Appignani Humanist Legal Center

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September 24, 2018

Jeff James – Superintendent
Stanly County Schools
1000-4 N First Street
Albemarle, NC 28001

jeff.james@stanlycountyschools.org

RE: Constitutional Violation

Dear Mr. James,

Our office was recently informed that Stanly County Schools, and specifically Millingport Elementary School, is involved in serious unconstitutional activity by promoting a prayer event, "See You at The Pole." The school recently posted on Facebook (seen via this link) urging readers to participate in "See You at the Pole" prayer activity. The post (a screenshot of which is pasted below) expressly states, among other things: "Please join us on Wednesday, September 26th as we gather around the pole to pray!!" It also states: "Come pray with us as we pray for our students. . ." This type of endorsement of prayer is not only totally insensitive to the religious minorities whose sincere convictions would be offended by such activity, it is also plainly unconstitutional. We demand that you take down the social media post immediately and instruct staff to refrain from such religious endorsements in the future.

"See You At The Pole" is an effort initiated and promoted by various Christian groups across the country. The religious activity takes place on school grounds, usually just before the start of the school day as children are arriving, in which public school staff should not be endorsing or participating. Such school-sponsored prayer activities obviously send a strong message of religious favoritism, leaving non-Christian students and families as outsiders. Such exclusion has no place in a public school supported by taxpayers of all faiths and no faith.

If the post is not promptly removed, your school district is inviting litigation. The American Humanist Association (AHA) is a national nonprofit organization with over 600,000 supporters and members across the country, including many in North Carolina. The mission of AHA's legal center is to protect one of the most fundamental principles of our democracy: the constitutional mandate requiring a separation of church and state. Our legal center includes a network of cooperating attorneys from around the country, including North Carolina, and we have litigated constitutional cases in state and federal courts from coast to coast, including North Carolina.

The First Amendment's Establishment Clause "commands a separation of church and state." *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005). It requires the "government [to] remain secular, rather than affiliate itself with religious beliefs or institutions." *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 610 (1989). Courts "pay particularly close attention to whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion." *Id.* at 592. Not only must the government not advance, promote, affiliate with, or favor any particular religion, it "'may not favor religious belief over disbelief.'" *Id.* at 593 (citation omitted). Indeed, the Establishment Clause "create[s] a complete and permanent separation of the spheres of religion activity and civil authority." *Everson v. Bd. of Ed*, 330 U.S. 1, 31-32 (1947). *Accord Engel v. Vitale*, 370 U.S. 421, 429 (1962). Separation "means separation, not something less." *McCollum v. Bd. of Educ.*, 333 U.S. 203, 231 (1948). In "no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart." *Id.*

To comply with the Establishment Clause, a government practice must pass the *Lemon* test,[1] pursuant to which it must: (1) have a secular purpose; (2) not have the effect of advancing or endorsing religion; and (3) not foster excessive entanglement with religion. *Allegheny*, 492 U.S. at 592. Government action "violates the Establishment Clause if it fails to satisfy any of these prongs." *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987). In applying these general principles to the context of public schools, the Supreme Court has emphasized that courts must defend the wall of separation with an even greater level of vigilance because "there are heightened concerns with protecting freedom of conscience from [even] subtle coercive pressure in the elementary and secondary public schools." *Lee v. Weisman*, 505 U.S. 577, 592 (1992).

With these principles in mind, the Supreme Court has specifically ruled: (1) that the state must not place its stamp of approval on prayers by authorizing them at school-sponsored events; and (2) that including prayers school-sponsored events (such as assemblies and graduations) unconstitutionally coerces students to participate in religious activity. *Santa Fe Indep. Sch. Dist.*

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

v. Doe, 530 U.S. 290, 308 (2000); *Lee*, 505 U.S. at 590-92. School "officials have long been prohibited by the Establishment Clause from inserting religious exercises into school activities." *S.D. v. St. Johns Cnty. Sch. Dist*., 632 F. Supp. 2d 1085, 1093 (M.D. Fla. 2009). Indeed, *Lee* and *Santa Fe* are "merely the most recent in a long line of cases carving out of the Establishment Clause what essentially amounts to a per se rule prohibiting public-school-related or -initiated religious expression or indoctrination." *Doe v. Duncanville Indep. Sch. Dist*., 994 F.2d 160, 165 (5th Cir. 1993).

