

November 21, 2019

VIA EMAIL

Kent Kern, Superintendent
San Juan Unified School District
3738 Walnut Avenue
Carmichael, CA 95608
kkern@sanjuan.edu

Re: School District Censorship of Black Lives Matter posters and parent volunteers who want to speak about Black Lives Matter topics

Dear Superintendent Kern,

We are writing on behalf of PARENT CLIENT and their STUDENT CLIENT at Del Paso Manor Elementary School in San Juan Unified School District ("District"). We are deeply concerned that the District may be refusing to let students create and post Black Lives Matter artwork as well as banning speakers who speak regarding that topic on District campuses. This is based on the actions by a Del Paso Manor Elementary School teacher, Mr. Madden, and its principal. It is our understanding that the District's General Counsel approved these conversations and the actions to censor Black Lives Matter content.¹

This refusal poses unlawful restrictions on student speech in violation of § 48907 and § 48950 of the California Education Code, Article I, § 2(a) of the California Constitution as well as the First Amendment along with a number of District Policies. Additionally, we are concerned that the District is treating student support of the Black Lives Matter movement differently than other students who express support for other topics and disciplining those students because of it. Indeed, the students who supported Black Lives Matter content had to redo their posters during class time. We ask that the District immediately rectify the problems described in this letter.

¹ Conversation between PARENT CLIENT and Principal on September 17, 2019 stating that the Principal would consult the District's General Counsel prior to censorship of the Black Lives Matter posters.

Factual Background

The District allows for parents to be Art Docents at Del Paso Manor Elementary School to conduct “discussions that open . . . children’s eyes to the wonderful world of art.”² These discussions include conversations regarding culture and history.³ While the outlined responsibilities of the teachers are to “provide a suitable amount of time for lessons,” there is no mention that a teacher should stifle or interfere with artwork created by the students during the art docent lesson.⁴

The opportunity as outlined was exciting news to our PARENT CLIENT, in part because the classroom is very diverse. There are Black, Latinx, refugee, and other students from various backgrounds in the class. Our PARENT CLIENT has volunteered for the Art Docent program for several years and is always invited back by teachers. According to PARENT CLIENT, she is encouraged to teach about diversity and to be creative.⁵ PARENT CLIENT has incorporated cultural conversations in the past, but this year, she decided to incorporate visuals regarding Black Lives Matter. It seems this was the line in the sand for the District regarding cultural competency.

On Monday, September 16, 2019, PARENT CLIENT delivered her lesson plan “Art can manifest in activism- can manifest in our communities and school.” The topics on her poster boards that she showed to students ranged from Immigration and housing rights, reforming financial aid, pay equity, animal rights, and Black Lives Matter.⁶ Her lesson encompassed a conversation regarding what each poster meant, and she answered the students’ questions regarding activism. The class assignment following the lesson was for the students to focus on something they wanted to see change in their school. PARENT CLIENT informed the students that the content of their assigned poster could be regarding a change at the school. Soon after relaying this information to the students, while PARENT CLIENT was still in her role as Art Docent, it became evident that something she said in this lesson plan bothered Mr. Madden.

During the lesson plan, PARENT CLIENT asked if she could do another Art Docent lesson to compliment future lessons in diversity. Mr. Madden replied in front of the class that his lessons would contain lessons with “a bunch of old white guys” so her content may not fit. PARENT CLIENT was obviously confused, and a bit concerned regarding this comment, but did not stop the lesson plan due to this comment. The students continued and finished creating their posters for that class period. This included STUDENT CLIENT who proudly created a Black Lives Matter poster during the class period. Three other students created Black Lives Matter posters as well.

On Monday, September 16, 2019, PARENT CLIENT contacted the teacher and stated that she would pick up the posters that she brought to help inform her lesson plan. The next day,

² <https://www.sanjuan.edu/domain/2288>; *see also* Exh. A “San Juan Unified School District Art Docent Program” Brochure.

³ *See* Exh. A.

⁴ *See* Exh. A.

