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11

12 UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
13 EASTERN DIVISION
14

15 FREEDOM FROM RELIGION) Case No.: 5:14-CV-2336 JGB (DTBx)
FOUNDATION, INC., et al.,)
16 Plaintiffs,) PLAINTIFFS' MEMORANDUM OF
vs.) POINTS AND AUTHORITIES IN
17) SUPPORT OF MOTION FOR
CHINO VALLEY UNIFIED) SUMMARY JUDGMENT
18 SCHOOL DISTRICT BOARD OF)
EDUCATION, etc. et al,) Hearing Date: October 26, 2015
19) Hearing Time: 9:00 a.m.
20) Courtroom: 1 Riverside
Defendants.) Hon. Jesus G. Bernal

1 Plaintiffs Freedom From Religion Foundation, Inc., Michael Anderson, Larry
2 Maldonado, and DOES 1 through 20 inclusive, hereby submit this Memorandum of
3 Points and Authorities in Support of their Motion for Summary Judgment.

4
5 Respectfully submitted,

6
7 Dated: September 28, 2015

8 
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

There is no dispute as to any material fact at issue in this case. The only question is what is the legal effect of the religious conduct of the Chino Valley Unified School District Board of Education (the “Board”) acting through the elected members of the Board during the Board meetings. In other words, the only question to resolve is whether the opening of the Board meetings with prayer (predominantly Christian prayer), the reading and reciting of passages from the Christian Bible by Board members during Board meetings, the proselytizing by Board members through religious comments and commentary during Board meetings, violate the constitutional rights of the Plaintiffs. The Plaintiffs refer to and incorporate herein by reference the undisputed material facts and corresponding citations to the record set forth in the Statement of Uncontroverted Facts and Conclusions of Law (hereinafter “SUF”).

The uncontroverted facts show that the Board had a regular practice of beginning each Board meeting with a prayer. (SUF Nos. 6, 26, 30, 33, 38-39, 42, 45, 50, 53, 56, 59, 63, 66, 73, 75, 77, 80, 84, 86, 88, 90-91, 93-100, 102). The Board enacted Board Resolution 2013/2014-11 on October 17, 2013 to make these prayers an official part of the Board meetings. (SUF No. 4). The intent of the Resolution, by its very terms, and in practice, is to promote religious prayer as part of the Board Meetings to the exclusion of non-religious and secular means of solemnizing the meetings. The invitation to the community to participate in the prayer is directed solely to religious organizations and religious leaders (predominantly Christian) to the exclusion of secular organizations or non-religious organizations. (SUF No. 5). Board members themselves conducted the prayers at times. (SUF Nos. 38, 42, 73, 84, 97) In

1 addition, Board members regularly recite and read passages from the Christian Bible,
2 usually the New Testament, (SUF Nos. 31, 34-37, 40, 43, 48, 51, 55, 57, 60-61, 67, 70,
3 76, 78, 81, 85, 89) as well as engaging in religious comments promoting Christian
4 beliefs and expressly encouraging those in attendance to accept and adopt such
5 beliefs—in other words, proselytizing. (SUF Nos. 32 35, 36, 37, 41, 43-44, 46-47, 49,
6 51-52, 54, 58, 62, 65, 69, 70-72, 74, 79, 81-83, 87, 92, 103-106). Moreover, the
7 uncontroverted facts show that the Board includes a student member, that students
8 attend the Board’s meetings, and that in order for students to participate in recognition,
9 awards, and other honors for their school activities, they must attend the Board
10 meetings. (SUF Nos. 15, 17-21, 26-29).

11 The Board controls and governs the schools in the District. (SUF No. 1). The
12 Board’s meetings are part of its functions and process for conducting the business of
13 the schools in the District. There is little to distinguish the Board’s meetings from a
14 school function. There is nothing that sets the Board meetings apart from the school
15 context. The conduct of the Board during its meetings should be analyzed as any other
16 school event.

17 Without any dispute as to the material facts in this case, the Court can answer
18 the only issue in the case: has the Board violated the Establishment Clause of the First
19 Amendment to the United States Constitution, the Equal Protection Clause of the
20 Fourteenth Amendment to the United States Constitution, the Establishment, No Aid
21 and No Preference clauses of the California state Constitution, and California’s civil
22 rights statute codified in California Civil Code §52.1? Based on the uncontroverted
23 facts here, the answer to all is yes.

1
2 II. ARGUMENT

3 A. THE PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT

4 The Plaintiffs are entitled to the entry of summary judgment in their favor
5 because, as demonstrated by the pleadings and evidence on the record, there is no
6 genuine issue of material fact and the Plaintiffs are entitled to judgment as a matter of
7 law. FED.R.CIV. P. 56(c). A fact is material when, under the governing substantive
8 law, it could affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S.
9 242, 248, 106 S.Ct. 2505 (1986). Summary judgment does not require an absolute
10 absence of any factual dispute between the parties. *Id.* at 247-48. The party moving for
11 summary judgment bears the initial burden of offering proof of the absence of any
12 genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct.
13 2548 (1986). If the moving party satisfies its initial burden, the nonmoving party must
14 “go beyond the pleadings and by her own affidavits, or by the ‘depositions, answers to
15 interrogatories, and admissions on file,’ designate ‘specific facts showing that there is
16 a genuine issue for trial.’” *Id.* at 324 (quoting FED. R. CIV. P. 56(e)). The declarations
17 of the Plaintiffs as to the facts about the Defendants’ conduct at issue, as do public
18 records (in the form of videos of the relevant Board of Education board meetings,
19 published Minutes of those meetings, and published Board of Education Resolutions)
20 of which the Court may take judicial notice. Given these established facts, judgment as
21 a matter of law is appropriate because they sufficiently show that the Defendant
22 Board’s conduct violates the Establishment Clause and the religion clauses of the
23 California Constitution, *infra*.

