

FREEDOM FROM RELIGION *foundation*

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May 16, 2016

SENT VIA EMAIL & U.S. MAIL

Duval County School Board
1701 Prudential Drive
6th Floor, Room 642
Jacksonville, FL 32207

Re: Liberty Counsel letter re: Unconstitutional Prayer at School Board Meetings

Dear Duval County School Board Members:

I am writing again on behalf of the FFRF to address the legal exaggerations and misleading offer in Liberty Counsel's May 6 letter.

Liberty Counsel misrepresents the law

The single biggest mistake in Liberty Counsel's letter is its reliance on the *Greece* case. *Town of Greece v. Galloway*, 134 S.Ct. 1811 (2014). As I mentioned before, *Greece* does not apply to school boards. FFRF won a case in federal court this February, which said precisely that.

Some reports suggest that this board may believe its prayer policy is acceptable because it allows various faiths to give invocations, as happened in *Greece*. An open, inviting, non-discriminatory policy is a prerequisite for government prayers in some contexts, but ***no court has ever upheld government prayers in the school board context, including the Supreme Court in Greece.***

Liberty Counsel suggests that only the 3rd Circuit has addressed prayers at school board meetings, which is simply false. The 3rd, 5th, 6th, and 9th Circuits have all struck down school board prayer. *See Doe v. Indian River School District*, 653 F.3d 256 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (holding that prayer at school board meetings conveys message favoring religion); *Doe v. Tangipahoa Parish Sch. Bd.*, 473 F.3d 188 (5th Cir. 2006), *dismissed on other grounds*, 494 F.3d 494 (5th Cir. 2007) (finding a school board's practice of opening meetings with sectarian prayer unconstitutional); *Bacus v. Palo Verde Unified Sch. Dist.*, 52 Fed. Appx. 355 (9th Cir. 2002) (unpublished) (finding that a school board violated the Establishment Clause in allowing prayers "in the name of Jesus"); *Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369 (6th Cir. 1999) (finding that a school board's practice of opening its meetings with prayers violated the Establishment Clause).

The 3rd and 6th Circuits have specifically stated that the government prayer exception to the First Amendment approved of in *Marsh v. Chambers*, 463 U.S. 783 (1983) (and later in *Greece*) does not apply to school boards.

Liberty Counsel makes much of the fact that the 11th Circuit, which has jurisdiction over DCS, has not ruled on this particular issue. This is misleading for three reasons. **First**, that a particular

court has not ruled on the issue does not mean the issue is undecided. There is no disagreement among any of the federal courts that have looked at school board prayer—all agree it is unconstitutional—and those cases will certainly be instrumental in any case brought in the 11th Circuit. And the Constitution those courts were interpreting is the same Constitution this school board is required to follow.

Second, the 11th Circuit has held that, in the school context, “the state cannot employ a religious means to serve otherwise legitimate secular interests.” *Jager v. Douglas County Sch. Dist.*, 862 F.2d 824, 830 (11th Cir. 1989). The court was speaking about prayer. The 11th Circuit has also, just like the courts mentioned above, explained that the school context is different from a typical legislative context, even noting, “The Supreme Court has since rejected the application of *Marsh* to prayer at public school graduations.” *Pelphrey v. Cobb Cty., Ga.*, 547 F.3d 1263, 1274 (11th Cir. 2008) (citations omitted). *See also, Id.* at 1276.

Third, there is no need for the 11th Circuit to weigh in on case that would cost the school district that decides to challenge this settled law hundreds of thousands of dollars.

Finally, Liberty Counsel misleading claims that *Greece* applies to school boards. In February, FFRF won a judgment against the Chino Valley School Board on this very issue, which included an order that the school district pay \$202,971.70. The court said:

Defendants contend that the Supreme Court’s recent ruling in *Greece*, alters this analysis, but if anything, *Greece* further supports the notion that the legislative exception is limited to houses of governance in the world of mature adults. . . . *Greece* left the school prayer cases, upon which *Indian River*, *Coles*, and this Court rely, undisturbed.

Freedom From Religion Found. v. Chino Valley Unified Sch. Dist., No. EDCV 14-2336-JGB (DTBx) at 22 (C.D. Cal. Feb. 18, 2016) (citations omitted).¹

That fee award is strikingly similar to fees courts have assessed against other government bodies Liberty Counsel has represented “pro bono.”

