UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

MARK AHLQUIST, as next friend, parent and guardian of J-- A--, a minor v. 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' REPLY BRIEF

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INTRODUCTION

Plaintiff's trial brief demonstrates conclusively that she cannot prove her case. Plaintiff's brief makes five primary mistakes. First—and most importantly—it fails to properly apply the governing precedents of the Supreme Court and the First Circuit on the Establishment Clause. Second, it mischaracterizes the record, including a number of mistakes about key facts. Third, it misstates the governing law on offended observer standing. Fourth, it relies upon inadmissible evidence. Fifth and finally, it fails to state a claim for injunctive relief.

For all its lengthy statements about the nature and purpose of the Establishment Clause, Plaintiff's brief falls short where it counts—in applying the governing law to the facts of this case. That is because, under the governing law, it is clear that the School Committee must prevail. Plaintiff's sermonizing on the nature of the law overlooks a critical fact—that our Establishment Clause is neither a command of hostility toward religion, nor a directive that our historical displays be scrubbed clean of religious references.

RESPONSE TO PLAINTIFF'S MISSTATEMENT OF FACTS

Plaintiff's recitation of the facts contains a number of points which are either unsupported by the evidence or a distortion of it. The Court should reject these statements and the inferences Plaintiff suggests should be drawn from them.

The Mural's Origin

The record is unclear as to whether the creation of the school creed and prayer were faculty- or student-directed. Plaintiff claims that the student council "was

tasked" by its faculty advisor to create a school mascot, school colors, a creed and a prayer. Plaintiff's Trial Memorandum ("Pl. Br.") at 10. In fact, the prayer's author, David Bradley, stated that he recalls the faculty advisor may have "started the idea" of creating these items, but that the student council president delegated and assigned to members the task of creating particular items. Bradley Tr. at 38-39; 52-53.

Plaintiff states that "Defendants have admitted that present day school officials would reject the [Mural],[1] or any other proposed display, if they disagreed with the text of the display and the message it conveyed." Pl. Br. at 15. This statement is apparently supported not by statements from present-day school officials, but evidence regarding the original decision to accept the Mural as a class gift. *See id.* at 15 & n.10; *see also* 30(b)(6) Tr. at 54-55 (discussing rules at time Mural was donated); Zito Tr. at 20 (same). Even if this were true—and the record is silent on the issue—it would be irrelevant here. The reasons for accepting a newly proposed display are not necessarily the same as those for the School Committee's non-action with respect to the Mural. The School Committee's purpose for that decision is well-documented. *See* Defendants' Trial Brief ("Br.") at 30-32 (discussing purpose).

The Mural's Location

Plaintiff claims that the Mural is visible from every seat in the Auditorium. Pl. Br. 4. Even if this were accurate—and it does not appear to be—being visible is not the same as being legible. The record is clear that the Mural is difficult to read from

[1] Capitalized terms have the same meaning as assigned in Defendants' Trial Brief.

beyond its immediate vicinity in the lower right-hand portion of the Auditorium. 30(b)(6) Tr. at 64, 152-53. It is legible from only a few rows. *Id.* Additionally, while the Mural may have originally occupied a "prominent" position within the Auditorium, Pl. Br. 13, it has become much less prominent over the years as other displays and artifacts have accumulated in the Auditorium. The introduction of dozens of other banners, plaques, class gifts, monuments and historical markers in the Auditorium and around the Cranston West campus means that the Mural is far less prominent than it was when the school was new and the walls bare. The Mural went entirely unnoticed by Plaintiff—whom one would expect to be more sensitive to in-school religious references than the vast majority of students—until it was pointed out to her by a third party on her fourth or fifth visit to the Auditorium. *See* J.A. Tr. at 13.

Plaintiff repeatedly claims that the location of the Mural was chosen by the City or School Committee. Pl. Br. 13 (citing Zito Tr. at 22-23, 37). The record contains only speculation on this point. The only witness with knowledge regarding the site selection, Mr. Zito, could do no more than speculate as to who selected the location. He testified that although he would "guess" that the School selected the location, he also stated it "could have been any one of a number [of people], the architect, the contractor, the artist." Zito Tr. at 31.

Recitation of the Mural

As Defendants explained in their brief, the weight of the evidence indicates that all recitation of the Mural text ceased in or about 1962. *See* Br. 10 & n.3. Plaintiff

claims that the Mural was recited at some events, even after regular morning recitation ended. Pl. Br. 12. For support, Plaintiff cites Edmond Lemoi's statement that "kids would regularly" recite the prayer at award ceremonies during his "first year or two" as a teacher, i.e., the 1964-65 and 1965-66 school years. Lemoi Tr. at 25. But the weight of the evidence suggests all in-school prayer recitation—including of the Mural—stopped for good in or about 1962. *See* 30(b)(6) Tr. at 38-40, 78-79; Bradley Tr. at 63; J.A. Tr. at 32, 36-37. Only one witness, Mr. Lemoi, had a hazy recollection of post-1962 recitation at awards ceremonies. *See* Lemoi Tr. at 50-51; 59-61. Lemoi also said that the school held only two award ceremonies, likely meaning two ceremonies per year, that these ceremonies would begin with "either the [secular] school creed, *maybe one time* the school prayer, and another time singing the school song . . . . to get the kids involved in the history of the school," that there were no assemblies other than the award ceremonies at which the school prayer might have been recited, and that these recitations stopped early in his time teaching there. *Id.* at 25, 30-31 (emphasis added).

Mr. Bradley's testimony, not Mr. Lemoi's, is most credible on this topic because, as the author of the text of the Mural, he testified he would "absolutely" recall whether or not it was recited. Bradley Tr. at 63. He states that the prayer was "never uttered in public" after the Mural was installed, "[c]ertainly not in an assembly." Bradley Tr. at 63-64. In any event, this discussion is ultimately irrelevant to Plaintiff's Establishment Clause claims. Plaintiff does not claim that the prayer was ever recited during her time at the school, or even during her lifetime. Whether students

occasionally recited the prayer almost fifty years ago has no bearing on the Plaintiff's Establishment Clause claims.

Plaintiff's brief also created an improper inference regarding the installation of the Mural and the end of school prayers. Plaintiff's brief suggests a causal link between the end of school prayer at Cranston West and the installation of the Mural. *See* Pl. Br. 15. This is rank speculation. Mr. Zito specifically denied any recollection of the Class's purpose in selecting the Mural as a class gift. Zito Tr. at 20-21. He also has no recollection of the Supreme Court's 1962 decision barring recitation of school prayer (*Engel*) and affirmatively denied hearing any discussion of that issue while at Cranston West. *Id.* Relatedly, Plaintiff also claims that "[i]n light of the history of the [Mural's] origins . . . there can be little doubt that the installation of the display in 1963 reflected an improper religious purpose . . . ." Pl. Br. 45 n.21. Again, there has been no evidence reflecting the Class's purpose for giving the Mural as a class gift, Zito Tr. at 20-21, or of the School's purpose in accepting it.[2] 30(b)(6) at 76. Further, Defendants are not aware of any Supreme Court or First Circuit decisions that would have made acceptance of the Mural unlawful or improper under the Establishment Clause as of 1963.