⁵ It is our understanding that the teacher provides the poster board and some lesson plans that can be used as inspiration, but no teacher has reviewed or pre-approved any of her lesson plans.

⁶ *See* Exh. B.

September 17, 2019, Mr. Madden let PARENT CLIENT know that he singled out and made certain students re-do their posters because they were inappropriate and political. Mr. Madden specifically mentioned that Black Lives Matter posters were inappropriate for the class and then continued to pressure PARENT CLIENT during the conversation by asking her whether students were getting shot at the school and demanded answers regarding why a presentation on Black Lives Matter was relevant to Del Paso Manor Elementary.

Mr. Madden disciplined four students who supported Black Lives Matter content, including STUDENT CLIENT, by forcing STUDENT CLIENT to re-do her poster during class time. Obviously upset by Mr. Madden's actions, PARENT CLIENT talked with the principal that day at the school site council meeting. In a surprising turn of events, Mr. Madden offered to give STUDENT CLIENT her original artwork, but then threw her Black Lives Matter poster away the same week that she created the Black Lives Matter poster.

The principal backed Mr. Madden by irrationally stating that Black Lives Matter lessons are political statements and therefore off limits for public display. The principal then told PARENT CLIENT that he would reach out to the District's General Counsel by that Friday and get back to her. The following day, on September 18, 2019, Mr. Madden banned PARENT CLIENT from the classroom. According to PARENT CLIENT, Mr. Madden stated that she made him feel "uncomfortable." Mr. Madden also stated that he did not appreciate PARENT CLIENT talking with the principal regarding the situation.

Next, as promised, on Friday, September 20, 2019 the principal contacted PARENT CLIENT. To PARENT CLIENT's surprise, the school decided not to display the student artwork. In November 2019, it is our understanding that the school decided to put the student artwork in Mr. Madden's classroom. This of course, was after the Black Lives Matter posters were thrown away and the students were disciplined for creating Black Lives Matter posters. There are no Black Lives Matter posters on display. In the lobby, ironically, there is currently some student artwork that supports environmentalism.⁷

The District forced STUDENT CLIENT to lose class time by disciplining STUDENT CLIENT for creating the Black Lives Matter poster, affirmed an environment that supported public embarrassment by having to recreate her artwork in front of other students who did not have to recreate posters, and allowed a teacher to throw away her original artwork, all because she supports Black Lives Matter. The District and school condoned PARENT CLIENT being ostracized and banned from being an Art Docent shortly after engaging in her right to petition a government entity for potentially treating STUDENT CLIENT unfairly and teaching a lesson that allowed students to converse regarding Black Lives Matter.

Legal Analysis

Black Lives Matter posters and conversations are protected speech under the California Education Code

⁷ See Exh. C.

Black Lives Matter posters and conversations are protected speech even if the principal and Mr. Madden believe that they are “political.” Education Code § 48907 gives students the right to “exercise freedom of speech and of the press *including, but not limited to*, the use of bulletin boards, the distribution of printed materials or petitions, *the wearing of buttons, badges, and other insignia*.” Cal. Ed. Code § 48907(a) (emphasis added). This speech must not be “obscene, libelous, or slanderous.” Cal. Ed. Code § 48907(a). First, Black Lives Matter posters are protected speech because they communicate a student’s expression of their thoughts, ideas, and beliefs regarding the support of Black lives. Additionally, the California Legislature squarely contemplated speech such as Black Lives Matter posters to ensure speech, like the type meant to uplift Black students and other marginalized groups, was protected under the California Education Code. The District has not and cannot make a serious argument that Black Lives Matter speech is obscene, libelous, or slanderous. Indeed, this type of speech meant to create a more inclusive campus is quite the opposite.

