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Dear Members of the Board of Education:

North Carolina recently enacted SB 370, which purports to authorize certain types of religious activity in public schools. One section, entitled "Religious activity for school personnel," provides that "Local boards of education may not prohibit school personnel from participating in religious activities on school grounds that are initiated by students at reasonable times before or after the instructional day so long as such activities are voluntary for all parties and do not conflict with the responsibilities or assignments of such personnel." N.C. Gen. Stat. § 115C-407.32(b). Whatever the direction from this North Carolina statute, the Establishment Clause of the First Amendment to the U.S. Constitution prohibits school personnel from leading or participating in student religious activity, and the school district's obligations under the First Amendment trump those arising from state law. Thus, to avoid legal liability for violations of the U.S. Constitution, please ensure that your school district officials do not lead or participate in religious activities at school-sponsored activities or events.

It is elementary that a state law cannot override the commands of the federal Establishment Clause. The U.S. "Constitution and the laws passed pursuant to it are the supreme laws of the land, binding alike upon states, courts, and the people, anything in the Constitution or Laws of any State to the contrary notwithstanding." *Testa v. Katt*, 330 U.S. 386, 391 (1947) (quotation marks omitted). Under the U.S. Constitution, public schools must avoid exerting even "subtle coercive pressure" on students to participate in religious activity, *Lee v. Weisman*, 505 U.S. 577, 592 (1992), and must avoid the appearance of endorsing religion or religious activity, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 305 (2000). Because students are impressionable and their attendance at school is mandatory, courts are "particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." *Edwards v. Aguillard*, 482 U.S. 578, 583–84 (1987). Parents—not school officials—are responsible for the religious upbringing of their children.

In light of these restrictions, courts interpreting the Establishment Clause have sharply limited public-school faculty and staff participation in student religious activity. *First*, although the North Carolina statute authorizes school officials to participate "before or after the instructional day," courts have prohibited school officials from leading or joining in student religious activity after instructional time: "teachers do not cease acting as teachers each time the bell rings or the

conversation moves beyond the narrow topic of curricular instruction." *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 967–68 (9th Cir. 2011). Indeed, "because of the position of trust and authority they hold and the impressionable young minds with which they interact, teachers necessarily act [in their capacity as such] when at school or a school function, in the general presence of students, in a capacity one might reasonably view as official." *Id.* at 968.

These rules also apply to school officials such as coaches and extracurricular advisors, even outside instructional time. For instance, in *Borden v. School District of Township of East Brunswick*, 523 F.3d 153 (3d Cir. 2008), the Third Circuit held that a football coach's participation in student-led prayer "cross[ed] the line and constitute[d] an unconstitutional endorsement of religion." *Id.* at 178. Likewise, in *Doe v. Duncanville Independent School District*, 70 F.3d 402, 406 (5th Cir. 1995), the Fifth Circuit held that coach participation in prayer at high-school basketball practices and games "signal[ed] an unconstitutional endorsement of religion." *Id.* at 406. Courts have also held that a school district violates the Establishment Clause by permitting band instructors to "lead[ ] the band in prayer at mandatory rehearsals and performances." *Steele v. Van Buren Pub. Sch. Dist.*, 845 F.2d 1492, 1493–94 (8th Cir. 1988). These restrictions apply even if school officials involve themselves only by "bow[ing] [their] head[s] and tak[ing] a knee while students pray." *Borden*, 523 F.3d at 175.

*Second*, although the North Carolina statute applies only "so long as [religious] activities are voluntary," the restrictions of the Establishment Clause apply even when student participation in religious activity is nominally "voluntary." Teachers, coaches, and other school officials are role models. Schools possess "great authority and coercive power … because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure." *Aguillard*, 482 U.S. at 584. The Supreme Court has recognized that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary schools," and that "prayer exercises in public schools carry a particular risk of indirect coercion." *Lee*, 505 U.S. at 592. Here, students will feel extra pressure to participate in religious exercises when school officials are leading or participating in them—even outside of the classroom.

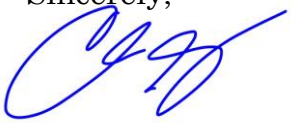
Teachers may have only limited involvement in student religious activity, and in only narrow circumstances at that. The federal Equal Access Act permits faculty to be present at student-sponsored and student-led religious clubs in public secondary schools—but only "in a nonparticipatory capacity". 20 U.S.C. § 4071(c)(3). In *Wigg v. Sioux Falls School District 49-5*, 382 F.3d 807 (8th Cir. 2004), the Eighth Circuit permitted a teacher to participate, as a private citizen, in a religious after-school club where the club was sponsored by an outside organization—not the school—and participation was limited to students with parental permission. *See id.* at 815. It is unclear whether the Fourth Circuit, whose decisions govern North Carolina, would permit teachers to participate in these circumstances; even if the Fourth Circuit

would reach the same result, these cases are the exception, not the rule, and "school districts … must tread carefully in a constitutional mine field." *Id.* at 815.

In sum, the North Carolina statute conflicts with the school district's responsibilities under the First Amendment's Establishment Clause. And because the school district's ultimate obligation is to the U.S. Constitution, if teachers take actions like those authorized by the North Carolina statute, the school district could be subject to legal liability under federal law. We trust, then, that the school district will neither encourage nor permit faculty and staff participation in student religious activity.

If you have any questions, please contact Charles Gokey at (202) 466-3234 or gokey@au.org.

Sincerely,



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