

# FREEDOM FROM RELIGION *foundation*

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SENT VIA U.S. MAIL AND EMAIL: [fdupchurch@ubulaw.com](mailto:fdupchurch@ubulaw.com)

Frank D. Upchurch III  
Upchurch, Bailey and Upchurch, P.A.  
780 North Ponce de Leon Boulevard (32084)  
Post Office Drawer 3007  
St. Augustine, FL 32085-3007

Re: Illegal Prayer at Graduation

Dear Mr. Upchurch:

I am writing on behalf the Freedom From Religion Foundation (FFRF) to oppose the St. Johns County School Board's desire to adopt a policy that would encourage prayer at graduation ceremonies. FFRF is a national nonprofit organization that works to protect the constitutional principle of separation between state and church. We represent over 19,000 members including 900 in Florida and a local chapter, the Central Florida Freethought Community. Several local citizens asked us to oppose this policy.

It is our information and understanding that the St. Johns County School Board (Board) is considering a policy that would encourage student led prayers at graduation ceremonies under Fla. Stat. Ann. § 1001.432 (2012). We urge the Board to avoid such a policy.

In *Adler*, the Eleventh Circuit upheld a school system's policy of permitting a graduating student, elected by her class, to deliver an unrestricted message of her choice at the graduation ceremony only because "school officials ha[d] no power to direct that a message (let alone a religious message) be delivered at graduation ceremonies, or control in any way the content of any message actually to be delivered." 250 F.3d 1330, 1331-33 (11<sup>th</sup> Cir. 2001).

Fla. Stat. Ann. §1001.432(1)(a)(2) echoes the requirement: "The student volunteers shall be solely responsible for the preparation and content of the inspirational message."

The Board with two major problems. First, the school will lose all control over the message. Second, the nascent history of the putative policy shows an explicit intent to have prayer in school. The Board cannot escape this history and the religious purpose puts the policy firmly in Establishment Clause, not free speech, jurisprudence.

## Unrestricted and unrestrictable student speech.

Once the Board passes this policy it will have no ability to police student speech. Students could seize the opportunity to talk about anything: sex, gay marriage, politics, or religion.

They could denigrate other religions and declare that only Christians will go to Heaven—or that only Muslims, or Buddhists, or atheists will have an eternal reward.

Nor is it certain that students will choose to give a prayer. In fact, 1-in-3 Americans under the age of 29 are not religious.<sup>1</sup> The Freedom From Religion Foundation annually distributes thousands of dollars in scholarships and Student Activist Awards to students who stand up for atheism or state/church separation. We will publicize this award to St. Johns County students if the Board passes this policy to incentivize a freethought message and discourage prayers. Moreover, if the students do choose prayer it will suggest pressure from faculty or other religious adults and reinforce the history of the policy in the first place.

The religious purpose and history of this policy is inescapable

The *Adler* Court did not address at the “as-applied” challenge, they simply looked at the language of the policy. Any case involving this Board will necessarily look at the history of this policy.

The push to have this policy is clearly religious; in fact, the push is not for an open forum but graduation prayer. The supporters’ buttons, call for “Graduation Prayer” with praying hands next to a mortarboard cap and diploma. It also calls for “Freedom From Atheism.” A copy is enclosed.

One parent said, “Prayer needs to be back and reinstated in graduation.”<sup>2</sup> Another is quoted, “prove that prayer in school and public areas by citizens or public officials was” the Founding Fathers’ intent.<sup>3</sup> Yet another decided to go to the Board meeting to show her support because she “firmly believes we need God.”<sup>4</sup>

The Board cannot escape this history. If this policy actually has the desired effect—graduation prayer—and the case comes before a court, that court will examine the statements made by the Board and its supporters to determine the purpose of this policy. In *Niemotko v. State of Md*, Maryland refused to grant Jehovah’s Witnesses permits to exercise their First Amendment rights in a park. 340 U.S. 268 (1951). The Court examined statements made by the Mayor and Park Commissioner and the minutes of the hearings to reach the “inescapable” conclusion “that the use of the park was denied because of the City Council’s dislike for or disagreement with the Witnesses or their views. The right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments, has a firmer foundation than the whims or personal opinions of a local governing body.” *Id.*, at 272. If this policy is adopted, its religious intent cannot be hidden.

Under the Establishment Clause, the constitutionality of government action depends on the history of those actions. “One consequence of taking account of the purpose underlying past actions is that the same government action may be constitutional if taken in the first instance

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<sup>1</sup> “Nones on the Rise: One-in-Five Adults Have No Religious Affiliation,” Pew Research Center, The Pew Forum on Religion & Public Life (October 9, 2012) available at <http://www.pewforum.org/Unaffiliated/nones-on-the-rise.aspx>

<sup>2</sup> Jessica Clark, “Parents ask for prayer at graduation ceremonies in St. Johns County,” *First Coast News*, March 12, 2013, available at <http://www.firstcoastnews.com/news/local/article/303060/3/Parents-ask-for-prayers>

<sup>3</sup> Marcia Lane, “Residents show favor for prayer initiative,” *The St. Augustine Record*, March 12, 2013, available at <http://staugustine.com/news/local-news/2013-03-12/residents-show-favor-prayer-initiative#.UUnRChmCYjU>.

