NO. 15-1574

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

AMERICAN HUMANIST ASSOCIATION; JOHN DOE, and JANE DOE, as parents and next friends of their minor child; JILL DOE,

Plaintiffs - Appellants,

v.

GREENVILLE COUNTY SCHOOL DISTRICT,

Defendant - Appellee,

On Appeal from the United States District Court for the District of South Carolina

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REPLY BRIEF OF THE APPELLANTS

Monica Lynn Miller
American Humanist Association
1777 T Street NW, Washington, DC 20009
202-238-9088, Fax: 202-238-9003
Email: mmiller@americanhumanist.org

Aaron Joel Kozloski
Capitol Counsel, LLC
P.O. Box 1996, Lexington, SC 29071
803-465-1400, Fax: 888-513-6021
Email: aaron@capitolcounsel.us

Attorneys for Appellants

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INTRODUCTION[1]

Courts have been virtually unanimous in finding graduation prayers unconstitutional, even when student-led, student-initiated, *uncensored*, or "*spontaneously initiated*." (P.Br.17-18;35-36). Defendant-Appellee nevertheless defends its Prayer Policy by disregarding this overwhelming precedent, by ignoring entirely the *Lemon* test and separate coercion test, and by relying instead on "free speech" arguments that have been unequivocally rejected even by the Supreme Court. Defendant-Appellee's position rests on a lone Eleventh Circuit case that has been largely abrogated even in that circuit, an outlier that stands helplessly ineffectual against an avalanche of prevailing contrary jurisprudence.

The district court erred in failing to enjoin Defendant-Appellee's Prayer Policy as well the Chapel Policy, which authorizes school-sponsored events to be held in proselytizing Christian venues. The "First Amendment prohibits [schools] from requiring religious objectors to alienate themselves from the [school] community in order to avoid a religious practice." *Mellen v. Bunting*, 327 F.3d 355, 372 n.9 (4th Cir. 2003).

Defendant-Appellee concedes the following facts:

[1] Plaintiffs-Appellants incorporate by reference all briefs and evidence filed in this Court, including Plaintiffs-Appellants' Brief ("P.Br."), Opposition to Motion to Dismiss ("P.MTD."), Opposition to *Amicus* Brief, and Preliminary Injunction Appeal (Appeal:13-2502). Defendant-Appellee's brief is cited as ("D.Br.").

- Graduation is a school-sponsored event and is often held during the school day. (D.Br.5,8-9)(J.A.36;884;888).
- School officials preside over the event, deliver speeches, and control the order of remarks, program, and dress code (P.Br.4,17)(J.A.90-92;116;422-524;528;883-84)(D.Br.5-6).
- Since 1951, Defendant-Appellee has included student-led Christian prayers in graduations.(J.A. 876)(D.Br.16).
- Many District schools, including elementary and middle, have a documented history of graduation prayer. (P.MTD.9 n.12)(P.Br.3-6).
- In response to AHA's letter, Defendant-Appellee wrote: "[w]ith regard to a student delivering a **prayer** or providing a **religious message** during a **school-sponsored event**, the District will not prohibit this practice[.]"(J.A.36)(P.Br.7;19).
- Defendant-Appellee has claimed, solely through the affidavits of three principals, that it will no longer screen prayers or designate them on printed programs. (D.Br.9)(P.Br.4-6)(J.A.231-33;850-53).
- The Prayer Policy is District-wide; all schools authorize the delivery of graduation prayers, even if proselytizing. (D.Br.8-9)(P.Br.3-6).
- School officials will continue to select graduation speakers based on "class rank, grades, citizenship," "public speaking ability" and "class office."

(D.Br.15)(P.Br.4-6)(J.A.883-84), and will censor "religious messages" that "create a disturbance." (D.Br.6-9)(J.A.36;888)(P.Br.14).

- Prayers were delivered in 2014 and 2015. (P.MTD.9;Ex.2)(J.A.894-95).
- Since 2012, Defendant-Appellee has held fifth-grade MVES graduations in Turner Chapel, a Christian chapel in the center of North Greenville University (NGU), affiliated with the Southern Baptist Convention. (D.Br.5-9)(J.A.16;121;541;568-575).
- In Turner Chapel, "religious imagery" is "easily visible" and the "overall environment" is "clearly Christian."(J.A.807).
- Since 2012, the annual District-wide Marching Band Exhibition has also been held at NGU.(P.MTD.12-16).
- Tigerville Elementary started using Turner Chapel for its holiday concerts. (J.A.416-17).
- The Chapel Policy extends to a growing number of schools and events; all venues are Christian, including: NGU/Turner Chapel, Fairview Baptist Church, Taylors First Baptist Church (since at least 2009), and Brookwood Church. (P.MTD.12-16;Exs.1-2)(Pernak Decl.¶17)(Street Decl.¶11).
- District funds are expended on transportation, rental fees, and materials for Turner Chapel events. (D.Br.32;40)(J.A.92-97;873-74)(P.Br.53).

ARGUMENT

I. GRADUATION PRAYERS ARE SCHOOL-SPONSORED SPEECH PROHIBITED BY THE ESTABLISHMENT CLAUSE.

The Supreme Court has held that "permitting student-led, student-initiated prayer" at school-sponsored events unconstitutionally endorses religion and coerces students to participate in religious activity. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301-03, 308 (2000); *Lee v. Weisman*, 505 U.S. 577, 590-96 (1992). The Court recently reiterated that "a religious invocation" is "coercive as to an objecting student" in "the context of a graduation." *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1827 (2014).

The Court in *Santa Fe* specifically held that a policy permitting *uncensored*, student-initiated, student-led, prayers delivered by *student-selected* speakers at *voluntary high school* football games was unconstitutional, even though *it was possible no prayer would ever be delivered*. 530 U.S. at 296-97, 309-16. *A fortiori*, the Prayer Policy, which authorizes proselytizing prayer by *school-selected* speakers at essentially *compulsory* events for high school, *elementary* and *middle schools*, is unconstitutional. *Id.* at 311 ("pressure to attend an athletic event is not as strong as a senior's desire to attend her own graduation ceremony.").

The court below concluded that Defendant-Appellee's minor litigation-inspired maneuvers converted the government-sponsored prayers to private speech.

