UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

MARK AHLQUIST, as next friend,
parent and guardian of J – A –,
a minor

v. C.A. No. 11- 138 -L

CITY OF CRANSTON, by and through
Robert F. Strom, in his capacity as
Director of Finance, and by and
through the SCHOOL COMMITTEE
OF THE CITY OF CRANSTON

Plaintiff's Trial Memorandum of Law

Plaintiff,
By Plaintiff's Attorneys,

Thomas R. Bender, #2799
Hanson Curran LLP
Cooperating Counsel,
Rhode Island Affiliate,
American Civil Liberties Union
One Turks Head Place, Suite 550
Providence, RI 02903
trb@hansoncurran.com
(401) 421-2154
(401) 521-7040 (fax)

Lynette Labinger, #1645
Roney & Labinger LLP
Cooperating Counsel,
Rhode Island Affiliate,
American Civil Liberties Union
344 Wickenden Street
Providence, RI 02903
labinger@roney-labinger.com
(401) 421-9794
(401) 421-0132 (fax)

Table of Contents

Introduction

Plaintiff Mark Ahlquist has brought this action as parent and guardian of his child, J–A–, a minor attending Cranston High School West ("Cranston West") against the City of Cranston and its School Committee (hereinafter referred to collectively as "the Defendants" or "the School Committee"). For ease of reference and to avoid repetitious redactions, we refer to J–A– hereinafter as "Plaintiff" and to Mark Ahlquist as "Plaintiff's father."

Cranston High School West ("Cranston West") is a public high school (grades 9 through 12) operated by the City of Cranston, through the Cranston School Committee. Both the City of Cranston and the School Committee of the City of Cranston have been named as defendants herein. For simplicity of reference, we refer to the defendants interchangeably either as "Cranston" or "the School Committee."

Plaintiff objects to Cranston's installation and maintenance of a religious prayer in the auditorium of Cranston West as a violation of her constitutional rights as protected by the Establishment Clause of the First Amendment to the United States Constitution.

Summary of Evidence Relied Upon by Plaintiff

By stipulation, the parties have agreed to submit the case for decision on the merits on the basis of materials developed through discovery, without the need for live testimony. A brief overview of the evidence relied upon by Plaintiff is described in the following paragraphs and its significance will be discussed in greater detail in the following sections.

Testimony of the Plaintiff: Plaintiff's testimony is provided in the Affidavit of J–A– previously submitted in support of the Motion for Preliminary Injunction (Pl. Ex. 15, "JA Aff."), and in the deposition of Plaintiff taken by the School Committee (Jt. Ex. 3, "JA Dep.").

Additional information is provided in the answers to interrogatories provided on her behalf by Plaintiff's father (Pl. Ex. 16, "Pl. Int.").

Deposition of the Defendants, taken pursuant to Rule 30(b)(6): the City and the School Committee jointly designated Frank Lombardi, a member of the School Committee, to testify on behalf of the defendants (Jt. Ex. 5, "Lombardi Dep."). The deposition testimony is offered both to provide historical information concerning the development, use and maintenance of the School Prayer and School Prayer display, and current usage of school prayer displays and prayer in the Cranston schools, as well as the School Committee's actions in reaffirming the maintenance of the School Prayer at Cranston West in 2011.

Depositions of David Bradley (Jt. Ex. 2, "Bradley Dep."), Edmond Lemoi (Jt. Ex. 1, "Lemoi Dep.") and Gerald Zito (Jt. Ex. 6, "Zito Dep."): These three witnesses provided testimony concerning the early years at Cranston West, including the organized recitation of prayer by students, the development of the School Prayer and other official school symbols, and the installation and maintenance of the School Prayer display.

Declaration of Rev. Dr. Donald Anderson (plaintiff's expert): the Declaration of the Rev. Dr. Donald Anderson (Pl. Ex. 18, "Anderson Dec.") is offered as expert testimony to establish that the subject display is in fact a religious prayer, associated with Christian beliefs, and in context represents an official endorsement of religion.

Answers to Interrogatories of the Defendants (Pl. Ex. 17, "Def. Int."): excerpts from Defendants' answers are provided to establish the fact and frequency of use of the auditorium by Cranston West students as part of their required and extra-curricular activities.

Documents and photographs:

Minutes of School Committee and subcommittee meetings of August 16, 2010 (Jt. Ex. 8, "8/16/10 Min.") , November 30, 2010 (Jt. Ex. 11, "11/30/10 Min.") , February 22, 2011 (Jt. Ex. 12, "2/22/11 Min."), and March 7, 2011 (Jt. Ex. 9, "3/7/11 Min."), and a complete video and audio recording of the entire March 7, 2011 meeting (Pl. Ex. 19, "3/7/11 Video") are provided.

Cranston West photographs provide a pictorial reference of the auditorium where the School Prayer is on display, and in context, as well as other official displays of communications to students in the lobby of Cranston West. (Pl. Ex. 20)

Cranston West "School Planners" for 2010-11 (Jt. Ex. 13, "School Planner for 2010-11") and 2011-12 (Jt. Ex. 14, "School Planner for 2011-12")(which coincide with Plaintiff's last and current year of attendance), which include reproductions of the School Creed and other banner displays, underscoring the importance of these communications as the official message of Cranston West to its student body, as well as listing the contemplated required and extra-curricular use of the auditorium by Cranston West students.

Bain Jr. High (now Middle) School ("Bain") photographs and documents are offered to demonstrate that it is part of the fabric of Cranston Public Schools to communicate and maintain religious messages and prayer. (Pl. Ex. 21) Photographs demonstrate that until this law suit was filed, Cranston maintained a virtually identical School Creed and School Prayer display in the auditorium of Bain. (Pl. Ex. 20-21, and Appendix hereto) Documents are offered to demonstrate that Cranston has, for decades, including this past May 2011, conducted a Memorial Day program for its Bain students, attended by members of the school administration, School Committee members and the Mayor. (Pl. Ex. 22, "Bain Memorial Day programs") The program has year in and year out included a prayer or invocation and benediction presented by a member

of the clergy, as an invited speaker, as part of the official program, notwithstanding controlling Supreme Court precedent to the contrary.

Plaintiff

Plaintiff entered Cranston West as a freshman (9th grade) in fall 2009. At the time the law suit was filed, she was finishing her sophomore year. She is now starting her junior year. Plaintiff is an atheist. She has known that she has been an atheist since she was about 10 or 11 years old. (JA Dep. at 29)

As a student at Cranston West, Plaintiff attends events in the school auditorium as part of her required and optional activities. Plaintiff has estimated that she has attended at least eight to ten school events in the auditorium so far, including four to five in one week alone in spring 2011. (JA Dep. at 12, 20, 48). According to the City, there are more than 20 regularly scheduled events in the auditorium each year, as well as class meetings and special assembly presentations. Programs that Plaintiff can be expected to attend in 2011-12 include opening day assembly, testing assembly for juniors, class meetings, Diversity Week programs, and various student concerts and performances. (Def. Int. # 12).

The auditorium in Cranston West is a free-standing building with a large stage and affixed seating. As one is facing the stage, on the wall to the right of the stage, there is a large painted display—about 8 feet high and at least 4 feet wide, about 5 feet off the ground, entitled "School Prayer." On the wall to the left of the stage, there is another large painted display, of similar dimensions, entitled "School Creed." The School Prayer is visible from every seat in the auditorium, whether one is sitting next to it or sitting in the back of the auditorium on the far side. The School Prayer and the School Creed on the opposite wall are the only two items on

display (besides a clock and exit signs) that are permanently part of the structure of the walls while all of the other items are hung from the top of the walls or hooks and could be removed. [1] (JA Aff. ¶¶13-18; Cranston West photos, Pl. Ex. 20(b)(1)-(16); Lemoi Dep. at 64; Lombardi Dep. at 57-58)

The School Prayer reads as follows:

SCHOOL PRAYER

OUR HEAVENLY FATHER

GRANT US EACH DAY THE DESIRE TO DO OUR BEST, TO GROW MENTALLY AND MORALLY AS WELL AS PHYSICALLY, TO BE KIND AND HELPFUL TO OUR CLASSMATES AND TEACHERS, TO BE HONEST WITH OURSELVES AS WELL AS WITH OTHERS, HELP US TO BE GOOD SPORTS AND SMILE WHEN WE LOSE AS WELL AS WHEN WE WIN, TEACH US THE VALUE OF TRUE FRIENDSHIP, HELP US TO ALWAYS CONDUCT OURSELVES SO AS TO BRING CREDIT TO CRANSTON HIGH SCHOOL WEST.

AMEN

Plaintiff did not realize, at first, that there was a "School Prayer" affixed to the wall of the Cranston West auditorium. While she noticed that there were displays on the walls of the auditorium, she had not read them. (JA Dep. at 31-32) It was first brought to her attention by another student who asked her if she realized that there was a prayer in the auditorium. This occurred in the spring of 2010. (JA Dep. at 11-12).

Plaintiff objects to the school sanctioned display of the "School Prayer" in her high school auditorium. From the first time Plaintiff read and comprehended the School Prayer display, it upset her. (JA Dep. at 14, 16) "When I saw the prayer in the school for the first time,

[1] Some of the class banners on display appear to be hung from wall lights. (Lombardi Dep. at 57-58, Jt. Ex. 7-17 thereto; Pl. Ex. 20(b)(16))

it made me feel excluded, ostracized and devalued. I belong to that school as an equal student, except it was excluding me from its request from God. It says Our Heavenly Father. And I wasn't included in that Our 'cause I don't believe in a Heavenly Father." (JA Dep. at 35-36) "The first time I saw the prayer, I felt excluded 'cause my … school didn't include me. I felt left out." (JA Dep. at 39)[2]

Plaintiff immediately engaged her father in a discussion about the appropriateness of a prayer in her school (JA Dep. at 15-16). Plaintiff did not want it there and did not think it should be there. She conducted research to see if there was any legal support for her belief and desire that the prayer not be there. She thought about raising the issue with the school administration, but "didn't really know how to or what to say. So I continued to think about it." (JA Dep. at 19)

Over time, Plaintiff engaged her school friends in discussions about the prayer, but mostly got push-back rather than support from others she considered friends. Plaintiff's "relationship with [some] friends became strained because of her objection to the School Prayer display. Their statements reinforced the feeling she had when she first read the prayer, that in her school and school environment, her beliefs about religion were considered less worthy, and were not only unimportant but *wrong*." (Pl. Int. #5 at 6; emphasis in original). "[P]eople did not seem

[2] "When J – A- first learned of the School Prayer display towards the end of her freshman year she was first surprised and shocked, and then upset. She is an atheist. When she first encountered the display and read the School Prayer she immediately recognized that it was a prayer to God. As an atheist, she does not believe in God. The realization that there was a School Prayer, written to be prayed by the school's students to a God she does not believe in, was offensive to her because she assumed school officials would not have permitted it to be displayed if they did not approve its message that she and her classmates should pray to God to become better students. She felt that the School Prayer display was a permanent message that school officials believed that praying to God was an important part of being a good member of the school community. She saw the school's sponsorship of this message offensive and disturbing because she saw it as official approval of a religious message she did not agree with or believe in. That message told her that school officials, and perhaps others, would disapprove of her non-belief, making her feel excluded, and that she would be ostracized if her non-belief were known." Pl. Int.#5 at 4-5.

to understand or respect her position on the issue, and were not supportive of her feelings and beliefs personally, even if they did not share her view. It made her feel both alone and vulnerable, because their own religious views prevented them from seeing how the School Prayer and its display could make someone who was an atheist and did not share their religious views, like her, their friend, feel uncomfortable and like an outsider." (Pl. Int. # 5 at 6-7) Responses from other students—not her friends—and others in the community once she publicly expressed her opinion against the Prayer included hateful, personal attacks and intimidation.[3] (Pl. Int. # 5 at 8-14)

During the summer after her freshman year, Plaintiff learned that someone else had complained about the Prayer to the ACLU and that it had been raised with the School Committee. On her own, Plaintiff created a Facebook group during the summer to support removal of the Prayer. (JA Dep. at 27-28) Plaintiff thought that would be the end of it, and was surprised to learn that the School Committee was reviewing the issue of what, if anything, to do about the Prayer. (Pl. Int. # 5 at 7-8) When she learned that the School Committee had established a subcommittee to consider the Prayer, she mustered her courage and spoke against the Prayer at its meeting on November 30, 2011 (11/30/11 Min. at 10) ("But, as an atheist, I have the right to go to school and not feel discriminated against by the people who are praying there.") "When [Plaintiff] said she was an atheist, someone in the room let out a small gasp and J –A- heard some quiet whispering. She felt they dismissed her beliefs and feelings, and made her feel entirely alone, causing her to wonder whether she was irrational for feeling the way she did. She also felt extremely nervous and unwelcome at this meeting." (Pl. Int. # 5 at 8)

[3] The parties have stipulated that, in the event the Court finds in favor of the Plaintiff on liability, in addition to any other relief the Court may award, compensatory damages shall be awarded in the amount of $25.00. Doc. 17, Stipulation at ¶f.

