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Via Email
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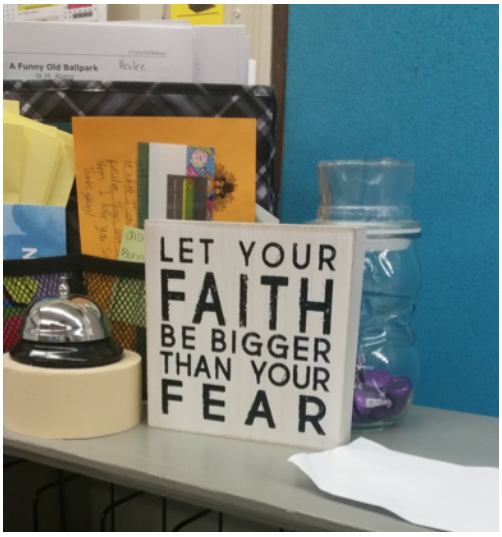
RE: Unconstitutional religious classroom displays

Dear Mr. Turner and Ms. Fambrough,

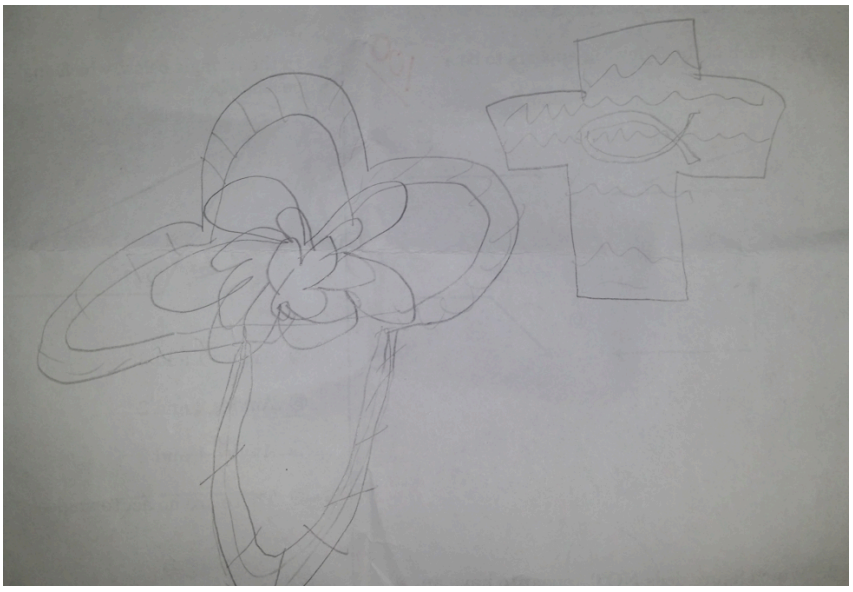
A parent has contacted our office to request assistance with regard to a serious constitutional violation that is occurring under the authority of your school and school district at her daughter's elementary school. In particular, her daughter's fourth-grade teacher is promoting prayer in the classroom and has overtly religious messages and crosses prominently displayed in the classroom in violation of the Establishment Clause of the First Amendment.

The parent in question, an atheist, learned of the displays in January from her nine-year-old daughter, who reported that her teacher, Mrs. Jalomo, had religious displays in the classroom that made her feel uncomfortable. The parent subsequently visited to the classroom and to her dismay observed a large sign promoting prayer: "Listen well…PRAY often…*Love* always." She observed yet another sign reading: "LET YOUR FAITH BE BIGGER THAN YOUR FEAR." Photographs of these displays are shown below:



Affronted by these proselytizing displays in her daughter's fourth-grade classroom, the parent promptly notified the administration of her concerns. But the administration refused to take action. Mrs. Jalomo informed the parent that the superintendent, Mr. Turner, told her that she is within her rights to have the displays in her room and that she would not have to remove them. Consequently, the parent contacted our office for assistance.

About a week later, the student came home from school clutching a piece of paper and reported to her mother that not only are religious signs displayed in the classroom but also Christian crosses. Concerned with what she saw, and without a camera, the daughter did her best to draw what she observed in her classroom during class time:



As the parent deliberately raised her child without religious beliefs, the daughter asked her

mother what the "fish" meant. The mother, understandably, felt disheartened by the entire situation and betrayed by her public school.