1 B. THE PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON
2 THEIR FEDERAL ESTABLISHMENT CLAUSE CLAIMS

3 The Supreme Court has consistently struck down government organized
4 prayers, bible readings, and proselytizing in the school context for more than 65 years.
5 *Illinois ex rel. McCollum v. Bd. of Ed.*, 333 U.S. 203, 211, 68 S.Ct. 461 (1948); *see*
6 *also Engel v. Vitale*, 370 U.S. 421, 424, 82 S.Ct. 1261 (1962); *Abington Sch. Dist. v.*
7 *Schempp*, 374 U.S. 203, 223, 83 S.Ct. 1560 (1963); *Lee v. Weisman*, 505 U.S. 577,
8 589, 112 S.Ct. 2649 (1992); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 310, 120
9 S.Ct. 2266 (2000). The Ninth Circuit has halted proselytizing at school events too.
10 *Cole v. Oroville Union High Sch.*, 228 F.3d 1092, 1101 (9th Cir. 2000) (“the District’s
11 refusal to allow the students to deliver a sectarian speech or prayer as part of the
12 graduation was necessary to avoid violating the Establishment Clause,” and finding
13 that “proselytizing, no less than prayer, is a religious practice.”); *Lassonde v.*
14 *Pleasanton Unified Sch. Dist.*, 320 F.3d 979, 984 (2003) (same); *see also, Johnson v.*
15 *Poway Unified Sch. Dist.*, 658 F.3d 954, 969 (9th Cir. 2011) (in classroom). These
16 holdings did not turn on the language of a prayer policy, whether or not the prayers
17 were sectarian, or who gave the prayers. No facts altered the unconstitutionality of
18 government organized religious rituals in the public school setting.

19 As an initial matter, however, the Court must determine whether or not the
20 Defendants’ conduct occurred and continues to occur in the school context. In other
21 words, the Court must determine if the School District’s Board of Education board
22 meetings fall within the context of schools generally. Clearly it does.

- 23 1. School board meetings are school events and organized prayer at the meetings
24 should be treated legally as such, as two Circuit courts have already held.

1 “This case puts the court squarely between the proverbial rock and a hard place.
2 The rock is *Lee v. Weisman*, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992),
3 holding that opening prayers at high school graduation ceremonies violate the
4 Establishment Clause of the First Amendment. The hard place is *Marsh v. Chambers*,
5 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983), ruling that opening prayers are
6 constitutionally permissible at sessions of a state legislature.” *Coles ex rel. Coles v.*
7 *Cleveland Bd. of Educ.*, 171 F.3d 369, 371 (6th Cir. 1999). The only two Federal
8 Circuit courts to address this precise issue both held that school boards are “closer to
9 the rock than to the hard place.” *Id.*¹

10 In *Coles*, the Sixth Circuit found the Cleveland school board’s prayers violated
11 the Establishment Clause. *Id.* at 385. In *Doe v. Indian River Sch. Dist.*, 653 F.3d 256
12 (3d Cir. 2011), the Third Circuit agreed with *Coles* and held “the Indian River School
13 Board Prayer Policy rises above the level of interaction between church and state that
14 the Establishment Clause permits.” *Id.* at 290. These two cases are directly on point
15 and were decided *after* the Supreme Court approved legislative prayer in *Marsh v.*
16 *Chambers*, 463 U.S. 783, 103 S.Ct. 3330 (1983). But in this case, the additional

17
18
19 ¹ The only case in the Ninth Circuit that addressed this question under similar facts is
20 the unpublished opinion of *Bacus v. Palo Verde Unified School Dist. Bd. of Educ.*, 52
21 Fed.Appx. 355 (9th Cir. 2002). In that case, the Ninth Circuit overturned the decision
22 of the district court which found that opening a school board meeting with prayer was
23 permissible. *See Bacus v. Palo Verde Unified School Dist. Bd. of Educ.*, 11 F.Supp.2d
24 1192 (C.D.Cal.1998). The district court determined under the facts of the case that the
25 *Marsh* analysis should be used instead of the *Lemon* and *Weisman* tests. *Id.* at 1196.
26 The Circuit reversed the district court’s decision. While the district court decision
 remains published, the Circuit opinion was not certified for publication. No other
 Ninth Circuit authority has been uncovered that addresses the very specific issue here.

1 conduct by Defendants in proselytizing and regularly reading passages from the Bible
2 during Board meetings makes the circumstances here more egregious.

3 This Court should do as the Third and Sixth Circuit Courts of Appeals did, and
4 focus its initial inquiry on whether the school board’s prayer practices should be
5 analyzed under the limited exception *Marsh* carved out, or under other jurisprudence
6 involving school-sponsored religion. Both courts found *Marsh* too narrow and
7 inapplicable to the school board setting. Both courts applied the *Lee v. Weisman* line of
8 cases and found the school boards’ prayer practices unconstitutional.

9 *Coles* and *Indian River* examined the factual context of the board meetings to
10 determine which line of cases should apply. Perhaps the most important fact was the
11 purpose of the school boards. The Sixth Circuit held that “the fact that school board
12 meetings are an integral component of the Cleveland public school system serves to
13 remove it from the logic in *Marsh* and to place it squarely within the history and
14 precedent concerning the school prayer line of cases.” *Coles, supra*, 171 F.3d at 381.
15 The Third Circuit agreed, “regardless of whether the Board is a ‘deliberative or
16 legislative body,’ we conclude that *Marsh* is ill-suited to this context because the entire
17 purpose and structure of the Indian River School Board revolves around public school
18 education.” *Indian River, supra*, 653 F.3d at 278.

19 The “realities” of school board meetings dictated the holding: “These meetings
20 are conducted on school property by school officials, and are attended by students who
21 actively and regularly participate in the discussions of school-related matters.” *Coles,*
22 *supra*, 171 F.3d at 381.

