

National
Coalition
Against
Censorship



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NCAC PARTICIPATING ORGANIZATIONS

Actors' Equity Association
American Association of School Administrators
American Association of University Professors
American Association of University Women
American Booksellers Foundation for Free Expression
American Civil Liberties Union
American Ethical Union
American Federation of Teachers
American Federation of Television & Radio Artists
American Jewish Committee
American Library Association
American Literary Translators Association
American Orthopsychiatric Association
American Society of Journalists & Authors
Americans United for Separation of Church & State
Association of American Publishers
Authors Guild
Catholics for Choice
Children's Literature Association
College Art Association
Directors Guild of America
The Dramatists Guild of America
Educational Book & Media Association
First Amendment Lawyers Association
International Reading Association
Lambda Legal
Modern Language Association
National Center for Science Education
National Communication Association
National Council for the Social Studies
National Council of Churches
National Council of Jewish Women
National Council of Teachers of English
National Education Association
PEN American Center
People For the American Way
Planned Parenthood Federation of America
Screen Actors Guild
Sexuality Information & Education Council of the U.S.
Society of Children's Book Writers & Illustrators
Student Press Law Center
Union for Reform Judaism
Union of Democratic Intellectuals
Unitarian Universalist Association
United Church of Christ
Office of Communication
United Methodist Church
United Methodist Communications
Women's American ORT
Writers Guild of America, East
Writers Guild of America, West

To: Chris Funk, Superintendent
Superintendent's Office
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February 10, 2017

Dear Superintendent Funk,

On behalf of the Arts Advocacy Program at the National Coalition Against Censorship, an organization devoted to promoting free speech and artistic expression, and the ACLU of Northern California, an organization dedicated to protecting civil liberties for all Californians, we write with regard to your removal of Mark Harris' paintings from the administrative offices of East Side Union High School District. Their removal raises serious First Amendment concerns, and we urge you to restore the exhibition and adopt policies that prevent viewpoint discrimination against artworks.

It is our understanding that African American Student Advocates (AASA) independently selects content for exhibitions designed to help celebrate Black History Month, observed annually in February. The Reverend Jeff Moore, president of the San Jose/Silicon Valley Branch of the NAACP, who has selected work on behalf of AASA for the past few years, invited San Francisco based artist and educator Mark Harris to exhibit his work in the lobby of a District administrative building. Harris presented eleven paintings that depict the African American experience and the history of racial injustice. Despite the lack of any school policy or constitutional bases for removal, the paintings were on display for only a few hours before the District removed them, apparently in response to complaints from parents and staff. The superintendent later stated the District should not "advocate one position or another as a public institution."

We appreciate and respect the fact that, by presenting artwork on the occasion of Black History Month, the District has chosen to celebrate this important time and to invite viewers to reflect on the African American experience in our nation's history. Given the richness of that history and the diversity of perspectives that experience has engendered,

however, there is no one “acceptable” way to represent this truth. Additionally, it is unacceptable to refuse to permit speech or expression because it might offend some.

Claims of offense do not in and of themselves provide adequate justification for censoring artwork, and in this era of intense political polarization, many artworks may be offensive to someone’s viewpoint. But removing Mark Harris’ paintings sets a precedent that ushers in more demands to remove artworks that may be at odds with some individuals’ beliefs, subjecting future exhibitions to a “heckler’s veto.” The District must reinstate the artwork exhibit because its removal may violate basic constitutional protections against viewpoint discrimination.

The District’s decision to remove Mr. Harris’ artwork is an impermissible viewpoint restriction.

Regardless of the forum, the District may only restrict access to the artwork “as long as the restrictions are reasonable and [are] not an effort to suppress expression merely because the public officials oppose the speaker’s view.” *Arkansas Educ. Television Comm. v. Forbes*, 523 U.S. 666, 677-78 (1998) (quoting *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788, 800 (1985)). However, the District completely restricted the individual artist’s voice because the superintendent was “shocked” at the paintings.

The Ninth Circuit has held that “viewpoint discrimination is a form of content discrimination in which the government targets not the subject matter, but particular views taken by the speakers on a subject.” *Brown v. California Dep’t of Transportation*, 321 F.3d 1217, 1223 (9th Cir. 2003). Indeed, “viewpoint discrimination” is the most “egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.” *Rosenberber v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995). By showing the artworks of Mark Harris, the District had the opportunity to spark dialogue about race relations. Censorship of the exhibition not only undermines this opportunity, but also sends the troubling message that the history of racism is a topic off limits during Black History Month.

After allowing the artwork in the lobby for several years, the District cannot argue the lobby is an incompatible forum for Black History Month artwork.

The decision to remove the artwork was clearly hasty and unjustified; moreover, the District cannot argue that the forum is incompatible with discussing Black History Month issues. Courts have said “where the government is plainly motivated by the nature of the message rather than the limitations of the forum or a specific risk within that forum, it is regulating a viewpoint rather than a subject matter.” *Sammartano v. First Judicial District Court*, 303 F.3d 959,971 (9th Cir. 2002). The District has not once stated that it does not believe the government lobby area is indeed a space that should be closed to Black History Month artwork. Nor has the District argued that the artwork inaccurately depicted a reality for Black people. The superintendent only disagreed with the view of how the artist presented the artwork.

As an aside, it is unreasonable to assume that the mere act of displaying artwork could signify endorsement of its message. To exhibit a work of art is not to endorse the work or the vision, ideas, and opinions of the artist; countless universities, libraries, arts councils, schools and administrative buildings across the country display artworks that express political viewpoints, and in doing so they do not endorse the artwork's message but rather showcase a diverse range of perspectives. The District has not actually stated that there is an issue with attributing the artwork to the District. But out of an abundance of caution to avoid confusion regarding whose artwork is displayed, we recommend that the District place a short explanation of the background of the artist and the exhibition's relevance to Black History Month. The text could emphasize the importance of showcasing diverse opinions, noting that the views belong to the artist alone. A wall label with a title and a description should also be placed by each work. To allow people to express their views in opposition or support, the District could provide a response book in addition to hosting educational events.

For the foregoing reasons, the ACLU and AAP urges the District to reinstate Mark Harris' paintings for 28 days to public display in celebration of Black History Month. Please confirm receipt and next steps including when the District plans to reinstate the exhibit by February 16, 2017. We are eager to assist you in implementing strategies to help avert or defuse complaints and look forward to working with you. We are prepared to consider any and all options to vindicate the First Amendment rights at stake here, but hope that will not be necessary.

Sincerely,



Svetlana Mintcheva
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National Coalition Against Censorship
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