

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA**

AMERICAN CIVIL LIBERTIES UNION of
LOUISIANA,

Plaintiff,

v.

GOVERNOR M.J. FOSTER and DAN RICHEY,

Defendants.

CIVIL ACTION NO.:

**MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION**

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

FACTS 2

 The Governor’s Program on Abstinence 2

 Official GPA Events and Documents 2

 Current GPA Grantees That Use GPA Funds To Promote
 Religious Principles 3

 Rapides Station Community Ministries 3

 Crisis Pregnancy Help Center of Slidell 6

 Community Christian Concern 8

 Just Say “Whoa” 9

 Prior GPA Grantees That Have Used GPA Funds To Promote
 Religious Principles 11

 Diocese of Lafayette 11

 Southwest Louisiana Area Health Education Center 12

 GPA Grants to Pervasively Sectarian Institutions 13

ARGUMENT..... 13

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS. 14

 A. The GPA Impermissibly Advances Religion Because It Permits
 Government-Financed and Government-Sponsored Inculcation
 of Religious Principles. 16

 B. The GPA Impermissibly Advances Religion by Awarding Direct
 Financial Grants to Pervasively Sectarian Institutions. 20

C.	The GPA’s Distribution of Funds Impermissibly Endorses Religion.	21
II.	AN INJUNCTION IS NECESSARY TO PREVENT IRREPARABLE HARM.	23
III.	AN INJUNCTION WILL DO NO HARM AND WILL SERVE THE PUBLIC INTEREST.....	23
	CONCLUSION.....	24

TABLE OF AUTHORITIES

CASES

<u>Agostini v. Felton</u> , 521 U.S. 203 (1997).....	15, 18
<u>Bowen v. Kendrick</u> , 487 U.S. 589 (1988).....	passim
<u>County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter</u> , 492 U.S. 573 (1989).....	21
<u>Doe v. Beaumont Indep. Sch. Dist.</u> , 240 F.3d 462 (5th Cir. 2001).....	14, 18, 19
<u>Doe v. Sch. Bd. of Ouachita Parish</u> , 274 F.3d 289 (5th Cir. 2001)	15, 21-22
<u>Elrod v. Burns</u> , 427 U.S. 347 (1976)	23
<u>Fla. Businessmen for Free Enterprise v. City of Hollywood</u> , 648 F.2d 956 (5th Cir. June 1981)	23
<u>Friends of the Earth, Inc. v. Laidlaw Envtl. Serv.</u> , 528 U.S. 167 (2000).....	1
<u>Frontiero v. Richardson</u> , 411 U.S. 677 (1973).....	23
<u>Ingebretsen v. Jackson Pub. Sch. Dist.</u> , 88 F.3d 274 (5th Cir. 1996).....	14, 15, 23, 24
<u>Lemon v. Kurtzman</u> , 403 U.S. 602 (1971)	14, 16
<u>Let's Help Florida v. McCrary</u> , 621 F.2d 195 (5th Cir. 1980)	23
<u>Marks v. United States</u> , 430 U.S. 188 (1977)	17
<u>Mitchell v. Helms</u> , 530 U.S. 793 (2000).....	17, 18, 21, 22
<u>Rosenberger v. Rector and Visitors of Univ. of Va.</u> , 515 U.S. 819 (1995)	16
<u>Sierra Club, Lone Star Chapter v. Cedar Point Oil Co. Inc.</u> , 73 F.3d 546 (5th Cir. 1996)	1
<u>Stone v. Graham</u> , 449 U.S. 39 (1980).....	16
<u>Walgreen Co. v. Hood</u> , 275 F.3d 475 (5th Cir. 2001),	

petition for cert. filed, 70 U.S.L.W. 3625 (U.S. Mar. 20, 2002) (No. 01-1427)..... 14

STATUTES

42 U.S.C. § 710..... 2

42 U.S.C. §§ 300z-300z-10 16

INTRODUCTION

The Louisiana Governor's Program on Abstinence ("GPA") has a history and ongoing practice of distributing public abstinence-education dollars in a manner that advances religion. The GPA itself, at official GPA events and in official GPA documents, has promoted religious precepts. It has also funded for many years, and continues to fund, organizations and individuals that convey religious messages and otherwise promote religion in the context of their GPA-funded programming. And the GPA has awarded for many years, and continues to award, public dollars to pervasively sectarian institutions. Yet the decisions of the United States Supreme Court make abundantly clear that government-financed or government-sponsored promotion of religious tenets violates the Establishment Clause of the federal Constitution, as do direct grants of taxpayer dollars to pervasively sectarian institutions.

Plaintiff seeks a preliminary injunction to bar the GPA's ongoing practice of impermissibly advancing religion through its distribution of public funds.¹ Plaintiff thus requests that this Court enjoin Defendants from promoting religion in the context of official GPA activities, from disbursing GPA funds to grantees that advance religion in the course of GPA-financed activities, and from awarding public dollars to pervasively sectarian institutions.

¹ Plaintiff has standing to bring this lawsuit. See Exhibit AAA to Gallagher Certification (Affidavit of Joe Cook) (affirming that members of the ACLU of Louisiana include state and federal taxpayers and that organization's purpose is to protect constitutional rights). See also Bowen v. Kendrick, 487 U.S. 589, 618-20 (1988) (recognizing longstanding rule that taxpayer standing is sufficient for Establishment Clause claims); see also Friends of the Earth, Inc. v. Laidlaw Env'tl. Serv., 528 U.S. 167, 181 (2000) (holding that organization has standing to sue on behalf of its members when members would have standing to sue in their own right, interests at stake are germane to purpose of organization, and participation of individual members not required); Sierra Club, Lone Star Chapter v. Cedar Point Oil Co. Inc., 73 F.3d 546, 555 (5th Cir. 1996) (same).

