

religious beliefs. When an elementary school teacher prays with students in class, teachers collaborate with parent volunteers to provide prayers for students, the principal of the school participates in religious activities on school grounds, prayers and religious texts are broadcast across the school lawn using the school's equipment, posters throughout the school promote a particular set of religious beliefs, and the principal announces his adherence to those beliefs by wearing an "I Prayed" sticker during the school day, the line of constitutional permissibility has been surpassed.

For the reasons detailed below, there are issues of material fact and where there are none, the defendants' conduct plainly violates the Establishment Clause. The motions should be denied.

I. FACTS

Jane Doe is the parent of James Doe, a five-year old, kindergarten student at Wilson County School System's Lakeview Elementary School in Mt. Juliet.

On the morning of September 5, 2005, Mrs. Doe and James Doe entered the school drive-thru and confronted a group of people surrounding the school flagpole near the drive-thru crosswalk used to enter the school. (*Marlowe Deposition*, Ex. 14 – diagram of the school drawn by Mr. Marlowe). The group – which included Lakeview's principal, Wendell Marlowe, and other school officials and teachers – was praying and reciting scripture. Jane Doe observed Mr. Marlowe participating in the prayers. Loud speakers, provided by the school district, broadcast the group's activities across the school lawn. James Doe, as well as other students being driven to school by their parents or arriving by school bus, had to pass alongside the assembled group in order to enter the elementary school. (*Jane Doe Deposition*, pp. 53-54; *Jane Doe Affidavit*).

Lakeview Elementary School holds classes from kindergarten to fifth grade. The typical student age is 5 to 12. It is a small and safe school. (*Marlowe Deposition*, p. 7, 9). Largely because of the age of the students, there are no student clubs, sports teams or extracurricular activities organized by Lakeview and no students have approached Mr. Marlowe to start any. (*Marlowe Deposition*, pp. 32-33). In the event students wished to form a club and meet at school after hours, Mr. Marlowe would require adult supervision. (*Marlowe Deposition*, p. 35).

Particularly in the lower grades, parents may volunteer as teacher helpers and work in the class alongside the teacher during class hours. Responsibilities of the parent volunteers are largely up to the individual teacher. The students at Lakeview Elementary School are taught to respect adult authority figures, and parents are given the same level of respect as teachers at Lakeview. (*Marlowe Deposition*, pp. 8, 12-13).

During the 2005-2006 school year, Jane Doe served periodically as a volunteer teacher helper in Ms. Adamson's classroom. On one of these occasions, she was approached by Jennifer Walker -- the mother of a Lakeview student, the organizer of the Praying Parents group at Lakeview, and a volunteer teacher helper -- in Ms. Adamson's classroom. (*Jane Doe Deposition*, pp. 47-49). (*Intervenor-Defendants' Statement of Undisputed Material Facts*, Nos. 2 and 6; *Defendants' Statement of Undisputed Material Facts*, No. 22); Ms. Walker handed Jane Doe a card, which stated that the Praying Parents had been praying for a student in the class, and asked her to pass it on to Ms. Adamson. (*Jane Doe Deposition*, pp. 47-49). Jane Doe had previously seen Jennifer Walker on other occasions in the Lakeview Elementary School walking the hallways pulling some type of suitcase. (*Jane Doe Deposition*, p. 49).

Ms. Walker is not the only member of the Praying Parents who volunteers at the school, nor was the September 5, 2005 event the only Praying Parents activity held on school grounds. Intervenor-Defendant Christy Gold is also involved with the Praying Parents. (*See Christy Gold Affidavit*). The Praying Parents meet monthly in the Lakeview Elementary School cafeteria during the school day. During their sessions, the Praying Parents pray for Lakeview teachers and students. (*Intervenor-Defendants' Statement of Undisputed Material Fact*, No. 24). Principal Marlowe stated that he is unaware of any other public school in Wilson County in which a group called Praying Parents exists or that facilitates similar activities. (*See Defendant Wendell Marlowe's Answer to Interrogatory No. 15 attached by Defendants in support of their motion.*).

During a school day, Praying Parents can be seen walking school hallways, and entering the teacher lounge at will to leave fliers, treats, and prayer response cards in the teacher mailbox. These activities occur with the consent of Mr. Marlowe. (*Marlowe Deposition*, pp. 61-64).

Prior to September 5, 2005, James Doe had brought home flyers for the Praying Parents, including some apprising of the event on September 5, 2005, in his student folder -- a folder for each kindergarten student in which the teacher places school announcements, class assignments, and other notices. (*Jane Doe Deposition*, pp. 40, 53, 82-83). Having a curious five-year old son, Jane Doe would have to explain the meaning of the fliers. (*Jane Doe Affidavit; Jane Doe Deposition*, p. 41).

