Appignani Humanist Legal Center

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*Via Email*

Dr. Esperanza Zendejas – Superintendent
Brownsville Independent School District drezendejas@bisd.us
1900 East Price Road
Brownsville, TX 78521

Sherry L. Stout – Principal
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**RE: Constitutional violation**

Dear Dr. Zendejas and Ms. Stout,

A concerned parent has contacted our office to request assistance with regard to what is correctly perceived as a constitutional violation that has occurred under the authority of your school and school district. Specifically, a third-grade teacher at Benavides Elementary School has been displaying a large Christian cross in her classroom and proselytizing to students through her classroom activities. The teacher, Ms. Sanroman, reportedly told her class recently that only one person is perfect and that person is "Our Lord." This comment was made as a Christian cross, approximately one foot in height, sat on a shelf in her room. This kind of religious activity is of great concern to the atheist-humanist family in question, which expects public schools to educate children without attempts at religious indoctrination.

The above-described activities are not the only religious activities that have been reported to us, and in fact the parent in question here has been informed of similar religious actions taking place in other schools in your district. The purpose of this letter is to advise you of these activities and demand that prompt steps be taken to ensure that they cease. With the school year having just begun, this family and other non-Christian families in your school district should not have to endure Christian proselytizing as a price to pay for sending their children to public schools. This is not a question of the teacher's religious freedom, for teachers are free to practice their religion as they wish on their own time and in their own homes and churches. Instead, this

is an issue of governmental employees promoting religion on the job and violating the rights of children and families.

The American Humanist Association ("AHA") is a national nonprofit organization with over 30,000 members and supporters across the country, including many in Texas, and over 260 chapters and affiliates nationwide, and an online following of over 480,000. The mission of AHA's legal center is to protect one of the most fundamental principles of our democracy: the constitutional mandate requiring separation of church and state. The Appignani Humanist Legal Center, AHA's legal arm, includes a network of cooperating attorneys from around the country, including Texas. The center has litigated cases involving church-state separation and the rights of Humanists, other non-theists, as well as Christians, in state and federal courts nationwide, including 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). Indeed, the Establishment Clause "create[s] a complete and permanent separation of the spheres of religion activity and civil authority." *Id.* at 31-32. Separation "means separation, not something less." *McCollum v. Bd. of Ed.*, 333 U.S. 203, 231 (1948). In "no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart." *Id.*

The Supreme Court "has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987). *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,* 505 U.S. 577, 592 (1992) (nondenominational prayer at graduation unconstitutional). Indeed, *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). The Supreme Court has issued numerous decisions "of considerable parentage that prohibits prayer in the school classroom or environs." *Id.* at 164.[1] The same is true of the Fifth Circuit.[2] "[S]chool officials have long been prohibited by the

[1] *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).

[2] *See Doe v. Sch. Bd*., 274 F.3d 289, 294 (5th Cir. 2001) (statute authorizing prayer in classrooms unconstitutional); *Doe v. Santa Fe Indep. Sch. Dist*., 168 F.3d 806, 816 (5th Cir. 1999), *aff'd*, 530 U.S. 290 (2000) (graduation and

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).

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). "The State must be certain… that subsidized teachers do not inculcate religion." *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971). 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; *Doe v. Duncanville Indep. Sch. Dist*., 70 F.3d 402 (5th Cir. 1995); *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) (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 with "let us pray" and ending it with "amen" violated Establishment Clause); *Bishop v. Aronov*, 926 F.2d 1066, 1073 (11th Cir. 1991) ("a teacher's [religious] speech can be taken as directly and deliberately representative of the school"); *Roberts v. Madigan*, 921 F.2d 1047, 1056-58 (10th Cir. 1990) (a teacher's display of a Bible in his classroom "had the primary effect of communicating a message of endorsement of a religion"); *Steele v. Van Buren Public Sch. Dist.*, 845 F.2d 1492, 1493 (8th Cir. 1988).[3]

School districts "have a constitutional duty" to "direct teachers to 'refrain from expression of religious viewpoints in the classroom and like settings.'" *Marchi*, 173 F.3d at 475 (citing *Lemon*, 403 U.S. at 619). In fact, even "permit[ting] [a teacher] to discuss his religious

