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May 31, 2012

Gary O. Bartlett
Executive Director
State Board of Elections
P.O. Box 27255
Raleigh, North Carolina 27611-7255

cc: Don Wright, General Counsel

Re: The Use of Churches as Polling Places

Mr. Bartlett:

This letter is to inform you of the American Humanist Association's serious legal concerns with the manner that elections are conducted in North Carolina. AHA is a national nonprofit organization with over 10,000 members and 20,000 supporters across the country, including many in North Carolina. The mission of AHA's legal center is to defend the separation of church and state and the equal rights and civil liberties of humanists, atheists and other nonbelievers.

We have recently received disturbing reports from our members in your state of their experiences on Election Day (May 8). Many North Carolinians voted that day in churches that were designated as their local polling places. As you are undoubtedly aware, many of these church polling places had put up signs[1] on their property adjacent to the polling place clearly indicating support for Amendment One,[2] a ballot measure that would amend the state constitution to bar any recognition of same sex marriage under state law. Despite their status as tax-exempt entities under Section 501(c)(3), there have also been reports of local church figures engaging in other expressly political conduct, such as urging their members to vote against President Obama in the upcoming election because of his recent announcement that he favors equal marriage rights for all, regardless of their sexual orientation.[3]

[1] For an example of such partisan signs, please see the pictures posted as part of the following media story: http://www.starnewsonline.com/article/20120508/ARTICLES/120509659.

[2] Amendment One provided that "[m]arriage between one man and one woman is the only domestic legal union that shall be valid or recognized in" North Carolina.

[3] *See, e.g.*, a letter dated May 23, 2012, from Americans United for Separation of Church and State to the Internal Revenue Service regarding such an incident: http://www.au.org/media/press-releases/irs-should-investigate-north-carolina-church-whose-pastor-urged-votes-against.

In order to ensure that polling places are politically neutral locations, North Carolina law prohibits "political advertising" and other "election-related activity" in polling places and within the 25-50 feet buffer zone surrounding their entrances. N.C.G.S. §163-166.4(a). It is unclear whether the churches' anti-Amendment One signs were within the "buffer zone" or not. Regardless, the State Board of Elections has the power in connection with the use of private facilities as polling places to permit county election boards to enter into an agreement "with the owners or managers of a nonpublic building to use the building as a voting place on the condition that election-related activity . . . not be permitted on their property adjacent to the buffer zone." N.C.G.S. §163-166.4(b). Why was this not done? The fact that it does not currently appear to be mandatory under state law highlights a major deficiency in that law and/or its enforcement: it permits county elections boards to choose as polling places partisan, politically-involved institutions such as churches.

Although state law grants to each county board of elections the power to establish such "voting places . . . as it may deem expedient,"[4] expedience is not the only, nor indeed anything approaching the most important, consideration in doing so. The law requires that any private facility leased for use as a polling place must be "suitable" as a place in which "voting may be conducted." N.C.G.S. §163-129. It also expresses a concern that "the pattern of voting places subject to agreements under this subsection . . . not disproportionately favor any party, racial or ethnic group, or candidate." N.C.G.S. §163-166.4(b).

In short, appropriate polling places must be neutral civic locations, welcoming to all voters. No voter should feel that the state, by choosing a private group to serve as a public polling place, has affiliated itself with a group that discriminates against him or her. Churches, by their very nature, exclude those who do not share their beliefs. As the recent past has shown, they also often express hateful bigotry toward certain groups grounded in their religious ideology.

Church buildings are the property of, and embody and reflect the beliefs of, those who own and use them. While churches of course have the right to speak about their views, the fact that they do so makes church properties themselves unsuitable for use by the public at large as a place to engage in their most fundamental of democratic activities. In addition to such express election-related advocacy, their inherently divisive sectarian religious nature (discussed in more detail below) also prevents them from serving a neutral civic function.

There are numerous secular places that can serve as polling places in every community across North Carolina, including public buildings such as schools, libraries, fire stations, municipal government offices, courts and recreation centers. State law in fact provides that county election boards are "entitled to demand and use any school or other State, county, or municipal building" as a polling place. N.C.G.S. §163-129. There is no excuse for election officials to choose churches when neutral public buildings are legally set aside for this use. When they do so, their motives are subject to question. Are these locations chosen to signal to Christians that the state is on their side, and to discourage others from voting? Even other private locations, such as shopping malls, would better serve the civic purposes of voters than partisan and religious locations such as churches.