The Supreme Court has issued numerous decisions "of considerable parentage that prohibits prayer in the school classroom or environs." *Id.* at 164. *See Santa Fe*, 530 U.S. at 294 (student prayers at football games unconstitutional); *Lee*, 505 U.S. at 580-83 (1992) (prayers at graduation ceremonies unconstitutional); *Wallace v. Jaffree*, 472 U.S. 38, 40-42 (1985) (school prayer and meditation unconstitutional); *Sch. Dist. Abington v. Schempp*, 374 U.S. 203, 205 (1963) (daily scripture readings unconstitutional); *Engel v. Vitale*, 370 U.S. 421, 422-23 (1962) (school prayer unconstitutional).[2] The Fourth Circuit has also made clear school prayers are prohibited. *See Mellen v. Bunting*, 327 F.3d 355, 367, 370-72 (4th Cir. 2003) (supper prayers at military school violated Establishment Clause).

"The State must be certain . . . that subsidized teachers do not inculcate religion." *Lemon*, 403 U.S. at 619. The Establishment Clause "absolutely prohibit[s] government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith." *School Dist. v. Ball*, 473 U.S. 373, 385 (1985). Constitutional doctrine teaches that a school cannot endorse religion in the classroom, *Wallace*, 472 U.S. 38; *Stone*, 449 U.S. 39 (Ten Commandments display in public school unconstitutional); *Schempp*, 374 U.S. 203; *Engel*, 370 U.S. 421, or at events it hosts, *Santa Fe*, 530 U.S. 290; *Lee*, 505 U.S. 577. *See also Doe v. Elmbrook Sch. Dist*., 687 F.3d 840, 856 (7th Cir. 2012), *cert. denied*, 134 S. Ct. 2283 (2014).

School districts must not permit any "of its teachers' activities [to] give[] the impression that the school endorses religion." *Marchi v. Board of Coop. Educ. Servs.*, 173 F.3d 469, 477 (2d Cir. 1999). *See Karen B*, 653 F.2d 897; *Borden v. Sch. Dist.*, 523 F.3d 153, 174 (3rd Cir. 2008) (coach silently bowing head and kneeling while team prayed violated Establishment Clause); *Holloman v. Harland*, 370 F.3d 1252, 1285 (11th Cir. 2004) (teacher's practice of initiating silent prayer with her students violated Establishment Clause); *Doe v. Duncanville Indep. Sch. Dist*., 70 F.3d 402 (5th Cir. 1995). A teacher's "[religious] speech can be taken as directly and deliberately representative of the school." *Bishop v. Aronov*, 926 F.2d 1066, 1073 (11th Cir. 1991). *See Doe v. Duncanville Indep. Sch. Dist*., 70 F.3d 402, 407 (5th Cir 1995) (*Duncanville II*) (school officials' supervision of student-initiated and student-led prayers preceding basketball games violated Establishment Clause); *Duncanville I*, 994 F.2d at 163.

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[2] *See also Allegheny*, 492 U.S. at 590 n.40; *Doe v. Santa Fe Indep. Sch. Dist*., 168 F.3d 806, 816 (5th Cir. 1999), *aff'd*, 530 U.S. 290 (2000) (graduation and football prayers unconstitutional); *Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982) (classroom prayers by students and teachers unconstitutional); *Hall v. Board of Sch. Comm'rs,* 656 F.2d 999, 1003 (5th Cir. 1981) (permitting students to conduct morning devotional readings over the school's public address system violated Establishment Clause); *Ingebretsen v. Jackson Pub. Sch. Dist*., 88 F.3d 274, 280 (5th Cir. 1996) (prayers at school-sponsored events unconstitutional).

Simply "permit[ting] [a teacher] to discuss his religious beliefs with students during school time on school grounds would violate the Establishment Clause." *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 522 (9th Cir. 1994). In *Roberts v. Madigan*, the Tenth Circuit held that a teacher's religious books on his desk "had the primary effect of...endorsement" even though his actions were "passive and *de minimis*" and "discreet." 21 F.2d 1047, 1056-58, 1061 (10th Cir. 1990).[3]

When the government sponsors an "intrinsically religious practice" such as prayer, it "cannot meet the secular purpose prong" of the *Lemon* test. *Jager v. Douglas County Sch. Dist*., 862 F.2d 824, 829-30 (11th Cir. 1989). *See Stone v. Graham*, 449 U.S. 39, 41 (1980); *North Carolina Civil Liberties Union v. Constangy*, 947 F.2d 1145, 1150 (4th Cir. 1991) (finding religious purpose in judge's practice of opening court sessions with prayer, as it involved "an act so intrinsically religious"); *Jaffree v. Wallace*, 705 F.2d 1526, 1534-35 (11th Cir. 1983), *aff'd* 472 U.S. 38 (1985); *North Carolina Civil Liberties Union v. Constangy*, 947 F.2d 1145, 1150 (4th Cir. 1991); *Karen B. v. Treen*, 653 F.2d 897, 901 (5th Cir. 1981) (no secular purpose in authorizing teacher-initiated prayer at the start of school day) *aff'd*, 455 U.S. 913 (1982); *Collins v. Chandler Unified Sch. Dist*., 644 F.2d 759, 760-63 (9th Cir. 1981) ("the invocation of assemblies with prayer has no apparent secular purpose"); *Hall v. Bradshaw*, 630 F.2d 1018, 1020-21 (4th Cir. 1980) (state's inclusion of prayer on state map failed purpose prong). A religious purpose may be inferred in this instance since "the government action itself besp[eaks] the purpose . . . [because it is] patently religious." *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 862-63 (2005).