These classroom religious displays are inappropriate in any public school context and especially in an elementary school. No child, Christian or non-Christian, should go to school to have his or her teacher's religious beliefs overtake the atmosphere of the classroom. "Parents don't drop off their children at the school house door to have their child's religious beliefs affirmed, questioned or compromised." *M.B. v. Rankin County Sch. Dist*., 2015 U.S. Dist. LEXIS 117289, *23 (S.D. Miss. July 10, 2015).

The American Humanist Association (AHA) is a national nonprofit organization with over 600,000 supporters and members across the country, including many in Texas. The mission of AHA's legal center is to protect one of the most fundamental principles of our democracy: the constitutional mandate requiring a separation of church and state. Our legal center includes a network of cooperating attorneys from around the country, including Texas, and we have litigated constitutional cases in state and federal courts from coast to coast, including in Texas.

The First Amendment's Establishment Clause "commands a separation of church and state." *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005). It requires the "government [to] remain secular, rather than affiliate itself with religious beliefs or institutions." *Cnty. of Allegheny v. ACLU,* 492 U.S. 573, 610 (1989). The government "may not promote or affiliate itself with any religious doctrine or organization," "discriminate among persons on the basis of their religious beliefs and practices." *Id.* at 590-91. "Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa." *Everson v. Bd. of Ed*, 330 U.S. 1, 16 (1947). At the most fundamental level, the Establishment Clause prohibits the government from promoting "a point of view in religious matters" or otherwise taking sides between "religion and religion or religion and nonreligion." *McCreary Cnty. v. ACLU*, 545 U.S. 844, 860 (2005) (citations omitted).

To comply with the Establishment Clause, governmental activity must pass the *Lemon* test,[1] pursuant to which it must: (1) have a secular purpose; (2) not have the effect of advancing or endorsing religion; and (3) not foster excessive entanglement with religion. *Allegheny*, 492 U.S. at 592. In addition, in *Lee v. Weisman*, the Supreme Court formulated the separate "coercion test," declaring that "*at a minimum*, the [Establishment Clause] guarantees that government may not coerce anyone to support or participate in religion or its exercise." 505 U.S. 577, 587 (1992) (emphasis added). Government action "violates the Establishment Clause if it fails to satisfy any of these prongs." *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987).

The Supreme Court "has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools," *id.* at 583-84, where "there are heightened concerns with protecting freedom of conscience from [even] subtle coercive pressure." *Lee*, 505 U.S. at 592. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 303 (2000) (student-led, student-initiated prayers before high school football games unconstitutional); *Lee v. Weisman* (nondenominational prayer at graduation unconstitutional); *McCollum v. Bd. of Ed.*, 333 U.S. 203, 231 (1948).

[1] The test is derived from *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

Furthermore, the Supreme Court has recognized parents' constitutionally-protected interest in guiding "the religious future and education of their children." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). Parents "entrust public schools with the education of their children, but condition their trust on the understanding" that they will not advance "religious views that may conflict with the private beliefs of the student and his or her family." *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987). *See Doe by Doe v. Beaumont Indep. Sch. Dis*t., 240 F.3d 462, 466-67 (5th Cir. 2001); *Bell v. Little Axe Indep. Sch. Dist.*, 766 F.2d 1391, 1398 (1985).

"The State must be certain … that subsidized teachers do not inculcate religion." *Lemon*, 403 U.S. at 619. The Establishment Clause "absolutely prohibit[s] government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith." *School Dist. v. Ball*, 473 U.S. 373, 385 (1985). Constitutional doctrine teaches that a school cannot endorse religion in the classroom, *Wallace*, 472 U.S. 38; *Stone*, 449 U.S. 39; *Schempp*, 374 U.S. 203; *Engel*, 370 U.S. 421, or at events it hosts, *Santa Fe*, 530 U.S. 290; *Lee*, 505 U.S. 577. The risk that students "will perceive the state as endorsing a set of religious beliefs is present" when exposure to religious symbols "occurs in the classroom." *Doe v. Elmbrook Sch. Dist*., 687 F.3d 840, 856 (7th Cir. 2012), *cert. denied*, 134 S. Ct. 2283 (2014).

