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November 22, 2017

The Honorable Jim Justice – governor@wv.gov
Office of the Governor
State Capitol, 1900 Kanawha Blvd., E
Charleston, WV 25305

**RE: Christian Heritage Week**

Dear Governor Justice:

A concerned citizen has contacted our office regarding a serious constitutional violation arising from your executive actions. In June, you proclaimed the week of November 19-25, 2017, to be "Christian Heritage Week" in West Virginia. Your proclamation declares in part: "Thanksgiving week is an appropriate time to center attention on our thanks to Almighty God for His great and good Providence and for the Christian faith." Making numerous references to prayer, worship, Bible reading, and other religious elements, the proclamation can only be understood as an official government endorsement of Christianity. This proclamation represents a clear breach of the Establishment Clause of the First Amendment of the United States Constitution.

The American Humanist Association (AHA) is a national nonprofit organization with over 600,000 supporters and members across the country, including in West Virginia. The mission of AHA's legal center is to protect one of the most fundamental principles of our democracy: the constitutional mandate requiring a separation of church and state. Our legal center includes a network of cooperating attorneys from around the country, including West Virginia, and we have litigated constitutional cases in state and federal courts from coast to coast.

The First Amendment's Establishment Clause "commands a separation of church and state." *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005). It requires the "government [to] remain secular, rather than affiliate itself with religious beliefs or institutions." *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 610 (1989). It also forbids the government "from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'" *Id.* at 594 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)). The Establishment Clause "create[s] a complete and permanent separation of the spheres of religious activity and civil authority." *Everson v. Bd. of Educ.*, 330 U.S. 1, 31-32 (1947). Separation "means separation, not something less." *McCollum v. Bd. of Educ.*, 333 U.S. 203, 231 (1948).

The government "may not place its prestige, coercive authority, or resources behind a single religious faith or behind religious belief in general, compelling nonadherents 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." *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 9 (1989). By honoring the contributions of one religion to the exclusion of others, your proclamation violates the "clearest command" of the Establishment Clause: "that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982).

Where, as here, the government discriminates "among religions," its actions are subject to strict scrutiny. *Id.* at 244, 246-47, 252 & n. 23 (1982). *See Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339 (1987) ("*Larson* indicates that laws discriminating among religions are subject to strict scrutiny."); *Liberty Univ., Inc. v. Lew*, 733 F.3d 72, 102 (4th Cir. 2013) (same). This is "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). *Larson* strict scrutiny is required when the government favors "particular religious denominations [while] excluding others." *Lew*, 733 F.3d at 102. Turning to the facts here, it is clear that your proclamation favors Christianity over other religions by honoring only the contributions and practices of Christian citizens. The state fails to likewise honor or "center attention" on the history of other religious groups. Thus, the proclamation discriminates among religions and is subject to strict scrutiny.

Such action can survive only if the government shows (1) a compelling government interest, and (2) that the disparate treatment is "closely fitted" to further that interest. *Larson*, 456 U.S. at 246-47. "Supreme Court case law instructs that overly general statements of abstract principles do not satisfy the government's burden to articulate a compelling interest." *Awad v. Ziriax*, 670 F.3d 1111, 1129-30 (10th Cir. 2012) (citations omitted).[1] "For an interest to be sufficiently compelling to justify a law that discriminates among religions, the interest must address an identified problem that the discrimination seeks to remedy." *Id.* at 1129-31 (citation omitted). Here, the state is not attempting to fix any identified problem. Christianity has long been the dominant religion in West Virginia, and the proclamation does not state a single problem that it purports to remedy. "Without a compelling interest based on an actual problem, the second step of the strict scrutiny analysis—whether there is a close fit with a compelling state interest—is unnecessary and not feasible." *Id.* (citing *Larson*, 456 U.S. at 246-47). There is simply no "compelling interest to try to fit." *Id.*

The state's endorsement of Christianity cannot satisfy the traditional *Lemon* test either. To prevail, the government must show that the challenged action (1) has a secular purpose; (2) does not have the effect of advancing or endorsing religion; and (3) does not foster excessive entanglement with religion. *Allegheny*, 492 U.S. at 592. Government action "violates the Establishment Clause if it fails to satisfy any of these prongs." *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987). It is plain that your proclamation violates the Establishment Clause by

[1] *E.g.*, *Watchtower Bible Tract Society of New York, Inc. v. Village of Strauss*, 536 U.S. 150, 169 (2002).

expressly endorsing theistic belief, and Christianity in particular, while designating a week in celebration of the Christian heritage.[2]

First, this proclamation fails the purpose prong of *Lemon* because it serves no conceivable secular purpose. "When the government acts with the ostensible and predominant purpose of advancing religion, it violates [the] central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides." *McCreary Cnty. v. ACLU*, 545 U.S. 844, 860 (2005).

Where, as here, the government sponsors an "intrinsically religious practice" it "cannot meet the secular purpose prong." *Id.* at 862-63. A religious purpose may be inferred where, as here, "the government action itself besp[eaks] the purpose . . . [because it is] patently religious." *Id. See also Mellen v. Bunting*, 327 F.3d 355, 373 (4th Cir. 2003) ("When a state-sponsored activity has an overtly religious character, courts have consistently rejected efforts to assert a secular purpose for that activity."); *North Carolina Civil Liberties Union v. Constangy*, 947 F.2d 1145, 1150 (4th Cir. 1991) (finding religious purpose in judge's practice of opening court sessions with prayer, as it involved "an act so intrinsically religious"); *Hall v. Bradshaw*, 630 F.2d 1018, 1020-21 (4th Cir. 1980) (state's inclusion of prayer on state map failed purpose prong).

