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Does 1 through 20, inclusive

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

FREEDOM FROM RELIGION FOUNDATION, INC., et al., Plaintiffs, vs. CHINO VALLEY UNIFIED SCHOOL DISTRICT BOARD OF EDUCATION, etc. et al, Defendants.	Case No.: 5:14-CV-2336 JGB (DTBx) PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT Hearing Date: November 2, 2015 Hearing Time: 9:00 a.m. Courtroom: 1 Riverside Hon. Jesus G. Bernal

Plaintiffs Freedom From Religion Foundation, Inc., Michael Anderson, Larry Maldonado, and Does 1-20 inclusive, by and through their attorney of record in this

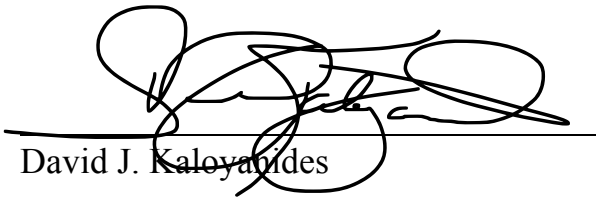
case, David J. Kaloyanides, hereby submit their Opposition to Defendants' Motion for Summary Judgment.

This Opposition is based on: i) Defendants failure to establish that there is no dispute as to any material fact; ii) Defendants failure to present any relevant evidence in support of their Motion; and iii) that Defendants' arguments are not supported by the law.

This Opposition is based on the accompanying Memorandum of Points and Authorities, the papers, pleadings and other documents in the Court's file, the argument of counsel at the hearing on this Motion, and such other matters of which the Court may take judicial notice.

Respectfully submitted,

Dated: October 12, 2015



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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

Defendants purport to bring a Motion for Summary Judgment to address three issues relating to the conduct of the Defendants who are the members of the Chino Valley Unified School District Board of Education (hereinafter the "Board"). Defendants assert that a resolution enacted by the Board to allow prayer at the Board meetings is constitutional. They aver that "Since there are no material disputes of fact—*Town of Greece*—resolution of this case via summary judgment is appropriate." (Defendants' Motion for Summary Judgment, Dkt No. 57, hereinafter "DMSJ", at 2:22-23).

Although Defendants have captioned their Motion as one for summary judgment, Defendants have failed to meet even the rudimentary requirements for a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. Most glaring is Defendants' failure to:

> Cit[e] to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials….
>
> *See* Fed.R.Civ.P. 56(c)(1)(a)&(b).

Specifically, Defendants have pointed to no facts in the record before the Court that support their motion. Defendants have cited no evidence, admissible or otherwise, that support their motion. Defendants make general sweeping statements concerning Defendants conduct but fail to provide any support for such statements. For example,

in Defendants' list of issues, Defendants state that there is a "practice of allowing an invocation prior to school board meetings." (See DMSJ, at 1:2). But Defendants have submitted no evidence to support this statement that such prayers take place prior to the meetings. Defendants refer to the "Board's Resolution" and "a private speaker". (See DMSJ, at 2:2 & 5). But Defendants have failed to submit any admissible evidence of the Resolution itself or the existence of any private speakers to which they refer. Defendants assert that the "Board is a deliberative and legislative body." (See DMSJ, at 2:15-16). But Defendants fail to submit any evidence to support this statement.

Defendants' principal argument is that school boards should be held to be legislative bodies like the state or local governing legislative entity. Defendants admit that there is no controlling precedent that holds a school board to be "more like a city council meeting". (DMSJ at 5:19-23). However, Defendants make the bold assertion that the case law "provides enough clues" that "these clues lead inexorably toward the conclusion that its board meetings should be treated much the same as other deliberative local bodies" and that "the board convenes and conducts its meetings in much the same fashion as a city counsel." Defendants then go on to speculate as to how Plaintiffs would respond to these assertions. (DMSJ 5:23-6:2). But nowhere do Defendants point to any fact in the record to support these statements. Completely absent from Defendants' motion is any evidence in support of these generalizations.

