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***VIA E-MAIL (jdys@libertyinstitute.org)
AND CERTIFIED MAIL, RETURN RECEIPT***

Jeremy Dys, Senior Counsel
Liberty Institute
2001 West Plano Parkway, Suite 1600
Plano, TX 75075

Re: June 18, 2014 Correspondence re Brooks Hamby Salutatorian Speech

Dear Mr. Dys:

This firm serves as legal counsel to the Brawley Union High School District. As such, please direct any and all future communications regarding this matter to our office.

The District is in receipt of your letter dated June 18, 2013, in which you request a meeting with Superintendent Dr. Hasmik Danielian and seek “a public statement from Brawley Union High School District exonerating Mr. Hamby of any wrongdoing [and]. . .that such censorship will not occur in the future.” For the reasons set forth below, the District respectfully denies each of your requests.

A. SCHOOL ADMINISTRATORS’ REVIEW OF STUDENT SALUTATORIAN SPEECHES IS NOT AN UNCONSTITUTIONAL PRIOR RESTRAINT

Your contention that site and District administration’s review and oversight of Mr. Hamby’s speech constituted an impermissible prior restraint on his alleged free speech rights is without merit. The rights of public school students are “not automatically coextensive with the rights of adults in other settings.” (*Hazelwood v. Kuhlmeier* (1988) 484 U.S. 260, 266 (citing *Bethel School District No. 403 v. Fraser* (1986) 478 U.S. 675, 682.)) In *Hazelwood*, the U.S. Supreme Court found no impermissible prior restraint or constitutional violation when the public school censored student articles to be printed in the school’s newspaper. It is well-established that a public school “may refuse to lend its name and resources to the dissemination of student expression” without running afoul of *Tinker v. Des Moines Independent Community School District* (1969) 393 U.S. 503. (*Id.* at 272–273.)

If anything, the fact that administration reviews and approves all speeches prior to the graduation ceremony for propriety of content evidences that the District exercises significant control and

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discretion over their content; this negates any claim by Mr. Hamby that the District's salutatory/valedictory speeches are "private" speech.

B. IT IS WELL-ESTABLISHED IN THE NINTH CIRCUIT AND CALIFORNIA THAT A PUBLIC SCHOOL SALUTATORIAN HAS NO CONSTITUTIONAL RIGHT TO LEAD A PRAYER OR INCLUDE SECTARIAN OR PROSELYTIZING CONTENT IN HIS/HER GRADUATION SPEECH

Under the laws of this jurisdiction, the District was legally obligated to prohibit the sectarian invocations from Mr. Hamby's speech; issuing a disclaimer would not excuse the District's endorsement of his message. There is no legal authority that a student speaker—who serves as a school district's authorized representative of student success in its ceremony—has a legal right to lead his classmates in prayer in his salutatory speech. In fact, the Ninth Circuit and California Supreme Court have both expressly (and repeatedly) required public school districts to maintain religious neutrality at graduation ceremonies.

1. The District was legally obligated to ensure prayers and other sectarian, proselytizing content were omitted from Mr. Hamby's speech

a. Mr. Hamby's speech bore the imprint of the District

You claim Mr. Hamby's speech was his own private speech which could not create an Establishment Clause violation for the District. However, the U.S. Supreme Court reached a contrary result in the case of *Santa Fe Independent School District v. Doe* (2002) 530 U.S. 290. In that case, the U.S. Supreme Court held that permitting student-led, student-initiated prayer prior to football games violated the Establishment Clause of the U.S. Constitution. (*Id.* at 313, 317.) The Court found such pre-game invocations did not constitute "private speech" so as to avoid an Establishment Clause violation; moreover, the pre-game ceremony was held not to be a limited public forum because only those messages deemed appropriate under Santa Fe's policy were permitted to be delivered. (*Id.* at 302–304.) The Court recognized that "the 'degree of school involvement' makes it clear that the pregame prayers bear 'the imprint of the State and thus put school-age children who objected in an untenable position.'" (*Id.* at 305 (citing *Lee v. Wiseman* (1992) 505 U.S. 577, 590).) Likewise, here, the District exercises control over the valedictory/salutatory speeches and only permits students to deliver content its administrators have deemed appropriate.

