



LIMANDRI & JONNA LLP

CHARLES S. LIMANDRI*
PAUL M. JONNA*

MARK D. MYERS
JEFFREY M. TRISSELL*
ROBERT E. WEISENBURGER
MILAN L. BRANDON II
JOHANNA DELEISSEGUES

BRIAN D. MILLER
GREGORY J. ANTHONY
RICHARD SALPIETRA
Of Counsel

*BOARD CERTIFIED CIVIL TRIAL ADVOCATE
ADMITTED TO THE DISTRICT OF COLUMBIA BAR
ADMITTED TO THE NEW YORK BAR
†ADMITTED TO THE U.S. SUPREME COURT

POST OFFICE BOX 9120
RANCHO SANTA FE, CALIFORNIA 92067
TELEPHONE: (858) 759-9930
FACSIMILE: (858) 759-9938

WEBSITE: www.limandri.com

PHYSICAL ADDRESS:

16236 SAN DIEGUITO ROAD
BUILDING 3, SUITE 3-15
RANCHO SANTA FE, CA 92091

KATHY DENWORTH
Office Administrator

May 9, 2023

**Via E-Mail: wsims-moten@sbunified.org;
& U.S. Mail dist_board@sbunified.org**

Wendy Sims-Moten
President of the Board
Santa Barbara Unified School District
720 Santa Barbara Street
Santa Barbara, CA 93101

Re: *Anti-Catholic Hate Speech in Theory of Knowledge Curriculum*

Dear President Sims-Moten:

This office serves as Special Counsel to the Thomas More Society, a not-for-profit, national public interest law firm dedicated to restoring respect in law for life, family, religious liberty, and election integrity. Based in Chicago, the Thomas More Society defends and fosters support for these causes by providing high quality pro bono legal services from local trial courts all the way to the United States Supreme Court. More information on the Thomas More Society is available at www.thomasmoresociety.org.

We write because it has come to our attention that a teacher at Dos Pueblos High School in Goleta is using the infamous anti-Catholic photograph “Piss Christ” as part of the curriculum in her Theory of Knowledge class. Taking this teacher’s Theory of Knowledge class is a necessary prerequisite to obtaining an International Baccalaureate Diploma. Our client, Mr. John Hayward, is currently a Junior at Dos Pueblos High School. As a Senior during the 2023-2024 school year, he was planning to take the Theory of Knowledge class and obtain the International Baccalaureate Diploma. However, when he learned that the anti-Catholic “Piss Christ” was a feature of the Theory of Knowledge class, he realized that he had no option but to drop out of the program.

We write to advise you, as explained below, that using the “Piss Christ” anti-Catholic hate speech as part of the Theory of Knowledge curriculum is illegal and request that you take action to remove the image. We understand that many students and teachers are upset about Dos Pueblos High School’s official promotion of anti-Catholic bigotry, are circulating a petition against it, and will be protesting at upcoming Board Meetings. We fully support these efforts and will take all measures necessary to help all students feel welcome within Santa Barbara Unified School District.

I. Background on the “Piss Christ” Image

The particularly vile, anti-Catholic image, *Immersion (Piss Christ)*, was created by an “artist” named Andres Serrano. It is a photograph of a crucifix immersed in Mr. Serrano’s urine. It was created in the late 1980s but came to prominence during the 1990s as the motive for Congress choosing to defund the National Endowment for the Arts. At that time, Congress decided that it would not allow federal funding to be used to promote “art” that demeaned and attacked particular religious beliefs.¹ Mr. Serrano is a former Catholic who left his faith because “[t]here must be some conflict between Catholicism and puberty.”² When it was created, “[t]he Pope [] publicly expressed disapproval of Piss Christ.”³

The “Piss Christ” image is hate-speech which is intended to, and which actually does, cause devout Catholics to feel directly harassed and targeted. It is intended to help “exorcise[] the artist’s experiences of Catholicism” and represent “his personal distrust of religion.”⁴ Mr. Serrano’s intent was to mock Catholics and cause them to feel ashamed of their religion and their Church. The piece was meant to be “provocative” and an attack on traditional Catholic views which “mistak[e] images for religious truths that could never be entirely incarnated.”⁵

A common question asked regarding the image—which the Theory of Knowledge class presumably asks—“is whether the artist is debasing religion or commenting on the way it has been debased.”⁶ Either way, the image is hate-speech: either it is debasing Christianity itself or the religion practiced by adherents of the Catholic Church. The image is meant to provoke a reaction, it is meant to be harassing. In that sense, it may be “art,” but teaching it is no different than asking

¹ See *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998).

