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' RESPONSE TO DEFENDANT'S SUPPLEMENTAL MEMORANDUM ON THE PRAYER CLAIM

I. Introduction and Overview

The Establishment Clause prohibits a school district "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). And it especially "forbids the State to exact religious conformity from a student as the price of attending her own high school graduation." *Lee v. Weisman*, 505 U.S. 577, 595-96 (1992). "That is being done here, and it is forbidden by the Establishment Clause." *Id.* at 599.

GCSD's prayers are also "intrinsically unconstitutional" because they interfere "'with the rights of parents to raise their children according to family religious traditions.'" *M.B. v. Rankin Cty. Sch. Dist.*, 2015 U.S. Dist. LEXIS 117289, at *27-28 (S.D. Miss. 2015) (quoting *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 226 (1963)). (Doc. 135 at 16-17). Families "entrust public schools with the education of their children, but condition their trust on the understanding" that they will not advance "religious views that may conflict with the private beliefs of the student and his or her family." *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987).

Over 100 years ago, the Supreme Court of Nebraska held unconstitutional the delivery of prayers, Bible readings, and Christian hymns to captive public student audiences, recognizing that "to some, the utterance of public prayer, except recitations from Scripture, is a vain and wicked act; and to some, the songs and hymns of praise in which others engage are a stumbling-block and an offense." *Freeman v. Scheve*, 65 Neb. 853, 871 (1902). The court declared, as relevant here: "if the system of compulsory education is persevered in, and religious worship or sectarian instruction in the public schools is at the same time permitted, parents will be compelled to expose their children to what they deem spiritual contamination, or else, while bearing their share of the burden for the support of public education, provide the means from their own pockets for the training of their offspring elsewhere." *Id.* at 872.[1]

[1] The Supreme Court of Iowa, in 1918, made the same observation that "in a large proportion of the cases where the courts have excluded Bible reading and other religious and sectarian exercises and practices from the public schools, the suits have been brought by or on behalf of Catholic complainants, and they have been allowed to prevail solely upon the theory that the law excludes from our public schools all religious and sectarian teaching and training, Protestant and Catholic alike." *Knowlton v. Baumhover*, 182

It is irrelevant that the prayers are "student-led, student-initiated," and "without scrutiny or preapproval by school officials." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 296, 298 n.6, 301, 307-08 (2000). Forcing captive students to "sit by while other students or faculty pray" is unconstitutional under *Lee* and *Santa Fe*. *Child Evangelism Fellowship of Md., Inc. v. Montgomery Cty. Pub. Schs*, 373 F.3d 589, 599 (4th Cir. 2004) ("*CEF*"). Even if the prayers are "in the strictest sense . . . 'student-initiated,'" turning "over the school public address system" to students to deliver prayers to a captive audience "places the District's seal of approval on this practice." *Herdahl v. Pontotoc Cty. Sch. Dist*., 887 F. Supp. 902, 908-09 (N.D. Miss. 1995).

In *Lee*, the Court upheld a "permanent injunction to prevent the inclusion of invocations and benedictions in the form of prayer in the promotion and graduation ceremonies of the Providence public schools." 728 F. Supp. at 70, 75, *aff'd*, 505 U.S. at 599. Plaintiffs seek the same relief here: a permanent injunction to prevent the inclusion of prayers and proselytizing remarks in GCSD's graduation ceremonies. *See also Gearon v. Loudoun Cty. Sch. Bd*., 844 F. Supp. 1097, 1103 (E.D. Va. 1993) ("permanently enjoin[ing] [district] from permitting prayer in high school graduations").[2] GCSD presented no reason to deny Plaintiffs this relief.

II. Overview of undisputed facts

GCSD does not dispute that it has continued to feature Christian prayers and proselytizing Bible readings in its graduation ceremonies. GCSD does not dispute that it continues to review, edit and approve student prayers and religious messages before they are delivered. GCSD does not deny that a number of 2017 graduation programs asked the audience to stand for student remarks that included prayers and proselytizing Christian messages. GCSD does not deny that school officials actively participate in the student prayers delivered. Nor does GCSD dispute that it continues to select speakers based on elected class office or grades.

To recap, in 2017, 16 high schools held graduations, but only 12 had students deliver

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Iowa 691, 720-21 (1918). "[F]or the public school and its benefit are a common heritage, which each and all may enjoy without interference by the religious propagandist, whatever his faith may be." *Id.*

[2] *See also Graham v. Central Comm. Sch. Dist*., 608 F. Supp. 531, 537 (S.D. Iowa 1985) ("defendant is hereby enjoined from including in its graduating ceremonies . . . any religious invocation").

welcome or closing remarks "of their own choosing" (Gibson Aff. ¶17). (Ex. V-1 at 1-6) (Miller Decl. at 6 ¶35). Of those, 8 included at least one prayer or religious message; 3 included *2 or more*. (*Id.*). All of the prayers/religious remarks were delivered by student body representatives or Valedictorians/Salutatorians, or under the direction of a choir teacher. (*Id.* ¶37). Most were officially reviewed and approved in advance. (*Id.* ¶¶38-39). School officials actively participated in the prayers. (*Id.* ¶41). (Ex. V-1 at 1-6) (Ex. W-1, 1:08-1:15). Plaintiffs received evidence of two 2018 graduations, Greer and GHS, both of which included Christian prayers.[3]

In 2017, at least half of the high schools that had welcome/closing student remarks asked audience to stand. (Ex. V-1 at 1-6) (Doc. 135 at 6 n.17). The audience was specifically asked to stand for the prayers at Berea and J.L. Mann and the proselytizing Christian remarks at Woodmont. (Miller Decl. ¶40) (Ex. V-1 at 2, 4, 6). That the instruction "was an oversight" or was for logistical purposes (Doc. 136 at 3) is irrelevant to whether students felt coerced into participating. Likewise, GCSD's assertion that "[t]he only prayer in 2017 that accompanied a 'please stand' asterisk was the Berea High School 'Closing Remarks" (*id.*), is deceptive. The 2017 Woodmont program instructed the audience to stand for the "Salutation," which proselytized Christianity. (Ex. S-16 at 3, 9). The audience was also verbally directed to stand *and bow their heads* for the 2017 J.L. Mann Christian prayer. (Ex. S-8 at 3, 12-13). The audience was also asked to stand for the 2018 Greer "Salutation," which was a Christian prayer (Ex. W-3):

> Now before we dive into the graduation ceremony, *I ask that you all bow your heads as we say the prayer to our heavenly father*. Let us pray. Dear Lord, in your word it says to give honor where honor is due. As the Greer High School Class of 2018, we thank you for all of the blessings that you have given us. Without you lord, we could not have accomplished all that we have thus far in life. For this, we honor you. I ask for the continued blessings on our class as we take the next steps in life. Let us remember that in your word it says, those who are righteous are ordered by the Lord. May every step you take bring you the praise, honor, and glory that you deserve. For it is in the name of Jesus Christ, our risen savior, we pray. Amen. Audience: Amen.

[3] (Ex. W-2) (Ex. W-3) (Ex. Z at 2 ¶10) (Ex. Z-1).