FACTS

The Governor's Program on Abstinence

In March 1998, in an effort to address problems of teenage pregnancy and sexually transmitted diseases in Louisiana, Governor M. J. Foster established the Louisiana Abstinence Education Project, also known as the GPA. Exhibit A to Gallagher Certification. The GPA's primary functions include seeking and distributing funds to develop programs that "ha[ve] as their exclusive purpose, teaching the . . . gains to be realized by abstaining from sexual activity." Id. at 2.

The GPA distributes significant public funds for abstinence education. Federal dollars are the GPA's principal source of funding. Since 1998 the GPA has received just over \$1.6 million per year in a federal block grant awarded pursuant to 42 U.S.C. § 710, a federal statute that appropriates \$250 million for teaching and promoting sexual abstinence. Exhibit E to Gallagher Certification. The Louisiana legislature has also allocated significant financial support for the GPA since 1998. Exhibits F, G, H, I to Gallagher Certification.

The GPA uses its funds in a number of ways. First, it promotes abstinence through official GPA events and resources. It also grants public funds to organizations and individuals to spread the abstinence-only message. Since 1999, it has awarded well over one million dollars in "community based contracts" to non-profit organizations and "professional services contracts" to individuals in the state for the development and implementation of abstinence programming. Exhibit J to Gallagher Certification.

Official GPA Events and Documents

The GPA itself has promoted religious messages at official GPA events and in official GPA documents. For example, in January 2002, the GPA sponsored a Legislative Caucus to

train high school students about the legislative process and to teach them how to debate the issue of sexual abstinence. The official materials prepared by the GPA include a “fact sheet” addressing why sexually transmitted diseases have spread over the past 30 years: “The answer is moral relativism. We removed God from the classroom.” Exhibit L to Gallagher Certification, at 33. Another fact sheet reads, “Abstinence . . . has been the cornerstone of Judeo-Christian beliefs for thousands of years. . . . We must . . . speak out against the prevailing culture, especially the activities that are bringing about the demise of our Judeo-Christian heritage. . . . It’s time to restore our Judeo-Christian heritage in America.” *Id.* at 42-43.

Current GPA Grantees That Use GPA Funds To Promote Religious Principles

Rapides Station Community Ministries

The GPA also has a pattern and practice of disbursing grants to organizations and individuals notwithstanding ample evidence that they impermissibly use GPA funds to promote religious doctrine. For example, the GPA has awarded contracts to the Rapides Station Community Ministries (“the Ministries”) to provide abstinence-only programming in contract years 1999-2000 (when the Ministries received \$25,000), 2000-2001 (when the Ministries received \$28,000), and 2001-2002 (the current contract cycle, during which the Ministries is receiving \$20,000). Exhibits M, O to Gallagher Certification; Exhibit N to Gallagher Certification, at A. Yet the monthly reports submitted by the Ministries to the GPA throughout this time establish that the Ministries has regularly used, and continues to use, its GPA funding to promote religious messages. Indeed, the monthly reports indicate that the religious content of the Ministries’ abstinence programs has become more pronounced over time. For instance:

- On its September 1999 Official GPA Monthly Reporting Form, the Ministries reported the following outcome of its abstinence-only events for the month: “The youth continue to have a positive attitude about the program and they are pleased that someone is concerned enough [to] give them bible based reasons for abstaining.” Exhibit P to Gallagher Certification.
- The following month, the Ministries reported on its Official GPA Monthly Reporting Form that at its GPA-funded events for the month, “young people show[ed] a positive attitude about the program and they are pleased that The Governor’s Program On Abstinence is also A Faith Base[d] Program.” Exhibit Q to Gallagher Certification.
- On its December 1999 Official GPA Monthly Reporting Form, the Ministries reported:

December was an excellen[t] month for our program, we were able to focus on the virgin birth and make it apparent that God[] desire[s] sexual purity as a way of life. The virgin birth help[ed] many people to see and understand what Christmas is about. Abstinence only put things in the right perspective, this let us know that each Individual must live to please God and not man. We were able to show from a good example in Joseph and Mary. There were several young people that did not know any thing about Joseph and Mary nor how they live for God.

Exhibit R to Gallagher Certification.

- On its February 2000 Official GPA Monthly Reporting Form, again detailing its GPA activities for the month, the Ministries reported that its “radio program offers a perfect setting to share abstinence as part of the gospel message. . . .

Abstinence is a natural when focusing on values and how God want[s] us to live.” Exhibit S to Gallagher Certification.

- On its August 2001 Official GPA Monthly Reporting Form – during its current funding cycle – the Ministries reported that it had hosted a back-to-school “Youth Revival,” where the Reverend Roger Layton “proclaim[ed] God’s Word with power as to why we should live pure and Holy. He made it clear that abstinence is the only way. There were many testimonies and pledges [during] the week of revival. Some promise[d] to become members of the Abstinence Club at their school.” Exhibit T to Gallagher Certification. As a result of this religious youth revival, “[t]here were commitments of faith and pledges to remain sexually abstinen[t] until marriage.” Id.
- And according to its December 2001 monthly report, the Ministries again relied on the story of the birth of Christ to promote the GPA’s abstinence message. As it informed the GPA, “The virgin birth or Christmas story transcended into commitments of purity for more than one hundred young people.” Exhibit U to Gallagher Certification.

