Appeals No. 16-55425

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FREEDOM FROM RELIGION FOUNDATION, INC.,

Plaintiff – Appellee,

vs.

CHINO VALLEY UNIFIED SCHOOL DISTRICT BOARD OF EDUCATION; and CHINO VALLEY UNIFIED SCHOOL BOARD OF EDUCATION BOARD MEMBERS JAMES NA, SYLVIA OROZCO, CHARLES DICKIE, ANDREW CRUZ, IRENE HERNANDEZ-BLAIR, in their official representative capacities,

Defendants-Appellants,

URGENT MOTION UNDER CIRCUIT RULE 27-3(b)

ORANGE COUNTY BOARD OF EDUCATION'S URGENT MOTION TO INTERVENE AS A DEFENDANT-APPELLANT

On Appeal from the United States District Court
for the Central District of California
Honorable Jesus G. Bernal, Presiding
No. EDCV 14-2336-JGB (DTBx)

TYLER & BURSCH, LLP
Robert H. Tyler, CA Bar No. 179572
rtyler@tylerbursch.com
James A. Long, CA Bar No. 273735
jlong@tylerbursch.com
25026 Las Brisas Road
Nada N. Higuera, CA Bar No. 299819
nhiguera@tylerbursch.com
Murrieta, California 92562
Tel: (951) 600-2733
Fax: (951) 600-4996

Attorneys for Proposed Intervenor
ORANGE COUNTY BOARD OF EDUCTION; and ORANGE COUNTY BOARD OF EDUCATION MEMBERS KEN WILLIAMS, MARI BARKE, LISA SPARKS, JOHN BEDELL, REBECCA GOMEZ, in their official representative capacities

---

CIRCUIT RULE 27-3 CERTIFICATE

I, James A. Long, Esq., certify, and state under penalty of perjury under the laws of the United States of America, as follows:

1. I am an attorney licensed to practice law before the United States Court of Appeals for the Ninth Circuit, I make this declaration pursuant to Circuit Rule 27-3, and based on my own personal knowledge.

2. I am a Senior Associate for Tyler & Bursch, LLP, counsel of record for Defendant-Appellant, Chino Valley.

3. This circuit issued its published, written opinion in this matter on July 25, 2018, affirming the Central District's injunction against Chino Valley, and effectively prohibiting prayers at school board meetings in all school boards within the territory of the Ninth Circuit.

4. The Chino Valley Board then voted to allow Tyler & Bursch, LLP to appeal the decision by filing a petition for rehearing, and a Writ of Certiorari to the United States Supreme Court.

5. Defendant-Appellant, Chino Valley, timely filed its petition for en banc rehearing on August 8, 2018.

6. During the November 2018 elections two new members of the Chino Valley Board were elected.

7. This Circuit published its decision denying Chino Valley's petition for en banc rehearing on December 26, 2018.

8. On January 17, 2019, in closed session meeting, the Chino Valley Board voted 3-2 to de-authorize Tyler & Bursch, LLP from filing a Writ of Certiorari to the United States Supreme Court.

9. The Orange County Board of Education ("OCBE") maintains a prayer policy nearly identical to the prayer policy of Chino Valley.

10. The Freedom From Religion Foundation has cited this case in a letter to the OCBE in a letter threatening to sue them if they do not cease engaging in prayer to open their board meetings.

11. Until January 17, 2019, OCBE had every reasonable expectation that Chino Valley would appeal to the United States Supreme Court.

12. On February 13, 2019, OCBE voted to intervene in this matter to seek review from the United State Supreme Court so that its interests in continuing its prayer policy may be protected.

13. Currently, there is a split opinion amongst the appellate districts. The Fifth Circuit found prayer at school board meetings to be constitutional legislative prayers. *American Humanist Association v. Birdville USD*, 851 F.3d 521 (5th Cir. 2017).

14. The deadline to file a Writ of Certiorari is March 26, 2019, 38-days away.

15. United States Supreme Court Rule 13(5) allows a party to seek an extension of time to file a Writ of Certiorari, but such a request must be made at least 10-days before March 26, 2019.

16. I believe that even 38-days would not be sufficient time to thoughtfully and carefully craft a Writ of Certiorari to the United States Supreme Court. OCBE would need significantly more time than would be available should their motion be heard, and granted in due course, therefore, they need to be able to apply for an extension of time. They cannot file a writ of certiorari or an application to extend time without being granted intervenor status.

17. OCBE needs a decision as soon as possible. I anticipate that it will take approximately 4-5 days to thoughtfully craft a request for an extension of time to be filed with the Supreme Court. Therefore, without a decision from this Circuit by at least March 10, 2019, OCBE will lose its ability to extend time to file a Writ of Certiorari, and their ability to thoughtfully, carefully, and successfully seek review from the Untied States Supreme Court will be impaired.

18. I emailed opposing counsel, David Kaloyanides, on February 15, 2019, to notify him of this motion pursuant to Circuit Rule 27-3. He indicated to me that he was opposed to the relief sought.

19. On February 15, 2019, I spoke with a representative of the Ninth Circuit Clerk's Office for Emergency Motions and spoke to a person named Sue to inform the office that OCBE would be filing this motion. At the time, I believed that the motion needed to be decided on an emergency basis. Upon review and consideration, I decided that the circumstances warranted urgent, but not necessarily emergency relief.