In *Lee, supra*, 505 U.S. at 597, the Supreme Court recognized that at "a high school graduation, teachers and principals must and do retain a high degree of control over the precise contents of the program, the speeches, the timing, the movements, the dress, and the decorum of the students." Thus, an impermissible Establishment Clause violation was found when the public school district selected a rabbi to deliver a nonsectarian prayer during its middle school graduation. (*Ibid.* [the school's involvement made "the prayer a state-sanctioned religious exercise in which the student was left with no alternative but to submit"].) Here, there is

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significant administrative involvement in the content of the graduation speeches and ceremony, which bears the imprint of the Brawley Union High School District. Those who do not wish to sit silently and respectfully through Mr. Hamby's prayer could not reasonably be expected to leave the ceremony. Although in *Lee, supra*, 505 U.S. at 595, the parties stipulated that students' attendance at graduation was "voluntary," such stipulation was rejected by the U.S. Supreme Court; the "[l]aw reaches past formalism. And to say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme."

b. *Censorship of the speech was necessary to avoid an Establishment Clause violation*

While you claim the District's desire to avoid a perceived Establishment Clause violation is not a valid justification for its decisions, the courts of this jurisdiction have expressly (and *repeatedly*) held otherwise.

The Ninth Circuit—the authoritative court of appeal in this jurisdiction—has authoritatively resolved this *exact same issue in at least three cases*.¹ First, in *Cole v. Oroville Union High School District* (9th Cir. 2000) 228 F.3d 1092, 1095, the Ninth Circuit disagreed that the student plaintiffs (Niemeyer and Cole) had a legal right to deliver (respectively) a "sectarian, proselytizing valedictory speech" and "a sectarian invocation at their graduation." Plaintiff student Niemeyer's final proposed speech "included a statement that he was going to refer to God and Jesus repeatedly, and if anyone was offended, they could leave the graduation." (*Id.* at 1097.) The Ninth Circuit described the proposed valedictory speech as follows:

Niemeyer's proposed speech was a religious sermon which advised the audience that "we are all God's children, through Jesus Christ [sic] death, when we accept his free love and saving grace in our lives," and requested that the audience accept that "God created us" and that man's plans will not fully succeed unless we pattern our lives after Jesus' example. Finally, Niemeyer's speech called upon the audience to "accept God's love and grace" and "yield to God our lives." (*Ibid.*)

Plaintiff student Cole's "proposed invocation referred repeatedly to the heavenly father and Father God, and concluded 'We ask all these things in the precious holy name of Jesus Christ, Amen.'" (*Ibid.*) The Ninth Circuit disagreed with Plaintiffs Cole and Niemeyer's claims that Oroville's graduation ceremony was "a public or limited public forum, and thus the District infringed their freedom of speech by discriminating against their presentations on the basis of their sectarian viewpoints." (*Id.* at 1101.) Specifically, the Ninth Circuit found that "[e]ven

¹ Even the Joint Statement on the Current Law on Religion in the Public Schools, created by several organizations including the ACLU and signed by numerous religious groups (available at <https://www.aclu.org/religion-belief/joint-statement-current-law-religion-public-schools>) recognizes that "[t]he courts have reached conflicting conclusions under the federal Constitution on student-initiated prayer at graduation. Until the issue is authoritatively resolved, schools should ask their lawyers what rules apply in their area." (Emphasis supplied.)

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assuming the Oroville graduation ceremony was a public or limited public forum, the District's refusal to allow the students to deliver a sectarian speech or prayer as part of the graduation was necessary to avoid violating the Establishment Clause under the principles applied in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000). . . There is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech." (*Ibid.*)

The Ninth Circuit held that allowing Plaintiff Niemeyer to deliver his proposed valedictory speech at the Oroville graduation "would have constituted government endorsement of religious speech[,]” noting Oroville’s “plenary control over the graduation ceremony.” (*Id.* at 1103.) In finding such “plenary control,” the Ninth Circuit noted:

[T]he District authorizes the valedictory speech as party of the District-administered graduation ceremony, which is held on District property and financed in part by District funds and in which only selected students are allowed to speak. . .[T]he principal retains supervisory control over all aspects of the graduation, and has final authority to approve the content of student speeches. (*Ibid.*)

Because students participating in the graduation were required to adhere to Oroville’s behavior expectations, and the valedictory speech was broadcast to the audience using the school’s public address system, the Ninth Circuit concluded the valedictory speech would have “borne the imprint of the District.” (*Ibid.*) Thus, the “objective observer familiar with the District’s policy and its implementation would have likely perceived that the speech carried the District’s seal of approval.” (*Ibid.*)

The Ninth Circuit *again* squarely addressed this *exact* issue in *Lassonde v. Pleasanton Unified School District* (9th Cir. 2003) 320 F.3d 979. Plaintiff Lassonde was selected as a co-salutatorian due to his “sterling” grade point average. (*Id.* at 981.) Lassonde, a “devout Christian, drafted a speech that quoted extensively from the Bible.” For example, in portions of his proposed speech, Lassonde stated:

I urge you to seek out the Lord, and let Him guide you. Through His power, you can stand tall in the face of darkness, and survive the trends of ‘modern society.’