In addition to the flyers, Praying Parents regularly posted notices in the PTO newsletter, the Eagle Eye, that is periodically distributed to students and brought home in student folders. (*Defendants' Statements of Undisputed Material Facts*, No. 12). Further, the Praying Parents had a link on the Lakeview Elementary School website, maintained

by the School to provide information about the school, news, regulations, and the school calendar. No other group or organization other than the Praying Parents had a link on the Lakeview Elementary School website. (See Exhibit 1 to Plaintiff's Original Complaint).

In November 2005, during class time, Ms. Adamson led the students in a prayer that she and the students sang. Ms. Adamson and the students were sitting in a circle and the prayer had obviously been practiced. Ms. Adamson did not tell the students that this was voluntary or not required.¹ (*Jane Doe Affidavit*).

At the end of the first semester in December 2005, the kindergarten teachers at Lakeview organized a Christmas program involving all of the kindergarten classes. As far as the Does knew, this program required all student participation. (*Jane Doe Affidavit*). In fact, the Eagle Eye advertisement for the event states "Bring your cameras . . . you won't want to miss this delightful play. Every child participates . . ." (See Ex. 5 to Plaintiff's Original Complaint). The program occurred at Lakeview and consisted of a recitation of the story of "'Twas the Night Before Christmas" in which there were role-playing by students. Students also sang certain Christmas songs as part of the program. (*Defendants' Statement of Undisputed Material Facts*, Nos. 48, 49). At the conclusion of the program, several students were dressed to demonstrate the Christian Nativity scene. While these children were being presented, the kindergarten students and their parents were asked to join and sing "Joy to the World" and "Away in a Manger." The words to these songs were included in the Christmas program. No other words to any of the other carols sung were provided in the program. A reproduction of the Christmas

¹ John and Jane Doe discovered this incident at year's end when they were presented a CD-ROM that captured certain highlights of the previous school year. The prayer sang by Ms. Adamson and her class was captured on the CD-ROM. (*Jane Doe Affidavit*).

program is attached as Exhibit 6 to Plaintiffs' Original Complaint. (*See also Affidavit of Jane Doe*).

Near the end of the 2005-2006 school year, James Doe brought home a series a flyers in his student folder. The flyers promoted an event called the National Day of Prayer that was to take place on May 4, 2006 at the Lakeview cafeteria from 6:40 to 7:00 a.m. A reproduction of this flyer is attached as Exhibit 3 to Plaintiffs' Original Complaint. (*See also Affidavit of Jane Doe*). The flyer did not identify what person or organization was organizing or sponsoring the event. The flyer did not reveal that participation in this event by students was voluntary, or indeed that participation by students required their parental consent. The National Day of Prayer event was also promoted in the Lakeview Eagle Eye newsletter. This notice again did not identify what person or group organized or sponsored the event. There was also a notice included in the advertisement for the Praying Parents. The reproduction of this notice is included as Exhibit 4 to Plaintiffs' Original Complaint.

The Praying Parents advertised the National Day of Prayer, with Mr. Marlowe's consent, on the Lakeview website and Eagle Eye newsletter. (*Marlowe Deposition*, p. 80). To further promote the event a poster contest was held. Posters purportedly made by students at their homes were hung, with Mr. Marlowe's consent, in the Lakeview hallways. (*Marlowe Deposition*, pp. 80-82). Mrs. Doe saw the posters and described the content of them as both patriotic and Christian oriented. (*Jane Doe Deposition*, p. 79).

The National Day of Prayer took place in the Lakeview cafeteria before the start of school. Members of the Praying Parents organized and led the program. (*Intervenor-Defendants' Statements of Undisputed Material Facts*, Nos. 5, 6, 8, 9, 10). At some point during or after the event, stickers were passed out with the words "I prayed" on it. At

least one student in James Doe's class wore that sticker. (*Defendants' Statements of Undisputed Material Facts*, Nos. 32, 33). Wendell Marlowe attended the National Day of Prayer, as did other Lakeview school officials and/or teachers. Mr. Marlowe received an "I prayed" sticker, put it on, and wore it. (*Wendell Marlowe Deposition*, pp. 87, 88).

John and Jane Doe approached Mr. Marlowe and other officials at the Wilson County School System about their concern over the activities described above. They were told that no changes or alterations would be made regarding their complaints. (*Jane Doe Deposition*, p. 82).

