



STATE OF ARKANSAS
ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2015-098

March 21, 2016

The Honorable John Cooper
State Senator
62 CR 396
Jonesboro, Arkansas 72401

Dear Senator Cooper:

I am writing in response to your request for an opinion. As background for your questions, you explain that the following questions “involve[] city-operated and/or owned media and communication channels, including those such as television channels, Facebook pages, Twitter accounts, websites and digital signs.” With this background in mind, you ask the following five questions:

1. Is it permissible to post verses, quotes or other sayings from the Holy Bible or any religious book on a Facebook page that is presented as a city-run department?
2. Is it permissible to post or display verses, quotes or other sayings from the Holy Bible or any religious book on any city-operated or controlled media or property?
3. Is it permissible for a city employee to post, display, or communicate to the public using city-operated media any verses, quotes, or other sayings from the Holy Bible or any religious book while utilizing city resources or while acting in their capacity as a city employee?
4. Is it permissible for a city employee to post, display or communicate to the public using city-operated media any solicitation to pray, either generically or specific to a particular religion or denomination, while utilizing city resources or while on duty?

5. Is it permissible to post or display any messages promoting religion, either specifically or generically, in any of the above-listed situations?

RESPONSE

Although your questions are posed generally and without reference to a specific context, it is my understanding that they have arisen from the context of a city employee posting at least four Facebook posts on an official Facebook page for a City of Jonesboro department. The posts contained certain Bible verses and other religious-themed statements. Because the legal analysis for your theoretical questions may heavily depend on the specific context and facts from which they arise, I must limit my analysis to the particular Facebook posts that triggered this inquiry.

Your questions implicate the Establishment Clause of the First Amendment to the U.S. Constitution. This clause was originally designed to ensure that Congress neither established a national religion nor attempted to disestablish the several official state churches that existed when the First Amendment was ratified. As such, the Establishment Clause was neutral on the merits of state and local establishments of religion. In 1947, the U.S. Supreme Court declared that the Establishment Clause limited states and localities (by virtue of the Fourteenth Amendment) and that the clause “requires the state to be a neutral in its relations with groups of religious believers and non-believers.” Over the last 70 years, shifting majorities on the Court have established at least three different, competing tests that the Court uses to assess whether challenged government action violates the Establishment Clause: the coercion test, the *Lemon* test, and the endorsement test.

Because the Supreme Court precedent in this area is admittedly somewhat unclear, I cannot be definitive about which of the three tests a court *would* use. **But, in my opinion, a court *should* use the coercion test because it has the best historical provenance and seems to be the direction in which the current Court is heading. Under this test, all four posts would be upheld.** If the court applied either of the other two tests, however, the result would be slightly different. Under the endorsement and *Lemon* tests, one of the posts would likely be struck.

DISCUSSION

The answer to your questions turns on the meaning and application of the Establishment Clause to the First Amendment of the U.S. Constitution. Yet, as many scholars, judges, and justices have noted, the U.S. Supreme Court has not consistently applied clear standards in the area of the Establishment Clause. In fact, the Court's shifting standards have resulted in, what Professor Steven Smith calls, an unusual kind of agreement: "In a rare and remarkable way, the Supreme Court's establishment clause jurisprudence has unified critical opinion: people who disagree about nearly everything else in the law agree that establishment doctrine is seriously, perhaps distinctively, defective."¹ Likewise, the former Chief Judge for the Seventh Circuit Court of Appeals predicated that "if the current establishment-clause doctrine had been announced by Congress or an administrative agency, the Supreme Court would declare it unconstitutionally vague."²

Accordingly, I believe a comprehensive answer requires me to provide significant detail concerning the history of the Establishment Clause and its current application by the Supreme Court. Having given this background, I will explain the three discernable standards that the Court uses when addressing establishment-clause questions and apply those standards to the four Facebook posts.³

I. Understanding the Establishment Clause

The Establishment Clause of the First Amendment to the U.S. Constitution states: "Congress shall make no law respecting an establishment of religion...." In 1947, the U.S. Supreme Court held that this constitutional limitation on government action applied not just to the federal government, but also to the states (and all their political subdivisions) through the Fourteenth Amendment.⁴

¹ Stephen D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 Tex. L. Rev. 995, 956 (1989);

² *Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 869 (7th Cir. 2012) (Easterbrook, dissenting).