20. The telephone number, email address, and office address for the Freedom From Religion Foundation and the other Plaintiff-Appellees is as follows:

David Kaloyanides

14726 Ramona Avenue, Suite 108

Chino, CA 91710-5730

213-623-8120

djpkaplc@me.com

21. The telephone number, email address, and office address for the Chino Valley Unified School District, and other Defendant-Appellants, and the proposed Intervenor, OCBE, is as follows:

Robert Tyler, James A. Long, Nada Higuera

Tyler & Bursch, LLP

25026 Las Brisas Road

Murrieta, CA 92562

(951) 600-2733

rtyler@tylerbursch.com

jlong@tylerbursch.com

nhiguera@tylerbursch.com

22. We will be filing the motion electronically. I also assured opposing counsel that I would e-mail him a copy for his convenience.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on this 16th day of February, 2019, at Eastvale, California.

s/ James A. Long

TABLE OF CONTENTS

I. INTRODUCTION 1
II. STATEMENT OF ISSUES 2
III. PROCEDURAL POSTURE 2
IV. STATEMENT OF FACTS 4
V. ARGUMENT 7
A. OCBE IS ENTITLED TO INTERVENE AS OF RIGHT 8
B. OCBE'S MOTION IS TIMELY 8
1. Stage of the Proceedings 9
2. Prejudice to Other Parties 10
3. Good Cause for Delay 11
C. OCBE HAS A SIGNIFICANTLY PROTECTABLE INTEREST IN THE SUBJECT MATTER OF THIS ACTION 12
D. OCBE'S ABILITY TO PROTECT ITS INTEREST MAY BE IMPAIRED .. 13
E. NO EXISTING PARTIES TO THE ACTION ADEQUATELY REPRESENT OCBE'S INTERESTS 14
F. THIS COURT SHOULD ALTERNATIVELY GRANT OCBE PERMISSIVE INTERVENTION 16
VI. CONCLUSION 17

TABLE OF AUTHORITIES

Page(s)

Cases

American Humanist Association v. Birdville USD,
851 F.3d 521 (5th Cir. 2017) 1, 13

Arakaki v. Cayetano,
324 F.3d 1078 (9th Cir. 2003) 7, 14

Banks v. Chicago Grain Trimmers Ass'n,
389 U.S. 813 (1967) 9-10

Bender v. Williamsport Area School District,
475 U.S. 534 (1986) 16

Citizens for Balanced Use v. Montana Wilderness Association,
647 F.3d 893 (9th Cir. 2011) 14

Citizens v. Wilson,
131 F.3d 1297 (9th Cir. 1997) 9

County of Fresno v. Andrus,
622 F.2d 436 (9th Cir. 1980) 12

Donnelly v. Glickman,
159 F.3d 405 (9th Cir. 1998) 8, 12

Greene v. U.S.,
996 F.2d 973 (9th Cir. 1993) 12

Hunter v. Ohio ex rel. Miller,
396 U.S. 879 (1969) 10

Lemon v. Kurtzman,
403 U.S. 602 (1971) 3

Lockyer v. United States,
450 F.3d 436 (9th Cir. 2006) 12

Pellegrino v. Nesbit,
203 F.2d 463 (9th Cir. 1953) 14, 15

Portland Audubon Soc. v. Hodel,
866 F.2d 302 (9th Cir.) 12

Prete v. Bradbury,
438 F.3d 949 (9th Cir. 2006) 8

Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ.,
910 F.3d 1297 (9th Cir. 2018) 1, 3, 13

Tocher v. City of Santa Ana,

219 F.3d 1040–1045 (9th Cir. 2000) 9

Trbovich v. United Mine Workers,
404 U.S. 528, 538 n. (1972) 14

U.S. v. Covington Technologies Co.,
967 F.2d 1391 (9th Cir. 1992.) 9

United Airlines, Inc. v. McDonald,
432 U.S. 385 (1977) 9, 11, 15, 16

United States v. City of Los Angeles,
288 F.3d 391 (9th Cir. 2002) 8

Wilderness Soc. v. U.S. Forest Serv.,
630 F.3d 1173 (9th Cir. 2011) 7-8

Wolpe v. Poretsky,
144 F.2d 505 (D.C.Cir. 1944) 14

Statutes

Cal. Educ. Code §§ 1040-1047 ..... 4, 12, 13

Cal. Gov't Code § 54954.3 5

I. INTRODUCTION

The Orange County Board of Education ("OCBE") and the individual OCBE members in their official representative capacities[1] seek to intervene as a defendant-appellant in this action as a matter of right, or alternatively, by permission. If left unchallenged, the lower court's ruling that invocations at school board meetings violate the Establishment Clause would impede OCBE's ability to preserve invocations at its board meetings.

The primary basis for this Motion is that OCBE cannot be adequately represented by existing parties because, during a closed session meeting on January 17, 2019, Chino Valley Unified School District ("Chino Valley") decided not to seek review of this Court's opinion in the United States Supreme Court. The disposition of this important case will have lasting impact on OCBE's interests. OCBE and school boards throughout the country remain uncertain whether the invocations occurring at their meetings are constitutional. The constitutionality has not been decided by the United States Supreme Court and circuit courts are divided on this issue of exceptional importance.[2] Respectfully, OCBE's Motion to Intervene should be granted.

---

[1] The names of the individual board members are Ken Williams, Mari Barke, Lisa Sparks, John Bedell, and Rebecca Gomez.

[2] *American Humanist Association v. Birdville USD*, 851 F.3d 521 (5th Cir. 2017) (a three-judge panel of the Fifth Circuit unanimously held that prayer at school board meetings does not violate the Establishment Clause) and *Freedom from*

II. STATEMENT OF ISSUES

Whether the proposed defendant-appellant intervenor OCBE should be granted intervention as of right to defend its interests in this matter. Alternatively, whether OCBE should be granted permissive intervention.

III. PROCEDURAL POSTURE

The underlying action is a suit challenging Chino Valley's policy of permitting an invocation to solemnize and open its board meetings. On December 15, 2014, Freedom From Religion Foundation ("FFRF"), together with several other plaintiffs, filed their operative First Amended Complaint against Chino Valley and its board members.[3] Plaintiff FFRF alleged that Chino Valley and its members violated the Establishment Clause by inviting and permitting invocations by religious leaders at the beginning of its school board meetings.[4]

Both parties filed motions for summary judgment.[5] On February 18, 2016, the United States District Court entered judgment declaring Chino Valley's invocation policy and custom of reciting Bible verses and proselytization in violation

---

Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 910 F.3d 1297, 1298 (9th Cir. 2018) (a three-judge panel of the Ninth Circuit unanimously held that prayer at school board meetings violates the Establishment Clause).