II. STANDING

Intervenor-Defendants challenge the Plaintiffs' standing to pursue this litigation on two basis, *to wit*: A) that the Does have not sustained any injury regarding two of the incidents at issue; and B) that they do not have taxpayer standing.

A. Actual Injury

The Does have Article III standing to challenge the activities occurring at Lakeview Elementary School. Jane Doe and her five-year old son confronted the religious activities of the Praying Parents repeatedly on school grounds, through the school distribution system, on the school website, and at school events. Where a school "[uses] governmental authority to encourage a sectarian religious view," "any parent, employee, or former student who uses the school facilities and suffers actual injury would have standing to sue." *Washegesic v. Bloomington Pub. Schs.*, 33 F.3d 679, 681, 683 (6th Cir. 1994) (holding that plaintiff had standing to challenge portrait of Jesus Christ on display in his school's hallway); *see also Adland v. Russ*, 307 F.3d 471,478 (6th Cir. 2002).

Intervenor-Defendants argue that because neither the Does nor their son attended the Praying Parents meeting or the National Day of Prayer ("NDP") they have

sustained no injury that they can challenge. (*Intervenor-Defendants' Supporting Memorandum*, p. 7). But Plaintiffs have sustained constitutional injury because they have repeatedly confronted the challenged activities during the course of the ordinary school day. Further, even had Plaintiffs not been directly and repeatedly exposed to these activities, they still would have standing to challenge the school district's endorsement and promotion of particular religious views and activities. See, e.g., *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 314 (2000) (stating that "the mere passage by the District of a policy that has the purpose and perception of government establishment of religion" can be a cognizable Establishment Clause injury). "Courts have never defined Establishment Clause violations in public schools so narrowly as to limit standing to only those students immediately subjected to the offensive content." *Kitzmiller v. Dover Area School Dist.*, 400 F. Supp. 2d 707, 710, n. 1 (M.D. Pa. 2005). *Steele v. Van Buren Public School District*, 845 F.2d 1492, 1495 (8th Cir. 1988) held similarly when it found that when a teacher led the Plaintiff's oldest child in prayer the teacher injured the parent's "interests in having her child educated in a public school free of religious activities. That interest will continue so long as she has children in the local schools." In *Littlefield v. Forney Independent School District*, 268 F.3d 275, 294, n. 31 (5th Cir. 2005) the Court found that "[T]he mere passage by the district of a policy that has the purpose and perception of government establishment of religion" constituted a cognizable Establishment Clause injury.

With regard to the meetings of the Praying Parents and the NDP, the injury that gives rise to standing on the part of the Plaintiffs is not the mere fact that the events occurred, but rather that the Lakeview School was the conduit through which the promotion for the those activities occurred. Such promotions included the Praying

Parents having a link on the Lakeview Elementary School website, the Praying Parents having a notice or ad in the Lakeview PTO newsletter (the Eagle Eye), the Praying Parent distributing fliers through Lakeview teacher mailboxes so that they could then be distributed by the Lakeview teachers to their students in student folders, the NDP fliers being distributed by the teachers to their students without a disclaimer that the event was not an official school extracurricular activity or that attendance was voluntary or parent permission needed, that the Praying Parents organized a poster contest in which posters were hung inside the Lakeview hallways in order to promote the NDP event. All of these activities created, at a minimum the perception, if not the actual reality, that the Lakeview Elementary School approved of and endorsed the Praying Parent meetings and the NDP event. For all of those reasons, the Plaintiffs have sustained an injury which allows them to challenge those actions.

B. Taxpayer Standing

Plaintiffs also have taxpayer standing because they pay taxes in the school district and the school district expends resources on the challenged activities. For example, Wendell Marlowe, principal of Lakeview, has permitted the Praying Parents to post a link on the Lakeview Elementary webpage (*Marlowe Deposition*, p. 60). The Praying Parents have also used the school's amplifier and sound system for events at Lakeview Elementary. (*Marlowe Deposition*, p. 87). Additionally, the Praying Parents meetings and the NDP event occurred in the Lakeview cafeteria before school hours, when the lights and facilities would not otherwise have been used. *See Jager v. Douglas County School District*, 862 F.2d 824, 826 (11th Cir. 1989) (holding that taxpayers had standing to challenge prayers recited at a high school football game because the games

were school sponsored activities played at a school stadium with lights and a public address system funded by the local taxpayers).

Intervenor-Defendants' arguments on standing have no merit and should be denied.

