
JON OSSOFF, GEORGIA

CHARLES E. GRASSLEY, IOWA
LINDSEY O. GRAHAM, SOUTH CAROLINA
JOHN CORNYN, TEXAS
MICHAEL S. LEE, UTAH
TED CRUZ, TEXAS
BEN SASSE, NEBRASKA
JOSHUA D. HAWLEY, MISSOURI
TOM COTTON, ARKANSAS
JOHN KENNEDY, LOUISIANA
THOM TILLIS, NORTH CAROLINA
MARSHA BLACKBURN, TENNESSEE

United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

October 7, 2021

VIA ELECTRONIC TRANSMISSION

The Honorable Merrick B. Garland
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Dear Attorney General Garland:

On October 4, you issued a memorandum titled, “Partnership Among Federal, State, Local, Tribal, and Territorial Law Enforcement to Address Threats Against School Administrators, Board Members, Teachers, and Staff.”¹ That memorandum discussed a “disturbing spike in harassment, intimidation, and threats of violence against school administrators, board members, teachers, and staff who participate in the vital work of running our nation’s public schools.”² You directed the FBI and the various United States Attorneys to hold meetings with “federal, state, local, Tribal, and territorial leaders in each federal judicial district within 30 days” in order to “facilitate the discussion of strategies for addressing threats against school administrators, board members, teachers, and staff...”³ Your press release for this memorandum involves numerous offices within DOJ, including, inexplicably the National Security Division, the FBI, and DOJ’s Civil Rights Division.⁴

A few days earlier, on September 29, the National School Boards Association sent a letter to President Biden asking for help from federal law enforcement “to deal with the growing number of threats of violence and acts of intimidation occurring across the nation.”⁵ According to that organization, it is seeing an increased number of “attacks against school board members and educators for approving policies for masks to protect the health and safety of students and school employees” as well as “physical threats because of propaganda purporting the false inclusion of critical race theory within classroom instruction.”⁶ The letter references the PATRIOT Act, a statute that helps the federal government fight international terrorism, a reference that is entirely inappropriate.

We are concerned about the appearance of the Department of Justice policing the speech of citizens and concerned parents. We urge you to make very clear to the American public that the Department of Justice will not interfere with the rights of parents to come before school boards and speak with educators about their concerns, whether regarding coronavirus-related measures, the teaching of

¹ Memorandum from Attorney Gen. Merrick Garland, Partnership Among Federal, State, Local, Tribal, and Territorial Law Enforcement to Address Threats Against School Administrators, Board Members, Teachers, and Staff (Oct. 4, 2021), at <https://www.justice.gov/ag/page/file/1438986/download>.

² *Id.*

³ *Id.*

⁴ Department of Justice, Justice Department Addresses Violent Threats Against School Officials and Teachers (Oct. 4, 2021), at <https://www.justice.gov/opa/pr/justice-department-addresses-violent-threats-against-school-officials-and-teachers>.

⁵ Letter from Viola M. Garcia, President, and Chip Slaven, Interim Executive Director & CEO, National School Boards Association, to Joseph R. Biden, President of the United States (September 29, 2021), at <https://nsba.org/-/media/NSBA/File/nsba-letter-to-president-biden-concerning-threats-to-public-schools-and-school-board-members-92921.pdf> (hereinafter NSBA letter).

⁶ NSBA letter.

critical race theory in schools, sexually explicit books in schools, or any other topic. Furthermore, we urge you to instruct the FBI and the various United States Attorneys to make clear in the meetings discussed above that speech and democratic processes, like those that occur at a local school board meeting, must be respected.

To be clear, violence⁷ and true threats of violence are not protected speech and have no place in the public discourse of a democracy. To the extent such violence and true threats of violence employ mechanisms within federal jurisdiction, the FBI is squarely within its authority to help local law enforcement investigate such crimes. However, the FBI should not be involved in quashing and criminalizing discourse that is well beneath violent acts. The reported heated encounters between concerned parents and school boards often involve speech that is clearly protected by the First Amendment. Federal law enforcement muscle should never be used against protesting parents.⁸

For example, the NSBA letter references a school board meeting being disrupted in Florida⁹ and cites to a Sarasota Herald-Tribune article discussing how the Sarasota County School Board might change its public comment protocol because of that disruption.¹⁰ That article describes how “[o]ver the past year, large crowds have shown up [at Sarasota school board meetings] to address items that are not always on the agenda, like critical race theory, masking in schools, or complaints over items in the curriculum” and that “boards throughout the state are examining their public comment protocols.”¹¹ Large numbers of citizens expressing their concerns in an appropriate forum is not a matter for law enforcement, and it is even more difficult to imagine what role federal law enforcement would play in such a scenario.