² Lucy Lippard, *Andres Serrano, the Spirit and the Letter*, ART IN AMERICA (Apr. 1990), <https://www.artnews.com/art-in-america/features/andres-serrano-provocative-work-lucy-lippard-1234652353/>.

³ *Id.* at n.9.

⁴ *Id.*

⁵ Michael Brenson, *Andres Serrano: Provocation And Spirituality*, N.Y. TIMES (Dec. 8, 1989), <https://www.nytimes.com/1989/12/08/arts/review-art-andres-serrano-provocation-and-spirituality.html>.

⁶ *Id.*

students to personally step on a crucifix so that the class can then have a discussion about how engaging in blasphemy made them feel.

II. Legal Analysis: Teaching the “Piss Christ” Image is Harassment

As explained below, including the “Piss Christ” image as a discussion topic in the Theory of Knowledge curriculum is an inappropriate, direct attack on a student’s religious beliefs. The image is *meant* to shock and harass devout Catholic students and other Christians.

Students like Mr. Hayward have a right to be free from harassment and discrimination on the basis of their religious beliefs. As stated by the California Supreme Court, even if presenting “Piss Christ” to students is speech, the government’s free speech rights do not extend to harassment. “To the contrary, as noted above, we conclude that it is clear from the high court’s decisions ... that the First Amendment permits imposition of civil liability for past instances of pure speech that create a hostile [] environment.”⁷

Thus, the application of the below principles to the present situation leads to a single conclusion. “[A] local government [can]not subsidize an exhibition of Andres Serrano’s ‘Piss Christ,’ a photo depicting a crucifix immersed in the artist’s urine,” because this “would constitute hate speech in violation of the government’s constitutional obligation not to discriminate against religious groups,” including “the restrictions imposed by the Equal Protection Clause, as well as the First Amendment’s religion clauses.”⁸

A. Legal Background on SBUSD’s Own Policies & California Law

Like most California school districts, Santa Barbara Unified School District (“SBUSD”) has adopted policies prohibiting discrimination on the basis of religion.⁹ Discrimination in this context includes the use of “any derogatory or discriminatory name, image, practice, or other barrier that may unlawfully prevent an individual ... from accessing district programs and activities.”¹⁰ SBUSD also prohibits “discriminatory harassment” which creates “a hostile environment.”¹¹ These policies are required by California law.¹²

⁷ *Aguilar v. Avis Rent A Car Sys., Inc.*, 21 Cal. 4th 121, 135 (1999).

⁸ Ernest A. Young, *Welcome to the Dark Side Liberals Rediscover Federalism in the Wake of the War on Terror*, 69 BROOK. L. REV. 1277, 1299-300 (2004).

⁹ SBUSD BP 0410 (July 24, 2018).

¹⁰ *Id.*

¹¹ SBUSD BP 5145.3 (July 24, 2018).

¹² See Cal. Educ. Code §§ 200, 201.

Further, just last November, this Board passed a resolution concerning *The Respectful Treatment of All Persons*. As stated in that resolution:

WHEREAS, respect for the dignity of all people is essential to the goal of achieving a more just and equitable society; and
WHEREAS, the number of incidents based on ... religion and other hostile acts against various groups of people have dramatically increased in recent years; ... therefore;
IT IS HEREBY RESOLVED that the Santa Barbara Unified School District establish and affirm that students, employees, parents and community members in both schools and offices treat all persons equally and respectfully and refrain from the willful or negligent use of slurs against any person on the basis of ... religion....¹³

Under California law, “religion” is defined broadly to include “all aspects of religious belief, observance and practice.”¹⁴ This tracks with the general understanding of “religion” in the constitution. As stated by the Supreme Court in a case against a school district, the Free Exercise Clause of the First Amendment “protects not only the right to harbor religious beliefs inwardly and secretly. It does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through ‘the performance of (or abstention from) physical acts.’”¹⁵ The Supreme Court also recognizes that discrimination based on conduct closely related with religion is no different than discrimination based on religion. As stated succinctly by the High Court: “A tax on wearing yarmulkes is a tax on Jews.”¹⁶

B. Legal Background on Constitutional Religious Protections

Because SBUSD is a government entity, it must also comply with the constitutional prohibitions on religious discrimination that appear in the First Amendment to the U.S. Constitution and Article 1 of the California Constitution. As stated by the U.S. Constitution, the government “shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”¹⁷ And as stated by the California Constitution, “Free exercise and enjoyment of

¹³ SBUSD Resolution No. 2022-23-21 (Nov. 15, 2022), <https://resources.finalsite.net/images/v1670881073/sbunifiedorg/agy9bvvels90zn7iy6jiu/Reso20222321.pdf>.