[4] *See also Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) ("If school authorities fail

GCSD asserts that "out of 94 end-of-year programs, 4 high school student graduation speakers included a prayer." (Doc. 136 at 2). This too is misleading. Of 16 *high school* programs in 2017—and more accurately *12* (since 4 schools had no student welcome/closing remarks)—there were at least 12 prayers or overt religious messages (including Christian hymns):

1. Berea "Closing Remarks" (Senior Class President): **Christian prayer**
2. Berea "Salutatorian Speech" (Salutatorian): **proselytizing Bible scripture**
3. Greenville "Reflection" (Class Treasurer): **prayer**
4. Greenville "Valedictory" (Valedictorian): **proselytizing religious remarks**
5. Greenville "Alma Matter:" "**And pray God bless you**"
6. Greer "Student Opening Remarks" (Senior Class President): **prayer**
7. J.L. Mann "Opening Remarks" (Senior Class President): **Christian prayer**
8. Mauldin: **Christian song, "Exsultate"**
9. Travelers Rest: "**Irish Blessing**"
10. Wade Hampton: "**The Lord Bless You and Keep You"**
11. Woodmont "Salutation" (Student Government President): **Bible readings**
12. Woodmont "Salutatorian speech" (Salutatorian): **Christian Bible readings**

(Ex. V-1 at 1-6) (Miller Decl. ¶¶51-84) (Doc. 153 at 7-12). GCSD's inclusion of middle schools is deceiving because no middle school had students deliver welcome/closing remarks "of their own choosing" (Gibson Aff. ¶17). (Ex. V-1 at 7-9). And only 5 of 52 elementary schools that held end-of-year ceremonies had students deliver welcome/closing remarks. (Ex. V-1 at 10-16) (Miller Decl. ¶47). Of those, 3 had school officials review, approve, and/or *draft* the student remarks. (*Id.* ¶48). The students were chosen based on elected office or grades. (*Id.* ¶49).

III. GCSD's longstanding and ongoing Establishment Clause violations, together with its flagrant contempt of this Court's injunction and even failure to comply with its own written policies, underscores the need for comprehensive relief.

GCSD's unconstitutional actions show no sign of abating. The 2017 graduation evidence proves relentless disregard for the Establishment Clause and even contempt of this Court's 2015 injunction, underscoring the need for comprehensive injunctive relief. *See Hutto v. Finney*, 437 U.S. 678, 687 (1978) ("The District Court had given the Department repeated opportunities to remedy the cruel and unusual conditions. . . . [T]aking the long and unhappy history of the litigation into account, the court was justified in entering a comprehensive order").[4]

[4] *See also Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) ("If school authorities fail in their affirmative obligations . . . the scope of a district court's equitable powers to remedy past wrongs

In the 2015 Order, this Court declared: "To the extent the plaintiffs seek to enjoin the kind of official and school-sponsored student prayers, . . . the injunction is granted." (Doc. 97 at 7). This Court made clear: "No formal or sponsored 'invocation' or 'inspirational reading' is allowed . . . This Order will be operative against it." (*Id.* at 15). Yet the 2017 programs featured an "Irish Blessing," "The Lord Bless You and Keep You," "Pray God Bless You," and an "Inspirational Reading," (Ex. V-1 at 1-6), violating this Court's Order (at 15, 17-18). The student-led prayers were equally violative. In its 2015 Order, this Court described three student prayers in 2014 it deemed unconstitutional and thus enjoined going forward:

- At East North Street Elementary, the "student prayer-givers were chosen by the school 'on the basis of grades and ability to speak publicly in front of a group.' *Id*. The official program for the 2014 graduation ceremony included an 'invocation.'"
- The "Blue Ridge High School graduation ceremony included a closing prayer by the senior class vice president. The official program for the 2014 ceremony directed the audience to stand for the 'closing remarks' which was a Christian prayer . . . BRHS graduation speakers are selected by the school."
- At Wade Hampton High School the "official program for the 2014 ceremony instructed the audience to stand for the 'inspirational reading' which was a prayer, and it appears the defendants knew in advance that a prayer would be delivered."

(Doc. 97 at 14-15). The Court found these constituted "formal or sponsored" prayers now enjoined by "This Order." (*Id.*). The post-remand evidence reveals that GCSD is continuing to feature prayers identical and even more flagrant than the 2014 examples this Court enjoined.

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

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is broad."); *Mitchell v. Helms*, 530 U.S. 793, 865 (2000) (O'Connor, J., concurring) ("[E]xtensive violations . . . will be highly relevant in shaping an appropriate remedy").

Likewise, the 2017 J.L. Mann "Opening Remarks" was a Christian prayer delivered by the Senior Class President. The audience was directed to stand and bow their heads as follows:

> Now, as we close this ineffable time in our life, would you please stand and bow your heads in prayer. Dear Lord, Thank you for the many blessings you have bestowed upon us thus far and this great accomplishment in our lives. Our hearts are filled with gratitude and joy for what you have done. The road has been long and at times very difficult, yet you stood by us and helped us along the way. We thank you Lord for our parents, our teachers and our community that have played a vital role in helping us get to where we are. As we take our next step forward, let us not forget all that you have done for us in the past. May we have the courage to stand up for what is right, wisdom to make good decisions, and knowledge to use our abilities to fulfill your goals. May we not forget the values our parents have instilled in us and may you continue to guide and protect us as we venture out into the future. Help us to fulfill your great plan that you have laid out for each one of us and may we be servant leaders in everything we do. In you name we pray, Amen.

(Ex. S-8 at 3, 12-13). The prayer was reviewed and approved by school officials. (Ex. S-8).[5]

Similarly, the 2017 GHS "Reflection" was a prayer by the class treasurer nearly identical to the 2016 "Reflection," and was reviewed and approved by school officials in advance:[6]

> Dear God, Thank you for bringing the class of 2017 together today as we celebrate our hard work and accomplishments we have made. We thank you for our military and those who have protected our freedoms. Please bless our teachers that have given us a strong foundation and opportunities to achieve our goals. Inspire the graduates to put to good to use all of the knowledge, skills and life lessons gained through their time at Greenville High. We thank our friends and family who encouraged us to strive for success along. I thank you for the friendships, spirit, laughter, and memories we've made at Greenville High School. I pray that we begin the next phase of our lives we look up to you for courage, wisdom, and strength. In God's name we pray, Amen.[7]

As noted above, Greer's 2018 "Salutation" was a proselytizing Christian prayer delivered by the "Senior Class President," for which the audience and students were asked to participate

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[5] The students were given a slip: "Because of your class rank and/or your position on Student Council, you are a designated speaker at this year's graduation ceremony. We will have a brief meeting . . . in Ms. Bishop's Office to go over expectations for your participation." (Ex. S-8 at 6). The "Graduation Speaker's Meeting" provided the students with the theme: "Adventure." (*Id.* at 7). School official assigned students to their speaking roles. (*Id.* at 8-22). The agenda stated: "**All speeches are due to Mrs. Holden, Mrs. Crider, and Mrs. Bishop by May 18 so they may be proofread and approved**." (*Id.* at 7).

[6] (Ex. S-5 at 3, 10, 20) (D. Disc. 2 at 5) (Pl. Disc. at 4) (Ex. Z at 1-2 ¶7).

[7] (Ex. S-5 at 10). In addition to the prayer, the Valedictory speech included proselytizing remarks. (*Id.* at 13). The written program also featured the Alma matter: "And pray God bless you." (*Id.*at 7). The 2018 "Reflection" was again a prayer by the Class Treasurer. (Irwin 2018 Decl. at 2¶10).

(Ex. W-3) (Miller Decl. at ¶87-88). Both the Salutatorian and Valedictorian speeches also included religious language. (*Id.* ¶90-91). The 2017 Greer High "Student Opening Remarks" was also a prayer delivered by the Senior Class President. (Ex. S-6 at 2-3).

The 2017 Travelers Rest program included an "Inspirational Reading" *and* an "Irish Blessing." (Ex. S-13). All remarks were reviewed and approved by school officials in advance. (*Id.* at 7-10). That the "Inspirational Reading" was not a prayer (Doc.136 at 5) is irrelevant, as this Court's Order specifically enjoined GCSD from using such language. (Doc. 97 at 15).

