

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

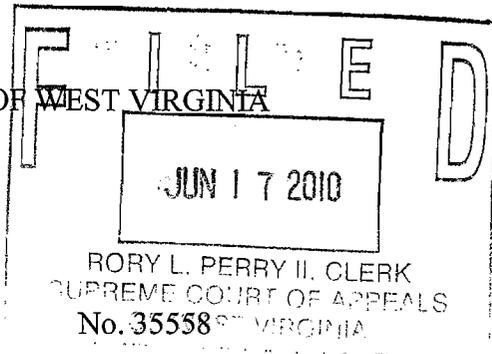
MEN & WOMEN AGAINST DISCRIMINATION,

Appellee/Plaintiff,

v.

THE FAMILY PROTECTION SERVICES BOARD,
et al.,

Appellants/Defendants.



**AMICUS CURIAE BRIEF ON BEHALF OF
WEST VIRGINIA COALITION AGAINST DOMESTIC VIOLENCE, INC.
IN SUPPORT OF APPELLANTS/DEFENDANTS**

I. INTRODUCTION

In order to better understand the relief sought by Men and Women Against Discrimination (“MAWAD”), and granted by the Circuit Court, in this litigation, a brief review of the history of MAWAD is revealing. The Circuit Court uncritically accepted MAWAD’s representation that it simply is a “...charitable organization organized to promote fairness and gender equality in the implementation of the purposes of the West Virginia Domestic Violence Act and the manner in which services are provided pursuant to that Act...” 10/2/09 Order, Finding of Fact (“FOF”) #1. Closer scrutiny indicates, however, there is little regard for fairness and less for gender equality in MAWAD’s world view and agenda.

In its original incarnation, MAWAD was known simply as Men Against Discrimination (“MAD”). MAD concluded that its agenda would appear more palatable by adding “women” to its name, hence the organization became Men and Women Against Discrimination in

approximately 2008. As do most so-called “fathers’ rights” groups¹, MAWAD promotes the myth of gender “symmetry” in domestic violence—i.e., that domestic violence by women against men is just as common and serious as men’s violence against women. WVCADV acknowledges that domestic violence by women against men does happen; however, credible peer-reviewed studies, and reviews indicate it is far less pervasive than male violence against women, and typically less injurious or lethal.² In fact, a leading research review establishes that violence is instrumental in maintaining control in relationships and over 90% of the “systematic, persistent, and injurious” violence is perpetrated by men against women.³ The information sources typically relied on by MAWAD and other fathers’ rights groups for their claim of gender “symmetry” in domestic violence are studies using the Conflict Tactics Scale (“CTS”), a survey tool devised in the 1970’s, when domestic violence awareness was barely in its infancy.⁴ Regarding the significant limitations of the CTS, the U.S. Department of Justice’s National Institute of Justice has observed:

¹In recent years, “fathers’ rights” groups have proliferated and filed lawsuits across the nation that, while “couched in neutral legal terms like ‘reverse discrimination’ and equal protection,’ . . . are in reality part of a systematic assault on laws designed to protect women and children.” Molly Dragiewicz and Yvonne Lindgren, The Gendered Nature of Domestic Violence: Statistical Data for Lawyers Considering Equal Protection Analysis, 17 J. of Gender, Soc. Pol. & Law 101, 104 (2009). MAWAD’s relief sought in this litigation is consistent with the goals of other similar groups.

²Kimmel, Michael S. “‘Gender symmetry’ in domestic violence: A substantive and methodological research review,” *Violence Against Women* 8(11), November 2002: 1332-1363.

³Kimmel, supra, note 2.

⁴There is a CTS 2 available since 2005, however much of the work relied on by “fathers’ rights” groups stems from the original CTS.

*CTS may not be appropriate for intimate partner violence research because it does not measure control, coercion, or the motives for conflict tactics; it also leaves out sexual assault and violence by ex-spouses or partners and does not determine who initiated the violence.*⁵

In 2007-08, when MAWAD publicized male domestic violence homicide victims in West Virginia, it simply stated that 42% are males. Appellee implied that, in domestic violence homicides, women kill men at a rate not far below that which men kill women.⁶ However, of the 12 male homicides in 2005 in West Virginia, only 25% were murdered by an intimate partner and 75% were murdered by non-intimate partners (i.e., principally other male family members).⁷ By contrast, two-thirds of the 15 women killed were murdered by an intimate partner.⁸ Simply stated, West Virginia women in 2005 were about three times more likely than men to be murdered by an intimate partner.⁹ In a Fatality Review Report for 2003 (the most recent publicly available), 39 domestic violence related deaths were identified in West Virginia—26 homicides and 13 suicides; 11 of the suicides were committed by men, 10 after murdering female intimate

⁵U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, “Measuring Intimate Partner (Domestic) Violence” (May 12, 2010), available at <http://www.ojp.usdoj.gov/nij/topics/crime/intimate-partner-violence/measuring.htm> (italics added for emphasis).