In applying the first prong of *Lemon*, the courts have made clear that because "prayer is 'a primary religious activity in itself,'" a "teacher or administrator's intent to facilitate or encourage prayer in a public school is *per se* an unconstitutional intent to further a religious goal." *Holloman v. Harland*, 370 F.3d 1252, 1285 (11th Cir. 2004) (teacher's practice of initiating silent prayer with her students with "let us pray" and ending it with "amen" violated Establishment Clause). *See also Santa Fe*, 530 U.S. at 309-10 ("infer[ring] that the specific purpose of the policy" permitting but not requiring student-led prayers was religious thus failing the purpose prong); *Jaffree v. Wallace*, 705 F.2d 1526, 1534-35 (11th Cir. 1983), *aff'd*, 472 U.S. 38 (1985); *Jager v. Douglas County Sch. Dist*., 862 F.2d 824, 830 (11th Cir. 1989) (where school officials sponsor or participate in an "intrinsically religious practice" such as prayer, even if student-led, it "cannot meet the secular purpose prong."). Consequently, the school's promotion via social media of prayer on school grounds violates the Establishment Clause under the first prong of the *Lemon* test.

Yet, regardless of the purposes motivating it, the School District's actions fail *Lemon's* effect prong. The "effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval [of religion]." *Wallace v. Jaffree*, 472 U.S. 38, 56 n.42 (1985) (quotation marks omitted). The "prohibition against governmental endorsement of religion 'preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or

[3] *See also Downing v. W. Haven Bd. of Educ*., 162 F. Supp. 2d 19, 27-28 (D. Conn. 2001) ("For the defendants to have permitted Downing to wear a shirt during classroom instruction that was emblazoned with the words 'JESUS 2000 - J2K' would likely have violated the Establishment Clause.").

preferred.'" *Allegheny*, 492 U.S. at 593 (citation omitted). Whether "the key word is 'endorsement' 'favoritism,' or 'promotion,' the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief[.]" *Id.* at 593-94. Accordingly, schools cannot "sponsor the . . . religious practice of prayer," *Santa Fe*, 530 U.S. at 313, or otherwise permit any "of its teachers' activities [to] give[] the impression that the school endorses religion." *Marchi*, 173 F.3d at 477.

A religious activity is "state-sponsored," and therefore unconstitutional, if "an objective observer . . . w[ould] perceive official school support for such religious [activity]." *Board of Educ. v. Mergens*, 496 U.S. 226, 249-50 (1990). *See, e.g.*, *Santa Fe*, 530 U.S. at 309-10 (holding that student-initiated, student-led prayers at public high school football game were unconstitutional). Any action by a school official that amounts to "inviting or encouraging students to pray violates the First Amendment." *Herdahl v. Pontotoc County Sch. Dist*., 933 F. Supp. 582, 591 (N.D. Miss. 1996). That principle is obviously violated here.

A prayer, "because it is religious, . . . advance[s] religion." *Hall*, 630 F.2d at 1021. In *Santa Fe*, the Supreme Court ruled that even student-initiated, student-led prayers at high school football games, where attendance is completely voluntary, result in "both perceived and actual endorsement of religion" in violation of the Establishment Clause. 530 U.S. at 305, 310. Here, the school is promoting prayer on an official school district social media platform. In this context, "an objective observer" would inevitably "perceive [the prayer event] as a state endorsement of prayer." *Id*. at 308 (internal quotation marks omitted).

Significantly, in *Doe v. Wilson Cnty. Sch. Sys*., the court held that a school unconstitutionally endorsed religion when teachers participated in a similar flagpole prayer event and further held that there was no "secular purpose supporting the flagpole event." 564 F. Supp. 2d 766, 778, 801 (M.D. Tenn. 2008).

