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February 14, 2017

Via Email
The Honorable William D. Franklin, Mayor of Warren
391 Mahoning Avenue N.W.
Warren, OH 44483
dfranklin@warren.org

Steve Chiaro, Superintendent
105 High Street,
Warren, OH 44481
tracy.preston@neomin.org

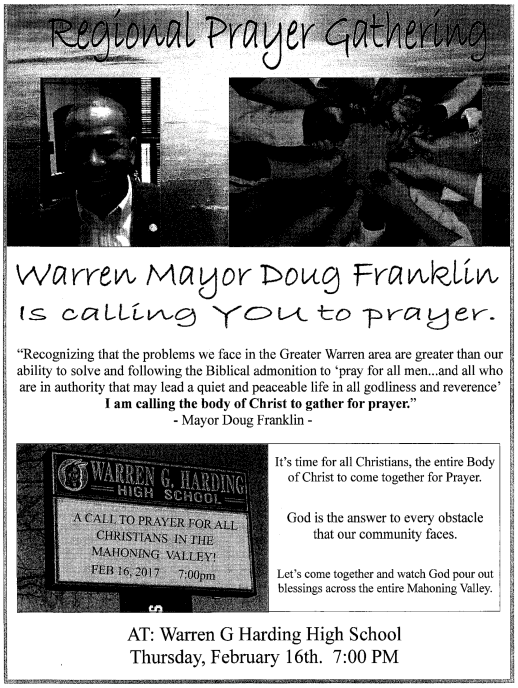
Re: Unconstitutional Prayer Gathering

Dear Mayor Franklin and Mr. Chiaro,

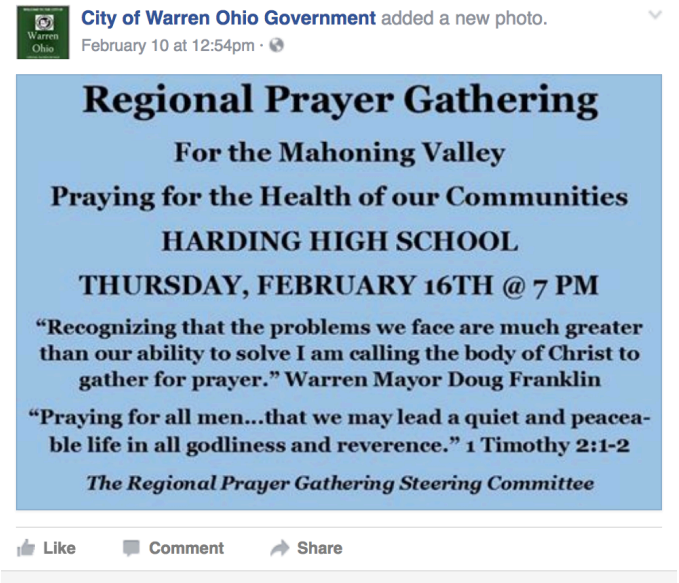
A concerned citizen has contacted our office to request assistance with regard to a serious constitutional violation that is occurring under the authority of the City of Warren and Warren City School District. In particular, the City and School District are sponsoring a "regional prayer gathering." The citizen encountered a flyer promoting the event, providing:

> "Warren Mayor Doug Franklin is calling YOU to prayer. Recognizing that the problems we face in the Greater Warren area are greater than our ability to solve and following the Biblical admonition to 'pray for all men ... and all who are in authority that may lead a quiet and peaceable life in all godliness and reverence' I am calling the body of Christ to gather for prayer. - Mayor Doug Franklin."

The flyer features a photograph of the billboard of Warren G. Harding, with an apparently photoshopped message: "A call to prayer for all Christians in the Mahoning Valley! Feb. 16, 2017 at 7:00 PM." A picture of this flyer is shown below:



The City is also prominently promoting the "prayer gathering" on its official Facebook page, as depicted in the screenshot below:



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

The American Humanist Association (AHA) is a national nonprofit organization with over 600,000 supporters and members across the country, including many in Ohio. 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 Ohio, and we have litigated constitutional cases in state and federal courts from coast to coast.

