CHURCH IN SCHOOL

(In the Loudoun County Public School System)

- An unconstitutional violation of the First Amendment -

Grace Bible Church Announcing Religious Worship Services at Harmony MS

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Superintendent of Schools, Loudoun County

School Board, Loudoun County

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On the feast day of the Immaculate Conception, may we perhaps cure some misconceptions.

MATTHEW 22:211 - "Render unto Caesar the things that are Caesar's, and unto God the things that are God's" - Ἀπόδοτε οὖν τὰ Καίσαρος Καίσαρι καὶ τὰ τοῦ Θεοῦ τῷ Θεῷ.

Virginia Statute for Religious Freedom - "That the impious presumption of legislators and rulers, civil as well as ecclesiastical, who, being themselves but fallible and uninspired men have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavouring to impose them on others, hath established and maintained false religions over the greatest part of the world and through all time..."

First Amendment, the United States Constitution - "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Thomas Jefferson's Letter to Benjamin Rush - "I promised you a letter on Christianity, which I have not forgotten ... the successful experiment made under the prevalence of that delusion on the clause of the Constitution, which, while it secured the freedom of the press, covered also the freedom of religion, had given to the clergy a very favorite hope of obtaining an establishment of a particular form of Christianity through the United States; and as every sect believes its own form the true one, every one perhaps hoped for his own, but especially the Episcopalians and Congregationalists."

Thomas Jefferson's Letter to the Danbury Baptist Association - "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church & State."

THE REPORT

I. EXECUTIVE SUMMARY

Grace Bible Church Banner (at the entrance of Harmony MS)

U.S. Supreme Court Justice Hugo Black in 1947 explained in his opinion in *Everson v. Board of Education,* 330 U.S. 1 (1947), that a government "establishes" a religion in violation of the First Amendment when it's "set[ting] up a church," and aiding any religion; Justice Black cautioned that "the wall [separating church and state] must be kept high and impregnable" against even "the slightest breach."

In past years, around December, we have discussed whether we should and may have crèches, menorahs, and symbols of religious worship displayed on public common grounds when seeking to skirt this prohibition.

We haven't, however, spent an instant in public dialogue with the county school superintendent, school board or board of supervisors about whether we have been violating the establishment clause of the First Amendment when we have transformed our schools into houses of religious worship on "the Lord's Day."

About 40% of our public schools (34 out of 87 schools) in Loudoun County host Masses and religious worship on Sunday.

The gyms, cafeterias and libraries in our public schools have served as the nave and transept for various church denominations going back 12 years or more. We've had these religious services without a murmur of inquiry or dissent, and now suffer from an inertial indifference to question what's become an unquestioned practice – "don't rock the boat" – "after all, the services are not during regular school hours" – "the churches pay to lease the space you know" - even though the established practice appears wholly unconstitutional.

It's time to declare that religious worship is an impermissible use of our public schools.

Weeks ago, I noticed a large sign roadside in front of the Harmony Middle School east of Purcellville, inviting the public to join the "Grace Bible Church, Sundays 10 am, [at] Harmony Middle School." The Bible Church's web site published the same invitation - http://gracebibleva.org/ . Pastor Jordan greeted his congregants at services "to God's worship" -(http://gracebibleva.org/mediaPlayer/#sermonaudio/63)

The Harmony principal said he'd approved the Bible Church's worship in accordance with school policy. As indicated, Harmony is only one of the County's schools hosting religious worship.

Some jurisdictions take great pains to ban religious worship in the public schools so that they won't breach the constitutional barrier designed to separate church from state action.

The U.S. Court of Appeals for the 2nd Circuit, in the case, *Bronx Household of Faith v. Board of Education*, 650 F.3d 30 (2d Cir. 2011), upheld New York's ban against religious worship in its public schools because "the conduct of a 'religious worship service' has the effect of placing centrally, and perhaps even of establishing, the religion in the school." The Court found further that "allowing the conduct of religious worship services in schools would give rise to a sufficient appearance of endorsement to constitute a violation of the establishment clause." This decision stands undisturbed by the Supreme Court of the United State that declined to reconsider the court's holding.

The Supreme Court earlier, in 1971, had established a three-fold "test" in *Lemon v. Kurtzman* to decide whether a government's interaction with religion violated the establishment clause. It is indicative that a state is engaged in the "establishment" of religion when the disputed practice is religious and not secular, when the practice

advances the religion, and, finally, when the government is "entangled" with the religious practice.

In Loudoun County the Churches that use public school space are holding "church services" and collecting "donations." There's no question that this a sectarian undertaking. This use advances the religious worship, and thus religion. Finally, the government is plainly entangled when it's hosting religious worship not in one or two schools but in 40% of all the County's public schools, and knows it's doing so because it requires the Church to declare its function.

