

November 24, 2014

Via Email

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J. Michael Gower, Senior Vice President for Finance and Treasurer; michael.gower@rutgers.edu
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Julie Hermann, Athletic Director; ad@scarletknights.com
Jason Baum, Senior Associate Athletic Director; jbaum@scarletknights.com

Re: Constitutional Violation

Dear Dr. Barchi, Mr. Gower, Mr. Edwards, Ms. Hermann, and Mr. Baum,

A Rutgers University alumnus and his wife, who are frequent patrons of Rutgers University football games, have contacted our office to request assistance with regard to what is correctly perceived as a constitutional violation that is occurring under the authority of your public university. Specifically, several weeks ago, your university organized and promoted a concession-stand fundraiser to benefit the “Church of God in Christ for All Saints.” A large sign at the concession stand stated that a portion of the proceeds would go directly to said Christian church, as shown in the photograph below. When the patron, a non-theist, went to the stand to purchase some concessions, she was affronted by this blatant violation of separation of church and state. Because she did not want her money to be used to support a church, she was unable to purchase provisions for the game.



The purpose of this letter is to advise you that such state-sponsored fundraising efforts – the proceeds of which go to an evangelical Christian church – must immediately cease, and that our organization will pursue the matter through litigation in federal court if it does not.

The American Humanist Association (AHA) is a national nonprofit organization with over 350,000 supporters and members across the country, including many in New Jersey. The mission of AHA's legal center is to protect one of the most fundamental principles of our democracy: the constitutional mandate requiring separation of church and state. Our legal center includes a network of cooperating attorneys from around the country, including New Jersey, and we have litigated constitutional cases in state and federal courts from coast to coast.

The First Amendment's Establishment Clause "commands a separation of church and state." *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005). It requires the "government [to] remain secular, rather than affiliate itself with religious beliefs **or institutions**." *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 610 (1989). Not only must the government not advance, promote, affiliate with, or favor any particular religion, it "may not favor religious belief over disbelief." *Id.* at 593 (citation omitted). Indeed, the Establishment Clause "create[s] a complete and permanent separation of the spheres of religion activity and civil authority." *Everson v. Bd. of Ed.*, 330 U.S. 1, 31-32 (1947). *Accord Engel v. Vitale*, 370 U.S. 421, 429 (1962). Separation "means separation, not something less." *McCullum v. Bd. of Educ.*, 333 U.S. 203, 231 (1948). In "no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart." *Id.*

To comply with the Establishment Clause, a government practice must pass the *Lemon* test,¹ pursuant to which it must: (1) have a secular purpose; (2) not have the effect of advancing or endorsing religion; and (3) not foster excessive entanglement with religion. *Allegheny*, 492 U.S. at 592. Government action “violates the Establishment Clause if it fails to satisfy any of these prongs.” *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987). In short, the government “may not place its prestige, coercive authority, or resources behind a single religious faith or behind religious belief in general, compelling nonadherents to support the practices or proselytizing of **favored religious organizations** and conveying the message that those who do not contribute gladly are less than full members of the community.” *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 9 (1989).

It is apodictic that private citizens have no right to “use the machinery of the State to practice its beliefs.” *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 226 (1963). For instance, in *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 307 (2000), the Supreme Court held that student-led prayer at public school football games failed the second prong of *Lemon* because the prayer was “delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property.” Even though any prayer would be delivered by a student rather than a government official, the Court concluded that “an objective observer, . . . would perceive it as a state endorsement of prayer[.]” *Id.* at 308 (internal quotation marks omitted). And surely, “[t]here is no inherent right in any citizen or in any religious or political organization to use public school buildings for any other purposes than those devoted to the public schools.” *Baggerly v. Lee*, 73 N.E. 921, 922 (Ind. App. 2d Div. 1905).

Turning to the facts here, it is plain that the university is in violation of the Establishment Clause pursuant to the *Lemon* test.

The school’s actions fail the purpose prong of *Lemon* because there is no secular purpose in raising money for a church to promote its proselytizing activities. A religious purpose may be inferred where, as here, “the government action itself besp[eaks] the purpose . . . [because it is] patently religious.” *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 862-63 (2005). See *Stone v. Graham*, 449 U.S. 39, 41 (1980) (“The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths”); *Mellen v. Bunting*, 327 F.3d 355, 373 (4th Cir. 2003) (“When a state-sponsored activity has an overtly religious character, courts have consistently rejected efforts to assert a secular purpose for that activity.”); *North Carolina Civil Liberties Union v. Constangy*, 947 F.2d 1145, 1150 (4th Cir. 1991), *cert. denied*, 505 U.S. 1219 (1992) (finding religious purpose in judge’s practice of opening court sessions with prayer, as it involved “an act so intrinsically religious”).

Regardless of the purposes motivating it, the university’s actions fail *Lemon*’s second prong. The “effect prong asks whether, irrespective of government’s actual purpose, the practice under review in fact conveys a message of endorsement or disapproval [of religion].” *Wallace v. Jaffree*, 472 U.S. 38, 56 n.42 (1985) (quotation marks omitted). The “advancement need not be material or tangible. An implicit symbolic benefit is enough.” *Friedman v. Board of County Comm’rs*, 781 F.2d 777, 781 (10th Cir. 1985). Even the “**mere appearance** of a joint exercise of authority by Church and State provides a significant symbolic benefit to religion,” and, therefore, has the impermissible

¹ The test is derived from *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

primary effect of advancing religion. *Larkin v. Grendel's Den*, 459 U.S. 116, 126-27 (1982). The Supreme Court has stated that:

an important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices.

School Dist. v. Ball, 473 U.S. 373, 390 (1985) (internal citation omitted).

Here, the university urged patrons to make a monetary contribution to a Christian church. In fact, patrons wishing to purchase concessions had no choice but to contribute to the Church or else walk away empty handed. The Supreme Court in *Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947) made clear: "The 'establishment of religion' clause of the First Amendment means at least this: . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." By directly fundraising for a Christian Church, the government sends the "unequivocal message that" the university, "as an institution, endorses the religious expressions" of that church in violation of the Establishment Clause. *Mellen*, 327 F.3d at 374.

The third *Lemon* prong, the question of excessive government entanglement with religion, is also violated here, as it is obviously inappropriate for a public school to be inexplicably promoting one particular religious congregation. Like the Establishment Clause generally, the prohibition on excessive government entanglement with religion "rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *McCullum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948).² In this situation, "where the underlying issue is the deeply emotional one of Church-State relationships, the potential for seriously divisive political consequences needs no elaboration." *Comm. for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 797 (1973).

None of this is to suggest that the university should not be participating in charitable endeavors. To the contrary, the AHA strongly supports charity giving. Such good intentions, however, can be pursued in innumerable other ways that do not involve religion.

In view of the aforementioned authorities, it is plain that the university is in violation of the Establishment Clause. As such, the university and its officials may be sued under 42 U.S.C. § 1983 for damages, an injunction, and attorneys' fees. This letter serves as an official notice of the unconstitutional activity and demands that the university terminate this and any similar illegal activity immediately. We are most hopeful that you will recognize the concerns raised by this letter and address them properly. Please respond within seven (7) days. We thank you in advance for your attention to this matter.

Very truly yours,
Monica Miller, Esq.

² See also *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 175 n.36 (3d Cir. 2002) ("'Entanglement' still matters, however, . . . in the rare case where government delegates civic power to a religious group.").