1 The realities that controlled those two cases exist here. In fact, the families and
2 Board agree that many of the facts here are *identical* to those upon which the Third and
3 Sixth Circuits relied in their analysis:

- 4 • The Board is the governing board of the School District.²
- 5 • “These public meetings usually take place on school property—either in the
6 school board’s administration building or in a schoolhouse.”³
- 7 • The Board retains control over the meeting by setting “the agenda and the
8 schedule.”⁴
- 9 • “The Board deals with student disciplinary actions at the closed-door portion of
10 its public meetings,” and that “students facing disciplinary action for serious
11 offenses are permitted to speak with the Board directly in connection with their
12 situation.”⁵
- 13 • “The Student Representative directly represents student interests at the Board’s
14 meeting. The meeting gives student representatives—and therefore all the
15

16 ² SUF No. 1. *Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 279 (3d Cir. 2011); *see also*
17 *Coles ex rel. Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 381 (6th Cir. 1999)
18 (“What actually occurs at the school board’s meetings is what sets it apart from the
19 deliberative processes of other legislative bodies. Simply stated, the fact that the
20 function of the school board is uniquely directed toward school-related matters gives it
21 a different type of “constituency” than those of other legislative bodies—namely,
22 students.”).

20 ³ SUF Nos. 22-23, 64, 68; *Indian River*, *supra*, 653 F.3d at 278; *Coles*, *supra*, 171 F.3d
21 at 386 (noting importance of government control over content).

21 ⁴ SUF Nos. 6, 24, 25. *See Indian River*, *supra*, 653 F.3d at 278, *citing Lee v. Weisman*,
22 505 U.S. at 597, 112 S.Ct. 2649 (1992)(“At a high school graduation, teachers and
23 principals must and do retain a high degree of control over the precise contents of the
24 program, the speeches, the timing, the movements, the dress, and the decorum of the
25 students.”).

24 ⁵ SUF No. 108; *See Indian River*, *supra*, 653 F.3d at 264; *Coles*, *supra*, 171 F.3d at
25 383.

1 students—an opportunity to draw attention to issues that affect their educational
2 experience.”⁶

3 These facts dictated that school board prayer be analyzed as school prayer.

4 Both *Coles* and *Indian River* placed significant emphasis on students attending
5 and participating in meetings, whether or not the Board characterized it as voluntary.
6 (Voluntariness was irrelevant because the Boards prayed “in an atmosphere that
7 contains many of the same indicia of coercion and involuntariness that the Supreme
8 Court has recognized elsewhere in its school prayer jurisprudence.”) *Indian River*,
9 *supra*, 653 F.3d at 275. *Indian River* recognized six ways students participate in board
10 meetings: (1) student disciplinary action, (2) JROTC students presenting colors, (3)
11 student representatives sitting as Board members, (4) students performing for the
12 Board’s benefit, (5) the Board recognizing student achievements, and (6) students
13 making public comments. Each of these has occurred or regularly occurs at CVUSD
14 meetings, in addition to other student participation such as reciting the pledge. *Id.* at
15 264-65.⁷

16 As these cases show, the issue is not whether the Board is a deliberative body or
17 is fulfilling legislative functions; the issue is whether the factual reality of Board
18 meetings puts it in the same class as other school events. “Although meetings of the
19

20 ⁶ SUF Nos. 20, 28. *See Indian River, supra*, 653 F.3d at 277; *Coles, supra*, 171 F.3d at
21 372.

22 ⁷ Defendant Board handles student disciplinary matters at Board meetings. SUF No.
23 108. JROTC has presented the colors at Defendant Board meetings. SUF No. 109.
24 Defendant Board has a Student Representative Board member. SUF Nos. 20 & 28.
25 Defendant Board recognizes and presents awards to students at meetings. SUF No. 18.
26 Students perform for Defendant Board at Board meetings. SUF Nos. 17, 26, & 27.
Students make public comments at Defendant Board meetings. SUF No. 19. Students
have led the pledge of allegiance at Defendant Board meetings. SUF No. 21.

1 school board might be of a ‘different variety’ than other school-related activities, the
2 fact remains that they are part of the same ‘class’ as those other activities in that they
3 take place on school property and are inextricably intertwined with the public school
4 system. Moreover, there is no question that the Establishment Clause jurisprudence
5 controls this case.” *Coles, supra*, 171 F.3d at 377.

6
7 2. No case has applied the *Marsh* exception to the school context; and every court
8 applying *Marsh* has specifically distinguished prayers in the school context.

9 *Coles* and *Indian River* were decided after *Marsh*, and *Town of Greece, N.Y. v.*
10 *Galloway*, 134 S.Ct. 1811, 188 L.Ed.2d 835 (2014) overturned neither. The Third and
11 Sixth circuits explicitly decided that *Marsh* did not apply to school board prayer. They
12 did so partly because the Supreme Court has distinguished the two cases that allow
13 legislative prayer—*Marsh* and *Galloway*—from the school context:

14 Inherent differences between the public school system and a session of a
15 state legislature distinguish this case from *Marsh v. Chambers*. The
16 considerations we have raised in objection to the invocation and
17 benediction are in many respects similar to the arguments we considered
18 in *Marsh*. But there are also obvious differences. The atmosphere at the
19 opening of a session of a state legislature ... cannot compare with the
20 constraining potential of the one school event most important for the
21 student to attend. ... The *Marsh* majority in fact gave specific
22 recognition to this distinction and placed particular reliance on it in
23 upholding the prayers at issue there. *Lee, supra*, 505 U.S. at 596-97
24 (citations omitted).

1 The distinction was not only explicit, but a requirement. *Id.* at 597 (noting that
2 our “decisions in *Engel v. Vitale* and *Schempp*, **require** us to distinguish the public
3 school context.”) (emphasis added).

