No. 16-55425

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FREEDOM FROM RELIGION FOUNDATION, INC., et al., Plaintiffs – Appellees, v. CHINO VALLEY UNIFIED SCHOOL DISTRICT BOARD OF EDUCATION; etc., et al., Defendants-Appellants,	DC No.: 5:14-cv-02336-JGB (DTBx) U.S. District Court for the Central District of California at Riverside

APPELLEES' ANSWERING BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

HONORABLE JESUS G. BERNAL
United States District Judge

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CORPORATE DISCLOSURE STATEMENT

Plaintiffs and Appellees Freedom From Religion Foundation, Inc., Michael Anderson, Larry Maldonado, and DOES 1 through 20, inclusive, hereby submit the Corporate Disclosure Statement pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure.

Plaintiff Freedom From Religion Foundation, Inc., is a Wisconsin non-stock corporation. It has no parent corporation, and no other corporation holds any ownership interest.

FREEDOM FROM RELIGION FOUNDATION, INC.

Dated: June 26, 2017 By: Annie Laurie Gaylor

Its: Co-President

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STATEMENT OF JURISDICTION

Appellees agrees with the Statement of Jurisdiction as set forth in the Appellants' Opening Brief.

ISSUE PRESENTED

Appellants have identified four issues on appeal. Two of those issues center on one question, which is the crux of this appeal.

The district court granted Plaintiff-Appellees Motion for Summary Judgment and issued a permanent injunction against the Chino Valley Unified School District Board of Education members because there was no disputed issue of material fact: the school board members adopted a policy promoting religious practice, and during the official school board meetings, the members promoted, encouraged, and engaged in religious conduct through regular Bible readings, proselytizing, prayer and calls to prayer. Did the district court properly enter summary judgment against the Appellants finding the board members violated the Establishment Clause?

The remaining two issues are not properly before this Court as neither were part of the litigation before the district court. The Board By-Law to which Appellants refer (ER Vol. 2, Tab 4, at 33) is not properly part of the record below because it was never presented to the district court as it was enacted eight

months after the school board members filed their Notice of Appeal. It is not part of the record below and should be stricken.

STATEMENT OF ADDENDUM

All pertinent constitutional provisions, treaties, statutes, ordinances, regulations and rules are set forth in the addendum attached to this brief.

STATEMENT OF THE CASE

The district court granted plaintiffs-appellees' motion for summary judgment as to the Chino Valley Unified School District ("CVUSD") Board of Education board members James Na, Andrew Cruz, Irene Hernandez-Blair, and Sylvia Orozco, the defendant-appellants here, and denied their cross-motion for summary judgment. On November 12, 2014, plaintiffs-appellees Freedom From Religion Foundation, Inc., ("FFRF") and several individual plaintiffs identified pseudonymously, filed a complaint alleging that the CVUSD Board of Education had violated the Establishment Clause of the First Amendment by instituting a policy and practice of prayer and religious conduct during the official CVUSD school board meetings. (ER Vol. 1, Tab 2, at 4.)[1] The district

[1] "ER" refers to Appellants' Excerpts of Record. plaintiffs-appellees filed a First Amended Complaint adding the two named parties, Michael Anderson and Larry Maldonado, and additional pseudonymously named individuals on December 15, 2014. For simplicity, the plaintiffs-appellees here will be referred to collectively under the abbreviation "FFRF."

court found that FFRF's complaint established violations of the Establishment Clause of the First Amendment.[2]

The facts before the district court are undisputed. (ER Vol. 1, Tab 2, at 7).

The CVUSD Board of Education is the governing body responsible for operating, controlling, and supervising all public schools within the CVUSD. (ER Vol. 1, Tab 2, at 7; Vol. 2, Tab 7, at 110.) School children in the district regularly participate in these board meetings, which take place on CVUSD property or at schools in the district. (ER Vol. 2, Tab 7, at 113.) The meeting begins with a closed session, which addresses student disciplinary issues with the student in attendance, as well as other issues of regarding employees and litigation. (ER Vol. 1, Tab 2, at 12; Vol. 2, Tab 7, at 125.) The open session of the meeting takes place immediately following the closed session, and begins with the Board's call to prayer and the giving of a prayer. (ER Vol. 1, Tab 2, at 10; Vol. 2, Tab 7, at 110.)

There is a student representative member of the Board who attends and represents the interests of students in the district. Additionally, students have been asked to lead the Pledge of Allegiance at meetings, and students often

[2] Although the school board members have only identified Freedom From Religion Foundation, Inc. as the plaintiff-appellee in this case, and while the docket before this Court only reflects Freedom From Religion Foundation, Inc., appellees here include all plaintiffs from the district court case below, namely Michael Anderson, Larry Maldonado, and DOES 1 through 20, inclusive.

attend the meetings to address issues concerning schools in the district. (ER Vol 1, Tab 2, at 11-12; Vol. 2, Tab 7, at 112-114, 120, and 125.) During the board meetings, the school children regularly deliver presentations addressing issues concerning schools, often involving more than one student. The student presentations follow the Board's call to prayer and the delivery of the prayer at the meetings. Students also participate in the public comment portion of the meetings. (ER Vol. 2, Tab 7, at 113-114.)

The Board adopted Board Resolution 2013/2014-11 Enacting a Policy Regarding Invocations at Meetings of the Board on October 17, 2013. (ER Vol. 1, Tab 2, at 7; Vol. 2, Tab 7, at 110.) The policy requires that each meeting begin with a prayer, delivered by a member of the clergy or a religious leader in the boundaries of the District. (ER Vol. 2, Tab 7, at 110.) The Resolution formally adopts a religious practice as a part of these District-run, school-related events on District property, which students participate in.

Prayer at the school board meetings occurred during 2013 prior to the Resolution's adoption. And school board members themselves often delivered these prayers. (ER Vol. 2, Tab 7, at 115-117.) The prayer practice at school board meetings continued regularly after the adoption of the Resolution. (*See e.g*. ER Vol 2, Tab 7, at 123.) No evidence was presented to the district court regarding when the religious practice of prayer at the school board meetings began nor how long that religious practice had been in place.

In addition to prayer, during the meetings, school board members engaged in overt religious conduct: reciting and reading passages from the Bible at various points in the meetings (ER Vol. 1, Tab 2, at 10-11; Vol. 2, Tab 7, at 115-123); proselytizing (ER Vol. 1, Tab 2, at 10-11; Vol. 2, Tab 7, at 116-121); and commenting on social and political issues in religious terms (ER Vol. 1, Tab 2, at 11; Vol. 2, Tab 7, at 123-125.)

The parties filed cross motions for summary judgment. (ER Vol. 1, Tab 2, at 4.) The district court found that the facts were not in dispute. (ER Vol. 1, Tab 2, at 7.) The district court granted FFRF's motion in part and denied the board members' motion. (ER Vol. 1, Tab 2, at 4.) The district court, on the motion of FFRF, awarded plaintiffs attorney's fees and costs. The board members timely filed their Notice of Appeal of the district court's judgment and order, including the permanent injunction. The CVUSD school board members did not appeal the district court's award of attorney's fees and costs.

SUMMARY OF THE ARGUMENT

The district court properly granted summary judgment in favor of FFRF declaring as an unconstitutional government endorsement of religion the CVUSD School Board's Resolution permitting religious prayer during school board meetings, as well as the policy and custom of reciting prayers, Bible readings, and proselytizing at these school board meetings. The district court

correctly found that based on the undisputed facts in the case, the prayer Resolution and practices of the school board members here violated FFRF's First Amendment rights. *See* U.S. Const. amend. I.

Properly considered as inextricably part of the public school system, the meetings of the school board can only be seen as school functions. The school board members here are not a legislative body but rather a specific type of governing body tasked with one and only one duty: to govern all aspects of the public schools for the benefit and well-being of the children who are students within their district.

The district court correctly found that there was no dispute as to the facts in this case and that summary judgment was appropriate. (ER Vol. 1, Tab 2, at 4.) On appeal, this Court must review the district court's order *de novo*:

> Grant or denial of summary judgment is reviewed de novo by this court. Summary judgment is appropriate if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law.

Mukherjee v. Immigration & Naturalization Serv., 793 F.2d 1006, 1008 (9th Cir. 1986).