Defendants primary argument is that their conduct is protected under the Supreme Court's decision in *Town of Greece, New York v. Galloway*, --- U.S. ---, 134 S.Ct. 1811, 188 L.Ed.2d 835 (2014). They make the sweeping statement that school boards are legislative bodies. Yet they cite no evidence in the record to to support such

a conclusion or to show how they fit that definition. They identify no fact, to say nothing about an undisputed fact, regarding their conduct, the functions of a school board, the authority of a school board, any conduct or action by a school board. Defendants point to no fact showing how a school board is a legislative body. They do not show such a conclusion by operation of law or by any set of fact from which it may be adjudged as such.

Defendants also argue that the relief Plaintiffs seek constitutes a prior restraint on protected speech. Violations of the First Amendment Speech Clause require a specific analysis based on a factual showing that the speech at issue is in fact protected. Defendants do not present any evidence concerning the speech at issue, the circumstances of that speech, the location and context of the speech, or even what the speech at issue is. Defendants' motion is simply devoid of facts supported by any evidence.

Although Defendants have submitted a Statement of Undisputed Fact in support of their motion, the facts it contains are irrelevant to Defendants arguments. Defendants identify two facts and never mention either in their motion.

Defendants have submitted two declarations and a series of documents as evidence of the two "undisputed facts." But the declarations lack foundation, fail to show any basis of personal knowledge for the assertions they make, and the documents have not been properly authenticated. And just as the "undisputed facts" are irrelevant, the declarations and documents are also irrelevant to Defendants' arguments.

While Defendants purport to seek summary judgment, they have failed to make any showing of fact on which such a motion must be based.

It appears Defendants are trying argue a motion to dismiss under Rule 12(b) of the Federal Rules of Civil Procedure under the guise of a motion for summary judgment. Yet Defendants' time for any motion under Rule 12(b) has long passed. And their failure to follow even the basic requirements under Rule 56 demands that the Court deny their motion for summary judgment.

Yet even if the Court considers the merits of Defendants' motion, the motion should still be denied. Defendants' arguments are wholly without merit and unsupported by law.

II. ARGUMENT

A. DEFENDANTS ARE NOT A LEGISLATIVE BODY SUBJECT TO THE EXCEPTION IN *TOWN OF GREECE*

1. School boards are part of the public school system, not independent legislative bodies.

Defendants' reliance on *Town of Greece* makes the fundamental logical error of begging the question. Their argument assumes that *Town of Greece* applies to schools and school boards. They fail to make any showing in law or fact to support this presumption. The city no statutory authority, no case precedent, fail to point to any fact supported by admissible evidence that leads to their conclusion. Nothing in *Town of Greece* (nor *Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983)for that matter) suggests that the exception identified in those cases applies in the context of a school-whether it be during the school instructional time, a school function outside of instructional time, or at a school board meeting.

Furthermore, defendants misrepresent what California law actually says about school boards. Nothing in California law deems school boards as legislative bodies for the broad purpose of taking school boards out of the school context and putting them into the context of a legislature. School boards are very specifically defined creatures of statute with a very precise purpose: governing the functions of public schools.

Defendants similarly misrepresent what California law says about the nature of the school board meeting. The law does not state that a school board is a legislative body for all purposes. To the contrary, the Education Code, which governs the functions and the existence of school boards, makes school boards subject to the Brown Act for the limited purpose of requiring public meetings No California State authority suggests that a school board is or is to be treated as legislative body similar to the State legislature or other local legislative entity.

Defendants fail to recognize that schools and school boards are first and foremost governed by the California Education Code. *See* Cal.Ed.Code §2, §35160, §33031.[1] The intent and purpose of the law governing education and the public

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[1] California Education Code §35160 provides:

"On and after January 1, 1976, the governing board of any school district may initiate and carry on any program, activity, or may otherwise act in any manner which is not in conflict with or inconsistent with, or preempted by, any law and which is not in conflict with the purposes for which school districts are established."