Under the California and federal constitutions, the District cannot single-out and prohibit Black Lives Matter posters and speech

The California and Federal Constitutions protect speech such as Black Lives Matter posters and conversations. The California Constitution, Article I, Section 2(a) provides that “...A law may not restrain or abridge liberty of speech or press.” The California Constitution provisions are “more protective, definitive and inclusive of rights to expression of speech than their federal counterparts.” *San Diego Unified Port District v. U.S. Citizens Patrol*, 63 Cal.App.4th 964, 970 (1998). Additionally, the First Amendment guarantees students a right to freedom of speech and expression. *Tinker v. Des Moines Indep. Cnty. Sch. Dist.*, 393 U.S. 503, 506 (1969). A district must meet the high burden of demonstrating the student expression “would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school” or “collide with the rights of others” to limit student speech. *Id.* at 513.

Like protections under the California Education Code, courts have firmly decided that school districts cannot strip students of their free speech and expression rights merely because they are at a school. *See Tinker*, 393 U.S. at 512; *Bible Club v. Placentia-Yorba Linda Sch. Dist.*, 573 F. Supp. 2d 1291 (C.D. Cal. 2008). Creating Black Lives Matter posters present constitutionally protected opportunities for San Juan Unified students to express their support for classmates, community members, and for some, their cultural identity. The District has not and cannot claim that this showing has materially and substantially disrupted school classes. Indeed, Mr. Madden threw away the posters prior to or around the timeframe when the school decided to hang the other posters in the school’s lobby.

In addition, there are obvious problems with a teacher and principal who currently have Black students in their classroom and school taking the positions that the acknowledgment of Black Lives is controversial and political in nature. Students have a legal right to support their classmates and others within the Black community through protected speech by creating Black Lives Matter posters. Indeed, even if the teacher believes that supporting Black Lives Matter is somehow political, the “silencing of a political message because of disagreement with that message, is particularly offensive.” *Gillman ex rel. Gillman v. School Bd. for Holmes County, Fla.*, 567 F.Supp.2d 1359, 1376 (N.D. Fla. Jul. 24, 2008).

American Civil Liberties Union Foundation of Northern California

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The District and school cannot punish PARENT CLIENT for engaging in protected free speech such as supporting Black Lives Matter through her artwork

District officials and teachers have unconstitutionally formally and informally punished STUDENT CLIENT for her decision to create a Black Lives Matter poster. *Tinker v. Des Moines* has long held that the formal punishment in that case violated the student's free speech rights because it did not meet the standard of a material or substantial disruption.⁸ Mere "discomfort or unpleasantness" is not the guidelines for a district to punish a student's free speech. *Id.* at 509. Whether the matter was political is also not the legal standard for restricting free speech and the Supreme Court has firmly held that political speech is protected in schools.

In *Tinker*, students wore armbands to personally protest the U.S.' engagement in the Vietnam war as well as their student expression regarding this subject matter. The Supreme Court found there was no reason to believe that wearing armbands would disrupt the learning process. *Id.* Here, Mr. Madden forced students to re-do their Black Lives Matter posters during class time. This constitutes formal punishment because STUDENT CLIENT missed lesson time to recreate her poster. STUDENT CLIENT also had to create additional material in class where it was obvious to students sitting in the classroom, who did not have to redo posters, that the students who created Black Lives Matter posters were creating posters after the entire class created artwork that week.

And Mr. Madden threw away their original posters, as though they were literal trash, and the students were made aware of Mr. Madden's decision to throw their artwork away. Moreover, because the District teacher, Mr. Madden, used class time to force the four students to recreate their Black Lives Matter posters, Del Paso Manor Elementary and the District has created an informal punishment of publicly shaming STUDENT CLIENT and the other three students for their decision to create Black Lives Matter posters.

Telling the students that they must recreate posters during class classifies as an unconstitutional singling-out and punishment. *Gillman ex rel. Gillman v. School Bd. for Holmes County, Fla.*, 567 F.Supp.2d 1359, 1375 (N.D. Fla. Jul. 24, 2008)(internal citations omitted) ("Discrimination against speech because of its message is presumed to be unconstitutional."). The District and its teachers cannot punish CLIENT for her decision to create a Black Lives Matter poster. *See id.*

The District's decision to remove STUDENT CLIENT artwork is an impermissible viewpoint restriction.

