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December 30, 2020

Kelly Gonez, President
Monica Garcia
Nick Melvoin
Dr. George J. McKenna III
Scott Schmerelson
Jackie Goldberg
Tanya Ortiz Franklin

Members of the Board
Los Angeles Unified School District
1240 Naomi Avenue
Los Angeles, California 90021

Re: October 6, 2020 Resolution adding April 24 as a new holiday to future school calendars to commemorate "Armenian Genocide Remembrance Day" ("Holiday Resolution").

Dear President Gonez and Members of the Board:

I represent Parents Against Hate (PAH), Association of Turkish Americans of Southern California (ATASC), Assembly of Turkish American Associations (ATAA), Turkish American National Steering Committee (TASC), U.S. Azeris Network (USAN), Turkish Anti Defamation Alliance (TADA) in the above-referenced matter.

As elaborated anon, we respectfully request that the Board of the Los Angeles Unified School District rescind its Holiday Resolution for manifold reasons. We make the request in the exercise our First Amendment right to petition government for a redress of grievances. *Borough of Duryea, Pennsylvania v. Guarnieri*, 564 U.S. 379, 393-397 (2011).

The Resolution is pedagogically unsound. It assumes infallibility notwithstanding that doubting is the alpha and omega of education. There are multiple reasons for doubting the Armenian

Genocide thesis, including the absence of a single prosecution or conviction for the alleged crime.
The Resolution is unconstitutional. Direct and circumstantial evidence demonstrate that a significant Board motivation was hostility towards viewpoints that dispute the Armenian Genocide thesis, notwithstanding the failure of proof in a court of law, for example, the International Court of Justice or United States federal courts. Such viewpoint discrimination constitutes a per se violation of the First Amendment.

The Resolution is further unconstitutional because its purpose is to stigmatize, defame, or vilify politically vulnerable Turkish Americans as heartless, merciless genocide deniers knowing that such inflammatory dehumanization will likely incite violence in the manner of ASALA and JCAG assassinations against disputants or opponents of the Armenian Genocide thesis. Emblematic was Harry Sassounian's assassination in Los Angeles of Turkish counsel general Kemal Arikan in 1982. A purpose to harm a politically unpopular group is constitutionally illicit and violates the equal protection clause of the Fourteenth Amendment.

The Resolution is also preempted by the Constitution's entrustment of foreign policy exclusively to the federal government. In that domain, we sink or swim together. The Armenian Genocide thesis is integral to United States relations with Turkey, Armenia, or otherwise. The Resolution fractures and weakens the foreign policy of the United States by embracing a combustible viewpoint that could handcuff or compromise U.S.-Turkish bilateral relations and a national genocide definition to inform United States foreign policy generally. Permitting local units of government to promulgate independent foreign policies would wreak havoc in the nation's ability, to speak with one voice abroad, particularly as to foreign policy.

I. The Resolution is Pedagogically Unsound

Sir Francis Bacon instructed: "If a man will begin with certainties, he shall end in doubts, but if he will be content to begin with doubts, he shall end in certainties." John Stuart Mill amplified in *On Liberty* that to censor challenges to mainstream thinking assumes an infallibility inimical to the discovery of truth. Knowledge is stunted when a Copernicus is thwarted from disputing a Ptolemy or a William Harvey is prevented from disputing a Galen.

The Resolution erroneously presumes infallibility over the Armenian Genocide thesis. The intended effect is to censor in the classroom credentialed disputants of the thesis, for example, Bernard Lewis of Princeton, Gunter Lewy of the University of Massachusetts Amherst, or Justin McCarthy of the University of Louisville. John Stuart Mill understood that dissenting views are invariably educationally valuable: they may expose falsehoods; they may contain partial truths that refine existing knowledge; and, in cases of error, they strengthen prevailing truths by subjecting them to battle.

A major quiver in the Armenian Genocide thesis is an alleged statement by Adolf Hitler: "Who, after all, speaks today of the annihilation of the Armenians?" But the statement has never been authenticated. It would never be admitted as evidence in a court of law. Indeed, it was not admitted in the Nuremberg Tribunals. And the scholarship of Heath Lowry at Princeton demonstrates probable fabrication.

Moreover, the process the Board employed to embrace the Armenian Genocide thesis fell short of professional educational standards. No person or nation has ever been found guilty and punished for an alleged Armenian Genocide. That is unsurprising. Genocide was not recognized as a crime until the Genocide Convention of 1948, which entered into force on January 12, 1951, decades after the alleged Armenian Genocide. And the universal prohibition on ex post facto laws would bar any genocide prosecution for actions antedating the Genocide Convention. See *Calder v. Bull*, 3 U.S. 386, 390 (1798) ("Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal and punishes such action," is a prohibited ex post facto law). Article 24 of the Rome Statute of the International Criminal Court prohibits retroactive application of its genocide prohibition to events that antedated its entry into force.

