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 BRIEF**

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American Humanist Association ("AHA")

Brashier Middle College Charter High School ("BMCCHS")

Blue Ridge High School ("BRHS")

Blue Ridge Middle School ("BRMS")

East North Street Academy ("ENSA")

Greenville County School District ("GCSD")

Greenville High School ("GHS")

Mountain View Elementary School ("MVES")

Northern Greenville University ("NGU")

Riverside High School ("RHS")

Travelers Rest High School ("TRHS")

Woodmont High School ("WHS")

Wade Hampton High School ("WHHS")

The Fourth Circuit instructed this Court to address the following issues:

1. Does AHA have associational standing to challenge the Prayer Policy?

2. "If AHA continues to have a live claim, the court should also consider whether its prior judgment on the prospective prayer claim should be amended in any respect."

3. Does the Chapel Policy violate the Establishment Clause?

I. Summary of the Statement of Facts and Procedural History[1]

Plaintiffs, AHA, Jane, Jill, and John Doe, challenge two practices of Defendant Greenville County School District ("GCSD"): (1) GCSD's longstanding practice of including prayer in graduation ceremonies to captive audiences ("Prayer Policy"); and (2) GCSD's practice of holding elementary school graduations and other school events in a proselytizing Christian environment ("Chapel Policy"). The following is a summary of the statement of facts, focusing mostly on evidence not previously presented to this Court on summary judgment.

A. Prayer Policy. GCSD has a longstanding policy, practice, and custom, from 1951 until present, of including prayers in elementary, middle, and high school graduation ceremonies throughout the District. The elementary ceremonies, such as those for Mountain View Elementary School ("MVES"), take place during school hours and last about two hours.[2] Students receive awards and several are chosen to speak.[3] Students are under the supervision and direction of the school. (Compl. ¶¶49-54) (Ans. ¶¶49-54). They are told what to wear, where to sit, and practice walking to their places.[4] The ceremony is described as an "educational trip." (Gibson Aff. Ex. C). Two prayers have been included in each ceremony, one after the opening remarks and the other at the ceremony's conclusion. (Ex. A) (D. Ans. AHA Int. Nos. 4-5). The prayers have always been Christian. (*Id.* No. 8). School officials subjectively selected the speakers based on vague "citizenship criteria" or "ability to speak in front of a group." (*Id*. No.

[1] Plaintiffs incorporate by reference all evidence, arguments, and authorities previously submitted to this Court on summary judgment, as if fully stated herein. Plaintiffs' Summary Judgment Memorandum is cited as ("P. MSJ") and GCSD's Motion for Summary Judgment is cited as ("D. MSJ").
[2] (Gibson Aff. ¶3) (Ex. A) (Doc. 96, Order at 2) (Doc. 17, D. Opp. Prelim. Inj. at 1-2).
[3] (Gibson Aff. ¶3) (Ex. A) (D. Opp. Prelim. Inj. at 2).
[4] (Compl. ¶50) (Ans. ¶50) (Gibson Aff. ¶13; Ex. B).

9) (Gibson Aff. ¶17). Prior to this lawsuit, teachers also reviewed and approved the content of the prayers and the prayers were mentioned on the graduation programs.[5]

GCSD's practice of including prayers in graduation ceremonies is District-wide.[6] A mere sample from discovery revealed that many schools regularly include prayers in their graduation ceremonies. Such schools include, but are certainly not limited to:

- Berea High (since at least 2013)[7]
- Blue Ridge High School ("BRHS") (since at least 2001, including 2014, 2015, 2016)[8]
- Blue Ridge Middle School ("BRMS") (since at least 2011)[9]
- Brashier Middle College Charter High School ("BMCCHS") (2013, 2014, 2015)(Ex.H)
- Carolina High (since at least 2013)[10]
- East North Street Academy ("ENSA") (since at least 2012, including 2014)[11]
- Eastside High (since at least 2008)[12]
- Gateway Elementary (since at least 2001, including 2013)[13]
- Greenville High School ("GHS") (since at least 2012, including 2013, 2016)[14]
- Greer High School (since at least 2012, including 2016)[15]

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[5] (Ex. A) (Compl. ¶¶52-54) (Ans. ¶¶52-54) (D. Ans. AHA Int. Nos. 9-11).

[6] (No. 15-1574, Doc. 26, D. App. Br. at 8-9) (D. Ans. AHA Int. Nos. 3-5; 9-11; 14) (D. Ans. Doe Int. Nos. 2-4; 9-10) (D. Ans. Rev. RFA Nos. 1-2; 7-9; 12-18; 20; 22-23; 37; 56) (DEFS 91-92; 95-98; 101-04; 109-12; 119; 124-27; 132; 134; 138-41; 144-45; 158-62; 171-73; 175-76; 180-81; 184-85; 188-91) (Jane Decl. ¶¶11-12; ¶¶14-18) (Irwin Decl. ¶¶9-13; Exs. A-B) (Bruccoliere Decl. ¶7; Ex. A) (Reynolds Decl. ¶¶1-2) (Pernak Decl. ¶¶9-10; ¶13; Exs. A-B) (Willis Decl. ¶6; Ex. A) (Lamb Decl. ¶¶6-9; ¶¶11-13; Exs. A-B) (Exs. A; B-1-B-2; B-4-B-8; H; I; J; K; L; M; N; O) (Spinks Aff. ¶5).

[7] The 2013 program directed the audience to stand for an "Invocation" and "Benediction." (DEFS 111-12). *See* (Exs. I-1-I-3) (audience to stand for "Opening Remarks" or "Welcome" and "Closing Remarks").

[8] (D. Ans. Rev. RFA No. 22). The 2016 and 2015 ceremonies included prayer during the "Opening Remarks" portion. (Lamb Decl. ¶¶11-13) (Ex. J). The 2013 program directed the audience to stand for an "Invocation" and "Benediction." (DEFS 124; 127). The 2014 through 2016 programs directed the audience to stand for "Closing Remarks." (DEFS 132; 134; 137) (Ex. J). The 2014 "Closing Remark" was a Christian prayer that referenced "God" and quoted a Bible verse, Jeremiah 29:11. (DEFS 134) (D. Ans. Doe Int. Nos. 4-5). *See also* (Irwin Decl. ¶9) (Christian-themed prayer at the 2001 and 2004 ceremonies).

[9] (D. Ans. Doe Int. No. 3) (DEFS 103-04). A teacher led the 2011 prayer. *Id.*

[10] The 2013 program directed the audience to stand for an "Invocation" and "Benediction." (DEFS 138-39). The 2014 through 2016 programs requested they stand for a "Dedication" and "Gratitude." (Ex. K).

[11] (D. Ans. Doe Int. No. 2). The 2014 program included an "Invocation." (DEFS 92).

[12] (D. Ans. Rev. RFA Nos. 8; 18) (Ex. B-8) (Jane Decl. ¶18). The 2013 program directed the audience to stand for a student-delivered "Reflection." (DEFS 141).

[13] (D. Ans. Rev. RFA No. 37) (DEFS 95-100) (D. Ans. Doe Int. No. 10).

[14] (D. Ans. Rev. RFA No. 20) (Bruccoliere Decl. ¶7; Ex. A) (DEFS 144-58). The 2016 ceremony included a Christian prayer during the "Reflection" portion of the program. (Irwin Decl. ¶¶10-13; Ex. B).

[15] (D. Ans. Rev. RFA No. 23) (DEFS 159-60). The 2016 ceremony included a Christian prayer. (Pernak Decl. ¶¶9-11; Ex. A).

- Hillcrest High (since at least 2012)[16]
- J.L. Mann High (since at least 2009, including 2013)[17]
- Mauldin High (since at least 2013, including 2015)[18]
- MVES (since 1951 through at least 2013)[19]
- Riverside High School ("RHS") (since at least 2013)[20]
- Travelers Rest High School ("TRHS") (since at least 2013, and 2014, 2015, 2016)*[21]
- Wade Hampton High School ("WHHS") (since at least 2013, and 2014, 2015, 2016)[22]
- Washington Center, special education school (since at least 2008, including 2013)[23]
- Woodmont High School ("WHS") (since at least 2005, including 2013)[24]

The speakers are school-selected, typically based on class rank or class office.[25] In most schools, the "prayer" (or "invocation") was mentioned on the program.[26] The programs also requested attendees to stand for the prayer.[27] At Gateway Elementary, the teacher's 2013 program even provided: "Prayer – Pray then say 'Amen, Please be seated.'" (DEFS 98).

GCSD does not deny that it has had a longstanding practice of "endorsing" Christian

[16] (DEFS 162) (Ex. B-4) (D. Ans. Rev. RFA Nos. 12-14) (Jane Decl. ¶14).
[17] (D. Ans. Rev. RFA No. 7) (Ex. B-7) (Jane Decl. ¶17) (DEF 173) (Reynolds Decl. ¶2) (Exs. L-1-L-2).
[18] The 2013, 2014, and 2015 programs included explicitly Christian songs. (Willis Decl. ¶6; Ex. A) (DEF 176). The 2013 program included "Be thou My Vision" and "Sing for Joy, Alleluia," and instructed the audience to stand for an "Inspiration." (Willis Decl. ¶6; Ex. A) (DEFS 176). The 2014 program included "O Magnum Mysterium," a Christian chant, and "Alleluia," a Christian song, and instructed the audience to stand for an "Inspiration." (Willis Decl. ¶6; Ex. A). The 2015 ceremony included "Lux Aurumque," a Christian song, and "Toccata of Praise." (*Id.*).
[19] (Ex. A) (Gibson Aff. ¶3) (D. Ans. AHA Int. Nos. 3-4).
[20] The 2013 program directed the audience to stand for an "Invocation." (DEFS 181). The 2014 program directed the audience to stand for a student-delivered "Welcome." (Ex. O).
[21] *The 2013, 2014, 2015, and 2016 programs directed the audience to stand for an "Inspirational Reading." (DEFS 184-87) (Ex. M). This Court enjoined GCSD from using such language.
[22] GCSD claimed "only that an 'inspirational reading' was part of the program to the 2013 graduation and a student chose to read a prayer." (D. Ans. Rev. RFA No. 15). But the 2013 program requested the audience to stand for an "*Invocation*." (DEFS 188). The 2014 program directed they stand for an "Inspirational Reading," which was a *prayer*. (DEFS 189-90). The 2013, 2014, 2015 *and* 2016 programs all include "The Lord Bless You and Keep You." (DEFS 188; 190) (Lamb Decl. ¶6; Exs. A-B).
[23] (D. Ans. Rev. RFA No. 17) (Ex. B-2) (D. Ans. Doe Int. No. 2) (DEFS 102).
[24] (Lamb. Decl. ¶11; ¶14) (Exs. B-1; B-6; N) (DEFS 191).
[25] (DEFS 112; 119; 124-27; 132-34; 139; 141; 145-46; 159-62; 176-78; 181; 185; 188-91) (D. Ans. Doe Int. Nos. 2; 4-6; 10) (Jane Decl. ¶11; ¶¶14-16) (Exs. B-1; B-4-B-6; H; J; K; L; N; O; Q) (Spinks Aff. ¶5) (Gibson Aff. ¶7) (Reynolds Decl. ¶2) (Byrd Aff. ¶5) (Meisten Aff. ¶5).
[26] (DEFS 92; 95-98; 103-04; 111-12; 124-27; 144-65; 171-74; 180-81; 188; 191-93) (Exs. A; B-1-B-2; B-6–B-8; H) (D. Ans. Doe Int. No. 4) (Irwin Decl. Ex. A) (Pernak Decl. Ex. A).
[27] (DEFS 98; 124; 127; 139; 160; 173; 181; 188; 191). Men were even required to remove their caps for the prayer. (Exs. B-7-B-8) (D. Ans. Rev. RFA Nos. 18) (Jane Decl. ¶18).

graduation prayers.[28] On June 25, 2013, GCSD responded to AHA's cease-and-desist letter, writing in part: "the District will not prohibit this practice as long as the prayer or ['religious'] message is student-led and initiated and does not create a disturbance to the event." (Compl. ¶¶62-63; Ex. 6). Through affidavits, GCSD asserted that the prayers will no longer be reviewed and that the program will no longer mention prayers. (Gibson Aff. ¶7) (Spinks Aff. ¶5). But prayers and Christian messages are still allowed. (Compl. Ex. 6). Moreover, students are still "selected to speak by teachers and school administrators." (D. App. Br. at 15). GCSD has made clear that this position on graduation prayer applies throughout the District, such that all of its schools are authorized to include prayer in graduation ceremonies. (*Id.* at 8-9).

