UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

American Humanist Association, John Doe and Jane Doe, as parents and next friends of their minor child, Jill Doe, *Plaintiffs,* v. Greenville County School District, *Defendant*.	C.A. No. 6:13-cv-02471-GRA **PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

Pursuant to Federal Rule of Civil Procedure 56, Plaintiffs move for summary judgment on their claims that: (1) Defendant's policy, practice and custom of including prayers in public school graduation ceremonies, including fifth grade graduation ceremonies, violate the Establishment Clause; and (2) Defendant's policy, practice and custom of holding fifth grade graduation ceremonies and similar events in a Christian chapel on the campus of a Christian university violate the Establishment Clause.

The grounds for this motion are: (1) that no facts material to Plaintiffs' claims remain in dispute; and (2) that based on the undisputed facts as set forth in the accompanying Statement of Undisputed Facts ("PSUF"), and for the reasons explained in the accompanying Memorandum of Law, Plaintiffs are entitled to judgment as a matter of law.

Accordingly, Plaintiffs respectfully request that this Court grant them summary judgment on their Establishment Clause claims, and that the Court issue an order awarding them the following relief: (1) a declaratory judgment that inclusion of prayer as part of School District graduation ceremonies violates the Establishment Clause of the First Amendment of the United States Constitution and is a violation of the Plaintiffs' constitutional rights under 42 U.S.C. § 1983; (2) a declaratory judgment that the Defendant's policy and practice of holding school-sponsored events, including graduation ceremonies, in sectarian venues, such as the Turner Chapel, violates the Establishment Clause of the First Amendment of the United States Constitution and is a violation of the Plaintiffs' constitutional rights under 42 U.S.C. § 1983; (3) a permanent injunction enjoining the Defendant from knowingly, intentionally, recklessly or negligently allowing: (i) prayers to be delivered as part of any School District graduation ceremony or any school-sponsored awards ceremony; and (ii) school-sponsored events, including graduations, to be held in churches, chapels and other places of worship, including but

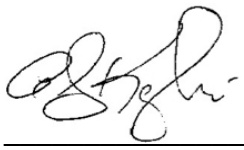
not limited to the Turner Chapel or other locations on the campus of North Greenville University; (4) nominal damages of $1 against Defendant for violating Plaintiffs' rights under the First and Fourteenth Amendments to the U.S. Constitution; (5) an award to the Plaintiffs of their reasonable costs, disbursements and attorneys' fees as allowed by law from the Defendant pursuant to 42 U.S.C. § 1988; and (6) any other relief that the Court deems just and proper.

In support of this motion, Plaintiffs submit the aforementioned PSUF, and Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment, and the exhibits attached hereto.

Plaintiffs will submit a Proposed Order by email in accordance with the Court's Filing Preferences. Per Local Civil Rule 7.02(B), Plaintiffs have not queried Defendant as to whether it plans to oppose this Motion.

Respectfully submitted,

February 2, 2015



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American Humanist Association, John Doe and Jane Doe, as parents and next friends of their minor child, Jill Doe, *Plaintiffs,* v. Greenville County School District, *Defendant*.	C.A. No. 6:13-cv-02471-GRA **PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF SUMMARY JUDGMENT**

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I. SUMMARY OF THE CASE

The School District has a longstanding policy and practice, dating back to 1951, of sponsoring and endorsing overtly Christian prayers at public elementary school graduations and a more recent policy and practice of holding these elementary school graduations in a Christian chapel on the campus of a Baptist University. Since 1951, the School District has been inviting elementary school children to write prayers, which are reviewed and approved by school officials and then delivered to a government-organized audience at a government-sponsored event. The prayers have always been Christian prayers. The School District's policies relating to graduation prayers are district-wide. Many of its public schools regularly include Christian prayers delivered by school-selected speakers in graduation ceremonies, and have continued to do so since this case has been filed. These practices unquestionably violate the Establishment Clause.

Throughout this litigation, the School District has steadfastly defended its practice of authorizing prayer at public school graduations, as well as its practice of using a Christian venue for the elementary ceremonies. In fact, it is the School District's policy that it *cannot* prohibit such prayers. So, in the absence of injunctive relief, the School District will continue to permit young children to deliver proselytizing Christian prayers at school-organized graduations to an audience assembled at the government's behest. The only modifications it claims to have made is that the prayers will no longer be pre-reviewed and the program itself will not list the prayers. Yet neither of these minor modifications suffices to remove the school's imprimatur over the prayers. The Supreme Court made abundantly clear in *Santa Fe* that the student-initiated nature of prayer does not insulate the school from the coercive element of the final message. Putting the ultimate choice to the students does not eliminate school-sponsorship over the prayer either.

II. STATEMENT OF UNDISPUTED MATERIAL FACTS

Plaintiffs refer to and incorporate by reference their Statement of Undisputed Facts ("PSUF") along with the corresponding citations to the record and all supporting exhibits, as well as all evidence and arguments previously filed in this case, as if fully stated herein. To summarize, in September 2013, the American Humanist Association ("AHA"), Jane, Jill and

John Doe ("Plaintiffs") filed this action against the Greenville County School District ("School District" or "Defendant") to vindicate their rights under the Establishment Clause, seeking declaratory and injunctive relief and damages pursuant to 42 U.S.C. § 1983. Plaintiffs challenge the constitutionality of Defendant's long-established policy and practice of including prayers at public school graduation ceremonies (the "Prayer Policy") and its more recent policy and practice of holding fifth grade graduations and similar events in a Christian Chapel on the campus of a Christian university (the "Chapel Policy"). The following facts are undisputed.

The School District has a longstanding policy and practice, established in 1951, of endorsing Christian prayers at its graduation ceremonies for elementary school children. (PSUF ¶11). Since 2012, the ceremonies have been held in a Christian chapel on the campus of a Baptist university, making it clear that the entire event is a school-endorsement of Christianity. (*Id.* ¶82).

Jill Doe is the daughter of Jane and John Doe ("Doe Parents"). (*Id.* ¶3). Jill was a fifth grade student at Mountain View Elementary School ("MVES") in the 2012-13 school year. (*Id.*). Jill currently attends Blue Ridge Middle School ("BRMS"), a school within the School District, and will eventually attend Blue Ridge High School ("BRHS"). (*Id.* ¶4). Doe Parents are plaintiffs in their own right. (*Id.* ¶¶5-6). They have a son enrolled in the third grade at MVES who will graduate from the fifth grade in 2016-2017, and will continue on to BRMS and BRHS. (*Id.* ¶7). The Does are humanists and members of Plaintiff AHA (*Id.* ¶2; ¶¶5-6).

Since 1951, the School District has held graduation ceremonies for the MVES fifth grade class every school year. (*Id.* ¶11). The ceremonies take place during school hours, often in the morning, and last about two hours. (*Id.* ¶12). Students are called by name and receive awards, and several children are chosen to speak at the ceremony. (*Id*). Parents are invited to attend the ceremony. (*Id.* ¶13). Students are under the supervision and direction of the school. (*Id.* ¶39). They are told what to wear, where to sit, and practice walking to their places. (*Id.* ¶¶40-41). The ceremony is described to parents as an "educational trip that has been planned for your child's class in connection with the school work." (*Id.* ¶98). On May 30, 2013, the School District conducted its annual MVES graduation and included two Christian prayers as part of the

ceremony. (*Id.* ¶14; ¶21). Jill participated in the event, and her parents attended. (*Id.*). The ceremony was held in a Christian chapel at a Christian university, with numerous Christian symbols and fixtures in plain sight of attendees, both inside and outside of the chapel. (*Id.* ¶15).

Prayer Policy. The School District has included prayers in MVES graduations ever since the school opened in 1951. (*Id.* ¶17). All prayers have been delivered by school-selected fifth graders, normally age 10 or 11. (*Id.* ¶18). Two prayers are included each ceremony. The first is offered after opening remarks by the principal and the second is offered at the ceremony's conclusion. (*Id.* ¶19; ¶31). None of the prayers have been non-Christian prayers. (*Id.* ¶¶20-21).

It has been the School District's policy and practice to have school officials, typically fifth grade teachers, select the students to deliver the prayers. (*Id.* ¶22). Students are selected based in part on their "ability to speak in front of a group." (*Id.* ¶23). It has also been the School District's practice to have school officials *review* and *approve* the content of the prayers prior to their delivery. (*Id.* ¶¶24-26). Each prayer is designated as "Prayer" on the official graduation programs, which are distributed to attendees, such as the Does. (*Id.* ¶¶27-30).

At the 2013 ceremony, the first prayer directly followed the "Welcome" by "Ms. Gibson." (*Id.* ¶¶30-31). Prior to the ceremony, a school official asked one student to write and deliver the first prayer and another to write and deliver the closing prayer. (*Id.* ¶¶32-34; ¶37).[1] Each prayer was then *reviewed* by, and *approved* by, a teacher. (*Id.* ¶36). During the ceremony, Jill Doe saw her peers bowing their heads during the prayers. Although praying is against Jill's sincerely held convictions, Jill bowed her head too. She was afraid she would be in trouble if she did not participate in the prayer and also did not want to stand out amongst her peers. (*Id.* ¶43). The Doe Parents witnessed most, if not everyone, bowing their head for the prayers, including their daughter. (*Id.* ¶44). The Doe Parents raised Jill as a non-theist and felt their daughter was coerced into participating in the prayer. (*Id.*).

[1]The "Closing Prayer" at the 2013 graduation provided in part: "Thank you for coming. Let us pray. Dear Lord, thank you for this day and all your many blessings upon us. Lord, bless each and every one of our teachers, leaders and parents. . . . In Jesus' name I pray. Amen." (PSUF ¶35).

The School District's policy of including prayers in graduation ceremonies extends far beyond MVES. (*Id.* ¶¶45-81). Many School District schools, including elementary schools, have a policy and practice of including prayers in graduation ceremonies. (*Id.* ¶¶45-46). Such schools include and BRMS which Jill Doe attends, and BRHS, which Jill will soon attend. (*Id.* ¶¶60-61). Defendant initially refused to produce any evidence regarding the prayer practices at its other schools, preventing Plaintiffs from securing a comprehensive list of such schools. However, even with mere sampling of evidence Plaintiff eventually obtained from discovery (after threatening to compel), it is obvious that the graduation practices pertaining to prayer are district-wide.[2]

In the vast majority of these schools (again, a mere sampling), the prayer-givers are selected by the school, as with MVES, often based on ability to publicly speak, class rank, or class office. (*Id.* ¶47; ¶¶51-52; ¶¶54-55; ¶¶57-58; ¶¶63-64; ¶67; ¶70; ¶74). At the 2011 BRMS 8th grade ceremony, the prayer wasn't even student-led, but rather, delivered by the math teacher. (*Id.* ¶60). In most of these schools, the "prayer" (or "invocation" and "benediction") is listed on the official graduation program handed out to attendees. (*Id.* ¶47; ¶¶51-52; ¶¶54-58; ¶¶60-67; ¶73; ¶74; ¶¶76-80). And in many of these programs, the audience and graduates are expressly instructed to stand for the prayer. (*Id.* ¶51; ¶¶54-55; ¶¶63-64; ¶67; ¶73; ¶75; ¶¶77-78; ¶80). In several schools, men are even required to remove their caps (*Id.* ¶48; ¶50; ¶69¶).[3] In addition to including two Christian prayers, the 2013 Wade Hampton High School graduation included a performance of "The Lord Bless You and Keep You," by the Wade Hampton Singers. (*Id.* ¶54).

