

**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-BHH

**PLAINTIFFS' SUPPLEMENTAL  
MEMORANDUM ON THE  
PRAYER CLAIM**

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Michael Bruccoliere Declaration (“Bruccoliere Decl.”) (Doc. 115-3)

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- Exhibit O: 2014 Riverside High School graduation program (Doc. 115-18)
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**New Exhibits For this Post-Remand Filing**

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- Exhibit S-4: Eastside High School 2017 Graduation Program and Speeches
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Exhibit S-14: Wade Hampton High School 2017 Graduation Program, Speeches, & Video Capture

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Exhibit Y: *Anderson et al. v. Chesterfield et al.* Consent Decree and Order

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### **2018 Written Discovery Responses**

Defendant's Responses to AHA's Supplemental RFA ("D. Disc. 1")

Defendant’s Responses to AHA’s Supplemental Interrogatories and RFP (“D. Disc. 2”)

Defendant’s Responses to AHA’s Second Supplemental Interrogatories, Requests for Admissions, and Requests for Production (“D. Disc. 3”)

Defendant’s Supplemental Responses to AHA’s Supplemental RFA, INT & RFP (“D. Disc. 4”)

AHA’s Responses to Defendant’s Supplemental Discovery Requests to Plaintiffs (“Pl. Disc”)

**Plaintiffs’ Previous Memoranda Referenced**

*(Cited pages herein refer to ECF page numbers rather than page numbers at bottom)*

- Doc. 5-1 Plaintiffs’ Memorandum in Support of Motion for Preliminary Injunction
- Doc. 21 Plaintiffs’ Reply to Motion for Preliminary Injunction
- Doc. 56 Plaintiffs’ Post-Remand Supplemental Memorandum (Preliminary Injunction)
- Doc. 74 Plaintiffs’ Motion to Determine Sufficiency of Defendant’s Responses to RFAs
- Doc. 84-1 Plaintiffs’ Memorandum in Support of Summary Judgment
- Doc. 87 Plaintiffs’ Objection to Report and Recommendation (Preliminary Injunction)
- Doc. 92 Plaintiffs’ Reply to Motion for Summary Judgment
- Doc. 115 Plaintiffs’ Post-Remand Supplemental Memorandum (Summary Judgment)
- Doc. 117 Plaintiffs’ Response to Defendant’s Post-Remand Supplemental Memorandum
- Doc. 119 Plaintiffs’ Reply to Post-Remand Supplemental Memorandum

**COMMONLY USED ACRONYMS**

American Humanist Association (“AHA”)

Greenville County School District (“GCSD”)

Blue Ridge High School (“BRHS”)

Greenville High School (“GHS”)

Mountain View Elementary School (“MVES”)

## I. Introduction and Overview<sup>2</sup>

The Constitution “forbids the State to exact religious conformity from a student as the price of attending her own high school graduation.” *Lee v. Weisman*, 505 U.S. 577, 595-96 (1992). Indeed, public “schools may not subject their students to readings of any prayer.” *Id.* at 610 (Souter, J., concurring) (citing *Engel v. Vitale*, 370 U.S. 421 (1962)). This is so even if the prayers are “student-led, student-initiated,” and “without scrutiny or preapproval by school officials,” at purely voluntary events. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 296, 298 n.6, 301, 307-08 (2000). Forcing captive students to “sit by while other students or faculty pray” is unconstitutional under *Lee* and *Santa Fe*. *Child Evangelism Fellowship of Md., Inc. v. Montgomery Cty. Pub. Schs*, 373 F.3d 589, 599 (4th Cir. 2004) (“*CEF*”). “That is being done here, and it is forbidden by the Establishment Clause.” *Lee*, 505 U.S. at 599.

Plaintiffs seek to enjoin Greenville County School District’s (“GCSD”) longstanding practice of subjecting public school students to prayer in the compulsory graduation setting. GCSD conceded that prayers delivered at its graduation ceremonies from 1951 through 2013 were unconstitutional. (Doc. 17 at 14). After the 2013 graduations, GCSD avowed (through principal affidavits only) to change its practice in two small ways: (1) by replacing “Invocation” and “Benediction” on the written programs with a “Welcome” and “Closing” (or “Reflection” and “Student Remarks”); and (2) by no longer reviewing, editing, or approving student speeches in advance.<sup>3</sup> GCSD has been adamant, however, that Christian prayers and Bible readings can still be delivered to captive student audiences. (Doc. 1 at 23-25) (Ex. X). And they have.<sup>4</sup>

Plaintiffs have consistently maintained that these superficial changes: (1) completely fail to eliminate the coercive element of prayers delivered to captive audiences; (2) underscore rather than militate against GCSD’s primary religious purpose; (3) fail to remove GCSD’s imprimatur over the prayers; and (4) fail to eliminate excessive entanglement.<sup>5</sup> *See Meltzer v. Bd. of Pub.*

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<sup>2</sup> Plaintiffs incorporate by reference all evidence, arguments, and authorities previously submitted to this Court as if fully stated herein. Plaintiffs specifically draw the Court’s attention to Doc. 115 at 10-40.

<sup>3</sup> (Doc. 89-1 at 4) (Doc. 93 at 5) (Doc. 17-1) (Gibson Aff. ¶7) (Spinks Aff. ¶5).

<sup>4</sup> (Doc. 115 at 10-15) (Doc. 84-1 at 8-9) (Miller Decl. at 6 ¶34) (Ex. V-1) (D. Disc. 1 at 1¶1).

<sup>5</sup> (Doc. 115 at 12-22) (Doc. 56 at 18-40) (Doc. 87 at 2-16) (Doc. 84-1 at 10, 23-27).

*Instruction*, 548 F.2d 559, 574 (5th Cir. 1977) (“[T]hese minor changes in the school board policy and practice do not cure the constitutional infirmities that we have found as to the initial board resolution and practices” because Bible readings are still delivered to captive students.).

Everything substantive about GCSD’s practice remains the same. Prayers are still delivered to captive student audiences whose attendance is compulsory (*Lee*). (Miller Decl. at 6 ¶34) (Ex. V-1). School officials still control the entire ceremony from start to finish,<sup>6</sup> and heavily regulate students’ dress, movements, and decorum.<sup>7</sup> The schools create the programs, select the speakers, and determine the order of the remarks, the theme, and the general content. (Exs. S-1 thru U-31) (Ex. V-1). The majority of speakers are school officials. (*Id.*). And GCSD retains authority to “prevent” a student “speaker if the content of their speech is obscene, contrary to the District’s behavior code or substantially disruptive to the school environment.”<sup>8</sup>

In May 2015, this Court held that prayers delivered from 1951 through 2013 were unconstitutional, but upheld GCSD’s practice of allowing “student-initiated” prayer due its professed minor changes. (Doc. 97). After AHA presented a mere sample of evidence regarding 2014-2016 graduations, this Court expressed “grave concerns about the constitutionality of the actual practices of the school district and the revised policy *as implemented*.” (Doc. 121 at 15-16). The fruits of the 2017 graduation discovery validate this Court’s concerns. Not only are prayers continuing as usual, but GCSD has not even adopted the two small changes it promised in 2013. (Ex. V-1) (D. Disc. 2 at 3 ¶3). The programs featured religious language, including an “Irish Blessing,” “The Lord Bless You and Keep You,” “Pray God Bless You,” and an

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<sup>6</sup> (Ex. V-1); *e.g.* (Ex. S-1 at 6-13) (Ex. S-2 at 4) (Ex. S-4 at 3, 10-12) (Ex. S-5 at 4, 17-24) (Ex. S-8 at 6-7) (Ex. S-11 at 6) (Ex. S-12 at 3) (Ex. S-13 at 3-4) (Ex. S-14 at 2, 6-9) (Ex. S-16 at 3) (Ex. T-3 at 2, 7-10) (Ex. U-7 at 4-7) (Ex. U-14 at 3) (Ex. U-16 at 3) (Ex. U-18 at 4) (Exs. U-23 thru U-25) (Doc. 84-10 at 8).

<sup>7</sup> (Doc. 115-12 at 10) (Doc. 84-10 at 25-26, 38-39) (“Dress and behavior must follow school policy” “Students who do not meet the dress requirement will not march”); (*id.* at 45-47) (“explain to your group of students how they will walk in, be seated, receive diplomas, return to their seat, and leave the arena”); *See also, e.g.*, (Ex. S-14 at 9-10, 17) (Ex. S-16 at 9, 26-29) (Ex. T-1 at 3) (Ex. T-3 at 2) (Ex. T-11 at 3-5) (Ex. T-16) (Ex. U-2) (Ex. U-5 at 3) (Ex. U-14 at 4) (Ex. U-17) (Ex. U-22) (Ex. U-27 at 3-7) (Ex. Z at 7).

<sup>8</sup> (Ex. X at 4-5, 8-9) (Doc. 1 at 23-25); *e.g.* (Ex. S-1 at 5-14) (Ex. S-4 at 4-12) (Ex. S-12 at 3).

“Inspirational Reading,” violating this Court’s Order. (Doc. 97 at 15, 17-18).<sup>9</sup> School officials also continue to review, edit, and approve student speeches and prayers. (Miller Decl. at 7 ¶38).

On December 12, 2017, the Court directed the parties to brief the “issues of whether the Court should amend its prior judgment on the prospective prayer claim and, if so, how the Court should do so.” (Doc. 121 at 5, 18-19). Plaintiffs previously touched on these issues (Doc. 115 at 10-39), and attempt to avoid unnecessary repetition. To quickly recap, in accord with *Lee* and *Santa Fe*, federal courts have been unanimous (save for *Adler*)<sup>10</sup> in finding prayers at graduation ceremonies unconstitutional, even when wholly student-initiated and neither pre-reviewed nor mentioned in a program.<sup>11</sup> Several cases have been decided since that bear emphasis here:

- *Freedom from Religion Found. v. Chino Valley Unified Sch. Dist. Bd. of Educ.*, 2018 U.S. App. LEXIS 20673, at \*33 (9th Cir. July 25, 2018) (“A requirement that a child choose whether to participate in a religious exercise or to dissent in order to participate in a complete educational experience, on par with that of her peers, implicates grave[] Establishment Clause considerations”), *affirming*, 2016 U.S. Dist. LEXIS 19995, at \*40-41 (C.D. Cal. Feb. 18, 2016) (prayers delivered in school board meetings held unconstitutionally coercive)
- *Freedom from Religion Found., Inc. v. Concord Cmty. Schs*, 885 F.3d 1038, 1048-49 (7th Cir. 2018) (finding that *Lee* and *Santa Fe* prohibit public schools from subjecting captive student audience to religious messages, “because a choice to participate or miss out on a significant portion of the curriculum is an unconstitutional one.”)
- *Cambridge Christian Sch., Inc. v. Fla. High Sch. Ath. Ass’n*, 2017 U.S. Dist. LEXIS 87298, at \*28, \*32 (M.D. Fla. June 7, 2017) (state properly prohibited private entity

<sup>9</sup> See also (Doc. 115-11 at 11-17) (Doc. 115-12 at 4-10) (Doc. 115-13) (Doc. 115-14 at 4-10) (Doc. 115-15 at 4-6) (Doc. 115-16 at 4-9) (Doc. 115-17) (Doc. 115-20) (Irwin Decl. ¶¶11-13) (Doc. 115-4 at 9-12).

<sup>10</sup> *Adler v Duval Cty. Sch. Bd.*, 250 F. 3d 1330 (11th Cir. 2001).

<sup>11</sup> See (Doc. 87 at 8-10) (Doc. 84-1 at 14-29) (Doc. 115 at 21, 25-28) (Doc. 56 at 21-24).

