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January 3, 2020

Dwain York, Superintendent  
Joe Malone, President  
Traci Maxwell, Vice President  
Rob Campbell, Secretary  
Lori Olson, Place 1  
Will Conley, Place 4  
Gina Fulkerson, Place 6  
Ken Strange, Place 7

Board of Trustees  
Wimberley Independent School District  
951 FM 2325  
Wimberley, Texas 78676

*Via E-mail*

**Re: Retaliation against Parents in Wimberley ISD**

Dear Trustees of Wimberley ISD and Superintendent York:

We write to express serious concerns about the silencing of parents who have expressed support for LGBTQ rights in Wimberley ISD and to put the school district on notice of unconstitutional actions that have been taken by school district officials. During the first annual Wimberley LGBTQ Pride March on September 21, 2019, several parents of LGBTQ students in Wimberley schools modified the Wimberley Texans logo by replacing the red and white colors with the rainbow flag. The parents then posted this image on Facebook and put it on t-shirts to express their support for LGBTQ students in Wimberley schools. On December 18, 2019, Superintendent York sent an e-mail to these parents threatening legal action against them if they do not take down the altered logo in social media or in print by January 6, 2020.

By targeting these parents, Wimberley ISD is violating the First Amendment in multiple ways. The school district is impermissibly retaliating against parents based on the content of their speech and chilling free expression with threats of legal action. Modifying a logo, even if copyrighted, for the purpose of political expression is protected by the First Amendment and specifically allowed under the fair use doctrine of federal copyright law. It is particularly concerning here that the Texans logo has previously been used by businesses in Wimberley for commercial purposes and altered with religious symbols without any action being taken by the district.

In order to avoid significant legal liability at the detriment of Wimberley taxpayers, students, and parents, the school district should immediately cease taking adverse action against anyone who has posted the altered logo and send a retraction to everyone who received the letter from Superintendent York. By taking these steps, Wimberley ISD can continue its mission of empowering and inspiring students while respecting the First Amendment freedoms of every Wimberley resident.

### ***Factual Background***

On September 21, 2019, the Wimberley Valley Chamber of Commerce held the first annual Wimberley LGBTQ Pride March. In the days leading up to the event, a group of parents designed an image that transformed the Texans logo from Wimberley ISD into an expression of support for LGBTQ students in Wimberley schools. They changed the Texans logo in many ways, including changing the colors in the background from white and red to the rainbow flag, which is a symbol recognized around the world as supporting LGBTQ rights:



The parents never sold this image nor used it for any commercial purpose. Instead, they posted the image on Facebook and printed out t-shirt transfers on their home computers. These transfers were then ironed onto t-shirts that several parents and students wore at Wimberley Pride. One T-shirt was also given to Lori Olson, a school board member of Wimberley ISD.

Ms. Olson posted a photo of herself wearing a t-shirt with the altered logo the morning before the Pride March to express her support for LGBTQ students in Wimberley ISD. The photo was accompanied by this message:

My heart is with all of the wonderful people in our community who are marching in our valley's first-ever Wimberley Pride Parade today. This is an historic event and I stand in solidarity with everyone involved (even though I am at school board training in Dallas and cannot be there). I am PROUD to support the LGBTQ community in our entire valley and especially in our schools.

Within hours of Ms. Olson's post, several Wimberley residents lodged complaints to Superintendent York and the school district about the content of Ms. Olson's Facebook post and the use of Texans logo to express support for LGBTQ students. In response, Superintendent York sent a letter to every student and parent in the district, in which he stated:

If a non-school related group alters and uses the official marks/logo of Wimberley ISD accompanied by text, it would suggest to the viewer, that Wimberley ISD endorses the group's activities. The Board of Trustees, acting as governing board, and any Wimberley ISD administrator, in a position of authority, will always protect the official marks/logo of Wimberley ISD and will not approve the brand's use in any altered format.

Following this letter, local news stations reported that the use and alteration of the Texans logo was actually widespread in the Wimberley community.<sup>1</sup> Texan Car Wash, which is located across the street from Wimberley High School, uses the logo on its business sign. Ace Hardware sells t-shirts with variations of the logo, including one with crosses behind it.