Notwithstanding early and repeated indications that the Ministries was using public funds to promote religious messages, the GPA evaluated its performance as “Excellent” at the end of its first year. The only criticism of Rapides Station noted by the GPA in its grantee evaluation was the “[t]ime in selecting the best curriculum.” Exhibit V to Gallagher Certification. And the GPA continues to fund the Ministries through the current contract year.

Crisis Pregnancy Help Center of Slidell

The GPA has likewise funded for many years, including the current contract year, the Crisis Pregnancy Help Center of Slidell (the “CPHC”), despite ample evidence that the CPHC impermissibly uses GPA funds to promote religious doctrine. The GPA has awarded contracts to the CPHC to provide abstinence-only programming in contract years 1999-2000 (when the CPHC received \$39,000), 2000-2001 (when the CPHC received \$42,000), and 2001-2002 (the current contract cycle, during which the CPHC is receiving \$30,000). Exhibits W, X, Y to Gallagher Certification. Yet from the moment that the CPHC applied for funding, it has been clear that it would use GPA funds to promote religious messages. For example:

- In the initial proposal submitted by the CPHC to the GPA for a 1999-2000 contract, the organization applied for – and ultimately received – funds to promote abstinence through its “Passion 4 Purity” program. Exhibit Z to Gallagher Certification. In that proposal, the CPHC repeatedly refers to Passion 4 Purity as a “ministry,” id. at cover letter; it describes the program as “minister[ing] the truth about sexual purity to the young adults of Louisiana,” id. at 6; it acknowledges that the program relies on “scriptural concepts” to teach abstinence, id. at 4, 7; and it emphasizes its efforts to educate the community on the value of “body, soul, and spirit” and how that value relates to sexual purity, id. at 4.
- With that initial proposal, the CPHC also submitted letters of recommendation that make clear the religious component of Passion 4 Purity. For example, a letter from a participant in the program states, “The group is wonderful because we all encourage one another to keep the commitment of purity that we have

made to ourselves, our parents, God and our future mates.” Exhibit AA to Gallagher Certification. In another letter, an assistant district attorney describes Passion 4 Purity as a program that “ministers to many teenagers in the Slidell area” and “provides a scriptural, spiritual and practical foundation for combating the issue of premarital sex.” Exhibit BB to Gallagher Certification. Another letter of recommendation, from a local pastor, reads, “Passion for Purity does not seek to turn young people into Victorian prudes. It seeks to instill in them a respect for God, for their bodies, and for sex” Exhibit CC to Gallagher Certification.

- The CPHC’s proposal for a renewal of funding for 2000-2001 – a renewal that the GPA granted – further establishes the religious content of its abstinence programming. For instance, the proposal includes a copy of Passion 4 Purity’s mission statement and statement of “expected outcome,” which specify that the program’s goals include “provid[ing] a Scriptural view of human sexuality as a gift” and “see[ing] lives restored from a Biblical perspective.” Exhibit DD to Gallagher Certification. The proposal further states that teenagers who attend Passion 4 Purity meetings “receive biblical instruction on purity.” Exhibit EE to Gallagher Certification. And the proposal includes copies of participant comments submitted to the Passion 4 Purity website, which indicate the program’s religious content. One Slidell participant wrote, “[I]’m part of the P[assion] 4 P[urity] [“P4P”] program and it has been a tremendous bles[s]ing to[] see people touching [G]od and [H]e touching back.” Exhibit FF to Gallagher Certification, at 1. Another participant wrote, “I am involved in the

P4P ministry, I am so glad to be a part of what God is doing in P4P! . . . We are standing up for Jesus, and we will not give up, we will press on, press in to God even more every day.” Id. at 2. And another wrote, “I have matured so much in my walk with Christ since [I] have been in Passion 4 Purity. The ministry has had an impact so deeply upon my life God cares about your purity!!” Id.

The monthly reports submitted by the CPHC to the GPA further indicate the underlying religious content of the organization’s abstinence programming. In its July 2001 Official GPA Monthly Reporting Form, for example, the CPHC listed as one of its abstinence efforts the “preparation of youth pastors” for outreach to community campuses. Exhibit GG to Gallagher Certification, at 4.

Community Christian Concern

Notwithstanding clear indications that the Passion 4 Purity program is suffused with religious content, see discussion of CPHC supra, the GPA has sponsored the program not only through its contract with the CPHC, but also through contracts with the Community Christian Concern (“CCC”). CCC received GPA contracts for 1999-2000 (when it received \$32,000) and 2000-2001 (when it received \$33,500), in large part to run the Passion 4 Purity program in cooperation with the CPHC. Exhibits HH, II to Gallagher Certification. In its proposals for each of those contracts, CCC included a curriculum for its abstinence program, to consist of four Passion 4 Purity sessions, with each session including two-hour meetings on six consecutive Saturdays. That curriculum specifies that the fifth Saturday of each session would be devoted to addressing “Spiritual Purity” and the issues, “Who is God? How can He help? Understanding a relationship with God.” Exhibit JJ to Gallagher Certification, at 21; Exhibit KK to Gallagher Certification, at 21. CCC’s proposals also made clear that one of the primary

purposes of its abstinence programming would be educating participants on the “spiritual need” for abstinence and addressing “[t]heir relationship with God.” Exhibit JJ to Gallagher Certification, at 13; Exhibit KK to Gallagher Certification, at 15. Again, the GPA funded these proposals. CCC also received \$19,500 for 2001-2002 to oversee the chartering of GPA Clubs in the high schools in its region. Exhibit LL to Gallagher Certification.