*E.g.*, *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979, 983 (9th Cir. 2003); *Cole v. Oroville Union High Sch.*, 228 F.3d 1092, 1104 (9th Cir. 2000); *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 816 (5th Cir. 1999), *aff’d*, 530 U.S. 290 (2000); *ACLU v. Black Horse Pike Reg’l Bd. of Educ.*, 84 F.3d 1471 (3d Cir. 1996); *Harris v. Joint Sch. Dist.*, 41 F.3d 447 (9th Cir. 1994), *vacated as moot*, 515 U.S. 1154 (1995); *Collins v. Chandler Unified Sch. Dist.*, 644 F.2d 759 (9th Cir. 1981) (school assembly); *M.B. v. Rankin Cty. Sch. Dist.*, 2015 U.S. Dist. LEXIS 117289 (S.D. Miss. 2015); *Workman v. Greenwood Cmty. Sch. Corp.*, 2010 U.S. Dist. LEXIS 42813 (S.D. Ind. 2010); *Doe v. Gossage*, 2006 U.S. Dist. LEXIS 34613 (W.D. Ky. May 24, 2006); *Ashby v. Isle of Cty. Sch. Bd.*, 354 F. Supp. 2d 616, 629 (E.D. Va. 2004); *Deveney v. Bd. of Educ. of Kanawha*, 231 F. Supp. 2d 483, 487-88 (S.D. W.VA. 2002); *Skarin v. Woodbine Cmty. Sch. Dist.*, 204 F. Supp. 2d 1195, 1198 (S.D. Iowa 2002); *Appenheimer v. Sch. Bd.*, 2001 WL 1885834 (C.D. Ill. 2001); *Gearon v. Loudoun Cty. Sch. Bd.*, 844 F. Supp. 1097 (E.D. Va. 1993); *Lundberg v. W. Monona Cmty. Sch. Dist.*, 731 F. Supp. 331, 337 (N.D. Iowa 1989). See also *Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1229-31 (10th Cir. 2009).

from delivering prayer over loudspeaker during championship game, holding that pursuant to “binding jurisprudence, the undersigned reaches the inescapable conclusion that the [prayer] . . . is government speech”) (distinguishing *Adler* and *Chandler*).

## **II. Supplemental Statement of Facts Regarding 2017 and 2018 Graduations**

In 2017, sixteen GCSD high schools held graduations, but only twelve had students deliver welcome or closing remarks “of their own choosing” (Gibson Aff. ¶17). (Ex. V-1 at 1-6) (Ex. V, Miller Decl. at 6 ¶35).<sup>12</sup> Of those, seven included at least one prayer or religious message. Three included two or more. (*Id.*). Most were expressly Christian; none were non-Christian. (*Id.* ¶36). All of the prayers and religious messages were delivered by student body representatives (i.e. class presidents) or Valedictorians/Salutatorians, or under the direction of a school official (i.e. “The Lord Bless You and Keep You” and “Irish Blessing”). (*Id.* ¶37). Over half of the prayers were reviewed and approved by school officials in advance. (*Id.* ¶¶38-39). The audience was also asked to stand and participate in two of the prayers (Berea and J.L. Mann) and the proselytizing Christian remarks at Woodmont. (*Id.* ¶40) (Ex. V-1 at 2, 4, and 6). School officials actively participated in the prayers. (Ex. V-1 at 1-6). Plaintiffs received evidence of two 2018 graduations, Greer and GHS, both of which included Christian prayers.<sup>13</sup>

### **A. Schools are still attempting to make space available for invocations.**

The crux of this Court’s decision upholding the practice in 2015 was: “There is nothing about the new position on graduations that suggests any role whatsoever in the schools attempting to make space available for invocation.” (Doc. 97 at 11). In October 2016, Plaintiffs produced overwhelming evidence to the contrary. (Doc. 115 thru 115-20). This Court agreed: “the school district has captioned innocuously as a ‘welcome,’ ‘opening remarks,’ or ‘closing remarks,’ but which merely continue the school district’s decades-long practice of including Christian prayers.” (Doc. 121 at 15). The new evidence further bears this out.

GHS, for instance, simply replaced “Invocation” with “Reflection,” which has continued

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<sup>12</sup> Twenty middle schools had graduations in 2017. But none had students deliver welcome/closing remarks “of their own choosing” (Gibson Aff. ¶17). (Ex. V-1 at 7-9). Likewise, only five of fifty-two elementary schools had students deliver welcoming or closing remarks of their own choosing. (*Id.*).

<sup>13</sup> (Ex. W-2) (Ex. W-3) (Ex. Z at 2 ¶10) (Ex. Z-1).



to be a Christian prayer.<sup>14</sup> A student council representative informed AHA member Andrew Irwin in 2017 that “the prayer is provided to the student graduation speaker each year by the school administration.” (Irwin 2018 Decl. at 1-2 ¶7). “The student has no choice in the matter as to the content of the prayer.” (*Id.*) This is corroborated by the principal’s own testimony that previous years’ prayers are given for “guidance.” (Doc. 116-1 at ¶4). Jeffrey Lamb, a teacher at Woodmont (2006-2010) and Blue Ridge High (2014-2016), confirmed that school officials “make it clear to students that prayer is allowed.” (Doc. 115-2 at 3¶15). “Students are aware that prayer is customarily included in graduation ceremonies and it is emphasized to them that no one can compel them *not* to pray at graduation.” (*Id.*). GCSD’s written memos prove as much: “the District protects . . . religious expression,” and a graduation speech “may not be restricted because of its religious or secular content.” (Ex. X at 9).

While Berea previously had an “Invocation” and a “Welcome,” and a “Benediction” and “Closing,” (Doc. 115-12), in 2017 it dropped “Invocation” and “Benediction” leaving the “Welcome” and “Closing.” (Ex. S-1 at 3). But it added an asterisk next to each, instructing the audience to stand for what was ultimately an overtly Christian prayer. (*Id.*). In perhaps an even more conspicuous attempt to make room for prayer, at least eight high schools and two elementary schools replaced “Invocation” with “Opening Remarks” or “Reflection,” while retaining (or adding) a *separate, redundant* “Welcome.”<sup>15</sup> The strong inference is that the “Opening” is something other than a “Welcome.” And in the past, that has been a prayer.

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<sup>14</sup> (Ex. S-5) (D. Disc. 1 at 2) (Pl. Disc. at 2-3) (D. Disc. 3 at 4) (Ex. Z) (Miller Decl. at 11-12).

<sup>15</sup> ♦**Adult/Lifelong**: “Welcome” and “Student Reflections” ♦**Carolina**: “Welcome” and “Reflections” ♦**Eastside**: “Reflection” and “Welcome” ♦**Greenville**: “Reflection” then “Welcome” ♦**Greer**: “Opening Remarks” and “Welcome” ♦**J.L. Mann**: “Opening Remarks” and “Welcome” ♦**Wade Hampton**: “Student Message” (*audience to stand*) and “Welcome” ♦**Woodmont**: “Salutation” (*audience to stand*) and “Welcome” ♦**MVES**: “Welcome” (principal), “Opening Remarks” (student), “Closing Remarks” (student) “Ending Comments” (principal) ♦**Sterling School**: “Pledge and Welcome” (student) separate “Welcome” (principal). (Miller Decl. at 8 ¶44) (Ex. V-1).

**B. That GCSD’s current practice is merely a continuation of its “decades-long practice” is dramatically illustrated by a comparison of its ceremonies before and after the alleged changes were adopted in June 2013.<sup>16</sup>**

**1. The audience is still asked to stand for prayers.**

As this Court noted in December, “even following the school district’s revision of its prayer policy, the programs for certain schools’ graduation ceremonies ask the audience to stand.” (Doc. 121 at 15). At least six high school graduations in 2017 had instructions for the audience to stand and participate in the prayer (or “student message”).<sup>17</sup>

**2. Prayers are still reviewed and approved by school officials.**

In 2015, this Court noted: “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.” (Doc. 97, at 2). Nothing has changed, despite GCSD repeatedly representing that: “The School District continues to follow the practice described in Gibson’s Affidavit for all of its schools. (Gibson Aff. ¶ 17.)” (Doc. 89-1 at 4) (Doc. 93 at 5). Gibson’s Affidavit provides: “Students will be chosen . . . to give messages of their own choosing *without prior review, censorship, or editing* by any teacher or administrator at this school.” (Gibson Aff. ¶17) (emphasis added).

At least eight of the twelve high schools that had welcome or closing student remarks in 2017 had school officials review and approve the remarks beforehand. (Miller Decl. at 7 ¶38) (Ex. V-1).<sup>18</sup> Over half of these were prayers or speeches proselytizing Bible scripture. (Miller Decl. at 6 ¶34). Of the five elementary schools that had students deliver opening/closing remarks, at least three reviewed and approved, and/or drafted the students’ remarks in advance. (*Id.* 9 ¶48) (Ex. V-1 at 10-16). At Brook Glenn Elementary, the student-led “Welcome” and “Closing” were *drafted entirely* by a teacher. (D. Disc. 3 at 5 ¶8, ¶11) (Ex. U-7 at 4-7). Similarly, Woodland Elementary had students “run” the program, but the script was clearly written by

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<sup>16</sup> See *Santa Fe*, 530 U.S. at 309; *M.B.*, 2015 U.S. Dist. LEXIS 117289, at \*14-15 (“A comparison between the 2014 ceremony and those from prior years shows that the 2014 event proceeded in its traditional fashion. Despite its Religion Policy . . . the District did not alter the program or its behavior.”).

<sup>17</sup> Berea (*prayer*), J.L. Mann (*prayer*), Woodmont (“Salutation” and “Farewell,” former was religious), Blue Ridge, Travelers Rest, Wade Hampton (student message). (Miller Dec. at 7-8 ¶40) (Ex. V-1 at 1-6).

<sup>18</sup> Berea, Eastside, Greenville, J.L. Mann, Riverside, Travelers Rest, Wade Hampton, and Woodmont.



school officials. (Ex. U-31).

### 3. The selection process has not changed.

GCS D has not changed how students are selected. The “Invocation” and “Benediction” were typically delivered by student body representatives,<sup>19</sup> and now the “Welcome,” “Reflection” and/or “Closing” are delivered by student body representatives. (Ex. V-1) (Miller Decl. at 7 ¶37). And elementary schools continue to choose students based on discretionary factors such as improved behavior or “citizenship criteria.”<sup>20</sup>

### 4. No disclaimers on programs (or no programs)

Since 2015, GCS D has purported to require its schools to display disclaimers on programs. (Ex. X at 8). While a “disclaimer is not sufficient to alleviate Establishment Clause concerns in the graduation speech context,” *Kennedy v. Bremerton Sch. Dist.*, 869 F.3d 813, 836 (9th Cir. 2017) (Smith, J., concurring) (citing *Lassonde*, 320 F.3d at 984); *See also Smith v. Cty. of Albemarle*, 895 F.2d 953, 958 (4th Cir. 1990) (Doc. 115 at 28-29, 32, 41-42), not a single disclaimer appeared on an elementary or middle school program in 2017. (Miller Decl. at 10 ¶50) (Ex. V-1 at 7-16). At least six high school programs did not include a disclaimer either, even when Christian prayers were delivered. (Miller Decl. at 10 ¶50).<sup>21</sup>

### 5. School-by-school comparison (before and after June 2013)

• **Berea High: 2013:** The program directed the audience to stand for an “Invocation” (by a senior class officer) and “Benediction.” (Doc. 84-10 at 22). **2014:** The program replaced “Invocation” with “Opening Remarks,” followed by a redundant “Welcome.” Both the “Opening Remarks” and “Closing Remarks” had an asterisk instructing the audience to stand. (Doc. 115-12 at 3). **2015 & 2016:** The programs directed the audience to stand for the “Welcome” and

<sup>19</sup> (Doc. 84-10 at 21-22, 29, 34-37, 42-44, 49, 51, 55-56, 69-72, 86-88, 91, 95, 98-101) (Doc. 84-9 at 2, 4-6, 10) (Jane Decl. ¶11, ¶¶14-16) (Doc. 56-2) (Doc. 56-5 thru 56-7) (Docs. 115-11, 115-13, 115-14, 115-15, 115-17, 115-18, 115-20) (Reynolds Decl. ¶2).

<sup>20</sup> (Miller Decl. at 10 ¶49) (Ex. V-1) (Gibson Aff. ¶17) (Spinks Aff. ¶5) (Byrd Aff. ¶5) (Meisten Aff. ¶5) (Doc. 84-9 at 2-3 ¶ 2) (Doc. 84-9 at 5-6; 10) (Doc. 56-2) (Docs. 56-5, 56-6, 56-7) (Doc. 87, at 5).

<sup>21</sup> Despite GCS D asserting on May 7, 2018 that it would ensure disclaimers on 2018 programs (D. Disc. 3 at 9-10) the June 2018 GHS program did not bear a disclaimer. (Ex. Z at 16) (Irwin 2018 Decl. at 2 ¶13).

