

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:14-cv-02878-RBJ

AMERICAN HUMANIST ASSOCIATION, INC., et al,

*Plaintiffs,*

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1, et al,

*Defendants.*

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**PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF  
LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT**

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Pursuant to Fed. R. Civ. P. 56 and Local Rule 56.1, Plaintiffs, by and through undersigned counsel, hereby submit this Motion for Summary Judgment:

## **I. PLAINTIFFS' STATEMENT OF UNDISPUTED FACTS<sup>1</sup>**

Plaintiffs are non-Christian parents in the Douglas County School District (District) and are also municipal taxpayers and members of American Humanist Association (AHA).<sup>2</sup> They challenge the constitutionality of the District's policy, practice, and custom of advancing, endorsing, affiliating with, fundraising for, and sponsoring – symbolically and tangibly – Christian organizations and their evangelical efforts, and its practice and custom of faculty participating in religious student activity.

**CHRISTIAN MISSION TRIP.** In March 2014, Cougar Run Elementary and Highlands Ranch High School (HRHS) fundraised for, participated in, sponsored, endorsed, promoted, and partnered with, the HRHS Fellowship of Christian Athletes (FCA) Mission Trip to Guatemala through “Adventures in Missions™: Christian Mission Trips” (AIM),<sup>3</sup> an evangelical Christian organization that conducts trips to bring “the gospel of Jesus Christ to those who don't know him,” and “disciple other Christians.”<sup>4</sup> The FCA is a Christian organization with clubs in many schools.<sup>5</sup>

The HRHS FCA went on a Mission Trip to Guatemala March 24-30, 2014.<sup>6</sup> Fourteen students attended the trip, which was chaperoned by two HRHS teachers, Alex Malach and Bradley Odice.<sup>7</sup> The trip was religious and school-endorsed. A fundraising webpage included a large image of the HRHS logo and stated: “The Highlands Ranch High School chapter of FCA ... in conjunction with AIM (Adventures in Missions) are sending approximately 15-20 students to Gautemala [sic] over Spring Break, ... [O]ur group's primary goal is to share the love and hope of Jesus.”<sup>8</sup> “[T]he plan was to ... introduce [children] to the Bible” and “promote Christianity.” (Berry Dep. 89, 106-07).

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<sup>1</sup> To aid the Court in navigating through the abundant evidence reflecting the District's longstanding and widespread Establishment Clause and Equal Access Act infractions, Plaintiffs file herewith a timeline/supplemental statement of undisputed facts, pursuant to Judge R. Brooke Jackson, Practice Standards.

<sup>2</sup> (AHA Int. Nos.1 & 3)(Zoe Int. No. 3)(Roe Int. No. 3). Zoe's two children are in Cougar Run Elementary (“Cougar Run”). (Zoe Int. Nos. 6-8). Roe children attend Douglas County High School and Aspen View Academy. (Roe Int. Nos. 3-4, 6-8) (Jack Dep. 25-26). Doe children attend SkyView Academy. (Doe Int. Nos. 6-8).

<sup>3</sup> (Sch. Dist. Int. No. 6) (Sch. Dist. RFA Nos. 20 -23) (Goings Dep. 43, 57, 64; Ex. 14) (Gutierrez Dep. 8) (Malach Dep. 13-16, 66) (Fagen Dep. 10-11)(Odice Dep. 8-9, 40) (Zoe Int. Nos. 5-8) (SJ Ex. 2)

<sup>4</sup> (Compl. Exs. 50-51) (Goings Dep. 28-31, Ex. 5) (Malach Dep. 10-13) (Odice Dep. 22).

<sup>5</sup> (Compl. Ex. 54) (Bowman Dep. 49-50) (Fagen Dep. 88) (SJ Ex. 9-H).

<sup>6</sup> (Sch. Dist. Int. No. 6) (RFA Nos. 20 -23) (Goings Dep. 16, 30) (Odice Dep. 9) (Berry Dep. 20-21) (SJ Ex. 2-A)

<sup>7</sup> (Sch. Dist. Int. No. 6)( RFA Nos. 20-23) (Goings Int. No. 8) (Goings Dep. 38)(Malach Dep. 15-16)(Berry Dep.25,91).

<sup>8</sup> (Compl. Ex. 55) (Ans. ¶¶181-184) (Goings Dep. 41-44 & Ex. 7) (Malach Dep. 32) (Odice Dep. 30).

Ms. Malach, a Christian, testified that the mission of AIM is: “To share the love of Jesus and the Bible.” (Malach Dep. 12, 41). She admitted her purpose was “to share Jesus Christ with those who don't know him.” (*Id.* 18-19). Mr. Odice, also a Christian, admitted the purpose of the trip was to “bring ... faith to people in Guatemala.” (Odice Dep. 8, 12-13). In a letter seeking donations for the trip, Mr. Odice wrote: “[the trip] will allow me to continue to explore my own faith [and] enrich my teaching practice... please make checks payable to Highlands Ranch High School[.]” (SJ Ex. 2-B).

Ms. Malach and Mr. Odice led and participated in religious activities with the HRHS students on the trip.<sup>9</sup> Mr. Odice admitted he and Ms. Malach “participate[d] in prayer with students on the trip” at least “once or twice a day” and also “led” the students in worship and shared Bible verses (Odice Dep. 47-48). Ms. Malach admits she shared “the love of Jesus” by “sitting and reading our ... Bibles at a church with Guatemalan locals[.]” (Malach Dep. at 19). She also sang, “Jesus Loves Me, This, I Know” with “small kids at church.” (*Id.* at 63-64). Ms. Malach wrote a blog on the AIM website where she referred to herself as the “leader and temporary guardian of my students” and averred: “The heart of this journey is to share, celebrate, and honor Christ.”<sup>10</sup> Mr. Odice wrote a letter stating: “Our group (14 students and 2 adults) stayed in San Pedro ... Each morning and afternoon, we went to a church or public school...Our students prepared skits to tell stories from the Bible, we worshipped together, and also made salvation bracelets as a way to help them remember the story of Christ. ... I loved watching our students spread their faith.” (Odice Dep. 52-55, Exs.27-28).<sup>11</sup>

District Involvement and HRHS Fundraising. Principal Goings admits HRHS “was the intermediary” for the trip, and that “Cougar Run” was “involved” in “the fundraising.” (Goings Dep. 45, 57, 64). Mr. Goings testified that teachers were required to chaperone because of school policy: “obviously for any school trip, it's absolutely policy that they attend.” (*Id.* 38). Mr. Odice spoke to Mr. Goings “to get his approval as a chaperone,” and Mr. Goings approved. (Odice Dep. 30-32). “Ms. Malach and Mr. Odice were the adult leaders of the FCA students on the trip.”<sup>12</sup> They “were certainly the only adults in charge.” (Malach Dep. 14-15, 26). Ms. Malach admitted “the school district's e-

<sup>9</sup> (Odice Dep. 45-48, 56, & Ex. 27) (Malach Dep. 16, 61-64) (Goings Dep. Ex. 13) (Berry Dep. 53-54, & Ex.5).

<sup>10</sup> (Sch. Dist. RFA No. 22) (Goings Dep. 61 & Ex. 13) (Malach Dep. 10-11, 15-17).

<sup>11</sup> They also participated in “Ask The Lord.” (Odice Dep. 45-47, 56) (Malach Dep. 21, 61-65) (Goings Dep. Ex. 13)

<sup>12</sup> (Sch. Dist. RFA Nos. 20-23) (Sch. Dist. Int. No. 8) (SJ Ex. 2-A).

mails and Listservs were used to fundraise for this trip.” (*Id.* at 86-88). Ms. Malach directed students to submit trip documents to the school’s bookkeeper. (*Id.* 43-45, 81) (Berry Dep. 26-27 109-110).

