**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF RHODE ISLAND**

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| MARK AHLQUIST, as next friend, parent and guardian of J-- A--, a minor<br><br>v.<br><br>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, and SCHOOL COMMITTEE OF THE CITY OF CRANSTON, by and through Andrea Iannazzi, in her capacity as Chair of the School Committee of the City of Cranston | C.A. No. 11-138-L |

# DEFENDANTS' TRIAL BRIEF


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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Other Authorities**

## INTRODUCTION

This case asks one basic question: does the Establishment Clause permit schools to keep historical references to religion? Plaintiff asks this Court to, quite literally, scrub the school clean of historical religious statements.

The School Committee of the City of Cranston, after a long and thoughtful deliberative process, decided not to erase history for the sake of political correctness. The mural at issue was a gift from Cranston West High School's first graduating class. It hung undisturbed for nearly fifty years. After the ACLU discovered it last year, it started making much ado about a mural that had been nothing.

The School Committee, after a long and heated debate, decided to do nothing. Their vote to leave the mural alone was based not upon some desire to inject religion into the public schools, but on their belief that school history and tradition should be maintained. The mural remains as an example that our world is not made new every day, that our public spaces are shaped by something more than the whims of the moment.

This is a state with a long tradition of religious freedom. It has an equally long tradition of religious expression in public. Just as we know that a city named Providence can welcome diverse faiths, we know that a school with an old mural can educate students of all faiths, or no faith at all.

## STATEMENT OF FACTS[1]

### A. Introduction

The City of Cranston, Rhode Island ("Cranston" or "the City") is a municipal corporation and government within the State of Rhode Island. It has a population of approximately 80,000 and is one of several cities that constitute the greater Providence metropolitan area. Historically, Cranston's public school system, which is operated by Defendant the School Committee of the City of Cranston ("School Committee"), featured one high school, known as Cranston High School (later, Cranston High School East) ("Cranston East"), and two middle or junior high schools, Park View Junior High School and Hugh B. Bain Middle School ("Bain"). Due principally to the City's growing population, it added a second high school in the western part of the City in the mid-20th century known as Cranston High School West ("Cranston West" or "the School").

History and tradition are especially valued at Cranston's two public high schools. Ex. 5, Rule 30(b)(6) Dep. Tr. of Defs., July 14, 2011, ("30(b)(6) Tr.") at 48-50. For example, while Cranston East and Cranston West hold graduation ceremonies on the same day, time must be allotted between ceremonies to replace red chairs with green chairs representing each school's colors. *Id*. at 48. Respect for traditions at the two schools once led to an emotional public stand-off over signage at the foot-

[1] Nearly than 50 years have passed since the principal events giving rise to this case occurred. As a result, key individuals who would have personal knowledge of the underlying events are deceased or unavailable to testify. Ex. 1, Dep. Tr. of Edmond Lemoi, June 29, 2011, at 28-29. Similarly, virtually no contemporaneous record of these events exists. Ex. 5, Rule 30(b)(6) Dep. Tr. of Defs., July 14, 2011, at 41.

ball stadium where they compete in the annual Thanksgiving Day game. Scharfenberg, David, *A Banner Class Division Unfurls in Cranston*, The Providence Journal, Oct. 27, 2007, § A, at 1. Cranston West presents a rose to all its graduates and situates a metallic falcon on the graduation stage large enough to obstruct the view of attending members of the School Committee. 30(b)(6) Tr. at 48, 50. Edmond Lemoi, a teacher at Cranston West from 1964 to 1972 and its principal from 1995 to 2006, described the importance of history and culture at Cranston West as follows:

> . . . as the history of the school becomes richer and deeper, it has more stuff, and so you have to come up with ways of displaying so that the kids understand the history of the school and the significance of their school, it is part of the community, that they are coming to an important place, an important place that represents that community, so you need to demonstrate these things, so there are displays cases in the library, there are display cases in the hallway of Cranston High School West that hold those trophies, and in front of each department, home economics, foreign language, English, and Science, there are display windows where they put important things that have happened during that school year or during the history of that department where they display trophies, citations from the mayor, from the governor, you win the National Honor Society, where you win the Academic Bowl or Academic Decathlon, the trophies are in those display cases for all to see so they have something to aspire to, so they can see what their cousins, their brothers, their sisters, their neighbors, and for some kids their mothers and father, the contributions they made to the history of the school so you display those kinds of trophies and banners and signs.

Ex. 1, Dep. Tr. of Edmond Lemoi, June 29, 2011, ("Lemoi Tr.") at 54-55. It is out of this context that the instant case arises.

**B. The Mural[2]**

Cranston High School West ("Cranston West") opened in the fall of 1959. Ex. 2, Dep. Tr. of David Bradley, June 29, 2011, ("Bradley Tr.") at 20-21. Construction continued into the 1960s. *Id*. In its first academic year, the 1959-60 academic year, Cranston West had only two grades, seventh and eighth grade. *Id*. The eighth grade that year would later graduate as twelfth graders as the Class of 1964. *Id*. In the 1960-61 academic year, a new class was added as a tenth grade. Ex. 6, Dep. Tr. of Gerald Zito, July 20, 2011, ("Zito Tr.") at 4-6. That tenth grade would become the first graduating class, the Class of 1963. *Id.*

As a brand new school, it was important for Cranston West to establish its own traditions and identifying features. Bradley Tr. at 38-41. To that end, during the first academic year, the student government undertook the task of creating such features, including school colors, a mascot, a school creed and school prayer. *Id*. David Bradley, now age 64, was a member of student government that year, having been elected to represent his homeroom class in that capacity. *Id*. at 35-36. The president of the student government delegated to Mr. Bradley and another seventh grader, Joseph Sullivan, the task of composing the creed and prayer. *Id.* at 41, 52-53. Mr. Sullivan is now deceased. *Id*. at 41. Messrs. Bradley and Sullivan were given "free rein" in performing this task. *Id*. at 40. While they sought assistance from an English teacher at the School with respect to the school creed, they prepared the

[2] In the pleadings and during discovery the parties have at times referred to the display being challenged in this case as a "banner." Because the display is affixed directly on the Auditorium wall, it is, more accurately, a mural.

school prayer with no outside assistance or contribution. *Id*. at 49-51. The student government adopted the prayer and creed by vote during the latter part of the 1959-60 academic year. *Id*. at 45, 48.

Prior to the creation of the school prayer, Cranston West's daily morning exercises included, like many schools of the time, a student-led recitation of the Lord's Prayer. *Id*. at 42. After the adoption of the school prayer composed by Messrs. Bradley and Sullivan, it replaced the Lord's Prayer in the morning recitation. *Id.* at 45. In or about 1962, Cranston West ceased recitation of any prayer and instead observed a moment of silence as part of morning exercises, presumably in response to the Supreme Court's ruling in *Engel* v. *Vitale*, 370 U.S. 421 (1962). *Id.* at 43, 46.

Several buildings comprise the Cranston West campus. 30(b)(6) Tr. at 149. Construction on the School's auditorium ("Auditorium") was completed in or about the summer of 1963. Zito Tr. at 5, 22-23. The Auditorium is and has historically been used for school and class-wide assemblies, performing arts productions, honors nights and similar events. 30(b)(6) Tr. at 65-66. Sometime near September of 1963—no one knows for sure—the first graduating class of Cranston West, the Class of 1963, presented as a Class gift two murals that adorn the walls on the sides of the Auditorium stage. Zito Tr. at 9-12. One mural featured the text of Messrs. Bradley and Sullivan's school prayer ("the Mural") and the other, the text of their school creed. *Id.* Gerald Zito, the Vice President of the Class of 1963 ("the Class"), participated in a school-wide assembly to recognize the school's acceptance of the gift. *Id.* at 29. The gift was the idea of the senior class's student council, a separate

and more independent body than the school-wide student government. *Id.* at 24, 35. The Class wanted to present the School with a gift that would remain "as long as the [Auditorium] existed." *Id.* at 20. For that reason, it chose the murals over installing a gate on a separate, then-unfinished building on the Cranston West campus. *Id.* at 10, 20. The Class did not design the murals but hired an independent artist—not employed by the School, School Committee, or City— to create them. *Id.* at 18-19, 34. Mr. Zito did not recall the School's administration giving the Class any direction concerning the formulation of the murals. *Id.* at 20. He believes a contractor installed the murals but is unsure whether the creating artist, an architect, a contractor or the School's administration selected its location. *Id.* at 31. All funds used to pay for the creation and installation of the murals derived from fundraising efforts of the students of the Class of 1963. *Id.* at 13-15.