Just Say “Whoa”

Additional GPA funds are currently being used to promote religious messages. For example, the GPA has awarded \$29,500 to Patricia Reeves, artistic director of a theater group called “Just Say ‘Whoa,’” for July 1, 2001, through June 30, 2002, to “bring[] the abstinence message to junior high and high schools throughout Louisiana with theatrical skits.” Exhibit MM to Gallagher Certification. Just Say “Whoa”’s flyers and pamphlets specify that it is sponsored “in cooperation with the Governor’s Program on Abstinence,” Exhibits NN, OO to Gallagher Certification, and participants must sign a commitment form which advises that they will be representing the Governor’s Office while members of the Just Say “Whoa” Players, Exhibit PP to Gallagher Certification. The group’s promotional materials state: “The Just Say ‘Whoa’ Players uses [sic] a format that is hard hitting, truth-based, entertaining, and Christ-centered. . . . Our belief is that sexual activity outside the commitment of marriage is offensive to the Lord we serve and should not be condoned or encouraged.” Exhibit OO to Gallagher Certification. The Just Say “Whoa” skits include the following exchanges:

- In a skit entitled “Verses,” a character named “Bible Guy” asks: “[H]ave you ever considered NOT having sex? . . . God never wanted you to have to have those problems to begin with. Why don’t you just do it His way [sic]?” Exhibit QQ to Gallagher Certification, at 13. Another character, “Katy,” responds,

“What does God have to do with my sex life?” Id. In addition to other statements about what God and the Bible say about abstinence, Bible Guy asserts, “As Christians, our bodies belong to the Lord, not to us. God wants more for you than a one-night-stand. We belong to Him and He has plans for us that go beyond Saturday night.” Id. at 14.

- In a skit called “Just Say ‘Whoa,’” “Girl” states, “Jesus is my first love and I thought He was yours.” Id. at 22.
- In “Damaged Goods,” “Kandace” remarks, “One thing I’ve learned is that . . . everyone is damaged goods. We all sin and make mistakes. Some have bigger consequences than others, but they all cost Jesus His life. We don’t have to stay damaged goods. We can be new creations in Christ.” Id. at 35.
- In “A New Heart,” “Narrator #1” states,

God says if we will just ask Him, He will forgive us and remember our sins no more. He will make us white as snow. He will give you a new heart and a clean spirit. You can make the commitment today to save yourself from this point on. Even more important than having some of yourself you have saved to give to your marriage partner – is having a relationship with God unhindered by sexual sin.”

Id. at 36.

- The “Ending” skit includes the following exchange: “Troy” states, “You can let a girl twist you around until you don’t know which way to go.” “Innocent Guy” replies, “Or you can ask the Lord to give you the strength to keep your convictions.” “Jared” later states, “Or you can call on Jesus to help you find the way.” The skit continues:

Lauren: Even if you've made a mistake . . . Kandace:
Jesus can make it right.

. . .

Narrator #1: Our prayer is that you will make the right
choices and receive the ultimate blessing of God.
Thank you and good night.

Id. at 42.

Moreover, Just Say “Whoa” requires its “players” to have a “commitment to the Lord and the team,” and to submit a letter of recommendation from a staff member of the applicant’s church discussing “your openness about your stand with the Lord.” Exhibit OO to Gallagher Certification. Just Say “Whoa” players are required to attend “Bible study/fellowship time . . . to help us to continue to grow spiritually” and are assigned “prayer partners” for the year. Id.

Prior GPA Grantees That Have Used GPA Funds To Promote Religious Principles

Diocese of Lafayette

The GPA’s prior awards further establish a pattern of disbursing funds in a manner that advances religion. For example, the GPA funded the Diocese of Lafayette (“the Diocese”) for two contract years, notwithstanding clear indications that the Diocese used its funds for religious purposes. The GPA first gave the Diocese \$16,000 for contract year 1999 to 2000, Exhibit SS to Gallagher Certification, even though the Diocese’s grant proposal stated that it would use a curriculum intended to help adolescents to “craft and implement a plan for their lives that is in accord with God’s plan for them,” Exhibit RR to Gallagher Certification, at 1. The GPA then almost doubled its grant to the Diocese, awarding it \$30,000 for 2000-2001, Exhibit TT to Gallagher Certification, even though the monthly reports submitted from the Diocese during its initial contract term made quite clear that it used its grant of public funds to engage in religious activities and promote religious messages. For instance:

- On its Official GPA Monthly Reporting Form for each month from March through July 1999, and September 1999 through February 2000, the Diocese reported operating a chastity program entitled “God’s Gift of Life.” Exhibits UU, VV to Gallagher Certification.
- In January and February 2000, the Diocese reported that it participated in prayers at abortion clinics as part of its volunteer activities associated with the GPA, and that it made GPA-related expenditures to support those prayers. Exhibit VV to Gallagher Certification.