Plaintiff also spoke out against the Prayer at the Subcommittee meeting of February 22, 2011 (2/22/11 Min. at 7) and at the School Committee meeting of March 7, 2011 (3/7/11 Min. at 60 and video of entire proceedings, Pl. 19). At the February 22 subcommittee meeting, Plaintiff again was made to "feel very intimidated and nervous, as well as hated. Speaking was much more difficult that night because she felt that many of the people in the room were angry at her and disliked her personally for speaking out against the prayer." (Pl. Int. #5 at 9) After the March 7, 2011 meeting and after she filed the law suit, Plaintiff received bullying and intimidating taunts, comments and threats at school, on her way home from school, and on-line. (Pl. Int. #5 5 at 10-14; JA Dep. at 40-44)

On every occasion that Plaintiff has viewed the School Prayer in her high school's auditorium, she has been upset and offended by it. (JA Dep. at 14, 16, 46) She explained that out-of-court statements that she was "not offended" were made by her in response to the backlash, bullying and intimidation she was experiencing, in her effort, as a 15-year old, to discourage more personal attacks upon her by making it seem that she was not personally or emotionally engaged or upset by them. As she said, in her own words, at deposition: "When I spoke [in a media interview] about not being offended, I was trying to cover up the emotion that I was feeling because of harassment that I was facing in school from other children because of it. It was being used as a tool to bully me. And I didn't want to become more susceptible to the bullying. Also, the subcommittee meetings were mainly adults, and many of them were very intimidating. And I didn't feel as though emotion really had any standing in an issue like this." (JA Dep. at 23) "I said it wasn't offensive, but I did not mean that…I said it because of the backlash that I was facing for opposing [the prayer]. I believe[d] that the backlash would

increase if I expressed an emotional aspect to this. Because many of my peers were harassing me, I didn't want to open up to more of that." (JA Dep. at 46-47).

Whenever Plaintiff is required to attend an assembly in the auditorium, or when she chooses to attend extracurricular events, she is exposed to this prominent and large display. She has felt isolated, ostracized and devalued by her school and community because of the School Prayer. She seeks its removal from the school auditorium. (JA Aff. ¶22)

Origin of the School Prayer

Cranston High School West opened in the fall of 1959 with two grades – a seventh grade class and an eighth grade class (Bradley Dep. at 20), and would eventually include classes for grades seven through twelve (then a junior-senior high school). David Bradley was a seventh grader and a member of the school's newly organized student council, created under the guidance of the school's faculty and administrators. (Bradley Dep. at 36). The student council met the last period of the school day every Wednesday with a faculty advisor. (Bradley Dep. at 36-37).

From the outset, morning exercises were conducted in individual homerooms, and consisted of a recitation of the Pledge of Allegiance followed by the "Catholic version of the Lord's Prayer."[4] (Bradley Dep. at 39, 46). The student council advisor to the seventh and eighth

[4] The "Lord's Prayer" refers to the prayer taught by Jesus to his disciples, and is also commonly referred to as the "Our Father." *The American Heritage Dictionary of the English Language* 1033 (4th ed. 2006). It epitomizes "the spirit of Christian Prayer and *a formula to be employed in worship*[,]" 2 *The Encyclopedia of Religion*, Eliade 26 (1987) (citing *Luke* 11:2-4) (emphasis added), and is the "fundamental Christian prayer" of the Catholic Church. *Catechism of the Catholic Church*, 2759 (1994). The Lord's Prayer recited in the Catholic liturgy originates from the New Testament Gospel of *Matthew* 6:9-13:

graders initiated a project in which they would decide upon a School Prayer to be recited in place of the Lord's Prayer, along with a School Creed, mascot and colors. (Bradley Dep. at 38, 53).

As part of the program for establishing the identity of the new school, the student council was tasked by the faculty advisor to create a school prayer, a school creed, school mascot and school colors. Bradley was given the assignment of writing the School Prayer and Creed.[5] (Bradley Dep. at 38, 39, 41, 52).

Once adopted, the School Prayer and the School Creed became part of the official identity of Cranston West. The school colors, for example, dictated the colors of the athletic team uniforms. One year later, when the class of 1963 arrived as 10th graders, their request to change the school colors and mascot was rejected by the administration because uniforms and other items had already been ordered. (Zito Dep. at 4-5, 25-28) The School Creed, which was affixed to the auditorium wall with the School Prayer, is reprinted in each year's School Planner distributed to the Cranston West students. (School Planner for 2010-11, Jt. Ex. 13 at 5; and for 2011-12, Jt. Ex. 14 at 5).

OUR FATHER WHO ART IN HEAVEN,
hallowed be thy name.
Thy kingdom come,
Thy will be done on earth,
as it is in heaven.
Give us this day our daily bread,
and forgive us our trespasses,
as we forgive those who trespass
against us,
and lead us not into temptation,
but deliver us from evil.

[5] Although Bradley testified that both the Prayer and Creed were his original work, the Creed, at least, most assuredly was not. With the exception of about five words and substitution of the reference as "Cranston West" instead of "Hugh B. Bain," the Creed adopted by Cranston West is identical to that already adopted and on display at Bain since at least the 1950s. (Lombardi Dep. at 23-24 and Jt. Ex. 7-14)

Bradley, who turned 13 years old in January 1960, presented a prayer and creed to his seventh and eighth grade classmates on the student council in the spring of 1960. (Bradley Dep. at 35). Both were approved – without change by students or faculty – and became "the official [S]chool [P]rayer and official [S]chool [C]reed of Cranston High School West." (Bradley Dep. at 35, 49, 64; Lombardi Dep. at 27). The School Prayer consists of a series of petitions by students to "Our Heavenly Father":

SCHOOL PRAYER

OUR HEAVENLY FATHER

GRANT US EACH DAY THE DESIRE TO DO OUR BEST, TO GROW MENTALLY AND MORALLY AS WELL AS PHYSICALLY, TO BE KIND AND HELPFUL TO OUR CLASSMATES AND TEACHERS, TO BE HONEST WITH OURSELVES AS WELL AS WITH OTHERS, HELP US TO BE GOOD SPORTS AND SMILE WHEN WE LOSE AS WELL AS WHEN WE WIN, TEACH US THE VALUE OF TRUE FRIENDSHIP, HELP US TO ALWAYS CONDUCT OURSELVES SO AS TO BRING CREDIT TO CRANSTON HIGH SCHOOL WEST.

AMEN

Beginning the following fall, in September 1960, the students began reciting the new School Prayer after the Pledge of Allegiance in place of the Lord's Prayer. (Bradley Dep. at 45, 65). That same fall a tenth grade class was added to the school, a class that would become the first class to graduate from the high school in 1963. (Bradley Dep. at 60-61). About this time that the Pledge of Allegiance and the School Prayer were recited by a student over the school's public address system, leading all of the homerooms at the same time. (Bradley Dep. at 65; Lombardi Dep. at 35-36).

In the following school year, 1962-1963, students were no longer led in the School Prayer as a part of their morning exercises, and began observing a moment of silence instead.[6] (Bradley Dep. at 43, 46; Lombardi Dep. at 35-36). The School Prayer continued to be recited, at times, during events in the auditorium.[7]

Origin of the School Prayer Display

The School Prayer and School Creed officially adopted by Cranston West in 1960 were permanently installed on the walls of the newly constructed auditorium in approximately the fall of 1963 as a gift from the first graduating class from Cranston West. (Zito Dep. at 4, 10, 12)[8]

Cranston West opened in stages and did not initially have an auditorium. One was under construction when the class of 1963 was to graduate. As the first class to graduate from Cranston West, the senior class decided that it wanted to give a gift with a substantial impact. Before settling on a gift, the class consulted with the school administration "in formulating what gift the graduating class would present to the school[.]" (Zito Dep. at 12) Their objective was "to have a gift that was going to be there forever[,] to let them know we were the first class."

---

[6] On June 25, 1962, the United States Supreme Court decided *Engel v. Vitale*, 370 U.S. 421 (1962), holding that the use of a public school address system to encourage recitation of a prayer, the nature of which "has always been religious," was "wholly inconsistent with the Establishment Clause." 370 U.S. at 425.

[7] Edmond Lemoi, who taught at Cranston West from fall 1964 to 1972 (and later returned as Principal), recalled that students at times were led in reciting the School Prayer during events in the auditorium. (Lemoi Dep. at 24-25, 31-32)

[8] Gerald Zito was a member of the tenth grade class that matriculated to Cranston West in the fall of 1960. (Zito Dep. at 3, 4). His class would be the first to graduate from Cranston High School West in June 1963. (Zito Dep. at 5). As the vice-president of his class, he participated in the decision to arrange for the School Prayer and School Creed to be permanently installed on the walls of the newly finished school auditorium, as a class gift to Cranston West. (Zito Dep. at 4, 10, 12).

(Zito Dep. at 11). When asked why the class "decided on the [S]chool [P]rayer and the [S]chool [C]reed as the messages to install in the auditorium?" Gerald Zito, who had served as the senior class vice-president and who later attended the formal presentation, testified it was because "they would be visible on a regular basis and would be up there for as long as the building existed." (Zito Dep. at 19-20). Zito acknowledged, not surprisingly, that the school administration had final approval over what they could choose to display on the auditorium walls. (Zito Dep. at 20).

Zito's class raised funds to pay for the design of the displays and their installation through in-school and out-of-school events. (Zito Dep. at 14, 32). The class selected a professional artist who had created murals in classrooms at Bain Junior High School to prepare designs for the display of the School Prayer, (Zito Dep. at 19; Lombardi Dep. at 99-100). The designs, or "proofs," prepared by the artist were reviewed and approved not only by the class representatives, but by their faculty advisor and school principal at Cranston West. Although the class representatives participated in the selection of the design, the placement and location of the displays in the auditorium (which was still under construction) were chosen by Cranston--either by members of the school administration or the architect. (Zito Dep. at 22-23, 37). Neither he nor anyone from his class had any role in determining where the displays were placed, how they were put in, or how high they would be. (Zito Dep. at 31). As Zito understood it, the location ultimately chosen for the displays, on the right and left hand walls at the beginning of the seating from the front, was chosen "because it was the most prominent position in the auditorium and would be visible when you walked in and constantly while you were there." (Zito Dep. at 23). No one in the senior class designed the art work, wrote the prayer or creed, or participated in the installation of the two displays. The senior class chose the gift and paid for it to be installed. (Zito Dep. at 31-32)

The auditorium was not completed in time for the graduating class of 1963. Zito returned at a later time to participate in the dedication ceremony. (Zito Dep. at 29-30; Lombardi Dep. at 55) When the displays were originally affixed to the walls each was accompanied by a plaque – either painted or hung – identifying them as "from [or gift of] the Class of 1963." (Zito Dep. at 15-16). At some time, about 15 years ago, in repainting the auditorium, the City painted over portions of the faux frames bordering the displays and removed or painted over the plaques associating the displays with the Class of 1963. The displays have not had a reference to the Class of 1963 since then. (Lombardi Dep. at 21, 56, 128-29; Zito Dep. at 29; (Bradley Dep. at 28-30).

At the time the School Prayer display was permanently installed, the City and its School Committee were aware that conducting daily recitation of prayer by public school students was unconstitutional. (Lombardi Dep. at 41)

The School Prayer Display Now

In discovery conducted after the filing of this lawsuit, the Defendants have admitted that the School Prayer display, which occupies 24 square feet of wall space beginning five feet above the ground, is permanently affixed to the wall of the Cranston West high school auditorium, and as such, is owned by Cranston High School West and/or the City of Cranston. (Lombardi Dep. at 54-55, 57, 65, 69-70). They admit the auditorium is an integral part of the school and is frequently used by students for a multitude of assemblies and programs. (Lombardi Dep. at 9-10, 66).[9]

[9] For students these events include: a barbeque and presentation for incoming 9th grade students and their parents and any other students new to the school; opening day assemblies for each grade; class meetings by grade as determined by class advisors; NECAP assessment testing

Defendants have admitted that the School Prayer set forth in the display would not have been affixed to the wall if school officials did not approve of the message its text conveys. (Lombardi Dep. at 54-55). Thus Defendants have admitted that present day school officials would reject the School Prayer display, or any other proposed display, if they disagreed with the text of the display and the message it conveyed. [10]

Defendants have also admitted that the prayer that is displayed was adopted as the "official School Prayer" of Cranston High School West beginning around 1960; that it conveys a message that had been approved by school officials; that it was recited in place of the Lord's Prayer and continued to be recited for some time into the early 1960s; and that around the time that it stopped being recited daily it was affixed to the auditorium wall to give it a place of permanency (Lombardi Dep. at 27, 36-38, 43, 78-79), in order "to pass on [its] message to future classes" of students. (Lombardi Dep. at 76). They admit that the phrase "Our Heavenly Father" is a Christian reference to God, and that "Amen" "suggests the ending of something religious" (Lombardi Dep. at 61), and that in a "vacuum," "Our Heavenly Father" and the word "Prayer" convey a religious message (Lombardi Dep. at 108).

---

assemblies for juniors; High School Diploma Policy assemblies for all students by grade; class meetings for seniors to prepare them for their senior portfolio presentations; Talent Show and Drama Club plays; and Orchestra, Band and Chorus concerts. Each year multiple Honors Nights are also held in the auditorium for Athletics, Languages and National Honor Society Inductions, as are a Law Day presentation and a week long series of presentations called "Diversity Week". (Def. Int. # 12; JA Aff. ¶19; School Planner for 2010-2011 at 7-8).