(J.A.897-98). But "graduation ceremonies have not been regarded, either by law or tradition, as public fora." *ACLU v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471, 1478 (3d Cir. 1996). Virtually every court to address the issue has deemed student-led, student-initiated graduation prayers school-sponsored rather than private. (P.Br.29-30)(J.A.49-51). *E.g.*, *Corder v. Lewis Palmer Sch. Dist.*, 566 F.3d 1219, 1229-31 (10th Cir. 2009)(student's religious speech was "school-sponsored" even though there were "fifteen valedictory speakers").

Defendant-Appellee even concedes graduations are "school-sponsored" and that prayers delivered between 1951-2013 were unconstitutionally school-endorsed. (D.Br.8-9)(J.A.36;884;888). Nothing material has changed. A prayer delivered at a school-sponsored event is, as a matter of law, school-sponsored. (P.Br.29-34). The district in *Santa Fe* also claimed that the "messages are private student speech, not public speech." 530 U.S. at 302. The Court flatly rejected that contention. *Id.*

Defendant-Appellee's argument "has as its major unarticulated premise the assumption that people who want to propagandize…views have a constitutional right to do so whenever and however and wherever they please." *Adderley v. Florida*, 385 U.S. 39, 47-48 (1966).(D.Br.28-29). But a "student's right to express his personal religious beliefs does not extend to using the machinery of the state as a vehicle for converting his audience." *Chandler v. James*, 180 F.3d 1254 (11th

Cir. 1999). A "graduation ceremony is not a public forum designed to accommodate the free speech…rights of the student[s]." *Skarin v. Woodbine Cmty. Sch.*, 204 F. Supp. 2d 1195, 1197 (S.D. Iowa 2002).

Defendant-Appellee admits it rests its position upon "equal access cases." (D.Br.25). But this Court emphasized in *Child Evangelism Fellowship v. Montgomery Cnty. Pub. Schs.*, 373 F.3d 589, 598 n.5 (4th Cir. 2004), that the relevant "prayer cases," *Santa Fe*, *Lee*, and *Mellen*, "did not involve equal access." Defendant-Appellee would have the Court "adopt a reading of [equal access] decisions that would require a school…to allow students" to use a "school-sponsored" event "to proselytize." *Bannon v. Sch. Dist.*, 387 F.3d 1208, 1216 (11th Cir. 2004)(per curiam).[2]

The district court flipped First Amendment jurisprudence on its head; by upholding the Prayer Policy, the court created an unprecedented Free Speech right for students to deliver prayers at government-sponsored events even though courts have affirmatively rejected this "right" for *adults* in analogous circumstances.

Specifically, prayers delivered by private citizens at public meetings are, as a matter of law, government speech, and this applies even when the prayers are uncensored and pursuant to a facially-neutral equal access policy. *E.g.*, *Greece*,

[2]The Supreme Court "ha[s] never held the mere creation of a public forum shields the government entity from scrutiny under the Establishment Clause." *Santa Fe*, 530 U.S. at 303 n.13.

134 S.Ct. at 1824-26. There is not a "single case in which a legislative prayer was treated as individual or private speech." *Turner v. City Council of Fredericksburg*, 534 F.3d 352, 355-56 (4th Cir. 2008). *See also Doe v. Tangipahoa Par. Sch. Bd.*, 473 F.3d 188, 192-93 (5th Cir. 2006)(prayers by "teachers and students" were government speech prohibited by Establishment Clause even though they could deliver "prayers of their own *unrestricted choosing*")(emphasis added).

For instance, Forsyth County had a facially neutral "take-all-comers" policy and the "County exercised no editorial control over the invocations," yet this Court still held the prayers were government speech. *Joyner v. Forsyth Cnty.*, 653 F.3d 341, 353-54 (4th Cir. 2011); *id.* at 362-63 (Niemeyer, J., dissenting). In *Pelphrey v. Cobb Cnty.*, 547 F.3d 1263, 1269-71 (11th Cir. 2008) the Eleventh Circuit substantially abrogated *Adler* by treating prayers by private citizens as government speech, even though the policy was facially-neutral and "[t]he commissions do not compose or censor the prayers."

First Amendment rights of students are *not* "'coextensive with the rights of adults in other settings.'" *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988)(citations omitted). Schools may, and often "must," prohibit "student speech in school-sponsored expressive activities" that the "public might reasonably perceive to bear the imprimatur of the school." *Id.* at 271-73. The court's ruling

therefore produces a paradoxical outcome that is manifestly at odds with First Amendment jurisprudence.

II. THE PRAYER POLICY CONTINUES TO VIOLATE THE ESTABLISHMENT CLAUSE.

A. The unconstitutional aspects of the Prayer Policy have not been remedied.

The district court's ruling arbitrarily found that prayers delivered prior to 2013 were unconstitutional, while sustaining Defendant-Appellee's position that permits the delivery of the exact same prayers. (P.Br.19-20). Its conclusion hinged upon the erroneous assumption that prayers will no longer be unconstitutional simply because Defendant-Appellee claims prayers will neither be screened nor mentioned in programs (although evidence belies both premises (P.Br.7)(P.MTD.9;Ex.2)). But these claims do not save the Prayer Policy.

The bottom line is this: **Defendant-Appellee continues to authorize the delivery of proselytizing Christian prayers to a captive student audience assembled for "the one school event most important for the student to attend."** *Lee*, 505 U.S. at 597. Whenever a prayer "occurs at a school-sponsored event…the conclusion is inescapable that the religious invocation conveys a message that the school endorses" it. *Jager v. Douglas Cnty. Sch. Dist.*, 862 F.2d 824, 831-32 (11th Cir. 1989). This is so "regardless of who makes the decision that the prayer will be

given and who authorizes the actual wording of the remarks." *Gearon v. Loudoun Cnty. Sch. Bd.*, 844 F. Supp. 1097, 1099 (E.D. Va. 1993).

And "[e]ven if the school district could have conducted the proceedings so as to avoid the appearance of governmental 'entanglement'" and "sponsorship," it has "*no* means of preventing the coerced participation of dissenters." *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979, 984 (9th Cir. 2003). The district court ignored the coercion test altogether, yet conceded, "pressure to stand participatorily at a graduation in prayer or other religious rite is inherently violative." (J.A.894 n.6).