The First Amendment's Establishment Clause "commands a separation of church and state." *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005). It requires the "government [to] remain secular, rather than affiliate itself with religious beliefs or institutions." *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 610 (1989). Not only must the government not advance, promote, affiliate with, or favor any particular religion, it "'may not favor religious belief over disbelief.'" *Id.* at 593 (citation omitted). The Establishment Clause prohibits the government from sending a message to "nonadherents 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members[.]" *McCreary Cnty. v. ACLU*, 545 U.S. 844, 860 (2005).

To comply with the Establishment Clause, governmental activity must pass the *Lemon* test,[1] pursuant to which it must: (1) have a secular purpose; (2) not have the effect of advancing or endorsing religion; and (3) not foster excessive entanglement with religion. *Allegheny*, 492 U.S. at 592. Government action "violates the Establishment Clause if it fails to satisfy any of these prongs." *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987). As shown below, the City's Prayer Gathering violates the Establishment Clause under *each* prong, as well as analogous precedent.

The jurisprudence analyzing similar practices is decidedly against the City. The Supreme Court has repeatedly held that government-sponsored prayer violates the Establishment Clause. *E.g.*, *Engel v. Vitale*, 370 U.S. 421, 430 (1962) ("government in this country . . . is without power to prescribe by law any particular form of prayer . . . in carrying on any program of governmentally sponsored religious activity.").[2] Courts have consistently held that prayer at any government-sponsored event violates the Establishment Clause, including at a:

- city-sponsored festival[3]
- police-department meeting[4]
- city-sponsored memorial prayer ceremony[5]
- mayor's community prayer breakfast[6]
- military institute[7]
- courtroom[8]

[1] The test is derived from *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).
[2] *See also Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301-03, 308 (2000); *Lee v. Weisman*, 505 U.S. 577, 592 (1992)
[3] *Doe v. Village of Crestwood*, 917 F.2d 1476 (7th Cir. 1990)
[4] *Marrero-Méndez v. Pesquera*, 2014 U.S. Dist. LEXIS 116118, 1-2 (D.P.R. Aug. 19, 2014)
[5] *Hewett v. City of King*, 29 F. Supp. 3d 584, 596, 636 (M.D.N.C. 2014)
[6] *Newman v. City of East Point*, 181 F. Supp. 2d 1374 (N.D. Ga. 2002)
[7] *Mellen v. Bunting*, 327 F.3d 355, 367-69 (4th Cir. 2003)
[8] *N.C. Civil Liberties Union v. Constangy*, 947 F.2d 1145, 1150 (4th Cir. 1991)

Even a nondenominational prayer on a state map, which had limited distribution and could "seem utterly innocuous," violated the Establishment Clause. *Hall v. Bradshaw*, 630 F.2d 1018, 1019-21 n.1 (4th Cir. 1980). Additionally, a county violated Establishment Clause by its sheriff inviting a religious group to speak at a sheriff's department leadership conference. *Milwaukee Deputy Sheriffs' Ass'n v. Clarke*, 588 F.3d 523, 524-26 (7th Cir. 2009).

Notably, in *Am. Humanist Ass'n v. City of Ocala*, the court found that a city-sponsored "prayer vigil" would violate the Establishment Clause, proclaiming that such governmental promotion of prayer "'lies so obviously at the very core of what the [Establishment Clause] prohibits that the unlawfulness of the conduct was readily apparent," even in the absence of "'fact-specific law.'" 127 F. Supp. 3d 1265, 1284 (M.D. Fla. 2015). The Establishment Clause prohibits the government from promoting "a point of view in religious matters" or otherwise taking sides between "religion and religion or religion and nonreligion." *McCreary Cty. v. ACLU*, 545 U.S. 844, 860 (2005) (citations omitted). As "the quintessential religious practice," the state cannot advance prayer without violating the Establishment Clause. *Jaffree v. Wallace*, 705 F.2d 1526, 1534 (11th Cir. 1983), *aff'd* 472 U.S. 38 (1985). Thus, "[n]o factually particularized, pre-existing case law was necessary for it to be obvious to local government officials that organizing and promoting a Prayer Vigil would violate the Establishment Clause." 127 F. Supp. 3d at 1284. Because the City's planned "prayer gathering" violates the Establishment Clause at "the most fundamental level," *Id.* at 1281, no additional analysis is even necessary. But for the sake of completion, it is shown below that the "prayer gathering" fails *each* prong of the *Lemon* test, even when only one is sufficient.