⁶See generally, *Charleston Gazette*, Jan. 27, 2008, “Overstating Blame in Domestic Violence Does Not Prevent Deaths” at 1C. See also, Video Clip, <http://www.youtube.com/watch?v=AUiHqozQ3A8> (MAWAD spokesman Ron Foster appearing at the Family Preservation Festival 2008, Upper Senate Park, Washington, D.C. 8/15-16/08, stating 42% of West Virginia domestic violence homicides are male).

⁷See e.g., WV Criminal Justice Statistical Analysis Center, *Official Reports of Domestic Violence Victimization in WV: 2000-2005*, p. 15 (May 2007), available at <http://www.dcjs.wv.gov/SAC/Documents/Official%20DV%20Report%2000-05.pdf>.

⁸ *Official Reports of Domestic Violence Victimization in WV: 2000-2005*, supra, note 7.

⁹ *Official Reports of Domestic Violence Victimization in WV: 2000-2005*, supra, note 7.

partners.¹⁰

In summary, Appellee's theory of gender "symmetry" is based on a flawed interpretation of data using a tool, the CTS, that is flawed for assessing and understanding domestic violence. Awareness of Appellee's flawed premise of gender "symmetry" (which goes hand in hand with rigid insistence on MAWAD's peculiar vision of gender "equality") is important in understanding the errors in the Circuit Court's decision. Broadly stated, MAWAD sought and the Circuit Court granted relief in three areas. First, the Circuit Court found fault with the advocate certification process under a FPSB rule. 10/2/09 Order, FOF #10-18. Second, the Circuit Court concluded that FPSB's rules regarding Perpetrators' Intervention Programs are unconstitutional. 10/2/09 Order, FOF #19-24. Finally, the Circuit Court found gender discrimination relating to domestic violence shelters. 10/2/09 Order, FOF #25-29. Each of the Circuit Court's erroneous conclusions will be addressed infra, along with an analysis of why Appellee lacks First Amendment standing.

II. LEGAL ARGUMENT

A. THE ADVOCATE CERTIFICATION RULES ARE LAWFUL AND DO NOT EXCEED FPSB'S AUTHORITY.

The Circuit Court concluded that the FPSB's rules concerning domestic violence advocate certification "...exceed the [statutory] authority granted to the Board." 10/2/09 Order, p. 9. The two rules involved provide:

§191-2-2.2. "Certified Domestic Violence Advocate" means an advocate employed by a licensed family protection program who has been approved by the

¹⁰WV Department of Health & Human Resources, Bureau of Public Health, Office of the Chief Medical Examiner, "*Domestic Violence Fatalities Among Adults in West Virginia 2003*", available at <http://www.wvdhhr.org/ocme/dvreport03/dvfatalities2003final.pdf>.

Board of Directors of West Virginia Coalition Against Domestic Violence as meeting the eligibility standards outlined in the Coalition's Domestic Violence Advocate Certification Project.

§191-2-3.2.k.12. [Each licensed domestic violence program shall] assure that at least one-third of its direct service providers are certified by the West Virginia Coalition Against Domestic Violence as Domestic Violence Advocates.

Appellee complained, and the Circuit Court accepted its argument, that “[i]n practice this rule excludes any person who does not adhere to the gender based fundamental beliefs of the Coalition from applying for and receiving the status of certified Domestic Violence Advocate.” This conclusion is erroneous for at least three reasons.

