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February 23, 2021

Sent via email and mail
Dr. Steve Flores, Superintendent
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Kelley Hirt, Principal
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Re: Establishment Clause Violation

Dear Principal Hirt and Dr. Flores,

A humanist family has contacted our office to request assistance regarding what is correctly perceived as a constitutional violation occurring under the authority of your school and school district. The parents report that a kindergarten teacher, [redacted], has repeatedly promoted prayer and church attendance to her impressionable students during the morning "moment of silence" period. Examples of the teacher's statements include: "this is a good time to say a prayer" and "go to church that helps you feel safe . . . and loved."

"Parents don't drop off their children at the school house door to have their child's religious beliefs affirmed, questioned or compromised." *M.B. v. Rankin Cnty. Sch. Dist.*, No. 3:13cv241-CWR-FKB, 2015 U.S. Dist. LEXIS 117289, at *23 (S.D. Miss. Jul. 10, 2015). I write today to demand that affirmative steps be taken to cease this unconstitutional behavior immediately.

The American Humanist Association (AHA) is a national nonprofit organization with tens of thousands of members across the country, including many in Texas. The mission of AHA's legal center is to protect one of the most fundamental principles of our democracy: the constitutional mandate requiring separation of church and state. We have litigated dozens of cases in federal courts from coast to coast, including in the U.S. Supreme Court and within the Fifth Circuit. *See Rankin*, 2015 U.S. Dist. LEXIS 117289 (holding that a single prayer delivered at a

school event violated the Establishment Clause and ordered the school district to pay $7,500 in damages "to compensate her for the deprivation of her constitutional rights;" ordering the school district to pay an additional $10,000 for every violation thereafter; awarding AHA $57,367 in attorneys' costs and fees); *see also Am. Humanist Assoc. v. Greenville Cnty. Sch. Dist.*, No. 6:13-cv-2471-BHH (D. S.C. 2020) (awarding AHA $456,242 in attorneys' fees and costs in school prayer case).

The Establishment Clause "commands a separation of church and state." *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005). The Establishment Clause "absolutely prohibit[s] government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith." *Sch. Dist. v. Ball*, 473 U.S. 373, 385 (1985). The government must not "place its prestige, coercive authority, or resources behind a single religious faith or behind religious belief in general, compelling non-adherents to support the practices or proselytizing of favored religious organizations and conveying the message that those who do not contribute gladly are less than full members of the community." *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 9 (1989).

The Supreme Court "has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools," *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987), where "there are heightened concerns with protecting freedom of conscience from [even] subtle coercive pressure." *Lee v. Weisman*, 505 U.S. 577, 592 (1992). *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 303 (2000) (student-led, student-initiated prayers before high school football games unconstitutional); *Lee*, 505 U.S. at 592 (nondenominational prayer at graduation unconstitutional).In "no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart." *McCollum v. Bd. of Educ*., 333 U.S. 203, 231 (1948).

The Supreme Court's cases place an *affirmative duty* upon public schools to "be certain . . . that subsidized teachers do not inculcate religion." *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971). As the Fifth Circuit observed in 1993, "*Lee* is merely the most recent in a long line of cases carving out of the Establishment Clause what essentially amounts to a *per se* rule prohibiting public-school-related or -initiated religious expression or indoctrination." *Doe v. Duncanville Indep. Sch. Dist*., 994 F.2d 160, 165 (5th Cir. 1993) (*Duncanville I*).[1] The Fifth Circuit also has a legion of cases prohibiting public schools from indoctrinating students during school activities.[2]

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[1] *See, e.g.*, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 294 (2000) (student prayers at football games unconstitutional); *Lee v. Weisman*, 505 U.S. 577, 580-83 (1992) (prayers at graduation ceremonies unconstitutional); *Wallace v. Jaffree*, 472 U.S. 38, 40-42 (1985) (moment of silence to start school day unconstitutional); *Stone v. Graham*, 449 U.S. 39 (1980) (posting of Ten Commandments on classroom walls unconstitutional); *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 205 (1963) (daily scripture readings unconstitutional); *Engel v. Vitale*, 370 U.S. 421, 422-23 (1962) (school prayer unconstitutional); *Karen B v. Treen*, 653 F.2d 897 (5th Cir. 1981), *summarily aff'd*, 455 U.S. 913 (1982) (prayers by students and teachers in classroom unconstitutional).