³ This opinion assumes, for purposes of argument, that the posts in question constitute "government action." The First Amendment only restricts government action.

⁴ *Everson v. Bd. of Education*, 330 U.S. 1, 14-15 (1947).

But, as I will explain below, the Court has not been entirely clear about how, exactly, the Establishment Clause applies to government action generally and the Facebook posts you present specifically. To address your questions, I must begin by explaining what the Establishment Clause almost certainly meant when it was enacted and how it was later extended to apply to the states and their political subdivisions. This will give the context for explaining (1) the Court's multiple standards for applying the Establishment Clause and (2) which standard(s) a court would likely use to evaluate your questions.

A. The Establishment Clause as Originally Understood

"It has been so long," says Professor Michael McConnell, "since any state in the United States has had an established church that we have almost forgotten what it is." Yet, he continues, "[w]hen the words 'Congress shall make no law respecting an establishment of religion' were added to the Constitution, virtually every American—and certainly every educated lawyer or statesman—knew from experience what those words meant."⁵ The American colonists mostly came from places where a single church was established by law as the country's official church.⁶ As Professor McConnell explains, the colonists mostly continued this practice of establishing a particular denomination or set of denominations as the government's official religion, both before and after the Revolution: "Nine of the thirteen colonies had established churches on the eve of the Revolution, and about half the states continued to have some form of official religious establishment when the First Amendment was adopted."⁷

This historical context sheds light on the Establishment Clause's terminology: "Congress shall make no law *respecting* an *establishment* of religion." While the meaning of the two emphasized terms might not be immediately apparent today, legal historians have shown that both terms were chosen carefully and had a clear meaning. An "establishment of religion," was—as noted above—very common during in the 1700s. A religion was established if, among other things, it was declared by law to be the official religion of the government. As Professor McConnell explains, the established religions in the colonies and the early states

⁵ Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2107 (2003).

⁶ *Id.* (noting that the "Church of England was established by law in Great Britain," and that "[o]ther Americans had first-hand experience of establishment of religion on the Continent—of the Lutheran establishments of Germany and Scandinavia, the Reformed establishment of Holland, or the Gallican Catholic establishment of France.") (internal citations omitted).

⁷ *Id.* (internal citations omitted).

shared certain elements: (1) the government controlled the religion's doctrines, structure, and personnel; (2) the government often passed laws that made church attendance mandatory; (3) the government financially supported the established church; and (4) the government usually prohibited other forms of religious worship.⁸ Therefore, historians and legal scholars explain that when the First Amendment refers to an "establishment of religion," the amendment prohibited the federal government from declaring a particular denomination as the country's official religion.

While the meaning of the term "establishment" was clear, one can certainly and reasonably wonder why the Establishment Clause says that Congress could not make a law "respecting" an establishment of religion. The answer lies in the debate between the House and Senate regarding how the clause should be worded in light of the fact that six of the states had established churches.⁹ The House's early version of the clause stated, "No religion shall be established by law...."¹⁰ When the House forwarded this language to the Senate for its approval, the Senate changed it to say, "Congress shall make no law establishing articles of faith or a mode of worship...."¹¹ Because the House refused to accept this change, Congress called "a joint committee of the two houses to negotiate a compromise. A strong committee of three members from each house, including four men who had been influential Framers ([James] Madison, Roger Sherman, Oliver Ellsworth, and William Paterson), drafted the language that we know as the First Amendment."¹² Yale Law Professor Akhil Reed Amar explains the result of this language:

The establishment clause did more than prohibit Congress from establishing a national church. Its mandate that Congress shall make no law "*respecting* an establishment of religion" also prohibited the national legislature from interfering with, or trying to *dis*-establish,

⁸ McConnell, *supra* note 5, at 2131–2181; *see also*, Leonard W. Levy, ORIGINS OF THE BILL OF RIGHTS 92 (Yale Univ. Press 2001) ("[A]t the time of the framing of the Bill of Rights, every one of the six states that still maintained an establishment of religion in the United States had multiple or general establishments of religion. An established religion had come to mean government support, primarily financial, for religion generally, without legal preference to any church.").