Where, as here, a government sponsors an "intrinsically religious practice" such as prayer, it "cannot meet the secular purpose prong." *Jager v. Douglas Cnty. Sch. Dist.*, 862 F.2d 824, 830 (11th Cir. 1989). *See Santa Fe*, 530 U.S. at 309.[9] The secular purpose must be the "pre-eminent" and "primary" force driving the action, and "has to be genuine, not a sham[.]" *McCreary*, 545 U.S. at 864. "When a state-sponsored activity has an overtly religious character, courts have consistently rejected efforts to assert a secular purpose for that activity." *Mellen*, 327 F.3d at 373.

It is undisputed that prayer — and specifically a "call to prayer for all Christians" — is the purpose of the Prayer Gathering. Because "prayer is 'a primary religious activity in itself,'" the City's "intent to facilitate or encourage prayer . . . is *per se* an unconstitutional intent to further a religious goal." *Holloman v. Harland*, 370 F.3d 1252, 1285 (11th Cir. 2004).[10]

No avowed secular purpose can overcome the Prayer Gathering's inherent religious purpose. Attempting "to further an ostensibly secular purpose through avowedly religious means is considered to have a constitutionally impermissible purpose." *Id.* at 1286.[11] For instance, in *Holloman*, the Eleventh Circuit held that even though a teacher's purpose in conducting prayers was to show "that praying is a compassionate act," such "an endorsement of an intrinsically

[9] *See also Stone v. Graham*, 449 U.S. 39, 41 (1980) (holding that "[t]he Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact.")

[10] *Accord Jaffree*, 705 F.2d at 1535; *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").

[11] *See Sch. Dist. Abington v. Schempp*, 374 U.S. 203, 222-23 (1963).

religious activity" fails the purpose test. *Id*. The same principle was applied in *Gilfillan v. Philadelphia*, where the Third Circuit held that a city failed the purpose prong by funding a platform for the Pope's visit. 637 F.2d 924, 927-30 (3d Cir. 1980). It was irrelevant that the service "generated an unprecedented outpouring of warmth and good will felt throughout the City for months following," and "favorably enhanced the image of the City." *Id.* The court reasoned that "if some peripheral public relations benefit can constitute a sufficient secular purpose, then the purpose test is destroyed." *Id*.

Thus, the state "cannot escape the proscriptions of the Establishment Clause merely by identifying a beneficial secular purpose." *Hall*, 630 F.2d at 1020-21 (holding that "motorist's prayer" on state maps failed purpose test, even though purpose was to promote motorist "safety," which court did not dispute, because "the state has chosen a clearly religious means to promote its secular end."). "[C]ontrolling caselaw suggests that an act so intrinsically religious as prayer cannot meet, or at least would have difficulty meeting, the secular purpose prong of the *Lemon* test." *Constangy*, 947 F.2d at 1150 (citing *Stone* and *Wallace*). In *Mellen*, for instance, the Fourth Circuit held that prayers delivered at a military institute failed the purpose test because of their plainly religious nature: "the purpose of an official school prayer 'is plainly religious in nature.'" 327 F.3d at 374. In *Constangy*, although the judge argued that his prayers served the secular purpose of solemnifying court proceedings, the Fourth Circuit held that the prayers failed the purpose test because of the "intrinsically religious" nature of prayer. 947 F.2d at 1150. A religious purpose may thus be inferred in this instance since "the government action itself besp[eaks] the purpose . . . [because it is] patently religious." *McCreary*, 545 U.S. at 862-63.

