

February 6, 2023

Re: Prohibitions on LGBTQ+ Rainbow Flags and Other Pride Displays

To Whom It May Concern:

You're being given this letter because your town, school, or school district may have or may be considering implementing a policy restricting displaying the LGBTQ+ Rainbow Flag or other pride displays.

Gilbert Baker created the LGBTQ+ Rainbow Flag in San Francisco in 1978 to celebrate visibility and empower the LGBTQ+ liberation movement. In the four decades since, the flag continues to inspire the quest for LGBTQ+ equality across the globe.



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There is a disturbing new trend where towns and school districts are banning the Rainbow Flag specifically or flags more generally. For example, the Monongalia County Board of Education in West Virginia banned Rainbow Flags from all district schools, stating that it was a political statement.<sup>1</sup> Furthermore, in Luzerne County, Pennsylvania, a school superintendent requested that teachers remove the Rainbow Flag from classrooms due to political ideologies.<sup>2</sup> Miami-Dade County in Florida is considering a ban on all flags except the United States flag and the state seal of Florida.<sup>3</sup>

We write to protect the rights of your residents, students, and teachers from these bans and to urge you to oppose such bans.

### **Towns and Municipalities**

The First Amendment to the United States Constitution guarantees freedoms concerning religion, expression, assembly, and the right to petition. The First Amendment prevents the government from discriminating against speakers based on their viewpoint or the content of their speech. *United States v. Grace*, 461 U.S. 171, 177 (1983); *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). Policies banning only the Rainbow Flag are viewpoint discrimination and violate the First Amendment.

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<sup>1</sup> <https://www.wvpublic.org/section/education/2022-09-28/mon-county-bans-pride-flags-in-schools-receives-pushback-at-board-meeting>

<sup>2</sup> <https://www.pennlive.com/news/2022/09/pa-school-district-asks-teacher-to-remove-rainbow-flag-from-classroom.html>

<sup>3</sup> <https://localtoday.news/fl/proposal-regarding-flags-in-classrooms-on-agenda-of-miami-dade-school-board-meeting-151281.html>



When the government is speaking for itself, the government may decide which views it wishes to express and “the First Amendment does not demand airtime for all views.” *Shurtleff v. City of Bos., Massachusetts*, 142 S. Ct. 1583, 1587 (2022). In *Shurtleff*, the city of Boston allowed groups to hold flag-raising ceremonies at City Hall Plaza, a public forum. *Id.* at 1588. The Supreme Court held that Boston’s flag-raising program was not government speech, but rather a public forum for private speech. In so holding, the Court emphasized that Boston’s “practice was to approve flag raisings [by outside groups], without exception,” that Boston “ha[d] no record of denying a request until *Shurtleff*’s, and that Boston “had nothing—no written policies or clear internal guidance—about what flags groups could fly and what those flags would communicate.” *Id.* at 1592. Because Boston had effectively opened its flagpole to all manner of private speech, without any government oversight or control over the message expressed, it could not refuse *Shurtleff*’s flag based on the viewpoint it represented. *Id.* at 1593.

The *Shurtleff* decision does not mean that cities must either deny all private flags or allow all private flags. The Court recognized that “Boston could easily have done more to make clear it wished to speak for itself by raising flags.” *Id.* “The City of San Jose, California, for example, provides in writing that its ‘flagpoles are not intended to serve as a forum for free expression by the public,’ and lists approved flags that may be flown ‘as an expression of the City’s official sentiments.’” *Id.* (internal citation omitted). Likewise, instead of opening their flagpoles to all manner of private speakers, municipalities may choose to take suggestions from the public and select only those flags that “present[] the image of the City that it wishes to project.” *Pleasant Grove v. Summum*, 555 U.S. 460, 473 (2009). A city choosing to fly a Rainbow Flag does not mean that the city must then fly any and all flags requested.

## Schools

The U.S. Constitution also guarantees robust free expression rights upon which the flag bans unlawfully infringe. While speech in public schools may be subject to more restrictions than other arenas, the Supreme Court has repeatedly held that First Amendment protections extend to “teachers and students,” neither of whom “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506 (1969); *See also Lane v. Franks*, 573 U.S. 228, 231 (2014); *Kennedy v. Bremerton School District*, 142 S.Ct. 2407, 2423 (2022). This bedrock principle of the Supreme Court’s First Amendment jurisprudence ensures schools do not become grounds for authoritarian control over the future of our democracy.



Similarly, the First Amendment prohibits content and viewpoint discrimination. *Rosenberger v. Rectors and Visitors of the University of Virginia*, 515 U.S. 819, 829 (1995). Public schools may prohibit private on-campus speech only insofar as it substantially interferes with or disrupts the educational environment, or interferes with the rights of other students. *Tinker*, 393 U.S. at 509; *accord Mahanoy Area Sch. Dist. v. B. L.*, 141 S. Ct. 2038, 2044 (2021). Actual evidence or reasonable forecast of substantial disruption is required – “undifferentiated fear or apprehension of disturbance” is insufficient. *Tinker*, 383 U.S. at 508; *Mahanoy Area Sch. Dist. v. B. L.*, 141 S. Ct. 2038, 2047 (2021).

Policies banning the Rainbow Flag or any political material in schools are not viewpoint neutral, as the removal is premised on the message the Rainbow Flag conveys. Such action, absent any evidence of substantial disruption, is contrary to the First Amendment protections afforded to students within public schools. *Tinker*, 383 U.S. at 508. Students have rights to convey messages that others deem controversial or offensive. *Sypniewski v. Warren Hills Reg’l Bd. Of Educ.*, 307 F.3d 243 (3d Cir. 2002). A “mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint” cannot justify the restriction of the display of the Rainbow Flag or flags deemed “political.” *Tinker*, 393 U.S. at 508.

The Rainbow Flag has been used to support LGBTQ+ students and instill a sense of community. Removing the LGBTQ+ Rainbow Flag sends a message to students, allies, and faculty that this community is not to be celebrated or protected. Such a message fosters an unsafe environment for many students.

The ACLU and the Gilbert Baker Foundation strongly encourage you to respect the Constitution and oppose and rescind any bans on the LGBTQ+ Rainbow Flag. Please do not hesitate to contact the ACLU if you have any questions about this letter or wish to discuss it further. We can be reached at 212-549-2673.

Sincerely,

A handwritten signature in black ink that reads "Li Nowlin-Sohl". The signature is written in a cursive, flowing style.

Li Nowlin-Sohl  
Senior Staff Attorney  
Jon L. Stryker and Slobodan Randjelović  
LGBTQ & HIV Project  
American Civil Liberties Union Foundation

*Students, parents, and community members: Feel free to use this letter as an advocacy tool in your school or community.*