4 When the Supreme Court recently reaffirmed *Marsh* in *Galloway*, it again
5 distinguished the decisions from the school prayer context:

6 This case can be distinguished from the conclusions and holding of *Lee*
7 *v. Weisman*. There the Court found that, in the context of a graduation
8 where school authorities maintained close supervision over the conduct
9 of the students and the substance of the ceremony, a religious invocation
10 was coercive as to an objecting student. *Id.*, at 592–594; *see also Santa*
11 *Fe Independent School Dist.*, 530 U.S., at 312. Four Justices dissented in
12 *Lee*, but the circumstances the Court confronted there are not present in
13 this case and do not control its outcome.

14 *Galloway, supra*, 134 S. Ct. at 1827 (emphasis added).

15 The circumstances that controlled *Lee* (and *Coles* and *Indian River*) did not
16 exist in *Galloway*. But those very circumstances are present here.

17 Though *Galloway* reaffirmed *Marsh*, the Supreme Court and Federal Circuits
18 have never applied the *Marsh* rationale to public schools. *See, e.g., Lee, supra*, 505
19 U.S. at 596-97; *Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S.
20 573, 602-05, 109 S.Ct. 3086 (1989); *Edwards v. Aguillard*, 482 U.S. 578, 583 n.4, 107
21 S.Ct. 2573 (1987); *Warner v. Orange Cnty. Dept. of Probation*, 115 F.3d 1068, 1076
22 (2d Cir. 1996), *reaffirmed after vacatur and remand*, 173 F.3d 120 (2d Cir. 1999);
23 *ACLU of Ohio Found. v. Ashbrook*, 375 F.3d 484, 494-95 (6th Cir. 2004); *Glassroth v.*

1 *Moore*, 335 F.3d 1282, 1297-1298 (11th Cir. 2003); *Mellen v. Bunting*, 327 F.3d 355,
2 369-70 (4th Cir. 2003); *Jager v. Douglas County Sch. Dist.*, 862 F.2d 824, 828-29
3 (11th Cir.1989).

4 The Ninth Circuit’s *Marsh*-affirming decision, *Rubin v. City of Lancaster*, 710
5 F.3d 1087 (9th Cir. 2013), also distinguished the school context, reiterating the
6 “inherent differences between the public school system and a session of a state
7 legislature.” *Id.* at 1096 n.8 (*citing Lee*, 505 U.S. at 596–97).

8 In sum, *Galloway*, *Marsh*, and *Rubin* all agree that prayers occurring in a school
9 context should be treated differently.

10 Courts are more sensitive to Establishment Clause violations in the school
11 context. The Supreme Court has repeatedly held that “there are heightened concerns
12 with protecting freedom of conscience from subtle coercive pressure in the elementary
13 and secondary public schools.” *Lee, supra*, 505 U.S. at 592. *See also Johnson, supra*,
14 658 F.3d at 972 (*citing Edwards*, 482 U.S. at 583–84) (“The Court has been
15 particularly vigilant in monitoring compliance with the Establishment Clause in
16 elementary and secondary schools.”). The constitutional concern “may not be limited
17 to the context of schools, but it is most pronounced there.” *Lee, supra*, 505 U.S. at 592
18 (*citing Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring in judgment in part and
19 dissenting in part)) (emphasis added).

20 Coercion, which certainly exists here, was not a factor in *Marsh* or *Galloway*.
21 But *Galloway* noted that *if* “prayer is alleged to be a means to coerce or intimidate
22 others, the objection can be addressed...” *Galloway, supra*, 134 S. Ct. at 1826.

1 Thus, whether prayer takes place in the “school context” is of primary
2 importance, as the Ninth Circuit has reiterated. *Johnson, supra* 658 F.3d at 972
3 (“Context is critical when evaluating the government’s conduct” under the
4 Establishment Clause). *Coles, Indian River*, and these facts show that Chino Valley
5 School Board meetings fall squarely in the school context.

6
7 C. BECAUSE SCHOOL BOARDS DO NOT MEET THE *MARSH* AND
8 *GALLOWAY* EXCEPTION TO THE FIRST AMENDMENT, THEIR
9 CONDUCT ARE ANALYZED USING THE *LEMON* TEST.

10 To determine if the government has violated the Establishment Clause, courts
11 “continue to apply the three-factor test set forth in *Lemon*. Despite recent criticism of
12 the *Lemon* test, it remains the analysis for the Court to use in Establishment Clause
13 cases.

14 As a mode of analysis for Establishment Clause inquiries, *Lemon* has
15 been much criticized both inside and outside the Court—and sometimes
16 ignored by the Court altogether, *see, e.g., Town of Greece v. Galloway*, –
17 — U.S. —, 134 S.Ct. 1811, 188 L.Ed.2d 835 (2014). Nevertheless,
18 *Lemon* remains the Court's principal framework for applying the
19 Establishment Clause.

20 *Santa Monica Nativity Scenes Comm. v. City of Santa Monica*, 784 F.3d 1286,
21 1299 n.7 (9th Cir. 2015) (citing *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 592, 109
22
23
24

1 S.Ct. 3086, 106 L.Ed.2d 472 (1989) (“[Lemon's] trilogy of tests has been applied
2 regularly in the Court's later Establishment Clause cases.”).⁸

3 ‘Under *Lemon*, a government act is consistent with the Establishment Clause if
4 it: (1) has a secular purpose; (2) has a principal or primary effect that neither advances
5 nor disapproves of religion; and (3) does not foster excessive governmental
6 entanglement with religion.’” *Johnson, supra*, 658 F.3d at 972. The Ninth Circuit has