III. ARGUMENT

The Defendants in this case have created an atmosphere at Lakeview Elementary School that communicates a clear message of support for one, and only one, set of religious beliefs. Teachers and school officials have at times created, often actively facilitated, and routinely participated in religious activities of a particular faith on school grounds. The Establishment Clause simply does not permit this type of government endorsement of beliefs.

"When evaluating the effect of government conduct under the Establishment Clause, we must ascertain whether 'the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choice.'" *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 597 (1989) (citation omitted); *see also Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309-310 (citation omitted).

In this case, by sponsoring, supporting, facilitating, participating in, and promoting particular religious beliefs, Lakeview Elementary School has sent a clear message to parents of other religious faiths and their elementary-age children "that they are outsiders, not full members of the [school] community and an accompanying message to adherents that they are insiders, favored members" *McCreary County v. ACLU of Kentucky*, 545 U.S. 844, 860 (2005) (citations and internal quotation marks omitted).

"The First Amendment mandates neutrality between religion and religion, and between religion and nonreligion. When the government acts with the ostensible and predominant purpose of advancing religion, it violates

that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides." *Id.* (citations and internal quotation marks omitted).

Lakeview Elementary School has violated the Establishment Clause in this case by acting with the purpose of promoting and endorsing particular religious beliefs, and by facilitating and sponsoring religious activities conveying the clear effect that the school endorses those beliefs.

Defendants and Intervenor-Defendants construct an imaginative and superficially persuasive argument that the activities at issue in this litigation are constitutionally permissible and that to restrict or prohibit those same activities would constitute "viewpoint discrimination" in violation of the First Amendment of the United States Constitution. The context in which the contested actions occur and the implicit partnership between the Praying Parents and the Lakeview School, however, render the actions here plainly unconstitutional. Rather than opening its facilities in a neutral manner to multiple groups, Lakeview Elementary School has facilitated, promoted, and endorsed the activities of a single religious group engaging in various activities with school participation and during the school day. *Cf. Chandler v. Siegelman*, 230 F.3d 1313, 1317 (11th Cir. 2000) ("So long as the prayer is *genuinely student-initiated*, and not the product of any school policy which actively or surreptitiously encourages it, the speech is private and it is protected."); *Prince v. Jacoby*, 303 F.3d 1074 (9th Cir. 2002) (holding that while the school did not violate the Establishment Clause by permitting equal participation in a limited public forum, the constitutional line would have been crossed if the school "required student participation in or itself participated in or sponsored religious meetings on the high school campus").

Further, Establishment Clause violations in elementary school settings are matters of “heightened concern.” *Lee v. Weisman*, 505 U.S. 577, 592, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992). “The symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as free and voluntary choice.” *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 390 (1985), *overruled on other grounds*, *Agostini v. Felton*, 521 U.S. 203, 222-23 (1997). Thus, the protection of public education from divisive religious influences reflects the fact that:

[F]amilies entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family.

Edwards v. Aguillard, 482 U.S. 578, 584, 107 S.Ct. 2573, 2577, 96 L.Ed.2d 510 (1987).

In a nutshell, the actions being contested in this litigation are unconstitutional for the following reasons:

- 1) The worship and prayers in the “See You at the Pole” and “National Day of Prayer” events are not student- initiated and led;
- 2) The Praying Parents act as surrogates in organizing and leading students in prayer at these events and school officials participate in these events;
- 3) Lakeview serves as a conduit by its surrogate, the Praying Parents, to promote its activities and signifies to a reasonably neutral observer that the state endorses the Praying Parents’ activities;
- 4) Teacher led prayer in class and religious symbolism at a teacher organized school event is state speech.

A. “See You at the Pole” and “National Day of Prayer” Events

Both of these events involve prayer and ostensibly religious worship. They occur on the grounds of Lakeview Elementary School. Neither event was or is promoted, organized, initiated or led by students. Because of the age of the Lakeview Elementary School students there are no school clubs, sports teams or extracurricular activities. (*Marlowe Deposition*, pp. 32-33).

“. . . it is clear that private parties’ religious speech can violate the Establishment Clause if the state use such parties as surrogates to accomplish what the state may not do.” *Chandler v. James*, 180 F.3d 1254, 1259 (11th Cir. 1999), vacated and later reinstated in *Chandler v. Siegelman*, 230 F.3d 1313 (11th Cir. 2000).

