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June 18, 2014

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Brawley Union High School District Board of Trustees
Carol Sassie
csassie@brawleyhigh.org
Rusty Garcia
rgarcia@brawleyhigh.org
Cecillia Dial
cdial@brawleyhigh.org
Ralph Fernandez
rferenandez@brawleyhigh.org
Gabriel Contreras, and
gcontreras@brawleyhigh.org
Brawley Union High School District Superintendent Dr. Hasmik Danielian
superintendent@brawleyhigh.org

480 North Imperial Avenue
Brawley, CA
92227

Re: Unconstitutional Censorship of John Brooks Hamby

Dear Superintendent Danielian and Board of Trustees:

John Brooks Hamby retained Liberty Institute to represent him in this matter. As such, please direct all communications regarding this matter to me.

As the Brawley Union High School (BUHS) class Salutatorian, Mr. Hamby earned the privilege of speaking to his classmates at the BUHS graduation ceremony, which took place on June 12, 2014.

On at least three occasions prior to the graduation ceremony, BUHS officials demanded that Mr. Hamby submit his graduation speech for prior review and approval. BUHS officials rejected Mr. Hamby' first two drafts and required him to re-write his speech. BUHS officials warned Mr. Hamby that his "first and second draft speeches proposed oppose government case law and are a violation of the Constitution." BUHS officials further warned that "reference to religious content is

inappropriate and that the two drafts provided will not be allowed." Mr. Hamby submitted a third draft to BUHS officials, who rejected the draft and returned it to him with all references to his faith, God, and the Bible redacted.

Not wanting to lose the hard-earned privilege of addressing his classmates, family, and community, Mr. Hamby reluctantly drafted a fourth speech. On the evening of the graduation ceremony, Mr. Hamby delivered the fourth version of his speech. No portion or version of any of the drafts of Mr. Hamby's speech contained any obscenity or vulgarity.

The issue of graduation speeches containing religious references is not novel. Under most circumstances, such as here, a graduation speaker's words are his own, not the government's. A student's remarks are not attributable to the state simply because they are delivered in a public setting or to a public audience. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000); *Board of Ed. v. Mergens*, 496 U.S. 226, 248-50 (1990). Mr. Hamby's words constituted *his* private speech, not government speech; private speech is not subject to the Establishment Clause. Accordingly, BUHS officials have no cause for concern that they might be endorsing religion. The "proposition that schools do not endorse everything they fail to censor is not complicated." *Mergens*, 496 U.S. at 250. And if BUHS officials were truly concerned that some in the audience might perceive government endorsement of Mr. Hamby's message, the United States Court of Appeals for the Ninth Circuit, in which Brawley Union High School District resides, has stated:

> The school's proper response is to educate the audience rather than squelch the speaker. Schools may explain that they do not endorse speech by permitting it. If pupils do not comprehend so simple a lesson, then one wonders whether the [] schools can teach anything at all. Free speech, free exercise, and the ban on establishment are quite compatible *when the government remains neutral* and educates the public about the reasons.
>
> *Hills v. Scottsdale Unified Sch. Dist.*, 329 F.3d 1044, 1055 (9th Cir. 2003) (emphasis added).

Clearly, there are no Establishment Clause concerns raised by Mr. Hamby's speech. But even if there were, the desire to avoid a perceived Establishment Clause violation is not a valid reason to violate the Free Exercise Clause by engaging in censorship. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993). In fact, a student's private, religious speech is entitled to full First Amendment protection.

It is a fundamental principle that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 506 (1969). This also applies to religious speech or expression. "Nothing in the Constitution . . . prohibits any public school student from voluntarily praying at any time before, during, or after the school day." *Santa Fe,* 530 U.S. at 313. Yet prohibiting, or attempting to prohibit, Mr. Hamby from voluntarily engaging in religious speech is precisely what BUHS officials attempted to do. This kind of censorship is called viewpoint discrimination, and it's unconstitutional. *Rosenberger*, 515 U.S. at 845-46; *Mergens*, 496 U.S. at 248 (plurality opinion); *id.* at 260-61 (Kennedy, J., concurring in part and in judgment).