[2] *See, e.g., Doe v. Sch. Bd*., 274 F.3d 289, 294 (5th Cir. 2001) (statute authorizing prayer in classrooms unconstitutional); *Doe v. Santa Fe Indep. Sch. Dist*., 168 F.3d 806, 816 (5th Cir. 1999), *aff'd*, 530 U.S. 290 (2000) (graduation and football prayers unconstitutional); *Ingebretsen v. Jackson Pub. Sch. Dist*., 88 F.3d 274, 280 (5th Cir. 1996) (prayers at school-sponsored events unconstitutional); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 407 (5th Cir. 1995) (school officials' supervision of student-initiated and student-led prayers preceding basketball games violated Establishment Clause) (*Duncanville II*); *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 163 (5th Cir. 1993) (*Duncanville I)*; *Hall v. Bd. of Sch. Comm'rs,* 656 F.2d 999, 1003 (5th Cir. 1981) (permitting students to conduct morning devotional readings over the school's public address system violated Establishment Clause); *Meltzer v. Bd.*

To comport with the Establishment Clause, a challenged public-school activity must: (1) have a primary secular purpose; (2) not have the effect of advancing or endorsing religion; and (3) not foster excessive entanglement with religion. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 222-23 (1963); *Waltz v. Tax Commission*, 397 U.S. 664, 669-70 (1970); *accord Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 592 (1989).[3] Public school action "violates the Establishment Clause if it fails to satisfy any of these prongs." *Edwards*, 482 U.S. at 583.

In addition to this *Lemon* test, the Supreme Court in *Lee* formulated the separate "coercion test," declaring "*at a minimum* the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise." *Lee*, 505 U.S. at 587 (emphasis added); *see Santa Fe*, 530 U.S. at 291 (holding that student-initiated prayers before football games violate Establishment Clause under *Lee* coercion test). Where, as here, government action violates the Establishment Clause under the coercion test, there is no need to employ the three-part *Lemon* analysis. *Duncanville II*, 994 F.2d at 166 n.7.

[redacted] conduct emphatically violates the Establishment Clause pursuant to direct precedent, *e.g.*, the *Lee* coercion test, as well as the *Lemon* test, *infra*, putting your school district at risk for serious legal repercussions. *E.g.*, *Rankin*, 2015 U.S. Dist. LEXIS 117289 at *28.

I.

No analysis is necessary for a Court to find your school's moment of silence practice—which is used directly by teachers to encourage prayer and church attendance—unconstitutional. The challenged conduct is "inconsistent both with the purposes of the Establishment Clause and with the Establishment Clause itself." *Engel*, 370 U.S. at 433. Binding precedent by the Supreme Court and Fifth Circuit render this conduct unconstitutional without the need for extensive analysis. *See Wallace*, 472 U.S. at 40-42 (holding that a school's moment of silence practice was unconstitutional where it was used to encourage prayer); *Karen B v. Treen*, 653 F. 2d 897 (5th Cir. 1981) (holding that allowing teachers to select students to pray or pray themselves unconstitutionally endorsed religion), *aff'd*, 455 U.S. 913 (1982); *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996); *Duncanville II*, 70 F.3d 402 (5th Cir. 1995) (holding that allowing coaches to participate in student-led prayer unconstitutionally endorsed religion).