The Praying Parents initiated, organized, and led both events. The Praying Parents used the Lakeview School facilities to promote the event, *to wit*: Eagle Eye PTO school newsletter, hosting a student poster contest in which posters promoting the event were hung (by the parents) in the Lakeview School hallways with the permission of Mr. Marlowe, and distributing fliers promoting the event that were distributed by Lakeview teachers to the students via their student folders. (*Jane Doe Deposition*, p. 40; *Affidavit of Jane Doe*). That Intervenor-Defendants Jennifer Walker and Christy Gold are both involved in the Praying Parents and serve as volunteer teacher helpers strengthens their identity as Lakeview surrogates. Lakeview students are taught to respect adult, authority figures. (*Marlowe Deposition*, p. 9)

The fliers promoting these events do not identify the group or entity hosting the event. The fliers do not explain that the event is voluntary and not a mandatory school event. The fliers do not disclaim any affiliation with the school. (*Jane Doe Affidavit*).

The Lakeview School endorsed both events with the attendance and the participation of Wendell Marlowe. In addition to taking part in the prayers and other

activities, Mr. Marlowe consented to the use of the school facilities for the events and the use of the school sound system at both events. (*Marlowe Deposition*, pp. 50, 80, 87). Mr. Marlowe, in fact, acknowledges not only attending the National Day of Pray, but indeed giving permission to the organizers to distribute “I Prayed” stickers and wearing one of the stickers himself, thereby broadcasting his participation to the students. (*Marlowe Deposition*, p. 87).

The Court in *Doe v. Duncanville Independent School District*, 70 F.3d 402, 406, n. 4, (5th Cir. 1995), concluded that:

“... if while acting in their official capacities, DISD employees join hands in a prayer circle or otherwise manifest approval and solidarity with students religious exercises, they cross the line between respect for religion and endorsement of religion.”

Mr. Marlowe’s actions crossed the line from respect to endorsement.

The manner at which the “See You at the Pole” event was conducted was particularly disturbing, in that it occurred as children were coming into school and necessarily had to pass the event that was being broadcast via the school sound system. *Doe v. Duncanville Independent School District*, 70 F.3d 402 (5th Cir. 1995) upheld an injunction that prohibited school employees from participating or supervising in school prayers. “DISD representatives’ participation in these prayers improperly entangles it in religion and signals an unconstitutional endorsement of religion.” 70 F.3d at 406.

Both the Defendants and the Intervenor-Defendants cite *Daugherty v. Vanguard Charter School Academy*, 116 F.Supp.2d 897 (W.D. Mich. 2000) for the proposition that teachers merely being present while students are praying around the flagpole was not deemed an unconstitutional activity. Plaintiffs disagree with this interpretation. The court in *Daugherty* first found no Establishment Clause violation based on teachers’ prayer meetings on school grounds only after concluding that “[t]here is no evidence

that Vanguard teachers have met for prayer *during instructional time or in the presence of students.*" *Id.* at 910 (emphasis added). With regard to gatherings at the flagpole, the court found no violation based on the record before it because "if teachers attended the flagpole gathering strictly in a passive or supervisory capacity without participating in the prayer, their mere presence would not be violative of the Establishment Clause"; and if the teachers had played a more active, participatory role in the prayer gathering, their conduct, the court determined, would have been violative of school policies prohibiting teachers' expression of religious belief in the presence of students and the school board defendant would not necessarily have been legally responsible for the teachers' conduct contrary to stated school policy. *See* 116 F.Supp.2d at 911. Even the district court case relied on by the Defendants and Intervenor-Defendants does not support their claim that teachers may actively participate in prayer activities with students on elementary school grounds.

Jane Doe testified the day she drove her five-year old son onto the Lakeview School grounds on September 5, 2005, she observed the gathering at the flagpole and in particular Mr. Wendell Marlowe and saw that "he [Mr. Marlowe] was doing what everybody else was doing. I mean, bowing their heads in prayer and, you know – he was doing what everyone else was doing." (*Jane Doe Deposition*, p. 55). In addition to participating in the prayer and religious worship on the National Day of Prayer, Mr. Marlowe wore one of the "I Prayed" stickers during the school day while acting in his official capacity as the principal of the elementary school.

Courts have consistently and unambiguously ruled that when teachers and school officials participate in religious activities on school grounds, the school has endorsed those activities in violation of the Establishment Clause. *See, e.g., Duncanville*

Indep. Sch. Dist., 70 F.3d at 406 (“[I]f while acting in their official capacities, [school] employees join hands in a prayer circle or otherwise manifest approval and solidarity with student religious exercises, they cross the line between respect for religion and endorsement of religion.”); *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 522 (9th Cir. 1994) (“Peloza is not just any ordinary citizen. He is a teacher. . . . He is clothed with the mantle of one who imparts knowledge and wisdom. His expressions of opinion are all the more believable because he is a teacher. The likelihood of high school students equating his views with those of the school is substantial. To permit him to discuss his religious beliefs with students during school time on school grounds would violate the Establishment Clause”); *Bishop v. Aranov*, 926 F.2d 1066, 1077 (11th Cir. 1991) (“Because of the potential establishment conflict, even the appearance of proselytizing by a professor should be a real concern to the University.”).