Wade Hampton's 2017 program also flouted this Court's order both by including "The Lord Bless You and Keep You," and by directing the audience *to stand* for a "Student Message" (in place of the "Invocation"). (Ex. S-14 at 2). All of the student remarks were reviewed and approved by school officials in advance. (Ex. S-14 at 5-8, 14-15).

The 2017 Woodmont program directed the audience to stand for the "Salutation" (co-class presidents), and the "Farewell" (Student Government President). (Ex. S-16 at 3).[8] The "Salutation" proselytized Christianity. (*Id.* at 9). The "Salutatorian" speech also preached extensively from the Bible. (*Id.* at 16). All speeches were approved in advance. (*Id.* at 6-24).[9]

In the face of this overwhelming evidence revealing wanton disregard of students' Establishment Clause rights and this Court's injunction, GCSD somehow thinks it's relevant that it "has provided training to its administrators and teachers." (Doc. 136 at 3) (citing Def. Exh. 4).[10] If anything, this heightens the need for judicial intervention, as the evidence shows that *despite this alleged training*, GCSD school officials are still demonstrably incapable of complying with the Constitution and even GCSD's own written policies, *infra*.

For instance, GCSD's written policy (effective 2015) states in plain terms: "A school publication, including an event flier or program, cannot include a description that would make a reasonable person believe that the school is endorsing religion. For example, the use by a school

[8] Video footage shows students standing during these remarks. (Ex. W-5 at 9:38).
[9] The 2017 BRHS program also had an asterisk directing the audience to stand for remarks (Ex. S-2).
[10] It bears emphasis that the policy in "Def. Exh. 4" expressly allows for graduation prayers, which are unconstitutional even if the policy is deemed facially neutral. *See Santa Fe*, 530 U.S. at 307 n.21.

of the terms Prayer, Invocation, or Inspirational Reading in a publication is not permitted." (Ex. X at 5, 8). Yet 2016, 2017, and 2018 written programs continued to feature religious language:

1. **"The Lord Bless You and Keep You"** – WHHS (2016, 2017)[11]
2. **"And pray God bless you"** – GHS (2016, 2017, 2018)[12]
3. **"Irish Blessing"** – Travelers Rest (2017) (Ex. S-13 at 4)
4. **"Inspirational Reading**" – Travelers Rest (2016, 2017) [13]
5. **"praying for you every step of the way!"** –Sue Cleveland (2016) (Ex. U-27 at 6)
6. "**Toccata of Praise**" – Mauldin High (2015) (Doc.115-6 at 6-12)

GCSD's guidance also states that "[p]rograms or fliers should not direct the audience or participants to stand for any student message." (Ex. X at 5, 8). But in 2017, at least *half of the high schools* that had welcome/closing student remarks directed the audience to stand.[14]

Likewise, the guidance states that "[h]igh school graduation programs should contain the following disclaimer…" (*Id.*). Not a single disclaimer appeared on an elementary or middle school program in 2017. (Ex. V-1 at 7-16). At least 6 high school programs also did not include a disclaimer, even when Christian prayers were delivered. (Miller Decl. at ¶50).[15]

GCSD has also represented that it "continues to follow the practice described in Gibson's Affidavit for all of its schools. (Gibson Aff. ¶ 17.)" (Doc. 89-1 at 4) (Doc. 93 at 5). Gibson's Affidavit provides: "Students will be chosen . . . to give messages of their own choosing without prior review, censorship, or editing." (Gibson Aff. ¶17). At least 8 of the 12 high schools that had welcome/closing student remarks in 2017 had school officials review and approve, and even edit the remarks beforehand. (Ex. V-1) (Miller Decl. at ¶38). Of the 5 elementary schools that had students welcome/closing remarks, at least 3 reviewed and/or drafted the remarks in advance. (*Id.* 9 ¶48) (Ex. V-1 at 10-16). GCSD's written policy also contradicts Gibson's

[11](Ex. S-14 at 2) (Doc. 84-10 at 98, 100) (Lamb Decl. ¶6) (Doc. 115-2 at 5-10).
[12] (Doc. 115-4 at 12) (Ex. S-5 at 7) (Ex. Z at 17).
[13] (Ex. S-13 at 3) (Doc. 84-10 at 94-97) (Doc. 115-16 at 1-9).
[14] (Ex. V-1 at 1-6) (Berea, J.L. Mann, Blue Ridge, Travelers Rest, Wade Hampton, and Woodmont).
[15] Again, a "school district's disclaimer on the commencement programs does not save the school's practice." *Harris v. Joint School Dist. No. 241*, 41 F.3d 447, 455–56 (9th Cir. 1994), *vacated as moot*, 515 U.S. 1154 (1995). "The student in the religious minority is well aware that the school has delegated authority" to students to deliver prayers "while retaining ultimate control over the school-sponsored meeting." *Id.* "While the district asserts that it 'neither promotes nor endorses' the stated views, this disclaimer flies in the face of what the student knows is occurring." *Id.*

Affidavit, as it provides that speeches *must* be reviewed in advance to censor any remarks that are "obscene, contrary to the District's behavior code," "may foreseeably disrupt the educational environment," or "contain profanity." (Ex. X 4-5, 9) (Doc. 1 at 23-25).

IV. GCSD's inclusion of Christian songs, proselytizing remarks, and Bible readings to captive student audiences at graduations violates the Establishment Clause.

Attempting to downplay its unrelenting defiance of the Establishment Clause and this Court's Order, GCSD urges this Court to focus only on the 4 explicit prayers delivered in 2017 and disregard the 8 other proselytizing remarks and Christian songs featured in 2017 graduations.

A. Proselytizing Remarks and Bible Readings

GCSD admits that in addition to the prayers, some "students made religious references," but asserts these "would not constitute a 'prayer.'" (Doc.136 at 2). While AHA does not seek to enjoin benign "thank you" remarks (Doc.135 at 33), the 2017 remarks were proselytizing:

1. **Woodmont 2017 Salutatorian speech** (Ex. S-16 at 16): "And I thank God most of all, because I honestly don't believe I would have made it here if He hadn't decided to give me His peace and guidance . . . I think the Apostle Paul put it best in Romans 12: 'In His grace, God has given us different gifts for doing certain things well. So if God has given you the ability to prophesy, speak out with as much faith as God has given you. If your gift is serving others, serve them well. If you are a teacher, teach well. If your gift is to encourage others, be encouraging. If it is giving, give generously. If God has given you leadership ability, take the responsibility seriously. And if you have a gift for showing kindness to others, do it gladly.'"
2. **Woodmont 2017 "Salutation" (co-class presidents):** "And most importantly let us thank the Lord above for always giving us much more than any of us will ever deserve (pause) all glory unto He who wears the real crown." (Ex. S-16). The program directed the audience to stand for the "Salutation." (*Id.*) (Ex. W-5 at 9:38)
3. **GHS 2017 Valedictory speech**: ". . . In life all of us find our niche. God has provided each one of us unique talents and traits to be used, and let's please not forget where all of our abilities ultimately originate from." (Ex. S-5 at 13).
4. **GHS Alma Matter:** "And pray God bless you." (Ex. S-5 at 7) (Ex. Z at 2 ¶ 12).
5. **Berea 2017 Salutatorian Speech:** "Timothy 4:14-15." (Ex. S-1 at 10).
6. **Greer 2018 Valedictorian:** "I want to thank God for giving me opportunities like this one and allowing me to wake up each and every day to be a light for his great name . . . May we walk out these doors, step into the world, and discover who God wants us to be . . . and may God be with you each step of the way." (Ex. W-3).