Other than because it was presented by the graduating class, the School's administration's purpose or intent in accepting the Mural is unclear. 30(b)(6) Tr. at 76. There were no religious aspects whatsoever to the acceptance ceremony. Bradley Tr. at 62-63. No prayers were recited. *Id.*

The Mural is affixed to the right of the stage when viewed from the Auditorium's entrance. It bears the heading "School Prayer" and includes the following text:

> 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 always to conduct ourselves so as to bring credit to Cranston High School West.
> Amen

*See* Ex. 7-2. It is approximately 8 ft. long and 4 ft. wide. Ex. 23-22, 23-25. Its bottom edge is approximately 6 ft. from the Auditorium floor. Ex. 23-26. The letters on the Mural are approximately 3 in. long and 2 in. wide. Ex. 23-23, 23-24. Though it can be viewed from most locations in the Auditorium, it is difficult to read the Mural from points beyond its immediate surrounding area. 30(b)(6) Tr. at 64, 153. At the time of its installation, a plaque was affixed to the Auditorium wall just beneath the Mural's bottom edge acknowledging it as a gift of the Class of 1963 ("the Plaque"). Zito Tr. at 15. The Plaque does not appear today and may have been painted over or removed when the Auditorium walls were painted approximately 15-20 years ago, although the City or School Committee did not direct its removal. 30(b)(6) Tr. at 55-57.

Directly across the Auditorium from the Mural is the second mural containing the text of the school creed. It is of the same size and shape, with the same lettering and a similar decorative design at the top. It contains the wholly secular school creed, which reads:

> I believe in Cranston High School West, maintained by the community for the development of character, citizenship and scholarship.
> I believe in its ideals of self-control, reliability, industry, cheerfulness, and courtesy as traits essential to worthy character.
> I believe it offers me an opportunity to work with others and for others but challenges me to think and act for myself.
> I believe it offers rich opportunities for me to develop in spirit, mind and body.
> Therefore, I believe it is my duty to my school to participate in its activities, to practice its code of sportsmanship, to protect its property and reputation, to love it and cherish its ideals.

> And I hereby resolve that, through my influence and example, I shall do all in my power to leave a richer school tradition to those who follow me.

*See* Ex. 7-2.

In addition to the two murals given to Cranston West by the Class of 1963, the Auditorium walls feature about two dozen additional student-given or student-created items. Ex. 23-19, 23-20, 23-21, 23-27, 23-28, 23-29, 23-75, 23-76; 30(b)(6) Tr. at 57-58. A small statue of a falcon (the School's mascot) is affixed to the wall to the left of the stage as viewed from the entrance. 30(b)(6) Tr. at 57; Ex. 23-18, 23-27, 23-57, 23-77, 23-78. The falcon statue was a gift of the Class of 1964 and bears a plaque identifying its origin. *Id.*; Bradley Tr. at 66. Class banners created by members of Cranston West graduating classes between 1985 and 2005 hang from the side and rear walls of the Auditorium. Ex. 23-32 through 23-35, 23-42 through 23-25, 23-55, 23-56, 23-58, 23-61 through 23-63, 23-67, 23-68; 30(b)(6) Tr. at 126-27. They generally bear the class year of the class that created them and feature colors, a depiction of the School mascot, and artistic themes meant to express the donating class's identity. Lemoi Tr. at 57-58, 62.

Beyond the Auditorium, the Cranston West campus features several other prominent displays of class gifts and historical markers. Lemoi Tr. at 54-55. The exterior of the main entrance includes a large stone monument bearing the School's name and text identifying the monument as a gift of the Class of 1998. Ex. 23-30, 23-54. A smaller stone monument dedicated to Cranston West alumni who lost their lives while serving in the U.S. military lies nearby. Ex. 23-31, 23-65, 23-73. The latter

monument was donated by the Cranston West Alumni Association. *Id.* A third stone monument in the area pays tribute to Ronald A. Gill, Jr., a member of the Class of 1995 and deceased veteran of the U.S. Coast Guard. Ex. 23-41, 23-53. The interior hallways and classrooms are dotted with items and memorabilia commemorating the construction of the School, its history and additional class gifts. *See, e.g.,* Ex. 23-36 through 23-38. Above the entrance to the Senior Class Council Office prominently appears a sign acknowledging the office as a gift of the Class of 1992. Ex. 23-50. An architectural rendering of design plans for the School as well as a collage of photos of students from decades past hangs outside the School library. Ex. 23-36, 23-59, 23-69. Trophy racks and awards cases line the hallway adjacent to the main office. Ex. 23-37, 23-38, 23-48, 23-49, 23-66, 23-71, 23-72. Plaques honoring former faculty and administrators appear within the interior of the School. Ex. 23-39, 23-51.

The main entrance to Cranston West is on the southerly side of the School's main building. Ex. 23-1, 23-2. After traversing an exterior staircase, one enters the School through a double set of glass doors into a lobby. Ex. 23-17, 23-40, 23-47, 23-52. Prominently featured in the lobby are a series of large, brightly colored banners that hang from the ceiling ("Lobby Banners"). Ex. 23-3 through 23-17, 23-47. The Lobby Banners set forth the Student Mission Statement, Community Mission Statement, Faculty Mission Statement, six separate statements of Academic Expectations, a statement of Social Expectations, and a Statement of Civic Expectations. *Id.* The Lobby Banners incorporate standards issued by the New England Association of Schools and Colleges ("NEASC"), a regional body that accredits public sec-

ondary schools in New England. Lemoi Tr. at 52-54. The Student, Faculty, and Community Mission Statements also appear in the introductory pages of a student handbook, or planner, distributed to the students at the commencement of each academic year. Ex. 13, 14 at CRA0293, CRA0384. The text of the secular school creed composed by Messrs. Bradley and Sullivan also appears within the same student handbook. *Id.* at CRA0297, CRA0388.

From the time Cranston West ceased prayer recitation during morning exercises in 1962, there has been no public recitation of prayer at the school. Bradley Tr. at 63; Dep. Tr. of J.A., July 11, 2011, ("J.A. Tr.") at 32, 37; 30(b)(6) Tr. at 39-40, 78-79; Zito Tr. at 7. The text of the Mural has not been recited publicly at the school since in or about 1962.[3] *Id.* In the almost 47 years between the Mural's installation in September of 1963 and July of 2010, an estimated 10,000 students and thousands more faculty members, parents and members of the community at large have attended the various events and functions held in the Auditorium. Ex. 27-2 (Ahlquist, Steven, *Philosophy On the Ground*: Interview with David Bradley, April, 2011 ("Bradley POTG Interview") at 12:05.

The Mural has been in place for nearly 50 years. Except for the complaint that is the subject of this case, the record is devoid of any complaints about the Mural. Lemoi Tr. at 43-44, 51; 30(b)(6) at 80, 82.

[3] While Mr. Lemoi evinced some recollection of public recitation, the weight of the testimony on this point is that public recitation of prayer at Cranston West ceased in 1962. *See* Lemoi Tr. at 50-51; 30(b)(6) Tr. at 38-39, 78-79; Bradley Tr. at 63; J.A. Tr. at 32, 37; Zito Tr. at 7.

### C. The Lawsuit

By letter dated July 6, 2010, Steven Brown, a local representative for the ACLU, relayed to Peter Nero, Superintendent of Cranston's School Department, a complaint Mr. Brown had purportedly received from a Cranston resident concerning religious references in the Mural. 30(b)(6) Tr. at 85, 111-12. The original complainant's two children are enrolled in Cranston public schools, but neither attends Cranston West. J.A. Tr. at 20. On August 16, 2010, the School Committee formed a subcommittee to determine what action, if any, should be taken in response to the complaint. ("the Subcommittee"). *See* School Committee and Subcommittee Meeting Minutes, Ex. 8-12 (hereinafter, "[meeting date] Minutes"). The Subcommittee met on November 30, 2010 and February 22, 2011. *See* Nov. 30 Minutes, Feb. 22 Minutes. The full School Committee met again on March 7, 21 and April 4, 2011. *See* March 7 Minutes, March 21 Minutes. The School Committee and Subcommittee heard extensive public comment concerning the Mural. Some of that testimony became quite heated, with many community members stating their personal views on the Mural and other hot-button issues, but Committee members repeatedly admonished community members to refrain from *ad hominem* arguments, and praised J.A. and other students for their thoughtful presentations on both sides of the debate. 30(b)(6) Tr. at 82-83; Aug. 16 2010 Minutes at 812; March 7 Minutes at 78. The committee also heard testimony from current Cranston West students that the Mural is not recited, but "is simply up there to remind all of us to strive to do our best and to be a better person," and "is just part of our history like the school creed

which was erected the same year by the same man." March 7 Minutes at 61 (comments of students P.M., S.A.).

