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Via Email

Ron Wilson, Superintendent
Herington Schools USD 487
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Donalyn Biehler, Principal
Herington Elementary School
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RE: Unconstitutional Distribution of Bibles

Dear Mr. Wilson and Ms. Biehler,

The parents of several children attending Herington Elementary School have contacted our office to request assistance with regard to a serious constitutional violation that is occurring under the authority of your school and school district. Your school district has allowed an outside religious organization, believed to be the Gideons, to distribute Bibles to young children at Herington Elementary School. The district's actions in assisting the Gideons in distributing Bibles to elementary students represents a clear breach of the Establishment Clause of the United States Constitution and we hereby demand assurances that this practice will discontinue immediately.

The children report that the Bibles were placed on a table in a common area during the course of the ordinary school hours, in a manner that would make them noticeable to the curious students walking through the hallway. The parents report that, when they asked Ms. Biehler, the principal, about the Bible distribution, she informed them that she had personally given approval of the activity, adding that she herself is a Christian. The parents subsequently inquired with Mr. Wilson as to whether the school district would allow the distribution of literature from other religious viewpoints, to which he responded only that he would discuss it with the principal. They have not heard again from him again.

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

The First Amendment's Establishment Clause "commands a separation of church and state." *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005). It requires the "government [to] remain secular, rather than affiliate itself with religious beliefs or institutions." *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 610 (1989). The Establishment Clause "create[s] a complete and permanent separation of the spheres of religious activity and civil authority." *Everson v. Bd. of Ed*, 330 U.S. 1, 31-32 (1947). *Accord Engel v. Vitale*, 370 U.S. 421, 429 (1962). Separation "means separation, not something less." *McCollum v. Bd. of Educ.*, 333 U.S. 203, 231 (1948). In "no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart." *Id.* In sum, the government "may not place its prestige, coercive authority, or resources behind a single religious faith or behind religious belief in general, compelling nonadherents to support the practices or proselytizing of *favored religious organizations* and conveying the message that those who do not contribute gladly are less than full members of the community." *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 9 (1989) (emphasis added).

The Supreme Court "has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987). *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 303 (2000); *Lee v. Weisman*, 505 U.S. 577, 592 (1992). The Establishment Clause "absolutely prohibit[s] government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith." *School Dist. v. Ball*, 473 U.S. 373, 385 (1985). "[S]chool officials have long been prohibited by the Establishment Clause from inserting religious exercises into school activities." *S.D. v. St. Johns Cnty. Sch. Dist*., 632 F. Supp. 2d 1085, 1093 (M.D. Fla. 2009).

> Regardless of the faith shared by a fraction or by the majority of its pupils, schools owe a duty to all students to refrain from conduct which gives the appearance of advocating a particular religion. In fairness to and protection of all, they must remain neutral. … Parents don't drop off their children at the school house door to have their child's religious beliefs affirmed, questioned or compromised.

M.B. v. Rankin Cnty. Sch. Dist., 2015 U.S. Dist. LEXIS 117289, *23 (S.D. Miss. July 10, 2015).

To comply with the Establishment Clause, a government practice must pass the *Lemon* test,[1] pursuant to which it must: (1) have a secular purpose; (2) not have the effect of advancing or endorsing religion; and (3) not foster excessive entanglement with religion. *Allegheny*, 492