Whether Plaintiff was really offended

Plaintiff's brief repeatedly refers to her deposition statements regarding the sin-

[2] Defendants' brief, *see* Br. 12 n.4, explained why Defendants have not yet installed an explanatory plaque under the Mural. Defendants regard the historical existence of a plaque and the fact that the School Committee approved one two weeks prior to the filing of this lawsuit as sufficient grounds to permit installation at this time. Defendants have not done so during the pendency of the litigation only because they do not wish to interfere with the course of the lawsuit.

cerity of her offense upon seeing the Mural. As stated in Defendants' brief, Plaintiff's earliest and therefore most credible statements repeatedly emphasize that she was not offended by the Mural, but merely wanted to make a point about separation of church and state. Br. 20-21. Plaintiff's subsequent self-serving testimony to the contrary should not be credited.

ARGUMENT

I. Plaintiff lacks standing.

As pointed out in Defendants' trial brief, Plaintiff lacks standing to challenge the Mural because she has suffered no injury in fact. Br. 18-21 (citing *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Plaintiff's trial brief does nothing to undermine that conclusion. Plaintiff offers only one theory of Establishment standing—offended observer standing. Pl. Br. 26-32. But in order to bring an Establishment Clause claim based on offended observation of a government display, a plaintiff must show more than mere objection to a government display; she must show injury in fact. *Valley Forge Christian Coll.* v. *Ams. United for Separation of Church & State*, 454 U.S. 464, 473 (1982). Courts have required *two* components for injury in fact under "offended observer" standing: 1) Some level of psychological injury or offense because of the government display; *id.* at 486 ("noneconomic injury"); and 2) some burden placed on the plaintiff that goes beyond simple outrage to "tangible . . . cost." *ACLU of Ill.* v. *City of St. Charles*, 794 F.2d 265, 268 (7th Cir. 1986). Plaintiff has not met the burden of showing either element. Similarly, Plaintiff has not met her burden of proving that her putative injury is traceable to government action—the "sense of exclusion" she complains about in the brief simply is not traceable to

the government action at issue—Cranston's decision to display the Mural. *See* Pl. Br. 31-32 & n.17.

A. Actual offense—not mere contact—is a necessary component of offended observer standing.

The Supreme Court made clear in *Valley Forge* that the purpose of the standing requirement is to avoid adjudicating "the abstract injury in nonobservance of the Constitution." 454 U.S. at 482 (quoting *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 223 n.13, (1974)) and to protect Courts from becoming "merely publicly funded forums for the ventilation of public grievances." *Valley Forge*, 454 U.S. at 473. But ventilating public grievances is exactly what Plaintiff is trying to do here. As pointed out in Defendants' trial brief, Plaintiff stated on multiple occasions that she was not offended by the Mural and was bringing the case in order to prove a point. Br. 20; Ex. 27-1 at 11:19, 12:25-50, 1:50-55; Ex. 30-1 at CRA0758. Having admitted that she takes no offense to the Mural, Plaintiff cannot show that her contact with the Mural has actually injured her.

Plaintiff tries to lower the standing bar by claiming that "unwelcome direct" contact is enough to create standing. Pl. Br. 27-28. But the cases Plaintiff cites include actual and significant personal offense at the challenged government display. *See id.*; *see also ACLU of Ohio Found., Inc.* v. *DeWeese*, 633 F.3d 424, 430 (6th Cir. 2011) (display "offend[ed] [plaintiff] personally"); *Cooper* v. *U.S. Postal Serv.*, 577 F.3d 479, 488 (2d Cir. 2009) (display made plaintiff "very uncomfortable"); *Vasquez* v. *Los Angeles Cnty.*, 487 F.3d 1246, 1250 (9th Cir. 2007) (considering whether contact with "offensive religious symbol" sufficed for standing); *Books* v. *City of Elkhart*, 235

F.3d 292, 297 (7th Cir. 2000) (plaintiff was "offended deeply"); *Suhre* v. *Haywood Cnty.*, 131 F.3d 1083, 1085 (4th Cir. 1997) (display "filled [plaintiff] with revulsion"); *Lambeth* v. *Bd. of Comm'rs of Davidson Cnty.*, 321 F. Supp. 2d 688, 690 (M.D.N.C. 2004) (plaintiffs were "offended by the display"). Of course direct contact is a necessary element of any offended observer claim, but it is hardly a *sufficient* element—Plaintiff must also show that it was deeply offensive to her.

Nor can the Court simply presume offense, as Plaintiff implies. *See* Pl. Br. 27-28. Courts have instead drawn a line between presumed offense and real injury. *See ACLU-NJ* v. *Twp. of Wall*, 246 F.3d 258, 266 (3d Cir. 2001) ("[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"); Br. 19-21. Here, Plaintiff's earliest and most credible statements demonstrate that she was not offended—and therefore not injured—at all. *See, e.g.*, Ex. 27-1 at 11:19, 12:25-50, 1:50-1:55; Ex. 30-1 at CRA0758.

B. A detour or other demonstrable burden is a necessary component of offended observer standing.

As discussed in Defendants' brief, mere offense—even great offense—taken at a government action is not sufficient to convey standing. *See* Br. 22-25 (citing *Valley Forge*, 454 U.S. at 485). Here, Plaintiff does not have standing because she did not go out of her way to avoid the Mural. *City of St. Charles*, 794 F.2d at 268 ("[E]ven that [plaintiffs] are deeply offended by such a display[]does not confer standing") (citing *Valley Forge*, 454 U.S. at 485-87); *Freedom From Religion Found., Inc.* v. *Obama*, 641 F.3d 803, 807-08 (7th Cir. 2011), *pet. for rhr'g en banc denied* Jun. 15,

2011 ("[H]urt feelings differ from legal injury . . . . Plaintiffs have not altered their conduct one whit . . . ."); *see* Br. 22-25. Courts regularly require some detour or other tangible action because that action is an objective indicator of "the existence of genuine distress and indignation, and [ ] distinguish[es] the plaintiffs from other objectors." *City of St. Charles*, 794 F.2d at 268. Here, Plaintiff is not "directly affected" by the government display, *Glassroth* v. *Moore*, 335 F.3d 1282, 1292 (11th Cir. 2003), nor has she "suffered 'as a consequence' of the challenged action." *ACLU of Ga.* v. *Rabun Cnty. Chamber of Commerce, Inc.*, 698 F.2d 1098, 1108 (11th Cir. 1982). Plaintiff does not claim she has taken any actions, nor assumed any burdens, in order to avoid contact with the allegedly injurious Mural. Br. 22-25; *see also* Pl. Br. 28-29 (relying on mere proximity to the Mural).