[10] Lombardi Dep. at 94: Q: "[I]f the Class of 1963 had wanted to present a message that included a message of racial hatred, . . . the school administration could have and most likely would have rejected it?" A: "I'm sure they could have.").

The Declaration of Plaintiff's expert, the Rev. Dr. Donald Anderson, confirms that the School Prayer is a prayer directed to God and more specifically is a formulation most commonly used as a Christian reference to God. (Anderson Dec. ¶¶5-9)

The School Committee and the City also admit that they have installed other banners at Cranston West intended to communicate messages to the students. A series of banners have been installed in the lobby of Cranston West which communicate a multitude of expectations that the Cranston school administration has for the students who attend and graduate from Cranston West. (Lombardi Dep. at 119-121; Cranston West Student Planners for 2010-11, Jt. Ex. 13 at 1, 4, 9-10 and for 2011-12, Jt. Ex. 14 at 1, 4, 9-11). They include a banner with the title, "STUDENT MISSION STATEMENT" in bold red letters, and a series of banners with similarly styled titles for "ACADEMIC EXPECTATIONS," "CIVIC EXPECTATIONS," and "SOCIAL EXPECTATIONS." (Photographs of Cranston West Lobby, Pl. Ex. 20(a)(3)-(17)).[11] The Defendants conceded at deposition that "these are messages to the Cranston High School students and others who walk through the lobby as to what the expectations are that will be achieved by students who attend and graduate Cranston High School West." (Lombardi Dep. at 121) In fact, the messages contained in those banners, for the most part verbatim, also appear in the Cranston West Student Planner distributed to students each year, accompanied by the message from the Principal that the handbook "contains the educational and behavioral expectations, as well as the school policies and procedures" for the upcoming academic year and is intended "through accurate and clearly articulated information to our parents and students, through this document, that everyone will embark upon this school year with a clear knowledge and understanding of our policies and expectations." (Cranston West Student Planners for 2010-

[11] Unlike the class banners in the auditorium, which can be and are periodically removed, the lobby banners appear to be a part of a permanent installation.

11, Jt. Ex. 13 at 4, and for 2011-12, Jt. Ex. 14 at 4). (*Compare* Planners, Jt. Ex. 13 at 1, 9-10, and Jt. Ex. 14 at 1, 9-11, with Cranston West Lobby Banners, Pl. Ex. 20(a)(3)-(17)). The significance is clear—the banners convey an official message from Cranston West to its students.

The Defendants acknowledged that the only characteristics that distinguish the School Prayer display from the lobby banners are: l) its location in the auditorium rather than the lobby, and 2) what some viewers might see as its apparent age. (Lombardi Dep. at 122, 125). Defendants admit the only change made to the School Prayer in its 48-year history was to paint over the plaque that identified the display as a gift of the Class of 1963, and part of the design's original borders (Lombardi Dep. at 56), and the only message ever associated with the display comes from its printed text – the text of the School's original, and only, School Prayer. (Lombardi Dep. at 80).

A student such as Plaintiff could not be expected to conclude that the age of the School Prayer Display meant that it no longer had significance as the official message of Cranston West since its counterpart—the School Creed—of the same age, style and location, is published in the School Planner each year along with the academic, civic and social expectations appearing on the lobby banners. Cranston West Student Planners for 2010-11 at 5, and for 2011-12 at 5)

The 2011 Decision to Maintain the School Prayer Display

In July 2010, the Rhode Island Affiliate of the American Civil Liberties Union ("ACLU") alerted the Superintendent of Cranston Public Schools of a complaint about the display of the School Prayer at Cranston West, which the School Committee considered as notice of intention to bring legal action if the Prayer display was not removed (8/16/10 Min. at 792, Nero; 2/22/11 Min. at 1), or reworded in a way to remove its religious content. (2/22/11 Min. at 5).

The School Committee met on a number of occasions and convened a subcommittee to consider Cranston's position on the continued maintenance of the Prayer: should it remove or alter the Prayer as sought, or resolve to defend against the anticipated law suit? The Committee and the subcommittee received comments from the public, as well as petitions, concerning the continued installation and display of the Prayer. On March 7, 2011 the full School Committee held a public hearing to consider the subcommittee's recommendation of February 22, 2011, that Cranston defend the continued display of the School Prayer. (3/7/11 Min. at 75). After a lengthy public hearing with numerous witnesses, and statements by each committee member as to how they would vote and why, the resolution to maintain the School Prayer display passed 4 to 3.[12] (3/7/11 Min. at 86).

Defendants acknowledge that the public hearings before the elected School Committee members were marked by significant "religious debate," and that the hearings "became quite a religious show[.]" (Lombardi Dep. at 101). From the School Committee's point of view, a "lopsided" majority of the speakers, and of the people who sent the committee members letters and e-mails, was in favor of keeping the School Prayer display as it was and where it was, because they favored maintaining the religious message expressed by the display. (Lombardi Dep. at 101, 103; 8/16/10 Min.; 3/7/11 Min. and Video). "[Q]uite a bit" of the sentiment was about "God and keeping God in the schools[.]" (Lombardi Dep. at 104; 8/16/10 Min.; 3/7/11 Min. and Video). As a result of this context, the committee members addressed their own religious beliefs before casting their votes. (Lombardi Dep. at 101-102).

[12] The entire meeting was digitally recorded, providing a full video and audio record, and is provided as Pl. Ex. 19.

The comments of the four committee members voting in favor of maintaining the School Prayer display are reflected in the official minutes (and preserved in the video record) of the March 7, 2011 School Committee meeting:

- Committee member Traficante prefaced his vote by explaining that he was "a person of faith"; that as an athletic coach in the school system for 25 years he led students in a prayer "before every single wrestling match or football game"; and as the Cranston Mayor he had invited clergy to all his mayoral events. He explained his belief that the United States was built on the "moral and religious" principles "emulated" in the display, and that it was their "obligation as School Committee members to protect and defend the moral values of our students and that banner helps us to express that[.]" (3/7/11 Min. at 80).
- Chairperson Iannazzi's prefacing remarks initially focused on the freedom to practice religion, stating this country "was founded not on freedom from religion but freedom of religion. Each person has the ability to practice whatever religion they want. That does not mean that they have the freedom from religion being practiced." But she claimed her support for the display was not based on religion, but instead "on a history and a tradition and a sense of what Cranston stands for." She explained that "Cranston stands for a code of being and the morals that are expressed in that banner[,] Cranston's tradition is rich and Cranston's tradition deserves to remain at Cranston West for years to come." (3/7/11 Min. at 85).
- Committee member McFarland explained that she did not believe that there was any "religious tone" to the display and viewed it as a form of individual student expression – "we have built into the walls of our school . . . an opportunity for everyone to speak of

who they are while they are there. * * * I think every student who leaves their mark on the school has a right for that mark to stay as such, I will support the [School Prayer] banner [display] staying in the school and support any future banners that will enlighten anyone's personal beliefs because that is what the public school system is built on." (3/7/11 Min. at 84-85).

- Vice Chairperson and Clerk of the Committee Lombardi noted he was a practicing Catholic and that the School Prayer display contained a "positive moral message that a child can choose or not choose to read[,]" and that message did not "offend [him] in any way, shape or form." He described the School Prayer display as a "very innocuous, very historical * * * fifty-one year old passive monument" conveying a "secular moral message." He also noted, "I am sure that as an elected official the majority of the people of Cranston want this banner restored and kept[,] and that is the way I intend to vote." (3/7/11 Min. at 79-80).[13]

In response to the Plaintiff's law suit, the Defendants have asserted the March 7, 2011 vote "had nothing to do with religion[.]" (Lombardi Dep. at 100, 110). They have asserted the School Prayer display is a "secular passive monument" with "historical significance" as a "student created project." (Lombardi Dep. at 95, 110, 114). They claim that the display does not necessarily contain a message to pray (Lombardi Dep. at 77), and that the decision to maintain it

[13] In the first School Committee meeting to consider the response to the complaint brought to the School Committee's attention by the ACLU, Mr. Lombardi acknowledged that, in approaching his decision, "I cannot leave God at the door step because I believe in God. I'm very religious and I pray every day. I'm proud of being able to do that." (8/16/10 Min. at 810). And he acknowledged that, as the only city-wide elected member of the Committee (Lombardi Dep. at 5), "[m]y obligations, I think are to listen to the people of Cranston, to listen to what their public comments say and to digest that and to do what I think is fair and best based on that input." (8/16/10 Min. at 809).

was not for the purpose of conveying a religious message, but simply to commemorate "a historical point in time[.]" (Lombardi Dep. at 95).[14]

Official Religious Communications at Bain Middle School

Plaintiff has developed information about religious communications by Cranston at Bain Middle School because it assists the Court in understanding the context of Cranston's actions in creating and maintaining the Cranston West Prayer display and in evaluating Cranston's argument for allowing it to remain on display in a public high school auditorium. Plaintiff does not claim that she has standing to obtain relief as to actions or events at Bain.

Bain School Prayer Display. When the School Prayer and School Creed displays were installed at Cranston West in the early 1960s, they replicated displays in the auditorium of Bain. There, in precisely the same configuration (Creed on the left, Prayer on the right of the stage) as at West, stood a large permanently affixed display of Bain's School Creed and School Prayer. While one bore the notation "Class of 1956," the Defendants testified that the two Bain displays had stood in place since the 1920s. (Lombardi Dep. at 11-13 and Jt. Ex. 7-12 and 7-13)

Not only were the Bain and West displays similar in configuration, the text of the Bain and Cranston West School Creeds were virtually identical, except for the school reference (Lombardi Dep. at 23-24 and Jt. Ex. 7-14), and non-religious. The two School Prayers were

[14] Vice Chairperson Lombardi, a practicing lawyer, pointed to the United States Supreme Court decision in *Van Orden v. Perry*, 545 U.S. 677 (2005), from the very first meeting to discuss the School Prayer display, asserting that because of that decision, "simply having a religious content or promoting a religious message that is consistent with religious doctrine does not run afoul of the [E]stablishment [C]lause." (8/16/10 Min. at 810). He urged his colleagues to reach the same conclusion. (Lombardi Dep. at 100). As the Rule 30(b)(6) witness for both the School Committee and the City, Lombardi testified that the School Prayer display fell "squarely within the *Van Orden* type of …secular passive monument[,]" and, moreover, it was "in line with tradition at Cranston West." (Lombardi Dep. at 95).

each addressed to "Our Heavenly Father" and distinctly religious, representing a petition for divine assistance for the school's students, but the text was not identical. (Jt. Ex. 7-15) Not only were the Creed/Prayer displays similar in configuration and text, but the design was virtually identical, except that Bain was painted in its school colors and Cranston West in its school colors. Each School Creed is topped by a stylized bird grasping a branch in each talon, and each School Prayer is topped by an urn or lamp with wings positioned over stylized mountains and an open book.[15]

Yet at some date after the filing of this law suit, without public notice, hearing, or vote, the School Committee, in consultation with the City, decided to remove—and obliterate—all signs of the School Creed and School Prayer at Bain. (Lombardi Dep. at 69-70, 72) All that is left are the two sign paintings containing the text of the Creed and Prayer, without the design or borders, in a storage room at the Cranston school administration building. Pl. Ex. 21(c)(1-2)(photographs).

Why did the City remove the Bain School Prayer? Why did the Defendants remove the innocuous School Creed at Bain? On inquiry at deposition, the Defendants refused to state anything other than that it was "on advice of counsel" and that they would not disclose that advice or reasoning. (Lombardi Dep. at 69-72) Moreover, the Defendants' designated witness himself acknowledged that there was nothing to distinguish the Bain Prayer display from the Cranston West Prayer display if one were considering them as "historical artifacts." (Lombardi Dep. at 115-116)

[15] A side-by-side comparison is attached as an Appendix to this Memorandum, drawn from photographs of the Cranston West School Prayer and Creed and the Bain School Prayer and Creed (before their removal) submitted in Plaintiff's Exhibits 20(b)(Cranston West auditorium) and 21(a)(Bain auditorium).

Bain Memorial Day Program. The Hugh B. Bain Middle/Jr. High School has a rich tradition of commemorating those of its graduates who gave their lives in military service to the country. It is a student centered event that has been conducted for 60 years to recognize former graduates of Bain that have died in service of our country. (Lombardi Dep. at 86). It is an outside assembly conducted during the school day (not on Memorial Day), with extensive participation by the middle school students and attended by various school officials. The entire school attends. (Lombardi Dep. at 86-88).

This is unquestionably a wonderful program, attended by local dignitaries, School Committee members, members of the school administration and the Mayor. And, year in and year out, one or more members of the clergy are invited to and do participate in the official program as religious speakers, leading the assembled group of children and adults in prayer, and providing an invocation and benediction. (Lombardi Dep. at 85-94, 107; Bain Memorial Day program materials, Pl. Ex. 22) When asked whether Defendants considered the significance of the presence and participation of a priest at a public school program for middle school children in the context of court precedent of *Lee v. Weisman*,, 505 U.S. 577, 587 (1992) (concluding that the state-sponsored prayer at a high school graduation violated the Establishment Clause), Defendants' designated witness stated that he had not thought specifically about that case, but "certainly considered his presence, but…--the presence of a priest, I think is muted by the wonderful ceremony that occurs there, and the willingness and the participation of all the kids there at Bain." (Lombardi Dep. at 88-89)

The most recent program was conducted on May 27, 2011, after this law suit was filed, and after consulting with counsel. A Roman Catholic priest, once again, participated in the program, and gave an invocation and a benediction. (Lombardi Dep. at 86-87, 90; Pl. Ex. 22)

The continuous and present day inclusion of clergy and prayer in an annual middle school assembly certainly signifies government approval and favor of incorporating elements of religious practice in public school programs, and an objective observer would be hard-pressed to conclude that the Cranston West School Prayer display was not intended to convey the same approval and favor for prayer as part of the public school experience.

