

# LIBERTY COUNSEL



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## Via E-Mail Only

██████████  
District Administrator  
Franklin Public Schools  
8255 West Forest Hill Avenue  
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RE: First Amendment protections of student speech

Dear District Administrator ██████████:

By way of introduction, Liberty Counsel is a national nonprofit litigation, education and public policy organization with an emphasis on First Amendment liberties, particularly regarding religious liberty and the public schools. We have offices in Florida, Virginia, and the District of Columbia, and affiliated attorneys across the nation, including Wisconsin.

Liberty Counsel writes to **Franklin Public Schools (“FPS” or “the District”)** to request that **the District approve for broadcast a student video submission for the May 1, 2024 broadcast of “The Saber Roar.”** Pseudonymous student “Michael Roe” (“M.R.”) attends Franklin High School and is enrolled in The Saber Roar class, which produces a weekly student news and entertainment YouTube show. M.R.’s video submission on the Easter holiday has been flagged to administration as being potentially inappropriate for broadcast, on the basis of religious viewpoint. **A failure by the District to broadcast this video would be unconstitutional suppression of student speech, in violation of the First Amendment.**

Nothing in the syllabus for “Video Production Company II (The Saber Roar Class)” – Course #HT1005Y nor its [grading rubric](#) prohibits (or justifies a prohibition on) M.R.’s video submission. Indeed, the syllabus states “Students will ... write, produce and direct other creative original productions. The programs are student driven and as open and varied as their imaginations.”

In Fall 2023 and Spring 2024, The Saber Roar has broadcast a number of student video productions. *See, e.g.*, the production on the [Multicultural Club](#) (“It is always great to show your pride in your culture and background and Multicultural Club is the way to do that at FHS.” “This is one of many Multicultural Club meetings that are hosted throughout the year. Here, people can dive deep into their culture and learn more about what it means to be their true selves... it’s a really good experience

overall and you get to talk to everyone about their culture; religion...”). The Saber Roar has aired many other student video productions on a variety of topics, including Weird Holidays, Cultural Misconceptions, Traditions, Foods, Black History Month, Halloween, Thanksgiving, Christmas, Valentine’s Day, and more, including a student production on [Ramadan and why it is important](#) to people who identify as Muslim. In this instance, M.R.’s video submission on Easter likewise met the criteria for the student news and entertainment show, as it was a) student-produced and b) related to a holiday (in this case, [Easter and why it is important](#) to people who identify as Christian).

**We therefore request that the District approve for broadcast M.R.’s video submission for the May 1, 2024 broadcast of “The Saber Roar,”** in accordance with the First and Fourteenth Amendments to the United States Constitution. We request confirmation by close of business on May 1, 2024, that the video has been broadcast as originally intended on that date. If we do not receive this confirmation, Liberty Counsel will take additional action to prevent irreparable harm to the cherished liberties of M.R.

Some examples of action Liberty Counsel has taken on behalf of First Amendment rights include highly successful civil rights litigation nationwide during COVID-19. Our work also includes the recent landmark 9-0 United States Supreme Court case, *Shurtleff v. City of Boston, Massachusetts*, 142 S. Ct. 1583 (2022), in which the court held that the city violated the free speech rights of a Christian organization and its founder, Harold Shurtleff, when it refused to let the group raise its flag in front of Boston City Hall as part of a Constitution Day ceremony in 2017. The City of Boston deemed the Christian flag “religious” and prohibited its display, while numerous other flags with the symbology of other religions, or which were deemed “nonreligious” were permitted for display.

### **Applicable Law**

The Supreme Court has held that public school students retain First Amendment rights: “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for [more than] 50 years.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). The “State may not establish a ‘religion of secularism’ in the sense of affirmatively opposing or showing hostility to religion, thus ‘preferring those who believe in no religion over those who do believe.’” *Sch. Dist. Of Abington Township. v. Schempp*, 374 U.S. 203, 225 (1963)(quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952)).