School districts must not permit any "of its teachers' activities [to] give[] the impression that the school endorses religion." *Marchi v. Board of Coop. Educ. Servs.*, 173 F.3d 469, 477 (2d Cir. 1999). *See Karen B*, 653 F.2d 897; *Borden v. Sch. Dist.*, 523 F.3d 153, 174 (3rd Cir. 2008) (coach silently bowing head and kneeling while team prayed violated Establishment Clause); *Holloman v. Harland*, 370 F.3d 1252, 1285 (11th Cir. 2004) (teacher's practice of initiating silent prayer with her students violated Establishment Clause); *Doe v. Duncanville Indep. Sch. Dist*., 70 F.3d 402 (5th Cir. 1995). A teacher's "[religious] speech can be taken as directly and deliberately representative of the school." *Bishop v. Aronov*, 926 F.2d 1066, 1073 (11th Cir. 1991). And school "officials have long been prohibited by the Establishment Clause from inserting religious exercises into school activities." *S.D. v. St. Johns Cnty. Sch. Dist*., 632 F. Supp. 2d 1085, 1093 (M.D. Fla. 2009). *Lee* and *Santa Fe* are "merely the most recent in a long line of cases carving out of the Establishment Clause what essentially amounts to a per se rule prohibiting public-school-related or -initiated religious expression or indoctrination." *Doe v. Duncanville Indep. Sch. Dist*., 994 F.2d 160, 165 (5th Cir. 1993).[2]

More to the point, Supreme Court precedent makes clear that religious displays in a public school classroom violate the Establishment Clause. *See Stone*, 449 U.S. at 41 (Ten

[2] *See Santa Fe*, 530 U.S. at 294 (student prayers at football games unconstitutional); *Lee*, 505 U.S. at 580-83 (1992) (prayers at graduation ceremonies unconstitutional); *Wallace v. Jaffree*, 472 U.S. 38, 40-42 (1985) (moment of silence to start school day unconstitutional); *Stone v. Graham*, 449 U.S. 39 (1980) (posting of Ten Commandments on classroom walls unconstitutional); *Sch. Dist. Abington v. Schempp*, 374 U.S. 203, 205 (1963) (daily scripture readings unconstitutional); *Engel v. Vitale*, 370 U.S. 421, 422-23 (1962) (school prayer unconstitutional); *Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982) (prayers by students and teachers in classroom unconstitutional)

Commandments display in public school unconstitutional); *see also Washegesic v. Bloomingdale Pub. Sch*., 33 F.3d 679 (6th Cir. 1994) (portrait of Jesus Christ in public school hallway).[3]

In *Stone*, the Supreme Court held that simply posting a small copy (16 x 20 inches) of the Ten Commandments in a classroom violated the Establishment Clause. 449 U.S. at 41. The Court reasoned that "[p]osting of religious texts on the wall serves no such educational function. If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments. However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause." *Id.* at 42. It emphasized: "Nor is it significant that the Bible verses involved in this case are merely posted on the wall, rather than read aloud." *Id*.

In *Washegesic*, the Sixth Circuit held that a privately-donated portrait of Jesus displayed in a public school hallway failed violated the Establishment Clause, reasoning: "Christ is central only to Christianity, and his portrait has a proselytizing, affirming effect that some non-believers find deeply offensive." 33 F.3d at 684.[4] Likewise, in *Roberts v. Madigan*, the Tenth Circuit held that religious books on a teacher's desk "had the primary effect of...endorsement" even though "passive and *de minimis*" and "discreet." 21 F.2d 1047, 1056-58, 1061 (10th Cir. 1990).