Prayers have continued to be included in GCSD's graduation ceremonies since the 2013 letter, as authorized by GCSD's current position.[29] A mere sample of evidence bears this out:

- The 2016 GHS ceremony included a Christian prayer, witnessed by AHA member Andrew Irwin and his son. (Irwin Decl. ¶11-13; Ex. B).
- The 2016 Greer High ceremony included a Christian prayer, witnessed by AHA member Doneta Pernak and her son. (Pernak Decl. ¶13; Ex. B).
- The 2016 and 2015 BRHS ceremonies both included prayer during the "Opening Remarks" portion, witnessed by AHA member Jeffrey Lamb. (Lamb Decl. ¶¶11-13) (Ex. J). The 2014 BRHS program directed the audience to stand for "Closing Remarks," which was a Christian prayer delivered by the senior class vice president."[30]
- The 2016, 2015, 2014, and 2013 WHHS ceremonies included "The Lord Bless You and Keep You" by the Wade Hampton Singers.[31] The 2014 program instructed the audience to stand for the "Inspirational Reading," which was prayer delivered by the student body president, as in prior years.[32]
- The 2015 and 2014 Mauldin High ceremonies included explicitly Christian songs, and the 2014 program directed the audience to stand for an "Inspiration," as in 2013.[33]
- The 2014 ENSA fifth grade awards ceremony included a prayer by a school-selected student, as in 2012 and 2013, identified on the program as an "Invocation."[34]

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[28] (Compl. Exs. 4-6) (Gibson Aff. ¶17) (Doc. 17, D. Opp. Prelim. Inj. at 9, n.2).
[29] (Exs. B-5; H) (DEFS 91-92; 132; 134; 176; 188-90) (D. Ans. Rev. RFA Nos. 15-16) (D. Ans. Doe Int. No. 9) (Jane Decl. ¶15) (Irwin Decl. ¶11-13; Ex. B) (Pernak Decl. ¶13; Ex. B) (Lamb Decl. ¶6; ¶¶11-13; Exs. A-B) (D. Ans. Doe Int. Nos. 2; 4-5) (Willis Decl. ¶6; Ex. A).
[30] (D. Ans. Doe Int. Nos. 4-5) (DEFS 132-34).
[31] (DEFS 188; 190) (Lamb Decl. ¶6; Exs. A-B).
[32] (DEFS 188-90). *See also* (Ex. B-5) (D. Ans. Rev. RFA Nos. 15-16) (D. Ans. Doe Int. No. 9).
[33] (Willis Decl. ¶6; Ex. A) (DEFS 176).

- The 2015 and 2014 BMCCHS ceremony programs included an "Invocation." (Ex. H).

In May 2015, this Court upheld GCSD's practice of allowing "student-initiated" prayer but enjoined it from using language such as "'invocation' or 'inspirational reading'" on the programs. (Order at 15, 17-18). Yet programs post-dating the Court's order still include such language or similarly suggestive language.[35] For instance, the 2015 and 2016 TRHS programs had an "Inspirational Reading." (Exs. M-2; M-3). The 2015 and 2016 GHS programs had a "Reflection" that, at least in 2016, was a prayer. (Ex. Q) (Irwin Decl. ¶¶11-13; Ex. B).[36]

Notably, AHA has at least three members other than the Does who have *already* had unwelcome contact with the Prayer Policy, including in 2016.[37] For instance, Pernak and her son had unwelcome contact with a proselytizing Christian prayer delivered at his June 2016 Greer High graduation ceremony. (Pernak Decl. ¶¶10-11; Ex. B). The speaker asked everyone to bow their heads and stated she could not "wait to see what Jesus has planned" for her classmates. (*Id.*). Pernak's son "sat in silence during the prayers, and did not bow his head." (*Id.*)

Irwin witnessed prayers at three of his children's GCSD graduations. (Irwin Decl. ¶9; ¶¶11-13). Irwin and his youngest son had unwelcome contact with an overtly Christian prayer delivered at his June 2016 GHS ceremony, identified as the "Reflection" on the program. (*Id.*; Ex. B). Irwin testified that his "son was disturbed and upset." (*Id.* ¶12). Irwin added that the reference to "Jesus Christ, our Lord and Savior" excluded many in attendance, as "there were Hindu and Muslim students and families present." (*Id.* ¶13).[38]

Jeffrey Lamb witnessed prayers at the 2015 and 2016 BRHS ceremonies. (Lamb Decl.

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[34] (DEFS 91-92). *See also* (D. Ans. Doe Int. No. 2).
[35] (Exs. H-3; I-2-I-3; J; K-2-K-3; L-2; M-2-M-3; N; Q) (Irwin Decl. ¶¶11-13; Ex. B).
[36] Where the 2013 WHS program directed the audience to stand for an "Invocation" and a "Benediction," (DEFS 191), the 2014 through 2016 programs directed the audience to stand for both a "Salutation" and a "Farewell." (Ex. N). The 2015 and 2016 Berea High programs directed the audience to stand for "Welcome" and "Closing Remarks." (Ex. I-2-I-3). Similarly, the 2015 J.L. Mann program directed "Audience and Graduates" to stand for "Opening Remarks" and "Closing Remarks" by the Senior Class President and Vice President. (Ex. L-2). *See* (DEFS 173) (Reynolds Decl. ¶2). The June 2015 and 2016 Carolina High programs had an opening "Dedication" and closing "Gratitude," with the 2015 program instructing the audience to stand for both. (Exs. K-2-K-3).
[37] (Pernak Decl. ¶10; Ex. B) (Irwin Decl. ¶¶11-13; Ex. B).
[38] Irwin and his two eldest sons witnessed prayer at the 2001 and 2004 BRHS ceremonies. (*Id.* ¶6; ¶9).

¶11-13). Each prayer was delivered as the "Opening Remarks" in the program, by the Senior Class Vice President and President, respectively. (*Id*. ¶¶12-13) (Ex. J-1-J-2).[39]

B. Chapel Policy. To summarize, GCSD holds elementary school events in a proselytizing Christian environment and has made no plans for an alternative venue.[40] Since May 2012 until present, MVES graduations have been held in a Christian chapel, Turner Chapel, in the center of a Baptist university, North Greenville University ("NGU").[41] NGU's slogan is "Christ Makes the Difference."[42] Turner Chapel is a Christian place of worship. (Compl. ¶18; ¶26) (Ans. ¶18; ¶26). Students and their families are directly exposed to numerous Christian symbols and fixtures, both inside and outside of the Chapel, including but not limited to:

- A cross atop Turner Chapel (Gibson Aff. Ex. D)
- A cross atop the Hayes Ministry Center, visible from the Chapel and highway[43]
- A cross affixed to the Todd Prayer Chapel, visible en route to Turner Chapel (Ex. C-15)
- A large brick wall with "North Greenville University Where Christ Makes the Difference" at the Turner Chapel parking lot (Exs. C-30) (Jane Decl. ¶35)
- Eight large stained glass windows of overtly Christian Biblical scenes, each featuring Jesus Christ, surrounding the entire interior of the Chapel[44]
- Life-size Christian monuments surrounding Turner Chapel, including "Gethsemane," featuring Jesus praying, "Fishers of Men," featuring Jesus with a casting net, "Divine Servant," with Jesus washing Peter's feet, and a giant sculpture of two bronze Bibles[45]
- Large doormats prominently featuring NGU's slogan, "Christ Makes The Difference" with a Christian cross in the center at the Turner Chapel lobby entranceways[46]
- Large permanent signs bearing NGU's Christian logo and slogan, marking each campus entranceway (Exs. C-32-C-37)
- NGU's logo and slogan pervasively lining the road leading up to the Chapel and prominently featured on adjacent buildings (Exs. C-13; C-16-C-19; C-27; C-29-C-31)

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[39] Lamb also witnessed prayers at each WHS graduation from 2007 through 2010. (Lamb Decl. ¶11).
[40] (Compl. ¶14) (Ans. ¶14) (D. Ans. Rev. RFA No. 6) (D. Ans. Doe Int. No. 11) (Ex. A) (Gibson Aff. ¶8).
[41] (Exs. A; C; E; F) (Compl. ¶14) (Ans. ¶14) (D. Ans. Rev. RFA No. 6) (Gibson Aff. ¶8).
[42] (Compl. ¶21; Ex. 1) (Ans. ¶21) (Jane. Decl. ¶22; ¶¶38-39; ¶41) (Exs. C-1-C-2; C-13; C-17; C-33; C-35) (Gibson Aff. Ex. D).
[43] (Exs. C-12-C-13; F-20) (Jane Decl. ¶22; ¶50).
[44] (Compl. ¶¶28-29) (Ans. ¶¶28-29) (Gibson Aff. Ex. D) (Doc. 17, D. Opp. Prelim. Inj. at 12) (Exs. C-3-C-11) (Jane Decl. ¶19; ¶21).
[45] (Exs. C-14-C-16; C-18; C-20; C-23-C-25; E; F-6; F-14; F-16-F-18) (Jane Decl. ¶¶23-26; ¶28; ¶¶30-32).
[46] (Exs. C-1-C-2) (Gibson Aff. Ex. D) (Jane Decl. ¶¶19-20).

The Does encountered all of these at the MVES ceremony. (Jane Decl. ¶¶20-41).

Significantly, GCSD did not previously disclose the fact that since 2012 until present, the annual GCSD High School Marching Band Exhibition, a District-sponsored function, has been held at NGU. (Ex. P) (Pernak Decl. ¶¶13-17). It opens with Christian prayer *and* includes a performance by the NGU "Crusaders." (*Id*). The exhibition is a "collaborative event between NGU and the school district." (Ex. P-1). Tigerville Elementary also uses Turner Chapel for its holiday concerts and intends to do so indefinitely. (D. Ans. Doe Int. No. 11).

Nor is NGU the only Christian venue utilized by GCSD. GCSD uses: (1) Taylors First Baptist Church for Brushy Creek Elementary graduations (since 2009) (Street Decl. ¶11); (2) Fairview Baptist Church for MVES and Taylors Elementary Christmas performances (Pernak Decl. ¶20; Ex. C); and (3) Brookwood Church (Baptist) for Bell's Crossing Elementary ceremonies (2014 & 2015) and BMCCHS graduations (2013, 2014, & 2015). (Exs. G-H). GCSD did not disclose these venues in discovery. (D. Ans. AHA Int. Nos. 18-19).

C. Relevant Procedural History. On May 11, 2015, this Court ruled on the Chapel Policy, finding all of the claims moot, including nominal damages. (Doc. 96, at 6). On May 18, the Court ruled on the Prayer Policy, granting Plaintiffs' motion "as to the practice of graduation prayers from 1951 through the 2013 MVES graduation" but denying it as to GCSD's "new position on prayer at graduations." (Doc. 97, at 21). Plaintiffs appealed. (No. 15-1574).[47]

In August 2015, a month after Plaintiffs filed their opening brief, the Does moved to Alabama. (No. 15-1574, Docs. 27-1; 30-1; 30-2). On September 23, GCSD filed its brief and moved to dismiss the appeal, arguing that the entire case was moot because of the Does' move.