The Second Circuit opinion has clarified the issue in recent years, by drawing a bright line, in an area of the law that has had much contention and needed just such a plain and straightforward discussion. It's now past the time, however, when we should have stopped this unconstitutional "establishment" of religious worship in our public schools.

In the discussion that follows and the Exhibits that are attached, we have expanded upon the factual and historical underpinnings for this concern and the law as it has evolved and now applies to these practices.

II. DISCUSSION

A. STATEMENT OF MATERIAL FACTS, POLICY AND REGULATIONS.

For 12 years or more, the Loudoun County Public School System has allowed churches to use the public schools to have church services, religious worship, on Sundays.

While currently, there are 34 churches using the schools, it appears there have been as many as 90 churches, using one or another of the County's schools 87 schools.

The form – a building school permit - that a group submits is forwarded to the school principal and then, once approved by the school principal, forwarded to the Assistant Superintendent for Support Services.

Based on a FOIA request, we have accumulated the church requests – for these building permits - that are current for this calendar year. See Exhibit A (Church Requests to Use Schools (for 2014), at p. __).

The form provides for the church to identify itself and the service requested.

A review of the form submitted by the Grace Bible Church to Eric Stewart, the Harmony MS Principal, shows that on August 19, 2014, the Church asked to use the Harmony

Middle School, for "Church" for a year of Sundays. See Exhibit A at p. 58. The person who submitted the request was David Jordan and he identified himself as the "Pastor."

The Church, by its pastor, anticipated that 45 persons would attend services for 4 ½ hours. Id. Grace Bible Church stated that it would solicit "donations" and, when asked to explain, the Church stated that the "donations" were "tithes, according to scripture." Id.

Tithes are referenced in the New Testament in Hebrews 7:1-10, referring back to Melchizedek; tithing is ordinarily considered to be 1/10th of an individual's annual earnings. (Interestingly, the New Testament promotes giving, rather than tithing.)

The County School, Harmony Middle School, therefore had the full knowledge and understanding that this was a request by a church to conduct religious worship for 45 persons who would contribute as much as 1/10th of their annual earnings to the Grace Bible Church.

Grace Bible Church placed signs in front of the school on Saturdays announcing there would be a church service, and a sign in front of the school on Sunday on the day of the church service. The Grace Bible Church advertised online on their web site.

Mr. Stewart, the Principal at Harmony, stated that he was "following school board policy" when he approved the use – and that Grace Bible Church had been in place before he became the principal.

Previously, Mr. Stewart said, he'd been the Principal at Smarts Mill Middle School and there had been church services there as well that he had approved and so had the Superintendent's office approved the request he forwarded.

Destiny Church, by its Ministry Coordinator, submitted a request to the Smarts Middle School and said they wanted the space for "Destiny Church Sunday Morning Services" for 5 hours for 200 persons. Ex. A at p. 40. Mr. Stewart said they had been holding services there for up to 7 years.

Mr. Stewart thought that the use of schools for church services was widespread in the school but did not know the precise number of schools out of the 87 schools in the system, and he thought it varied; he said the use was more prevalent at the High School and Middle School level.

The policy for the "use or access to school facilities for non-school purposes" is that "community organizations" that are non-profit may use the facility subject to certain

restrictions but none of those restrictions have to do with the prohibition of religious services or worship. See Policy Support Service, Community Use of Facilities Section 6-27. Nor is there any prohibition against a church raising money during such worship or services – not as the policy is presently written. Id. at Section 6-27 B 3.

No use is permitted without the approval of the principal where the use is requested. See Regulation Support Service, Community Use of Facilities Section 6-27 A. Indeed, the policy is that "no organization may use any school facility unless it has current approval of the principal of the facility to be used." See Policy Support Service, Community Use of Facilities Section 6-28 A.

It's therefore not possible to be confused about the purpose of the use that the organization intends over the years, as if it is not monitored, as the organization must request approval yearly within 45 days in advance of the anniversary of its first use. See Policy Support Service, Community Use of Facilities Section 6-27 A.

While fees are charged according to a schedule, the "fees for use of school facilities may be waived by the Division Superintendent for activities…" under certain specified circumstances that may not have applied in the case of these churches. See Policy Support Service, Community Use of Facilities Section 6-28 B.

The Division Superintendent sets the fees for use and they may be revised annually. See Policy Support Service, Community Use of Facilities Section 6-29.

Currently, there is a range in the size of the congregation that invokes the use of these facilities for church services.

From the current request for building permits, we have summarized the self-declared purpose for using the facilities. See Exhibit B ("Church Stated Reasons for Use"). They range with some variation from "church activities," to "church," to "church service," to "religious" to "revival meeting." Plainly, if the policy were revised as recommended, then there would have to be a re-application to confirm that the activity was "worship" as opposed to some other permissible activity.