7. **Greer 2018 Salutatorian speech**: "I can't wait to see what God has in store for us in the future." (Ex. W-3 at 35:00)[16]

The Supreme Court and federal courts have repeatedly "struck down the recitation of prayers, Bible readings, and devotional activities in public schools." *Jaffree v. Wallace*, 705 F.2d 1526, 1533 (11th Cir. 1983). The Fourth Circuit has declared that it is unconstitutionally coercive to force captive student audiences to "listen to a *religious message*." *CEF*, 373 F.3d at 599 (emphasis added). Indeed, it is well settled that "Bible reading to students in a 'captive audience' situation" is unconstitutional. *Meltzer v. Bd. of Pub. Instruction*, 548 F.2d 559, 574 (5th Cir. 1977). This principle was established well over 100 years ago.[17]

The Supreme Court in *Schempp* held that student-led readings of "verses from the Bible" to captive student audiences violated the Establishment Clause. 374 U.S. at 207, 224. It was irrelevant that the "student reading the verses from the Bible may select the passages and read from any version he chooses," and that an objecting "student may absent himself from the classroom." *Id.* at 224. It is the act of turning over the "machinery of the State" to the students to broadcast their religion which violates the Constitution. *Id.* at 226. Since *Schempp*, federal courts have consistently invalidated allowing the "broadcast of religious messages over the public address system." *Herdahl v. Pontotoc Cty. Sch. Dist.*, 933 F. Supp. 582, 588 (N.D. Miss. 1996).[18]

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[16] In isolation, this remark is benign, but when "viewed in the context of the totality of the program—starting with an explicit prayer by the Senior Class President, followed by two other overtly religious remarks by student representatives—the 2018 program was overwhelmingly religious." (Miller Decl.¶92).

[17] *See Herold v. Parish Bd. of Sch. Directors*, 68 So. 116, 121 (La. 1915) (permitting a student to excuse himself during Bible readings subjects that student to a stigma, which is the functional equivalent of forcing that child to stay in class); *Freeman v. Scheve*, 65 Neb. 853, 869 (1902); *Weiss v. Dist. Bd. of Sch. Dist.*, 76 Wis. 177 (1890) (Bible readings unconstitutional); *Ring v. Bd. of Educ.*, 245 Ill. 334, 336 (1910) (enjoining public schools from reading of the Bible, the singing of hymns, and the Lord's Prayer).

[18] *See, e.g.*, *Holloman v. Harland*, 370 F.3d 1252, 1261 (11th Cir. 2004) (where teacher "permitted one of her students to read aloud a passage from the Bible" in classroom, she violated the Establishment Clause); *Hall v. Board of Sch. Comm'rs of Conecuh County*, 656 F.2d 999, 1000 (5th Cir. 1981) (permitting students to conduct morning devotional readings over public address system held unconstitutional); *Lubbock Civil Liberties Union v. Lubbock Indp. Sch. Dist.*, 669 F.2d 1038 (5th Cir. 1982) (same); *Meltzer*, 548 F.2d at 574 (same); *Breen v. Runkel*, 614 F. Supp. 355, 361 (W.D. Mich. 1985) ("the establishment clause prohibits prayer and Bible reading in the classroom"); *Ala. Civil Liberties Union v. Wallace*, 331 F. Supp. 966, 970 (M.D. Ala. 1971) ("The practice of conducting Bible reading in the public schools of Alabama violates the First Amendment"); *Goodwin v. Cross Cty. Sch. Dist.*, 394 F. Supp. 417, 424, 426 (E.D. Ark. 1973) ("Although employees of the School District do not participate in the selection or reading of Bible verses or recitation of the Lord's Prayer, it is done with the approval of

More pertinently, Circuit Courts have consistently made clear that proselytizing graduation speeches are just as problematic as prayers. In *Cole v. Oroville Union High Sch.*, the Ninth Circuit held that a valedictorian's speech, which mentioned "God" and "Jesus Christ," although not a prayer, would have violated the Establishment Clause. 228 F.3d 1092, 1097 (9th Cir. 2000). The court explained: "Allowing Niemeyer to give his proposed valedictory speech at the Oroville graduation would have constituted government endorsement of religious speech similar to the prayer policies found unconstitutional in *Santa Fe* and *Lee*." *Id.* 1103-04. It "also would have constituted District coercion of attendance and participation in a religious practice because proselytizing, no less than prayer, is a religious practice." *Id.*

In *Lassonde v. Pleasanton Unified Sch. Dist.*, the Ninth Circuit again held that allowing a Salutatorian to deliver a speech that included Bible passages would violate the Establishment Clause. 320 F.3d 979, 981 (9th Cir. 2003). There was no question that "a reasonable dissenter could have felt that silence signified approval or participation." *Id.* at 984.

In *Corder v. Lewis Palmer Sch. Dist. No. 38*, the Tenth Circuit likewise held that a school properly precluded a valedictorian from delivering religious remarks. 566 F.3d 1219, 1221 (10th Cir. 2009). The court reasoned that "the graduation ceremony was supervised by the school's faculty and was clearly a school-sponsored event," and is "'so closely connected to the school that it appears the school is somehow sponsoring the speech.'" *Id.* at 1229 (citation omitted).

Similarly, in *A.M. v. Taconic Hills Cent. Sch. Dist.*, the Second Circuit held that a student's "brief message" at a graduation, which included religious remarks, was properly censored. 510 F. App'x 3, 5 (2d Cir. 2013).[19] The court found "that a reasonable observer would perceive A.M.'s speech as being endorsed by the Middle School." *Id.* at 8.

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school officials and obviously supervised by teachers" in "contravention of the First Amendment"); *see also Roberts v. Madigan*, 921 F.2d 1047, 1056-57 (10th Cir. 1990) (teacher reading Bible to himself "communicated a message of endorsement of a religion"); *Busch v. Marple Newtown Sch. Dist.*, 2007 U.S. Dist. LEXIS 40027, at *40 (E.D. Pa. May 31, 2007) (a visiting parent "reading of the Bible to the kindergarten class could easily have been interpreted . . . as endorsed by the school.").

[19] The speech provided: "As we say our goodbyes and leave middle school behind, I say to you, may the LORD bless you and keep you; make His face shine upon you and be gracious to you; lift up His countenance upon you, and give you peace." 510 F. App'x at 5.

GHS's Alma Matter proclaiming "pray God bless you" is at least as problematic, if not more so, than the student-led prayers, because it constitutes an official school stamp of approval on prayer. *See Engel v. Vitale*, 370 U.S. 421, 422 (1962) ("Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country" held unconstitutional). In *Hall v. Bradshaw*, the court held that an "utterly innocuous" nondenominational prayer on a state map, which had a "limited audience and distribution," violated the Establishment Clause, even in the absence of "compelled recitation of the prayer or subjection to ridicule as part of the captive audience." 630 F.2d 1018, 1019-21 n.1 (4th Cir. 1980). The Fourth Circuit stressed: "No *de minimis* exception is tolerable." *Id.* at 1020-21.[20]

B. Overtly Christian songs ("The Lord Bless You and Keep You")

GCSD also argues that "AHA's suggestion that the traditional graduation musical selection at Wade Hampton High School of 'The Lord Bless and Keep You' and other musical selections at other schools create an unconstitutional endorsement of religion has been uniformly rejected by federal courts." (Doc. 136 at 5). This is false, *infra*, and irrelevant in light of this Court's Order enjoining GCSD from including religious language in programs. (Doc. 97 at 15).