Mr. Odice and Ms. Malach actively participated in the fundraising efforts for the Mission Trip,<sup>13</sup> and the FCA faculty advisors “advised” the students on the fundraising options. (Berry Dep. 92). All three fundraisers took place on campus. (*Id.* 103-104). Ms. Malach wrote: “I am in charge of both the babysitting night [fundraisers] and the trip to Guatemala as a whole[.]” (Goings Dep. Ex. 14) (Malach Dep. 69). The fundraising flyers, which Ms. Malach created, stated: “Email questions to Alexandra.Malach@dcsdk12.org All proceeds go towards HRHS's Fellowship of Christian Athlete’s service trip to Guatemala.” (Berry Dep. 35, 38-39, 98, Ex.3) (Goings Dep. 31-32). Mr. Odice emailed Cougar Run staff asking them to disseminate flyers for “a babysitting fundraiser through our FCA program,” for “a mission trip,” and elementary schools, including Cougar Run, Fox Creek, and Acres Green, put flyers in student folders and sent emails to “help the FCA program.”<sup>14</sup> The District’s written policy distinguishes school-sponsored trips from non-school trips and requires disclaimers for the latter. (Goings Dep. 52-60, & Ex.12). The teachers did not use any disclaimers for this trip. (*Id.*).

The District handled the funds for the Mission Trip; the money from the fundraisers went into the HRHS FCA “Fund 74 Account,” managed by the District.<sup>15</sup> The District’s vendor list shows two transactions with AIM totaling \$10,435.32, and separately reflects the plane tickets.<sup>16</sup>

Cougar Run Fundraisers. Cougar Run, an HRHS feeder school, “partnered” with FCA to organize school-wide fundraisers for the mission trip in connection with its “curriculum.”<sup>17</sup> Cougar Run asked parents and students to make checks payable to “Cougar Run Elementary.” (Gutierrez Dep. Ex. 20). Principal Gutierrez admits, “funds were solicited as well as donations ... for the mission trip” by Cougar Run. (*Id.* 11-12). Cougar Run fundraising efforts were teacher-initiated and teacher-led.<sup>18</sup> Teacher Micki Bengé “was the facilitator.” (*Id.* 9-10). On February 18, Ms. Bengé emailed Ms.

<sup>13</sup> (Sch. Dist. RFA No. 25)(Goings Dep. Exs. 6, 14, 29-36)(Malach Dep. 45-53, 56-47)(Odice Dep. 35-42)(Berry Dep. 30, 33-34, 37, 46, 101-102 & Exs. 2-4).

<sup>14</sup> (Berry Dep. 44-45) (Goings Dep. 37-38, & Ex. 6, 14) (Gutierrez Dep. 20-22) (Malach Dep. 47-50) (Odice Dep. 35-38).

<sup>15</sup> (Sch. Dist. Int. No. 12)(Goings Dep. 33-36,45-49, Exs. 8-11)(Malach Dep. 54-56)(Odice Dep. 35, 43-44)(Berry Dep. 28-29, 93, 98,103) (SJ Ex. 2-B).

<sup>16</sup> (Goings Dep. Ex. 11). The proceeds “did not go to plane tickets,” but “went to AIM.” (Malach Dep. 45, 54, 58).

<sup>17</sup> (Sch. Dist. Int. No. 13) (Compl. Exs. 58-59) (Ans. ¶201, ¶¶206-207) (Goings Dep. 37, 64 & Ex. 14) (Gutierrez Dep. 8, 15, 17, 22-24, & Ex. 21) (Fagen Dep. 10-11) (Malach Dep. 66-68) (Odice Dep. 39-41) (Zoe Int. Nos. 5-8, 10)

<sup>18</sup> (Goings Dep. 63-68 & Ex. 14) (Gutierrez Dep. 8-10, 14, 22, 26) (Malach Dep. 67-69) (Odice Dep. 40, 42)

Malach and Mr. Odice, copying Mr. Gutierrez: “I saw your name on the flier for the FCA fundraising event. ...[I] would love to have my 6th graders organize a supply drive!”<sup>19</sup> Ms. Malach responded: “I am in charge ...you have the right person.” (Goings Dep. Ex. 14). Ms. Bengé then told Mr. Gutierrez: “I will ... get our students involved!” (*Id.*) (Gutierrez Dep. 26).

Cougar Run sent home a flyer promoting the Mission Trip to parents, including Jane Zoe, stating: “Giving to Guatemala Supply Drive” “Sponsored by Cougar Run 6<sup>th</sup> Graders partnering with the FCA,” “We will be collecting ... equipment that the FCA students will take,” “Monetary donations are also welcome! Please make checks payable to Cougar Run Elementary.”<sup>20</sup> Each class was asked to donate a specific item; Zoe’s son was asked to donate “temporary tattoos.” (Gutierrez Dep. Ex. 21). On March 10, Ms. Espinosa, a Cougar Run employee, sent an email stating in part:

Parents, ... **We are partnering with HRHS on this effort - specifically the FCA (Fellowship of Christian Athletes) organization. ....We have designated grade level supplies** ...Students will bring collection boxes to your pods and will be around daily to collect the items. Flyers will be going home in Friday Folders, there will be an email blast to families, and it will be featured during next week's morning announcements ... \*\* Monetary donations are also welcome! **Please make checks payable to Cougar Run Elementary.**<sup>21</sup>

On March 10, Ms. Bengé emailed the listserv: “Our students should have brought around grade level collection boxes and baggies for monetary donations. ... [W]e appreciate any positive talk you can give it in your classrooms.” (*Id.* Ex. 21) (SJ Ex. 2-G). On March 21, Principal Gutierrez emailed “Cougar Run Families,” informing them that Cougar Run “partnered with [FCA],” and asking them to donate money “to our 6th grade project.” (Gutierrez Dep. 8, 11-12, 15-17, Ex. 19). In addition to the supply drive, Cougar Run donated proceeds from its school newspaper to the trip, and raised funds through a school program called “Muffins for Mom.”<sup>22</sup> HRHS students and teachers went to Ms. Bengé’s classroom for a “packing party.” (Goings Dep. Ex. 14) (Berry Dep. 65) (Odice Dep. 40).

Defendant admits it received AHA’s June 17, 2014, cease-and-desist letter and that it never provided a response.<sup>23</sup> Principal Gutierrez admitted, “we need to be more diligent,” and that he could understand why the plaintiffs “would be upset.” (Gutierrez Dep. 22-23, 33-34).

<sup>19</sup> (Goings Dep. Ex. 14) (Gutierrez Dep. 9-10, 13-14) (Malach Dep. 67-68) (Odice Dep. 40-41) (SJ Ex. 2-E)

<sup>20</sup> (Gutierrez Dep. 14-16, 22-24, 31, & Ex. 20) (Compl. Ex. 58) (Zoe Int. Nos. 5-8, 10)

<sup>21</sup> (Compl. Ex. 59) (Ans. ¶¶206-207) (Zoe Int. Nos. 5-8, 10) (Gutierrez Dep. 22-24, & Ex. 21) (emphasis added).

<sup>22</sup> (Sch. Dist. Int. No. 13) (Goings Dep. Ex. 14) (Gutierrez Dep. 11-12, 26-29, Ex. 19) (Malach Dep. 66-67).

<sup>23</sup> (Compl. Ex. 61) (Ans. ¶¶215-16) (Goings Dep. 11-14, 28-29, Exs. 1-2) (Gutierrez Dep. 8) (SJ Ex. 2-A & 2-C).