The cases Plaintiff relies on are distinguishable. Plaintiff argues that the Supreme Court has accepted offended observer standing *sub silentio* by accepting religious display cases without addressing the question of standing. Pl. Br. 29-31 (citing *McCreary Cnty.* v. *ACLU of Ky.*, 545 U.S. 844 (2005); *Van Orden* v. *Perry*, 545 U.S. 677 (2005)). But this is contrary to the longstanding doctrine that *sub silentio* jurisdictional rulings have no precedential effect. *See, e.g.*, *Steel Co.* v. *Citizens United for a Better Env't*, 523 U.S. 83, 91 (1998) ("[D]rive-by jurisdictional rulings . . . have no precedential effect."); *Lewis* v. *Casey*, 518 U.S. 343, 353 n.2 (1996) ("[W]e have repeatedly held that the existence of unaddressed jurisdictional defects has no precedential effect."); *Hagans* v. *Lavine*, 415 U.S. 528, 533 n.5 (1974) ("Moreover, when questions of jurisdiction have been passed on in prior decisions *sub silentio*, this

Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us."); *Polyplastics, Inc.* v. *Transconex, Inc.*, 713 F.2d 875, 879 n.4 (1st Cir. 1983) ("[W]e do not believe that the case can be taken to have decided so important a jurisdictional question *sub silentio*.") (all citations omitted).

Similarly, the fact that the Supreme Court found standing in *School District of Abington Township* v. *Schempp*, 374 U.S. 203 (1963) is of no moment. In that case, religious exercises took place in students' classrooms during the school day. In this case, Plaintiff has not been asked to take part in any such exercise, nor has she attempted to avoid the Auditorium. J.A. Tr. at 27, 32. She attended event after event there without an expression of objection to the School. *Id.* at 13-14. Because she has not taken on any additional burden, she does not have standing.

C. Plaintiff does not attempt to prove taxpayer standing or independent standing for Mark Ahlquist.

Plaintiff abandons any argument that Mark Ahlquist has independent standing. Pl. Br. 26-32. He therefore does not have standing to challenge the Mural.

II. Cranston's actions do not violate any of the Establishment Clause tests set out in *Hanover*.

Plaintiff's trial brief shows that she cannot prove that Cranston's actions with respect to the Mural violate the Establishment Clause. Plaintiff spends many pages of briefing to reiterate points about which no one disagrees; no one disputes the idea that government must be neutral among religion and non-religion, or that the public school setting is sensitive. *See* Pl. Br. 32-41. But Plaintiff's brief fails when it comes to the specifics: explaining how binding First Circuit and Supreme Court precedent applies to this case.

Indeed, Plaintiff's brief is remarkable for its failure to deal with the two primary precedents this Court must apply: the First Circuit's leading Establishment Clause decision, *Freedom From Religion Foundation* v. *Hanover School District*, 26 F.3d 1 (1st Cir. 2010), *cert. denied*, 131 S. Ct. 2992 (Jun. 13, 2011), and the Supreme Court's most recent Establishment Clause government display decision, *Van Orden* v. *Perry*, 545 U.S. 677 (2005). Although Plaintiff's brief cites both cases in passing, it fails to explain how either applies here. *See, e.g.*, Pl. Br. 56-60 (citing, but failing to apply *Hanover*); *id.* at 42 (distinguishing *Van Orden*). The reason is simple: Cranston's actions easily pass the tests set forth in those cases.

In particular, *Cranston's actions*[3] regarding the Mural pass muster under each of the "three interrelated analytical approaches" identified in *Hanover*—the *Lemon* test, the endorsement test, and the coercion test.[4]

A. Cranston passes the *Lemon* test.

Cranston's actions easily pass muster under the three prongs of the *Lemon* test—purpose, effects, and entanglement.

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[3] Plaintiff seems to argue that the Mural, divorced from its historical and physical context, could constitute some sort of free-standing Establishment Clause violation. *See* Pl. Br. 45-47 (examining text of Mural). If so, this is wrong—it is government action, not a particular phrasing or display that violates the Establishment Clause. A particular phrase can be a violation in one context but perfectly normal in another. For example, a public school teacher can teach a student about Christian religious beliefs regarding sin in order for the student to understand Chaucer's *Canterbury Tales*, but the teacher may not teach the student about those same beliefs as part of a government-designed program to inculcate religious beliefs.

[4] Because Plaintiff does not make a specific argument under the coercion test, Defendants do not address that test in this brief. As explained in Defendants' trial brief, the test is easily satisfied here. *See* Br. 43-44.

1. Cranston had a legitimate secular purpose in keeping the Mural.

In their brief, Defendants explained why Cranston's actions with respect to the Mural easily pass the purpose prong of the *Lemon* test. *See* Br. 29-33. Specifically, the Committee simply chose to leave an almost 50-year-old display in place, recognizing that it was a piece of student art and part of the history and tradition of the school. *See id.*

In her trial brief, Plaintiff both mischaracterizes what Cranston has stated its purpose to be, and argues that Cranston's stated purpose is a sham. Pl. Br. 44 (misstating purpose); *id.* at 44-55 (arguing Committee's secular purpose is a sham). Plaintiff's arguments rely on at least five errors.

a. Plaintiff misstates the nature of the Purpose inquiry.

First, Plaintiff attempts to graft an additional neutrality requirement onto the *Lemon* and endorsement tests, in contradiction of binding precedent. Plaintiff's brief argues at length about the underlying purposes of the Establishment Clause, specifically, its command of government neutrality. *See* Pl. Br. 32-41. But it is here, under the purpose prong, that the Supreme Court gives content to the principle of government neutrality. *See, e.g.*, *McCreary*, 545 U.S. at 860 ("When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality . . . ."); *Corp. of Presiding Bishop* v. *Amos*, 483 U.S. 327, 335 (1987) ("Rather, Lemon's 'purpose' requirement aims at preventing the relevant governmental decisionmaker—in this case, Congress—from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters."); *Wallace* v. *Jaffree*, 472 U.S. 38,

60 (1985) (invalidating statute under endorsement test because "[s]uch an endorsement is not consistent with the established principle that the government must pursue a course of complete neutrality toward religion"). Plaintiff's freestanding neutrality test is nowhere to be found in *Hanover*. Neutrality is not some additional hurdle that the Defendants must clear, but a principle that animates the specific tests set forth in *Hanover*.