In *Engel v. Vitale*, 370 U.S. 421 (1963), the Court (virtually unanimously) struck down a nondenominational school prayer despite arguments about its benign and historical nature. The New York Court of Appeals had upheld the prayer, noting that that "[a] few seconds of prayer in the schools, acknowledging dependence on Almighty God, is consistent with our heritage of 'securing' the blessings of freedom which are recognized in both the Federal and State Constitutions as having emanated from Almighty God" and is "an integral part of our national

of Pub. Instruction, 548 F.2d 559, 574 (5th Cir. 1977) (en banc) (same). *See also Herdahl v. Pontotoc Cnty Sch. Dist.*, 933 F. Supp. 582, 591 (N.D. Miss. 1996) (same); *S.D. v. St. Johns Cnty. Sch. Dist*., 632 F. Supp. 2d 1085, 1093 (M.D. Fla. 2009).

[3] These requirements were enshrined in *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971), later known as the "*Lemon* test." But these requirements long predate *Lemon*. *See Schempp*, 374 U.S. at 222 ("[W]hat are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment" violates "the Constitution."); *Torcaso v. Watkins*, 367 U.S. 488, 489-90 (1961) (invalidating law because "the purpose or effect" favored god-believers over atheists).

heritage and tradition." *Engel v. Vitale*, 10 N.Y.2d 174, 179 (1961). In the Supreme Court's view, however, it was "an unfortunate fact of history that when some of the very groups which had most strenuously opposed the established Church of England found themselves sufficiently in control of colonial governments in this country to write their own prayers into law, they passed laws making their own religion the official religion of their respective colonies." *Engel*, 370 U.S. at 427. The Court then concluded: "by using its public school system to encourage recitation of the Regents' prayer, the State of New York has adopted a practice wholly inconsistent with the Establishment Clause." *Id*. at 424.

You should know that we recently won a case against a Florida police department that promoted prayer on the department's Facebook page. *Rojas v. City of Ocala,* 315 F. Supp. 3d 1256, 1278 (M.D. Fla. 2018). The court reasoned: "Given that the Facebook page posting by the Ocala Police Department asked Ocala's citizens to join in 'fervent prayer'—an undisputedly religious action, and that the Prayer Vigil consisted of chaplains offering Christian prayers and singing from the stage with responsive audience participation, a reasonable observer would find that the Prayer Vigil had a religious purpose" and was thus unconstitutional. *Id.* In fact, the court found the police department's conduct:

> "'lies so obviously at the very core of what the [Establishment Clause] prohibits that the unlawfulness of the conduct was readily apparent to [them], notwithstanding the lack of fact-specific law.'" [citation omitted]. . . .No factually particularized, pre-existing case law was necessary for it to be obvious to local government officials that organizing and promoting a Prayer Vigil would violate the Establishment Clause.

Am. Humanist Ass'n v. City of Ocala, 127 F. Supp. 3d 1265, 1284 (M.D. Fla. 2015).

II.

The teacher's conduct readily violates the Establishment Clause pursuant to *Lee*'s coercion test. In *Lee*, the Supreme Court held that a public school's inclusion of nonsectarian prayer in a graduation ceremony was unconstitutionally coercive even though the event was technically voluntary, and students were not required to participate in the prayer. *Lee*, 505 U.S. at 586. This is because the "State exerts great authority and coercive power . . . because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure." *Edwards*, 482 U.S. at 584. Thus, when a teacher encourages prayer to her students, her actions are coercive because such a message coming from a person in a position of authority "no doubt will be perceived by the students as inducing a participation they might otherwise reject." *Duncanville I*, 994 F.2d at 165.

Certainly, [redacted] actions are more flagrantly unconstitutional than the practice found unconstitutional in *Lee* (which the Supreme Court treated as an extreme example of an Establishment Clause violation) in *three* key respects.

