August 30, 2021

SENT VIA E-MAIL AND FIRST-CLASS MAIL

Board of Directors
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RE: Removing Black Lives Matter and LGBTQ+ Pride Displays; Banning Political Signs

To the Newberg School Board and Counsel:

The ACLU of Oregon understands that on August 10, 2021, the Newberg School District 29J Board of Directors (the "Board") voted to issue two directives to the district superintendent; first, to immediately remove all Black Lives Matter and LGBTQ+ Pride signs, flags, apparel, buttons, and symbols from district facilities (the "Removal Directive") and, second, to direct the Board's Policy Committee to draft a policy banning the display of all "political" signs, flags, apparel, buttons, and symbols (except the U.S. and Oregon flags and any "exemptions [the committee] deems proper") (the "Political Sign Ban"). We write to protect the rights of students, teachers, and staff threatened by these ill-considered actions, to explain in detail the unlawfulness of the Board's actions, and to urge the Board to retract the Removal Directive and the Political Sign Ban. Should the Board continue its current course of violating Oregonians' constitutional rights, the Board should be prepared for legal action.

I. Article I, section 8, of the Oregon Constitution

Both the Removal Directive and the Political Sign Ban violate the right of free expression that all Oregonians enjoy under this State's own constitution. Article I, section 8, of the Oregon Constitution provides:

> "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."

Article I, section 8, is independent of, and even broader than, the First Amendment to the U.S. Constitution. *See State v. Henry*, 302 Or. 510, 515 (1987) ("The text of Article I, section 8, is broader and covers any expression of opinion[.]"). Under Article I, section 8, a restriction on expression is *per se* unconstitutional when it is "written in terms directed to the substance of any 'opinion' or any 'subject' of communication," unless there is a recognized historical exception not applicable here. *Oregon Nat. Res. Council Fund v. Port of Portland*, 286 Or. App. 447, 464 (2017) (striking down Port of Portland policy prohibiting display of ads containing political messages at the airport). The Oregon Supreme Court has zealously enforced the rights preserved by Article I, section 8, and has emphatically rejected "balancing" other interests against Oregonians' free expression with respect to laws intended to restrict the content of protected expression. *See, e.g., State v. Ciancanelli*, 339 Or. 282, 285 (2005) ("[W]e reject categorically the state's proffered . . . balancing test."); *Higgins v. DMV*, 170 Or. App. 542 (2000) ("[A]n essential feature of Oregon's free speech analysis is the principle that Article I, section 8, bars the state from balancing the people's right of free expression against the state's competing policy objectives."). Moreover, the broad sweep of Article I, section 8, plainly extends to all manner of signs, symbols, and displays, including expression that is controversial or unpopular, as long recognized by the Oregon courts. *See Ciancanelli*, 339 Or. at 311 ("[I]t appears to us to be beyond reasonable dispute that the protection extends to the kinds of expression that a majority of citizens in many communities would dislike. [T]he people who framed and adopted Article I, section 8, as part of the original Oregon Constitution intended to prohibit broadly any laws directed at restraining verbal or nonverbal expression of ideas of any kind.").

What this means for the Board is that both the Removal Directive and the Political Sign Ban are plainly unconstitutional and that no interest in regulating teachers or staff as employees could justify the Board's restriction of teachers' and staff's Article I, section 8, rights. The Political Sign Ban closely resembles the ban on "political messages" held unconstitutional in the *Port of Portland* case, and the Removal Directive similarly orders the removal of signs, symbols, and displays. The Board's action is obviously "written in terms directed to the substance of any 'opinion' or any 'subject' of communication" and, in fact, specifically targets particular messages disfavored by the Board. The Board's action therefore violates the spirit and the letter of Article I, section 8, and must be rescinded.

II. The First Amendment of the United States Constitution

The U.S. Constitution also guarantees robust free expression rights upon which the Board's action unlawfully infringes. Teachers, students, and staff do not surrender their constitutional rights at the schoolhouse gate. *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506 (1969). This bedrock principle of the Supreme Court's First Amendment jurisprudence ensures that schools do not become grounds for authoritarian control over the future of our democracy. Similarly, the First Amendment prohibits viewpoint and content discrimination:

> "When the government targets not subject matter but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination."

Rosenberger v. Rectors and Visitors of the University of Virginia, 515 U.S. 819, 829 (1995) (citations omitted). Directing the superintendent to remove only Black Lives Matter and LGBTQ+ Pride displays is quintessential viewpoint discrimination. *Cf. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist*., 508 U.S. 384 (1993) (school district violated First Amendment free speech provisions in denying church access to school facilities based on film's perspective).

