CENTER FOR
RELIGIOUS
EXPRESSION

Clearing the path for Truth

NATE KELLUM
Chief Counsel

November 14, 2016

Dr. Virginia Young
Superintendent
Newton Municipal School District
205 School Street
Newton, MS 39345

Via: Email and U.S. Mail

Robert M. Logan, Jr., Esq.
Newton Municipal School District Attorney
Logan & Mayo, PA
205 East Church Street
Newton, MS 39345

Re: Freedom From Religion Foundation's Attack on Ryan Smith's Religious Expression

Dear Dr. Young and Mr. Logan,

By way of introduction, the Center for Religious Expression (CRE) is a non-profit public interest law firm that focuses on First Amendment rights and we regularly work with public officials and administrators to ensure those rights are properly understood and respected.

It recently came to our attention that your school received a threatening letter from the Freedom From Religion Foundation (FFRF) attacking Coach Ryan Smith's exercise of First Amendment rights to Free Speech and Free Exercise of Religion with regard to a baptism he performed on a consenting student off campus, after school hours, and outside of any school program. FFRF effectively demands that you prohibit Coach Smith from sharing his religious beliefs at any time, in any context.

This careless, overbearing approach to the law is not surprising. FFRF have utter contempt for anything or anybody remotely religious and frequently employ scare tactics to browbeat public schools into furthering their agenda of eliminating religion altogether. This recent effort, like many others, is pure blustering, preying on – and counting on – irrational fear.

Having reviewed the situation, we can unequivocally assure you that Coach Smith did not violate the constitution in any way by exercising his own constitutional rights off campus, after school hours, and outside of any school program. Rather, it is FFRF's

699 Oakleaf Office Lane, Suite 107 • Memphis, TN 38117 • Phone 901-684-5485 • Fax 901-684-5499 • email: nkellum@crelaw.org

proposal – that you ban Coach Smith from sharing his religious beliefs in any context – that would violate the constitution. *See Lee v. Weisman*, 505 U.S. 577, 598 (1992) ("A relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution"); *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 777 F.2d 1046, 1053-55 (5th Cir. 1985) (ban on teachers' discussion of entire topic during non-class time unconstitutional), *aff'd*, 479 U.S. 801 (1986).

As is their custom, FFRF employs a deeply flawed and downright disingenuous legal analysis to convince you that public employees have no constitutional right to express their religious beliefs – ever. But no court has ever adopted such an extreme approach. Indeed, the Supreme Court has made clear that teachers, like students, retain their constitutional rights. *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate"). Furthermore, the Establishment Clause and the Free Exercise and Free Speech Clauses have always been carefully balanced, a concept that FFRF overlooks. *See Lee*, 505 U.S. at 589 ("The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State"); *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984) (stating that "an absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court").

The cases FFRF cites provide no support for their erroneous conclusion that public school employees may never engage in religious expression in public. Rather, *every single case* FFRF cites turned as it did because of a public school's active involvement in furthering religion at school-sponsored events. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (prayer at school-sponsored football game); *Lee*, 505 U.S. 577 (prayer at school-sponsored graduation); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (moment of prayer at school during school hours); *Epperson v. State of Ark.*, 393 U.S. 97 (1968) (prohibition on teaching evolution in public schools based on contradiction with religious doctrine); *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203 (1963) (law mandating classes begin with reading from the Bible); *Engel v. Vitale*, 370 U.S. 421 (1962) (official prayer to be recited in each class); *Borden v. Sch. Dist. of Twp. of E. Brunswick*, 523 F.3d 153 (3d Cir. 2008) (football coach's participation in prayer at school-sponsored football games because of coach's prior 23-year practice of organizing and leading such prayers at games); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995) (basketball coach's prayer with students at "school-controlled, curriculum-related" practices). In those circumstances, school officials' expression could be attributed to the school as endorsing religion.