For all Plaintiff's discussion of the neutrality principle, the brief omits an equally important point: neutrality is not a command of government silence or hostility toward religion. The Supreme Court has repeatedly affirmed that the Establishment Clause does not command hostility toward religion, nor the cleansing of religious influences from the public sphere. *See, e.g.*, *Van Orden*, 545 U.S. at 705 ("to reach a contrary conclusion here, based primarily on the religious nature of the tablets' text would, I fear, lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions") (Breyer, J., concurring); *Lynch* v. *Donnelly*, 465 U.S. 668, 673 (1984) ("Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."); *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952) ("But we find no constitutional requirement which makes it necessary for government to be hostile to religion . . . ."). It is not enough to invoke the principle of neutrality and end the analysis. The neutrality principle is applied through the *Lemon* and endorsement tests, balancing the need for neutrality with the reality that religion and religious references have long been part of our public

life.

b. Plaintiff cannot combine the separate purposes of the 1960s School Committee and the 2010 School Committee.

Second, Plaintiff uses a fundamentally confused notion of "purpose." Plaintiff argues that improper purpose can be inferred from a combination of the text of the Mural, the placement of the Mural, and the School Committee's 2010 comments regarding the Mural. Pl. Br. 45-53. These contextual factors are actually the hallmark of the effects inquiry. *See infra* pp. 25-27. But the purpose inquiry cannot be a mishmash of the purposes of different government officials observed over the course of decades. The purpose inquiry looks instead at specific government officials' purposes in taking specific actions at specific times. *See Boyajian* v. *Gatzunis*, 212 F.3d 1, 7 (1st Cir. 2000) ("Our task is to consider the validity of the statute before us, not the one enacted fifty years ago."). Thus the Court must distinguish between the purpose of the School Committee of the early 1960s in allowing the Mural to be placed on the Auditorium wall, and the purpose of the 2010 School Committee in deciding to take no action with respect to the Mural despite Plaintiff's request that it be painted over. The placement, design, and content of the Mural are evidence as to the purpose of the 1960s Committee, but they are not evidence of the 2010 School Committee's purpose, because the 2010 Committee took the Mural as it found it. Another way of putting it is that the purpose analysis would be entirely different had the 2010 School Committee allowed the Mural to be placed in the Auditorium for the first time in 2010. Then the design and placement of the Mural would be plausible evidence of the School Committee's current purposes. But because the

Mural has been in place for so many decades, the 2010 School Committee was simply reacting to the existence of an historical artifact.

Nor is it the law that a government body can actually be held liable for "ancient purposes"—that is, the purpose of a government entity decades ago. As far as we are aware, there is no case where a governmental entity has been held liable under *Lemon*'s purpose prong for actions that were taken years ago by different government officials. Instead, courts have said that the proper purpose inquiry is the present purpose in keeping the display, not the original purpose in erecting it. *See Freethought Soc'y of Greater Philadelphia* v. *Chester Cnty.*, 334 F.3d 247, 262 (3d Cir. 2003) (focus should be on the purpose of current officials responding to complaint); *see also Hanover*, 626 F.3d at 9 (focusing on recent New Hampshire statute rather than original statute adding "under God" to the pledge); *Newdow* v. *Rio Linda Union School Dist.*, 597 F.3d 1007, 1016 (9th Cir. 2010) (same).

Even if the 1960s School Committee's purpose were relevant, there is not enough information in the record to support purpose prong liability. *See supra* p. 5; *see also* 30(b)(6) Tr. at 76. The only things Plaintiff can point to are disputed allegations regarding whether the text was recited post-1963, and school officials' involvement in selecting the placement in the Auditorium. *See supra* pp. 3-5. But government involvement in placement of a donated display is neither surprising nor relevant. *See Van Orden*, 545 U.S. at 682 (state decided on placement of Ten Commandments monument).

c. Plaintiff fails to meet the heavy burden of disproving Defendants' stated purpose.

Third, Plaintiff argues that Cranston's stated purpose in taking no action with respect to the Mural is a sham. Pl. Br. 44-55. None of Plaintiff's evidence enables Plaintiff to overcome the heavy presumption that the government is not lying about its stated purposes. *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*, 472 U.S. at 74-75 (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.'" (alteration in original) (quoting *Edwards* v. *Aguillard*, 482 U.S. 578, 587 (1987))). When attempting to prove a sham purpose, a Plaintiff may not substitute the statements of third parties (such as citizens who spoke at the committee meetings) for the stated goals of the School Committee: "We do not impute an impermissible purpose to advance religion to an elected official merely because he responds to a religiously motivated constituent request." *Peck* v. *Upshur Cnty. Bd. of Educ.*, 155 F.3d 274, 281 (4th Cir. 1998); *Modrovich* v. *Allegheny Cnty.*, 385 F.3d 397, 412 (3d Cir. 2004) ("[T]he record in this case contains sufficient evidence that Allegheny County retained the Plaque for the secular reasons of historic preservation and commemoration of the rule of law, rather than solely for the religious reasons voiced by some members of the community.").

In attempting to overcome this presumption, Plaintiff first baldly asserts that the Committee's purpose in refusing to take action on Plaintiff's request that the

Mural be removed was to "recall a period in Cranston West's history when school officials did approve and encourage a specific student prayer as part of their public education." Pl. Br. 44. This is made up out of whole cloth, and ignores the purposes stated by the Committee—to preserve school history and student artwork. *See* Br. 29-33. Committee members repeatedly stated that their purpose was not to affirm any religious message associated with the Mural. *See id.* at 30-31 (collecting statements). That alleged purpose arises from a selective reading of the facts. *See* Br. 30-33 (discussing the history and context which supports the stated purpose). It is also a selective reading of the law—the Supreme Court is clear that, in order to fail the purpose prong, the government must display an "***ostensible and predominant*** purpose of advancing religion." *McCreary*, 545 U.S. at 860 (emphasis added).

d. Plaintiff supports the purpose argument with a selective (and misleading) reading of the record.

Fourth, Plaintiff offers a selective reading of statements by members of the School Committee as evidence of a hidden improper purpose. Plaintiff cherry-picks particular words or phrases from lengthy statements, arguing that they demonstrate religious intent. Defendants invite the Court to review the whole text of these statements, found on pp. 78-86 of Ex. 9. Those statements, taken as a whole, are clear that the Committee's purpose in keeping the Mural was to recognize history and student art, not to inject religion into Cranston West.