¹⁴ Cal. Educ. Code § 212.3.

¹⁵ *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421 (2022) (quoting *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 877 (1990)).

¹⁶ *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 270 (1993). See also *Carson v. Makin*, 142 S. Ct. 1987, 2001 (2022) (“the prohibition on status-based discrimination under the Free Exercise Clause is not a permission to engage in use-based discrimination”).

¹⁷ U.S. Const., amend. I.

religion without discrimination or preference are guaranteed” and the government “shall make no law respecting an establishment of religion.”¹⁸

These constitutional guarantees are generally interpreted in tandem. “California courts alone determine the rights guaranteed by the California Constitution so long as those rights extend equal or greater protection to those guaranteed by the federal Constitution under totally similar provisions of the Bill of Rights.”¹⁹ In other words, “Article I, Section 4, of the California Constitution [] is at least as protective of religious liberties as the First Amendment.”²⁰

The U.S. Constitution’s Religion Clauses traditionally enshrine the principle of religious neutrality in government action. “A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of ‘neutrality’ toward religion.”²¹ “The touchstone for [the] analysis is the principle that the ‘First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.’”²²

Importantly, in 2022, the Supreme Court decided *Kennedy v. Bremerton School District*,²³ a watershed case that inherently changed the landscape of Establishment Clause jurisprudence. In *Kennedy*, a high school football coach was fired for engaging in private prayer following games. The High Court held that doing so violated his Free Exercise rights, and that there was absolutely no Establishment Clause problem. In discussing the latter issue, the Court directly revived its pre-1971 jurisprudence, and it cited its more recent cases following that early jurisprudence.²⁴ The Supreme Court explained that the Establishment Clause must be analyzed in a manner that “accord[s] with history and faithfully reflect[s] the understanding of the Founding Fathers.”²⁵ This is “[a]n analysis focused on original meaning and history,” with “reference to historical practices and understandings.”²⁶

Under a pre-1971 “history and tradition” analysis, religious neutrality is confirmed as the key issue. In the mid-Nineteenth Century, the “common school” system emerged as part of “the

¹⁸ Cal. Const., art. 1, § 4.

¹⁹ *Feminist Women’s Health Center, Inc. v. Philibosian*, 157 Cal. App. 3d 1076, 1086 (1984) (citing *Mandel v. Hodges*, 54 Cal. App. 3d 596, 616 (1976)).

²⁰ *Burfitt v. Newsom*, No. BCV-20-102267, 2021 WL 2152961, at *3 (Cal. Super. 2021).

²¹ *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 696 (1994) (quoting *Committee for Public Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756, 792-93 (1973)).

²² *McCreary County, Ky. v. ACLU*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

²³ *Kennedy*, 142 S. Ct. 2407.

²⁴ *Id.* at 2428 (citing *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565, 577 (2014); *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2087 (2019) (plurality)).

²⁵ *Id.* (brackets omitted).

²⁶ *Id.*

strong nativist movement” and as a means of “decreas[ing] the political influence of immigrants and Catholics.”²⁷ In essence, America had two school systems: privately funded Catholic schools and publicly funded Protestant schools.²⁸ To cure this divide, the Supreme Court vigorously applied the religious neutrality principles of a “history and tradition” analysis to strike down prayer in public schools,²⁹ and laws prohibiting the teaching of evolution.³⁰

Thus, “[g]overnments must commit themselves to ‘a position of neutrality’ whenever ‘the relationship between man and religion’ is affected.”³¹ The Religion Clauses “forbid[] hostility toward any” religion.³² This is because “[d]isapproval” of religious beliefs “sends a message to []adherents that they are outsiders, not full members of the political community.”³³ Stated differently, “the government ... cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices.”³⁴

The U.S. Supreme Court “has been particularly vigilant in monitoring compliance with [the religion clauses] in elementary and secondary schools” because “[f]amilies entrust public schools with the education of their children” and “[s]tudents in such institutions are impressionable and their attendance is involuntary.”³⁵ There are “special dangers” in the academic context because schools are “at the center of our intellectual and philosophic tradition.”³⁶ Thus, for schools “to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation’s intellectual life.”³⁷

As explained by the California Court of Appeal:

Religious guarantees in our constitutions stem not from opposition to religion but from respect for it—and for the right of each person to determine for himself his fundamental faith. Children, as they become aware of the religious differences of our people, should

²⁷ *Espinoza v. Montana Dep’t of Revenue*, 140 S. Ct. 2246, 2269-2272 (2020) (Alito, J., concurring).