FFRF does not (and cannot) cite a single case holding unconstitutional the situation at hand – a coach's religious expression off campus, after school hours, and outside of any school program. FFRF forgets that "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses

protect." *Santa Fe*, 530 U.S. at 302 (emphasis in original). Under these circumstances, Coach Smith's speech is obviously his own private expression, which he has a constitutional right to convey, just like anyone else. *See Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006) ("[T]he First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen"); *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will Cty., Illinois*, 391 U.S. 563, 568 (1968) (holding public schoolteachers do not "relinquish the First Amendment rights they would otherwise enjoy as citizens"). Speech which is not pursuant to a school employee's official duties is private, and therefore does not generate Establishment Clause concerns. *Garcetti*, 547 U.S. at 420-21 (controlling factor of official vs. private nature of speech is whether expression is made pursuant to official duties – not location); *see also Eng v. Cooley*, 552 F.3d 1062, 1071 (9th Cir. 2009) ("Statements are made in the speaker's capacity as citizen if the speaker 'had no official duty' to make the questioned statements, or if the speech was not the product of 'performing the tasks the employee was paid to perform'") (citation omitted).

Courts have widely recognized that the protected status of teachers' out-of-classroom expression, including religious expression. *Bishop v. Aronov*, 926 F.2d 1066, 1076 (11th Cir. 1991) ("The University has not suggested that Dr. Bishop cannot hold his [religious] views; express them, on his own time, far and wide and to whomever will listen; or write and publish, no doubt authoritatively, on them; *nor could it so prohibit him*") (emphasis added); *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1177 (3d Cir. 1990) ("[A] teacher's out-of-class conduct, including her advocacy of particular teaching methods, is protected…the School District's undisputed right to control the classroom curriculum does not extend to a right to control a teacher's proselytization of teaching methods"); *May v. Evansville-Vanderburgh Sch. Corp.*, 787 F.2d 1105, 1108 (7th Cir. 1986) (acknowledging this right "indeed prevent[s] the school authorities from forbidding Mrs. May to advocate, in her own time and in [non-classroom] places, political or religious opinions"). Indeed, the Eighth Circuit rejected the claim that Establishment Clause concerns justified prohibiting a teacher from participating in a private religious club on campus on her own time after school hours, explaining:

> Wigg's private speech does not put SFSD at risk of violating the Establishment Clause: Wigg's speech did not occur during a school-sponsored event; she did not affiliate her views with SFSD…; students participated in the meetings with parental consent; and nonparticipating students – unless supervised – exited the building before the meetings began. Under the inquiry provided in *Santa Fe*, no reasonable observer would perceive Wigg's private speech as a state endorsement of religion by SFSD. SFSD's desire to avoid the appearance of endorsing religion does not transform Wigg's private religious speech into a state action in violation of the Establishment Clause.

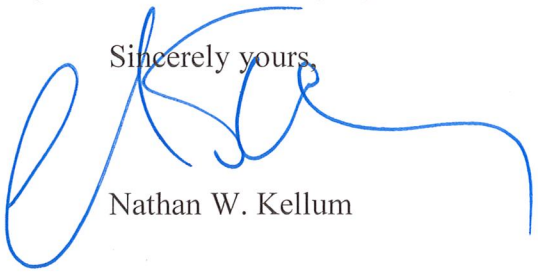
Wigg v. Sioux Falls Sch. Dist. 49-5, 382 F.3d 807, 814-15 (8th Cir. 2004).

Coach Smith's speech and baptism of a student is even clearer than the situation in *Wigg*. He was not exercising official coaching duties. The event was not school-

sponsored, nor did Coach Smith indicate that it was. Attendance by all parties was purely voluntary. And it took place off-campus and after school hours. No reasonable person could conceivably conclude that Coach Smith was speaking on behalf of the school. *See Pickering*, 391 U.S. at 574 (noting that where fact of employment was only "tangentially and insubstantially involved…it is necessary to regard the teacher as the member of the general public he seeks to be"). Therefore, no one could reasonably perceive the school's endorsement of religion.

In conclusion, there is absolutely no merit to FFRF's contention that the school ought in any way restrict Coach Smith's non-curricular speech. We write to encourage you that Coach Smith's actions were fully constitutional and were merely those of a private citizen outside of school. It is our hope that the school district stand up for the rights of its employees and not give in to FFRF's bullying tactics.

Sincerely yours,



Nathan W. Kellum

NWK/sr