Appignani Humanist Legal Center

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January 4, 2017

Via Email
Leroy Smith, Director
South Carolina Department of Public Safety
PO Box 1993
Blythewood, SC 29016
LeroySmith@scdps.gov; WebMaster@scdps.gov

Re: Unconstitutional Promotion of Christianity

Dear Mr. Smith,

A concerned citizen has contacted our office to request assistance with regard to a serious constitutional violation that is occurring under the authority of the South Carolina Department of Public Safety ("SCDPS"). In October 2016, the citizen's father died in a car wreck. Several weeks later, she unexpectedly received a book on grief from SCDPS. To her surprise, the citizen discovered that the book, despite having been sent by a government office, was a religious publication that proselytizes Christianity and God-belief.

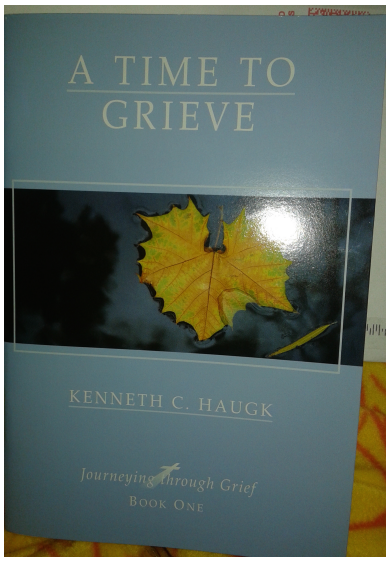
The book in question — "A Time to Grieve" by Kenneth C. Haugk" — features a small cross on the cover as shown in the photograph below. It is published by "Stephen Ministries," for which Haugk serves as the founder and executive director, as revealed by the description inside. The book elucidates that Stephen Ministries "is a non-for-profit Christian training and educational organization" that "has provided Christ-centered training and resources to thousands of congregations from more than 160 denominations." It continues: "Stephen Ministries offers resources in the areas of grief support, lay caregiving, small group ministry, spiritual gifts discovery, caring evangelism, spiritual growth, caring for inactive members and more."

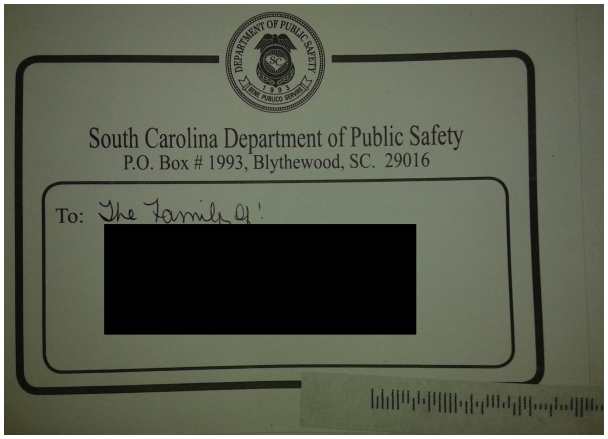
The book is laden with Bible passages and other overtly religious messages such as:

- "Be merciful to me, LORD, for I am faint; O LORD, heal me, for my bones are in agony. My soul is in anguish. How long, O LORD, how long? Psalm 6:2-3"
- "Even if your hold on God seems to slip at times — don't worry. God has a firm hold on you!"
- "There is nothing we do to make God love us more. There is nothing we can do to make God love us less."
- "What God does is not always immediately evident to human eyes."

- "Stand still, and whisper God's name, and listen. He is nearer than you think."

An entire chapter of the book is dedicated to the subject, "If God Seems Far Away." The chapter urges its readers to pray to God and not to lose faith.





Such state-sponsored religious endorsement is a clear violation of the Establishment Clause of the First Amendment of the United States Constitution.

The American Humanist Association (AHA) is a national nonprofit organization with over 600,000 supporters and members across the country, including many in South Carolina. The mission of AHA's legal center is to protect one of the most fundamental principles of our democracy: the constitutional mandate requiring a separation of church and state. Our legal center includes a network of cooperating attorneys from around the country, including South Carolina, and we have litigated constitutional cases in state and federal courts from coast to coast, including in South Carolina.

