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October 6, 2021

Board of Education of the Pasadena Unified School District by its Secretary, Superintendent Brian McDonald; Scott Phelps, President; Kim Kenne, Member; Elizabeth Pomeroy, Member; Patrick Cahalan, Member; Michelle Richardson Bailey; Member; Jennifer Hall Lee, Member

Via Email Only

Dear Secretary/Superintend McDonald and Board Members:

The Law Office of Gronemeier & Hickambottom represents Tina Fredericks with respect to claims she has for violation of the constitutional expressive rights (free speech, free petition, free press) and the constitutional right to equal protection of the laws of herself, her constituents, and/or the press arising from the Pasadena Unified School District (“PUSD”) Board of Education’s (“Board”) Board Protocol #8, Protocols/Agreements ##f-I, inclusive, and the Board’s conduct in enforcing those Protocols/Agreements at the Board meeting on August 26 2021.

### **Overview of PUSD unconstitutional restraints on Board Members’ outside<sup>1</sup> expressive activity**

The PUSD Board maintains discriminatory prior restraints on its Members’ outside expressive activities in Board Protocol #8, Protocols/Agreements ##f-i . A Board Member’s failure to observe these prior restraints subjects the Member

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<sup>1</sup>By “outside”, we refer to free speech, free petition and free press activities outside of Board meetings, directly to other Board Members, or within PUSD – specifically, outside op-eds and other advocacy through media outlets and organizing petitioning from residents to the Board and Superintendent.

to sanctions, as they are deemed ethical violations. Board Protocol #8, Protocols/Agreements ##f-i are facially unconstitutional because they are an impermissible prior restraint and are void for vagueness; considered as time, place, and manner regulations, they do not serve arguable overriding legitimate governmental interests by the least restrictive means available.

If there were any doubt that Board Protocol #8, Protocols/Agreements ##f-i are facially unconstitutional, the manner in which they were applied by Superintendent McDonald, President Phelps, and Board members Bailey and Lee in their public trial of Board Member Fredericks on August 26, 2021, removes all such doubts. In a proceeding fraught with procedural irregularities, Board Members Bailey, Lee, and Phelps attempted to chill Member Fredericks' outside expressive activities. Their method was to publicly shame Member Fredericks as unethical because they disagreed with her constitutionally-protected outside expressive activities advocating a PUSD vaccine mandate – a public health issue with immediate life-and-death consequences that is at the highest order of public interest protected by the constitutional expressive rights because of the current pandemic of the unvaccinated that especially threatens the life and health of PUSD's vaccine-ineligible students who are under the age of 12.

## **Demand**

Demand is made on behalf of Tina Fredericks that the Board, on or before October 15, 2021, remedy the unconstitutional restrictions on her, her constituents, and the press's outside expressive activities and her Equal Protection constitutional rights arising from the California Constitution that are contained in Board Protocol #8, Protocols/Agreements ##f-I, inclusive, by rescinding Board Protocol #8, Protocols/Agreements ##f-I, inclusive. If the Board timely and unconditionally rescinds Board Protocol #8, Protocols/Agreements ##f-I, inclusive, Member Fredericks agrees that she will not initiate litigation to establish the unconstitutionality of those Protocols/Agreements nor initiate litigation for any other remedies for PUSD's maintenance of these unconstitutional restrictions on Member constitutionally-expressive activity and the use of them to chill her constitutional rights through them at the August 26, 2021 Board meeting.

## **Board Member Frederick's outside expressive activities**

The relevant constitutionally-protected activity of Tina Fredericks involves her advocacy that PUSD adopt a vaccine mandate that all persons who enter its premises who are eligible for vaccination must obtain the coronavirus vaccine—employees, students, vendors, and others. Board Members Fredericks, Kenne, and Cahalan have publicly urged such a mandate (or at least a mandate on employees) while Superintendent McDonald and Board Members Phelps, Bailey, Pomeroy, and Lee have opposed such a mandate and/or opposed the Board taking a stand on the issue.

The issue of institutional vaccine mandates is an issue of the highest public interest involving life-and-death consequence given the current coronavirus-delta epidemic of the unvaccinated. Tina Fredericks is a mother of a child under 12 who attends PUSD; since children under 12 cannot be vaccinated; the parents of the thousands of children both in the sub-geographic district from which she was elected and throughout the entire PUSD geographic area<sup>2</sup> have a heightened interest in a vaccine mandate because of the vulnerability of their necessarily-unvaccinated children to teachers and others who refuse to get vaccinated.