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

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

Numerous courts have explicitly ruled that distributing Gideon Bibles (or other bibles) to public school elementary students during school hours violates the Establishment Clause. *See Lubbock Civil Liberties Union v. Lubbock Independent Sch. Dist*., 669 F.2d 1038 (5th Cir. 1982) (holding unconstitutional distribution of Gideon Bibles to fifth and sixth grade students)[2]; *Meltzer v. Bd. of Public Instruction*, 548 F.2d 559, 575-76 (5th Cir. 1977) ("the distribution of Gideon Bibles to public school students violates the First Amendment."); *Roark v. South Iron R-1 Sch. Dist*., 573 F.3d 556, 561 (8th Cir. 2009) (affirming permanent injunction enjoining school district from "allowing distribution of Bibles" during the school day); *Doe v. S. Iron R-1 Sch. Dist*., 498 F.3d 878, 882-84 (8th Cir. 2007) (same for preliminary injunction); *Berger v. Rensselaer Central Sch. Corp*., 982 F.2d 1160 (7th Cir. 1993) (policy that permitted the Gideons to distribute Bibles in public schools during school hours violated Establishment Clause because it endorsed the Gideons' beliefs and unnecessarily entangled the government in religious affairs); *M.B.*, 2015 U.S. Dist. LEXIS 117289 (ordering school district to pay damages for allowing Bibles to be distributed in school during school hours); *Roe v. Tangipahoa Parish Sch. Bd*., 2008 U.S. Dist. LEXIS 32793, at *10-12 (E.D. La. Apr. 22, 2008) ("this Court determines that the distribution of Bibles was ultimately coercive . . . in violation of *Lee*; that distribution of Bibles is a religious activity without a secular purpose in violation of *Lemon*; and that the distribution by the Gideons amounted to promotion of Christianity by the School Board in violation of *County of Allegheny*."); *Roark v. South Iron R-1 Sch. Dist*., 540 F. Supp. 2d 1047, 1057 (E.D. Mo. 2008) ("Numerous cases have held that the distribution of Gideon Bibles . . . on school property and during school hours violates the Establishment Clause."); *Jabr v. Rapides Parish Sch. Bd*., 171 F. Supp. 2d 653 (W.D. La. 2001) (school board's action of making Bibles available to students in principal's office, in the presence of other students, was an unconstitutional endorsement of religion); *Chandler v. James*, 985 F. Supp. 1094, 1101 (N.D. Ala. 1997); *Goodwin v. Cross Cnty. Sch. Dist. No. 7*, 394 F. Supp. 417 (E.D. Ark. 1973) (school board's practice of permitting religious organization to distribute Bibles violated Establishment Clause); *Tudor v. Bd. of Ed.*, 100 A.2d 857, 868 (N.J. 1953) (the distribution of Gideon Bibles to public school students was unconstitutional even though the Bibles were given only to children whose parents signed a request slip therefor, since this is more than mere accommodation of, or assistance to, a religious sect); *Brown v. Orange Cnty. Bd. of Public Instruction*, 128 So.2d 181, 185 (Fla. Dist. Ct. App. 1960) (distribution of Gideon Bibles in public schools unconstitutional).

[2] *See Ingebretsen v. Jackson Pub. Sch. Dist*., 864 F. Supp. 1473, 1492 (S.D. Miss. 1994) (citing *Lubbock*). Note also that the district court in *Doe v. Duncanville Indep. Sch. Dist*., 70 F.3d 402, 408 (5th Cir. 1995) held that the distribution of Gideon Bibles in public schools was unconstitutional and enjoined the school district from "leading, authorizing, permitting or condoning the distribution of Bibles to students on school premises and during school hours." The Fifth Circuit vacated the order on standing grounds only.

See also Roberts v. Madigan, 921 F.2d 1047, 1056-58, 1061 (10th Cir. 1990) (teacher passively displaying religious books on his desk "had the primary effect of communicating a message of endorsement of a religion" even though his activities "were passive and *de minimis*" and "discreet").

Turning to the facts here, it is plain that the school district, as in the above cases, violated the Establishment Clause pursuant to the *Lemon* and coercion tests by assisting Gideons in distributing Bibles to unsuspecting and trusting elementary school students.

The school's actions fail the purpose prong of *Lemon* because there is no conceivable secular purpose in distributing Bibles to elementary students. *See Berger*, 982 F.2d at 1170; *Roe*, 2008 U.S. Dist. LEXIS 32793, at *11 ("As to the first prong, the Gideons were given access to the elementary school during school hours to distribute Bibles to fifth grade students. The School Board has failed to set forth a secular purpose for this practice"); *Jabr*, 171 F. Supp. 2d at 660 (school board's actions failed the first prong of *Lemon* because there was no secular purpose in permitting a principle to make Gideon Bibles available in his office).