“Closing Remarks,” and retained a redundant “Opening Remarks.” (Doc. 115-12 at 6, *Id.* at 9) (Doc.115-12 at 4-10). (*Id.*). **2017:** The “Closing Remarks” was a Christian prayer by the Senior Class President. (Ex. S-1 at 12). The program included an asterisk directing the audience to stand for the prayer, which they did. (Ex. S-1 at 3) (Ex. W-1). The student asked everyone: “Please join me in prayer,” and the prayer ended: “In Jesus Name. Amen.” (Ex. S-1 at 12) (Ex. W-1). The audience followed: “Amen” (*Id.*). Video footage shows school officials participating in the prayer. (Ex. W-1). The Salutatorian Speech included Bible scripture. (Ex. S-1 at 10). Both were reviewed and were approved by school officials beforehand. (D. Disc. 2 at 5) (Ex. S-1 at 9-12).

**•Blue Ridge High: 2001-2004:** Irwin confronted overtly Christian prayers in the 2001 and 2004 graduations. (Irwin Decl. ¶¶8-9). **2012 & 2013:** The programs directed the audience to stand for the “Invocation” and “Benediction.” (Doc. 84-10 at 29, 34). The 2013 “Invocation” was led by the Senior Class Treasurer and the “Benediction” by the Senior Class Secretary. (Doc. 84-10 at 34). Both were Christian prayers reviewed and approved in advance. (Doc. 84-10 at 35-36). **2014:** The program replaced “Invocation” with “Opening Remarks” (Senior Class President) and directed the audience to stand for “Closing Remarks,” which was a Christian prayer by the Senior Class Vice President. (Doc. 84-10 at 42) (Doc. 84-9 at 4-5). The remarks were approved in advance. (Doc. 84-10 at 43-44). **2015 & 2016:** The programs directed the audience to stand for “Closing Remarks” (Senior Class President and Vice President). (Doc. 84-10 at 42, 44, 47) (Doc. 115-13). The 2015 and 2016 “Opening Remarks” were prayers (Senior Class Vice President and President). (Lamb Decl. ¶¶11-13) (Doc. 115-13 at 1-6). **2017:** The program directed the audience to stand for the “Closing Remarks.” (Ex. S-2 at 4).

**•Carolina High: 2013:** The program directed the audience to stand for an “Invocation” and “Benediction” (Student Body President) (Doc. 84-10 at 48-49). **2014 & 2015:** The programs directed the audience to stand for a “Dedication” and “Gratitude.” (Doc. 115-14 at 1-6). The Dedication was delivered by the Senior Class Vice President (2014) and Senior Class President (2015). (Doc. 115-14 at 1-6). The Gratitude was led by the Student Body President (2014) and Vice President (2015). (Doc. 115-14 at 1-6). **2016:** Student body officials led the “Dedication”

and “Gratitude.” (Doc. 115-14 at 7-10). **2017:** The “Reflections” were led by the Student Body Vice President and Senior Class President. (Ex. S-3 at 4) (D. Disc. 3 at 6).

•**Greenville High: 2012:** GHS had graduation prayers prior to 2012. (Doc. 84-8 at 4 ¶20). **2013:** The program had an “Invocation” and the “Alma Matter,” which includes “And pray God bless you.”<sup>22</sup> **2016:** The “Reflection” was a Christian prayer delivered by a student council member, witnessed by Irwin and his son at his son’s graduation.<sup>23</sup> The prayer and other student speeches were reviewed and approved by school officials. (Ex. S-5 at 20-24). The program also included a recitation of the Alma Matter. (Doc. 115-4 at 12). **2017:** The “Reflection” was a prayer by the “Class treasurer” (Ex. S-5 at 10), virtually identical to the 2016 prayer. (Doc. 116-1 at ¶4), and was reviewed and approved in advance.<sup>24</sup> The Valedictory speech preached: “God has provided each one of us ... let’s not forget where all of our abilities ultimately originate from.” (Ex. S-5 at 13). The program included the Alma Matter. (Ex. S-5 at 7). **2018:** The “Reflection” was again a prayer by the “Class Treasurer,” witnessed by Irwin and his daughter at her graduation. (Irwin 2018 Decl. at 2¶10). The program included the Alma Matter. (Ex. Z at 17).

•**Greer High: 2012 & 2013:** The programs included an “Invocation” by the Senior Class Vice President and a “Benediction.”<sup>25</sup> The audience was instructed to stand for the “Invocation.” (Doc. 84-10 at 69-70). **2016:** The program replaced “Invocation” with “Student Opening Remarks,” while including a redundant “Welcome” (by a school official) and then a “Greetings” by the Student Body President. (Pernak Decl. ¶¶10-11) (Doc. 115-5 at 8-10). The “Student Opening Remarks” was a proselytizing Christian prayer, witnessed by AHA member Doneta Pernak and her son. (*Id.*). **2017:** The “Student Opening Remarks” was a prayer by the “Senior Class President.” (Ex. W-3) (Miller Decl. at 15-16 ¶87-88). **2018:** The “Salutation” was a proselytizing Christian prayer by the “Senior Class President,” for which the audience was asked

<sup>22</sup> (Doc. 84-10 at 55, 68) (Doc. 84-8 at 20) (Brucoliere Decl. ¶7) (Doc. 115-3 at 3-9) (Doc. 115-4 at 5-8).

<sup>23</sup> (Irwin Decl. ¶¶10-13) (Doc. 115-4 at 9-12) (Doc. 115-20).

<sup>24</sup> (Ex. S-5 at 3, 10, 20) (D. Disc. 2 at 5) (Pl. Disc. at 4) (Ex. Z at 1-2 ¶7).

<sup>25</sup> (Doc. 84-8 at 23) (Doc. 84-10 at 69-70) (Pernak Decl. ¶¶9-11) (Doc. 115-5 at 5-7).

to participate.<sup>26</sup> Both the Salutatorian and Valedictorian speeches also included religious language. (Ex. W-3) (Miller Decl. at 16 ¶¶90-91).

•**J.L. Mann Academy: 2009-2013:** The 2009 and 2013 programs included prayers.<sup>27</sup> The 2013 “Invocation” was led by the “Senior Class Vice President” and the “Benediction” was led by the “Senior Class President.” (Doc. 84-10 at 83). The audience was directed to stand for both. (*Id.*). **2014:** The program directed the audience to stand for “Opening Remarks” and “Closing Remarks” by the Senior Class Vice President and Senior Class President, respectively. (Doc. 115-15 at 3). **2015:** The program directed the “Audience and Graduates” to stand for “Opening Remarks” and “Closing Remarks” by the Senior Class Vice President and Senior Class President, respectively. (Doc. 115-15 at 6). **2017:** The “Opening Remarks” was a Christian prayer delivered by the Senior Class President, followed by a separate “Welcome” by the Student Body President.<sup>28</sup> The audience was directed to stand and bow their heads for the prayer.<sup>29</sup> Prior to the ceremony, the student speakers were given a slip: “Because of your class rank and/or your position on Student Council, you are a designated speaker at this year’s graduation ceremony. We will have a brief meeting . . . in Ms. Bishop’s Office to go over expectations.” (Ex. S-8 at 6). The school provided a theme for the student remarks and officials assigned students to their roles. (*Id.* at 7). The agenda stated: “All speeches are due to Mrs. Holden, Mrs. Crider, and Mrs. Bishop by May 18 so they may be proofread and approved.” (*Id.*).

•**Mauldin: 2013:** The program instructed the audience to stand for an “Inspiration” and included Christian songs. (Doc. 115-6 at 3, 7-12) (Doc. 84-10 at 86). **2014:** The program instructed the audience to stand for an “Inspiration,” and included a Christian chant and a

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<sup>26</sup> (Ex. W-3) (Miller Decl. at 15-16 ¶¶87-88) (“I ask that you all bow your heads as we say the prayer to our heavenly father. Let us pray. Dear Lord, in your word it says to give honor where honor is due. . . . Without you lord, we could not have accomplished . . . Let us remember that in your word it says, those who are righteous are ordered by the Lord . . . For it is in the name of Jesus Christ, our risen savior, we pray. Amen.”)

<sup>27</sup> (Doc. 84-8 at 7) (Doc. 56-8) (Jane Decl. ¶17) (Doc. 84-10 at 83) (Reynolds Decl. ¶2).

<sup>28</sup> (Ex. S-8 at 3, 12-13) (D. Disc. 1 at 2-3).

<sup>29</sup> (Ex.S-8 at 12-13) (“. . . would you please stand and bow your heads in prayer. Dear Lord, . . . Help us to fulfill your great plan that you have laid out for each one of us and may we be servant leaders in everything we do. In your name we pray, Amen.”).

Christian song (“Alleluia”) (*Id.*). **2015:** The ceremony included a Christian song and “Toccata of Praise.” (*Id.* at 11-12). **2017:** The program included a Christian song, “Exsultate.” (Ex. S-10 at 3). See <https://genius.com/Libera-exsultate-lyrics> (last viewed August 1, 2018).

• **Riverside: 2013:** The program directed the audience to stand for an “Invocation.” (Doc. 84-10 at 91). **2014:** The program directed the audience to stand for a “Welcome.” (Doc. 115-18). **2017:** The school set the theme and reviewed speeches beforehand. (Ex. S-11 at 6-12).

• **Travelers Rest: 2013, 2014, 2015, 2016:** The programs directed the audience to stand for an “Inspirational Reading.”<sup>30</sup> **2017:** The program again included an “Inspirational Reading.” (Ex. S-13 at 3). It also included an “Irish Blessing” led by faculty and the choir. (Ex. S-13 at 4). All student remarks were reviewed and approved beforehand. (Ex. S-13 at 7-10).

• **Wade Hampton: 2013:** The program directed the audience to stand for an “Invocation.” (Doc. 84-10 at 98). **2014:** The program instructed the audience to stand for the “Inspirational Reading,” which was a prayer delivered by the Student Body President.<sup>31</sup> **2013 - 2016:** The ceremonies included “The Lord Bless You and Keep You.”<sup>32</sup> **2017:** The program included “The Lord Bless You and Keep You.” It also included a “Student Message” by the Student Body President, for which the audience was directed to stand, followed by a separate “Welcome,” by the Senior Class President. (Ex. S-14 at 2). The remarks were reviewed and approved by school officials. (Ex. S-14 at 7, 14-15) (Ex. V-1 at 5) (no disclaimer).

• **Woodmont: 2006-2010:** Jeffery Lamb, who taught at Woodmont from 2006 to 2010, testified there was “a prayer at each and every GCSD graduation that I attended, and at least one WHS graduation I attended included two prayers.” (Lamb Decl. ¶11). Lamb added: “one year a WHS student was concerned about being a Salutatorian and felt pressure to lead a prayer during graduation.” (*Id.* at ¶14). **2013:** The program directed the audience to stand for the “Invocation” and “Benediction.”<sup>33</sup> **2014, 2015, 2016:** The programs directed the audience to stand for both the

<sup>30</sup> (Doc. 84-10 at 94-97) (Doc. 115-16 at 1-9).

<sup>31</sup> (Doc. 84-10 at 98-100); *see also* (Doc. 56-6) (Doc. 84-8 at 15-16) (Doc. 84-9 at 9).

<sup>32</sup> (Doc. 84-10 at 98, 100) (Lamb Decl. ¶6) (Doc. 115-2 at 5-10).

<sup>33</sup> (Lamb. Decl. ¶11; ¶14) (Doc 56-2) (Doc. 56-7) (Doc.115-17) (Doc. 84-10 at 101).

“Salutation” and “Farewell.” (Doc. 115-17). **2017:** The program directed the audience to stand for the “Salutation” (co-class presidents), and the “Farewell” (Student Government President). (Ex. S-16 at 3) (D. Disc. 4 at 6). The “Salutation” proselytized Christianity. (Ex. S-16 at 9). Video footage shows students standing during these remarks. (Ex. W-5 at 9:38). The “Salutatorian” also speech preached extensively from the Bible.<sup>34</sup> All speeches were reviewed and approved beforehand. (S-16 at 6-24). *See also* (Ex. S-16 at 2-3) (no disclaimer).