7 _____
8 ⁸ See also *Edwards v. Aguillard*, 482 U.S. 578, 583 n.4, 107 S.Ct. 2573 (1987) (“The
9 Lemon test has been applied in all cases since its adoption in 1971, except in *Marsh*”);
10 *Atheists of Fla., Inc. v. City of Lakeland*, 713 F.3d 577, 590 (11th Cir. 2013) (the
11 “Supreme Court has not extended the *Marsh* exception”); *Joyner v. Forsyth County*,
12 653 F.3d 341, 349 (4th Cir. 2011) (“the exception created by *Marsh* is limited”)
13 (citation omitted); *Pelphrey v. Cobb County*, 547 F.3d 1263, 1276 (11th Cir. 2008)
14 (“the Supreme Court has never expanded the *Marsh* exception”); *Coles, supra*, 171
15 F.3d at 376 (“the unique and narrow exception articulated in *Marsh*”); *Jager v.*
16 *Douglas County Sch. Dist.*, 862 F.2d 824, 829 n.9 (11th Cir. 1989) (“*Marsh* created an
17 exception to the Lemon test only for such historical practice.”); *Katcoff v. Marsh*, 755
18 F.2d 223, 232 (2d Cir. 1985) (referring to *Marsh* as an “exception” to Lemon);
19 *Weisman v. Lee*, 908 F.2d 1090, 1094-96 (1st Cir. 1990) (Bownes, J., concurring)
20 (twice referring to “the exception to [*Lemon*] delineated in *Marsh*”); *Bats v. Cobb*
21 *County*, 410 F. Supp. 2d 1324, 1328 (N.D. Ga. 2006) (*Marsh* is an “exception”);
22 *Glassroth v. Moore*, 229 F. Supp. 2d 1290, 1306 (M.D. Ala. 2002) (same); *Metzl v.*
23 *Leininger*, 850 F. Supp. 740, 744 (N.D. Ill. 1994) (referring to the “*Marsh* court’s
24 narrow ‘historical exception’ to traditional Establishment Clause jurisprudence”);
Albright v. Board of Educ. of Granite School Dist., 765 F. Supp. 682, 689 (D. Utah
1991) (*Marsh* is an “exception”); *Lundberg v. West Monona Community School Dist.*,
731 F. Supp. 331, 346 (N.D. Iowa 1989) (explaining that the plaintiffs sought to
“escape the *Lemon* test by invoking the *Marsh* exception” and concluding that “the
Marsh exception is not controlling.”); *Jewish War Veterans v. U.S.*, 695 F. Supp. 3, 11
n.4 (D.D.C. 1988) (“[T]he Supreme Court has applied the Lemon framework in all but
one establishment clause case. The exception was *Marsh v. Chambers*, 463 U.S. 783,
103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983)...”); *Blackwelder v. Safnauer*, 689 F. Supp.
106, 142 n.38 (N.D.N.Y 1988) (the “*Lemon* test has been applied by the Supreme
Court in all cases subsequent to its formulation with one exception. In *Marsh* . . . the
Court carved out a narrow exception to the prohibitions of the establishment clause”);
Card v. City of Everett, 520 F.3d 1009, 1014 (9th Cir. 2008) (“*Marsh* . . . should be
construed as carving out an exception to normal Establishment Clause jurisprudence”)
(internal quotation omitted); cf. *Marsh*, 463 U.S. 783, 796, 103 S.Ct. 3330 (1983)
(Brennan, J., dissenting) (“the Court is carving out an exception to the Establishment
Clause”).

1 “collapsed these last two prongs to ask ‘whether the challenged governmental practice
2 has the effect of endorsing religion.’” *Id.* (citing *Trunk v. City of San Diego*, 629 F.3d
3 1099, 1106 (9th Cir. 2011) (quoting *Access Fund v. U.S. Dept. of Agriculture*, 499 F.3d
4 1036, 1043 (9th Cir. 2007))). If the government action fails any prong it is
5 unconstitutional. Here, Defendants fail all three.

6 1. The prayers, proselytizing, and Bible readings have an obvious religious
7 purpose and no legitimate secular purpose.

8 The purpose behind hosting prayers, reading from the bible, and proselytizing
9 is, as Mr. Na stated at one meeting, to “urge[] everyone who does not know Jesus
10 Christ to go and find Him.”⁹ Sectarian and proselytizing prayers “by definition, are
11 designed to reflect, and even convert others to, a particular religious viewpoint and ...
12 do not serve (and even run counter to) the permissible secular purpose of solemnizing
13 an event.” *Doe v. Santa Fe Independent Sch. Dist.*, 168 F.3d 806, 817-18 (5th Cir.
14 1999). The purpose is to use a public office serving all citizens, to promote that
15 particular officeholder’s personal religion. This is not a legitimate secular purpose.
16 *Collins v. Chandler Unified Sch. Dist.*, 644 F.2d 759, 762 (9th Cir. 1981) (citing
17 *Brandon v. Board*, 635 F.2d 971, 978 (2^d Cir. 1980)).

18 The Ninth Circuit has said that merely having a school invocation policy shows
19 an impermissible religious purpose: “an invocation policy by its very terms appears to
20 reflect an impermissible state purpose to encourage a religious message.” *Cole, supra*,
21 228 F.3d at 1102-1103 (citing *Santa Fe, supra*, 530 U.S. at 291).

22
23
24 ⁹ SUF No. 49.

1 Finally, even if solemnization is a legitimate secular purpose, it fails for two
2 reasons. First, religion only solemnizes events for its adherents. It tells “nonadherents
3 ‘that they are outsiders, not full members of the political community and
4 accompanying message to adherents that they are insiders, favored members of the
5 political community.’” *Santa Fe*, supra, 530 U.S. at 309-10 (quoting *Lynch v.*
6 *Donnelly*, 465 U.S. 668, 688 104 S.Ct. 1355 (1984) (O’Connor, J., concurring)).
7 Second, there are many nonreligious ways to solemnize a school event and the “the
8 state cannot employ a religious means to serve otherwise legitimate secular interests.”
9 *Jager*, supra, 862 F.2d at 830. There are plenty of secular alternatives: “The board
10 could have used the inspirational words of Abraham Lincoln or ... Dr. Martin Luther
11 King, Jr. to achieve the same ends. Instead, the board relied upon the intrinsically
12 religious practice of prayer to achieve its stated secular end.” *Coles*, 171 F.3d at 384.
13 Because “solemnization ... could have been achieved without resort to prayer, ... the
14 school board’s practice fails to satisfy the purpose prong of the *Lemon* test.” *Id.*

15 Bible reading and proselytizing have a similarly religious purpose. When it
16 struck down Bible reading in public schools more than fifty years ago, the Court
17 wrote, “the place of the Bible as an instrument of religion cannot be gainsaid.”
18 *Schempp*, supra, 374 U.S. at 224. Nor can it. The Bible is a religious book and Board
19 members read from it to publicize their personal religion.