[47] The issues on appeal were, in part: "(1) Whether the District's prayer practice, which authorizes the delivery of Christian prayers to captive audiences at school-organized, school-sponsored graduation ceremonies, violates the Establishment Clause, and specifically: (a) Whether the court, after finding the District's longstanding Prayer Policy unconstitutional, erred in upholding the Prayer Policy as currently described by the district, which continues to authorize proselytizing Christian prayers before captive audiences at school-sponsored events; (b) Whether the court erred by failing to apply the coercion test and by disregarding the practical effects of the Prayer Policy; (2) Whether: (a) holding elementary school graduations and holiday concerts in a proselytizing Christian chapel at a Christian university violates the Establishment Clause; and if so, whether the court erred in: (b) refusing to award nominal damages; and (c) holding plaintiffs' nominal damages claim moot." (No. 15-1574, Doc. 20 at 2).

(Docs. 26; 27-1; 29-1; 29-2). In response, Plaintiffs produced declarations of AHA members with standing to challenge the Prayer Policy, and asserted that the Does' separate claim for nominal damages for the Chapel Policy remained alive. (Docs. 42; 42-8-42-16). On June 21, the Fourth Circuit vacated this Court's ruling on the Prayer Policy, remanded for a determination of AHA's standing to enjoin said policy, and if found, for a determination of whether this Court's prior decision on the merits should be amended. (Doc. 58). The court also held that the Does had standing to seek nominal damages for the Chapel Policy, reversing the judgment finding the claim moot and remanding for consideration in the first instance. (Docs. 58; 59-1).

II. AHA has standing to seek prospective relief against the Prayer Policy.

An association has standing when: "(a) its members would otherwise have standing;" (b) "the interests it seeks to protect are germane to the organization's purpose;" and (c) the relief requested does not require "participation of individual members in the lawsuit." *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). The sole issue on remand is the first prong.[48] Under this prong, AHA need only have a single member with standing. "'The general rule applicable to federal court suits with multiple plaintiffs is that once the court determines that one of the plaintiffs has standing, it need not decide the standing of the others.'" *Buono v. Norton*, 371 F.3d 543, 548 n.3 (9th Cir. 2004) (citations omitted).

Under the Establishment Clause, a plaintiff has standing for prospective relief if he or she is likely to have "direct contact with an unwelcome religious exercise or display." *Suhre v. Haywood Cty.*, 131 F.3d 1083, 1086 (4th Cir. 1997). The injury need not "be actualized." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008). *E.g.*, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 306-13 (2000) (enjoining an *unimplemented* policy permitting student-initiated "invocation and/or message" at school events). Establishment Clause "standing is even stronger when the plaintiffs are students and parents of students attending public schools. Students and

[48] GCSD does not dispute that the interests at stake are germane to AHA's organizational interests. *See generally* (Speckhardt Decl. ¶¶4-7). Nor does it dispute that the third element is satisfied because only declaratory and injunctive relief is sought. *See UAW v. Brock*, 477 U.S. 274, 288 (1986).

their parents enjoy a cluster of rights vis-a-vis their schools - a relationship which removes them from the sphere of 'concerned bystanders.'" *Doe v. Beaumont Indep. Sch. Dist.*, 240 F.3d 462, 466-67 (5th Cir. 2001). Parents can "on their own behalf, assert that the state is unconstitutionally acting to establish a religious preference affecting their children." *Bell v. Little Axe Indep. Sch. Dist.*, 766 F.2d 1391, 1398 (10th Cir. 1985).[49] AHA has many members who are parents of children directly subject to, and injured by, the Prayer Policy.[50] At least *three* of these members unequivocally have standing, *infra*, when just one is enough.

1. Jeffrey Lamb. Lamb, an AHA member since at least 2007, has two daughters in GCSD schools subject to the Prayer Policy. (Lamb Decl. ¶¶1-5). Lamb's youngest is a first grader at Buena Vista Elementary, and is expected to matriculate to Riverside Middle and RHS. (*Id.* ¶5). His eldest daughter is a freshman at WHHS. (*Id.* ¶4). Not only does the Prayer Policy apply to these schools (D. App. Br. at 8-9) – which alone is sufficient to confer standing, *e.g.*, *Beaumont*, 240 F.3d at 467 (majority), & 498-99 (concurrence) – but they have included prayer and religious messages in recent graduations, making the likelihood of future injury particularly acute.[51] Lamb testified: "If this practice is not enjoined, my daughters will not feel welcome at their own graduation ceremonies. They 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).

Instructively, in *Lee*, a father had standing to seek a district-wide injunction against graduation prayers, even though his daughter's high school graduation was four years away. 505 U.S. at 584. The Court merely "assume[d]" the high school had a practice similar to her middle

[49] *See Lee v. Weisman*, 505 U.S. 577, 581 (1992); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).
[50] (Speckhardt Decl. ¶¶9-11) (Pernak Decl. ¶13) (Irwin Decl. ¶¶11-13) (Lamb Decl. ¶¶1-9) (Bruccoliere Decl. ¶¶4-7) (Street Decl. ¶¶6-8) (Willis Decl. ¶¶4-6).
[51] The 2013 and 2014 WHHS ceremonies included a prayer by the Student Body President. (DEFS 188-90). Also, the 2013, 2014, 2015, *and* 2016 programs included "The Lord Bless You and Keep You." (*Id.*) (Lamb Decl. ¶8; Exs. A-B). RHS has included prayers since at least 2013. (DEFS 180-81) (Lamb Decl. ¶9). The 2014 ceremony included a "Welcome" for which the audience was requested to stand. (Ex. O).

school. *Id*.[52] Here, the Court need not merely assume, as in *Lee*, that Lamb's high schools will include prayer based on *other* schools' practices, because their own schools regularly include prayer and religious messages in their ceremonies.[53]

2. Michael Bruccoliere. Bruccoliere has been an AHA member since 2011 and has two children at schools subject to the Prayer Policy. (Bruccoliere Decl. ¶¶1-2; ¶¶4-5). Bruccoliere's eldest daughter is a freshman at GHS and his youngest is a fifth grader at Stone Academy, slated to matriculate to League Academy and GHS. (*Id.* ¶¶4-5). GHS has had prayer in its ceremonies since at least 2012 and as recently as 2016.[54] Bruccoliere does not want his children to be subjected to graduation prayers or to feel coerced into participating in such prayer. (*Id.* ¶¶8-11).

3. J.W. J.W., an AHA member since February 2013, has a child in Mauldin Elementary who will matriculate to Mauldin Middle and Mauldin High. (Speckhardt Decl. ¶11; Ex. A). Mauldin Elementary explicitly adopted the Prayer Policy. (Spinks Aff. ¶5). Further, Mauldin High included Christian songs from 2013 to 2015. (Willis Decl. ¶6; Ex. A) (DEFS 175-76).

III. This Court should amend its prior judgment on the prospective prayer claim.

With AHA's standing established, this Court is instructed to decide whether "its prior judgment on the prospective prayer claim should be amended in any respect." (No. 15-1574, Doc. 58 at 6). As the Fourth Circuit vacated this Court's judgment on the Prayer Policy, this Court has ample authority to reach a different conclusion than before. The "ultimate responsibility of the federal courts, at all levels, is to reach the correct judgment under law." *Am. Canoe Ass'n v. Murphy Farms, Inc*., 326 F.3d 505, 515 (4th Cir. 2003).

A. Establishment Clause Overview

It is well settled that "public schools may not subject their students to readings of any

[52] As *Lee* exemplifies, imminence "requires only that the anticipated injury occur with[in] some fixed period of time in the future, not that it happen in the colloquial sense of soon[.]" *NAACP v. Browning*, 522 F.3d 1153, 1161 (11th Cir. 2008). The plaintiff need not even establish that "'recurrence is probable.'" *Truth v. Kent Sch. Dist*., 524 F.3d 957, 965 (9th Cir. 2008) (citation omitted).

[53] Where "defendants have repeatedly engaged in the injurious acts in the past, there is a sufficient possibility that they will engage in them in the near future." *Armstrong v. Davis*, 275 F.3d 849, 861 (9th Cir. 2001). *Accord Wall v. Wade*, 741 F.3d 492, 497 (4th Cir. 2014).

[54] (Bruccoliere Decl. Ex. A) (DEFS 144-45) (Irwin Decl. ¶10-13; Exs. A-B) (D. Ans. Rev. RFA No. 20).

prayer." *Lee*, 505 U.S. at 610. Further, the "First Amendment prohibits [schools] from requiring religious objectors to alienate themselves from the [school] community in order to avoid a religious practice." *Mellen v. Bunting*, 327 F.3d 355, 372 n.9 (4th Cir. 2003). GCSD subjects its students to prayer and forces religious objectors to alienate themselves from their own gradations or risk being subjected to a prayer that is "offensive to the student." *Lee*, 505 U.S. at 594. "The Constitution forbids the State to exact religious conformity from a student as the price of attending her own high school graduation." *Id.* at 596.

This Court's prior decision allows GCSD to permit "students to present overtly sectarian and proselytizing religious prayers to a group of students [and citizens] clearly assembled at the behest of the government." *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 821 n.11, 823 (5th Cir. 1999), *aff'd*, 530 U.S. 290 (2000). Such a practice does not merely cross the line between separation of church and state but "plunge[s] over the cliff." *Id.*

Both *Lee* and *Santa Fe* make clear that a public school cannot include prayer "at events it hosts." *Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 856 (7th Cir. 2012) (en banc), *cert. denied*, 134 S. Ct. 2283 (2014). In *Santa Fe*, the Court specifically held that "permitting student-led, student-initiated prayer" at school-sponsored events unconstitutionally endorses religion and coerces students to participate in religious activity. 530 U.S. at 296-97, 301-03, 308-16. This was so even though the prayers would be delivered by student-selected students at voluntary high school football games. *Id.* The Court recently reiterated that in a graduation where "school authorities maintain[] close supervision over the conduct of the students," an "invocation [i]s coercive." *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1827 (2014).

Governmental action must pass the disjunctive *Lemon* test, under 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. *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 592 (1989). Additionally, in *Lee*, the Court formulated the separate Coercion Test, 505 U.S. at 587, pursuant to which a public school cannot "force a student to choose between attending and participating in school functions and not attending only to avoid personally offensive religious rituals." *Skarin v.*

Woodbine Cmty. Sch. Dist., 204 F. Supp. 2d 1195, 1198 (S.D. Iowa 2002).

B. There is no "new" Prayer Policy.

It is important to clarify at the outset what is meant by the "Prayer Policy." There is only one. This Court properly held that prayers delivered at graduations from 1951 through 2013 were unconstitutional. (Order at 20-21). GCSD does not even deny it has had a practice of "endorsing" Christian prayers all these years, *supra.* In 2013, it *refused* to discontinue this practice, writing: "With regard to a student delivering a **prayer** or providing a **religious message** during a school sponsored event, the District will not prohibit this practice as long as the **prayer or message** is student led and initiated and does not create a disturbance to the event." (Compl. Ex. 6) (emphasis added). Although "Prayer Policy" is used for concision, GCSD has never had a written policy. More accurately, it has had a longstanding *practice* of *including* prayers in graduation ceremonies and it is this *practice* Plaintiffs challenge.[55] The *sine qua non* of this practice remains unchanged – GCSD continues to include prayers delivered to captive student audiences at school-sponsored graduation ceremonies. Now there is simply written authorization.