⁹ Levy, *supra* note 8, at 92.

¹⁰ *Id.* at 88–89.

¹¹ *Id.*

¹² *Id.* at 89

churches [that already were or would become] established by state or local governments.¹³

In summary, and as Professor McConnell explains, the Establishment clause simply preserved the eighteenth century status quo in America and remained neutral on whether established religion was desirable: “Contrary to popular myth, the First Amendment did not disestablish anything. It prevented the newly formed *federal* government from establishing religion or from interfering in the religious establishments of the states.”¹⁴ The clause was “intended to prohibit federal power over the subject of religion, reserving the same to the states. In this way, the original Establishment Clause expressed the principle of federalism: The federal government could neither establish religion at the federal level, nor disestablish religion in the states. The Clause made no statement regarding the merits of religious establishments as such.”¹⁵

B. The Establishment Clause as Applied to the States

The Bill of Rights was originally designed to limit the actions of the federal government. They did not apply to the states, and they thus did not limit the actions of state governments. According to the United States Supreme Court, the post-civil-war amendments to the federal constitution changed this understanding of the Bill of Rights. The Court concluded that the Fourteenth Amendment was deliberately designed to apply (at least parts of) the Bill of Rights to the states.¹⁶

¹³ Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 32 (Yale Univ. Press 1998).

¹⁴ McConnell, *supra* note 5, at 2109 (emphases added).

¹⁵ Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 *Ariz. St. L.J.* 1085, 1088–89 (1995).

¹⁶ *Everson*, 330 U.S. at 14–15. Scholars debate whether the framers of the Fourteenth Amendment intended to incorporate the Establishment Clause against the states. Compare Amar, *supra* note 13, at 33–34 (“[T]he nature of the states’ establishment-clause right against federal disestablishment makes it quite awkward to mechanically ‘incorporate’ the clause against the states via the Fourteenth Amendment.... [T]o apply the clause against a state government is precisely to eliminate its right to choose whether to establish a religion—a right clearly confirmed by the establishment clause itself.”), and Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 *Nw. U. L. Rev.* 1115, 1136 (1988) (“[The historical data] strongly suggest that the fourteenth amendment, as originally understood, did not incorporate the establishment clause for application to state government action.”) with Lash, *supra* note 15 (“The scholars are right. The original Establishment Clause cannot be incorporated against the states. But time did not stop at the Founding.... By 1868, the (Non)Establishment Clause was

In 1947, the U.S. Supreme Court declared that the Fourteenth Amendment applies the Establishment Clause to the states.¹⁷ The Court was not entirely clear as to the meaning of the Establishment Clause. Much of the language used by the Court suggests that the Establishment clause prohibited states (and their political subdivisions) from engaging in the kinds of coercive actions that Professor McConnell noted above were the historic focus of the Establishment Clause:

The ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect ‘a wall of separation between Church and State.’¹⁸

Yet the Court went beyond merely stating that the Establishment Clause prohibits the foregoing kinds of coercion. It also made two additional statements in dicta

understood to be a liberty as fully capable of incorporation as any other provision in the first eight amendments to the Constitution.”).

¹⁷ *Everson*, 330 U.S. 1.

¹⁸ *Id.* at 15–16 (internal citation omitted, original punctuation preserved). This non-coercion understanding of the Establishment Clause is very similar to the understanding of religious liberty that is found in our state constitution: “All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can, of right, be **compelled** to attend, erect, or support any place of worship; or to maintain any ministry **against his consent**. No human authority can, in any case or manner whatsoever, control or interfere with the right of conscience; and no preference shall ever be given, **by law**, to any religious establishment, denomination or mode of worship, above any other.” Ark. Const., art. 2, §24 (emphases added).

that sowed the seeds for the Court's later development of the Establishment Clause rules. First, the Court stated that the Establishment Clause "requires the state to be a *neutral* [party] in its relations with groups of religious believers and non-believers.... State power is no more to be used so as to handicap religions, than it is to favor them."¹⁹ Second, relying on a statement Thomas Jefferson made in a letter to a friend, the Court declared that the Establishment Clause "has erected a wall between church and state. That wall must be kept high and impregnable."²⁰

These variations in language used by the Supreme Court have resulted in at least three (often competing) tests suggesting that the Establishment Clause (a) prohibits coercion, (b) requires neutrality, and (c) requires a "high and impregnable" separation between church and state. These three formulations became seeds for at least three tests that the Court would later develop.