Moreover, the Ninth Circuit has held that simply "permit[ting] [a teacher] to discuss his religious beliefs with students during school time on school grounds would violate the Establishment Clause." *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 522 (9th Cir. 1994). Even allowing a teacher to wear a t-shirt promoting "Jesus" would violate the Establishment Clause. *See Downing v. W. Haven Bd. of Educ*., 162 F. Supp. 2d 19, 27-28 (D. Conn. 2001) ("For the defendants to have permitted Downing to wear a shirt during classroom instruction that was emblazoned with the words 'JESUS 2000 - J2K' would likely have violated the Establishment Clause."). Yet here, the teacher is not merely "discussing" her religious beliefs with students, which alone would be constitutionally violative, but is *affirmatively endorsing them* before a captive audience of students.

The teacher's sign encouraging "prayer" is especially problematic. It is firmly established that faculty encouraging prayer to students violates the Establishment Clause. *See Karen B*, 653 F.2d 897; *Doe v. Duncanville Indep. Sch. Dist*., 70 F.3d 402 (5th Cir. 1995) (school's practice of allowing coaches to participate in student prayers during athletic events violated Establishment Clause); *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 163 (5th Cir. 1993) (*Duncanville I*) (school officials' supervision of student-initiated and student-led prayers preceding basketball games violated Establishment Clause); *Borden v. Sch. Dist.*, 523 F.3d 153, 174 (3rd Cir. 2008); *Holloman v. Harland*, 370 F.3d 1252, 1285 (11th Cir. 2004); *Steele v. Van Buren Public Sch. Dist.*, 845 F.2d 1492, 1493 (8th Cir. 1988) (permitting teachers to conduct prayer at school functions unconstitutional). Any action by a school official that amounts to "inviting or

[3] *See also Ahlquist v. City of Cranston*, 840 F. Supp. 2d 507 (D. R.I. 2012) (prayer mural); *Joki v. Bd. of Educ. of Schuylerville Cent. Sch. Dist*., 745 F. Supp. 823, 829-30 (N.D. N.Y 1990) (portrait of Jesus in public school unconstitutional); *Doe v. Aldine Indep. Sch. Dist*., 563 F. Supp. 883, 888 (S.D.Tex. 1982) (religious display in gym)

[4] *See also Allegheny*, 492 U.S. at 599 (cross on government building would convey "endorsement of Christianity"); *Am. Atheists, Inc. v. Duncan*, 616 F.3d 1145 (10th Cir. 2010), *cert. denied*, 132 S. Ct. 12 (2011) (roadside memorial crosses); *ACLU v. St. Charles*, 794 F.2d 265, 271 (7th Cir. 1986) (cross illuminated during holiday season)

encouraging students to pray violates the First Amendment." *Herdahl v. Pontotoc Cnty. Sch. Dist*., 933 F. Supp. 582, 591 (N.D. Miss. 1996). As shown below, the teacher's sign encouraging prayer, by itself, is unconstitutional pursuant to each prong of the *Lemon* test as well as the separate coercion test.

Where, as here, the government promotes an "intrinsically religious practice," it "cannot meet the secular purpose prong." *Jager v. Douglas Cnty. Sch. Dist*., 862 F.2d 824, 829-30 (11th Cir. 1989).[5] In applying the first prong of *Lemon*, the courts have made clear that because "prayer is 'a primary religious activity in itself,'" a "teacher or administrator's intent to facilitate or encourage prayer in a public school is *per se* an unconstitutional intent to further a religious goal." *Holloman v. Harland*, 370 F.3d 1252, 1285 (11th Cir. 2004). *See also Santa Fe*, 530 U.S. at 309-10 ("infer[ring] that the specific purpose of the policy" permitting but not requiring student-led prayers was religious thus failing the purpose prong);. *Treen*, 653 F.2d at 901 (5th Cir. 1981) (no secular purpose in authorizing teacher-initiated prayer at the start of school day) *aff'd*, 455 U.S. 913 (1982); *Jaffree v. Wallace*, 705 F.2d 1526, 1534-35 (11th Cir. 1983), *aff'd*, 472 U.S. 38 (1985); *Jager v. Douglas County Sch. Dist*., 862 F.2d 824, 830 (11th Cir. 1989) (where school officials sponsor or participate in an "intrinsically religious practice" such as prayer, even if student-led, it "cannot meet the secular purpose prong."); *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 522 (9th Cir. 1994) (teacher's discussion of religion with students before and after class "would not have a secular purpose").

