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Does 1 through 20, inclusive

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

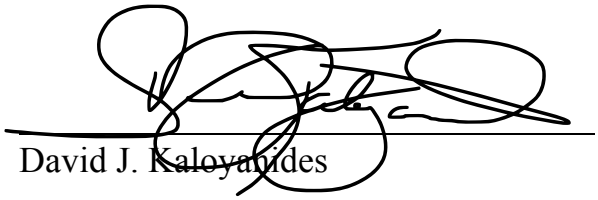
FREEDOM FROM RELIGION FOUNDATION, INC., et al., Plaintiffs, vs. CHINO VALLEY UNIFIED SCHOOL DISTRICT BOARD OF EDUCATION, etc. et al, Defendants.	Case No.: 5:14-CV-2336 JGB (DTBx) PLAINTIFFS' REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT Hearing Date: November 2, 2015 Hearing Time: 9:00 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 Reply in Support of Plaintiffs' Motion for Summary Judgment.

Respectfully submitted,

Dated: October 18, 2015



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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendants seem to misunderstand the purpose of a summary judgment motion. Defendants expressly assert that they do not dispute any fact presented by Plaintiffs. Yet in their opposition, Defendants argue facts that differ from and contradict Plaintiffs' facts. Defendants assert that they are a legislative body. This is directly contrary to the facts presented by Plaintiffs' Motion. Defendants assert that the prayers take place prior to the Board meeting and that Defendants' conduct during the meetings is protected private speech. This, too, is contrary to the facts presented by Plaintiffs. Defendants assert that Plaintiffs lack standing contradicting Plaintiffs' evidence. And Defendants assert they are entitled to both Eleventh Amendment and legislative immunity. However, they present no evidence to support any of their factual assertions.

Defendants have failed to counter any of Plaintiffs' evidence. As to certain issues Defendants have ignored the relevant case authorities. On others they are simply wrong. The Court should deem Plaintiffs' facts as uncontroverted and grant Plaintiffs' Motion.

II. DISCUSSION

A. DEFENDANTS ARE NOT A LEGISLATIVE BODY.

School boards are distinct and fundamentally different from legislative bodies. They are part of the essential function of the public schools. 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. Moreover, nothing in California law suggests that a school board is a general legislative body like the state legislature or

Congress. The Education Code, which governs the functions and the existence of school boards,[1] states 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.

Yet even 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).

In addition, there is no basis for extending the limited exception in *Town of Greece* to schools. The Supreme Court's paramount consideration in *Town of Greece* was the "tradition long followed in Congress and the state legislatures." 134 S.Ct. at 1819 (emphasis added). Nothing in *Town of Greece* suggests that the Court intended to

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[1] *See Knickerbocker v. Redlands High Sch. Dist.*, 49 Cal. App. 2d 722, 727, 122 P.2d 289 (1942); *see also* Cal.Ed.Code §2, §35160, §33031.

apply the exception beyond its specific holding. Such an expansion misconstrues the rationale and holding of *Town of Greece* and ignores well-established Establishment Clause law.

Finally, Defendants' attempt to distinguish school boards from other school functions ignores the critical reason for restricting religious conduct at schools in the first place: 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 the conduct is affiliated with the school. Even though performed by students, the religious conduct took place on school property, at school-sponsored events, or during school hours. It is the school nexus—the school context—that is key. And it is the very reason that the Third and Sixth Circuits have prohibited prayer at school board meetings. *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 present no facts to counter Plaintiffs' evidence showing how there is no meaningful difference between the school board meeting and the public school itself. Defendants are not like "Congress and the state legislatures," and there is no long history or tradition that prayer at school board meetings is an acceptable practice. The exception in *Town of Greece* simply does not apply here. Defendants have not, and cannot refute Plaintiffs' showing that Defendants' prayer, Bible readings, religious commentary, and proselytizing during the Board meetings is an unconstitutional entanglement and clear government endorsement of religion.

B. DEFENDANTS' CONDUCT IS GOVERNMENT SPEECH.

California law is clear: a school board meeting is a function of the school. Its entire purpose, function, and authority is inseparable from the public schools it governs and serves.[2] And while teachers and students do not give up their First Amendment rights while at school functions, "where that speech or expression begins to implicate the school as speaker, First Amendment rights have been limited. [] 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) (internal citations omitted).

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."). Where a school board policy promotes and engages in prayer at such meetings, those prayers constitute government speech. In *Santa Fe Independent Sch. Dist. v. Doe*, 530 U.S. 290, 302, 120 S.Ct. 2266 (2000), 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. *Id*., at 302.

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[2] *See* Cal. Educ. Code §35010; *Knickerbocker v. Redlands High Sch. Dist.*, 49 Cal. App. 2d 722, 727, 122 P.2d 289, 291 (1942).