[3] 1 EOR 2, P. 4-5; 2 EOR 5, P. 34-35.

[4] 1 EOR 2, P. 4; 2 EOR 5, P. 34-35.

[5] 1 EOR 2, P. 4.

of the Plaintiffs' First Amendment rights.[6] The Central District Court also enjoined the Chino Valley board members personally from permitting invocations at school board meetings.

On March 16, 2016, Chino Valley appealed the lower court's ruling. The sole issue raised on appeal by Chino Valley was whether its invocation policy was constitutional.[7] On July 25, 2018, this Circuit affirmed the decision.

On August 8, 2018, Chino Valley filed a petition for rehearing en banc. On December 26, 2018, in a published decision, the petition was denied with eight judges joining two separate dissenting opinions. *Freedom from Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ.*, 910 F.3d 1297, 1298 (9th Cir. 2018). Judge R. Nelson's dissent argued that the Ninth Circuit's opinion conflicts with the Supreme Court's decisions and Fifth Circuit precedent, and misapplies *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *Id.* at 1305. Judge O'Scannlain also stated that the practice of Chino Valley to begin its regular public meetings with prayer did not constitute an establishment of religion. *Id.* at 1304.

On January 17, 2019, the Chino Valley board members voted by a 3-2 vote not to appeal this Circuit's ruling. (Tyler Declaration at ¶ 3.) As a result, OCBE

---

[6] 1 EOR 3, P. 30-31.

[7] Defendants' Notice of Appeal, Doc. No. 94.

seeks to intervene to protect its interest by filing a petition for a writ of certiorari with the United States Supreme Court to reverse the Ninth Circuit's ruling.

IV. STATEMENT OF FACTS

OCBE is a public education organization offering support and services to 27 school districts in Orange County. *See* Cal. Educ. Code §§ 1040-1047. OCBE is responsible for establishing and overseeing all charter schools in Orange County, special education programs and services, and the county's alternative, community, and correctional education schools ("ACCESS"). (Williams Declaration at ¶ 2.) OCBE adopts curriculum and courses of study for ACCESS and special education students.[8] (Williams Declaration at ¶ 3.)

Chino Valley and OCBE both share a similar structure of their board meetings. The meetings begin with an opening invocation, recitation of the pledge of allegiance, roll call, an opportunity for public comment, and closed and open portions of the meetings. (Williams Declaration at ¶ 4.) During the closed sessions, the Board's five members typically make decisions on student disciplinary actions including adjudication of expulsion appeals and inter-district attendance appeals. (Williams Declaration at ¶ 5.) Students facing disciplinary action for serious offenses are permitted to speak at board meetings. (Williams Declaration at ¶ 6.)

---

[8] The California Education Code provisions frequently use the term "school district" to include county boards of education. See e.g. Cal. Educ. Code § 35160.1(c).

During the open portion of the meetings, the Board conducts its business of making decisions regarding district administration. (Williams Declaration at ¶ 7.) Occasionally, the Board sets aside time for student recognition to highlight the academic and extracurricular accomplishments of students in the district. (Williams Declaration at ¶ 8.) For example, during the December 12, 2018 regular session board meeting, choir students from the public high school Fullerton Union High performed a holiday musical presentation. (Williams Declaration at ¶ 8.) Students may also attend OCBE meetings to advocate for or against programs and services such as charter schools. (Williams Declaration at ¶ 9.) Like local school district meetings, OCBE meetings are open to any member of the public pursuant to Cal. Gov't Code § 54954.3 and include various opportunities for public comment. (Williams Declaration at ¶ 10.)

The Board holds roughly fifteen public meetings per year. (Williams Declaration at ¶ 11.) For at least the past five years, these meetings included an invocation. (Williams Declaration at ¶ 12.) In October 2014, the Board adopted an official policy codifying the invocations at the beginning of each OCBE meeting. (Board Policy 100-12, attached as Exhibit A to Williams Declaration.) OCBE's invocation policy is similar to Chino Valley's Resolution 2013/2014-11, which was found unconstitutional by the district court and this Circuit.[9]

[9] 3 EOR. 9, P. 423-429.

OCBE's invocation policy provides that the Orange County Superintendent of Schools post a notice on OCBE website to solicit the names of volunteers to deliver the invocation. (Ex. A.) Persons interested in delivering an invocation must then send a letter of interest in writing or email to OCBE by a specified date. (Ex. A.) The policy provides that names of those selected to deliver the invocation "will be chosen at random." If the person selected to deliver the invocation is unable to attend or is a no-show, the chairman of the meeting may request a volunteer from the audience." (Ex. A.)

In August 2016, FFRF sent a letter to OCBE requesting that OCBE "refrain from scheduling prayers as part of future school board meetings." (FFRF Letter attached as Exhibit B to Williams Declaration.) In the letter, FFRF explained that it sued Chino Valley over the "exact issue" of a school board conducting prayer as part of its meetings. The letter referenced the district court's decision that inclusion of prayers at board meetings is unconstitutional, and the letter quoted directly from the district court decision. FFRF sent Chino Valley a similar letter requesting that it "refrain from scheduling prayers as part of future school board meetings" before suing the district. (Ex. B.)

OCBE has not ceased its practice of permitting invocations prior to its board meetings despite FFRF's letter citing the district court's holding. (Williams Declaration at ¶ 14.) OCBE wants to preserve its right to allow invocations by

intervening in this case because Chino Valley is not going to seek review of the lower court's decision, which was affirmed by this Circuit. The District Court's judgment and this Circuit's opinion not only enjoined the Chino Valley board members personally from permitting invocations at school board meetings, it also applies to every school board within the jurisdiction of the Ninth Circuit to ban invocations.