The only modifications GCSD claims to have made in 2013 is that prayers will no longer be prescreened and the graduation programs will no longer mention the prayers. (Gibson Aff. ¶17). But neither of these minor gestures removes GCSD's imprimatur over the prayers; nor do they insulate GCSD from the coercive element of the final message. *Santa Fe*, 530 U.S. at 302-03. Many cases, including *Santa Fe*, have held student-led prayers unconstitutional even though they would not be prescreened or mentioned in a program.[56]

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[55] *E.g.*, *Appenheimer v. Sch. Bd.*, 2001 WL 1885834, at *1-6 (C.D. Ill. 2001) (unwritten practice permitting student-initiated prayers unconstitutional).

[56] *E.g.*, *Santa Fe*, 530 U.S. at 301; *ACLU v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471, 1475 (3rd Cir. 1996); *Harris v. Joint Indep. Sch. Dist.*, 41 F.3d 447, 452-53 (9th Cir. 1994) *vacated as moot*, 515 U.S. 1154 (1995); *Collins v. Chandler Unified Sch. Dist.*, 644 F.2d 759 (9th Cir. 1981); *Doe v. Gossage*, 2006 U.S. Dist. LEXIS 34613, *5, *20 (W.D. Ky. May 24, 2006) (no school official "attempted to influence the speaker with regard to the content of the remarks" and prayers would not be on programs); *Gearon v. Loudoun Cty. Sch. Bd.*, 844 F. Supp. 1097 (E.D. Va. 1993); *Graham v. Cent. Cmty. Sch. Dist.*, 608 F. Supp. 531, 533 (S.D. Iowa 1985) (speaker had "complete control of what he will say").

C. This Court's previous decision produces an unwieldy result foreclosed by precedent, specifically, *Santa Fe*.

In *Santa Fe*, the Supreme Court held that a school district's practice of allowing student-selected students to deliver an uncensored, "brief invocation and/or message" at school events violated the Establishment Clause. *Id*. at 306-13. The salient facts in *Santa Fe* are present here. GCSD's student prayers are "delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property." *Id.* at 307. A student "representing the student body, under the supervision of school faculty" delivers the prayers. *Id.* at 302-03, 310-15.[57] The message is delivered over a sound system "which remains subject to the control of school officials." *Id.* at 307.[58] The "school's name is . . . written in large print" on the graduation programs, podiums, flags, and banners. *Id.* at 308.[59] It is in a setting such as this that GCSD "'has chosen to permit'" the student "to rise and give the 'statement or invocation.'" *Id*. The "history of this policy, moreover, reinforce[s] our objective student's perception that the prayer is, in actuality, encouraged by the school." *Id.* at 308-09. As in *Santa Fe*, the objective observer is aware of GCSD's long history of explicitly allowing students to deliver "prayer" only. *Id*. *Supra* at 1-6. In these circumstances, an objective "student will unquestionably perceive the . . . prayer as stamped with her school's seal of approval." *Id*.

To the extent it can be distinguished from *Santa Fe*, GCSD's practice is even worse in at least three ways. First, GCSD's practice applies to middle and elementary schools. The "symbolism of a union between church and state is most likely to influence children of tender years." *Sch. Dist. v. Ball*, 473 U.S. 373, 390 (1985). These "schoolchildren are vastly more impressionable than high school or university students." *Bell*, 766 F.2d at 1404. "In elementary schools, the concerns animating the coercion principle are at their strongest." *Peck v. Upshur Cty. Bd. of Educ.*, 155 F.3d 274, 288 n* (4th Cir. 1998). Plaintiffs are not aware of a single case upholding graduation prayers in elementary schools.

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[57] *E.g.*, (Compl. ¶¶49-50) (Ans. ¶¶49-50) (Gibson Aff. ¶13; Ex. B). *See, e.g.* (DEFS 188-90) (Ex. L-2).
[58] (Gibson Aff. Ex. B) (Exs. B-1; B-4).
[59] *E.g.*, (Exs. A-D; G-O; Q) (DEFS 92-193) (Pernak Decl. Exs. A-B) (Lamb Decl. Exs. A-B) (Willis Decl. Ex. A) (Irwin Decl. Exs. A-B) (Doc. 65-1, Gibson Supp. Aff. Ex. A).

Second, GCSD's prayers are delivered at formal, effectively involuntary graduations. The Court in *Lee* recognized that "graduation is one of life's most significant occasions." 505 U.S. at 595. In *Santa Fe*, the Court even acknowledged that the "pressure to attend an athletic event is not as strong as a senior's desire to attend her own graduation ceremony." 530 U.S. at 311.

Third, the *Santa Fe* speakers were student selected. *Id.* at 306. By contrast, GCSD readily concedes that its "students are selected to speak by teachers and school administrators." (D. App. Br. at 15). Many GCSD schools also select speakers based on GPA. (*Id.*). In *Lassonde v. Pleasanton Unified Sch. Dist.*, the Ninth Circuit explained: "Speakers were selected by the school solely because of their academic achievement; that is, *the school endorsed and sponsored* the speakers as representative examples of the success of the school's own educational mission." 320 F.3d 979, 984 (9th Cir. 2003) (emphasis added).[60]

In diverging from *Santa Fe*, this Court relied on the fact that the *Santa Fe* policy involved "election processes." (Order at 12). As discussed above, however, GCSD's selection processes are far more problematic. Whereas the "dual election" in *Santa Fe* helped *distance* the school from the prayers, GCSD speakers are selected *by the school*, often based on subjective criteria, making the school's imprimatur much greater here. 530 U.S. at 306 (finding the two-step process problematic *because* it involved "the school in the selection of the speaker"). Moreover, many of GCSD's schools select speakers based on *elected* class office, *supra* at 25, making it indistinguishable from *Santa Fe*. 530 U.S. at 306-08. This, coupled with the fact that GCSD now censors messages that "create a disturbance" (Compl. Ex. 6), "ensures that only those messages deemed 'appropriate' under the District's policy may be delivered." *Id*. at 304.

But the absence of such an election is inconsequential: "The distinction . . . is simply one without difference. *Regardless of whether the prayers are selected by vote or spontaneously initiated* . . . school officials are present and have the authority to stop the prayers." *Santa Fe*,

[60] Many GCSD schools also continue to choose students based on vague "citizenship criteria." (Gibson Aff. ¶17) (Spinks Aff. ¶5) (Byrd Aff. ¶5) (Meisten Aff. ¶5) (D. Ans. Doe Int. No. 2) (D. Ans. Doe Int. Nos. 2; 5-6; 10) (Exs. B-1; B-4-B-6) (Doc. 87, P. Obj. R&R at 5).

168 F.3d at 823 (emphasis added). *Accord Cole v. Oroville Union High Sch.*, 228 F.3d 1092, 1103 (9th Cir. 2000) (religious valedictorian speech would be school-sponsored and violate the Establishment Clause even though the 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"). Indeed, the "election process" in *Santa Fe* was only one, and hardly a dispositive factor. 530 U.S. at 307-17. In fact, it was only relevant to its *facial* unconstitutionality.[61] But the Court made abundantly clear that it would have found the prayers unconstitutional even if the policy were "facially neutral." *Id.* at 307 n.21. This was so for three reasons. First, the Court emphasized that the "endorsement of the message" is "established by factors beyond just the *text of the policy*." *Id.* at 314 (emphasis added). It was far more relevant that the prayer would be "delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function." *Id.*[62] Second, independent of the words of the policy, there was no secular purpose for permitting prayer at school events. *Id.* at 308-09. Third, regardless of the written policy, any prayer ultimately delivered at a school event would have "the improper effect of coercing those present to participate." *Id.* at 312, & n.21.

Like *Santa Fe*, independent of any written policy or election, the "new [position] does nothing to eliminate the fact that a minority of students are impermissibly coerced to participate in a religious exercise." *Gossage*, 2006 U.S. Dist. LEXIS 34613, at *19-20.[63] Even with the more attenuated selection process in *Santa Fe*, the Court held that the "'circuit-breaker' mechanism" did not "insulate the school from the coercive element of the final message." 530 U.S. at 310. The Ninth Circuit similarly recognized in *Lassonde*: "Even if the school district could have conducted the proceedings so as to avoid" endorsement, it has "no means of preventing the coerced participation . . . other than censoring [religious] speech." 320 F.3d at 984.

As *Santa Fe* is indistinguishable, this Court should change its prior ruling. The Eleventh

[61] *See Santa Fe*, 530 U.S. at 316 ("This policy likewise does not survive a facial challenge because it impermissibly imposes upon the student body a majoritarian election on the issue of prayer").
[62] The court did not find the election process dispositive to *Santa Fe* in *Mellen*, 327 F.3d at 367-68.
[63] (Irwin Decl. ¶¶11-13) (Pernak Decl. ¶¶10-11) (Jill Decl. ¶¶3-6) (Jane Decl. ¶¶5-8) (Lamb Decl. ¶19).

Circuit in *Jaffree v. Wallace* properly noted: "While many may disagree on the subject of prayer in public schools, our Constitution provides that the Supreme Court is the final arbiter of constitutional disputes." 705 F.2d 1526, 1536 (11th Cir. 1983), *aff'd*, 472 U.S. 38 (1985). And because the practice fails *Santa Fe* alone, this Court need not even bother with the full "*Lemon* analysis." *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 166 n.7 (5th Cir. 1993). Nonetheless, Plaintiffs offer a brief *Lemon* analysis, responding mostly to this Court's ruling.

D. There is no secular purpose in permitting graduation prayers.

If state action fails the purpose test, it is unconstitutional *regardless* of its "possible applications." *Santa Fe*, 530 U.S. at 314. Thus, even if GCSD's alleged minor modifications could remedy the Prayer Policy's unconstitutional effect, entanglement, and even coercion, it remains unconstitutional if it lacks a secular purpose. *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985).

Because prayer is "patently religious," a religious purpose is presumed. *McCreary Cty. v. ACLU*, 545 U.S. 844, 862 (2005). *See Santa Fe*, 530 U.S. at 309-10. "[C]ontrolling caselaw suggests that an act so intrinsically religious as prayer cannot meet . . . the secular purpose prong." *N.C. Civil Liberties Union v. Constangy*, 947 F.2d 1145, 1150 (4th Cir. 1991). When a school "permits religious invocations which by definition serve religious purposes," it "cannot meet the secular purpose prong." *Jager v. Douglas Cty. Sch. Dist.*, 862 F.2d 824, 830 (11th Cir. 1989). *Accord Jaffree*, 705 F.2d at 1534-35. "[A]llowing the students to decide whether to include prayer does not cure the problem." *Appenheimer*, 2001 WL 1885834, at *10.[64]

The 2013 statement is merely an explicit decision to continue authorizing graduation prayer. Rather than secularize the Prayer Policy, GCSD's recent maneuvers actually magnify its religious purpose. *See Santa Fe*, 530 U.S. at 316. GCSD is "simply reaching for any way to keep a religious [practice]." *McCreary*, 545 U.S. at 873. Critically, even this Court recognized that GCSD "insists on securing every slight remaining loophole of religious demonstration in

[64] *E.g.*, *Santa Fe*, 168 F.3d at 816-17; *Black Horse*, 84 F.3d at 1484-85; *Harris*, 41 F.3d at 458; *Collins*, 644 F.2d at 762; *Gossage*, 2006 U.S. Dist. LEXIS 34613 at *19-20; *Skarin*, 204 F. Supp. 2d at 1198.

school[.]" (Order at 6). Under *McCreary*, this is an unconstitutional religious purpose.[65]

Furthermore, it "will matter to objective observers whether [the new policy] follows on the heels of [policies] motivated by sectarianism." *Id*. at n.14. The Court must consider GCSD's "latest action 'in light of [its] history of' unconstitutional practices." *Id*. at 873 n.22. The "reasonable observer could not forget it." *Id.* at 870. As in *Santa Fe*, in "light of the school's history of regular delivery of a student-led prayer" dating back to 1951, it is "reasonable to infer that the specific purpose of the [new] policy [is] to preserve a popular 'state-sponsored religious practice,'" failing *Lemon's* purpose prong. 530 U.S. at 308-09, 315 (citing *Lee*, 505 U.S. at 596).