Thus, the Court "need decide only whether any genuine issue of material fact remains for trial and whether the substantive law was correctly applied." *Inland Cities Exp., Inc. v. Diamond Nat. Corp.*, 524 F.2d 753, 754 (9th Cir.

1975) (citing *Vickery v. Fisher Governor Co.*, 417 F.2d 466, 468 (9th Cir. 1969)).

There are no disputed facts in this case. In fact, the school board presented no evidence to counter FFRF's motion for summary judgment, instead admitting that there were no disputed facts. (ER Vol. 4, Tab 17, at 474.)[3] And the district court found that there were no disputes as to the facts in the case. (ER Vol. 1, Tab 2, at 7.)[4] Accordingly, this Court need "only determine whether the substantive law was correctly applied." *Amaro v. Cont'l Can Co.*, 724 F.2d 747, 749 (9th Cir. 1984); *Beers v. Southern Pacific Transportation Co.*, 703 F.2d 425, 428 (9th Cir.1983).

At the crux of this case is the well-established principle in Establishment Clause jurisprudence of government neutrality. Governments must be neutral on matters of religion. In the district court below, and now on appeal here, the

[3] The school board members submitted only two additional facts in support of their motion for summary judgment, namely that the Board mailed invitations to religious leaders in the community inviting them to conduct prayers at the meeting and that there is no effort by the Board to limit those prayers to a particular religion. (ER Vol. 4, Tab 14, at 454).

[4] Although the school board members' submitted "Defendants' Statement of Genuine Disputes," in that filing, they state that "Defendants do not dispute any of the 106 uncontroverted facts." (ER Vol. 4, Tab 17, at 474. There were, in fact 109 uncontroverted facts submitted by FFRF. (ER Vol. 2, Tab 7, at 125.) It is unclear whether the school board members made a typographical error or if they disputed three of the facts. However, the CVUSD board members never identified any facts that were in dispute.

school board members concede this. Moreover, the school board members also implicitly concede the other major issues addressed by the district court—they have not appealed the other non-prayer religious conduct in which the board members engaged (the Bible recitation and readings, the religious commentary on social and political matters, and the proselytizing at the school board meetings).[5]

At its core, the school board members' argument on appeal is this: as the governing board of the public schools in the district, it is a "deliberative body" and, therefore, allowed to organize and impose religious practice and conduct in the form of prayer on students, parents, and community members because the neutrality standard does not apply to it. By attempting to reframe the nature, purpose, and function of a public school board, the school board members in this appeal try to squeeze themselves into the narrow exception of legislative prayer under *Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983) and *Town of Greece, N.Y. v. Galloway*, --- U.S. ---, 134 S.Ct. 1811, 188 L.Ed.2d 835 (2014) and avoid the correct analysis of their conduct during the

[5] The school board members make a convoluted argument that the district court's injunction is moot because of a Board Bylaw enacted eight months after the Notice of Appeal was filed in this case. (ER Vol. 2, Tab 4, at 33.) That by-law is not properly before this Court as it was never submitted to the district court and is not properly part of the Excerpts of Record. As such, it should be stricken, and the school board members' argument relating to it rejected.

school board meetings under *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). And under the *Lemon* test analysis, the school board members' conduct and the prayer Resolution they enacted, fail.[6]

The Supreme Court in *Lee v. Weisman*, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992) stressed the importance of the legal standard of government neutrality on matters of religion. *Lee* found prayers at public high school graduations violated this standard, because:

> [a] school official, the principal, decided that an invocation and a benediction should be given; this is a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur.

Id. at 587.

Here, the school board members assert that they fit within the very limited ruling under *Marsh v. Chambers* and *Town of Greece, N.Y. v. Galloway*. *Marsh* held that a long-standing tradition and practice of opening a legislative session

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[6] The *Lemon* test remains the appropriate test in Establishment Clause cases despite how some courts have ignored it. *See Santa Monica Nativity Scenes Comm. v. City of Santa Monica*, 784 F.3d 1286, 1300 (9th Cir. 2015) ("As a mode of analysis for Establishment Clause inquiries, *Lemon* has been much criticized both inside and outside the Court—and sometimes ignored by the Court altogether, *see, e.g., Town of Greece v. Galloway,* —— U.S. ——, 134 S.Ct. 1811, 188 L.Ed.2d 835 (2014). Nevertheless, *Lemon* remains the Court's principal framework for applying the Establishment Clause. *See 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.")).

with a prayer does not run afoul of the Establishment Clause and, therefore, the Nebraska legislature's practice was not a constitutional violation. The Supreme Court's analysis in *Marsh* exception relies solely on a "unique history" of prayer at legislatures dating to before the Bill of Rights. *Id*. at 791. However, the Court emphasized that prayer falling under the ambit of the *Marsh* exception did not include proselytizing activities or prayer "placing the government's 'official seal of approval on one religious view.'" *Id*. *Town of Greece* did nothing more than to extend the reasoning of *Marsh* to a town council. Yet key to both decisions were the specific facts regarding the purpose of the legislative body in question and those present at such meetings—namely addressing concerns of the broad base of community members who are mature adults:

> Our tradition assumes that ***adult*** citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith. See Letter from John Adams to Abigail Adams (Sept. 16, 1774), in C. Adams, Familiar Letters of John Adams and His Wife Abigail Adams, During the Revolution 37–38 (1876).

Town of Greece, N.Y., supra, 134 S. Ct. at 1823–24 (emphasis added).

> ***Adults*** often encounter speech they find disagreeable; and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum, especially where, as here, any member of the public is welcome in turn to offer an invocation reflecting his or her own convictions. See *Elk Grove Unified School Dist. v. Newdow,* 542 U.S. 1, 44, 124 S.Ct. 2301, 159 L.Ed.2d 98 (2004) (O'Connor, J., concurring)

Id., at 1826 (emphasis added).

It is precisely the distinction between mature adults and school children that makes the *Marsh/Town of Greece* analysis inapplicable to this case. The principles of the Establishment Clause have a particularly heightened concern when the issue involves children, and particularly public school students. *See Town of Greece*, *supra*, at 1827 (neither choosing to leave the meeting during a prayer or choosing to stay "represents an unconstitutional imposition as to mature adults, who 'presumably' are 'not readily susceptible to religious indoctrination or peer pressure.'")

This district court properly analyzed and distinguished this case from *Marsh* and *Town of Greece* and properly decided the case under the *Lemon* test. Yet even if this Court were to analyze this case under *Marsh* and *Town of Greece*, the prayer Resolution and the board members' conduct still fails. The school board members presented no evidence in the district court to show a long history or tradition of school board prayers—the key point in the *Marsh* and *Town of Greece* rationale. And even *Town of Greece* expressly recognized the inherent danger where a constitutionally valid invocation practice deteriorates into an unconstitutional endorsement of religion.

> If the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion, many present may consider the prayer to fall short of the desire to elevate the purpose of the occasion and to unite lawmakers in their common effort. That circumstance would present a different case than the one presently before the Court.

Town of Greece, supra, at 1823.

Nevertheless, given the undisputed facts presented to the district court below, the Court should reject the CVUSD board members' argument to extend the *Marsh* and *Town of Greece* analysis to the school context and the school board setting, and affirm the district court's order and judgment granting FFRF's motion for summary judgment.

ARGUMENT

I. The Legislative Prayer Exception Is Not A Categorical Exception That Applies In The Context of Every Meeting Of A Governmental Body.

The legislative prayer exception, which allows government prayer despite the strictures of the First Amendment, is narrow. This Court noted the narrow application of the exception, which Justice Brennan emphasized in his dissenting opinion in *Marsh*:

> *Marsh* is a narrow opinion that should be construed as carving out an exception to normal Establishment Clause jurisprudence due to the 'unique history' of legislative prayer.