<sup>4</sup> Marcia Lane, “Residents show favor for prayer initiative,” *The St. Augustine Record*, March 12, 2013, available at <http://staugustine.com/news/local-news/2013-03-12/residents-show-favor-prayer-initiative#.UUnRChmCYjU>.

and unconstitutional if it has a sectarian heritage.” *McCreary County, Ky. v. American Civil Liberties Union of Ky.*, 545 U.S. 844, n. 14 (2005).

In *McCreary County*, the Counties argued that governmental purpose “should be inferred, if at all, only from the latest news about the last in a series of governmental actions, however close they may all be in time and subject. ***But the world is not made brand new every morning***, and the Counties are simply asking us to ignore perfectly probative evidence.” *Id.* at 866 (emphasis added).

The Court refused to assume “an absentminded objective observer,” preferring “one presumed to be familiar with the history of the government’s actions and competent to learn what history has to show.” *Id.* See also *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000)(objective observer is familiar with “implementation of” government action); *Edwards v. Aguillard*, *supra*, 482 U.S. 578, 595 (1987) (enquiry looks to “the historical context of the statute ... and the specific sequence of events leading to [its] passage.”); *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995) (O’Connor, J., concurring) (“[T]he reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious display appears”).

The Court held that “reasonable observers have reasonable memories, and our precedents sensibly forbid an observer ‘to turn a blind eye to the context in which [the] policy arose.’” *McCreary* at 866, quoting *Santa Fe* at 315.

In short, this purpose of this policy is religious. The Board, citizens, supporters, and students know the purpose is to put prayer back in school. The Board cannot escape this by drafting a neutral policy.

#### **Even Student-led prayer is unconstitutional**

The patently religious purpose behind this push, even if the end product is facially neutral, brings us back to traditional Establishment Clause jurisprudence and away from free speech issues. The Supreme Court has continually struck down formal prayer in public high schools. See, e.g., *Engel v. Vitale*, 370 U.S. 421 (1962) (declared prayers in public schools unconstitutional); *Abington Township Sch. Dist. v. Schempp*, 374 U.S. 203 (1963) (declared unconstitutional devotional Bible reading and recitation of the Lord’s Prayer in public schools); See also *Lee v. Weisman*, 505 U.S. 577 (1992) (ruled prayers at public school graduations an impermissible establishment of religion); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (overturned law requiring daily “period of silence not to exceed one minute ... for meditation or daily prayer.”).

Even when student-delivered, the Supreme Court has found these prayers unconstitutional. See *Santa Fe* at 308 (struck down a school policy that authorized students to vote on whether to hold a prayer at high school football games). Prayer occurring on public school property as part of a regularly scheduled annual event sponsored by the school certainly leads “an objective observer, acquainted with the [prayer to] perceive it as a state endorsement...” *Id.*

Graduation ceremonies are school-sponsored events and are not voluntary in any true sense of the word. The Supreme Court has held that forcing a student to compromise their religious beliefs in order to attend the culmination of their academic career is coercive and unconstitutional:



Everyone knows that in our society and in our culture high school graduation is one of life's most significant occasions. A school rule which excuses attendance is beside the point. Attendance may not be required by official decree, yet it is apparent that a student is not free to absent herself from the graduation exercise in any real sense of the term "voluntary," for absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years. *Lee v. Weisman*, 505 U.S. 577, 595 (1992).

The courts have continually reaffirmed that the rights of minorities are protected by the Constitution. The non-religious are the fastest-growing segment of the U.S. population by religious identification — at 19% by national average.<sup>5</sup> It makes no difference how many parents want prayer at graduation ceremonies. As the Supreme Court has said, "fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *Santa Fe* at 304-305 (quoting *Barnette*, at 638).

A Board policy motivated by the desire to put prayer back in graduation would tread roughshod over established precedent and leave the local School Board open to costly and time consuming litigation. While Fla. Stat. Ann. § 1001.432 (2012) allows for student led and devised "inspirational messages," the School Board must understand that any policy encouraging religious prayers, directly or indirectly, would stand in direct contravention of established and pervasive court opinion.

There are two reasons why no other district in Florida has used this new law to pass such a policy. First, it is unwise to give high school students a microphone with no restrictions on what they can say. Second, the Board that first passes this policy is asking for a lawsuit.

Therefore, we request written assurances that St. Augustine County School district will take the appropriate steps to ensure that religious prayers and religious endorsements are not part of graduation ceremonies or any other school-sponsored events. We look forward to your reply.

Sincerely,



Andrew Seidel  
Staff Attorney

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enclosure

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<sup>5</sup> "Nones on the Rise: One-in-Five Adults Have No Religious Affiliation," Pew Research Center, The Pew Forum on Religion & Public Life (October 9, 2012) available at <http://www.pewforum.org/Unaffiliated/nones-on-the-rise.aspx>

