KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 21, 2018

VIA E-MAIL

Dr. Paul Cruz
Office of the Superintendent
Austin Independent School District
1111 West Sixth Street
Austin, Texas 78703

Re: Renting Austin ISD Facilities to Churches

Dear Dr. Cruz:

We are aware of media reports that suggest Austin Independent School District (the "District") may change its facilities use policy to prevent certain churches from renting its facilities after school and on weekends.[1] We caution you to reconsider these changes and be respectful of the religious liberty protections afforded churches under the Constitution and Texas law.

According to the District's Board Policy Manual, "[t]he District shall permit nonschool use of designated District facilities for educational, recreational, civic, or social activities, when these activities do not conflict with school use or with this policy."[2] The policy expressly permits churches to rent school facilities: "School facilities may be rented by religious groups for religious purposes."[3] In other words, churches may rent school facilities on the same terms as all community organizations.

Despite its current commitment to equal access, the District's decision to change the facilities use policy is troubling because of the timing and intent of trustees. Austin ISD trustee Ann Teich is on record stating that, in reference to Celebration Church renting the District's Performing Arts Center, she is "not in favor of renting to any entity that doesn't support our values . . . and that's full inclusion of our LGBTQ community."[4] Teich's comments come after protesters demonstrated outside Celebration's Sunday service on August 26 because they disagreed with the

[1] Julie Chang, *Amid church protests, AISD considers limits to facility rentals*, Austin American-Statesman, Sept. 19, 2018, https://www.mystatesman.com/news/local-education/amid-church-protests-aisd-considers-limits-facility-rentals/i0XoCSgty3Z08vcSm788fO/.
[2] Austin ISD, Board Policy Manual, GKD(Local), *Community Relations – Nonschool Use of School Facilities* (adopted May 24, 2010).
[3] *Id.*
[4] *See supra* note 1.

church's religious beliefs about marriage. Trustee Jayme Mathias agreed with Teich and said that Celebration had "values [that] did not align with those of the district."[5] The District should not make any changes to its facilities use policy that would prevent churches from renting those facilities on the same terms as other community organizations, lest it violate state and federal law.

I. The District Is Targeting Celebration Church for Discriminatory Treatment

When the government acts based on "impermissible hostility toward . . . sincere religious beliefs," its actions are *per se* unconstitutional. *Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1729 (2018). It makes no difference that the exclusion of a religious group arises from a government contract or lease. Excluding churches from a government forum or program due to their religious nature is "odious to our Constitution." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2025 (2017). Here, two District trustees commented publicly that they do not want Celebration Church, or any church with similar beliefs about marriage, to rent District facilities. These trustees have "passed judgment upon [and] presupposed the illegitimacy of religious beliefs and practices" in violation of the First Amendment. *Masterpiece*, 138 S. Ct. at 1731.

II. The District's Proposed Actions Are Not Neutral Toward Religion.

If a law burdening religious exercise is not neutral or generally applicable, then it must be "justified by a compelling state interest and is narrowly tailored to advance that interest." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). A law is not neutral "if it refers to a religious practice without a secular meaning discernable from the language or context." *Id.* Here, the District's desire to exclude churches based on their religious beliefs about marriage is not a neutral policy decision. Presumably, the District would welcome churches and community organizations that believe in same-sex marriage. Thus, the exclusion of those churches that do not agree removes any neutrality in the policy. Moreover, the District cannot justify its non-neutral policy because discriminating against churches based on their beliefs is not a compelling governmental interest.

The District's proposed policy also violates the Establishment Clause's demand that government remain neutral toward religion and among religious. No government entity can "pass laws which . . . prefer one religion over another." *Larson v. Valente*, 456 U.S. 228, 246 (1982) (internal quotation marks and citation omitted). In fact, the "clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Id.* at 244. The District's proposal to exclude churches with traditional beliefs about marriage, while allowing churches that agree with same-sex marriage to continue renting its facility smacks of denominational preference, and is unconstitutional. It also excessively entangles the District with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971). If the District adopts the

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[5] Austin Sanders, *Austin ISD Board Considering Policy Change for Facility Use*, Austin Chronicle, Sept. 7, 2018, https://www.austinchronicle.com/news/2018-09-07/austin-isd-board-considering-policy-change-for-facility-use/.

proposed changes, its employees will be charged with reviewing church doctrine, interviewing pastors about their beliefs, and even attending church services to determine if a particular church's beliefs coincide with the District's "values." Such entanglement is impermissible and violates the Establishment Clause.

III. The District's Proposed Actions Are Viewpoint Discriminatory.

By opening its facilities for rental by community organizations, the District created a forum for speech. But the exclusion of churches based on their views about marriage is viewpoint discrimination that violates the Free Speech Clause of the First Amendment. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001). "[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993). Here, the District proposes to allow churches to rent its facilities only if the churches agree with the District's views about marriage. But the forum the District created in opening its facilities to community groups has nothing to do with marriage. Instead, the District seeks to play favorites and exclude churches that do not have the same "values" about marriage. That is viewpoint discrimination, and it is unconstitutional.

IV. The District's Proposed Actions Violate Texas's Religious Freedom Restoration Act.

The Texas Religious Freedom Restoration Act ("RFRA") prohibits governmental entities like the District from "substantially burden[ing] a person's free exercise of religion," unless the government can demonstrate that the burden is the "least restrictive means" of furthering a "compelling governmental interest." Tex. Civ. Prac. & Rem. Code § 110.003(a)-(b). Someone aggrieved by a government action under RFRA may seek equitable relief, damages, and attorney's fees. *Id.* § 110.005. Notably, when interpreting the federal Religious Freedom Restoration Act, the Supreme Court said "RFRA was designed to provide very broad protection for religious liberty," *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2767 (2014), and protects individual and businesses alike, *id.* at 2768-69.

The District's proposed policy changes would substantially burden the religious exercise of churches in the Austin community by requiring them to abandon their core beliefs about marriage as a condition of renting school facilities. As stated above, the government does not have a compelling interest to treat churches differently than other community organizations solely because of their beliefs. Such actions are not neutral toward religion. *Masterpiece*, 138 S. Ct. at 1732. Moreover, the District's proposed changes are not the least restrictive means, because even other federal anti-discrimination statutes provide exemptions for religious entities when the policy goals of the nondiscrimination mandate would potentially conflict with a person or entity's religious beliefs. *See, e.g.*, 42 U.S.C. § 2000e-1 (exempting religious entities from compliance with Title VII's prohibition on religious discrimination).

V. Conclusion

The District should welcome churches who want to rent its facilities after school and on weekends, not discriminate against some of them based on their beliefs about marriage. In fact, the Constitution and state law require the District to provide churches with equal access to facilities it opens to community organizations. The District should reject the calls of its trustees to alter the facility use policies, and maintain its longstanding, cooperative relationship with churches in the community.

Very truly yours,

Jeffrey C. Mateer
First Assistant Attorney General

Cc: Joe Champion, Pastor, Celebration Church