The individual statements of the members who voted for the display are clear on this point. Committee Member Iannazzi stated that history, tradition, and secular moral aspirations were the reasons for her vote. Plaintiff plucks one phrase from

her statement to argue that the Mural is some sort of religious exercise, but it is clear when the line is read in context that Ms. Iannazzi is speaking about the overall purpose of the Establishment Clause that she studied "as an attorney when [she] took Constitutional Law at Suffolk [University Law School]," rather than any specific exercise connected with the Mural. *See id.* at 84-85. Committee Member Traficante did not focus upon the Mural's history, but instead on its universal moral message, saying that it expresses "those qualities that we want each and every one of our children of all faiths to acquire, such as ethics and respect, sportsmanship, there is nothing wrong with those moral values." *Id.* at 80. This is not an improper purpose. Committee Member McFarland was quite clear that her vote was not about whether or not a religious message was in the school, but the fact that the Mural represented student artwork, and "every student who leaves their mark on the school has a right for that mark to stay as such." *Id.* at 84. That is in no way inconsistent with Lombardi's later statement that one might see a religious message if the text were viewed "in a vacuum." Finally, Committee Member Lombardi, too, was clear about the historical and student-created nature of the display, and reasons for keeping it. *See id.* at 78-80. He did mention his own religious beliefs as background in his lengthy statement, but he also stated that, as a member of the School Committee, he had to "try and keep [his] personal feelings at the door," however difficult that might be, and that he listened to all sides of the discussion and "kept an open mind . . . throughout the entire process." *Id.* at 80, 78. The Committee

Members' statements, individually and in context, demonstrate that they had a permissible secular purpose.[5]

e. Plaintiff relies on irrelevant evidence regarding activities at Bain Middle School.

Fifth and finally, having failed to prove that the 2010 School Committee had an improper purpose of promoting religion by means of the Mural itself, Plaintiff instead relies on allegations about displays and activities at another Cranston school that plaintiff has never even visited, much less attended. Pl. Br. 52-54 (discussing display and events at Bain Middle School). This evidence is irrelevant to this case. Indeed, it amounts to forbidden character evidence regarding Cranston's municipal character. This evidence should therefore be excluded under Federal Rules of Evidence 402 and 404. And were the Court to leave it in the record—since this is a bench trial—it should not give it any weight.

The Bain evidence is irrelevant and should be excluded under Fed. R. Evid. 402. As Plaintiff concedes, she has suffered no injury from the events at Bain Middle School and therefore has no standing to challenge them. *See* Pl. Br. 21 ("Plaintiff does not claim that she has standing to obtain relief as to actions or events at

[5] This sets this case apart from *Wallace* v. *Jaffree*, where the legislature's intent to encourage prayer was clear because the statute's sponsor testified that the encouragement of prayer was his sole purpose. 472 U.S. 38, 43 (1985). The new statute's entire purpose was to make it clear that the real reason for the moment of silence was to encourage prayer. *See id.; see also id.* at 58-59 (only significant change in new statute was the addition of the words "or voluntary prayer"). That is a far cry from the situation here, where the text of the resolution makes no mention of prayer, and focuses instead on the historical and student-created nature of the display. *See* Ex. 10, March 21 Minutes at 14. *Wallace* would apply if the Committee passed a resolution stating that the Mural should remain so that students could recite it as a prayer.

Bain."). Plaintiff's reliance on the Bain display and memorial service is a bald attempt to obtain an advisory ruling on something she has no standing to challenge. Therefore all evidence relating to it should be excluded.

Even if the Court were to accept this evidence, it should accord it no weight, as it has no probative value. Although context is important in Establishment Clause cases, context does not extend to every display or event in a jurisdiction. *See, e.g.*, *Van Orden*, 545 U.S. at 681 (taking into account other monuments on state capitol grounds, but no mention of monuments at other locations); *McCreary*, 545 U.S. at 868-73 (considering the context of displays within the courthouse, but no mention of any other displays or monuments in the counties). Plaintiff claims that the presence of prayers at a Memorial Day program shows that the decision to keep the Mural was "suffused with a predominantly religious, not historical, purpose." Pl. Br. 24; *see also id.* at 54. It is unclear how the two are connected. The Memorial Day program takes place at another school, was not the subject of the ACLU complaint, and was not the subject of any resolution or hearing by the School Committee during the controversy over the Mural. Nor is there record evidence that the prayer said at that service is the same prayer as that on the Bain Banner. This is a different event, at a different school, unconnected in any way to the Mural at the heart of this case. It is not probative of the 2010 Committee's purpose in refusing to erase the Mural.

Marginally closer to the case at hand, but still irrelevant, are Plaintiff's objections to the banners which used to hang in Bain Middle School. It is true that the

same artist who painted the Mural may also have painted the Bain Banners in the 1950s, *see* Zito Tr. at 18-19, but that has nothing to do with the Committee's purpose, since (1) the artist was not responsible for the text of the Mural, and (2) this is irrelevant to the current Committee's purpose. Instead, Plaintiff argues that the banners are proof of pervasive religious messages in Cranston public schools. *See* Pl. Br. 3, 21-24.

This is a serious distortion of the record. After the controversy commenced, the superintendent canvassed all the schools in the Cranston system to learn whether there were any other displays bearing the text of prayers or arguably religious language. *See, generally,* Ex. 35 (emails between superintendent and school principals). He found one—the Bain Banner.

That is one banner out of more than a dozen schools, and hundreds of hallways and classrooms. It is hardly proof of an overarching pattern or practice of religious establishment. If anything, the presence of only two longstanding displays is proof not of religious purpose, but of the fact that the Cranston public schools have avoided inserting religious references where none existed historically. This is a far cry from *McCreary* or *Stone* v. *Graham*, where defendants did the opposite—they attempted to insert new displays where none existed historically. *See McCreary*, 545 U.S. at 851 (new law directing Ten Commandments be placed in "high traffic" area); *Stone* v. *Graham*, 449 U.S. 39, 39-40 & n.1 (1980) (new law requiring schools to place Ten Commandments in each classroom). If Defendants were truly trying to insinuate religious exercises into the school system, they have done a remarkably

poor job of it. The objective observer would see their actions and conclude, correctly, that Defendants were acting out of a desire to recognize history, not a desire to inject religious language into the public school setting.

Having failed to prove an improper purpose attributable to the Bain Banners themselves, Plaintiff oddly objects to their removal. *See* Pl. Br. 53-54. Plaintiff makes much of the Committee's decision to relocate the Bain Banners under the advice of counsel.[6] But the reality is simple. After the superintendent ascertained that one other display with a "school prayer" existed in the system, he then consulted newly-retained constitutional counsel and, upon their recommendation, placed the Bain Banners in storage.

If the Court were to accept this evidence—and it should not—it should note that the reasonable observer would see the many differences between the Bain Banners and the Cranston Mural. But ultimately, while there are many distinctions between the respective displays at Cranston West and Bain, (e.g., different history, different text, different physical setting, different student ages), the reasons for the latter's relocation are not relevant to this case.[7]

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[6] Plaintiff states that the defendants "obliterate[d]" "all signs of the School Creed and School Prayer at Bain." Pl. Br. 22. This is hyperbolic. The banners were taken down from the walls and placed into storage. 30(b)(6) Tr. at 13-14.