As Psalm 146 says, “Do not put your trust in princes, in mortal men, who cannot even save themselves. When their spirit departs, they return to the ground; on that very day their plans come to nothing. Blessed is he whose help is the God of Jacob, whose hope is in the Lord his God, the Maker of heaven and earth, the sea, and everything in them—the Lord, who remains faithful forever. He upholds the cause of the oppressed and gives food to the hungry. The Lord sets prisoners free, the Lord gives sight to the blind, the Lord lifts up those who are bowed down, the

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Lord loves the righteous. The Lord watches over the alien and sustains the fatherless and the widow, but he frustrates the ways of the wicked.

For the wages of sin is death; but the gift of God is eternal life through Jesus Christ our Lord. Have you accepted the gift, or will you pay the ultimate price? (*Id.* at 981.)

The Ninth Circuit noted the graduation ceremony “was conducted entirely under the school’s direction.” (*Id.* at 982.) Looking to *Cole, supra*, the *Lassonde* court found that although there were “a few minor differences” between the two cases, none was material. As in *Cole*, the Ninth Circuit *again* found that refusing to allow *Lassonde* to deliver his sectarian speech during the school’s graduation ceremony “was necessary to avoid violating the Establishment Clause[,]” which is “a state interest sufficiently compelling to justify content-based restrictions on speech.” (*Id.* at 983.) The Ninth Circuit noted two distinct reasons why this refusal was legally *required*. “First, the school district had to censor the speech in order to avoid the appearance of government sponsorship of religion. . . . Second, allowing the speech would have had an impermissibly coercive effect on dissenters, requiring them to participate in a religious practice even by their silence.” (*Ibid.*)

The Ninth Circuit, for a *third* time, addressed the issue of student-initiated religious content at a graduation ceremony in *Nurre v. Whitehead* (9th Cir. 2009) 580 F.3d 1087, cert. denied. In that case, the plaintiff student was not permitted to perform an instrumental version of the student-selected song “Ave Maria” during the ceremony. The Ninth Circuit found there was no violation of the plaintiff student’s rights when the school barred her performance of a religious musical selection “when there is a captive audience at a graduation ceremony, which spans a finite amount of time, and during which the demand for equal time is so great that comparable non-religious musical works might not be presented.” (*Id.* at 1095.) Moreover, the Ninth Circuit rejected the plaintiff student’s argument that the school violated the Establishment Clause by “acting in a hostile manner toward religion” as the Ninth Circuit found the school simply “took actions reasonably perceived as an attempt to avoid conflict with the Establishment Clause.” (*Id.* at 1097.)

You claim there was no proselytizing or other impermissible content in Mr. Hamby’s draft speech. However, even a cursory reading of Mr. Hamby’s proposed speeches reveals they were little more than prayers/sectarian invocations; the religious content did not merely refer to his personal convictions. Specifically, Mr. Hamby’s first proposed draft read, in relevant part:

Now, If I may humbly ask you you [sic] to bow your heads with me in prayer.

Gracious God,

We thank you today for the immense opportunities and blessings you have provided us throughout our lives and our high school career.

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Father, as these graduates enter the next chapter of their lives, we pray that you may be a light unto their feet, allowing them to know Your perfect will and plan for them.

Lord, may these graduates gain wisdom from you in whatever path they take in these next four years, and the rest of their lives.

For those entering university, Lord, we pray that you may guide them and encourage them with industry, hard work, and to bear the fruit of the Spirit. But Father, we also pray that in their time at college, that they may remember right and wrong, what is good and bad, what is Godly and what is of this world, to flee the many temptations and to embrace to [sic] true joy of righteousness found only in You.

Father God, we pray for individuals to help these graduates in the years to come, friends[,] family, teachers, pastors, mentors, and others, that through their friendship and love that they may guide these graduates with support, advice, and accountability, seeking to keep them upright in your eyes, God.

Eternal God, we pray that these graduates will have the boldness to stand for what is right, truthful, and just wherever they work, study or socialize, even if they are challenged or cast out when they seek to do what is right.