Taken together, these events would suggest to the objective observer that Defendants *presently* value encouraging prayer to their public school students, and that was the purpose of the 2011 decision to maintain the School Prayer display. When the "objective observer" considers that a similar, but much older, School Prayer was removed from another school, and that school officials presently approve of the involvement of clergy and prayer in an annual middle school memorial event, the observer should have little trouble concluding the School Committee's 2011 decision respecting the School Prayer display was suffused with a predominantly religious, not historical, purpose.

Argument

I.) Plaintiff has Article III standing for an Establishment Clause challenge.

A.) The School Prayer display constitutes a government speech subject to the limitations of the Establishment Clause.

"By accepting a privately donated monument and placing it on city property, a city engages in expressive conduct[.]" *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 129 S.Ct. 1125, 1136, 172 L.Ed.2d 853 (2009). A permanent monument is, "by definition, a structure that is designed as a means of expression." 555 U.S. --, 129 S.Ct. at 1133. When a government itself arranges for the construction of a monument, "it does so because it wishes to convey some thought or instill some feeling in those who see the structure[,]" and the same holds

true for "*privately financed and donated monuments that the government accepts and displays to the public on government land*." *Id.* (emphasis added).

The reason is clear: because property owners typically do not permit the construction of permanent monuments on public property that convey a message with which they do not wish to be associated, persons who observe donated monuments "routinely – and reasonably – interpret them as conveying some message on the property owner's behalf." *Id.* "[T]here is little chance that observers will fail to appreciate the identity of the speaker . . . whether the monument is located on private property or on public property, such as national, state, or city park land[,]" *id.*, or on the grounds of a public school. *See also id.* at 1138 (Stevens, J., concurring) (describing "the near certainty that observers will associate permanent displays with the government property owner").

Pleasant Grove involved a public park, and the Court observed that "[p]ublic parks are often closely identified in the public mind with the governmental unit that owns the land." *Id.* at 1133. City parks, the Court noted:

> play an important role in defining the identity that a city projects to its own residents and to the outside world. Accordingly, cities and other jurisdictions take some care in accepting donated monuments. Government decision-makers select the monuments that portray what they view as appropriate for the place in question, taking into account esthetics, history, and local culture.

Id. at 1134. Consequently, "the monuments that are accepted, therefore, are meant to convey and have the effect of conveying a government message, and they thus constitute government speech." *Id.* High school auditoriums play an essentially identical role in defining the identity a high school projects to its students and members of the public – who enter it for assemblies, award ceremonies, student performances and the like – and school officials have the right and responsibility to select displays, in particular permanent ones, that are appropriate for that

context. The School Prayer display qualifies as a "permanent monument" erected in the Cranston West auditorium in every essential sense of that phrase.

- It is permanently installed on the wall as an integral part of the auditorium. (Lombardi Dep. at 54-55, 58, 69-70).

- It occupies an area of 24 square feet (8 feet high by 3 feet wide) at the right front of the auditorium, a full five feet above floor level. (Lombardi Dep. at 65).

- It was affixed to the wall, and remains affixed to the wall, with the permission of the city and school defendants, and is, as admitted by defendants, owned by the school and/or the city. (Lombardi Dep. at 69-70).

The School Prayer display thus conveys a government message from school officials, the School Committee, and the City, and it constitutes government speech, *see Pleasant Grove City*, 129 S.Ct. at 1134, that "must comport with the Establishment Clause." *Id.* at 1132; *see also Santa Fe Indep. Sch. District v. Doe*, 530 U.S. 290, 302 (2000) ("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.").

At its core, the issue before the Court is whether the government message that is approved and endorsed by installing and maintaining the School Prayer display, and the affirmative decision to continue its display, is a religious one or a secular historical one. Plaintiff asserts it is the former, and that she has Article III standing to assert that claim.

B.) Unwelcome direct contact with a religious display on public property is an Article III injury-in-fact.

It is a truism that "'standing to sue is an indispensable component of federal court jurisdiction.'" *Block v. Mollis*, 618 F.Supp.2d 142, 147 (D.R.I. 2009) (quoting *Osediacz v. City of Cranston*, 414 F.3d 136, 139 (1st Cir. 2005)). To establish standing a plaintiff must show "(a)

that they have suffered an injury in fact; (b) that such injury is fairly traceable to conduct complained of (some causal connection); and (c) that the relief sought is likely to redress the injury sustained." *Id.* at 147-148 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). In Establishment Clause cases the focus of the standing inquiry is typically the "injury-in-fact" requirement, and a plaintiff must show that she "'personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.'" *Cooper v. U.S. Postal Service*, 577 F.3d 479, 489 (2d Cir. 2009) (quoting *Valley Forge Christian College v. Ams. United for Separation of Church and State*, 454 U.S. 464, 471-72 (1982)).

The injury-in-fact component for Establishment Clause cases has been tailored by the courts to reflect the kind of injury a plaintiff is likely to suffer because of an Establishment Clause violation. *Suhre v. Haywood County*, 131 F.3d 1083, 1086 (4th Cir. 1997). The Establishment Clause is primarily aimed at protecting non-economic interests of a spiritual nature, *Vasquez v. Los Angeles [('LA')] County*, 487 F.3d 1246, 1250-51 (9th Cir. 2007), and Establishment Clause violations cause injury to the "spiritual, value-laden beliefs" of the plaintiff. *Suhre*, 131 F.3d at 1086.

Thus, in the case of displays of religious messages or symbols on public property – representative of spiritual or religious beliefs to which one does not subscribe – simply seeing the display causes injury to that person's "spiritual, value-laden beliefs" in violation of the Establishment Clause and "[t]he fact of exposure becomes the basis for [Art. III] injury and jurisdiction." *Cooper*, 577 F.3d at 489. Of the Courts of Appeal that have addressed the issue, a majority have held that spiritual harm resulting from unwelcome direct contact with the display

of a religious message or symbol on public property is sufficient to confer Article III standing to bring an action for an Establishment Clause violation. *Vasquez*, 487 A.2d at 1252.[16]

The proximity of the plaintiff to the challenged conduct is the distinctive factor that establishes standing, "because direct contact with an unwelcome religious exercise or display works a personal injury distinct from and in addition to each citizen's general grievance against unconstitutional governmental conduct[,]" *Suhre*, 131 F.3d at 1086, particularly where the display is in the plaintiff's local community. *Id.* at 1087 ("[T]he practices of [one's] own community may create a larger psychological wound than someplace [one] is just passing through.") (quoting *Washegisic v. Bloomingdale Public School*, 33 F.3d 679, 683 (6th Cir. 1994)). Plaintiffs that are a part of the community where the challenged display is located and

[16] *See, e.g., ACLU of Ohio Foundation, Inc. v. DeWeese*, 633 F.3d 424, 429 (6th Cir. 2011) ("In suits brought under the Establishment Clause, 'direct and unwelcome' contact with the contested object demonstrates psychological injury in fact sufficient to confer standing."); *American Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1113 (10th Cir. 2010) (concluding that "direct personal and unwelcome contact" with large Latin memorial crosses on roadsides established Establishment Clause standing); *Cooper*, 577 F.3d at 491 (concluding plaintiff had a "sufficiently direct and personal stake" to confer standing where "he was made uncomfortable by direct contact with religious displays that were made part of his experience using the postal facilities nearest his home, and that upon complaint he was advised to alter his behavior"); *Vasquez*, 487 F.3d at 1251 (finding standing where plaintiff "alleged more than 'a mere abstract objection' to Defendants' removal of the cross from the county seal. * * * To the contrary, he has held himself out as a member of the community where the seal is located," and as someone "directly affected" by his "unwelcome direct contact" with the seal); *Books v. City of Elkhart, Indiana*, 235 F.3d 292, 301 (7th Cir. 2000) (concluding "that a plaintiff may allege an injury-in-fact when he is forced to view a religious object that he wishes to avoid but is unable to avoid because of his right or duty to attend the government-owned place where the object is located"); *Suhre*, 131 F.3d at 1086 ("The injury that gives standing to plaintiffs in these cases is that caused by unwelcome direct contact with a religious display that appears to be endorsed by the State."); *see also Lambeth v. Board of Com'rs of Davidson County, N.C.*, 321 F.Supp.2d 688, (M.D.N.C. 2004) ("By alleging that they are offended by a perceived government expression of religion which appears in a location where each has regular personal and professional contact with it, Plaintiffs have sufficiently demonstrated standing to challenge a potential Establishment Clause violation.").

are "directly affronted by the presence" of the display, "have more than an abstract interest" in seeing that government observes the Constitution. *Id.* (internal citations omitted).

And it is no answer, courts have held, to say that the person may simply avoid the religious display or the public facility where it is located. *See, e.g., Vasquez*, 487 F.3d at 1252; *Suhre*, 131 F.3d at 1089. "In evaluating standing, the Supreme Court has never required that Establishment Clause plaintiffs take affirmative steps to avoid contact with challenged displays or religious exercises." 131 F.3d at 1088. In *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963), the Supreme Court held that students and the parents had standing to challenge Bible readings in public schools notwithstanding "the fact that individual students [could] absent themselves upon parental request, for that fact furnishes no defense to a claim of unconstitutionality under the Establishment Clause." 374 U.S. at 224-25 & n. 9. Public facilities – such as public schools – exist to serve *all* citizens of a community, whatever their spiritual beliefs may be. *Suhre*, 131 F.3d at 1088. Students are not required to absent themselves from school, refuse to attend assemblies, or to forego participation in extracurricular activities to have standing to claim an alleged Establishment Clause violation in their own public school.

This view of the Establishment Clause standing in religious display cases – unwelcome direct contact with the display – was implicitly approved by the United States Supreme Court in both *Van Orden v. Perry*, 545 U.S. 677 (2005), involving a monument displaying the Ten Commandments on the Texas State Capitol grounds, and *McCreary County, Kentucky v. ACLU of Kentucky*, 545 U.S. 844 (2005), involving the display of gold framed copies of the Ten Commandments on the hallway walls of a county courthouse.

In both cases the District Courts addressed the threshold issue of standing. In *Van Orden*, the District Court concluded the plaintiff had established injury-in-fact standing because his

visits to the Texas State Law library brought him into unwelcome contact with the Ten Commandments monument; unwelcome because he was not religious, did not acknowledge the existence of any god, and did not adhere to either the Christian or Jewish faiths, and in his view the monument appeared to symbolize a state policy favoring the Christian and Jewish religions over other religions and over non-believers. *Van Orden v. Perry*, 2002 WL 32737462 (W.D. Tex.) at 2. In *McCreary*, the District Court denied a motion to dismiss for lack of standing, holding that the plaintiffs had Article III standing because, as lawyers, they had to "come into contact with the display of the Ten Commandments whenever they enter the courthouse to conduct business." *American Civil Liberties Union of Kentucky v. McCreary County, Kentucky*, 96 F.Supp.2d 679, 682 (E.D. Ky. 2000). Although the Supreme Court did not subsequently address the standing of the *Van Orden* and *McCreary* plaintiffs, that simply confirms that their unwelcome direct contact with the displays was a sufficient Article III injury-in-fact to confer standing for an Establishment Clause claim.

Because "standing to sue is an indispensable component of federal court jurisdiction" under Article III, *Block*, 618 F.Supp.2d at 147 (quoting *Osediacz*, 414 F.3d at 139), and is therefore a constitutional requirement of federal judicial power, the Supreme Court has asserted its "obligation to assure [itself] of litigants' standing under Article III" before addressing the merits of a controversy. *Daimler Chrysler Corp. v. Cuno*, 547 U.S. 332, 340 (2006) (quoting *Friends of The Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 180 (2000). The Court does not "assume" standing in order to reach the merits of a controversy, *see Steel Company v. Citizens United for a Better Environment*, 523 U.S. 83, 94 (1998) (rejecting the doctrine of "hypothetical" Article III jurisdiction), and the fact that no Justice took issue with the plaintiffs' standing in either *Van Orden* or *McCreary* means, *a fortiori*, that the plaintiffs'

unwelcome direct contact with the display of a religious message or symbol on public property – there the Ten Commandments – was a sufficient injury for purposes of Article III standing.

C.) Plaintiff's normal school activities bring her into unwelcome direct contact with the School Prayer display.

Public school students "have a cognizable interest in receiving a public education that comports with the Establishment Clause[,]" *Moss v. Spartanberry County School District No. 7*, 775 F.Supp2d 858, 870 (D.S.C. 2011) (citing *Schempp*, 374 U.S. at 224 n. 9), and they are not, therefore, "merely concerned bystanders" to Establishment Clause violations that occur in their schools. *Doe v. School Board of Quachita Parish*, 274 F.3d 289, 292 (5th Cir. 2001). Plaintiff has demonstrated an injury-in-fact to her cognizable interests under the Establishment Clause.