In 2017, this Court admonished GCSD for including "The Lord Bless You and Keep You." (Doc. 121 at 16). This Court relied on *Skarin v. Woodbine Cmty. Sch. Dist.*, 204 F. Supp. 2d 1195, 1197 (S.D. Iowa 2002), which held that the "singing of 'The Lord's Prayer' by the Woodbine High School choir at the school graduation ceremony . . . violates the Establishment Clause." (citing *Santa Fe*; *Lee*; *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Schempp*, 374 U.S. 203; *Engel*, 370 U.S. 421). The court reasoned: "Whether recited or sung, prayer 'by its very nature, is undeniably a religious exercise.'" *Id.* at 1197-98 (citation omitted). "The principal effect of having the choir sing 'The Lord's Prayer' is to advance the Christian religion." *Id.*

[20] The court in *Hall* relied in part on *De Spain v. DeKalb Cnty. Com. Sch. Dist.*, where the Seventh Circuit held unconstitutional a "thank you poem" recited in public schools that provided: "We thank you for the flowers so sweet; We thank you for the food we eat; We thank you for the birds that sing; We thank you for everything." 384 F.2d 836, 837 (7th Cir. 1967).

GCSD failed to cite a single case in which the inclusion of a Christian song was upheld in the *graduation context*. The case law is decidedly against GCSD. *See Skarin*, 204 F. Supp. 2d at 1198; *Nurre v. Whitehead*, 580 F.3d 1087, 1091, 1095 (9th Cir. 2009) (explaining that "when there is a captive audience . . . it is reasonable for a school official to prohibit the performance of an obviously religious piece" to avoid "conflict with the Establishment Clause"); *Ashby v. Isle of Wight County Sch. Bd.*, 354 F. Supp. 2d 616, 629-30 (E.D. Va. 2004).[21]

The only court within the Fourth Circuit that has addressed the issue found that the performance of a religious song in a "graduation ceremony might constitute violation of the Establishment Clause" and held that the school "has a compelling interest in prohibiting religious presentations at graduation." *Id.* The Ninth Circuit in *Nurre* also ruled: "Permitting a performance of 'Ave Maria'--an obviously religious piece based on the title printed in the program--at graduation could have had the same impact" as prayer of demonstrating a "preference for one type of religion over another." 580 F.3d at 1097.

Significantly, in *Bauchman v. W. High Sch.*, which GCSD relies upon, the Tenth Circuit *enjoined* the choir's performance of "The Lord Bless You and Keep You" at the 1995 graduation ceremony pending appeal. 132 F.3d 542, 546 n.4 (10th Cir. 1997).

The three cases GCSD relies upon—*FFRF v. Concord Cmty. Schs*, 885 F.3d 1038 (7th Cir. 2018), *Bauchman*, and *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995) (Doc. 136 at 6-7)—are readily distinguishable, as none involved the graduation context.

Duncanville addressed the issue of Christian choral songs *at choir performances*. *Id.* at 407. The court "did not consider a performance of the song in the graduation context." *Nurre v. Whitehead*, 520 F. Supp. 2d 1222, 1239-40 (W.D. Wash. 2007) (distinguishing the performance of a Christian song in the context of a "music concert" from "the graduation context.").

[21] *See also Sease v. School Dist. of Phila.*, 811 F. Supp. 183, 192 (E.D. Pa. 1993) ("Clearly, a school employee's participation in, or sponsorship of, a public school gospel choir during school hours would be a violation of the Establishment Clause."); *Doe v. Aldine Indep. Sch. Dist.*, 563 F. Supp. 883, 888 (S.D. Tex. 1982) ("the . . . singing of the 'Aldine School Prayer' . . . is in violation of the first amendment.").

"Similarly, in *Bauchman*, the Tenth Circuit did not" address "the graduation context." *Id.* *See Bauchman*, 132 F.3d at 548, 550 (dismissing as moot appeal No. 95-4084 concerning the choir's performance at graduation). The court simply held that a choir's performance of Christian choir music *at choir performances* did not constitute endorsement of religion. *Id.* at 555-56 ("Any choral curriculum designed to expose students to the full array of vocal music culture therefore can be expected to reflect a significant number of religious songs.").

Likewise, *Concord* involved a student-run "holiday show featuring students' choral, instrumental, and dance performances." 885 F.3d at 1041. The first half was entirely secular while the second half included a diverse array of songs including "Ani Ma'amin" and "Harambee" "to represent Hanukkah and Kwanzaa," as well as Christmas songs. *Id.* at 1042. Although on the fence, the court concluded, given the context of a holiday performance, the brief inclusion of Christmas music did "not inevitably convey a religious message." *Id.* at 1047. The addition of two non-Christian holiday songs "reduced the religious impact, tipping the scales in favor of Concord. . . . [I]t can now be seen as a collection of music from multiple traditions." *Id.* at 1048. Critically, however, in addressing coercion, the court noted that unlike a graduation: "With the lights dimmed, mid-performance, however, it would have been hard to observe the behavior of others, let alone be sure that they were reflecting on the religiosity of the performance rather than enjoying the entertainment or checking texts on their cellphones." *Id.* at 1049. Even still, this was not an "open-and-shut" question. *Id.*[22]

V. GCSD is unable to defend its prayers under the Establishment Clause.

A. GCSD's prayers violate the Establishment Clause even in the absence of evidence that GCSD is overtly encouraging student speakers to pray.

GCSD argues that "[t]he mere fact that a student may choose to say a prayer is not evidence that he or she has been encouraged to say a prayer, or that the School District has

[22] The decision affirmed by the Seventh Circuit also understood the distinction between a musical performance and a graduation. *FFRF v. Concord Cmty. Schs*, 148 F. Supp. 3d 727, 737-38 (N.D. Ind. 2015) (citing *Bauchman* and *Duncanville* for the notion that "performing such music in public schools is acceptable when it is an appropriate part of the *study of choral music*") (emphasis added).

endorsed that student prayer, any more that it has endorsed the words, theories, or politics of Malcom X, Dr. Seuss, Ronald Reagan, Steven Spielberg, Carl Jung, or any other celebrity or historical figure referenced in a graduation speech." (Doc. 136 at 5). But it is well settled that a public school cannot "sanitize an endorsement of religion forbidden under the Establishment Clause by also sponsoring non-religious speech" in the "coercive context of public schools." *Berger v. Rensselaer Cent. Sch. Corp*., 982 F.2d 1160, 1168 (7th Cir. 1993).

In *Santa Fe*, the Court held prayers delivered at football games would be unconstitutionally school-endorsed under *Lemon*'s effect prong even though there was "no certainty that any of the statements or invocations will be religious." 530 U.S. at 313, 315-16. In other words, the Court recognized that a *single* prayer would be school-endorsed even if the vast majority of remarks were secular. The Court explicitly declared that even if no "student were ever to offer a religious message," the "award of that power alone, regardless of the students' ultimate use of it, is not acceptable." *Id.* And even if a school district can distance itself from "endorsing" prayers (which GCSD has failed to do), it has no means of preventing "the coercive element of the final message" delivered to a captive audience. *Id.* at 310. In *Lee*, Justice Souter "fully agree[d] that prayers at public school graduation ceremonies indirectly coerce religious observance," even if a school could eliminate endorsement. 505 U.S. at 609 (concurring).

GCSD's argument also erroneously assumes that *Lemon*'s effect prong is the only pathway to unconstitutionality, and even more specifically, that Plaintiffs must show that students have "been encouraged to say a prayer." (Doc. 136 at 6). Although Plaintiffs have made this showing (Doc. 135 at 4-5), GCDS's prayers are unconstitutional absent such evidence, pursuant to *all three* prongs of the disjunctive *Lemon* test, *and* the separate coercion test. None of these tests require a showing that a government is encouraging student speakers to pray, *infra*.