**OPERATION CHRISTMAS CHILD.** The District has promoted, advanced, endorsed, and affiliated with Samaritan’s Purse and its evangelical program, “Operation Christmas Child” (OCC).<sup>24</sup> Samaritan’s Purse is “an evangelistic Christian organization” and OCC “is just one of their projects. They ... take these boxes to often third-world countries, ... with the intent of introducing the gospel.” (Leah Dep. 59-60).<sup>25</sup> Its president, evangelist minister Franklin Graham, stated, “evangelism is the focus” of OCC. (Compl. Exs. 2 & 24) (SJ Ex. 3-G). OCC boxes are dropped off at “processing” centers, where proselytizing Christian materials are placed in prepared boxes.<sup>26</sup> Volunteers proselytize Christianity to children receiving boxes, which are delivered with Christian literature, usually at a minimum “a booklet in the local language” called “The Greatest Gift,” which is “filled with scriptures, colorful pictures, and a simple presentation of the Gospel.”<sup>27</sup> Many District schools have participated in OCC, including: Chaparral High School (CHS), Mesa Middle School, Flagstone Elementary, Douglas County High School (DCHS), Legend High School, Mountain Vista High School (MVHS), Pioneer Elementary, Larkspur Elementary, and SkyView Academy.<sup>28</sup>

CHS, through its Student Government and faculty, organized, sponsored, and participated in OCC in 2010, 2011, and 2012. (Gotchey Dep. 25) (“we have done [OCC] ... through school.”).<sup>29</sup> Student Government is a graded class that meets during the school day “three times a week for an hour and a half” and during fifth period.<sup>30</sup> The administration has final authority over its projects.<sup>31</sup> According to Craig Bowman, the faculty advisor, “my role would be to approve it, deny it, or modify it based on what they were trying to do. And then it would go to the next level up.”<sup>32</sup> Principal Gotchey testified: “I have the ultimate authority.” (Gotchey Dep. 17-21). The administration will reject a project if it “wasn’t promoting our values as a school[.]” (*Id.*). Student Government has an activities fund to conduct school-wide projects, such as “homecoming.”<sup>33</sup> “Student activity funds are

<sup>24</sup> (Sch. Dist. Int. Nos. 1, 4, & Ex. A) (Sch. Dist. RFA Nos. 5-6) (Doe Int. Nos. 5-6, 8) (Bowman Dep. 24-28).

<sup>25</sup> (K.D. Dep. 54, 78-79, Ex.12) (Gotchey Dep. 24, Ex.1) (Bowman Dep. 25-26) (Kim Dep. 28, 43) (SJ Ex. 3-G-3-I)

<sup>26</sup> (Compl.Exs.14-22)(Bowman Dep.22,35)(Fagen Dep.52,69-70)(Leah Dep.69,74)(K.D.Dep.13,57,78-88)(SJ Ex.3-G,3-I)

<sup>27</sup> (Compl. ¶¶60-68; ¶¶76-78; Exs. 6; 14-18, 21, 23, 25) (SJ Ex. 3-A) (SJ Ex. 3-G) (Doe Int. No. 8)

<sup>28</sup> (Sch. Dist. Int. No. 1, No. 13 & Ex. A, Ex. D) (Sch. Dist. RFA Nos. 5-6) (Doe Int. No. 8)

<sup>29</sup> (Sch. Dist. Int. No. 1, No. 13 & Ex. A, Ex. D) (Sch. Dist. RFA Nos. 5-6) (Bowman Dep. 25-32) (Leah Dep. 15, 67)

<sup>30</sup> (Bowman Dep. 10-11,17)(Kim Dep. 14-15)(K.D. Dep.12-15)(Gotchey Dep.14-16)(Fagen Dep. 63-64)(Leah Dep.12).

<sup>31</sup> (Bowman Dep.11-15) (Gotchey Dep.16-17) (Fagen Dep.62-64) (Leah Dep. 63-64) (Kim Dep.12-15) (K.D. Dep.70-72).

<sup>32</sup> (Bowman Dep. 7, 9, 11-15, 31-32)(Leah Dep. 13) (Sch. Dist. Int. No. 1, Ex. A)(K.D. Dep. 15, 83)(Gotchey Dep. 14-15)

<sup>33</sup> (Bowman Dep. 46-47) (K.D. Dep. 21) (Leah Dep. 40, & Ex. 21).

considered a part of the total fiscal operation of the School District. ...[and] shall be so expended as to benefit the student body as a whole.” (SJ Ex. 4). In 2011 and 2012, CHS offered prizes for class-wide participation in OCC in connection with the school’s annual can-drive; the prizes were purchased from the student government fund after approval from Mr. Bowman.<sup>34</sup>

In 2010, CHS Student Government participated in OCC.<sup>35</sup> Prior to approving it, Mr. Bowman visited the website to “see what the purpose of it was.” (Bowman Dep. 20-25). He admits OCC “endorse[s] Christianity,” and “encourage[s] people to join the Christian church.” (*Id.*). OCC was submitted “for a vote in front of the entire student government.” (Leah Dep. 17-19). In addition to collecting boxes, the “whole student body” was invited to join the OCC “packing party.” (*Id.* 20, 65).

In 2011 and 2012, CHS used the annual “canned food drive to promote Operation Christmas Child.” (Leah Dep. 30-31). Samaritan’s Purse provided them shoeboxes to fill, featuring the OCC logo. (*Id.* 36-37). Each “homeroom” class participated. (*Id.* 39). Boxes were delivered to classrooms during instructional hours.<sup>36</sup> Points were awarded for boxes to incentive participation.<sup>37</sup> Each year, about 80 OCC boxes were collected. (Leah Dep. 37-38). Mr. Bowman used District email to promote OCC on at least five occasions. In the emails, he instructed faculty to “allow members of Student Government to come in to your room” during “3rd Period” to drop off OCC boxes, “[w]hen you have completed the box, you need to return it with \$7,” and to “encourage your 3rd period to get involved[.]”<sup>38</sup> OCC was a school-wide project in 2012 with a prize for the class with the most points.<sup>39</sup> OCC was promoted in “Daily Bulletins” and staff again used the email listserv to promote OCC.<sup>40</sup> In 2013 and 2014, the CHS Interact Club, supervised by a teacher conducted OCC projects, which were approved by the administration.<sup>41</sup> In 2014, a teacher sent emails to promote OCC.<sup>42</sup>

Many of the District’s other schools have participated in OCC, including DCHS, which a Roe child attends. (Sch. Dist. Int. No. 1 & Ex. A). Specifically, in 2014, DCHS teachers organized OCC

<sup>34</sup> (Bowman Dep. 29-30, 56) (Leah Dep. 29-31) (K.D. Dep. 21, 42) (SJ Ex. 3-B).

<sup>35</sup> (Sch. Dist. Int. No. 1 & Ex. A) (Bowman Dep. 27) (Leah Dep. 13, 15, 67).

<sup>36</sup> (Sch. Dist. RFA No. 6) (Bowman Dep. 31, 37) (SJ Ex. 3-C).

<sup>37</sup> (Sch. Dist. Int. No. 1, Ex. A) (RFA No. 5) (Bowman Dep. 29-31, 38, 47) (Leah Dep. 30-39, 75-76, Ex. 20) (K.D. Dep. 35, 85)

<sup>38</sup> (Bowman Dep. 35-41, Exs. 17, 23) (Leah Dep. 32, Exs. 18-21) (K.D. Dep. Ex. 4) (SJ Ex. 3-C) (Sch. Dist. Int. No. 1, Ex. A).

<sup>39</sup> (Leah Dep. 36-37) (Sch. Dist. Int. No. 1 & Ex. A) (K.D. Dep. 23-27, 38, 41, 84-87).

<sup>40</sup> (Sch. Dist. Int. No. 1 & Ex. A) (Compl. Exs. 33 & 34) (K.D. Dep. 18-25, Exs. 3, 5, 7) (Gotchey Dep. 31-32, 35 & Ex. 2)

<sup>41</sup> (Sch. Dist. Int. Nos. 1, 13 & Exs. A & D) (Leah Dep. 47-48) (K.D. Dep. 47, 54, 56-57).

<sup>42</sup> (Sch. Dist. Int. No. 1 & Ex. A) (Bowman Dep. 48) (Gotchey Dep. 41-50; Exs. 3&4).

in a 90-minute “homeroom” class that meets every other day. (*Id.*). Involvement in OCC in the other schools generally included teachers organizing OCC during class, using school email and newsletters to promote OCC, and bringing in supplies for student to pack boxes. (*Id.*).<sup>43</sup> After AHA sent SkyView Academy a cease-and-desist in November 2013, its principal admitted: “The best attorneys in the land, that defend our religious rights (Alliance Defending Freedom), even said we had an indefensible case[.]”<sup>44</sup> The Superintendent was aware of AHA’s letter. (SJ Ex. 3-E).