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football prayers unconstitutional); *Ingebretsen v. Jackson Pub. Sch. Dist*., 88 F.3d 274, 280 (5th Cir. 1996) (prayers at school-sponsored events unconstitutional); *Doe v. Duncanville Indep. Sch. Dist*., 70 F.3d 402, 407 (5th Cir 1995) (*Duncanville II*) (school officials' supervision of student-initiated and student-led prayers preceding basketball games violated Establishment Clause); *Duncanville I*, 994 F.2d at 163; *Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982); *Hall v. Board of Sch. Comm'rs,* 656 F.2d 999, 1003 (5th Cir. 1981) (permitting students to conduct morning devotional readings over the school's public address system violated Establishment Clause); *Meltzer v. Bd. of Pub. Instruction,* 548 F.2d 559, 574 (5th Cir. 1977) (en banc) (same). *See also Herdahl v. Pontotoc County Sch. Dist.*, 933 F. Supp. 582, 591 (N.D. Miss. 1996) (same).

[3] *See also Doe v. Wilson Cty. Sch. System*, 564 F. Supp. 2d 766 (M.D. Tenn. 2008) (holding that principal and kindergarten teacher who bowed their heads during a nonschool sponsored prayer event and wore 'I Prayed' stickers during instructional time endorsed the prayer event and thus violated Establishment Clause); *Daugherty v. Vanguard Charter Sch. Academy*, 116 F. Supp. 2d 897, 910 (W.D. Mich. 2000) ("The presence of teachers and elementary students together, for prayer, on school premises, albeit during non-instructional hours, is a matter of heightened concern."); *Carlino v. Gloucester City High Sch*., 57 F. Supp. 2d 1 (D.N.J. 1999), *aff'd*, 44 Fed. Appx. 599 (3rd Cir. 2002) (principal's involvement with a baccalaureate service unconstitutional); *Sease v. Sch. Dist*., 811 F. Supp. 183, 192 (E.D. Pa. 1993) ("Clearly, a school employee's participation in, or sponsorship of, a public school gospel choir during school hours would be a violation of the Establishment Clause."); *Quappe v. Endry*, 772 F. Supp. 1004 (S.D. Ohio 1991), *aff'd*, 979 F.2d 851 (6th Cir. 1992) (participation of teacher in religious club for students meeting in elementary school directly after close of school day established "symbolic nexus between the school and the club, thus providing the active government participation necessary to find a constitutional violation"); *Breen v. Runkel*, 614 F. Supp. 355 (W.D. Mich. 1985) (teachers praying and reading Bible in classrooms unconstitutional); *Doe v. Aldine Indep. Sch. Dist.*, 563 F. Supp. 883, 888 (S.D.Tex. 1982).

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

[5] *See also Collins v. Chandler Unified Sch. Dist*., 644 F.2d 759, 760-63 (9th Cir. 1981) ("the invocation of assemblies with prayer has no apparent secular purpose"); *Hall v. Bradshaw*, 630 F.2d 1018, 1020-21 (4th Cir.

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). Where, as here, teacher "conduct endorses a particular religion" it "infringes on the rights of others and must be prohibited." *Roberts*, 921 F.2d at 1057 (citation omitted).

To comply with the Establishment Clause, a government practice must pass the *Lemon* test, [4] 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. Government action "violates the Establishment Clause if it fails to satisfy any of these prongs." *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987). In applying these general principles to the context of public schools, the Supreme Court has emphasized that courts must defend the wall of separation with an even greater level of vigilance because "there are heightened concerns with protecting freedom of conscience from [even] subtle coercive pressure in the elementary and secondary public schools." *Lee*, 505 U.S. at 592. In addition to the *Lemon* test, in *Lee*, the Supreme Court formulated the separate "coercion test," declaring, "*at a minimum*, the [Establishment Clause] guarantees that government may not coerce anyone to support or participate in religion or its exercise." *Id.* at 587 (emphasis added).

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). *See also Stone v. Graham*, 449 U.S. 39, 41 (1980); *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). A religious purpose may be inferred in this instance since "the government action itself besp[eaks] the purpose . . . [because it is] patently religious." *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 862-63 (2005). *See also Santa Fe*, 530 U.S. at 309-10 (2000) ("infer[ring] that the specific purpose of the policy" permitting but not requiring student-led prayers was religious thus failing the purpose prong); *Karen B. v. Treen*, 653 F.2d 897, 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); *Peloza*, 37 F.3d at 522 (teacher's discussion of religion with students before and after class "would not have a secular purpose"). [5]

Moreover, even if the purpose prong is not problematic, allowing an on-the-job government employee to advocate to a captive student audience, doing so while displaying a Christian cross as an item in her classroom, to the exclusion of other religions, 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

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

[5] *See also Collins v. Chandler Unified Sch. Dist*., 644 F.2d 759, 760-63 (9th Cir. 1981) ("the invocation of assemblies with prayer has no apparent secular purpose"); *Hall v. Bradshaw*, 630 F.2d 1018, 1020-21 (4th Cir. 1980) (state's inclusion of prayer on state map failed purpose prong).

Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief[.]" *Id.* at 593-94.

A religious activity is "state-sponsored," and therefore unconstitutional, if "an objective observer . . . w[ould] perceive official school support for such religious [activity]." *Bd. of Educ. v. Mergens*, 496 U.S. 226, 249-50 (1990). *See, e.g.*, *Santa Fe*, 530 U.S. at 309-10 (holding that student-initiated, student-led prayers at public high school football game were unconstitutional). The policy successfully challenged in *Santa Fe* allowed the senior class to elect students to deliver a "brief invocation and/or message" at football games. *Id.* at 296-97. Despite the fact that any message would be student-led and student-initiated, the Supreme Court found the policy unconstitutional as it "involves both perceived and actual endorsement of religion." *Id.* at 305, 310. Obviously, expressly promoting belief in "Our Lord" as the only perfect person, while simultaneously displaying a Christian cross, must be perceived as an endorsement of that religious view, especially when none others are made available, and thus the effect *Lemon* prong is violated. Here, unlike in *Santa Fe*, the religious activity is *not* even student-led or student-initiated and rather than being a voluntary football game, the teacher is promoting religion in the formal classroom to a captive audience of students.

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 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).

Indeed, it is settled law, for example, that teaching creationist or similar ideas in any guise in public schools violates the Establishment Clause. *See Epperson v. Arkansas*, 393 U.S. 97 (1968) (holding that a statute that forbids the teaching of evolution in public schools violates the Establishment Clause); *Edwards*, 482 U.S. 578 (holding that a statute requiring the teaching of creationism alongside evolution in public schools violates the Establishment Clause); *Freiler v. Tangipahoa Parish Bd. of Educ*., 185 F. 3d 337, 346 (5th Cir. 1999) (holding that a required disclaimer to be read before evolution lessons in public schools that states that they were "not intended to influence or dissuade the Biblical version of Creation" and that urged students "to exercise critical thinking and gather all information possible and closely examine each alternative" violates the Establishment Clause because it "protect[s] and maintain[s] a particular religious viewpoint").[6] The same reasoning underlying these cases applies with equal force to

[6] *See also Webster v. New Lenox Sch. Dist.*, 917 F.2d 1004, 1008 (7th Cir. 1990) (upholding school board's prohibition on the teaching of creation science to junior high students); *Peloza*, 37 F.3d at 521 (requiring that a public school teacher to teach evolution and not creationism does not violate the First Amendment); *Kitzmiller v. Dover Area Sch. Dist*., 400 F. Supp. 2d 707 (M.D. Pa. 2005) (holding that it was unconstitutional to teach Intelligent Design as an alternative to evolution in public school);

teacher informing her class that only one person is perfect and that person is "Our Lord." *Cf. Grossman v. South Shore Public Sch. Dist*., 507 F.3d 1097 (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). "Teachers and other public school employees have no right to make the promotion of religion a part of their job description and by doing so precipitate a possible violation of the First Amendment's establishment clause[.]" *Id.* at 1099-1100. This includes any speech or conduct that "endorses a particular religion and is an activity 'that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.'" *Roberts*, 921 F. 2d at 1055 (quoting *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988)). For instance, the Fifth Circuit in *Treen* concluded that the effect prong of *Lemon* was violated by "encouraging observance of a religious ritual in the classroom." 653 F.2d at 901. The court added that "[t]he result is the same even though Jefferson Parish students must affirmatively request to participate in the prayer observance, for an Establishment Clause violation does not depend upon the presence of actual governmental coercion." *Id.* at 902.