First, advocate certification is not, as MAWAD implies, a nefarious feminist plot to perpetuate “gender discrimination” in advocacy for domestic violence victims. Rather, the requirement is an effort to ensure quality in licensed programs’ advocacy for domestic violence victims in West Virginia. Specifically, certification helps ensure competent services delivery by enhancing licensed programs’ capacity to assess and respond to complex individual and family circumstances. Anyone, regardless of gender, is free to apply for employment as an advocate with a licensed domestic violence program.¹¹ Once hired, any advocate, regardless of gender, may begin fulfilling the requirements for certification immediately. After three years’ employment as an advocate, completing training requirements, demonstrating competency, and adhering to the Code of Ethics for Domestic Violence Advocates, advocates of any gender may apply for certification. Applications are reviewed bi-annually, and ultimately approved by the

¹¹This is not to say that an applicant whose beliefs are fundamentally at odds with mainstream, contemporary thinking about domestic violence automatically is entitled to an advocate’s job with a licensed program. For example, common sense dictates that society not put still-abusing crackheads and meth addicts in charge of rehabilitation services for drug offenders.

WVCADV Board of Directors on a non-discriminatory basis.¹²

Second, neither FPSB nor WVCADV has “gender based fundamental beliefs” in any sense that constitutes unlawful discrimination.¹³ Rather, the WVCADV embraces, and the FPSB by its Rules accepts, established and sound social science concerning the dynamics of domestic violence.¹⁴ By contrast, MAWAD believes there is gender “symmetry” in domestic violence. While Appellee obviously disagrees with the social science underlying FPSB’s rules, such discontent with the rules does not constitute cognizable discrimination under the Constitution or any relevant statute.

Third, no discrete or specific instances of gender discrimination in hiring by licensed domestic violence programs in West Virginia have been proven (or even alleged) by Appellee. Simply put, this is not a case where a licensed domestic violence program allegedly discriminated against a male applicant in hiring (or opportunity for advocate certification) because of their gender.¹⁵ Rather, this is a case where MAWAD has a generalized, ideological dissatisfaction with the FPSB and its rules, and seeks to impose its agenda upon the FPSB in the development and implementation of new rules more to its liking.

¹²In the history of the advocate certification program, one male advocate has attained certification and another presently is working toward certification. Other male advocates are employed and may seek certification in the future.

¹³In fact, WVCADV has several projects and/or task forces that embrace diversity, including the Advocates of Color Network, LGBTQQI Advisory Council (for lesbians, gays, et al.), Disability & Later Life Advisory Council, and others.

¹⁴Kimmel, supra, note 2.

¹⁵In fact, licensed domestic violence programs have hired males as Domestic Violence Advocates. If a male meets the criteria for certification, they have been and in the future will be certified.

B. FPSB'S ADMINISTRATION OF PERPETRATORS' INTERVENTION PROGRAMS IS LAWFUL AND WITHIN ITS AUTHORITY.

Appellee contended, and the Circuit Court found, that “[t]he promulgation of this rule forms the basis for the [FPSB’s] official position that perpetrator intervention programs should actually be and, in fact are, administered as ‘batterers’ intervention programs with the fundamental premise that only men can be batterers and therefore only men are appropriate candidates for participation in perpetrator intervention programs.” 10/2/09 Order, FOF #21. The Circuit Court also found that the Legislature has mandated gender-neutral perpetrator intervention programs and the FPSB has “ignored this [legislative] intent and created a gender specific program that includes only men and excludes all women.” 10/2/09 Order, FOF # 22. MAWAD’s complaint and the Circuit Court’s erroneous conclusions flow from CSR 191-3-3.3 (2003). That rule concerns staff qualifications for licensing perpetrator intervention programs, and provides:

3.3. Staff Qualifications

3.3.a. Educators/facilitators shall have a minimum of 30 hours of training approved by the Board, including, but not be limited to, the following:

3.3.a.1. The dynamics of domestic violence within the context of power and control;

3.3.a.2. The effects of domestic violence on victims and their children and the critical nature of victim contacts and safety planning;

3.3.a.3. The understanding that **domestic violence is deeply rooted in historical attitudes toward women** and is intergenerational;

3.3.a.4. Lethality assessment for risks of homicide, suicide, further domestic violence, or other violent aggressive behaviors, and the access to or use of weapons.

3.3.a.5. Information on state and federal laws pertaining to domestic violence, including the policies affecting treatment of court-ordered program participants, child abuse, divorce and custody matters;

3.3.a.6. The role of the facilitator within the group and in the context of a coordinated community response to domestic violence;

3.3.a.7. Teaching non-controlling alternatives to violent and controlling behaviors, and understanding and preventing collusion.

3.3.a.8. Dynamics involved in interpersonal relationships and knowledge of human behavior and development.