OCBE believes that FFRF will bring a lawsuit against OCBE if OCBE continues its invocation policy. (Williams Declaration at ¶ 15.) This will likely lead to another several years of litigation and appeals on the exact legal issue at stake here with the exact plaintiff, FFRF. However, to preserve OCBE's significantly protectable interest and to avoid future litigation, OCBE now seeks to intervene in this action.

V. ARGUMENT

The requirements for intervention in federal actions are set forth in Rule 24 of the *Federal Rules of Civil Procedure*. "Rule 24 traditionally receives liberal construction in favor of applicants for intervention," as "courts are guided primarily by practical and equitable considerations." *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003). This Circuit has observed that "[a] liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts." *Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011)

(en banc) (quoting *United States v. City of Los Angeles*, 288 F.3d 391, 397-98 (9th Cir. 2002).

Rule 24 allows both intervention as of right and permissive intervention. As shown below, OCBE satisfies all of the intervention requirements for intervention by right, as well as permissive intervention.

A. OCBE is Entitled to Intervene as of Right

Given this Circuit's liberal policy in favor of intervention, courts should broadly construe the following four criteria when evaluating a request to intervene by right under Fed. R. Civ. P. 24(a)(2): (1) the application must be timely; (2) the applicant must have a significantly protectable interest in the action; (3) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and (4) the existing parties may not adequately represent the applicant's interest. *Prete v. Bradbury*, 438 F.3d 949, 954 (9th Cir. 2006); *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998). Courts "are guided primarily by practical and equitable considerations" in assessing these criteria. *Donnelly*, *supra*, 159 F.3d at 409.

B. OCBE's Motion is Timely

This Circuit gauges timeliness by considering "three factors: (1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay." *League of United Latin Am.*

Citizens v. Wilson, 131 F.3d 1297, 1302 (9th Cir. 1997) (internal quotation marks and citations omitted).

1. Stage of the Proceedings

The court may permit intervention at any stage in the proceeding, including post-judgment. *See, e.g. U.S. v. Covington Technologies Co.*, 967 F.2d 1391, 1394 (9th Cir. 1992.) The U.S. Supreme Court has also held that motions to intervene are timely if filed immediately after it becomes apparent that existing parties will not seek appellate review. *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977). Moreover, a post-judgment motion to intervene is timely if filed if it is filed within the time allowed for seeking appellate review. *See Tocher v. City of Santa Ana*, 219 F.3d 1040, 1044–1045 (9th Cir. 2000) ("A post-judgment motion to intervene is generally considered timely if it is filed before the time for filing an appeal has expired."); *see also United States ex rel. McGough v. Covington Techs.*, 967 F.2d 1391, 1395 (9th Cir. 1992).

On January 17, 2019, following this Court's decision on December 26, 2018 denying Chino Valley's petition for rehearing en banc, Chino Valley decided not to pursue review of the United States Supreme Court, necessitating OCBE's instant Motion to Intervene. In circumstances similar to those here, the United States Supreme Court has granted motions of a nonparty to intervene to file a petition for certiorari. *See Banks v. Chicago Grain Trimmers Ass'n*, 389 U.S. 813 (1967)

(intervention allowed where the would-be petitioner's interests had been represented by a different party below but that party had failed to file its own petition for certiorari following an adverse judgment); see also *Hunter v. Ohio ex rel. Miller*, 396 U.S. 879 (1969) (same).

Here, this Motion is timely because it is filed well before the March 26, 2019 deadline for Chino Valley to file a petition for writ of certiorari. OCBE also acted promptly after it became apparent that Chino Valley will not seek Supreme Court review. OCBE learned about Chino Valley's decision not to seek review from the U.S. Supreme Court on January 18, 2019. (Declaration of Williams ¶ 16.) That same day, OCBE contacted Tyler & Bursch, LLP to inquire whether OCBE could intervene and started the process to call a formal board meeting to vote on whether to intervene or not. (Declaration of Williams ¶ 16.) The first available date of a meeting at which a quorum of the board members could lawfully attend was February 13, 2019. (Declaration of Williams ¶ 17.) On February 13, 2019, OCBE voted to intervene. (Declaration of Williams ¶ 18.) This Motion to Intervene is filed on February 16, 2019, just three days after the vote to intervene. OCBE therefore acted as promptly as possible to file this Motion to Intervene.

2. Prejudice to Other Parties

OCBE is seeking intervention with diligence and without unreasonable delay, and the timing of the intervention application will not cause any prejudice to the

exiting parties. This Circuit has recognized that post-judgment intervention is not unfairly prejudicial when a nonparty seeks to intervene for the purpose of an appeal that the existing parties have decided not to pursue. *United Airlines*, *supra*, 432 U.S. at 394.

With this post-judgment intervention where OCBE is seeking to intervene solely to seek review from the Supreme Court and take the place of Chino Valley, it is difficult to conceive of any significant prejudice that might result from allowing intervention. Discovery is not necessary or useful because the issue at bar is not a factual question, but rather a legal question as to the constitutionality of invocations at school board meetings. OCBE will proceed with the appeal in the same manner that Chino Valley would have. Thus, there is no prejudice to the Plaintiffs.

3. Good Cause for Delay

This intervention application is timely because the need for OCBE to intervene did not arise until after Chino Valley decided it will not appeal. Until then, OCBE had every reason to believe that Chino Valley was adequately representing its shared interest in defending the constitutionality of permitting invocations prior to school board meetings. OCBE President Ken Williams learned on January 18, 2019, that Chino Valley would not seek review at the U.S. Supreme Court, and that very same day, he contacted legal counsel and started arranging for a board meeting to discuss intervention. (Williams Declaration at ¶ 16.)

Therefore, considering the relevant factors broadly in favor of intervention, OCBE has satisfied the timeliness factor.