**TIM TEBOW FOUNDATION.** In September 24-28, 2012, Rockridge Elementary fundraised for the Tim Tebow Foundation, “a registered Christian charity” - which has as its stated goals to “proclaim the Kingdom of God,” and “share the Gospel” - through its annual “Spirit Week.” (Fagen Dep. 27-28, 36, Ex. 1) (SJ Ex. 1). During “Sprit Week,” students donate \$.25 a day to “dress up” in a fun and silly way; the proceeds are then donated to a charity chosen by the student body and approved by the administration. (*Id.*). On September 18, a parent voiced her concerns to Principal Amber Sorg about the chosen Christian charity but Ms. Sorg told the parent Spirit Week is “optional.” (*Id.*). On October 22, ACLU sent the District a cease-and-desist letter and the District responded, stating it would use these “activities as an educational opportunity for students.” (*Id.*).

**FACULTY PARTICIPATION IN FCA.** District employees, and outside adults, regularly lead and participate in FCA clubs.<sup>45</sup> Faculty in numerous schools, including but not limited to HRHS, DCHS, CHS, MVHS, Cimarron MS, Mesa MS, Castle View High School (CVHS), Ponderosa High School (PHS), and Legend High School are involved in promoting Christianity through their roles as FCA advisors.<sup>46</sup> Seth Olsen is an outside FCA “Area Rep,” who regularly directs, attends and speaks at FCA club meetings.<sup>47</sup> At Mr. Olsen’s behest, faculty at many schools filled out an FCA “Ministry Leader Application (MLA),” which “covers your Christian beliefs”<sup>48</sup> – “a background check ... that help us see if our beliefs are in the same alignment.” (SJ Ex. 13-B)(Gotchey Dep. Ex. 9).

<sup>43</sup> (Compl. Exs. 37-38)(SJ Exs. 3-D, 3-F)(Sch. Dist. Int. No. 1 & Ex. A) (Goings Dep. 17)

<sup>44</sup> (Compl. Exs. 45-47) (Ans. ¶¶123-140) (Doe Int. Nos. 8 & 10).

<sup>45</sup> FCA meetings are referred to as “Huddles” and faculty advisors are “Huddle coaches.” (Berry Dep. 112-113).

<sup>46</sup> (Goings Dep. 20-21, 68-80, Exs. 3, 15-18) (Malach Dep. 27-32) (Odice Dep. 15-17) (Berry Dep. 18-19, 112) (Fagen Dep. 106-114, & Exs. 5- 6, 8) (Bowman Dep. 49-50) (Gotchey Dep. 11, 53, 58-65, 72-73, & Exs. 6-10) (SJ Exs. 5 - 15)

<sup>47</sup> (Goings Dep. 73-80, & Exs. 16-18) (Fagen Dep. 111-113, & Ex. 6) (Gotchey Dep. Exs. 7-8, 10) (SJ Ex. 7-D) (SJ Ex. 8) (SJ. Ex. 9) (SJ Exs. 10-E, 11-B, 11-D-11-I, 12-C, 12-D, 13-A -13-B, 13-E,14-B, Ex. 15).

<sup>48</sup> (Goings Dep. Ex. 16) (Fagen Dep. 114-119, & Ex. 8) (SJ Ex. 9-F) (SJ Ex. 11-C, 11-D, 11-H) (SJ Ex. 13-B).

Ms. Berry, a student, testified the HRHS faculty advisors “Cushing, Wolf, and Wood” are the ones “facilitating the meeting.” (Berry Dep. 18-19, 25). The activities are “mostly ... initiated by the coaches,” and the advisors regularly “initiated ... prayers” and “participated in those prayers.” (*Id.* 112). (Goings Dep. Ex. 17). Ms. Malach testified it is “typical” for other faculty to “join meetings.” (Malach Dep. 27-31). She “attended” two meetings and at each, “there were at least eight teachers there,” not “as supervisors” but “being a part of FCA.” (*Id.*). All of the teachers “participated” in prayers. (*Id.*). Mr. Odice attended two different meetings “to support their club.” (Odice Dep. 15-17). The PHS FCA faculty advisor’s 2014 bio states: “Chris also *leads* the [FCA] club.” (SJ Ex. 14-C).

At some schools, including CHS, CVHS, Cimarron, Mesa, and Cresthill Middle Schools, FCA was initiated by staff without any student initiation of any kind.<sup>49</sup> For example, staff at Mesa attempted to establish FCA in 2014, initiated by an email thread involving Wayne Koehn, a Mesa teacher, and two others: a local pastor and an outside FCA rep. (SJ Ex. 5). The pastor introduced Koehn and the FCA rep by describing each as “a GREAT guy” who “loves Jesus.” A detailed email thread then begins between the teacher and the FCA rep wherein the two discuss how FCA might infiltrate the school. (*Id.*). Cimarron MS teacher Beau Davies emailed Mr. Olsen in December 2014: “I am interested in bringing FCA to our campus.” (SJ Ex. 8). Mr. Davies subsequently filled out an FCA MLA. (*Id.*). In 2013 and 2014, faculty at HRHS and Cresthill worked together to start FCA to Cresthill. (Goings Dep. Ex. 15) (SJ Ex. 15). In 2014, CHS teacher Lori Pace, along with other faculty and Mr. Olsen, worked together, without any student involvement, to revive FCA at CHS after it dissolved.<sup>50</sup> Ms. Pace helped Mr. Olsen find a “Potential FCA Student Leader.” (SJ Ex. 11-B) (Fagen Dep. Ex. 8). On September 30, she emailed a parent: “We are starting back up FCA ... I will work on [your son] to join us for that.” (SJ Ex. 11-E). In 2014, the Legend FCA advisor emailed Mr. Olsen: “Would love to ... chat about the direction of the Legend FCA huddle.” (SJ Ex. 13-A).

FCA advisors, such as DCHS FCA advisor Lon Smith, are often listed as the person to contact in school announcements, and many recruit students and teachers to join FCA.<sup>51</sup> Faculty also

<sup>49</sup> (Goings Dep. 68-71, Ex.15)(Gotchey Dep. Ex. 8)(SJ Exs. 5, 6, 8, 10-E, 11-A-11-E,11-G, 15) (Fagen Dep. Ex. 8).

<sup>50</sup> (SJ Exs. 10-E & 11-G) (Gotchey Dep. 58-65, 72, Ex. 6-8) (SJ Ex. 11-A)

<sup>51</sup> (SJ Exs. 7, 9-I-9-M, 11-E,11-G, 2-A). An MVHS advisor emailed a parent: “I also am one of the Huddle Coaches for our Fellowship of Christian Athletes Huddle here at Vista and would love to have [student] join us at FCA.” (SJ Ex. 9-I).

organize FCA events. In 2010 and 2011, Ms. Pace organized an FCA event called “Fields of Faith.”<sup>52</sup> In 2013, she and other CHS staff organized an FCA concert held at the CHS gym. (SJ Ex. 10-E). On August 2, 2014, an MVHS FCA advisor hosted an “FCA Leadership Retreat.” (SJ Exs. 9-E, 9-H). In September 2014, the PHS FCA advisor invited “every head coach” to an FCA “Ponderosa Coaches Chapel ... in the teachers lounge.” (SJ Ex. 14-B). Some FCA faculty advisors have served as such for over 10 years, including HRHS advisors Mr. Cushing, Mr. Wood, and Mr. Wolf, MVHS advisors Ms. Strait (12 years) and Mr. Cash, and CHS Lori Pace.<sup>53</sup> Many display FCA in their signature blocks.<sup>54</sup>

**SEE YOU AT THE POLE (SYATP).** For many years, HRHS faculty have joined students in an annual prayer event, SYATP, that takes place right before school starts.<sup>55</sup> It is not part of FCA – it is “just something that happens.” (Goings Dep. 20). “[L]ots of faculty” participate. (Berry Dep. 113-114). In addition, for several years, Mr. Cushing and Mr. Wood have used their school email to invite Christian pastors to attend SYATP “[a]t our flag Pole!” (Goings Dep. 19-22, & Ex. 3).

