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February 26, 2014

BY E-MAIL AND FIRST CLASS MAIL

Barry L. Loftus, Esq.
Stuart & Branigin LLP
P.O. Box 1010
Lafayette, IN 47902-1010

Re: Dr. Michael McCracken

Dear Mr. Loftus:

This letter follows up on our telephone conversation of January 29, 2014. We and the Liberty Institute represent Dr. Michael McCracken in a matter arising out of Purdue University's decision to censor the speech of Dr. McCracken and his wife Cynthia, both Purdue alumni, simply because it would have referenced "God's physical laws." Because the University's decision trammels on the Free Speech rights guaranteed to the McCrackens by the United States Constitution, we write to reiterate our request that the University consider Dr. McCracken's proposal to resolve this matter. Should the University refuse to engage in a constructive dialogue to address Dr. McCracken's concerns, our client has instructed us to commence litigation to vindicate his First Amendment rights.

In 2012, Dr. McCracken and his wife made a \$12,500 pledge to the University's School of Mechanical Engineering. In return for their pledge, Purdue Development officials invited the McCrackens to name a small conference room in the recently expanded Herrick Labs and to supply language for a plaque to be installed in that conference room.

Dr. McCracken requested that the conference room be named after his father Dr. William "Ed" McCracken, who graduated from Purdue with a Ph.D. in Mechanical Engineering in 1969, and his mother Glenda, who has since passed away. Further, in response to the University's request that he supply language for the plaque to be placed in the conference room, Dr. McCracken requested that the plaque state:

To those who seek to better the world through the understanding of God's physical laws and innovation of practical solutions. In honor of Dr. William 'Ed' and Glenda McCracken.

To Dr. McCracken's surprise, the University rejected this language, claiming that the generic and nonsectarian reference to "God's physical laws" amounted to an

February 26, 2014
Page 2

impermissible government endorsement of religion. It instead installed a plaque mentioning only Dr. McCracken's parents.

On January 29, 2014, I called you to propose the following alternative language for the plaque:

Dr. Michael and Mrs. Cindy McCracken present this plaque to honor Dr. William "Ed" and Glenda McCracken and all those who seek to better the world through the understanding of God's physical laws and innovation of practical solutions.

This proposed language would make clear that the speech reflected in the plaque is speech by the McCrackens, not speech by the University.¹ Put another way, the McCrackens would be the "ultimate communicator of the message."² You, however, rebuffed this reasonable proposal. You indicated that while you did not believe it would be acceptable, you would discuss it with your client. We have not heard from you since then.

The University's current position violates the McCrackens' First Amendment rights. The Supreme Court has made clear that "private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression."³ By refusing to allow the McCrackens to refer to God on the plaque, the University has impermissibly prohibited "private religious speech" while at the same time permitting "secular private expression" in other plaques and forums.

The Herrick Labs, for example, contain just a few of the dozens of plaques peppering the West Lafayette campus, many of which contain forms of secular private expression. These include a declaration by the John Deere Foundation of its support for "engineering education to foster creative solutions in feeding, clothing and housing a growing global population"; a plaque from "the friends, family, and colleagues of Thomas R. Cunningham," which asserts that devotion to family, commitment to community, and leadership in one's profession are "the most desirable qualities" of a pharmacy graduate; and a plaque apparently from Bill Cook and the Cook Group, Inc., noting that perhaps a professor's greatest accomplishment was "forming the hearts, minds and lives of his students."

¹ See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 841 (1995) (noting "the critical difference between *government* speech . . . which the Establishment Clause forbids, and *private* speech . . . which the Free Speech and Free Exercise Clauses protect") (internal quotation marks omitted).

² *Choose Life Illinois v. White*, 547 F.3d 853, 864 (7th Cir. 2008).

³ *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995).

February 26, 2014

Page 3

Moreover, as you are well aware, the University successfully defended, over an Establishment Clause challenge, the right of a student at another Purdue campus to stage a play referencing Jesus in an extremely negative context.⁴ It is difficult to imagine that the First Amendment permits a private speaker to blaspheme Jesus at length in University spaces, yet simultaneously prohibits the McCrackens from mentioning “God’s physical laws” on a plaque intended to honor Dr. McCracken’s parents.⁵ By permitting secular expression and expression that portrays deity in a negative context while simultaneously refusing to permit private religious speech, the University has engaged in just the type of “egregious . . . content discrimination” that constitutes impermissible viewpoint discrimination.⁶

Even if the McCrackens’ plaque were considered speech by the University—which it is not—the plaque’s simple reference to “God’s physical laws” is in line with references to the divine that have survived, or would certainly survive, an Establishment Clause challenge. The contested language is similar to the anodyne references printed on money (“In God We Trust”) or intoned before the Supreme Court justices take their seats (“God save . . . this Honorable Court!”).⁷ Indeed, the plaque’s reference to God as the author of physical laws parallels the first sentence of the Indiana Constitution, which recognizes “ALMIGHTY GOD” as having granted Indianans “the right to choose their own form of government.”⁸ It also specifically echoes the Preamble to the Declaration of Independence, an indisputably secular document also on display at Purdue, that references “the Laws of Nature and of Nature’s God.”⁹

Justice Breyer’s controlling concurrence in *Van Orden v. Perry*, a case that upheld the display of a monument inscribed with the Ten Commandments on the grounds of the Texas State Capitol, is particularly instructive here.¹⁰ There, Justice Breyer urged a

⁴ *Linnemeir v. Board of Trustees of Purdue Univ.*, 260 F.3d 757 (7th Cir. 2001).