Card v. City of Everett, 520 F.3d 1009, 1014 (9th Cir. 2008); *see also, Rubin v. City of Lancaster*, 802 F. Supp. 2d 1107, 1111 n.2 (C.D. Cal. 2011), *aff'd*, 710 F.3d 1087 (9th Cir. 2013).[7]

[7] *See also, Town of Greece* at 1818 ("*Marsh* is sometimes described as 'carving out an exception' to the Court's Establishment Clause jurisprudence"); *Coles ex rel. Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 376 (6th Cir. 1999) ("the practice challenged in this case does not neatly fall under the unique and narrow

The very Supreme Court decision on which the board members rely contradicts their assertion that there is categorical exception for legislative prayer at any government meeting. Both *Town of Greece* and *Marsh* recognize that there is ***no*** categorical exception for government prayer. Government prayers, even before a state legislature or town council, can violate the Constitution based on a number of circumstances:

(i) content, especially if the prayers "denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion," *Town of Greece*, *supra,* at 1823;

(ii) failing to accomplish a secular purpose, as when the prayers "fall short of the desire to elevate the purpose of the occasion and to unite lawmakers in their common effort," *Id*.;

(iii) accomplishing a deleterious purpose, such as prayer practices that "preach conversion," *Id*., or prayers that "denigrate, proselytize, or betray an impermissible government purpose," *Id*. at 1824;

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exception articulated in *Marsh,* because the school board is an integral part of the public school system.); *Doe v. Indian River Sch. Dist*., 653 F.3d 256, 282 (3d Cir. 2011) ("in light of *Marsh*'s narrow historical context, we hold that the District Court erred in applying the legislative exception to [school board prayer.]"); *Doe v. Tangipahoa Par. Sch. Bd*., 473 F.3d 188, 199 (5th Cir. 2006), *on reh'g en banc*, 494 F.3d 494 (5th Cir. 2007) ("the [Supreme] Court has continued to define *Marsh* as a narrow exception for nonsectarian legislative invocations.")

(iv) where the audience is "readily susceptible to religious indoctrination, or peer pressure," *Marsh*, *supra*, at 792; or

(v) where the prayer policies are discriminatory.

Moreover, the narrow legislative prayer exception of *Marsh* does not apply unless there has been a long, unbroken history to justify the practice. And *Marsh* simply does not apply in the public school context.

A. The legislative prayer exception does not apply to school boards because prayers at school board meetings lack a long, unbroken history.

The Supreme Court decided *Marsh* in 1983. Within four years, first in 1985 and then again in 1987, the Court declined to extend this "nod to history" to the public school context. In *Wallace v. Jaffree*, the Court recognized that there is no long, unbroken history of prayer in public schools or school boards. 472 U.S. 38, 80, 105 S.Ct. 2479, 86 L.Ed.2d 39 (1985). Two years later, in *Edwards v. Aguillard*, the Court explicitly found that *Marsh's* rationale was based entirely on the historical context:

> The Court based its conclusion in that case on the historical acceptance of the practice. Such a historical approach is not useful in determining the proper roles of church and state in public schools, since free public education was virtually nonexistent at the time the Constitution was adopted.

Edwards v. Aguillard, 482 U.S. 578, 583, 107 S. Ct. 2573, 96 L. Ed. 2d 510 (1987).

Other courts have refused to apply the *Marsh/Town of Greece* exception

"beyond its specific context." *See, e.g., Hewett v. City of King*, 29 F.Supp.3d 584, 630 (M.D.N.C. 2014). In *Hewett*, a lengthy post-*Town of Greece* decision, invocations at memorial events were not subject to the exception because those events did not have the "same unique history and long-lived tradition as legislative prayer." *Id*. at 629.[8]

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[8] The district court in *Hewett* cites numerous cases that refused to extend *Marsh* beyond its specific factual context:

> [T]he Court notes that many courts, including the Fourth Circuit, have considered and generally refused to extend the rule of *Marsh,* which like *Galloway* upheld legislative prayer practices, beyond its specific context. *Wynne v. Town of Great Falls,* 376 F.3d 292, 302 (4th Cir.2004); *see Mellen,* 327 F.3d at 369–70 ("declining to extend *Marsh* to supper prayer at issue in that case because it did not share the "unique history" of legislative prayer."); *Coles v. Cleveland Bd. of Educ.,* 171 F.3d 369, 381 (6th Cir.1999) (refusing to extend *Marsh* to prayers opening school board meetings, which it found more akin to the school prayers that were prohibited by *Weisman,* 505 U.S. 577, 112 S.Ct. 2649 than the legislative prayers allowed in *Marsh); N.C. Civil Liberties Union Legal Found. v. Constangy,* 947 F.2d 1145, 1149 (4th Cir.1991) (refusing to extend the rationale in *Marsh* to a state court judge's practice of opening court with a prayer, and instead, applying the *Lemon* test); *Jager v. Douglas Cnty. Sch. Dist.,* 862 F.2d 824, 828–29 (11th Cir.1989) (noting that *Marsh* "was based on more than 200 years of the 'unique history' of legislative invocations" and that "it has no application to the case at bar" in a case that involved a challenge to the practice of having invocations before high school football games and applying the *Lemon* test); *Newman v. City of East Point,* 181 F.Supp.2d 1374, 1378–80 (N.D.Ga.2002) (concluding that *Marsh* did not apply in considering the plaintiff's request to enjoin the "Mayor's Community Prayer Breakfast" and applying the *Lemon* test).

The Supreme Court's paramount consideration in *Town of Greece* was the "tradition long followed." 134 S.Ct. at 819. The school board members failed to present any evidence to the district court to establish such a history, let alone the unbroken founding-to-present history *Marsh* required. And they can point to nothing in the record or in the law establishing that such a history exists.

B. Courts have consistently refused to extend the *Marsh/Town of Greece* exception to public schools.

The Supreme Court and federal circuit courts of appeal have repeatedly refused to apply *Marsh* or *Town of Greece* to the public school setting.[9] Even this Court has recognized that critical distinction noting the "inherent differences between the public school system and a session of a state legislature." *Rubin v. City of Lancaster*, 710 F.3d 1087, 1096 n.8 (9th Cir. 2013) (*citing Lee v. Weisman*, *supra*, 505 U.S. at 596–9).

The school board members would have the Court look no further than whether the board constitutes a "deliberative body." This description never

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Hewett, 29 F. Supp.3d at 630–31.

[9] *See, e.g., Lee*, 505 U.S. at 596-97; *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 602-05 (1989); *Warner v. Orange County Dep't of Probation*, 115 F.3d 1068, 1076-77 (2d Cir. 1997), *reaff'd after vacatur and remand*, 173 F.3d 120 (2d Cir. 1999); *ACLU of Ohio Foundation v. Ashbrook*, 375 F.3d 484, 494-95 (6th Cir. 2004); *Glassroth v. Moore*, 335 F.3d 1282, 1297-98 (11th Cir. 2003); *Mellen v. Bunting*, 327 F.3d 355, 369-70 (4th Cir. 2003); *Jager v. Douglas Cty. Sch. Dist.*, 862 F.2d 824, 828-29 (11th Cir. 1989).

appears in *Town of Greece* and is used only once in *Marsh*. *See Marsh, supra*, at 786. The school board members attempt to define themselves as a deliberative body based on a very specific provision under state law. The California Education Code, which governs the formation and function of school boards and defines school boards as part of the school district itself,[10] uses the descriptive label "legislative body" for the limited and specific purpose of bringing public school boards under the requirements of public meeting requirements of the Brown Act, thereby ensuring transparency. *See* Cal.Educ.Code § 35145. The Brown Act itself recognizes that school boards are different and governed by the separate statutory scheme of Education Code, not the Government Code. *See 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 (2009).

The school board members' attempt to distinguish board meetings from other school functions ignores the reason for restricting religious conduct at school events in the first place: the religious conduct cannot be dissociated from

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[10] *See Knickerbocker v. Redlands High Sch. Dist.*, 49 Cal. App. 2d 722, 727, 122 P.2d 289 (1942) ("The whole system of legislation regulating the educational machinery is based upon the consideration of the welfare and best interests of the children. The proper regulation of tenure in office and other rights of teachers were also properly considered and regulated, but the 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**.") (emphasis added); *see also* Cal.Ed.Code §2, §35160, §35160.2, and §33031.

the school itself. The school board members have admitted as much. Board member Na told the audience at one meeting,

> We're all parents, we're all teachers. We're nobody special. But God appointed us to be here—whether you to be teachers, or our staff members, or our principals, or our directors, assistant superintendents . . ..

ER Vol. 2, Tab 7, at 121.