•**East North Street Academy: 2014:** As in 2012 and 2013, the 2014 fifth grade awards ceremony included a prayer identified on the program as an “Invocation.”<sup>35</sup>

•**Sue Cleveland Elementary: 2016:** The program had a “Message from Principal” stating that the school “will be praying for you every step of the way!” (Ex. U-27 at 6).

### **III. GCSD’s prayers violate the Establishment Clause and therefore must be enjoined.**

This Court left open the “question of the constitutionality of wholly student-led and -initiated prayers.” (Doc. 121 at 16). *Lee* and *Santa Fe* require that such prayers be enjoined for three independent reasons. First, even if GCSD could distance itself from “endorsing” the prayers, it has no means of preventing “the coercive element of the final message.” *Santa Fe*, 530 U.S. at 310. Second, GCSD’s recent actions underscore, rather than negate, its primary religious purpose. *Id.* Third, in the heavily school-controlled context of graduation, the prayers continue to bear the school’s imprimatur and excessively entangle GCSD with religion, *infra*.

#### **A. GCSD cannot eliminate the coercive aspect of the prayers.**

“Even if the school district could have conducted the proceedings so as to avoid” endorsement, it has “no means of preventing the coerced participation of dissenters attending their graduation ceremony other than censoring [religious] speech.” *Lassonde*, 320 F.3d at 984. In *Santa Fe*, the Supreme Court rejected the argument that “there is no impermissible government coercion because the pregame messages are the product of student choices.” 530 U.S. at 310-11. The Court held that neither the “dual elections and student speaker” nor the fact

<sup>34</sup> (Ex. S-16 at 16) (“Apostle Paul put it best in Romans 12 . . .”) (Miller. Decl. at 15 ¶82).

<sup>35</sup> (Doc. 84-10 at 2); *see also* (Doc. 84-9 at 2).



that a student’s decision to attend a game is “purely voluntary” could “insulate the school from the coercive element of the final message.” *Id.* See also *Gossage*, 2006 U.S. Dist. LEXIS 34613, at \*20 (“The new policy also does nothing to eliminate the fact that a minority of students are impermissibly coerced to participate in a religious exercise.”).<sup>36</sup>

“[P]rayer exercises” in public schools “carry a particular risk” of coercion, as there “are heightened concerns with protecting freedom of conscience from [even] subtle coercive pressure.” *Lee*, 505 U.S. at 592. Prayers delivered in most *adult* governmental settings are unconstitutional. See *McCreary Cty. v. ACLU*, 545 U.S. 844, 875 (2005) (“The prohibition on establishment covers . . . prayer in widely varying government settings”).<sup>37</sup> But the risk of coercion “is most pronounced” in public schools. *Lee*, 505 U.S. at 592. Justice Kennedy, joined by Justice Scalia, agreed that the “inquiry with respect to coercion” must be “whether the government imposes pressure upon a student to participate in a religious activity. This inquiry, of course, must be undertaken with sensitivity to the special circumstances that exist in a secondary school where the line between voluntary and coerced participation may be difficult to draw.” *Bd. of Educ. v. Mergens*, 496 U.S. 226, 261-62 (1990) (Kennedy, J., concurring in part).<sup>38</sup>

Accordingly, in “the context of school prayer,” a court “must give special consideration, under the principles discussed in *Lee* and *Santa Fe*, to whether a state has coerced religious worship.” *Mellen*, 327 F.3d at 37. Under *Lee* and *Santa Fe*, unconstitutional coercion exists when a school district forces “a student to choose between attending and participating in school functions and not attending only to avoid personally offensive religious rituals.” *Skarin*, 204 F.

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<sup>36</sup> See also *Cole*, 228 F.3d at 1103-04; *Black Horse*, 84 F.3d at 1482, 1487.

<sup>37</sup> See, e.g., *N.C. Civil Liberties Union Legal Found. v. Constangy*, 947 F.2d 1145, 1147-49 (4th Cir. 1991) (courtroom); *Hall v. Bradshaw*, 630 F.2d 1018, 1022 n.1 (4th Cir. 1980) (“utterly innocuous” motorist prayer limited to adult audiences); *Mellen v. Bunting*, 327 F.3d 355, 368-69 (4th Cir. 2003) (military academy); *Marrero-Méndez v. Calixto-Rodríguez*, 830 F.3d 38, 48 (1st Cir. 2016) (police department); *Milwaukee Deputy Sheriffs' Ass'n v. Clarke*, 588 F.3d 523, 528-29 (7th Cir. 2009) (sheriff's department); *Doe v. Village of Crestwood*, 917 F.2d 1476, 1479 (7th Cir. 1990) (village-sponsored event); *Rojas v. City of Ocala*, 2018 WL 2359139, at \*37 (M.D. Fla. May 24, 2018) (police-sponsored prayer vigil in adult setting violated Establishment Clause) (distinguished *Adler*).

<sup>38</sup> See also *Marsh v. Chambers*, 463 U.S. 783, 792 (1983) (distinguishing adults not susceptible to “religious indoctrination” and children subject to “peer pressure”); *Town of Greece*, 134 S. Ct. at 1823, 1826-27 (2014) (same, and reiterating that a prayer is coercive in the graduation setting).

Supp. 2d at 1198 (citing *Santa Fe*, at 312; *Lee*, at 593). *Accord Mellen*, 327 F.3d at 372 n.9. By permitting graduation prayers, GCSD forces students to choose between attending “one of life’s most significant occasions,” and not attending to avoid religious rituals. *Lee* 505 U.S. at 595. The Constitution forbids it from forcing this “difficult choice upon these students.” *Id.*

*Santa Fe* held that the Establishment Clause “will not permit the District ‘to exact religious conformity from a student as the price’ of joining her classmates at a varsity football game.” 530 U.S. at 311-12. Although attendance was “purely voluntary,” the Court declared that a school may not “force [the] difficult choice upon these students.” *Id.* GCSD’s practice is far more coercive, as the “pressure to attend an athletic event is not as strong as a senior’s desire to attend her own graduation ceremony.” *Id.* “To say that a student must remain apart from the ceremony . . . is to risk compelling conformity in an environment analogous to the classroom setting.” *Lee*, 505 U.S. at 596. *See also Concord Cmty. Schs.*, 885 F.3d at 1048-49 (7th Cir. 2018) (“As in *Lee*, *Santa Fe*, and *Elmbrook II*, Concord had a captive audience on its hands . . . That the school had a policy allowing students to opt out of participating in the Spectacular (an option some invoked) is irrelevant, because a choice to participate or miss out on a significant portion of the curriculum *is an unconstitutional one.*”) (emphasis added).<sup>39</sup>

That GCSD imposes this unconstitutional choice on students *before* the graduation is enough to warrant enjoining future prayers. But such prayers must also be enjoined due to the unconstitutional pressures students in a captive audience face when a prayer is actually delivered *during* the ceremony. *See Lee*, 505 U.S. at 594. “Finding no violation under these circumstances would place objectors in the dilemma of participating, with all that implies, or protesting,” *id.* at 593, and “thereby risk actual or perceived opprobrium and ostracism.” *Doe v. Beaumont Indep. Sch. Dist.*, 173 F.3d 274, 290 (5th Cir. 1999).<sup>40</sup> A school may not “place primary and secondary

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<sup>39</sup> *See also Collins*, 644 F.2d at 760-62 (“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”); *Gearon*, 844 F. Supp. at 1099.

<sup>40</sup> *See Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 289-90 (1963) (“[E]ven devout children may well avoid claiming their right and simply continue to participate in exercises distasteful to them because of an understandable reluctance to be stigmatized as atheists.”).



school children in this position.” *Lee*, 505 U.S. at 593. Not even when the prayers are student-led and student-initiated. *Santa Fe*, 530 U.S. at 310-312. In *Santa Fe*, the Court held 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 312 (emphasis added).

In originally declining to enjoin future prayers, this Court confined its coercion analysis to the “face” of GCSD’s “position.” (Doc. 97 at 11). The coercion test, however, focuses on the “effect” of any prayer that may be delivered, regardless of a written policy. *Lee*, 505 U.S. at 583 (no written policy). (Doc. 115 at 38-40). And “the effect of the particular prayer that is offered in any given year will be to advance religion and coerce dissenting students.” *Black Horse*, 84 F.3d at 1487. This Court even agreed that the “pressure to stand participatorily at a graduation in prayer or other religious rite is *inherently violative*.” (Doc. 97 at 14 n.6) (emphasis added).<sup>41</sup>

Many of GCSD’s prayers, including in 2017 and 2018, explicitly call for the audience’s participation.<sup>42</sup> But merely enjoining GCSD from inviting the audience to participate in prayers while allowing prayers to continue will not eliminate coercion. It is unconstitutionally coercive to force captive student audiences to “listen to a religious message” or “sit by while other students or faculty pray.” *CEF*, 373 F.3d at 599. *See Meltzer*, 548 F.2d at 574 (“daily Bible reading to students in a ‘captive audience’ situation over the public address system” is unconstitutional regardless of participation).<sup>43</sup> The Ninth Circuit in *Harris* held that student prayers were unconstitutional even though “[n]o one is asked to participate in the prayer by standing, bowing their heads, or removing their hats.” 41 F.3d at 452-53. Even forcing adults in a captive audience to listen to a religious message is unconstitutionally coercive. *See Howard v.*

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<sup>41</sup> This Court distinguished a prayer from “a student spontaneously decided to end her speech, without invitation to others to participate, by innocently saying, ‘God, thank you for helping me complete my remarks.’” (Doc. 97 at 14 n.6). Plaintiffs do not seek to enjoin such remarks. *See infra* at Section IV-A.

<sup>42</sup> (Miller Decl. at 7-8 ¶40-41) (Ex. V-1) (Ex. S-1 at 12) (Ex. W-1 at 1:08-1:15) (Ex. S-16 at 9) (Ex. W-5).

<sup>43</sup> *See also Ingebretsen v. Jackson Pub. Sch. Dist.*, 864 F. Supp. 1473, 1488 (S.D. Miss. 1994) *aff’d*, 88 F.3d 274 (5th Cir. 1996) (“[I]f students are subjected to prayer in a ‘captive audience’ situation, the state, although not officially delivering the prayer, may be effectively coercing students.”).

*Joyce Meyer Ministries*, 2017 U.S. Dist. LEXIS 207022, at \*29 (E.D. Wis. Dec. 18, 2017) (“Inmates should not be forced to listen to religious programming as a condition of getting information over the institution's television channel. While the warden may not have directed the playing of a Christian radio station, his failure to take any action in the face of a complaint would render him personally liable if the religious programming continued.”).

“Even the appearance of participation should be avoided in this setting.” *Black Horse*, 84 F.3d at 1480. *See Lee*, 505 U.S. at 588. “The undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, *at least, maintain respectful silence* during the invocation and benediction.” *Id.* at 593 (emphasis added). “There can be no doubt that for many, if not most, of the students at the graduation, the act of standing *or remaining silent* [is] an expression of participation.” *Id.* (emphasis added).

The unconstitutionally coercive dilemma imposed by GCSD's prayers is not merely conjectural. Jill Doe testified that she felt compelled to “look like” she was praying to “not stand out.” (Doc. 61-12 at ¶3, ¶6). Victor Reynolds felt that the Christian prayer at his 2013 J.L. Mann graduation was “threatening to those who practice non-Abrahamic religions.” (Doc. 21-2 at ¶4). Andrew Irwin testified that his youngest “son was disturbed and upset” by the Christian prayer at his 2016 GHS graduation. (Irwin Decl. ¶9; ¶¶11-13) “He was with the group of graduates and felt forced to participate by proximity.” (*Id.*). Irwin testified: “I was deeply concerned that my daughter would be placed in the position of having to participate in a prayer that would out herself as a non-Christian at her 2018 GHS graduation ceremony. In light of the past prayers we encountered, we were very conflicted on whether to attend. Understandably, we did not want our daughter to miss her own graduation ceremony.” (Ex. Z at 2 ¶9). And true to form, Irwin and his daughter were subjected to prayer and religious messages at her 2018 graduation. (Ex. Z at 2 ¶10). Irwin averred: “I felt that my rights as a parent to raise my children free from religious doctrine were violated by the prayer delivered at my daughter's graduation ceremony.” (*Id.* ¶15).