The district-wide prayer practices described above have continued since this lawsuit has

[2] Such schools include, but are certainly not limited to: (1) BRMS (since at least 2011); (2) BRHS (since at least 2012); (3) East North Street Elementary School (since at least 2012); (4) Gateway Elementary School (since at least 2001); (5) Washington Center, a special education school ages 5-21 (since at least 2008); (6) J.L. Mann High School (since at least 2009); (7) Eastside High School (since at least 2008); (8) Woodmont High School (since at least 2005); (9) Hillcrest High School (since at least 2012); (10) Wade Hampton High School (since at least 2013); (11) Greenville High Academy (since at least 2013); (12) Greer High School (since at least 2013); (13) Berea High School (since at least 2013); (14) Carolina High School & Academy (since at least 2013); (15) Greenville Senior High School (since at least 2013); and (16) Riverside High School (since at least 2013). (*Id.* ¶¶45-81).

[3] To reiterate, Defendant has not been forthcoming in disclosing a complete list of schools that include graduation prayers; the majority of Plaintiffs' information is derived from Defendant's answers to the RFAs, which included only a randomized sampling of School District schools.

been filed and even after Defendant claimed it changed its district-wide policy to "eliminate" "school-sponsored" prayers, *infra*. For instance, East North Street Elementary School included prayer in its 2012, 2013, *and* 2014 programs. (*Id.* ¶58). The student prayer-givers were chosen by the school "on the basis of grades and ability to speak publicly in front of a group." (*Id.*). The official program for the 2014 graduation ceremony included an "invocation." (*Id.*).

Likewise, the 2014 BRHS graduation ceremony included a closing prayer by the senior class vice president. The official program for the 2014 ceremony directed the audience to stand for the "closing remarks" which was a Christian prayer. (*Id.* ¶¶67-68). BRHS graduation speakers are selected by the school. (*Id.* ¶70). The 2014 prayer was consistent with prior years; BRHS's 2012 and 2013 graduations included overly Christian opening and closing prayers. (*Id.* ¶¶64-66; ¶¶70-71). The evidence shows Defendant knew or had reason to know a prayer would be delivered at the 2014 ceremony, but did nothing to stop it or disclaim it after it was delivered.[4]

Wade Hampton High School also included a prayer (by the student body president) in its 2014 graduation ceremony, as it had in prior years. (*Id.* ¶55). The official program for the 2014 ceremony instructed the audience to stand for the "inspirational reading" which was a prayer, and it appears Defendant knew in advance that a prayer would be delivered. (*Id.*).

No school official, school employee, or student has ever been disciplined or reprimanded in any way by the Defendant due to prayers that have occurred as part of graduation ceremonies at any of Defendant's schools since 2012. (*Id.* ¶81).

The School District does not deny it has had a practice of "endorsing" Christian prayers at MVES ceremonies. (*Id.* ¶169). After the lawsuit commenced, Principal Gibson filed an affidavit stating in part: "I have revised the program for the 2014 graduation to *eliminate* any school-sponsored or endorsed invocations, prayers or benedictions." (*Id.* ¶170) (emphasis added) (hereafter the "new" prayer policy). However, the School District will continue to permit prayers,

[4] BRHS held a "practice" graduation ceremony on June 2, 2014, several days before the actual ceremony. The practice guidelines instructed men to remove their hats during the "closing remarks." (*Id.* ¶69). In addition, Defendant retained a written copy of the prayer that was delivered at the 2014 ceremony and produced it to Plaintiffs, further indicating that it reviewed the prayer prior to its delivery. (*Id.* ¶67).

including Christian prayers, at its graduations. (*Id.* ¶172). In fact, it adamantly refuses to prohibit prayer at future ceremonies. (*Id.*). It stated: "With regard to a student delivering a prayer or providing a religious message during a school-sponsored event, the District will not prohibit this practice." (*Id.* ¶173). It will continue to "as long as the prayer or message is student-led and initiated and does not create a disturbance." (*Id.* ¶171). It reiterated: "The District, however, will not create a policy that prohibits student-initiated and led prayers at future events." (*Id.* ¶174).

Chapel Policy. Despite a variety of viable secular venues, including the gymnasiums, auditoriums, and athletic fields at any one of the School District's 100 schools, the School District insists on continuing to hold MVES graduations in the Turner Chapel, which it admits is a Christian place of worship, located in the center of North Greenville University's ("NGU") campus. (*Id.* ¶¶82-92; ¶97). Children are transported to and from the chapel in school buses under the supervision of faculty. (*Id.* ¶87; ¶¶99-100). Defendant started its practice of holding these elementary school graduations in the Turner Chapel in May 2012. (*Id.* ¶82; ¶¶95-96; ¶145). In addition, Tigerville Elementary has used the Turner Chapel for its holiday concert and intends to continue using the Turner Chapel for that purpose. (*Id.* ¶146).

NGU is a sectarian Christian institution affiliated with the Southern Baptist Convention. (*Id.* ¶83). NGU's slogan is "Christ Makes the Difference." (*Id.* ¶86). The Turner Chapel is a place where, according to NGU, "[m]any students have received Jesus Christ as their personal Lord and Savior," "evangelism" is a focus, and "students are exposed to the truth of the gospel of Jesus Christ." (*Id.* ¶90). It is the site of "regular chapel services," has "eight stained glass windows" and a pipe organ. (*Id.* ¶89).

It is impossible to avoid the abundance of Christian iconography in and around the chapel. A Christian cross sits atop the Turner Chapel. (*Id.* ¶101). Children must pass beneath a cross to enter the sanctuary. (*Id.* ¶102). A Christian cross also sits atop the Hayes Ministry Center, which is visible from the Turner Chapel and from the highway approaching the campus. (*Id.* ¶103; ¶117; ¶¶124-26). A large Christian cross affixed to the Todd Prayer Chapel can also be seen en route to the Turner Chapel and standing outside the chapel. (*Id.* at ¶116). At the 2013 graduation,

there was a Christian cross on a podium near the center of the stage. (*Id.* ¶114). At the entranceways to the Turner Chapel lobby are several large doormats prominently featuring NGU's slogan, "Christ Makes The Difference" with a Christian cross in the center. (*Id.* ¶104).

Surrounding the entire interior of the chapel are eight large stained glass windows of overtly Christian scenes, each featuring Jesus Christ. The first on the left side (facing the stage) depicts the birth of Jesus, with Jesus in a manger and Mary and Joseph kneeling by him. Above Jesus is a floating cross. The second depicts Jesus preaching to followers. The third depicts Jesus helping Peter, as described in Matthew 14:22-33. The fourth shows Jesus talking to two children, likely a reference to Matthew 18:1-6. The fifth shows Jesus praying in the garden of Gethsemane. The sixth features Jesus crucified on a cross. The seventh depicts Jesus having supper with two disciples, likely in Luke 14:13-32. The eighth depicts the resurrection of Jesus. (*Id.* ¶¶105-113).

Each entranceway to NGU's campus is marked by large permanent signs affixed on stonewalls bearing NGU's logo and slogan "Christ Makes the Difference" with a Christian cross in the center. (*Id.* ¶¶117-122). Numerous signs depicting NGU's Christian logo and slogan line the road leading up to the chapel. (*Id.* ¶123). A large sign bearing NGU's Christian logo and slogan is affixed above the entrance to the Hayes Ministry Center, and on a brick wall near its lawn. (*Id.* ¶¶127-29). At the Turner Chapel parking lot is another permanent sign displaying the Christian slogan and logo, and a large brick wall that bears the words "North Greenville University Where Christ Makes the Difference." (*Id.* ¶¶130-31). A large permanent sign bearing NGU's logo and slogan is featured on the Hayes Christian Fine Art Center (adjacent to the chapel), (*id.* ¶132), and on the Averyt/Wood Learning Center, visible from the parking lot. (*Id.* ¶140). NGU's logo and slogan is also prominently featured in front of the Todd Dining Hall, across from the Turner Chapel, and on a nearby Bell Tower. (*Id.* ¶¶142-43).

In addition to the many Christian crosses and Christian signs, *supra*, students also confront several blatantly Christian monuments on their way to the Turner Chapel. A Biblical sculpture entitled "Gethsemane," which can be seen from the chapel, features Jesus praying, accompanied by a large plaque quoting Luke 22:42,44 (King James). (*Id.* ¶¶133-34). Between

the Turner Chapel and Averyt/Wood Learning Center is a sculpture ("Fishers of Men") of Jesus holding a casting net. (*Id.* ¶¶140-41). Near the front entrance of the campus is a sculpture (the "Divine Servant") of Jesus washing Peter's feet. (*Id.* ¶135). Near the Todd Prayer Chapel (visible from the parking lot) is a Christian sculpture featuring two bronze Bibles, each opened to pages with Biblical scripture in large font. (*Id.* ¶¶136-39).[5] When the Does attended the graduation, they had direct unwelcome contact with each of these monuments. (*Id.* ¶¶133-143).

The School District will continue holding MVES graduations and Tigerville Elementary concerts in the Turner Chapel and has made no plans for an alternative venue. (*Id.* ¶145). There are at least 100 schools within the School District. (*Id.* ¶149). With the exception of MVES, the School District's middle and elementary school end of year awards programs (graduations) are held at each individual school. (*Id.* ¶150). It is possible for the School District to hold MVES ceremonies in a venue that is free from religious iconography. (*Id.* ¶¶147-48). The ceremony could be held at BRMS, which has a gymnasium, and is a mere 3 miles from MVES. (*Id.* ¶151). BRMS holds its "8th Grade Awards" in its auditorium. (*Id.* ¶152). There are approximately 300 students in the eighth grade at BRMS, which is roughly double the size of the MVES fifth grade class. (*Id.* ¶¶153-57). MVES ceremonies can be held at BRHS, which has a gym and a stadium, and is a mere 5 miles away. (*Id.* ¶158). Greer High School also has a fully equipped gymnasium that seats 2,100 people. (*Id.* ¶159). Moreover, Defendant regularly holds high school graduations at the Bon Secours arena (the "BiLo" center), which is a non-sectarian venue. (*Id.* ¶160).

III. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT.