At the March 7 meeting, the School Committee acknowledged the Subcommittee's recommendation that the City defend any lawsuit brought by the ACLU challenging the Mural. *Id.* at 75, 86. At its March 21 meeting, the School Committee authorized the placement of an "explanatory plaque, historical marker or other similar item" to accompany the Mural. The resolution authorizing a plaque stated that its purpose would be to ". . . help guarantee that student works of excellence be protected and conserved for current and future generations, and for historic and cultural reasons, without promoting any ethnic, political or religious content, element or elements contained or perceived to be contained therein." March 21 Minutes at 14.[4]

Defendants' 30(b)(6) witness explained the purpose for the Mural's continued display as follows:

> [T]his was really a historical piece of work recreated by a student that's akin to any other artwork that would be created by a student . . . and it ought to remain as an artifact, as a historical artifact.

[4] Though authorized by the School Committee at its March 21, 2011 meeting to do so, Defendants have not yet installed a plaque or other explanatory marker to accompany the Mural, principally out of concern that any alteration of the Mural subsequent to the filing of this lawsuit might prejudice Defendants. It came to light in discovery that, historically, an explanatory plaque was affixed to the Auditorium wall inches beneath the Mural identifying it as a gift of the Class of 1963. Zito Tr. at 15. Defendants do not object to the installation of a similar plaque at this time if approved by this Court, provided that doing so will not in any way prejudice Defendants, including by being construed as an admission of liability, entanglement with (or tainting of) the current Mural, or otherwise.

30(b)(6) Tr. at 18-19.

**D. The Plaintiff**

J.A. is a junior at Cranston West.[5] J.A. Tr. at 5. She enrolled as a freshman at the start of the 2009-10 academic year. *Id.* She is an atheist. *Id.* at 29. She claims she first noticed the Mural towards the end of her freshman year when a fellow student and friend of hers pointed it out. *Id.* at 12. She had been in the Auditorium approximately four to five times when the Mural was pointed out to her and did not notice it on any of the prior occasions. *Id.* at 13. As of July 11, 2011, she had been in the Auditorium approximately eight to ten times. *Id.* at 13, 33. She has made statements indicating she had no interest in the Mural until she learned that a controversy had already arisen in the summer of 2010: "The issue started over the summer [of 2010] when a concerned parent filed a complaint to the Rhode Island chapter of the [ACLU]"; Ex. 25, Conover, Ben, *An Interview with [J.A.]*, Atheist Soapbox, April 28, 2011, ("J.A. Soapbox Interview"); "I was not the person who first complained. However, when I heard about the issue, I recognized that it was more important than just a prayer on a wall," *id.*; "This all started for me last August [of 2010]," *Freethought Radio Rhode Island*, 88.1 FM, WELH, May 26, 2011, 34:00; "When I first heard about the issue, I wasn't sure how to show my support for the parent who filed the complaint or the ACLU,"; J.A. Soapbox Interview; "The ACLU has been involved from the beginning. They're the ones who . . . brought this com-

[5] J.A. is a minor child, so she is referred to using her initials, or as "Plaintiff."

plaint forward"; Ahlquist, Steven,[6] *Philosophy On the Ground*: Interview of J.A., March, 2011 at 23:45 ("J.A. POTG Interview"); "When I first heard about the issue, I found it very black and white. I assumed everyone would agree that it was a violation." Ex. 28, Miller, Monica, *[J's] Bravery: Challenging Religious Banners in Public School*, Humanist Network News, Spring 2011.

J.A. attended the School Committee and Subcommittee meetings of November 30, February 22 and March 7 and spoke in opposition to the Mural. November 30, February 22, March 7 Minutes. In early 2011, the ACLU reached out to her by email and inquired whether she would be willing to serve as the plaintiff in a lawsuit challenging the Mural. J.A. Tr. at 20-23. She agreed. *Id.*

At her deposition, J.A. stated that she became an atheist at about ten years old. *Id.* at 29. She further explained that since that time she has come to support the "cause" of someday seeing the removal of aspects of God from government. *Id.* at 28-30. She does not "think [religion] belongs in the government." *Id.* She further identifies herself as an "activist working towards removing [religion]" from the government. *Id.* This includes, she explained, removing religious references from U.S. currency and the Pledge of Allegiance and re-writing the National Motto. *Id.* She has made other comments indicating her challenge to the Mural is motivated by its perceived illegality, rather than its personal effect on her: "As an atheist and an American, this prayer discriminates against me and my decision not to believe in that

[6] Steven Ahlquist is J.A.'s uncle and the producer of the Philosophy on the Ground interview of J.A. For that reason, he is cited as the author of the piece. However, all statements cited from the interview are direct quotations of J.A. None are statements by Steven Ahlquist.

which cannot be proven. More importantly though, I am offended that the Constitution that has kept this country together for so long is being infringed upon and violated." Ex. 24 (J.A. correspondence, Feb. 23, 2011). She cites the promotion of tolerance and inclusion as her motives for challenging the Mural, but has made comments harshly critical of religious people in general, and Catholics in particular. She publicly stated, "I don't like them" (referring to the Catholic Church), that Catholics are "selfish," while atheists are "far more moral," and that Catholics "whine all the time" and are "hypocritical." J.A. POTG Interview at 51:45-54:30. She concluded her comments with: "I do judge them," (referring to Catholics). *Id.* Later, she stated that spiritualists were superior to religious people because "they don't have, say, a holy book that tells them to do a bunch of horrible things every day." Ex. 26-4, *Freethought Radio Rhode Island*, 88.1 FM, WELH, Jul. 20, 2011, at 30:20. Most recently, in the Facebook group she maintains to oppose the Mural, she stated: "Religion is poison to society and apparently not enough people realize this. So no, I will continue until religion stops polluting the poor minds of innocent people." Ex. 30-3, J.A. Facebook Posting, July 25, 2011.

Since publicly challenging the Mural, J.A. has made statements on the internet and in interviews with the press. She has stated repeatedly that she does not find the Mural offensive. Instead, she explained in one radio interview, "what's offensive . . . is that people are so adamant about keeping it." Ex. 26-1, *Freethought Radio Rhode Island*, 88.1 FM, WELH, March 11, 2011 at 5:51. She reiterated her position in a later interview: "the prayer banner isn't offensive. The message it gives is posi-

tive . . . It's supposed to be something that encourages kids . . . So, no, it's not really offensive." J.A. POTG Interview at 11:19. Again in the same interview she stated: "Yeah, I'm not offended by it, but you can't—can't violate the Constitution." *Id.* at 49:45. She characterized the instant case as "a small issue" that "might not really affect [her] everyday in [her] day to day life." *Id.* at 12:50. Similarly, she stated in an internet posting, "Honestly, I know that the prayer itself is not offensive. That's not the problem. . . . I think that religion is counter-productive and has absolutely no place in a public school where so many children are going to be seeing [the Mural] and possibly feeling offended by it." Ex. 30-1 at CRA0758.

Later, at her deposition, J.A. reversed her frequently-stated position that the Mural does not offend her, claiming:

> I said it because of the backlash that I was facing for opposing [the Mural]. I believe 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. I also wanted to keep a more professional attitude towards it. I wanted to act like a grown-up.

J.A. Tr. at 46-47.

She admits that no school official ever led anyone to recite the Mural, that she was never asked to remain silent while anyone recited the Mural, and that she cannot recall any school official ever referring to the Mural in any way prior to the recent the recent controversy. J.A. Tr. at 15, 36-37.[7]

[7] The Amended Complaint sets forth factual allegations concerning banners displayed at Hugh B. Bain Middle School ("Bain Banners"). Discovery revealed that neither J.A. nor Mark Ahlquist had ever seen or had any contact with the Bain Banners prior to this lawsuit. J.A. Tr. at 39; Ex. 4, Depo. Transcript of Mark Ahlquist, July 11, 2011, at 3-4. Thus, to the extent Plaintiff's claim still even includes a

### E. Procedural Posture

Plaintiff filed suit on April 4, 2011. On May 25, 2011 Plaintiff filed a Motion for Preliminary Injunction requesting that the Mural be covered up before the start of the 2011-12 academic year. On June 5, 2011, Plaintiff filed the Amended Complaint. On June 6, 2011, the Court entered an Order directing that the parties conduct expedited discovery in advance of a hearing on Plaintiff's Motion for Preliminary Injunction. The parties took depositions and exchanged written discovery during June, July and August. On August 19, 2011, the parties filed a Stipulation reflecting their agreement that Plaintiff's Motion for Preliminary Injunction be consolidated with trial on the merits and that memoranda of law with supporting documentary evidence be submitted to the Court in lieu of live testimony. The Court approved that stipulation on Aug. 30. Dkt. 15. Briefing concludes on September 23, 2011. A hearing on the consolidated proceeding is scheduled for October 13, 2011.