While the import of this "report" is to advise against church worship and religious services in our schools, that is not to say that there may be no use of the schools by religious organizations.

As indicated, the Courts have reviewed disputes over the years that have identified the scope of activity that is permissible for religious organizations that does not qualify as the

establishment of religion or that is otherwise in violation of any constitutional direction or prohibition.

B. OFFICIAL REACTION

i. THE SCHOOL BOARD

When consulting with Eric Hornberger, the incumbent School Board Chair, representing the Ashburn District, his reaction was that the current policy "makes sense."

Mr. Hornberger said that there was "not enough religious facilities for people to meet."

The Freedom from Religion Foundation does say that "public school districts often have the least expensive rental rates available in a community" and so "rental to churches often involves what many of us consider taxpayer subsidy of congregations."

Of course, the "free exercise clause" creates no obligation for the government to facilitate or subsidize a church's religious exercise; no more than the right to speak freely creates an obligation for the government to supply any citizen with a printing press. *See, e.g., Lock v. Davey*, 540 US 712 (2004); *Skoros v. City of New York*, 437 F.3d 1, 39 (2d Cir. 2006); *Eulitt ex. Rel. Eulitt v. Maine Dept of Education*, 386 F.3d 344, 354 (1st Cir. 2004); *Regan v. Taxation With Representation of Washington*, 461 US 540, 549-550 (1983)("We have held in several contexts that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right … The reasoning of these decisions is simple: although government may not place obstacles in the path of a person's exercise of … freedom of speech, it need not remove those not of its own creation.")

In truth, the "establishment clause" stands for the opposite proposition than that government should involve itself; rather it stands for the proposition that the government should stand down and not assist or prefer any religion.

"I don't personally have a problem with it [meaning Church Worship in School]," said Mr. Hornberger, "It's happening all throughout America."

Mr. Hornberger did not know how many schools held religious services in Loudoun County but his sense was that it was about half of the County's schools.

In truth and fact, it has varied over the years in Loudoun and is presently about 40% of the County's schools.

In a review of known churches that are using or have used school facilities, we assembled a list of 97 churches but don't have the time frame before this year - as we only requested under FOIA the records for the current calendar year. See Exhibit C ("Churches that have used the facilities and are using them now").

The current policy allowing for religious worship in the schools was in place before Mr. Hornberger's tenure on the Board; Mr. Hornberger affirmed that this issue hadn't been taken up by the School Board since. It has not been raised by any Member of the Board.

ii. THE SUPERINTENDENT

In the course of a public presentation last Thursday, December 4, 2014, I asked the Superintendent of Schools, Eric Williams, about the practice of "church in school," how it was that approximately 40% of the schools are hosting religious services and worship and advertising the services, and whether his office, the Office of Superintendent, planned to reconsider the practice of allowing religious worship in our schools given that it is a manifest breach of the First Amendment's "establishment clause."

The Superintendent said he hadn't had cause to think about the practice, indicated no discomfort with the practice, but said that he would consult with his in-house counsel and review whatever I might submit making the case that the practice of hosting religious services violated the constitutional prohibition against "establishing religion."

C. THE LAW

i. Historical Context.

Given the world we live in now, where religious conflict abounds, and not just in the mid-East, it should be unsurprising that there was great religious conflict in colonial America before we had a Constitution and that included the colonials' aversion toward the native American who were here when we arrived.

Most of the early Americans subscribed to Christianity but there was bitter and hateful competition and discrimination between and among Protestant sects in the Christian religion and between Protestants and Catholics.

The Georgia Colony banned Catholics.

Peter Stuyvesant who headed up New Netherlands wanted Jewish refugees expelled before they could "infect" the colony.

It's said that the early settlers came here to flee religious discrimination.

What we don't always say so clearly, and some don't appreciate at all, is that there was religious discrimination and conflict here as well - in our new found "Garden of Eden."

In 1775, the leading religions comprised 500,000 Anglicans and 575,000 Congregationalists. See Thomas A. Bailey, THE AMERICAN PAGEANT (Heath 2d Edition, 1961) at 74.

The minority religions at the other end of the spectrum consisted of 25,000 Catholics, 5,000 Methodists, and 2,000 Jews. Id.

It's easy to appreciate how the Anglicans – the Church of England - lost ground in membership and influence when the colonials declared independence and won their Revolution.

ii. The First Amendment

Thomas Jefferson's correspondence to Benjamin Rush states his concern that each sect of religion believes "its own form the true one, every one perhaps hoped for his own," Jefferson wrote, "but especially the Episcopalians and Congregationalists."

That's why the very first amendment to the Constitution provided that "Congress shall make no law respecting an establishment of religion" but also no law "prohibiting the free exercise thereof."