Tina Fredericks has not only regularly advocated a PUSD vaccine-mandate within the Board but also, as PUSD's Superintendent and Board majority have dithered both on discussing the issue of a vaccine mandate and adopting a vaccine mandate, she has engaged in the following activity outside the Board that the Board majority has contended is violative of PUSD Board Protocols.

1. **7/29/21 Op-Ed:** On July 29, 2021, an op-ed by her was published in the local print and on-line media outlet *Colorado Boulevard* “Why I support PUSD Employee Vaccine Mandate;” she did not submit the Op-Ed to the Superintendent nor the Board President (both opponents of her position) before its publication as required by Protocol 8 ##f-g. The Op-Ed generally urged community support for PUSD providing the safest educational environment possible by a vaccine mandate for all PUSD employees and through encouraging vaccine-eligible PUSD students and families to get vaccinated. The Op-Ed but did not specifically suggest contacting any Board Members nor even refer to any

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<sup>2</sup>PUSD Board Protocols expressly provide that each Board member represents not just the persons in the Board Member's District but persons in all of its districts.

Board Members.

**2. 8/9/21 Petition:** On August 9, 2021, Board Member Fredericks initiated an on-line petition endorsing a PUSD vaccine mandate resolution; the petition did not refer to any Board Members. By August 26, 2021, it had 431 signatories. In an online update on August 9, 2021, she urged contacting Board Members Bailey, Pomeroy and Lee to urge support for a vaccine mandate, baseline COVID testing, and weekly COVID testing of staff and students. In an online update on August 11, 2021 she urged contacting Superintendent McDonald and Board Members Phelps, Pomeroy, Bailey, Kenne, Cahalan, and Lee to urge that all employees at the opening of school the following day be either vaccinated or recently tested negative and that PUSD implement other coronavirus safety measures. In online updates on August 10, 2021, August 18, 2021, and August 26, 2021, she urged contacting the Superintendent and Board Members to hold an emergency meeting to vote on a testing mandate and/or to agendize such a resolution.

**3. 8/10/21 Press Conference with City of Pasadena Mayor:** On August 10, 2021, Board Member Frederick urged support for a PUSD vaccine mandate in a press conference with City of Pasadena Mayor Victor Gordo in front of Willard Elementary School. Mayor Gordo had on August 7, 2021, publicly indicated that the City of Los Angeles might redirect \$7 million that the City of Pasadena would otherwise pay to PUSD to City coronavirus control if PUSD did not adopt a vaccine mandate, as the City of Pasadena is adopting. Her comments, along with Mayor Gordo's comments, were extensively quoted in an August 10, 2021, article, in the local print media *The Pasadena Star-News*.

**4. 9/13/21 Public Letter to Superintendent McDonald and President Phelps:** On September 13, 2021, Board Member Fredericks sent an "Open Letter" to Superintendent McDonald and President Phelps urging a vaccine mandate. The Open Letter was published by the online newspaper *Pasadena Now* and in her online petition updates.

**The constitutional protections extend to  
Board Member Fredericks'  
outside expressive activity**

The California Constitution, Article I, §2, provides, "Every person may

freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." This constitutional free speech press provision "is more definitive and inclusive than its federal counterpart."<sup>3</sup> Because of the preeminence of federal law, California law must provide as much free speech/press protection as federal law, but California can and does provide greater free speech protection than federal law.<sup>4</sup> The California Constitution, Article. I, § 3, contains provides a similar right guaranteeing "the right to . . . petition government for redress of grievances." The constitutional right of free petition is "an essential attribute of governing."<sup>5</sup>

Since the seminal U.S. Supreme Court decision prohibiting the Georgia State Legislature from expelling civil rights icon Julian Bond because of his outside opposition to the Vietnam war, constitutional law has been crystal clear that elective officials such as Board Member Fredericks enjoy the free speech/press/petition rights to the same extent as all other persons:

"...[T]he First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy. ...The interest of the public in hearing all sides of a public issue is hardly advanced by extending more protection to citizen-critics than to legislators. Legislators have an obligation to take positions on controversial political questions so that their constituents can be fully informed by them, and be better able to assess their qualifications for office; also so they may be represented in governmental debates by the person they have elected to

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<sup>3</sup>Wilson v. Superior Court (1975) 13 Cal.3d 652, 658. See the further analysis in Pines v. Tomson (1984) 160 Cal.App.3d 370, 393 , "Analysis of the section shows that it is comprised of three subparts: (1) an affirmation that all persons may freely speak, write and publish their "sentiments," (2) a provision allowing for liability once that right is abused and (3) a prohibition against [\*\*881] laws which infringe freedom of speech or the press. Only the third subpart is paralleled, more or less, in the federal Constitution ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . .").