⁵ We further note that more than 50 campus ministries are currently advertised within the “organizations” directory on the “boilerlink.purdue.edu” website, *see* <<https://boilerlink.purdue.edu/organizations?SearchValue=Religious&SearchType=Category&CurrentPage=1&SelectedCategoryId=1467>>, and that at least one church, University Lutheran, hosts its website at purdue.edu, *see* <<http://web.ics.purdue.edu/~lsf/>>.

⁶ *Rosenberger*, 515 U.S. at 829.

⁷ *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 37 (2004) (O’Connor, J., concurring) (contending that these and similar “refer[ences] to the divine [do not] offend[] the Constitution”).

⁸ INDIANA CONST. (Preamble).

⁹ 1 Stat. 1 (July 4, 1776).

¹⁰ 545 U.S. 677, 701-02 (Breyer, J., concurring). Because Justice Breyer was the “swing vote” in *Van Orden* and its companion case, *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005), which reached a different result on similar facts, his concurrence in *Van Orden* provides the most reliable guide to the Supreme Court’s current Establishment Clause jurisprudence.

February 26, 2014
Page 4

contextual approach to Establishment Clause cases and disclaimed rote application of “exact formula[e],” including the “endorsement test” upon which the University relied in rejecting the McCrackens proposed plaque language.¹¹ Instead, Justice Breyer called for the “exercise of legal judgment” in evaluating Establishment Clause cases.¹² That judgment, Justice Breyer suggested, should be informed by whether the text is “nonsectarian,” whether its “physical location” is predominantly secular, and whether it communicates both a religious and secular message.¹³ Where these elements are present, the text of a display is unlikely to contain the sort of religious expression prohibited by the Establishment Clause.

All three of these elements are present here. A bare reference to “God’s physical laws” is even more clearly “nonsectarian” than the text of the Ten Commandments, which was described as “nonsectarian” in *Van Orden*. Moreover, the reference to “God’s physical laws” was proposed by the McCrackens acting in their personal capacity as private citizens, not by any church or religious organization.¹⁴ In addition, the “physical setting” of the plaque—a 95-square foot conference room on the second floor of a laboratory building, furnished only by a round table and four chairs—“suggests little or nothing of the sacred.”¹⁵ And, like the Ten Commandments display, the plaque “communicates not simply a religious message, but a secular message as well.”¹⁶ By juxtaposing an “understanding of God’s physical laws” with the “innovation of practical solutions,” the McCrackens’ proposed language reminds readers—using an invocation of deity as shorthand—that an ineluctable element of the transcendent accompanies precise theorems in accounting for scientific phenomena. This acknowledgement is in keeping with a quotation from Arthur G. Hansen, Purdue’s 8th President, prominently displayed in a campus plaque, praising “that sense of the transcendent that provides nobility and meaning to all human existence.”

As Justice Breyer explained in *Van Orden*, “the Establishment Clause does *not* compel the government to purge from the public sphere all that in any way partakes of the religious.”¹⁷ Such a purge would be the logical extension of Purdue’s refusal to permit the McCrackens to make any reference to God on the plaque. This result cannot be squared with the First Amendment to the United States Constitution.

¹¹ *Id.* at 700.

¹² *Id.*

¹³ *Id.* at 701-02.

¹⁴ *See id.* at 701.

¹⁵ *Id.* at 702.

¹⁶ *Id.* at 701.

¹⁷ *Id.* at 699 (emphasis added).

February 26, 2014

Page 5

We hope that this letter will facilitate resolution along the lines proposed in our January 29 call: replacing the current plaque with one referencing “God’s physical laws” but making clear that the speech is that of the McCrackens rather than of Purdue. As we indicated during that call, if the University would like to suggest alternative language to make clear that the speech is private speech by the McCrackens, while retaining the reference to “God’s physical laws,” we would welcome the opportunity to consider any such reasonable alternative. Please let us know by March 5, 2014, if you are open to discussing a potential resolution. If not, Dr. McCracken has instructed us to commence litigation to preserve the McCrackens’ First Amendment right to reference “God’s physical laws” on the plaque. We note that, if this matter proceeds to litigation and Dr. McCracken prevails, the University will be responsible for his attorneys’ fees.

We look forward to your response.

Sincerely,



Robert K. Kelner

cc: Hiram Sasser, Esq., Deputy General Counsel, Liberty Institute
Jeremiah Dys, Esq., Senior Counsel, Liberty Institute