The First Amendment also protects teachers speaking on "matters of public concern." *Pickering v. Bd. Of Educ. Of Twp. High Sch. Dist. 205, Will Cnty., Ill.*, 391 U.S. 562, 568 (1968); *Connick v. Myers*, 461 U.S. 138 (1983). There can be little doubt that speech that supports Black and LBGTQ+ students who have been historically and systematically excluded, abused, and neglected by those in power in schools and other public institutions is speech that is of "social, or other concern to the community." *Connick*, 461 U.S. at 146. This is especially obvious when, as now, our nation is reckoning with that truth in large public demonstrations, in national public discourse, and in policy changes.

We further note that, notwithstanding Vice Chair Brian Shannon's misunderstanding of the applicable law, *Garcetti v. Ceballos*, 547 U.S. 410 (2006), does not apply here. The Supreme Court was clear that neither the fact that the speech was made in the workplace nor that the speech was about the speaker's job were dispositive. *Id.* at 420–21. Such a broad application of *Garcetti* would erase teachers' speech rights and run afoul of the Court's "long-established principle that the government may not constitutionally compel persons to relinquish their First Amendment rights as a condition of public employment." *Connick*, at 156 (citations omitted).

The Board's language purporting to limit its action to teachers and staff does not avoid a First Amendment violation here. First, even if the Political Sign Ban will not apply directly to students, nothing in the Removal Directive is limited to materials placed on district facilities by teachers and staff. Under the First Amendment, the District may only regulate student speech that "materially and substantially" disrupts the learning environment. *Tinker,* 393 U.S. at 509. Second, independent of the effect on students, teachers and staff retain their First Amendment rights, as noted above. Third, the Removal Directive is blatant viewpoint discrimination because it specifically targets removal of BLM and LGBTQ+ Pride signs (but not, apparently, signs with opposing viewpoints), and "the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view" espoused by that speaker "on an otherwise includible subject." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.,* 473 U.S. 788, 806, 105 S. Ct. 3439, 3451, 87 L. Ed. 2d 567 (1985); *Lamb's Chapel*, 508 U.S. 384, 394.

All of this is *in addition to* the plain violation of the Oregon Constitution described above.

III. Prohibiting messages supporting Black and LGBTQ+ students contravenes the District's mandate to ensure learning environments are free from discrimination.

Schools are legally obligated to make sure that Black and LGBTQ+ students are welcomed. State and federal law prohibit education providers from discriminating against students and employees based on race, sexual orientation, and gender identity. *See* ORS 659.850; ORS 659A.030; 20 U.S.C. § 1681; 42 U.S.C. § 2000d. The Board's action sends a

message to students, teachers and staff that Black and LGBTQ+ students are not to be cared for or celebrated in the district, and their safety and security needs will not be met. That message, especially in a district that has a significantly minoritized Black and LGBTQ+ student and staff population, is likely to create a hostile environment for Black and LGBTQ+ students in the district.

IV. Conclusion

The ACLU of Oregon strongly encourages the Board to revisit and rescind the unlawful and ill-considered directives it issued at the August 10 meeting.[1] Choosing to do the right and lawful thing is fiscally responsible[2] and in the best interests of students and staff. We also urge Superintendent Morelock to continue to refuse to implement the illegal directive and make clear to students and staff that they have protected rights. Should the Board and its counsel wish to discuss the contents of this letter further, please do not hesitate to reach out. We can be reached by e-mail at ksimon@aclu-or.org and alangalloway@dwt.com.

Sincerely,

American Civil Liberties Union of Oregon

Kelly Simon
Legal Director

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cc:
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[1] The ACLU of Oregon understands that Superintendent Morelock did not intend to implement the Board's directives before receiving legal advice and committed to not enforcing the directives should they be unlawful. We applaud the Superintendent's integrity in committing to adhere to the law and protect the rights of students, teachers, and staff. We also applaud that same integrity shown by Directors Peña, Piros, and Penner in committing to do the same.

[2] On August 26, 2021, the ACLU announced that it settled a student rights case for $1.3M in attorney fees and costs. https://www.aclu.org/press-releases/gloucester-county-school-board-pay-13-million-resolve-gavin-grimms-case. Violations of constitutional rights are enforceable through 42 U.S.C. § 1983, and that statute includes a "fee shifting" provision in 42 U.S.C. § 1988. Thus, when a court declares the Board's actions unconstitutional, the Board will have to pay not only its own attorney fees incurred in defending the unconstitutional actions, but the Board will also have the ACLU's attorney fees incurred by bringing any legal action against the Board. Those costs will ultimately be borne by the hardworking families and citizens of Newberg, many of whom voted for the Board members responsible for the Removal Directive and the Political Sign Ban.