Even though the Diocese reported the use of grant funds to promote religious messages, the GPA awarded the Diocese an overall performance evaluation of “Good.” Exhibit WW to Gallagher Certification. The GPA’s only criticism of the Diocese’s activities under the auspices of the GPA was that the Diocese “need[s] to increase participant numbers.” *Id.* The GPA concluded that it would provide further funding to the Diocese, *id.*, and, as mentioned above, increased funding for the group in the following contract year.

Southwest Louisiana Area Health Education Center

The GPA also awarded \$33,000 to the Southwest Louisiana Area Health Education Center (“SLAHEC”) in 1999 for abstinence-only programming even though the group’s grant application revealed that it intended to use public money to promote religion. Exhibit XX to Gallagher Certification. Specifically, the GPA awarded the contract even though SLAHEC requested:

- \$600 for “[a]wards and recognition supplies,” including “Christian music tapes,” Exhibit YY to Gallagher Certification, at 17;
- \$750 for “Bible[s] with names engraved for program participants,” *id.* at 18;

- \$35 for pamphlets entitled “Let’s Talk About Sex,” which advise parents how to “encourage teens to make godly choices,” id. at 17c, 18;
- \$20 for a book entitled “Life on the Edge,” which provides “solid, biblical advice” for teens, id.;
- \$8 for a booklet entitled “Until You Say I Do,” which helps teens “follow a biblical plan for purity” and encourages them to “hold out for God’s best,” id.;
- \$11 for a book entitled “Too Young to Die,” which tells children “how Christ’s love can win them out” of gangs, id. at 17d, 18;
- \$9 for a book entitled “Pure Excitement,” which advises teens “to accept nothing less than God’s best,” id.; and
- \$9 for a book entitled “I Kissed Dating Goodbye,” which teaches teens “how to reorder their romantic life in the light of God’s word,” id.

GPA Grants to Pervasively Sectarian Institutions

The GPA also awards direct grants of public dollars to various pervasively sectarian institutions. As discussed above, for example, the GPA has awarded \$46,000 directly to the Diocese of Lafayette. Likewise, it is currently funding the Roman Catholic Church-Diocese of Houma/Thibodeaux in the amount of \$25,000. Exhibit ZZ to Gallagher Certification. The GPA also gave a \$23,000 grant to the Roman Catholic Church-Diocese of Houma/Thibodeaux for the 2000-2001 contract year. Exhibit N to Gallagher Certification, at A.

ARGUMENT

In deciding whether to issue injunctive relief, this Court must consider whether:

- (1) there is a substantial likelihood that [the party seeking the preliminary injunction] will succeed on the merits, (2) there is a substantial threat that the party will suffer irreparable injury if the

preliminary injunction is denied, (3) the threatened injury to the party seeking the injunction outweighs the threatened injury to the party to be enjoined, and (4) granting the preliminary injunction will not disserve the public interest.

Walgreen Co. v. Hood, 275 F.3d 475, 477 (5th Cir. 2001), petition for cert. filed, 70 U.S.L.W. 3625 (U.S. Mar. 20, 2002) (No. 01-1427). These standards are more than satisfied here.

First, Plaintiff can establish a substantial – indeed, an overwhelming – likelihood of success on the merits. It is beyond question that the Establishment Clause bars the government-sponsored and government-financed promotion of religion that has been permitted by the GPA. See infra Part I. Second, because the GPA’s practice infringes on First Amendment rights, an injunction is necessary to prevent irreparable harm. Third, because constitutional rights are at stake, the balance of hardships tips heavily in favor of Plaintiff. Finally, the public interest strongly favors the issuance of an injunction preventing the continued violation of the Constitution.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS.

The United States Court of Appeals for the Fifth Circuit has identified two relevant lines of analysis developed by the United States Supreme Court to determine whether a government action or policy constitutes an establishment of religion. See, e.g., Doe v. Beaumont Indep. Sch. Dist., 240 F.3d 462, 468 (5th Cir. 2001) (en banc) (plurality opinion); Ingebretsen v. Jackson Pub. Sch. Dist., 88 F.3d 274, 278-79 (5th Cir. 1996). First, under the “Lemon test,” initially set forth in Lemon v. Kurtzman, 403 U.S. 602 (1971), “a government practice is constitutional if (1) it has a secular purpose, (2) its primary effect neither advances nor inhibits religion, and (3) it does not excessively entangle government with religion.”

Ingebretsen, 88 F.3d at 278-79. Second, the Supreme Court has “disapproved of governmental practices that appear to endorse religion.” Id. at 279.²

The GPA’s use and disbursement of public funds cannot satisfy either test. As the United States Supreme Court has emphasized, government aid has the impermissible effect of advancing religion – and therefore cannot satisfy the second prong of the Lemon test – if it results in the inculcation of religious beliefs. See, e.g., Bowen v. Kendrick, 487 U.S. 589, 611, 612, 621 (1988) (recognizing that government practice has impermissible effect of advancing religion if it results in government-financed or government-sponsored indoctrination of religious beliefs); see also Agostini v. Felton, 521 U.S. 203, 234 (1997) (same). The Supreme Court has likewise held that the disbursement of public funds directly to pervasively sectarian institutions has the primary effect of advancing religion. See, e.g., Bowen, 487 U.S. at 609-10. Yet as discussed in detail below, the GPA permits government-financed inculcation of religious principles by its grantees and in the course of official GPA activities, and the GPA disburses financial grants directly to pervasively sectarian institutions. Its distribution of funds thus cannot meet the second prong of the Lemon test; and “[f]ailure of any prong of th[at] test results in a finding of unconstitutionality” Doe v. Sch. Bd. of Ouachita Parish, 274 F.3d 289, 293 (5th Cir. 2001). For the same reasons, the GPA’s actions fail the endorsement test. See infra Part I.C.