In *Treen*, the Fifth Circuit soundly ruled: "since prayer is a primary religious activity in itself, its observance in public school classrooms has, if anything, a more obviously religious purpose than merely displaying a copy of [the Ten Commandments] in the classroom." *Treen*, 653 F.2d at 901. *See also Holloman*, 370 F.3d at 1285.

Yet, regardless of the purposes motivating it, the teacher's prayer sign fails *Lemon*'s effect prong. The "effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval [of religion]." *Wallace v. Jaffree*, 472 U.S. 38, 56 n.42 (1985) (quotation marks omitted). The "prohibition against governmental endorsement of religion 'preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred.'" *Allegheny*, 492 U.S. at 593 (citation omitted). Whether "the key word is 'endorsement' 'favoritism,' or 'promotion,' the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief[.]" *Id.* at 593-94.

Even the "mere appearance of a joint exercise of authority by Church and State provides a significant symbolic benefit to religion," and, therefore, has the impermissible primary effect of advancing religion. *Larkin v. Grendel's Den*, 459 U.S. 116, 126-27 (1982). The Supreme Court has stated that:

> an important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by

[5] *See Stone*, 449 U.S. at 41; *Jaffree v. Wallace*, 705 F.2d 1526, 1534-35 (11th Cir. 1983), *aff'd* 472 U.S. 38 (1985); *N.C. Civil Liberties Union v. Constangy*, 947 F.2d 1145, 1150 (4th Cir. 1991)

> adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices.

School Dist. v. Ball, 473 U.S. 373, 390 (1985) (internal citation omitted).

Schools cannot "sponsor the . . . religious practice of prayer." *Santa Fe*, 530 U.S. at 313 (holding that student-initiated, student-led prayers at public high school football game were unconstitutional). The Fifth Circuit in *Treen* held that *Lemon*'s effect prong was violated by a teacher "encouraging observance of a religious ritual in the classroom." 653 F.2d at 901. In *Holloman*, the Eleventh Circuit similarly ruled that a teacher's "prayer requests" violated the second prong of *Lemon* because "the effect of her behavior was clearly to promote praying, a religious activity. Praying is perhaps the 'quintessential religious practice,' see *Treen*, 653 F.2d at 901, and to explicitly call for prayer requests, . . . has the effect of both endorsing religious activity, as well as encouraging or facilitating its practice." 370 F.3d at 1286.

In *Doe v. Aldine Indep. Sch. Dist*., 563 F. Supp. 883, 884 (S.D. Tex. 1982), the Texas district court held that a prayer posted "in raised block letters on the wall over the entrance to the gymnasium at Aldine Senior High School" violated the Establishment Clause. The prayer was also recited and sung by students at athletic contests, pep rallies and graduation ceremonies. The court explained that "[e]ach of these practices, under the circumstances of this case, is proscribed by the first amendment." *Id.* at 885 n.2. Notably, the court suggested that the printed prayer was even more unconstitutional than the recitation and singing of the prayer, explaining: "Though the act of posting the prayer on the gymnasium wall is distinct from the initiation of its singing and recitation, the court proceeds with the analysis as though both acts are part of the same religious practice. It would seem, however, that the posting of the words alone is unconstitutional in light of *Stone v. Graham*[.]" *Id.*

In *Hall*, the Fourth Circuit held that a nondenominational prayer printed on a state map, which had a "limited audience and distribution," violated the Establishment Clause, even in the absence of "compelled recitation of the prayer or subjection to ridicule as part of the captive audience" and that the prayer could "seem utterly innocuous." *Hall*, 630 F.2d at 1019-21 n.1. The court reasoned that because prayer "is undeniably religious and has, by its nature, both a religious purpose and effect." *Id.* at 1020-21. The facts here are far more egregious, as there is nothing "innocuous" about a teacher encouraging impressionable young students in a captive audience to pray. *See, e.g.*, *Santa Fe*, 530 U.S. at 309-10.