Plaintiffs are entitled to summary judgment in their favor because the material facts are undisputed and Plaintiffs are entitled to judgment as a matter of law, *infra*. FED. R. CIV. P. 56(c). *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Nguyen v. CNA Corp.*, 44 F.3d 234, 236-37 (4th Cir. 1995). Summary judgment does not require an absolute absence of any factual

[5] The sculpture includes passages such as: "Go ye therefore and teach all nations, baptizing them in the name of the Father, and of the Son, and of the Holy Ghost: Teaching them to observe all things I have commanded you." "Lo, I am with you always, even unto the end of the world. Jesus Christ Matthew 28:19:20." (*Id.* ¶139).

dispute. *See Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247-48 (1986). Whether a fact is material depends on the relevant substantive law, and "[f]actual disputes that are irrelevant or unnecessary will not be counted." *Id.* Once the moving party demonstrates that there is no genuine issue of material fact, the nonmoving party must "go beyond the pleadings and by her own affidavits, . . . designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex*, 477 U.S. at 324 (quoting FED. R. CIV. P. 56(e)). Summary judgment must be granted if the nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case." *Id* at 322. In this case, all material facts are undisputed. (*See generally* PSUF). And as shown below, Plaintiffs are entitled to judgment as a matter of law.

IV. ESTABLISHMENT CLAUSE OVERVIEW

The Establishment Clause "create[s] a complete and permanent separation of the spheres of religious activity and civil authority." *Everson v. Bd. of Ed*, 330 U.S. 1, 31-32 (1947). 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." *McCollum v. Bd. of Educ*., 333 U.S. 203, 231 (1948). With these principles in mind, the Supreme Court has ruled that student-initiated prayers at school-sponsored events are unconstitutional and that prayers at public school graduations, and even purely voluntary football games, unconstitutionally coerce students to participate in religious activity. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000); *Lee v. Weisman*, 505 U.S. 577, 590-92 (1992). *See also Turner v. City Council*, 534 F.3d 352, 355 (4th Cir. 2008) ("*Lee* established that government cannot compel students to participate in a religious exercise as part of a school program.").

Indeed, *Lee* and *Santa Fe* are "merely the most recent in a long line of cases carving out of the Establishment Clause what essentially amounts to a per se rule prohibiting public-school-related or -initiated religious expression or indoctrination." *Doe v. Duncanville Indep. Sch. Dist*., 994 F.2d 160, 165 (5th Cir. 1993) (*Duncanville I*).

To comply with the Establishment Clause, a governmental practice must pass the *Lemon* test, 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. *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 610, 592 (1989).[6] Government action "violates the Establishment Clause if it fails to satisfy any of these prongs." *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987). Although "coercion is not necessary to prove an Establishment Clause violation," its presence "is an obvious indication that the government is endorsing or promoting religion." *Lee*, 505 U.S. at 604 (Blackmun, J., concurring). In *Lee*, the Court formulated the "coercion test" and held that a school's inclusion of nonsectarian prayer in graduation ceremonies failed the test. *Id.* at 587. *See Mellen v. Bunting*, 327 F.3d 355, 367, 370-72 (4th Cir. 2003) (applying *Lemon* and coercion test and concluding that prayers failed both). As shown below, both graduation policies, standing alone and doubly so when combined, violate the Establishment Clause under both tests.

V. DEFENDANT'S PRAYER POLICY VIOLATES THE ESTABLISHMENT CLAUSE.

A. Public school graduation prayers violate the Establishment Clause.

The School District's Prayer Policy (in both its pre- and post-litigation form) violates the Establishment Clause pursuant to *Lemon* and the coercion test, as informed by decades of well-settled Establishment Clause cases. *See, e.g.*, *Santa Fe*, 530 U.S. at 303 (policy permitting student-led prayers preceding public school football games unconstitutional); *Lee*, 505 U.S. at 579 (nonsectarian prayer at graduation unconstitutional). There is a long line of Supreme Court cases "of considerable parentage that prohibits prayer in the school classroom or environs." *Duncanville I*, 994 F.2d at 164.[7] The courts "have clearly ruled that" including prayer in a school-sponsored event is unconstitutional regardless of whether it is "led by students or teachers." *Herdahl v. Pontotoc Cnty. Sch. Dist.*, 933 F. Supp. 582, 591 (N.D. Miss. 1996) (citations omitted). *See Allegheny*, 492 U.S. at 590 n.40 ("state-sponsored prayer in public schools" is "unconstitutional"). *See also Holloman v. Harland*, 370 F.3d 1252, 1285 (11th Cir. 2004); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 407 (5th Cir 1995) (*Duncanville II*)

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

[7] *See Wallace v. Jaffree*, 472 U.S. 38, 48 (1985); *Sch. Dist. Abington v. Schempp*, 374 U.S. 203, 205 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962); *Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982).

(prayers at public school basketball games unconstitutional); *Jager v. Douglas Cnty. Sch. Dist*., 862 F.2d 824, 830 (11th Cir. 1989) (prayers at football games unconstitutional).

As a result of this well-settled jurisprudence, "a constitutional violation inherently occurs when, in a secondary school graduation setting, a prayer is offered, regardless of who makes the decision that the prayer will be given and who authorizes the actual wording of the remarks." *Gearon v. Loudoun Cnty. Sch. Bd*., 844 F. Supp. 1097, 1099 (E.D. Va. 1993). The Supreme Court recently reiterated that "[o]ur Government is prohibited from prescribing prayers to be recited in our public institutions[.]" *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1822 (2014). This is especially so "in the context of a graduation[.]" *Id.* at 1827 (citing *Lee*). In such a setting, the Court reaffirmed, "a religious invocation [i]s coercive as to an objecting student." *Id.* at 1827.

The prayers at issue here are particularly troubling because they are offered at graduations for elementary students. The "Establishment Clause plainly forbids public schools from sponsoring an official prayer for young children." *Mellen*, 327 F.3d at 376. The Court emphasized in *Lee* that there are "heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." 505 U.S. at 592.

Since *Lee*, federal circuit courts have been nearly unanimous in concluding that prayers delivered at primary and secondary public school graduations violate the Establishment Clause, *even* when they are student-initiated and student-led. *See Doe v. Santa Fe Indep. Sch. Dist*., 168 F.3d 806, 816 (5th Cir. 1999), *aff'd*, 530 U.S. 290 (2000); *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979, 983 (9th Cir. 2003) (student-delivered religious speech at graduation unconstitutional); *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1104 (9th Cir. 2000); *ACLU v. Black Horse Pike Regional Bd. of Educ*., 84 F.3d 1471, 1488 (3d Cir. 1996); *Harris v. Joint Sch. Dist. No. 241*, 41 F.3d 447, 454 (9th Cir. 1994), *judgment vacated on other grounds*, 515 U.S. 1154 (1995), 62 F.3d 1233 (9th Cir. 1995).[8]

[8] *See also Nurre v. Whitehead*, 580 F.3d 1087, 1098 (9th Cir. 2009); *Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1231 (10th Cir. 2009); *Warnock v. Archer*, 443 F.3d 954 (8th Cir. 2006); *Carlino v. Gloucester City High Sch.*, 57 F. Supp. 2d 1 (D.N.J. 1999), *aff'd* 44 Fed. Appx. 599 (3rd Cir. 2002).

Federal district courts, including those within the Fourth Circuit, as well as state courts, have been similarly unanimous in holding that prayers at public school graduations are unconstitutional. *See Workman v. Greenwood Cmty. Sch. Corp*., 2010 U.S. Dist. LEXIS 42813, *27 (S.D. Ind. 2010) (school's practice "permitting a student-led prayer at [the graduation] represents a clear violation of the Establishment Clause"); *Doe v. Gossage*, 2006 U.S. Dist. LEXIS 34613, *19-20 (W.D. Ky. 2006) (same); *Ashby v. Isle of Wight Cnty. Sch. Bd.*, 354 F. Supp. 2d 616, 629-30 (E.D. Va. 2004) (prohibiting religious song at graduation prevented Establishment Clause violation); *Deveney v. Bd. of Educ. of Cnty. of Kanawha*, 231 F. Supp. 2d 483, 485-88 (S.D. W.VA. 2002) (student-led prayer at graduation unconstitutional); *Skarin v. Woodbine Cmty. Sch.,* 204 F. Supp. 2d 1195, 1198 (S.D. Iowa 2002) (Lord's Prayer at graduation unconstitutional); *Appenheimer v. Sch. Bd.*, 2001 WL 1885834, *6-9 (C.D. Ill. 2001) (student-led prayers at graduation unconstitutional); *Gearon*, 844 F. Supp. at 1099 (same); *Lundberg v. W. Monona Cmty. Sch. Dist*., 731 F. Supp. 331, 333, 345-46 (N.D. Iowa 1989); *Graham v. Central Cmty. Sch. Dist.*, 608 F. Supp. 531 (S.D. Iowa 1985); *Committee for Voluntary Prayer v. Wimberly*, 704 A.2d 1199 (D.C. 1997); *Sands v. Morongo Unified Sch. Dist*., 53 Cal. 3d 863 (1991); *Bennett v. Livermore Unified Sch. Dist.*, 193 Cal. App. 3d 1012 (1st Dist. 1987). Courts have also ruled that prayers in public school classrooms,[9] assemblies,[10] and athletic events[11] violate the Establishment Clause.

Given the clarity of the jurisprudence, the School District's longstanding practice of regularly including prayers in its formal school-sponsored events, for elementary students no less,

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[9] *See Doe v. Sch. Bd*., 274 F.3d 289, 294 (5th Cir. 2001); *Karen B.*, 653 F.2d at 902; *Meltzer v. Bd. of Pub. Instruction,* 548 F.2d 559, 574 (5th Cir. 1977); *Mangold v. Albert Gallatin Area Sch. Dist.*, 438 F.2d 1194, 1195-96 (3rd Cir. 1971); *De Spain v. De Kalb Cnty. Comm. Sch. Dist*., 384 F.2d 836 (7th Cir. 1967); *Doe v. Wilson Cnty. Sch.*, 564 F. Supp. 2d 766 (M.D. Tenn. 2008); *Ahlquist v. City of Cranston*, 840 F. Supp. 2d 507 (D. R.I. 2012) (prayer mural).

[10] *See Collins v. Chandler Unified Sch. Dist*., 644 F.2d 759, 760-63 (9th Cir. 1981); *S.D. v. St. Johns County Sch. Dist.,* 632 F. Supp. 2d 1085, 1100 (M.D. Fla. 2009); *Golden v. Rossford Exempted Vill. Sch. Dist*., 445 F. Supp. 2d 820, 823-25 (N.D. Ohio 2006).