² The Fifth Circuit has also noted that the Supreme Court has “analyzed school-sponsored religious activity in terms of the coercive effect that the activity has on students,” Ingebretsen, 88 F.3d at 279, but that analysis is irrelevant to the facts of this case.

A. The GPA Impermissibly Advances Religion Because It Permits Government-Financed and Government-Sponsored Inculcation of Religious Principles.

One bedrock Establishment Clause principle governs the outcome of this case: Religion is impermissibly advanced, and the Constitution violated, when government aid is used to fund “specifically religious activit[ies]” even within “an otherwise substantially secular setting.” Bowen, 487 U.S. at 621 (internal quotation and citation omitted). This principle underlies a number of Supreme Court Establishment Clause decisions. See, e.g., Stone v. Graham, 449 U.S. 39, 41-43 (1980) (per curiam) (invalidating state law requiring posting of Ten Commandments in public schools because it amounted to government sponsorship of religious message); Lemon, 403 U.S. at 619 (“The State must be certain, given the Religion Clauses, that [publicly] subsidized teachers do not inculcate religion”); Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 847 (1995) (O’Connor, J., concurring) (“[Our] decisions . . . provide no precedent for the use of public funds to finance religious activities.”).

It is of particular relevance here that this principle guided the Court’s decision in Bowen v. Kendrick, 487 U.S. 589, a case challenging the constitutionality of one of the federal statutes that provides abstinence-only funding, the Adolescent Family Life Act (“AFLA”), 42 U.S.C. §§ 300z–300z-10. Designed to address the “multiple and complex problems” surrounding teenage pregnancy and parenthood, 42 U.S.C. § 300z(a)(8)(A), AFLA requires grant recipients to involve a range of groups in the provision of services, including “families of adolescents[,] . . . religious and charitable organizations, voluntary associations, and other groups,” 42 U.S.C. § 300z-5(a)(21). AFLA funding for abstinence education has thus flowed to an array of grantees and sub-grantees, including religiously affiliated organizations. See

Bowen, 487 U.S. at 597. The Bowen Court addressed the constitutionality of the public grants to religiously affiliated groups. It held, first, that the Establishment Clause is not necessarily violated every time a religiously affiliated organization – as distinct from a “pervasively sectarian” institution, see infra Part I.B – receives public funds. See Bowen, 487 U.S. at 608-12. The Court stated, “[N]othing in our prior cases warrants the presumption . . . that religiously affiliated . . . grantees are not capable of carrying out their functions . . . in a lawful, secular manner.” Id. at 612 (emphasis added). At the same time, the Court made clear that government aid has the primary effect of advancing religion, and the Establishment Clause is accordingly violated, when grantees do not carry out their functions in a secular manner – namely, when public funds are used to support “religious activit[ies],” such as “materials that have an explicitly religious content or are designed to inculcate the views of a particular religious faith.” Id. at 621. As Justice O’Connor reiterated in her concurring opinion, “public funds may not be used to endorse [a] religious message,” id. at 622 (O’Connor, J., concurring), and “any use of public funds to promote religious doctrines violates the Establishment Clause,” id. at 623 (O’Connor, J., concurring) (emphasis in original).

More recently, in the controlling opinion of Mitchell v. Helms, 530 U.S. 793 (2000), a case challenging the government’s provision of such educational materials as library books and computers to parochial schools, Justice O’Connor³ wrote:

³ Justice O’Connor cast the deciding vote in Mitchell, upholding the challenged program on the ground that only de minimis evidence was proffered to show that the government assistance at issue was being used to promote religious precepts. See Mitchell, 530 U.S. at 864 (O’Connor, J., concurring). Because her opinion provides the narrowest ground for the holding of the Court, it is the controlling opinion in the case. See Marks v. United States, 430 U.S. 188, 193 (1977) (where no single rationale commands a majority of the Court, the narrowest ground for the holding is controlling).

Our decision in Bowen v. Kendrick . . . demonstrates that actual diversion [of government aid to the religious mission of an institution] is constitutionally impermissible. After concluding that the government-aid program in question was constitutional on its face [in large part because the Court refused to presume that a religiously affiliated organization would use the aid to promote religion], we remanded the case so that the District Court could determine, after further factual development, whether aid recipients had used the government aid to support their religious objectives. The remand would have been unnecessary if . . . [such] diversion were irrelevant under the Establishment Clause.

Mitchell, 530 U.S. at 840-41 (internal citations omitted). Five justices in Mitchell likewise agreed with the principle that “[a]lthough our cases have permitted some government funding of secular functions performed by sectarian organizations, our decisions provide no precedent for the use of public funds to finance religious activities.” Id. at 840 (internal quotation and citation omitted).

Yet another recent Supreme Court Establishment Clause case confirms that public funds may not be used to support religious messages. In a challenge to a city program allowing public school teachers to teach remedial classes in parochial schools, the Court emphasized, “As we have repeatedly recognized, government inculcation of religious beliefs has the impermissible effect of advancing religion.” Agostini, 521 U.S. at 223. Noting that the challenged program authorized only “secular, neutral, and nonideological” services, id. at 210, the Court upheld the program because, inter alia, there was no evidence that the teachers had “attempted to inculcate religion in students,” id. at 226.