A religious purpose may be inferred where, as here, "the government action itself besp[eaks] the purpose . . . [because it is] patently religious." *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 862-63 (2005). *See Stone v. Graham*, 449 U.S. 39, 41 (1980) ("The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths"); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 222-23 (1963) (accepting stated purpose of "the promotion of moral values," but holding that practice failed purpose test because "[e]ven if its purpose is not strictly religious, it is sought to be accomplished through readings … from the Bible."); *Mellen v. Bunting*, 327 F.3d 355, 373 (4th Cir. 2003) ("When a state-sponsored activity has an overtly religious character, courts have consistently rejected efforts to assert a secular purpose for that activity."); *Roberts*, 921 F.2d at 1056-58.

Nothing "could be more unabashedly Christian than the New Testament Bibles." *Jabr*, 171 F. Supp. 2d at 660. "Permitting distribution of 'The New Testament' . . . affronts not only non-religious people, but all those whose faiths, or lack of faith, does not encompass the New Testament." *Berger*, 982 F.2d at 1170. Clearly, a government practice that assists in tendering New Testament "has the purpose of promoting and approving Christianity." *Jabr*, 171 F. Supp. 2d at 660. *See also Meltzer*, 548 F.2d at 576 n.36 ("We join with the Courts in both *Tudor* and *Brown* in surmising that if the tables were turned, so that it was the Douay version of the Bible, or the Koran, or the Talmud which was being distributed to public school students, the Protestant groups in the County would feel a tremendous sectarian resentment against the actions of the school authorities."). This religious purpose is so clear that it is "controlling even if there were evidence of some other stated legislative purpose." *Summers v. Adams*, 669 F. Supp. 2d 637, 658 (D.S.C. 2009).

Regardless of the purposes motivating it, the district's actions fail *Lemon's* second prong. The "effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval [of religion]." *Wallace v. Jaffree*, 472 U.S. 38, 56 n.42 (1985) (quotation marks omitted). The "advancement need not be

material or tangible. An implicit symbolic benefit is enough." *Friedman v. Bd. of Cnty. Comm'rs*, 781 F.2d 777, 781 (10th Cir. 1985).[3]

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

> an important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices.

School Dist. v. Ball, 473 U.S. 373, 390 (1985) (internal citation omitted). The effect test is thus violated when the government makes "'adherence to a religion relevant in any way to a person's standing in the political community.'" *Green v. Haskell Cnty. Bd. of Comm'rs*, 568 F.3d 784, 799 (10th Cir. 2009) (citing *Allegheny*).

It is apodictic that private citizens such as the Gideons have no right to "use the machinery of the State to practice its beliefs." *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 226 (1963).[4] For instance, in *Santa Fe*, the Supreme Court held that student-led prayer at public school football games failed the second prong of *Lemon* because the prayer was "delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property." 530 U.S. at 307. Even though any prayer would be delivered by a student rather than a government official, the Court concluded that "an objective observer, . . . would perceive it as a state endorsement of prayer[.]" *Id*. at 308 (internal quotation marks omitted). And surely, "[t]here is no inherent right in any citizen or in any religious or political organization to use public school buildings for any other purposes than those devoted to the public schools." *Baggerly v. Lee*, 73 N.E. 921, 922 (Ind. App. 2d Div. 1905).

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[3] *See Larkin v. Grendel's Den*, 459 U.S. 116, 125-26 (1982) ("The *mere appearance* of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred. It does not strain our prior holdings to say that the statute can be seen as having a 'primary' and 'principal' effect of advancing religion.") (emphasis added). By way of example, in *Granzeier v. Middleton*, 955 F. Supp. 741, 746-47 (E.D. Ky. 1997), *aff'd*, 173 F.3d 568 (6th Cir. 1999), the court held that a government sign depicting a small (4-inch) "clip art" cross violated the Establishment Clause reasoning, "the sign could be, and was in fact, perceived by reasonably informed observers, to be a government endorsement of the Christian religion. The court accepts that this apparent endorsement was *not intended*, but this made no difference in the observer's perception." (emphasis added).

[4] *See Lee*, 505 U.S. at 592 (private citizens have no right to use "the machinery of the State to enforce a religious orthodoxy."); *Chandler v. James*, 180 F.3d 1254, 1265 (11th Cir. 1999) ("[A] student's right to express his personal religious beliefs does not extend to using the machinery of the state as a vehicle for converting his audience."). *See also Allegheny*, 492 U.S. at 601 n.51 ("To be sure, prohibiting the display of a creche in the courthouse deprives Christians of the satisfaction of seeing the government adopt their religious message as their own, but this kind of government affiliation with particular religious messages is precisely what the Establishment Clause precludes.").