Not only is it unreasonable to conclude that Mr. Hamby's speech is government speech, it is also unreasonable to conclude that his speech was an attempt to proselytize. To *proselytize* means to convert or attempt to convert someone from one religion or belief system to another. Nothing in Mr. Hamby's speech could reasonably be construed as an attempt to convert anyone to a different belief system. Mr. Hamby simply wanted to share that which is important to him, and that from which he draws meaningful inspiration. Even if Mr. Hamby's speech could be construed as proselytizing—which it cannot—the government cannot engage in the kind of prior restraint and censorship that occurred at the hands of BUHS officials in this instance.

The United States Court of Appeals for the Ninth Circuit, in which Brawley Union High School District resides, has addressed this issue in the past. *See Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979 (9th Cir. 2003); *Cole v. Oroville Union High Sch.*, 228 F.3d 1092 (9th Cir. 2000); *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958 (9th Cir. 1999). In each of those cases, a public school attempted to censor the religious expression of a graduation speaker for fear that the speaker might abuse the opportunity to speak by proselytizing to the audience, and potentially offending some in the audience. But the circumstances of BUHS officials' censorship of Mr. Hamby's speech stand in stark contrast to those cases. And recent Supreme Court precedent raises serious questions about the continued validity of BUHS' rationale.

Long ago, the Supreme Court warned that prior restraint is "the essence of censorship," and that it will not be countenanced absent very "exceptional" circumstances not present here. *Near v. Minn.*, 283 U.S. 697, 713, 716 (1931). Much more recently, the Supreme Court bolstered this proposition when it issued a strong warning against "involv[ing] government in religious matters" by inquiring about the contents of a prospective prayer. *Town of Greece v. Galloway*, No. 12-696 (May 5, 2014). Although *Town of Greece* involved public prayers before governmental bodies, the *Town of Greece* majority made clear that neither the court nor the government has the authority to examine the content of private, religious speech.

Applying Justice Kennedy's rationale in *Town of Greece* here, BUHS officials clearly ran afoul of this prohibition when they demanded to review and approve Mr. Hamby's words.

Even more recently than *Town of Greece* the Supreme Court denied *certiorari* in the case of *Elmbrook Sch. Dist. v. Doe*, No. 12-755 (June 16, 2014). *Elmbrook* is noteworthy because Justice Scalia, joined by Justice Thomas, dissented from the denial of *certiorari*. In his dissent, Justice Scalia stated that "*Town of Greece* abandoned the antiquated 'endorsement test.'" *Elmbrook*, slip op. at 2 (Scalia, J., dissenting). Therefore, any argument that Mr. Hamby's words, if left uncensored, would constitute a type of tacit government endorsement of his beliefs, does not survive after *Town of Greece*.

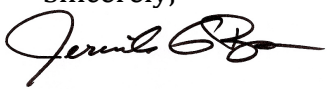
Finally, pursuant to the No Child Left Behind Act, 20 U.S.C. § 7904, the United States Department of Education drafted guidelines for student speech, including student speakers at graduation ceremonies. According to the Department of Education:

> Where students or other private graduation speakers are selected on the basis of genuinely neutral, evenhanded criteria and retain primary control over the content of their expression, however, that expression is not attributable to the school and therefore may not be restricted because of its religious (or anti-religious) content. To avoid any mistaken perception that a school endorses student or other private speech that is not in fact attributable to the school, school officials may make appropriate, neutral disclaimers to clarify that such speech (whether religious or nonreligious) is the speaker's and not the school's.

U.S. Dep't of Ed., Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools, dated February 7, 2003. (http://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html, last accessed on June 18, 2014)

We would like to meet with the Superintendent before July 11, 2014 to resolve these issues. Specifically, we are seeking a public statement from Brawley Union High School District exonerating Mr. Hamby of any wrongdoing. We also seek a statement from Brawley Union High School District that such censorship will not occur in the future.

Sincerely,



Jeremy Dys
Senior Counsel
Liberty Institute

CC: United States Secretary of Education, Arne Duncan
400 Maryland Avenue, SW
Washington, D.C. 20202