**FCA FOOTBALL CAMPS.** The District endorsed and promoted two religious summer football camps co-sponsored by FCA, held June 26-28, 2014 (SJ Exs. 16-17). On May 7, 2014, Tyler Polumbus emailed Tim Ottmann, PHS Assistant Principal, copying Mr. Olsen, which emphasized: “there will be a faith component to this camp. [FCA] has partnered with us and we will be pouring into the kids spiritually as well.” Attached was a flyer with the words: “Romans 6:17-18” “Spirituality Powered By [FCA]” “Campers will deepen their faith,” and the FCA logo. Mr. Ottmann responded: “I will get this out” and forwarded the flyer to the PHS Head Football Coach, requesting him to “send this to the Ponderosa youth feeder coaches and encourage our incoming freshmen to attend.” (*Id.*). The District also endorsed an adaptive version of the FCA camp held June 28, by disseminating emails and flyers to parents at a number of schools, including DCHS. (SJ Ex. 17).

**DISTRICT POLICIES.** The Superintendent could not identify any specific policy that prohibits Establishment Clause violations but simply said, “I think that we know it when we see it.”

<sup>52</sup> (SJ Ex. 10-B) (Fagen Dep. Ex. 5) (Ms. Pace was an “event coordinator” for three FCA events) (SJ Ex. 10-C)

<sup>53</sup> (Bowman Dep. 49-50) (Gotchey Dep. 11 53, 73, & Exs. 6-9) (Fagen Dep. Ex. 5) (SJ Exs. 10-11) (Goings Dep. 21) (Fagen Dep. Ex. 6) (SJ Ex. 9-B, 9-M) (SJ Ex. 12-B)

<sup>54</sup> (Fagen Dep. Ex. 6) (SJ Exs. 10, 13). Ms. Pace was the “2011 [FCA] ‘Coach of Influence Award.’” *Id.*

<sup>55</sup> (Goings Dep. 19-21, & Ex. 3) (Fagen Dep. 113-114, & Ex. 7) (Berry Dep. 113-115)

(Fagen Dep. 43-46, 126-128). HRHS Principal Goings admitted “there's not a firm school policy prohibiting teachers from participating in religious clubs.” (Goings Dep. 22-24). Despite serving as principal for ten years, Mr. Goings was unaware of the Equal Access Act (EAA) requirements. (*Id.*). He admitted there has never been any faculty training on Establishment Clause or EAA. (*Id.*) (Malach Dep. 87-88). CHS Principal Gotchey was “not really” “familiar with the [EAA].” (Gotchey Dep. 8, 53-54). He said teachers receive no specific training in First Amendment issues, and concedes there are no ramifications for teachers who participate in FCA meetings. Mr. Gotchey testified that even he is unsure about “what is allowed and what isn't allowed.” (*Id.* 27-28, 30-31, 36, 44-45, 55, 69-70).<sup>56</sup>

## II. ESTABLISHMENT CLAUSE AND EQUAL ACCESS ACT OVERVIEW

The Establishment Clause requires “government [to] remain secular, rather than affiliate itself with religious beliefs or institutions.” *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 610 (1989). The Supreme Court “has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools.” *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987). “The State must be certain... that subsidized teachers do not inculcate religion.” *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971). *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) and *Lee v. Weisman*, 505 U.S. 577 (1992) are “merely the most recent in a long line of cases carving out ... what essentially amounts to a per se rule prohibiting public-school-related or -initiated religious expression[.]” *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 165 (5th Cir. 1993). “[S]chool officials have long been prohibited ... from inserting religious exercises into school activities.” *S.D. v. St. Johns Cnty. Sch. Dist.*, 632 F. Supp. 2d 1085, 1093 (M.D. Fla. 2009). Districts must not permit any “of its teachers’ activities [to] give[] the impression that the school endorses religion.” *Marchi v. Board of Educ.*, 173 F.3d 469, 477 (2d Cir. 1999). See *Roberts v. Madigan*, 921 F.2d 1047, 1056-58 (10th Cir. 1990) (teacher’s Bible in classroom “had the primary effect of communicating a message of endorsement”); *Bell v. Little Axe Indep. Sch. Dist.*, 766 F.2d 1391, 1396-97 (10th Cir. 1985) (unconstitutional endorsement when teachers “participat[ed] in religiously-oriented meetings”).

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<sup>56</sup> Ms. Dassler, who taught at CHS from 2005-2013, testified: “My understanding is, if it's student led, anything goes.” (Kim Dep. 54-55). Mr. Bowman, who has taught at CHS for 10 years, contended OCC was permissible: “students didn't have to get involved.” (Bowman Dep. 7, 42-44).

To comply with the Establishment Clause, a 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. *Allegheny*, 492 U.S. at 592. If “any of these tests are violated,” the “practice will be deemed unconstitutional.” *Am. Atheists, Inc. v. Duncan*, 616 F.3d 1145, 1156-57 (10th Cir. 2010).<sup>57</sup> In addition, in *Lee*, the Court formulated the separate “coercion test,” holding, “at a minimum, the...government may not coerce anyone to support or participate in religion or its exercise.” 505 U.S. at 587. The District’s practices fail each test, *infra*.

The District’s practices and also violate the EAA, 20 U.S.C. § 4071, which expressly limits faculty involvement in religious clubs to a “nonparticipatory capacity” to avoid unconstitutional “endorsement or coercion” or entanglement with religion. *Bd. of Educ. v. Mergens*, 496 U.S. 226, 249-50 (1990). The Court has made clear that “faculty monitors may not participate in any religious meetings, and nonschool persons may not direct, control, or regularly attend activities of student groups.” *Id.* at 236, 250-53. Moreover, the “Act prohibits school ‘sponsorship’ of any religious meetings, § 4071(c)(2), which means that school officials may not promote, lead, or participate in any such meeting, § 4072(2).” *Id.* Teachers are limited to “custodial oversight ... merely to ensure order and good behavior.” *Id.* “The primary reason why the Act provides for nonsponsorship and nonparticipation of religious groups is to prevent ... violations of the Establishment Clause.” *Pope v. East Brunswick Bd. of Educ.*, 1993 U.S. Dist. LEXIS 18661, \*35-36 (D.N.J. 1993).

### **III. THE RELIGIOUS FUNDRAISING PRACTICES ARE UNCONSTITUTIONAL.**

At its core, the Establishment Clause prohibits government “sponsorship, financial support, and active involvement ... in religious activity.” *Walz v. Tax Comm’n*, 397 U.S. 664, 668 (1970). “Government may not finance religious groups ... nor blend secular and sectarian education[.]” *Zorach v. Clauson*, 343 U.S. 306, 314 (1952). The District’s practices violate the Establishment Clause because they place the government’s “prestige, coercive authority, [and] resources behind a single religious faith [and] behind religious belief in general, compelling nonadherents to support the practices [and] proselytizing ... and conveying the message that those who do not contribute gladly

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<sup>57</sup> The Tenth Circuit “interpret[s] the purpose and effect prongs of *Lemon* in light of [the] endorsement test.” *Id.* (citation omitted). See *Green v. Haskell Cnty. Bd. of Comm’rs*, 568 F.3d 784, 796 (10th Cir. 2009).

are less than full members of the community.” *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 9 (1989).

**A. The religious fundraising practices lack a secular purpose.**

The District’s practices of sponsoring, participating in, and fundraising for Christian evangelical organizations fail the purpose test. An unconstitutional religious purpose may be inferred where, as here, “the government action itself besp[eaks] the purpose . . . [because it is] patently religious.” *McCreary Cnty. v. ACLU*, 545 U.S. 844, 862-63 (2005). Specifically, where a school sponsors an “inherently religious practice” such as evangelism it “cannot meet the secular purpose prong.” *Jager v. Douglas Cnty. Sch. Dist.*, 862 F.2d 824, 829-30 (11th Cir. 1989). In *Roberts*, this Court held, and the Tenth Circuit affirmed, that a teacher’s actions in displaying a Bible on his desk failed the purpose prong because of its inherently religious nature. 921 F.2d at 1056-57.