20 The Establishment Clause also prohibits government proselytizing. The secular
21 purpose prong means “not only that government may not be overtly hostile to religion
22 but also that it may not place its prestige, coercive authority, or resources behind a
23 single religious faith or behind religious belief in general, compelling nonadherents to
24

1 support the practices or proselytizing of favored religious organizations.” *Texas*
2 *Monthly, Inc. v. Bullock*, 489 U.S. 1, 9, 109 S.Ct. 890 (1989).

3 2. The prayers, proselytizing, and Bible readings endorse religion.

4 The *Lemon* effects prong question is “whether ‘it would be objectively
5 reasonable for the government action to be construed as sending primarily a message
6 of either endorsement or disapproval of religion.’” *Trunk v. City of San Diego*, 629
7 F.3d 1099, 1109 (9th Cir. 2011) (citing *Vernon v. City of Los Angeles*, 27 F.3d 1385,
8 1398 (9th Cir.1994)). Endorsement concerns “those acts that send the stigmatic
9 message to non-adherents “ ‘that they are outsiders, not full members of the political
10 community, and an accompanying message to adherents that they are insiders, favored
11 members....’ ” *Id.* at 1109 (citing *Santa Fe, supra*, 530 U.S. at 309-10 (quoting *Lynch,*
12 *supra*, 465 U.S. at 688, (O'Connor, J., concurring))). Plaintiffs—and apparently the
13 Chino Valley community—have received this message. The endorsement inquiry is
14 conducted from the perspective of an “informed as well as reasonable” observer who is
15 “familiar with the history of the government practice at issue.” *Kreisner v. City of San*
16 *Diego*, 1 F.3d 775, 784 (9th Cir. 1993). In Establishment Clause claims involving
17 government speech—as when government officials, in their official capacity, at a
18 government meeting on government property, speak from their raised dais—the
19 *appearance* of endorsement is enough to violate the clause. *Allegheny County, supra*,
20 492 U.S. at 594 (the Establishment Clause “at the very least, prohibits government
21 from *appearing to take a position* on questions of religious belief”); *Lynch, supra*, 465
22 U.S. at 692 (O'Connor, J., concurring) (It is those practices that communicate an
23 endorsement of religion “whether intentionally or unintentionally, that make religion
24

1 relevant, *in reality or public perception*, to status in the political community.”); *Id.* at
2 711 (Brennan, J., dissenting) (“But when officials participate in *or appear to endorse*
3 the distinctively religious elements of this otherwise secular event, they encroach upon
4 First Amendment freedoms.”); *Westside Comm. Bd. of Educ. v. Mergens*, 496 U.S.
5 226, 264, 110 S.Ct. 2356 (1990) (Marshall, J., concurring) (“If public schools *are*
6 *perceived as conferring* the imprimatur of the State on religious doctrine or practice”
7 they run “afoul of the Establishment Clause.”); *Widmar v. Vincent*, 454 U.S. 263, 280-
8 81, 102 S.Ct. 269 (Stevens, J., concurring) (“the record discloses no danger that the
9 University *will appear to sponsor* any particular religion”) (emphasis added
10 throughout). The Board’s religious activities not only appear to endorse Christianity,
11 but actually endorse it, as the community reaction shows.

12 In *Indian River*, the court found that prayers and the prayer policy failed the
13 endorsement test. *See, Indian River, supra*, 653 F.3d at 290. The Ninth Circuit has
14 examined school prayers and found them to unconstitutionally endorse religion.
15 *Collins v. Chandler Unified Sch. Dist.*, 644 F.2d 759, 762 (9th Cir. 1981). To a
16 reasonable observer or “an impressionable student, even the mere appearance of
17 secular involvement in religious activities might indicate that the state has placed its
18 imprimatur on a particular religious creed. This symbolic inference is too dangerous to
19 permit.” *Id.* at 762 (quoting *Brandon v. Board of Ed. of Guilderland Central Sch. Dist.*,
20 635 F.2d 971, 978 (2d Cir. 1980). And in the context of a school board, which governs
21 and manages all aspects of public school life, the danger is so much the greater.

1 When an elected public school board official, at a public school board meeting,
2 to rise in his official capacity, and read from his holy book,¹⁰ tell everyone how they
3 need God and should follow Jesus Christ,¹¹ or explain to citizens that a tragedy tells us
4 “how much we need God in today’s society [and] thank God for sending his son Jesus
5 Christ so that our sins are forgiven and may have eternal life in heaven,”¹² he is
6 endorsing religion. Defendants are using the machinery of the state—their government
7 offices—to proclaim the tenets of their religious doctrines. Na actually uses his
8 position to urge conversion—he “urged everyone who does not know Jesus Christ to
9 go and find Him.”¹³ This is proselytizing by definition. Any reasonable observer—
10 indeed any observer at all—would see this as endorsing and approving a religious
11 message, which necessarily excludes non-adherents. *Lynch, supra*, 465 U.S. at 688
12 (O’Connor, J., concurring).

13 The community reaction to this lawsuit demonstrates that reasonable observers
14 view the prayers as a religiously significant issue and specifically an endorsement. In
15 *Indian River*, the court cataloged community reaction at board meetings, noting that
16 most speakers were in favor of prayer and that those speakers supported prayer for
17 religious reasons. *Indian River, supra*, 653 F.3d at 287 (looking at meetings, noting
18 broad support among community members and that “their conduct reveals that in the
19 minds of many, the issue of prayer at the Board meetings ...[is] closely intertwined
20

21 _____
22 ¹⁰ SUF Nos. 31, 34-37, 40, 43, 48, 51, 55, 57, 60-61, 67, 70, 76, 78, 81, 85, 89.