First, [redacted] is encouraging prayer and church attendance to a captive audience of *kindergarten* students. If the "Supreme Court was concerned about the coercive pressures on fourteen-year-old Deborah Weisman, then we must be even more worried about the pressures on

[kindergarteners]." *Berger v. Rensselaer Cent. Sch. Corp.*, 982 F.2d 1160, 1169-70 (7th Cir. 1993). The "symbolism of a union between church and state is most likely to influence children of tender years." *Ball*, 473 U.S. at 390. *See Morgan v. Swanson*, 659 F.3d 359, 382 (5th Cir. 2011) (noting that "elementary students are different" in "the Establishment Clause context.") (citation omitted). *See also Waltz v. Egg Harbor Twp. Bd. of Educ.*, 342 F.3d 271, 277 (3rd Cir. 2003) (explaining that in "an elementary school" the line "between school-endorsed speech and merely allowable speech is blurred") (citation omitted); *Peck v. Upshur Cnty. Bd. of Educ.*, 155 F.3d 274, 288 n* (4th Cir. 1998) (equal access policy violated the Establishment Clause "in the elementary schools" but not high schools"); *Bell v. Little Axe Indep. Sch. Dist.*, 766 F.2d 1391, 1404 (10th Cir. 1985) (elementary children are "vastly more impressionable than high school or university students.").[4]

Second, class attendance is compulsory, unlike a middle school graduation (*Lee*), or a completely voluntary event like a high school football game (*Santa Fe*). Significantly, in *Santa Fe*, the Supreme Court held that even student-initiated, student-led prayers at high school football games, which were *completely voluntary*, failed the coercion test. *Santa Fe*, 530 U.S. at 310-12. The school argued that the policy was "distinguishable from . . . *Lee* because it does not coerce students." *Id*. The Court declared 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*.

"The prayer in *Lee* occurred during an after-school extracurricular event," as did the unconstitutional prayers in *Santa Fe*, whereas [redacted] "moment of silence" period is "during instructional time." *Berger*, 982 F.2d at 1170-71 (even though children could choose not to accept a Bible, the practice of distributing them during class time was coercive). *See Ingebretsen*, 88 F.3d at 279 (teacher's prayer practice was particularly coercive because classroom attendance is mandatory); *Herdahl v. Pontotoc Cnty. Sch. Dist.*, 887 F. Supp. 902, 910 (N.D. Miss. Apr. 17, 1995) (noting the "critical distinction" between religious activities conducted during instructional time and outside such time as in *Lee*). Students are required to "obey the instructions of the teacher[]" during this period. *Rankin*, 2015 U.S. Dist. LEXIS 117289 at *29 ("The NRE students suffered undue and unconstitutional coercion as they did what was expected of them daily – obey the instructions of the teachers."). Encouraging prayer to such an impressionable and captive audience strikes at the core of what courts have warned against—the "heightened concerns with protecting freedom of conscience from [even] subtle coercive pressure in [elementary schools]." *Lee*, 505 U.S. at 592.

In *Stone*, the Supreme Court held that even just posting copies of the Ten Commandments in public school classrooms violated the Establishment Clause. *Stone v. Graham*, 449 U.S. 39, 42-43 (1980). The Court explained that the display serves only to "induce school children to read, meditate upon, . . . venerate and obey, the Commandments." *Id*. Thus, "the mere posting of the copies under the auspices of the legislature provides the official support of the State Government that the Establishment Clause prohibits." *Id*. In *Doe v. Aldine Indep. Sch. Dist.*, 563 F. Supp. 883,

[4] *See also Rankin*, 2015 U.S. Dist. LEXIS 117289 at *28 ("young children are impressionable; therefore, introducing a particular belief . . . can be extremely persuasive"); *Roe v. Tangipahoa Parish Sch. Bd.*, No. 07-2908, 2008 U.S. Dist. LEXIS 32793, *9-11 (E.D. La. Apr. 22, 2008) ("as to elementary school students, the practice would be unconstitutional because of the heightened concerns regarding coercion."); *Herdahl*, 887 F. Supp. at 910 ("subtle coercive pressures . . . obviously differ depending on the maturity levels of the students. . . .").