<sup>4</sup>Robins v. Pruneyard Shopping Center (1969) 23 Cal. 3d 899, 907; Aguilar v. Avis Rent-a-Car Sys. (1996) 50 Cal.App.4th 28, 33. As a result, federal authorities are applicable unless there is California law that is more protective of free speech rights.

<sup>5</sup>Robins v. Pruneyard Shopping Center (1969) 23 Cal. 3d 899, 907.

represent them.”<sup>6</sup>

Thus, “[c]onditions [on legislators] violative of First Amendment protections are invalid.”<sup>7</sup>

Board Protocol #8, Protocols/Agreements ##f-i, adversely discriminates against the expressive-activity rights of Board Members which are not imposed on “citizen-critics” and are consequently invalid. No citizen-critic of PUSD could legally be required to share their opinion pieces with PUSD’s Superintendent prior to publication as is required by Board Protocol #8, Protocol/Agreement #f. No citizen-critic of PUSD could legally be required to share their opinion pieces with PUSD’s Board President prior to publication as is required by Board Protocol #8, Protocol/Agreement #g. No citizen-critic of PUSD could legally be prohibited from collaborating on opinion pieces with others prior to publication as is required by Board Protocol #8, Protocol/Agreement #h; nor could a citizen-critic be required to obtain direction to collaborate from the full Board as is required by Board Protocol #8, Protocol/Agreement #h. No citizen-critic of PUSD could legally be prohibited from attributing particular intentions to Board Members as is required by Board Protocol #8, Protocol/Agreement #i. Thus, each of the four protocols in Board Protocol #8, Protocols/Agreements ##f-l, fails the non-discrimination test established by *Bond v. Floyd* and its progeny. Board Protocol #8, Protocols/Agreements ##f-i, facially violate the free speech/press provisions of both the U.S. Constitution and the California Constitution. Moreover, because they illegally discriminate against Board Members as to their outside expressive activity, they thereby establish violations of the Equal Protection provisions of the U.S. and California Constitutions.

### **The constitutional protections for outside expressive activity prohibit the prior restraints contained in the Board’s Protocol 8**

More than a century ago, the California Supreme Court stated that

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<sup>6</sup>*Bond v. Floyd* (1966) 385 U.S. 116, 136-137.; cited with approval, *City of Montebello v. Vasquez* (2016) 1 Cal.5th 409, 423; *Eller Outdoor Advertising Co. v. Board of Supervisors* (1979) 89 Cal.App.3d 76, 80; *Levy v. City of Santa Monica* (2004) 114 Cal. App. 4th 1252, 1261; *Cal. War Veterans for Justice v. Hayden* (1986) 176 Cal.App.3d 982, 988.

<sup>7</sup>*Id.*, citing *Bond v. Floyd*..

California Constitution's free speech provision "is terse and vigorous, and its meaning so plain that construction is not needed. ... It is patent that this right to speak, write, and publish, cannot be abused until it is exercised, and before it is exercised there can be no responsibility."<sup>8</sup> The Supreme Court consequently held that the plain meaning of the California Constitution's free speech provision "is that 'sentiments' are protected from any prepublication sanctions, i.e., from all prior restraints."<sup>9</sup> In 1932, the U.S. Supreme Court affirmed the near-total prohibition of any form of prior restraint on press publication of criticism of public officeholders:

"In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty [of a free press] to prevent previous restraints upon publication. . . That liberty was especially cherished for the immunity it afforded from previous restraint of the publication of censure of public officers and charges of official misconduct. . . . The fact that for approximately one hundred and fifty years there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional right. . . . The recognition of authority to impose previous restraint upon publication in order to protect the community against the circulation of charges of misconduct, and especially of official misconduct, necessarily would carry with it the admission of the authority of the censor against which the constitutional barrier was erected"<sup>10</sup>

"[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.' The term prior restraint is used 'to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur. The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before

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<sup>8</sup>*Dailey v. Superior Court* (1896) 112 Cal. 94, 97.

<sup>9</sup>*Id.* at 100.

<sup>10</sup>*Near v. Minnesota* (1931) 283 U.S. 697, 713, 717, 718, 721.

an adequate determination that it is unprotected by the First Amendment.”<sup>11</sup> Thus, “...any prior restraint on expression bears a heavy presumption against its constitutional validity.”<sup>12</sup>

Board Protocol #8, Protocols/Agreements ##f-i each constitute impermissible prior restraints on publication.