GCSD failed to overcome this strong presumption of an inherently religious purpose.[66] GCSD merely asserted that permitting graduation prayers furthers free speech and free exercise of religion. (D. MSJ 9). But the Court in *Santa Fe* rejected this very same justification, reasoning that the prayers or messages took place "at government-sponsored school-related events," and thus constituted *government* speech as a matter of law. *Id.* at 302, 309-15. In rejecting the avowed purpose of "recognizing the students' rights to free speech," the Third Circuit in *Black Horse* similarly held: "the constitutional guarantee of free speech does not secularize [the new policy's] attempt to preserve 'the long standing practice.'" 84 F.3d at 1484.

Courts have consistently recognized that graduation prayers are not private speech, even if student-initiated.[67] Additionally, *every case* involving prayers at school board meetings has found that such prayers constitute government speech, even when delivered by private citizens of

[65] *See also Jager*, 862 F.2d at 830 ("In choosing the equal access plan, the School District opted for an alternative that permits religious invocations, which by definition serve religious purposes"); *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").

[66] The "defendant [must] show by a preponderance of the evidence that action challenged" has a secular purpose. *Church of Scientology Flag Serv. v. Clearwater*, 2 F.3d 1514, 1530 (11th Cir. 1993).

[67] *E.g.*, *Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1229-31 (10th Cir. 2009); *Cole*, 228 F.3d at 1102; *Santa Fe*, 168 F.3d at 818-22; *Black Horse*, 84 F.3d at 1477-78; *Harris*, 41 F.3d at 456-57; *Brody v. Spang*, 957 F.2d 1108, 1119-20 (3d Cir. 1992); *Workman v. Greenwood Cmty. Sch. Corp.*, 2010 U.S. Dist. LEXIS 42813, at *22-23 (S.D. Ind. Apr. 30, 2010); *Ashby v. Isle of Cty. Sch. Bd.*, 354 F. Supp. 2d 616, 629 (E.D. Va. 2004); *Gossage*, 2006 U.S. Dist. LEXIS 34613, at *10-11; *Deveney v. Bd. of Educ. of Kanawha*, 231 F. Supp. 2d 483, 487-88 (S.D. W.VA. 2002); *Skarin*, 204 F. Supp. 2d at 1197; *Appenheimer*, 2001 WL 1885834, *6-9; *Gearon*, 844 F. Supp. at 1099; *Lundberg v. W. Monona Cmty. Sch. Dist.*, 731 F. Supp. 331, 337 (N.D. Iowa 1989).

"their own unrestricted choosing." *Doe v. Tangipahoa Parish Sch. Bd.*, 473 F.3d 188, 192-93 (5th Cir. 2006), *vacated on standing grounds*, 494 F.3d 494 (5th Cir. 2007) (en banc).[68] Nor is there a "single case in which a legislative prayer was treated as individual or private speech." *Turner v. City Council*, 534 F.3d 352, 355-56 (4th Cir. 2008). Such prayers, which are *exempt* from *Lemon*, are government speech even when the legislators "do not compose or censor the prayers," have "no editorial control," and are delivered under an "all-comers" policy.[69] Accepting GCSD's argument would therefore produce a highly anomalous situation foreclosed by precedent because students' First Amendment rights are *not* "'coextensive with the rights of adults in other settings.'" *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (citations omitted). Schools "do not offend the First Amendment" by prohibiting "student speech in school-sponsored expressive activities." *Id.* at 271-73. In *Santa Fe*, the Fifth Circuit explained:

> [W]e explicitly approved a school district's review of the content of the student-initiated, student-led graduation prayers . . . a review that would undoubtedly constitute impermissible viewpoint discrimination if the students' graduation prayers constituted purely private speech.[70]

Of course, GCSD's "new statements of purpose were presented only as a litigating position[.]" *McCreary*, 545 U.S. at 871. The "world is not made brand new every morning." *Id.* at 866. The Court is obligated to consider the "evolution of the current policy," which includes a history of "institutional practices that unquestionably violated the Establishment Clause." *Santa Fe*, 530 U.S. at 309, 315. GCSD wants this Court "to accept what is obviously untrue:" that these prayers are "essential to the protection of student speech." *Id.* at 315. But the Court must not "turn a blind eye to the context in which this policy arose, and that context quells any doubt that

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[68] *See also Doe v. Indian River Sch. Dist.*, 653 F.3d 256 (3d Cir. 2011); *Bacus v. Palo Verde Unified Sch. Dist. Bd. of Educ.*, 52 F. App'x 355 (9th Cir. 2002); *Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369 (6th Cir. 1999); *FFRF. v. Chino Valley Unified Sch. Dist. Bd. of Educ.*, 2016 U.S. Dist. LEXIS 19995 (C.D. Cal. Feb. 18, 2016).

[69] *Greece*, 134 S. Ct. at 1816, 1824-26; *Joyner v. Forsyth Cty.*, 653 F.3d 341, 353-54, 362-63 (4th Cir. 2011); *Pelphrey v. Cobb Cty.*, 547 F.3d 1263, 1269-71 (11th Cir. 2008). For instance, the citizen-led prayers in *Joyner* were not private speech even though the county "exercised no editorial control" over the remarks. 653 F.3d at 362-63 (Niemeyer, J., dissenting).

[70] 168 F.3d at 821 n.12. *See also Hazelwood*, 484 U.S. at 272 ("A school *must* also retain the authority to refuse to sponsor student speech that might . . . associate the school with any position other than neutrality") (emphasis added).

this [new statement] was implemented with the purpose of endorsing school prayer." *Id.*

E. The Prayer Policy has the unconstitutional effect of endorsing religion.

Regardless of the purposes motivating it, GCSD's practice fails *Lemon*'s effect prong. Courts have been nearly unanimous in holding that graduation prayers unconstitutionally endorse religion, even if student-initiated.[71] Contrary to GCSD's "repeated assertions that it has [now] adopted a 'hands-off' approach," the "realities of the situation plainly reveal that its policy involves both perceived and actual endorsement of religion." *Id*. at 303-05. Like *Santa Fe*, the student-initiated nature of the remarks do not "insulate the school from the . . . message." *Id.* at 308-10. Putting "the ultimate choice to the students" does not eliminate school-sponsorship. *Santa Fe*, 168 F.3d at 817-18. The *Santa Fe* school argued that its policy was constitutional because it "permits but does not require prayer." *Id.* at n.10. But the court rejected this argument, reasoning that prayers "that a school 'merely' permits will still be delivered to a government-organized audience" at "a government-sponsored event." *Id.* at 817-18.

Indeed, whenever a prayer "is given via a sound system controlled by school principals and the religious invocation occurs at a school-sponsored event," the "*conclusion is inescapable* that the religious invocation conveys a message that the school endorses the religious invocation." *Jager*, 862 F.2d at 831-32 (emphasis added). Consistent with *Santa Fe*, in *Collins*, the Ninth Circuit held that "merely 'permitting' students" to open voluntary student assemblies with prayer unconstitutionally endorsed religion even though the assemblies were organized and conducted *entirely* by students. 644 F.2d at 760-62. In *Black Horse*, the Third Circuit likewise held that student-initiated prayer unconstitutionally endorsed religion even though the programs included a disclaimer. 84 F.3d at 1475, 1479. A "proselytizing prayer (perhaps even degrading other religions) would be delivered in a forum controlled by the School [District]." *Id.* at 1484-85. The Supreme Court would not even tolerate such proselytizing or degrading prayers in

[71] *See Cole*, 228 F.3d at 1103-04; *Santa Fe*, 168 F.3d at 817; *Black Horse*, 84 F.3d at 1486; *Harris*, 41 F.3d at 458; *Gossage*, 2006 U.S. Dist. LEXIS 34613, at *19-20; *Deveney*, 231 F. Supp. 2d at 487; *Skarin*, 204 F. Supp. 2d at 1198; *Appenheimer*, 2001 WL 1885834, at *6; *Gearon*, 844 F. Supp. at 1102; *Lundberg*, 731 F. Supp. at 345; *Graham*, 608 F. Supp. at 536.

legislative meetings for *adult* audiences under a rare *exception* to *Lemon* carved out exclusively for legislative prayer. *Greece*, 134 S. Ct. at 1823.

1. GCSD's minor modifications do not eliminate school endorsement.

That the agendas no longer state "prayer" is immaterial. The student remarks in *Santa Fe* would not be mentioned on a program but were still impermissibly school-endorsed. 530 U.S. at 298 n.6, 302-03, 307. Under *Santa Fe*, even "spontaneously initiated" prayers unconstitutionally endorse religion. 168 F.3d at 823. This makes sense because students "hear the prayers," not the program. *Joyner*, 653 F.3d at 354.[72] Nor would any disclaimer cure the problem.[73] The "Establishment Clause does not limit only the religious content of the government's own communications." *Allegheny*, 492 U.S. at 600-01.[74] Even if GCSD could partially distance itself from "sponsoring" the prayers, it "cannot sanction coerced participation in a religious observance merely by disclaiming responsibility." *Black Horse*, 84 F.3d at 1482. A "disclaimer" does nothing to prevent "coerced participation." *Lassonde*, 320 F.3d at 984-85.

Finally, the fact the prayers will no longer be prescreened is irrelevant. The prayers in *Santa Fe* would not have been prescreened either. *See* 530 U.S. at 296, 298 n.6 ("[T]he prayer was to be determined by the students, without scrutiny or preapproval by school officials."); & *id.* at 301 n.11 ("'The state is not involved.'"). The student-initiated prayers in both *Collins* and *Harris* would not be reviewed or mentioned in a program, and unlike a graduation, the *students* even "set the assembly agenda" in *Collins*. *Harris*, 41 F.3d at 453-55 (citing *Collins*).

2. The Establishment Clause would be a mockery if unconstitutional activities could be carried on merely because no written policy authorized the activities.

This Court previously assigned significance to the fact that GCSD has no written policy but instead permits prayer, or does not prohibit it (which are of course, two sides of the same

[72] Even this Court recognized that the citizen-led prayers in *Joyner* were neither screened nor "a memorialized part of the physically prepared agenda," but were still not private speech. (Order at 11).
[73] *See Black Horse*, 84 F.3d at 1475-79; *Lassonde*, 320 F.3d at 984; *Harris*, 41 F.3d at 455-56.
[74] *See also Smith v. Cty. of Albemarle*, 895 F.2d 953, 958 (4th Cir. 1990) ("It remains to be seen whether *any* disclaimer can eliminate the patent aura of government endorsement of religion.").

coin). (Order at 11). But numerous courts have held that school policies – whether written or unwritten – that simply "permit" prayers at school events, violate the Establishment Clause.[75]

That the challenged "prayer activities in public schools may not be statutorily authorized or conducted pursuant to written school board policy" is immaterial. *Jaffree*, 705 F.2d at 1534, *aff'd*, 466 U.S. 924 (1984). "The reach of the establishment clause is not limited by the lack of statutory authorization." *Id.* (citations omitted). The Eleventh Circuit properly held: "If a statute authorizing the teachers' activities would be unconstitutional, then the activities, in the absence of a statute, are also unconstitutional." *Id.* In *Sch. Dist. of Abington Twp. v. Schempp*, Justice Douglas announced: "What may not be done directly may not be done indirectly lest the Establishment Clause become a mockery." 374 U.S. 203, 230 (1963) (concurring).