Michael Bruccoliere's eldest daughter is a rising junior at GHS and his youngest will

matriculate to GHS. He fears they too will be “coerced into participating in prayer.” (Bruccoliere Decl. ¶¶1-2, ¶¶4-5, ¶11). Elisa Sanders and Arthur Street share the same concerns for their children. (Doc. 115-6, ¶¶7-8) (Doc. 115-7 ¶10). Pernak and her son were faced with both the unconstitutional choice of deciding whether to attend his 2016 Greer graduation or forgo a momentous life occasion only to avoid prayer, *and* the unconstitutional dilemma of being forced to participate in a prayer with all it implies, or protest, with all it implies, when the speaker asked everyone to bow their heads and pray to Jesus. (Pernak Decl. at 2 ¶¶10-11). Pernak’s son was left to “out” himself as he “sat in silence during the prayers, and did not bow his head.” (*Id.*). Pernak fears her other child (a freshman at Greer) will be placed in this dilemma. (Pernak Decl. at 2 ¶12). Jeffery Lamb likewise testified: “If this practice is not enjoined, my daughters . . . will be put in an untenable position of having to choose between attending the most important event of their high school careers and avoiding it in order to avoid personally offensive religious rituals.” (Lamb Decl. ¶19). Because GCSD’s prayers are exacting an “unconstitutional toll on the consciences of religious objectors,” they must be enjoined. *Mellen*, 327 F.3d at 372.

The prayers are also “intrinsically unconstitutional” because they interfere “with the rights of parents to raise their children according to family religious traditions.” *M.B.*, 2015 U.S. Dist. LEXIS 117289, at \*27-28 (quoting *Schempp*, 374 U.S. at 226).

## **B. Prayers delivered at GCSD graduation ceremonies fail the *Lemon* test.**

### **1. The 2017 evidence confirms that GCSD’s purpose is to preserve a longstanding practice of graduation prayer, failing the purpose prong.**

When governmental action fails *Lemon*’s purpose prong, it is unconstitutional regardless of its “possible applications.” *Santa Fe*, 530 U.S. at 314. (Doc. 115 at 25-28). Again, when a school district “permits religious invocations which by definition serve religious purposes,” its practice “cannot meet the secular purpose prong.” *Jager v. Douglas Cty. Sch. Dist.*, 862 F.2d 824, 830 (11th Cir. 1989).<sup>44</sup> As this Court recognized last December, it must consider the

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<sup>44</sup> See also *Karen B. v. Treen*, 653 F.2d 897, 901 (5th Cir. 1981), *aff’d*, 455 U.S. 913 (1982) (Supreme Court affirmed holding that policies intended to permit “student” prayers have an “obviously religious purpose.”); *Collins*, 644 F.2d at 760-63; *Black Horse*, 84 F.3d at 1484-85; *Harris*, 41 F.3d at 458.

“evolution” of GCSD’s practices, which includes a history of “practices that unquestionably violated the Establishment Clause.” *Santa Fe*, 530 U.S. at 309, 315. (Doc. 121 at 17).

There can be no doubt at this juncture that GCSD is “simply reaching for any way to keep a religious [practice].” *McCreary*, 545 U.S. at 873 & n.14. Even in 2015, this Court understood that GCSD “insists on securing every slight remaining loophole of religious demonstration.” (Doc. 97 at 6). The only problem is that there is no such “loophole” because such an effort *is itself* an impermissible religious purpose. *Id.* at 871 & n.14; *Santa Fe*, 530 U.S. at 309.<sup>45</sup> In *Santa Fe*, the school district’s practice failed *Lemon*’s purpose test because the history of its actions “indicate[d] that the District intended to preserve the practice of prayer before football games.” *Id.* The Court reasoned: “The conclusion that the District viewed the October policy simply as a continuation of the previous policies is dramatically illustrated by the fact that the school did not conduct a new election, pursuant to the current policy, to replace the results of the previous election, which occurred under the former policy.” *Id.*

That GCSD views its current practice “as a continuation of the previous policies” is dramatically illustrated by not one but many facts, including that: (1) it has not adopted a formal written policy changing the practice permanently;<sup>46</sup> (2) it has not even implemented the two minor changes it promised in 2013;<sup>47</sup> (3) many schools replaced “Invocation” with “Opening Remarks” or “Reflection” while retaining a *separate*, redundant “Welcome,” while others added an asterisk to the “Welcome” instructing the audience to stand for what continues to be prayer; and (4) no change has been made to the selection process, *supra*. Given “these observations, and

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<sup>45</sup> See also *Gossage*, 2006 U.S. Dist. LEXIS 34613, at \*19-20 (new policy permitting uncensored student “remarks” was “nothing more than a poorly disguised attempt to ensure that prayer will continue”).

<sup>46</sup> See *Concord Cmty. Schs.*, 885 F.3d at 1051-52 (“we cannot give definitive weight to the superintendent’s statements. . . Though the school board had the authority to adopt official policies, . . . [it] failed to document in any way its decision to make the changes permanent.”).

<sup>47</sup> See *Hall v. Bd. of Sch. Comm’rs*, 656 F.2d 999, 1000 (5th Cir. 1981) (“Defendants permitted the longstanding practice to continue until the filing of this lawsuit was imminent in 1979, despite the fact that such religious readings in public schools were declared unconstitutional as early as 1963. . . . Although the superintendent of schools testified he was aware the activity was unconstitutional and had so advised the various school principals, no further attempt had been made to ensure the practice had been discontinued in all Conecuh County schools.”).

in light of the school’s history of regular delivery of a student-led prayer” at graduations, “it is reasonable to infer that the specific purpose of the policy was to preserve a popular ‘state-sponsored religious practice.’” *Id.* at 309. In 2017, this Court agreed that GCSD’s proposed changes are designed to “merely continue the school district’s decades-long practice of including Christian prayers.” (Doc. 121 at 15). For this reason alone, the prayers must be enjoined.

The only secular purpose GCSD has proffered for its prayers is to promote freedom of speech and religion,<sup>48</sup> the very purposes rejected in *Santa Fe*, at 309. Moreover, in light of GCSD’s history and failure to make any substantive changes, it is clear that this “new statement[] of purpose w[as] presented only as a litigating position.” *McCreary*, 545 U.S. at 871 & n.4. (Doc. 115 at 27). If the “stated purpose is not actually furthered” by the government action, “then that purpose is disregarded as being insincere or a sham.” *Church of Scientology Flag Serv. v. City of Clearwater*, 2 F.3d 1514, 1527 (11th Cir. 1993).<sup>49</sup> The fact that “graduation is not an open or public forum . . . disposes of this free speech argument.” *Harris*, 41 F.3d at 458-59.<sup>50</sup> Schools “do not offend the First Amendment” by prohibiting “student speech in school-sponsored expressive activities.” *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271-73 (1988) (citations omitted). And the “principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause.” *Lee*, 505 U.S. at 587; *accord Santa Fe*, 530 U.S. at 302.<sup>51</sup>

Just like the 2014-2016 evidence, moreover, the 2017 evidence sharply belies GCSD’s alleged free speech purpose. Graduation speaking slots are not open to the entire student body for indiscriminate speech, but rather, a small, select group of student body representatives or

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<sup>48</sup> (Doc. 93 at 2) (Doc. 17 at 20) (Doc. 89-1 at 9, 28).

<sup>49</sup> *See also Chino Valley*, 2016 U.S. Dist. LEXIS 19995, at \*58-59 (“Because the Court questions the sincerity of the asserted secular purpose, and because solemnization of the meetings could have been achieved without resort to religious prayer, the Resolution fails to satisfy the purpose prong”).

<sup>50</sup> *See also Black Horse*, 84 F.3d at 1484-85; *Cambridge Christian Sch., Inc.*, 2017 U.S. Dist. LEXIS 87298, at \*26-27 (“the government was not required to open its loudspeaker to allow Cambridge Christian to broadcast its prayer. Its decision not to do so is not subject to the Free Speech Clause.”).

<sup>51</sup> *See also Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 406 (5th Cir. 1995) (“free expression rights must bow to the Establishment Clause.”); *Lundberg*, 731 F. Supp. at 333.

Valedictorians/Salutatorians. “[S]elective access does not transform government property into a public forum.” *Id.* at 303 (citation omitted). In some 2017 graduations, a teacher drafted the student remarks *entirely*, others gave the students a theme, and some selected a poem or script for the student to read.<sup>52</sup> In at least three 2017 ceremonies, school officials selected or heavily influenced the *religious* remarks, including Wade Hampton’s “The Lord Bless You and Keep You,” Travelers Rest’s “Irish Blessing,” and GHS’s Alma Matter and “Reflection” prayer.<sup>53</sup> The “purpose of an official school prayer ‘is plainly religious in nature.’” *Mellen*, 327 F.3d at 373-74 (citation omitted). In short, GCSD’s alleged policy changes are merely an attempt to keep “prayer and proselytization into public schools through the backdoor.” *Chino Valley*, 2016 U.S. Dist. LEXIS 19995, at \*60-61. This improper purpose requires future prayers be enjoined. *Id.*

## 2. The prayers still have the effect of advancing and endorsing religion.

A school’s policy or practice, “as actually implemented,” must “not have the effect of promoting or inhibiting religion.” *Holloman v. Harland*, 370 F.3d 1252, 1284-91 (11th Cir. 2004). The Court “cannot turn a blind eye to the practical effects of the invocations at issue here.” *Joyner v. Forsyth Cty.*, 653 F.3d 341, 353-54 (4th Cir. 2011). In *Santa Fe*, the Court held that although there was “no certainty that any of the statements or invocations will be religious,” even if no “student were ever to offer a religious message,” the “award of that power *alone*, regardless of the students’ ultimate use of it, is not acceptable.” 530 U.S. at 313, 315-16. It is undisputed that GCSD has awarded students the power to deliver prayers at graduation ceremonies, and that students frequently exercise that power.

If, as in *Santa Fe*, a policy “authorizing the [prayer] activities would be unconstitutional, then the activities, in the absence of a [policy], are also unconstitutional.” *Jaffree v. Wallace*, 705 F.2d 1526, 1534 (11th Cir. 1983), *aff’d*, 472 U.S. 38 (1985). The Court must not be concerned with the “mechanism used to advance a concept, but the evil against which the clause protects.”

<sup>52</sup> (Ex. V-1) (Miller Decl. at 9-10 ¶48) (D. Disc. 4 at 4 ¶¶8-11); *see, e.g.*, (Ex. Z at 1-2 ¶7) (Ex. S-5 at 11-12) (Ex. S-8 at 6-7) (S-11 at 6-7) (Ex. T-3 at 7-10) (Ex. U-7 at 4-7) (Ex. U-31).

<sup>53</sup> (Ex. S-14 at 2) (Ex. S-13 at 4) (Ex. S-5 at 7, 10) (Ex. Z at 1-2 ¶7) (Pl. Disc. at 4).



*Id.* (citation omitted). The “need to protect students from government coercion [and endorsement]. . . is at the heart of the school prayer cases.” *Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 275 (3d Cir. 2011). “School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents ‘that they are outsiders, not full members of the political community.’” *Santa Fe*, 530 U.S. at 309-10 (citation omitted). As Lamb testified: “My daughters, who are growing up to be wonderful young people in a Humanist household, routinely experience and clearly understand that Christianity is the expected norm of their schools and that they are the outsiders.”<sup>54</sup>

To reiterate, “student initiated, wholly student-led prayers” at graduation ceremonies fail *Lemon’s* effect prong. Putting “the ultimate choice to the students” does not eliminate school-sponsorship. *Santa Fe*, 168 F.3d at 817-18.<sup>55</sup> The “graduation ceremony is a school sponsored event; the fact that the school board has chosen to delegate the decision regarding one segment of the ceremony to the members of the graduating class does not alter that sponsorship.” *Black Horse*, 84 F.3d at 1476. Such prayers are school-endorsed even if the policy “neither encourages a religious message nor subjects the speaker to a majority vote.” *Cole*, 228 F.3d at 1103. This is because students “hear the prayers, not the policy.” *Joyner*, 653 F.3d at 353-54.