The Constitution was to guard against the government choosing "winners," preferring or "establishing" religions generally, or in particular, while protecting the individual's right to believe and practice whatever religion the person wanted.

Jefferson wrote the Danbury Baptists in 1802 that the language in the First Amendment served to "build .. a wall of separation between Church and State."

iii. The Case Law

U.S. Supreme Court Justice Hugo Black in 1947 explained in *Everson v. Board of Education,* 330 U.S. 1 (1947), that a government "establishes" a religion in violation of the First Amendment when it's "set[ting] up a church," and aiding any religion; Justice Black cautioned that "the wall [separating church and state] must be kept high and impregnable" against even "the slightest breach."

U.S. Circuit Judge Pierre N. Leval, speaking for the court in *Bronx Household of Faith v. Board of Education*, 650 F.3d 30, 37 (2d Cir. 2011), upheld New York's ban against religious worship in its public schools, because "the conduct of a 'religious worship service' has the effect of placing centrally, and perhaps even of establishing, the religion in the school."

The Court stated that the definition of the verb "to worship" is "to honor or reverence as a divine being or supernatural power." Id., fn. 7.

It is not the use of the term in the vernacular such as a miser who "worships" money. Id., 38.

The Court found further that "allowing the conduct of religious worship services in schools would give rise to a sufficient appearance of endorsement to constitute a violation of the establishment clause." Id., at 40.

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Court instructed that "government action which interacts with religion" must: (1) "have a secular purpose," (2) "a principal or primary effect … that neither advances nor inhibits religion," and (3) "not foster an excessive government entanglement with religion." Id., at 40-41.

In Loudoun County, the Churches that use public school space are holding "church services" and collecting "donations." There's no question that this a sectarian undertaking, and most certainly not secular. This use also advances the religious worship, and thus religion. Finally, the government is plainly entangled when it's hosting religious worship not in one or two schools but in 40% of all the County's public schools, and knows it's doing so because it requires the Church to declare its function in permits that are renewed, and have been renewed for years.

"The performance of worship services is a core event in organized religion," the Court stated. Id., at 41.

The Court stated: "When worship services are performed in a place, the nature of the site changes. The site is no longer simply a room in a school being used temporarily for some activity. The church has made the school the place for the performance of its rites, and might well appear to have established itself there. The place has, at least for a time, become the church." Id. At 41.

Nor can we ignore the fact the current practices have on students who observe the signs for these church services in the community or t their school. They may perceive an

endorsement of whatever religion is at their school, as students are impressionable. Justice Breyer cited just such a concern in his concurring opinion in *Van Orden v. Perry*, 545 U.S. 677, 703 (2005) regarding the display of the Ten Commandments; the Justice considered it a distinguishing characteristic that the ten commandments were "on the grounds of a public school, where, given the impressionability of the young, government must exercise particular care in separating church and state."

It's not irrelevant to consider who the religions may exclude from their services, for example, persons not baptized, those who have been excommunicated or who advocate the Islamic religion. Compare *Bronx Household of Faith v. Board of Education*, 650 F.3d 30, supra, at 43.

The Bronx Household of Faith decision from the Second Circuit stands undisturbed by the Supreme Court of the United States that declined to reconsider the federal appellate court's holding.

The offended church, the Bronx Household of Faith, sought to challenge the ruling more recently but was rebuffed once more on appeal, pretty much on the same grounds as previously stated. *Bronx Household of Faith v. Board of Education*, 750 F.3d 184 (2d Cir. 2014).

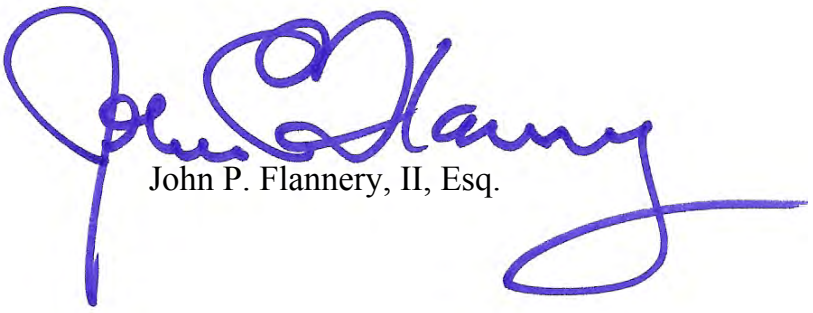
III. CONCLUSION AND RECOMMENDATION

The Second Circuit opinion in Bronx Household of Faith has clarified the issue, drawing a bright line, in an area of the law that has had much contention and needed a plain and straightforward directive.

It's now past the time when we should have stopped this unconstitutional "establishment" of religious worship in our public schools.

Most respectfully, I insist that we modify the current policy and regulations to exclude religious services and religious worship from those permissible uses in our public schools.

Respectfully Submitted,



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