



October 22, 2013
Via Email and US Mail

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Gilroy Unified School District Board of Education
7810 Arroyo Circle
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Dear Members of the Board,

It has come to our attention that Gilroy Unified School District's ("GUSD" or "the District") Superintendent of Schools recently decided, after receiving a few complaints, to end GUSD's long-standing tradition of permitting its many exceptional choir groups to perform in acoustically-superior churches in the local community. The relevant facts as we understand them, based on recent media reports, are as follows.

GUSD has a state-acclaimed choir program. The program began to receive recognition at the state level in the 1990s and, under the direction of Phil Robb (who recently retired), developed a "stellar reputation as a top high school choral program" in the state.¹ Video clips of a recent GUSD choir performance confirm that the program deserves all the credit and accolades it receives.²

GUSD has long held some of its performances at local churches and similar religious venues. Critically, the directors of the GUSD choral program have held performances at these venues because of their excellent acoustics, *not* to promote any religious message or belief. As the current director of the Christopher High School choir said, "I don't care whether or not it is in a church. I care about the acoustics."³ Thus, if a nonreligious building had superior acoustics to a church, the choir would perform there. In fact, it appears that GUSD choirs have performed at many nonreligious, nonschool venues, including, among others, the South Valley National Bank, the Gilroy Elks Lodge, the Portuguese Hall in Gilroy, and the Eagle Ridge Clubhouse.⁴

¹ *Separation of singers and state?*, GUSD choirs no longer allowed to hold performances in local churches, http://www.morganhilltimes.com/articles_from_gilroy/separation-of-singers-and-state/article_757da9e7-8430-54de-acf5-d8f05a523755.html?mode=jqm.

² *Phil Robb Conducting the Gilroy and Christopher High Choir*, <http://www.viddler.com/v/637ca0aa>.

³ See *Separation of singers and state?*, *supra* n.1.

⁴ *Id.*

Despite the choir directors' neutral process for selecting performance venues, GUSD's Superintendent recently barred school choirs from performing at religious sites after receiving a few complaints. In so doing, the Superintendent deprived the members of GUSD's choral program the best acoustical venues for their performances. This is very unfortunate. Exceptional musicians in a state-acclaimed music program deserve to perform at facilities with superior acoustics.

Her decision also was completely unnecessary from a legal standpoint. We understand that she based her decision on the concern that holding choir performances in a church would violate the "separation of church and state."⁵ In other words, she was concerned about the District violating the Establishment Clause.

This concern is unfounded. Indeed, GUSD's acoustic-excellence criterion is the epitome of neutrality. It does not favor religious or secular venues. Rather, it favors venues with excellent acoustics, regardless of their religious or secular character. Simply put, the District is just as likely to select a religious as a nonreligious venue when employing this secular criterion. Such neutrality is the hallmark of programs *upheld* in the face of Establishment Clause challenges. *Rosenberger*, 515 U.S. at 839 ("[A] significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion"); *see also Good News Club*, 533 U.S. at 114 ("For the 'guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to' religious and secular beneficiaries alike).

Moreover, the Superintendent is mistaken in believing that the Establishment Clause mandates "separation of church and state." The Sixth Circuit has held that this phrase is a "tiresome," "extra-constitutional construct" and specifically rejected that "[t]he First Amendment . . . demand[s] a wall of separation between church and state." *Am. Civil Liberties Union of Kentucky v. Mercer Cnty.*, 432 F.3d 624, 638 (6th Cir. 2005). The United States Supreme Court has likewise held that "the Constitution [does not] require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). Ironically, by jettisoning GUSD's constitutionally-sound acoustic-excellence criterion for selecting choir venues based on her mistaken belief that the Establishment Clause demands separation, the Superintendent actually risks violating that Clause by exhibiting hostility toward religion. *See Rosenberger*, 515 U.S. at 846 ("[F]ostering a pervasive bias or hostility to religion . . . undermine[s] the very neutrality the Establishment Clause requires.").

Because of a handful of misguided complaints, and one official's misunderstanding of First Amendment law, two hundred members of GUSD's acclaimed choral program are now deprived of the best possible acoustical venues for their performances. We write to ask that you, the members the GUSD Board of Education, right this wrong by immediately reinstating the policy allowing GUSD's choral program directors to select the best performance venues pursuant to the acoustic-excellence criterion they employed for years.

⁵ *Id.*

Please respond to this letter by **October 25, 2013**, confirming that the Board has reinstated the policy. And please know that, should one or more of the complainants pursue legal action against the District's decision to reinstate the policy, Alliance Defending Freedom would be happy to defend the District free of charge.

Please feel free to contact us if you would like to discuss this important matter.

Sincerely



Jeremy D. Tedesco
Senior Legal Counsel
Director of Secondary School Project

cc: Deborah Flores, GUSD Superintendent of Schools (debbie.flores@gusd.k12.ca.us)