The amendment of a challenged law will moot relief only if "the challenged aspects of the [original policy] have been remedied." *Chapin Furniture Outlet Inc. v. Town of Chapin*, 252 Fed. Appx. 566, 570 (4th Cir. 2007). That is obviously not the case here. In the following cases, the practice of permitting student-led prayer was held unconstitutional even though prayers would not be screened, censored, or mentioned in a program:

- *Santa Fe*, 530 U.S. at 301;
- *Black Horse*, 84 F.3d at 1475;
- *Harris v. Joint Sch. Dist.*, 41 F.3d 447, 452-53 (9th Cir. 1994), *vacated on other grounds*, 515 U.S. 1154 (1995);
- *Collins v. Chandler Unified Sch. Dist.*, 644 F.2d 759 (9th Cir. 1981);

- *Doe v. Gossage*, 2006 U.S. Dist. LEXIS 34613, *5,*20 (W.D. Ky. 2006)(no school official "attempted to influence the speaker with regard to the content of the remarks" and prayers would not be on programs);
- *Gearon*, 844 F. Supp. 1097;
- *Graham v. Cent. Cmty. Sch. Dist.*, 608 F. Supp. 531, 533 (S.D. Iowa 1985)(speaker had "complete control of what he will say"; no mention of printed programs);
- *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 821 n.12 (5th Cir. 1999)(censoring was immaterial because student-led prayers are not "private speech"),*aff'd*, 530 U.S. 290 (2000);
- *See also Lee*, 505 U.S. at 582-83 (no evidence of prayers on programs or censoring).

Even the district court recognized that the citizen-led prayers found unconstitutional in *Joyner* were neither screened nor "a memorialized part of the physically prepared agenda." (J.A.891).

Printed Programs

The Prayer Policy is more egregious than the above cases. Whereas Defendant-Appellee's position merely contends "prayer," "invocation" or "benediction" will not be printed on programs, appellate courts have found policies unconstitutional that affirmatively required a printed "disclaimer." *See Black*

Horse, 84 F.3d at 1475-79; *Lassonde*, 320 F.3d at 984; *Harris*, 41 F.3d at 455-56. *See also Smith v. Cnty. of Albemarle*, 895 F.2d 953, 958 (4th Cir. 1990)("It remains to be seen whether *any* disclaimer can eliminate the patent aura of government endorsement of religion.").

The prayers are school-endorsed even if "spontaneously initiated." *Santa Fe*, 168 F.3d at 823. The prayers also remain unconstitutionally coercive, independent of endorsement. In *Lassonde*, the Ninth Circuit ruled: "[a]lthough a disclaimer *arguably distances school officials from 'sponsoring' the speech*, it does not change the fact that proselytizing amounts to a religious practice that the school district may not *coerce* other students to participate in, even while looking the other way." 320 F.3d at 984-85 (emphasis added).

Screening/Censoring

Nor does the elimination of screening save the practice. The prayers in *Santa Fe* would not have been screened, yet the Court still found the practice unconstitutional. *See* 530 U.S. at 296, 298 n.6 ("the prayer was to be determined by the students, without scrutiny or preapproval by school officials."). This was so despite the dissenting Fifth Circuit judge's insistence that the policy:

> "is the neutral accommodation of non-coerced, private, religious speech, which allows students, selected by students, to express their personal viewpoints. The state is not involved. *The school board has neither scripted, supervised, endorsed, suggested, nor edited these personal viewpoints*."

Id. at 301 n.11 (quoting dissent).

The Third and Ninth circuits reached the same conclusion in *Black Horse*, *Harris*, and *Collins*. For instance, in *Harris*, it was undisputed, "no school official reviews presentations prior to commencement," but the practice still failed. 41 F.3d at 453. Similarly, in *Collins*, even though "students set the assembly agenda," the student-initiated prayers were still unconstitutional. *Id.* at 454-55. Defendant-Appellee "cannot sanction coerced participation in a religious observance merely by disclaiming responsibility for the content of the ceremony." *Black Horse*, 84 F.3d at 1482.

In *Lassonde* and *Cole*, the Ninth Circuit "did not hold that, in censoring the speech, the school had done more than what was required; rather," it held that "the school district *had to censor* the speech in order to avoid the appearance of government sponsorship of religion." 320 F.3d at 983-84 (emphasis added, citing *Santa Fe*). In *Santa Fe*, the Fifth Circuit similarly reasoned:

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

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

B. The Prayer Policy clearly continues to lack a secular purpose.

Plaintiffs-Appellants demonstrated that the Prayer Policy lacks a secular purpose (P.Br.21-26), which is amply supported by caselaw. *E.g.*, *Santa Fe*, 530 U.S. at 309-10; *Jager*, 862 F.2d at 830 ("In choosing the equal access plan, the School District opted for an alternative that permits religious invocations, which by definition serve religious purposes"). Defendant-Appellee, in turn, has failed to meet its burden. (P.Br.23). Indeed, it ignored the purpose prong altogether, despite later conceding that *Lemon* is controlling. (D.Br.25-26).

Rather than secularize the policy, Defendant-Appellee's litigation maneuvers underscore its religious purpose. It is "simply reaching for any way to keep a religious [practice]." *McCreary Cnty. v. ACLU*, 545 U.S. 844, 865, 871-73 (2005). Even the court recognized Defendant-Appellee "insists on securing every slight remaining loophole of religious demonstration in school[.]"(J.A.886).

The "text of the [2013] policy *alone* reveals that it has an unconstitutional purpose." *Santa Fe*, 530 U.S. at 314 (emphasis added). Defendant-Appellee will not prohibit including "a **prayer** or providing a **religious message** during a **school sponsored event**…as long as the **prayer or message** is student led and initiated[.]"(J.A.36)(emphasis added). It is thus indistinguishable from *Santa Fe*. *Id.* at 298, 314-16.