By assisting Gideons in distributing Bibles to a captive audience of elementary students, the school district sends the "unequivocal message that" the School District, "as an institution, endorses the religious expressions embodied" in the Bibles, *Mellen*, 327 F.3d at 374, and thus violates the Establishment Clause under the second prong of *Lemon. See Meltzer*, 548 F.2d at 575-76 ("the school board's use of the school system as a means of distribution amounts to its placing, at least in the eyes of children and perhaps their parents, its stamp of approval upon the Gideon version of the Bible, thus creating an unconstitutional preference for one religion over another."); *Berger*, 982 F.2d at 1171 ("Though we are confident the school district's policy is not aimed at promoting the religious values of the Gideons, it does have the effect of sending a message to an objective observer that the Corporation endorses the Gideons' beliefs, and it entangles the government unnecessarily in religious affairs."); *Roe*, 2008 U.S. Dist. LEXIS 32793, at *11 ("As for prong two, allowing the Gideons to distribute Bibles under the circumstances in this case evidences a preference towards religion, specifically, Christianity."); *Jabr*, 171 F. Supp. 2d at 663-64 (school board's "action of permitting the principal of the school to offer, give, or make available Bibles . . . in his office . . . is an unconstitutional endorsement of religion . . . creating an impression that the school endorsed a particular religious belief: Christianity."); *Goodwin*, 394 F. Supp. at 427 ("permitting representatives of the well-known and active Gideon organization to distribute their Bibles to students" was unconstitutional advancement of religion); *Brown*, 128 So.2d at 185 ("The distribution of Gideon Bibles through the school system each year certainly approximates an annual promotion and endorsement of the religious sects or groups which follow its teachings and precepts.").

Because the school district "acted with state authority in welcoming the Gideons," "its actions are subject to the dictates of the First Amendment. Under the Establishment Clause, the government may not aid one religion, aid all religions or favor one religion over another." *Berger*, 982 F.2d at 1168-69.

It is no defense to claim that the school was merely making Gideon Bibles available to the students and was not otherwise involved in distributing them. The "Establishment Clause does not limit only the religious content of the government's own communications. It also prohibits the government's support and promotion of religious communications by religious organizations." *Allegheny*, 492 U.S. at 600.

It is firmly established that "[s]chool officials do not have to personally distribute or author materials for the District to be liable for implicitly advancing or endorsing the viewpoints contained therein." *M.B.*, 2015 U.S. Dist. LEXIS 117289, *31.. *See Allegheny*, 492 U.S. 573 (finding that the fact that a crèche exhibited a sign disclosing its ownership by a Roman Catholic organization did not alter the conclusion that it sent a message that the county supported Christianity); *Atheists, Inc. v. Duncan*, 616 F.3d 1145, 1160-61 (10th Cir. 2010) (roadside memorial crosses held unconstitutional where the motorist is "bound to notice the preeminent symbol of Christianity and the UHP insignia, linking the State to that religious sign."). Indeed, the very first court to address the issue held:

> We cannot accept the argument that . . . the State is merely 'accommodating' religion. It matters little whether the teachers themselves will distribute the Bibles or whether that will be done by members of the Gideons International. The same vice exists, that of preference of one religion over another. . . . The society is

> engaged in missionary work, accomplished in part by placing the King James version of the Bible in the hands of public school children throughout the United States. To achieve this end it employs the public school system as the medium of distribution. . . . ***In other words, the public school machinery is used to bring about the distribution of these Bibles to the children*****[.]**

Tudor, 100 A.2d at 868 (emphasis added). *See also Meltzer*, 548 F.2d at 575 ("In the first wave of distribution, the Gideons simply walked into classrooms, asked the children who would like a free Bible, and passed out the Bibles to the children who raised their hands. In the second wave of distribution, the Gideons set up a central Bible distribution point on campus, and students who wanted Bibles had to walk to the distribution center to get them. In both methods, however, the distribution took place with the permission of the school board and the local schools."); *Berger*, 982 F.2d at 1164 (Gideons sent representatives to distribute Bibles to students); *Roe*, 2008 U.S. Dist. LEXIS 32793 (same); *Goodwin*, 394 F. Supp. at 428 (the practice "permitted by the school authorities of distributing the Gideon Bible by a representative of the Society to the fifth grade students in the elementary schools of the Cross County School District is an exercise of religious character which is prohibited by the First Amendment"); *Jabr*, 171 F. Supp. 2d at 660 (observing that "in *Berger*, the classroom teachers did not even participate in the handing out of the Bibles, they merely observed private citizens, known as Gideons, distribute the Bibles to students.").[5]