The Board itself made no pretense of acting as a surrogate independent and impartial tribunal to adjudicate the Armenian Genocide thesis with the trappings of due process before voting on the Holiday Resolution. There was no notice to an accused nor opportunity to respond. There were neither witnesses nor cross-examination. Turkish Americans were given no forum to present their evidence. The Board members are neither independent nor impartial nor scholars of history. They are beholden to the political clout of the Armenian American community in the Los Angeles Unified School District. The conclusion is irresistible that the Board acted as a kangaroo court in summarily endorsing the Armenian Genocide thesis contrary to civilized norms of jurisprudence and justice.

Accordingly, the Board should rescind its Holiday Resolution as injurious to the inculcation of critical thinking by students and false to enlightened pedagogy.

II. The Resolution Violates the First Amendment

The First Amendment categorically prohibits government action motivated in whole or in significant part by viewpoint hostility. Iancu .v Brunetti, 139 S.Ct. 2294 (2019); Rosenberger v. Rector and Visitors University of Virginia, 515 U.S. 819 (1995); Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993). The direct and circumstantial evidence is overwhelming that the Board's Holiday Resolution was significantly motivated by hostility to viewpoints that dispute the Armenian Genocide thesis.

1. President Gonez amplified: "Each year, Armenian families across Los Angeles remember those lost in the first genocide in modern history, and many of them have a direct connection to the tragedy. This change in our calendar shows Los Angeles Unified's commitment and solidarity to our Armenian community, especially during this trying time, to recognize and to tell the truth about their history."

2. Superintendent Austin Beutner added: "We recognize and remember the Armenian Genocide of 1915 in hopes of helping to prevent such an atrocity from happening again."

3. The Education Commission of the Armenian National Committee of America-West Region (ANCA-WR), the U.S. representative of the ultranationalist Armenian Revolutionary Federation political party, boasted: "Today's vote is truly a monumental moment for our community and the legacy of our ancestors. This calendar change will

allow our Los Angeles Unified Armenian community to participate and pass on the truth of our history to the younger generations. We thank Board Member Gonez and her staff for working collaboratively with the ANCA-WR Education Committee to reach this important goal. We also thank her fellow Board members for their efforts on behalf of the Armenian community. We look forward to continuing our strong support to ensure all District students, regardless of ethnicity or national origin, benefit from learning about the Armenian Genocide as we teach tolerance and prevent recurrence of genocide."

4. Board Member Monica Garcia asserted: "We have to call out racism, hate, and injustice for what it is," implying that disputants of the Armenian genocide thesis are racists, filled with hate, and celebrants of injustice.

5. Board Member Scott M. Schmerelson maintained: "It is essential that Los Angeles Unified joins in recognizing April 24 as the commemoration of the Armenian Genocide of 1915. We must ensure that our students learn the truth about the Armenian Genocide and how they can prevent such atrocities against humanity from occurring ever again."

6. Board Member Nick Melvoin added: "Armenian Genocide Remembrance Day will allow students to participate in the events that remember the Genocide as an integral part of Armenian history and promote a more peaceful future."

The Board's pieties about preventing genocides irresponsibly endorse and incite hostility towards Turkish Americans and Armenian genocide thesis dissenters. The "Holiday Resolution" targets Turkish American children and critical thinkers who part company with the Armenian allegation of genocide. The Resolution inflicts emotional and threatens physical harm to Turkish Americans who exercise free speech and decry the racist holiday. The etymology of "holiday" is holy day. But there is nothing holy about dehumanizing vulnerable Turkish American schoolchildren while acting in loco parentis.

A court will not be blind to what all others can see and understand. Bailey v. Drexel Furniture, 259 U.S. 20, 37 (1922). The Holiday Resolution constitutes rank discrimination against American children of Turkish heritage to placate their Armenian American supporters. It speaks volumes about the selective targeting of Turkish American students that the Board has refrained from holiday resolutions over the gruesome, oft-genocidal maltreatments of American Indians exterminated in California, the Rohingya of Myanmar, the Uighur Turks of China, the Muslim men mass executed and Muslim women systematically raped in Srebrenica, the more than 750,000 internally displaced Azerbaijanis who fled Armenia's brutal invasion, and the Herero (1904) and Namaqua (1908), Congolese (1885), and Algerians (1954) viciously slaughtered by Germany, Belgium and France, respectively.

The Holiday Resolution will be interpretated as denoting Turkish Americans as cruel and inhuman collaborators in an alleged Armenian Genocide. The foreseeable consequence will be to stunt the educational and mental development of Turkish American students in violation of the equal protection of the laws. Brown v. Board of Education, 347 U.S. 483, 494-495 (1954).

Finally, the European Court of Human Rights (ECHR) in *Perincek v. Switzerland* (October 15, 2015) held that prosecuting a Turkish politician for disputing the Armenian Genocide thesis violated freedom of expression. The ECHR held that the Armenian case had never been proven a genocide. Accordingly, the Supreme Court of Switzerland reversed the conviction the following year.

