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May 11, 2020

Via Email
Dr. Jeanette Ball
Superintendent
Judson Independent School District
8012 Shin Oak Drive, Live Oak, TX 78233
rsaldivar@judsonisd.org

Jesús Hernández III
Principal
Judson High School
9142 FM 78, Converse, TX 78109
jehernandez@judsonisd.org

Re: Establishment Clause Violation

Dear Dr. Ball and Principal Hernández III,

I am writing to alert you to a serious constitutional violation that occurred under the authority of your school, Judson High School, and your school district, Judson Independent School District. Specifically, our office was notified that Judson High School was displaying "Just Pray" on its marquee (as shown below) from at least April 1 through April 13 of this year. Under well-settled First Amendment Establishment Clause jurisprudence, *infra*, your actions mark a clear breach of the United States Constitution. While we appreciate trying to bring comfort in a time of crisis, this display serves only to divide students, faculty, and staff along religious lines and alienate those who do not believe in prayer. This letter demands assurances that you will refrain from posting religious messages on the marquee or anywhere else on public school grounds.

The American Humanist Association ("AHA") is a national nonprofit organization with tens of thousands of members across the country, including many in Texas. The mission of AHA's legal center is to protect the cornerstone principle of our democracy: the constitutional mandate requiring separation of church and state. We have litigated dozens of church-state separation cases in federal courts from coast to coast, including in the U.S. Supreme Court.

The First Amendment's Establishment Clause "commands a separation of church and state." *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005). The Establishment Clause "absolutely prohibit[s] government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith." *Sch. Dist. v. Ball*, 473 U.S. 373, 385 (1985). The government must not "place its prestige, coercive authority, or resources behind a single religious faith or behind religious belief in general, compelling non-adherents to support the practices or proselytizing of favored religious organizations and conveying the message that those who do not contribute gladly are less than full members of the community." *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 9 (1989).

The Supreme Court is "particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools," *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987), where "there are heightened concerns with protecting freedom of conscience from [even] subtle coercive pressure." *Lee v. Weisman*, 505 U.S. 577, 592 (1992).[1] *Accord Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 303 (2000) (holding that student-led, student-initiated prayers before high school football games violated the Establishment Clause despite school's hands-off approach to the prayers). Indeed, the Supreme Court places an *affirmative duty* upon public schools to "be certain . . . that subsidized teachers do not inculcate religion." *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971).

In *Lee*, the Supreme Court declared that, "at a minimum, the [Establishment Clause] guarantees that government may not coerce anyone to support or participate in religion or its exercise." 505 U.S. at 587. The Court went on to hold that a public school's inclusion of a nonsectarian prayer by a Rabbi in a graduation ceremony violated the Establishment Clause even though students were not required to participate in the prayer. *Id.* at 586. The Court reasoned, in part, that prayer is "an essential and profound recognition of a divine authority." *Id.* at 593 (citations omitted). In finding the prayer coercive, the Court explained that a school's "supervision and control of a . . . graduation ceremony places public pressure, as well as peer pressure" on students. *Id.* at 593. This holding echoed the Court's earlier rulings, which had recognized that the "State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure." *Edwards*, 482 U.S. at 584 (holding unconstitutional a statute prohibiting the teaching of evolution in schools unless accompanied by instruction in "creation science").

As the Fifth Circuit noted in 1993, "*Lee* is merely the most recent in a long line of cases carving out of the Establishment Clause what essentially amounts to a *per se* rule prohibiting public-school-related or -initiated religious expression or indoctrination." *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 165 (5th Cir. 1993); *e.g.*, *Wallace v. Jaffree*, 472 U.S. 38, 40-42

[1] *Cf. Marsh v. Chambers*, 463 U.S. 783, 792 (1983) (distinguishing adults not susceptible to "religious indoctrination" and children subject to "peer pressure").

(1985) (moment of silence to start school day unconstitutional); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 205 (1963) (daily scripture readings unconstitutional); *Engel v. Vitale*, 370 U.S. 421, 422-23 (1962) (school prayer unconstitutional).

Moreover, independent from coercion concerns, the Supreme Court has made clear that any "[s]chool sponsorship of a religious message is impermissible." *Santa Fe*, 530 U.S. at 309-10. In *Santa Fe*, the Supreme Court held that even student-initiated, student-led prayers at football games, which were completely voluntary, violated the Establishment Clause. *Id.* at 317. As the Court noted, irrespective of coercion, "[s]chool sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are not adherents that they are outsiders." *Id.* at 309. "[T]he religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer." *Id*. at 313. The Court also found that the prayers were unconstitutionally coercive under *Lee*, reasoning that even "if we regard every high school student's decision to attend a home football game as purely voluntary, we are nevertheless persuaded that the delivery of a pregame prayer has the improper effect of coercing those present." *Id*. at 311-12.

In accordance with Supreme Court precedent, the Fifth Circuit has similarly made clear that public schools may not endorse religion. *See Ingebretson v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996) (holding that allowing prayer in schools during school events unconstitutionally endorsed religion); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995) (holding that allowing coaches to participate in student-led prayer unconstitutionally endorsed religion); *Karen B. v. Treen*, 653 F. 2d 897 (5th Cir. 1981) (holding that allowing teachers to select students to pray or pray themselves unconstitutionally endorsed religion), *aff'd*, 455 U.S. 913 (1982).