[11] *See Santa Fe*, 530 U.S. at 303; *Duncanville II,* 70 F.3d at 407; *Duncanville I,* 994 F.2d 160; *Borden v. Sch. Dist.*, 523 F.3d 153 (3rd Cir. 2008); *Jager*, 862 F.2d at 831; *Doe v. Aldine Indep. Sch. Dist.*, 563 F. Supp. 883, 866-88 (S.D. Tex. 1982).

is disturbing. The School District does not deny, nor could it, that its prayer practice in place since 1951 until the commencement of this suit is unconstitutional. (PSUF ¶169-174). Yet it claimed after litigation commenced that it changed its policy to "eliminate" all school "endorsed" prayers from future events. But it has done no such thing. All the School District has done is solidify its policy of authorizing prayers at graduations. It unequivocally stated: "With regard to a student delivering a prayer or providing a religious message during a school-sponsored event, the District will not prohibit this practice." (*Id.* ¶173). The School District will, and already has, continued to permit prayers at School District graduations. (*Id.* ¶¶172-73). As discussed in more detail below (sections B and E), this "new" policy remains constitutionally deficient and is effectively the same as the original prayer policy.

B. Student-led, student-initiated, prayers at public school graduations are government speech prohibited by the Establishment Clause.

Defendant's current district-wide prayer practice remains unconstitutional, entitling Plaintiffs to summary judgment on their claims for declaratory and injunctive relief. Prayers delivered at public school graduations are government speech, regardless of whether they are student-led and student-initiated, and are therefore constrained by the Establishment Clause rather than protected by the Free Speech Clause. *See Santa Fe*, 530 U.S. at 302-03 (student-initiated prayers were government speech); *Child Evangelism Fellowship v. Montgomery Cnty. Pub. Schs*, 373 F.3d 589, 598 n.5 (4th Cir. 2004) (noting that the "prayer cases" including *Santa Fe*, *Lee*, and *Mellen*, "did not involve equal access; rather, government officials there granted an inherently religious activity (prayer) sole access to student audiences.").

Virtually *every* federal circuit court that has passed on the issue has concluded that prayers delivered at public school graduations are government speech and that graduations are *not* public forums for private free speech. *See Corder*, 566 F.3d at 1229-31 (graduation is "clearly a school-sponsored event" and student's religious speech was "school-sponsored" even though there were "fifteen valedictory speakers"); *Cole*, 228 F.3d at 1102 (a student's "invocation would not have been private speech," and school's "refusal to allow [the student] to

deliver a sectarian invocation" was "necessary to avoid an Establishment Clause violation"); *Santa Fe*, 168 F.3d at 818-22 (holding "as a matter of law [the school] has not created a limited public forum" at its graduations); *Black Horse*, 84 F.3d at 1477-78 (school's policy permitting students to vote to include prayer in graduation did not create limited public forum); *Harris*, 41 F.3d at 456-57 (same); *Brody v. Spang*, 957 F.2d 1108, 1119-20, 1117 (3d Cir. 1992) ("[g]raduation ceremonies have never served as forums" for private speech).

Federal district courts, including those within the Fourth Circuit, have similarly rejected the notion that graduations are fora for private speech. *See Workman*, 2010 U.S. Dist. LEXIS 42813 at *22-23 (rejecting contention that "the prayer that will be offered at [school's] commencement ceremony is not government speech"); *Ashby*, 354 F. Supp. 2d at 629; *Gossage*, 2006 U.S. Dist. LEXIS 34613 at *10-11; *Deveney*, 231 F. Supp. 2d at 487-88; *Skarin*, 204 F. Supp. 2d at 1197; *Appenheimer*, 2001 WL 1885834 at *6-9; *Gearon*, 844 F. Supp. at 1099-100; *Lundberg*, 731 F. Supp. at 337. Student-delivered prayers at other school events such as awards ceremonies, *A.M. v. Taconic Hills Cent. Sch. Dist.*, 510 Fed. Appx. 3, 7 (2d Cir. 2013), football games, *Santa Fe*, 530 U.S. at 303, and school assemblies,[12] are deemed governmental speech as well. Therefore, Defendant cannot "evade the requirements of the Establishment Clause by running for the protective cover of a designated public forum." *Santa Fe*, 168 F.3d at 818-20.[13]

The Supreme Court and lower court "cases support no meaningful distinction between school authorities actually organizing the religious activity and officials merely 'permitting' students to direct the exercises." *Collins*, 644 F.2d at 760-62. *See, e.g.*, *Santa Fe*, 530 U.S. at 301 ("permitting student-led, student-initiated prayer at football games violates the Establishment Clause."); *Lee*, 505 U.S. at 579; *Karen B.*, 653 F.2d at 900-01 (statute "permitting student and teacher prayers in the public schools violate[s] the First Amendment."); *Santa Fe*, 168 F.3d at 816-17; *Cole*, 228 F.3d at 1104 (merely "allowing the students to engage in sectarian prayer"

[12] *Collins*, 644 F.2d at 762-63; *St. Johns*, 632 F. Supp. 2d at 1094-95; *Golden*, 445 F. Supp. 2d at 825.
[13] *See also Cole*, 228 F.3d at 1101 (even assuming the "graduation ceremony was a public or limited public forum, the District's refusal to allow the students to deliver a sectarian speech or prayer" was "necessary to avoid violating the Establishment Clause"); *Herdahl*, 933 F. Supp. at 589 (same).

amounts to "government sponsorship"); *Jager*, 862 F.2d 824 (policy that "permits religious invocations" at football games unconstitutional); *Black Horse*, 84 F.3d at 1482-88; *Collins*, 644 F.2d at 760; *Gossage*, 2006 U.S. Dist. LEXIS 34613, at *19-20; *Deveney*, 231 F. Supp. 2d at 485-88; *Gearon*, 844 F. Supp. at 1099. In *Santa Fe*, the Fifth Circuit held that a "prayer policy that . . . permits sectarian, proselytizing benedictions and invocations cannot pass constitutional muster." 168 F.3d at 809. The defendant argued that the policy was constitutional because it "does not require prayer." *Id.* at 818 n.10. The court rejected this argument, declaring:

> Prayers that a school "merely" permits will still be delivered to a government-organized audience . . . [S]uch "permission" undoubtedly conveys a message not only that the government endorses religion, but that it endorses a particular form of religion.

Id. at 817-18. The court further found that even if prayers were "spontaneously initiated[,]" officials "are present and have the authority to stop the prayers." *Id*. *See also Lassonde*, 320 F.3d at 984 ("if the school had not censored the [religious] speech, the result would have been a violation of the Establishment Clause."); *Black Horse*, 84 F.3d at 1479.[14]

A court in the Fourth Circuit properly ruled that a "constitutional violation inherently occurs when," in a graduation setting, "a prayer is offered, regardless of who makes the decision that the prayer will be given." *Gearon*, 844 F. Supp. at 1099. In *Gearon*, the school argued that the "remarks delivered were student-initiated, student-written and student-delivered," and therefore constitutional. *Id.* at 1098. The court disagreed and permanently enjoined the school from permitting prayers at future graduations, concluding that "[s]tate sponsorship, *i.e.*, involvement in, a graduation ceremony is inherent." *Id.* Because Defendant's policy continues to authorize prayer at public school graduations, it is unconstitutional (see also Section E, *infra*).

C. The Prayer Policy is unconstitutional pursuant to the *Lemon* test.

Defendant's Prayer Policy so patently violates the Establishment Clause under binding Supreme Court cases, *supra*, that no further analysis is even necessary. Nevertheless, Plaintiffs

[14] *Cf. Galloway*, 134 S. Ct. at 1824 (prayers by private citizens are subject to Establishment Clause); *Joyner v. Forsyth Cnty.*, 653 F.3d 341, 350-51 (4th Cir. 2011) (same); *Turner*, 534 F.3d at 353-54; *Simpson v. Chesterfield Cnty. Bd. of Supervisors*, 404 F.3d 276, 286 (4th Cir. 2005).

demonstrate below that the Prayer Policy fails each prong of the *Lemon* test.

1. The Prayer Policy fails the secular purpose prong of *Lemon*

Where, as here, a school sponsors an "intrinsically religious practice" such as prayer, it "cannot meet the secular purpose prong." *Jager*, 862 F.2d at 830 (permitting student-led prayers at football games lacked secular purpose). *See Santa Fe*, 530 U.S. at 309 ("infer[ring] that the specific purpose of the policy" permitting student-led prayers was religious). The secular purpose required by *Lemon* must be the "pre-eminent" and "primary" force driving the action, and "has to be genuine, not a sham[.]" *McCreary Cnty. v. ACLU*, 545 U.S. 844, 864 (2005).

Because "prayer is 'a primary religious activity in itself,'" a school's "intent to facilitate or encourage prayer in a public school is per se an unconstitutional intent to further a religious goal." *Holloman*, 370 F.3d at 1285. *See also Jaffree v. Wallace*, 705 F.2d 1526, 1534-35 (11th Cir. 1983), *aff'd*, 472 U.S. 38 (1985) (same); *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 v. Bradshaw*, 630 F.2d 1018, 1020-21 (4th Cir. 1980) (prayer on state map failed purpose prong).

Applying this rationale, courts have consistently held that permitting prayers to be delivered at public school graduations by definition furthers a religious purpose, thus failing *Lemon*. *See Santa Fe*, 530 U.S. at 294; *Santa Fe*, 168 F.3d at 816-17; *Black Horse*, 84 F.3d at 1484-85; *Harris*, 41 F.3d at 458; *Gossage*, 2006 U.S. Dist. LEXIS 34613 at *19-20; *Skarin*, 204 F. Supp. 2d at 1198; *Appenheimer*, 2001 WL 1885834 at *10 (same, and adding that "allowing the students to decide whether to include prayer does not cure the problem"); *Gearon*, 844 F. Supp. at 1102; *Lundberg*, 731 F. Supp. at 342; *Graham*, 608 F. Supp. at 535; *Wimberley*, 704 A.2d at 1203; *Bennett*, 193 Cal. App. 3d at 1020. As such, the Prayer Policy, which permits Christian prayers both in its pre-litigation and litigation-inspired form, lacks a secular purpose.

2. The Prayer Policy endorses and advances religion and Christianity.

Prayers delivered at Defendant's graduations fail the effect prong of *Lemon* because they advance and endorse religion and Christianity specifically. A prayer, "because it is religious, . . .

advance[s] religion." *Hall*, 630 F.2d at 1021. Indeed, there is no question that "facilitating any prayer clearly fosters and endorses religion over nonreligion." *Holloman*, 370 F.3d at 1288. Whenever a prayer "occurs at a school-sponsored event . . . the conclusion is inescapable that the religious invocation conveys a message that the school endorses" it. *Jager*, 862 F.2d at 831-32.

It is therefore not surprising that virtually every case involving graduation prayers held that such prayers unconstitutionally advance or endorse religion, even if student-led and student-initiated. *See Cole*, 228 F.3d at 1103-04; *Santa Fe*, 168 F.3d at 817; *Black Horse*, 84 F.3d at 1486; *Harris*, 41 F.3d at 458; *Gossage*, 2006 U.S. Dist. LEXIS 34613 at *19-20; *Deveney*, 231 F. Supp. 2d at 487; *Skarin*, 204 F. Supp. 2d at 1198; *Appenheimer*, 2001 WL 1885834 at *6; *Gearon*, 844 F. Supp. at 1102; *Lundberg*, 731 F. Supp. at 345; *Graham*, 608 F. Supp. at 536; *Wimberly*, 704 A.2d at 1203; *Sands*, 53 Cal. 3d at 876.