Liberty Counsel’s “pro bono” “no charge” offer is misleading.

Liberty Counsel calls us “the most litigious” secular organization. While it is true that FFRF has filed eight lawsuits since the end of February, we prefer to resolve these issues amicably, through education. Especially when the law is this clear.

Please do not be hooked by Liberty Counsel’s disingenuous offer. Even with pro bono representation government defendants have to reimburse fees and costs. In 2005, Liberty Counsel represented two Kentucky counties “pro bono” and each ended up paying over \$220,000. For example, Mat Staver, the founder and chairman of Liberty Counsel, represented Pulaski County in a losing Ten Commandments case.² According to reports, “Staver stated that **the battle is costing Pulaski taxpayers ‘zero’ dollars**, since Liberty Counsel is working ‘pro bono’ for the county governments.”³ The county paid the ACLU \$231,662.⁴ It was forced to take out a loan to pay the legal fees.⁵ McCreary County owed a similar amount.⁶

Liberty Counsel is not looking out for the DCS's interests. In Santa Rose, Florida, a school district was found liable for attorney's fees after the ACLU challenged some of its practices under the Establishment Clause. The court entered a consent decree between the ACLU and the school board. Several school employees intentionally violated the terms of that decree. Liberty Counsel represented those employees and when invited to work with the ACLU and the school to make the terms of the decree more clear, Liberty Counsel "rejected these invitations out of hand" increasing costs and causing litigation to drag on for years.⁷ In the end, the school district owed the ACLU over \$150,000 and the ACLU agreed to waive its fee.⁸ Liberty Counsel did not waive its fee, requiring the school to pay \$265,000.⁹

Religious law firms like Liberty Counsel exist to push their own agenda. They don't care about the costs that are passed on to public schools and local taxpayers. And those costs can be extensive, well over \$200,000. In one case, a Pennsylvania school board had to pay out more than one million dollars in legal fees (down from \$2,067,226),¹⁰ despite being represented by the Thomas More Law Center, "pro bono."¹¹ FFRF simply wants to ensure the board abides by the Constitution by stopping the prayers.

We look forward to your written response.

Sincerely,



Andrew Seidel
Staff Attorney

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¹ Available at http://ffrf.org/uploads/legal/FFRFvChinoValley_Order.pdf.

² *McCreary County, Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 848 (2005).

³ Chris Harris, "Federal Appeals Court Justices rule against Pulaski Ten Commandment display," The Commonwealth Journal, June 10, 2010, available at <http://someset-kentucky.com/local/x93709955/Federal-Appeals-Court-Justices-rule-against-Pulaski-Ten-Commandments-display/print>. Emphasis added.

⁴ Bill Estep, "Pulaski pays \$230,000 in fees in 10 Commandments case," Lexington Herald-Leader, September 10, 2011, available at <http://www.kentucky.com/2011/09/10/1875644/pulaski-pays-230000-in-fees-in.html#storylink=cpy>

⁵ *Id.*

⁶ Bill Estep, "Pulaski pays \$230,000 in fees in 10 Commandments case," Kentucky.com, September 10, 2011, available at <http://www.kentucky.com/2011/09/10/1875644/pulaski-pays-230000-in-fees-in.html#storylink=cpy>

⁷ Benjamin Stevenson, ACLU of FLORIDA, letter to Santa Rosa County School Board, July 1, 2011. Available at <http://www.aclufl.org/pdfs/2011-07-01-ACLUFeeWaiver.pdf>.

⁸ *Id.*

⁹ See Howard Friedman, "Settlement Reached In Long-Running Santa Rosa Florida School Consent Decree Challenge," Religion Clause blog, July 1, 2011, available at <http://religionclause.blogspot.com/2011/07/settlement-reached-in-long-running.html>.

¹⁰ Christina Kauffman, "Dover gets a million-dollar bill," *The York Dispatch*, February 22, 2006.

¹¹ Gordy Slack, "Intelligent Designer: The Chief Defender of Intelligent Design in the Dover Evolution Trial Insists he has Science and God on his Side," SALON.COM, Oct. 20, 2005, available at http://www.salon.com/2005/10/20/dover_trial/