(bold added for emphasis). The bolded language from § 3.3.a.3 apparently formed the basis for the Circuit Court's unsupported conclusions that "...perpetrator intervention programs...are administered as 'batterers' intervention programs with the fundamental premise that only men can be batterers and...only men are appropriate candidates for participation in perpetrator intervention programs," and the FPSB has "ignored...[legislative] intent and created a gender specific program that includes only men and excludes all women."

On their face, there is nothing discriminatory or legally objectionable about the foregoing FPSB rules. They are drafted in terms of "perpetrator intervention programs," which obviously is a gender-neutral term. Even if the term "batterer" is used interchangeably with "perpetrator" there is no evidence in this case concerning the rule's implementation that FPSB believes that only men can be "batterers." While perpetrators and batterers predominantly are men, they are not exclusively so; the Circuit Court's finding that FPSB believes that "only men are appropriate

candidates for participation in perpetrator intervention programs” simply is unsupported.

Appellee suggested and the Circuit Court apparently concluded that a reference in a rule to “historical attitudes toward women” somehow rendered it discriminatory or exclusionary. However, “historical attitudes toward women” are inseparable from any reasonable understanding of domestic violence:

In ancient Roman times, a man was allowed by law to chastise, divorce, or kill his wife for adultery, public drunkenness, or attending public games...During the middle ages, a man’s right to beat his wife was beyond question...

This general idea prevailed for hundreds of years. A few enlightened souls began to recognize the brutality of wife beating very early on, though it took centuries before any real efforts were made to curtail the problem.

* * *

“Rule of thumb” refers to an English common law, which was included in Blackstone’s codification of the law published in the eighteenth century. Before the rule of thumb, a husband could chastise his wife with “any reasonable instrument.” The rule of thumb actually represented some progress toward limiting the amount of force a man could use. It allowed a husband to beat his wife with any stick of his choosing—as long as it was no thicker than his own thumb.

American courts approved this rule in 1824, when a Mississippi court held that husbands could use corporal punishment against wives within this paltry limitation. A typical statement of the early law declared that a man could beat his wife “without subjecting himself to vexatious prosecutions for assault and battery, resulting in the discredit and shame of all concerned.”

* * *

...few people actually saw violence in the home as a problem. One reason for the lack of concern was the common notion—in British, American, and many other societies—that a woman was not a full human being, but property, first of her father, then of her husband.

Berry, The Domestic Violence Sourcebook, pp. 15-18 (1st Ed. 1996). Against this immutable historical and legal backdrop, only an un- or misinformed ideologue could fail to fathom that men's historical attitudes toward women played and continue to play a central role in our still-evolving understanding of the dynamics of domestic violence. Accordingly, there is nothing discriminatory or insidious about taking cognizance of this context in administering programs designed to remedy the serious societal problem of domestic violence.

C. FPSB'S RULES CONCERNING EMERGENCY SHELTER ADMINISTRATION ARE LAWFUL AND WITHIN ITS AUTHORITY.

Believing that female violence against males is as pervasive as male violence against women, Appellee suggested below, and the Circuit Court agreed¹⁶, that CSR §191-2-4.11 mandates "separate but equal" gender discrimination. CSR §191-2-4.11 provides:

A shelter shall have a written process for obtaining alternative lodging to house victims of domestic violence and their children when the residential facility is filled to capacity or is unable to accommodate special needs populations, including, but not limited to, victims who are: elderly, have disabilities, or who are adult and adolescent males.

On its face, however, this Rule mandates an alternative lodging process for various populations including both males and females. For example, elderly or disabled females with special needs are treated the same as adult males—they are housed in alternate facilities. Such a rule does not indicate age or disability discrimination against older or disabled females any more than it does gender discrimination against males. It simply is a recognition of the practical resource limits and above all, safety considerations, that constrain emergency domestic violence shelters from

¹⁶10/2/09 Order, FOF #28.

being able to serve every segment of the population simultaneously all the time.

In Woods v. Horton, 167 Cal.App.4th 658, 84 Cal.Rptr.3d 332 (2008), the California Court of Appeal faced an equal protection challenge by male domestic violence victims to two statutory programs providing grants to service providers for domestic violence victims and two programs for inmate mothers. The Court of Appeal agreed with the plaintiffs as to the statutory programs providing grants to service providers for domestic violence victims, and reformed (rather than invalidated) the statutes in a gender-neutral manner. The Court stressed however (in language that debunks MAWAD's gender "symmetry" theory), that gender-neutral treatment does not necessarily translate into *identical services* for men and women:

Given the noted disparity in the number of women needing services and greater severity of their injuries, it may be appropriate to provide more and different services to battered women and their children. For example, a program might offer shelter for women, but only hotel vouchers for a smaller number of men.