884 (S.D. Tx. 1982), the court held that a prayer posted "in raised block letters on the wall over the entrance to the gymnasium" violated the Establishment Clause. The court reasoned: "the posting of the words alone is unconstitutional in light of *Stone v. Graham*." *Id.* at 885 n.2.

Third, it is axiomatic that "[n]either a state nor the Federal Government . . . can force nor influence a person to go to . . . church." *Everson v. Bd. Of Educ.*, 330 U.S. 1, 15 (1947). The Establishment Clause "is violated when the government directs students to attend a pervasively Christian, proselytizing environment." *Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 855 (7th Cir. 2012). Unlike in *Lee*, where a Rabbi delivered a short nondenominational prayer at a voluntary non-curricular event, a public school teacher here is not just encouraging prayer, she's literally influencing students to go to church.

"No parent can be required to subject their children to Bible studies, worship service, or any other activity that pertains to the Christian faith, in order for their child to take advantage of the opportunities of a public school system." *Jane Doe v. Joplin Schools Pub. Sch. Dist.*, No. 3:15-CV-5052-MDH, slip op. at 22 (W.D. Mo. Mar. 9, 2017) (AHA case ended in successful court decree for AHA's clients).

III.

Nothing more need be shown; as discussed above, a finding of coercion "is sufficient" to violate the Establishment Clause. *Lee*, 505 U.S. at 586-87. Even so, [redacted] active encouragement of prayer and church attendance violates the Establishment Clause pursuant to the tripartite *Schempp*/*Lemon* analysis.

A.

Independent from coercion concerns, the Supreme Court has made clear that any "[s]chool sponsorship of a religious message is impermissible." *Santa Fe*, 530 U.S. at 309-10. A purely "symbolic" endorsement of religion, absent any form of coercion, violates the Establishment Clause. *Bell*, 766 F.2d at 1399, 1405 ("'This symbolic inference is too dangerous to permit.'").

The Supreme Court has held that government action violates the Establishment Clause when, "irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval [of religion]." *Wallace*, 472 U.S. at 56 n.42 (quotation marks omitted).

Consequently, school districts must not permit any "of its teachers' activities [to] give[] the impression that the school endorses religion." *Marchi v. Bd. of Coop. Educ. Servs.*, 173 F.3d 469, 477 (2d Cir. 1999). *See Duncanville II*, 70 F.3d 402 (a coach's silent participation in student-initiated, student-led prayers preceding basketball games violated the Establishment Clause); *Ingebretsen*, 88 F.3d at 280 (a school official's silent participation in student-initiated, student-led prayers preceding basketball games violated the Establishment Clause); *Karen B*, 653 F.2d 897 (prayers by students and teachers in classroom unconstitutional); *Borden v. Sch. Dist.*, 523 F.3d 153, 174 (3rd Cir. 2008) (coach silently bowing head and kneeling while team prayed violated the Establishment Clause); *Holloman v. Harland*, 370 F.3d 1252, 1285 (11th Cir. 2004) (teacher's

practice of initiating silent prayer with her students with "let us pray" and ending it with "amen" violated the Establishment Clause); *Bishop v. Aronov*, 926 F.2d 1066, 1073 (11th Cir. 1991) ("a teacher's [religious] speech can be taken as directly and deliberately representative of the school"); *Roberts v. Madigan*, 921 F.2d 1047, 1056-58 (10th Cir. 1990) (a teacher's display of a Bible in his classroom "had the primary effect of communicating a message of endorsement of a religion"); *Steele v. Van Buren Public Sch. Dist.*, 845 F.2d 1492, 1493 (8th Cir. 1988) (band teacher conducting prayer at mandatory rehearsals violated the Establishment Clause).

> A public school "unconstitutionally endorses religion whenever it appears to take a position on questions of religious belief or makes adherence to a religion relevant in any way to a person's standing in the political community." *Ingebretsen*, 88 F.3d at 280-81 (citations omitted). A school official does this whenever it "conveys a message that religion is favored, preferred, or promoted over other beliefs." *Id*. (citations omitted).