Independent of the text, in light of a longstanding practice of "regular delivery of a student-led prayer," it is "reasonable to infer that the specific purpose of the [2013] policy [is] to preserve a popular 'state-sponsored religious practice.'" *Id.* at 308-09, 315 (citing *Lee*).[3]

C. The graduation prayers remain unconstitutionally coercive.

Neither of the litigation maneuvers "eliminate the fact that a minority of students are impermissibly coerced to participate in a religious exercise." *Gossage*, 2006 U.S. Dist. LEXIS 34613 at *20. The court's failure to apply the separate coercion test was an error. The Magistrate even recognized the "coercion test" must be applied in the "'school prayer context.'" (J.A.801,n.5). Contrary to Defendant-Appellee's argument (D.Br.26), the coercion test is separate from *Lemon*, as evidenced by *Santa Fe*, *Lee*, and *Mellen.* The Ninth Circuit drove this point home in *Lassonde*, *supra*. Defendant-Appellee inexplicably relies on *Mellen* (D.Br.25), but in *Mellen*, this Court made clear, "coercion has emerged as a prevailing consideration in the school prayer context." 327 F.3d at 370.

In eschewing the coercion test, the court erroneously focused solely on the "*face*" of the position, stating, "[o]n *its face*,…it cannot be said to be coercive."

[3]Notably, school officials will continue to review, and even deliver, other graduation remarks, thus undermining the "free speech" claim. *See N.C. Civil Liberties Union Legal Found. v. Constangy*, 947 F.2d 1145, 1149-50 (4th Cir. 1991)(judge's purpose, to "solemnify and dignify the atmosphere in court," was a sham because he "only recited the prayer in the morning sessions…and not in the afternoon sessions").

(J.A.891)(emphasis added). But the coercion test focuses not on the text of any written policy, but rather, the "*effect*" of any prayer that may be delivered. *Lee*, 505 U.S. at 583 (no written policy). Recall in *Santa Fe*, the Court held that independent of the *written policy* and the voluntariness of the games "the delivery of a pregame prayer has the *improper effect* of coercing those present." 530 U.S. at 310-12 (emphasis added).

As in *Santa Fe*, the policy fails the coercion test even if no "student were ever to offer a religious message." *Id.* at 313-16. Knowing that a prayer might be delivered, students are forced to make the "difficult choice" between "being exposed to a religious ritual" or "not attend an event honoring…[them]." *Id.* at 292; *M.B. v. Rankin Cnty. Sch. Dist.*, 2015 U.S. Dist. LEXIS 117289, *16 (S.D. Miss. July 10, 2015).

III. THE COURT ERRED BY FOCUSING SOLELY ON THE FACE OF THE POLICY AND BY RELYING ON *ADLER-I.*

In drawing an arbitrary distinction between prayers prior to 2013 and after, the court relied solely on *Adler v. Duval Cnty. Sch. Bd.*, 206 F.3d 1070 (11th Cir. 2000)(*Adler-I*), for its contention that Plaintiffs-Appellants demonstrated no "serious evidentiary basis to expect that students speaking at graduation will enter into prayer…in a way that implies school sponsorship." (J.A.889). This conclusion is patently erroneous because it: (1) contravenes *Santa Fe* and *Wallace*; (2) overlooks the fact that the policy is not facially-neutral; (3) rests on the erroneous

assumption that the two minor litigation maneuvers remedied *all* unconstitutional aspects of the practice; (4) focuses solely on the *face* of the policy while ignoring its practical effects; (5) relies exclusively upon *Adler-I*, which applied a test that was subsequently rejected by the Supreme Court; and (6) trivializes prayers that were delivered in 2014.

A. The policy is unconstitutional even if no prayers were ever delivered.

In *Santa Fe*, the Court held the policy unconstitutional even though it had yet to be *implemented*; unlike here, there was no evidence whatsoever that prayers would *in fact* be delivered. 530 U.S. at 313-16. That school made the *very same* argument as Defendant-Appellee (D.Br.28), that the "challenge must fail because 'Santa Fe's Football Policy cannot be invalidated on the basis of some 'possibility or even likelihood' of an unconstitutional application.'" *Id.* The school averred, "until a student actually delivers a solemnizing message…there can be no certainty that any of the statements or invocations will be religious." *Id.*

The Court agreed there was "no certainty" but held, "even if no Santa Fe High School student were ever to offer a religious message, the [new] policy fails." *Id.* The "award of that power *alone*, regardless of the students' ultimate use of it, is not acceptable." *Id.* (emphasis added). The Court concluded it "need not wait for the inevitable to confirm and magnify the constitutional injury." *Id.*

Here, unlike in *Santa Fe*, the inevitable has happened, as evidenced by a mere sample of 2014 and 2015 programs. This is significant because it is Defendant-Appellee's "new position" that programs will no longer mention prayer.

The court's ruling also contravenes *Wallace v. Jaffree*, 472 U.S. 38, 41-42, 60 (1985), where the Court invalidated Alabama's as yet *unimplemented* and voluntary "moment of silence" statute, which authorized "a period of silence for 'meditation or voluntary prayer.'" Like *Santa Fe*, it was possible no students would ever pray. *Id.* Nevertheless, the language "'or voluntary prayer' indicate[d] that the State intended to characterize prayer as a favored practice." *Id*. The circumstances here are more egregious. "During a moment of silence, a student who objects to prayer is left to his or her own thoughts, and is not compelled to listen to the prayers or thoughts of others." *Id.* at 72 (O'Connor J., concurring). *Cf. Page v. Lexington Cnty. Sch. Dist. One*, 2007 U.S. Dist. LEXIS 53233, *36-37 n.24 (D.S.C. 2007)("Here, the speaker has not literally been provided with a platform and a captive audience (as would be the case for a commencement speaker).").

Lastly, the purpose prong is violated regardless of the "possible applications of the [policy]." *Santa Fe*, 530 U.S. at 314. The dissent in *Adler v. Duval Cnty. Sch. Bd.*, 250 F.3d 1330, 1343 (11th Cir. 2001)(Kravitch, J., dissenting) aptly

understood: "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."

B. The court erred relying solely on the "face" of the statement.

The district court erred in focusing solely upon the "face" of the position while remaining "'studiously oblivious to [its] effect.'" *Santa Fe*, 530 U.S. at 307 n.21 (citation omitted)(J.A.891-92). The court blindly followed *Adler* where the Eleventh Circuit "***expressly*** declined to consider…any as-applied objection." 250 F.3d at 1332 n.1 (emphasis added). In so doing, the court ignored *Santa Fe*, *Lee*, and *Joyner*, which hold that even if a policy is facially neutral, "[the court] cannot turn a blind eye to the practical effects of the invocations." 653 F.3d at 348,354. This makes sense because students "hear the prayers, not the policy." *Id.* (P.Br.33-36). Properly following *Santa Fe*, courts within this jurisdiction have evaluated graduation prayer policies "as written *and as applied.*" *Deveney v. Bd. of Educ.*, 231 F. Supp. 2d 483, 487 (S.D. W. Va. 2002)(emphasis added).