Prayers delivered at MVES graduations, as in the above cases, have "the primary effect of promoting religion, in that [they] send[] the unequivocal message" that the School District "endorses the religious expressions embodied in the prayer[s]." *Mellen*, 327 F.3d at 372. The policy challenged in *Santa Fe* allowed the senior class to elect students to deliver a "brief invocation and/or message" at football games. 530 U.S. at 296-97. Despite the fact that any message would be student-led and student-initiated, the Court found that the policy "involves both perceived and actual endorsement of religion." *Id.* at 305, 310. "A religious service under governmental auspices necessarily conveys the message of approval or endorsement. Prevailing doctrine condemns such endorsement, even when no private party is taxed or coerced in any way." *Doe v. Crestwood, IL*, 917 F.2d 1476, 1478 (7th Cir. 1990).

MVES prayers, like those in *Lee* and *Santa Fe*, are "delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function." 530 U.S. at 307. Students are under the supervision and direction of school officials. (PSUF ¶39-41; ¶98). Moreover, unlike the football games in *Santa Fe*, MVES graduations occur during the regular school day and the students are transported to and from the Turner Chapel in school busses. (*Id.* ¶12; ¶87; ¶¶99-100). In this context, "an objective observer" would inevitably "perceive [the

prayers] as a state endorsement of prayer." *Id*. at 308.

That the prayers may be student-initiated does not change this conclusion. *See id.* at 294, 308, and analysis *supra*. It is sufficient that the School District *permits* prayers to be delivered at its graduations, particularly for elementary students. *See, e.g*., *Cole*, 228 F.3d at 1104; *Santa Fe*, 168 F.3d at 817; *Black Horse*, 84 F.3d at 1482-86; *Harris*, 41 F.3d at 454-55; *Workman*, 2010 U.S. Dist. LEXIS 42813 at *27 ("permitting a student-led prayer at [the graduation] represents a clear violation of the Establishment Clause"); *Gearon*, 844 F. Supp. at 1102 (same). In *Holloman*, the Eleventh Circuit emphasized that "[s]chool personnel may not facilitate prayer simply because a student requests or leads it." 370 F.3d at 1287. Rather, "it is the act of turning over the 'machinery of the State' to the students . . . to broadcast their religion which violates the Constitution." *Herdahl*, 933 F. Supp. at 589.

The Third and Ninth Circuits held, even prior to *Santa Fe*, that school districts could not delegate authority to students to decide whether or not to have a prayer, as this is a decision the school itself could not make. In *Black Horse*, the school's policy even required that "printed programs for the graduation include a disclaimer." 84 F.3d at 1475. Nevertheless, the Third Circuit held that the policy unconstitutionally endorsed religion because it *permitted* prayers to be delivered. The court was not inclined to "alter [its] analysis merely because [the policy] does not expressly allow proselytization." *Id.* at 1479. In *Harris*, the Ninth Circuit held that a similar policy violated the Establishment Clause even though any prayer would have to be initiated, selected, and delivered by students, explaining: "When the senior class is given plenary power over a state-sponsored, state-controlled event such as high school graduation, it is just as constrained by the Constitution as the state would be." 41 F.3d 455.

Of course, prayers delivered at MVES graduations and other School District graduations have not even been student-initiated. (PSUF ¶¶22-37). The prayer-givers are selected by school officials and the prayers have been reviewed and approved of by school officials in advance. As the Fourth Circuit recognized, "[w]hen government officially approves a prayer, it unconstitutionally favors one religious view over others." *Hall*, 630 F.2d at 1023 (citations

omitted). And unlike the student-election in *Santa Fe*, MVES school officials select the student speakers, even under the new policy. (*Id.*). Indeed, in many of the School District's schools, the prayer-givers are selected by the school. (*Id.* ¶47; ¶¶51-52; ¶¶54-55; ¶¶57-58; ¶¶63-64; ¶67; ¶70; ¶74). For instance, East North Street Elementary included prayer in its 2012, 2013, *and* 2014 programs. (*Id.* ¶58). The student prayer-givers were chosen by the school "on the basis of grades and ability to speak publicly in front of a group." (*Id.*). Likewise, the 2014 BRHS ceremony included a prayer by the senior class vice president. The official program explicitly directed the audience to stand for the "closing remarks" which was a Christian prayer. (*Id.* ¶¶67-68). Because the degree of state involvement in the prayers in the case *sub judice* is considerably greater than that found unconstitutional in *Santa Fe*, the Prayer Policy clearly fails the *Lemon* test here.

Several additional factors make Defendant's policy even more egregious than the policies struck down in *Santa Fe*, *Lee* and their progeny. First, Defendant endorses *sectarian* prayers with references to "Jesus." Not a single MVES prayer has been non-Christian. (PSUF ¶20; ¶71). *See Lee*, 505 U.S. at 589 (noting that a nonsectarian prayer is less egregious than one which "makes explicit reference" to "Jesus Christ"); *Cole*, 228 F.3d at 1104 (a "sectarian invocation would have caused a more serious Establishment Clause violation than in *Santa Fe*"); *Santa Fe*, 168 F.3d at 809, 815. Nonsectarian prayers are of course unconstitutional too. *Lee*, 505 U.S. at 589-90; *Mellen*, 327 F.3d at 374 n.12; *Hall*, 630 F.2d at 1019-20.

Second, Defendant's prayers are delivered to young and impressionable elementary school children, thereby heightening the endorsement and coercion concerns. *See Lee*, 505 U.S. at 592, 595; *Mellen*, 327 F.3d at 371. *Lee* involved eighth graders and nearly every other case finding graduation prayers unconstitutional involved high school students.[15] Plaintiffs are not aware of a single case upholding graduation prayers in elementary schools. This should not be

[15] *Santa Fe*, 168 F.3d 806; *Lassonde*, 320 F.3d 979; *Cole*, 228 F.3d 1092; *Black Horse*, 84 F.3d 1471; *Harris*, 41 F.3d at 455; *Workman*, 2010 U.S. Dist. LEXIS 42813; *Gossage*, 2006 U.S. Dist. LEXIS 34613; *Ashby*, 354 F. Supp. 2d 616; *Deveney*, 231 F. Supp. 2d 483; *Skarin*, 204 F. Supp. 2d 1195; *Appenheimer*, 2001 WL 1885834; *Gearon*, 844 F. Supp. 1097; *Lundberg*, 731 F. Supp. 331; *Graham*, 608 F. Supp. 531; *Sands*, 53 Cal. 3d 863; *Bennett*, 193 Cal. App. 3d 1012. *Cf. Wimberly*, 704 A.2d 1199.

surprising. *See Peck v. Upshur Cnty. Bd. of Educ.*, 155 F.3d 274, 288 n* (4th Cir. 1998) (equal access policy allowing the limited display of religious and non-religious materials by private groups was unconstitutional "in the elementary schools" but not in the high schools); *Morgan v. Swanson*, 659 F.3d 359, 382 (5th Cir. 2011); *Walz v. Egg Harbor Twp. Bd. of Educ.*, 342 F.3d 271, 277-79 (3d Cir. 2003); *Bell v. Little Axe Indep. Sch. Dist.*, 766 F.2d 1391, 1404 (10th Cir. 1985) ("Elementary schoolchildren are vastly more impressionable than high school or university students and cannot be expected to discern nuances which indicate whether there is true neutrality toward religion on the part of a school administration").[16]

Finally, Defendant's prayers are delivered in a religious setting: a Christian Chapel on the campus of a Christian university, thus compounding the school's endorsement of Christianity. *A fortiori*, the Prayer Policy is unconstitutional.

3. The Prayer Policy causes excessive entanglement with religion.

The school's oversight, sponsorship, and control over the graduation prayers foster excessive entanglement with religion, prohibited by *Lemon's* third prong. The Fourth Circuit has repeatedly held that state endorsement of prayer "necessarily" results in unconstitutional entanglement with religion. *Mellen*, 327 F.3d at 375; *Constangy*, 947 F.2d at 1151-52 (when "a judge prays in court, there is necessarily an excessive entanglement of the court with religion."); *Hall*, 630 F.2d at 1021. Several courts, including those within the Fourth Circuit, have specifically held that the inclusion of prayer in graduation ceremonies fails the excessive entanglement prong. *See Deveney*, 231 F. Supp. 2d at 487; *Gearon*, 844 F. Supp. at 1102; *Skarin*, 204 F. Supp. 2d at 1198; *Sands*, 53 Cal. 3d at 879.[17] The Prayer Policy also creates "divisiveness

[16] That Defendant's prayers are directed to elementary students also makes this case distinguishable from the few cases upholding graduation prayers since *Lee*. *See, e.g.*, *Adler v. Duval County Sch. Bd.*, 250 F.3d 1330, 1331-32 (11th Cir. 2001); *Chaudhuri v. Tennessee*, 130 F.3d 232, 239 (6th Cir. 1997) (upholding *university's* moment of silence at graduations, noting "[w]e may safely assume that doctors of philosophy are less susceptible to religious indoctrination than children are."); *Tanford v. Brand*, 104 F.3d 982, 985-86 (7th Cir. 1997) (nonsectarian invocation at *university* graduation upheld as "'University students . . . are less impressionable than younger students'") (citation omitted).

[17] *See also Karen B.*, 653 F.2d at 902 (classroom); *Collins*, 644 F.2d at 762 (school assemblies); *Herdahl*, 933 F. Supp. at 597-98 (homeroom).

along religious lines," which is a form of entanglement prohibited by the Establishment Clause. *Constangy*, 947 F.2d at 1151-52. *See Hall*, 630 F.2d at 1021-22 ("political divisiveness" is "inherent in any form of officially composed prayer"). The "potential for divisiveness is of particular relevance" in a "school environment where . . . subtle coercive pressures exist." *Lee*, 505 U.S. at 588. Accordingly, the Prayer Policy fails the *Lemon* test in its entirety.