As the Supreme Court noted in *Schempp*, it is the act of turning over the “machinery of the State” to the students to broadcast their religion which violates the Constitution, and that act cannot be justified as accommodating the First Amendment rights of the students who wish to do so. 374 U.S. at 226. Even if the prayers are, “in the strictest sense . . . ‘student-initiated,’” turning “over the school public address system” to students to deliver prayers to a captive audience “places the District’s seal of approval on this practice.” *Herdahl v. Pontotoc Cty. Sch. Dist.*, 887 F. Supp. 902, 908-09 (N.D. Miss. 1995). When the “principal hands control of the address system over to a student”—in this case, a student representative wearing school regalia and

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<sup>54</sup> (Lamb Decl. ¶18); *see also* (Pernak Decl. at 4 ¶26) (Irwin Decl. ¶15) (Street Decl. ¶14).

<sup>55</sup> *See also Collins*, 644 F.2d at 760-62; *Black Horse*, 84 F.3d at 1475-79, 1484-85 (student-initiated prayer unconstitutionally endorsed religion despite disclaimer because a prayer “would be delivered in a forum controlled by the School [District.]”); *Appenheimer*, 2001 WL 1885834, at \*1-6.

sharing the stage with school officials—“for the purpose of prayer” (whatever it is labeled on the program) “the students reasonably believe that the school, a governmental institution, is advocating religion.” *Id.* Because school officials “are present and have the authority to stop the prayers,” their failure to do so manifests endorsement, *Santa Fe*, 168 F.3d at 817-18.<sup>56</sup> Such “inaction has been found significant in the Establishment Clause context.” *Green v. Haskell Cty. Bd. of Comm'rs*, 568 F.3d 784, 802 (10th Cir. 2009) (citations omitted).

This is not a case where an isolated prayer is delivered in “*circumvention* of the School District’s policy,” where “the students and the audience” are “clearly and unequivocally notified” of the policy “that no prayers would be held.” *Doe v. Sch. Dist. of City of Norfolk*, 340 F.3d 605, 612, 615 (8th Cir. 2003) (emphasis added). Quite the opposite, GCSD students are “clearly and unequivocally” (*id.*) aware of the fact that GCSD *allows* prayer (Lamb Decl. at 2 ¶11), and is devoting excessive resources to maintain its “decades-long practice of including Christian prayers.” (Doc. 121 at 15). Such prayers are thus clearly school-endorsed.

**i. Selecting students based on “neutral criteria” does not eliminate school endorsement over the prayers.**

Inexplicably, GCSD touts as dispositive the fact that students are selected by “neutral criteria.” (Ex. X at 9). In its 2018 memo to principals, GCSD states conclusively: “Where student speakers are selected on the basis of genuinely neutral, evenhanded criteria and retain primary control over the content of their expression, that expression is not attributable to the school and therefore may not be restricted because of its religious or secular content.” (Ex. X at 9). This “widely misses the mark.” *Santa Fe*, 168 F.3d at 823. *See Santa Fe*, 530 U.S. at 307 n.21 (“the Establishment Clause forbids a State to hide behind the application of formally neutral criteria”) (citation omitted); *Joyner*, 653 F.3d at 350. It is not enough that the “policy is neutral” because again, students “hear the prayers, not the policy.” *Id.* at 350, 353-54.

GCSD’s focus on the speaker selection is a red herring. It was never a core issue with the

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<sup>56</sup> *See also Lassonde*, 320 F.3d at 984; *Black Horse*, 84 F.3d at 1479; *Jager*, 862 F.2d at 831-32; *Ashby*, 354 F. Supp. 2d at 629-30; *Lundberg*, 731 F. Supp. at 341; *Gearon*, 844 F. Supp. at 1102-03.



policy to begin with, nor has it even changed since 2013, *supra*. In school prayer cases, the issue under *Lemon*'s effect prong is not whether students are selected by "neutral criteria" but rather, whether the prayer could reasonably be perceived as "delivered with the approval of the school administration." *Santa Fe*, 530 U.S. at 308.<sup>57</sup> The election in *Santa Fe* was problematic under the effect prong because it involved "the school in the selection of the speaker." *Id.* at 306. It was also problematic that the speaker was "representing the student body." *Id.* In this way, GCSD's practice is charged with even greater endorsement. *See* (Doc. 115 at 22-45).

GCSD graduation speakers consist of school officials, Valedictorians and Salutatorians (based on academic achievement), and student body representatives (i.e., Senior Class President). (Ex. V-1). That is, "the school endorsed and sponsored the speakers as representative examples of the success of the school's own educational mission." *Lassonde*, 320 F.3d at 984. In *Corder*, the speeches were given by "valedictorians." 566 F.3d at 1229. Consequently, the Tenth Circuit found that the speech is "closely connected to the school" and the school is "sponsoring the speech." *Id.* (citation omitted). *Accord Cole*, 228 F.3d at 1103 (valedictorian speech was school-sponsored even though school's "policy neither encourages a religious message nor subjects the speaker to a majority vote that operates to ensure only a popular message is expressed at the graduation"). The students who delivered prayers in 2017 were: as follows:

- Berea "Closing Remarks" (Christian prayer): **Senior Class President**
- Berea "Salutatorian Speech" (quoting Bible passage): **Salutatorian**
- Greenville "Reflection" (prayer): **Class Treasurer**
- Greenville "Valedictory" (proselytizing remarks): **Valedictorian**
- Greer "Student Opening Remarks" (prayer): **Senior Class President**
- J.L. Mann "Opening Remarks" (Christian prayer): **Senior Class President**
- Travelers Rest "Irish Blessing:" **High School Chorus under faculty direction**
- Wade Hampton "The Lord Bless You and Keep You": **Wade Hampton Singers**
- Woodmont "Salutation" (Christian prayer): **Student Government President**
- Woodmont "Salutatorian speech" (Christian Bible references): **Salutatorian**

(Miller Decl. at 7 ¶8) (Ex. V-1). When such a prayer is "delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function" an objective observer

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<sup>57</sup> *See Doe v. Marshall*, 2018 U.S. Dist. LEXIS 41477, at \*39 (M.D. Ala. Mar. 14, 2018) ("What matters instead is whether the government's message is 'readily associated' with the private person").

would unquestionably “perceive it as a state endorsement of prayer.” *Mellen*, 327 F.3d at 374 (quoting *Santa Fe*). And surely the “delivery of such a message—over the school’s public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer—is not properly characterized as ‘private’ speech.” *Santa Fe*, 530 U.S. at 308.<sup>58</sup>

The Fourth Circuit has characterized a focus on the speaker selection as “miss[ing] the forest for the trees.” *Joyner*, 653 F.3d at 350. “It [is] the governmental setting for the delivery of . . . prayers that court[s] constitutional difficulty, not those who actually gave the invocation.” *Id.* The Establishment Clause “limit[s] freedom of speech when the speaking is done under government auspices.” *McCreary*, 545 U.S. at 875. When “authority derives in part from Government’s thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by Government itself.” *American Comm. Ass’n v. Douds*, 339 U.S. 382, 401 (1950). (Doc. 115 at 29). Thus, “[w]hen 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.” *Harris*, 41 F.3d 455.

In *Joyner*, the Fourth Circuit held that invocations by private citizens were government speech even though: (1) they were pursuant to a “neutral policy;” (2) the invocation would not be “listed or recognized as an agenda item;” (3) nobody would be “required to participate in any prayer that is offered;” (4) the government did not engage “in any prior inquiry, review of, or involvement in, the content of any prayer;” and (5) the board’s policy stated that 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.” 653 F.3d at 344.

GCSO rests its simplistic position on a footnote from Justice Souter’s concurrence in *Lee*, at 630, n.8 (Doc. 89-1 at 10), but *Santa Fe* found this unavailing. In *Santa Fe*, Justice Rehnquist, in his dissent, quoted Justice Souter’s passage to justify upholding the “student-initiated” prayers

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<sup>58</sup> Although there is no written “policy,” the written memos and letters from GCSO both explicitly and implicitly encourage prayer. (Ex. X) (Doc. 1 at 23-25) (Ex. Z at 1-2) (Lamb Decl. at 3 ¶15).

because the speakers were chosen “according to wholly secular criteria.” 530 U.S. at 324-25 (dissenting, quoting *Lee* at 630 n.8). The *Santa Fe* majority, which included Justice Souter, did not dispute that the selection criteria was neutral, but found that the prayers would still bear the school’s imprimatur and result in coercion. *Id.* at 310. Moreover, in *Lee*, Justice Souter merely opined that “it would have been *harder* to attribute an endorsement.” 505 U.S. at 630 n.8 (emphasis added). He did not state that secular criteria would eliminate coercion or even eliminate endorsement. *Id.* On the contrary, he “fully agree[d] that prayers at public school graduation ceremonies indirectly coerce religious observance.” *Id.* at 609.

GCSD rests the balance of its position on inapposite Eleventh Circuit cases (*Adler and Chandler II*),<sup>59</sup> and open-access policy cases such as *Peck v. Upshur Cty. Bd. of Educ.*, where students could readily “ignore or simply walk past the table” without “calling any attention to that choice.” 155 F.3d 274, 277-78 (4th Cir. 1998). But the present case does not involve “the use of school property as a ‘public’ or ‘open’ forum of some sort.” *Harris*, 41 F.3d at 456. “Graduation ceremonies have never served as forums” for private speech. *Brody v. Spang*, 957 F.2d 1108, 1119-20, 1117 (3d Cir. 1992). “A graduation proceeding is a theatrical production in a sense—the actors, director, and stage crew, or rather the students, administrators, teachers, and staff members, hope to convey a message the audience will understand and appreciate.” *Dreaming Bear v. Fleming*, 714 F. Supp. 2d 972, 988-989 (D.S.D. 2010). It is not a case where a student’s “speech happens to occur in a school setting as in *Tinker*.” *Id.* “Rather, it is the school-sponsored event—the graduation exercises—which provide the forum and opportunity” for the prayer. *Id.* These prayers thus “bear the imprimatur of the school.” *Hazelwood*, 484 U.S. at 271.

Lest there be any lingering doubt—despite the unanimity of graduation prayer cases with all but *Adler* finding student prayers government speech and therefore unconstitutional—the analysis enunciated in *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239,

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<sup>59</sup> Unlike the injunction in *Chandler II*, which applied to *any* school context, including student clubs, 230 F.3d at 1316 n.4, Plaintiffs’ proposed injunction is limited to graduations (Ex. Y), *infra* at Section-IV.

2250 (2015), conclusively forecloses GCSD’s argument.<sup>60</sup> In assessing whether speech by a private actor constitutes government speech, the Supreme Court considers: (1) whether the government has historically used the speech to convey government messages, (2) whether the speech is “often closely identified in the public mind” with the government, and (3) the extent to which government “maintain[s] direct control over the messages conveyed.” *Matal v. Tam*, 137 S. Ct. 1744, 1760 (2017) (quoting *Walker*, 135 S. Ct. at 2246-49). Holding that specialty license plates created by private organizations constituted government speech, the Court reasoned that plates “long have communicated messages from states,” are issued and regulated by the state, and the state maintained ultimate control over the messaging. 135 S. Ct. at 2248-50, 2253. In *Vista-Graphics, Inc. v. Va. DOT*, the Fourth Circuit applied *Walker* and “easily” concluded that private vendor advertisements at rest areas constituted government speech because “the Commonwealth historically has used rest areas to disseminate information” and “the rest areas are operated by the Commonwealth.” 682 F. App’x 231, 236 (4th Cir. 2017).

The first *Walker* factor strongly weighs in favor of government speech here for two reasons. First, the graduation ceremony has always communicated the message that the government (GCSD) approves students for graduation, and issues diplomas to signify that approval.<sup>61</sup> Second, the specific speech in question has historically (from at least 1951-2013) been used to convey GCSD’s chosen message (Invocation and Benediction), which it now designates as a “Welcome,” “Reflection,” or “Closing.” “A medium that has long communicated government messages is more likely to be government speech.” *Mech v. Sch. Bd. of Palm Beach Cty.*, 806 F.3d 1070, 1075-76 (11th Cir. 2015) (citing *Walker*).

The second factor powerfully, if not definitively, weighs in favor of government speech because the “essence of graduation is to place the school’s imprimatur on the ceremony.”

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<sup>60</sup> See also *Cambridge Christian Sch.*, 2017 U.S. Dist. LEXIS 87298, at \*18-19 (under *Walker*, a prayer by a private entity via school’s loudspeaker at school event was government speech).