After Wimberley Pride and local news coverage of this controversy, members of the community attended school board meetings in October, November, and December of 2019 to express their views on LGBTQ rights and whether the school board should take action against Ms. Olson for her Facebook post. On October 21, 2019, the ACLU of Texas sent a letter to Superintendent York and the Wimberley ISD Trustees, in which we warned that any action taken against Ms. Olson for her Facebook post would constitute impermissible retaliation in violation of the First Amendment. In response, the school board voted on December 16, 2019 to take no official action against Ms. Olson, although Ms. Olson did remove the altered logo from her Facebook page.

As these events unfolded, the Wimberley ISD Board of Trustees voted on November 18, 2019, not to add any explicit protections for LGBTQ students in district nondiscrimination policies. The school district also made efforts to obtain the copyright to the Texans logo that it already claimed to own. The artist who designed the logo assigned the rights to it to Wimberley ISD several weeks after the controversy began.

After the Board of Trustees voted not to take action against Ms. Olson on December 16, 2019, many Wimberley parents thought that the school district would move on from this incident. Two days later, however, on December 18, 2019, Superintendent York sent individual e-mails to parents and community members who previously posted the altered logo. The superintendent wrote:

Wimberley ISD has obtained the copyright to both the Wimberley Texan logo and the new ISD logo to ensure fairness and consistency for all those who wish to display these official WISD trademarks.

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<sup>1</sup> Christian Flores, *Wimberley Pride and Wimberley ISD at odds over use of high school's logo*, CBS Austin (Sept. 25, 2019), <https://cbsaustin.com/news/local/wimberley-pride-and-wimberley-isd-at-odds-over-use-of-high-schools-logo>.

Wimberley ISD is aware that you are using and displaying an altered Texan logo, and while this is a serious concern, WISD is prepared to resolve this matter amicably. These marks can only be used in accordance with CY Local Policy, with Superintendent permission and consistent with WISD brand guidelines.

We request that you immediately take down the altered Texan logo on social media or in print. Failure to do so by Jan. 6, will result in a cease and desist letter from the WISD attorney.

It is unclear how many Wimberley parents received this message, but it seems that the e-mail achieved its intended effect. Confronted by threatened legal action, several parents who had previously posted the image on social media took it down. Other parents continue to display the image to express their support for LGBTQ students in Wimberley ISD, despite the school district's ongoing threats.

### *Legal Concerns*

By taking legal action against Wimberley ISD parents who have voiced their support for LGBTQ rights, the school district is violating the First Amendment in multiple ways: by chilling protected speech, by discriminating against a particular viewpoint, and by engaging in impermissible retaliation against Wimberley parents. Regardless of whatever copyright or trademark claims the district puts forward, posting an image of the rainbow flag and Texans logo on Facebook to express support for LGBTQ students falls squarely within the ambit of the "fair use" doctrine and constitutionally protected speech. Wimberley ISD therefore may not take any action against parents and community members who have posted this image online, and should immediately abandon its efforts to silence free speech and retaliate against people based on the content of their posts online.

The freedom of speech secured by the First Amendment guarantees "the unfettered interchange of ideas for the bringing about of political and social changes desired by the people."<sup>2</sup> Since the inception of our government, there has been "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."<sup>3</sup> Accordingly, "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection."<sup>4</sup>

Posting an image on Facebook to express support for LGBTQ rights constitutes core political speech on a matter of public concern. It is therefore afforded the "highest rung" of constitutional protection.<sup>5</sup> As the Supreme Court recently explained, the internet and "social media in particular" are among "the most important places . . . for the exchange of views," and

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<sup>2</sup> *Roth v. United States*, 354 U.S. 476, 484 (1957).

<sup>3</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

<sup>4</sup> *Connick v. Myers*, 461 U.S. 138, 145 (1983).

<sup>5</sup> *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010) ("Laws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'").