California Education Code §33031 provides:
"The board shall adopt rules and regulations not inconsistent with the laws of this state (a) for its own government, (b) for the government of its appointees and employees, (c) for the government of the day and evening elementary schools, the day and evening secondary schools, and the technical and vocational schools of the state, and (d) for the government of other schools, excepting the University of California, the California State University, and the California Community Colleges, as may receive in whole or in part financial support from the state."

education system in California is clear: "[T]he fundamental purpose and primary object of the legislature was the consideration of the welfare of the children. This fundamental purpose must not be lost sight of by courts in the construction of legislation dealing with our educational system." *Knickerbocker v. Redlands High Sch. Dist.*, 49 Cal. App. 2d 722, 727, 122 P.2d 289, 291 (1942).

In California, school boards exist solely under the authority established by statute. The California Education Code established school boards and governs their functions.

> (a) Every school district shall be under the control of a board of school trustees or a board of education.
>
> (b) The governing board of each school district shall prescribe and enforce rules not inconsistent with law, or with the rules prescribed by the State Board of Education, for its own government.

Cal.Educ.Code § 35010..

The school board meetings are similarly governed by the Education Code:

> Subject to the provisions of this article the governing board of any school district shall by rule and regulation fix the time and place for its regular meetings. Such action shall be proper notice to all members of the board of the regular meetings.

Cal.Educ.Code § 35140.

The Education Code governs the board meetings setting forth the frequency of those meetings,[2] and it also specifies how the school board is to set the time for the meetings.[3] However, nothing in the Education Code (or any other provision of California law) deems that a school board is a general legislative body like the state legislature or Congress. What the California Education Code does state is that a school board falls under the definition of a legislative body for the express and limited purpose of complying with the public meeting provisions of the Brown Act. *See* Cal.Educ.Code §35145. This provision simply makes sure that the meetings of the board are open to the public for the purpose of public deliberation and transparency of government. That is the very purpose of the Brown Act.

> In enacting this chapter, the Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.
>
> The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know

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[2] "The governing board of any union or joint union high school district, shall hold its regular meetings either monthly or quarterly. The governing board of any other high school district, shall hold its regular meetings monthly." Cal.Educ.Code § 35141.

[3] "Subject to the provisions of Section 35141, the times at which the regular meetings of the governing board of a high school district are to be held shall be prescribed by the rules and regulations adopted by such board for its own government." Cal.Educ.Code §35142.

> and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.
>
> Cal.Gov't Code §54950.

The Brown Act does not make a school board a legislative body akin to a political governing council or legislature. The Brown Act's purpose was to ensure that governing boards relating to matters of public interest, such as school boards, are subject to public scrutiny by ensuring openness of all its business with very few exceptions. The Brown Act is not a statute that creates equality among or equates all entities subject to its open meeting requirements. To the contrary, the Brown Act recognizes that school boards are different and specifically governed by the Education Code.

> The Brown Act generally requires that "[a]ll meetings of the legislative body of a local agency shall be open and public...." (Gov.Code, § 54953.) It applies to school districts. (Gov.Code, §§ 54951, 54952; *Fischer v. Los Angeles Unified School Dist.* (1999) 70 Cal.App.4th 87, 95, 82 Cal.Rptr.2d 452 (*Fischer*).) Per the Brown Act itself, the only exceptions are found in its own provisions or in "any provision of the Education Code pertaining to school districts...." (Gov.Code, § 54962.)
>
> *Kolter v. Comm'n on Prof'l Competence of Los Angeles Unified Sch. Dist.*, 170 Cal. App. 4th 1346, 1350, 88 Cal. Rptr. 3d 620, 622 (2009).

Finally, courts have consistently made a distinction between "legislative body" and "school board" when discussing the application of the Brown Act.[4]

Simply put, school boards are distinct and fundamentally different from legislative bodies. They are part of the essential function of the public schools. Nothing in California law supports a conclusion that the legislative body exception articulated in *Marsh* or *Town of Greece* applies in this context. And Defendants have failed to show otherwise.