D. The Prayer Policy is unconstitutional pursuant to the Coercion Test.

The Supreme Court has made clear that "at a minimum, the [Establishment Clause] guarantees that government may not coerce anyone to support or participate in religion or its exercise." *Id.* at 587. Over fifty years ago, the Supreme Court ruled that "one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon . . . prayer[.]" *Engel*, 370 U.S. at 429. As such, in *Lee*, the Court held that a school's inclusion of a nonsectarian prayer in a graduation ceremony was unconstitutionally coercive even though the event was technically voluntary and students were not required to participate in the prayer. 505 U.S. at 586. A school's "supervision and control of a . . . graduation ceremony places public pressure, as well as peer pressure" on students, the Court observed. *Id.* at 593. Students opposed to the prayer are placed "in the dilemma of participating . . . or protesting." *Id.* The Court concluded that a school "may not, consistent with the Establishment Clause, place primary and secondary school children in this position." *Id.*

Notably, in *Santa Fe*, the Supreme Court held that even student-initiated, student-led prayers at football games, which were *completely voluntary*, violated the Establishment Clause under the *Lemon* and coercion tests. 530 U.S. at 310. The school district argued that the policy was "distinguishable from the graduation prayer in *Lee* because it does not coerce students." *Id.* at 310. The Court rejected this contention, observing that even "if we regard every high school student's decision to attend a home football game as purely voluntary, we are nevertheless persuaded that the delivery of a pregame prayer has the improper effect of coercing those

present." *Id*. at 311-12.[18]

Since *Lee*, many courts, including those in the Fourth Circuit, have properly held that student-led and even student-initiated prayers at graduations fail the coercion test. *See Lassonde*, 320 F.3d at 983; *Cole*, 228 F.3d at 1104; *Santa Fe*, 168 F.3d at 818; *Black Horse*, 84 F.3d at 1480; *Harris*, 41 F.3d at 457; *Workman*, 2010 U.S. Dist. LEXIS 42813 at *16-17; *Gossage*, 2006 U.S. Dist. LEXIS 34613 at *20-21; *Deveney*, 231 F. Supp. 2d at 485-88; *Gearon*, 844 F. Supp. at 1099; *Wimberly*, 704 A.2d at 1202-03.

As in *Lee*, the "prayer exercises in this case" are "improper because the State has in every practical sense compelled attendance and participation in an explicit religious exercise." 505 U.S. at 598. The prayers are "state-directed" in light of the "school district's supervision and control" of the event. *Lee*, 505 U.S. at 593. That they are "student-initiated" is irrelevant. *Santa Fe*, 530 U.S. at 301-02. And, as in *Santa Fe* and *Lee*, the prayers "oblige the participations of objectors." *Lee*, 505 U.S. at 593. A prayer at a graduation ceremony, for elementary students no less, is arguably far more coercive than prayer at football games. Unlike a football game, a "graduation ceremony [is] a school-sponsored function that all graduating [students] could be expected to attend." *Lassonde*, 320 F.3d at 985. *See also Collins*, 644 F.2d at 762 (students "must either listen to a prayer chosen by a select group of students or forego the opportunity to attend a major school function. It is difficult to conceive how this choice would not coerce a student"). In fact, many of the School District's schools expressly instruct the audience and graduates to participate in the prayers by requiring them to stand and by requiring the men to remove their caps, *supra.*

Ruling that a military institute's practice of delivering supper prayers to adult cadets failed the coercion test, the Fourth Circuit recognized that the "First Amendment prohibits [a school] from requiring religious objectors to alienate themselves from the [school] community in order to avoid a religious practice." *Mellen*, 327 F.3d at 372 n.9 (citing *Lee*). That is precisely

[18] *See also Engel*, 370 U.S. at 430; *Santa Fe*, 168 F.3d at 818 ("we are not required to determine that such public school prayer policies also run afoul of the Coercion Test."); *Carlino*, 57 F. Supp. 2d at 24 ("government endorsement of religion, in the absence of coerced participation, still violates the Establishment Clause.").

what the School District will continue to do in the absence of permanent injunctive relief.

E. The "new" Prayer Policy fails the *Lemon* Test and Coercion Test.

There is no question that the original Prayer Policy, whereby school officials select speakers to deliver prayers and review and approve the content of those prayers beforehand, is unconstitutional pursuant to clearly established law. *Santa Fe*, 530 U.S. at 315; *Lee*, 505 U.S. at 587 ("[a] school official, the principal, decided that an invocation and a benediction should be given; this is a choice attributable to the State"). But the "new" litigation-inspired prayer policy does nothing to remedy the challenged aspects of the original policy as it continues to allow prayers to be delivered at graduations. Indeed, it is "nothing more than a poorly disguised attempt to ensure that prayer will continue." *Gossage*, 2006 U.S. Dist. LEXIS 34613 at *19-20.

As discussed extensively above, the fact that the new policy does not *require* prayers to be delivered is constitutionally irrelevant. In *Santa Fe*, the Court rejected the school's argument that the "messages are private student speech" since they took place at school-related events. 530 U.S. at 302. Moreover, as here, the school district "failed to divorce itself from the religious content in the invocations." *Id.* at 302-03. It "has not succeeded in doing so, either by claiming that its policy is 'one of neutrality rather than endorsement'" or by "characterizing the individual student as the 'circuit-breaker.'" *Id*. The prayers are "delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function." *Id.* at 307. In this context, the audience will perceive the prayers as delivered "with the approval of the school." *Id.* at 308.

The Court must look beyond the face of Defendant's purported new policy to assess its practical effect. The Supreme Court and Fourth Circuit rulings make clear that "the mere passage of a resolution . . . cannot immunize the body from constitutional challenge where its actual practice fails to meet the standard set forth in its resolution." *Doe v. Pittsylvania Cnty.*, 842 F. Supp. 2d 906, 926 (W.D. Va. 2012). *See Santa Fe*, 530 U.S. at 315 ("The District, nevertheless, asks us to pretend that we do not recognize what every Santa Fe High School student understands clearly -- that this policy is about prayer . . . We refuse to turn a blind eye to the context in which this policy arose, and that context quells any doubt that this policy was

implemented with the purpose of endorsing school prayer."); *Joyner*, 653 F.3d at 348; 354 ("[o]ur cases have . . . approv[ed] legislative prayer *only* when it is nonsectarian in both policy *and practice*" because "citizens attending Board meetings *hear the prayers, not the policy*.") (emphasis added). Stated differently, even if the School District's policy is facially neutral, "[the Court] cannot turn a blind eye to the practical effects of the invocations." *Id.*

By way of illustration, in *Joyner* (an otherwise inapposite legislative prayer case), the board had a facially neutral written policy stating, *inter alia,* that the prayers were "not intended, and shall not be implemented or construed in any way, to affiliate the Board with, nor express the Board's preference for, any faith or religious denomination." *Id.* at 344. Looking to the actual *practice*, the Fourth Circuit ruled that "[d]espite that language, the prayers repeatedly continued to reference specific tenets of Christianity." *Id.* The court emphasized that it "is not enough to contend . . . that the policy was 'neutral and proactively inclusive,' . . . when the County was not in any way proactive in discouraging sectarian prayer in public settings." *Id.*

In the present case, the School District "has not shown that it does not and will not permit prayer at school functions." *Steele v. Van Buren Public Sch. Dist.*, 845 F.2d 1492, 1494-95 (8th Cir. 1988). In fact, it emphatically refuses to adopt a policy prohibiting prayers at future graduations. (PSUF ¶¶164-174). The new policy still permits the delivery of prayers at elementary school (and middle and high school) graduations. (*Id.*). But permitting the delivery of prayers, at an elementary school graduation in a Christian chapel no less, will inexorably be stamped with the "school's seal of approval" resulting in unconstitutional endorsement. *Santa Fe*, 530 U.S. at 308. *See also Santa Fe*, 168 F.3d at 816; *Black Horse*, 84 F.3d at 1488; *Harris*, 41 F.3d at 454; *Workman*, 2010 U.S. Dist. LEXIS 42813 at *27; *Gossage*, 2006 U.S. Dist. LEXIS 34613 at *19-20; *Deveney*, 231 F. Supp. 2d at 485-88; *Skarin*, 204 F. Supp. 2d at 1198; *Appenheimer*, 2001 WL 1885834, at *6-9; *Gearon*, 844 F. Supp. at 1098-99. As previously noted, the school cannot "simply delegate the decision as to a prayer component of that ceremony to the graduating class without offending the Establishment Clause." *Id.* (policy permitting "remarks [that are] student-initiated, student-written and student-delivered" held unconstitutional).

The new policy "permits a student to give a sectarian, proselytizing address." *Black Horse*, 84 F.3d at 1484-85. The "administration could not halt it without violating its own policy. If this were to occur, a proselytizing prayer (perhaps even degrading other religions) would be delivered in a forum controlled by the School [District]." *Id.* Putting "the ultimate choice to the students" does not eliminate school-sponsorship over the message. *Santa Fe*, 168 F.3d at 817.

For instance, in *Gossage*, after a student filed suit challenging a school's practice of including student-delivered prayers at graduation, the school changed its practice to allow student-elected speakers to give a brief, uncensored "opening and/or closing message." 2006 U.S. Dist. LEXIS 34613 at *2-3. The court found that such a policy "was facially unconstitutional in light of *Santa Fe*." *Id.* at *10-11, *13-14. The court observed: "Despite the hands-off approach as to the content of the remarks, the school officials still maintain certain control over the ceremony. Graduation is a school sponsored event[.]" *Id.* at *19-20. Thus, "[a]n objective listener would no doubt find any prayer given in this context to be stamped with the approval of the school." *Id.*

Additionally, in "light of the school's history of regular delivery of a student-led prayer" it is "reasonable to infer that the specific purpose of the [new] policy [is] to preserve a popular 'state-sponsored religious practice'" thus failing *Lemon's* purpose prong. *Santa Fe*, 530 U.S. at 308-09, 315 (citing *Lee*, 505 U.S. at 596). *See also Jager*, 862 F.2d at 829 ("[c]learly, the [post-litigation] equal access plan . . . was adopted with the actual purpose of endorsing and perpetuating religion" failing the purpose prong); *Gossage*, 2006 U.S. Dist. LEXIS 34613 at *19-20 (new policy calling for uncensored student "remarks" was "nothing more than a poorly disguised attempt to ensure that prayer will continue").

Finally, "[t]he new policy also does nothing to eliminate the fact that a minority of students are impermissibly coerced to participate in a religious exercise." *Id.* at *20. The Court held in *Santa Fe* that the "alleged 'circuit-breaker' mechanism of the dual elections and student speaker" did not "insulate the school from the coercive element of the final message." 530 U.S. at 310. *See also Black Horse*, 84 F.3d at 1487 ("the effect of the particular prayer that is offered in any given year will be to advance religion and coerce dissenting students.").