Plaintiff, who is now 16 years old, will begin her junior year at Cranston High School West in September. (JA Dep. at 3, 5). She is an atheist, and was an atheist when she matriculated to the high school for her freshman year. (JA Dep. at 29). Although she had been in the auditorium several times during her freshman year, she did not notice the content of the School Prayer display until a friend told her about it at the end of the school year in May or June. She went to read it. (JA Dep. at 12-13). She explained at her deposition that, when she first read the display, labeled "School Prayer," ostensibly addressed by Cranston West students to "Our Heavenly Father," it made her feel excluded, ostracized and devalued as a member of the school community because she did not subscribe to a belief in a "Heavenly Father." (JA Dep. at 35-36). Both the fact that a "School Prayer" for Cranston West even existed, and that it was on display in the auditorium, upset her, (JA Dep. at 16), making her feel "left out" and "excluded" because she did not subscribe to the religious belief expressed by the prayer and its display. (JA Dep. at 39); *see also* (JA Dep. at 36) ("[It] is entitled School Prayer. I want the school. I don't want the

prayer. So it makes me feel excluded."). Since that time she has been in the school auditorium on multiple occasions to participate in school programs and extra-curricular activities; is very cognizant of the prayer when she is; and she continues to experience the same sense of being excluded and left out, (JA Dep. at 12-14, 45), by the display on school property that she perceives as a message from school officials.[17]

Plaintiff's sense of spiritual injury, her sense of exclusion and ostracism, and her psychological injury, constitute injury-in-fact under Article III for purposes of the Establishment Clause. Moreover, that injury "is fairly traceable" to Defendants' decision to display the School Prayer and to continue its display, and a permanent injunction requiring removal of the display will redress her injury. *See Block*, 618 F.Supp.2d at 147-48. Plaintiff has standing to bring this claim. [18]

II.) The Establishment Clause embodies a principle of government neutrality towards religion.

In *McCreary* a majority of the Supreme Court reaffirmed the long-standing view that the "touchstone" underlying the Establishment Clause is "government neutrality between religion

[17] After Plaintiff publicly voiced her objection to the school's display of a "School Prayer" she was harassed and bullied by other students, and her sense of exclusion only increased. (JA Dep. at 23, 38, 46-47; Pl. Int. #5). As a consequence, she stated in interviews that she did not find the prayer offensive. (JA Dep. at 23, 46-47). In fact, she has always been offended by the School Prayer display. (JA Dep. at 46-47). In her deposition she explained that she was trying to cover up what she was feeling because she thought those feelings only made her more susceptible to further bullying and harassment. (JA Dep. at 23, 46). She also "wanted to keep a more professional attitude towards [the controversy]. I wanted to act like a grown-up." (JA Dep. at 47).

[18] Originally applicable only as to the Federal government, the Establishment Clause has been incorporated through the Fourteenth Amendment to apply to State governments, *Freedom From Religion Foundation v. Hanover School District*, 626 F.3d 1, 6-7 (1st Cir. 2010) (hereinafter "*Freedom*"), because the decisions and actions of municipal school officials and school boards are considered choices "attributable to the State." *Lee v. Weisman*, 505 U.S. 577, 587 (1992).

and religion, and between religion and nonreligion." *McCreary*, 545 U.S. at 580 (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1963)). The neutrality principle promotes three essential constitutional goals.

First, it protects the liberty of conscience in the highly personal matter of religious faith and belief, unencumbered by the interference or influence of government. *See McCreary*, 545 U.S. at 881-82 (O'Connor, J., concurring). Both religion clauses reflect a constitutional design in which "the preservation and transmission of religious beliefs" is a "responsibility and choice committed to the private sphere[,]" *see Lee v. Weisman*, 505 U.S. at 589, in "reliance on home, the church and the inviolable citadel of the individual heart and mind." *Schempp*, 374 U.S. at 226. It is not the responsibility or prerogative of local school officials and administrators.

Second, the requirement for government neutrality on religious matters "stands as an expression of principle on the part of the Founders that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate." *Engel v. Vitale*, 370 U.S. 421, 431-32 (1962) (quoting *Memorial and Remonstrance Against Religious Assessment*, II Writings of Madison 183, 187). The Clause recognizes that it is not within the business or competence of

civil authorities to interfere in, or direct, religious matters. 370 U.S. at 434 n. 20.[19] Speaking to the School Committee during the initial public hearing on whether the display of the School Prayer should remain in the auditorium, Rabbi Amy Levin**,** Vice President of the Rhode Island Board of Rabbis, expressed the core of these principles very eloquently and succinctly:

> Any member of the clergy in Cranston welcomes the opportunity to deepen our teenagers' relationship with God and with the particular premises of our respective religious faiths. [But] I am not comfortable with this discussion passively or actively, taking place within our town[']s secular school[] system. * * * We gather as people of faith or not by personal choice.

(8/16/10 Min. at 791). The Establishment Clause preserves the individual freedom to explore and determine, according to individual conscience influenced by family, church, or individual experiences, whether religious tradition suits them, and if it does, which tradition suits them best.

---

[19] *Engel* quoted Roger Williams, "what imprudence and indiscretion is it in the most common affaires of Life, to conceive that Emperours, Kings and Rulers of the earth must not only be qualified with politicall and state abilities to make and execute such Civille Lawes which may concerne the common rights, peace and safety (which is worke and businesse, load and burthen enough for the ablest shoulders in the Commonweal) but also furnished with such Spirituall and heavenly abilities to governe the Spirituall and Christian Commonweale * * * ") (Williams, *The Bloudy Tenent of Persecution, for cause of Conscience*, discussed in A Conference betweene Truth and Peace (London 1644), reprinted in Narragansett Publications, Vol. III, p. 366).

Indeed, Rev. Dr. Donald Anderson confirmed that, today as well, the display of the School Prayer at Cranston West is not in keeping with the principles and traditions of the Baptist Belief Church founded by Roger Williams, stating:

> The installation and maintenance of the "School Prayer" by the governing bodies of the City of Cranston and its School Committee in a publicly established and maintained high school do not conform to the religious principles and traditions of historic Baptist Belief Church in that it appears to represent an official endorsement of religious belief. The First Baptist Church in America was founded by Roger Williams. From its founding to the present, the Church has consistently supported separation of church and state and has opposed government-sponsored expressions of religious piety.
> Anderson Dec. ¶10.

It proscribes government in general, and public schools in particular, from endorsing a religious path. The neutrality principle respects individual conscience by exalting it to a personal, sacred sphere beyond the reach of civil officials.

The third constitutional goal promoted by the principle of government neutrality towards religion is to avoid the social divisiveness that arises when government appears to take sides in matters of religious conscience, debated between differing but deeply held religious traditions, beliefs and practices -- "sapping the strength of government and religion alike." *Van Orden*, 545 U.S. at 705 (Breyer, J., concurring in the judgment) (citing *Zelmon v. Simmons-Harris*, 536 U.S. 639, 717-729 (2002) (Breyer, J., dissenting)). The concern with the potential for divisiveness that arises when government appears to align itself with religion, or an identifiable religious view, is a particular concern in the Court's Establishment Clause jurisprudence concerning public schools. In *Engel*, the Court held that the Establishment Clause forbids prayer in public schools, in part because the Court recognized the "anguish, hardship and bitter strife that could come when zealous religious groups struggle with one another to obtain the Government's stamp of approval . . ." *Id.* at 429. *See also Lee v. Weisman*, 505 U.S. at 588 (striking down school-sanctioned prayer at high school graduation ceremony because "potential for divisiveness" has "particular relevance" in the school environment); *Schempp*, 374 U.S. at 307 (Goldberg, J., concurring) (Bible-reading program violated Establishment Clause in part because it gave rise "to those very divisive influences and inhibitions of freedom" that come with government efforts to impose religious influence on "young impressionable [school] children").

The neutrality principle and the constitutional goals it promotes ultimately demand at least institutional respect and tolerance for differing views of religion and religious practices, a tolerance extending beyond tolerance among different Christian sects and tolerance among

different religions, to tolerance "of the disbeliever and the uncertain[,]" and requires "equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism." *Wallace v. Jaffree*, 472 U.S. 38, 53-54 (1985). Compactly stated by the First Circuit: "The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief[.]" *Freedom*, 626 F.3d at 10 (quoting *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 593-94 (1989)). And that is of particular constitutional importance in public school systems.

III.) Courts vigorously apply the principle of religious neutrality in primary and secondary schools because of a parent's fundamental right to direct the religious upbringing of their children without the competing influence of the state.

A second principle deeply embedded in Establishment Clause jurisprudence is the principle requiring a heightened sensitivity for the Establishment Clause in the context of primary and secondary schools. *See, e.g., Lee v. Weisman*, 505 U.S. at 592 ("As we have observed before, there are heightened concerns with protecting freedom of conscience from subtle coercive pressures in the elementary and secondary schools."); *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987) ("This Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools."); *see Doe v. Beaumont*, 240 F.3d 462, 487 (5th Cir. 2001) (noting that the Establishment Clause must be applied with "special sensitivity" in a public school setting). Even the four justices joining the plurality opinion in *Van Orden*, approving the display of the Ten Commandments on a monument in the Texas State Capitol grounds, all of whom dissented in *McCreary*, acknowledged the Court's "particularly vigilant" enforcement of the Establishment Clause in elementary and secondary schools. 545 U.S. at 691 (plurality opinion) (quoting *Aguillard*, *supra*). In the First Circuit, this

principle is stated very simply: "[i]n the Establishment Clause context, public schools are different[.]" *Freedom*, 626 F.3d at 8.

Perhaps the single most important reason why "public schools are different" is the recognition of "the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children." *Wisconsin v. Yoder*, 406 U.S. 205, 231 (1972); *see id.* at 233 (referring to the "charter of the rights of parents to direct the religious upbringing of their children"); *Doe v. Madison School Dist. No. 321*, 177 F.3d 789, 795 (9th Cir. 1999) ("Parents have a right to direct the religious upbringing of their children and, on that basis, have standing to protect their right."). And that fundamental parental and family interest is applied with particular importance to parents and families who do not embrace the majority religious view of a particular community.

Parents "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. at 584; *see also Lee v. Weisman*, 505 U.S. at 643 (Scalia, J., joined by Rehnquist, C.J., White, J., and Thomas, J., dissenting) (acknowledging "the liberty of parents to direct the religious upbringing of their children"). Parents have a fundamental liberty interest in preserving and transmitting their religious beliefs and traditions to their children, through their relationship with their children, and the churches, synagogues, mosques or other institutions of worship or teaching they choose, without the competing exertion of influence by local public school officials.

The recognition of the "subtle coercive pressures in the elementary and secondary schools[,]" *Lee v. Weisman*, 505 U.S. at 592, that threaten that liberty interest is a constant

theme throughout Establishment Clause jurisprudence. It is a familiar teaching of the Court that school sponsorship of a religious message sends an ancillary message to students (and their families) who do not adhere to that religious message "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." *See, e.g., Santa Fe Independent School District v. Doe*, 530 U.S. 290, 309-10 (2000) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). The Supreme Court has long recognized that "the indirect coercive pressure upon religious minorities to conform . . . is plain[,]" in the public school context where attendance is mandatory. *Jaffree*, 472 U.S. at 60 n. 51 (internal quotations and citations omitted).

Even if school officials do not "operate directly to coerce nonobserving individuals," that "does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain[,]"*Jaffree*, 472 U.S. at 61 (internal quotations and citations omitted), because "[w]hat to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy." *Santa Fe*, 530 U.S. at 312 (quoting *Lee*, 505 U.S. at 592). For elementary and secondary public school students, whose attendance at school is mandatory, the Court has long recognized the "special force" of the "indirect coercive pressure upon religious minorities to conform," when the prestige of government is placed behind a particular religious belief – whether it be a belief in God, numerous gods or no god, or a preference for one religion over another. *Jaffree*, 472 U.S. at 60, n. 51 (quoting *Engel*, 370 U.S. at 431). Public schools are therefore an especially important venue for recognizing, implementing, and enforcing the

Establishment Clause's neutrality principle, which embodies the understanding "that liberty and social stability demand a religious tolerance that respects the religious views of all citizens," including high school students, "to worship God in their own way," or not, and "allows families to 'teach their children and to form their character' as they wish[,]" without government sending the message that they are wrong. *Zelmon v. Simmons-Harris*, 536 U.S. at 718 (Breyer, J., with whom Stevens, J., and Souter, J., join, dissenting) (quoting C. Radcliffe, *The Law & Its Compass* 71 (1960)).

For over 50 years the Court has applied the special Establishment Clause concerns that exist for primary and secondary schools to consistently invalidate overt and implied messages of government endorsement of the religious activity of prayer in public schools, messages directed by government to students. *See, e.g., Santa Fe*, 530 U.S. at 313 (invalidating school district policy permitting student-led, student-initiated invocations prior to football games); *Lee*, 505 U.S. at 596 (invalidating school-sanctioned clergy prayers at official graduation ceremonies); *Wallace*, 472 U.S. at 60-61 (invalidating Alabama statute authorizing daily period of silence for the suggested purpose of meditation or prayer, where prior statute authorized moment of silence with no mention of prayer); *Schempp*, 374 U.S. at 223 (invalidating recitation of the Lord's prayer or a Bible reading as part of a school's morning exercise); *Engel*, 370 U.S. at 436 (invalidating student recitation of prayer selected by State Board of Regents).