The U.S. District Court of Mississippi ruled in a case brought by the undersigned on behalf of a student that:

> the fact that the Bibles were distributed by Gideons and not by teachers is an inconsequential distinction because, through the eyes of a child, activities conducted at school are naturally viewed as school-sanctioned events. *See Berger*, 982 F.2d at 1166 ("A ten- or eleven-year-old fifth grader cannot be expected to make subtle distinctions between speakers or instructors invited by the [school] and those whose invitations are self-initiated, even assuming the children were told how the Gideons arrived in their classrooms.").

M.B., 2015 U.S. Dist. LEXIS 117289, at *28-30.

The unconstitutional endorsement is even more troubling here because the Bibles were distributed to students in *elementary* school. Elementary students are vastly more impressionable than high school students and are more likely to perceive the school's actions as an endorsement of religion. *See Bell v. Little Axe Independent School Dist.*, 766 F.2d 1391, 1404 (10th Cir. 1985) ("Elementary schoolchildren are vastly more impressionable than high school or university students and cannot be expected to discern nuances which indicate whether there is true neutrality toward religion on the part of a school administration"); *Peck v. Upshur Cnty. Bd. of Educ.*, 155 F.3d 274, 288 n* (4th Cir. 1998) (equal access policy allowing the limited display of religious and non-religious materials by private groups was unconstitutional "in the elementary

[5] *Cf. Stone*, 449 U.S. at 42-43 ("It does not matter that the posted copies of the Ten Commandments are financed by voluntary private contributions, for the mere posting of the copies under the auspices of the legislature provides the 'official support of the State . . . Government' that the Establishment Clause prohibits.") (citations omitted); *Allegheny*, 492 U.S. at 580, 597.

schools" but not in the high schools due to the impressionability of the younger children); *See also Morgan v. Swanson*, 659 F.3d 359, 382 (5th Cir. 2011); *Walz v. Egg Harbor Twp. Bd. of Educ*., 342 F.3d 271, 277 (3d Cir. 2003) (explaining that in "an elementary school" the line "between school-endorsed speech and merely allowable speech is blurred" and that "[w]hile 'secondary school students are mature enough and are likely to understand that a school does not endorse or support speech that it merely permits on a nondiscriminatory basis,'" elementary students "are different.") (citation omitted); *Berger*, 982 F.2d at 1170 ("If the Supreme Court was concerned about the coercive pressures on fourteen-year-old Deborah Weisman, then we must be even more worried about the pressures on ten- and eleven-year-old fifth graders").

In *Peck*, for instance, the Fourth Circuit reviewed the constitutionality of a school board's policy allowing the limited display of religious *and* non-religious materials by private groups in elementary and secondary schools. Despite the board's efforts to avoid endorsement, the court held the policy unconstitutional "to the extent that it allows . . . religious material in the elementary schools." 155 F.3d at 288 n.* The court distinguished elementary students from high school students and noted, "because children of these ages may be unable to fully recognize and appreciate the difference between government and private speech" the school's "policy could more easily be (mis)perceived as endorsement rather than as neutrality." *Id*.

Other courts have found *Peck* persuasive on this point. *See Morgan v. Swanson*, 659 F.3d 359, 384 (5th Cir. 2011) ("Neither can we ignore the Fourth Circuit's decision in *Peck*, which forbade the distribution of religious materials in elementary schools on Establishment Clause grounds."); *Walker-Serrano v. Leonard*, 325 F.3d 412, 416-17 (3d Cir. 2003); *M.B.*, 2015 U.S. Dist. LEXIS 117289, *28-29 (S.D. Miss. July 10, 2015); *Roe*, 2008 U.S. Dist. LEXIS 32793, at *9-11 ("the *Peck* holding … specifically stated that as to elementary school students, the practice would be unconstitutional because of the heightened concerns regarding coercion.").