In the very next example, the NSBA letter cites to a Board of Education meeting in Gwinnett County, Georgia being disrupted.¹² In that situation, the supposed disruption appears to have been participants refusing to wear masks while protesting the school district’s requirement that students wear masks in school.¹³ This too does not appear to warrant criminal investigation, especially by the federal government. Rather, these actions look a lot like civil disobedience in protest of public policy, a tactic often embraced as virtuous by Democrats when it comes to policies they oppose. Not wearing a mask in a public place may or may not be a violation of a local law, but at most it is a petty offense wholly unworthy of the federal government’s attention and the sort of civil disobedience many Democrats would embrace if the politics of wearing masks were reversed.

⁷ When this letter uses the word “violence,” it refers to the ordinary understanding of the word, generally meaning a physical assault. It does not use the word “violence” to refer to an idea making a listener feel uncomfortable, which seems to be a trendy definition of “violence” as of late in academic circles.

⁸ It is especially concerning that your memorandum does not discuss school board-based acts against parents, such as doxing them, perhaps in violation of the law. See Kelly Sadler, THE WASHINGTON TIMES, “Loudoun County teachers blacklist, dox parents critical of race teachings,” March 17, 2021, at <https://www.washingtontimes.com/news/2021/mar/17/loudoun-county-teachers-blacklist-dox-parents-crit/>. Such a one-sided approach gives an appearance that the Department of Justice is muscle for teachers and education administrators, which are historically strong sources of support for the Democratic Party.

⁹ NSBA letter at n.5.

¹⁰ Ryan McKinnon, SARASOTA HERALD-TRIBUNE, “Sarasota school board may limit public input after some meetings get disorderly,” Sept. 20, 2021, at <https://www.heraldtribune.com/story/news/education/2021/09/20/sarasotaschool-board-may-limit-public-input-after-meetings-gone-wild/8417784002/>.

¹¹ *Id.*

¹² NSBA letter at n.6.

¹³ Alia Malik, THE ATLANTA JOURNAL-CONSTITUTION, “Anti-mask crowd disrupts Gwinnett school board meeting,” May 21, 2021, at <https://www.ajc.com/news/anti-mask-crowd-disrupts-gwinnett-school-boardmeeting/IYO7R6GHJ5DTLEFCQHER7V3GBA/>.

The NSBA letter describes¹⁴ a similar meeting in Clark County, Nevada in which participants exchanged allegations of who was a “Marxist” and who was a “racist.”¹⁵ According to a news report, that meeting appears to have been disrupted on different occasions, but local law enforcement also appears to have been capable of handling the disruptions.¹⁶ Then the NSBA letter describes school board meetings in Michigan, one of which involved “the [school] board ... call[ing] a recess because of opposition to critical race theory.”¹⁷ The article cited in the letter about this incident described the school board meeting being delayed to another day because “two board members were speaking to one another and the audience kept interrupting. ... after multiple warnings to the public, [the school board president] announced that they would be going into recess and reconvene another day.”¹⁸ Again, this appears to be passionate civic engagement that local law enforcement can handle if it evolves into criminal action.

And at one point the NSBA letter states, “Other groups are posting watchlists against school boards and spreading misinformation that boards are adopting critical race theory curriculum and working to maintain online learning by haphazardly attributing it to COVID-19.”¹⁹ It supports this claim with a citation to a partisan Substack article titled, “TPUSA launches project targeting school member,” which attacks the right-wing group Turning Point USA.²⁰ Law enforcement at every level must always remain neutral in the marketplace of ideas, and your office should make clear that federal law enforcement may never intervene in the marketplace of ideas.