Even student-led prayers at football games have been disallowed precisely because the conduct is affiliated with the school. In *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000), the Supreme Court struck down 6-3 a school policy that authorized students to vote on whether to hold a prayer at high school football games. The Supreme Court held that "student-led, student-initiated prayer at football games violate[] the Establishment Clause." *Id*. at 301. Even though the school had a "long-established tradition of sanctioning student-led prayer at varsity football games" a new prayer policy did not "insulate[] the continuation of such prayers from constitutional scrutiny." *Id*. at 315. The link between the extracurricular activity of a voluntary football game and the school could not be denied. The high Court emphasized that government endorsement of a religious message "is established by factors beyond just the text of the policy," including the fact that

> [T]he invocation is then delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property . . . is broadcast over the school's public address system, which remains subject to

> the control of school officials.

Id. at 307.

In such circumstances, the religious message is therefore "delivered with the approval of the school administration." *Id*. at 308.

Thus, it is the school nexus—the school context—on which the analysis turns. 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). In this case, the school board members presented no evidence to counter this context.

There is no basis for extending the limited exception in *Marsh* and *Town of Greece* to a school board context. Regardless of any lack of history of practice or tradition of prayer in school board meetings, public school boards are inherently different from the type of legislative body represented by Congress, a state legislature or a city council. The Court explicitly recognized this in *Town of Greece*:

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

its outcome.

Town of Greece, *supra*, at 1827 (emphasis added).

The circumstances that controlled in *Lee* did not exist in *Town of Greece*. But they do exist here.

II. The Factual Context Of This Case Demonstrates The School Boards' Prayer Resolution and Religious Conduct Violated the Constitution.

In determining a constitutional violation under the Establishment Clause, the facts of the specific case are the key. "Establishment Clause jurisprudence remains a delicate and fact-sensitive one," *Lee*, *supra*, 505 U.S. at 597. Such cases require a specific factual analysis that avoids bright lines that proscribe entire areas of interaction and conduct. *See, e.g.*, *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 867, 125 S.Ct. 2722, 162 L.Ed.2d 729 (2005) (explaining that a prior case "did not purport to decide the constitutionality of every possible way the [Ten] Commandments might be set out by the government, and under the Establishment Clause detail is key"); *Lynch v. Donnelly*, 465 U.S. 668, 678, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) ("In each case, the inquiry calls for line-drawing; no fixed, per se rule can be framed.").

The school board members' argument that *Town of Greece* created a blanket prayer exception for any deliberative government body is unsupported in the law. This argument attempts to deflect from the well-established fact-based analysis in Establishment Clause cases. What the CVUSD board members seek

to avoid is the inevitable conclusion that where, as here, the facts are nearly identical to, and in some instances are precisely the same as, those in *Coles* and *Indian River*, this Court should follow the analysis and rationale of those cases and reject expanding *Marsh* and *Town of Greece*. No federal circuit court analyzing prayers at school board meetings has concluded that *Town of Greece* removed fact-based analysis from Establishment Clause cases. *Coles* and *Indian River* were decided on their facts. Even the Fifth Circuit's recent decision, *American Humanist Ass'n v. McCarty*, on which the school board members rely heavily, was also decided on its facts:

> *Coles* and *Indian River* predate *Galloway* and are factually, and therefore legally, distinguishable from the circumstance at BISD. *Coles* involved a school board that always had at least one student member. *Coles*, 171 F.3d at 383. In *Indian River*, student representatives attended board meetings "in their formal role as student government representatives." *Indian River*, 653 F.3d at 264. In contrast, no students sit on the BISD board, BISD board members do not deliver the invocations, and the student representatives are not expected to attend board meetings.

McCarty, 851 F.3d 521, 528 (5th Cir. 2017).

The Fifth Circuit in *McCarty* noted "Establishment Clause cases often hinge on facts peculiar to each situation. *See Weisman*, 505 U.S. at 597, 112 S.Ct. 2649 ("Our Establishment Clause jurisprudence remains a delicate and fact-sensitive one....")." *Id*. at 528, n.21.

These are fact-specific cases. This Court should do as the *McCarty*, *Coles* and *Indian River* Courts did, and focus its initial inquiry on whether the school board's prayer practices should be analyzed under the limited exception *Marsh* carved out, or under other jurisprudence involving school-sponsored religion. Ultimately, *Coles* and *Indian River* control in these circumstances.

A. As the factual circumstances in this case are nearly identical to those in *Coles* and *Indian River*, the Court should follow the analysis in those cases.

Coles and *Indian River* emphasize the point that the *Marsh* exception is not categorical. Neither *Town of Greece* nor *McCarty* do anything to alter that. *Coles* and *Indian River*, were decided after *Marsh*, and were not modified nor overturned by *Town of Greece*. The Third and Sixth Circuits explicitly held that *Marsh* did not apply to school board prayer partly because the Supreme Court had already distinguished legislative prayer from the school context:

> Inherent differences between the public school system and a session of a state legislature distinguish this case from *Marsh v. Chambers*. The considerations we have raised in objection to the invocation and benediction are in many respects similar to the arguments we considered in *Marsh*. But there are also obvious differences. The atmosphere at the opening of a session of a state legislature … cannot compare with the constraining potential of the one school event most important for the student to attend. … The *Marsh* majority in fact gave specific recognition to this distinction and placed particular reliance on it in upholding the prayers at issue there.

Lee, *supra*, 505 U.S. at 596-97 (citations omitted).

As the Fifth Circuit noted, *Coles* and *Indian River* had specific and

distinct facts that were not present in *McCarty*. *See McCarty*, 851 F.3d at 528. The facts here are even more compelling than in *Coles* and *Indian River*. The undisputed facts here demonstrate that there is greater student participation in the CVUSD board meetings than was present in *Coles* and *Indian River*. This was a central fact on which the courts based their holdings. Moreover, the conduct of the school board members here was far more religiously coercive, for *during the meetings* the board members themselves engaged in proselytizing, Bible reading and recitation, and overt religious commentary on issues of social and political importance. The prayers in *Coles* and *Indian River* were endorsements of religion. Here, the prayers and calls to prayer by the school board members, as formalized in the prayer Resolution, were but one way the school board members regularly used their position to impose religion on the school children in the district.

Coles and *Indian River* looked to the factual context of school board meetings in determining that the standard government neutrality rule and not the narrow legislative prayer exception should apply. Of primary importance in the analysis was the purpose of school boards. The Sixth Circuit held:

> [T]he fact that school board meetings are an integral component of the Cleveland public school system serves to remove it from the logic in *Marsh* and to place it squarely within the history and precedent concerning the school prayer line of cases.

Coles, 171 F.3d at 381.

The Third Circuit agreed:

> regardless of whether the Board is a 'deliberative or legislative body,' we conclude that *Marsh* is ill-suited to this context because the entire purpose and structure of the Indian River School Board revolves around public school education."

Indian River, 653 F.3d at 278.

Furthermore, the practical reality of school board meetings were also integral to the Court's holding:

> These meetings are conducted on school property by school officials, and are attended by students who actively and regularly participate in the discussions of school-related matters.

Coles, 171 F.3d at 381.

These same factors exist in this case. This is undisputed.

Indian River recognized six ways students participate in board meetings: (1) student disciplinary action, (2) JROTC students presenting colors, (3) student representatives sitting as Board members, (4) students perform for the Board's benefit, (5) the Board recognizes student achievements, and (6) students make public comments. *Indian River*, 653 F.3d at 264-65.

Each of these six methods of student participation has occurred or regularly occurs at board meetings. Student disciplinary matters are handled during the closed portion of the meetings. (ER Vol. 2, Tab 7, at 125.) Student Junior ROTC presentation of the colors take place at the school board meetings. (*Id*.) There is a student representative who is a member of the school board and

attends meetings on behalf of the students. (ER Vol. 2, Tab. 7, at 112.) Students attend meetings of the Board to address issues concerning schools in the District. (Id.) Students attend meetings of the Board to make presentations. (ER Vol. 2, Tab 7, at 111.) Students attend the meetings to receive recognition from the Board. (ER Vol. 2, Tab 7, at 111.) Students may participate in the public comment portion of the school board meetings. (ER Vol. 2, Tab 7, at 115.)

There is even more student participation at CVUSD board meetings than existed in *Coles* or *Indian River*. Entire classes or student groups attended school board meetings to perform for the board, and school children even recite the pledge. (ER Vol. 2, Tab 7, at 113.)