Because of the Court's "heightened sensitivity" for enforcement of Establishment Clause's limitations in primary and secondary schools, the same government act may be constitutional outside the school grounds, but unconstitutional inside. *Compare Stone*, 449 U.S. at 42-43 (1980) (per curiam) (holding state law requiring Ten Commandments to be posted in every public school classroom violated Establishment Clause) with *Van Orden*, 545 U.S. at 681

(plurality opinion) (rejecting Establishment Clause challenge to Ten Commandments monument on 22-acre state capitol grounds); 545 U.S. at 703 (Breyer, J., concurring in the judgment) ("This display is not on the grounds of a public school, where, given the impressionability of the young, government must exercise particular care in separating church and state."); *compare also Lee*, 505 U.S. at 598-99 (holding prayer at secondary school graduation to be unconstitutional) with *Marsh v. Chambers*, 463 U.S. 783, 793-95 (1983) (upholding prayer in state legislature).

While the use of religious text, as part of a curriculum about different religions or cultures, comparative religion, history or ethics, may well be constitutional, *see Stone*, *supra*, at 42; *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968) ("study of religions and of the Bible from a literary and historic viewpoint, presented objectively as part of a secular program of education, need not collide with the First Amendment's prohibition"), never has the Supreme Court held that the non-educational display of religious symbols or text in a public school is constitutionally permissible. It has been a consistent position of the Court that even if schools "do not actually 'impos[e] pressure upon a student to participate in a religious activity[,]' " *Lee*, 505 U.S. at 604-05 (Blackmun, J., with whom Stevens, J., and O'Connor J., join, concurring) (quoting *Board of Ed. of Westside Community Schools, Dist. 66 v. Mergens*, 496 U.S. 226, 261 (1990) (Kennedy, J., concurring in part and concurring in judgment)), the Establishment Clause "proscribes public schools from 'conveying or attempting to convey a message that religion or a particular religious belief is *favored or preferred*[.]'" *Id.* (quoting *Allegheny*, 492 U.S. at 593 (internal quotation marks omitted; emphasis in original)).

The government-sanctioned permanent installation of Cranston West's official "School Prayer" for its students does precisely that – it conveys the message that religious belief and prayer to "Our Heavenly Father" are integral to achieving the aspirations the students are asked

to live up to as members of the Cranston West community and tradition. It conveys approval of the importance of religious belief and prayer, and the message that religious belief and prayer to "Our Heavenly Father" are, in the official school view, a vital part of becoming a good Cranston West citizen-student. From any objective perspective, that is the predominant, if not the sole, purpose and effect of displaying and continuing to display the School Prayer in the school auditorium.

IV.) Both the purpose and the effect of displaying the School Prayer is to communicate official approval of student prayer as part of the educational experience and tradition.

Establishment Clause analysis has historically focused on inquiry into the *purpose* and *effect* of a governmental act with respect to religion, factors first articulated in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). *See Agostini v. Felton*, 521 U.S. 203, 232-33 (1997).[20]

Although the plurality in *Van Orden* concluded the "*Lemon*" test was "not useful in dealing with the sort of passive [Ten Commandments] monument that Texas ha[d] erected on its Capitol grounds[,]" and instead employed an analysis "driven both by the nature of the monument and by our Nation's history],]" 545 U.S. at 686, "[m]ost courts of appeal have concluded that the *Lemon* tripartite test of purpose, effect and entanglement still stands after *Van Orden*[.]" Edith Brown Clement, Public Displays of Affection. . . For God: Religious Monuments After *McCreary* and *Van Orden*, 32 Harv. J. L. 8 Pub.Policy, 231, 246 (2009). Moreover, a majority of the Court applied *Lemon*, specifically its "purpose" analysis, to the "passive" display of religious text in *McCreary*. *See* 545 U.S. at 860.

[20] *Lemon* also articulated a third factor – whether the government action fostered an "excessive entanglement with religion." *Id.* But in *Agostini* the Court folded the entanglement inquiry into the primary effect inquiry, reasoning that the factors used to assess whether an entanglement is "excessive" are similar to the factors used to examine "effect[,]" 521 U.S. at 232, and concluding it "is simplest to recognize why entanglement is significant and treat it … as an aspect of the inquiry into … effect." *Id.* at 233.

The *McCreary* majority included Justice Breyer, who had joined the *Van Orden* plurality's judgment, but not its opinion and rationale. 545 U.S. at 700. Specifically, Justice Breyer declined to reject *Lemon* for all "passive" display cases, finding it unhelpful only in certain "borderline" cases, and determined *Van Orden* was one of those cases. 545 U.S. at 700. But Justice Breyer specifically excluded from the category of "difficult borderline cases" those religious displays "*on the grounds of a public school, where given the impressionability of the young, government must exercise care in separating church and state*[,]" 545 U.S. at 703 (citing *Stone, supra*) (emphasis added). Justice Breyer's concurrence is the controlling rationale of *Van Orden* with respect to the *Lemon* test. *See Marks v. United States*, 430 U.S. 188, 193 (1997) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five justices, the holding of the Court may be viewed as that position of those members who concurred in the judgment on the narrowest grounds[.]").

Justice Breyer's exception for public schools is consistent with the Court's inclination to apply the *Lemon* factors in the public school context. *See Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 383 (1985) (noting that the Court has "particularly relied on *Lemon* in every case involving the sensitive relationship between government and religion in the education of our children."). Consequently, *Lemon's* purpose and effect analysis should be the framework under which the Cranston West School Prayer display must be evaluated. Under that framework, "purpose" and "effect" are examined by courts from an "endorsement" perspective first described by Justice O'Connor concurring in *Lynch v. Donnelly*, 465 U.S. at 688, and subsequently adopted by a majority of the Court. *See County of Allegheny v. ACLU*, 492 U.S. 573, 592 (1989); *see also Green v. Haskill v. County Board of Commissioners*, 568 F.3d 784, 796 (10th Cir. 2009) ("Justice O'Connor's concurring opinion in *Lynch* . . . offered a refined

version of the *Lemon* test implicating its purpose and effect elements that has been repeatedly used in this circuit.").

The "purpose" inquiry asks whether the actual purpose of the government's act is to endorse or approve religion. *Lynch*, 465 U.S. at 690 (O'Connor, J. concurring). The "effect" inquiry asks whether the government's act, regardless of the government's actual purpose, nevertheless conveys a message of endorsement or approval of religion, *id.*, that is, does it "send[] the ancillary message to members of the audience who are nonadherents that they are outsiders, not full members of the community, and an accompanying message to adherents that they are insiders, favored members of the community." *Freedom*, 626 F.3d at 10 (internal citations omitted). "[G]overnment impermissibly endorses religion if its conduct has either (1) the purpose or (2) the effect of conveying a message that religion or a particular religious belief is favored or preferred." *Green*, 568 F.3d at 796.

A.) The predominant purpose of displaying the School Prayer is to communicate official approval of student prayer.

The first step in the *Lemon* analysis is to discern the actual purpose for the government's act – in this case the permanent display of a religious prayer and the 2011 decision to continue to display the Cranston West School Prayer. "Purpose" analysis plays the vital role of ensuring government does not "abandon[ ] neutrality and act[ ] with the intent of promoting a particular point of view in religious matters." *Skoros v. City of New York*, 437 F.3d 1, 18 (2d Cir. 2006) (quoting *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 335 (1987)). Here, the School Prayer display permanently affixed to the auditorium wall constitutes approved government expression and speech, and conveys a message or

sentiment approved by the School Committee and City. *See Pleasant Grove City*, 129 S.Ct. at 1136. The Court's purpose analysis must focus on determining what that intended message is.

Notwithstanding that the display is self-described as a prayer; is in the format of a prayer; and consists of a series of petitions to "Our Heavenly Father" to "grant us," "help us," and "teach us," Defendants claim the government message is not approval and endorsement of student prayer to a "Heavenly Father" and thereby belief in God. Instead they claim the actual intended message of their decision is merely commemorative. They claim that, whatever message was intended when school officials originally permitted the Cranston West prayer to be permanently installed in the auditorium, their 2011 decision to continue to display it was simply to recall a period in Cranston West's history when school officials did approve and encourage a specific student prayer as part of their public education. They claim the School Committee's 2011 decision to continue the School Prayer display "had *nothing* to do with religion[,]" and was rather simply to commemorate a "historical point in time[,]" "in line with tradition at Cranston West." (Lombardi Dep. at 95, 100, 110) (emphasis added). Although a government's claimed secular purpose will generally be accorded some deference, courts have a duty to determine that the claimed secular purpose is "genuine, not a sham, and not merely secondary to the religious objective[.]" *McCreary*, 545 U.S. at 864 (citations omitted). A "predominantly religious purpose" violates the Establishment Clause. *McCreary*, 545 U.S. at 881; *see id.* at 862 ("predominantly" religious purpose); *id.* at 863 ("predominant purpose of advancing religion").

In determining the genuine purpose of the government's act, "[t]he eyes that look to purpose belong to an objective observer," *McCreary*, 545 U.S. at 862, "one who takes account of the traditional external signs that show up in the text, . . . history, and implementation" of the challenged act from "readily discoverable facts[,]" *id.* and who is "presumed to be familiar with

the history of the government's actions and competent to learn what history has to show[.]" *Id.* at 866. *McCreary* instructed that courts may not "cut the context" out of the purpose inquiry, *id.* at 864. If the "openly available data support[s] a commonsense conclusion that a religious objective permeated the government action[,]" the action is unconstitutional. *Id.* at 863. "[P]urpose needs to be taken seriously under the Establishment Clause and needs to be understood in light of context[.]" *Id.* at 874.

To determine what the Defendants' predominant purpose was, and whether a religious objective permeated its decision to continue the display of Cranston West's official School Prayer, the Court may look to several relevant areas of context here: the text of the display, *see McCreary* at 868; the act of displaying the School Prayer itself, *see id.*, at 862; and the public comments by the School Committee members prior to their vote, *see id.* at 862 (citing the Court's reliance on detailed public comments by the sponsor of the disputed evidence in *Edwards*, 482 U.S. at 586-88), and examine them in light of the history of the prayer and its display as established in the record. Plaintiff asserts that each of these three pieces of "readily discoverable fact" – the text of the display, the act of displaying it, and the committee members' contemporaneous public comments – considered in the context of the history of the prayer and its display, demonstrate that the only commonsense conclusion is that the March 2011 approval of the School Prayer display by the School Committee was for a predominantly, if not wholly, religious purpose – not a historical one.[21]

The Text

Labels "are quite important in determining the purpose behind an action." *See Holloman v. Harland*, 370 F.3d 1252, 1289 (11th Cir. 2004). Here the text of the display, beginning with its

[21] In light of the history of the display's origins, discussed herein, there can be little doubt that the installation of the display in 1963 reflected an improper religious purpose as well.

title, "SCHOOL PRAYER," is overtly religious. "Prayer" is a quintessentially religious practice that is both fundamentally and intrinsically religious in character. *Karen B. v. Treen*, 653 F.2d 897, 901 (5th Cir. 1981). The purpose of prayer "is always active – to invite divine intercession," *Newdow v. Rio Linda School District*, 597 F.3d 1007, 1021 (9th Cir. 2010), and constitutes "a solemn avowal of divine faith and supplication for the blessing of the Almighty." *Engel*, 370 U.S. at 424. Prayer is "an address of entreaty, supplication, praise or thanksgiving directed to some sacred or divine spirit, being, or object." *Treen*, 653 F.2d at 901. *See also Catechism of the Catholic Church* 2559 (1994) ("Prayer is the raising of one's mind and heart to God or the requesting of good things from God."). The Cranston School Prayer that is displayed in the school's auditorium, is a series of petitions by a student speaker to "Our Heavenly Father" requesting divine intervention to help them grow and act in certain ways, and was originally written and recited as a prayer in place of a foundational Christian prayer. (Lombardi Dep. at 27, 36-38, 43, 78-79). The content of the display is undeniably religious. (Anderson Dec. ¶¶5-9)

The fact that the text of the School Prayer targets the promotion of secular student civic values does not alter the religious nature of the text or make it permissibly secular. "[T]eaching students that praying is necessary or helpful" to achieve even secular goals is itself a violation of the Establishment Clause. *Holloman*, 370 F.3d at 1285-86. "[A] person attempting to further an ostensibly secular purpose through avowedly religious means is considered to have a constitutionally impermissible purpose." *Id*. at 286; *see also Jaffree v. Wallace*, 705 F.2d 1526, 1534-35 (11th Cir. 1983), *aff'd sub nom. Wallace v. Jaffree*, 472 U.S. 38 (1985) ("Recognizing that prayer is the quintessential religious practice implies that no secular purpose can be satisfied[.]"). By embodying admirable civic values and goals in a prayer, the display converts what might have otherwise been a constitutionally inoffensive exhortation to be good student-

citizens "into an effort by the majority to use the machinery of the State to encourage" students to embrace prayer as a Cranston West educational tradition. *See Jaffree*, 472 U.S. at 73 n. 2 (O'Connor, J., concurring).