HRHS and Cougar Run’s explicit “partnership” with FCA and AIM, and their teacher-run fundraising efforts for the inherently religious Mission Trip, clearly lack a secular purpose. (Goings Dep. 28-30). The trip’s purpose was “to share Jesus Christ with those who don’t know him.” (Malach Dep. 18-19). The teachers openly shared this purpose and participated in religious conversion efforts. (*Id.*) (SJ Ex. 2-B) (Odice Dep. 8). The trip did not involve any secular “service work.” (Odice Dep. 56-57). The fundraising materials, created and disseminated by school staff, explicitly referred to a “partnership” with the “FCA” and a “Mission Trip,” signaling a clear religious purpose.<sup>58</sup>

It is equally clear that Defendant’s pervasive sponsorship, endorsement of, and affiliation with, Samaritan’s Purse and its evangelical program, OCC, lacks a secular purpose. The primary purpose of OCC is to convert children to Christianity. Because this is an “inherently religious practice,” the schools’ participation in OCC “cannot meet the secular purpose prong.” *Jager*, 862 F.2d at 829-30.

Moreover, “[t]he unmistakable message of the Supreme Court’s teachings is that the state cannot employ a religious means to serve otherwise legitimate secular interest[.]” *Karen B. v. Treen*, 653 F.2d 897, 901 (5th Cir. 1981), *aff’d*, 455 U.S. 913 (1982). “[A]ttempting to further an ostensibly secular purpose through avowedly religious means is . . . a constitutionally impermissible purpose.”

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<sup>58</sup> *E.g.*, *Books v. City of Elkhart*, 235 F.3d 292, 303-304 (7th Cir. 2000) (“The participation of these . . . religious congregations makes it clear that the purpose . . . was [religious]”); *ACLU v. Grayson Cnty*, 591 F.3d 837, 851 (6th Cir. 2010) (government fails the purpose test when there “is evidence that the government has adopted the message of the organization . . . A sign on the display provides evidence to that effect.”).

*Holloman v. Harland*, 370 F.3d 1252, 1286 (11th Cir. 2004). For instance, in *Sch. Dist. Abington v. Schempp*, 374 U.S. 203, 222-23 (1963), a school argued that Bible reading served secular purposes including “the promotion of moral values, ... and the teaching of literature.” Without discrediting these ends, the Court held the practice furthered unconstitutional religious purpose, as they “sought to be accomplished through readings . . . from the Bible.” *Id.* The rejection of “wholly secular [charities] makes it very clear that” the purpose in sponsoring the Christian organizations “was religious.” *Jager*, 862 F.2d at 830. An “observer could reasonably conclude that the District would only choose” these Christian charities despite “the existence of other suitable [charities]—if the District approved of [their religious] message.” *Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 854 (7th Cir. 2012) (en banc).

**B. The religious fundraising practices have the effect of endorsing religion.**

The religious fundraising practices fail the second *Lemon* prong because they convey a message of religious endorsement. *Duncan*, 637 F.3d at 1117. If “the challenged practice is likely to be interpreted as advancing religion, it has an impermissible effect ... regardless of whether it actually is intended to do so.” *Friedman v. Bd. of Cnty. Comm'rs*, 781 F.2d 777, 781 (10th Cir. 1985). “[T]he resulting advancement need not be material or tangible.” *Id.* “[E]ven the unspoken grant of a state ‘imprimatur’ to religious activity in primary schools is impermissible under the effect test.” *Id.* “Student religious activities violate the Establishment Clause when they are conducted in concert with school authority.” *Rivera v. East Otero Sch. Dist.*, 721 F. Supp. 1189, 1196 (D. Colo. 1989). A religious activity is “state-sponsored” if “an objective observer ... will perceive official school support for [it].” *Mergens*, 496 U.S. at 249-50. Applying this test, the Court has held that even student-initiated, student-led prayer “is impermissible.” *Santa Fe*, 530 U.S. at 305, 309-310.

A “reasonable observer would find that the [District] had assigned a place of special prominence” to these Christian organizations. *Green*, 568 F.3d at 800-805 n.14; *Smith v. Cnty. of Albemarle*, 895 F.2d 953, 958 (4th Cir. 1990) (“The endorsement of the religious message proceeds as much from the religious display itself as from the identification of a religious sponsor.”). *Kucera v. Jefferson Cnty. Bd. of Sch. Comm'rs*, 956 F. Supp. 2d 842, 849 (E.D. Tenn. 2013) (a “reasonable observer” would “see the Board's decision to contract with a self-proclaimed ‘religious institution,’

conveys a message of religious endorsement”). And the endorsement is more than symbolic. The District uses its resources and personnel time to provide aid to evangelical institutions (OCC, FCA, AIM, Tim Tebow), violating the Establishment Clause at its core. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15-16 (1947); *Cnty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1059 (9th Cir. 2007).

**Mission Trip.** The Mission Trip had every possible indicia of school-endorsement. School officials urged parents and very young students to make an in-kind contribution, as well as a monetary one, to support FCA and AIM in their conversion efforts. Teachers chaperoned the trip, participated in religious conversion efforts, blogged and about their religious activity, and helped fundraise using school resources. Cougar Run officials initiated fundraising efforts and organized a school-wide supply drive, asking parents to make checks out to “Cougar Run Elementary.” Items were collected during school and proceeds from the school newspaper were donated. Inevitably, the District sent the message to schoolchildren that the Christianity at the core of the Mission Trip is “stamped with [the] school’s seal of approval.” *Santa Fe*, 530 U.S. at 308. *See also Roberts*, 921 F.2d at 1056 (“Mr. Roberts was setting a Christian tone in his classroom. Having formed that impression, [the school] had a duty to take corrective steps.”); *Bell*, 766 F.2d at 1405. The endorsement is even more troubling here because the fundraising efforts were targeted at *elementary* students. *Id.* at 1404.

**OCC.** The District’s participation and promotion of OCC unconstitutionally endorses Christianity for similar reasons. Schools urged students and teachers to make an in-kind contribution, and monetary one, to Samaritan Purse’s conversion efforts. “Religion permeates every aspect of the program.” *FFRF v. Mont. Office of Rural Health*, 2004 U.S. Dist. LEXIS 29139, \*31 (D. Mont. 2004). “If the speech at issue bears the imprimatur of the school and involves pedagogical interests, then it is school-sponsored speech.” *Fleming v. Jefferson Cnty. Sch. Dist. R-1*, 298 F.3d 918, 920-25 (10th Cir. 2002). In *Corder v. Lewis Palmer Sch. Dist.*, 566 F.3d 1219, 1229 (10th Cir. 2009), the court upheld a school’s decision to reprimand a student for delivering a religious graduation speech because her speech would be “school sponsored.” The court reasoned, “[a]lthough her speech did not occur in a traditional classroom setting, the graduation ceremony was supervised by the school’s faculty and was clearly a school-sponsored event.” *Id.*

Here, as in *Fleming*, *Corder*, and *Santa Fe*, students “must perceive the [OCC projects] as a public expression of the views of the majority of the student body delivered with the approval of the school administration.” *Santa Fe*, 530 U.S. at 307-08. Student government is “an integral part of the school's organization.” *Goodwin v. Cross Cnty. Sch. Dist.*, 394 F. Supp. 417, 424 (E.D. Ark. 1973). It is a graded class that uses District funds to execute school-wide projects. The administration has final authority over all of its projects, including OCC. *See Planned Parenthood v. Clark Cnty. Sch. Dist.*, 941 F.2d 817, 828-29 (9th Cir. 1991) (en banc) (because school had to “specifically approve” the speech, the speech would “bear the imprimatur of the school”); *Bull v. Dardanelle Pub. Sch. Dist.*, 745 F. Supp. 1455, 1459 (E.D. Ark. 1990). OCC boxes were distributed during instructional hours and teachers encouraged participation and participated themselves. (Leah Dep. Ex. 18) (SJ Ex. 3-C).