Finally, the teacher's "prayer" sign fosters excessive entanglement with religion, thus violating the Establishment Clause under *Lemon*'s third prong. *See Duncanville*, 70 F.3d at 406 (faculty's participation in "prayers improperly entangle[d] [the school] in religion"); *Treen*, 653 F.2d at 902 (permitting teachers to lead prayers would result in "excessive governmental entanglement with religion."); *Mellen v. Bunting*, 327 F.3d 355, 375 (4th Cir. 2003) (university's sponsorship of prayer failed "*Lemon's* third prong."); *Constangy*, 947 F.2d at 1151-52 (when "a judge prays in court, there is necessarily an excessive entanglement of the court with religion."); *Hall*, 630 F.2d at 1021 (prayer on a state map fostered unconstitutional entanglement).

In addition to violating the Establishment Clause under the *Lemon* test, *supra*, the prayer sign is also unconstitutional under the coercion test established in *Lee.* 505 U.S. at 587.[6] In *Lee*, the Court held that a public school's inclusion of a nonsectarian prayer in a graduation ceremony was unconstitutionally coercive, even though the event was technically voluntary and students were not required to participate in the prayer. *Id.* at 586. The "State exerts great authority and coercive power…because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure." *Edwards*, 482 U.S. at 584. Thus, when a teacher or coach encourages prayer, his or her actions are coercive because such involvement "no doubt 'will be perceived by the students as inducing a participation they might otherwise reject.'" *Duncanville*, 994 F.2d at 165 (quoting *Lee*). "'[T]he government may no more use social pressure to enforce orthodoxy than it may use more direct means.'" *Santa Fe*, 530 U.S. at 312 (quoting *Lee*).

The Christian crosses and sign promoting "faith" clearly violate the Establishment Clause too. *E.g.*, *Washegesic*, 33 F.3d at 684 (portrait of Christ "has a proselytizing…effect."). Indeed, the courts have been virtually unanimous in holding that the display of the cross on government property violates the Establishment Clause.[7] By way of example, in *Granzeier v. Middleton*, 955 F. Supp. 741, 746-47 (E.D. Ky. 1997), *aff'd*, 174 F.3d 568 (6th Cir. 1999), the court held that a government sign depicting a small (4-inch) "clip art" cross violated the Establishment Clause,

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[6] "[C]oercion is not necessary to prove an Establishment Clause violation." *Id.* at 604 (Blackmun, J., concurring). *See Schempp*, 374 U.S. at 223 ("a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended."); *Santa Fe*, 168 F.3d at 818 ("we are not required to determine that such public school prayer policies also run afoul of the Coercion Test.").