<sup>61</sup> See *Pro-Football, Inc. v. Blackhorse*, 112 F. Supp. 3d 439, 458 (E.D. Va. 2015) (a trademark “communicates the message that the federal government has approved the trademark.”).

*Lassonde*, 320 F.3d 985.<sup>62</sup> The ceremony is held solely for school purposes, on school grounds, and the school’s seal prominently displayed on the written programs and on the stage. School officials determine the content of the program, the order of the remarks, and the speakers and the majority of the literal speakers are school officials, *supra*, (*see* Ex. V-1). The few students chosen to fill spots are student representatives, *supra*, wearing school regalia,<sup>63</sup> while all other students are subject to uniform requirements.<sup>64</sup> Such remarks are therefore “‘closely identified in the public mind’” with GCSD. *Walker*, 135 S. Ct. at 2248. *See Turner v. City Council*, 534 F.3d 352, 354 (4th Cir. 2008) (prayers were government speech because “the central purpose of the Council meeting is to conduct the business of the government,” the slot was “listed on the agenda, and is delivered as part of the opening”).

As to the final factor, GCSD “maintain[s] direct control over the messages conveyed,” *Walker*, 135 S. Ct. at 2249. *See* (Ex. X) (Ex. S-8 at 6). At a public school graduation, “teachers and principals must and do retain a high degree of control over the . . . movements, the dress, and the decorum of the students.” *Lee*, 505 U.S. at 597. Due to this high “degree of control,” observers “would reasonably perceive the [student] expressions . . . as bearing the imprimatur of the school.” *Griffith v. Caney Valley Pub. Sch.*, 2015 U.S. Dist. LEXIS 66059, \*10-11 (N.D. Okla. May 20, 2015). Even if GCSD “allowed the students great input in planning,” it “is a far stretch” to say that it relinquished “ultimate control over the content and orderly progression of the proceedings,” *Dreaming Bear*, 714 F. Supp. 2d at 988, by changing the “Invocation” and “Benediction” to “Welcome” and “Closing.”

**ii. The prayers are school-endorsed regardless of whether they are reviewed, edited, or approved by school officials.**

Likewise, even if GCSD upheld its promise and actually stopped reviewing, editing, and approving student remarks, prayers delivered at its ceremonies would still be unconstitutionally

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<sup>62</sup>*See also Mech*, 806 F.3d at 1075-77 (“the banners bear the imprimatur of the schools” as they are “hung on school fences” are “printed in school colors and are subject to uniform design requirements”).

<sup>63</sup> (Ex. S-1 at 14) (Ex. S-14 at 17) (Ex. S-16 at 26-29) (Ex. W) (Ex. Z-1) (Docs. 84-14 thru 84-17).

<sup>64</sup> (Doc. 115-12 at 10) (Doc. 84-10 at 25) (“Dress and behavior must follow school policy.”)

school-endorsed. The Fourth Circuit has held that prayers by private citizens are government-sponsored even when the government does not engage “in any prior inquiry, review of, or involvement in, the content of any prayer.” *Joyner*, 653 F.3d at 344, 353. Again, the prayers in *Santa Fe* would not be preapproved by school officials but still failed *Lemon*’s effect prong. 530 U.S. at 296, 298 n.6 (“the prayer was to be determined by the students, without scrutiny or preapproval by school officials.”); *id.* at 301 n.11 (“The school board has neither scripted, supervised, endorsed, suggested, nor edited these personal viewpoints.”). The student prayers in *Harris* unconstitutionally endorsed religion even though “no school official reviews presentations prior to commencement. No one is asked to participate in the prayer by standing, bowing their heads, or removing their hats.” 41 F.3d at 452-53. The Fifth Circuit twice held that prayers delivered at school board meetings are government speech even if delivered by private citizens, including students, of their own “unrestricted choosing” and are not reviewed in advance. *Doe v. Tangipahoa Parish Sch. Bd.*, 473 F.3d 188, 192-93 (5th Cir. 2006), *vacated on standing*, 494 F.3d 494 (5th Cir. 2007) (en banc); *Am. Humanist Ass’n v. McCarty*, 851 F.3d 521, 525, 529 n.25 (5th Cir. 2017), *cert. den.*, 138 S. Ct. 470 (2017) (student-led, student-initiated, uncensored “student expressions”).<sup>65</sup>

Failing to prevent prayers from being delivered would in fact be an abdication of the school’s duty to protect students in a captive audience. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 684 (1986) (recognizing the duty of “school authorities acting in *loco parentis*, to protect children -- especially in a captive audience”); *Gearon*, 844 F. Supp. at 1100 n.5; (Ex. Y). A school must “retain the authority to refuse to sponsor student speech that might . . . associate the school with any position other than neutrality.” *Hazelwood*, 484 U.S. at 272. In *Lassonde* and in *Cole*, the Ninth Circuit thus held that “the school district *had to censor* the speech in order to avoid the appearance of government sponsorship of religion.” *Lassonde*, 320 F.3d at 983-84

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<sup>65</sup> The Fifth Circuit’s application of the legislative prayer exception to school board prayers is irreconcilable with the Third, Sixth, and Ninth Circuits’ cases. See *Indian River*, 653 F.3d 256; *Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369 (6th Cir. 1999); *Chino Valley*, 2018 U.S. App. LEXIS 20673.



(emphasis added, citing *Santa Fe* and *Cole*). This was so even if the “policy neither encourage[d] a religious message nor subjects the speaker to a majority vote.” *Cole*, 228 F.3d at 1103.

**iii. *Adler* conflicts with binding precedent and is distinguishable.**

Plaintiffs thoroughly demonstrated why *Adler* is inapt.<sup>66</sup> *Adler* directly conflicts with *Santa Fe*, Fourth Circuit precedent, and even subsequent Eleventh Circuit precedent. (Doc. 115 at 33-35). *Adler* is also readily distinguishable. To reiterate, the Eleventh Circuit upheld the policy on its face—turning a blind eye to its effects (*Joyner*)—based on “the total absence of state involvement in deciding *whether there will be a graduation message, who will speak, or what the speaker may say.*” 250 F.3d at 1342 (emphasis added). By contrast: (1) *GCSD* decides whether there will be a graduation message and what that message is called (“Welcome,” “Closing,” etc.); (2) *GCSD* decides who will speak (student body representatives, Valedictorians);<sup>67</sup> and (3) *GCSD* regulates the speech and retains authority to “prevent” a student “speaker if the content is obscene, contrary to the District’s behavior code,” “may foreseeably disrupt the educational environment,” or “contain profanity.” (Ex. X 4-5, 9) (Doc. 1 at 23-25). *Adler* has only been cited in 23 cases (*Shepard’s*®, excluding duplicates, including this Court’s decision). Of the few graduation cases that cited *Adler*, at least seven rejected or distinguished it.<sup>68</sup> At least seven graduation speech/prayer cases ignored *Adler* completely.<sup>69</sup>

**iv. Although the ratio is immaterial, it does not favor *GCSD*.**

<sup>66</sup> (Doc. 21 at 7-13) (Doc. 115 at 31-35) (Doc. 56 at 32-35).

<sup>67</sup> That *Adler*’s policy “did not contain any restriction on the identity of the student speaker” was a “key” fact of the decision. *Newman v. City of East Point*, 181 F. Supp. 2d 1374, 1379-80 (N.D. Ga. 2002) (citing *Adler*). *Corder*, 568 F. Supp. 2d at 1246 n.5.

<sup>68</sup> *Corder*, 566 F.3d at 1229 n.5; *Workman*, 2010 U.S. Dist. LEXIS 42813, at \*23-24 n.4; *S.D. v. St. Johns Cnty. Sch. Dist.*, 632 F. Supp. 2d 1085, 1091-92 (M.D. Fla. 2009); *Corder v. Lewis Palmer Sch. Dist. No. 38*, 568 F. Supp. 2d 1237, 1246 n.5 (D. Colo. 2008); *Gossage*, 2006 U.S. Dist. LEXIS 34613, at \*11-21 (rejecting *Adler*); *Deveney*, 231 F. Supp. 2d at 486; *Appenheimer*, 2001 WL 1885834, at \*10; *see also Indian River*, 653 F.3d at 288-89 (citing *Adler* to find prayers at school board meetings unconstitutional); *Cambridge Christian Sch.*, 2017 U.S. Dist. LEXIS 87298, at \*25-26 (finding *Adler* inapposite to prayer delivered over stadium’s loudspeaker because it “would be broadcast during a school event in a program established and controlled by the state”); *Rojas*, 2018 U.S. Dist. LEXIS 87288, at \*43-44, \*50.

<sup>69</sup> *E.g.*, *A.M. v. Taconic Hills Cent. Sch. Dist.*, 510 Fed. Appx. 3 (2d Cir. 2013); *Nurre v. Whitehead*, 580 F.3d 1087, 1098 (9th Cir. 2009); *Lassonde*, 320 F.3d 979; *Dreaming Bear*, 714 F. Supp. 2d 972; *Griffith*, 2015 U.S. Dist. LEXIS 66059; *Ashby*, 354 F. Supp. 2d 616, *Skarin*, 204 F. Supp. 2d 1195. *See also Golden v. Rossford Exempted Vill. Sch. Dist.*, 445 F. Supp. 2d 820, 824-25 (N.D. Ohio 2006).

Plaintiffs previously established that the ratio of prayers is immaterial under the coercion test and *Lemon* test. (Doc. 115 at 35-37). The only school prayer case to turn on “ratio” evidence was *Adler I*, 206 F.3d 1070, 1083-84 (11th Cir. 2000), and it was limited to a *facial* challenge. More importantly, *Adler I*’s facial analysis was “unequivocally” found inapposite in *Santa Fe. Selman v. Cobb Cty. Sch. Dist.*, 390 F. Supp. 2d 1286, 1299 (N.D. Ga. 2005) (Doc. 115 at 36).

Again, *Santa Fe* found the coercion test violated even if no “student were ever to offer a religious message.” 530 U.S. at 313-16. Knowing that a prayer *could be* delivered forces a dissenter to choose between foregoing a “ceremony that marks the culmination of his high school career,” or risk being forced to participate “in an unwelcome religious exercise.” *Deveney*, 231 F. Supp. 2d at 486-87.<sup>70</sup> Even a *single* future graduation prayer is unconstitutional. (Doc. 115 at 30). The student in *Lee* “was exposed to approximately two minutes of prayer.” *Am. Humanist Ass’n v. Douglas Cty. Sch. Dist. Re-1*, 859 F.3d 1243, 1252 (10th Cir. 2017) (citing *Lee*, at 583-84). *See also Hall*, 630 F.2d at 1021-22 (“No *de minimis* exception is tolerable”).

Critically, in *Joyner*, the Fourth Circuit found that the ratio of prayers is irrelevant in determining whether a prayer practice is unconstitutional as implemented. 653 F.3d at 354. The court reasoned that some “attend meetings only sporadically.” *Id.* Thus, regardless of what occurs at other meetings, those “citizens will have to listen to someone professing religious beliefs that they do not themselves hold as a condition of attendance and participation.” *Id.* The court recognized that even as to *adults* who are ““Jewish, Muslim, Bahá’i, Hindu, or Buddhist[,] a request to recognize the supremacy of Jesus Christ and to participate in a civic function sanctified in his name is a wrenching burden.”” *Id.*<sup>71</sup> *A fortiori*, it is a “wrenching burden” to put public school children in this position at “one of life’s most significant occasions.” *Lee*, 505 U.S. at 595. It is no consolation to say that a prayer was not delivered at other graduations that year.

The ratio does not even help GCSD. At least eleven of sixteen high schools included at least one prayer in a ceremony after 2013. (Miller Decl. at 6 ¶35) (Ex. V-1 at 1-6). At least nine

<sup>70</sup> *Accord Concord Cmty. Schs*, 885 F.3d at 1048-49; *Lassonde*, 320 F.3d at 984.

<sup>71</sup> *Joyner*’s holding regarding the irrelevancy of a ratio of prayers was not abrogated by *Town of Greece*.



included a prayer in 2016, 2017 and/or 2018. (*Id.*). In 2017, of twelve high schools had students deliver opening/closing remarks, seven included at least one prayer. (*Id.*).