Government action fails *Lemon*'s purpose prong if it is "simply reaching for any way to keep a religious [practice]." *McCreary Cty. v. ACLU*, 545 U.S. 844, 873 & n.14 (2005).[23] The

[23] *See also Doe v. Gossage*, 2006 U.S. Dist. LEXIS 34613, *19-20 (W.D. Ky. May 24, 2006) (new policy permitting uncensored remarks was "a poorly disguised attempt to ensure that prayer will continue").

Court in *Santa Fe* found *Lemon*'s purpose test violated because the history of the district's actions "indicate[d] that the District intended to preserve the practice of prayer before football games." 530 U.S. at 309. The same is true here. GCSD "insists on securing every slight remaining loophole of religious demonstration." (Doc. 97 at 6). GCSD's new position is intended to "merely continue the school district's decades-long practice of including Christian prayers." (Doc.121 at 15). Given "these observations, and in light of the school's history of regular delivery of a student-led prayer" at graduations, "it is reasonable to infer that the specific purpose of the [new] policy was to preserve a popular 'state-sponsored religious practice.'" *Id.*

GCSD's unconstitutional religious purpose is magnified by its continued inclusion of prayers that are not student-initiated. (Doc. 135 at 5, 34). Those individually fail *Lemon*, for "the purpose of an official school prayer 'is plainly religious in nature.'" *Mellen*, 327 F.3d at 374.[24]

Even if GCSD's prayer practice survived *Lemon*'s purpose prong, it easily fails *Lemon*'s effect prong, which likewise does not depend on evidence of GCSD "encouraging" student speakers to pray. *See Id.* ("Regardless of the purposes motivating it, the supper prayer fails *Lemon's* second prong."). The "Establishment Clause is violated when a given governmental practice has the *appearance* or effect of endorsing religion," *Smith v. County of Albemarle*, 895 F.2d 953, 956, 959 (4th Cir. 1990), "regardless of whether it actually is intended to do so." *Friedman v. Bd. of Cnty. Comm'rs*, 781 F.2d 777, 781 (10th Cir. 1985).

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

School Dist. v. Ball, 473 U.S. 373, 390 (1985) (internal citation omitted, emphasis added).

The Supreme Court and lower court "cases support no meaningful distinction between school authorities actually organizing the religious activity and officials merely 'permitting' students to direct the exercises." *Collins v. Chandler Unified Sch. Dist*., 644 F.2d 759, 760-62

[24] *See also Nurre*, 580 F.3d at 1097 ("choir's performance of a musical piece referencing angels, God, and heaven illustrated the District's preference for one type of religion over another").

(9th Cir. 1981). *See Santa Fe*, 530 U.S. at 301 ("permitting student-led, student-initiated prayer at football games violates the Establishment Clause."); *ACLU v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471, 1483 (3d Cir. 1996) ("'[S]chool officials cannot divest themselves of constitutional responsibility by allowing the students to make crucial decisions'") (quoting *Harris*, 41 F.3d at 455). In *Cole*, for instance, the Ninth Circuit held that a religious graduation speech violates the Establishment Clause even if the school "neither encourages a religious message nor subjects the speaker to a majority vote." 228 F.3d at 1103.[25]

The Fourth Circuit in *Joyner v. Forsyth Cty.*, made clear that a facially "neutral policy" is irrelevant to the constitutionality of prayers. 653 F.3d 341, 353-54 (4th Cir. 2011). In *Joyner*, the court held that sectarian invocations by private citizens were government-endorsed even though: (1) they were delivered under a "neutral policy;" (2) the invocation would not be "listed" on a program; (3) nobody would be "required to participate;" (4) the government did not engage "in any prior inquiry, review of, or involvement in, the content of any prayer;" and (5) the policy stated that prayers were "not intended. . . to affiliate the Board with, nor express the Board's preference for, any faith or religious denomination." *Id*. at 344.

GCSD's prayers independently fail the third *Lemon* prong. The fact that school officials are still reviewing, editing, and approving student prayers, and will "prevent" speeches "contrary to the District's behavior code," or that "may foreseeably disrupt the educational environment," (Ex. X at 4) fosters excessive entanglement. (Doc. 135 at 31-32). That school officials are actively participating in the prayers also fosters excessive entanglement. *See N.C. Civil Liberties Union Legal Found. v. Constangy*, 947 F.2d 1145, 1151-52 (4th Cir. 1991) (when "a judge prays in court, there is necessarily an excessive entanglement"); *Duncanville*, 70 F.3d at 406 (coach's "participation in these prayers improperly entangles it in religion"); *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 279 (5th Cir. 1996) (when "school administrators participate in prayers" it "excessively entangles government with religion.").

[25] *Accord Lassonde*, 320 F.3d at 984-85; *Ashby*, 354 F. Supp. 2d at 629-30 ("the decision not to allow the students to [deliver a religious song] was necessary to avoid violating the Establishment Clause").

Lastly, GCSD's prayers inescapably fail *Lee*'s coercion test regardless of whether GCSD is encouraging speakers to pray. Unconstitutional coercion exists when a district forces "a student to choose between attending and participating in school functions and not attending only to avoid personally offensive religious rituals." *Skarin*, 204 F. Supp. 2d at 1198 (citing *Santa Fe* and *Lee*). *Accord Mellen*, 327 F.3d at 372 n.9; *Deveney v. Bd. of Educ. of Kanawha*, 231 F. Supp. 2d 483, 487-88 (S.D. W.VA. 2002) (finding a single future graduation prayer violative, as an objecting student "will be forced to choose between taking part in an unwelcome religious exercise at his graduation ceremony, or foregoing his participation in a ceremony that marks the culmination of his high school career, in violation of his First Amendment rights").

Santa Fe held that the Establishment Clause "will not permit the District 'to exact religious conformity from a student as the price' of joining her classmates at a varsity football game." 530 U.S. at 311-12. The "pressure to attend an athletic event is not as strong as a senior's desire to attend her own graduation ceremony." *Id.* "To say that a student must remain apart from the ceremony . . . is to risk compelling conformity in an environment analogous to the classroom setting." *Lee*, 505 U.S. at 596. As Plaintiffs illustrated, the fact that GCSD explicitly allows prayers in its graduation ceremonies renders its practice unconstitutionally coercive, even if no future prayers are ever delivered, because knowing that prayers *could be delivered*, students will continue to face the unconstitutional dilemma of having to choose between attending their graduation or avoiding it to avoid religious observance. (Doc. 135 at 12-17, 30). *Id.* at 595-596.[26]

Although not necessary, Plaintiffs presented evidence showing that GCSD is in fact encouraging student speakers to pray, making injunctive relief all the more imperative. School officials are verbally making "it clear to students that prayer is allowed." (Doc. 115-2 at 3¶15) (Ex. Z at 1-2). The written memos and letters from GCSD alone encourage prayer. (Ex. X) (Doc.

[26] For instance, Irwin testified: "I was deeply concerned that my daughter would be placed in the position of having to participate in a prayer that would out herself as a non-Christian at her 2018 GHS graduation ceremony. In light of the past prayers we encountered, we were very conflicted on whether to attend." (Ex. Z at 2 ¶9). Lamb similarly testified: "If this practice is not enjoined, my daughters . . . will be put in an untenable position of having to choose between attending the most important event of their high school careers and avoiding it in order to avoid personally offensive religious rituals." (Lamb Decl. ¶19).

1 at 23-25). For instance, the guidance states that "[p]rayer may be given over the PA system" at a school event. (Doc. 136-5 at 3). GCSD requires its schools to disseminate its statement, "Student Speakers at School-Sponsored Activities" directly to students. (*Id.* at 7). The statement makes clear prayers are allowed: "the District protects . . . religious expression," and a speech "may not be restricted because of its religious or secular content." (Ex. X at 9). The purpose behind informing students "that they can pray at any school event so long as a student 'initiates' the prayer" cannot "be characterized as 'secular.'" *Ingebretsen*, 88 F.3d at 279.