The Supreme Court decision in *Wallace v. Jaffree, supra*, offers a useful comparison to the case at bar. In *Jaffree*, an Alabama statute providing for a moment of silence in public schools for "meditation" was amended to describe the purpose of the moment of silence to provide for "meditation *or voluntary prayer*." 472 U.S. at 59 (emphasis added). Because the prior statute already protected the right of students to engage in voluntary silent prayer during the moment of silence, the Court concluded that the addition of the phrase "or voluntary prayer" to the statute revealed the State's intent "to characterize prayer as a favored practice[,]" and held that "[s]uch an endorsement is not consistent with the established principle that the government must pursue a course of complete neutrality toward religion." *Id.* at 60; *see* 472 U.S. at 78-79 (O'Connor, J., concurring) (finding that legislature's addition of the words "or voluntary prayer" conveys government "approval of the child who selects prayer over other alternatives during a moment of silence. * * * It endorses the decision to pray during a moment of silence, and accordingly sponsors a religious exercise.").

Just as the specific inclusion of the word "prayer" in the statute at issue in *Jaffree* revealed a governmental purpose to characterize prayer as a favored practice, the self-described "School *Prayer*" display reveals a purpose to characterize prayer as the favored means for students to strive for moral and ethical conduct.

The Display

The Court's 1980 decision in *Stone v. Graham*, 449 U.S. 39 (1980), involved displays of the Ten Commandments posted in public school classrooms that violated the Establishment

Clause. *McCreary* noted that *Stone* was an example of a case where "the government action itself bespoke" a religious purpose; because "if the posted copies of the Ten Commandments [were] to have any effect at all, it [would] be to induce the school children to read, meditate upon, perhaps to venerate and obey, the Commandments." 545 U.S. at 862-63 (quoting *Stone*, 449 U.S. at 42). And it was constitutionally insignificant in *Stone* that the "undeniably sacred text" was "posted on the wall, rather than read aloud[.]" 449 U.S. at 42. The religious text was displayed to be read. Just as in *Stone*, the original purpose of displaying the Cranston West School Prayer in the early 1960s, and the decision to continue its display in 2011, could only have been for the intended purpose of having it read, by students and other visitors to the auditorium, just as they surely intended that students and visitors would read the numerous banners in the lobby entrance describing the school's expectations for its students. The display serves no purpose if it is not intended to be read.

Although Defendants have admitted that the text of the display, in their words, in a "vacuum," conveys a religious message (Lombardi Dep. at 61, 108), in response to this lawsuit they claim an intent to convey a historical message, not a religious one. (Lombardi Dep. at 95, 110, 114). But "[w]here the [religious] text is set out, the insistence of the religious message is hard to avoid in the absence of a context plausibly suggesting a message going beyond an excuse to promote the religious point of view." *McCreary*, 545 U.S. at 868. No such context exists here. The objective observer would be aware that:

- The text of the prayer in the display was approved as the official School Prayer with the encouragement and approval of school administrators in 1960. (Bradley Dep. at 45, 65).

- School officials organized daily recitation of the prayer by students. (Bradley Dep. at 43, 46).

- School officials participated in the decision to permanently affix the prayer to the auditorium wall and the design of the display, and were solely responsible for choosing where it would be located, "so that it would be visible on a regular basis. . . for as long as the building existed." (Zito Dep. at 19-27).

- The prayer was sometimes recited by students at assemblies in the auditorium even after 1964. (Lemoi Dep. at 21, 24-26).

- School officials approved of the prayer's religious message or they would not have permitted its display, either in 1963 or in 2011. (Lombardi Dep. at 54-55, 94).

The hypothetical "objective" observer, particularly the hypothetical objective high school student, would reasonably draw the conclusion from these facts that the composition, recitation and display of a Cranston West School Prayer between 1960 and 1964 was for a wholly religious original purpose – approving and encouraging student prayer as part of the specific identity of the Cranston West student body, just as integral a part of the new school's identity as the School Creed, the school colors, and the school mascot. But the objective observer would see nothing between 1964 and 2011 indicating that the original purpose of the School Prayer display had dissipated or been disavowed in favor of merely historical purpose. The display has not been modified to confine its message to any particular era or part of the school's history, and the text has not been modified to alter the religious message that it conveys. (Lombardi Dep. at 61, 80, 108). The text of its companion display, the School Creed, is published annually in the School Planner distributed to students immediately following the Principal's message that the contents of the Planner contain "the educational and behavioral expectations, as well as the school policies and procedures" of Cranston West. (School Planners for 2010-11, Jt. Ex. 13 at 5, and for 2011-12, Jt. Ex. 14 at 5)

The *only* modification of the display, occurring about 15 years ago, was the removal of the reference to the Class of 1963 that raised money to pay for its installation as a gift to the

school. (Bradley Dep. at 28-29; Lombardi Dep. at 21, 86, 128-29). That modification—which removed a reference to the date of installation and the role of the class of 1963--did nothing to alter its religious communication or lessen the City's endorsement of it. At least fifteen years have passed without further alteration. Cranston continues to the present day to regularly use banners to convey messages to Cranston West students – such as the numerous banners hanging in the lobby entrance describing the school's expectations for its students. Since Cranston West students are regularly exposed to displays of messages concerning the type of student that school officials hope and expect them to be, there is no reason to conclude that the purpose of the School Prayer display, and the 2011 decision to continue its display, would be any different.

The Public Comments

Defendants have admitted that the public hearings considering whether the display should be removed, or its text altered so that it was no longer a prayer, were marked by "quite a bit" of sentiment about "God and keeping God in the schools[.]" Defendants perceived a "lopsided" majority of the citizens who communicated to them at the hearings and by e-mail and letter, favored keeping the School Prayer where it was, just as it was, because they favored "keeping God" in Cranston West, in so many words. (Lombardi Dep. at 101, 103, 104). It was against this backdrop that the four committee members who voted to maintain the display explained their votes.

Committee member Traficante was quite candid. He acknowledged that as a person of faith he had routinely led student athletes in prayer, post-*Engel,* before sporting events in his 25 years as a teacher and athletic coach in the Cranston school system. He believed the Committee was responsible for fostering the "moral values" of the City's public school students, and that the School Prayer displayed in the auditorium – which "emulated" the "moral and *religious*"

principles on which our country was built – helped them fulfill that responsibility. (3/7/11 Min. at 80; emphasis added). He mentioned nothing of history or the past. His focus was present-centered, on the "moral and religious" message that the School Prayer display could *presently* impart to Cranston West students.

Although Chairperson Iannazzi did include words like "history" and "tradition" in her explanatory remarks, she spoke of "religion being practiced" in reference to the prayer in the display. (3/7/11 Min. at 85). With apparent reference to the individual who had complained to the ACLU, Iannazzi stated: "[e]ach person has the ability to practice whatever religion they want. That does not mean that they have the freedom *from religion being practiced*." (3/7/11 Min. at 85, emphasis added). "[R]eligion being practiced" in the context of the School Prayer display unmistakably implies the freedom to pray – a quintessentially religious practice – as approved, endorsed, and favored by the text of the display. Moreover, Iannazzi spoke approvingly of the display's message as belonging to the City of Cranston in the present tense: "Cranston stands for a code of being and the morals that are expressed in that banner[.]" (*Id.*). The code of being and morality expressed in the School Prayer is not simply an expression of secular civic virtues, it is inherently religious. It expresses, on behalf of the School Committee and the City, that Cranston's "code of being" and "morals" includes a belief in God and the practice of prayer, and it does it in the specific context of a public high school. Iannazzi spoke of that "code of being" as "Cranston's tradition," and concluded that "it deserves to remain at Cranston West for years to come." (*Id.*). Her comments do not reflect a belief that the display conveys a message for a "code of being" belonging only to a decades old past, but rather, a "code of being" still presently embraced by Cranston.

The third person to vote to maintain the display, Committee member McFarland, made no attempt to justify the School Prayer's continued display on the grounds of its claimed historical significance. Instead, McFarland inexplicably claimed the display had no "religious tone" (3/7/11 Min. at 84-85), a view the Defendants have subsequently admitted is not the case, given the references to "PRAYER," "OUR HEAVENLY FATHER," and "AMEN" in the text of the display. (Lombardi Dep. at 61, 108). McFarland also suggested the display constituted private speech on behalf of the seventh grader who authored it, rather than government speech by the school and city. (*Id.* at 84-85). That is simply incorrect as a matter of constitutional law under the facts presented here. *See Pleasant Grove City*, 129 S.Ct. at 1136 ("By accepting a privately donated monument and placing it on city property, a city engages in expressive conduct[.]").

Vice Chairperson Lombardi was the fourth vote in favor of maintaining the display, and from the very beginning of the debate he emphasized his belief in prayer and the importance of it in his life, publicly acknowledging that he could "not leave God at the door step because I believe in God[,]" and that being "very religious . . . I pray every day." (8/16/10 Min. at 810). Moreover, he also acknowledged the *present effect* of the display's message, stating it was a "positive moral message that a child can choose or not choose to read[,]" that he characterized as secular (3/7/11 Min. at 79-80), notwithstanding his later acknowledgement on behalf of the Defendants that in a "vacuum" the text could be read to convey a religious message. (Lombardi Dep. at 61, 108).

In addition to the public comments of the decision-makers explaining their decision, there are also events that occurred at the Bain Middle School after the vote, and after suit was filed, that also must be examined to determine the purpose of the School Prayer display. On May 27,

2011, Cranston school officials held a Memorial Day program at Bain that Lombardi described as "one of perhaps the richest tradition[s] in the City." (Lombardi Dep. at 86-87). It is a student-centered event that has been conducted for 60 years to recognize former graduates of Bain that have died in service of our country. (Lombardi Dep. at 86). It is an outside assembly conducted during the school day, with extensive participation by the middle school students and attended by various school and municipal official and dignitaries. (Lombardi Dep. at 86-88; Bain Memorial Day programs, submitted as Pl. Ex. 22). An integral part of this tradition is the invitation of a Catholic priest to provide an "invocation, benediction or other religious message." (Lombardi Dep. at 86, 88). The continuous and present day inclusion of clergy and prayer in an annual middle school assembly certainly signifies government approval and favor of incorporating elements of religious practice in public school programs, and an objective observer would be hard-pressed to conclude that the School Prayer display was not intended to convey the same approval and favor for prayer as part of the public school experience.

The other matter of significance is Defendants' handling of a similar School Prayer display at Bain Middle School. Defendants have acknowledged that a School Prayer Display (and its companion Creed) which stood on continuous display since the 1920s, were *removed*, without fanfare or public attention, from the school walls, and the remaining portions placed in a basement storage room in the school district administration building. (Lombardi Dep. at 12-14; Bain photos, Pl. Ex. 21(b) and (c)). The removal was authorized by the School Committee and the City without any formal action, hearings, or vote, based on "the advice of counsel" (Lombardi Dep. at 15, 17-18, 70, 115), notwithstanding that this Display arguably represented an even greater historical tradition. This decision and action were taken essentially contemporaneously with the decision not to remove the Cranston West School Prayer. To an

objective observer, the two decisions appear completely inconsistent—if anything, the Bain display had more "history" than that at Cranston West, and would undercut any claim of historical purpose as the motivation for the 2011 decision to maintain the Cranston West School Prayer display.

When the "objective observer" considers that a similar, but much older, School Prayer was removed from another school, and that Defendants presently approve of (and individually participate in) the involvement of clergy and prayer in an annual middle school program, that observer would have little trouble concluding the School Committee's 2011 decision respecting the School Prayer display was suffused with a predominantly, if not exclusively, religious purpose. In sum, that objective observer would see a display containing the text of a prayer – a fundamentally and intrinsically religious exercise – for achieving secular virtues Cranston West students should strive for. That observer would understand that the act of displaying a text and its message is by its very nature an effort to have the text and its message seen, read and contemplated. That observer would understand the decision to display this School Prayer was ultimately the decision of City officials after approval of its message, both in the 1960s and at present. That observer would see no context surrounding the display that would show its purpose was any different than the purpose of the banners in the school lobby and the School Creed in the auditorium– to convey messages of expectation to the students; no context that the religious message conveyed by its text is purely historical, or limited to, or representative of only a past historical period. And that observer would know that the *only* such context that might suggest that – the reference to the Class of 1963 – was removed almost two decades ago.

And finally, that observer would know that the 2011 decision to continue to display the School Prayer occurred in the context of substantial, earnest public sentiment in favor of keeping

God in school, and that at least three of the four School Committee members spoke of the display's *present* ability to convey a message to students about a "code of being" and morals. In this context the objective observer would have little trouble determining that the government's purpose in continuing to display the School Prayer was religious – not historical and not secular.

And even if the objective observer could somehow find that the School Committee's actual *purpose* in displaying the School Prayer was not to favor and endorse religion, that observer would certainly determine, based on the above context, that was the *effect* of the decision.

B.) The principal and primary effect of displaying a School Prayer is to communicate official approval of student prayer.