The OCC activities at many of the other schools, including DCHS (Roe child’s school), are even more school-endorsed because they were teacher-initiated and teacher-led. Of course, putting “the ultimate choice to the students” does not eliminate school-sponsorship. *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 817 (5th Cir. 1999). 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. “[I]t is the act of turning over the ‘machinery of the State’ to the students . . . to broadcast their religion which violates the Constitution.” *Herdahl v. Pontotoc Cnty. Sch. Dist.*, 933 F. Supp. 582, 588-89 (N.D. Miss. 1996). Submitting OCC to a “vote” (Leah Dep. 17-18) is an independent violation. *Santa Fe*, 530 U.S. at 305. “Such a system encourages divisiveness along religious lines and threatens the imposition of coercion upon those students not desiring to participate in a religious exercise. Simply by establishing this school-related procedure, . . . a constitutional violation has occurred.” *Id.* at 316-17.<sup>59</sup>

### **C. The religious fundraising practices are unconstitutionally coercive.**

Defendant’s fundraising practices also violate the Establishment Clause pursuant to the separate coercion test. *Lee*, 505 U.S. at 586-87 (a graduation prayer was unconstitutionally coercive even though the event was voluntary). A school’s “supervision and control of a [school event] places

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<sup>59</sup> The District’s oversight, sponsorship, and control over the fundraising efforts also foster excessive entanglement with religion, failing the third prong of *Lemon*. *See Collins*, 644 F.2d at 762; *Mellen*, 327 F.3d at 375.

public pressure, as well as peer pressure” on students. *Id.* at 593. Students who object to the religious exercise are placed “in the dilemma of participating, with all that implies, or protesting.” *Id.* The “State may not ... place primary and secondary school children in this position.” *Id.*

The teacher-initiated and teacher-led Cougar Elementary fundraisers involved the school urging elementary children to bring a particular item and money to school to support the Mission Trip. At the behest of a teacher, students brought around “collection boxes and baggies” during school hours and teachers gave “positive talk” about it in their “classrooms.” (Gutierrez Dep. Ex. 21) (SJ Ex. 2-G). It is difficult to imagine how any student would not feel coerced by their school to participate, let alone a six-year-old child. “When the power, prestige, and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.” *Friedman*, 781 F.2d at 782-84 (citations omitted). “In elementary schools, the concerns animating the coercion principle are at their strongest[.]” *Peck v. Upshur Cnty. Bd. of Educ.*, 155 F.3d 274, 287 (4th Cir. 1998). If the “Supreme Court was concerned about the coercive pressures on fourteen-year-old Deborah Weisman, then we must be even more worried about the pressures on [kindergarteners]” such as Jane Zoe’s son. *Berger v. Rensselaer Cent. Sch. Corp.*, 982 F.2d 1160, 1169-70 (7th Cir. 1993).

The OCC and Tim Tebow fundraisers fail the coercion test for similar reasons. CHS and Rockridge offered rewards to students to induce participation. (Bowman Dep. 29, 38). At Rockridge, where children could only “dress up” in a fun and silly way if they donated to the Christian charity (Fagen Dep. Ex. 1) (SJ Ex. 1), the non-Christian student literally “had no real alternative which would have allowed her to avoid the fact or appearance of participation.” *Lee*, 505 U.S. at 588.

At DCHS, CHS, Pioneer Elementary, and Mesa Middle, OCC participation took place in the classroom - boxes and supplies were delivered during instructional hours and students were expected to return the filled box to class. “Finding no violation under these circumstances would place objectors in the dilemma of participating, with all that implies, or protesting.” *Id.* at 593. “The prayer in *Lee* occurred during an after-school extracurricular event,” whereas “the [OCC boxes were] distributed [] during instructional time.” *Berger*, 982 F.2d at 1170-71 (even though children could

choose not to accept a Bible, the practice was coercive). Religious activity in the classroom, “where students have no choice but to participate or to conspicuously” opt out while others participate “is unconstitutional whether led by students or teachers.” *Herdahl*, 933 F. Supp. at 591 (citing *Engel v. Vitale*, 370 U.S. 421 (1962)). It “segregates students along religious lines. The plaintiff’s children are likely to feel ostracized and stigmatized[.]” *Herdahl*, 887 F. Supp. at 910-11.

#### **IV. FACULTY PARTICIPATION IN RELIGIOUS ACTIVITY IS UNCONSTITUTIONAL.**

##### **A. Faculty participation in religious activity lacks a secular purpose.**

The courts have made clear that a “teacher or administrator’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. District faculty regularly lead and participate in prayer and proselytization with students, which by definition, serves religious purposes. *See Roberts*, 921 F.2d at 1056-57; *Pelozza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 522 (9th Cir. 1994) (teacher’s discussion of religion with students before and after class “would not have a secular purpose”); *Karen B.*, 653 F.2d at 901.

##### **B. Faculty participation has the effect of advancing and endorsing religion.**

Schools cannot “sponsor ... prayer,” *Santa Fe*, 530 U.S. at 313, *Corder*, 566 F.3d at 1228, or permit any “of its teachers’ activities [to] give[] the impression that the school endorses religion.” *Marchi*, 173 F.3d at 477. Even “permit[ting] [a teacher] to discuss his religious beliefs with students during school time ... violate[s] the Establishment Clause.” *Pelozza*, 37 F.3d at 522. “[G]enuinely student-initiated speech” constitutes “state action if the State participates in” it. *Holloman*, 370 F.3d at 1287. Where, a teacher participates in prayer with students, “the conclusion is inescapable that the religious invocation conveys a message that the school endorses” it. *Jager*, 862 F.2d at 831-32.<sup>60</sup>

It is undisputed that faculty lead and participate in prayers with students in religious clubs and events such as the Mission Trip, SYATP, and Fields of Faith, thus inevitably endorsing religion. *See Bell*, 766 F.2d at 1396-97 (school unconstitutionally endorsed religion when teachers “participat[ed]

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<sup>60</sup> *See Karen B.*, 653 F.2d 897; *Borden v. Sch. Dist.*, 523 F.3d 153, 174 (3rd Cir. 2008); *Holloman*, 370 F.3d at 1285-88; *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995); *Duncanville*, 994 F.2d at 163; *Steele v. Van Buren Sch. Dist.*, 845 F.2d 1492, 1493-96 (8th Cir. 1988) (school liable for “failure to act” when teacher participated in prayer with band). *See also Sease v. Sch. Dist.*, 811 F. Supp. 183, 192 (E.D. Pa. 1993); *Quappe v. Endry*, 772 F. Supp. 1004 (S.D. Ohio 1991), *aff’d*, 979 F.2d 851 (6th Cir. 1992); *Breen v. Runkel*, 614 F. Supp. 355 (W.D. Mich. 1985).

in religiously-oriented meetings involving students”); *Roberts*, 921 F.2d at 1056-58. In *Duncanville*, the Fifth Circuit held that high school basketball coaches’ “participation” in prayer with players was “an unconstitutional endorsement of religion.” 70 F.3d at 406. Likewise, in *Borden*, the Third Circuit held that a football coach unconstitutionally endorsed religion when he silently bowed and took a knee while his team prayed. 523 F.3d 153. The court held that merely “demonstrating some approval of ... students' prayer” is unconstitutional. *Id.* at 167.

Yet prayer-participation is just one component of the District’s larger practice of permitting teachers to actively involve themselves in religious student activity. Faculty initiate FCA clubs, run the meetings, recruit student members, invite speakers and outsiders to attend meetings, organize FCA events (such as concerts), and attend offsite trips. Teachers are named in FCA announcements and use “we” and “our” to discuss FCA. Many teachers have served as FCA advisors for over ten years and prominently display FCA in school signature blocks. A teacher’s involvement in FCA, “as a participant, an organizer, and a leader” clearly “lead[s] a reasonable observer to conclude that he was endorsing religion.” *Borden*, 523 F.3d at 176.