C. The Court's Multiple Standards for Applying the Establishment Clause

These three views, or tests, persist today because the Court has specifically stated its "unwillingness" to "be confined to any single test or criterion in this sensitive area" of the Establishment Clause.²¹ This unwillingness has resulted in at least three different standards that the Court uses to apply the Establishment Clause: (1) the strict separationist approach known as the *Lemon* test; (2) the endorsement test; and (3) the coercion test. Before sketching each standard, one should know that, as one commentator explains, the Court's unwillingness to clearly state a specific standard means that "even the most rudimentary form of case synthesis in the area of governmental religious expression is impossible."²² This is because, as

¹⁹ *Everson*, 330 U.S. at 18 (emphasis added).

²⁰ *Id.*

²¹ *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984); see also *Warnock v. Archer*, 380 F.3d 1076, 1080 (8th Cir. 2004) ("[A]lthough the Court announced three 'tests' for establishment clause violations in *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971), it has often found it unnecessary to rely on *Lemon* in deciding later cases ... and has made it plain that it will not be confined to applying the *Lemon* principles in all cases 'in this sensitive area.'").

²² Michael I. Meyerson, *The Original Meaning of "God": Using the Language of the Framing Generation to Create a Coherent Establishment Clause Jurisprudence*, 98 Marq. L. Rev. 1035, 1053–54 (2015).

scholars and some judges acknowledge, the Court has not been consistent on when or how these tests apply.²³

a. The Lemon test

In 1971, the Court announced what is called the “*Lemon* test.”²⁴ Under this test, a statute or regulation violates the Establishment Clause if it fails any one of the following three prongs: (1) it must have a secular legislative purpose; (2) it must have a principle or primary effect that neither advances nor inhibits religion; and (3) it must not foster an excessive government entanglement with religion.²⁵ When a challenged government action is assessed under the *Lemon* test, the action is often declared unconstitutional.

I will not discuss this test in detail for several reasons. First, the U.S. Supreme Court has itself vacillated on whether this is a genuine test, explaining that *Lemon* is merely a “helpful signpost” to resolve establishment-clause disputes.²⁶ Second,

²³ Compare *County of Allegheny v. ACLU*, 492 US 573 (1989) (stating that sectarian government-sponsored prayer necessarily violates the constitution); with *Town of Greece v. Galloway*, ___ U.S. ___, 134 S. Ct. 1811 (2014) (expressly abrogating *County of Allegheny* and stating that such prayer does not necessarily violate the constitution); compare *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (creating a three-part test to determine whether a statute violates the Establishment Clause); with *Hunt v. McNair*, 413 U.S. 734, 741 (1973) (stating that *Lemon* provides “no more than helpful signposts”); see also *Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 872 (7th Cir. 2012) (Posner, dissenting) (“The case law that the Supreme Court has heaped on the defenseless text of the establishment clause is widely acknowledged, even by some Supreme Court Justices, to be formless, unanchored, subjective and provide no guidance.”).

²⁴ *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

²⁵ *Id.*; see also, *ACLU Nebraska v. City of Plattsmouth*, 419 F.3d 772, 775 (8th Cir. 2005) (en banc).

²⁶ See *Mueller v. Allen*, 463 U.S. 388, 394 (1983) (“[O]ur cases have emphasized that [*Lemon*] provides no more than [a] helpful signpost in dealing with Establishment Clause challenges.”) (internal quotation omitted). Despite this clear language from the Court, some federal circuit courts have declared that *Lemon* is the default test. See, e.g. *Am. Atheists, Inc. v. Port Auth. of New York and New Jersey*, 760 F.3d 227, 238 (2d Cir. 2014) (“Thus, in reviewing the challenged Museum display here, our standard is general rather than absolute neutrality, which we determine by reference to the three-prong analysis set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105.”); *Koenick v. Felton*, 190 F.3d 259, 264–265 & n. 4 (4th Cir.1999) (acknowledging “the Supreme Court has employed several different tests presented as either glosses or replacements for the *Lemon* test” but determining that courts must rely on *Lemon*’s principles until they are “overruled”).