Not a single case supports Defendant's position that its policy is *required* by the Free Speech Clause. Rather, the courts, state and federal, have been unanimous in explicitly rejecting this very argument, see *supra* at Section-B. A "graduation ceremony is not a public forum designed to accommodate the free speech and free exercise of religious rights of the student[s]." *Skarin*, 204 F. Supp. 2d at 1197. *See also Black Horse*, 84 F.3d at 1487-88; *Corder*, 566 F.3d at 1231 (school did not violate Free Speech Clause by forcing student to apologize for religious speech because "her speech is school-sponsored"); *Lundberg*, 731 F. Supp. at 333-34. In *Graham*, (before *Lee*), the school argued that if an injunction barring the school from authorizing prayers were issued, "the rights of others to freely exercise their religion will be infringed." 608 F. Supp. at 537. The court unequivocally held: "That is not so. The First Amendment . . . does not give them a right to have government provide them public prayer at government functions and ceremonies, even if the majority would like it." *Id.*[19]

In *Collins*, students requested permission "to open [student-organized student-conducted] assemblies with prayer" and the principal merely approved. 644 F.2d at 760-62. The school contended, as Defendant here, that granting students "permission to open assemblies with prayer" is a "reasonable accommodation" and that the "denial of permission" "would violate the students' rights to free speech." *Id*. Relying on *Engel* and *Schempp*, the Ninth Circuit rejected such contentions outright, finding no distinction between "school authorities actually organizing the religious activity and officials merely 'permitting' students to direct the exercises." *Id.*

The School District's recent actions only solidify the fact that it strongly opposes any

[19] Even the lone case (*Adler*) that upheld a graduation policy on its face (an as-applied challenge was not before it) did not hold students had a *right* to deliver graduation prayers. Moreover, *Adler* is an outlier and conflicts with *Santa Fe*, 530 U.S. at 316 ("This policy . . . . impermissibly imposes upon the student body a majoritarian election on the issue of prayer"); *Gossage*, 2006 U.S. Dist. LEXIS 34613, at *20-21; *Workman*, 2010 U.S. Dist. LEXIS 42813, at *15. *See also Adler*, 250 F.3d at 1344 (Kravitch, J., Anderson, C.J., Carnes and Barkett, J.J, dissenting) ("the very mechanism that the majority of this Court claims removes any impermissible coercion . . . serves to silence students espousing minority views, and forces them to participate in a state-sponsored exercise"); *id.* at 1347-48 (Carnes) ("[I]n light of the additional guidance the *Santa Fe* decision has given us, I am persuaded that the conclusion I reached [when this case was last before us] before is wrong. . . . [A] school board may not delegate to the student body or some subgroup of it the power to do by majority vote what the school board itself may not do.").

efforts to prohibit graduation prayers, even insisting that doing so would be unconstitutional. (ECF Dkt. 17 p.18). Operating under this erroneous assumption, it is practically certain prayers will continue to be delivered at its graduations. *See Duncanville I*, 994 F.2d at 166-67; *Jager*, 862 F.2d at 833-34; *St. Johns*, 632 F. Supp. 2d at 1095-96. And in fact – they have. As noted above, even after Defendant claimed that it changed its prayer policy, several School District schools continued to include prayer in their 2014 graduation ceremonies, including an elementary school and BRHS, where Jill Doe will soon attend. (PSUF ¶55; ¶58; ¶¶67-68). The superintendent even presided over the 2014 BRHS graduation (*Id.* ¶67). No school official or student has ever been disciplined or reprimanded in any way by the Defendant due to prayers that have occurred as part of graduation ceremonies at any of Defendant's schools since 2012. (*Id.* ¶81). *See Joyner*, 653 F.3d at 344 (facially-neutral policy unconstitutional where "the County was not in any way proactive in discouraging sectarian prayer in public settings.").

In view of the above, it is plain that both Defendant's original Prayer Policy and its new one violate the Establishment Clause. As such, Plaintiffs are entitled to summary judgment.

VI. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR CHAPEL POLICY CLAIM.

Defendant's policy of holding elementary school graduations and similar school-sponsored events in a sectarian venue adorned with Christian iconography is manifestly unconstitutional. *See Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 851 (7th Cir. 2012) (en banc), *cert. denied*, 134 S. Ct. 2283 (2014) (school's practice of holding high school graduations in church violated Establishment Clause even though no prayers were delivered); *Does v. Enfield Pub. Schools*, 716 F. Supp. 2d 172 (D. Conn. 2010) (same); *Musgrove v. Sch. Bd.*, 608 F. Supp. 2d 1303, 1305 (M.D. Fla. 2005) (holding a graduation ceremony "in a religious institution . . . [is] contrary to Supreme Court precedent"); *Spacco v. Bridgewater Sch. Dep't*, 722 F. Supp. 834, 842 (D. Mass. 1989) (ruling that students could not attend classes in facilities owned by a church); *Lemke v. Black*, 376 F. Supp. 87, 89-90 (E.D. Wis. 1974) (enjoining school from holding graduation in church as some students could not attend without violating their

consciences). As discussed below, the Chapel Policy fails the coercion test and *Lemon*.

A. The Chapel Policy is unconstitutional pursuant to the *Lemon* test.

1. The Chapel Policy advances and endorses religion and Christianity.

The Chapel Policy had the effect of endorsing and affiliating the school with Christianity, thus violating *Lemon's* second prong. *See Elmbrook*, 687 F.3d at 853 (holding that the "sheer religiosity of the space" "created a likelihood that high school students and their younger siblings would perceive a link between church and state" thereby unconstitutionally "convey[ing] a message of endorsement"). 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*, 472 U.S. at 56 n.42 (quotation marks omitted). "An implicit symbolic benefit is enough." *Friedman v. Bd. of Cnty. Comm'rs*, 781 F.2d 777, 781 (10th Cir. 1985). *See Larkin v. Grendel's Den*, 459 U.S. 116, 125-26 (1982) ("The *mere appearance* of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred.") (emphasis added).

By way of example, in *Granzeier v. Middleton*, 955 F. Supp. 741, 746-47 (E.D. Ky. 1997), *aff'd*, 173 F.3d 568 (6th Cir. 1999), the court held that a government sign depicting a small (4-inch) "clip art" cross violated the Establishment Clause reasoning, "the sign could be, and was in fact, perceived by reasonably informed observers, to be a government endorsement of the Christian religion." *See also Stone v. Graham*, 449 U.S. 39, 41 (1980); *Washegesic v. Bloomingdale Pub. Sch.*, 33 F.3d 679 (6th Cir. 1994) (portrait of Jesus Christ in public school unconstitutional); *Gilfillan v. Philadelphia*, 637 F.2d 924 (3d Cir. 1980) (Pope's mass in a public park is an unconstitutional endorsement when the city pays for the construction of the altar).

In a case directly on point, the Seventh Circuit in *Elmbrook* ruled that a school district violated the Establishment Clause under the second prong of *Lemon* by holding high school graduations in a church. 687 F.3d at 856. The court stressed that the "risk that children in particular will perceive the state as endorsing a set of religious beliefs is present . . . when government summons students to an offsite location for important ceremonial events." *Id.* And

the court in *Enfield* similarly held that holding high school graduations in a church "constitutes an impermissible endorsement of religion because it conveys the message that certain religious views are embraced by Enfield Schools, and others are not." 716 F. Supp. 2d at 189.

Likewise, in *Spacco*, the court held that students assigned to a public school facility leased from the Roman Catholic Church were entitled to an injunction because of the religious character of the space. 722 F. Supp. at 842-43. As is relevant here, the *Spacco* court observed that, "in order to enter the building, the children and other individuals pass beneath a large cross[."] *Id.* The court concluded that the Establishment Clause was violated, even though by "[s]imply sitting in a classroom, a reasonable observer, including a reasonable child, would not receive any constitutionally impermissible message from his or her surroundings." *Id*. The Turner Chapel "creates an environment even more overwrought with religious symbols than the venue challenged in *Spacco*." *Enfield*, 716 F. Supp. 2d at 191.

Here, as in *Elfield* and *Elmbrook*, the "presence of religious iconography" in and around the Turner Chapel, which is located in the center of NGU, "is likely to prove particularly powerful, indicating to everyone that the religious message is favored and to nonadherents that they are outsiders." 687 F.3d at 853. A prominent Christian cross sits on top of the chapel (PSUF ¶101), and on nearby buildings (*Id.*¶103; ¶136). In order to enter the Turner Chapel, students must pass beneath the cross. (*Id.* ¶102). NGU's logo depicting the Christian cross and its slogan, "Christ Makes the Difference" (*Id.* ¶86), appears throughout the campus (*id.* ¶123; ¶¶127-132; ¶140; ¶¶142-43), including at the entranceways to the chapel (*id.* ¶104), and at the entranceways to the campus (*id.* ¶¶117-122). Surrounding the entire interior of the sanctuary are eight large stained glass windows of overtly Christian religious scenes, each featuring Jesus Christ. (*Id.* ¶¶105-113). Overtly Christian monuments also surround the chapel including: (i) a sculpture of Jesus Christ praying (*id.* ¶133-34); (ii) the "Divine Servant" featuring Jesus washing the feet of Peter; (*id.* ¶135); (iii) the "Fishers of Men" sculpture of Jesus holding a casting net; (*id.* ¶141); and (iv) the large sculpture of two bronze Bibles inscribed with Bible passages (*Id.* ¶¶137-39).

Three additional facts make the endorsement even stronger in this case: (1) prayers are

delivered at the MVES ceremony; (2) the children are in elementary school; and (3) the church is located within a pervasively Christian university, compounding the perception of Christian favoritism. The Establishment Clause prohibits "government affiliation with religious beliefs *or* institutions." *Allegheny*, 492 U.S. at 611 (emphasis added). In short, "[b]y choosing to hold graduations at [the chapel]," the School District "sends the message that it is closely linked" with the Turner Chapel *and* NGU "and its religious mission, that it favors the religious over the irreligious, and that it prefers Christians." *Enfield*, 716 F. Supp. 2d at 192.

2. The Chapel Policy lacks a secular purpose.

The Chapel Policy also fails the purpose prong of *Lemon* because of the inherently religious nature of the Turner Chapel and NGU. A religious purpose may be inferred where, as here, "the government action itself besp[eaks] the purpose . . . [because it is] patently religious." *McCreary*, 545 U.S. at 862-63. *See Stone*, 449 U.S. at 41 ("The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature.").

That the chapel may serve secondary beneficial state purposes is irrelevant. "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.*, 653 F.2d at 901. In *Hall*, the state contended that a prayer printed on the North Carolina 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.* "If a state could avoid the application of the first amendment in this manner, 'any religious activity of whatever nature could be justified[.]'" *Id.* (quoting *DeSpain v. DeKalb Cnty. Cmty. Sch. Dist. 428*, 384 F.2d 836 (7th Cir. 1967)).[20]

Gilfillan is also illustrative. There, the Third Circuit held that a city violated the

[20] *See also ACLU v. Rabun Cnty. Chamber of Commerce, Inc.*, 698 F.2d 1098, 1111 (11th Cir. 1983) ("even if the . . . purpose for constructing the cross was to promote tourism, this . . . would not have provided a sufficient basis for avoiding conflict with the Establishment Clause").

Establishment Clause under the purpose prong by funding a platform for the Pope's visit. 637 F.2d at 929. This was so, despite its findings that the service "generated an unprecedented outpouring of warmth and good will felt throughout the City," and "favorably enhanced the image of the City." *Id.* at 927. The court reasoned that "if some peripheral public relations benefit can constitute a sufficient secular purpose, then the purpose test is destroyed[.]" *Id.* at 930.