Regardless of the purposes motivating it, the Prayer Gathering obviously fails *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]." *Id.* at 56 n.42 (quotation marks omitted). The government is precluded "'from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred.'" *Allegheny*, 492 U.S. at 593-94 (citation omitted). Government action "facilitating any prayer clearly fosters and endorses religion over nonreligion." *Holloman*, 370 F.3d at 1288. Indeed, a "religious service under governmental auspices *necessarily* conveys the message of approval or endorsement. Prevailing doctrine condemns such endorsement, even when no private party is taxed or coerced in any way." *Crestwood*, 917 F.2d at 1478 (citations omitted, emphasis added). The "First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of [government] would be used to control, support or influence the kinds of prayer the American people can say." *Engel*, 370 U.S. at 429-30. Thus, the City's Prayer Gathering is "inconsistent both with the purposes of the Establishment Clause and with the Establishment Clause itself." *Id.* at 433.

In *Crestwood*, a village sponsored a three-day secular Italian Festival, which happened to include a private 45-minute mass that occurred simultaneously with other secular events. 917 F.2d 1476.[12] The Seventh Circuit held that the village violated the Establishment Clause, finding it sufficient that a newspaper article had a headline: "Italian Mass to be celebrated at our Italian Fest." *Id.* at 1479. The court observed that the use of the word "our" implied that "the mass and

[12] *See id.* at 1489 (Coffey, J., dissenting) ("The plaintiff is suing because there is a short 45-minute event in a three-day festival")

Festival alike are under the Village's sponsorship." 917 F.2d at 1479. Thus, it concluded that the village unconstitutionally endorsed religion even though the "Women's Club is the true sponsor," and even though "the endorsement takes place in company with secular events." *Id*.

The same was true in *Hewett*, where the court held that a mayor and other city officials' involvement in an otherwise privately-sponsored, mostly *secular* event that merely included prayer, violated the Establishment Clause. 29 F. Supp. 3d at 633. Relying on *Crestwood*, the court concluded that the city unconstitutionally endorsed religion simply because its advertisement for one ceremony used the word "us" to describe the event. *Id.* at 635.

Similarly, in *Gilfillan*, a city unconstitutionally endorsed religion by funding part of a platform for the Pope's visit even though the event itself was organized and sponsored by the Archdiocese. 637 F.2d at 931. The city funded the platform for ostensible safety reasons: "the safety of the expected crowd, for which the City remained primarily responsible, would be endangered if the Pope were not visible to a large percentage of the persons in attendance." *Id.* at 937 (Aldisert, J., dissenting). Notably, the "mass would have occurred regardless of the [city's] expenditures, but may have been accompanied by tragedy." *Id.* at 939 (dissent). Nonetheless, the Third Circuit held that the "religious effect was both plain and primary." *Id.* at 931. It found that the Pope was "able to celebrate a Mass and deliver a sermon. In so doing, he brought a religious message, with the help of the City, from the Roman Catholic Church." *Id.*

The City's Prayer Gathering here, to the extent it can be distinguished from the unconstitutional activities in *Crestwood*, *Hewett*, and *Gilfillan*, is far more flagrantly unconstitutional. Unlike in those cases, the City appears to be the *sole* sponsor of the Prayer Vigil. Nor is the Prayer Vigil merely one small component of a much longer otherwise *secular* event as in *Crestwood* and *Hewett.* The entire event appears to focus on prayer, and Christian prayer in particular.

Even the City's communications promoting the Prayer Gathering unconstitutionally endorse religion, without more.[13] The "*mere appearance* of a joint exercise" between "Church and State" is unconstitutional. *Larkin v. Grendel's Den*, 459 U.S. 116, 125-26 (1982) (emphasis added).

> [A]n important concern of the effects test is whether the *symbolic union* of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices.