[4] N.C.G.S. §163-128(a)

In light of these facts, it would be advisable for the State Board of Elections to take formal action to change the manner in which private polling places are selected and regulated. The Board has the power to "advise [county election board members] as to the proper methods of conducting primaries and elections." N.C.G.S. §163-22(c).[5] It has the "authority to make such reasonable rules and regulations with respect to the conduct of primaries and elections as it may deem advisable." N.C.G.S. §163-22(a). It is clearly past time for the Board to make use of this authority to develop and promulgate regulations, embodying the broad policy objectives of state election law, that would proscribe the use of churches as polling places because they are not suitable to serve as such under state law.

Of course, North Carolina law is not the only law which bears on this matter. The use of churches as polling places is, in addition to being a violation of state law, unconstitutional.

Churches become entwined with the state when used by the government as part of the democratic machinery of elections. Citizens are forced to enter a religious structure and encounter religious messages simply to exercise their fundamental right to vote. This violates the Establishment Clause, which requires the separation of church and state.[6] The government "may not . . . affiliate itself with any religious doctrine or organization." Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 590 (1989). Courts "pay particularly close attention to whether the challenged governmental practice either has the purpose or effect of [unconstitutionally] 'endorsing' religion." *Id.* at 591. Endorsement includes "conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred." *Id*. at 593. This message is sent when the state chooses to affiliate itself with churches by choosing them to carry out state functions.

Churches are an unconstitutionally hostile environment for nonreligious voters. The state's use of them as polling places marks such voters as disfavored political outsiders by making clear that churches are so synonymous with the state that they may stand in for government buildings. *See* Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring, stating that "[e]ndorsement [of religion] sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community"). This is unconstitutional because "[t]he Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community." *Id*.[7] In order to prevent this sort of estrangement between citizens and their government, our Constitution "mandates that the

[5] The Board, of course, also has the power to "appoint . . . all members of the county boards of elections." *Id.* Those who refuse to change their ways regarding church polling places should not be reappointed.

[6] The very first sentence of the Bill of Rights mandates that our government must be secular, stating that "Congress shall make no law respecting an establishment of religion." This provision, known as the Establishment Clause, "build[s] a wall of separation between church and State." Reynolds v. United States, 98 U.S. 145, 164 (1878). Pursuant to the Fourteenth Amendment, the Establishment Clause applies to the states. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940). Not only may the government not advance, promote, affiliate with, endorse, prefer or favor any *particular* religion, it "may not favor religious belief [in general] over disbelief." Allegheny at 593.

[7] The full Supreme Court has adopted the view, originally espoused by Justice O'Connor in her concurrence in Lynch, that government endorsement of religion unconstitutionally makes nonbelievers into political outsiders. *See* Santa Fe Independent School Dist. v. Doe, 530 U.S. 290, 309-10 (2000) (stating that "[w]hen the government associates one set of religious beliefs with the state and identifies nonadherents as outsiders, it encroaches upon the individual's decision of whether and how to worship").

government remain secular, rather than affiliate itself with religious beliefs or institutions, precisely in order to avoid discriminating among citizens." Allegheny at 610.

Not only does the use of church buildings by the state for its purposes amount to an endorsement of religion that marks non-Christian voters as outsiders, it, perhaps even more disturbingly, actually skews the results of the voting toward religious views, which amounts to an unconstitutional advancing of religion. *See, e.g.,* Allegheny at 590 (restating that the Establishment Clause requires that all government action must have a "secular purpose" and not "advance . . . religion"). This conclusion is based on the results of recent scientific research into what psychologists call the "priming effect." When a person is exposed to a stimulus (such as a particular environment) it can influence his or her response to a later stimulus (such as a choice being made about an unrelated matter). In the case of polling places, the type of environment in which voting takes places "nudges voters in a predictable direction−that is, it leads to a systematic, non-random bias in individual's decision-making." Jeremy A. Blumenthal and Terry L. Turnipseed, Is Voting in Churches (or Anywhere Else) Unconstitutional?: The Polling Place Priming (PPP) Effect, 91 Bos. U. L. Rev. 561, 566 (2011).[8] The "[e]mpirical research demonstrates that subtle environmental cues in a polling place can significantly, but unconsciously, affect citizens' real-world votes." *Id.* at 598. Scientific studies have concluded that "[v]oting in church buildings has been shown to prime attitudes and beliefs that elicit more conservative votes, as demonstrated by support for more conservative candidates and for more conservative stances on issues fraught with conservative religious values." *Id.* These priming effects are subconscious; they alter voting results without explicit advocacy seeking to change minds on the part of the church, and therefore present a separate concern from that related to express church electioneering activities or the governmental endorsement of religion inherent in the choice of the church to serve a state function.