B. GCSD still relies on *Adler I*'s ratio analysis even though it is irreconcilable with *Santa Fe, Lee*, and *Joyner*, and is limited to facial challenges.

GCSD relies exclusively on the *Salerno* facial analysis employed in *Adler v. Duval County School Bd.,* 206 F.3d 1330 (11th Cir. 2001) (*Adler I*) (Doc. 136 at 6-7) to defend its prayer practice, even though the "*Salerno* standard in a facial challenge" employed by *Adler I* 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). (Doc. 135 at 29-31). Three Eleventh Circuit judges, dissenting in *Adler II*, observed their error in *Adler I*:

> 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.

250 F.3d at 1347-48 (Carnes, J., dissenting) (emphasis added). Judge Kravitch separately added:

> 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 (dissenting). To reiterate, *Adler I* is the only case that turned on "ratio" evidence. And *Adler I* considered the ratio because the case was limited to a *facial* challenge *only*, *unlike* here. 206 F.3d at 1083-84. 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 Eleventh Circuit observed, "this argument would be far better suited to an as-applied challenge." *Id.*

GCSD nonetheless insists that its "ratio of religious speech to secular speech" is "miniscule compared to that described in *Adler*, further invalidating Plaintiffs' argument that the School District's neutral position is constitutionally infirm *as applied*." (Doc.136 at 7) (emphasis added). GCSD's reliance on *Adler I* to refute Plaintiffs' *as-applied* challenge is unavailing, since *Adler I* looked to a ratio solely because it was evaluating a *facial* challenge. *Id.* at 1083-84. The ratio was only relevant to *Salerno*'s "set of circumstances" analysis. *Id.* And both *Lee* and *Santa Fe* foreclose this analysis in Establishment Clause challenges, whether facial or as applied.[27]

The Supreme Court in *Lee* recognized that a *single* future graduation prayer violates a student's Establishment Clause rights, warranting permanent injunctive relief, despite the absence of any written policy. 505 U.S. at 583-84. Referring to the brief nonsectarian prayers at a single graduation, the Court declared: "the intrusion was both real and, in the context of a secondary school, a violation of the objectors' rights." *Id.* at 594. It emphasized 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." *Id.*[28]

In *Santa Fe*, the Court was even more explicit, holding that the Establishment Clause was violated even if no "student were ever to offer a religious message." 530 U.S. at 313-16. The Could held that the modified district policy allowing uncensored student-initiated messages, which could include prayers, was unconstitutional, even though there was *no evidence* that prayers would be delivered. *Id.* at 315. The Court held that the "award of that power *alone*, regardless of the students' ultimate use of it, is not acceptable." *Id.* at 313, 316 (emphasis added).

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[27] Moreover, as shown *supra* at 3-4, GCSD's "ratio" (Doc.136 at 7) is wildly misleading, as it includes schools that did not offer unrestricted student welcome/closing remarks and excludes at least 8 proselytizing religious remarks/hymns.

[28] *See also Rojas v. City of Ocala*, 2018 U.S. Dist. LEXIS 87288, at *59-60 (M.D. Fla. May 24, 2018) (single prayer vigil violated Establishment Clause); *M.B.*, 2015 U.S. Dist. LEXIS 117289 (single prayer); *Deveney*, 231 F. Supp. 2d at 487-88 (single prayer at upcoming graduation would be violative).

The *Santa Fe* policy also failed *Lemon*'s purpose test, independent of how many future prayers would be delivered, because it was intended "to preserve a popular 'state-sponsored religious practice.'" *Id.* at 309. It also separately failed *Lee*'s coercion test, irrespective of the ratio of future prayers, on two discrete grounds. First, because the policy allowed prayers to be delivered, the district was placing upon students an unconstitutional choice "between whether to attend these games or to risk facing a personally offensive religious ritual." *Id.* at 312. The Court declared that the Constitution "demands that the school may not force this difficult choice upon these students." *Id.* Second, the Court recognized that a single future prayer would be unconstitutionally coercive as applied to students at a game: "the delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship." *Id.*

VI. *Monell* liability is clearly established.

Unable to locate any precedent that supports the continuance of its prayers, GCSD resorts to arguing that the "AHA has simply not proved any 'custom or policy'" within the meaning of *Monell*. (Doc. 136 at 7). GCSD is seriously mistaken. GCSD clearly has an unwritten "policy allowing prayer"[29] *and* written policies and statements explicitly permitting graduation prayers,[30] making *Monell* a nonstarter. It is beyond dispute that GCSD has a "decades-long practice of including Christian prayers" in graduations. (Doc.121 at 15),

This 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). If as in *Santa Fe*, a policy "authorizing the [prayer] activities would be unconstitutional, then the activities, in the absence of a [written policy], are also unconstitutional." *Id.* "What may not be done directly may not be done indirectly lest the Establishment Clause become a mockery."

[29] *Steele v. Van Buren Pub. Sch. Dist*., 845 F.2d 1492, 1495 (8th Cir. 1988) (unwritten prayer practice).

[30] (Ex. X) (Doc. 136-5). Even GCSD's memorandum refers to its written "Religious Expression Guide," which allows graduation prayers. (Doc. 136 at 3). In addition to these written policies: "The School District continues to follow the practice described in Gibson's Affidavit for all of its schools. (Gibson Aff. ¶ 17.)" (Doc. 89-1 at 4) (Doc. 93 at 5). Its letter to AHA also made clear: "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." (Doc. 1 at 23-25). It stressed: "[T]hese policies and practices are adhered to throughout the District." (*Id.* at 25).

Schempp, 374 U.S. at 230 (Douglas, J., concurring). Indeed, in *Lee*, there was no written policy at all but merely a "custom" of including prayers in graduation ceremonies. 505 U.S. at 583. The Court noted the "record in this case is sparse in many respects, and we are unfamiliar with any fixed custom or practice at middle school graduations." *Id*. In affirming the permanent injunction, the Court simply "assume[d]" that prayer "in any high school graduation exercise would be about what it was at Deborah's middle school ceremony." *Id.*

In *Collins v. Chandler Unified Sch. Dist.*, there was no written policy of allowing prayers in student assemblies, yet the Ninth Circuit affirmed the district court's permanent injunction barring the district from "permitting, authorizing, or condoning the saying of public prayers by the students." 470 F. Supp. 959, 964 (D. Ariz. 1979), *aff'd*, 644 F.2d 759. Likewise, in *Harris* there was no written policy and "'little or no [school] involvement' in the process resulting in prayer," yet the Ninth Circuit held that the district's unwritten practice of permitting student-imitated prayers violated the Establishment Clause. 41 F.3d at 452-53. *Accord Appenheimer v. Sch. Bd.*, 2001 WL 1885834, *1, *6 (C.D. Ill. 2001) (completely student-initiated prayers held unconstitutional pursuant to *Lee* and *Santa Fe*, despite absence of "official written policy.").

> GCSD fails to grasp that *Monell* liability can attach in many ways, including:
>
> (1) through an express policy, such as a written ordinance or regulation; (2) through the decisions of a person with final policymaking authority; (3) through an omission, such as a failure to properly train officers, that "manifest [s] deliberate indifference to the rights of citizens"; or (4) through a practice that is so "persistent and widespread" as to constitute a "custom or usage with the force of law."