2. Nothing in *Town of Greece* nor *Marsh* supports extending the legislative exception to the school boards.

Defendants seem to have missed the primary rationale underpinning *Town of Greece*. The Court found no constitutional violation in the specific legislative prayers there in deference to "historical practices and understandings." 134 S.Ct. at 1819 ("*Marsh* stands for the proposition that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted"). In complete disregard for the underlying rationale of the Court's decision,

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[4] *Frazer v. Dixon Unified Sch. Dist.*, 18 Cal. App. 4th 781, 790, 22 Cal. Rptr. 2d 641, 648 (1993). ("[T]he Legislature declared that both school boards and any other "legislative body" of a local agency may proceed in a "special meeting" after posting a "call and notice" at least 24 hours prior to the special meeting. (Ed.Code, § 35144; § 54956) Of course, special meetings must be open and public, and the school board/legislative body may not consider any business other than that which is specified in the posted "notice." (Ed.Code, § 35145; § 54953, subd. (a).)"); *San Lorenzo Valley Cmty. Advocates for Responsible Educ. v. San Lorenzo Valley Unified Sch. Dist.*, 139 Cal. App. 4th 1356, 1409, 44 Cal. Rptr. 3d 128, 168 (2006) ("The Brown Act (§ 54950 et seq.) provides for open meetings for local legislative bodies such as city councils, boards of supervisors and school boards."); *see also Ingram v. Flippo*, 74 Cal.App.4th 1280, 1287, 89 Cal.Rptr.2d 60 (1999).

Defendants assert that *Town of Greece* should be expanded to uphold prayers at school board meetings despite the fact that Defendants cannot show any long history or tradition that prayer at school board meetings is an acceptable practice.

Defendants' argument to extend *Town of Greece* to include prayers at school board meetings ignores the Supreme Court's paramount consideration: "The Court's inquiry, then, must be to determine whether the prayer practice in the town of Greece fits within the tradition long followed in Congress and the state legislatures." 134 S.Ct. at 1819 (emphasis added). Defendants have failed to show how they fall within either category of legislative bodies. Without any factual or evidentiary support, and with no basis in law, Defendants ask this Court to extend the Supreme Court's decision in *Town of Greece* and apply it to school boards. Yet nothing in the Court's decision suggests that the Court ever intended or even contemplated a school board context in arriving at its decision. Any such application misconstrues the principles stated in *Town of Greece* and ignores well-established Establishment Clause law.

Defendants reliance on *Marsh v. Chambers*, *supra*, 463 U.S. 783 is equally misplaced. *Marsh* never suggested that the legislative prayer exception should apply to school board meetings or any other administrative governing body. The single reference in *Marsh* to "legislative and other deliberative public bodies," *id.* at 786, is limited to legislative bodies such as Congress and state legislatures where there is a demonstrable established history and tradition of prayer in those contexts. Here, Defendants have presented no evidence of any such long, unbroken history or tradition of prayer either at school board meetings, specifically, or in the public school context in general.

But even if Defendants had such evidence, which they do not, a showing of history and tradition itself is not enough.

> Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees, but there is far more here than simply historical patterns. In this context, historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress—their actions reveal their intent.

Marsh, supra, 463 U.S. at 790.

Nowhere have Defendants pointed to any specific or even general expression of intention that Congress or the California state legislature ever intended that religious practice, including prayer, should be permitted in the public school context including at school board meetings. The history of litigation and the resulting decisions of the federal courts regarding religious practice and prayer in the public schools compels a different conclusion from that in *Marsh*. Thus, long-standing practice alone cannot justify an exception, much less serve as license, to violate the Constitution. *Id.* at 790 (quoting *Walz v. Tax Commission of City of New York*, 397 U.S. 664, 678, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970) ("It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it.")).