GCSD has a *practice* of *including* prayer in its gradation ceremonies. No written policy is necessary for even just *one* prayer to be unconstitutional,[76] in the same way no written policy is necessary for one religious display to be unconstitutional, as in *Allegheny* and *Smith*. For the "purpose of an Establishment Clause violation, a state policy need not be formal [or] written." *Canell v. Lightner*, 143 F.3d 1210, 1214 (9th Cir. 1998). The Court must not be concerned with the "mechanism used to advance a concept, but the evil against which the clause protects." *Jaffree*, 705 F.2d at 1534 (citation omitted). Indeed, the prayers in *Lee*, *Mellen*, *Collins*, and *Harris*, were all found unconstitutional in the absence of a formal written policy. *See also Steele v. Van Buren Sch. Dist*., 845 F.2d 1492, 1495 (8th Cir. 1988) ("Based on the Board's failure to act . . . [the] district had a custom or policy allowing prayer[.]").

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[75] *See Santa Fe*, 530 U.S. at 301 ("[P]ermitting student-led, student-initiated prayer at football games violates the Establishment Clause."); *Santa Fe*, 168 F.3d at 816; *Lassonde*, 320 F.3d at 983; *Cole*, 228 F.3d at 1104 (merely "allowing the students to engage in sectarian prayer" would "amount to government sponsorship"); *Black Horse*, 84 F.3d at 1484; *Harris*, 41 F.3d at 452-54; *Workman*, 2010 U.S. Dist. LEXIS 42813 at *27; *Gossage*, 2006 U.S. Dist. LEXIS 34613, at *19-20 ("allowing" prayer); *Ashby*, 354 F. Supp. 2d at 629-30; *Deveney*, 231 F. Supp. 2d at 485-88; *Skarin*, 204 F. Supp. 2d at 1198; *Appenheimer*, 2001 WL 1885834, at *6-9; *Gearon*, 844 F. Supp. at 1098-1103; *Lundberg*, 731 F. Supp. at 345-46; *Graham*, 608 F. Supp. at 537.

[76] *E.g.*, *Lee*; *M.B. v. Rankin Cty. Sch. Dist*., 2015 U.S. Dist. LEXIS 117289 (S.D. Miss. 2015) (single prayer delivered at a single awards ceremony); *Workman*, 2010 U.S. Dist. LEXIS 42813, at *27 (single student prayer slated to be delivered at a single graduation); *Deveney*, 231 F. Supp. 2d at 488 (same); *Graham*, 608 F. Supp. at 532 (same).

This Court further believed that "no policy or position, as neutral and passive as the one at issue in this case, has ever been struck down." (Order at 11). But the *Santa Fe* policy was actually far more "hands off" than GCSD's policy because GCSD selects the student speakers.

Additionally, in *Collins*, the student assemblies were completely student run and voluntary. 644 F.2d at 760-62. The students merely asked the principal if they could deliver prayers. *Id.* There was *no written policy*. *Id.* In finding the prayers unconstitutional, the Ninth Circuit observed that the Supreme Court and lower court "cases support no meaningful distinction between school authorities actually organizing the religious activity and officials merely 'permitting' students to direct the exercises." *Id*. Like *Santa Fe*, *Collins* understood that "whether school officials make the decisions or give their authority to decide to another, the ultimate responsibility for those decisions is borne by school officials." *Harris*, 41 F.3d at 452-55 (citing *Collins*). It further recognized that regardless of any a written policy: "'students must either listen to a prayer chosen by a select group of students or forego the opportunity to attend a major school function.'" *Id.* (quoting *Collins*, at 762).

Likewise, in *Harris*, there was "'little or no [school] involvement' in the process resulting in prayer," yet the school's *unwritten* practice was unconstitutional. 41 F.3d at 452-53. The court reiterated: "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." *Id.* Unlike here, the "seniors ma[d]e all decisions relating to the ceremony." *Id.* But the court concluded: "When the senior class is given plenary power over a state-sponsored, state-controlled event . . . it is just as constrained by the Constitution as the state would be." *Id.* at 455.[77]

Finally, the policy in *Gossage* was identical to *Adler v Duval Cty. Sch. Bd.*, 250 F. 3d 1330 (11th Cir. 2001). A student could give an uncensored "opening and/or closing message." 2006 U.S. Dist. LEXIS 34613, *2-3. "Despite the hands-off approach as to the content of the remarks," the student prayers were still "unconstitutional." *Id.* at *10-14, *19-20.

[77] The Third Circuit in *Black Horse* found *Harris* "persuasive." 84 F. 3d at 1483. Both *Harris* and *Black Horse* are "consistent with current Supreme Court precedent." *Appenheimer*, 2001 WL 1885834, *8.

3. Contrary to this Court's previous decision, prohibiting prayers in public school graduations does not violate the Free Speech Clause.

Finding the Establishment Clause landscape inhospitable, GCSD sought "sanctuary for its graduation prayer policy in the Free Speech Clause." *Santa Fe*, 168 F.3d at 818-19. GCSD contended that it is not simply permissible to include prayer in its graduation ceremonies, but it "would be guilty of unconstitutional viewpoint discrimination were it to do otherwise." *Id.* (D. App. Br. at 20-21). But again, *Santa Fe* makes clear that the "delivery of such a message" by a "speaker representing the student body, under the supervision of school faculty," is "not properly characterized as 'private' speech." 530 U.S. at 302-03, 310-15. Graduation "ceremonies have not been regarded, either by law or tradition, as public fora." *Black Horse*, 84 F.3d at 1478.[78]

On the contrary, a restriction on prayer is "'necessary' to avoid running afoul of the Establishment Clause." *Lassonde*, 320 F.3d at 984-85. This is so even "if a disclaimer were given" *id.*, and even if the policy "neither encourages a religious message nor subjects the speaker to a majority vote." *Cole*, 228 F.3d at 1103.[79]

GCSD urged the Court to "adopt a reading of [equal access] decisions that would require a school . . . to allow students" to use a "school-sponsored" event "to proselytize." *Bannon v. Sch. Dist.*, 387 F.3d 1208, 1216 (11th Cir. 2004) (per curiam). But this case does not involve "the use of school property as a 'public' or 'open' forum," where "school officials allowed . . . *non-school-related meetings* to be held on school property." *Harris*, 41 F.3d at 456 (emphasis added). *See Santa Fe*, 530 U.S. at 302-03 (equal access cases are inapplicable to student messages at "school-related events"). This Court nonetheless relied on equal access cases such as *Child Evangelism Fellowship* ("*CEF*") *II* and *Peck.* (Order at 13, 19). *CEF II* is readily distinguishable as it involved school property "not being used for school purposes." *Harris*, 41 F.3d at 456-57.

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[78] Regardless, the Supreme Court has "never held [that] the mere creation of a public forum shields the government entity from scrutiny under the Establishment Clause." *Santa Fe*, 530 U.S. at 303 n.13. *See Cole*, 228 F.3d at 1101 (even assuming the ceremony was a "public forum, the District's refusal to allow the students to deliver a sectarian speech or prayer" was "necessary").

[79] *See also Ashby*, 354 F. Supp. 2d at 629-30 ("the decision not to allow the students to [deliver a religious song] was necessary"); *Lundberg*, 731 F. Supp. at 341 (upholding ban on graduation prayer); *Gearon*, 844 F. Supp. at 1102-03 ("forbidding the defendants from permitting prayer").

But the "essence of graduation is to place the school's imprimatur on the ceremony." *Lassonde*, 320 F.3d 985.[80] Similarly, *Peck* upheld an equal access policy allowing the passive display of materials by citizens "not affiliated in any way with the school." 155 F.3d at 275-82. *Peck* did not involve a school event. Nor did it involve prayer delivered to a captive student audience assembled at its behest.[81] Critical to the court's holding was the fact that students could "ignore or simply walk past the table" without "calling any attention to that choice." *Id.* at 287-88. By contrast, finding "no violation under these circumstances would place objectors in the dilemma of participating [in prayer], with all that implies, or protesting." *Lee*, 505 U.S. at 593.

GCSD's argument "has as its major unarticulated premise the assumption that people who want to propagandize . . . views have a constitutional right to do so whenever and however and wherever they please." *Adderley v. Florida*, 385 U.S. 39, 47-48 (1966). But a "student's right to express his personal religious beliefs does not extend to using the machinery of the state as a vehicle for converting his audience." *Chandler v. James*, 180 F.3d 1254 (11th Cir. 1999).

4. This Court should not rely on *Adler* because it defies *Santa Fe*, is plainly distinguishable, and utterly lacks persuasion.

Other than the equal access cases, this Court previously rested its decision on *Adler*, an outlier that contravenes *Santa Fe* and practically every other graduation prayer case.

Importantly, *Adler* involved a *facial* challenge only; the Eleventh Circuit "***expressly*** declined to consider . . . any as-applied objection to the policy's constitutionality." 250 F.3d at 1332 n.1 (emphasis added). Here, there is no written policy, so *Adler*'s rationale is inapplicable. Besides, *Adler*'s refusal to consider the effects of the policy as applied contravenes *Santa Fe* as well as Fourth Circuit precedent. *See Joyner*, 653 F.3d at 348, 354. *Compare Santa Fe*, 530 U.S. at 307 ("The actual or perceived endorsement of the message, moreover, is established by factors beyond just the text of the policy."); *id.* at n.21 (practice would fail "[e]ven if the plain language .

[80] *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 115-16 (2001) ("where the school facilities are being used for a nonschool function . . . *Lee* is inapposite.").
[81] *Cf. Page v. Lexington Cty. Sch. Dist. One*, 2007 U.S. Dist. LEXIS 53233, *36-37 n.24 (D.S.C. 2007) ("Here, the speaker has not literally been provided with a platform and a captive audience (as would be the case for a commencement speaker).").

. . were facially neutral"); *id.* at 315 ("Our examination . . . [must] not stop at an analysis of the text of the policy."), *with Adler*, 250 F.3d at 1332 (focusing solely "*on its face*"); & *id.* at n.1 (refusing to consider effects). Indeed, four justices in a strong dissent properly maintained that the *Adler* policy was unconstitutional under *Santa Fe* and that the majority erred by "considering only the terms of the policy itself."[82] Additionally, *Adler* sanctioned a majoritarian student election, which was found unconstitutional in *Santa Fe.* 250 F.3d at 1332. Consequently, courts confronted with identical facts have disregarded *Adler*. *See Gossage*, 2006 U.S. Dist. LEXIS 34613, at *2-5, *10-14 (an *Adler* policy was "unconstitutional in light of *Santa Fe*.").[83]

Beyond contravening *Santa Fe*, the *Adler* majority also misinterpreted *Santa Fe.* Critical to *Adler*'s conclusion was its mistaken contention that "*Santa Fe* only addresses one part of the *Lemon* test: whether the policy at issue has a secular purpose." 250 F.3d at 1339. But *Santa Fe* also clearly addressed the second prong of *Lemon*. 530 U.S. at 305-10.

Regardless, *Adler* is distinguishable in at least three material ways. The Eleventh Circuit upheld the policy 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. First, GCSD decides who will speak, whereas *Adler* and even *Santa Fe* involved "a student speaker not chosen by the school." *Corder*, 568 F. Supp. 2d at 1246 n.5.[84] 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*). Second, GCSD *will censor* messages that "*create a disturbance*." (Compl. Ex. 6). *Adler*

[82] *See* 250 F.3d at 1344-45 (Kravitch, J., Anderson, C.J., Carnes, and Barkett, J.J, dissenting) ("By considering only the terms of the policy itself, the majority fails to address contextual evidence that evinces an impermissible religious purpose."); *id.* at 1347-48 (Carnes) ("[I]n light of the additional guidance the *Santa Fe* decision has given us, . . . a school board may not delegate to the student body or some subgroup of it the power to do by majority vote what the school board itself may not do.").

[83] *See Corder v. Lewis Palmer Sch. Dist.*, 568 F. Supp. 2d 1237, 1245-46 (D. Colo. 2008) ("I disagree that the analysis of *Tinker* or *Adler* . . . should apply."); *Newdow v. Bush*, 2001 U.S. Dist. LEXIS 25936, *10 n.5 (E.D. Cal. 2001) ("*Adler* conflicts with the Ninth Circuit decision in *Cole*.").