In *Ingebretson*, for instance, the Fifth Circuit held that a public school "unconstitutionally endorses religion whenever it appears to take a position on questions of religious belief or makes adherence to a religion relevant in any way to a person's standing in the political community." 88 F.3d at 280-81 (citations omitted). The government does this whenever it "conveys a message that religion is favored, preferred, or promoted over other beliefs." *Id*. (citations omitted). Thus, the policy at issue was "an unconstitutional endorsement of religion" because it "set[] aside special time for prayer." *Id*.

And in *Treen*, the Fifth Circuit held unconstitutional a Louisiana statute allowing teachers to either select students to give prayers or give prayers themselves. 653 F.2d 897. The statute did not prescribe a specific form of prayer, but the court emphasized that the First Amendment "demands absolute government neutrality with respect to religion." *Id*. at 901. "Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of students is voluntary can serve to free it from the limitations of the Establishment Clause." *Id*. at 902 (citing *Engel*, 370 U.S. at 430).

The Fifth Circuit in *Duncanville* held that school coaches merely participating in student prayer violated the Establishment Clause. 70 F.3d at 406. The court noted that these coaches are "representatives of the school and their actions are representative of the [school district's] policies." *Id*. Thus, "participate[ng] in [the] prayers improperly entangles [the school] in religion

and signals an unconstitutional endorsement of religion." *Id*. The court emphasized that "the principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause." *Id*. (citations omitted).

In addition to prayer, public schools cannot endorse religious displays pursuant to directly applicable precedent established by the Supreme Court, the U.S. District Court of Texas, and other federal courts. *E.g.*, *Stone v. Graham*, 449 U.S. 39, 41 (1980) (Ten Commandments display in public school unconstitutional); *Doe v. Aldine Indep. Sch. Dist.*, 563 F. Supp. 883, 888 (S.D. Tex. 1982) (religious text display violated the Establishment Clause); *Washegesic v. Bloomingdale Pub. Sch.*, 33 F.3d 697 (6th Cir. 1994) (portrait of Jesus Christ in public school held unconstitutional); *Ahlquist v. City of Cranston*, 840 F. Supp. 2d 507 (D. R.I. 2012) (prayer mural held unconstitutional); *Joki v. Bd. Of Educ. of Schuylerville Cent. Sch. Dist.*, 745 F. Supp. 823, 829-30 (N.D. N.Y. 1990) (religious painting in public school unconstitutional). *See also Greater Houston Chapter of ACLU v. Eckels*, 589 F. supp. 222 (S.D. Tex. 1984), *reh'g denied*, 763 F.2d 180 (5th Cir. 1985) (war memorial containing crosses and Star of David in public park unconstitutional); *Roberts v. Madigan*, 921 F.2d 1047, 1056-58 (10th Cir. 1990) (a teacher's display of a Bible in his classroom "had the primary effect of communicating a message of endorsement of a religion").

In *Stone*, the Supreme Court held that posting copies of the Ten Commandments in public school classrooms violated the Establishment Clause. 449 U.S. at 42-43. The Court explained that the display serves only to "induce school children to read, meditate upon, . . . venerate and obey, the Commandments." *Id*. Thus, "the mere posting of the copies under the auspices of the legislature provides the official support of the State Government that the Establishment Clause prohibits." *Id*.

Following *Stone*, in *Aldine*, the U.S. District Court of Texas held that a prayer posted "in raised block letters on the wall over the entrance to the gymnasium at Aldine Senior High School" violated the Establishment Clause. 563 F. at 884. The court reasoned: "the posting of the words alone is unconstitutional in light of *Stone v. Graham*." *Id.* at 885 n.2. Regardless of the purpose for the display, the court explained that "[a] school district . . . cannot seek to advance nonreligious goals and values, no matter how laudatory, through religious means." *Id*. at 886 (citing *Schempp*, 374 U.S. 203). *See also*, *Treen*, 653 F.2d at 901 (rejecting officials' statements of a secular purpose because "prayer is a primary religious activity in itself").

While government-sponsored prayer and religious displays are plainly prohibited in the public-school context, *supra*, government-sponsored prayer and displays are generally unconstitutional even in the adult context. For instance, we (the AHA) recently won a case against a Florida police department that promoted prayer on the department's Facebook page. *Rojas v. City of Ocala*, 315 F. Supp. 3d 1256, 1278 (M.D. Fla. 2018). The court reasoned, as relevant here: "Given that the Facebook page posting by the Ocala Police Department asked Ocala's citizens to join in 'fervent prayer'— an undisputedly religious action, and that the Prayer Vigil consisted of chaplains offering Christian prayers and singing from the stage with responsive audience participation, a reasonable observer would find that the Prayer Vigil had a religious purpose" and was thus unconstitutional. *Id.* In fact, the court found the police department's conduct:

> "'lies so obviously at the very core of what the [Establishment Clause] prohibits that the unlawfulness of the conduct was readily apparent to [them], notwithstanding the lack of fact-specific law.'" [citation omitted]. . . . No factually

> particularized, pre-existing case law was necessary for it to be obvious to local government officials that organizing and promoting a Prayer Vigil would violate the Establishment Clause.

Am. Humanist Ass'n v. City of Ocala, 127 F. Supp. 3d 1265, 1284 (M.D. Fla. 2015).

This letter serves as an official notice of the unconstitutional activity and demands that your school district end this and any similar illegal activity immediately. To avoid legal action, we kindly ask that you notify us in writing within two weeks of receipt of this letter setting forth the steps you will take to rectify this constitutional infringement. Thank you for turning your attention to this important matter.

Sincerely,
s/Monica L. Miller, Esq.

Legal Director and Senior Counsel
American Humanist Association
Appignani Humanist Legal Center