[7] Of course, had the Committee decided to continue displaying the Bain Banners, Plaintiff would have undoubtedly argued that their continued existence is proof of pervasive religious sentiment in Cranston public schools, and would likely have recruited a second plaintiff to initiate a lawsuit challenging those banners. *See* Am. Compl. ¶¶ 25-26 (challenging the Bain Banners). The Court should reject this sort of "heads I win, tails you lose" reasoning.

2. The Committee's decision to keep the Mural did not have the effect of advancing religion.

a. Plaintiff fails to apply binding precedent and misapplies non-binding precedent.

Defendants explained in their trial brief that the Mural does not advance religion because the objective observer would not perceive a message of religious endorsement. Br. 34-39. Using the Supreme Court and First Circuit's Establishment Clause precedents, Defendants showed how the Mural sends a message of school history, tradition, and secular moral aspirations. *Id.* Plaintiff makes no attempt to apply the controlling *Van Orden* concurrence as part of the purpose (or endorsement) analysis, but instead attempts to distinguish that opinion away by relying on a dictum. *See* Pl. Br. 42 (arguing it is controlling only on a minor point irrelevant to this case).[8] This is directly contrary to *Hanover*, which relied on both the *Lemon* and

[8] Specifically, Plaintiff argues that the concurrence is controlling only with respect to the question of whether *Lemon* applies. But as the narrowest grounds of decision, it is controlling on all the Establishment Clause questions, not only one. *See Marks* v. *United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'") (internal citation omitted)). Every subsequent Court of Appeals to address the question has treated Justice Breyer's concurrence as controlling. *See, e.g.*, *Bronx Household of Faith* v. *Bd. of Educ. of City of New York*, --- F.3d ----, 2011 WL 2150974, at *16 (2d Cir. Jun. 2, 2011) (relying on "Justice Breyer's controlling opinion in *Van Orden*"); *Trunk* v. *City of San Diego*, 629 F.3d 1099, 1107 (9th Cir. 2011) ("As we have recognized, Justice Breyer's concurrence provides the controlling opinion in *Van Orden*."); *Green* v. *Haskell Cnty. Bd. of Comm'rs*, 568 F.3d 784, 807 n.17 (10th Cir. 2009) ("Given that *Van Orden* was decided by a plurality, the separate opinion of Justice Breyer . . . is controlling under the rule of *Marks* v. *United States* . . . ."); *Staley* v. *Harris Cnty.*, 485 F.3d 305, 309 n.1 (5th Cir. 2007) (en banc) ("For the purposes of our case today, Justice Breyer's concurrence is the controlling opinion in *Van Orden*."). This includes cases arising in the public school setting. *See Rio Linda*, 597 F.3d at 1022-23 (applying Breyer concurrence).

endorsement tests—including the *Van Orden* concurrence—to determine whether "under God" was constitutional when recited in public schools. *See Hanover*, 626 F.3d at 7-12.

This is similar to Plaintiff's general treatment of *Hanover*—rather than apply the most recent controlling precedent, Plaintiff urges the Court to substitute some other case which better suits the Plaintiff's needs. That is because the Plaintiff cannot prevail under the controlling standard. In order to prevail, Plaintiff must demonstrate that the Mural is unconstitutional under the tests the First Circuit and the Supreme Court have actually applied, not some stronger, hypothetical variant of them. Plaintiff fails to do so.

Instead, Plaintiff relies heavily on a case from the Third Circuit, *Doe* v. *Indian River School District*, 2011 WL 3373810 (3d Cir. Aug. 5, 2011).[9] *See* Pl. Br. 55, 58-60. That opinion is not relevant, nor binding precedent. In *Doe*, the issue was not a longstanding historical display, but a variety of prayers currently recited in the presence of students at school board meetings. The court found that the *Doe* case was similar to *Lee* v. *Weisman* or *Doe* v. *Santa Fe* because students had to attend the meetings—and thus choose to participate or stand silently during the prayers—in order to fulfill extracurricular requirements or receive commendations and awards. *Indian River*, 2011 WL 3373810, at *17-19. The prayers also contained far

[9] *Indian River* was decided less than two months ago, and it is unclear whether it will be appealed further. There is currently a circuit split on the subject of legislative prayers before local boards. *See Joyner* v. *Forsyth Cnty.*, --- F.3d ----, 2011 WL 3211354, at *14 (4th Cir. Jul. 29, 2011) (Niemeyer, J., dissenting) (noting circuit split).

more religious and denominational content than the secular moral aspirations stated in the Mural. *See id.* at * 24-25 ("We ask that You continue to guide and direct us in . . . our decision-making . . . We ask these things and all others in the name of Jesus Christ, our Lord. Amen."). By contrast, the Mural here has not been recited at the school for nearly fifty years, and Plaintiff admits that no one even referred to it in her presence prior to the start of the current controversy. *See supra* pp. 3-5; J.A. Tr. at 14-15. It is also a passive display, not a participatory ceremony.

b. Plaintiff misapplies the law regarding the Mural's context.

Plaintiff errs again by conflating the effects analysis with the purpose analysis, and by misapplying the facts which shed light on the Mural's effect. The text and context of the Mural are evidence of its effects, not of the School Committee's purpose. *See, e.g.*, *Hanover*, 626 F.3d at 10 ("In looking at the effect of the state's creation of a daily period for the voluntary recitation of the Pledge, we must consider the text as a whole and must take account of context and circumstances.") (citing *Van Orden*, 545 U.S. at 701 (Breyer, J., concurring)). They are relevant for their effect upon the objective observer, not for what they might or might not suggest regarding the School Committee's motivations. For that reason, Plaintiff's misdirected arguments on this point are dealt with here, under the effects analysis.

Plaintiff argues, in essence, that the mere fact the Mural is entitled "School Prayer" is dispositive evidence that the 2010 School Committee had an improper purpose. Pl. Br. 45-47. This is silly. As noted above, the 2010 School Committee took the Mural as it found it; nothing can be inferred about their state of mind based on

the content of the Mural as historical artifact. By Plaintiff's reasoning, the fact that the National Archives prominently display copies of the Declaration of Independence—which refers to God a number of times—is evidence of an improper purpose of promoting religion. This is contrary to Supreme Court precedent. After all, the Supreme Court upheld a monument consisting almost entirely of a lengthy quotation of Scripture, followed by a common symbol for Christ. *Van Orden*, 545 U.S. at 681.