Board Protocol #8, Protocol/Agreement #f restrains prior publications without first sharing the proposed publication with the Superintendent “so that staff may have an opportunity to suggest edits and clarifications.” Protocol/Agreement #f thereby burdens a Member’s expressive activity rights by delaying their exercise for an indeterminate time while the Superintendent and his staff exercise their right to suggest edits and clarification. Besides giving the Superintendent the power to delay publication for that indeterminate period of time, it gives the Superintendent a potential strategic advantage in the battle of ideas to exploit the delay and during the delay period take counter-measures to any criticism of him or his staff.

Board Protocol #8, Protocol/Agreement #g restrains prior publications without first sharing the proposed publication with the Board President. While sharing with the Board President presumably would cause only the minimal delay of the time it takes to email an unpublished op-ed, it does give some strategy advantage to the Board President in knowing of the impending publication in the time between submission of the op-ed for publication and the time of its publication.

Board Protocol #8, Protocol/Agreement #h, is a prior restraint on all op-eds and other opinion publications concerning which there is any collaboration on an opinion publication which has not been directed by the full Board at a Board meeting.

Board Protocol #8, Protocol/Agreement #i, is a content-based prior restraint that prevents any publication to attribute particular intentions to other

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<sup>11</sup>*DVD Copy Control Assn., Inc. v. Bunner* (2003) 31 Cal.4th 864, 886 (citations omitted), quoting *Pittsburgh Press Co. v. Human Rel. Comm'n* (1973) 413 U.S. 376, 390.

<sup>12</sup>*Wilson v. Superior Court* (1975) 13 Cal.3d 652, 657.

Board Members. This prior restraint runs afoul of an essential purpose of prior restraints to protect the right to publish “charges of official misconduct”<sup>13</sup> and the strict scrutiny required for content-based restrictions.

**To the extent they can be considered time, place & manner rules,  
the 4 Protocols/Agreements in Protocol 8  
do not satisfy the legal standard for defensible rules**

As reflected *supra*, Board Protocol #8, Protocols/Agreements ##f-i do not survive the strict scrutiny required for discriminatory treatment of Member constitutionally protected expressive activity, for prior restraint of publication, nor for content-based restrictions. Assuming *arguendo* any of them could survive their facial unconstitutionality and the Board tries to defend as being garden-variety, content-neutral time, place, and manner rules, they still would not survive.

*H-Chh*, the 1985-1989 litigation over the time, place, and manner rules for the Plaza Pasadena<sup>14</sup> that Mr. Hickambottom and I had the privilege of handling<sup>15</sup> is the seminal case for such rules for shopping centers. *H-Chh* applied the same standards as applied for governmental time, place, and manner rules – *i.e.*, the following:

- The exercise of rights of free expression may be restricted when it conflicts with the promotion of countervailing substantial or compelling interests. However, even those restrictions justified in the protection of these

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<sup>13</sup>*Near v. Minnesota* , *supra*.

<sup>14</sup>*H-Chh Assocs. v. Citizens for Representative Gov't* (1987) 193 Cal.App.3d 1193.

<sup>15</sup>Mr. Hickambottom and I were both petitioners who were sued by the owners of the Plaza Pasadena and attorneys who defended the case and prosecuted the successful cross-complaint invalidating most of the Plaza Pasadena’s time, place and manner rules. One of the few rules we did not prevail on was the Plaza Pasadena’s prohibition against soliciting financial contributions for political or other causes, but the California Supreme Court ultimately vindicated our position by disapproving of that holding in the appellate decision. See *Fashion Valley Mall, LLC v. National Labor Relations Bd.*(2007) 42 Cal. 4th 850, 858, disapproving only that holding in *H-Chh Assocs. v. Citizens for Representative Gov't* .

interests must be narrowly drawn to that end.<sup>16</sup>

- To be reasonable, such regulations must be neither vague nor subjectively over- or underinclusive.<sup>17</sup>
- The constitutionality of regulations must be assessed by a balancing of interests and a determination that the party has used the least restrictive means' to regulate the conduct in question.<sup>18</sup>

It is not clear that any of the four Protocols/Agreements at issue are based upon any *substantial or compelling interest*. The purported purpose of #f is “so that staff may have an opportunity to suggest edits and clarifications.” Generally, persons get elected because they are proficient in communication, so the need of editing or making clarifications is not substantial. The premise of the constitutional protection of expressive rights is that vigorous debate in the marketplace of ideas is the best way to correct error. No purpose is stated for #g’s requirement of sharing opinion pieces with the President; the arguable interest here is to keep the President informed about op-eds that may be important to the Board, but because the prohibition only gives the President knowledge he would not otherwise have for the short time between receiving the op-ed and getting it upon its publication, it does little to serve that interest. The prohibition in #h against members collaborating on opinion pieces unless authorized by the full Board has no apparent justification other than to prevent a minority of the Board from collaborative outside expressive activity. The content-based prohibition in #i against attributing particular intentions to other members of the Board presumably serves the interest of civility between Board Members, but civil discourse as a compelling interest has generally fallen into disrepute as courts have held that expressive activity such as burning flags, profanity, or other uncivil expression is still protected activity