Both *Coles* and *Indian River* placed significant emphasis on students attending and participating in school board meetings, whether or not the Board characterized it as voluntary. The Third Circuit analysis focused on the distinct and heightened concern where children are involved, a concern the Court recognized was not adequately addressed in *Marsh*:

> *Marsh* does not adequately capture these concerns. The Indian River School Board carries out its practice of praying in an atmosphere that contains many of the same indicia of coercion and involuntariness that the Supreme Court has recognized elsewhere in its school prayer jurisprudence. While there is no doubt that school board meetings do not necessarily hold the same type of personal and cultural significance as a high school graduation or perhaps even a football game, we take to heart the Supreme Court's observation that, in this respect, "[l]aw reaches past formalism." *Lee,* 505 U.S. at 595, 112 S.Ct. 2649.

Indian River, 653 F.3d at 275.

The specific factual circumstances of the CVUSD board meetings make the school board members' prayer Resolution and religious conduct, that much more egregious. The facts before this Court dictate that this case be analyzed under the school prayer line of cases and not under the *Marsh/Town of Greece* exception. And that is what the district court did below.

The inquiry for the Court is not whether the school board members constitute a deliberative body or fulfill legislative functions. The question is whether the factual reality of school board meetings puts it in the same class as other school events.

> Although meetings of the school board might be of a 'different variety' than other school-related activities, the fact remains that they are part of the same 'class' as those other activities in that they take place on school property and are inextricably intertwined with the public school system. Moreover, there is no question that the Establishment Clause jurisprudence controls this case.

Coles, 171 F.3d at 377.

B. The school board members' reliance on Fifth Circuit's decision in *McCarty* is misplaced as the case here is factually distinct.

The Fifth Circuit's opinion in *McCarty* is a judicial outlier on the question of school board prayer. In *McCarty*, the Birdville School Board invited students to deliver personal statements before school board meetings. Those students, randomly selected from a list of volunteers, could deliver prayers or, as was done "[a]t a number of meetings, … student speakers … presented poems or

read secular statements." *McCarty*, 851 F.3d. at 524. The critical difference in *McCarty* as compared with the case here is that after the practice that allowed students to pray was challenged, it was abandoned in favor of an unregulated student statement, and a policy was adopted to reflect that change. *Id*. at 524, n.5-7. Chino Valley meetings feature adults—board members, staff, or clergy—nearly always Christian, delivering a prayer, and in the case of the school board members, reciting or reading from the Bible, calling on the audience to convert to Christianity, and making overtly religious comments on matters of social and political concern. This stands in stark contrast to the one-minute open statement period for random students to say what they choose as was the case in *McCarty*.

The Fifth Circuit correctly honed in on the "key question . . . whether this case is essentially more a legislative-prayer case or a school-prayer matter." *Id*. at 526. In an analysis of one paragraph, citing only the Texas Education Code and no facts, the panel wrote: "We agree with the district court that 'a school board is more like a legislature than a school classroom or event.'" *Id*. The dearth of analysis in the opinion was only addressed later when the court noted "*Coles* and *Indian River* predate *Galloway* and are factually, and therefore legally, distinguishable from the circumstance at B[irdville]." *Id*. at 528.

The *McCarty* Court then pointed to several factual distinctions between the circumstances it was addressing and those of *Coles* and *Indian River*.

Coles involved a school board that always had at least one

> student member. *Coles*, 171 F.3d at 383. In *Indian River*, student representatives attended board meetings "in their formal role as student government representatives." *Indian River*, 653 F.3d at 264. In contrast, no students sit on the BISD board, BISD board members do not deliver the invocations, and the student representatives are not expected to attend board meetings.

Id. at 528.

The very facts that led the *McCarty* court to distinguish itself from *Coles* and *Indian River* are present, and more compelling, here. The CVUSD board includes a student member who is present for every invocation and who votes on Board business. (ER Vol. 2, Tab 7, at 112-113.) School children are also present for other reasons that are, if not compulsory, not to be missed, including ROTC students presenting the colors, classes and student groups such as choirs performing for the board, leading the pledge of allegiance, and receiving awards. (ER Vol. 2, Tab 7, at 111-114, 125.) Moreover, the school board members begin their meeting in closed session where they address issues of student discipline, which the student attends. (ER Vol. 2, Tab 7, at 125.) It is after the school board meeting has begun, at the start of the open session, that the school board members hold the call to prayer and the prayer itself. (ER Vol. 2, Tab 7, at 110.)

The *McCarty* court seemed unconcerned with the fact that school children are present at the meeting:

> [T]he presence of students at board meetings does not transform this into a school-prayer case. There were children present at the town-board meetings in *Galloway*.

McCarty, 851 F.3d at 527-28.

There is an important, if not controlling, distinction here. Where children might have been present at a town council meeting in *Town of Greece*, the school children are participants in the CVUSD school board meetings and, for one student, sit as a member of the school board itself. The CVUSD board members invite the school children of the district to attend and participate in all aspects of the meeting. Often this is for public recognition, awards, or honors related to academic, athletic, or other school related achievement. Other times this is to allow the school children to perform for the school board members and the public. Sometimes it is so the student can lead the school board and members of the community in the pledge. But for these school children to participate in such recognition, in all aspects of the board meetings at which matters of significance to the child's education are discussed and decided, school children of the CVUSD must endure a call to prayer and prayer, and much other religious conduct, by the very school board members who control their very education.

C. The notion that the voluntary presence excuses a constitutional violation has been soundly rejected.

School children cannot be forced to choose between taking part in a unique opportunities afforded by a public school, such as graduation or a football game, and missing such opportunities to avoid a state-sponsored

religious practice. *See, Lee v. Weisman*, 505 U.S. at 596 ("It is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice."); *see also, School Dist. of Abington Tp, Pa. v. Schempp*, 374 U.S. 203, 288, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963) (Brennan, J., concurring) ("Thus, the short, and to me sufficient, answer is that the availability of excusal or exemption simply has no relevance to the establishment question…"); *Mellen v. Bunting*, 327 F.3d 355, 372 (4th Cir. 2003) ("…VMI cannot avoid Establishment Clause problems by simply asserting that a cadet's attendance at supper or his or her participation in the supper prayer are 'voluntary.'").

The simple conclusion here is that an invitation for school children to participate in and receive recognition by the school board—the body that is so central to the school district—cannot be made contingent on the child's willingness to be exposed to religious activities by that school board.

The Court emphasized this in *Santa Fe*:

> High school home football games are traditional gatherings of a school community; they bring together students and faculty as well as friends and family from years present and past to root for a common cause. Undoubtedly, the games are not important to some students, and they voluntarily choose not to attend. For many others, however, the choice between attending these games and avoiding personally offensive religious rituals is in no practical sense an easy one. The Constitution, moreover, demands that the school may not force this difficult choice upon these students . . .

Santa Fe, supra, 530 U.S. at 312.

School children who want to participate in the highest recognition, awards, and other honors for their school activities must attend the school board meetings. (ER Vol. 2, at 111-115.) Perhaps attending the school board meeting for recognition and honors is not as significant in the life of school children as the graduation ceremony. On the other hand, one might posit that attending a school football game lacks real meaning in the life of a student. It is not for the Court to speculate as to the relative significance these events have for students. These are opportunities that exist for the benefit of the school children in the district and are part of the experience of public school life. The CVUSD school board members cannot condition access to all the opportunities of public school life on a willingness to sit through a religious ritual.

As Judge Bernal noted poignantly in his order granting FFRF's' motion for summary judgment:

> These students are not mere observers on a field trip, watching a legislative assembly from a quiet balcony. They are participants—"constituents" of the Board drawn to the meetings to seek relief (in the case of disciplinary proceedings) (SUF ¶108), acknowledgment of their curricular and extracurricular successes, (SUF ¶¶ 26-27), or change to the policies that govern their daily lives, (SUF ¶¶ 20, 28). They are also children, students of the District that rises before them and asks them to pray.

(ER. Vol. 1, Tab 2, at 24.)

Marsh, *Town of Greece* and even *McCarty* all agree that prayers occurring

in a school context should be treated differently. And while the Fifth Circuit in *McCarty* found that a student led invocation during the student expression time at its board meeting did not violate the Constitution, it acknowledged that the decision turned on the facts specific to its case. *See McCarty*, 851, F.3d at 529-30 ("Although it is possible to imagine a school-board student-expression practice that offends the Establishment Clause, this one, under its specific facts, does not.") And the facts specific to the case before this Court stand in stark contrast to *McCarty* and demonstrate that here the *Marsh*/*Town of Greece* exception does not apply.