C. OCBE Has a Significantly Protectable Interest in the Subject Matter of this Action

A proposed intervenor has a significantly protectable interest in an action if "(1) it asserts an interest that is protected under some law, and (2) there is a relationship between its legally protected interest and the plaintiff's claim." *Cal. ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006) (quoting *Donnelly*, *supra*, 159 F.3d at 409). The "interest" test is not a quantitative or bright-line rule, because "[n]o specific legal or equitable interest need be established." *Greene v. U.S.*, 996 F.2d 973, 976 (9th Cir. 1993); *see also Portland Audubon Soc. v. Hodel*, 866 F.2d 302, 308 (9th Cir.), cert. denied, 492 U.S. 911 (1989). Rather, the "interest" test serves as "a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *County of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980) (internal quotation marks and citation omitted).

At stake here is OCBE's interest under Cal. Educ. Code § 1040 *et seq*. to adopt rules and regulations for their own government. Under that authority, OCBE adopted an official policy in 2014 regarding the practice of permitting an invocation at each OCBE meeting. OCBE has a significantly protectable interest in continuing

and preserving invocations at its board meetings pursuant to Board Policy 100-12 and Cal. Educ. Code § 1040.

Moreover, OCBE has a significantly protectable interest in resolving the split of authority between the circuits regarding the issue at bar, especially in light of FFRF's threat to sue OCBE for its invocation policy. In the case *American Humanist Association v. Birdville USD*, the three-judge panel of the Fifth Circuit unanimously held that prayer at a school board meeting does not violate the Establishment Clause. 851 F.3d 521 (5th Cir. 2017) cert. denied, 138 S. Ct. 470 (2018). When this Circuit denied Chino Valley's petition for en banc rehearing, eight judges issued two separate dissenting opinions agreeing with the Fifth Circuit, and opining that prayer at a school board meeting does not violate the Establishment Clause. *Freedom from Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ.*, 910 F.3d 1297 (9th Cir. 2018). Review by the Supreme Court is warranted to settle this important constitutional issue.

D. OCBE's Ability to Protect Its Interest May Be Impaired

A significantly protectable interest is very closely linked with the third requirement for intervention of right—that the outcome of the challenge may impair the proposed intervenor's interest. Once such an interest is established, a court should have "little difficulty concluding that the disposition of th[e] case may, as a

practical matter, affect" the intervenor. *Citizens for Balanced Use v. Montana Wilderness Association*, 647 F.3d 893, 898 (9th Cir. 2011) (citation omitted).

The distinct possibility of impairment of OCBE's interest is straightforward. If Chino Valley does not appeal, then FFRF prevails, and this Circuit's decision will prohibit invocations at OCBE's school board meetings. Thus, OCBE's interest in continuing and preserving its invocation policy will be impaired.

E. No Existing Parties to the Action Adequately Represent OCBE's Interests

OCBE's interests cannot adequately be represented by the current parties to this action. To succeed in a motion to intervene, "[t]he burden on proposed intervenors in showing inadequate representation is *minimal* and would be satisfied if they could demonstrate that representation of their interests 'may be' inadequate." *Arakaki*, *supra*, 324 F.3d at 1086, emphasis added (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972)).

Numerous cases have found that the failure of a party to appeal an adverse ruling is determinative as to whether that party adequately represented the interests of would-be intervenors. *Pellegrino v. Nesbit*, 203 F.2d 463, 468 (9th Cir. 1953); *Wolpe v. Poretsky*, 144 F.2d 505, 507 (D.C.Cir. 1944) ("The failure of the [agency] to take an appeal clearly indicates that its representation of the interest of the interveners was inadequate.").

In *Pellegrino v. Nesbit*, a corporation sued its employees to recover short-swing profits resulting from the corporation's own options agreements. *Pellegrino*, *supra*, 203 F.2d at 468. The lower court held the corporation was estopped from recovering profits because it had itself drafted the options agreements. *Id.* The corporation's board of directors, who were "reluctant to bring suit against its own beneficial owners, directors or officers" announced that it would not pursue an appeal. *Id.* at 465. Shortly thereafter, the stockholder who had urged the board to pursue the original case moved to intervene. *Id.* at 465. The denial of the motion to intervene was reversed on appeal because of the board's failure to appeal. *Id.* at 469. This Circuit explained that intervention for the purpose of perfecting an appeal from a judgment should be liberally granted. *Id.* at 467

The United States Supreme Court also addressed a similar issue in *United Airlines v. McDonald*, 432 U.S. 385 (1977). There, certain female employees brought an equal protection suit against United Airlines arguing that the policy of requiring female stewardesses to remain single (while allowing male stewards to marry) was unconstitutional. *Id.* at 387. After final judgment against United on the issue of liability, one would-be plaintiff attempted both to intervene and to certify a class of all employees who had been fired as a result of the discriminatory policy. *Id.* at 389-90. The district court denied her motions as untimely, and she appealed. *Id.* at 390. The original plaintiffs, who had already received a favorable judgment,

had no motivation to appeal and enlarge the number of plaintiffs. *Id.* The Court of Appeals reversed the motion to intervene and allowed class certification. *Id.* at 390. The Supreme Court affirmed. *Id.* at 396.

Here, OCBE cannot adequately be represented by Chino Valley because the board members have made the official, and final decision that the board will not seek review to the Supreme Court. Moreover, the individual board members themselves lack standing to bring an appeal because they were sued only in their official capacities and not in their individual capacities. *See Bender v. Williamsport Area School District*, 475 U.S. 534, 544 (1986). OCBE is moving to intervene so that it can seek review of the adverse ruling of the lower court. As ample case precedent has established, OCBE's intervention for the purpose of seeking review should be granted.

OCBE has satisfied the requirements for intervention as of right.

F. This Court Should Alternatively Grant OCBE Permissive Intervention

In addition to satisfying the requirements for intervention as of right, OCBE also satisfies the requirements for permissive intervention. *Federal Rule of Civil Procedure* 24(b)(1) provides that "[o]n timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." In making this determination, a court must also

consider "whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." *Federal Rule of Civil Procedure* 24(b)(3).