to the extent that the *Lemon* test is at least a standard for resolving establishment-clause disputes, it is unlikely that a court in the Eighth Circuit would apply this test to your questions because our circuit appears to distinguish between (a) government actions and (b) statutes or policies.”²⁷ The Eighth Circuit has stated that “the *Lemon* test may be better suited to cases challenging statutes and policies, rather than specific government actions.”²⁸ The Facebook posts are the latter type of action. Third, the current U.S. Supreme Court seems to be definitively moving away from the view that *Lemon* is even a “helpful signpost.”²⁹ The move away from *Lemon* is further evinced by the fact that several U.S. Supreme Court Justices have written or joined opinions questioning or decrying *Lemon*.³⁰

b. *The endorsement test*

Widespread dissatisfaction with the *Lemon* test prompted Justice O’Connor to develop what is known as the “endorsement test.”³¹ Justice O’Connor argued that the Establishment Clause prohibits government from appearing to make or

²⁷ *Roark v. South Iron R-1 School Dist.*, 573 F.3d 556, n.4 (8th Cir. 2009) (“‘Taking our cue’ from *Van Orden*, we did not apply the *Lemon* test in *ACLU Neb. Found. v. City of Plattsmouth*, 419 F.3d 772, 778 n.8 (8th Cir. 2005) (en banc), a Ten Commandments display case like *Van Orden*. The *Lemon* test may be better suited to cases challenging statutes and policies, rather than specific government actions.”).

²⁸ *City of Plattsmouth*, 419 F.3d at 778 n.8.

²⁹ As other Attorneys General have noted, the most recent U.S. Supreme Court case addressing the Establishment Clause did not employ *Lemon* and seems to have shifted toward the coercion standard. See S.C. Att’y Gen. Op., 2014 WL 4659412, at *9 (Sept. 3, 2014) (“*Town of Greece* rejected the ‘endorsement’ test previously employed in other Supreme Court decisions and utilized instead the ‘coercion’ test.”); Tx. Att’y Gen. Op. KP-0042 (Nov. 4, 2015), 2015 WL 6872710.

³⁰ *Utah Hwy. Patrol Ass’n v. Am. Atheists, Inc.*, 132 S. Ct. 12, 21 (2011) (Thomas, J. dissenting from denial of cert.) (“Indeed five sitting justices have questioned or decried the *Lemon*/endorsement test’s continued use.”); see generally *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398–99 (1993) (Scalia, J., concurring in judgment) (“Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after repeatedly being killed and buried, *Lemon* stalks our Establishment Clause jurisprudence.... Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature’s heart ... and a sixth has joined an opinion doing so.”).

³¹ See Jesse H. Chopper, *The Endorsement Test: Its Status and Desirability*, 18 J.L. & Pol. 499 (2002).

actually “making adherence to a religion relevant in any way to a person’s standing in the political community.”³² Justice O’Connor originally proposed the test as a clarification of the *Lemon* test, but it has come to be viewed as its own test.³³ Under the endorsement test, a government action violates the Establishment Clause if a “reasonable observer” would conclude that the action “endorses religion.” This occurs if the government action has “the effect of communicating a message of government endorsement or disapproval of religion.”³⁴

c. The coercion test

In addition to the foregoing two tests, the Court has also used the “coercion test.”³⁵ Indeed, recent cases suggest that the Court views the coercion test as a better fit with the true meaning of the Establishment clause than the *Lemon* or *Endorsement* tests are.³⁶ Under this test, a government action violates the Establishment Clause if the action compels or coerces a citizen to participate in some form of religious observance or worship.³⁷

The Court is divided into two groups about what qualifies as “coercion.” The first group argues that a government action is coercive for purposes of the Establishment Clause *only if* the attempted coercion is backed up by the force of law and threat of a penalty. This first view is called “direct coercion.” Examples of direct coercion include a tax to specifically aide a religion or a religious oath required to serve in public office. The second view is less strict as to what amounts to coercion. Under this looser view, a citizen can also be coerced by indirect pressure from peer groups or certain segments of society. This view—called “indirect coercion”—is that the required coercive force can also be generated by

³² *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O’Connor, J., concurring); *see also County of Allegheny v. ACLU*, 492 U.S. 573, 594 (1989) (“The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from ‘making adherence to a religion relevant in any way to a person’s standing in the political community.’”) (quoting *Lynch*, 465 U.S. at 687 (O’Connor, concurring)).