## ARGUMENT

### I. The Plaintiff does not have standing.

Neither Plaintiff nor Mark Ahlquist, her father, have standing to sue Defendants over the Mural. Plaintiff cannot claim what is commonly known as "offended observer" standing because her own statements demonstrate that she was not actually offended by the Mural. Nor has she taken additional actions, such as at-

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challenge to the Bain Banners, Plaintiff lacks standing to press that challenge. *See infra* Part I.C. Similarly, Plaintiff has inquired about an annual Memorial Day event held at Hugh B. Bain Middle School in discovery, which is not the subject of the Amended Complaint and which Plaintiff would lack standing to challenge. Defendants contend that any and all evidence concerning the Bain Banners or Memorial Event is not relevant, carries no weight and should be disregarded.

tempting to avoid the Mural, which are necessary components of such standing. Mere philosophical disagreement is insufficient to confer standing.

Plaintiff's father, Mark Ahlquist, lacks standing for similar reasons. He does not have next-friend standing because J.A. lacks standing. He does not have standing on his own behalf because he never viewed the Mural in person prior to filing the lawsuit. Ex. 4, Dep. Tr. of Mark Ahlquist, July 11, 2011, ("Mark Ahlquist Tr.") at 3. He does not have taxpayer standing because no taxpayer funds have been spent on the Mural.

**A. J.A. does not have offended observer standing.**

J.A. asserts standing on the sole basis that she, as a student at Cranston West, has come into the presence of a government display with which she disagrees. *See* Compl. ¶¶ 3, 33-34, 48-49. The "the irreducible constitutional minimum of standing" requires that the plaintiff "must have suffered an 'injury in fact'—an invasion of a legally protected interest which is [ ] concrete and particularized," *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The injury must be something more than "the psychological consequence presumably produced by observation of conduct with which one disagrees." *Valley Forge Christian Coll.* v. *Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982).

The First Circuit has never explored the definition of injury in cases involving Establishment Clause challenges to government ceremonies or displays. *See, e.g., Weisman* v. *Lee,* 908 F.2d 1090 (1st Cir. 1990) (affirming without comment district court decision which did not explain basis for standing); *Donnelly* v. *Lynch,* 691 F.2d 1029 (1st Cir. 1982) (based on municipal taxpayer standing). But many other courts

have grappled with this question and concluded standing in such cases is based upon "offensive" contact with a display. *See, e.g., Newdow* v. *Lefevre*, 598 F.3d 638, 642 (9th Cir. 2010) ("unwelcome direct contact with an . . . offensive . . . symbol") (citing *Vasquez* v. *L.A. Cnty.*, 487 F.3d 1246, 1253 (9th Cir. 2007)); *see also Suhre* v. *Haywood County,* 131 F.3d 1083, 1086, 1087 (4th Cir. 1997) (standing premised upon "unwelcome direct contact" with "offensive" display); *Hawley* v. *City of Cleveland*, 773 F.2d 736, 740 (6th Cir. 1985) (plaintiffs had to "assume special burdens" to "avoid unwelcome religious exercises" due to their frequent use of the airport with the challenged chapel) (citing *Valley Forge*); *Saladin* v. *City of Milledgeville,* 812 F.2d 687, 692 (11th Cir. 1987) (standing based upon "direct contact with the offensive conduct" plaintiffs sought to challenge).

But offensive contact cannot exist where the plaintiff fails to prove she was offended. As Judge Alito explained in *ACLU-NJ* v. *Twp. of Wall*, "[w]hile we assume that the [plaintiffs] disagreed with the [challenged] display for some reason, we cannot assume that the [plaintiffs] suffered the type of injury that would confer standing." 246 F.3d 258, 266 (3d Cir. 2001). There, the plaintiffs' case failed because they did not adduce evidence proving that they were actually offended by the particular display challenged on appeal: "neither [plaintiff] provided testimony regarding their reaction to the 1999 display, which was significantly different from the display in 1998." *Id.* For that reason, they had no standing to challenge the new holiday display.

The same is true here. Plaintiff fails to prove that she was actually offended by the Mural. Plaintiff's public statements in a variety of outlets, public and private, prior to her deposition said that she was ***not*** offended by the display, but that she simply thought the display was unconstitutional. This lack of offense is confirmed by the fact that she took no action with respect to the Mural until the ACLU began a campaign to remove it. The record is also devoid of any suggestion that she took steps to avoid contact with the Mural, a common requirement of standing in such cases. Taken together, these actions and admissions demonstrate that the plaintiff did not have offensive contact with the Mural, but instead wants to use the Mural's presence in her school as an opportunity to make a political point.

*1. J.A.'s public statements show she was not offended.*

Before the lawsuit started, J.A. repeatedly stated that she was not offended by the Mural. Her attempts to walk those comments back at her deposition are not remotely credible. Prior to filing the lawsuit, J.A. said:

- "The prayer banner isn't offensive. The message it gives is positive . . . It's supposed to be something that encourages kids . . . So, no, it's not really offensive." J.A. POTG Interview at 11:19.

- She characterized the instant case as "a small issue" that "might not really affect [her] everyday in [her] day to day life." *Id.* at 12:25-12:50.

- She said her reaction upon seeing the Mural for the first time with a friend as: "But we didn't really think much of it, we just kind of let it go, I guess." *Id.* at 1:50-1:55.

- She stated in an internet posting, "Honestly, I know that the prayer itself is not offensive. That's not the problem. . . . I think that religion is counter-productive and has absolutely no place in a public school where so many children are going to be seeing [the Mural] and possibly feeling offended by it." Defs.' Ex. 30-1 at CRA0758.

After filing the lawsuit, Plaintiff retracted these statements, saying that "I believe 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." J.A. Tr. at 46-47. But this statement is inconsistent with Plaintiff's actions. She claims fear of harassment, but she voluntarily gave the YouTube interview, multiple radio interviews, newspaper interviews, and spoke at an atheist conference on the subject. *See supra* p. 13-15; Ex. 30-3 (J.A. Facebook Posting, July 31, 2011). She has co-hosted an atheist radio program where she discusses the issue. *See* Freethought Radio Interview (Jul 20, 2011); *see also Freethought Radio Rhode Island*, 88.1 FM, WELH, Aug. 3, 2011. She also created and operated two different Facebook groups opposed to the prayer, the latest of which has nearly 2000 members and contains a number of statements which appear to be intentionally controversial and provocative to religious individuals. *See, generally,* Ex. 30-1. These are not the actions of a frightened student, but of a zealous advocate. J.A.'s own admissions demonstrate that she is not offended by the Mural itself, but by religion in general. And while she is free to advocate that point in the media and before legislative bodies, her political grievances do not give her the right to be heard in federal court. *See Newdow* v. *Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1016 (9th Cir. 2010) ("Newdow has no personal injury to contest its wording in the courts. Rather, his remedy must be through the legislative branch.").[8]

[8] Plaintiff's after-the-fact explanation that her comments about not finding the Mural offensive were meant to minimize backlash from Mural supporters lacks cre-

*2. J.A.'s delay in bringing the case shows she was not offended.*

The lack of injury in this case is confirmed by Plaintiff's delay in making a complaint or filing suit. By her own admission, Plaintiff was in the auditorium multiple times without noticing the Mural. J.A. Tr. at 12-13. When a friend pointed it out to her, she mentioned it to her father at home, but took no further action. As she later explained, "I guess I just kind of forgot about it, because I never did [complain]. I guess I kind of planned to, but it wasn't really the first thing on my mind." J.A. POTG Interview at 2:28.

It was only after a third party complained to the School Committee and a subcommittee was formed to discuss the issue that she decided to become involved. *See* J.A. Soapbox Interview; J.A. POTG Interview at 23:33; *id.* at 3:38 (after initially learning of ACLU complaint, "I didn't think I'd be involved, for sure."). These statements, corroborated by her delay in taking action demonstrate, that her alleged offense over the Mural was minimal.