Protocol/Agreement #i’s language prohibiting “attributing particular intentions” violates the requirements that restrictions not be vague and not be

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<sup>16</sup>*H-Chh Assocs. v. Citizens for Representative Gov’t, supra*, 193 Cal.App.3d at 1207.

<sup>17</sup>*Id.*

<sup>18</sup>*Id.*

overinclusive. The language is vague as to whether #i is, like its three preceding Protocols/Agreements a prohibition of such attributions in Op-Eds only, whether it is a prohibition in all dealings with the public, whether it is a prohibition in Board meetings,<sup>19</sup> whether it is a prohibition in all communications with or about Board Members, etc. Besides the vagueness of the locus of the prohibition, there is uncertainty as its meaning. Is it a prohibition on attributing only *negative* intentions to other Board Members, or does it also prohibit attributing *positive* intentions to other Board Members? Because the literal language prohibits attributing even positive intentions to other Board Members and therefore prohibits utterances such as “Member X has demonstrated an intention to understand complex policy issues”, it subverts rather than serves the civility interest and is clearly overinclusive.

None of the four Protocols/Agreements at issue are the least restrictive alternative to achieve the arguable interests. As to #g’s requirement to share prior to publication in order to suggest edits and clarifications, engaging in expressive activity to counter an opposed opinion or to correct error is a less restrictive available alternative that does not impinge on protected expressive activity. As to #h’s share-with-the-President requirement, the less restrictive alternative is for the President to keep abreast by reading the published versions of op-eds. Even assuming arguendo that any restriction on op-ed collaboration by members could be justified by some interest by the majority in preventing collaboration among a minority of the Board, such a dubious interest could be served by the less restrictive alternative of permission from a majority of the Board rather than permission by the full Board.

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<sup>19</sup>At the August 26, 2021, Board Meeting, Board Member Lee would have committed an ethical violation if Protocol #i is constitutionally enforceable and applies to Board meetings. Member Hall referred to Member Fredericks’ August 9, 2021, press conference with Pasadena Mayor Victor Gordo calling for a vaccine mandate as working “aggressively with an agenda to break a school board. It’s my opinion that’s just the purpose.” The statement is plainly an attribution of “particular intentions” to Member Fredericks. President Phelps was chairing the meeting. In a grammatically-challenged utterance, President Phelps claimed that Member Fredericks had violated Board Protocols in that she did not refrain “from particular intentions from the Board.” But he failed to admonish Board Member Lee when she apparently violated Protocol/Agreement #i. His conduct reflects the egregious double-standard operating in the August 26 meeting and his own hypocrisy in the application of the Protocols.

## **The 4 Protocols/Agreements in Protocol 8 as applied in the 8/26/21 public shaming trial shows they are constitutionally impermissible restrictions**

### **A. Overview.**

On August 26, 2021, Board President Phelps and Members Bailey and Lee in collusion with Superintendent McDonald relied upon Board Protocol #8, Protocols/Agreements ##f-i in a public trial of Member Fredericks with the intention of retaliating against Member Fredericks for her constitutionally-protected expressive activity supporting a vaccine mandate. They used Board Protocol #8, Protocols/Agreements ##f-i as the vehicle to threaten Board Member Fredericks with penalties for unethical conduct because she violated Board Protocol #8, Protocols/Agreements ##f-i. Protocols/Agreements ##f-i , as applied in the Board's August 26, 2021, meeting, were thereby shown to be impermissible restrictions on Board Member Fredericks' constitutionally-protected expressive rights.

### **B. The ostensible agenda for the August 26 meeting.**

The agenda for a Board meeting is typically set in a meeting between the President and the Superintendent. The agenda for the August 26, 2021, Board meeting contained as its item J the following:

- J. Board Discussion.
  - 1) Review of Board Bylaw 9271 - Code of Ethics; Protocol 8 – Board Role in Public,  
BB 9171 - FINAL - 5-10-11  
Protocol 8.