²⁸ *Id.*

²⁹ *School Dist. of Abington Tp., Pa. v. Schempp*, 374 U.S. 203 (1963)

³⁰ *Epperson v. Arkansas*, 393 U.S. 97 (1968).

³¹ *Fox v. City of Los Angeles*, 22 Cal. 3d 792, 798 (1978) (quoting *School Dist. of Abington Tp., Pa. v. Schempp*, 374 U.S. 203, 226 (1963)).

³² *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984).

³³ *Cath. League for Religious & Civil Rights v. City & Cty. of San Francisco*, 624 F.3d 1043, 1049 (9th Cir. 2010) (en banc) (quoting *Lynch*, 465 U.S. at 688 (O’Connor, J., concurring)).

³⁴ *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com’n*, 138 S. Ct. 1719, 1731 (2018).

³⁵ *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987).

³⁶ *InterVarsity Christian Fellowship/USA v. Bd. of Governors of Wayne State Univ.*, 534 F. Supp. 3d 785, 824 (E.D. Mich. 2021).

³⁷ *Id.*

be made to understand the true character of the public school’s religious neutrality; the omission of religious services from the public school curriculum should never be allowed to assume the appearance of state hostility to religion.³⁸

In the Free Exercise context, it is not difficult to establish hostility. Hostility includes expressions of animus or suspicion against religious traditions or principles. This can include Administrative Judges comparing religious beliefs about traditional marriage to “slavery” and “the holocaust,”³⁹ the President stating that “Islam hates us” and that the U.S. is “having problems with Muslims coming into the country,”⁴⁰ City Council members describing religious practices as “an abomination,”⁴¹ an Attorney General describing opposition to same-sex adoption as “discriminatory animus” by “‘hate-mongers’ who disliked gay people more than they cared about children,”⁴² or a health officer “characterize[ing] ‘anti-vaxxers’ as ‘very ignorant’”⁴³

Relevant here, hostility in academia was shown in a case where a professor “remarked that religion ‘oppresses students,’” that “Christians ... were ‘primarily motivated out of fear,’” that “Christian doctrines ... should not be taught,” and that “Christian professors ‘should be banned’ from teaching courses on Christianity.”⁴⁴ In cases of religious “hostility,” strict scrutiny does not apply; rather, courts “‘set aside’ such policies without further inquiry.”⁴⁵

Finally, university professors have great protection given to them by the First Amendment as they fashion the content of their own curriculum.⁴⁶ But this does not translate to the teaching of children, where “the school, not the teacher, has the right to fix the curriculum.”⁴⁷ Most jurisdictions have explicitly rejected the concept of applying these principles to the primary and secondary school context.⁴⁸ This includes both the Ninth Circuit and California courts.⁴⁹

³⁸ *Citizens for Parental Rights v. San Mateo Cty. Bd. of Educ.*, 51 Cal. App. 3d 1, 25 n.26 (1975) (quoting 25 Cal. Ops. Att’y Gen. 325 (1955)).

³⁹ *Masterpiece Cakeshop*, 138 S. Ct. at 1729.

⁴⁰ *Trump v. Hawaii*, 138 S. Ct. 2392, 2417 (2018).

⁴¹ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 541 (1993).

⁴² *Buck v. Gordon*, 429 F. Supp. 3d 447, 451, 462-63 (W.D. Mich. 2019); see also *New Hope Fam. Servs., Inc. v. Poole*, 966 F.3d 145, 168 (2d Cir. 2020).

⁴³ *M.A. v. Rockland Cnty. Dep’t of Health*, 53 F.4th 29, 37 (2d Cir. 2022).

⁴⁴ *Meriwether v. Hartop*, 992 F.3d 492, 512-13 (6th Cir. 2021).

⁴⁵ *Kennedy*, 142 S. Ct. at 2422 n.1 (quoting *Masterpiece Cakeshop*, 138 S. Ct. at 1732).

⁴⁶ See *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

⁴⁷ *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 370 (4th Cir. 1998).

⁴⁸ See *Brown v. Chicago Bd. of Educ.*, 824 F.3d 713, 716 (7th Cir. 2016) (collecting cases).

⁴⁹ *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 966 n.12 (9th Cir. 2011) (the “academic freedom” jurisprudence “applie[s] to teachers at ‘public colleges and universities,’ [citation] not primary and secondary school

C. Analysis of Dos Pueblos High School's Use of Piss Christ

Here, the question is not whether “art”—however loosely defined—should be censored by the government. The issue is whether a public school system, that is meant to be open to all of our Nation’s children, should be presenting a blasphemous image for the student’s discussion. As noted above, “[f]amilies entrust public schools with the education of their children” and “[s]tudents in such institutions are impressionable and their attendance is involuntary.”⁵⁰ Discussion of the “Piss Christ” image may arguably be appropriate at the university level, but it should never be presented in the K-12 context.