The court in *Adler-I* looked to the ratio of prayers *because* it was considering a *facial* challenge only. 206 F.3d at 1083-84. In refusing to apply the coercion test, the Eleventh Circuit explained, "this argument would be far better suited to an as-applied challenge." *Id.* (citing *U.S. v. Salerno*, 481 U.S. 739 (1987)). Importantly, the "*Salerno* standard in a facial challenge" employed by *Adler-I* and by the court below was "unequivocally" found inapposite in the "Establishment Clause area" in

Santa Fe. *Selman v. Cobb Cnty. Sch. Dist.*, 390 F. Supp. 2d 1286, 1299 (N.D. Ga. 2005); *Adler*, 250 F.3d at 1347-48 (Carnes, J., dissenting).

For similar reasons, Defendant-Appellee's argument that it "does not have a 'Prayer Policy'" must be rejected. (D.Br.15) "For the purpose of an Establishment Clause violation, 'a government policy need not be formal, written, or approved by an official body[.]'" *Am. Humanist Ass'n v. U.S.*, 63 F. Supp. 3d 1274, 1282 (D. Or. 2014)(citation omitted). Many relevant cases including *Lee*, *Mellen*, *Collins*, and *Harris*, did not involve any formal written policy.

Finally, the 2014 prayers are not "*de minimis*[.]" (J.A.896). *See Lee*, 505 U.S. at 594; *Santa Fe*, 530 U.S. at 309. The Eleventh Circuit in *Holloman v. Harland*, 370 F.3d 1252, 1288-89 (11th Cir. 2004), admonished the district court for being "willing to overlook the fact that [the teacher] would frequently 'slip[] up' by using the word 'pray' instead of the words 'moment of silence[.]'" The court explained, "such labels" are "quite important in determining not only the purpose behind the actions at issue" but also their "likely effects." *Id.*

IV. *ADLER* IS AN OUTLIER THAT DEFIES BINDING PRECEDENT.

A. *Adler* conflicts with *Santa Fe* and this Court's jurisprudence.

The fact that *Adler* refused to consider the policy as-applied, *alone*, puts it diametrically at odds with *Joyner* and *Santa Fe*, *supra*. *Compare Santa Fe*, 530 U.S. at 307 ("The actual or perceived endorsement of the message, moreover, is

established by factors beyond just the text of the policy."); *id.* at n.21 (practice would fail "[e]ven if the plain language…were facially neutral"); *id.* at 315 ("Our examination…[must] not stop at an analysis of the text of the policy."), *with Adler*, 250 F.3d at 1332 (focusing solely "*on its face*"); *id.* at n.1. Four justices in a strong dissent properly maintained that the policy was unconstitutional pursuant to *Santa Fe* and that the majority erred by "considering only the terms of the policy itself." *Id.* at 1344-45 (Kravitch, J., dissenting).

In *Gossage*, even though the policy mirrored *Adler*, the court found the policy "unconstitutional in light of *Santa Fe*." 2006 U.S. Dist. LEXIS 34613, at *10-14. Another court observed, "*Adler* conflicts with the Ninth Circuit decision in *Cole*." *Newdow v. Bush*, 2001 U.S. Dist. LEXIS 25936, *10 n.5 (E.D. Cal. 2001). *See also Corder v. Lewis Palmer Sch. Dist.*, 568 F. Supp. 2d 1237, 1245-46 (D. Colo. 2008)("I disagree that the analysis of *Tinker* or *Adler*…should apply.").

Not only is *Adler* irreconcilable with *Santa Fe*, but it also misinterpreted *Santa Fe.* Critical to *Adler*'s conclusion was its mistaken contention that "*Santa Fe* only addresses one part of the *Lemon* test: whether the policy at issue has a secular purpose." 250 F.3d at 1339. However, *Santa Fe* also clearly held that the policy failed the effect prong of *Lemon*. 530 U.S. at 305-10.

B. *Adler* is distinguishable.

Adler is materially factually distinguishable. (P.Br.44-45). To reiterate, *schools* select graduation speakers here whereas *Adler* and even *Santa Fe* involved "a student speaker not chosen by the school." *Corder*, 568 F. Supp. 2d at 1246 n.5. This distinction is important. *See Santa Fe*, 530 U.S. at 306; *Corder*, 566 F.3d at 1229-30.(P.Br.44). In *Newman v. City of East Point*, 181 F. Supp. 2d 1374, 1379-80 (N.D. Ga. 2002), the court explained: "the Eleventh Circuit noted several *key facts* that supported its decision. The court observed that the policy did not contain *any restriction on the identity of the student speaker*." (emphasis added).

Defendant-Appellee does not even limit its selection process to objective criteria, as it allows teachers to select speakers based on "citizenship, or public speaking ability." (D.Br.23)(Doc.46-1,pp.8-10). And again, the Prayer Policy is not facially neutral; it expressly authorizes "prayer" and "religious message[s]." (J.A.36). In contrast, "the Duval County policy refers to 'messages' only," not "prayer." *Gossage*, 2006 U.S. Dist. LEXIS 34613, at *13.

Defendant-Appellee practically concedes an *Adler* policy is unconstitutional. It distinguishes *Gossage* on the ground that it involved an "election," admitting it "resulted in an unconstitutional endorsement of prayer." (D.Br.16). Yet *Adler* also involved a majoritarian "election," 250 F.3d at 1332,1338, and the policy in *Gossage*, was *identical* to *Adler*. (P.Br.36)(Doc.46-1,p.17-18).

C. *Adler* is unpersuasive.

Adler is hardly persuasive, which is underscored by the fact that it has only been cited 22 times (per *Shepard's*®), *inclusive* of the decision below, despite being decided 15 years ago. Not a single case has relied upon *Adler* to *uphold* a graduation policy, except for the decision below.

