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By Email & U.S. Mail

District Attorney William Higgins
Bedford County Courthouse
First Floor
200 South Juliana Street
Bedford, PA 15522
bhiggins@bedfordcountypa.org

Re: Criminal Charge against Fourteen-Year-Old for Photograph of Jesus Statue

Dear Mr. Higgins:

Bedford County recently charged a fourteen-year-old boy with the crime of desecration of a venerated object. The charges arose from a photo that he posted on Facebook, in which he mimed a sexual act with a statue of Jesus Christ. See, e.g., Hilary Hanson, *Teen May Get 2 Years for Pic of Fake Oral Sex With Jesus*, Huffington Post (Sept. 11, 2014, 1:25pm), http://www.huffingtonpost.com/2014/09/11/oral-sex-jesus-statue-photo_n_5805174.html; Brian Shields, *Teen Could Get Two Years for Facebook Photos with Jesus Statue*, Kron 4 News (Sept. 10, 2014, 10:44am), <http://news.kron4.com/news/teen-could-get-two-years-for-facebook-photos-with-jesus-statue/>.

Under Pennsylvania law, it is a second-degree misdemeanor to intentionally desecrate a place of worship, public monument, burial, or “any other object of veneration by the public or a substantial segment thereof in any public place.” 18 Pa. Stat. §5509. The law defines “desecrate” as “defacing, damaging, polluting or otherwise physically mistreating in a way that the actor knows will outrage the sensibilities of persons likely to observe or discover the action.” *Id.* If convicted, the teenager faces up to two years in prison. *Id.* §106(b)(7).

The teenager has been charged not because he trespassed, defaced, or damaged the statue. Rather, the statute contemplates—and your statements confirm—that the teenager is being prosecuted because of the County’s disagreement with the message conveyed by his conduct, including the teenager’s apparent disrespect for a symbol of the Christian religion. You yourself recently stated, “this troubled young man offended the sensibilities and morals of OUR community” and that if the prosecution “tends to upset the ‘anti-Christian, ban-school-prayer, war-on-

Christmas, oppose-display-of-Ten-Commandments' crowd, I make no apologies.” See Hemant Mehta, *Attorney Charging Teen with Desecration of Jesus Statue Had Affair in His Office and Posted Porn Audio on Twitter*, Patheos (Sept. 15, 2014), <http://www.patheos.com/blogs/friendlyatheist/2014/09/15/attorney-charging-teen-with-desecration-of-jesus-statue-had-affair-in-his-office-and-posted-porn-audio-on-twitter>.

By prosecuting this teenager because of the message conveyed by his actions—and because these actions may have “outraged the sensibilities” of others—the County is violating both the Free Speech and Establishment Clauses of the First Amendment. Even if the County obtains a conviction, it is almost certain to be overturned, and the County would also be vulnerable to a lawsuit for civil rights violations.

A. *Free Speech*

The statute and resulting prosecution violate the Free Speech Clause in two ways: (1) the teenager is being prosecuted because of the viewpoint expressed by his actions, and (2) the statute is unconstitutionally overbroad in what it prohibits. Each of these is an independent violation of the First Amendment.

Viewpoint discrimination. The statute in general and this prosecution in particular violate the Free Speech Clause by targeting conduct based on its message. The Free Speech Clause prohibits the enforcement of statutes to suppress particular viewpoints merely because you or the community finds them offensive. For instance, in *Texas v. Johnson*, 491 U.S. 397 (1989), the defendant was convicted under a Texas law prohibiting desecration of a venerated object, because he burned an American flag as part of a protest. *Id.* at 399–400. The Supreme Court overturned the conviction, and held that under the Free Speech Clause, the government “may not … proscribe particular conduct *because* it has expressive elements.” *Id.* at 406 (emphasis in original). The flag desecration charge could not survive because the Texas law was “not aimed at protecting the physical integrity of the flag in all circumstances, but [was] designed instead to protect it only against impairments that would cause serious offense to others.” *Id.* at 411.

The Pennsylvania statute and this prosecution suffer from the same problems. The teenager is being prosecuted not for trespassing or causing physical damage to the statue—nor could he be, since there is no suggestion that his gesture damaged the structure. Instead, he is being prosecuted under a statute that bars conduct that “will outrage the sensibilities” of others; that is, on the basis of his message and others’ likely reaction to that message. As you have said yourself, “this troubled young man offended the sensibilities and morals of OUR community.” Mehta, *supra*. This type of prosecution undermines citizens’ basic freedom to dissent, and violates elementary free-speech principles: “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an

idea simply because society finds that idea itself offensive or disagreeable.” *Johnson*, 491 U.S. at 414.

