CONGRESSIONAL PRAYER CAUCUS FOUNDATION

December 8, 2017

Dr. Mark Scott, Superintendent
Houston County Board of Education
1100 Main Street
Perry, GA 31069

Dear Superintendent Scott and School Board Members:

I have the honor of serving as the Executive Director of the Congressional Prayer Caucus Foundation. The Foundation serves nearly 100 members of Congress who are part of the Congressional Prayer Caucus (the names of those members of Congress who serve on the Congressional Prayer Advisory Team are listed on the left).

In addition, the Foundation serves Legislative Prayer Caucuses in 30 states, including Georgia, which have nearly 1,000 state senators and state representatives as members. These leaders are working together to preserve the integrity of our Founding Principles and to protect First Amendment rights for all.

We recently learned from news reports that an out-of-state organization sent a letter to the Houston County School System's attorney stating that the band performance by the Perry High School Panther Regiment on October 24th, 2017 unconstitutionally promoted religion.

Based on the case law that we cite in this letter, we believe that the show's theme, "Paradise Lost," and its props, formations, and overall performance do not violate the Constitution, since the piece demonstrates a broad appreciation for literature and music and therefore does not have the primary effect of advancing or endorsing religion. We assume for purposes of this opinion that each year the band's music genre is different, and that the band does not exclusively perform music with biblical themes every year (we note that last year's band performance entitled "Paranormal Activity" was certainly not a religious theme.) If this assumption is correct, then "Paradise Lost" is simply an appreciation of religious music, which of course is part of American music as a whole. To use a simple example, works of recognized artistic value such as Handel's *Messiah* can be performed by the Perry High School Music Department without violating the First Amendment, as long as it is not part of a plan to perform only sacred works for religious purposes.

The U.S. Supreme Court in 1963 recognized that an appropriate topic of study in public schools is religion. In *School District of Abington Township v. Schempp*, 374 U.S. 203, 225 (1963), the Court stated, "It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be affected consistently with the First Amendment."

Following this logic, a federal district court upheld the inclusion of religious music and religious symbols within a K-12 Christmas program at a public school. See *Florey v. Sioux Falls Sch. Dist.* 49-5, 464 F. Supp. 911, 915-916 (D.S.D. 1979), *aff'd* 619 F.2d 1311 (8th Cir. 1980). The court noted,

> [M]uch of our artistic tradition has a religious origin. Religious texts are frequently used in Christmas music. Much of this art, while religious in origin, has acquired a significance which is no longer confined to the religious sphere of life. It has become integrated into our national culture and heritage. To allow students *only* to study and *not* to perform such works when they have developed an independent secular and artistic significance would give students a truncated view of our culture.

In the Fifth Circuit, the court upheld a public high school's adoption of a religious hymn as its theme song, even when it was a requirement for the school's choral program. See *Doe v. Duncanville Ind. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995). Similarly, the Tenth Circuit upheld a public school choir's performances of religious songs at graduation ceremonies and concerts in churches. See *Bauchman v. West High Sch.,* 132 F.3d 542 (10th Cir. 1997). In both cases, the religious nature of the songs did not create an Establishment Clause violation, even though the songs were being played/sung by public school students under the direction of public school teachers. The benefit provided public school choirs by singing religious choral music was explained well by the court in *Bauchman*:

> Any choral curriculum designed to expose students to the full array of vocal music culture therefore can be expected to reflect a significant number of religious songs. Moreover, a vocal music instructor would be expected to select any particular piece of sacred choral music, like any piece of secular choral music, in part for its unique qualities useful to teach a variety of vocal music skills (i.e., sight reading, intonation, harmonization, expression.). *Id.*at 554.

The Houston County School System would, in our opinion, pose a greater constitutional risk if it yielded to the Freedom From Religion Foundation's demand to erase all references to our cultural religious heritage. Such action would have the primary effect of showing hostility to religion, something the U.S. Supreme Court forbids. As the U.S. Supreme Court stated well in *Zorach v. Clauson*, 343 U.S. 306, 314 (1952): "[W]e find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence."

The voluntary nature of this band program also distinguishes this situation from that in *West Virginia Board of Education v. Barnette*, 319 U. S. 624 (1943), in which students were punished for not reciting the pledge of allegiance. Here, no student is required to do anything that would violate his/her religious convictions. And there is no penalty for a student who may choose not to participate in playing religious songs. *Grove v. Mead School Dist*. No 354, 753 F.2d 1528, 1533 (9th Cir. 1985).

The benevolent accommodation of religion, particularly in ways that acknowledge our nation's Judeo-Christian heritage, was once taken for granted. It was not until the 1960s that the U.S. Supreme Court gave the Establishment Clause new interpretations that portended a stricter separation from religion would be required in the public sphere. The Supreme Court has backed away from those interpretations in the decades since, but organizations like the Freedom from Religion Foundation pretend that those earlier interpretations are still binding and should be extended to ever greater degrees, causing confusion in our public institutions to this day. Under current Supreme Court precedent, the band's program such as that performed in "Paradise Lost" is perfectly acceptable as long as the band's repertoire is not intentionally limited to only religious works, religious songs are performed in a non-devotional manner, and the school does not coerce or penalize any students with regard to their performance of the religious songs or their refusal to perform them.

We hope that you will not yield to threats to rob you, your students, and your community of your rights and heritage. To protect our freedom, we must exercise that freedom. If we can be of any further service to you on this issue, feel free to contact us. We have First Amendment lawyers on staff who will work with you, without charge, if you need their services.

May God bless you and your students,

Lea

Lea Carawan
Executive Director