In *M.B.*, the U.S. District Court for Mississippi held that a school's actions in making Gideon Bibles available to elementary students violated the Establishment Clause, and even ordered the district to pay the "Plaintiff an additional $5,000 for exposing the violation at NRE where the Gideons were allowed to distribute Bibles on the elementary school's campus," and awarded attorneys' fees to AHA. 2015 U.S. Dist. LEXIS 117289, *34. In finding the Bible distribution unconstitutional, the court reiterated: "the fact that the students involved were fifth-graders is significant to the analysis. In general, young children are impressionable; therefore, introducing a particular belief to groups of fifth-graders can be extremely persuasive." *Id.* at *28-29.

The school district in *M.B.* had argued that the Bible distribution was free speech, and that any endorsement was negated by a disclaimer on the table denouncing the school's involvement. But the court soundly ruled, "[s]uch an argument is patently misguided as the disclaimers were not enough to deflect the perception that the school endorsed the Gideons' belief." *Id.* at *30-32. The court continued, "[f]urthermore, the District, which has an almost singular function of educating children of all ages, should recognize that it is unreasonable to believe a disclaimer would accomplish a detachment between the teachers who led them there and the Christian organization distributing Bibles." *Id.* The court opined, "Does the District really expect the fifth grade students to read the signs and placards on the table and also discern their meaning?" *Id.*

The school district's actions are also "unconstitutional when measured by the third prong of the *Lemon* test." *Jabr*, 171 F. Supp. 2d at 661 ("when the School Board permitted the principal to make Bibles available to students in the principal's office, the principal became excessively entangled with religion."). *See also Roe*, 2008 U.S. Dist. LEXIS 32793, at *11 ("as for prong three, the teachers who were required to inquire as to which students want the Bible, and then organize and direct them to the principal's office, became excessively entangled with religion."). In *Berger*, the Seventh Circuit held that "[t]eachers, who did not actively participate in Bible distribution, but merely observed non-school personnel distribute the material, became excessively entangled with religion in violation of the Establishment Clause." *Id.* (citing *Berger*, 982 F.2d at 1162-63). *See Berger*, 982 F.2d at 1171 ("Though we are confident the school district's policy is not aimed at promoting the religious values of the Gideons, it . . . entangles the government unnecessarily in religious affairs.").

In addition to violating the Establishment Clause pursuant to the *Lemon* test, *supra*, the school's actions also violate the Establishment Clause pursuant to *Lee*'s separate coercion test. 505 U.S. at 587. In *Lee*, the Court held that a public school's inclusion of a nonsectarian prayer in a graduation ceremony was unconstitutionally coercive even though the event was technically voluntary and students were not required to participate in the prayer. *Id.* at 586.

Applying *Lee*, the Seventh Circuit in *Berger* held that a school's "practice of assisting Gideons in distributing Bibles for non-pedagogical purposes is a far more glaring offense to First Amendment principles than a nonsectarian graduation prayer." 982 F.2d at 1169. *See also Roe*, 2008 U.S. Dist. LEXIS 32793, at *10-11 (distribution of Gideon Bibles held unconstitutionally coercive). In *Jabr*, the school defendants argued that "when the principal placed Bibles on his desk, the school did not place any pressure or coerce the child to take the Bible because the child could freely decide whether to accept or reject possession of the Bible." 171 F. Supp. 2d at 661-62. The court disagreed. *Id.* The court explained, "[e]ven when we assume that the principal 'passively' or 'neutrally' offered the Bibles to the students, . . . [t]he pressure created by the principal in his office was coercive and, thus, illegal." *Id. See also Meltzer*, 548 F.2d at 574; *Goodwin*, 394 F. Supp. at 427 ("The fact that a student is not required to accept the [Gideons'] presentation is of no significance.").