The school board meetings at issue in the National School Boards Association letter largely appear to involve parents being frustrated by COVID-19 mask mandates for children as well as the possibility of school curricula newly incorporating the controversial academic discipline generally known as critical race theory. Parents who get upset about these topics, and others, are engaging in speech that is clearly protected under the First Amendment. We ask you to explain how any of this rises to the definition of criminal harassment. After a year of prolonged school closures, even well after it was clear that schools could safely reopen amidst COVID-19, parents are understandably asking questions and seeking accountability. Even if tempers flare at school board meetings because of these and other topics, that does not make the discussions of them any less protected under the First Amendment. As a former federal appellate judge, you are surely well aware that the legal threshold in the United States for what speech can be sanctioned because of its propensity for inciting lawless action is a high bar. In the seminal Supreme Court case *Brandenburg v. Ohio*, the Court ruled that speech could only be sanctioned for condoning illegal activity if that speech “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”²¹ We seriously doubt the discourse at school board meetings across the country rises to this level.

¹⁴ NSBA letter at n.7.

¹⁵ Julie Wootton-Greener, LAS VEGAS REVIEW-JOURNAL, “School board meeting turns contentious over COVID-19 policies,” August 12, 2021, at <https://www.reviewjournal.com/local/education/school-board-meeting-turns-contentious-over-covid-19-policies-2418652/>.

¹⁶ *See id.*

¹⁷ NSBA letter at 3.

¹⁸ Kalie Marantette, WLNS.com, “Grand Ledge school board goes into recess due to public ‘disruption,’” June 16, 2021, at <https://www.wlns.com/news/grand-ledge-school-board-goes-into-recess-due-to-public-disruption/>.

¹⁹ NSBA letter at 5.

²⁰ Nick Surgery, Documented, “TPUSA launches project targeting school board members,” August 20, 2021, at <https://substack.documented.net/p/tpusa-school-board-watchlist>.

²¹ *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

Moreover, angry parents are not necessarily threatening parents, especially in the eyes of the law. In *Virginia v. Black*, the Supreme Court ruled in 2003 that only “true threats” were unprotected by the First Amendment, stating, “‘True threats’ encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”²² Parents who are angry at school board members, and even verbally attack them on a personal level, are not necessarily making true threats, and is not the job of law enforcement – and cannot be the job of law enforcement, especially the FBI – to make sure parents are nice to their elected officials. They are certainly not domestic terrorists who require the use of tools such as the PATRIOT Act and the expertise of the National Security Division.

Violence and true threats of violence should have no place in our civic discourse, but parents should absolutely be involved in public debates over what and how our public schools teach their children, even if those discussions get heated. When you were sworn in as the Attorney General, you took an oath to uphold our Constitution, and now your fundamental job is to protect the rights of all Americans. Perhaps the most basic and most important right every American has is the right to question our governments, from the heights of the Congress and the Presidency all the way down to the local school boards. That includes asking them some very tough questions and requesting changes to school policies. It is not appropriate to use the awesome powers of the federal government – including the PATRIOT Act, a statute designed to thwart international terrorism – to quash those who question local school boards. By even suggesting that possibility, important speech by American citizens will be chilled in school board meetings across this country. Your job now is to make clear to all stakeholders and the American people that such action is decidedly not the role of the federal government nor the role of any other government in the United States – in fact, it can never be.

If you have any questions, please contact John Schoenecker on Ranking Member Grassley’s staff at (202) 224-5225.

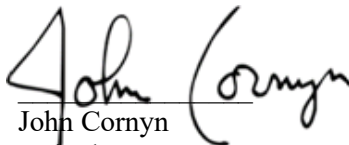
Sincerely,



Charles E. Grassley
Ranking Member
Committee on the Judiciary



Lindsey O. Graham
United States Senator
Committee on the Judiciary




John Cornyn
United States Senator
Committee on the Judiciary



Michael S. Lee
United States Senator
Committee on the Judiciary

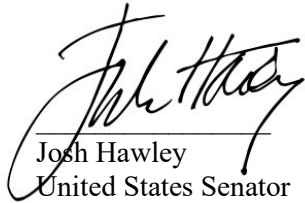
²² *Virginia v. Black*, 538 U.S. 343, 359 (2003).



Ted Cruz
United States Senator
Committee on the Judiciary



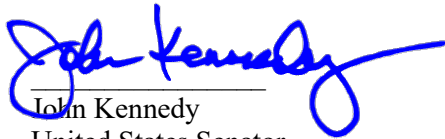
Ben Sasse
United States Senator
Committee on the Judiciary



Josh Hawley
United States Senator
Committee on the Judiciary



Tom Cotton
United States Senator
Committee on the Judiciary



John Kennedy
United States Senator
Committee on the Judiciary



Thom Tillis
United States Senator
Committee on the Judiciary



Marsha Blackburn
United States Senator
Committee on the Judiciary