23 ¹¹ SUF Nos. 32, 36, 41, 44, 46, 47, 49, 51, 52, 54, 58, 62, 65, 70, 74, 81, 82, 87, 92,
106.

24 ¹² SUF No. 65.

25 ¹³ SUF No. 49.

1 with religion.”). This reaction told the Court that the community viewed the prayers as
2 an endorsement.

3 The same is true here. Meeting minutes show that at the first meeting after this
4 suit was filed, 22 people spoke in favor of the prayers, including Jack Hibbs, Na and
5 Cruz’s pastor, while none spoke against the prayers.¹⁴ Citizens credited God, Jesus,
6 and other religious reasons for their support. For example, many at the meeting
7 supported the board’s alleged behavior, including the outgoing Chino police chief.
8 “All of the qualities you see in me came from my faith. They came from my belief in
9 God,” Chief Miles Pruitt said. “Prayer works. God hears prayer,” one meeting attendee
10 said. Another stated: “I’ve never met anyone who was offended when I asked if I
11 could pray for them so please keep up this good example.”¹⁵ Ila Zavoda, a retired
12 English teacher from Chino High School told the Board “I appreciate this district ... I
13 recognize that there’s [*sic*] strong conservative values here, and I praise God for the
14 way the elections went this time. Glory to God, the Christians voted.”¹⁶

15 More than twenty supporters spoke out at the Board meeting on November 20,
16 2014, saying that they appreciated the board and their actions. Many others spoke at
17 the December 11 meeting, telling the Board that the only person they had to answer to
18 was God.¹⁷

19
20
21 _____
22 ¹⁴ SUF No. 107.

23 ¹⁵ CBS News LA, “Chino Valley Unified School District Target Of Suit Over Prayer
24 At Board Meetings,” (Nov. 20, 2014), *available at* <http://cbsloc.al/1vwxBDA>.

25 ¹⁶ Grace Wong, “Chino Valley Unified board mulls response to prayer lawsuit,” *Inland
26 Valley Daily Bulletin*, Nov. 21, 2014, *available online at* <http://bit.ly/1BN0G0w>.

¹⁷ Grace Wong, “Chino Valley Unified blurs line between religion, public policy,”
Inland Valley Daily Bulletin, Dec. 28, 2014, *available online at* <http://bit.ly/1yUb59X>.

1 At the January 15, 2015 meeting, more than 20 supporters carried signs reading
2 “We Support Prayer” or “We support keeping prayer in CVUSD board meetings ”
3 followed by a social media tag “#letusprayCVUSD.”¹⁸

4 Like *Indian River*, most attendees supported the prayers and do so because the
5 prayers are closely intertwined with their religion. Though most citizens support the
6 prayers, some, including plaintiffs, oppose them. But all agree that the prayers are
7 inextricably religious. Supporters want to keep the prayers because they want the
8 government endorsing their religious beliefs. Plaintiffs and others want the prayers
9 stopped because the government is endorsing religious beliefs that contravene their
10 own. In short, *any* reasonable observer “would conclude that the primary effect of the
11 Board’s Policy was to endorse religion.” *Indian River, supra*, 653 F.3d at 287.

12 As the undisputed facts demonstrate, the Board’s conduct and policy fail each
13 prong of the *Lemon* test. Defendant Board’s conduct clearly violates the Establishment
14 Clause of the First Amendment to the United States Constitution. Accordingly,
15 summary judgment should be entered in favor of Plaintiffs on this claim.

16
17 D. THE UNDISPUTED FACTS SUPPORT SUMMARY JUDGMENT IN
18 FAVOR OF PLAINTIFFS ON THEIR CALIFORNIA CONSTITUTION
CLAIMS AS WELL.

19 1. The Board’s conduct violates the Establishment Clause of the California
20 Constitution

21
22
23 ¹⁸ Grace Wong, “Chino Valley school board denies violating church-and-state
24 separation,” *Inland Valley Daily Bulletin*, Jan. 15, 2015, available online at
<http://bit.ly/1yUbbl1>. Video at <http://bit.ly/1yKL6QQ>.

1 The analysis under Plaintiffs’ claims under the California Constitution results in
2 the same conclusion. To determine claims under California’s Establishment Clause,
3 the Court uses same analysis as under the federal Constitution.

4 Thus, in determining whether a government practice violates the
5 establishment clause of the state Constitution, California courts are
6 guided by First Amendment establishment clause jurisprudence. (See,
7 e.g., *East Bay, supra*, 24 Cal.4th at p. 719, 102 Cal.Rptr.2d 280, 13 P.3d
8 1122[“Our construction of the establishment clause of article I, section 4
9 is ... guided by decisions of the Supreme Court”]; *Sands v. Morongo*
10 *Unified School Dist.* (1991) 53 Cal.3d 863, 883, 281 Cal.Rptr. 34, 809
11 P.2d 809 (*Sands*) (lead opn. of Kennard, J.) [“federal cases ... supply
12 guidance for interpreting [the establishment clause of state
13 Constitution]”].)