Prayers at school board meetings are in the nature of public school prayers. There is no meaningful distinction. And Defendants cannot show otherwise. Accordingly, the legislative-body prayer exception does not apply. *See Doe v. Indian*

River Sch. Dist., 653 F.3d 256 (3d Cir. 2011); *Coles ex rel. Coles v. Cleveland Board of Educ*., 171 F.3d 369 (6th Cir. 1999). Defendants' argument that school boards are different from other school activities ignores the critical reasoning behind restricting religious practices at school functions: the religious conduct cannot be dissociated from the school itself. Student-led prayers and religious commentaries at graduation ceremonies and football games have been disallowed precisely because of the affiliation with the school. The conduct, though performed by students, took place on school property at school-sponsored events or during school hours. It is the school nexus, the school context, that is crux of the issue. It is the very reason that the Third and Sixth Circuits have prohibited prayer at school board meetings. *See Indian River, supra*; *Coles, supra).* And here, Defendants present no facts to show how a school board meeting is distinct from and not inexorably connected with the public school. Defendants have not shown that their conduct lacks any unconstitutional entanglement and that there is no appearance of government endorsement of religion or religious practices.

Nor can they.

B. DEFENDANTS CONDUCT IS UNPROTECTED GOVERNMENT SPEECH SUBJECT TO THE RESTRICTIONS OF THE ESTABLISHMENT CLAUSE.

Defendants' argument that their conduct amounts to protected speech is equally unavailing. Fatal to the argument is its presumption. Defendants argue, in an entirely conclusory fashion, that the Board's prayer, Bible readings, and proselytizing constitute private speech. Absent from Defendants' argument is any analysis of the distinction between private speech and government speech. Defendants fail to cite any

authority to support that the religious conduct of a school board in general, or this Board specifically, constitutes private speech. Defendants fail to cite any factual support or admissible evidence that shows the conduct of the Board can be considered private speech under any stretch of the imagination. With no factual and evidentiary support, along with the glaring absence of legal authority, Defendants' argument regarding prior restraint of private speech falls flat. It is simply irrelevant to this case.

Defendants seem to take great pains to dance around the central principle that frames the issue in this case: under California law, the school board meeting is a function of the school. The school board is the governing body for the public school. The school board's existence is nothing without the school. Its entire purpose, function, and authority is inseparable from the public schools it governs and serves.[5] And while teachers and students do not give up their First Amendment rights while at school functions,

> [W]here that speech or expression begins to implicate the school as speaker, First Amendment rights have been limited. *See, e.g., Hazelwood,* 484 U.S. at 270–73, 108 S.Ct. 562 (dealing specifically with student speech); *Planned Parenthood,* 941 F.2d at 828–29 (outside organization's attempt to advertise in school publications); *see also DiLoreto,* 196 F.3d at 969 n. 5 ("The Supreme Court has made clear that the question whether the First Amendment requires a school to tolerate

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[5] *See* Cal. Educ. Code §35010, *supra*; *Knickerbocker, supra.*

> certain speech, such as the speech of students, is different from the question whether the First Amendment requires a school to promote or endorse another's speech."). Cases have identified this lesser-protected type of speech as "school-sponsored speech" or speech that will likely bear the "imprimatur" of the school.

Downs v. Los Angeles Unified Sch. Dist., 228 F.3d 1003, 1009 (9th Cir. 2000).

Defendants conflate two distinct and different constitutional issues here: free speech and government endorsement of religious practices. This is not a free speech case. Yet perhaps because Defendants know they cannot prevail under the appropriate Establishment Clause analysis here, they try to hide behind a free speech argument. But even that analysis fails. Defendants blatantly disregard the fact that the "speech" on which they are focused is *government speech endorsing religion*. Such government speech is forbidden by the Establishment Clause. This case does not involve private speech endorsing religion, which is protected. *See Chandler v. Siegelman,* 230 F.3d 1313, 1316 (11th Cir. 2000) (citing *Santa Fe Independent Sch. Dist. v. Doe*, 530 U.S. 290, 302, 120 S.Ct. 2266 (2000)); *Doe v. Small,* 964 F.2d 611, 617-618 (7th Cir. 1992) (citing *Board of Educ. of Westside Community Schools v. Mergens*, 496 U.S. 226, 250, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990)). School board members are elected by the public. They act in their official representative capacities during the official school board meetings. Their actions, policies, statements, and comments constitute school speech and, therefore, government speech. See *Downs, supra*, 228 F.3d at 1016 ("The LAUSD school board is elected by the public, and until its current members are voted out of office, they "speak" for the school district through the policies they adopt.