The third *Lemon* prong, the question of excessive government entanglement with religion, is also violated here, as it is obviously inappropriate for an on-the-job public school teacher to be inexplicably promoting one particular religious view. *See Duncanville*, 70 F.3d at 406 (faculty's participation in "prayers improperly entangle[d] [the school] in religion"); *Karen B*., 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); *Jabr v. Rapides Parish Sch. Bd*., 171 F. Supp. 2d 653, 661 (W.D. La. 2001) ("[t]eachers, who did not actively participate in Bible distribution, but merely observed non-school personnel distribute the material, became excessively entangled with religion in violation of the Establishment Clause."). Like the Establishment Clause generally, the prohibition on excessive government entanglement with religion "rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *McCollum v. Bd. of Educ*., 333 U.S. 203, 212 (1948). In this situation, "where the underlying issue is the deeply emotional one of Church-State relationships, the potential for seriously divisive political consequences needs no elaboration." *Comm. for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 797 (1973).

Finally, it bears emphasis that, in addition to violating the Establishment Clause under all three prongs of the *Lemon* test, *supra*, the teacher's activity also violates the Establishment Clause under the "coercion test." *Lee*, 505 U.S. at 587-99. The implied message here is that students stand to gain favor by accepting the views promoted. In *Lee*, the Supreme Court emphasized that, "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise." *Id*. at 587, 588-99 (recognizing that unconstitutional coercion may be exercised both directly, such as by mandatory attendance at a religious exercise, and indirectly).

The classroom display of the Christian cross, *alone* (independent of the teacher's religious comments), violates the Establishment Clause and must be immediately removed. *E.g.*, *Stone*, 449 U.S. at 41 (Ten Commandments display in public school unconstitutional); *ACLU v. Rabun Cnty. Chamber of Commerce, Inc.*, 698 F.2d 1098, 1110 (11th Cir. 1983) (cross displayed in public park held unconstitutional under *Lemon*); *Washegesic v. Bloomingdale Pub. Sch*., 33 F.3d 679 (6th Cir. 1994) (portrait of Jesus Christ in public school held unconstitutional pursuant to each prong of *Lemon*); *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).

The display fails the purpose prong of *Lemon* because there is no conceivable secular purpose for displaying an inherently Christian symbol in the classroom. Indeed, federal courts, including those in Texas, have been virtually unanimous in holding that a government display of the cross is unconstitutional. *See 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 containing crosses and Star of David in public park unconstitutional); *Trunk v. City of San Diego*, 629 F.3d 1099, 1066 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 2535 (2012); *Am. Atheists, Inc. v. Duncan*, 616 F.3d 1145, 1162 (10th Cir. 2010) (individualized memorial crosses for state troopers on public roadside unconstitutional); *Carpenter v. City & County of San Francisco*, 93 F.3d 627, 630 (9th Cir. 1996); *Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617, 620 (9th Cir. 1996) (war memorial cross in public park unconstitutional); *Robinson v. City of Edmond*, 68 F.3d 1226, 1232 (10th Cir. 1995) (cross on city seal unconstitutional); *Ellis v. La Mesa*, 990 F.2d 1518, 1525 (9th Cir. 1993) (three separate government cross displays unconstitutional); *Gonzales v. North Township of Lake County*, 4 F.3d 1412, 1418 (7th Cir. 1993) (war memorial crucifix in public park unconstitutional); *Harris v. City of Zion*, 927 F.2d 1401, 1414 (7th Cir. 1991) (cross on city seal unconstitutional); *ACLU v. City of St. Charles*, 794 F.2d 265 (7th Cir. 1986) (lighted cross on government building unconstitutional); *Friedman v. Board of County Commissioners*, 781 F.2d 777, 782 (10th Cir. 1985) (en banc) (cross on city seal unconstitutional); Gilfillan v. City of Philadelphia, 637 F.2d 924, 930 (3d Cir. 1980) (platform containing a 36-foot-tall cross unconstitutional); *ACLU v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098 (11th Cir. 1983) (war memorial cross unconstitutional); *Am. Humanist Ass'n v. City of Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180, at *23-24 (C.D. Cal. February 25, 2014) (city monument displaying cross headstone markers held unconstitutional); *Cabral v. City of Evansville*, 958 F. Supp. 2d 1018, 1029 (S.D. Ind. 2013); *Am. Atheists, Inc. v. City of Starke*, 2007 U.S. Dist. LEXIS 19512, at *14 (M.D. Fla. March 19, 2007) (cross on city water tower unconstitutional); *ACLU v. City of Stow*, 29 F. Supp. 2d 845 (N.D. Ohio 1998) (cross on city seal unconstitutional); *Granzeier v. Middleton*, 955 F. Supp. 741, 746 (E.D. Ky. 1997), *aff'd*, 173 F.3d 568 (6th Cir. 1999) (sign containing a 4-inch-high crucifix unconstitutional); *Jewish War Veterans v. U.S.*, 695 F. Supp. 3 (D.D.C. 1988) (war memorial cross on military base unconstitutional); *Mendelson v. St. Cloud*, 719 F. Supp. 1065 (M.D. Fla. 1989) (cross on government building unconstitutional); *ACLU v. Mississippi State General Services Admin.*, 652 F. Supp. 380, 382 (S.D. Miss. 1987) (illuminated cross on state owned-building unconstitutional); *Libin v. Greenwich*, 625 F. Supp. 393, 399 (D. Conn. 1985) (3-by-5 foot cross on firehouse unconstitutional); *Fox v. City of Los Angeles*, 22 Cal.3d 792 (1978) (cross on city hall unconstitutional). *See also Allegheny*, 492 U.S. at 606-07 (explaining that there is "no doubt, '. . . that the [Establishment] Clause forbids a city to permit the permanent erection of a large Latin cross . . . because such an obtrusive year-round religious