Of the few graduation prayer cases that even mentioned *Adler*, six expressly rejected or distinguished it: *Corder* (Tenth Circuit *and* district court), *Gossage*, *Deveney*, *Appenheimer*, and *Workman*; *cf. S.D. v. St. Johns Cnty. Sch. Dist.*, 632 F. Supp. 2d 1085, 1091-92 (M.D. Fla. 2009). At least six graduation prayer cases decided since *Adler* ignored it completely, including *Lassonde*, *Nurre*, *Ashby*, *Skarin*, *A.M. v. Taconic Hills Cent. Sch. Dist.*, 510 Fed. Appx. 3 (2d Cir. 2013) and *M.B.*, 2015 U.S. Dist. LEXIS 117289.(P.Br.17-18).

At least ten additional cases involving student graduation speech or school prayer ignored *Adler*, including but not limited to: *Busch v. Marple Newtown Sch. Dist.*, 567 F.3d 89 (3d Cir. 2009); *Griffith v. Caney Valley Pub. Sch.*, 2015 U.S. Dist. LEXIS 66059 (N.D. Okla. May 20, 2015); *Dreaming Bear v. Fleming*, 714 F. Supp. 2d 972 (D.S.D. 2010); *Golden v. Rossford Exempted Vill. Sch. Dist.*, 445 F. Supp. 2d 820 (N.D. Ohio 2006).

Tellingly, the Eleventh Circuit cited *Adler* in only four cases, three of which were for unrelated purposes. The fourth, *Holloman*, undermines *Adler*, *infra. Adler*

has only been cited by Eleventh Circuit district courts in six cases, four of which were for unrelated purposes. The remaining two found *Adler* unpersuasive, holding the government activity violated the Establishment Clause (*S.D.* and *Newman*).

D. The Eleventh Circuit has effectively abrogated *Adler.*

Post-*Adler* Eleventh Circuit cases effectively gut the core of the decision. In *Pelphrey*, the court held that prayers delivered by private citizens pursuant to a facially neutral policy were government speech, even though the government did not "compose or censor the prayers." 547 F.3d at 1267, 1271. In *Holloman*, the court invalidated a teacher's unwritten practice of conducting a moment of silence, recognizing that a policy "as actually implemented," must "not have the effect of promoting or inhibiting religion." 370 F.3d at 1284-91.

Finally, *Adler* was substantially abrogated by *Bannon*, where the Eleventh Circuit held that student-initiated, student-painted religious murals were "school sponsored" even though they were not pre-reviewed. 387 F.3d at 1214-15. The court found "the murals constituted school-sponsored expression within the meaning of *Hazelwood*, and "that "censorship" of the speech "was rationally related to the legitimate pedagogical concern of avoiding the religious controversy." *Id.* at 1217. In contrast, *Adler* implicitly and erroneously relied on *Tinker* rather than *Hazelwood*. *See Corder*, 566 F.3d at 1229 n.5.

Bannon rather than *Adler* is consistent with *free speech* challenges in the graduation context, which apply *Hazelwood*, not *Tinker*, because a graduation is "school-sponsored." *See A.M.*, 510 F. Appx. at 7-8; *Corder*, 566 F.3d at 1229-30; *Griffith*, 2015 U.S. Dist. LEXIS 66059, at *8; *Fleming*, 714 F. Supp. 2d at 988-89; *Lundberg v. W. Monona Cmty. Sch. Dist.*, 731 F. Supp. 331, 338-39 (N.D. Iowa 1989)("While the school in *Tinker* had no fear that others could attribute the students' acts of self-expression to the school's position…prayer at a school-run function may work to stamp the belief in God with the imprimatur of the school").[4]

E. *Norfolk* and *Chandler* are inapposite.

Attempting to prove *Adler* is not an outlier, Defendant-Appellee avers, "Eighth and Eleventh Circuits" have "declined to enjoin school districts from allowing private religious speech." (D.Br.17). This is highly misleading.(P.Br.48-49). The issue in *Doe v. Sch. Dist. of Norfolk*, 340 F.3d 605, 613-15 (8th Cir. 2003) was whether a district could be liable under *Monell* for the actions of a rogue parent/board member who "was acting in circumvention of the School District's policy" *not* to deliver prayers. The court took pains to explain that the "*past* policy of allowing a[] [student-led] Invocation and Benediction…was never before the district court and similarly is not before us." *Id.* at 610 (emphasis added).

[4]*See also Boring v. Buncombe Cnty. Bd. of Educ.*, 136 F.3d 364, 368 (4th Cir. 1998)(play was school-sponsored and thus, governed by *Hazelwood*).

Chandler v. Siegelman, 230 F.3d 1313, 1316 (11th Cir. 2000), which did not directly involve graduations, is also inapposite. An injunction was held overbroad because "it eliminated any possibility of private student religious speech *under any circumstances* other than silently." *Id.* (emphasis added). *See Holloman*, 370 F.3d at 1287 (interpreting *Chandler* narrowly).

V. DEFENDANT-APPELLEE FAILS TO DISTINGUISH *SANTA FE* AND GRADUATION PRAYER CASES.

The primary, if not exclusive, basis upon which Defendant-Appellee attempts to distinguish *Santa Fe*, *Black Horse*, *Gearon*, and *Gossage* is that these cases involved an "election." (D.Br.15-16). But Defendant-Appellee utterly fails to explain why this makes its policy more acceptable. (P.Br.37-40).

To reiterate, under Defendant-Appellee's policy, "students are selected to speak by teachers and school administrators." (D.Br.15). Thus, the degree of state involvement is even greater here than in *Santa Fe*, where the "dual election" partially distanced the school from the prayers. 530 U.S. at 306.

That some schools select speakers based on GPA (D.Br.15) furthers the school endorsement. In *Lassonde*, the Ninth Circuit explained: "[s]peakers were selected by the school solely because of their academic achievement; that is, *the school endorsed and sponsored* the speakers as representative examples of the success of the school's own educational mission." 320 F.3d at 984 (emphasis added).

And, insofar as many schools select students based on "class office" (J.A.883-84), the policy is indistinguishable from *Santa Fe*, as officers are the product of a "majority election." 530 U.S. at 306-08. Notably, Defendant-Appellee censors "messages" that "create a disturbance." (J.A.888). This "ensures that only those messages deemed 'appropriate' under the District's policy may be delivered." *Id*. at 304.