“[o]n Facebook, for example, users can debate religion and politics with their friends and neighbors.”<sup>6</sup>

When Wimberley parents posted the image of the rainbow flag and Texans logo online, they expressed a political message in support of LGBTQ students at Wimberley schools. The school district was therefore forbidden from taking any action against them based on the content of this speech.<sup>7</sup> The district’s choice to do so chills protected speech and constitutes retaliation in violation of the First Amendment because the parents were engaged in a constitutionally protected activity; the school district took actions against them that would “chill a person of ordinary firmness from continuing to engage in that activity;” and there is a causal connection between the free speech activity and the school district’s actions.<sup>8</sup> Because the parents were engaging in core political speech, “[a]ny form of official retaliation for exercising one’s freedom of speech, including prosecution, threatened prosecution, bad faith investigation, and legal harassment, constitutes an infringement of that freedom.”<sup>9</sup>

The school district’s actions also constitute impermissible viewpoint discrimination against parents who have expressed their support for LGBTQ students.<sup>10</sup> It is particularly concerning that Wimberley ISD has allowed other entities to use the Texans logo for commercial purposes and to alter the logo by adding religious symbols in the background. This suggests that the school district is selectively enforcing its intellectual property rights in opposition to the viewpoints expressed by Wimberley parents, which is bolstered by the fact that Wimberley ISD did not obtain the copyright for the Texans logo until after local news coverage of the controversy.

The district’s unlawful actions cannot be salvaged by meritless intellectual property arguments because there can be no federal copyright claim against parents who transform a logo and post it online as a form of political expression. The “fair use” doctrine allows people to use copyrighted material for “criticism” or “comment” by altering it with new “expression, meaning, or message.”<sup>11</sup> Here, Wimberley parents did just that. By altering the logo and adding a rainbow

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<sup>6</sup> *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017).

<sup>7</sup> *Lozman v. City of Riviera Beach, Fla.*, 138 S. Ct. 1945, 1949 (2018)

(“[T]he First Amendment prohibits government officials from retaliating against individuals for engaging in protected speech.”).

<sup>8</sup> To establish a First Amendment retaliation claim, plaintiffs “must show that (1) they were engaged in constitutionally protected activity, (2) the defendants’ actions caused them to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity, and (3) the defendants’ adverse actions were substantially motivated against the plaintiffs’ exercise of constitutionally protected conduct.” *Keenan v. Tejada*, 290 F.3d 252, 258 (5th Cir. 2002).

<sup>9</sup> *Smith v. Plati*, 258 F.3d 1167, 1176 (10th Cir. 2001).

<sup>10</sup> *See Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2223 (2015) (explaining that “[g]overnment discrimination among viewpoints is a “more blatant” and “egregious form of content discrimination”).

<sup>11</sup> 17 U.S.C. § 107; *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

flag, they changed its meaning for the purpose of making a political statement, which triggers fair use protections.

The district's intellectual property arguments also fail because no one used the Wimberley Pride image for commercial purposes.<sup>12</sup> The logo and t-shirt transfers were never marketed, sold, nor distributed for financial gain. When people post "copyrighted material for criticism or to spark conversation" for non-commercial purposes, their use of such material is "presumptively fair" and shielded by federal copyright law and the First Amendment.<sup>13</sup> Thus, even under federal copyright law, the school district has no basis for taking legal action against Wimberley parents who altered and posted the logo to engage in political expression.

### ***Conclusion***

As a government body, Wimberley ISD cannot discriminate or retaliate against parents, students, or community members based on the content of their speech. This is especially important in the area of LGBTQ rights, which is a matter of public concern that is currently subject to significant debate in Wimberley ISD. As parents and students raise concerns about how to make the school district safer and more affirming for LGBTQ students, the school district cannot silence their voices. By threatening legal action against parents who express support for LGBTQ students, Wimberley ISD is not only violating the First Amendment but also wasting potentially thousands of taxpayer dollars at the detriment Wimberley students and parents.

We urge you to respect the freedom of expression enshrined in the U.S. Constitution by ceasing to take adverse actions against people who have posted the altered logo and by sending a letter retracting Superintendent York's e-mail on December 18, 2019, to everyone who received it. We look forward to hearing from you on or before January 17, 2020. Sincerely,



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<sup>12</sup> 17 U.S.C. § 107.

<sup>13</sup> *In re DMCA Subpoena To Reddit, Inc.*, 383 F. Supp. 3d 900, 906 (N.D. Cal. 2019) (posting copyrighted material on Reddit was shielded by the fair use doctrine because it was meant to "evoke conversation" and not for commercial purposes); *see also Peterman v. Republican Nat'l Comm.*, 369 F. Supp. 3d 1053, 1060 (D. Mont. 2019) (finding that the Republican Party had a right to use photographs whose copyright was owned by a Democratic campaign because the photos were used for political messaging and did not affect the market for the original copyrighted material).