Finally, the promotion of a prayer event fosters excessive entanglement with religion, thus violating the Establishment Clause under *Lemon*'s third prong. *See Duncanville*, 70 F.3d at 406 (faculty's participation in "prayers improperly entangle[d] [the school] in religion"); *Karen B*., 653 F.2d at 902 (permitting teachers to lead prayers would result in "excessive governmental entanglement with religion."); *Mellen*, 327 F.3d 355, 375 (4th Cir. 2003) (university's sponsorship of prayer failed "*Lemon's* third prong."); *Constangy*, 947 F.2d at 1151-52 (when "a judge prays in court, there is necessarily an excessive entanglement of the court with religion."); *Hall*, 630 F.2d at 1021 (prayer on a state map fostered unconstitutional entanglement); *Jabr v. Rapides Parish Sch. Bd*., 171 F. Supp. 2d 653, 661 (W.D. La. 2001) ("[t]eachers, who did not actively participate in Bible distribution, but merely observed non-school personnel distribute the material, became excessively entangled with religion in violation of the Establishment Clause."). Like the Establishment Clause generally, the prohibition on excessive government entanglement with religion "rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *McCollum v. Bd. of Educ*., 333 U.S. 203, 212 (1948).

In addition to violating the Establishment Clause under the *Lemon* test, *supra*, the school's actions in promoting a prayer event are also unconstitutional under the "coercion test"

established by the Supreme Court in *Lee*. The Supreme Court has made clear that "[i]t is beyond dispute that, at a minimum, the [Establishment Clause] guarantees that government may not coerce anyone to support or participate in religion or its exercise." *Lee*, 505 U.S. at 587. Students and families, seeing the school promote prayer this way, and seeing teachers participating in a religious exercise on school grounds, would feel coerced to join the exercise to stay in the teachers' good favor. Certainly, at a minimum, most would feel reluctant to speak out against the exercise and the religious message it conveys.

In *Lee*, the Court held that a public school's inclusion of a nonsectarian prayer in a graduation ceremony was unconstitutionally coercive, even though the event was technically voluntary and students were not required to participate in the prayer. *Id.* at 586. A school's "supervision and control of a . . . graduation ceremony places public pressure, as well as peer pressure" on students, the Court observed. *Id.* at 593. Students opposed to the prayer are placed "in the dilemma of participating . . . or protesting." *Id.* The Court concluded that a school "may not, consistent with the Establishment Clause, place primary and secondary school children in this position." *Id.* The facts here are indistinguishable from *Lee*. "A school official . . . decided that an invocation . . . should be given; this is a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur." *Id.* at 587. The school official "chose the religious participant" and "that choice is also attributable to the State." *Id.* The "potential for divisiveness over the choice of a particular member of the clergy to conduct the ceremony is apparent." *Id.* And indeed, "the student had no real alternative which would have allowed her to avoid the fact or appearance of participation." *Id.* at 588.

Furthermore, the Supreme Court has recognized parents' constitutionally-protected interest in guiding "the religious future and education of their children." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). Parents "entrust public schools with the education of their children, but condition their trust on the understanding" that they will not advance "religious views that may conflict with the private beliefs of the student and his or her family." *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987). *See Doe by Doe v. Beaumont Indep. Sch. Dis*t., 240 F.3d 462, 466-67 (5th Cir. 2001); *Bell v. Little Axe Indep. Sch. Dist.*, 766 F.2d 1391, 1398 (1985). The actions described above are thus "intrinsically unconstitutional" because they interfere "'with the rights of parents to raise their children according to family religious traditions.'" *M.B. v. Rankin Cty. Sch. Dist*., 2015 U.S. Dist. LEXIS 117289, at *27-28 (S.D. Miss. 2015) (quoting *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 226 (1963)).

In view of the aforementioned authorities, it is clear that your school district is in violation of the Establishment Clause and may be sued under 42 U.S.C. § 1983 for damages, an injunction, and attorneys' fees. Of note, the AHA recently succeeded in challenging a city's promotion of a prayer vigil on social media as a violation of the Establishment Clause. *Rojas v. City of Ocala*, 2018 U.S. Dist. LEXIS 87288 (M.D. Fla. May 24, 2018). The AHA also recently succeeded in its case challenging a school district's promotion of a religious charity as a violation of the Establishment Clause. *See Am. Humanist Ass'n v. Douglas Cnty. Sch. Dist. Re-1*, 2018 U.S. Dist. LEXIS 118963 (D. Colo. July 17, 2018); *Am. Humanist Ass'n v. Douglas Cty. Sch. Dist. Re-1*, 859 F.3d 1243 (10th Cir. 2017).

This letter serves as an official notice of the unconstitutional activity and demands that the district terminate this and any similar illegal activity immediately. To avoid legal action, we kindly demand that the district take down the social media post and provide us with written assurances that teachers will not be allowed to participate in such activity in the future.

We are most hopeful that you will recognize the concerns raised by this letter and address them properly. Please respond within seven (7) days. We thank you in advance for your attention to this matter.

Sincerely,
Monica Miller, Esq.