The nature of the image makes its teaching particularly problematic from a constitutional perspective. As stated by the “artist,” its purpose was to blaspheme and thereby trigger a reaction. (It is irrelevant that the artist was raised Catholic.) In other words, the purpose of the image is to be hostile to religion. But, of course, the government has no legitimate interest in promoting hostility to religion. “[T]he public school curriculum should never be allowed to assume the appearance of state hostility to religion.”⁵¹

Moreover, under SBUSD’s policies, any student who wishes to obtain an International Baccalaureate Diploma has to subject himself to blasphemy and then discuss how it affected him. In other words, speech that is directly harassing, hostile, intimidating and even fear-inspiring is being taught to all International Baccalaureate students. Those students are being acclimated to hate-speech without any explanation that the “image” would be viewed by a significant portion of their classmates as directly meant to harass them.

The only way the “Piss Christ” image could potentially be taught, and then only in a university setting, is in the same manner as the Charlie Hebdo cartoons of the Prophet Muhammad—*i.e.*, as a controversial moment in history pitting free speech against the right to intentionally offend. But it is instead presented here as part of a discussion on the nature of art,⁵² without any discussion of how the image is intended to express hostility to religion. This teaches students that intentional harassment of religious students is appropriate in a government run secondary school, which is prohibited both under the California Education Code and the California

teachers.”); *Berry v. Pope Valley Union Elementary Sch. Dist.*, No. A160256, 2021 WL 4205235, at *7 (Cal. Ct. App. Sept. 16, 2021).

⁵⁰ *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987).

⁵¹ *Citizens for Parental Rights*, 51 Cal. App. 3d at 25, n.26.

⁵² See *Areas of Knowledge: The Arts*, TOK RESOURCE, <https://www.tokresource.org/duchamps-fountain>.

and U.S. constitutions. Conduct which makes students feel “less than fully welcome” because of their religious beliefs is unconstitutional hostility.⁵³

III. Next Steps

As stated above, we understand that numerous students and teachers intend to circulate a petition and protest the inclusion of the “Piss Christ” image in the Dos Pueblos High School curriculum. We fully support these students and teachers and encourage the Board of Education to take prompt remedial action. We will also fully defend these students or teachers if SBUSD takes adverse action against them. Indeed, the Ninth Circuit recently made clear that retaliation in this context would not be protected by even qualified immunity.⁵⁴

In light of the above, SBUSD would be fully justified in granting—and indeed is required to grant—the requests of its students and teachers to remove the “Piss Christ” image from its classes. But, if SBUSD insists on maintaining it, we will take all appropriate steps to protect the rights of SBUSD students to a learning environment free from religious discrimination and harassment.

Sincerely,

LiMANDRI & JONNA LLP



Jeffrey M. Trissell
Special Counsel to the Thomas More Society

cc:

**Via E-Mail: valvarez@sbunified.org
& U.S. Mail**

Virginia Alvarez
Vice President of the Board
Santa Barbara Unified School District
720 Santa Barbara Street
Santa Barbara, CA 93101

**Via E-Mail: gescobedo@sbunified.org
& U.S. Mail**

Gabe Escobedo
Clerk of the Board
Santa Barbara Unified School District
720 Santa Barbara Street
Santa Barbara, CA 93101

⁵³ *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 46 F.4th 1075, 1100 (9th Cir. 2022) (Lee, J., concurring); *granting injunction pending en banc review*, 64 F.4th 1024, 1025 (9th Cir. 2023).

⁵⁴ *Dodge v. Evergreen Sch. Dist. #114*, 56 F.4th 767, 786-87 & n.6 (9th Cir. 2022).

Wendy Sims-Moten, President of the Board
Santa Barbara Unified School District
Re: *Anti-Catholic Hate Speech in Theory of Knowledge Curriculum*
May 9, 2023
Page 10

**Via E-Mail: rmunoz@sbunified.org
& U.S. Mail**

Rose Muñoz
Board Member
Santa Barbara Unified School District
720 Santa Barbara Street
Santa Barbara, CA 93101

**Via E-Mail:
studentboardmember@sbunified.org
& U.S. Mail**

Kavya Suresh
Student Board Member
Santa Barbara Unified School District
720 Santa Barbara Street
Santa Barbara, CA 93101

**Via E-Mail: wbanning@sbunified.org
& U.S. Mail**

William Banning
Board Member
Santa Barbara Unified School District
720 Santa Barbara Street
Santa Barbara, CA 93101