Indeed, because this desecration charge arose not due to any physical damage, but merely because of the particular message expressed, the County engaged in unconstitutional viewpoint discrimination. Government entities “must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.” *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). Had the teenager taken a photo kneeling next to the statue or praying to the statue or standing behind the statue, it is impossible to think that he would have been prosecuted for desecration. He is being prosecuted, instead, because of the likely offense taken by the particular gesture that he used and the message conveyed by that gesture, in violation of First Amendment prohibition against viewpoint discrimination.

Overbreadth. The County’s prosecution violates the Free Speech Clause in another way: the desecration statute is overbroad. A statute is overbroad, and thus unenforceable in all circumstances, if it prohibits a substantial range of protected speech beyond the statute’s legitimate scope. See *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). As a result of its overbreadth, the desecration law chills a wide range of protected speech, because individuals “may self-censor rather than risk the perils of trial.” *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 670–71 (2004). And because of its overbreadth, the law provides the government with “unfettered discretion to arrest individuals for words or conduct that annoy or offend them.” *City of Hous. v. Hill*, 482 U.S. 451, 465 (1987).

Here, any controversial opinion or gesture surrounding any object that is important to someone could be said to cause offense, and thus to desecrate that object. The statute prohibits the desecration of any “object of veneration by the public or a substantial segment thereof in any public place.” 18 Pa. Stat. §5509. The statute does not define “veneration”; even if it did, an individual cannot determine in advance which objects are venerated by a “substantial segment” of the public and which objects are not. In addition, the definition of “desecrate” could extend to a range of protected speech, such as expressive conduct in the presence of a “venerated object” during a political rally, or an artistic endeavor using a “venerated object” that is owned by the artist. As a result, many speakers will be chilled from engaging in protected speech or conduct; those who nonetheless engage in the speech or conduct will be vulnerable to prosecution by government officials who disagree with their message.

B. Establishment Clause

The prosecution also appears to be motivated by a concern that the teenager’s conduct involved a statue of Jesus Christ and was offensive to Christians. By taking

government action for a religious purpose and to protect a particular religious view, the County is violating the Establishment Clause.

Under the Establishment Clause, government action must (1) have a secular purpose, (2) have a principal or primary effect that neither advances nor inhibit religion, and (3) avoid fostering excessive government entanglement with religion. *See Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971). Thus, the government must avoid acting with the purpose or effect of promoting religion or a particular religion. To do otherwise “sends the ... message to ... nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members.” *McCreary Cnty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 860 (2005) (quotation marks omitted).

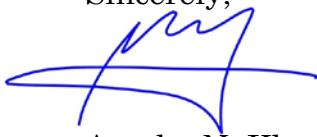
The Pennsylvania statute prohibits desecrating “any other object of veneration by the public or a substantial segment thereof in any public place.” 18 Pa. Stat. §5509. The term “veneration” has obvious religious connotations. And the application of this statute to any “object of veneration by the public or a substantial segment thereof” ensures that the statute will apply disproportionately to objects venerated by those in the religious majority.

Even if the statute itself avoided taking positions on questions of religion, your recent comments suggest that the teenager is being prosecuted for religious reasons. You recently stated that the prosecution serves to protect the “sensibilities and morals of OUR community,” and that if prosecution “tends to upset the ‘anti-Christian, ban-school-prayer, war-on-Christmas, oppose-display-of-Ten-Commandments’ crowd, I make no apologies.” Mehta, *supra*. These statements establish an improper religious motive. *See, e.g., Edwards v. Aguillard*, 482 U.S. 578, 592–93 (1987) (statements of public officials demonstrated that challenged statute was designed to promote a particular religious viewpoint). They also suggest that the government is prosecuting the teenager because he insulted Christianity. This type of religiously motivated prosecution violates the Establishment Clause.

* * *

Please withdraw the desecration charges against the teenager. If you have any questions, you may contact Natacha Lam at (202) 466-3234 or lam@au.org.

Sincerely,



Ayesha N. Khan, Legal Director
Gregory M. Lipper, Senior Litigation Counsel