Defendants conduct takes place *during* the board meetings. Defendants' conduct takes place in front of the community while Defendants are acting in their official representative capacities conducting official school business. Defendants officially sanction the prayers, often giving them, make the religious comments, quote or read from the Bible, and directly call upon the audience to "find Jesus." And the minutes reflect all of this. (*See* Exhibits in Support of Plaintiffs' Motion for Summary Judgment, Ex. 16, §V, at 14; Ex. 19, §V, at 32; Ex. 31, §V, at 135; Ex. 33, §V, at 152; Ex. 34, §V, at 161.) This conduct takes place at the official school meetings on school property and, most importantly, are delivered by authority of school district policy adopted by the Board itself. *See* Resolution, item no. 2 ("WHEREAS, the Board of Education now desires to adopt this formal, written policy to clarify and codify its invocation practices").

Defendants' prayer policy and practice, religious comments, and proselytizing all constitute government speech, which 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). Accordingly, Defendants' conduct must be examined under the *Lemon* test *(see Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), 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) (recognizing that "the *Lemon* test remains the benchmark to gauge whether a particular government activity violates the Establishment Clause"). As set forth fully in Plaintiffs' moving papers, Defendants conduct fails every prong of the *Lemon* test. And Defendants have failed to refute this.

C. PLAINTIFFS HAVE ESTABLISHED STANDING.

In Establishment Clause cases, Article III standing arises from direct contact with an offensive religious or anti-religious symbol. *See Vasquez v. Los Angeles (LA) County*, 487 F.3d 1246, 1251 (9th Cir. 2007) (county resident was found to have a "sufficiently concrete injury" giving rise to standing to bring action against county for removing the image of the cross from the county's official seal, because he had "unwelcome direct contact" with the seal on a regular basis); *see also Van Orden v. Perry*, 545 U.S. 677, 125 S.Ct. 2854, 162 L.Ed.2d 607 (2005) (plaintiff who passes by the Capitol grounds on his way to the library northwest of the Capitol building was found to have standing to question the religious monument erected on the Capitol grounds).

But contact with a physical religious symbol or item is not required for Establishment Clause standing. The Ninth Circuit has also found standing even where he offensive government conduct is an official government enactment such as a resolution. In *Catholic League for Religious & Civil Rights v. City & Cnty. of San Francisco*, 624 F.3d 1043 (9th Cir. 2010), the injury was not as direct or palpable as in *Vasquez*. Plaintiffs were found to have standing merely because they lived within the city that was subjected to the resolution that plaintiffs alleged conveyed a message of hostility towards their belief. This was enough contact with the offending Resolution sufficient to show standing. *Id.*at 1053. Like the offending conduct in *Catholic League* involved more than just mere display of religious symbols, the conduct here involves unequivocal words and actions coming directly from government agents and employees. *See Catholic League, supra,* 624 F.3d at 1050 n.20 ("The resolution at issue, like a symbol, conveys a message, but unlike a symbol, the message is unambiguous.").

Here, Plaintiffs have shown a direct connection to the Defendants conduct in that they are either employees of or have children who are students within the District. They have attended and viewed the public broadcasts of the Defendants' board meetings. At these meetings Plaintiffs are confronted by Defendants unconstitutional practices. Defendants officially endorse and themselves engage in open religious prayer, religious comments, readings and quoting from religious texts, and proselytizing during the Board meeting. This conduct is offensive to Plaintiffs' personal beliefs.[3] These facts, which remain undisputed, establishes Plaintiffs' Article III standing in this case.

There is no question that Plaintiffs have suffered a concrete injury brought about by their direct exposure to and contact with Defendants' unconstitutional endorsement of and entanglement with religion. By promoting religion, Defendants send the message that the Plaintiffs are outsiders and not full members of the community. *See Cnty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 595, 109 S. Ct. 3086, 106 L. Ed. 2d 472 (1989) (citing *Lynch v. Donnelly*, 465 U.S. 668, 687,104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) (O'Connor, J., concurring)).

Furthermore, a favorable decision here will redress Plaintiffs' injury. Declaratory judgment that the Resolution is unconstitutional and imposition of a permanent injunction against Defendants will stop Defendants' violations. More importantly, a