III. Illicit Purpose to Incite Threats or Violence against Turkish Americans

A substantial purpose and foreseeable result of the Holiday Resolution are to stigmatize, incite violence against, and dehumanize Turkish Americans or detractors of the Armenian Genocide thesis because of their political weakness or unpopularity. In the words of Board Member Garcia, detractors of the Resolution reveal themselves as racists, haters, and servants of injustice. Experience teaches that the Armenian Genocide thesis is a code for inciting Armenian American attacks or threats against Turkish Americans, just as a cross burning is a code for inciting threats and violence by white supremacists against blacks. Ignorance of these appalling fact requires willful blindness.

A grisly chronicle of Armenian terrorism to avenge the Armenian Genocide thesis promoted by the Holiday Resolution is appended as Exhibit 1. The terrorism, including the threat or use of violence to intimidate or coerce the Turkish American civilian population (18 U.S.C. 2331), continues. On November 1, 2020, three Armenian nationalists assaulted an MIT Professor of nuclear science of Turkish heritage following her lecture at Harvard University. Three days later, on November 4, 2020, an ethnic Armenian William Stepanyan of Glendale was arrested for a hate crime at Café Istanbul in Beverley Hills for destroying property and physically attacking and disparaging restaurant employees.

The Resolution thus shipwrecks on the equal protection clause of the Fourteenth Amendment. The United States Supreme Court held in U.S. Department of Agriculture v. Moreno, 413 U.S. 528, 534 (1973): "For if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."

IV. Federal Preemption

International relations are entrusted exclusively to the federal government under the Constitution. It endows the federal government with exclusive authority to administer foreign affairs. *See, e.g., United States v. Pink,* 315 U.S. 203, 233 (1942) ("Power over external affairs is not shared by the States; it is vested in the national government exclusively."); *Hines v. Davidowitz,* 312 U.S. 52, 63, 61 (1941) ("The Federal Government, representing as it does the collective interests of the forty-eight states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties.... Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference.").

Under the foreign affairs doctrine, state laws that intrude on this exclusively federal power are preempted. Foreign affairs preemption divides between conflict preemption and field preemption. *Am. Ins. Ass'n v. Garamendi,* 539 U.S. 396, 418–20 (2003). Under conflict preemption, a state law must yield when it conflicts with an express federal foreign policy.

But even in the absence of federal conflict, a state law still may be preempted under the foreign affairs doctrine if it intrudes on the field of foreign affairs without addressing a traditional state responsibility. This concept is known as field preemption or "dormant foreign affairs preemption." *Deutsch v. Turner Corp.,* 324 F.3d 692, 709 n. 6 (9th Cir.2003).

In *Pink* and *Hines*, the Supreme Court recognized that the Constitution implicitly grants to the federal government a broad foreign affairs power. *See also Deutsch*, 324 F.3d at 709 ("Because the Constitution mentions no general foreign affairs power, and because only a few specified powers related to foreign affairs are expressly denied the states, one might assume that, with certain exceptions, states are free to pursue their own foreign policies. This is not, however, the case. To the contrary, the Supreme Court has long viewed the foreign affairs powers specified in the text of the Constitution as reflections of a generally applicable constitutional principle that power over foreign affairs is reserved to the federal government."). The existence of this general foreign affairs power implies that, even when the federal government has taken no action on a particular foreign policy issue, the state generally is not free to make its own foreign policy on that subject.

In *Zschernig v. Miller*, 389 U.S. 429, 440–41 (1968), the Supreme Court recognized that, even in the absence of any treaty, federal statute, or executive order, a state law may be unconstitutional if it "disturb[s] foreign relations" or "establish[es] its own foreign policy."

The Holiday Resolution unconstitutionally intrudes on the federal government's exclusive power to conduct foreign affairs by endorsing the Armenian Genocide thesis, a distinct political viewpoint on a specific matter of foreign policy establishing a foreign policy for the Los Angeles Unified School District. See Movsesian v. Victoria Versichertung AG, 670 F. 3d 1067, 1076 (9th Cir. 2012). There, in an 11-0 *en banc* decision, the Court of Appeals invalidated a California statute that proclaimed the Armenian Genocide thesis, and elaborated:

> "It imposes the politically charged label of 'genocide" on the actions of the Ottoman Empire (and consequently, present-day Turkey) and expresses sympathy for 'Armenian Genocide victim[s].'[citation omitted]. The law establishes a particular foreign policy for California—one that decries the actions of the Ottoman Empire…The passage of nearly a century since the events in question has not extinguished the potential effect…on foreign affairs. On the contrary, Turkey expresses great concern over the issue, which continues to be a hotly contested matter of foreign policy around the world." Id. at 1076-1077.

The United States Supreme Court denied certiorari to California, leaving the Ninth Circuit decision undisturbed.

V. Conclusion

The Board of Education should promptly rescind the Holiday Resolution as both pedagogically wayward and flagrantly unconstitutional. If the Board declines, we will pursue all of legal avenues of redress comprehensively and determination.

Sincerely,

/s/Bruce Fein

Bruce Fein