Lord, give these students the wisdom with the means you provide them. Let us be wise with our monies, diligent with our time, and let us know that the world of the generous gets larger and larger, that the one who blesses others is abundantly blessed.

And Father, in the best of times and in the times in which we feel we must endure every painful moment, let us not worry, instead, let us tell you all our needs, and let us not forget to thank you for your answers.

Heavenly Father, in all times, let us always be kind to one another, tenderhearted, forgiving one another, as God in Christ has forgiven us.

Father, let us live the days of our lives with contentment and thanks for the blessings you bestow upon us, faith in your Lord, hope in our future, and the greatest of these charity and love for all.

We pray these things in the name of your Son, our Savior, Jesus Christ, Amen.

In Mr. Hamby's proposed second and third draft speeches, Mr. Hamby [permissibly] noted that he would have liked to ask the audience to join him in prayer, but that this was not permitted.

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Nevertheless, Mr. Hamby proceeded to propose to [impermissibly] deliver a nearly identical prayer as that in his initial draft (above), simply preceded by words such as “*I would say*,” or “*I would pray*,” and ending with “*If I could, I would pray* these things in the name of Your Son, my Savior, Jesus Christ, Amen.” (Emphasis in original.) Adding words such as “I would say,” would not negate the fact that those in attendance at the graduation ceremony would have been compelled to sit through a sectarian prayer. District administration therefore advised Mr. Hamby to revise his speech. As provided in her statements to the press, District Superintendent Dr. Danielian did not receive Mr. Hamby’s proposed fourth draft of his speech prior to the ceremony, and therefore administration was unable to review it.

Although you acknowledge that the Ninth Circuit has addressed the issue of religious content in salutatorian speeches in at least *Lassonde* and *Cole (supra)*, you argue (without providing any factual support whatsoever) “the circumstances of BUHS officials’ censorship of Mr. Hamby’s speech stand in stark contrast to those cases.” As shown above, Mr. Hamby’s salutatorian speech was a sectarian invocation, which is not legally permitted in California or the Ninth Circuit.

As stated above, the legal authority on this precise point is so well-established in the Ninth Circuit that any such legal claim brought against a school district in this jurisdiction would likely be “unreasonable, frivolous, meritless, or vexatious” so as to entitle a defendant school district to an award of its attorney’s fees in defending such an action under 42 U.S.C. section 1988.

2. The Ninth Circuit has held that disclaimers are insufficient to eliminate an Establishment Clause violation

You cite *Hills v. Scottsdale Unified School District* (9th Cir. 2003) 329 F.3d 1044, 1055² for the proposition that the school should have explained that it did not endorse Mr. Hamby’s speech by permitting it; in other words, you contend a disclaimer would have sufficed to preclude an Establishment Clause violation.

In *Lassonde, supra*, 320 F.3d at 984, the Ninth Circuit rejected the plaintiff salutatorian’s argument that the school should have issued a disclaimer (rather than censor his speech). The Ninth Circuit noted that in *Cole, supra*, 228 F.3d at 1101, it had found the school’s restriction on the students’ speeches was “‘necessary’ to avoid running afoul of the Establishment Clause.” Thus, “if the school had not censored the speech, the result would have been a violation of the Establishment Clause[.]” because the result would “amount to coerced participation in a religious

² The *Scottsdale Unified School District* case involved a question of whether a non-profit summer camp may distribute camp flyers featuring Bible classes. The schools allowed other groups to distribute brochures at school regarding summer programs of interest to schoolchildren (creating a limited public forum). The Ninth Circuit held that the school could not discriminate against a summer camp simply because its brochure referenced Bible classes if the school issued a disclaimer that it did not endorse the activity. Notably, the court found the school was permitted to redact the proselytizing language that included references to “Jesus Christ” from the brochures distributed on its campuses. (329 F.3d at 1053.)

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practice” at the school’s graduation ceremony. (*Id.* at 984.) The result here would have been no different.

Thus, the Ninth Circuit has repeatedly held that there is no less restrictive alternative than prohibiting such speech.

3. **You cite no legal authority providing a student speaker has a legal right to lead his classmates in prayer during a public school’s graduation ceremony**

You claim the U.S. Supreme Court’s decision in *Town of Greece*, issued on May 5, 2014, negated the District’s authority to examine the content of Mr. Hamby’s speech. However, in that case the Supreme Court expressly distinguished public school speech cases such as *Lee v. Wiseman* (1992) 505 U.S. 577 [graduation ceremony] and *Santa Fe Independent School District v. Doe* (2002) 530 U.S. 290 [student speech before football games]. *Town of Greece* clearly does not apply to cases involving religious speech at public school-sponsored events.