The fact that many teachers (other than faculty advisors) regularly “attend” FCA meetings to participate, and the fact that the faculty advisors engage in FCA events and religious activities (rather than to just monitor as required by the EAA), amounts to “government sponsorship of religion.” *Prince v. Jacoby*, 303 F.3d 1074, 1082 (9th Cir. 2002). In *Bell*, the Tenth Circuit soundly held that “[a]lthough under the [new] policy teachers no longer actively participate in the [student club] meetings, they had previously done so ... Since [only one teacher is needed] to monitor student meetings, the attendance by several teachers unmistakably expressed their personal endorsement of religion and, by implication, that of the school.” 766 F.2d at 1405. It is particularly egregious that faculty initiate FCA clubs and recruit student members. In *Quappe*, a teacher “invited her students to attend [Good News] Club meetings.” 772 F. Supp. at 1014. The court held that this “established a symbolic nexus between the school and the Club.” *Id.*

**Mission Trip.** The Cougar Run and HRHS faculty involvement in the Mission Trip, independent of any fundraising, undoubtedly endorsed Christianity. Again, the Cougar Run

fundraiser was teacher-initiated and curriculum-based. It was broadcast to parents and students that Cougar Run was “partnering” with FCA to sponsor a “Mission Trip.”<sup>61</sup> The chaperones flagrantly endorsed Christianity when they joined students in proselytizing to Guatemalan children and led their students in worship. *See Pelozo*, 37 F.3d at 522 (“whether he is in the classroom or outside of it during contract time, Pelozo is not just any ordinary citizen. He is a teacher.”); *Marchi*, 173 F.3d at 478 (when a teacher “supervised students on a weekend field trip,” the school can restrict teacher’s “religious expression” to “avoid an Establishment Clause violation.”).

**OCC.** The faculty promotion of OCC, and in some schools, initiation of it, inevitably endorses Christianity. The Tenth Circuit held that a teacher’s actions in merely placing a Bible on his desk and silently reading it during silent reading time, “provided ‘a crucial symbolic link between government and religion.’” *Roberts*, 921 F.2d at 1058. Teachers here have gone much further, making OCC part of the “traditional classroom setting,” which inherently “bears the imprimatur of the school.” *Miles v. Denver Public Sch.*, 944 F.2d 773, 776 (10th Cir. 1991).

**See You At The Pole (SYATP).** For many years, faculty have joined students in an annual prayer event on school grounds immediately before school starts. Not only do faculty participate, but two teachers have actively sought out clergy to participate. As discussed above, faculty participation in a prayer event with students unconstitutionally gives an “impression of school endorsement.” *Bell*, 766 F.2d at 1405. In *Doe v. Wilson Cnty. Sch. Sys.*, 564 F. Supp. 2d 766, 778, 801 (M.D. Tenn. 2008), the court held that a school unconstitutionally endorsed religion when teachers participated in SYATP and also held that there was no “secular purpose supporting the flagpole event.”<sup>62</sup>

**C. Faculty participation fosters entanglement and is unconstitutionally coercive.**

When, as here, teachers are allowed to “occaision[ally] participat[e]” in religious clubs, there is an excessive entanglement with religion, failing *Lemon*’s third prong. *Bell*, 766 F.2d at 1406. *See also Duncanville*, 70 F.3d at 406 (faculty’s participation in “prayers improperly entangle[d] [the

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<sup>61</sup> There is also a grave issue of deceptive advertising. Despite Cougar Run’s claims to parents that the trip would serve “700 orphans,” the HRHS team did not “visit any orphanages.” (Malach Dep. 34). The trip did not even involve any “service work, physical labor [or] giving less fortunate people resources.” (Odice Dep. 56-57).

<sup>62</sup> *See also Daugherty v. Vanguard Charter Sch.*, 116 F. Supp. 2d 897, 910 (W.D. Mich. 2000) (“The presence of teachers and ... students together, for prayer, on school premises, albeit during non-instructional hours, is a matter of heightened concern.”).

school] in religion”); *Karen B.*, 653 F.2d at 902 (same); *Peloza*, 37 F.3d at 522 (allowing a teacher to discuss religion with students “would entangle the school with religion”).<sup>63</sup> And when faculty lead and participate in religious activity, they put additional coercive pressure on students. *See Roberts v. Madigan*, 702 F. Supp. 1505, 1516 (D. Colo. 1989) (“a teacher's silent reading of the Bible provokes students’ curiosity about the Bible's religious teachings,” which is “constitutionally impermissible.”).

#### **V. FACULTY PARTICIPATION IN FCA VIOLATES THE EAA.**

As discussed *supra*, teachers may only be involved in student religious clubs in a “nonparticipatory capacity.” 20 USC § 4071. Any involvement beyond “custodial oversight” violates the EAA and by necessary implication, the Establishment Clause. *See Mergens*, 496 U.S. at 250-53; *Borden*, 523 F.3d at 167-71; *Prince*, 303 F.3d at 1083 (when a “School District went beyond the limits of section 4071(c), its activities ... violate the Establishment Clause”). Stated differently, a violation of § 4071 is *prima facie* evidence of an Establishment Clause violation. *Id.* *See Wilson Cnty.*, 564 F. Supp. 2d at 802 (teachers participated in religious club when they “bowed their heads” thus violating the EAA and Establishment Clause); *Sease*, 811 F. Supp. at 187 (teacher’s participation in gospel choir violated the EAA, and so, “[c]learly ... a violation of the Establishment Clause”).

It is irrefutable that faculty “participate” in FCA; some even run the clubs, violating the express terms of the EAA. *Id.* at 190 (“Mrs. Safford is present ... in a participatory capacity. A violation of sections 4071(c)(2) and (c)(3) of the Act.”). The District also allows outside adults, such Mr. Olsen, to be heavily involved in FCA clubs – a clear “violation of section 4071(c)(5).” *Id.*

#### **VI. PLAINTIFFS ARE ENTITLED TO THE RELIEF THEY SEEK.**

Plaintiffs are entitled to a permanent injunction, as a violation of the First Amendment “unquestionably constitutes irreparable injury,” *Elrod v. Burns*, 427 U.S. 347, 373 (1976), and they readily satisfy the remaining elements. *Fisher v. Oklahoma Health Care Auth.*, 335 F.3d 1175, 1180 (10th Cir. 2003). Plaintiffs are also entitled to an “award of nominal damages.” *O'Connor v. Washburn Univ.*, 416 F.3d 1216, 1221 (10th Cir. 2005).

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<sup>63</sup> *See also Jabr v. Rapides Parish Sch. Bd.*, 171 F. Supp. 2d 653, 661 (W.D. La. 2001) (“[t]eachers, who did not actively participate in Bible distribution, but merely observed non-school personnel distribute the material, became excessively entangled with religion in violation of the Establishment Clause.”).

**CONCLUSION.** Plaintiffs have scrupulously established that Defendant’s widespread, flagrant, and acknowledged religious practices are unconstitutional. There is “an overwhelming aura of endorsement and approval of [religion] the part of the school administration, resulting in the students’ inevitable perception of [Christianity] as [the District’s] ‘favored practice.’” *Bell*, 766 F.2d at 1406. For the foregoing reasons, Plaintiffs respectfully request the Court to grant their Motion for Summary Judgment. Respectfully submitted,

August 3, 2015

s/ Monica L. Miller  
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MONICA L. MILLER  
American Humanist Association  
1777 T Street N.W., Washington, D.C, 20009  
202-238-9088; Fax: 202-238-9003  
[mmiller@americanhumanist.org](mailto:mmiller@americanhumanist.org)  
CA Bar: 288343 / DC Bar: 101625

DAVID A. NIOSE  
Law Offices of David Niose  
348 Lunenburg Street, Suite 202, Fitchburg, MA 01420  
978-343-0800  
[dniose@nioselaw.com](mailto:dniose@nioselaw.com)  
MA Bar: 556484

Daniele W. Bonifazi, Colorado Bar No. 30645  
BONIFAZI & INDERWISH, P.C.  
1873 South Bellaire Street, Suite 1401  
Denver, Colorado 80222  
Phone Number: 720-208-0111  
Fax Number: 720-208-0130  
[dbonifazi@i-blaw.com](mailto:dbonifazi@i-blaw.com)

**ATTORNEYS FOR PLAINTIFFS**