Regardless of the forum, the District may only restrict access to the artwork "as long as the restrictions are reasonable and [are] not an effort to suppress expression merely because the public officials oppose the speaker's view." *Arkansas Educ. Television Comm. v. Forbes*, 523 U.S. 666, 677-78 (1998) (quoting *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788, 800 (1985)). However, the District completely restricted the students' voices because all Black Lives Matter student pieces have since been destroyed by Mr. Madden. It is still not entirely clear that Mr. Madden needed to destroy the artwork. And the timing is more

⁸ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 258 F. Supp. 971, 972 (S.D. Iowa 1966), rev'd, 393 U.S. 503 (1969).

than suspect given that he told PARENT CLIENT that Black Lives Matter content was “political.”

The Ninth Circuit has held that “viewpoint discrimination is a form of content discrimination in which the government targets not the subject matter, but particular views taken by the speakers on a subject.” *Brown v. California Dep’t of Transportation*, 321 F.3d 1217, 1223 (9th Cir. 2003). Indeed, “viewpoint discrimination” is the most “egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.” *Rosenberber v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995). By showing the Black Lives Matter artwork, the District had the opportunity to spark dialogue about race relations. Censorship of the exhibition not only undermines this opportunity, but also sends the troubling message that the history of racism is a topic off limits to everyone at the school.

School districts do not have a right to censor protected speech based on arbitrary reasons or because they believe a topic is controversial or political. The District has and continues to allow students to create and even post artwork that conveys support for environmentalism like “every day is Earth day.”⁹ The District has no legitimate basis for allowing students to express these views but dismiss student support for their Black classmates. We are happy to see that the District did not interfere with student support for other issues, but the District cannot decide that it draws the line when Black students need support.

The District allowed for unconstitutional interference with PARENT CLIENT’s right to petition the District for its unfair treatment towards STUDENT CLIENT

By retaliating against PARENT CLIENT for speaking to the principal regarding STUDENT CLIENT’s Black Lives Matter artwork and the banning of Black Lives Matter conversations, the District currently violates the right to petition for redress of grievances as protected by the First Amendment.¹⁰ Students and parents have a constitutional right to seek redress without fear that recourse will make that student a target for retaliation. *Powell v. Alexander*, 391 F.3d 1 (1st Cir. 2004). Mr. Madden banned PARENT CLIENT from coming back to the classroom the same week PARENT CLIENT talked with the principal regarding the banning of Black Lives Matter artwork. Additionally, Mr. Madden told PARENT CLIENT that he did not appreciate PARENT CLIENT talking with the principal regarding how Mr. Madden censored Black Lives Matter artwork in the same conversation where Mr. Madden told PARENT CLIENT she could not come back to the classroom. Mr. Madden cannot take adverse actions against PARENT CLIENT because she addressed a concern regarding STUDENT CLIENT’s free speech rights.

Remedies

Because of the harm this has caused for our CLIENTS, we are asking the following: (1) the District to issue a public apology (2) allow PARENT CLIENT to continue volunteering in

⁹ See Exh. C.

¹⁰ U.S. Const. Amend. I.

the classroom (3) to hang the Black Lives Matter posters up during the Spring Art Night (if the students want to remake them) that has a Black Lives Matter theme, in addition to the breezeway where the other artwork is hung at Del Paso Manor Elementary (4) curriculum and events that include Black Lives Matter (5) a cultural and sensitivity training for staff that is based on our clients' input and (6) parent engagement training.

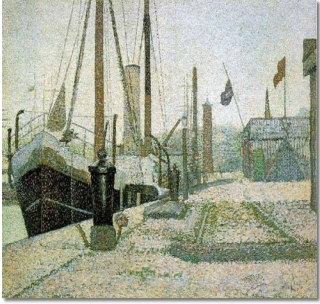
Given the urgency of this matter, we request an immediate response to fixing these fundamental constitutional violations by November 27, 2019 close of business.