III. The District Court Correctly Concluded That The Board's Prayer Resolution, Proselytizing, and Bible Readings Fail the *Lemon* Test.

As the narrow legislative prayer exception does not apply here, the Court must analyze this case under *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). This Court's precedent has never allowed government organized and sponsored prayer in a school setting. And while the *Lemon* test has undergone criticism and reinterpretation, it remains the established test for Establishment Clause cases. *See Santa Monica Nativity Scenes Comm. v. City of Santa Monica*, 784 F.3d 1286, 1300 (9th Cir. 2015). As the district court found, the CVUSD school board's prayer Resolution and religious conduct by its members at its meetings fail each prong of the *Lemon* test.

This Court has noted that the Supreme Court has "eschewed the Lemon

test in the context of coercive religious activity in public schools, where 'there are heightened concerns with protecting freedom of conscience from subtle coercive pressure.'" *Card*, 520 F.3d at 1014, (*quoting Lee v. Weisman*, 505 U.S. at 592.) For instance, in cases of prayer and Bible reading in the school context, the outcome is so clear that *Lemon* is unnecessary:

> In *Lee*, which addressed mandatory religious speech at graduation, the Court also did not apply the *Lemon* test, instead holding that "[t]he government involvement with religious activity in this case is pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school."

Id. (internal citations omitted.)

Though this Court has pointed out the inconsistent use of the Lemon test, it has also has recognized that "Lemon remains the Court's principal framework for applying the Establishment Clause." *Santa Monica Nativity Scenes Comm*. 784 F.3d at 1299 n.7. This is why the district court was correct to apply *Lemon* in this case.

> Under Lemon, a government act is consistent with the Establishment Clause if it: (1) has a secular purpose; (2) has a principal or primary effect that neither advances nor disapproves of religion; and (3) does not foster excessive governmental entanglement with religion.

Johnson v. Poway Unified Sch. Dist., 658 F.3d 954, 972 (9th Cir. 2011).

This Court has "collapsed these last two prongs to ask 'whether the challenged governmental practice has the effect of endorsing religion.'" *Id*. (*citing Trunk v. City of San Diego*, 629 F.3d 1099, 1106 (9th Cir. 2011) (*quoting*

Access Fund v. U.S. Dept. of Agriculture, 499 F.3d 1036, 1043 (9th Cir. 2007))). If the conduct in question fails any prong, it is unconstitutional.

A. The prayers, proselytizing, and Bible readings have an obvious religious purpose and no secular purpose.

Merely having a school invocation policy shows an impermissible religious purpose: "an invocation policy by its very terms appears to reflect an impermissible state purpose to encourage a religious message." *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1103 (9th Cir. 2000)(*citing Santa Fe*, 530 U.S. at 291).

The district court, giving the required deference to the school board here (*see Santa Fe*, 530 U.S. at 380), found that its stated purpose for continuing prayers was insincere. (ER Vol. 1, Tab 2, at 26-27.) The school board members failed to argue or even address the *Lemon* test, relying on a policy that says the purpose of the prayer Resolution is to "solemnify" board meetings. As the District Court noted, the school board members' statements, proselytizing, and Bible reading "cast serious doubt on the sincerity of the school board's articulated secular purpose." *Id*. at 27 (*citing Coles*, 171 F.3d at 384). In other words, the prayer Resolution and policy is part of an overall program promoting religion. And The school board members appear to agree that part of that program (Bible readings, proselytizing, and religious commentary) must go, thereby conceding the religious purpose underlying the entire program.

The district court noted two statements, "among others of a similar nature," that "raise serious questions as to the true motivation behind the [Prayer] Resolution." (ER Vol. 1, Tab 2, at 27.)[11] When determining the secular purpose of the prayers, this Court must take into account the school board members' previous actions, including religious comments, proselytizing, and Bible reading. When examining the purpose of two Kentucky county courthouse displays of the Ten Commandments under the *Lemon* test, the Supreme Court rejected the government's argument that only its latest action had any relevance to determining the purpose of a religious display. The government asked the Court to ignore everything that led up to that last act. The Court declined:

> They [the County defendants] argue that purpose in a case like this one should be inferred, if at all, only from the latest news about the last in a series of governmental actions, however close they may all be in time and subject. But the world is not made brand new every morning, and the Counties are simply asking us to ignore perfectly probative evidence; they want an absentminded objective observer, not one presumed to be familiar with the history of the government's actions and competent to learn what history has to show . . . The Counties' position just bucks common sense: reasonable observers have reasonable memories, and our precedents sensibly forbid an observer to turn a blind eye to the context in which [the] policy arose.

[11] The school board members misinterpreted the district court's analysis, arguing that the court "questioned the sincerity of the asserted secular purpose based on statements made by two of the board members." Appellant's Opening Br., at 40-41. Reading the district court's decision and analysis fully, it is clear that the court was merely highlighting two instances among many.

McCreary Cty., Ky., supra, 545 U.S. 866 (citations and internal quotations omitted.)

"The world is not made brand new every morning" and, accordingly, the board members conduct of proselytizing, Bible reading, and religious commentary must be considered alongside the prayers to help determine the true purpose of the prayer Resolution and prayer policy. *See Id*. Similarly in *Santa Fe*, the Supreme Court "refuse[d] to turn a blind eye to the context in which this policy arose, and that context quells any doubt that this policy was implemented with the purpose of endorsing school prayer." *Santa Fe*, *supra*, 530 U.S. at 315.

The CVUSD board members are willing to use their public school positions and policies of the public school board to promote their personal religion. And they are using the prayer Resolution to do the same thing. The Bible reading, proselytizing, religious commentary and prayers are all are part of the same attempt to use a public office to impose religion. This is evident by the overtly religious conduct and commentary by members of the school board during the meetings. At one meeting, board member James Na piggybacked on the prayer to deliver a sermon to the school children and citizens in attendance. He told the audience:

> Man, as we were born is flawed. We're not complete. We're not God. . . Pastor Frank Gonzalez was right in his prayers, that I need [to] first look up to Jesus Christ for serving our students…because without that, we'll be flawed just like those judges in superior court or on the local bench.

(ER Vol 2, Tab 7, at 115.)

Evidence of such regular religious conduct at the meetings abound. At another meeting, school board member Andrew Cruz thanked the pastor who gave the prayer saying, "Thank you Pastor Boyd for your serving the Lord Jesus Christ and serving all of our students because we do need your prayers daily basis [sic]." (ER Vol. 2, Tab 7, at 119.)

Board members also mix their proselytizing with the prayers, again showing that the two are one and the same, that is, that the prayers are meant to proselytize. Na responded to a parent who had addressed the Board regarding special needs education at one meeting:

> I have been praying for your daughter…she has gone home to our father. And we have lost pastor Chuck Smith as well. And he said we have just moved. So we have a hope because we love Lord Jesus Christ. So, continue to serve your two other children. That is your mission on this earth.

(ER Vol. 2, Tab 7, at 117-118.)

Board members have been clear about the purpose of injecting prayers and other religious acts into the school board meeting. Andrew Cruz told the audience at one meeting:

> You needed the right board to follow that path. And I find that extraordinary. I think there are very few districts of that powerfulness of having a board such as ourselves having a goal. And that one goal is under God, Jesus Christ.

(ER Vol. 2, Tab 7, at 118.)

Mr. Cruz then read from the Bible, Psalm 143:8. *Id*.

The purpose behind the call to prayer and prayers, reading from the Bible, the religious commentary, and proselytizing is, as Mr. Na stated at one meeting, to "urge[] everyone who does not know Jesus Christ to go and find Him." (ER Vol. 2, Tab 7, at 118.)

The school board members would have this Court believe that "The only conclusion to be learned from these statements is that Mr. Na and Mr. Cruz are devoted Christians." Appellant's Opening Br., at 43. There are far more examples of the overtly religious conduct by the school board members than the two example statements the district court highlighted. The record (ER Vol. 2, Tab 7, at 115-125) identifies a host of prayers, proselytizing, and Bible reading by the board members and was introduced in the district court through, among other things, video recordings and minutes of the school board meetings. All told, the school board members use their positions to turn the meetings into something akin to a religious revival or church service, of which the prayers are an integral and often proselytizing part.