*3. J.A. took no steps to avoid contact with the Mural.*

Finally, Plaintiff has no standing because she took no action to avoid contact with the Mural. Detours, schedule changes or other such actions by a plaintiff are crucial to demonstrate an injury in fact. As the Seventh Circuit explained in *ACLU of Illinois* v. *City of St. Charles*, "The fact that the plaintiffs do not like a cross to be

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dibility. Consider that one such comment—her statement that she does not find the Mural offensive but rather, "that people are so adamant about keeping it" (Ex. 26-1)—reveals a shift in focus away from the Mural itself and, in a personal way, toward those who support it—a strange way to curb backlash.

displayed on public property—even that they are deeply offended by such a display—does not confer standing . . . for it is not by itself a fact that distinguishes them from anyone else in the United States who disapproves of such displays." 794 F.2d 265, 268 (7th Cir. 1986) (internal citation omitted). Instead, the plaintiffs established standing only because "[t]hey say they have been led to alter their behavior—to detour, at some inconvenience to themselves, around the streets they ordinarily use." *Id.* The detour was significant because plaintiff's willingness "to incur a tangible if small cost serves to validate, at least to some extent, the existence of genuine distress and indignation, and to distinguish the plaintiffs from other objectors to the alleged establishment of religion by St. Charles." *Id.* The court recently reaffirmed this rule in *Freedom From Religion Foundation, Inc.* v. *Obama*, holding that plaintiffs had no standing to challenge a proclamation of the National Day of Prayer because "[p]laintiffs have not altered their conduct one whit or incurred any cost in time or money." 641 F.3d 803, 807-808 (7th Cir. 2011), pet. for rhr'g *en banc* denied Jun. 23, 2011. Without such actions, the only injury plaintiffs suffer is "psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III . . . ." *Valley Forge*, 454 U.S. at 485.

The Eleventh Circuit used a similar standard in *Glassroth* v. *Moore*, where plaintiffs challenged a Ten Commandments monument in the courthouse. "Under these facts, the two plaintiffs who have altered their behavior as a result of the monument have suffered and will continue to suffer injuries in fact sufficient for stand-

ing purposes." 335 F.3d 1282, 1292 (11th Cir. 2003). The altered behavior was the basis for this determination, even though plaintiffs were attorneys who had to pass by the monument in order to conduct business at the courthouse. *See id.; see also ACLU of Ga.* v. *Rabun Cnty. Chamber of Commerce, Inc.*, 698 F.2d 1098, 1108 (11th Cir. 1982) (plaintiffs had standing to challenge cross display in state park because they "are presently forced to locate other camping areas or to have their right to use Black Rock Mountain State Park conditioned upon the acceptance of unwanted religious symbolism"). There is no evidence that J.A. tried to avoid the Mural.

Although she learned of the Mural prior to the end of the school year, and prior to the time that it became a subject of public discussion, J.A. did not raise the issue with the administration or take any other steps to avoid contact with the Mural she now deems offensive. *See* 30(b)(6) Tr. at 82 (no student complaints prior to the summer 2010 ACLU complaint); J.A. Soapbox Interview (she did not bring a complaint but only became involved after someone else complained in Summer 2010); J.A. POTG Interview at 23:33 (the ACLU was the driving force behind the complaints). Plaintiff admits she was in the auditorium four to five times without noticing the Mural. *See* J.A. Tr. at 12-13, 33. Even after the controversy arose, Plaintiff continued to voluntarily attend extracurricular activities held in the Auditorium. *Id.* at 13-14 (attended auditions, school plays, and other events). Plaintiff did not change her schedule, request that the school move events, or miss extracurricular activities, despite her purported offense at being in the same room as the Mural. Her unwillingness to change her plans to avoid the Mural demonstrates that she

has not suffered any concrete and particularized injury, but merely the "psychological consequence" produced by observation of a display with which she disagrees. *Valley Forge,* 454 U.S. at 485. This is not sufficient to establish standing.

Because Plaintiff fails to establish standing as an offended observer of the Mural, her challenge to it should be dismissed.

**B. Mark Ahlquist does not have taxpayer standing.**

Mark Ahlquist asserts standing as parent, guardian and next friend of J.A. Compl. ¶ 3. But he has no such standing because J.A. lacks standing as an offended observer. Nor can Mr. Ahlquist claim standing on his own behalf. He never saw the Mural in person prior to the filing of the lawsuit. Mark Ahlquist Tr. at 3-4. Because he lacks offensive direct contact with the Mural, he lacks standing to challenge it on his own behalf. *See supra* Part I.A.

Although the complaint does not state that he asserts standing as a taxpayer, it does note that he is a resident and taxpayer of the city of Cranston. Compl. ¶ 3. Whether he is or not is irrelevant. As has become clear through discovery, the City has not expended any taxpayer funds on the Mural. *See* Zito Tr. at 13-15 (Mural donated with funds from graduating class); 30(b)(6) Tr. at 50-54 (Mural donated as class gift with funds raised and controlled by student officers). The most basic requirement of taxpayer standing is a showing that the plaintiff has a "direct and particular financial interest" in the suit. *Ariz. Christian Sch. Tuition Org.* v. *Winn*, 131 S. Ct. 1436 (2011) (quoting *Doremus* v. *Bd. of Educ. of Hawthorne,* 342 U.S. 429, 434-35 (1952)). Mr. Ahlquist cannot make this showing. Private parties paid to erect the Mural, and it has been in place for fifty years, long before Mr. Ahlquist became

a Cranston taxpayer. *See* Mark Ahlquist Tr. at 3 (Mr. Ahlquist has lived in Cranston since the mid-1990s). Therefore Mr. Ahlquist cannot claim standing on his own behalf.

### C. Plaintiff does not have standing to challenge the banner at Bain Middle School.

Even were the Court were to determine that Plaintiff had standing to challenge the Mural, it should exclude any evidence pertaining to the banner at Hugh B. Bain Middle School. *See* Compl. ¶¶ 25-26 (discussing Bain banner). Plaintiff admits she has suffered no injuries stemming from the banner. Pl.'s Resp. to Interrog. 6. She has never viewed the banner in person. Pl.'s Resp. to Interrog. 9. Nor has she attended any events at Bain Middle School. J.A. Tr. at 39-40 (no recollection of visiting the school). Without an injury of any sort, she cannot claim standing to challenge the Bain banner. *See Lujan*, 504 U.S. at 560 ("the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized") (citations omitted); *Doe* v. *Tangipahoa Parish Sch. Bd.*, 494 F.3d 494 (5th Cir. 2007) (en banc) (no standing to challenge school board prayer where there was no evidence that any plaintiff was actually present to hear the prayer); *see also Rio Linda*, 597 F.3d at 1016-17 (plaintiffs had no standing to challenge the 1954 pledge of allegiance act, but could challenge the act mandating it be said in their own schools).

In addition, because Plaintiff does not have standing to challenge the banner, evidence regarding the Bain banner should be excluded as irrelevant. Fed. R. Evid. 402.

## II. The Defendants have not violated the Establishment Clause.

Even were the Court to find standing, Plaintiff's Establishment Clause claim fails on the merits.[9] To decide an Establishment Clause claim, the First Circuit looks to "three interrelated analytical approaches: [1] the three-prong analysis set forth in *Lemon* v. *Kurtzman,* 403 U.S. 602, 612-13 (1971); [2] the 'endorsement' analysis, . . . and [3] the 'coercion' analysis." *Freedom From Religion Found.* v. *Hanover Sch. Dist.*, 626 F.3d 1, 7 (1st Cir. 2010). The first two prongs of the *Lemon* analysis largely overlap with the Endorsement test. *See Freethought Soc'y of Greater Philadelphia* v. *Chester Cnty.*, 334 F.3d 247, 256-62 (3d Cir. 2003) (discussing the relationship among the tests at length); *see also Hanover,* 626 F.3d at 7-12 (treating the tests separately, although the analysis largely overlaps). The Mural is constitutional no matter which of the three tests is applied.

### A. The Mural passes the *Lemon* test.

Under the *Lemon* test, the challenged government action "[f]irst . . . must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the [action] must not foster 'an exces-

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[9] Although the complaint generically alleges the "denial of rights protected by the First and Fourteenth Amendments," Compl. ¶ 1, it appears from Plaintiff's preliminary injunction motion that she intends only to advance a claim under the Establishment Clause. *See, generally,* Dkt. 6 (preliminary injunction brief); *see also* Compl. ¶ 52 ("Count I (42 U.S.C. § 1983, First Amendment)"). Regardless of Plaintiff's intentions, the complaint fails to state an actionable Fourteenth Amendment claim, as it does not "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Gargano* v. *Liberty Int'l Underwriters, Inc.*, 572 F.3d 45, 48-49 (1st Cir. 2009) (quoting *Bell Atl. Corp.* v. *Twombly,* 550 U.S. 544, 555 (2007)).

sive government entanglement with religion.'" *Hanover,* 626 F.3d at 9 (quoting *Lemon,* 403 U.S. at 612-13).