Sincerely,



Abre' Conner
Staff Attorney
ACLU Foundation of Northern California

EXHIBIT A



Honfleur Harbor by Seurat Grade 6-D

Kindergarten

Houses, Animals,
Fall and Spring,
Portraits, Pictures,
Old West, Parents
& Children, Stories

Grade 1

People at Play, People at Work, Color,
Circus, Self-Portraits, Kings & Queens, Pets,
Flowers & Plants

Grade 2

Winter and Summer, Bridges & Seashores,
Dressing Long Ago, Line, American Folk
Artists, Birds, Women, Trees

Grade 3

Food, Children, Landscapes, Feelings,
Horses, Shape, Still Life, Dancers

Grade 4

Texture & Pattern, Celebrations & Parades,
Realism, Trains, Villages, Fantasy &
Imagination, Tribal Art, The Sea

Grade 5

American History, The City, Action &
Adventure,
Skies, Musicians, Women Artists, Space,
Cubism & Surrealism

Grade 6

Italian Renaissance, Perspective, Sports &
Games, Impressionism/Post Impressionism,
African Art, Early 20th Century Art, Art in
Northern Europe: 15-17th Century, Later
20th Century Art

San Juan Unified School District

3738 Walnut Avenue

Carmichael, CA 95608

Visual and Performing Arts (VAPA)

Craig Faniani, Curriculum Coordinator

Art Docent Program

Heather Taft, Program Coordinator
heather.taft@sanjuan.edu

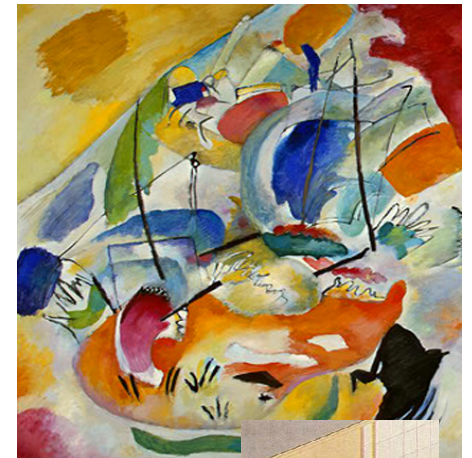


ART DOCENT PROGRAM™
Learning about art. Making art.

Amy Scherschligt, Director
Heidi Grasty, Director

www.artdocentprogram.com

San Juan Unified School District



Improvisation #31
by Kandinsky
Kindergarten - E



Woman and Maid
by Shunsho Grade 2 - G

What is the Art Docent Program?

From cave art to Op and Pop - from Renaissance discoveries to the Cubists' puzzling paintings - from African ceremonial works to the Surrealist dream world - from van Gogh's swirling brushstrokes to Remington's bucking broncos - from Cassatt's gentle works to Bellow's boxing matches - from America's tribal art to Escher's mathematical marvels - from Rousseau's jungles to Ringgold's Tar Beach....your children are becoming visually and verbally literate in the language of art.

What is an Art Docent?

An Art Docent is a volunteer who conducts groups of people on tours in an art museum. In this Program, parent volunteers bring portfolios of works of art to elementary classrooms and conduct discussions that open the children's eyes to the wonderful world of art.

What is a Portfolio?

A portfolio is a case containing 5-8 large reproductions of artworks. There are 56 Portfolios in all, each with a different theme. Each Portfolio contains Artist Name Cards, a Pocket Manual complete with lessons, presentation ideas, games & activities, Elements & Principals of art, materials list, color wheel and glossary.



What is a Portfolio Presentation?

Docents visit their child's classroom once a month to make a portfolio presentation. This presentation can last between 20-30 minutes for Kindergarten and Grade 1, increasing up to 60 minutes for the upper grades, if needed. A Docent's presentation focuses on questions and comments, games and other activities that help children to:

- describe what they see in artworks
- analyze how artists used color, shape, and line in making compositions
- interpret the moods, feelings and emotions expressed by the artists
- learn biographical and historical information about artists, their styles, media, and purposes in creating art

What is a Hands-on Lesson?