The Supreme Court’s recent decisions in *Shurtleff v. City of Boston, Massachusetts*, 142 S. Ct. 1583 (2022), and in *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022) do not permit the District to deny M.R.’s video submission. In *Shurtleff* and in *Kennedy*, the Court held that a government entity could not single out Christian religious speech for exclusion in a forum where it permits the free expression of other viewpoints. The opinion of the majority in *Kennedy* stated:

This Court has since made plain, too, that **the Establishment Clause does not include anything like a “modified heckler’s veto, in which ... religious activity can be proscribed” based on “ ‘perceptions’ “ or “ ‘discomfort.’** “*Good News Club v. Milford Central School*, 533 U.S. 98, 119, 121 S.Ct. 2093, 150 L.Ed.2d 151 (2001) (emphasis deleted). **An Establishment Clause violation does not automatically**

**follow whenever a public school or other government entity “fail[s] to censor” private religious speech.** *Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens*, 496 U.S. 226, 250, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990) (plurality opinion). Nor does the Clause “compel the government to purge from the public sphere” anything an objective observer could reasonably infer endorses or “partakes of the religious.” *Van Orden v. Perry*, 545 U.S. 677, 699, 125 S.Ct. 2854, 162 L.Ed.2d 607 (2005) (BREYER, J., concurring in judgment). **In fact, just this term the Court unanimously rejected a city’s attempt to censor religious speech based on *Lemon* and the endorsement test. See *Shurtleff*, 142 S.Ct., at 1587–1588; ...142 S.Ct., at 1595 (ALITO, J., concurring in judgment); *id.*, 142 S.Ct., at 1587, 1588–1589 (opinion of GORSUCH, J.).**<sup>4</sup>

In place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by “reference to historical practices and understandings.” “*Town of Greece*, 572 U.S. at 576, 134 S.Ct. 1811; see also *American Legion*, 139 S.Ct., at 2087 (plurality opinion). “ ‘[T]he line’ “ that courts and governments “must draw between the permissible and the impermissible” has to “ ‘accor[d] with history and faithfully reflec[t] the understanding of the Founding Fathers.’ “ *Town of Greece*, 572 U.S. at 577, 134 S.Ct. 1811 (quoting *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 294, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963) (Brennan, J., concurring)). An analysis focused on original meaning and history, this Court has stressed, has long represented the rule rather than some “ ‘exception’ “ within the “Court’s Establishment Clause jurisprudence.” 572 U.S. at 575, 134 S.Ct. 1811; see *American Legion*, ...139 S.Ct., at 2087 (plurality opinion); *Torcaso v. Watkins*, 367 U.S. 488, 490, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961) (analyzing certain historical elements of religious establishments); *McGowan v. Maryland*, 366 U.S. 420, 437–440, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961) (analyzing Sunday closing laws by looking to their “place ... in the First Amendment’s history”); *Walz v. Tax Comm’n of City of New York*, 397 U.S. 664, 680, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970) (analyzing the “history and uninterrupted practice” of church tax exemptions). The District and the Ninth Circuit erred by failing to heed this guidance.

*Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2427–28 (2022)(emphasis added; internal citations omitted). In light of this line of cases culminating in *Shurtleff* and *Kennedy*, the District should resist the temptation to analyze this case under *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988) (student newspaper case) to suggest that the District may censor M.R.’s video submission here. The District has opened a forum for student expression under the criteria set forth above and applicable to The Saber Roar. The District has permitted other students to produce videos which the students deem of interest to the larger student body, including discussion of culture or religious beliefs and the meanings of religious concepts or practices behind holidays.

As a specific comparison to M.R.’s Easter video, the Ramadan video broadcast on April 3, 2024,<sup>1</sup> shows District students discussing Ramadan and the importance of its associated religious practices, including student discussion of the holiday as a whole, fasting, prayer – including *Fajr* prayer

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<sup>1</sup> [https://www.youtube.com/watch?v=c2\\_JotpXf\\_Q&t=207s](https://www.youtube.com/watch?v=c2_JotpXf_Q&t=207s)



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