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). The Establishment Clause prohibits the government from sending a message to "nonadherents 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members[.]" *McCreary Cnty. v. ACLU*, 545 U.S. 844, 860 (2005).

To comply with the Establishment Clause, governmental activity 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

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

these prongs." *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987). As discussed below, it is beyond clear that SCDPS's actions in endorsing and partnering with a Christian ministry and mailing grieving citizens an explicitly Christian book, violates the Establishment Clause pursuant to these tests as well as directly applicable precedent. *See Hall v. Bradshaw*, 630 F.2d 1018, 1020-21 (4th Cir. 1980) (state's inclusion of prayer on state map violated Establishment Clause).

In *Hall*, the Fourth Circuit held that a nondenominational prayer printed on a state map, which had a "limited audience and distribution," violated the Establishment Clause, even in the absence of "compelled recitation of the prayer or subjection to ridicule as part of the captive audience" and that the prayer could "seem utterly innocuous." *Id.* at 1019-21 n.1. The court reasoned that because prayer "is undeniably religious and has, by its nature, both a religious purpose and effect." *Id.* at 1020-21. The court reiterated: "A prayer, because it is religious, does advance religion, and the limited nature of the encroachment does not free the state from the limitations of the Establishment Clause." *Id.* The facts here are far more egregious than those in *Hall* as there is nothing "innocuous" about sending vulnerable grieving families a proselytizing Christian book endorsed by the state. Even though further analysis is unnecessary in light of *Hall*, SCDPS's actions fail each prong of the *Lemon* test as well.

Where, as here, the government sponsors an "intrinsically religious practice" or a "patently religious" display, it "cannot meet the secular purpose prong." *McCreary*, 545 U.S. at 862-63. *See also Mellen v. Bunting*, 327 F.3d 355, 373 (4th Cir. 2003); *North Carolina Civil Liberties Union v. Constangy*, 947 F.2d 1145, 1150 (4th Cir. 1991) (finding religious purpose in judge's practice of opening court sessions with prayer, as it involved "an act so intrinsically religious"); *Hall*, 630 F.2d at 1020-21 (state's inclusion of prayer on state map failed purpose prong).

The "defendant [must] show by a preponderance of the evidence that action challenged" has a secular purpose. *Church of Scientology Flag Serv. v. City of Clearwater*, 2 F.3d 1514, 1530 (11th Cir. 1993). *See McCreary*, 545 U.S. at 870-72 (government failed to articulate a secular purpose for Ten Commandments); *see also Metzl v. Leininger*, 57 F.3d 618, 622 (7th Cir. 1995) (a secular purpose "is in the nature of a defense, and the burden of producing evidence in support of a defense is . . . on the defendant"). The state "cannot escape the proscriptions of the Establishment Clause merely by identifying a beneficial secular purpose." *Hall*, 630 F.2d at 1020-21.

The Fourth Circuit has admonished that "controlling caselaw suggests that an act so intrinsically religious as prayer cannot meet, or at least would have difficulty meeting, the secular purpose prong of the *Lemon* test." *Constangy*, 947 F.2d at 1150 (citing *Stone* and *Wallace*). In *Mellen*, for instance, the Fourth Circuit held that prayers delivered at a military institute failed the purpose test because of their plainly religious nature: "the purpose of an official school prayer 'is plainly religious in nature.'" 327 F.3d at 374. In *Constangy*, although the judge argued that his prayers served the secular purpose of solemnifying court proceedings, the Fourth Circuit held that the prayers failed the purpose test because of the "intrinsically religious" nature of prayer. 947 F.2d at 1150. A religious purpose may thus be inferred in this instance since "the government action itself besp[eaks] the purpose . . . [because it is] patently religious." *McCreary*, 545 U.S. at 862-63.