167 Cal.App.4th at 679, 84 Cal.Rptr. at 350 (underlining added for emphasis). While the evidence in this case is that some West Virginia programs provide shelter while others provide hotel vouchers for males, it is clear that FPSB's rule passes constitutional muster--even under a strict scrutiny analysis (which California applies to gender distinctions under its State Constitution). Id.

D. THE CIRCUIT COURT ERRED BY CONCLUDING THAT MAWAD HAS STANDING TO MAINTAIN THIS LITIGATION.

Appellee has asserted repeatedly, and the Circuit Court found, an alleged “chilling effect” on its free speech rights (10/2/09 Order, FOF # 17, 24, 29, 30), in the FPSB’s rules relating to domestic violence services. MAWAD cited, and the Circuit Court relied, on several federal cases relating to First Amendment standing. As the following discussion will demonstrate, these authorities actually are of no support to Appellee here.

The first case cited by the Circuit Court is U.S. v. Blaszak, 349 F.3d 881 (6th Cir.2003), for the proposition that “[s]tanding requirements are relaxed in First Amendment cases where ‘an overbroad statute [acts] to ‘chill’ the exercise of rights guaranteed protection.” 10/2/09 Order, p. 10. Blaszak, however, was a criminal case involving First Amendment (overbreadth) and due process (vagueness) claims as a defense to an *actual prosecution*. The portion of the case relied on by MAWAD and the Circuit Court is at p. 888, wherein the Sixth Circuit explained that “...the analysis required for a challenge of overbreadth is not as strict as the vagueness test,” and “[t]he overbreadth doctrine is an ‘exception to traditional rules of standing and is applicable only in First Amendment cases in order to ensure that an overbroad statute does not act to ‘chill’ the exercise of rights guaranteed protection.’” 349 F.3d at 888. Appellee fails to note however, that the Blaszak court specifically upheld the defendant’s conviction because the statute did not implicate the First Amendment, could be constitutionally applied to him, and he was precluded from mounting an overbreadth challenge on the mere possibility the statute could be unconstitutionally applied to others. Id. As an actual criminal prosecution case, Blaszak is

wholly inapposite to this case. Id. MAWAD and its members have *not been prosecuted, nor threatened with prosecution, nor could it / they possibly be prosecuted under the FPSB rules* they purport to challenge.

Appellee and the Circuit Court also cited Dambrot v. Central Michigan University, 55 F.3d 1177 (6th Cir. 1995), for the proposition that “[s]tanding requirements are relaxed in First Amendment cases where ‘an overbroad statute [acts] to ‘chill’ the exercise of rights guaranteed protection.’” 10/2/09 Order, p. 10. The Sixth Circuit clarified that a statute is facially unconstitutional on overbreadth grounds if there is “...a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the court...” 55 F.3d at 1182. The rules challenged here by MAWAD say nothing of speech, and do not implicate, much less significantly compromise, “...recognized First Amendment protections of parties not before the court...” Id.

Appellee and the Circuit Court relied on Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947, 104 S.Ct. 2839 (1984), in which a divided Supreme Court found standing for a for-profit fund-raising group to challenge a 25% limit on charitable fund-raising expenses by non-profits imposed by a statute, brushing aside prudential limitations of standing. However, Munson Co. includes cautionary language¹⁷ which speaks volumes to the case at bar: “...prudential limitations add to the constitutional minima a healthy concern that if the claim is

¹⁷Munson Co. also counsels judicial restraint because the First Amendment overbreadth doctrine is “strong medicine” and should be invoked only “as a last resort.” 467 U.S. at 958, 104 S.Ct. at 2848.

brought by someone other than one at whom the constitutional protection is aimed, the claim not be an abstract, generalized grievance that the courts are neither well equipped nor well advised to adjudicate.” 465 U.S. at 955, 104 S.Ct. at 2846. Because MAWAD’s claims here amount to “an abstract, generalized grievance that the courts are neither well equipped nor well advised to adjudicate,” Munson Co. offers no support for Appellee.