### **C. The hidden agenda for the August 26 meeting**

The foregoing agenda item was deceptively worded to hide the true nature of the intended discussion that followed. The following sections show that there was a hidden agenda. An accurate description of the real agenda that was hidden would have been the following:

- J. Board Action.

Use of Board Bylaw 9271, Code of Ethics, and Protocol 8, Board Role in Public, as vehicles to threaten Board Member Fredericks with disciplinary action

**D. Member Fredericks attempts to get the agenda clarified and the McDonald/Phelps evasive responses.**

Member Fredericks was puzzled by the ostensible agenda's description, so she asked Superintendent McDonald before the August 26 Board meeting for clarification on what the item for discussion was; his reply was that Scott Phelps knew what the item is about.<sup>20</sup> Member Fredericks emailed President Phelps asking for a brief description of the agenda item. President Phelps responded evasively by parroting part but not even all of what was in the inadequate description in the ostensible agenda; the only additional information he provided was that the item was requested by Trustee Bailey.

As item J was called at the August 26 Board meeting, Member Fredericks at 4:00:05-4:00:48 of the meeting made one last attempt to get a non-evasive response clarifying what the item was. Ms. Fredericks stated to President Phelps "So you know what it means?" President Phelps stated "Yes, I know what it means .. Right now it means this..." and he repeated language from the ostensible agenda. When Board Member Fredericks continued to push him on what the agenda item means, President Phelps responded "you will hear it from the bringer of the item" and recognized Board Member Bailey.

**E. Board Member Bailey begins the disclosure of the hidden agenda but largely tries to stay above the fray.**

Board Member Bailey made her first of two presentations for about 9 minutes beginning at 4:00:48 of the Board meeting. She indicated she had asked for a review of the Board's Code of Ethics and bylaws concerning how Board Members relate to each other and the community because "it speaks to what has just been experienced by myself and other Members of the Board." She did not further specify what she and other Board Members had just experienced but rather left it for others and for herself in her second presentation to specify.

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<sup>20</sup>It would be uncharacteristically inattentive of Dr. McDonald to not know the true purpose for the item; his response appears to be intentionally evasive.

Member Bailey then proceeded to read selected excerpts of the Board's Code of Ethics, BB 9271. The majority of her time was spent on the final section titled "Breaches of the Code of Ethics or other Board Policy." Ms. Bailey read all of the subsections entitled "Background and Purpose" and "Policy." When it came to the final section titled "Procedure", she skipped over the first six paragraphs and read only the last paragraph concerning a Resolution of censure, a written warning, or a written reprimand.

She ended her first presentation by making it clear that she wanted to make a second presentation as President Phelps went around the room indicating Board members could speak on the topic.

After Member Lee spoke (see next section), Member Bailey spoke again for a little more than five minutes. She cryptically referred to the Code of Ethics and Protocols twice but otherwise said nothing related to the ostensible agenda's express topic. Concerning the hidden agenda, she made a few brief and vague references to her concerns about Member Fredericks' constitutionally-protected outside expressive activity – "this type of thing is going to continue" if the Members don't talk to each other more, being "drag through the mud," "my heart is broken by what I experienced this past week", and dismay that PUSD students are reading about the Board in the newspapers. But she stayed as general as she did in her first presentation, did not mention Member Fredericks' name, and talked about the virtues of the Board working together.

#### **F. Board Member Lee identifies Board Member Fredericks as the person on trial while never mentioning her name.**

Member Lee was recognized by President Phelps at approximately 4:09:40 of the August 26, 2021, Board meeting. She indicated at the outset that she had prepared written remarks. She then began to read those previously prepared remarks, which took her about 4 minutes.

Member Lee's written remarks referred to the ostensible agenda's Code of Ethics and Protocol 8 only once in her remarks – *i.e.*, she generally referred to "protocols" in a statement that adhering to protocols<sup>21</sup> promotes Members working together. She did not refer to the Code of Ethics. Her written remarks largely fell

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<sup>21</sup>Her single reference did not specifically refer to the ostensible agenda's Protocol 8.

into two categories: (1) remarks identifying and condemning outside expressive activity by Board Member Fredericks while never mentioning her by name; and (2) an extended argument that “high functioning” boards don’t have dissent such as that involved in Member Frederick’s outside expressive activity.<sup>22</sup>

Member Lee’s remarks identifying and condemning outside expressive activity by Board Member Fredericks, while never mentioning her by name, provided specificity for Member Bailey’s earlier reference to “what has just been experienced by myself and other Members of the Board.” All of the specific matters identified and condemned were Member Fredericks’ recent outside expressive activity and was known as such by the entire Board:

- Member Lee first stated that “starting around August 9 through the last few days” actions have been taken that have damaged the Board. August 9 was the day that Member Fredericks had appeared at the press conference with Pasadena Mayor Victor Gordo to call upon PUSD to enact a vaccine mandate – constitutionally-protected outside activity that was reported in local media.
- Member Lee then made a number of statements about “calling out” Board Members – *i.e.*, behaving “publicly as an individual with an agenda to call out certain Board Members,” “not only were several Members called out publicly this month but so was the Superintendent,” “we don’t tear down Board Members publicly, we don’t paint targets on them.” While her pejorative characterization of constitutionally-protected petitioning activity as “calling out” and “painting targets on” Board Members is over-the-top whining, the clearly-understood referent of her remarks was the petition for a Board vaccine mandate resolution Member Fredericks began circulating on August 8, 2021, and Member Fredericks asking community members to sign the petition and to contact the Superintendent and the Board majority who were opposing the vaccine mandate and to urge them to pass it.
- Member Lee next returned to the August 9 press conference, stating “we don’t hold press conferences” and “to do so is to work aggressively with an agenda to break a school board.”

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<sup>22</sup>I’ll ignore her anti-dissent ideology remarks, as she’s entitled to have those views and, while the views are reactionary, there is nothing wrong with her expressing them except that it is questionable that they are within the scope of the topic noticed on the agenda.

- Member Lee then waxed rhetorical about the gravity of Board Member Fredericks' constitutionally-protected outside expressive activity, warning that "personal political theatrics" are not only "distracting" but also "dangerous."
- Finally, Member Lee demanded action against Member Fredericks
- constitutionally-protected outside expressive activity, saying that "we should do everything in our power to never let this happen again."

Taken together, Board Member Lee's pre-prepared written remarks made it unequivocally clear that the hidden agenda was to attack Member Fredericks constitutionally-protected outside expressive activity.

Member Lee clearly knew what the hidden agenda was before the Board meeting. Her remarks were carefully prepared in writing before the meeting. Having prepared in advance of the Board meeting her written remarks in order to follow-up to Member Bailey's opening statement, Member Lee obviously was informed of the hidden agenda before the Board meeting by either the Superintendent and/or another Board Member(s). Board Member Hall knew before the meeting that what Ms. Bailey was referring to as "what has just been experienced by myself and other Members of the Board" was the outside expressive activity of Member Fredericks. Member Lee knew the hidden agenda of item J was to upbraid Member Fredericks for her outside expressive activity. Member Lee had thus been informed in advance what the Superintendent and President Phelps had been asked to disclose by Member Fredericks but which the Superintendent and President Phelps has refused to disclose. As a result, Member Fredericks was ambushed at the August 26 Board meeting and unable to prepare a response to the hidden agenda. Correspondingly, Member Lee was advantaged by the prior disclosure of the hidden agenda and was consequently able to carefully prepare her attack on Member Fredericks.

**G. President Phelps bluntly names Board Member Fredericks, accuses her of violating the Protocols, and claims her trial didn't violate the Brown Act because the hidden agenda was "obvious."**

President Phelps remarks were short – slightly less than 2 minutes starting at

4:28:33 in the August 26, 2021, Board meeting.<sup>23</sup> In six short sentences – two of which were repetitive – he connected all of the dots on the hidden agenda by bluntly naming Member Frederick as the topic agendized and setting out the accusation that she violated Protocol/Agreement #h by her petitioning activity. His six sentences were the following:

I don't feel that the integrity of myself and the merit of my work was recognized by Ms. Fredericks' actions. I don't feel that at all." [interruptions] I don't feel my integrity was respected. I don't feel that the Board Member refrained from particular intention from the Board. I don't feel that was honored at all. And so that my objection is the organizing of attacks on individual Board Members, I don't think it is in keeping with the Code of Ethics and the Protocols.

The interruption in President Phelps' presentation that is referenced above arose from Member Fredericks objecting because the agenda did not refer to her name. President Phelps twice dismissed the objection by asserting "it doesn't matter." When Member Fredericks persisted that referring to her was beyond the agendized topic, President Phelps asserted the remarkable proposition that the agenda "doesn't limit the topic." Member Fredericks protested that she would like to have known ahead of time that she was the topic. President Phelps responded "it's pretty obvious." When Member Fredericks told President Phelps to "stick to the Brown Act", he denied that there was a Brown Act violation.