[7] *See, e.g.*, *Allegheny*, 492 U.S. 573, at 606-07 ("the [Establishment] Clause forbids a city to permit the permanent erection of a large Latin cross"); *id.* at 661 (Kennedy, J., concurring and dissenting in part) (same); *Trunk v. City of San Diego*, 629 F.3d 1099, 1066 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 2535 (2012) (longstanding war memorial cross with plaque); *Am. Atheists, Inc. v. Duncan*, 616 F.3d 1145, 1162 (10th Cir. 2010), *cert. denied*, 132 S.Ct. 12 (2011) (individualized roadside memorial crosses for state troopers); *Buono v. Norton*, 371 F.3d 543, 545-46 (9th Cir. 2004) (seven-foot war memorial cross), *rev'd on other grounds, Salazar v. Buono*, 559 U.S. 700 (2010) (plurality) (questioning need for injunction after transfer to private entity); *Carpenter v. City & Cnty. of San Francisco*, 93 F.3d 627, 630 (9th Cir. 1996) (longstanding concrete cross in park); *Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617 (9th Cir. 1996) (war memorial cross); *Robinson v. City of Edmond*, 68 F.3d 1226 (10th Cir. 1995) (cross on insignia); *Ellis v. La Mesa*, 990 F.2d 1518 (9th Cir. 1993) (war memorial cross, landmark cross on hilltop, and cross on insignia); *Gonzales v. North Twp. of Lake Cnty.*, 4 F.3d 1412 (7th Cir. 1993) (war memorial); *Harris v. City of Zion*, 927 F.2d 1401 (7th Cir. 1991) (cross on insignia); *ACLU v. City of St. Charles*, 794 F.2d 265 (7th Cir. 1986) (cross on building); *Friedman v. Bd. of Cnty. Comm'rs*, 781 F.2d 777 (10th Cir. 1985) (en banc) (cross on insignia); *ACLU v. Rabun Cnty. Chamber of Commerce, Inc*., 698 F.2d 1098 (11th Cir. 1983) (memorial cross); *Gilfillan v. City of Philadelphia*, 637 F.2d 924 (3d Cir. 1980) (platform containing cross); *Am. Humanist Ass'n v. City of Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180 (C.D. Cal. 2014) (war memorial depicting cross headstones); *Cabral v. City of Evansville*, 958 F. Supp. 2d 1018, 1029 (S.D. Ind. 2013), *app. dism.*, 759 F.3d 639 (7th Cir. 2014) (six-foot crosses within "Veterans Memorial Parkway."); *Summers v. Adams*, 2008 U.S. Dist. LEXIS 103729 (D.S.C. Dec. 23, 2008) (license plate featuring a cross); *Am. Atheists, Inc. v. City of Starke*, 2007 U.S. Dist. LEXIS 19512 (M.D. Fla. 2007) (water tower cross); *ACLU v. City of Stow*, 29 F. Supp. 2d 845 (N.D. Ohio 1998) (cross on insignia); *Granzeier v. Middleton*, 955 F. Supp. 741, 746 (E.D. Ky. 1997), *aff'd*, 173 F.3d 568 (6th Cir. 1999) (temporary sign containing a 4-inch cross); *Mendelson v. St. Cloud*, 719 F. Supp. 1065 (M.D. Fla. 1989) (cross on water tower); *Jewish War Veterans v. U.S.*, 695 F. Supp. 3 (D.D.C. 1988) (war memorial cross on military base); *ACLU v. Mississippi State General Services Admin.*, 652 F. Supp. 380 (S.D. Miss. 1987) (cross on building); *Libin v. Greenwich*, 625 F. Supp. 393 (D. Conn. 1985) (3-by-5 cross on firehouse); *Greater Houston Chapter of ACLU v. Eckels*, 589 F. Supp. 222 (S.D. Tex. 1984), *reh'g denied*, 763 F.2d 180 (5th Cir. 1985) (war memorial crosses); *Fox v. City of Los Angeles*, 22 Cal.3d 792 (1978) (cross on city hall); *see also Joki v. Bd. of Educ.*, 745 F. Supp. 823, 829-30 (N.D. N.Y 1990) ("There is abundant case law holding unconstitutional the prominent display of a cross").

reasoning, "the sign could be, and was in fact, perceived by reasonably informed observers, to be a government endorsement of the Christian religion. The court accepts that this apparent endorsement was not intended, but this made no difference in the observer's perception."

Likewise, in *Eckels*, Harris County, Texas, maintained three Latin crosses and a Star of David as part of a war memorial to honor the nation's war dead. The court found that the symbols violated both the purpose and effects tests of *Lemon*. 589 F. Supp. at 234-35. In a sweeping statement, the Texas district court declared: "The Court can reach no other conclusion but that the symbols' primary or principal effect, like their purpose, is religious." *Id.* It reasoned: "That the cross and the Star of David are the primary symbols for Christianity and Judaism respectively is beyond question." *Id.* The court concluded:

> The messages conveyed by these symbols are not lost when they are removed from the churches and synagogues with which they are traditionally associated. . . .These permanent symbols become state symbols when placed in a public park, and they convey purely religious messages.