Furthermore, in the case of the typical school board, influence from the community does not end at the ballot box, but continues through publicly-held school board meetings at which parents and other interested parties may express satisfaction or dissatisfaction with the school board's policies or "speech.").

Defendants, who themselves have relied on the California Government Code (see DMSJ, 9:15-17), cannot deny that the school district is an agency of the government (*see* Cal. Gov't Code §54951), and its board members act as agents of the government at such official functions. Thus, Defendants, when acting in their official capacities as representatives of the School District, represent the government. Their speech is government speech.

Moreover, where a school board by policy promotes and engages in prayer at such meetings, those prayers constitute government speech. In *Santa Fe Independent Sch. Dist. v. Doe*, *supra*, 530 U.S. 290, the Supreme Court held that even student-led prayers constituted government speech, not private speech, because they were delivered under a government policy and practice and occurred on government property at a government-sponsored event. 530 U.S. at 302. There was no limited public forum because the school authorized only one student to give the invocation and limited the topic of the student's invocation. *Id.* at 303, 306 (noting that speakers select particular words but that prayers must be "consistent with the goals and purposes of this policy."). The Court held that "the delivery of such a message…is not properly characterized as 'private' speech." *Id.* at 310.

Even the authorities upon which Defendants rely prove this point. In *Marsh v. Chambers, supra,* 463 U.S. 783, the Supreme Court treated the chaplain's prayers as government speech subject to the Establishment Clause. *Id.* at 792-795. Were the chaplain's invocations private speech, *Marsh*'s Establishment Clause analysis would have been superfluous.

Indeed, it is well-established that such prayers constitute government speech. *See, e.g.*, *Joyner v. Forsyth Cnty., N.C.*, No. 1:07CV243, 2009 WL 3787754 at 5, (M.D.N.C., 2009) ("Defendant's invocation prayers are government speech.") *aff'd* 653 F.3d 341 (2011)*; Turner v. City Council of City of Fredericksburg, VA,* 534 F.3d 352, 353 (4th Cir. 2008) ("the prayers at issue here are government speech"); *Hinrichs v. Bosma,* 440 F.3d 393, 402 n.5 (7th Cir. 2006) (noting speech limitations when speaking on behalf of the government); *Simpson v. Chesterfield County Bd. of Sup'rs,* 404 F.3d 276, 288 (4th Cir. 2004) ("the speech . . . was government speech").

That the Board's religious commentaries and proselytizing constitute government speech is bolstered by the fact that these statements were made during the sessions of the meetings.[6] The prayers cannot be treated differently. *See Santa Fe, supra*, 530 U.S. at 302 (pregame invocations authorized by a government policy and that take place on government property at government-sponsored school-related events did not amount to private speech).

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[6] Defendants state that the prayer takes place before the Board meeting. However, they have failed to point to any evidence to support this statement. If the Court is inclined to consider Defendants' Exhibit B to the Amended Declaration of Michael Peffer (Dkt. No. 58-1), those documents lend additional support that the prayers are in fact government speech.

With all their free speech arguments, Defendants fail to address a key part of free speech analysis: whether the Board meeting is a public forum. Citing no evidence from the record, Defendants have failed to establish the nature of the Board meeting for any analysis under the Free Speech clause. However, the law makes it clear: school board meetings are limited public forums. *See Leventhal v. Vista Unified Sch. Dist.*, 973 F. Supp. 951, 957 (S.D. Cal. 1997); *see also Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.,* 473 U.S. 788, 803, 105 S.Ct. 3439, 3449–50, 87 L.Ed.2d 567 (1985) ("[I]n *Madison* ..., the Court held that a forum for citizen involvement was created by a state statute providing for open school board meetings."); *Clark v. Burleigh,* 4 Cal.4th 474, 489, 14 Cal.Rptr.2d 455, 841 P.2d 975 (1992) (noting that *Madison* "presented a designated public forum unlimited as to speakers but not as to topic: any member of the public could speak, but only on school board business").