14 *Sedlock v. Baird*, 235 Cal. App. 4th 874, 885, 185 Cal. Rptr. 3d 739 (2015)

15 Accordingly, to determine whether the conduct of the Board violates the
16 Establishment Clause of California’s Constitution, the *Lemon* test is also employed. *Id.*
17 at 886.¹⁹

18 _____
19 ¹⁹ The Supreme Court of California went beyond merely applying the *Lemon* test in
20 *Sands v. Morongo Unified School District*, 53 Cal.3d 863, 281 Cal.Rptr. 34 (1991),
21 and clearly expressed California courts’ deference to the test as “law.” *Id.* at 872
22 (stating that the *Lemon* test “has remained controlling law for 20 years,” and that the
23 court is “required to decide federal constitutional cases on the law as it presently
24 exists”). The court applied the test to declare unconstitutional the inclusion of religious
25 invocations at public high school graduation ceremonies, having failed at least two, if
26 not all, of the prongs under the *Lemon* test. *Id.* at 872 (“Although we have doubts
whether the government-sponsored prayers at issue here pass the “secular purpose”
test, that question need not be addressed because we conclude that the practice of
government sponsorship of graduation prayers fails both the “effect” and the

1 Moreover, in analyzing the California Establishment Clause in the context of
2 school prayer, the California Supreme Court has emphasized that the United States
3 Supreme Court itself has declared that *Marsh* should not be applied in the analysis of
4 practices involving public schools. *Sands*, 53 Cal.3d at 881 (“The high court has taken
5 particular care to explain that *Marsh* should not be applied to determine the
6 constitutionality of public school practices.”).

7 As the Board’s conduct fails all prongs of the *Lemon* test when analyzed under
8 the federal Constitution (as shown above), that conduct also violates the California
9 Constitution to the same extent. Accordingly, Plaintiffs are entitled to summary
10 judgment on this state constitutional claim.

11 2. The Board’s conduct violates California’s No Preference Clause

12 The “No Preference Clause” of the California Constitution (Cal. Const. Art. I,
13 §4) is even “more expansive” than the Establishment Clause. *Am. Family Ass’n v. City*
14 *& County of San Francisco*, 277 F.3d 1114, 1123 (9th Cir. 2002), *cert. denied*, 537
15 U.S. 886, 123 S.Ct. 129 (Mem) (2002). Both California courts and the Ninth Circuit
16 “have interpreted [it] as censuring so much as even the *appearance* of religious
17 partiality.” *Murphy v. Bilbray*, 782 F. Supp. 1420 (S.D. Cal. 1991); *see also Hewitt v.*
18 *Joyner*, 940 F.2d 1561, 1566 (9th Cir. 1991) *cert. denied*, 502 U.S. 1073, 112 S.Ct.
19 969 (1992).

20 California has interpreted its No Preference Clause as co-extensive with and
21 mirroring the federal Establishment Clause. *See Bennett v. Livermore Unified School*
22

23 “entanglement” tests of *Lemon, supra*, 403 U.S. 602, 91 S.Ct. 2105, thus rendering the
24 practice unconstitutional.”)

1 *District*, 193 Cal.App.3d 1012, 106, 238 Cal.Rptr. 819 (1987) (citing *Johnson v.*
2 *Huntington Beach Union High School District*, 68 Cal.App.3d 1 (1977) “[I]rrespective
3 of the federal Constitution and of *Widmar's* potential application to high school
4 activities, it is settled that *California's* Constitution does not permit the use of high
5 school facilities as a meeting place for student religious activities. Such a use would
6 both result in both state financing of religion—in the form of providing space, heat and
7 light for the meetings,—and in impermissibly placing the state's imprimatur upon the
8 religious activity.”).

9 As demonstrated, the Board’s conduct cannot pass any of the *Lemon* test
10 prongs. Accordingly, such conduct can no more withstand the more expansive analysis
11 under California’s No Preference Clause.

12
13 3. The Board’s conduct also violates California’s No Aid Clause

14 Plaintiffs are also entitled to summary judgment on their No Aid Clause claim.
15 Cal. Const., Art. XVI, §5. The No Aid Clause is expansive and imposes a broad ban on
16 any activity that assists in the promotion of religion. “*First*, article XVI, section 5, is so
17 broad that state or local governments need not provide a financial benefit or tangible
18 aid in order to violate the provision; they violate it by doing no more than lending their
19 ‘prestige and power’ to a ‘sectarian purpose.’” *Paulson v. City of San Diego*, 294 F.3d
20 1124, 1130 (9th Cir. 2002). The purpose of the No Aid Clause is to ban any official
21 involvement that has the effect of promoting religion.

22 It bans any official involvement, whatever its form, which has the direct,
23 immediate, and substantial effect of promoting religious purposes.’ ” *E.*

24 *Bay*, 102 Cal.Rptr.2d 280, 13 P.3d at 1140(quoting *Cal. Educ. Facilities*

1 Christian beliefs to the point of calling on those in attendance to adopt these very
2 beliefs.

3 Such conduct by elected school officials such as the Defendants here is a clear
4 violation of the No Aid Clause. Accordingly, summary judgment should be granted on
5 this claim as well.

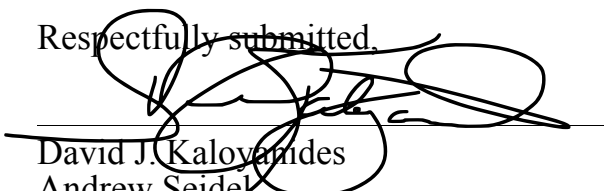
6
7 III. CONCLUSION.

8 The undisputed facts demonstrate that Defendants' conduct during the Board
9 meetings is an egregious and flagrant violation of both the federal and California State
10 Constitutions. Defendants engage in more than simple acknowledgement of diverse
11 religious belief and non-belief. Defendants actively and blatantly promote religion, and
12 their own particular religious beliefs. The Defendants act in an official capacity of that
13 of school officials. The official business of the CVUSD Board must take place during
14 Board meetings. There is no question that school board are an integral part of public
15 school life. The Board meetings are nothing less than school functions. Defendants'
16 conduct in this case must be analyzed in the school context.

17 In so doing, the undisputed facts compel only one conclusion, Defendants
18 conduct of opening the meetings with prayer, their Bible reading, religious
19 commentary, and proselytizing violate Plaintiffs constitutional rights. The Court
20 should grant this motion.

21 Dated: September 28, 2015

Respectfully submitted,



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