Lytle v. Doyle, 326 F.3d 463, 471 (4th Cir. 2003) (citations omitted). Even absent GCSD's written policies and widespread practice, *Monell* liability could attach through the superintendent and principals' knowledge and acquiescence of prayers delivered at recent graduation ceremonies over which they presided. (Exs. S-1, S-5, S-6, S-8, S-13, S-14).[31] Because they "are present and have the authority to stop the prayers," their failure to do so manifests endorsement. *Doe v. Santa Fe Indep. Sch. Dist*., 168 F.3d 806, 817-18 (5th Cir. 1999), *aff'd*, 530 U.S. 290

[31] *See City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988); *Mulholland v. Cnty. of Berks, Pa*., 706 F.3d 227, 237 (3d Cir. 2013) (a policy may "be established by evidence of knowledge and acquiescence.").

(2000). Such "inaction has been found significant in the Establishment Clause context." *Green v. Haskell Cty. Bd. of Comm'rs*, 568 F.3d 784, 802 (10th Cir. 2009) (citations omitted). For instance, in *Steele*, the Eighth Circuit held: "Based on the Board's failure to act and [the superintendent's] tacit approval of [the teacher's] conduct," the school "district had a custom or policy allowing prayer in school." 845 F.2d at 1495-96. Liability could also attach to GCSD's inadequate training and supervision. *Thomas v. City of Chattanooga*, 398 F.3d 426, 429 (6th Cir. 2005). Some "courts have viewed a single abuse as so flagrant that it gives rise to an inference that the supervisory official must have breached his duty of proper supervision." *Bowen v. Watkins*, 669 F.2d 979, 988-89 (5th Cir. 1982) (citations omitted). *Monell* liability could even attach to GCSD's failure to make a policy of preventing prayers at graduation ceremonies.[32]

VII. Plaintiffs are entitled to permanent injunctive relief.

Once "a constitutional violation has been found, a district court has broad discretion to fashion an appropriate remedy." *Karcher v. Daggett*, 466 U.S. 910 (1984) (Stevens, J., concurring); *Swann*, 402 U.S. at 15 (same). A party seeking permanent injunction must demonstrate "(1) that it has suffered an irreparable injury;" (2) "that remedies available at law, such as monetary damages, are inadequate;" (3) that, "considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved." *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). Contrary to GCSD's argument (Doc. 136 at 8), each factor weighs heavily in Plaintiffs' favor.

First, a violation of First Amendment rights "unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). *See Lee*, 505 U.S. at 594 (plaintiffs injured by prayers "said in the future"). Second, "monetary damages are inadequate to compensate for the loss of First Amendment freedoms." *Legend Night Club v. Miller*, 637 F.3d 291, 302 (4th Cir. 2011). Third, against the "irreparable harm that will befall" Plaintiffs, GCSD would only need to

[32] *Cornfield v. Consolidated High Sch. Dist. No. 230*, 991 F.2d 1316, 1326 (7th Cir. 1993) ("the failure to make a policy itself may be actionable . . . although lacking formal approval").

alter its "graduation ceremon[ies] in [a] relatively minor way." *Workman v. Greenwood Cmty. Sch. Corp*., 2010 U.S. Dist. LEXIS 42813, *26 (S.D. Ind. 2010). As the Ninth Circuit observed:

> the district court will have little if any difficulty fashioning an enforceable remedy in this case. Nor will the school district have difficulty outlining what may take place at graduation. Just as the school district gave permission to the senior class to plan graduation in part, it may take back its permission in part. The school purportedly gave seniors this chance to plan graduation in order to teach them leadership. If so, then it can teach them the responsibilities that go with such leadership, one of which is to *respect the constitutional rights of others*.

Harris 41 F.3d at 459 (emphasis added). Indeed, GCSD has "no legally protected interest in promoting messages of religious content at a school-sponsored graduation ceremony," and therefore "will suffer no harm by the issuance of" a permanent injunction barring future graduation prayers. *Deveney*, 231 F. Supp. 2d at 487-88. "The balance of harm thus weighs heavily in favor of plaintiff[s]." *Id. Accord Gossage*, 2006 U.S. Dist. LEXIS 34613 at *21-22.[33]

The final element is met because "upholding constitutional rights serves the public interest." *Newsom v. Albemarle Cnty. Sch. Bd.*, 354 F. 3d 249, 261 (4th Cir. 2003). *See Lee*, 505 U.S. at 590-92. The "public interest weighs in favor of protecting a student's first amendment right to be free from the unwanted intrusion of religion at a school-sponsored graduation." *Deveney*, 231 F. Supp. 2d at 487-88. In recognition "that a union of government and religion tends to destroy government and to degrade religion" the Supreme Court has long acknowledged that governmental actions that appear to favor one religion "inevitabl[y]" foster "the hatred, disrespect and even contempt of those who [hold] contrary beliefs." *Engel*, 370 U. S. at 431.

As early as 1890, courts "emphatically reject[ed]" the argument that enjoining public schools from subjecting captive student audiences to prayer and Bible readings is "disastrous to the cause of religion." *Weiss*, 76 Wis. at 202. Prayers and Bible readings are "best taught to our

[33] *See also Lee*, 505 U.S. at 629-30 (Souter, J., concurring) ("Religious students cannot complain that omitting prayers from their graduation ceremony would, in any realistic sense, 'burden' their spiritual callings."); *Nurre*, 580 F.3d at 1094 n.6 (The "dangers of entangling religious speech into a convocation where the audience [is] essentially captive and composed of impressionable adolescents outweigh[s] the individual's interest in presenting proselytistic speech."); *Lundberg v. W. Monona Cmty. Sch. Dist.*, 731 F. Supp. 331, 333, 337 (N.D. Iowa 1989) ("the weight comes down on the side of preventing a violation of the establishment of religion clause.").

youth in the church, the Sabbath and parochial schools . . . The constitution does not interfere with such teaching and culture." *Id.* "It only banishes theological polemics from the district schools. It does this, not because of any hostility to religion, but . . . in the interests of good government" *and* in the interests of protecting religion. *Id.*

James Madison viewed governmental support for religion as "[r]eligious bondage [that] shackles and debilitates the mind and unfits it for every noble enterprize." Such support would only "weaken in those who profess [the benefitted] [r]eligion a pious confidence in its innate excellence," while "foster[ing] in those who still reject it, a suspicion that its friends are too conscious of its fallacies, to trust it to its own merits."[34] Thomas Jefferson agreed that it "tends only to corrupt the principles of that very Religion it is meant to encourage."[35] Benjamin Franklin also professed: "When a Religion is good, I conceive it will support itself; and when it does not support itself, and God does not care to support [it], so that its Professors are oblig'd to call for the help of the Civil Power, 'tis a Sign, I apprehend, of its being a bad one."[36] Perhaps the best rejoinder to GCSD's position is Justice O'Connor's poignant observation:

> At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate: Our regard for constitutional boundaries has protected us from similar travails, while allowing private religious exercise to flourish. . . . Those who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?

McCreary, 545 U.S. at 882 (O'Connor, J., concurring).

CONCLUSION

GCSD fails to "appreciate the impact of its view upon adherents of minority faiths." *Joyner*, 653 F.3d at 354-55. A public school exists "to serve *all* citizens of a community, whatever their faith may be." *Suhre v. Haywood Cnty.*, 131 F.3d 1083, 1088 (4th Cir. 1997). For the foregoing reasons, this Court should grant Plaintiffs the permanent injunction they seek.

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[34] Letter from James Madison to William Bradford (April 1, 1774), http://bit.ly/2h57Xm5.
[35] Thomas Jefferson, *The Virginia Statute for Religious Freedom* (Jan. 16, 1786), *reprinted in* FOUNDING THE REPUBLIC: A DOCUMENTARY HISTORY 94-95 (John J. Patrick ed., 1995).
[36] Letter from Benjamin Franklin to Richard Price (October 9, 1780), http://bit.ly/2jMsrVO.

Respectfully submitted,

September 6, 2018

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