Appellee and the Circuit Court cited Virginia v. American Booksellers Ass’n, Inc., 484 U.S. 383, 108 S.Ct. 636, 81 L.Ed.2d 786 (1988), and three lower court decisions for the proposition that courts have determined that a “self-imposed chilling effect on speech constitutes a sufficient injury in fact to confer standing.” 10/2/09 Order, p. 10. While the American Booksellers Ass’n, Inc. Court did find sufficient injury in fact to confer standing upon booksellers by virtue of threatened criminal prosecutions, it declined to address the constitutional issues presented, and instead certified two questions to the Virginia Supreme Court for authoritative interpretation of the challenged statute. Thus, American Booksellers Ass’n, Inc. actually stands for the familiar, cautionary admonition that constitutional adjudication is not to be embarked upon lightly. More importantly, MAWAD here has not established a sufficient injury in fact to confer standing; unlike the booksellers in American Booksellers Ass’n, Inc., it is not having to undertake costly and significant compliance measures on peril of criminal prosecution. Rather, MAWAD merely alleges “an abstract, generalized grievance” with FPSB rules relating to domestic violence services in this state. Such ideological discontent is not sufficient injury in fact to confer First Amendment standing.

The lower court decisions cited by Appellee and the Circuit Court involved credible threats of criminal prosecution against the parties mounting pre-enforcement challenges to the respective statutes on First Amendment grounds. In St. Paul Area Chamber of Commerce v. Gaertner, 439 F.3d 481 (8th Cir. 2006), three chambers of commerce sought to make political contributions which were proscribed by a Minnesota statute. The Eighth Circuit noted that standing exists where there is a “credible threat of prosecution” and the chambers’ fear was “not imaginary or speculative” because a similar prosecution had occurred in another county under the same statute. 439 F.3d at 485-86. In Majors v. Abell, 317 F.3d 719 (7th Cir. 2003), the Seventh Circuit similarly ruled that if a statute criminally proscribes conduct and so may deter constitutionally protected expression, a pre-enforcement challenge is allowed without actual criminal prosecution or specific threat thereof. American Booksellers Foundation v. Dean, 342 F.3d 96, 101 (2nd Cir. 2003), similarly found standing because the plaintiffs had demonstrated “an actual and well-founded fear that the law will be enforced against [them].” Unlike the plaintiffs in the “threat of prosecution” cases it has cited, MAWAD faces *not the slightest, theoretical risk of criminal prosecution* by operation of the challenged rules. Consequently, the authorities relied on by Appellee and the Circuit Court are no support for concluding there is standing here.

The Circuit Court’s erroneous conclusion that Appellee has standing is such a quantum extension of the foregoing authorities that it cannot withstand appellate review in this Court.¹⁸

¹⁸Under the Circuit Court’s expansive approach to First Amendment standing, literally any disgruntled citizen or group with a generalized disagreement with State funding mechanisms

The Circuit Court concluded:

...[MAWAD] has established the actual and well-founded reality that rules adopted by the defendants *prohibit* the plaintiff and its constituent members from expressing their views regarding the gender-neutral nature of domestic violence by seeking certification as certified domestic violence advocates or the operators of licensed domestic violence programs, shelters or perpetrator intervention. In view of the reality of the plaintiff's situation, the Court concludes that the plaintiff has standing to prosecute this action.

10/2/09 Order, p. 11 (*italics added for emphasis*). The Circuit Court's conclusion that FPSB's rules prohibit *anything* vis a vis MAWAD is wholly unsupported by the record and the rules on their face. MAWAD and its members can speak and advocate freely at any time in any forum and in any way they see fit.¹⁹ FPSB's rules prohibit none of this. Like any other citizen wanting to become a certified domestic violence advocate, MAWAD's members are free to seek and maintain employment with a licensed program for three years, satisfy the requirements of the rule, and become certified. Similarly, nothing in FPSB's rules bars Appellee from organizing and seeking funding for an alternate program around the premise (albeit erroneous) that women commit domestic violence as frequently and seriously as do men.

In summary, there is no "chilling effect" upon MAWAD by operation or implementation of FPSB's rules. Simply put, there is *no effect* upon Appellee by FPSB's rules; therefore it lacks

or rules has standing to bring a free speech challenge.

¹⁹While WVCADV vigorously disputes that Appellee's First Amendment rights have been violated by the FPSB here, it acknowledges that MAWAD like any other advocacy group has First Amendment rights. The First Amendment protects not only wise speech, but also foolish, intemperate, and grossly un- or misinformed speech. See e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) (striking down Ohio statute criminalizing mere advocacy rather than incitement to imminent lawless action).

standing to maintain this litigation. Appellee's convoluted free speech claim is ironic if nothing else for, as discussed infra, this litigation appears calculated to have a chilling effect on the operation of bona fide domestic violence programs in West Virginia.