The court in *M.B.* reached the same conclusion. It held that making the Gideon Bibles available to elementary students was unconstitutionally coercive "[e]ven if none of the teachers with the District actually handed a Bible to a child or instructed that the child pick one up from the tables." 2015 U.S. Dist. LEXIS 117289, *28-30. The court explained, as relevant here, "[a] reasonable fifth grader would also succumb to peer pressure. While her friends 'freely' accepted the Bibles, a fifth-grader, who may have harbored an objection, also would accept one rather than be teased, questioned or criticized by her classmates." *Id. See Meltzer*, 548 F.2d at 575 (reasoning that, even though Gideon Bibles were given only to students whose parents signed confirmation slips, "pressures would be exerted upon non-conforming pupils, thus creating an unconstitutional preference") (citation omitted).

As the Seventh Circuit aptly observed: "The only reason the Gideons find schools a more amenable point of solicitation than, say, a church or local mall, is ease of distribution, since all children are compelled by law to attend school and the vast majority attend public schools."

Berger, 982 F.2d at 1167. And the Supreme Court has made clear that, "'the government may no more use social pressure to enforce orthodoxy than it may use more direct means.'" *Santa Fe*, 530 U.S. at 312 (quoting *Lee*, 505 U.S. at 594). Put simply, the government's actions in offering Bibles to elementary students "exacts an unconstitutional toll on the consciences of religious objectors." *Id.*[6]

"Finding no violation under these circumstances would place objectors in the dilemma of participating, with all that implies, or protesting." *Id.* at 593. "The prayer in *Lee* occurred during an after-school extracurricular event," whereas "the [OCC boxes were] distributed [] during instructional time." *Berger*, 982 F.2d at 1170-71 (even though children could choose not to accept a Bible, the practice was coercive). Religious activity in the classroom, "where students have no choice but to participate or to conspicuously" opt out while others participate "is unconstitutional whether led by students or teachers." *Herdahl v. Pontotoc Cnty. Sch. Dist*., 933 F. Supp. 582, 591 (N.D. Miss. 1996) (citing *Engel v. Vitale*, 370 U.S. 421 (1962)). It "segregates students along religious lines. The [] children are likely to feel ostracized and stigmatized[.]" *Herdahl v. Pontotoc Cnty. Sch. Dist*., 887 F. Supp. 902, 910-11 (N.D. Miss. 1995).

In view of the aforementioned authorities, it is beyond clear that your school district violated the First Amendment by assisting in the distribution of Bibles to elementary school students. This letter serves as a notice of the district's unconstitutional activity and demands that such activity be enjoined immediately. Because the law prohibiting Bible distribution is well-settled, especially in the elementary schools, not only will the district itself be liable for this constitutional infringement pursuant to 42 U.S.C. § 1983, including in the form of the payment of attorneys' fees, but each and every school official and employee involved may be found *personally* liable, in their individual capacities, as well.

Accordingly, we demand the following assurances: (1) the school district and its agents must refrain from leading, authorizing, permitting or condoning the formal distribution of Bibles at any elementary or middle school premises and during school hours, or immediately before or immediately after school hours; (2) teachers and staff in your school district must be advised that they are not permitted to distribute Bibles to students in class or during class time; and (3) teachers and staff must be instructed that under no circumstances should they attempt to persuade or invite students to take Bibles during class time.

[6] Any claim that the school district here has established a "public forum" for private speech is belied by the actual facts in this case. The "evidence shows that the only group who has been allowed access" to distribute materials "is the Gideons." *Roark*, 540 F. Supp. 2d at 1058. *See also Berger*, 982 F.2d at 1166 (rejecting free speech defense, observing that "the record is barren of addresses or literary distributions by political groups or religious organizations other than the Gideons."). *See also Cole v. Oroville Union High Sch*., 228 F.3d 1092, 1101 (9th Cir. 2000) (even assuming the "graduation ceremony was a public or limited public forum, the District's refusal to allow the students to deliver a sectarian speech or prayer" was "necessary to avoid violating the Establishment Clause"); *Herdahl v. Pontotoc County Sch. Dist*., 933 F. Supp. 582, 589 (N.D. Miss. 1996) (even if a school "established a limited open forum" sectarian "prayer broadcast over the public school loudspeaker would still violate the First Amendment").

In order to avoid litigation, please respond immediately (no later than 7 days), indicating that you will take the appropriate steps to remedy this clear constitutional violation, including providing us with the written assurances outlined above. Thank you in advance for turning your attention to this serious matter.

Sincerely,
Monica L. Miller, Esq.