In order to apply the *Lemon* test, the Court must first determine which government action is under scrutiny. As an initial matter, there is a question of whether there is any government action that could run afoul of the Establishment Clause. The School Committee *in 2010* did nothing more than (1) decide not to remove the Mural at Plaintiff's request, and (b) authorize an explanatory plaque for the Mural. It is unclear from existing caselaw whether merely deciding not to remove an historic artifact that contains religious content can by itself violate the Constitution. It would be strange if the First Amendment required government bodies to seek out and destroy historic references to religious ideas.

What is clear is that the only action or inaction that could possibly be at issue is the *current* School Committee's decision not to do anything regarding the Mural other than post an explanatory plaque. In Establishment Clause cases, while history may be relevant in providing context, courts focus upon recent actions. "Our task is to consider the validity of the statute before us, not the one enacted fifty years ago." *Boyajian* v. *Gatzunis*, 212 F.3d 1, 7 (1st Cir. 2000) (citing *Walz* v. *Tax Comm'n of City of New York*, 397 U.S. 664, 688 n.8 (1970) ("The only governmental purposes germane to the present inquiry . . . are those that now exist.")).

In cases involving longstanding government displays, the focus is on the recent actions of the government taken with respect to the display. *See Chester Cnty.*, 334 F.3d at 262 ("the primary focus should be on the events of 2001, when the County

refused Flynn's request" to remove a historic Ten Commandments plaque from the county courthouse). In this case, actions taken by the School Committee as constituted in 1958-63 are at best helpful in understanding how the Mural came into being. But the original decision to accept the Mural does nothing more than that, especially because we know so little about it. *See* 30(b)(6) Tr. at 76 (Q: "Do you have any information concerning the intent of the school committee and/or the city in accepting the gift . . . in or about 1963? A: No."); *id.* at 6-8 (detailing Lombardi's in-depth research in preparation for 30(b)(6) deposition). Making any further investigation would be just as absurd as an inquiry into Roger Williams' purpose in naming the City of Providence as he did, and perhaps more so—we actually have a contemporaneous account of the naming of Providence: "I Roger Williams . . . having in a sense of God's merciful providence unto me in my distress, called the place, Providence." Staples, William R., *Annals of the town of Providence* 30 (Knowles and Vose 1843) (quoting Roger Williams, deed (Dec. 20, 1661)). The School Committee had a secular purpose in deciding not to remove the Mural at Plaintiffs' request.

The School Committee's purpose in deciding to take no action with respect to the Mural despite Plaintiff's complaints was entirely secular. In order to show a violation of the purpose prong of the *Lemon* test, a plaintiff must prove that "the government acts with the ***ostensible and predominant*** purpose of advancing religion." *McCreary Cnty.* v. *ACLU of Ky.*, 545 U.S. 844, 860 (2005) (emphasis added). The purpose inquiry is based upon "an understanding of official objective emerg[ing] from readily discoverable fact," and in making this determination, courts refrain

from "any judicial psychoanalysis of a drafter's heart of hearts." *Id.* at 862. Instead, the inquiry is made from the perspective of "an objective observer, one who takes account of the traditional external signs that show up in the text, legislative history, and implementation of the statute, or comparable official act." *Id.* (internal quotation and citation omitted). Courts generally defer to the legislators' stated purpose. *See, e.g., Sherman ex rel. Sherman* v. *Koch*, 623 F.3d 501, 513 (7th Cir. 2010) ("Where 'a legislature expresses a plausible secular purpose . . . courts should generally defer to that stated intent.'" (quoting *Wallace* v. *Jaffree*, 472 U.S. 38, 74-75 (1985) (O'Connor, J., concurring))); *Croft* v. *Perry*, 624 F.3d 157, 166 (5th Cir. 2010) ("Courts are 'normally deferential to a [legislative] articulation of a secular purpose.'" (quoting *Edwards* v. *Aguillard,* 482 U.S. 578, 587 (1987))). The purposes of third parties, such as citizens who speak out on the issue, are irrelevant. *See, e.g., Modrovich* v. *Allegheny Cnty.,* 385 F.3d 397, 412 (3d Cir. 2004).

The Defendants' purpose was to retain the Mural in order to recognize the history and tradition of Cranston West and respect the students and student artists who donated it. As they explained in their resolution, such displays are "maintained out of respect for the student artist, to help guarantee that student works of excellence be protected and conserved for current and future generations, and for historical and cultural reasons without promoting any ethnic, political or religious content, element or elements contained or perceived to be contained therein." March 21 Minutes at 14. *See also* 30(b)(6) Tr. at 95-96 ("It was not intended to convey a religious

purpose, but rather to convey a historical point in time, a gift from the class of '63 . . .''). This is a wholly secular purpose, perfectly constitutional under *Lemon*.

The contemporaneous statements of the school committee members are consistent with this secular purpose. Perhaps the most succinct statement was from Chair Ianazzi, who said:

> I support keeping the Mural at Cranston West. That support is not based on religion. That support is based on a history and a tradition and sense of what Cranston stands for. Cranston stands for the code of being and the morals that are expressed in that Mural. Cranston tradition is rich and Cranston's tradition deserves to remain at Cranston West for years to come.

March 7 Minutes at 85; *see also id.* (Committee Member McFarland: "there was no religious value," and "I think it is an artistic approach."). As Lombardi later explained, "I told my colleagues it never became a debate between God and not God. It was whether to keep this tablet, a tablet created in 1963 by a student and authorized by a student council to be up on the wall, and that's all it was." 30(b)(6) Tr. at 102. Even members who voted against the Mural stated that the issue was not one of religious establishment, but the fear of lawsuits.[10]

This understanding of the School Committee's purpose is supported by the context and history of the School Committee's decision to take no action. The Mural

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[10] Committee Member Culhane: "So I will not be supporting the resolution to fight the ACLU. Not because I want the banner taken down, I can't see how anyone is offended by those words and while our students spoke so eloquently on how they feel I don't agree with them. I believe that if we had the money to fight this the banner should stay." March 7 Minutes at 82. Committee Member Ruggieri: "I really honestly wish there was another option besides keep it or let it go because as I have said before, I think that the heart of the message is something that we all should strive for . . . . I don't believe I can support keeping the banner because I believe it would cost the city too much." *Id.*

was placed on the Auditorium wall in 1963, alongside a matching mural containing a school creed (a display Plaintiff does not, and cannot, challenge as being religious). *See supra* pp. 4-8. It is surrounded by other, unquestionably secular class banners and gifts. *Id.*

The Mural was undisturbed and unremarkable for nearly fifty years, until the ACLU filed a complaint, and Plaintiff J.A. subsequently came forward to sue. *See* 30(b)(6) Tr. at 80-82 (describing peaceful history of the Mural); Lemoi Tr. at 43-44, 51 (same); J.A. Soapbox Interview (J.A. discussing initial complaint and her involvement); J.A. POTG Interview 23:33 (same). Only then did the Mural become the subject of controversy. The objective observer, aware of this history, could only conclude that the School Committee's purpose was the preservation of school history, not the promotion of religion.

Because there is no evidence of improper purpose, Plaintiff focuses narrowly on the Mural's content. *See* Dkt. 6 at 25-30 (Plaintiff's preliminary injunction brief making this argument). But content is not dispositive. In *Weinbaum* v. *City of Las Cruces*, 541 F.3d 1017 (10th Cir. 2008), the Tenth Circuit upheld a mural in an elementary school with a central element containing a common religious symbol—three Latin crosses. The court found that the district's secular purpose for the mural, "namely that student participants in an after-school program created the artwork—was genuine." *Id.* at 1037. The mere fact of the mural's content was not dispositive. Instead, the plaintiff needed to make some showing on purpose which "address[ed] its context and history." *Id.* Context and history showed that the crosses

in the mural were included as a common symbol of the City of Las Cruces. *See id.* The fact that a common religious symbol found its way onto the schoolhouse wall was not dispositive. The context and history of the display were what mattered.