Both the Defendants and Intervenor-Defendants cite *Good News Club v. Milford Central School*, 533 U.S. 98, 121 S.Ct. 2093, 150 L.Ed.2d 151 (2001) for the proposition that activities such as “See You at the Pole” and “National Day of Prayer” events that occur on school campus but before or after school cannot be excluded on the basis of viewpoint discrimination.

To the contrary, there are several facts that distinguish *Good New Club v. Milford Central School*:

- 1) The Good News Club was clearly a private charitable organization unaffiliated with the school (533 U.S. at 103, 121 S.Ct. at 2098), unlike the Praying Parents whose only existence is tied with their children’s attendance at the Lakeview Elementary School.

- 2) The Good New Club meetings were held in special use rooms after school hours when children were not permitted to loiter around the school. Additionally, the school required parental consent for participation in the meetings. (533 U.S. at 113, 117; 121 S. Ct. at 2103, 2106).
- 3) Milford Central School included a larger student body with classes ranging from kindergarten through twelfth grade (533 U.S. at 118, 121 S.Ct. 2106). In contrast, Lakeview Elementary School had classes only from kindergarten to fifth grade, ages 5 to 12 years old.
- 4) Milford Central School did not promote the Good New Club meetings, nor were school teachers or official involved.

The facts and applicable law demonstrate that the Praying Parents acted as school surrogates to initiate, promote, organize and lead the “See You at the Pole” and “National Day of Prayer” events. Lakeview Elementary School, through Mr. Marlowe, served as the conduit through which the Praying Parents promoted both events. School officials, at least Mr. Marlowe, were not merely silent witnesses to these events, but active participants and affirmative facilitators of the activities. Summary Judgment is clearly not warranted; at a minimum there is an issue of material fact, which prevents summary judgment.

B. Actions of the Praying Parents

The activities of the Praying Parents to which the Plaintiffs object also reveal unconstitutional promotion and endorsement of a particular religious viewpoint by the elementary school. These activities include the following:

- 1) Having a link on the elementary school website;

- 2) Regularly advertising their meetings and activities, without disclaimer, in the Lakeview PTO newsletter, the Eagle Eye;
- 3) Having access and distributing prayer response cards and material to the teacher mailboxes that is then passed out the students to take home;
- 4) Distributing fliers through students' school folders and failing to include a disclaimer, or, at times even the name of the group organizing the event, to indicate that the religious activities announced are not school-sponsored;
- 5) Conducting prayer meetings at the Lakeview cafeteria during school hours and thereafter having its members go out into the school hallways, and in at least one instance, into a classroom, to pass out materials to teachers.

The Defendants and the Intervenor-Defendants argue that to restrict or eliminate the activities of the Praying Parents would constitute viewpoint discrimination. First, Plaintiffs would point out again that their objection is to Lakeview Elementary School's cooperation with and facilitation and promotion of the Praying Parents' activities, not to the simple existence of the group itself. In support of their argument, Intervenor-Defendants cite *Daugherty v. Vanguard Charter School Academy*, 116 F.Supp.2d 897 (W.D. Mich.); *Rusk v. Crestview Local School District*, 379 F.3d 418 (6th Cir. 2004); *Child Evangelism Fellowship of New Jersey, Inc. v. Stafford Township School District*, 386 F.3d 514 (3rd Cir. 2004); and *Child Evangelism Fellowship of Maryland, Inc. v. Montgomery County Public Schools*, 457 F.3d 376 (4th Cir. 2006); all of which are distinguishable.

Daugherty involved an elementary public school in which plaintiffs contested the actions of a "Mom's Prayer Group" that met weekly at the school's "parent room" to

read the bible and pray for student's families and teachers. 116 F.Supp.2d at 907. The *Daugherty* plaintiffs objected not only to the "Mom's Prayer Group" praying on school premises, but also that some of the members served in various volunteer capacities and at times sponsored luncheons for the school faculty. The "Mom's Prayer Group," however, was not in cooperation with the school administration in the way that Praying Parents is with Lakeview Elementary School. The "Mom's Prayer Group" was not linked on the school webpage, was not noticed and advertised in the school PTO newsletter, was not announced in fliers distributed to students, did not host, organize or lead gatherings attended by teachers on school grounds in areas of wide visibility and using school equipment, and did not promote student poster contests that were hung by the "Mom's Prayer Group" in school hallways.