I understand that the recently emerged social science consensus regarding the psychological impact of polling places on voters may be new to you and your colleagues at the State Board of Elections. The time has now come, however, for you (and elections officials around the country) to acknowledge this reality and to reshape your policies to reflect this important scientific fact. The state cannot choose as polling places any type of location that would favor religious stances on political issues or promote a particular (in this case conservative) political ideology. Because their very nature causes changes in voting behavior, churches cannot be considered suitable places to vote.

Finally, in addition to violating the Establishment Clause, the use of churches as polling places is unconstitutional because it amounts to a burden on the fundamental right to vote. Policies that place a "substantial burden . . . on the right to vote must serve a compelling state interest and be narrowly tailored to serve that state interest." Greidinger v. Davis, 988 F. 2d 1344, 1352 (4th Cir. 1993), *citing* Storer v. Brown, 415 U.S. 724, 729 (1974) (stating that "substantial burdens on the right to vote . . . are constitutionally suspect and invalid under the First and

[8] The authors of the law review article cite several scientific studies supporting their conclusions, including the following: Abraham Rutchick, Deus ex Machina: The Influence of Polling Place on Voting Behavior, 31 Pol. Psychol. 209, 221-23 (2010); Jonah Berger *et al.*, Contextual Priming: Where People Vote Affects How They Vote, 105 Proc. Of the Natl. Acad. of Sci. (PNAS) 8846, 8848 (2008); Jonah Berger *et al.*, Can Where People Vote Influence How They Vote? The Influence of Polling Location Type on Voting Behavior, 23-26 (Stanford GSB Research Paper No. 1926, 2006). I would be happy to provide you with copies of these studies upon request.

Fourteenth Amendments and under the Equal Protection Clause unless essential to serve a compelling state interest"). The right to vote is burdened when voters are forced to vote in a hostile location that skews the results. There is no compelling interest requiring the use of churches as polling places when numerous municipal (and private secular) buildings are available in every community. To the contrary, the use of partisan, and, to the nonreligious voter, profoundly alienating and unwelcoming, church polling places violates the Constitution, which protects "the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system." Burdick v. Takashi, 504 U.S. 428, 441 (1992). In fact, the state has a contrary "compelling interest in protecting voters from . . . undue influence" at the polling place. Burson v. Freeman, 504 U.S. 191, 199 (1992).

The fact that voters may be given the option to vote absentee does not remedy the violation of their constitutional rights. No voter should be told that they are in effect a second class citizen, forced to use a separate procedure rather than participate in person in their civic duty alongside their fellow citizens. A visit to the polls on Election Day is a right for every person eligible to vote. It is a validation and vindication of our democracy and a citizen's place within it. If the choice polling place sends a message of exclusion to nonreligious voters, that message in and of itself is unconstitutional and must be changed, not the voter's views or conduct. Separate is not equal.

In conclusion, the use of churches as polling places is an illegal and unconstitutional policy that subjects voters to partisan messages, alienates nonreligious voters and skews the results of elections towards religious viewpoints in a scientifically identified and confirmed way. The time for this practice to end has come. I implore you to take this opportunity to end it, and replace it with one that ensures the integrity and fairness of your elections and respects the right of all citizens to vote in a neutral civic location. It is your duty under the law to do so.

Thank you for your time and attention to this matter. I invite you to contact me, either by email at bburgess@americanhumanist.org or by phone at (202) 239-9088, to discuss the concerns raised in this letter and your response thereto. I believe that the troubling events surrounding the recent election and the serious concerns regarding the fairness of future elections in North Carolina should give rise to a serious dialogue about how to reform the state's policy in this area lest an important opportunity to make the system more just, and avoid any potential legal challenges to its unconstitutionality, be missed.

Sincerely,

William J. Burgess
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American Humanist Association