[84] *See Santa Fe*, 530 U.S. at 306; *Corder*, 566 F.3d at 1229 n.5 ("*Adler* is distinguishable" because the speaker "was chosen by the school" based on her "4.0 [GPA]."); *Workman*, 2010 U.S. Dist. LEXIS 42813 at *23-24 (distinguishing *Adler* because speakers selected on class rank).

involved no censorship at all. 250 F.3d at 1332-37. Third, GCSD authorizes the delivery of prayers to captive impressionable elementary students. *Peck*, 155 F.3d at 287 n*.

Finally, post-*Adler* Eleventh Circuit cases effectively abrogate the decision. In *Pelphrey*, the court held that prayers delivered by private citizens under a facially neutral policy were not private speech, even though the government did not "compose or censor the prayers." 547 F.3d at 1267, 1271. In *Holloman v. Harland*, the court invalidated a teacher's unwritten practice of conducting a moment of silence, recognizing that a policy "as actually implemented," must "not have the effect of promoting or inhibiting religion." 370 F.3d 1252, 1284-91 (11th Cir. 2004). And in *Bannon*, the court held that student-initiated religious murals "constituted school-sponsored expression within the meaning of *Hazelwood*," even though they were not pre-reviewed. 387 F.3d at 1214-15. It then found that "censorship" of the student speech "was rationally related to the legitimate pedagogical concern of avoiding the religious controversy." *Id.* at 1217. In contrast, *Adler* implicitly and erroneously applied the *Tinker* standard rather than the *Hazelwood* standard. *See Corder*, 566 F.3d at 1229 n.5. *Bannon*, rather than *Adler*, is consistent with free speech challenges in the graduation context, which apply *Hazelwood*, not *Tinker*, because a graduation is "school-sponsored."[85] Instructively, Plaintiffs are not aware of any other that court has relied upon *Adler* to *uphold* a graduation prayer policy.

5. GCSD's award of power to students to deliver graduation prayers is unconstitutional regardless of the "ratio" of prayers delivered.

In drawing a distinction between prayers prior to 2013 and after, this Court relied on *Adler I* for its contention that the 2014 prayers (which were only a *sample*) were "*de minimis*" and "not representative of the kind of ratio that suggests unconstitutionality in practice." (Order at 15-16). In *Santa Fe*, however, the policy had *yet to be implemented*; unlike here, there was *no evidence whatsoever* that prayers would be delivered. 530 U.S. at 315. The school district

[85] *See Corder*, 566 F.3d at 1229-30; *Lundberg*, 731 F. Supp. at 338-39 ("While the school in *Tinker* had no fear that others could attribute the students' acts of self-expression to the school's position . . . prayer at a school-run function may work to stamp the belief in God with the imprimatur of the school"). *See also Boring v. Buncombe Cty. Bd. of Educ.*, 136 F.3d 364, 368 (4th Cir. 1998) (play was school-sponsored and thus, governed by *Hazelwood*).

averred, "until a student actually delivers a solemnizing message . . . there can be no certainty that any of the statements or invocations will be religious." *Id.* at 313. The Court agreed there was "no certainty" but held: "even if no Santa Fe High School 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." *Id.* (emphasis added). *Id.* at 313, 316.

Here, like *Santa Fe*, GCSD has clearly awarded students the power to deliver prayers at graduation ceremonies where the pressure to attend is even greater than football games. *Id.* at 311. Under *Santa Fe*, the award of that power is unconstitutional, regardless of the number of prayers actually delivered. The only material difference here is that the inevitable *has happened*, repeatedly, as evidenced by a mere sample of evidence Plaintiffs were able to obtain mostly from its own members regarding the 2014, 2015, *and* 2016 ceremonies. If as in *Santa Fe*, a school policy "authorizing the [prayer] activities would be unconstitutional, then the activities, in the absence of a [policy], are also unconstitutional." *Jaffree*, 705 F.2d at 1534.

Plaintiffs are unaware of any graduation prayer case other than *Adler I* that turned on "ratio" evidence. Regardless, *Adler I* considered the ratio *because* it was a *facial* challenge *only*, *unlike* here. 206 F.3d 1070, 1083-84 (11th Cir. 2000). The court explained: "A facial challenge to be successful 'must establish that no set of circumstances exists under which the Act would be valid.'" *Id.* (citing *U.S. v. Salerno*, 481 U.S. 739 (1987)). In refusing to apply the Coercion Test, the court observed, "this argument would be far better suited to an as-applied challenge." *Id.*

More importantly, the "*Salerno* standard in a facial challenge" employed by *Adler I* and this Court was "unequivocally" found inapposite in the "Establishment Clause area" in *Santa Fe*. *Selman v. Cobb Cty. Sch. Dist.*, 390 F. Supp. 2d 1286, 1299 (N.D. Ga. 2005). Three Eleventh Circuit judges, Carnes, Chief Judge Anderson, and Barkett, properly recognized:

> When this case was last before us, I joined the majority opinion in large part because it reasoned, I thought correctly, that "a facial challenge to be successful 'must establish that no set of circumstances exists under which the Act would be valid.'" [*Adler I*] . . . But the Supreme Court has now unequivocally held that principle of facial challenge law does not apply in the Establishment Clause area. [*Santa Fe*]. Since that prop has been knocked out from under our reasoning, . . . the conclusion I reached before is wrong.

Adler, 250 F.3d at 1347-48 (Carnes, J., dissenting). Judge Kravitch's separate dissent added:

> Despite the majority's position, the Supreme Court makes clear in *Santa Fe* that facial Establishment Clause challenges must not focus "solely on the possible applications of the statute, but rather on whether the statute has an unconstitutional purpose." *Santa Fe,* 530 U.S. at 314 . . . What the opinion overlooks is that, under *Santa Fe*, if the Duval policy has an unconstitutional purpose, then there is no set of circumstances under which the policy would be valid, notwithstanding that some of the graduation messages delivered pursuant to the policy might be totally devoid of religious content. [*Id.* at 1343]

Nor can the 2014 (2015 *and* 2016) prayers be dismissed as "*de minimis*." In *Lee*, the Court held that the "embarrassment and the intrusion of the religious exercise cannot be refuted by arguing that these prayers, and similar ones to be said in the future, are of a *de minimis* character." 505 U.S. at 594.[86] Indeed, a single graduation prayer is enough to violate the Establishment Clause.[87] In *Lee*, the student would only be exposed to prayer at a single graduation, four years away, if at all. *Id.* at 583-84. That prayer would be no less unconstitutional if it were the only prayer delivered in all of the district's graduations. *Id.* The plaintiff's daughter would still be put in the unconstitutional dilemma of participating in the prayer, or protesting, independent of whether students at other schools were placed in this dilemma too. *Id.* at 593.

F. The Prayer Policy fosters excessive entanglement with religion.

Government endorsement of prayer "necessarily" results in unconstitutional entanglement.[88] In upholding the Prayer Policy under this prong, this Court relied on *Doe v. Sch. Dist. of Norfolk*, 340 F.3d 605 (8th Cir. 2003), for the notion that the 2013 "position requires and expects no involvement of the schools." (Order at 17). But GCSD will censor prayers or messages that "create a disturbance." (Compl. Ex. 6). Any "such determination would necessarily entangle the administration in deciding religious issues." *Bell*, 766 F.2d at 1406.

Furthermore, *Norfolk* is easily distinguishable. The issue was whether a district could be

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[86] *See Hall v. Bradshaw*, 630 F.2d 1018, 1022 n.1 (4th Cir. 1980) (nondenominational prayer on a map held unconstitutional even though it was "utterly innocuous."); *De Spain v. De Kalb Cty. Comm. Sch. Dist.*, 384 F.2d 836, 840 (7th Cir. 1967) (poem was "*de minimis*" and "innocuous" but unconstitutional).
[87] *E.g.*, *M.B*, *Workman*, *Deveney*, and *Graham*, *supra* at n. 76.
[88] *Mellen*, 327 F.3d at 375; *Constangy*, 947 F.2d at 1151-52; *Hall*, 630 F.2d at 1021; *Collins*, 644 F.2d at 762; *Deveney*, 231 F. Supp. 2d at 487; *Gearon*, 844 F. Supp. at 1102; *Skarin*, 204 F. Supp. 2d at 1198.

liable for the actions of a rogue parent/board member who "was acting in circumvention of the School District's policy" *not* to deliver prayers. 340 F.3d at 613-15. The court took pains to explain that the "past policy of allowing a[] [student-led] Invocation and Benediction . . . was never before the [court]." *Id.* at 610. The court concluded that the school district could not be liable because it "specifically advised all graduation participants, including the school-board-member parent, that prayer was *not permitted*." *Wigg v. Sioux Falls Sch. Dist.*, 382 F.3d 807, 814-15 (8th Cir. 2004) (citing *Norfolk*) (emphasis added). That is certainly not the case here.

G. GCSD's Prayer Policy fails the Coercion Test because it requires religious minorities to make the difficult decision between being exposed to prayer and alienating themselves from the most important school event.

Absent injunctive relief, religious minorities will continue to face the unconstitutional choice between attending their school's most significant event and forgoing to avoid a religious practice. *E.g.* (Lamb Decl. ¶19). This Court should therefore, at the very least, reconsider its decision in light of the Coercion Test. The Fourth Circuit has instructed: "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 370-72 (emphasis added). But this Court did not apply the Coercion Test. It merely stated that on its *face*, the 2013 position "cannot be said to be coercive." (Order at 11). The Coercion Test focuses not on the *face* of any written policy, but rather, the "*effect*" of any prayer that may be delivered. *Lee*, 505 U.S. at 583 (no written policy); *Adler I*, 206 F.3d at 1083-84. Had the Court properly applied the test, it would find that "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.[89]

In *Lee*, the Court held that a school's inclusion of a nonsectarian prayer in a graduation was unconstitutionally coercive even though students could abstain from the prayer. 505 U.S. at 586-87. The Court reasoned: "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

[89] Even this Court correctly acknowledged that the "pressure to stand participatorily at a graduation in prayer or other religious rite is inherently violative." (Order at 14 n.6).

attending students to stand as a group or, at least, maintain respectful silence during the Invocation and Benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion." *Id.* at 593. The Court opined: "Finding no violation under these circumstances would place objectors in the dilemma of participating, with all that implies, or protesting." *Id.* A school may not "place primary and secondary school children in this position." *Id.*

In *Santa Fe*, the Court held that even student-initiated, student-led prayers at football games failed the Coercion Test. 530 U.S. at 310. The "dual elections and student speaker" did not "insulate the school from the coercive element of the final message." *Id.* The school argued that *Lee* was distinguishable because the football games were voluntary. But 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 311-12. In *CEF I*, the Fourth Circuit distinguished *Lee* and *Santa Fe*, emphasizing: "Unlike the cases in which the Supreme Court has found unconstitutional coercion, students here would not be participating in an inherently religious activity. They would not be forced to engage in any formal religious exercise; . . . nor would they be *bound to sit by while other students or faculty pray*." 373 F.3d 589, 599 (4th Cir. 2004) (emphasis added). Yet this is exactly what GCSD students must endure.

Finally, like *Santa Fe*, the Coercion Test is violated even if no "student were ever to offer a religious message" again. 530 U.S. at 313-16. Knowing that a prayer might be delivered, as GCSD allows, religious minorities must make the "difficult choice" between "being exposed to a religious ritual" or "not attend an event honoring . . . [them]." *Id.* at 292; *M.B.*, 2015 U.S. Dist. LEXIS 117289, at *16. The Court in *Santa Fe* recognized "the difficult choice between attending [the] games and avoiding personally offensive religious rituals." 530 U.S. at 292, 311-12.