That context and history also distinguish the Defendants' actions from those in *McCreary, Stone*, or *Wallace*, the latter two of which are cases where the Supreme Court found an improper purpose behind an action in public schools. In those cases, the government imposed some new, overtly religious text or practice, and it was plain from the nature of the enactment and the context of the displays that they served no secular purpose. In *McCreary*, it was a resolution calling for a copy of the Ten Commandments—and no other document—to be posted "in 'a very high traffic area' of the courthouse." 545 U.S. at 851. In *Stone* v. *Graham,* 449 U.S. 39 (1980), it was a statute requiring that the Ten Commandments—and no other document—be posted on the wall of every classroom in the state. In *Wallace,* 472 U.S. 38, it was a law mandating that schools hold a moment of silence each morning, adding legislative suggestion that the silence should be used for voluntary prayer. Those events are strikingly different from the events here, where the School Committee did not attempt to foist some new religious display on students, but instead simply decided not to paint over a mural that had hung undisturbed for decades.

1. *The School Committee's decision not to remove the Mural does not advance religion.*

The School Committee's decision not to remove the Mural at Plaintiff's request does not advance religion. In order to determine whether leaving the Mural in place advances religion, the Court "must consider the text as a whole and must take ac-

count of context and circumstances." *Hanover*, 626 F.3d at 10 (citing *Van Orden* v. *Perry*, 545 U.S. 677, 701 (2005) (Breyer, J., concurring)). Given the proper context, a seemingly religious display—even one whose text is composed entirely of Scripture—can have a secular effect because it sends a secular message. In *Van Orden*, the Court found that the Ten Commandments monument "communicates not simply a religious message, but a secular message as well." 545 U.S. at 701. Similarly, in *Hanover,* the fact that the Pledge "has some religious content, however, is not determinative of the New Hampshire Act's constitutionality." 626 F.3d at 7. *Cf. Pleasant Grove City* v. *Summum*, 555 U.S. 460, 129 S. Ct. 1125, 1135-37 (2009). (monuments convey many different meanings depending on physical and temporal context).

In order to determine what message is being sent, it is particularly important to consider the context in which the display is presented: the "circumstances surrounding the display's placement," the "physical setting," and, perhaps most important, the presence or absence of controversies surrounding the display. *Van Orden,* 545 U.S. at 701-03 (Breyer, J., concurring). Here, all three of these factors show that the Mural does not endorse religion.

The circumstances surrounding the Mural's placement are described above. *See supra* pp. 4-6. The text was written as a school prayer at a time when such prayers were both commonplace and constitutional. *See* Bradley Tr. at 35, 40-41 (text written in 1958-59 school year); 30(b)(6) Tr. at 45-46 (school prayers were commonplace throughout Rhode Island at the time). The prayer was written by a committee of

students as part of a project to create an identity and traditions for the new school. 30(b)(6) Tr. at 29-32. The prayer was written with minimal input and oversight from school officials. *See id.*, Bradley Tr. at 40, 49-51. After the Supreme Court's decision in *Engel* v. *Vitale*, the school stopped reciting the prayer. *See* 30(b)(6) Tr. at 36-37. Shortly after graduation, the Class of 1963 paid to have the prayer and school creed painted on the walls as a class gift to the school. Zito Tr. at 10-11, 13-15; 30(b)(6) Tr. at 52-53. The school accepted the gift, although there is no record of what discussions or actions, if any, were taken by the School Committee at the time. 30(b)(6) Tr. at 54-55. These facts demonstrate that the Mural was created by students, paid for by students, and painted on the wall at the direction of students. The school district had a passive role of accepting the gift. In this way, the Mural is akin to the Ten Commandments monument in *Van Orden*. It was the gift of a third party and accepted and maintained out of respect for that party.

The identity of that third party—a graduating class—is also relevant to the analysis. In *Van Orden*, it was relevant that the monument was donated by a "primarily secular" organization. 545 U.S. at 701 (Breyer, J., concurring). That organization endeavored to come up with a text of the Ten Commandments that transcended religious differences. *Id.* This gift meets these requirements and then some. It communicates a secular message of school tradition and history. It was donated by a secular organization—a graduating class. The text is the work of a student who endeavored to make the prayer inclusive. *See* Bradley Tr. at 53-54; Bradley POTG Interview at 15:39; Ex 27-2. It contains no overtly religious language, apart from

the salutation and "amen," and speaks entirely of secular aspirations such as being helpful to teachers and kind to peers. *See* Ex. 7-2. Any religious message is subordinate to the secular message of school history, tradition, and moral aspirations.

The Mural is part of the school's history and tradition. Such tradition is important at Cranston West. 30(b)(6) Tr. at 48-49. It has a tradition, at least twenty-five years old, of hanging student-designed banners in the auditorium to commemorate the graduating class. 30(b)(6) Tr. at 126-28. Those banners are hung on the walls adjacent to the prayer and creed murals and the school mascot. *See supra* p. 8; *see also* Ex. 23-32 through 23-35, 23-42 through 23-25, 23-55, 23-56, 23-58, 23-61 through 23-63, 23-67, 23-68 (photos of banners).

These traditions also inform the physical setting of the Mural. As in *Van Orden*, "[t]he physical setting of the" Mural "suggests little or nothing of the sacred." 545 U.S. at 702 (Breyer, J., concurring). There, the display sat in a large park with seventeen other monuments and many historical markers, "all designed to illustrate the 'ideals' of those who settled in Texas and of those who have lived there since that time." *Id.*

Here, the Mural is located in a large auditorium surrounded by a matching school creed mural, the school mascot, and class banners from the mid-1980s to the present. *See supra* p. 5, 8-9; 30(b)(6) Tr. at 59-60 (class banners from 1980s on). All are designed to show something about the students who created them and the graduates of Cranston West. These are only some of many displays documenting the history and traditions of Cranston West; the halls are lined with photographs, pla-

ques and trophies commemorating the school's history. *See, e.g.*, Ex. 23-37, 23-38. Large stone displays around the main entrance identify the school and pay tribute to graduates who died while serving in the military. *See, e.g.*, Ex. 23-31. Class gift plaques adorn offices and classrooms. Ex. 23-50, 23-54. Historic photographs, trophy cases, and plaques honoring faculty and staff line the halls. Lemoi Tr. at 54-55; *see, e.g.*, Ex. 23-37. The Lobby Banners set forth a variety of mission statements and academic expectations for the school. Lemoi Tr. at 51-53; Ex. 23-3 through 23-17, 23-47. Amidst all these messages, along the wall of an infrequently-used room, hangs the Mural.

The physical setting of the banners demonstrates that the Mural is not a religious decoration, but a historical one. Each of the displays is the work of Cranston West students from a particular time period, and each relates somehow to school history or tradition. *See* 30(b)(6) Tr. at 58-59 (banners must relate to the school by using school colors, mascot, etc.). The displays are of varying sizes and types, showing that they reflect the students who designed them. Taken together, this context demonstrates that the school intended the historical and traditional message to predominate.

Finally, the Mural's history demonstrates that no endorsement occurred. Justice Breyer found it "determinative" that "40 years passed in which the presence of this monument, legally speaking, went unchallenged (until the single legal objection raised by petitioner)." *Van Orden*, 545 U.S. at 702 (Breyer, J., concurring). Here the Mural has gone unchallenged for even longer than the *Van Orden* Ten Command-

ments monument: nearly fifty years. *See* 30(b)(6) Tr. at 82, 84-85 (no student complaint until late 2010). "[T]hose 40 years suggest more strongly than can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the [Mural] as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect . . . ." *Van Orden*, 545 U.S. at 702 (Breyer, J., concurring). The history suggests that the nearly 10,000 students who have passed through Cranston West have "considered the religious aspect of the [Mural's] message as part of what is a broader moral and historical message reflective of a cultural heritage." *Id.* at 703 (Breyer, J., concurring).

Compare this history to that of the display invalidated in *McCreary*. There, the display was put in place only a few months before the litigation, amidst controversy over its installation. *See McCreary,* 545 U.S. at 851-53. The Ten Commandments monument was intentionally placed in a prominent location in the courthouse, and originally placed alone, with no similar displays nearby. *Id.* at 851-52. A lawsuit was filed almost immediately. The displays were then modified during litigation to include a number of additional historical texts, each with a religious theme or prominent religious language. *Id.* at 853-54. The displays were then modified yet again with less overtly religious documents during the appeal. *Id.* at 856. As a result of the history and context, "[t]he reasonable observer could only think that the Counties meant to emphasize and celebrate the Commandments' religious message." *Id.* at 869. None of these characteristics are present here.

The Mural's long history, standing undisturbed and almost entirely without comment, further demonstrates that it is a benign expression of school history and student art. Its message expresses neither exclusion nor favoritism, but history and tradition. Its effect is simply to recognize student artists and school history. It is indistinguishable from the Ten Commandments monument in *Van Orden*.