Regardless, the Court made abundantly clear that the "election" was *only* relevant to the *facial* analysis, and even then, not dispositive. *Id.* at 316-17. The Court also noted the "'myriad'" of ways in which the Establishment Clause is violated: "*One* is the mere passage by the District of a policy that has the purpose and perception of government establishment of religion. *Another* is the implementation of a governmental electoral process[.]" *Id.* at 313-14 (emphasis added). The Court reiterated that these are "different, yet *equally important*, constitutional injuries." *Id.* (emphasis added).

In fact, the Fifth Circuit in *Santa Fe* rejected the very argument asserted by Defendant-Appellee, declaring: "The distinction…is simply one without difference. ***Regardless of whether the prayers are selected by vote or spontaneously initiated***…school officials are present and have the authority to stop the prayers." 168 F.3d at 823 (emphasis added).

The only other basis upon which Defendant-Appellee attempts to distinguish *Santa Fe* is its contention that the Prayer Policy does not "suggest that students chosen to speak offer a prayer or religious message." (D.Br.12). But *Santa Fe* is indistinguishable. *Compare* 530 U.S. at 298, 306 ("'messages' and 'statements' as well as 'invocations.'"), *with* (J.A.36)("prayer" and "religious messages.")

Noticeably absent from Defendant-Appellee's brief is any mention, let alone discussion, of many highly persuasive cases (P.Br.34-36) including *Lassonde*, *Collins*, *Cole*, *Corder*, *Nurre*, *Harris*, *Workman, Deveney*, *Skarin*, *Appenheimer*, *Lundberg*, *Graham*, and *Sands.* Defendant-Appellee's omission of these cases is not surprising because many involved practices that had "'*little or no [state] involvement'* in the process resulting in prayer" and were still held unconstitutional. *Harris*, 41 F.3d at 452-53 (emphasis added). In *Harris*, for example, it was "the senior students themselves…who determine[d] every element of their graduations." *Id.* Courts have found "the reasoning of [*Harris*]" to be *particularly* "persuasive." *Black Horse*, 84 F.3d at 1483. *See Santa Fe*, 168 F.3d at 819; *Carlino v. Gloucester City High Sch.*, 57 F. Supp. 2d 1, 22 (D.N.J. 1999), *aff'd*, 44 F. App'x 599 (3d Cir. 2002); *Appenheimer v. Sch. Bd. of Washington Cmty. High Sch. Dist.*, 2001 WL 1885834, at *8 (C.D. Ill. 2001).

VI. THE CHAPEL POLICY IS UNCONSTITUTIONAL.

Plaintiffs-Appellants demonstrated that the Chapel Policy is unconstitutional (P.Br.55-61) and attempt not to be repetitive here. Plaintiffs-Appellants have since unearthed evidence revealing that the policy expands to numerous schools and applies to a variety of school-sponsored events. (P.MTD.12-16).

The most noteworthy is the annual District-wide Marching Band Exhibition, held at NGU since 2012, when Defendant-Appellee began holding MVES ceremonies in Turner Chapel. It is a "collaborative event between NGU and the school district" and has opens with adult-led Christian prayer. (*Id.*). Defendant-Appellee also began using Turner Chapel for Tigerville Elementary holiday concerts.(J.A.417).

Additionally, Defendant-Appellee utilizes Taylors First Baptist Church for Brushy Creek Elementary graduations (since 2009), Fairview Baptist Church for MVES *and* Taylors Elementary Christmas performances, and Brookwood Church for Bell's Crossing Elementary and BMCCHS graduations (P.MTD.12-16).[5]

Defendant-Appellee intends to use Christian venues indefinitely. Thus, this case is markedly more egregious than *Elmbrook* and *Enfield*, which were limited to a single event held at a single church, where prayers were not delivered, and where the schools had already commenced construction to return the events to secular

[5] Defendant-Appellee failed to disclose these in discovery.(J.A.371-72).

school facilities.(P.MTD.15). Nor is this a case "where there was no other suitable auditorium or place available." *Miller v. Cooper*, 56 N.M. 355, 357 (1952). And even if it were, that would not justify Defendant-Appellee's partnership with NGU for the Exhibition. The completely unnecessary involvement with NGU speaks volumes to Defendant-Appellee's religious purpose and actual and perceived endorsement of religion.

Although presenting a matter of first impression (D.Br.33), this Court has invalidated practices far less flagrant than the Chapel Policy. For instance, in *Smith*, this Court ruled that a privately donated crèche violated the Establishment Clause, even though it was temporary, accompanied by a disclaimer, and "involved no expenditure of County funds." 895 F.2d at 955-58. In *Hall v. Bradshaw*, 630 F.2d 1018, 1019-21 n.1 (4th Cir. 1980), this Court held that a seemingly "innocuous" prayer on a 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."

A. The Chapel Policy fails the coercion test.

Ignoring the abundance of federal cases applying the coercion analysis to this very issue (P.Br.60-61)(Appeal:13-2502,Doc.14,pp.46-48), Defendant-Appellee argues the coercion test is inapplicable because Turner Chapel is a "passive display." (D.Br.35). But courts have even held passive "displays"

unconstitutional on coercion grounds. *E.g.*, *Ahlquist v. City of Cranston*, 840 F. Supp. 2d 507, 524 (D. R.I. 2012).

Turner Chapel is far from *passive*; "evangelism" is a focus. (J.A.16;121). Unlike a stone monument situated in a park, students are compelled to attend graduations. *Lee*, 505 U.S. at 586. To some, entering a church is a "religious act in itself." *Does v. Enfield Pub. Sch.*, 716 F. Supp. 2d 172, 200-01 (D. Conn. 2010). For others, "entering a Christian church is prohibited." *Id*.

Tellingly, the leading case on the issue, *Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 851 (7th Cir. 2012)(en banc) applied the coercion test. (P.Br.61). This policy is even more coercive than *Elmbrook*, *Enfield*, *Lemke* and *Spacco*, because no prayers were delivered in those cases. (P.Br.60-61). In *Harris*, the court explained: "The prayers said in this case are indistinguishable from those that might be said in a church service. If said there, no one would dispute that their intent and primary effect was to advance religion." 41 F.3d at 458.