As already established, OCBE's motion is timely filed and will cause no undue delay or prejudice to the original parties. OCBE does not seek to delay the pending proceedings. Moreover, it is clear that OCBE's defenses "share[] with the main action a common question of law or fact," namely the constitutionality of permitting invocations prior to school board meetings.

VI. CONCLUSION

For the foregoing reasons, this Court should grant OCBE's Motion to Intervene as of right, or in the alternative, its motion for permissive intervention.

Dated: February 16, 2019

Respectfully Submitted

TYLER & BURSCH, LLP

By: s/Robert H. Tyler
Attorney for Proposed Intervenor
ORANGE COUNTY BOARD
OF EDUCATION

CERTIFICATE OF COMPLETION

1. I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached motion for leave to intervene is:

X Proportionately spaced, has a typeface of 14 points or more and contains 3,632 words.

s/ Robert H. Tyler
Email: rtyler@tylerbursch.com

CERTIFICATE OF SERVICE

I am employed in the county of Riverside, State of California. I am over the age of 18 and not a party to the within action. My business address is 25026 Las Brisas Road, Murrieta, California 92562.

☒ I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 16, 2019.

INTERVENOR'S, AS PARTY APPELLANT, URGENT MOTION FOR LEAVE TO INTERVENE-NINTH CIRCUIT COURT

Executed on February 16, 2019, at Murrieta, California.

☒ (Federal) I declare that I am a member of the Bar of this Court at whose direction the service was made.

s/ Robert H. Tyler
Email: rtyler@tylerbursch.com

Appeals No. 16-55425

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FREEDOM FROM RELIGION FOUNDATION, INC.,

Plaintiff – Appellee,

vs.

CHINO VALLEY UNIFIED SCHOOL DISTRICT BOARD OF EDUCATION; and CHINO VALLEY UNIFIED SCHOOL BOARD OF EDUCATION BOARD MEMBERS JAMES NA, SYLVIA OROZCO, CHARLES DICKIE, ANDREW CRUZ, IRENE HERNANDEZ-BLAIR, in their official representative capacities,

Defendants-Appellants,

DECLARATION OF DR. KEN L. WILLIAMS IN SUPPORT OF ORANGE COUNTY BOARD OF EDUCATION'S MOTION TO INTERVENE AS A DEFENDANT-APPELLANT

On Appeal from the United States District Court
for the Central District of California
Honorable Jesus G. Bernal, Presiding
No. EDCV 14-2336-JGB (DTBx)

TYLER & BURSCH, LLP
Robert H. Tyler, CA Bar No. 179572
rtyler@tylerbursch.com
James A. Long, CA Bar No. 273735
jlong@tylerbursch.com
Nada N. Higuera, CA Bar No. 299819
nhiguera@tylerbursch.com
Murrieta, California 92562
Tel: (951) 600-2733
Fax: (951) 600-4996

Attorneys for Proposed Intervenor
ORANGE COUNTY BOARD OF EDUCTION; and ORANGE COUNTY BOARD OF EDUCATION MEMBERS KEN WILLIAMS, MARI BARKE, LISA SPARKS, JOHN BEDELL, REBECCA GOMEZ, in their official representative capacities

---

I, Dr. Ken L. Williams, certify, and state under penalty of perjury under the laws of the United States of America, as follows:

1. I am over the age of 18 years and have personal knowledge of the facts stated herein. I am the President of the Orange County Board of Education ("OCBE"). I have been a board member of OCBE since 1996.

2. OCBE is responsible for establishing and overseeing charter schools in Orange County, special education programs and services, and the county's alternative, community, and correctional education schools ("ACCESS").

3. OCBE has oversight of curriculum and courses of study for ACCESS and special education students.

4. OCBE meetings begin with an opening invocation, recitation of the pledge of allegiance, roll call, an opportunity for public comment, and then we conduct closed and open portions of the meetings.

5. During the closed sessions, the Board's five members typically make decisions on student disciplinary actions including adjudication of expulsion appeals and inter-district attendance appeals.

6. Students facing disciplinary action for serious offenses are permitted to speak with the Board directly in connection with their situation.

7. During the open portion of the meetings, the Board conducts its business of making decisions regarding the Orange County Department of Education

budget, OCBE projects, and state mandates such as the Local Control and Accountability Plan.

8. On a regular basis, the Board sets aside time for student recognition to highlight the academic and extracurricular accomplishments of students in the district. For example, during the December 12, 2018 regular session board meeting, choir students from the public high school Fullerton Union High performed a holiday musical presentation.

9. Students attend OCBE meetings to advocate for or against programs and services such as charter schools.

10. OCBE meetings are open to any member of the public and include various opportunities for public comment.

11. The Board holds roughly fourteen public meetings per year. For at least the past five years, most of these meetings included an invocation.

12. In October 2014, the Board adopted an official policy permitting an invocation at the beginning of each OCBE meeting. Attached as Exhibit A to this Declaration is a true and correct copy of OCBE Board Policy 100-12.

13. In August 2016, Freedom From Religion Foundation ("FFRF") sent OCBE a letter requesting that OCBE "refrain from scheduling prayers as part of future school board meetings." Attached as Exhibit B to this Declaration is a true and correct copy of the letter from FFRF.

14. OCBE has not ceased its practice of permitting invocations prior to its board meetings despite FFRF's threatening letter.

15. I believe that FFRF will bring a lawsuit against OCBE if OCBE continues its invocation policy.

16. I learned about Chino Valley's decision not to appeal to the US Supreme Court on January 18, 2019. That same day, I contacted Tyler & Bursch, LLP to inquire whether OCBE could intervene, and I started the process to call a formal meeting of OCBE to vote on whether to intervene or not.

17. The next scheduled OCBE board meeting date was February 13, 2019. I attempted to schedule an emergency meeting prior to February 13, 2019, however, I was unable to do so due with such limited time and various scheduling conflicts of board members. The first available date of a meeting at which a quorum of the board members could lawfully attend was February 13, 2019.