School Dist. v. Ball, 473 U.S. 373, 390 (1985) (internal citation omitted, emphasis added). In *Newman*, for example, the court held that a mayor's "prayer breakfast" violated the Establishment Clause under the effect prong. 181 F. Supp. 2d at 1379-80. The evidence of city-sponsorship consisted of: (1) "a letter from the Mayor on City of East Point letterhead;" (2) a letter from the Mayor addressed to "friends of the community;" and (3) a "flyer that was

[13] *E.g.*, *Newman*, 181 F. Supp. 2d at 1379-80; *Am. Atheists, Inc. v. City of Starke*, 2007 U.S. Dist. LEXIS 19512, at *18 (M.D. Fla. 2007) ("the words 'STARKE' and the Cross on the water tower clearly communicates the City's endorsement of Christianity").

distributed at a City of East Point sponsored holiday party." *Id.* at 1381.[14]

Furthermore, the Prayer Vigil is promoted by the School District and will be held on school property, making it particularly problematic. *See Lee v. Weisman*, 505 U.S. 577 (1992) (nondenominational prayer at school event unconstitutionally coercive).[15] For instance, in *Santa Fe*, the Court held that a school district unconstitutionally endorsed religion by merely allowing the senior class to elect other students to deliver a "brief invocation and/or message" at football games. 530 U.S. at 296-97, 309-10. Although any message would be student-led and student-initiated, and it was possible no prayer would ever be delivered, the Court found the policy unconstitutional as it "involves both perceived and actual endorsement of religion." *Id.* at 305, 310. The City's Prayer Gathering sends an even *stronger* message of religious endorsement. Whereas the prayers in *Santa Fe* were at least student-initiated and student-led, the Prayer Gathering here is initiated and led by City officials, including especially the Mayor.

Finally, the City's actions contravene *Lemon*'s third prong, which prohibits excessive entanglement. When, as here, a "City, through the acts of the Mayor or any other city official acting in their official capacity as a representative of the City, has participated in conveying religious messages," it fosters "excessive entanglement in the religious activities" thus failing *Lemon*'s third prong. *Hewett*, 29 F. Supp. 3d at 635 (holding that "the City's organization and arrangement of the religious speakers;" "advertisement of the annual commemorative events by using words such as 'us';" "disclosing religious messages, through its City officials, as part of the prayer practices at the annual commemorative events . . . excessively entangle[s] the City with the religious messages conveyed"). *See also Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 385 (6th Cir. 1999) (finding excessive entanglement where "the school board decided to include prayer" and "chose which member from the local religious community would give those prayers"); *Gilfillan*, 637 F.2d at 931 ("relationship between the City and the Archdiocese [in connection with the event] constituted entanglement in violation of the third part [of *Lemon*]"). Indeed, because a Prayer Gathering is inherently religious, the City's actions in organizing and sponsoring it necessarily entangled it with religion. *Constangy*, 947 F.2d at 1151-52 (when "a judge prays in court, there is necessarily an excessive entanglement of the court with religion.").

Like the Establishment Clause generally, the prohibition on excessive government entanglement with religion "rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *McCollum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948). In this situation, "where the underlying issue is the deeply emotional one of Church-State relationships, the potential for seriously divisive political consequences needs no elaboration." *Comm. for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 797 (1973).

Prayer at a government-sponsored event "sends the ancillary message to members of the audience who are nonadherants 'that they are outsiders, not full members of the political community.'" *Santa Fe*, 530 U.S. at 309-10 (citation omitted). By organizing a Prayer Gathering,

[14] *See also Hewett*, 29 F. Supp. 3d at 635 (city unconstitutionally endorsed private Veterans Day ceremony that included prayer based on a city advertisement using the word "us").

[15] Although "coercion is not necessary to prove an Establishment Clause violation," its presence "is an obvious indication that the government is endorsing or promoting religion." *Id.* at 604 (Blackmun, J., concurring).

the City is sending "the message that it is closely linked" with Christianity and "that it favors the religious over the irreligious." *Does 1 v. Enfield Pub. Sch*., 716 F. Supp. 2d 172, 192 (D. Conn. 2010). "This message violates the Establishment Clause." *Trunk v. City of San Diego*, 629 F.3d 1099, 1125 (9th Cir. 2011). Citizens should come to government events "confident in the assurance that government plays no favorites in matters of faith but welcomes the participation of all." *Joyner v. Forsyth Cnty.*, 653 F.3d 341, 354-55 (4th Cir. 2011).

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

Sincerely,
Monica Miller, Esq.