B. The Chapel Policy fails the *Lemon* test.

There is little room to distinguish *Elmbrook*, except that the practice here is even more blatantly unconstitutional.(P.Br.55-58). Defendant-Appellee states: "although worship services are held in Turner Chapel, it is not a traditional 'church sanctuary.'" (D.Br.39). However, the venue in *Elmbrook* was not a "traditional church sanctuary." 687 F.3d at 844 n.1. The room was "called the 'auditorium.'"

Id. Further, Defendant-Appellee omits venues it uses for other events, which are "traditional" churches with *pews* and alters. (P.MTD.13-14).

Next, Defendant-Appellee avers that Turner Chapel "has no religious materials" either "in the lobby or inside the seating area." (D.Br.39). With "Christ Makes the Difference" welcoming visitors *inside the lobby*, this claim lacks credibility. (P.Br.8-9)(J.A.691-730). Even the Magistrate recognized: "In this case, religious imagery was easily visible and the overall environment was clearly Christian[.]"(J.A.807). Defendant-Appellee also omits numerous crosses and proselytizing Christian displays that the Does encountered *en route* to and standing *directly* outside Turner Chapel. (J.A.203-209,741).

The Magistrate erroneously relied upon Defendant-Appellee's assertion that no NGU employees "encountered students and their families." (J.A.806)(D.Br.39). While this would be irrelevant even if true (J.A.833-36), it is misleading because it ignores the Exhibition where NGU faculty manage "informational tables" and NGU's President provides "a warm welcome and prayer." (P.MTD.12-16;Ex.3). Having shown that there *is* an "ongoing relationship" between the District and NGU (D.Br.42), the *Lemon* test is plainly violated.

Because *Elmbrook* is indistinguishable, Defendant-Appellee argues it is "not consistent with Fourth Circuit precedent" because this Court has "upheld the converse–access to school facilities." (D.Br.37). But cases involving non-school

events are inapposite, *supra*. So too are the few cases involving polling places. *See Elmbrook*, 687 F.3d at 843. (Appeal:13-2502,Doc.31,n.5). *ACLU-TN* and *Porta* are also distinguishable because in both, there was "no religious symbols or imagery of any kind." (*Id*.p.25). *Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs*, 788 F.3d 580, 590 (6th Cir. 2015) is also inapposite. A "budgetary crisis forced the Board to close its alternative school and, needing to accommodate the alternative-school students on short notice," selected a "state-certified alternative school." *Id.* That district always intended to, and did in fact, return its students to public schools. *Id.* at 585,590. The court also emphasized: "attendance was not required and the assemblies did not carry anything like the monumental life importance that makes attendance at a high-school graduation close to mandatory." *Id.* at 592-93.

VII. PLAINTIFFS-APPELLANTS HAVE STANDING.

Plaintiffs-Appellants have established that AHA has standing to seek prospective relief against both policies.(P.Br.51-55)(P.MTD.1-20). Defendant-Appellee merely cites *Summers v. Earth Island Institute*, 555 U.S. 488, 495 (2009), for the notion that "[i]f respondents had not met the challenge to their standing *at the time of judgment*, they could not remedy the defect retroactively." (Doc.45)(emphasis added).

But *at the time of judgment*, Plaintiffs-Appellants had standing to enjoin the Prayer Policy (J.A.887), which Defendant-Appellee concedes. (Doc.30-1). Does

also had taxpayer standing to enjoin the Chapel Policy, if not direct standing due to its District-wide scope. (P.Br.52-55)(P.MTD.9 n.11). AHA's other members only became relevant *after* judgment. (P.MTD.7-16).

At a minimum, Does' nominal damages claim is not moot. (P.MTD.2-7). Defendant-Appellee simply asserts that the complaint did not plead nominal damages for both policies.(Doc.45). Yet the complaint seeks "damages" and clearly describes two separate practices. (J.A.22)(P.MTD.5). "Nominal damages need not be specifically pleaded where a party alleges a claim for general damages." *Liberty Mut. Fire Ins. Co. v. JT Walker Indus*., 554 F. Appx. 176, 190 (4th Cir. 2014). And in a claim "for the violation of constitutionally guaranteed rights…nominal damages may be presumed." *Tracy v. Robbins*, 40 F.R.D. 108, 113 (D.S.C. 1966).

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellants respectfully request that the Court REVERSE with instructions to enter judgment in favor of Plaintiffs-Appellants on all claims, and REMAND to determine the appropriate amount of attorney's fees and costs.

Respectfully submitted:

October 28, 2015

s/ Monica Lynn Miller
Monica Lynn Miller

American Humanist Association
1777 T Street, N.W., Washington, D.C. 20009
phone (202) 238-9088 / facsimile (202) 238-9003
mmiller@americanhumanist.org
CA 288343 / DC 101625

Aaron J. Kozloski, Fed. ID No. 9510
Capitol Counsel, LLC
P.O. Box 1996, Lexington, SC 29071
phone 803-748-1320 / facsimile 888-513-6021
aaron@capitolcounsel.us

COUNSEL FOR PLAINTIFFS-APPELLANTS

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,994 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft® Word 12.2.8 in 14-point font size in Times New Roman.

October 28, 2015

s/ Monica Lynn Miller
Monica Lynn Miller
American Humanist Association
1777 T Street, N.W., Washington, D.C. 20009
phone (202) 238-9088 / facsimile (202) 238-9003
mmiller@americanhumanist.org
CA 288343 / DC 101625

Aaron J. Kozloski, Fed. ID No. 9510
Capitol Counsel, LLC
P.O. Box 1996, Lexington, SC 29071
phone 803-748-1320 / facsimile 888-513-6021
aaron@capitolcounsel.us

COUNSEL FOR PLAINTIFFS-APPELLANTS

CERTIFICATE OF SERVICE

I certify that on October 28, 2015, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

October 28, 2015

s/ Monica Lynn Miller
Monica Lynn Miller
American Humanist Association
1777 T Street, N.W., Washington, D.C. 20009
phone (202) 238-9088 / facsimile (202) 238-9003
mmiller@americanhumanist.org
CA 288343 / DC 101625

Aaron J. Kozloski, Fed. ID No. 9510
Capitol Counsel, LLC
P.O. Box 1996, Lexington, SC 29071
phone 803-748-1320 / facsimile 888-513-6021
aaron@capitolcounsel.us

COUNSEL FOR PLAINTIFFS-APPELLANTS