18. At the February 13, 2019 board meeting, OCBE voted to intervene.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on this 16th day of February, 2019, at Silverado, California.

s/ Dr. Ken L. Williams

CERTIFICATE OF SERVICE

I am employed in the county of Riverside, State of California. I am over the age of 18 and not a party to the within action. My business address is 25026 Las Brisas Road, Murrieta, California 92562.

☒ I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 9, 2017.

DECLARATION OF DR. KEN L. WILLIAMS IN SUPPORT OF INTERVENOR'S, AS PARTY APPELLANT, MOTION FOR LEAVE TO INTERVENE-NINTH CIRCUIT COURT

Executed on August 9, 2017, at Murrieta, California.

☒ (Federal) I declare that I am a member of the Bar of this Court at whose direction the service was made.

s/ Robert H. Tyler
Email: rtyler@tylerbursch.com

EXHIBIT "A"

ORANGE COUNTY DEPARTMENT OF EDUCATION

Costa Mesa, California

BOARD POLICY

100-12

Invocations at Board Meetings

The Orange County Board of Education believes that authorizing invocations at board meetings is consistent with the board's values and has long been a part of our nation's heritage. Prayers and invocations that are solemn and respectful in tone, that invite board members to reflect upon the shared ideals and common ends of the difficult business of governing serve to set a serious tone in which the members of the board may conduct the people's business. The opportunity to provide an invocation at a board meeting shall be open to all religions and the board shall maintain a policy of nondiscrimination.

Prayers or invocations shall not denigrate nonbelievers or religious minorities, proselytize, advance or disparage any religion or belief, promote harm to people, or threaten damnation or preach conversion. In all other respects, the board will not regulate the content of the prayers or invocations presented at board meetings.

Invocations shall not last more than three minutes and it is expected that the invocation focus on Orange County's children with a special emphasis on the children whom the Orange County Board of Education and the Orange County Superintendent of Schools serve. Presenters should be sensitive to the issues on the agenda for the particular meeting and the emotional concerns of those in attendance.

Each December employees of the Orange County Superintendent of Schools will post a notice on the OCDE website to solicit the names of volunteers to deliver the invocation for the next calendar year. Persons interested in delivering an invocation must send a letter of interest in writing or email to OCDE by the specified date. The names will be chosen at random and those accepted will receive written confirmation by email from the Board Clerk. Confirmations will identify the date and time for their invocation. If the person who was selected to deliver the invocation is unable to attend or is a no show, the chairman of the meeting may request a volunteer from the audience.

Reference: Town of Greece v. Galloway, 134 S.Ct. 1811 (2014); Rubin v. City of Lancaster, 710 F.3d 1087 (9th Cir. 2013).

Adopted: 10/01/2014

EXHIBIT "B"

FREEDOM FROM RELIGION *foundation*

P.O. BOX 750 · MADISON, WI 53701 · (608) 256-8900 · WWW.FFRF.ORG

August 15, 2016

SENT VIA EMAIL & U.S. MAIL: ocbe@ocde.us

Orange County Board of Education
200 Kalmus Drive
Costa Mesa, CA 92626

Re: Unconstitutional Prayer and Religious Promotion at School Board Meetings

Dear Boardmembers:

I am writing on behalf of the Freedom From Religion Foundation (FFRF) regarding serious constitutional violations occurring in the Orange County Board of Education (OCBE). We were contacted by a concerned school employee. FFRF is a national nonprofit organization with nearly 24,000 members across the country, including more than 3,200 members and a chapter in California. Our purpose is to protect the constitutional principle of separation between state and church.

School Board Prayer
It is our understanding that the OCBE begins each meeting with an invocation. We understand that the board allows interested persons to request to deliver the invocation and that the board has set up guidelines that must be followed in order to give an invocation. Please see attached photo 1.

It is beyond the scope of a public school board to schedule or conduct prayer as part of its meetings. FFRF recently sued a school board over this exact issue. A California federal court held the Chino Valley Unified School District School Board's inclusion of prayers at its board meetings is unconstitutional. The court said:

> The School Board possesses an inherently authoritarian position with respect to the students. The Board metes out discipline and awards at these meetings, and sets school policies that directly and immediately affect the students' lives. . . . In this formal, manifestly school-sponsored setting, the power imbalance between the State and the students is even more pronounced than at football games or graduations. The student who has come before the Board is unlikely to feel free to dissent from or walk out on the body that governs, disciplines, and honors her.

Freedom From Religion Found. v. Chino Valley Unified Sch. Dist., No. EDCV 14-2336-JGB (DTBx) at 21 (C.D. Cal. Feb. 18, 2016).[1]

[1] *Available at* http://ffrf.org/uploads/legal/FFRFvChinoValley_Order.pdf.

Other federal courts have also struck down school board practices that include this religious ritual. *See Doe v. Indian River School* District, 653 F.3d 256 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (holding that prayer at school board meetings conveys message favoring religion); *Doe v. Tangipahoa Parish Sch. Bd.*, 473 F.3d 188 (5th Cir. 2006), *dismissed on other grounds*, 494 F.3d 494 (5th Cir. 2007) (finding a school board's practice of opening meetings with sectarian prayer unconstitutional); *Bacus v. Palo Verde Unified Sch. Dist.*, 52 Fed. Appx. 355 (9th Cir. 2002) (finding that a school board violated the Establishment Clause in allowing prayers "in the name of Jesus"); *Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369 (6th Cir. 1999) (finding that a school board's practice of opening its meetings with prayers violated the Establishment Clause).

In *Indian River School District* the court emphasized that school board prayer is analogous to other school prayer cases when it comes to protecting children from the coercion of school-sponsored prayer, which is heightened in the context of public schools. 653 F.3d at 275. In that case, the court also held that the school board meetings are "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." *Id.* The court's "decision [was] premised on careful consideration of the role of students at school boards, the purpose of the school board, and the principles underlying the Supreme Court's school prayer case law." *Id.* at 281. The final conclusion was that the school board prayer policy "[rose] above the level of interaction between church and state that the Establishment Clause permits." *Id.* at 290.