E. THE RELIEF SOUGHT BY MAWAD IN THIS LITIGATION APPEARS CALCULATED TO CONTROL OR DISRUPT BONA FIDE DOMESTIC VIOLENCE PROGRAMS AND THEIR FUNDING IN WEST VIRGINIA.

No amicus brief from WVCADV is complete without brief comment on the implications of the Circuit Court's decision and MAWAD's attempt to bolster its misinformed agenda through this litigation. By promoting gender "symmetry" and otherwise, MAWAD seeks to confuse the analysis of domestic violence by men against women, and deter legitimate domestic violence victims from seeking appropriate services from licensed programs. MAWAD seeks to disrupt FPSB funding to licensed domestic violence programs in West Virginia. By interfering with advocate certification, Appellee effectively undermines efforts to enhance the quality of services provided to domestic violence victims and survivors. By speciously suggesting gender discrimination, Appellee jeopardizes funding of the FPSB, WVCADV, and licensed domestic violence programs, all of whom rely on funders that demand non-discrimination as a condition of funding.²⁰ MAWAD apparently seeks to disrupt the operation of bona fide shelters and

²⁰The Circuit Court noted that W.Va. Code § 48-26-601 that a licensed domestic violence program may not be funded initially if it is found to have discriminated in its services on the basis of, inter alia, sex. Under that provision, a program may not be refunded until such discrimination ceases. While there has been no finding here that a particular program has discriminated in any specific instance, the Circuit Court's erroneous decision, if not corrected, imperils funding of the 14 licensed domestic violence programs in West Virginia under W.Va. Code § 48-26-601.

perpetrators' intervention programs through this litigation. Appellee apparently believes that licensed domestic violence programs should disregard social science, embrace gender "symmetry," and open their shelters to all populations at all times, without regard to strategic and tactical safety concerns. Contrary to this notion, women fresh from violent homes with vivid and intensely terrifying memories reasonably cannot be expected to share emergency shelter living quarters with adult males. Failing co-ed shelters, MAWAD presumably believes that scarce resources should be diverted to brick and mortar shelters for men (rather than housing them in alternate accommodations), and protective orders should be entered against all women committing acts worthy of CTS scoring, regardless of coercion, context, or circumstances. Although nothing in FPSB's rules has restrained, impaired or even chilled Appellee's (or its members') First Amendment rights, this litigation has created the unwarranted perception of "free speech" violations. Finally, Appellee seeks to encourage similar vexatious litigation against state agencies and/or domestic violence services providers nationwide. Fortunately, the Circuit Court's decision is replete with legal error so none of these implications need come to pass.

III. CONCLUSION

Returning to an overview of this matter, the Circuit Court erred by concluding that the advocate certification process under FPSB rules violates MAWAD's free speech rights or is not a proper delegation of legislative authority. The Circuit Court erred by concluding that FPSB rules concerning perpetrator intervention programs are unconstitutional or in excess of the Board's authority. Similarly, it was error for the Circuit Court to invalidate rules relating to domestic violence shelters as violating MAWAD's free speech rights or exceeding FPSB's authority. Finally and perhaps most obviously, MAWAD lacks standing to prosecute this litigation; the First Amendment standing authorities relied on by Appellee and the Circuit Court are wholly inapposite to this case. This Court should reverse the decision below and remand with directions to dismiss Appellee's claims with prejudice.

Respectfully submitted,
WEST VIRGINIA COALITION
AGAINST DOMESTIC VIOLENCE, INC.
By counsel



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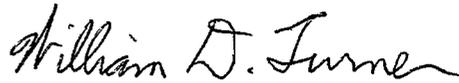
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CERTIFICATE OF SERVICE

I, William D. Turner, counsel for amicus curiae, WVCADV, do hereby certify that I have served the foregoing, *Renewed Motion for Leave to File an Amicus Curiae and AMICUS CURIAE BRIEF ON BEHALF OF WEST VIRGINIA COALITION AGAINST DOMESTIC VIOLENCE, INC. IN SUPPORT OF APPELLANTS/DEFENDANTS* upon counsel of record, by mailing a true and exact copy thereof, via United States First Class Mail, postage paid, on this the 16th day of June, 2010, and addressed as follows:

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