Finally, as recently as last year the Fifth Circuit, sitting en banc, recognized this governing principle of Establishment Clause jurisprudence. In Doe v. Beaumont Indep. Sch. Dist., 240 F.3d 462 (5th Cir. 2001) (en banc), the Court considered an Establishment Clause challenge to a school district program that enlists volunteer pastors to counsel students on

secular topics in public schools. As the Court emphasized, the program prohibits the pastors from “wear[ing] clerical garb, identify[ing] their religious affiliations, engag[ing] in religious discussions, or quot[ing] from the Bible,” and requires that “[r]equests for prayer . . . be deflected to outside of the school.” *Id.* at 465 (plurality opinion). Although the deeply divided Court disagreed as to whether the school board’s focus on recruiting pastors in and of itself violates the Constitution, even those judges who took the most limited view of Establishment Clause protections recognized that the First Amendment would be violated if religious messages were conveyed in the course of the program:

By its very nature and proven operation, the [challenged] program does not inculcate religious beliefs or practices. Quite the contrary, the record refutes any suggestion of improper proselytizing by the clergy volunteers. The volunteers are required to shed all evidence of their profession – from clerical collars to scriptural quotations – in order to participate. The fact[] that . . . the [plaintiffs] find no constitutional fault with the content of the program reinforce[s] that there is no government-sponsored religious speech and no inculcation or endorsement of religious beliefs.

Id. at 480 (Jones, J., dissenting) (emphasis in original).

Here, by contrast, there is ample, clear evidence of government-sponsored promotion of religion and government-financed inculcation of religious beliefs. The GPA itself has promoted the message that God should be returned to the classroom, and that “[i]t’s time to restore [America’s] Judeo-Christian heritage.” Exhibit L to Gallagher Certification, at 42. Its grantees have used GPA funds to inform students inter alia that “God[] desire[s] sexual purity as a way of life,” Exhibit R to Gallagher Certification; that “each Individual must live to please God and not man,” *id.*; that “sexual activity outside the commitment of marriage is offensive to the Lord,” Exhibit OO to Gallagher Certification; and that “[a]s Christians, our bodies belong

to the Lord, not to us,” Exhibit QQ to Gallagher Certification, at 14. Moreover, GPA funding has supported prayer at abortion clinics, Exhibit VV to Gallagher Certification; the teaching of abstinence “as part of the gospel message,” Exhibit S to Gallagher Certification; a youth revival at which a minister “proclaim[ed] God’s Word [about abstinence] with power,” Exhibit T to Gallagher Certification; a “ministry” devoted to teaching abstinence by using “scriptural concepts” to provide a “view of human sexuality as a gift,” Exhibit Z to Gallagher Certification, at 4; and a series of classes on the issues “Who is God? How can He help? Understanding a relationship with God,” Exhibit JJ to Gallagher Certification, at 21; Exhibit KK to Gallagher Certification, at 21. These examples and others delineated above leave no doubt that the GPA has financed religious activity and promoted religious doctrine in violation of the Establishment Clause.

B. The GPA Impermissibly Advances Religion by Awarding Direct Financial Grants to Pervasively Sectarian Institutions.

The GPA also advances religion by issuing financial grants directly to pervasively sectarian institutions. As the Supreme Court emphasized in Bowen, “[o]ne way in which direct government aid might have th[e primary] effect [of advancing religion] is if the aid flows to institutions that are ‘pervasively sectarian.’” 487 U.S. at 610. The Court defined a pervasively sectarian institution as one in which “religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission,” id. (internal quotation and citation omitted), or the secular purposes and religious mission of the organization are “inextricably intertwined,” id. at 621 n.16. The Court explained that the ban on direct financial aid to pervasively sectarian institutions is necessary because “there is a risk that direct government funding, even if it is designated for specific secular purposes, may nonetheless advance the pervasively

sectarian institution’s ‘religious mission.’” Id. at 610; see also id. at 612 (“[I]n the context of aid to ‘pervasively sectarian’ institutions . . . there [i]s a ‘substantial’ risk that aid to these religious institutions would, knowingly or unknowingly, result in religious indoctrination.”). The Court in Mitchell likewise recognized “special Establishment Clause dangers” when public dollars flow to parochial schools and comparable sectarian institutions. See 530 U.S. at 819-20 (plurality opinion); see also id. at 855 (O’Connor, J., concurring) (noting “our continued recognition of the special dangers associated with direct money grants to religious institutions” like parochial schools).

The GPA has a pattern and practice of violating this prohibition on the direct grant of public dollars to pervasively sectarian institutions. During the current contract year, for example, it is disbursing \$25,000 of direct financial assistance to the Roman Catholic Church-Diocese of Houma/Thibodeaux. Exhibit ZZ to Gallagher Certification. This is in addition to the \$23,000 it awarded to the Roman Catholic Church-Diocese of Houma/Thibodeaux for the 2000-2001 contract year, and the \$46,000 of direct financial aid it issued to Diocese of Lafayette from 1999 to 2001. Exhibits N, SS, TT to Gallagher Certification. The GPA is thus impermissibly funding the Church itself, a quintessential violation of the Establishment Clause.