### 3. GCSB's prayers foster excessive entanglement with religion.

GCSB's prayers continue to foster excessive entanglement with religion. *See Collins*, 644 F.2d at 762. "[E]xcessive entanglement may lie simply where the government's entanglement has the effect of advancing or inhibiting religion." *Am. Humanist Ass'n v. Md.-National Capital Park & Planning Comm'n*, 874 F.3d 195, 211 (4th Cir. 2017). The 2017 evidence reinforces Plaintiffs' previous arguments (Doc. 115 at 37-38) in three ways.

First, school officials are still reviewing, edit, and approving student prayers, *supra*, and will "prevent" speeches "contrary to the District's behavior code," or that "may foreseeably disrupt the educational environment." (Ex. X at 4). Again, any "such determination would necessarily entangle the administration in deciding religious issues." *Bell v. Little Axe Indep. Sch. Dist.*, 766 F.2d 1391, 1406 (10th Cir. 1985). *See Gearon*, 844 F. Supp. at 1100 n.5 ("If a Principal or school officer does not review the remarks he or she could be accused of an abdication of responsibility. If the remarks are reviewed it smacks of state entanglement.").<sup>72</sup>

Second, the 2017 evidence exposed several flagrant instances of entanglement where the remarks were chosen, led, or encouraged by school officials (*e.g.*, Wade Hampton's "Lord Bless You and Keep You," Travelers Rest's "Irish Blessing," and GHS's Alma Matter and prayer). *See Mellen*, 327 F.3d at 375; *Coles*, 171 F.3d at 385; *Rojas*, 2018 U.S. Dist. LEXIS 87288, at \*39 ("Even without more, an invitation by a city police department encouraging the community's attendance at a Prayer Vigil entangles the government with religion.").

Third, school officials are continuing to actively participate in the student prayers.<sup>73</sup> *See Duncanville*, 70 F.3d at 406 ("DISD representatives' participation in these prayers improperly entangles it in religion"); *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 279 (5th Cir.

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<sup>72</sup> *See also Bennett v. Livermore Unified Sch. Dist.*, 193 Cal. App. 3d 1012, 1020 (Cal. App. 1st Dist. 1987) ("it will be necessary to oversee the students' choice of ceremony to ensure that the limits set here are not exceeded. It is just this kind of surveillance which causes the entanglement condemned").

<sup>73</sup> (Ex. W-1, 1:08-1:15) (Ex. V-1 at 1-6) (Doc. 84-15) (Doc. 61-12) (Doc. 61-13) (Miller Decl. at 8 ¶41).

1996) (“To the extent that school administrators participate in prayers . . . the School Prayer Statute excessively entangles government with religion.”).

### **C. Faculty participation in prayers violates the Establishment Clause.**

School officials’ active participation in student prayers independently violates the Establishment Clause. The “State exerts great authority and coercive power . . . because of the students’ emulation of [school officials] as role models.” *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987). *See Mergens*, 496 U.S. at 251-52. When school officials “manifest approval and solidarity with student religious exercises, they cross the line between respect for religion and endorsement of religion.” *Duncanville*, 70 F.3d at 406 n.4 (coach’s participation in prayer with students unconstitutionally endorsed religion); *Borden v. Sch. Dist.*, 523 F.3d 153, 170 (3d Cir. 2008) (same).<sup>74</sup> Video footage of the 2017 Berea graduation, for instance, shows school officials praying alongside students. (Ex. W-1) (*See also* Ex. S-1 at 14). Photographs of the 2013 Hillcrest graduation show the same. (Doc. 84-15 at 2-3). The Does witnessed school officials actively participating in the student prayers at the MVES graduation in 2013 as well.<sup>75</sup> As a result, Jill feared she would be in “trouble” if she did not participate. (Doc. 61-12, at ¶3; ¶6).

## **IV. Scope and Terms of Injunctive Relief**

### **A. The terms of the *Anderson* Permanent Injunction are narrowly tailored to remedy the constitutional defects with GCSD’s prayers.**

“The scope of injunctive relief is dictated by the extent of the violation established.” *Lewis v. Casey*, 518 U.S. 343, 359 (1996). “Especially in the Establishment Clause context, courts must endeavor to craft remedies that correspond to the violations.” *Cooper v. United States Postal Serv.*, 577 F.3d 479, 496 (2d Cir. 2009). *See Bowen v. Kendrick*, 487 U.S. 589, 620 (1988). A district court has “wide discretion to fashion appropriate injunctive relief.” *Richmond Tenants Org., Inc. v. Kemp*, 956 F.2d 1300, 1308 (4th Cir. 1992). GCSD’s prayers, even if truly “student initiated,” remain hopelessly unconstitutional, and therefore must be enjoined.

<sup>74</sup> *See also Pelozo v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 522 (9th Cir. 1994); *Roberts v. Madigan*, 921 F.2d 1047, 1056-58 (10th Cir. 1990).

<sup>75</sup> (Doc. 61-12, at ¶3, ¶6) (Doc. 61-13 at 2 ¶5) (Doc. 61-14 at 2 ¶¶5-6).

Plaintiffs propose that the Court adopt the “Permanent Injunction” terms applicable to graduations from the *Anderson v. Chesterfield County School District* “Consent Decree and Order,” approved by the District Court (Florence Division). (Ex. Y). The Order enjoins the inclusion of student-led, and student-initiated “Prayer” in graduation ceremonies, “whether or not it is noted in a printed program.” (Ex. Y at 5 ¶c). The Order places an affirmative obligation on schools to “prohibit or curb efforts by third parties to introduce Prayer.” (*Id.* 5 ¶g). The Order also allays this Court’s concerns (Doc. 97 at 14 n.6) by using a carefully crafted definition of “Prayer” to *exclude* “customary, polite expressions and greetings” including “God Bless You” or “Thank Heavens.” (Ex. Y at 3 ¶b).<sup>76</sup>

**B. While GCSD’s two promised changes would not remedy the constitutional infirmities inherent with its prayers, GCSD’s failure to implement those changes, together with its flagrant violations of this Court’s Order and the Establishment Clause, necessitates comprehensive injunctive relief.**

Even if this Court is not convinced that “student initiated” prayers delivered before captive student audiences at compulsory events (*Lee*) violate the Establishment Clause— notwithstanding *Lee*, *Santa Fe*, and a near-unanimous body of federal court precedent—GCSD’s long history of violating the Establishment Clause, coupled with its recent violations, *and* failure to comply with this Court’s 2015 Order, warrants comprehensive relief. *See Hutto v. Finney*, 437 U.S. 678, 687 (1978) (“The District Court had given the Department repeated opportunities to remedy the cruel and unusual conditions. . . . [T]aking the long and unhappy history of the litigation into account, the court was justified in entering a comprehensive order”); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) (“If school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked. Once a right and a violation have been shown, the scope of a district court’s equitable powers to remedy past wrongs is broad.”); *Mitchell v. Helms*, 530 U.S. 793, 865 (2000) (O’Connor, J., concurring) (“[E]xtensive violations . . . will be highly relevant in shaping an appropriate remedy”).

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<sup>76</sup> *See also Chino Valley*, 2018 U.S. App. LEXIS 20673, at \*44 (enjoining school board “‘from conducting, permitting or otherwise endorsing school-sponsored prayer in Board meetings.’”).

It is significant that GCSD admitted it was operating an unconstitutional practice from 1951 to 2013 (Doc. 17 at 14), but has still failed to implement the two minor changes it promised in 2013. *See Hall*, 656 F.2d at 1000 (finding it relevant that school district “permitted the longstanding practice to continue until the filing of this lawsuit was imminent in 1979, despite the fact that such religious readings in public schools were declared unconstitutional as early as 1963” and failed to ensure practice discontinued). In November 2013, GCSD averred: “Any future fifth grade graduations will not include such prayers.” (Doc. 17 at 14). GCSD immediately broke this promise, as the 2014 East North Street Academy included an “Invocation” in its program. (Doc. 84-10 at 2). When this Court upheld GCSD’s post-2013 prayer practice, it did so under the assumption that GCSD had made at least some changes to its longstanding practice. That assumption was proven false in 2016 (Doc. 121 at 16), and remains so today, *infra*.

Flouting this Court’s Order (Doc. 97 at 7) (Doc. 121 at 15-16) and firmly established precedent, GCSD is still sponsoring *official* school prayers that are in no way “student-initiated.” In 2017 alone, there were at least four such instances: (1) Wade Hampton’s “The Lord Bless You and Keep You;” (2) Travelers Rest’s “Irish Blessing;” (3) GHS’s “Reflection” prayer (as a copy is given to students for “guidance”). (Irwin 2018 Decl. at 1-2 ¶7) (Doc. 116-1 at ¶4); (4) GHS’s Alma Matter, “pray God bless you” (Irwin 2018 Decl.). The “First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige” of the government “would be used to *control, support or influence* the kinds of prayer the American people can say.” *Engel*, 370 U.S. at 429 (emphasis added); *id.* at 424-25 (“using [the] public school system to encourage recitation of the Regents’ prayer” was “wholly inconsistent with the Establishment Clause.”). “The clear effect of any officially composed and published prayer is to advance religion.” *Hall*, 630 F.2d at 1021. *See Mellen*, 327 F.3d at 368.<sup>77</sup>

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<sup>77</sup> The GHS Alma Matter is alone violative, and cannot be dismissed as “de minimis.” *See Engel*, 370 U.S. at 422 (“Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.”); *De Spain v. DeKalb Cnty. Com. Sch. Dist.*, 384 F.2d 836, 837 (7th Cir. 1967) (holding unconstitutional “thank you poem” that provided: “We thank you for the flowers so sweet; We thank you for the food we eat; We thank you for the birds that sing; We thank you for everything.”); *Hall*, 630 F.2d at 1021 (citing *De Spain* with approval).

Moreover, 2017 programs continued to feature language this Court specifically enjoined in May 2015. (Doc. 97 at 15).<sup>78</sup> For instance, the 2017 Travelers Rest program included an “Inspirational Reading,” just as in 2013, 2014, 2015 and 2016.<sup>79</sup> Other schools replaced “Invocation” with “Reflection” or “Dedication,”<sup>80</sup> contravening the spirit of this Court’s order. (Doc. 97 at 11). The GHS “Reflection” was a prayer in 2018, 2017, and 2016.<sup>81</sup>

As discussed above, GCSD has made no effort to discontinue drafting, reviewing, editing and/or approving student remarks. (Ex. V-1). GCSD avowed that Gibson Aff. ¶17 applies to all its schools, meaning nearly half the high schools in 2017, and elementary schools like Brook Glenn, in which teachers wrote the student remarks *entirely* (D. Disc. 4 at 4 ¶¶8-11) violated district policy, or GCSD does not really mean what it says. Ultimately, GCSD is either unable or unwilling to respect the constitutional rights of religious minorities, giving this Court “ample authority to go beyond earlier orders” and enter a “comprehensive order to insure against the risk of inadequate compliance.” *Hutto*, 437 U.S. at 687.

## V. Conclusion

“The First Amendment is a shield that prohibits the state from interfering with a person’s right to worship as he or she pleases. It is not a sword that can be used to compel others to join in a religious observance at a state sponsored event.” *Black Horse*, 84 F.3d at 1481. The “preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission.” *Lee*, 505 U.S. at 589. For the foregoing reasons, Plaintiffs respectfully request that this Court enter an order granting summary judgment to Plaintiffs on their prayer claim and permanently enjoin GCSD from including prayers in its graduation and end-of-year ceremonies.

Respectfully submitted,

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<sup>78</sup> See also (Docs. 115-11 at 11-17; 115-12 at 4-10; 115-13; 115-14 at 4-10; 115-15 at 4-6; 115-16 at 4-9; 115-17; and 115-20) (Irwin Decl. ¶¶11-13) (Doc. 115-4 at 9-12).

<sup>79</sup> (Ex. S-13 at 8-9) (Doc. 84-10 at 95) (Doc. 115-16 at 1-3) (Doc. 115-16 at 4-6) (Doc. 115-16 at 7-9).

<sup>80</sup> (Ex. S-9 at 3) (Ex. S-3at 4) (Ex. S-4 at 3) (Ex. S-5 at 3) (Doc. 115-14 at 4-10).

<sup>81</sup> (Ex. S-5 at 10) (Irwin Decl. ¶¶11-13) (Doc. 115-4 at 8-10).

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