By statute, the school board meeting is limited as to the topics that may be addressed—either by the Board or by the public. In other words, the First Amendment protections of the speech content at a school board meeting is expressly limited by the statutes that require that any member of the public *limit the content to the business of the board*. Defendants misrepresent the nature of the speech and the protections afforded in this case. Plaintiffs do not seek to restrict any legitimate First Amendment speech at the board meetings. But that point is irrelevant to the issues in this case. All speech regarding the appropriate business of the school board is, and should be, permitted. Defendants' religious speech, speech endorsing religion, and religious prayer, are not an appropriate part of a school board's business. This is not a speech case. This is an endorsement, Establishment Clause, and entanglement case. And

defendants cannot mask the true issues in this case by hiding behind non-existent free speech concerns.

Defendants' prayer policy and practice, their religious comments and proselytizing all constitute government speech. And government speech remains subject to the limitations imposed by the Establishment Clause. *See Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 468-69, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009) ("This does not mean that there are no restraints on government speech. For example, government speech must comport with the Establishment Clause. The involvement of public officials in advocacy may be limited by law, regulation, or practice.").[7]

Defendants' conduct here falls under Establishment Clause analysis, not a Free Speech Clause one. Accordingly, Defendants' conduct must be examined under the *Lemon* test, which "remains the Court's principal framework for applying the Establishment Clause." *Santa Monica Nativity Scenes Comm. v. City of Santa Monica*, 784 F.3d 1286, 1299 n.7 (9th Cir. 2015) (citing *Cnty. of Allegheny v. ACLU,* 492 U.S. 573, 592, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989) ("[Lemon's] trilogy of tests has been applied regularly in the Court's later Establishment Clause cases.")).

Yet Defendants' motion does not even attempt to analyze their conduct under the *Lemon* test. This serves as another basis for denying their motion.

When speech occurs in a context that would lead an objective observer to believe a public school is endorsing the speech, it "*is not properly characterized as 'private' speech*." *Santa Fe, supra,* 530 U.S. at 310 (emphasis added). Even genuine

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[7] Moreover, as to any analysis under the Free Speech clause, the Court in *Summum* was absolutely clear: government speech is *not* subject to scrutiny under the Free Speech Clause. *See Summum, supra*, 555 U.S. at 464.

student-led, student-initiated speech is government speech if a reasonable observer would perceive it as such. *Id.* at 302. The *Santa Fe* Court held that the religious speech was government speech because of the context in which the message was delivered:

> The delivery of such a message — over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer — is not properly characterized as 'private' speech.
>
> *Id.* at 310.

As government speech, Defendants' prayers, religious comments, Bible readings, and proselytizing is subject to restrictions. Limitations on the conduct of government representatives does not violate their free speech or free exercise rights. Defendants remain free to pray, proselytize, read aloud from the Bible or engage in any other type of religious activity *on their own time*. What they must not do is engage in this conduct while acting under the color of government authority.

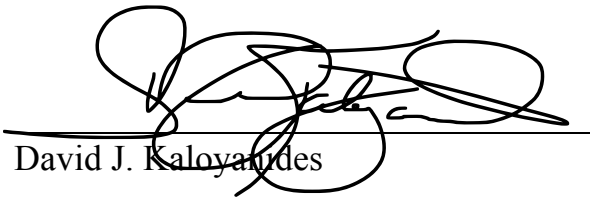
III. CONCLUSION

Defendants have failed to set forth any evidence showing that there are no genuine issues of material fact. Defendants have failed to present any evidence to support their broad generalizations of their conduct. Defendants have failed to present any evidence to support a conclusion that they fall within any exception to an Establishment Clause analysis for their religious conduct during official school board meetings. Defendants have failed to present any evidence to show that their conduct amounts to protected private speech and not unprotected government speech.

Moreover, Defendants' legal arguments do not show how, as a matter of law, they are entitled to summary judgment. Accordingly, and for all the reasons set forth above, the Court should deny their motion.

Respectfully submitted,

Dated: October 12, 2015



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