C. The GPA’s Distribution of Funds Impermissibly Endorses Religion.

Because the GPA permits government-financed inculcation of religious principles, see supra Part I.A, and because it awards direct financial grants to pervasively sectarian institutions, see supra Part I.B, it fails not only the Lemon test, but also the “endorsement” test. It is well established that government actions with the purpose or effect of endorsing religion violate the Establishment Clause. See, e.g., County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 592-93 (1989); Doe v. Sch. Bd. of Ouachita

Parish, 274 F.3d at 293. And, when public aid is used to inculcate religion, the government communicates the impermissible message that it endorses religion: “Because the religious indoctrination is supported by government assistance, the reasonable observer would naturally perceive the aid program as government support for the advancement of religion.” Mitchell, 530 U.S. at 843 (O’Connor, J., concurring) (emphasis in original). And the “special dangers” of granting financial assistance to pervasively sectarian institutions include the appearance of endorsing the institutions’ religious missions. See id. at 848 (O’Connor, J., concurring).

This case provides vivid examples of how the government-financed promotion of religious beliefs can lead to the perception that the state supports the advancement of religion. The flyers and pamphlets of one GPA-supported group, for example, state both that the group is sponsored “in cooperation with the Governor’s Program on Abstinence” and that it “use[s] a format that is . . . Christ-centered” and believes that “sexual activity outside . . . marriage is offensive to the Lord we serve.” Exhibit OO to Gallagher Certification. That same group requires its student members both to sign a commitment form advising them that as members they represent the Governor’s Office and to attend Bible study with a prayer partner. Exhibits OO, PP to Gallagher Certification. Another group uses “youth pastors” to spread the GPA’s abstinence message. Exhibit GG to Gallagher Certification, at 4. And yet another ran a GPA-financed curriculum entitled “God’s Gift of Life.” Exhibits UU, VV to Gallagher Certification. In each of these cases, and in many others discussed above, the GPA has fostered the impression that it endorses religion and seeks its advancement. The Establishment Clause does not permit the state to convey that message.

II. AN INJUNCTION IS NECESSARY TO PREVENT IRREPARABLE HARM.

The GPA's pattern and practice of using and disbursing public funds in a manner that advances religion violates First Amendment rights. See supra Part I. The Fifth Circuit has repeatedly held that even a threat of such a violation mandates the conclusion that irreparable harm will result if a preliminary injunction is denied. In Ingebretsen v. Jackson Public School District, 88 F.3d 274 (5th Cir. 1996), for example, the Fifth Circuit reviewed the issuance of a preliminary injunction barring enforcement of a statute allowing school prayer. After concluding that there was a substantial likelihood that the statute violated the Establishment Clause, the Fifth Circuit held that the "[l]oss of First Amendment freedoms, even for minimal periods of time, constitutes irreparable injury." Id. at 280 (citing Elrod v. Burns, 427 U.S. 347, 373 (1976)); see also Fla. Businessmen for Free Enterprise v. City of Hollywood, 648 F.2d 956, 958 (5th Cir. June 1981) (same); Let's Help Florida v. McCrary, 621 F.2d 195, 199 (5th Cir. 1980) (same). An injunction is thus necessary in this case to prevent ongoing, irreparable harm.

III. AN INJUNCTION WILL DO NO HARM AND WILL SERVE THE PUBLIC INTEREST.

The remaining standards governing the appropriateness of a preliminary injunction are likewise easily met in this case. First, the threatened harm – namely, the violation of First Amendment rights – more than outweighs any conceivable injury to Defendants from the issuance of an injunction. Defendants will at most incur administrative costs as a result of an injunction ensuring their compliance with the Constitution; such costs have long been deemed insufficient to justify an infringement on constitutional rights. Cf. Frontiero v. Richardson, 411 U.S. 677, 690 (1973) (holding that gender discrimination by the state cannot be justified by its

interest in administrative convenience). Moreover, because the GPA's pattern and practice is unconstitutional, the public interest cannot be disserved by an injunction barring this practice. See, e.g., Ingebretsen, 88 F.3d at 280.

CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests that the Court grant its motion for a preliminary injunction ordering Defendants to (a) cease and desist from promoting religion in any manner in the context of official GPA events, documents, or other resources; (b) cease and desist from disbursing GPA funds to grantees that advance religion in any way in the course of GPA-financed events or documents; and (c) cease and desist from disbursing GPA funds to pervasively sectarian institutions.

Respectfully submitted,

BOOTH & BOOTH
A Professional Law Corporation

VINCENT J. BOOTH (#18565)
Cooperating Attorney, ACLU Foundation of
Louisiana
138 North Cortez Street
New Orleans, Louisiana 70119
(504) 482-5292 (phone)
(504) 482-5847 (fax)

REPRODUCTIVE FREEDOM PROJECT
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
Catherine Weiss*
Jaya Ramji*
Julie Sternberg*
125 Broad Street
New York, New York 10004
(212) 549-2633 (phone)
(212) 549-2652 (fax)

GIBBONS, DEL DEO, DOLAN,

GRIFFINGER & VECCHIONE
A Professional Corporation
Lawrence S. Lustberg*
Jessica A. Roth*
Risa E. Kaufman*
Philip G. Gallagher*
One Riverfront Plaza
Newark, New Jersey 07102-5496
(973) 596-4500 (phone)
(973) 639-8329 (fax)

Attorneys for Plaintiff

Dated: May ____, 2002

*Motion for Admission *Pro Hac Vice* Pending