As the record demonstrates, the evidence presented to the district court reveals that the purpose underlying the CVUSD school board's prayer Resolution was to promote the personal religion of the school board members. This is not a legitimate secular purpose. *See Collins v. Chandler Unified Sch. Dist.*, 644 F.2d 759, 762 (9th Cir. 1981) (*citing Brandon v. Board*, 635 F.2d 971, 978 (2d Cir. 1980)).

Finally, even if solemnization is a legitimate secular purpose, religious ritual for solemnization fails for two reasons. First, a religious message is foremost directed to its adherents.

> School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents "that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch,* 465 U.S., at 688, 104 S.Ct. 1355 (O'Connor, J., concurring).

Santa Fe, 530 U.S. at 309–10.

Second, there are many nonreligious ways to solemnize a school event. "[T]he state cannot employ a religious means to serve otherwise legitimate secular interests." *Jager,* 862 F.2d at 830 (*citing Karen B. v. Treen,* 653 F.2d 897, 901 (5th Cir. Unit A 1981), *aff'd mem.,* 455 U.S. 913 (1982)). There are plenty of secular alternatives:

> The board could have used the inspirational words of Abraham Lincoln or … Dr. Martin Luther King, Jr. to achieve the same ends. Instead, the board relied upon the intrinsically religious practice of prayer to achieve its stated secular end.

Coles, 171 F.3d at 384.

Because "solemnization … could have been achieved without resort to prayer, … the school board's practice fails to satisfy the purpose prong of the Lemon test." *Id*.

When viewed in its totality, the school board members' statements, their consistent religious conduct at the meetings, as well as the availability of other

methods of solemnization, the CVUSD board's prayer Resolution and religious conduct at the school board meetings fail the purpose prong of the *Lemon* test.

B. The undisputed evidence shows that the prayer Resolution and the religious conduct of the school board members constitute an unconstitutional endorsement of religion.

The school board members chose to include prayer and religious conduct as part of their State mandated public meetings. The school board members themselves engaged in religious conduct and, at times, composed and delivered the prayers. This conduct conveys an unmistakable message.

> If public schools are perceived as conferring the *imprimatur* of the State on religious doctrine or practice as a result of such a policy, the nominally "neutral" character of the policy will not save it from running afoul of the Establishment Clause.

Bd. of Educ. of Westside Cmty. Sch. v. Mergens By & Through Mergens, 496 U.S. 226, 264, 110 S. Ct. 2356, 2379, 110 L. Ed. 2d 191 (1990) (Marshall, J., concurring). Thus, the message conveyed by the prayer Resolution, along with the school board members' conduct during the meetings, must be examined.

The effects prong of the *Lemon* test asks "whether 'it would be objectively reasonable for the government action to be construed as sending primarily a message of either endorsement or disapproval of religion.'" *Trunk,* 629 F.3d at 1109 (*citing Vernon v. City of Los Angeles*, 27 F.3d 1385, 1398 (9th Cir.1994)). The inquiry asks how is the conduct perceived by an "informed as well as reasonable" observer who is "familiar with the history of the government

practice at issue." *Kreisner v. City of San Diego*, 1 F.3d 775, 784 (9th Cir. 1993). The ***appearance*** of endorsement is enough to violate the clause. *See Cnty. of Allegheny, supra*, 492 U.S. at 594 (the Establishment Clause "at the very least, prohibits government from appearing to take a position on questions of religious belief"); *Lynch, supra*, 465 U.S. at 692 (O'Connor, J., concurring) (It is those practices that communicate an endorsement of religion "whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community."); *Westside Comm. Bd. of Educ. v. Mergens*, 496 U.S. at 264, (Marshall, J., concurring) ("If public schools are perceived as conferring the imprimatur of the State on religious doctrine or practice" they run "afoul of the Establishment Clause.").

Here, the school board members' religious activities not only appear to endorse Christianity but evidence actual endorsement.

The danger that the school board members' conduct in this case will be perceived as an endorsement of religion is of particular concern because the message is communicated to public school children. School prayer is an unconstitutional endorsement of religion.

> [To] an impressionable student, even the mere appearance of secular involvement in religious activities might indicate that the state has placed its imprimatur on a particular religious creed. This symbolic inference is too dangerous to permit.

See Collins, 644 F.2d at 762 (*quoting Brandon v. Board of Ed. of Guilderland Central Sch. Dist*., 635 F.2d 971, 978 (2d Cir. 1980)).

In the context of a school board, which governs and manages all aspects of public school life, the risk that the school children will see their school as placing its support behind religious practice is greater.

The CVUSD board members try to minimize the seriousness of their conduct, arguing only two board members were responsible for most of the proselytizing, religious commentary, and Bible reading. This argument is specious. As the district court noted of the board as a whole, "they are responsible for the administration of the Board meetings." (ER Vol. 1, Tab 2, at 28.) They are responsible for how their policies, including the prayer policy, are implemented. The other board members did not object or even comment on the blatant religious conduct during the meetings. And each of the CVUSD board members approved the prayer Resolution. The reasonable observer would conclude under the circumstances here that the board members together endorsed the prayers, proselytizing and Bible readings.

Similarly, the absence of the prayer from the meeting agenda does not alter the analysis nor the conclusion that the school board members' conduct, at a minimum, creates an appearance of endorsing religion. The prayers occur at the opening of the public session of the meeting at the time when most of the students (those being honored, recognized or otherwise participating in the

meeting) as well as members of the public are present.

Considering all the circumstances surrounding the conduct of the school board members during the school board meetings as well as the circumstances of the meetings themselves, the conclusion is clear. "Under these circumstances, any reasonable observer would conclude that the school board was endorsing Christianity." *See Coles*, 171 F.3d at 385; *see also Indian River*, 653 F.3d at 289.

IV. The CVUSD Board Members' Cannot Raise Any Issue Regarding The Public's Free Speech Rights As This Issue Was Never Raised Below.

The school board members are precluded from raising the issue of whether the injunction infringes on the free speech rights of the public at large, as they failed to raise this issue in the district court. The school board members' new free speech claim asks this Court to take action out of turn. The board had every opportunity to raise this or any other concern at the time the injunction was issued. But that time has long passed, and they cannot raise this question for the first time on appeal.

The school board members had ample opportunity to ask the district court to reconsider, modify or amend its order and the injunction.

> Under Federal Rule of Civil Procedure 59(e), a party may move to have the court amend its judgment within twenty-eight days after entry of the judgment. . . . But amending a judgment after its entry remains an extraordinary remedy which should be used sparingly.

Allstate Ins. Co. v. Herron, 634 F.3d 1101, 1111 (9th Cir. 2011) (internal

citations and quotations omitted). Even if the time window was not more than a year in the distant past, none of the four reasons for a 59(e) motion are present here. *See McDowell v. Calderon*, 197 F.3d 1253, 1255 n. 1 (9th Cir.1999) (en banc) (per curiam).

Alternatively, the board members had the opportunity to request relief from the judgment under Federal Rule of Civil Procedure 60(b). Any such motion at this juncture would be untimely, as Rule 60 motions must also be brought within a reasonable time "and in any event not longer than one year after the judgment was entered." *See Ashford v. Steuart*, 657 F.2d 1053, 1055 (9th Cir. 1981) (per curium).

Assuming, however, that the question could be raised properly in this appeal, the school board members have failed to show that they have standing. They assert a constitutional injury to parties not before the Court—the general public—without explaining on what basis they can bring such a claim. While there is great leeway given on the question of standing in an overbreadth claim, *see Broadrick v. Oklahoma,* 413 U.S. 601, 612, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973); *Dombrowski v. Pfister,* 380 U.S. 479, 486, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965), the party claiming the violation still must meet the basic principles of standing. *See generally Get Outdoors II, LLC v. City of San Diego, Cal.*, 506 F.3d 886, 891 (9th Cir. 2007). The school board members have made no showing that they have standing at this point to raise this issue on behalf of the

general public.