In *Rusk v. Crestview*, the plaintiffs challenged a school practice of placing fliers in student mailboxes that advertised activities of community organizations, including local churches. These activities, however did not occur on school grounds and required parental consent. 379 F.3d at 421-422. Further, the student mailbox system was available to all community organizations on equal terms.

Both *Child Evangelism Fellowship of New Jersey v. Stafford* and *Child Evangelism Fellowship of Maryland v. Montgomery* involved issues of an outside group being allowed school access to distribute its fliers regarding religious activities to students. Both cases found that the schools had acted in a neutral manner. As the court explained in *Stafford*, "Nothing in the materials suggested that Stafford had any role in their production or approved their content. Indeed, the Good New Club flier contained an express disclaimer stating that the Good News Club was not a school sponsored activity." 386 F.3d at 525.

The Praying Parents in this case have no existence other than with the Lakeview Elementary School. See Defendant Wendell Marlowe's Answer to Interrogatory No. 15. There are no disclaimers on the Praying Parents link on the Lakeview website, their individual webpage, the advertisements and notices in the Eagle Eye newsletter, or in their fliers to students to dispel the reasonable perception that the school endorses the activities of this group which has a regular presence on school grounds, during the school day, and in which school officials participate.. See *Hedges v. Wauconda Community Unit School District*, 9 F.3d 1295, 1300 (7th Cir. 1993). The Praying Parents do not disclaim their affiliation with the Lakeview Elementary School; that Lakeview either allows or condones the Praying Parents use of its facilities as a conduit to promote its message creates the impression that the activities of the Praying Parents are being endorsed by Lakeview Elementary School, and thus is unconstitutional and impermissible.

C. Classroom Actions of Janet Adamson

A DVD of the 2005-2006 school year of Ms. Adamson's kindergarten class reveals Ms. Adamson leading the class in singing a prayer. Defendants attempt to explain that the recitation of a prayer was merely role-playing a lesson plan demonstrated to teach the significance of the Thanksgiving holiday. The facts make clear, however, that Ms. Adamson led the class in a prayer of Thanksgiving, not in a role play intended to highlight the historical or sociological aspects of the holiday.

In support, the defendants cite *Eklund v. Byron Union School District*, 2003 U.S. Lexis 27152 (M.D. Cal. 2003). *Eklund* is not dispositive on this issue, and is an unpublished district court opinion. *Eklund* involved a California State Board of Education approved seventh-grade world history course. During this class, a unit

involving Islam was taught and at some point, the teacher at issue required her class to role-play certain tenets of the Islamic religion as part of her instruction about that religion. By contrast, Ms. Adamson led a class of kindergarten students in prayer. There is no evidence that Ms. Adamson disclaimed what the prayer was or that they were actually not praying, and there is no reason to believe that a five year old child would know the difference.

The problems with Ms. Adamson's teacher-led prayer go beyond simply the young age of the students involved. The prayer occurred during class time and the young students were not invited to opt out (even assuming students so young would understand such an invitation). Because the students, including James Doe, were a captured audience, and the prayer was being led by a teacher, there is a degree of coercion and state action that constitutes sponsorship and endorsement of religion. "It really did not matter what the prayer said; *no* prayer commanded by the state can survive scrutiny under the Establishment Clause." *Chandler v. James*, 180 F.3d 1254, 1260 (11th Cir. 1999), vacated and later reinstated in *Chandler v. Siegelman*, 230 F.3d 1313 (11th Cir. 2000); *see also Doe v. Duncanville Independent School District*, 70 F.3d 402 (5th Cir. 1995) (holding that coach-led prayer before practice and games was unconstitutional and that school employees may not lead or supervise prayers).

For these same reasons, Ms. Adamson's playing of the religious/inspirational CD in her classroom was similarly unconstitutional and impermissible.

For both factual and legal reasons, summary judgment on this issue is in appropriate and should be denied.

D. Christmas Program 2005

The 2005 Christmas Program for the kindergarten class at the Lakeview School was organized by the Lakeview kindergarten teachers who were responsible for its content. (*Marlowe Deposition*, p. 92). The program occurred at the Lakeview Elementary School grounds. For all practical purposes, the Christmas program was an extracurricular activity from the kindergarten class. Although Mr. Marlowe explained that he has been asked in the past by certain parents to allow their children to be excused from the program, the Does were not told of this and considered their child's participation more or less obligatory. *See Jane Doe Affidavit*.