The Establishment Clause does not require that decades-old displays be continually reviewed and replaced, because "the world is not made brand new every morning." *McCreary*, 545 U.S. at 866. This rule is particularly important in New England, where many historical markers use religious language. If history and context were irrelevant, William Bradford's famous quotations could not appear at the Plymouth Founder's Monument, the Old North Church could not be part of the (city-maintained) Freedom Trail, and the inscription *Non Sed Homine Sed Sub Deo Et Lege* ("Not under man, but under God and the law.") would be chiseled from above the bench of the Rhode Island Supreme Court.

*2. The Mural does not promote excessive entanglement with religion.*

Finally, the Mural is also constitutional because it does not create excessive entanglement with religion. The excessive entanglement prong, developed in religious school funding cases, is primarily an issue when government funding requires intrusive oversight of religious recipients. *See, e.g., Lemon*, 403 U.S. at 616 (linking "state aid" to excessive entanglement); *Chester Cnty.*, 334 F.3d at 258 n.8 (associating "school funding" and the "'entanglement' prong"). Government displays are generally dealt with under the purpose or effects prongs, not excessive entanglement. *See, e.g., Van Orden*, 545 U.S. at 691-92 (ruling based on "dual significance," reli-

gious and secular, of monument"); *McCreary Cnty.*, 545 U.S. at 881 (upholding an injunction against the 10 Commandments "[g]iven the ample support for the District Court's finding of a predominantly religious purpose behind the . . . display").

No entanglement has occurred here. The prayer was written fifty years ago by a student, not the School Committee. 30(b)(6) Tr. at 29-30; Bradley Tr. at 40-41. It was placed in the auditorium at the direction of the graduating class as a gift from that class, not some religious entity. Zito Tr. at 10-15, 18-20. It has remained virtually untouched since that time. 30(b)(6) Tr. at 55-57. No entanglement has occurred.

For all these reasons, the Mural satisfies the *Lemon* test, and therefore does not violate the Establishment Clause.

**B. The Mural passes the endorsement test.**

The Mural is also constitutional under the "related endorsement analysis" of *Lynch* v. *Donnelly*. *See Hanover*, 626 F.3d at 7 (applying "'endorsement' analysis"). Plaintiff's primary argument with respect to the endorsement test is that *Van Orden* and other cases are inapposite because the Mural appears in a public school. *See* Dkt. 6 at 15-20. But the mere fact that a display is in a public school is not determinative. Here, the Mural is perfectly constitutional in its historic setting.

*1. The Mural's context and history demonstrate no endorsement of religion.*

"Under the related endorsement analysis, courts must consider whether the challenged governmental action has the purpose or effect of endorsing, favoring, or promoting religion." *Hanover*, 626 F.3d at 10 (citing *Cnty. of Allegheny* v. *ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 593-94 (1989)). The question of endorse-

ment, like the question of purpose above, is decided through the eyes of the objective observer. "[I]n the endorsement analysis, the court assumes the viewpoint of an 'objective observer acquainted with the text, legislative history, and implementation of the statute.'" *Hanover*, 626 F.3d at 11 (quoting *Santa Fe Indep. Sch. Dist* v. *Doe*, 530 U.S. 290, 308 (2000) (O'Connor, J., concurring in the judgment)). This is a judicial determination made by the court, and is based upon a complete review of the record, not the opinion of a single individual or putative expert. *See id.* As described above, the history and context of the Mural convey no message of endorsement.

*2. The Mural's setting in a high school does not change the result of the endorsement analysis.*

Because the Mural is virtually indistinguishable from the *Van Orden* monument, Plaintiff attempts to argue that the Mural is somehow different because it is located in a public school. *See* Dkt. 6 at 15-22. This does not save Plaintiff's claim. Courts may not base their inquiry "on the basis of what the youngest members of the audience might misperceive." *Good News Club* v. *Milford Cent. Sch.,* 533 U.S. 98, 119 (2001). Rather, "[t]he school context changes these objective inquiries only slightly." *Weinbaum,* 541 F.3d at 1032. The standard of care is higher with elementary school children, somewhat lower for middle school children, lower still for high school students. *See Parker* v. *Hurley,* 514 F.3d 87, 100 (1st Cir. 2008) ("Just as university students 'are less impressionable than younger students' when it comes to school policies regarding religion, . . . so also are high school students less impressionable than the very youngest children" (citations omitted)); *see also Hanover,* 626 F.3d at 3-4, 8 (noting standard of care and upholding Pledge recitation in elementa-

ry schools). Courts have approved a number of potentially or partially religious messages in the public school setting. *See, e.g., Rio Linda*, 597 F.3d at 1012 (upholding the statement of the Pledge of Allegiance, including the words "under God"); *Hanover*, 626 F.3d at 3-4 (same); *Weinbaum*, 541 F.3d at 1037 (upholding crosses representing city history on school property).

The facts of the case render this a distinction without a difference. The Mural is no more religious than the acceptable phrase "under God" the First Circuit upheld in *Hanover*. As the First Circuit recognized there, the mere fact that an allegedly religious display occurs in a public school is not the end of the inquiry. No endorsement occurred in the Pledge because, even in the public school setting, the plaintiffs were "not *religiously* differentiated from their peers merely by virtue of their non-participation in the Pledge." *Hanover,* 626 F.3d at 11 (emphasis in original). This is even more true here, where no one is required to recite or otherwise demonstrate assent or dissent from the text of the Mural. Bradley Tr. at 63; J.A. Tr. at 32, 37; 30(b)(6) Tr. at 39, 78-79; Zito Tr. at 7.

The *Hanover* court also found it important, even in the public school setting, that the challenged religious language occurred as part of an otherwise secular exercise. *See Hanover*, 626 F.3d at 12 (comparing the purely religious display in *County of Allegheny* with the mixed display in *Lynch*). As the court explained, "[t]he phrase is surrounded by words that modify its significance—not by changing its meaning, but rather by providing clarity to the message conveyed and its purpose." *Id.* So too, the challenged language in the Mural is situated in a secular context. The religious text

of the prayer—the words "Heavenly Father," "Amen," and the phrase "School Prayer" itself—are balanced by the secular content of the message, which does not praise God or ask for mercy, but instead states ordinary moral aspirations such as "be[ing] kind and helpful to our classmates and teachers," "be[ing] good sports," and "smil[ing] when we lose." Ex. 7-2.

Even more important, the Mural occurs in a larger secular context—a school auditorium, where it is mirrored by a secular "School Creed" and surrounded by two dozen displays commemorating other graduating classes. *See supra* pp. 5-8. This is distinct from the Ten Commandments displays invalidated in *Stone,* where, by law, a copy of the Ten Commandments would be hung in each individual classroom, regardless of context. 449 U.S. at 39 n.1. A single 50-year-old student-designed Mural, accepted as a gift and displayed together with other class gifts, is strikingly different than a government-mandated display of religious text hung without secular context in every classroom in the state.

**C. The Mural passes the coercion test.**

There can be no serious claim that the Mural fails the coercion test. No coercive action has been taken against Plaintiff. The coercion test is applicable where "[s]tate officials direct the performance of a *formal religious exercise . . . .*" *Hanover,* 626 F.3d at 13 (quoting *Lee* v. *Weisman,* 505 U.S. 577, 586 (1992)) (emphasis added in *Hanover*). The First Circuit found the lack of a formal religious exercise dispositive in *Hanover*. *See id.*; *see also Briggs* v. *Mississippi*, 331 F.3d 499, 505 (5th Cir. 2003) (coercion test "is facially inapplicable" to case involving religious symbol on school property). Here, there is no recitation of the prayer at all, so the risk of coer-

cion is even more attenuated than it was with the Pledge in *Hanover*. Because Plaintiff has not been pressured to participate in any religious ritual, she has not experienced unconstitutional coercion. The Mural therefore passes the coercion test.

**III. Plaintiff is not entitled to injunctive relief.**

For the reasons stated above, Plaintiff is not entitled to either preliminary of permanent injunctive relief. Her lack of concrete injury demonstrates that she has not and will not suffer irreparable harm if the Mural remains. The facts surrounding her Establishment Clause challenge demonstrate that she is unlikely to succeed on the merits. Therefore the Court should deny her motion for preliminary injunction and enter judgment on behalf of the defendants.[11]

**CONCLUSION**

For all the foregoing reasons, judgment should be entered in favor of Defendants.

Respectfully submitted,

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[11] To the extent required under the federal or local rules, Defendants hereby formally object to and oppose Plaintiff's Motion for Preliminary Injunction.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 9th day of September, 2011, the within document was filed electronically and made available for viewing and downloading from the Court's Electronic Case Filing System by all parties, represented as follows:

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