In *Santa Fe*, the Court noted, irrespective of coercion, "[s]chool sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are not adherents that they are outsiders." 530 U.S. at 309. "[T]he religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer." *Id.* at 313.

Simply "permit[ting] [a teacher] to discuss his religious beliefs with students during school time on school grounds violate the Establishment Clause." *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 522 (9th Cir. 1994). *See Downing v. W. Haven Bd. of Educ.*, 162 F. Supp. 2d 19, 27-28 (D. Conn. 2001) ("For the defendants to have permitted Downing to wear a shirt during classroom instruction that was emblazoned with the words 'JESUS 2000 – J2K' would likely have violated the Establishment Clause.").

In *Ingebretsen*, the Fifth Circuit held that a school policy amounted to "an unconstitutional endorsement of religion" because it "set[] aside special time for prayer." 88 F.3d at 280.

The Fifth Circuit held in *Karen B* that "encouraging observance of a religious ritual in the classroom" constituted impermissible endorsement of religion. 653 F.2d at 901. The statute did not prescribe a specific form of prayer, but the court emphasized that the First Amendment "demands absolute government neutrality with respect to religion." *Id.* "Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of students is voluntary can serve to free it from the limitations of the Establishment Clause." *Id.* at 902 (citing *Engel*, 370 U.S. at 430).

And the Fifth Circuit in *Duncanville II* held that coaches merely participating in student prayer violated the Establishment Clause. 70 F.3d at 406. The court noted that these coaches are "representatives of the school and their actions are representative of the [school district's] policies." *Id*. Thus, "participate[ng] in [the] prayers . . . signals an unconstitutional endorsement of religion." *Id*. Further, in *Duncanville II*, the Fifth Circuit ruled that when school authorities "manifest approval and solidarity with student religious exercises, they cross the line between respect for religion and endorsement of religion." *Id*. at 405-06 & n.4.

In *Roberts v. Madigan*, the Tenth Circuit held that a teacher's religious books on his desk a teacher's display of religious books on his desk, for a limited period of time, "had the primary effect of communicating a message of endorsement of a religion" even though his actions "were passive and *de minimis*" and "discreet." 21 F.2d at 1056-58, 1061.[5]

By way of contrast, the Fourth Circuit held that a nondenominational prayer printed 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" and that the prayer could "seem utterly innocuous." *Hall v. Bradshaw*, 630 F.2d 1018, 1019-21 n.1 (4th Cir. 1980).

There is nothing "innocuous" about a teacher encouraging impressionable young students in a captive audience to engage in religious activities. *See e.g.*, *Santa Fe*, 530 U.S. at 309-10. [redacted] is affirmatively endorsing prayer and church to a captive audience of impressionable children during compulsory class time. This amounts to unconstitutional religious endorsement above and beyond the coercion.

B.

There is no secular purpose for a moment of silence practice designed to further prayer and church attendance either. *Wallace*, 472 U.S. at 60. *See Peloza*, 37 F.3d at 522 (teacher's discussion of religion with students before and after class "would not have a secular purpose"). It is "settled [Supreme Court] jurisprudence that 'the Establishment Clause prohibits government from abandoning secular purposes.'" *Tex. Monthly*, 489 U.S. at 8-9.

"Because prayer is a primary religious activity in itself, a teacher or administrator's intent to facilitate or *encourage* prayer in a public school is *per se* an unconstitutional intent to further religious goal." *Holloman*, 370 F.3d at 1285 (emphasis added) (citations omitted); *see also Jaffree v. Wallace*, 705 F.2d 1526, 1534-35 (11th Cir. 1983) ("Recognizing that prayer is the quintessential religious practice implies that no secular purpose can be satisfied. . . ."), *aff'd sub nom.*, *Wallace v. Jaffree*, 472 U.S. 38 (1985).