"The content of a public school's curriculum may not be based on a desire to promote religious beliefs." *Allegheny*, 492 U.S. at 591 (citing *Edwards v. Aguillard*, 482 U.S. 578 (1987); and *Epperson v. Arkansas*, 393 U.S. 97, (1968)). Although the singing of religious music may be appropriate in certain school settings, such as choral training or performances, schools may not hold religious celebrations of holidays or celebrate holidays, such as Christmas, of particular religions to the exclusion of other religions. *See Allegheny*, 492 U.S. at 601 ("Lynch teaches that government may celebrate Christmas in some manner and form, but not in a way that endorses Christian doctrine. Here, Allegheny County has transgressed this line. It has chosen to celebrate Christmas in a way that has the effect of endorsing a patently Christian message: Glory to God for the birth of Jesus Christ."). Here, Lakeview Elementary School has put on a Christmas program that celebrates no other religious holiday of any other faith, *see* (*Marlowe Deposition*, p.93), and that contains expressly religious material celebrating Christian doctrine as opposed to the secular aspects of the holiday. *Cf. Sechler v. State College Area School District*, 121 F. Supp. 2d 439, 453 (M.D. Pa. 2000) (holding that a school's winter

holiday program did not violate the Establishment Clause because the inclusion of songs celebrating Christmas, Kwanza, and Hanukah “sends a message of inclusion that celebrates freedom to choose one’s own beliefs. Since this message did not offend the Establishment Clause, either favoring one religion or others, or as favoring religion over non-religion, the government entity is conveying a legitimate secular message”). “To be sure, some Christians may wish to see the government proclaim its allegiance to Christianity in a religious celebration of Christmas, but the Constitution does not permit the gratification of that desire, which would contradict the ‘logic of secular liberty’ it is the purpose of the Establishment Clause to protect.” *Allegheny*, 492 U.S. at 612.

The Lakeview Elementary Christmas program for the kindergarten class in December 2005 clearly favored one religion over others and religion over non-religion by requiring students to reenact the birth of Jesus during a Christmas program in which expressly religious songs were played.

“The First Amendment mandates government neutrality between religion and religion, and between religion and non-religion . . . when government acts with the ostensible predominant purpose of advancing religion it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government’s ostensible object is to take sides.” *McCreary County, KY v. ACLU of KY*, 545 U.S. 844, 860, 125 S.Ct. 2722, 2733, 162 L.Ed.2d 729 (2005)(other case citations omitted).

In *McCreary* the Supreme Court affirmed an injunction prohibiting a county courthouse display of the Ten Commandments with other historical documents as conveying an overtly religious message. The Lakeview kindergarten Christmas program conveyed an overtly Christian message when the program culminated with the children Nativity scene and the singing of the Christian, Christmas songs. The fact that the program included secular elements does not excuse or obviate the religious message of the program’s conclusion.

Because of these reasons, both factually and legally, summary judgment is inappropriate on this issue.

IV. CONCLUSION

Lakeview Elementary School led by Principal Wendell Marlowe outwardly engaged or implicitly condoned through its surrogate the Praying Parents a pattern and practice that communicated a clear endorsement of Christian religious worship. Such actions violate the Establishment Clause of the First Amendment to the United States Constitution. At a minimum, there are outstanding issues of material fact. As such, Summary Judgment is inappropriate and the motions should be denied.

Respectfully submitted,

By: s/Edmund J. Schmidt III
Edmund J. Schmidt III, TN Bar #021313
1913 21st Avenue South
Nashville, Tennessee 37212
Phone: (615) 742-1775
Fax: (615) 742-1223

Susan Kay
Chair ACLU Legal Committee
131 21st Ave. South
Nashville, TN 37203-1120

Tricia Herzfeld
Staff Attorney
ACLU Foundation of Tennessee
P.O. Box 120160
Nashville, Tennessee 37212

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this the 19th day of October, 2007, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's electronic filing system.

Winston N. Harless, Esq.
David A. Changas, Esq.
P.O. Box 198615
Nashville, TN 37219-8615

Larry L. Crain, Esq.
Suite 402
5214 Maryland Way
Brentwood, TN 37027

Michael R. Jennings, Esq.
326 North Cumberland Street
Lebanon, TN 37087

Nathan W. Kellum, Esq.
699 Oakleaf Office Lane, Suite 107
Memphis, TN 38117

Benjamin W. Bull
Alliance Defense Fund
15333 N. Prima Road, Suite 165
Scottsdale, AZ 85260

s/Edmund J. Schmidt III
Edmund J. Schmidt III