³³ *See Chopper*, *supra* note 30.

³⁴ *Lynch*, 465 U.S. at 692 (O’Connor, J., concurring).

³⁵ *Lee v. Weisman*, 505 U.S. 577 (1992); *Town of Greece v. Galloway*, ___ U.S. ___, 134 S. Ct. 1811 (2014).

³⁶ *See, e.g., Van Orden v. Perry*, 545 U.S. 677 (2005); *Town of Greece*, 134 S. Ct. 1811.

³⁷ *Id.*

societal pressure rather than simply the force of law backed by threat of a penalty. But the “indirect coercion” theory may be limited to Establishment Clause challenges involving school children.³⁸ And the indirect-coercion theory was not applied in the most recent U.S. Supreme Court case to address the establishment-clause standards—namely, *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014). As noted earlier in this opinion, the coercion test is in my opinion the one most consistent with the Establishment Clause’s original meaning.

II. Application

I am persuaded that a court *should* apply the coercion test, which has the best historical provenance based on the original understanding of the Establishment clause. Moreover, this seems to be the direction in which the current U.S. Supreme Court is heading. As explained below, all the posts in question pass muster under the coercion test. Nevertheless, due to conflicting court rulings, it is extremely difficult to say (with certainty) which test a court *would* employ.³⁹ It is also difficult to apply *Lemon* and the endorsement test without a full understanding of the facts that gave rise to your questions. Therefore, I will describe each post and discuss how it would likely fare under each standard, based on the limited facts before me.

A. Post 1

The first post contains a logo with “911 Dispatch Jonesboro” at the top. The Post states, “I can do everything through him who gives me strength. Have a great Day!” While this statement is unattributed, it is clearly a quotation of Philippians 4:13. Immediately under the statement is a picture of a lone tree in the early morning with sun beams streaming through it.

In my opinion, this Post would withstand scrutiny, regardless of which test the court employed. This Post would clearly withstand the coercion test (whether direct or indirect). Under the direct coercion standard, nothing in your factual

³⁸ Compare *Lee*, 505 U.S. at 592 (“As we have observed before, there are *heightened concerns* with protecting freedom of conscience from subtle coercive pressure *in the elementary and secondary public schools*....Our decisions...recognize, among other things, that prayer exercises in public schools carry a *particular risk of indirect coercion*.”) (emphases added) with *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) (not making any reference the distinction between direct and indirect coercion when addressing an context in which only adults were present).

³⁹ Meyerson, *supra* note 21, at 1053–54: “Unfortunately...the most accurate prediction we can make based on all the relevant cases is that ‘the Justices will be divided, the opinion will be rancorous, and years of litigation will be required to help clarify the Court’s evolving jurisprudence in this area.’”

background indicated that the city was forcing people to engage in any religious practices lest they be penalized. No one was being forced by law to view the Facebook page or in any way even acknowledge its existence. Likewise, even under the indirect coercion standard (if that applies outside the school context) posting verses from the Bible on a Facebook page does not generate societal pressure to even visit the Facebook page, let alone engage in any religious practices.

The analysis under the *Lemon* and endorsement tests is very similar. A reasonable observer would (in my opinion) likely see the Post as simply an inspirational statement. This amounts to a secular purpose (satisfying *Lemon*'s first prong), and it has a primary effect (*Lemon*'s second prong) that neither advances nor inhibits religion. Accordingly, under either test, the specific Post would likely pass muster.

B. Post 2

The second post contains the "911 Dispatch Jonesboro" logo, two statements, and two pictures. The statements are, "End of watch ___ Even though I walk through the valley of the shadow of death I will fear no evil, for you are with me; your rod and your staff, they comfort me." Though the latter statement is unattributed, it is clearly a quotation from Psalm 23:4. Underneath these statements are two pictures. The first is the U.S. Marine Corps seal overlaid with a black ribbon with the words, "In Remembrance." The second picture is of U.S. Marines in full dress uniform standing at attention with their heads lowered. The picture, which appears to be at a funeral, contains the following statement: "Semper Fidelis, Marines #HonortheFallen."