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[3] *See, e.g.,* Declarations in Support of Motion for Summary Judgment, Dkt. No. 48-3, Ex. 1 (Anderson Decl.) at ¶¶ 1, 4, 7-10; Ex. 2 (Maldonado Decl.) ¶¶ 1, 4, 6-8; Plaintiffs' Supplemental Declarations in Support of Motion for Summary Judgment, Dkt. No. 69, Ex 54 (Anderson Decl.), at ¶¶ 1-4, Ex. 55 (Maldonado Decl.), at ¶¶ 1, 3-5, Ex. 56 (DOE 1 Decl.), at ¶¶ 1-4, Ex. 57 (DOE 2 Decl.), at ¶¶ 1-4, Ex. 58 (DOE 3 Decl.) at ¶¶ 1-4, 6, Ex. 59 (DOE 4 Decl.), at ¶¶ 1-3, Ex. 60 (DOE 6 Decl.), at ¶¶ 1-3, 5-6, Ex. 61 (DOE 7 Decl.), at ¶¶ 1-3, 5-6, Ex. 62 (DOE 11 Decl.), at ¶¶ 1-4, 6-7, Ex. 63 (DOE 12 Decl.), at ¶¶ 1-4, 6-7, Ex. 64 (DOE 13 Decl.), at ¶¶ 1-2, 4-5, Ex. 65 (DOE 18 Decl.), at ¶¶ 1-4, 6-7.

favorable judgment will communicate to the community that the government is constitutionally prohibited from engaging in or endorsing any religion. *See Catholic League*, *supra*, 624 F.3d at 1053 ("The fullest realization of true religious liberty requires that government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that it work deterrence of no religious belief." (italics omitted)).

D. DEFENDANTS HAVE NO IMMUNITY DEFENSE.

Finally, Defendants' immunity arguments are meritless. Defendants have ignored the long standing exception to the Eleventh Amendment: prospective injunctive relief sought against an official for a continuing violation of federal law. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 n. 10, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989) ("Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because "official-capacity actions for prospective relief are not treated as actions against the State." (citing *Kentucky v. Graham,* 473 U.S. 159, 167 n.14, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985))). The rationale behind the exception has been recognized by the United States Supreme Court for more than a century:

> The general discretion regarding the enforcement of the laws when and as [the attorney general] deems appropriate is not interfered with by an injunction which restrains the state officer from taking any steps towards the enforcement of an unconstitutional enactment, to the injury of complainant. In such case no affirmative action of any nature is directed, and the officer is simply prohibited from doing an act which he had no legal right to do. An

> injunction to prevent him from doing that which he has no legal right to do is not an interference with the discretion of an officer.
>
> *Ex parte Young,* 209 U.S. 123, 159, 28 S.Ct. 441, 52 L.Ed. 714 (1908)

The central purpose of this case is to stop Defendants, sued in their individual representative capacities, from their continuing violation of Plaintiffs' rights secured by the United States Constitution. *See Green v. Mansour*, 474 U.S. 64, 68, 106 S. Ct. 423, 88 L. Ed. 2d 371 (1985) ("[t]he availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law."). Defendants must not be permitted to use their office to continue their flagrant disregard for the individual constitutional rights of Plaintiffs.

Nor can Defendants find refuge for their misconduct behind the veil of legislative immunity. This privilege inures only to legislators engaging in actions considered to be "an integral part of the deliberative and communicative processes by which [legislators] participate in . . . proceedings with respect to the consideration and passage or rejection of proposed legislation." *Gravel v. United States*, 408 U.S. 606, 625, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972).

First, Defendants are not legislators. They are not a legislative body.

Second, even if the Speech or Debate Clause applied to school boards, Defendants cannot show that their religious conduct is within "the sphere of legitimate legislative activity." *See Bogan v. Scott-Harris*, 523 U.S. 44, 54, 118 S.Ct. 966, 140 L.Ed.2d 79 (1998) (citing *Tenney v. Brandhove*, 341 U.S. 367, 376-77, 71 S. Ct. 783, 95 L. Ed. 1019 (1951)).

Legislative immunity is not an umbrella protection for all legislative conduct. "In every case thus for before this Court, the Speech or Debate Clause has been limited to an act which was clearly a part of the legislative process—the due functioning of the process." *United States v. Brewster*, 408 U.S. 501, 515-16, 92 S. Ct. 2531, 33 L. Ed. 2d 507 (1972). It is "the nature of the function performed, not the identity of the actor who performed it," that brings conduct within the realm of immunity." *Forrester v. White*, 484 U.S. 219, 229, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988); *see also Eastland v. U. S. Servicemen's Fund*, 421 U.S. 491, 501, 95 S. Ct. 1813, 44 L. Ed. 2d 324 (1975)(Speech and Debate Clause immunities not for personal protection of members of Congress but to protect integrity of legislative process).

No evidence supports Defendants' assertion that their religious prayers, the Resolution, their Bible readings, comments, or proselytizing falls within a legitimate legislative process. Their legislative immunity argument is simply meritless.

III. CONCLUSION

For the foregoing reasons, and those set forth in Plaintiffs' moving papers, the Court should grant Plaintiffs motion and enter summary judgment in favor of Plaintiffs.

Respectfully submitted,

Dated: October 18, 2015

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