Grade 3-D



Grade 1-D

This activity focuses on various concepts and skills. The lesson plan lists materials needed, a motivation, how-to-do-it, vocabulary, and a spin-off. Here children engage in drawing from observation and imagination, painting, cutting out shapes, tearing paper, collage, print making, etc.



Street Musicians
by Johnson
Grade 5 - E

How can I become an Art Docent?

If you're interested in and enthusiastic about art and you like talking with children, then welcome to the Program! Volunteer to the school principal or Head Docent. Then attend a training session. You will receive a manual with lessons for your grade level of interest.

What are the duties of the Head Art Docent?

The Head Docent helps to recruit volunteers, assists with communication and district announcements, and oversees campus scheduling of lessons and materials. The Head Docent also receives, inventories and delivers a set of Portfolios each month to the next school on the rotation schedule.

What are the responsibilities of the classroom teacher?

Teachers provide a suitable amount of time for lessons once a month and assist with the Portfolio presentations and Hands-on lessons.

EXHIBIT B

JUSTICE CAN'T WAIT!

FLIGHT FOR
\$15
AND A UNION

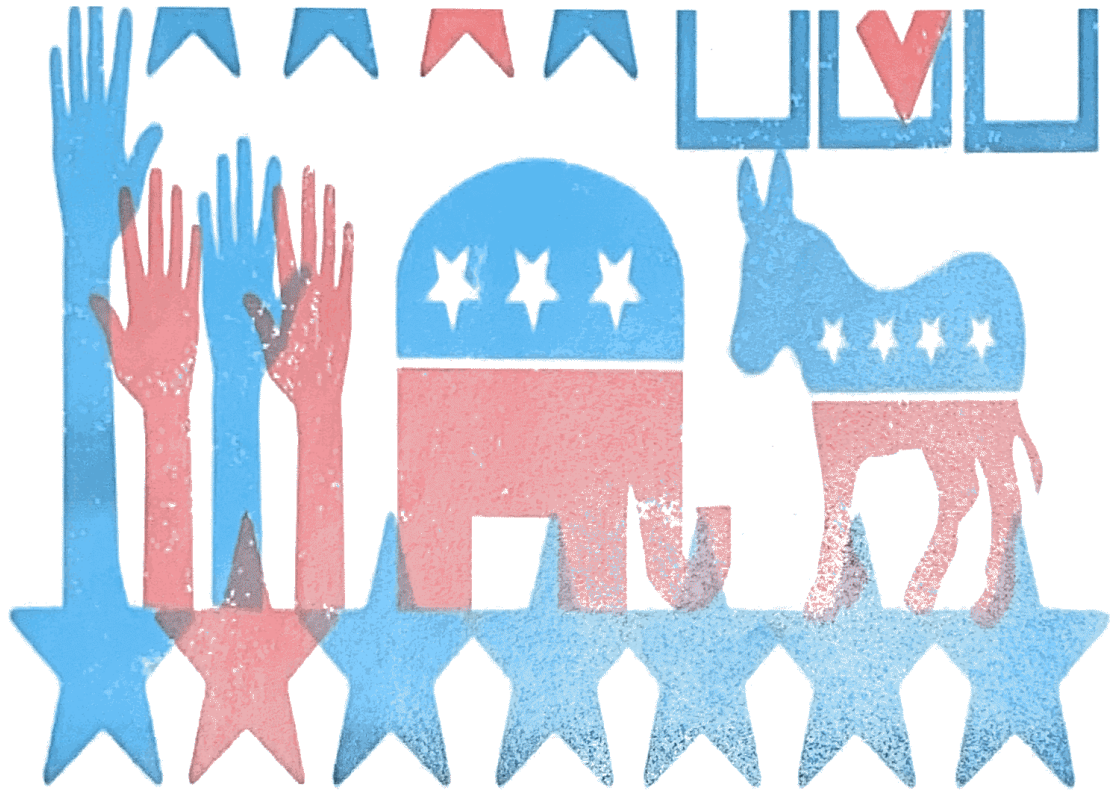
WATER
IS
LIFE

HOMES
ALL

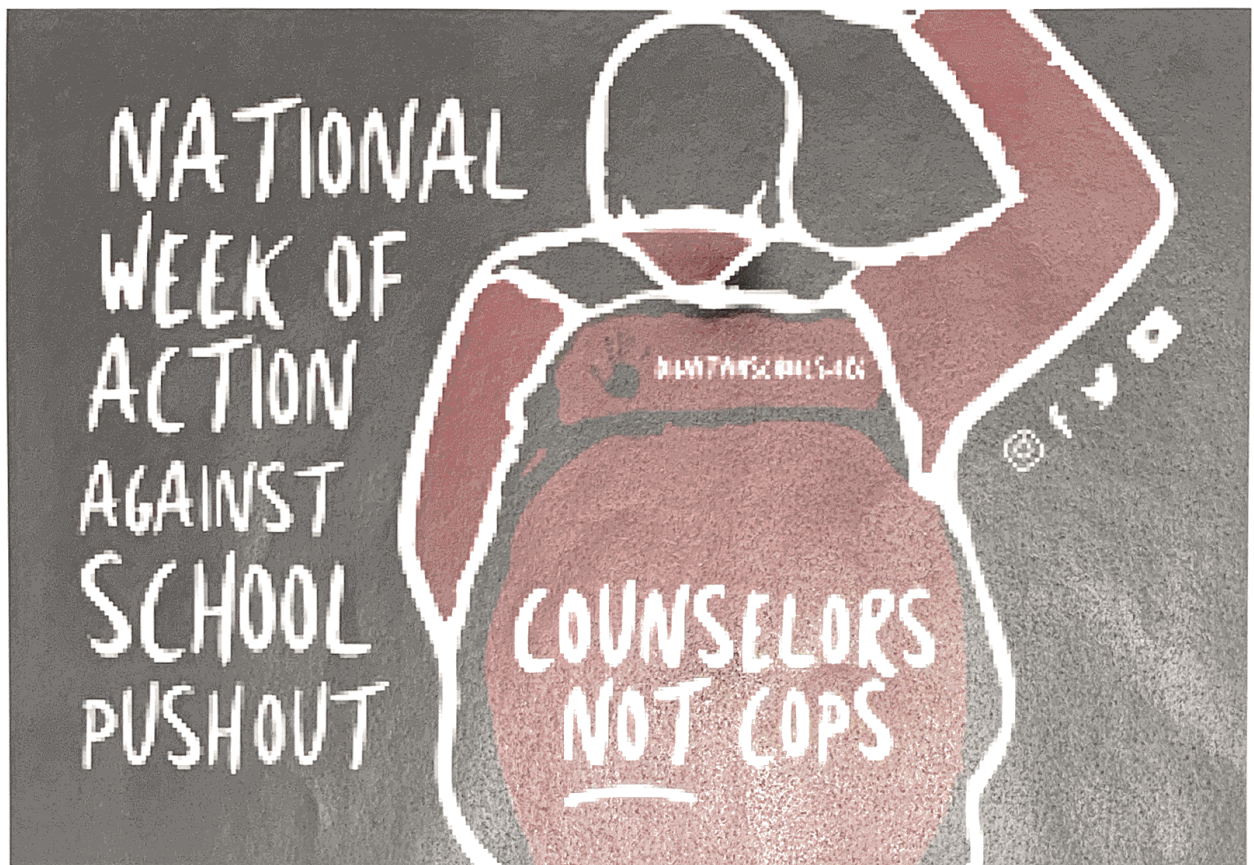
BLACK
LIVES
MATTER

IMMIGRANT
RIGHTS



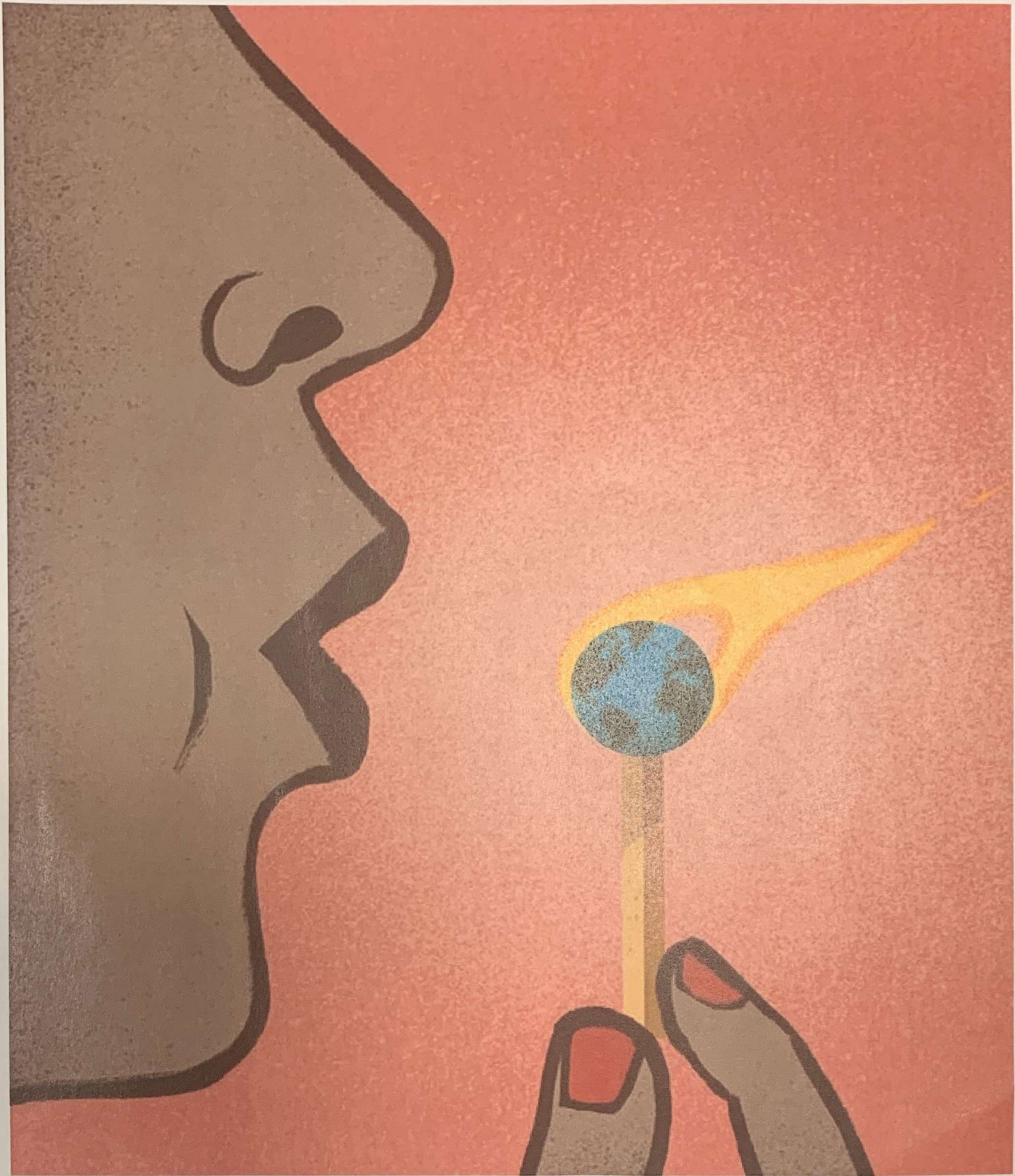


THE POWER TO MAKE A DIFFERENCE
IS IN **YOUR** HANDS
★ ★ ★



Save The Water





FIX FINANCIAL AID



FOR ALL CALIFORNIA STUDENTS

新 華 書 局



SAVE MY
EDUCATION

Xéna González C/S

#FreeTheCSU

California Faculty Association

April 4th, 2018

FIX

FINANCIAL

AID

EXHIBIT C

EVERY
DAY IS



DAY!

So lets ...

• do not kill
wildlife

• pick up
our trash

• plant some
trees

• lets
recycle

• help wild life