In my opinion, this Post would withstand scrutiny, regardless of which test the court employed. The analysis under the coercion standard is identical to that offered, above, when I addressed Post 1. Further, under both *Lemon* and the endorsement tests, the Post clearly has the secular purpose and effect of honoring veterans—specifically, Marines. So far from endorsing (or advancing, under *Lemon*) religion, the Post uses a biblical quotation to add solemnity to attempt to honor our veterans.

C. Post 3

The third post contains the same 911 Dispatch logo, followed by an unattributed quotation of Matthew 5:9: "Blessed are the peacemakers, for they shall be called sons of God." Directly under the statement is a picture with a coffee mug and the messages, "Good Morning," and "Wishing you a very peaceful Sunday."

A court would be highly likely to declare that this Post withstands the coercion test and somewhat likely to declare that it withstands the endorsement test. As for the *Lemon* test, given the fact-intensive nature of that test, I cannot provide a definitive response without more facts.

The coercion analysis is identical to that offered in response to Post 1. Under *Lemon*, the critical issue would be whether Post 3 has a primary secular purpose. It seems conceivable and reasonable to me that the Post has a secular purpose—namely, to promote emergency responders (and respect for emergency responders) as peacemakers. If this was indeed the primary purpose of the post, it would likely be found constitutional. But, based on the limited facts before me, I cannot definitively opine on whether that is the primary secular purpose behind the Post. Therefore, I cannot definitively say whether Post 3 would be upheld under *Lemon*.

Under the endorsement test, a court would inquire into how a reasonable, objective observer would view the Post. In my opinion, such an observer would think that the Post is affirming and promoting the peace-making activities of emergency-service providers. The Post is simply using a religious quotation to add weight and solemnity to the affirmation. The Post is not endorsing a religion, or a religious establishment, or even the idea of religion in general. Accordingly, under the endorsement test, a court would likely hold that the Post passes scrutiny.

D. Post 4

The fourth post also contains the 911 Dispatch logo, followed by an attributed New Testament quotation in which Jesus is speaking: “Matthew 11:28–30 Come to me, all who labor and are heavy laden, and I will give you rest. Take my yoke upon you, and learn from me, for I am gentle and lowly in heart, and you will find rest for your souls. For my yoke is easy and my burden is light.” Like the other posts, this quote is also followed with a picture. This one depicts a coffee mug, a present, flowers, and some kind of box. The picture contains two statements: “Good Morning” and “Have a Beautiful and Blessed Day.”

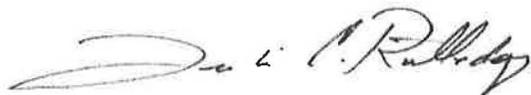
A court would likely declare that this Post withstands the coercion test, but violates the *Lemon* and endorsement tests. The coercion analysis is identical to that offered in response to Post 1. The analysis under the *Lemon* and endorsement tests is very similar. Post 4 contains a message for which it is difficult to discern a primary secular purpose. The attributed quotation seems to be an exhortation to consider the claims of Jesus, who is the speaker in the quotation. Because there appears to be no secular purpose for the quotation, a court applying the *Lemon* test would probably find the post unconstitutional. The lack of an apparent secular

purpose also means that a reasonable observer is likely to think that the Post at least gives the appearance of endorsing religion by affirming the truthfulness of the quotation. Accordingly, the post would probably fail the endorsement test.

III. Conclusion

To summarize, the key to addressing your questions is determining which of the three competing tests a court would use. While I cannot be certain how a court would attempt to sift the case law on this subject, I can offer some conclusions on how the posts would fare under each test. **Under the coercion test, all the posts would be permissible.** Under the endorsement test, three posts would be permissible, and one would be impermissible. Under the more stringent *Lemon* test, two posts would be permissible, one would be impermissible, and I lack sufficient facts to assess one of posts. **In my opinion, the Establishment Clause's text and history (as well as the most current case law) point toward the coercion test as the appropriate test. If this test were used, all the posts would be permissible.**

Sincerely,



LESLIE RUTLEDGE
Attorney General