display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion.'").

When government utilizes "religious symbols . . . its ability to articulate a secular purpose becomes the crucial focus under the Establishment Clause." *Rabun*, 698 F.2d at 1110 (11th Cir. 1983) (cross in public park held unconstitutional under *Lemon*) (internal footnote omitted). Many "courts addressing . . . challenges to the maintenance of religious symbols" have ruled that the symbols fail *Lemon* upon the "finding of a religious purpose." *Id.* at 1110 n.23.[7] A religious purpose may be inferred here because the cross is "patently religious." *McCreary*, 545 U.S. 844, 862-63 (2005). *See Stone*, 449 U.S. at 41 ("The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths."); *Mellen*, 327 F.3d at 373. "Several courts—including the Supreme Court—have noted that the presence of patently religious symbols . . . suggest that the purpose of erecting a monument is religious motivated." *Am. Humanist Ass'n*, 2013 U.S. Dist. LEXIS 188202, at *36.[8] *See also ACLU of Ohio Found., Inc. v. Deweese*, 633 F.3d 424, 434 (6th Cir. 2011) ("The poster's patently religious content reveals Defendant's religious purpose"); *Gonzales*, 4 F.3d at 1421 (the court could find "no secular purpose served by a crucifix").[9] Finding a memorial cross unconstitutional pursuant to *Lemon's* purpose prong, the Eleventh Circuit in *Rabun* relied on the fact that the "cross is universally regarded as a symbol of Christianity." 698 F.2d at 1111. Here, as in the many cases cited above, there is no secular purpose "for the display" of Jesus. *Mississippi State*, 652 F. Supp. at 383. Due to its plain religious nature, the "only purpose which can be ascribed to the display of the cross is to either advance or endorse the Christian religion." *Id*.

Likewise, the classroom cross display plainly fails the effect prong of *Lemon*. *See Stone*, 449 U.S. at 41; *Roberts*, 921 F.2d at 1056-58 (a teacher's display of a Bible in his classroom "had the primary effect of communicating a message of endorsement of a religion); *Washegesic*

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[7] *See McCreary Cnty. v. ACLU of Ky*., 545 U.S. 844 (2005) (Ten Commandments); *Stone v. Graham*, 449 U.S. 39, 41-42 (1980) (same); *Deweese*, 633 F.3d at 434 (same); *ACLU v. Ashbrook*, 375 F.3d 484, 492 (6th Cir. 2004) (same); *Baker v. Adams County/Ohio Valley Sch. Bd*., 86 Fed. Appx. 104 (6th Cir. 2004) (same); *Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002) (same); *Ind. Civ. Liberties Union v. O'Bannon*, 259 F.3d 766, 770-71 (7th Cir. 2001) (same); *Books v. City of Elkhart*, 235 F.3d 292, 304 (7th Cir. 2000) (same); *Washegesic v. Bloomingdale Pub. Sch.*, 33 F.3d 679 (6th Cir. 1994) (portrait of Jesus); *Gonzales*, 4 F.3d at 1421 (cross); *Harris*, 927 F.2d at 1414 (cross); *Rabun*, 698 F.2d at 1110 (cross); *Eckels*, 589 F. Supp. 222 (cross); *Gilfillan*, 637 F.2d at 930 (cross); *Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180, *19 (cross); *Kimbley v. Lawrence Cnty*., 119 F. Supp. 2d 856 (S.D. Ind. 2000) (Ten Commandments); *Mendelson*, 719 F. Supp. 1065 (cross); *Mississippi State*, 652 F. Supp. at 382 (cross); *Libin*, 625 F. Supp. at 399 (cross); *Fox*, 22 Cal.3d 792 (1978) (cross); *CCSCS v. Denver*, 481 F. Supp. 522 (D.C. Colo.1979) (creche); *Ahlquist*, 840 F. Supp. 2d at 522 (prayer mural); *Doe v. Cnty. of Montgomery*, 915 F. Supp. 32, 37 (C.D. Ill. 1996) (religious sign); *Burelle v. Nashua*, 599 F. Supp. 792, 797 (D.N.H. 1984) (creche).