You also cite the U.S. Supreme Court’s denial of *certiorari* in *Doe ex. rel. Doe v. Elmbrook School District* (2012) 687 F.3d 840 as support for Mr. Hamby’s position. Yet you cite a non-binding and non-precedential *dissenting* opinion by Justices Scalia and Thomas. In fact, the majority’s denial of *certiorari* in the *Elmbrook* case stands for the proposition that because “[h]igh school graduations enjoy an iconic place in American life[,]” it is impermissible for a public school to indicate to those in attendance that a “religious message is favored and to nonadherents that they are outsiders.” (*Id.* at 853.)

Lastly, you claim that the U.S. Department of Education’s publication, “Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools” (which pre-dates the decision of *Lassonde v. Pleasanton Unified School District* (9th Cir. 2003) 320 F.3d 979 by 12 days) supports your argument that Mr. Hamby had some legal right to lead his graduating class in prayer during the school’s ceremony. Yet the Ninth Circuit decisively stated (only 12 days later) that “*Cole* controls unless some later Supreme Court or en banc authority undermines its logic.” (*Id.* at 985.) The U.S. Department of Education’s Guidance document³ does not alter the well-settled law of this jurisdiction. The federal courts have recognized that the U.S. Department of Education’s Guidance document “is [actually] in agreement with the *Cole* Court in acknowledging that ‘where school officials determine or substantially control the content of what is expressed, such speech is attributable to the school and may not include prayer or other specifically religious (or anti-religious) content.’” (*Ashby v. Isle of Wight County School Board* (E.D. Va. 2004) 354 F.Supp.2d 616, 630–631 [finding school board had a compelling interest in prohibiting religious presentations at graduation, and dismissing the suit of the plaintiff student who was denied permission to sing a song with religious content at graduation].)

³ As an attorney, you are aware that such departmental guidance documents are merely those agencies’ interpretations of the current state of the law; they do not impact authoritative case law on the same subject.

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Thus, your claim that Mr. Hamby had some legal right to deliver his proposed speeches lacks any reasonable basis in both law and fact.

4. **The California Constitution additionally prohibits public school districts from endorsing religious speech at their graduation ceremonies**

The California Supreme Court, in *Sands v. Morongo Unified School District* (1991) 53 Cal.3d 863, 867, cert. denied, explicitly held that “religious invocations and benedictions at public high school graduation ceremonies are constitutionally impermissible.” The California Constitution “contains guarantees of separation of religion and state in addition to those found in the federal Constitution.” (*Id.* at 882.) The California Constitution, at Article I, Section 4, contains an Establishment Clause mirroring that of the First Amendment to the U.S. Constitution. Article I, section 4 of the California Constitution guarantees the “[f]ree exercise and enjoyment of religion without discrimination or preference[,]” and at Article XVI, Section 5, further provides that a school district shall not “ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose.”

As a practical matter, the California Supreme Court reasoned that “nonbelievers and adherents of minority religious would be effectively excluded from, or made to feel unwelcome at, an important public school activity” if invocations or benedictions were given in public school graduation ceremonies. (*Id.* at 878.) The Court further noted:

Ours is a religiously diverse nation. Within the vast array of Christian denominations and sects, there is a wide variety of belief and practice. Moreover, substantial segments of our population adhere to non-Christian religions or to no religion. Respect for the differing religious choices of the people of this country requires that the government neither place its stamp of approval on any particular religious practice, nor appear to take a stand on any religious question. In a world frequently torn by religious factionalism and the violence tragically associated with political division along religious lines, our nation’s position of governmental neutrality on religious matters stands as an illuminating example of the true meaning of freedom and tolerance. (*Id.* at 883–884.)

Mr. Hamby was not permitted to use his salutatory speech to lead his classmates in a sectarian prayer. As a salutarian, Mr. Hamby (like the plaintiff in *Lassonde*) stood in front of his graduating class as a “representative example of the success of the school’s own educational mission.” (*Lassonde, supra*, 320 F.3d at 984.) As such, he was speaking with the District’s endorsement as a representative of the District, and could not speak in a manner which would violate the laws governing California’s public schools.

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Based on the foregoing, the District respectfully denies each of your requests.

Best regards,

ATKINSON, ANDELSON, LOYA, RUUD & ROMO

A handwritten signature in cursive script that reads "Gerald A. Conradi".

Gerald A. Conradi
Mark R. Bresee
Amy W. Estrada

GAC/MRB:awe