Establishment Clause jurisprudence recognizes that context is key. Displays regularly send mixed and even conflicting messages. The question is not whether one of those messages has religious content; it is whether, given the context, the secular message prevails. *See, e.g.*, *Hanover*, 626 F.3d at 8 ("The fact of some religious content is also not dispositive because there are different degrees of religious and non-religious meaning."); *see also Van Orden*, 545 U.S. at 701 (Breyer, J., concurring) (displays "can convey not simply a religious message but also a secular moral message . . . And in certain contexts, a display of the tablets can also convey a historical message . . . ."). The secular message is plain—even Plaintiff is forced to concede that the bulk of the text is "a constitutionally inoffensive exhortation to be good student-citizens." Pl. Br. 46-47. As the Supreme Court recognized in *Pleasant Grove* v. *Summum*, "Even when a monument features the written word, the monument may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways." 555 U.S. 460, 129 S. Ct. 1125, 1135 (2009).

Plaintiff also argues that the Mural, "in a vacuum," displays a religious message and that this is evidence of an improper purpose on the part of the 2010 School Committee. Pl. Br. 15, 48-49. But the entire point of the endorsement test is that government actions are not viewed "in a vacuum." Context and history matter. *See Lynch*, 465 U.S. at 691-93 (crèche did not have purpose of endorsing religion because it had a peaceful history and was in a holiday setting with secular symbols) (O'Connor, J., concurring); *Hanover*, 626 F.3d at 10 ("[W]e must consider the text as a whole and must take account of context and circumstances."). And as Defendants have explained at length, the context and history of the Mural demonstrate that it does not have the effect of advancing religion. *See* Br. 34-39.

3. The Committee's decision to keep the Mural does not create excessive entanglement with religion.

The Mural also poses no entanglement issues. Plaintiff concedes that no separate entanglement analysis is necessary, since it is subsumed in the purpose and effects inquiries. Pl. Br. 41 & n.20. Defendants addressed the inapplicability of the entanglement prong in their trial brief. *See* Br. 39-40.

B. Cranston's actions pass the endorsement test.

In their trial brief, Defendants explained why Cranston's actions with respect to the Mural do not violate the Endorsement test: the context and history of the Mural mean that secular, not religious, messages prevail, and the public school setting does not change that conclusion. As we pointed out, the Mural easily qualifies under the test set out in *Hanover*. Br. 40-43. In *Hanover*, the religious content of the words "under God" was neutralized because an objective observer would know that, in con-

text, they were part of a secular patriotic exercise. 626 F.3d at 11-12. Here, any religious content in the Mural is neutralized by its language, setting and history. The allegedly religious language of the Mural comprises only a few words (the title, salutation, and "amen,") while the rest of the banner contains secular moral aspirations such as being respectful of teachers and classmates and being good sports. The Mural was given as a class gift by the school's first graduating class, together with a wholly secular school creed, and is surrounded by other student artwork and class gifts on display in the Auditorium. Under *Hanover*, this context is more than sufficient to neutralize any religious message. *See id.* at 12 (thirty-one non-religious words neutralize the two-word religious phrase).

Plaintiff makes three arguments in an attempt to take this case outside the endorsement analysis set forth in *Hanover*. Each fails.

1. Plaintiff misapplies precedent governing the endorsement inquiry.

Plaintiff first argues that this case is different because the Mural is located in a public school, where the Establishment Clause is applied with particular vigilance. *See, e.g.*, Pl. Br. 36-41. Plaintiff overstates the case. As Defendants explained in their trial brief, "[t]he school context changes these objective inquiries only slightly." Br. 41; *see also Weinbaum* v. *City of Las Cruces*, 541 F.3d 1017, 1032 (10th Cir. 2008); *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)). The Mural's location in a

public school cannot take this case outside the bounds of *Hanover* because *Hanover* was about what happened in a public school. Although *Hanover* acknowledged the considerations of public school, that did not stop the First Circuit from upholding the recitation of "under God" in the Pledge of Allegiance. 626 F.3d at 4. More to the point, it did not stop the First Circuit from employing the traditional Establishment Clause tests: the *Lemon* test, endorsement test, and coercion test. *See id.* at 9-14. And in so doing, the First Circuit drew no distinction between those cases which were decided in the public school context, and those which were not. *See id.* at 10 (relying on *Van Orden* and *County of Allegheny*); *id.* at 12 (relying on *County of Allegheny* and *Lynch*). Moreover, the *Hanover* court was dealing with a much more intrusive form of government interaction with religious content: a daily ceremony that students participated in under teachers' leadership. By contrast, in this case, the Mural is a passive display that students are able to see only a few days out of the year. The Mural's location in a high school auditorium cannot, standing alone, change the endorsement analysis.

2. The endorsement analysis turns on the entire context and history of the Mural, not Plaintiff's cherry-picked "context."

Plaintiff next argues that other displays (the Lobby Banners and the school creed mural) imbue the Mural with special significance. Pl. Br. 48-50, 54. A review of the entire context makes it clear that they do not.

The Mural's context and history bring it squarely within Justice Breyer's controlling concurrence in *Van Orden*. Like the display in that case, it is surrounded by a hodgepodge of current and historical displays of student art, class gifts, and school

history. There, the Texas state capitol grounds were filled with monuments of various dates and origins, both erected by the State and donated by third parties. The monuments did not send any unified message to the public. Any religious content in the display in question—there, a lengthy quotation of Scripture—was outweighed by the secular aspects of the context. *Van Orden*, 545 U.S. at 700-04 (Breyer, J., concurring).

Plaintiff draws incorrect conclusions from two aspects of the Cranston Mural's context: the creed and the Lobby Banners. That argument fails for two reasons. First, it discounts the immediate context of the Mural—the many other class gifts in the Auditorium—in favor of some banners which hang in a different building. *See* Ex. 23 (photos); 30(b)(6) Tr. at 149 (Auditorium is not in "the main building"); Br. 9-10 (location of Lobby Banners). Second, Plaintiff gets the significance of the creed and Lobby Banners exactly backwards. Plaintiffs take their presence as proof that school displays, including the Mural, are intended "to convey messages of expectation to the students." Pl. Br. 54. If true,[10] then the Lobby Banners and creed serve to deemphasize, not enhance, the message conveyed by the Mural. The Lobby Banners feature bright colors and are hung prominently in the school entrance, where students will see them every day. Br. 9-10. That is their point. The Mural, by contrast, is displayed in a room that students only enter a few times a year. *See* J.A. Tr.