Moreover, the "unmistakable message of the Supreme Court's teachings is that the state cannot employ a religious means to serve otherwise legitimate secular interest[.]"*Karen B. v. Treen*, 653 F.2d 897, 901 (5th Cir. 1981) (no secular purpose in authorizing teacher-initiated prayer at the start of school day) *aff'd*, 455 U.S. 913 (1982). In *Hall*, for instance, the state contended that a prayer printed on the state map "promoted safety, which is a legitimate secular purpose." 630 F.2d at 1020-21. While the Fourth Circuit accepted the argument that the "prayer may foster the state's legitimate concern for safety," the prayer failed the purpose prong because the state chose "a clearly religious means to promote its secular end." *Id.*

Regardless of the unabashedly religious purposes motivating the book, it clearly violates the Establishment Clause under *Lemon*'s effect 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 "prohibition against governmental endorsement of religion 'preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred.'" *Allegheny*, 492 U.S. at 593 (citation omitted). Whether "the key word is 'endorsement' 'favoritism,' or 'promotion,' the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief[.]" *Id.* at 593-94.

The book has the obvious effect of endorsing theistic religion, and Christianity in particular, and disapproving of atheism, thus violating the Establishment Clause. 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 primary effect of advancing religion. *Larkin v. Grendel's Den*, 459 U.S. 116, 126-27 (1982). For state action to violate the Establishment Clause under the second prong of *Lemon*, "the resulting advancement need not be material or tangible. An implicit symbolic benefit is enough." *Friedman v. Bd. of Cnty. Comm'rs*, 781 F.2d 777, 781 (10th Cir. 1985). *See Allegheny*, 492 U.S. 573 (finding that the fact that a crèche exhibited a sign disclosing its ownership by a Roman Catholic organization did not alter the conclusion that it sent a message that the county supported Christianity).

The "Establishment Clause does not limit only the religious content of the government's own communications. It also prohibits the government's support and promotion of religious communications by religious organizations." *Allegheny*, 492 U.S. at 600. *E.g.*, *Smith v. Cnty. of Albemarle*, 895 F.2d 953, 958 (4th Cir. 1990) (privately donated nativity scene unconstitutional pursuant to *Lemon*). In *Smith*, for instance, the Fourth Circuit ruled that a privately donated nativity scene on the front lawn of a government building failed the second prong of *Lemon*. *Id.* at 955. Despite the fact that the crèche was only on the lawn for a short period of time, was accompanied by a disclaimer stating that the crèche was "Sponsored by Charlottesville Jaycees," and the "erection and maintenance of the crèche involved no expenditure of County funds," the Fourth Circuit held that the display was unconstitutional. *Id.* Specifically, the court declared: "the unmistakable message conveyed is one of government endorsement of religion -- impermissible under the Establishment Clause of the Constitution. The endorsement of the religious message proceeds as much from the religious display itself as from the identification of a religious sponsor." *Id.* at 958. The book here is even more flagrantly unconstitutional than the crèche in

Smith; it is not a passive display — the state actively sends the book to grieving families, even if they are non-Christian — and there is no disclaimer on it.[2]

Because the book is inherently religious, it also unconstitutionally entangles the government with religion. *E.g.*, *Constangy*, 947 F.2d at 1151-52 (when "a judge prays in court, there is necessarily an excessive entanglement of the court with religion."); *Mellen v. Bunting*, 327 F.3d 355, 375 (4th Cir. 2003); *Hall*, 630 F.2d at 1021. 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." *McCollum v. Bd. of Educ*., 333 U.S. 203, 212 (1948). 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).

We are most hopeful that you will recognize the concerns raised by this letter and address them properly. To avoid legal action, we ask that you notify us in writing of the steps you will take to rectify this constitutional infringement. Please respond within seven (7) days. We thank you in advance for your attention to this matter.

Sincerely,
Monica Miller, Esq.

[2] Of course, a disclaimer would not render an unconstitutional display constitutional. *See Allegheny*, 492 U.S. at 600 ("the sign simply demonstrates that the government is endorsing the religious message of that organization, rather than communicating a message of its own."); *Smith*, 895 F.2d at 958 ("It remains to be seen whether any disclaimer can eliminate the patent aura of government endorsement of religion."); *Green v. Haskell County Bd. of Comm'rs*, 568 F.3d 784, 808-09 (10th Cir. 2009).