In any event, the board members' argument is factually incorrect. The district court injunction applies to the four named school board members alone. The assertion that the "word 'permitting' in the judgment requires the school board member to stop public comments if, in the board member's opinion, the comment is a prayer" is a misreading of the express language of the injunction. The injunction prohibits "***school-sponsored*** prayer in Board meetings," this necessarily includes proscribing the school board members from "conducting, permitting, or otherwise endorsing school-sponsored prayer in Board meetings." (1 EOR. 3, p. 31) (emphasis added). The ability of the public to pray or speak was never part of the case and, therefore, was not part of the district court's judgment. Nothing in the district court's order granting the motion for summary judgment nor in the express language of the injunction touches upon speech delivered by citizens during the public comment period. The only reasonable interpretation of the injunction that could affect the public comment period would be a prohibition against the enjoined school board members inviting local pastors to give invocations during public comment period in order to circumvent the district court's order.

V. The School Board's New By-Law Is Not Properly Before This Court.

The school board member have included in the Excerpts of Record a new Board By-Law, enacted in November of 2016, eight months after they filed their

Notice of Appeal. This document was never submitted to, nor filed in, the district court. It is not properly before the Court on appeal.

Material that was not filed with the district court, admitted into evidence or otherwise considered by the district court is ***not part of the record on appeal***. *See Kirshner v. Uniden Corp. of America*, 842 F2d 1074, 1077 (9th Cir. 1988); *Barcamerica Int'l USA Trust v. Tyfield Importers, Inc.*, 289 F3d 589, 594 (9th Cir. 2002). Matters not part of the record on appeal must be stricken and may not be considered by the Court on appeal. *See Kirshner*, *supra*, 842 F2d at 1077. Such extraneous matters may be stricken from the record on the appellate court's own motion. *See Panaview Door & Window Co. v. Reynolds Metals Co.*, 255 F2d 920, 922 (9th Cir. 1958); *see also United States v. Kennedy*, 890 F2d 1056, 1058, fn. 4 (9th Cir. 1989).

Furthermore, the appellate court may sanction a party or attorney for improperly relying on materials that are not part of the record. *See Lowry v. Barnhart*, 329 F3d 1019, 1024-1026 (9th Cir. 2003) (attorney fee sanctions imposed where appellee improperly included document that did not even exist when appellant filed opening brief).

The board members have improperly included in the Excerpts of Record a document that did not exist until eight months after they filed their Notice of Appeal. They never attempted to augment the record and never attempted to

submit the document in the district court. Now they rely on this improper document as a basis for asserting the district court's injunction is moot.

This Court should strike the document (ER Vol. 2, Tab 4, at 33) from the Excerpts of Record and disregard the document and the board members' argument regarding it.

Even if the Court were to consider the document, a November 2016 Board By-Law provision, the argument still fails. The injunction declared the prayer Resolution and the policy and custom of "reciting prayers, Bible readings, and proselytizing at Board meetings" a violation of FFRF's' First Amendment rights. (ER Vol. 1, Tab 3, at 31.) By enacting a new By-Law prohibiting the board members from engaging in the conduct declared unconstitutional, the board members concede that their conduct (other than the prayer Resolution which is not part of the new By-Law) violated FFRF's' First Amendment rights. By enacting the new By-Law, the school board members rendered their appeal as to those issues moot—not the underlying injunction.

In *Staley v. Harris Cty., Tex*., a citizen sued the county for displaying a Bible at the Harris County Civil Courthouse. 485 F.3d 305 (5th Cir. 2007). The district court issued a permanent injunction ordering the bible to be removed and the county appealed. *Id*. Four days before oral argument on the appeal, Harris County removed the Bible display. *Id*. at 308. In response, the Fifth Circuit found that the appeal was moot, not the underlying case. *Id*. at 309 (emphasis

added) ("In this light, we see that this appeal is moot."). The court also found that the county was not entitled to a vacatur of the district court decision granting the injunction.

With the enactment of the new By-Law, the board members have eliminated the issue of their religious conduct at the school board meetings as an actual controversy. In so doing, their appeal on those issues (proselytizing, religious commentary, and Bible readings) is now moot. *See Cook Inlet Treaty Tribes v. Shalala*, 166 F.3d 986, 989 (9th Cir.1999) ("federal courts have no jurisdiction to hear a case that is moot, that is, where no actual or live controversy exists.") Accordingly, FFRF and the individual plaintiffs are prevailing parties on those issues because they are no longer properly before this Court. FFRF and the individual plaintiffs are entitled to fees and costs on those issues, regardless of this Court's decision on the question of the school board prayer.

CONCLUSION

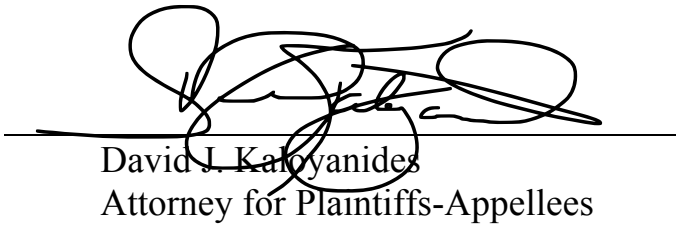
The district court correctly granted summary judgment in favor of FFRF against the individual school board members. The CVUSD Board prayer Resolution, the school board members' conduct of proselytizing, Bible reading and recitation, and religious commentary all run afoul of the Establishment Clause. Because this case arises in the context of a public school involving

public school children, it does not fall within the narrow exception under *Marsh* and *Town of Greece*. Under the standard Establishment Clause test of *Lemon*, the district court correctly found that the CVUSD Board Members violated the First Amendment rights of FFRF and the individual plaintiffs.

The Court should affirm the judgment and the permanent injunction issued by the district court, and order an award of reasonable fees and costs to FFRF.

Respectfully submitted,

Dated: June 26, 2017



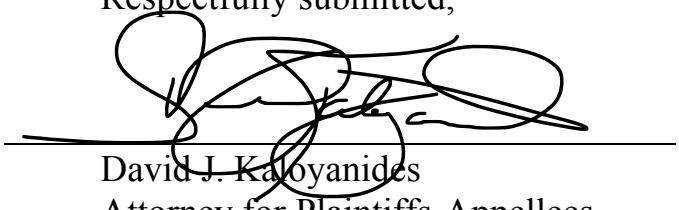
David J. Kaloyanides
Attorney for Plaintiffs-Appellees
FREEDOM FROM RELIGION FOUNDATION, INC., MICHAEL ANDERSON, LARRY MALDONADO, and DOES 1 through 20 inclusive.

CERTIFICATE OF RELATED CASES

As of the date of the filing of this Appellees' Answering Brief, there are no related cases pending on appeal.

Respectfully submitted,

Dated: June 26, 2017



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FREEDOM FROM RELIGION
FOUNDATION, INC., MICHAEL
ANDERSON, LARRY MALDONADO,
and DOES 1 through 20 inclusive.

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Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

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The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

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☐ This brief complies with the longer length limit authorized by court order dated [ ]
The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 32-2 (a) and is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32 (f), if applicable. The brief's type size and type face comply with Fed. R .App. P. 32(a)(5) and (6).

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Signature of Attorney or Unrepresented Litigant [ ] Date [ ]

("s/" plus typed name is acceptable for electronically-filed documents)

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AAB ADDENDUM

Table of Contents

United States Constitution Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

California Education Code § 2

The code establishes the law of this state respecting the subjects to which it relates, and its provisions and all proceedings under it are to be liberally construed, with a view to effect its objects and to promote justice.

California Education Code § 33031

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.

The rules and regulations adopted shall be published for distribution as soon as practicable after adoption.

California Education Code § 35160

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 § 35160.2

For the purposes of Section 35160, "school district" shall include county superintendents of schools and county boards of education.

This section shall be interpreted to be declaratory of existing law.

California Education Code § 35145

All meetings of the governing board of any school district shall be open to the public and shall be conducted in accordance with Chapter 9 (commencing with Section 54950) of Division 2 of Title 5 of the Government Code. All actions authorized or required by law of the governing board shall be taken at the meetings and shall be subject to the following requirements:

(a) Minutes shall be taken at all of those meetings, recording all actions taken by the governing board. The minutes are public records and shall be available to the public.

(b) An agenda shall be posted by the governing board, or its designee, in accordance with the requirements of Section 54954.2 of the Government Code. Any interested person may commence an action by mandamus or injunction pursuant to Section 54960.1 of the Government Code for the purpose of obtaining a judicial determination that any action taken by the governing board in violation of this subdivision or Section 35144 is null and void.