The fact that these crosses and religious signs are displayed in a fourth grade classroom to a captive audience of *elementary* students makes them far more flagrantly unconstitutional than the crosses found unconstitutional in public parks or on government insignia. The "symbolism of a union between church and state is most likely to influence children of tender years." *Ball*, 473 U.S. at 390. Elementary children are "vastly more impressionable than high school or university students." *Bell v. Little Axe Indep. Sch. Dist*., 766 F.2d 1391, 1404 (10th Cir. 1985). *See Peck v. Upshur Cnty. Bd. of Educ*., 155 F.3d 274, 288 n* (4th Cir. 1998) (equal access policy violated Establishment Clause "in the elementary schools" but not high schools, reasoning: "because children of these ages may be unable to fully recognize and appreciate the difference between government and private speech" the school's "policy could more easily be (mis)perceived as endorsement rather than as neutrality."). In *Morgan v. Swanson*, this Court agreed with *Peck* and held that "'elementary students are different'" in "the Establishment Clause context." 659 F.3d 359, 382 (5th Cir. 2011)(citation omitted). *See also Walz v. Egg Harbor Twp. Bd. of Educ*., 342 F.3d 271, 277 (3d Cir. 2003) (explaining that in "an elementary school" the line "between school-endorsed speech and merely allowable speech is blurred" and that "[w]hile 'secondary school students are mature enough and are likely to understand that a school does not endorse or support speech that it merely permits on a nondiscriminatory basis,'" elementary students "are different.") (citation omitted); *Berger v. Rensselaer Cent. Sch. Corp*., 982 F.2d 1160, 1170 (7th Cir. 1993) ("If the Supreme Court was concerned about the coercive pressures on fourteen-year-old Deborah Weisman, then we must be even more worried about the pressures on ten- and eleven-year-old fifth graders").

In view of the above, the teacher's religious displays are unconstitutional and must be removed immediately. The superintendent's statement that the teacher somehow has a "right" to display proselyting religious elements in her classroom that overtly promote prayer and Christianity rings hollow. A "'public school teacher's in class conduct is not protected by the First Amendment.'" *Lee v. York Co. Sch. Div*., 484 F. 3d 687, 695 (4th Cir. 2007) (citation omitted) (school did not infringe on teacher's rights when it ordered him to remove articles

detailing religious missionary activities from a classroom bulletin).[8] "Teachers and other public school employees have no right to make the promotion of religion a part of their job description." *Grossman v. South Shore Public Sch. Dist*., 507 F.3d 1097, 1099-1100 (7th Cir. 2007) (upholding school's decision not to renew the contract of school guidance counselor who replaced educational literature about contraceptives with religious literature on abstinence). The district would even be permitted to restrict the teacher's conduct if it fell "short of an establishment violation." *Bishop v. Aronov*, 926 F.2d 1066, 1077 (11th Cir. 1991). But in this situation, a "clear establishment violation exist[s]," making the district's actions in enjoining the illegal activity necessary. *Id.*

We are most hopeful that you will recognize the concerns raised by this letter and address them properly. To avoid legal action, we ask that you notify us in writing of the steps you will take to rectify this constitutional infringement. Please respond within seven (7) days. We thank you in advance for your attention to this matter.

Very truly yours,
Monica Miller, Esq.

[8] *See Johnson v. Poway Unified School Dist*., 658 F. 3d 954, 957 (9th Cir. 2011) (rejecting First Amendment challenge by teacher to school requiring that he remove classroom banners that read "In God We Trust," "One Nation Under God," "God Bless America," and "God Shed His Grace on Thee," and "All men are created equal, they are endowed by their CREATOR"); *Peloza*, 37 F.3d at 522 (school district's interest in avoiding violation of Establishment Clause justified prohibiting teacher from discussing religion with students before and after class and holding that to "permit [a teacher] to discuss his religious beliefs with students during school time on school grounds would violate the Establishment Clause"); *Marchi*, 173 F.3d at 477 (upholding school's cease and desist directive to teacher, and rejecting free exercise claim of teacher who shared his religious conversion experience with his students, because "that risks giving the impression that the school endorses religion" and it has a "compelling interest in avoiding Establishment Clause violations"); *Roberts*, 921 F.2d at 1056-58 (teacher could be prohibited from reading Bible during silent reading period, and from stocking two books on Christianity on shelves, because these could leave students with the impression that Christianity was officially sanctioned); *Downing*, 162 F.Supp.2d 19 (school board's response to teacher wearing "Jesus 2000" shirt was appropriate and did not violate teacher's First Amendment rights because the school would risk Establishment Clause violation).