Where the government promotes an "intrinsically religious practice," – such as prayer or evangelism – it "cannot meet the secular purpose prong." *Jager v. Douglas Cnty. Sch. Dist*., 862 F.2d 824, 829-30 (11th Cir. 1989). *See Santa Fe*, 530 U.S. at 309-10 ("infer[ring] that the specific purpose of the policy" permitting but not requiring student-led prayers was religious, not secular); *Ingebretsen*, 88 F.3d at 279 ("Returning prayer to public schools is not a secular purpose."); *Karen B*, 653 F.2d at 901 (no secular purpose in authorizing teacher-initiated prayer at the start of the school day), *aff'd*, 455 U.S. 913 (1982).

C.

Third, [redacted] actions have excessively entangled her government employer with

[5] *E.g.*, *Green v. Haskell Cnty. Bd. of Comm'rs*, 568 F.3d 784, 794 (10th Cir. 2009) (passive Ten Commandments monument without any coercion violated Establishment Clause); *American Atheists, Inc. v. Duncan*, 616 F.3d 1145 (10th Cir. 2010) (crosses on public highway).

religion. *See Duncanville II*, 70 F.3d at 406 (faculty's participation in "prayers improperly entangle[d] [the school] in religion."); *Karen B*, 653 F.2d at 902 (permitting teachers to lead prayers would result in "excessive governmental entanglement with religion."); *Bishop*, 926 F.2d at 1073 ("[A] teacher's [religious] speech can be taken as directly and deliberately representative of the school."); *Mellen v. Bunting*, 327 F.3d 355, 375 (4th Cir. 1991) (when "a judge prays in court, there is necessarily an excessive entanglement of the court with religion."); *Hall*, 630 F.2d at 1021 (prayer on a state map fostered unconstitutional entanglement).

IV.

Finally, please note that [redacted] may not hide behind the Free Speech or Free Exercise Clause of the First Amendment to vindicate her unconstitutional conduct. The courts have made clear that when government actors are acting in their governmental capacity—that is, as here, in the classroom—they speak on behalf of the government, not themselves, and "government speech **must** comport with the Establishment Clause." *Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009) (emphasis added). *See*, *e.g.*, *Duncanville II*, 70 F.3d at 406 ("[The school district] contends that it cannot prevent its employees from participating in student prayers without violating their employees' rights to the free exercise of religion, to association, and to free speech and academic. We do not agree.").[6]

"Teachers and other public school employees have no right to make the promotion of religion a part of their job description." *Grossman v. S. Shore Pub. Sch. Dist.*, 507 F.3d 1097, 1099-1100 (7th Cir. 2007) (upholding school's decision not to renew the contract of school guidance counselor who replaced educational literature about contraceptives with religious literature on abstinence). The District would even be permitted to restrict the teacher's conduct if it fell "short of an establishment violation." *Bishop*, 926 F.2d at 1077. But, in this situation, a "clear establishment violation exist[s]," making the District's actions enjoining the illegal activity necessary. *Id*.

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This letter serves as an official notice of the unconstitutional activity and demands that your school district end this and any similar illegal activity immediately. To avoid legal action, we kindly ask that you notify us in writing within two weeks of receipt of this letter setting forth the steps you will take to rectify this constitutional infringement. Thank you for turning your attention to this important matter.

[6] *See also Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) ("We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."); *Johnson v. Poway Unified Sch. Dist.*, 658 F. 3d 954, 957 (9th Cir. 2011) (rejecting First Amendment challenge by teacher to school requiring that he remove classroom banners that read "In God We Trust," "One Nation Under God," "God Bless America," and "God Shed His Grace on Thee," and "All men are created equal, they are endowed by their CREATOR"); *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 522 (9th Cir. 1994) (school district's interest in avoiding violation of Establishment Clause justified prohibiting teacher from discussing religion with students before and after class and holding that to "permit [a teacher] to discuss his religious beliefs with students during school time on school grounds would violate the Establishment Clause").

Sincerely,
s/Monica L. Miller, Esq.

Legal Director and Senior Counsel
American Humanist Association
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