[10] The Lobby Banners and creed do not prove that every message on the walls is a literal exhortation to students; that argument is absurd in the face of all the other displays, plaques and signs that line the campus. *See* Br. 7-10 (discussing displays including memorials, architectural renderings, trophies, class gifts, plaques honoring former faculty).

at 13, 33. It is displayed with a collection of other class gifts, historic displays, and student art. It is more akin to the trophy cases and class gift plaques lining the halls than to the Lobby Banners. *See* Br. 7-10. They are merely evidence of the varied and diverse displays and messages which confront students on a daily basis.[11]

Similarly, Plaintiff misconstrues the significance of the prominence of the school creed and text of the Lobby Banners in the student handbook. Plaintiff somehow concludes that this imbues the school prayer with additional significance. *See* Pl. Br. 16-17, 49-50. But the fact that the School chose to put the content of the creed and Lobby Banners in the handbook but leave out the Mural's content again serves to deemphasize the Mural and shows that Cranston understands the text primarily as an historical reference, rather than a present directive to the students. A reasonable observer would see that Cranston correctly chose to continue highlighting the

[11] Plaintiff states that Defendants conceded that the only difference between the Lobby Banners and the Mural is their location and apparent age. Pl. Br. 17. This is a misstatement of the record. Defendants' 30(b)(6) witness responded to a series of questions about the physical appearance of the banners and Mural, as viewed by an uninformed observer. *See* 30(b)(6) Tr. at 121-22 (after viewing pictures of Lobby Banners, "Q: Is there anything about these messages that conveys or would convey to a student attending Cranston High School West that this is a message that is intended for them, but the message of the school prayer or the school creed is not?"); *id.* at 125 ("Q: So one—a student who comes in, say, 2010 or 2009 could look at the banners and look at the prayers and the prayer in the auditorium and say that's been there longer than the banners just by the age, correct?"); *id.* at 129 ("Q: And a student who enrolled two or three years ago would not know by looking at the prayer displays, anything other than that they were old and whatever they read when they read them, correct?"). Defendants have not at all conceded that the difference in location is insignificant. Moreover, the objective observer used in the endorsement test is aware of more than a single witness—the objective observer is aware of the entire history and context of the display at issue. *See supra* pp. 25-30.

purely secular message of the creed, but left the prayer in place as an historical display.

This is another example of Plaintiff's wanting to have the facts both ways—if the Mural text and creed were quoted side-by-side in the handbook, Plaintiff would surely have argued that it was an improper religious exhortation to students. But since Cranston omitted the Mural's content from the handbook, the Plaintiff's observer must infer some nefarious significance from the omission. This is a paranoid observer, not an objective one. The Establishment Clause does not command the Court to engage in such absurd interpretations.

3. Plaintiff cannot prove endorsement based on a controversy she and her counsel have manufactured.

Finally, Plaintiff claims the Mural is "a contentious issue." Pl. Br. 59 (quoting *Indian River* at *26). This argument reminds one of the old joke about the man who murders his parents and then throws himself on the mercy of the court as an orphan.[12] Every bit of the divisiveness over the Mural happened after the July 2010 threat to sue over the Mural. *See* Ex. 36 (letter from ACLU starting the controversy); *see also* Ex. 30 at CRA0714 (plaintiff started and operates 2000-member Facebook group opposed to the Mural). It would be an odd constitutional rule that allowed someone to stir up a controversy and then have the government held liable under the Establishment Clause for the existence of the controversy.

[12] *See* Leo Rosten, The New Joys of Yiddish 81, 81 (Lawrence Bush, ed., Crown 2001) (definition of "chutzpa").

This is why Justice Breyer in *Van Orden* focused on the long, peaceful history of the Ten Commandments monument on the Texas Capitol grounds. *See* 545 U. S. at 702 (Breyer, J., concurring). In that case, the monument did attract attention once the plaintiff started complaining. *See Van Orden* v. *Perry*, No. A-01-CA-133-H, 2002 WL 32737462, at *5 (W.D. Tex. Oct. 2, 2002) ("[B]ut for the publicity generated by the present litigation, most visitors to the State Capitol and most residents of the State of Texas would have been unaware of the existence of the Ten Commandments monument."). But a single controversy in forty otherwise peaceful years could not be proof of a violation. *See Van Orden*, 545 U.S. at 702 (Breyer, J., concurring) ("those 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 monument as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect . . . .").[13] Here the Mural has been in place for even longer than the forty-year-old monument in *Van Orden* and has also aroused a minimum of controversy.

As Justice O'Connor explained in the opinion where she introduced the endorsement test, "Guessing the potential for political divisiveness inherent in a government practice is simply too speculative an enterprise, in part because the existence of the litigation, as this case illustrates, itself may affect the political response

[13] No controversy arose until 2010, after the ACLU's complaint brought public attention to the Mural. Note that Plaintiff's own delay in coming forward was not because she was afraid to do so, but because "I just kind of forgot about it . . . it wasn't really the first thing on my mind." J.A. POTG Interview at 2:28.

to the government practice." *Lynch*, 465 U.S. at 689 (O'Connor, J., concurring). Instead, "the constitutional inquiry should focus ultimately on the character of the government activity that might cause such divisiveness, not on the divisiveness itself." *Id.* In other words, the focus of the endorsement inquiry ought to be on the Mural and its context, not on the public comments surrounding it.

For all these reasons, as well as those stated in Defendants' Trial Brief, Plaintiff has failed to carry her burden of proving an Establishment Clause violation.

III. Plaintiff's proffered expert testimony regarding legal questions should not be admitted.

The testimony of the Rev. Dr. Donald Anderson is irrelevant to this litigation and should be excluded. Dr. Anderson's testimony consists of his opinions that the Mural is a prayer and that it violates the Establishment Clause. *See* Ex. 18. These are legal questions that the Court, not an expert, must decide. *See Weinbaum*, 541 F.3d at 1038 ("We need not sift through empirical evidence . . . because we need 'not ask whether there is *any* person who could find an endorsement of religion.'") (citing *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring)).

Courts faced with expert testimony in Establishment Clause cases have rightly rejected them as distractions. *Brown* v. *Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1382 (9th Cir. 1994) ("The Supreme Court generally has not relied on expert testimony to determine whether a school practice reasonably appears to endorse religion.") (citing *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993)). Instead of relying on experts, "courts assume[ ] the viewpoint of an 'objective observer ac-

quainted 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)). The opinions of local citizens and non-decision-makers are irrelevant to the Court's analysis, and should be stricken from evidence. *See Modrovich*, 385 F.3d at 412 (letters of county residents and non-decision-makers irrelevant to *Lemon* analysis). Dr. Anderson's testimony should be excluded.

IV. The Plaintiff is not entitled to injunctive or declaratory relief.

Because Plaintiff's First Amendment rights have not been violated, she is not entitled to any relief. Nor does "the fact that [plaintiff] is asserting First Amendment rights . . . automatically require a finding of irreparable injury." *Rushia* v. *Town of Ashburnham*, 701 F.2d 7 (1st Cir. 1983) (distinguishing *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976)); *Vaqueria Tres Monjitas, Inc.* v. *Irizarry*, 587 F.3d 464 (1st Cir. 2009) ("'[W]e have generally reserved this status for 'infringements of free speech, association, privacy or other rights as to which temporary deprivation is viewed of such qualitative importance as to be irremediable by any subsequent relief.'") As demonstrated, the plaintiff is not suffering irreparable injury. Therefore she is not entitled to either a preliminary or permanent injunction.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th 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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