[8] Where, as here, the government sponsors an "intrinsically religious practice," it "cannot meet the secular purpose prong." *Jager*, 862 F.2d at 829-30. *See Jaffree*, 705 F.2d at 1534-35; *Mellen*, 327 F.3d at 373 ("When a state-sponsored activity has an overtly religious character, courts have consistently rejected efforts to assert a secular purpose for that activity."); *Constangy*, 947 F.2d at 1150 (finding religious purpose in judge's practice of opening court sessions with prayer, as it involved "an act so intrinsically religious").

[9] *See also Indiana Civ. Liberties Union, Inc. v. O'Bannon*, 110 F. Supp. 2d 842, 852 (S.D. Ind. 2000) (finding unconstitutional religious purpose based on "the very design"); *Doe v. Cnty. of Montgomery*, 915 F. Supp. 32, 36-37 (C.D. Ill. 1996) ("the sign 'THE WORLD NEEDS GOD' is undeniably a religious message….[and thus lacks a] secular purpose.").

*v. Bloomingdale Pub. Sch*., 33 F.3d 679 (6th Cir. 1994).[10] Holding that a portrait of Jesus displayed in a public school violated the Establishment Clause, the court in *Washegesic* explained: "Christ is central only to Christianity, and his portrait has a proselytizing, affirming effect that some non-believers find deeply offensive. . . . [I]t [i]s a governmental statement favoring one religious group and downplaying others. It is the rights of these few [non-adherents] that the Establishment Clause protects." *Id.* at 684. 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 even held that a government sign depicting a *small* (4-inch) "clip art" cross violated the Establishment Clause—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."

And 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.

*Id.* Similarly, 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.*

Lastly, it is apodictic that "'[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 because they bore the imprimatur of the school). The School District would be permitted to restrict the teacher's speech

[10] *See also Robinson v. City of Edmond*, 68 F.3d 1226, 1228 (10th Cir. 1995) (holding that a city seal that contained four quadrants, only one of which depicted a Latin cross had the unconstitutional effect of endorsing religion); *Ellis v. La Mesa*, 990 F.2d 1518, 1525 (9th Cir. 1993) (cross on city seal unconstitutional); *Harris v. City of Zion*, 927 F.2d 1401, 1414 (7th Cir. 1991), *cert. denied*, 505 U.S. 1218 (1992) (same); *ACLU v. City of Stow*, 29 F. Supp. 2d 845 (N.D. Ohio 1998) (same).

even if it fell "short of an establishment violation" because "even the appearance of proselytizing by a [teacher] should be a real concern to the [District]." *Bishop v. Aronov*, 926 F.2d 1066, 1077 (11th Cir. 1991). But because a "clear establishment violation exist[s]," there is no need for further "evaluation." *Id.* (citing *Roberts*, 921 F.2d at 1053-56). *See Borden*, 523 F.3d at 174 n.16.[11]

We ask that you respond to this letter within seven (7) days, acknowledging the errors here and assuring that they will be corrected. We look forward to hearing from you. Thank you for turning your attention to this important matter.

Sincerely,
Monica L. Miller, Esq.

[11] Importantly, many courts have upheld a school district's decision to remove religious items from a teacher's classroom over free exercise and free speech objections. *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"); *Lee v. York Co. School Div*., 484 F. 3d 687 (4th Cir. 2007) (rejecting First Amendment challenge by teacher to school requiring that he remove from the classroom a "National Day of Prayer poster, featuring George Washington kneeling in prayer," newspaper articles about religion in politics and newsletters about local missionaries); *Downing v. West Haven Board of Ed.*, 162 F.Supp.2d 19 (D. Conn. 2001) (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). *See also 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"); *Peloza*, 37 F.3d at 522 (9th Cir. 1994) (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"); *Roberts*, 921 F.2d at 1056-58.