The proclamation's text makes clear that the sole purpose of Christian Heritage Week is to promote Christianity, stating that the objective of the celebration is "to center attention on our thanks to Almighty God for His great and good Providence and for the Christian faith."

In *Hall*, for instance, 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." *Id.* at 1019-21 n.1. The court reasoned that prayer "is undeniably religious and has, by its nature, both a religious purpose and effect." *Id.* at 1020-21. Likewise, in *Constangy*, although the judge argued that his prayers served the secular purpose of solemnifying court proceedings, the Fourth Circuit held that the prayers failed the purpose test because of the "intrinsically religious" nature of prayer. 947 F.2d at 1150.

Regardless of the purposes motivating it, the proclamation also fails *Lemon*'s second prong by endorsing Christianity. The "effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval [of religion]." *Wallace v. Jaffree*, 472 U.S. 38, 56 n.42 (1985) (quotation marks omitted). The "advancement need not be material or tangible. An implicit symbolic benefit is enough." *Friedman v. Bd. of Cnty. Comm'rs*, 781 F.2d 777, 781 (10th Cir. 1985). Even the "*mere appearance* of a joint exercise of [] authority by Church and State provides a significant symbolic benefit to religion," and, therefore, has the impermissible primary effect of advancing

[2] The fact that the state has celebrated Christian Heritage Week for twenty-six years makes this practice even more problematic. *See Am. Humanist Ass'n v. Md.-Nat'l Capital Park & Planning Comm'n*, 874 F.3d 195, 208 (4th Cir. 2017) ("Perhaps the longer a violation persists, the greater the affront to those offended."), *petition for reh'g en banc filed* (Nov. 1, 2017).

religion. *Larkin v. Grendel's Den*, 459 U.S. 116, 126-27 (1982) (emphasis added). *See Allegheny*, 492 U.S. at 600 (finding that the fact that a crèche exhibited a sign disclosing its ownership by a Roman Catholic organization did not alter the conclusion that it sent a message that the county supported Christianity); *Smith v. Cnty. of Albemarle*, 895 F.2d 953, 958 (4th Cir. 1990) (privately donated nativity scene unconstitutional pursuant to *Lemon*). The Supreme Court has stated that:

> an 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). The effect test is thus violated when the government makes "'adherence to a religion relevant in any way to a person's standing in the political community.'" *Green v. Haskell Cnty. Bd. of Comm'rs*, 568 F.3d 784, 799 (10th Cir. 2009) (citing *Allegheny*).

An official statement declaring a week in celebration of only Christianity plainly endorses religion in violation of the effect prong, considering the fact that no other religions receive the same, preferential treatment. The proclamation also advances Christianity by highlighting the importance of prayer, the Bible, Sunday worship, and Christian organizations while failing to recognize the practices of minority faiths. *See, e.g.*, *Mellen*, 327 F.3d at 374 ("The supper prayer has the primary effect of promoting religion, in that it sends the unequivocal message that VMI, as an institution, endorses the religious expressions embodied in the prayer."); *Constangy*, 947 F.2d at 1151 (a judge's courtroom prayer conveys a message of endorsement); *Smith*, 895 F.2d at 958 (nativity scene conveyed the "unmistakable message" of "government endorsement of religion"); *Hall*, 630 F.2d at 1021 ("the clear effect of any officially composed and published prayer is to advance religion"). In addition, the proclamation makes adherence to Christianity relevant to political standing and isolates nonadherents by inviting citizens to join the government in the celebration.

The proclamation is also unconstitutional under the *Lemon* test's third prong, which forbids "excessive government entanglement with religion." *Lemon*, 403 U.S. at 613 (citing *Walz*, 397 U.S. at 674). Like the Establishment Clause generally, the prohibition on excessive government entanglement with religion "rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *McCollum*, 333 U.S. at 212. In this situation, "where the underlying issue is the deeply emotional one of Church-State relationships, the potential for seriously divisive political consequences needs no elaboration." *Comm. for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 797 (1973).

Because the proclamation is inherently sectarian, it clearly entangles the government with religion. *E.g.*, *Am. Humanist Ass'n*, 874 F.3d at 211-12 (holding that a cross display violates the entanglement prong); *Constangy*, 947 F.2d at 1151-52 (when "a judge prays in court, there is necessarily an excessive entanglement of the court with religion."); *Mellen*, 327 F.3d at 375; *Hall*, 630 F.2d at 1021. Entanglement is particularly excessive when, as here, "the government is placed in the position of deciding between competing religious views." *Petruska v. Gannon Univ.*, 462 F.3d 294, 311 (3d Cir. 2006); *see also Coles ex rel. Coles v. Cleveland Bd. of Educ.*,

171 F.3d 369, 385 (6th Cir. 1999) ("the school board's practice of opening its meetings with prayer leads to excessive entanglement in religious matters"). By dedicating a week to the celebration of the Christian heritage, the state unnecessarily entangles itself with religion in violation of *Lemon*'s third prong.

In view of the aforementioned authorities, it is clear that the proclamation violates the First Amendment's Establishment Clause. Citizens should be "confident in the assurance that government plays no favorites in matters of faith." *Joyner v. Forsyth Cnty.*, 653 F.3d 341, 354-55 (4th Cir. 2011). We recognize that you and other elected officials may feel that endorsing the majority religion will be seen as a popular gesture, but your constitutional obligation requires that you respect the rights of religious minorities, and all citizens who value secular government, by refraining from such actions. Based on the above, we are seeking your assurance that "Christian Heritage Week" and similar events will not be repeated, and that your office will not issue similar proclamations endorsing religion. Should the state decide to repeat this kind of activity in the future, you are on notice that litigation may follow.

Sincerely,
Monica L. Miller, Esq.