IV. The Does are entitled to nominal damages because GCSD violated the Establishment Clause by holding an elementary school graduation ceremony in a proselytizing Christian environment.

Plaintiffs fully demonstrated that the Chapel Policy is unconstitutional (P.MSJ 27-32) (P. Reply 12-15) and attempt not to be unduly repetitive here. To reiterate, numerous courts have

held that using a religious venue for public school events violates the Establishment Clause.[90] These cases are "consistent with well-established doctrine prohibiting school administrators from bringing church to the schoolhouse." *Elmbrook*, 687 F.3d at 850 (citation omitted).

A. The practice has the unconstitutional effect of endorsing Christianity.

"The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief" and from appearing to "affiliate" itself with religious "institutions." *Allegheny*, 492 U.S. at 593-94, 610. GCSD's use of a Baptist university's Christian chapel "affiliated" GCSD with a Christian institution. The "sheer religiosity of the space" created "a likelihood" that students would "perceive a link between church and state." *Elmbrook*, 687 F.3d at 853. Worse, it sent a stigmatizing message to "nonadherants 'that they are outsiders.'" *Santa Fe*, 530 U.S. at 309-10 (citation omitted).[91]

The Seventh Circuit correctly ruled that holding graduations in an "auditorium" of a nondenominational church failed the effect test because the "presence of religious iconography" would not only create "a likelihood" that students would "perceive a link between church and state" but would also indicate "to everyone that the religious message is favored and to nonadherents that they are outsiders." *Elmbrook*, 687 F.3d at 844 n.1, 853-54. It was irrelevant that the school selected the church because its facilities were crowded and overheated and could not find a comparable venue for the same price. *Id.* at 845 n.2, 848, 855.[92]

The salient facts in *Elmbrook* are indistinguishable from those present here. There, as here, "the environment was pervasively Christian, obviously aimed at nurturing Christian beliefs and gaining new adherents among those who set foot inside the church." *Id.* at 853. Even the Magistrate conceded: "religious imagery was easily visible and the overall environment was clearly Christian[.]" (Doc. 86, at 19). Notably, the venue in *Elmbrook* was not a "traditional

[90] *See Elmbrook*, 687 F.3d at 851; *Does v. Enfield Pub. Schools*, 716 F. Supp. 2d 172 (D. Conn. 2010); *Spacco v. Bridgewater Sch. Dep't*, 722 F. Supp. 834 (D. Mass. 1989); *Reimann v. Fremont Cty. Joint Sch. Dist.*, Civil No. 80-4059 (D. Idaho 1980); *Lemke v. Black*, 376 F. Supp. 87 (E.D. Wis. 1974).
[91] (Jill Decl. ¶¶3-6) (Jane Decl. ¶¶5-8) (John Decl. ¶5).
[92] *Enfield* similarly held that using a church for graduation "constitutes an impermissible endorsement of religion" even though it "provided the best location within the budget." 716 F. Supp. 2d at 182, 189.

church sanctuary." *Id.* at 844 n.1. The room was "the 'auditorium'" and used only for weekend services. *Id*. By contrast, the Turner Chapel is the site of "regular chapel services."[93]

A Christian cross sits on top of Turner Chapel and on nearby buildings. To enter, students must pass beneath a cross. NGU's proselytizing slogan, "Christ Makes the Difference," appears prominently in both the Turner Chapel parking lot and entry lobby, as well as elsewhere on campus. Students proceed into the sanctuary where they are surrounded by eight large stained glass windows featuring Jesus Christ. Proselytizing Christian monuments featuring Jesus also surround the Chapel. *See supra*, at 6-7.

If located in a public school, these Christian displays would indisputably violate the Establishment Clause. In *Stone v. Graham*, the Court held that a small (16 x 20 inch) donated copy of the Ten Commandments in a classroom was unconstitutional, reasoning that the effect "will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments." 449 U.S. 39, 41-42 (1980). In *Washegesic v. Bloomingdale Pub. Sch*., the court held unconstitutional a privately-donated portrait of Jesus in a public school hallway, reasoning: "Christ is central only to Christianity, and his portrait has a proselytizing, affirming effect that some non-believers find deeply offensive." 33 F.3d 679, 684 (6th Cir. 1994).[94]

The same risk that students "will perceive the state as endorsing a set of religious beliefs is present both when exposure to a pervasively religious environment occurs in the classroom and when government summons students to an offsite location." *Elmbrook*, 687 F.3d at 856. If "constitutional doctrine teaches that a school cannot create a pervasively religious environment in the classroom, or at events it hosts, it appears overly formalistic to allow a school to engage in identical practices when it acts through a short-term lessee." *Id.* (internal citations omitted).

The Fourth Circuit has invalidated practices far less flagrant. For instance, in *Smith*, it ruled that a privately donated crèche violated the Establishment Clause even though it was

[93] (Compl. ¶16) (Ans. ¶16) (Gibson Aff. Ex. D).
[94] *See also Roberts v. Madigan*, 921 F.2d 1047, 1056-58 (10th Cir. 1990) (Bible displayed on a teacher's desk); *Ahlquist v. City of Cranston*, 840 F. Supp. 2d 507 (D. R.I. 2012) (prayer mural); *Joki v. Bd. of Educ*., 745 F. Supp. 823, 829-30 (N.D. N.Y. 1990) (portrait of Jesus).

temporary, accompanied by a disclaimer, and "involved no expenditure of County funds." 895 F.2d at 955-58. In *Hall*, it held unconstitutional a decidedly "innocuous" prayer on a map, which had a "limited audience and distribution," even in the absence of "compelled recitation of the prayer" to a "captive audience." 630 F.2d at 1019-21 n.1. Unlike in *Smith* and *Hall* where a dissenter could simply walk by or ignore the religious display, MVES forced a captive audience of impressionable young students to endure a proselytizing Christian environment for *several hours* as the price of attending their own graduation ceremony. *Lee*, 505 U.S. at 586.

In *Spacco*, the court enjoined a school district from renting facilities owned by a church, based largely on the need for students to "pass beneath a large cross." 722 F. Supp. at 842-43. The Establishment Clause was violated, even though by "[s]imply sitting in a classroom, a reasonable observer . . . would not receive any constitutionally impermissible message from his or her surroundings." *Id*. Turner Chapel "creates an environment even more overwrought with religious symbols than the venue challenged in *Spacco*." *Enfield*, 716 F. Supp. 2d at 191. Unlike *Spacco* students, the Does were surrounded by numerous Christian symbols and messages inside the sanctuary and also throughout NGU's sectarian campus. (Jane Decl. ¶¶19-41).

At least seven factors make this case even more problematic than *Elmbrook* as well. First, Turner Chapel, both inside and outside, has far more Christian symbolism than the nonsectarian auditorium in *Elmbrook*: 1) Unlike *Elmbrook*, the chapel itself features eight giant stained glass windows featuring Jesus Christ. 2) Immediately outside, there are several large unavoidable Christian monuments dedicated to Jesus. 3) The lobby features large mats prominently displaying NGU's logo, "Christ Makes the Difference," with a cross in the center. 4) "Christ Makes the Difference" signs appear at each campus entrance and at the parking lot. 5) Christian crosses appear on the surrounding buildings on NGU's campus. *Supra*, at 6-7, *cf.* (Ex. R).

Second, two Christian prayers were delivered in the MVES ceremony, whereas *no* prayers were included in *Elmbrook*, 687 F.3d at 854-55, or *Enfield*, 716 F. Supp. 2d at 200-01. In *Harris*, the court noted: "The prayers said in this case are indistinguishable from those that might be said in a church service. If said there, no one would dispute that their intent and primary effect

was to advance religion." 41 F.3d at 458. Here, the prayers were delivered in a *church setting*.

Third, MVES children are vastly more impressionable than the high school students in *Elmbrook* and *Enfield*. Merely allowing materials to be displayed on tables by private citizens for one day is unconstitutionally coercive in elementary schools. *Peck*, 155 F.3d at 288 n*.

Fourth, Turner Chapel is not only a Christian *place of worship*, but it is part of a pervasively Christian university, *supra*, compounding the perception of Christian favoritism.

Fifth, GCSD intends to use Turner Chapel indefinitely. (D. Ans. Doe Int. No. 11). The *Elmbrook* district always intended to return its events to secular school facilities. 687 F.3d at 847. By the time of the appeal, it had already built a "new field house" for such occasions. *Id.*

Sixth, the reasonable observer would be aware of GCSD's partnership with NGU for its marching band exhibition – a "collaborative event between NGU and the school district" – that includes Christian prayers and Christian music. (Ex. P) (Pernak Decl. ¶¶13-17).[95] Such unnecessary involvement with NGU speaks volumes to GCSD's religious purpose and actual and perceived endorsement of religion. Finally, GCSD's use of numerous other Baptist venues, but no non-Christian religious venues, *supra* at 6-7, added to the already overwhelming message of Christian favoritism conveyed to an observer by GCSD's use of Turner Chapel.

B. Forcing non-Christian students to alienate themselves from the most important school event to avoid a proselytizing Christian environment is unconstitutionally coercive.

GCSD's use of Turner Chapel for the MVES graduation placed young schoolchildren and their families in the dilemma of choosing between attending a milestone school event and forgoing it entirely to avoid a Christian environment. Putting "school-age children who objected in an untenable position'" is unconstitutional. *Santa Fe*, 530 U.S. at 300, 305 (citing *Lee*). It is a "tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice." *Lee*, 505 U.S. at 596. It is also axiomatic that the government cannot "influence a person to go to

[95] The "reasonable observer" is aware of more than just the "challenged" activity. *Cressman v. Thompson*, 2015 U.S. App. LEXIS 13612, *41-42 (10th Cir. 2015).

. . . church." *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947). As such, the Establishment Clause is clearly violated when "the government directs students to attend a pervasively Christian, proselytizing environment." *Elmbrook*, 687 F.3d at 855. The court in *Elmbrook* properly found that, in "addition to impermissibly endorsing religion, the District's decision to use Elmbrook Church for graduations was religiously coercive." *Id.* at 854. This was so even though no prayers were delivered. *Id.* at 847, 851. The same was true in *Enfield*, 716 F. Supp. 2d at 200-01.

Lee and *Santa Fe* "cannot be meaningfully distinguished." *Elmbrook*, 687 F.3d at 855. In fact, to the extent "that *Lee* and *Santa Fe* involved challenged action that required only passive observance" – whereas GCSD required "students to undertake the act of entering a place of religious worship" – the MVES graduation was "more coercive." *Enfield*, 716 F. Supp. 2d at 200-201. In *Lee* and *Santa Fe*, the state "merely required students to be exposed to others engaging in religious activity at secular venues." *Id.* And that religious activity consisted of a nondenominational prayer lasting ***two minutes***. But MVES students were exposed to "the gospel of Jesus Christ" where "evangelism" is a focus, and where according to NGU, "[m]any students have received Jesus Christ as their personal Lord and Savior," for ***two hours***.[96] To "subject a student at such an event to a display of religion that is offensive or not agreeable to his or her own religion or lack of religion is to constructively exclude that student . . . The Establishment Clause does not permit this." *Gearon*, 844 F. Supp. at 1099-1000.

CONCLUSION. The Prayer Policy and Chapel Policy unconstitutionally exact religious conformity from a student as the price of attending his or her own public school graduation. Consequently, this Court should enter judgment in favor of Plaintiffs on all remaining claims, award nominal damages to the Does on the Chapel Policy, declare GCSD's Prayer Policy unconstitutional, permanently enjoin GCSD from including prayer in graduation ceremonies (including awards ceremonies), and award Plaintiffs attorneys' fees and costs.

Respectfully submitted,

[96] (Compl. ¶17) (Ans. ¶17) (Gibson Aff. ¶3) (Ex. A) (D. Opp. Prelim. Inj. at 1-2).

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