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VIA E-MAIL AND U.S. MAIL

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Re: Letter from American Humanist Association

Ladies and Gentlemen,

We were recently informed of a letter sent on behalf of the American Humanist Association (AHA) regarding a recent community service fieldtrip taken by students at the School of Engineering and Arts. According to media reports, the students visited Calvary Lutheran Church to participate in a volunteer program sponsored by Feed My Starving Children. As part of the program, students prepared pre-packed meal that would be sent to malnourished children across the globe. Importantly, AHA fails to cite a single instance of religious proselytizing or activity that occurred during the students visit. Rather, its chief complaint is merely that the community service event was held in a church and that the school cooperated with a religious non-profit organization in furtherance of a secular, educational activity.

We write to inform you that public schools may constitutionally work with religious charities to provide food or other secular goods and services to impoverished children. Thus, AHA's claim that such educationally valuable community service activities violate the Establishment Clause of the First Amendment is simply wrong.

Under controlling precedent of the U.S. Supreme Court, a government entity like a public school complies with the Establishment Clause when its actions (1) serve a secular purpose, (2) do not have the primary effect of advancing religion, and (3) do not excessively entangle the government with religion. *Lemon v. Kurtzman*, 403 US. 602, 612-13 (1971). Courts have consistently upheld instances where schools cooperated with religious organizations and even incorporated religious works into the school curriculum where they had a valid educational purpose for doing so.

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For example, state educational programs may constitutionally cooperate with private religious schools by providing funding for testing services textbooks, and other secular supplies and materials to the schools because doing so serves the secular purpose of improving students' educational opportunities. *See, e.g., Comm. for Pub. Ed. & Religious Liberty v. Regan*, 444 U.S. 646, 662 (1980); *Bd. of Ed. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 248 (1968); *Walker v. San Francisco Unified Sch. Dist.*, 46 F.3d 1449, 1470 (9th Cir. 1995). Likewise, courts have upheld schools' decisions to include religious songs in school music programs because of the educational need to teach students about the historical importance and quality of such works. *See, e.g., Florey v. Sioux Falls Sch. Dist.*, 619 F.2d 1311, 1316 n.5 (8th Cir. 1980) (recognizing that Christmas "carols have achieved a cultural significance that justifies their being sung . . . in public schools"); *Bauchman v. West High Sch.*, 132 F.3d 542, 556 (10th Cir. 1997) ("[T]he selection of religious songs from a body of choral music predominated by songs with religious themes and text ... without more, amount[s] to religiously neutral educational choices.").

Here, the School of Engineering and Art's participation in a secular charitable activity easily satisfies every aspect of the *Lemon* test. Looking first to the secular purpose prong, the U.S. Supreme Court has said it is "reluctan[t] to attribute unconstitutional motives to" government officials "when a plausible secular purpose for" their actions is proffered. *Mueller v. Allen,* 463 U.S. 388, 394-95 (1983). Having students participate in preparing meals for malnourished children serves the clear educational purpose of teaching the value of community service to students. It likewise serves the secular purpose of aiding those who have suffered a great tragedy, such as those devastated by the earthquakes in Haiti.

Second, the cooperation between the School and a non-profit organization that happened to hold an event at a church does not have the primary effect of advancing religion, nor does it unlawfully entangle the School with religion. The AHA's letter complains that the church has a "pervasively Christian, proselytizing environment" and that the non-profit organization sponsoring the meal preparation is "unambiguous about its religious mission." But the beliefs, actions, and motivations of a third party are irrelevant to the question of whether the School itself is unlawfully advancing religion. As the Supreme Court has explained, "For a law to have forbidden 'effects' under *Lemon,* it must be fair to say that the *government itself* has advanced religion through its own activities and influence." *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos,* 483 U.S. 327, 337 (1987). Here, the School has not promoted any religious aspect of the church or the non-profit organization. Nor can AHA point to any such evidence. The School simply choose to cooperate with a local charity to do nothing more than prepare meals for impoverished children. The School is not advancing religion *at all.* For the same reasons, it also is not excessively entangled with religion. Entanglement concerns are thus completely absent.

The AHA's interpretation of the Establishment Clause is inaccurate and highly antagonistic to religion. Under its view, religious entities and government can never work together towards common goals that serve an important secular benefit to the community. The AHA asks public schools to exclude religious organizations or persons from cooperating with them simply because they are religious. But such blatant religious discrimination is prohibited by the Establishment and Free Exercise Clauses. As the U.S. Supreme Court has said, "religious people (or groups of religious people) cannot be denied the opportunity to exercise the rights of

citizens simply because of their religious affiliations or commitments, for such a disability would violate the right to religious free exercise." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet,* 512 U.S. 687, 698 (1994) (plurality opinion). Government entities are thus generally prohibited from "impos[ing] special disabilities on the basis of religious views or religious status," *Employment Div., Dept. of Human Res. of Ore. v. Smith,* 494 U.S. 872, 877 (1990), and from exhibiting "hostility toward any [religion]," *Lynch v. Donnelly,* 465 U.S. 668, 673 (1984). As Supreme Court Justice William Brennan once rightly said,

> The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities.

McDaniel v. Paty, 435 U.S. 618, 641 (1978) (Brennan, J., concurring). Yet, that is exactly what AHA demands.

Importantly, the AHA's reliance upon *Doe v. Elmbrook School District*, and similar cases, is misplaced. The *Elmbrook* case is currently pending at the U.S. Supreme Court. In a rare move, the Court has refrained from deciding whether to grant review in *Elmbrook* while it is considering another pending Establishment Clause case, *Town of Greece v. Galloway*, which involves a town's practice of opening it meetings with prayer. Such a move likely means that the Court's ruling in *Town of Greece* will influence the outcome in *Elmbrook* and could well result in a remand for reconsideration of that decision. Simply put, the Establishment Clause is no more offended by having students participate in a community service activity—one supported by an important educational purpose—in a facility owned by a church, than it is by having students visit a historical cathedral on a field trip or hear a performance of Handel's *Messiah* by the local symphony.

This is a teaching moment for your School District and one that students, parents, and the community are watching. The District should demonstrate both to its students and to this wider audience that the correct response to being wrongfully accused of violating the law is taking a stand, rather than acquiescing to an accuser's unreasonable demands. Should the District decide to take such a stand, we will be happy to represent it free of charge against a legal action filed by the AHA based on students' participation in the Feed My Starving Children project.

Please feel free to contact us with any questions you may have. We stand ready to defend the School District against the AHA's unwarranted and misguided attacks.

Cordially,

J. Matthew Sharp, Legal Counsel
Rory T. Gray, Litigation Staff Counsel