While "[t]he purpose prong asks what message the government *meant* to convey, . . . the effect prong asks what message the government *actually* conveyed." *Catholic League for Religious and Civil Rights v. City and County of San Francisco*, 567 F.3d 595, 604 n. 9 (9th Cir. 2009) (emphasis in original) (citing *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring)). Even if the purpose of the government act was in fact secular, or a stated secular purpose is accorded deference, the act "may still violate the Establishment Clause if it has the principal or primary effect of advancing . . . religion." *Id.* at 604 (internal quotes omitted). This means that regardless of its purpose, the School Committee's decision to maintain the School Prayer display in the auditorium "cannot symbolically endorse . . . religion." *Doe v. Indian River School District*, 2011 WL 3373810 *24 (3rd Cir.); *see also Freedom*, 626 F.3d at 10 (noting the effect of the challenged act may not "endors[e], favor[ ], or promot[e] religion.").

Unconstitutional endorsement includes not only coercive measures, but also "the numerous more subtle ways that government can show favoritism to particular beliefs[.]"

Allegheny, 492 U.S. at 627-28 (O'Connor, J., concurring in part and concurring in judgment). The mere *appearance* that government endorses or favors religious belief regardless of its actual intent, violates the Establishment Clause because it conveys the "stigmatic message" to nonadherents of religion that they are "outsiders," and therefore not wholly full members of the particular community – in this case Cranston High School West – as compared to the more favored "insiders" who do adhere to religion. *Trunk*, 629 F.3d at 1109 (quoting *Santa Fe*, 530 U.S. at 309-10).

Effect, like purpose, is also examined by courts from the perspective of an "objective observer," *Freedom*, 626 F.3d at 10, taking context and history into consideration, ensuring both questions are examined "from the same nuanced contextualized perspective." *Catholic League*, 567 F.3d at 604 n. 9. As in the purpose inquiry, the reasonable or objective observer that is the lens through which the court evaluates the effect of the government act, is presumed to be "aware of the history and context of the community and forum where the religious display appears[.]" *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring in part and concurring in judgment).

The objective observer in the effect inquiry is, however, somewhat different than the objective observer in the inquiry into government's actual purpose in that it considers the intended audience of the government message. In evaluating whether the School Committee's decision to maintain the School Prayer display has the effect of conveying a message of approval or favor for student prayer, the Court should consider "that school children are the intended audience for the display[ ], and these children are being raised in a variety of faiths (as well as none), and that by virtue of their ages, they may be especially susceptible to any religious message[ ] conveyed by such [a] display[ ]." *Skoros*, 437 F.3d at 24-25. That is in fact how the

Supreme Court has evaluated the effect of a government message where the intended recipient of the message is a high school student. *See, e.g., Santa Fe*, 530 U.S. at 307 ("[T]he expressed purposes of the policy encourage the selection of a religious message and that is precisely how *the students* understand the policy.") (emphasis added); *id.* at 308 "([A]n *objective Santa Fe High School student* will unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval.") (emphasis added); *Board of Education of Westside Community Schools (District 66) v. Mergens*, 496 U.S. 226, 249-52 (1990) (examining whether an objective observer in *the position of a secondary school student* "will perceive official school support for . . . [on-campus] religious meetings") (emphasis added). Thus stated succinctly, the question is whether a reasonable high school student would conclude that the longstanding, prominent display of Cranston West's School Prayer in its auditorium and the School Committee's 2011 recommitment to continue displaying an official Cranston West School Prayer "has the effect of endorsing religion." *DeWeese*, 633 F.3d at 434.

All of the same contextual facts and circumstances that were discussed in relation to discerning the *purpose* of the display and of the 2011 decision to continue displaying the official School Prayer are also the same contextual facts and circumstances related to determining the *effect* of the display and the 2011 decision. That is, even if the Court credits the Defendants' claimed historical purpose in maintaining the School Prayer display, and is not persuaded that those facts and circumstances objectively demonstrate that the Defendants' actual *purpose* was to approve and endorse religion, the Court should still find that, on the same evidence, an objective observer would conclude the *effect* of the School Committee's action is to approve, and thereby endorse, religion. Without repeating the arguments related to those contextual facts and circumstances here, Plaintiff asserts they demonstrate the effect of endorsement of religion.

A recent decision by the U.S. Court of Appeals for the Third Circuit emphasizes the obvious religious nature of prayer and the significance of public debate concerning the issue before the School Committee in determining the effect of its decision. In *Doe v. Indian River School District*, 2011 WL 3373810 (3rd Cir. 2011), the Indian River School Board had exercised a custom of reciting a prayer at the opening of each of the Board's public meetings since the School District was created in 1969. *Id.* *2. For years students had regularly participated in these meetings. *Id.* *17, 19. Student government members were invited to participate as representatives of the two local high schools and made presentations as part of the regular agenda for the meetings. *Id.* at 19. The meetings were also used, in lieu of assemblies, to recognize the academic, athletic and artistic accomplishments of students who were invited to the meetings along with their families. *Id.* *17.

In June 2004 a mother complained about the recitation of a prayer at her daughter's high school graduation, and the complaint generated a heated public debate about the propriety of prayer at the School Board meetings as well as graduation. *Id.* *2. The public debate prompted the Board to adopt a written policy formalizing its decades' long practice. *Id.* The policy declared the purpose of the prayer was to "solemnify" the proceedings; that the prayer was voluntary and was "among only the adult members of the Board[,]" and that no school employee, student or any other member of the public was required to participate in the prayer; and the prayer opportunity was not to be used to advance or disparage any particular faith or belief. *Id.* *2-3.

Applying the *Lemon* "purpose" and "effect" analyses, the Third Circuit declined to "take issue" with the Board's claim that the purpose of the prayer was secular. *Id.* *24. Even assuming the Board's primary *purpose* was to solemnify the meetings, the Court held, the prayer

policy still violated the Establishment Clause because "its primary *effect* [was] to advance religion[.]" *Id.* (emphasis added). The Court determined the prayer policy had the primary effect of advancing religion for two reasons. *Id.*

First, the Court held the religious content of the prayers themselves "would suggest to the reasonable person that the primary effect of the [prayer] policy is to promote Christianity." *Id.* The prayers frequently included references to "Heavenly Father, Lord, God, or Jesus." *Id.* *25. Given these references, the Court found "it difficult to accept the proposition that a 'reasonable person' would *not* find that the primary effect of the Prayer Policy was to advance religion." *Id.* (emphasis added). In short, the content of the prayers themselves promoted religion. The same conclusion is true for the Cranston West School Prayer that begins with "Our Heavenly Father."[22]

The second factor the Court evaluated to determine the effect of the Prayer Policy was the fact that the government act – the written policy – arose out of a history and context where school prayer had become "a contentious issue[.]" *Id.* *26. At the first School Board meeting two weeks after the 2004 complaint was lodged, more than 100 people attended, with a reported majority seeing the complaint as an attempt "to stifle their religious freedom and degrade the moral fiber of the community." *Id.* *26. At a special meeting convened approximately a month later, several board members expressed their view that their constituents did not want the Board to change its practice of opening the meetings with prayer, and a newspaper reported that a

[22] "'Heavenly Father' is a reference to God and is most commonly used as a Christian formulation of a reference to God. It is not commonly associated, if at all, with Judaism, Islam, or other non-Christian faiths, such as Hinduism or Buddhism. I believe that the formulation draws its source from the Lord's Prayer, which is found both in the Gospel of Luke in Luke 11:2-4 and the Gospel of Matthew in Matthew 6:9-13, and begins with the recitation 'Our Father Who Art in Heaven.'" Anderson Dec. ¶6.

majority of the 800 people who attended supported prayer at both School Board meetings and high school graduations. *Id.* *27.

The Third Circuit found this history "illuminating," because it demonstrated a close link between the Board's prayer position and the public's position favoring the presence of prayer at public school events, and suggested both were "closely intertwined with religion." *Id.* *28. Because the School Board's act – the implementation of a Prayer Policy regarding a prayer practice that was decades old – occurred "in an atmosphere of contention and hostility towards those who wanted prayers to be eliminated from school events[,]" the Court concluded "[a] reasonable person aware of this history would conclude that the primary effect of the Board's [act] was to endorse religion." *Id.*

The same is true here. The minutes from the public hearings held on August 16, 2010 and March 7, 2011, and the video recording of that meeting with respect to the Cranston West School Prayer display, reflect both hostility to those who questioned the propriety of the prayer's continued display, and fervent sentiment in maintaining the display for religious – not historical – reasons. When combined with the past history of the use of the prayer; the manner in which it has been, and is being, displayed; and the School Committee members' explanation of their votes; it is clear that the principal and primary effect of the School Prayer's continued display is to favor and endorse religion.

"When public school officials, armed with the State's authority, convey an endorsement of religion to their students, they strike near the core of the Establishment Clause[, and h]owever, 'ceremonial' their messages may be, they are flatly unconstitutional." *Lee v. Weisman*, 505 U.S. at 631 (Souter, J., with whom Stevens, J., and O'Connor, J., join, concurring). Cranston West's School Prayer display fails this test.

Relief Sought

Plaintiff seeks a declaratory judgment declaring that the maintenance and display of the "School Prayer" at Cranston High School West by the Defendants have deprived Plaintiff of rights secured by the First and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. §1983.

Plaintiff further seeks a permanent injunction directing Defendants to remove the School Prayer from public display at any public school building attended by students of the City of Cranston. No relief other than the removal of the Prayer will redress Plaintiff's injury under the First Amendment, but its removal will do so.

Granting a permanent injunction to prevent the continued display of the Ten Commandments in McCreary County courtrooms, the Sixth Circuit observed that, "[i]n general, [t]he standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that [for a preliminary injunction] the plaintiff must show a likelihood of success on the merits rather than actual success. In the context of this case, a party is entitled to a permanent injunction if it can establish that it suffered a constitutional violation and will suffer 'continuing irreparable injury' for which there is no adequate remedy at law." *ACLU of Ky. v. McCreary County*, 607 F.3d 439, 445 (6th Cir. Ky. 2010), *cert. denied*, 131 S.Ct. 1474 (2011)(internal quotations and citations omitted).

Here, Plaintiff has established that the School Prayer violates the Establishment Clause of the First Amendment, to her injury. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion). *Elrod* involved political speech that was either threatened or in fact being impaired at the time relief was sought, *id.*, but this principle of irreparable injury has

also been applied to alleged Establishment Clause violations. *See, e.g., Chaplaincy of Full Gospel Churches v. England,* 454 F.3d 290, 304 (D.C. Cir. 2006); *American Civil Liberties Union of Kentucky v. McCreary County, Kentucky,* 354 F.3d 438, 445 (6th Cir. 2003), *aff'd on other grounds,* 545 U.S. 844 (2005)." 354 F.3d at 445; *see also Chaplaincy,* 454 F.3d at 304.

When an Establishment Clause violation is alleged, the constitutional injury occurs the moment the government action takes place, 454 F.3d at 303, because the liberty interest at stake under the Establishment Clause is implicated as soon as the government engages in an impermissible endorsement of religion, sending "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." *Id.* at 302 (quoting *Lynch, supra,* 465 U.S. at 688 (O'Connor, J., concurring)).

The harm inflicted by a governmental endorsement of religion "is self-executing and requires no attendant conduct" on the part of the Plaintiff, because the government action is all that is necessary to inflict immediate and irreparable injury to the Plaintiff under the Establishment Clause. *Id.*

Finally, the parties have agreed, by stipulation, that in the event of a finding of liability, Plaintiff shall be awarded compensatory damages in the amount of $25.00.[23]

[23] In their stipulation, approved by the Court (Document 17), the parties agreed that Plaintiff would be entitled to seek declaratory and injunctive relief and that Defendants would be entitled to object to the need for such relief and that decisions on declaratory and injunctive relief would be presented to the Court for its determination. Only the issue of compensatory damages—in the event of a finding of liability—was resolved.

Conclusion

For the above-stated reasons, Plaintiff asks this Court to find that the Cranston West School Prayer display has both a predominantly religious purpose and effect in violation of the Establishment Clause and to enter judgment for the Plaintiff, according her all of the relief requested above.

Respectfully submitted,

/s/ Thomas R. Bender
Thomas R. Bender, #2799
Hanson Curran LLP
Cooperating Counsel,
Rhode Island Affiliate,
American Civil Liberties Union
One Turks Head Place, Suite 550
Providence, RI 02903
trb@hansoncurran.com
(401) 421-2154
(401) 521-7040 (fax)

/s/ Lynette Labinger
Lynette Labinger #1645
Roney & Labinger LLP
Cooperating Counsel,
Rhode Island Affiliate,
American Civil Liberties Union
344 Wickenden Street
Providence, RI 02903
labinger@roney-labinger.com
(401) 421-9794
(401) 421-0132 (fax)

Certificate of Service

I hereby certify that on September 9, 2011, a true copy of the foregoing document was served upon each attorney of record listed below by electronic filing of this document with the United States District Court for the District of Rhode Island:

Joseph V. Cavanagh, Jr.
Blish & Cavanagh LLP
30 Exchange Terrace
Providence, RI 02903-1765
jvc@blishcavlaw.com

Joseph V. Cavanagh, III
Blish & Cavanagh LLP
30 Exchange Terrace
Providence, RI 02903-1765
jvc3@blishcavlaw.com

Lori H Windham
The Becket Fund for Religious Liberty
3000 K St. NW, Suite 220
Washington, D.C. 20007
lwindham@becketfund.org

Anthony A. Cipriano #1508
Christopher M. Rawson #5191
869 Park Avenue
Cranston, Rhode Island 02910
acipriano@cranstonri.org
crawson@lovettlaw.com

/s/ Lynette Labinger