Because there are numerous viable secular venues, including the School District's stadiums and gyms, the facilities at BRHS and BRMS, and the Bi-Lo center (PSUF ¶¶147-161), Defendant's choice to use the Turner Chapel fails the purpose prong. The school in *Elmbrook* similarly claimed that it selected the church because its gyms were crowded and overheated. 687 F.3d at 845 n.2, 855. The school contended that "although other venues are available for graduation, none is as attractive as the Church, particularly for the price[.]" *Id.* at 848. Such venues included "the School gym and football fields," and a "County Expo Center." *Id.* at 845 n.3. The Seventh Circuit concluded, as is relevant here, that an "observer could reasonably conclude that the [School] District would only choose such a proselytizing environment aimed at spreading religious faith —despite . . . the existence of other suitable graduation sites—if the District approved of the Church's message." *Id.* at 854.

3. The Chapel Policy fosters excessive entanglement with religion.

Finally, the Chapel Policy fosters unconstitutional entanglement with religion by creating "political division along religious lines." *Hall*, 630 F.2d at 1021. *See Mellen*, 327 F.3d at 375; *Constangy*, 947 F.2d at 1151-52. The School District has made religion relevant to a student's position in the community by requiring students to either attend a religious venue or forgo the ceremony altogether. Unavoidably, this leads to religious divisiveness. *Lemke*, 376 F. Supp. at 90 (holding graduation in church fostered unconstitutional entanglement, noting: "It is only natural that, under these circumstances, the religious dispute will eventually become politicized.").

B. The Chapel Policy is unconstitutional pursuant to the Coercion Test.

It "is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise," *Lee*, 505 U.S. at 577,

and that no government entity "can force [or] influence a person to go to or to remain away from church." *Everson*, 330 U.S. at 15. This "principle is violated when the government directs students to attend a pervasively Christian, proselytizing environment." *Elmbrook*, 687 F.3d at 855. Defendant's policy of holding elementary graduations (and similar events) in a Christian church on the campus of a Baptist university is therefore obviously unconstitutional. *See id.* at 851; *Enfield*, 716 F. Supp. 2d 172; *Musgrove*, 608 F. Supp. 2d at 1305; *Spacco*, 722 F. Supp. at 842; *Lemke*, 376 F. Supp. at 89-90.

The Seventh Circuit in *Elmbrook* ruled that holding high school graduations in a nondenominational church failed the coercion test, observing that "*Lee* and *Santa Fe* cannot be meaningfully distinguished from the case at bar." 687 F.3d at 851. It "is cruel to force any individual to violate his conscience in order to participate in such an important event." *Lemke*, 376 F. Supp. at 89. In fact, some "believers see entering a church as a religious act in itself." *Enfield*, 716 F. Supp. 2d at 200. As in *Lee* and *Santa Fe*, MVES students "cannot be said to have a real choice to absent themselves from their own graduations. Effectively then," the School District has required students to attend a proselytizing Christian environment. *Id.* at 200.

Students must enter Turner Chapel, a place NGU states is where "[m]any students have received Jesus Christ," "evangelism" is a focus, and "students are exposed to the truth of the gospel of Jesus Christ." (PSUF ¶90). The chapel is surrounded with Christian iconography, including crosses and stained glass windows featuring Jesus Christ. To the extent "*Lee* and *Santa Fe* involved challenged action that required only passive observance," and the Chapel Policy "requires students to undertake the act of entering a place of religious worship[,]" it is even "more coercive." *Enfield*, 716 F. Supp. 2d at 201. Moreover, when "a student who holds minority (or no) religious beliefs observes classmates at a graduation event . . . meditating on its symbols (or posing for pictures in front of them)[,]" (*see* PSUF ¶115) the "'law of imitation operates,' . . . and may create subtle pressure to honor the day in a similar manner." *Elmbrook*, 687 F.3d at 855-56. The only way "to avoid the dynamic is to leave the ceremony. That is a choice, *Lee v. Weisman* teaches, the Establishment Clause does not force students to make." *Id.*

VII. PLAINTIFFS ARE ENTITLED TO PERMANENT INJUNCTIVE RELIEF.

Plaintiffs are entitled to permanent injunctive relief against Defendant's unconstitutional graduation policies. Once "a constitutional violation has been found, a district court has broad discretion to fashion an appropriate remedy." *Karcher v. Daggett*, 466 U.S. 910 (1984) (Stevens, J., concurring). A party seeking permanent injunction must demonstrate "'(1) that it has suffered an irreparable injury;" (2) that "remedies available at law, such as monetary damages, are inadequate;" (3) that, "considering the balance of hardships . . . a remedy in equity is warranted;" and (4) "that the public interest would not be disserved.'" *Christopher Phelps & Assocs., LLC v. Galloway*, 492 F.3d 532, 543 (4th Cir. 2007) (citation omitted).

Plaintiffs easily satisfy the first factor because a violation of First Amendment rights "unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). *See also Newsom v. Albemarle Cnty. Sch. Bd.*, 354 F. 3d 249, 261 (4th Cir. 2003). This includes violations of the Establishment Clause. *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 303 (D.C. Cir. 2006); *Duncanville II*, 994 F.2d at 166. Plaintiffs have and will continue to suffer said irreparable harm in the absence of injunctive relief because the Does have two students in the School District who are subject to the unconstitutional graduation policies.

Indeed, the unconstitutional policies irreparably harm Plaintiffs in an immediate and ongoing manner independent of the Does' attendance at future graduations. *Santa Fe*, 530 U.S. at 316 ("[t]he simple enactment of this policy, with the purpose and perception of school endorsement of student prayer, was a constitutional violation. We need not wait for the inevitable to confirm and magnify the constitutional injury."); *Workman*, 2010 U.S. Dist. LEXIS 42813, *5-6. The fact that the Does *will* attend future graduations including one at MVES only serves to "magnify" their irreparable injury. *Santa Fe*, 530 U.S. at 316. *See Lee*, 505 U.S. at 594. The second factor is also met because "monetary damages are inadequate to compensate for the loss of First Amendment freedoms." *Legend Night Club v. Miller*, 637 F.3d 291, 302 (4th Cir. 2011).

The balance of hardships decidedly weighs in Plaintiffs' favor. *Newsom*, 354 F. 3d at 261. Against "the certain and irreparable harm that will befall" Plaintiffs, Defendant would only be

required to alter their "graduation ceremon[ies] in [a] relatively minor way. The First Amendment injury . . . clearly outweighs the [School] District's minimal harm." *Workman*, 2010 U.S. Dist. LEXIS 42813 at *26. Defendant will suffer no *legally* cognizable harm at all. *See, e.g.*, *Gossage*, 2006 U.S. Dist. LEXIS 34613 at *21-22 ("The Defendant has no legally protected interest in promoting messages of religious content at a school-sponsored graduation ceremony"); *Deveney*, 231 F. Supp. 2d at 487 (same). In *Lundberg*, a case decided before *Lee*, the plaintiffs sought an injunction to require the school district to allow graduation prayers. The court denied them relief finding that such prayers would violate the Establishment Clause. 731 F. Supp. at 333. The court even assumed, "for the sake of this analysis, that defendant's ban on prayer has violated the plaintiffs' first amendment rights," *and still concluded* that "the weight comes down on the side of preventing a violation of the establishment of religion clause, as opposed to preventing the violation of these individual plaintiffs' free speech and free exercise of religion rights." *Id.* That the majority of students might want prayer "to be a part of the program is not a factor in the Constitutional analysis." *Skarin*, 204 F. Supp. 2d at 1198.

The final element is met because it "upholding constitutional rights serves the public interest." *Newsom*, 354 F. 3d at 261. It is obviously in the public interest to protect minority groups, religious or otherwise, from majority pressure and coercion. *Lee*, 505 U.S. at 590-92.

It also bears emphasis that the injunction sought is narrowly tailored to remedy the action necessitating the injunction. The School District has established a district-wide policy, practice and custom of authorizing prayers at its public school graduations. *See Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658 (1978). This policy and practice extends beyond MVES, *supra.* Many courts have issued or upheld injunctions against an entire school district to enjoin similar practices. For instance, in *Lee*, Weisman sought and obtained "a permanent injunction to prevent the inclusion of invocations and benedictions in the form of prayer in the promotion and graduation ceremonies of the Providence public schools," not just at Deborah's high school. 728

F. Supp. at 70, 75, *aff'd*, 505 U.S. at 599.[21] Accordingly, each of the permanent injunction factors weigh in favor of Plaintiffs, entitling them to a permanent injunction as a matter of law.

VIII. PLAINTIFFS ARE ENTITLED TO NOMINAL DAMAGES.

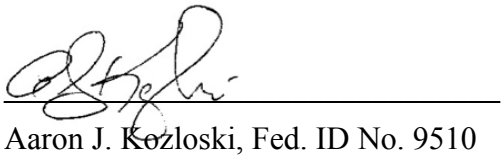
Plaintiffs are clearly entitled to summary judgment on their claims for nominal damages based on the policies in place at Jill Doe's graduation. Defendant does not even deny that the Prayer Policy from 1951 through the 2013 MVES graduation was unconstitutional, *supra.* Plaintiffs would be entitled to nominal damages even if Defendant enacted a new policy prohibiting graduation prayers because nominal damages, by definition, cannot be mooted. *See Rendelman v. Rouse*, 569 F.3d 182, 187 (4th Cir. 2009); *Mellen*, 327 F.3d at 364-65 (same). Once it is shown that a plaintiff's constitutional rights were violated, a court has *no discretion* to deny nominal damages. *Farrar v. Hobby*, 506 U.S. 103, 112 (1992); *Covenant Media of S.C., LLC v. City of N. Charleston*, 493 F.3d 421, 429 n.4 (4th Cir. 2007); *Henson v. Honor Committee of U. Va.*, 719 F.2d 69, 72 n.5 (4th Cir. 1983); *Pelphrey v. Cobb Cnty.*, 495 F. Supp. 2d 1311, 1319 (N.D. Ga. 2007) ("a court is obligated to award nominal damages"). Therefore, *at a minimum*, Plaintiffs are entitled to summary judgment on their damages claims.

IX. CONCLUSION

Plaintiffs have comprehensively established that Defendant's Graduation Policies are unconstitutional pursuant to decades of Establishment Clause cases. For the foregoing reasons, Plaintiffs respectfully request that the Court grant their Motion for Summary Judgment in its entirety.

Respectfully submitted,

February 2, 2015



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[21] *See also Sch. Dist. of Abington Twp. v. Schempp*, 177 F. Supp. 398, 408 (D. Pa. 1959) (enjoining entire school district even though plaintiffs only attended two schools), *aff'd*, 374 U.S. 203, 205-206 (1963); *McCollum*, 333 U.S. at 204 ("all public schools in Champaign School District."). *Black Horse*, 84 F.3d at 1476; *Gearon*, 844 F. Supp. at 1103 ("permanently enjoin[ing] [all schools] from permitting prayer in high school graduations"); *Graham*, 608 F. Supp. at 537.

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