

September 12, 2018

OPEN LETTER DEMANDING IMMEDIATE REVERSAL OF NIKE BAN

Ben Zahn
City of Kenner
Office of the Mayor
1801 Williams Boulevard, Suite B-200
Kenner, Louisiana 70062
Via U.S. postal mail and e-mail: kennermayor@kenner.la.us



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Alanah Odoms Hebert
Executive Director

Dear Mayor Zahn:

According to widespread media reports, you recently issued a memorandum, dated Sept. 5, that forbids Kenner booster clubs from purchasing Nike products. As the memo stated, “Under no circumstances will any Nike product or any product with the Nike logo be purchased for use or delivery at any City of Kenner Recreation Facility.”

You subsequently issued a public statement, which made clear that you took the action in response to a recent Nike advertisement. You sought to ban Nike products to avoid promoting what you termed the brand’s “political agenda.”

This letter is to advise you that your actions are unconstitutional, and we strongly urge you to rescind your policy. The policy violates the First Amendment’s prohibition against content and viewpoint discrimination because it prevents booster clubs and their members from purchasing, for use at Kenner facilities, types of apparel that you have targeted as political expression. Kenner booster clubs and their members have a protected right to exercise their freedom of expression by buying, and wearing, their chosen sportswear at Kenner facilities.

“The First Amendment protects not only verbal and written expression, but also symbols and conduct that constitute ‘symbolic speech.’” *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 282 (5th Cir. 2001) (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505–06 (1969)). As suggested by the United States Supreme Court’s decision in *Tinker*, which upheld a student’s right to wear a black armband to protest the Vietnam War, an individual’s choice of attire may be endowed with sufficient expressive qualities to warrant First Amendment protection.

As the Fifth Circuit stated in *Canady v. Bossier Parish School Board*:

A person's choice of clothing is infused with intentional expression on many levels. In some instances, clothing functions as pure speech. A student may choose to wear shirts or jackets with written messages supporting political candidates or important social issues. Words printed on clothing qualify as pure speech and are protected under the First Amendment. ... Clothing may also symbolize ethnic heritage, religious beliefs, and political and social views. Individuals regularly use their clothing to express ideas and opinions. ...

240 F.3d 437, 440–41 (5th Cir. 2001). Like the statute struck down in *Texas v. Johnson*, your policy restricts not just “the expression of an idea through activity,” it restricts “expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values.” 491 U.S. 397, 410-11 (1989).

“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 the idea itself offensive or disagreeable.” *Id.* at 414. Laws that “cannot be justified without reference to the content” of the regulated expressive conduct, or that have been adopted “because of disagreement with the message” conveyed, are content based, and often viewpoint based as well. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). Such laws trigger strict scrutiny, requiring the government to demonstrate that the restriction is both necessary to advance a compelling government interest, and the least restrictive means for doing so. *Id.* at 2231.

Because your policy imposes a blanket restriction on booster clubs’ purchase of Nike products, regardless whether the clubs use government funds or their own money, it is not narrowly tailored to any government interest in the “protect[ion] of taxpayer dollars.” See *FCC v. League of Women Voters*, 468 U.S. 364, 399–401 (1989). Your personal objection to the political messages expressed by Nike is simply not a legitimate government interest, let alone a compelling one.

I trust that you will comply with the requirements of our Constitutions and ensure adequate protections for all.

Sincerely,



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American Civil Liberties Union of Louisiana

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