## **I. Conclusion.**

The foregoing sections establish that in the August 26, 2021, Board meeting that was a trial of Member Fredericks which was solely based on her constitutionally-protect outside expressive activity and the premise that Board Protocol 8, Protocols/Agreements ##f-i, could legally prohibit that activity. President Phelps, Superintended McDonald, and Member Bailey colluded to hide from Director Fredericks the fact that there was going to be such a trial, denying Director Frederick advance notice that she was going to be on trial. Members Bailey and Lee tried to

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<sup>23</sup>Members Cahalan and Pomeroy spoke between Member Bailey's 2<sup>nd</sup> presentation and President Phelp's presentation. Members Kenne and Fredericks spoke after President Phelps' presentation. None of their presentations are analyzed because they did not contribute to the prosecution of the hidden agenda.

have a trial by innuendo that was based on what everyone knew was Member Frederick's expressive activities but to pretend she was not on trial by avoiding the mention of her name. Their innuendo strategy was blown apart President Phelps' specifically identifying Member Frederick by name and accusing her of violating a specific Protocol because she engaged in constitutionally-protected free petition activity. The conduct of the August 23, 2021, meeting demonstrates that, as applied, Protocol 8, Protocols/Agreements ##g-i, violate the constitutional right of an elected official to engage in constitutionally-protected outside expressive activity.

## **PUSD's Crossroad**

Mr. Hickambottom and I have taken Member Frederick's case on a pro bono basis because of the importance of the issues raised. For us, the protection of the constitutional expressive rights of free speech, free petition, and a free press are always among the highest values we can serve, and those values are even more important these days when we have to confront the Trumpist autocratic values that seek to overthrow our democracy. But the substantive issue which has been disserved by PUSD's unconstitutional conduct – the vaccine mandate – is equally important in the current pandemic of the unvaccinated. Superintendent McDonald and the Board majority are on the wrong side of this issue with their cowardly catering to the anti-vaxxers' psychopathology that threatens the public health and, most dangerously, threatens the health of our students under the age of 12 who are vaccine ineligible.

PUSD ought to meet the demand made herein to rescind its unconstitutional restraints on Board Members' outside expressive activity because it is the right thing to do. It is the right thing to do on both legal and policy grounds. But it is also the right thing to do for fiscal reasons. To research and prepare this demand letter, we have incurred approximately \$10,000 in time at our current hourly rates. The fact that our services are free to Member Fredericks does not necessarily mean that they will not be a cost to PUSD. Our services were pro bono to the several dozen people and organizations we represented in the Plaza Pasadena case, but, because of California's statute providing for recovery of attorneys fees to attorneys who act as private attorney generals to represent matters of public interest, the owners of the Plaza Pasadena had to pay to their attorneys a significant sum to represent them but also had to pay my firm more than \$400,000 in private attorney general attorneys fees. Our hourly rates are now about double what they were in the 1980s, so a repeat of the Plaza Pasadena case today would incur fees for us approaching a million

dollars. In some respects this case is simpler than the Plaza Pasadena case, and in some respects it is more complex. The bottom line is that with what PUSD would have to pay its lawyers to defend this case and with the risk it has that it would have to pay our attorneys fees, it may have a seven-figure exposure to defend this case. We are prepared to litigate this case to its conclusion. We believe that doing so would be as financially rewarding to us and to the progressive community in the greater Pasadena area.<sup>24</sup> But we would rather that PUSD do the right thing, rescind its unconstitutional restrictions on Board Members' outside expressive activities, and spend its money on educating children rather than legal fees on losing causes.

On fairness and moral grounds, the right thing to do would also be pay damages to Member Fredericks and for the Board to apologize to Member Fredericks for the abuse of her in attempting to chill her exercise of her constitutionally-protected outside expressive activity rights. Such an apology would begin to purge the taint of repression from the unclean hands of Superintendent McDonald and at least three Board Members. But Member Fredericks is prepared to forego demanding anything for herself in the pursuit of the higher goal of cleansing from the Board its unconstitutional restrictions on Board Members' outside expressive activity. We urge the Board to do the right thing, meet the demand herein, and turn in the right direction on the crossroad that has been reached on the matters discuss herein.

## **Law Office of Gronemeier & Hickambottom**

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/S/  
By Dale L. Gronemeier  
Partner  
Cc: PUSD Board Member Tina Fredericks  
Local media outlets

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<sup>24</sup>It would be rewarding to the progressive community because my firm has always had a policy of titheing on large settlements to worthy progressive causes. For instance on the Plaza Pasadena case, we donated \$20,000 to KPAS for the purpose of increasing its coverage of local issues. We also contribut \$20,000 to voter registration efforts in Northeast Pasadena, which contributed to the election of the first African-American to the City of Pasadena's Council District 1.