



November 8, 2017

**BY EMAIL TO:** [jsmith@house.ms.gov](mailto:jsmith@house.ms.gov), [simsandsims@yahoo.com](mailto:simsandsims@yahoo.com)

Jeffrey C. Smith

General Counsel for Lowndes County School District

809 Third Avenue North

Columbus, Mississippi 39703

Tel: (662) 328-2711

*Re: Students' Right to Protest Peacefully*

Dear Mr. Smith:

AMERICAN CIVIL  
LIBERTIES UNION OF  
MISSISSIPPI  
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The ACLU of Mississippi writes in support of public school students' right to protest peacefully during pre-game patriotic rituals, including their right to take a knee, lock arms or raise a fist during the National Anthem before sporting events. It has come to the ACLU's attention that the Lowndes County School District and the Mississippi High School Activities Association are considering a policy that would require everyone, including those attending sporting events, to stand for the National Anthem. This policy is an unconstitutional one and should be rejected.

Policies that prevent students from engaging in peaceful protest are unconstitutional, as is any punishment or retaliation. The ACLU supports these students in both their activism and their messages of freedom and equality. We believe that any action by the government to punish these students for exercising their constitutional rights is antithetical to our American values and would violate students' clearly established First Amendment free speech rights.

It is well-established law that schools cannot force students to salute the flag or recite the Pledge of Allegiance. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). This includes the right not to stand. *See, e.g., Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1274, 1277–82 (11th Cir. 2004) (holding that school officials are not entitled to qualified immunity when they violate a student's "clearly established" right to "expressive conduct" by punishing him for remaining seated and silent during the pledge); *Lipp v. Morris*, 579 F.2d 834, 835 (3d Cir. 1978) (per curiam) (holding that requiring students to stand during the pledge is unconstitutional compulsion); *Goetz v. Ansell*, 477 F.2d 636, 638 (2d Cir. 1973) (holding that standing for the pledge "can no more be required than the Pledge itself"); *Rabideau v. Beekmantown Cent. Sch. Dist.*, 89 F. Supp. 2d 263, 267 (N.D.N.Y. 2000) ("It is well established that a school may not require its students to stand for or recite the Pledge of Allegiance or punish any student for his/her failure to do so."); *Banks v. Bd. of Pub. Instruction of Dade Cty.*, 314 F. Supp. 285, 294–96 (S.D. Fla. 1970) (holding that requiring students to stand during the pledge is unconstitutional), *aff'd*, 450 F.2d 1103 (5th Cir. 1971); *Sheldon v. Fannin*, 221 F. Supp. 766, 775 (D. Ariz. 1963) (holding that student may not be disciplined for choosing not to stand during the national anthem). In addition, a student retains her free speech rights whether "[s]he is in the cafeteria, or on the playing field, or on the campus during the

authorized hours.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512-513, 514 (1969).

The government does not get to impose patriotic rituals. *See W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. at 642 (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”). In addition, the role of school is to foster discussion, inspire thought, and teach students about what it means to live in our democracy, including the fact that the right to protest is protected. Accordingly, the government can have no valid interest in imposing a patriotic ritual on student athletes – or on their fans in the stands.

The “take-a-knee” protests represent personal beliefs about important public issues. They have raised in Mississippi and across the country discussions about racial justice and about what it means to be patriotic. Schools should foster this discussion not stamp it out. Peaceful protest during the National Anthem is not disrespectful. To the contrary, dissent and protest are patriotic. They are constitutional rights in action.<sup>1</sup>

In sharp contrast, schools should not compel speech, including forced patriotic rituals. Schools should not demand a specific version of patriotism. Schools should not stamp out their students’ political views and enshrine this disapproval in official policy.

Because “[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools,” *Shelton v. Tucker*, 364 U.S. 479, 487 (1960), the ACLU of Mississippi wants to make clear that it is unlawful to punish a student for exercising a constitutional right and that students have a constitutionally protected right to peaceful protest during the National Anthem. Upholding this right protects students and schools and would further the school’s purpose. As the U.S. Supreme Court provided, schools “are educating the young for citizenship,” and “scrupulous protection of Constitutional freedoms of the individual” is required “if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.” *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. at 637.

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<sup>1</sup> To be sure, engaging in silent protest during the National Anthem does not interfere with or deny the rights of others to participate in the ceremony. Taking a knee, linking arms and raising a fist are peaceful gestures that are not disruptive of the National Anthem or of the subsequent game.

Jeffrey C. Smith  
General Counsel for Lowndes County School District  
November 8, 2017  
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Sincerely,

A handwritten signature in cursive script that reads "J Tom". The signature is written in black ink and is centered on the page.

**Joshua F. Tom**  
**Legal Director**  
**ACLU of Mississippi**  
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cc: Rosemary G. Aultman, Chair, Mississippi Board of Education  
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