The U.S. Supreme Court's decision in *Town of Greece v. Galloway*, permitting sectarian prayers at legislative meetings, does not apply to public school board meetings, because school boards are not deliberative legislative bodies. In addition, *Galloway* does not apply to school board meetings because there is no longstanding "historical precedent" or an "unambiguous and unbroken history" since the First Amendment was ratified of prayers at school board meetings, unlike prayers at government meetings in other contexts. *See Galloway*, 134 S.Ct. 1811, 1819 (2014). In fact, while Congress and state legislatures existed when the First Amendment was ratified, the public school system did not. Thus, *Galloway* has no applicability to the constitutionality of prayers at public school board meetings.

Students and parents have the right—and often have reason—to participate in school board meetings. It is coercive, embarrassing, and intimidating for nonreligious citizens to be required to make a public showing of their nonbelief (by not rising or praying) or else to display deference toward a religious sentiment in which they do not believe, but which their school board members clearly do. Board members should not be promoting religion by including prayer in meetings.

Board members are free to pray privately or to worship on their own time in their own way. The school board, however, ought not to lend its power and prestige to religion, amounting to a governmental endorsement of religion, excluding the 23% of Americans who are nonreligious.[2]

In God We Trust

[2] *America's Changing Religious Landscape*, Pew Research Center (May 12, 2015), *available at* www.pewforum.org/2015/05/12/americas-changing-religious-landscape/.

We understand that "IN GOD WE TRUST" is written in large, gold letters behind OCBE board members during school board meetings. Please see photo 2.

The phrase "In God We Trust" was chosen belatedly as a national motto by an Act of Congress only in 1956 as a response to fear of "godless" communism. It first appeared on paper currency in 1957. This symbolic unity of "God" with government has created a lack of respect for the previously revered constitutional principle of the separation of state and church. America's original motto, "E pluribus unum," (From many, one) chosen by Thomas Jefferson, John Adams and Benjamin Franklin, is entirely secular and does not mandate that students trust in a god.

There is no place in a public school setting for religious messages. The posting at the OCBE is particularly concerning as it falsely associates faith in a god and patriotism. Young, impressionable students are apt to believe that the school system endorses the religious message of the display.

For those students and parents who don't believe in a god or have beliefs contrary to a monotheistic faith, posting "In God We Trust" in their school is offensive. Public schools should strive to be welcoming to families of all faiths and non-faith. There is no need to place "In God We Trust" prominently in view of young students, and their parents, at school board meetings. It is the right of parents to discuss their faith or non-belief with their own children in ways they find appropriate.

The display of religious messages in the school setting violates the Establishment Clause of the First Amendment, which prohibits public schools from advancing, supporting or promoting religion. Courts have continually held that school districts may not display religious messages or iconography on the walls of public schools. *See Stone v. Graham*, 449 U.S. 39 (1980) (ruling that the Ten Commandments may not be displayed on classroom walls); *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 970 (9th Cir. 2011), *cert. denied* 132 S. Ct. 1807 (2012) (upholding decision of school board to require a teacher to remove two banners with historical quotes referencing "God," including "In God We Trust"); *Lee v. York Cnty.*, 484 F.3d 689 (4th Cir. 2007) (ruling that a teacher may be barred from displaying religious messages on classroom bulletin boards); *Washegesic v. Bloomingdale Pub. Sch.*, 813 F. Supp. 559 (W.D. Mich. 1993), *aff'd*, 33 F. 3d 679 (6th Cir. 1994) (ruling that a picture of Jesus may not be displayed in a public school).

It is important to note that courts are vigilant in protecting public school children from religious influence by school authorities. Even messages that may be displayed in other public settings might be unconstitutional when displayed in a public school setting because young school children are impressionable and their attendance at board meetings may be mandatory.

<u>Resolutions promoting and endorsing Christianity</u>
We also understand that the OCBE has passed several resolutions in 2016 that promote and endorse Christianity. For Black History Month, the board passed a resolution proclaiming, "freedom is a gift from God, but it must be secured by His people here on earth." For the National Day of Prayer, the board passed a resolution that declared the day as:

> An opportunity for Americans of all faiths to join in united prayer to acknowledge our dependence on God, to give thanks for blessings received, to request healing for wounds endured, and to ask God to guide our leaders and bring wholeness to the United States and her citizens.

The National Day of Prayer is a sectarian event. It originated with Rev. Billy Graham during his evangelical crusade in Washington, D.C. in 1952. He expressed an openly Christian purpose, seeking such an annual proclamation by the President because he wanted "the Lord Jesus Christ" to be recognized across the land. Subsequently, the National Day of Prayer Task Force was created to "communicate with every individual the need for personal repentance and prayer, mobilizing the Christian community to intercede for America and its leadership." Chair Shirley Dobson or her designate issues annual National Day of Prayer proclamations and submits them to the President, choosing a theme with supporting scripture from the bible. The task force's stated goal is to pressure as many mayors and other elected officials as possible to also issue National Day of Prayer proclamations. Coordinators, volunteers and speakers at task force events must share the view that the bible is inerrant and "there is only one Savior and only one gospel."

Declaring a National Day of Prayer event sends the message that the OCBE not only prefers religion over non-religion, but also Christianity over all other faiths. It alienates non-Christians in Orange County by turning them into political outsiders in their own community.

We are aware these resolutions mirror presidential proclamations. However, again, courts impose much stronger restrictions on religion in the school context. The OCBE cannot direct people to pray. The Supreme Court has continually struck down school-sponsored prayer. *See, e.g.*, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (holding student-led prayer over the loudspeaker before football games unconstitutional. "Regardless of the listener's support for, or objection to, the message, an objective Santa Fe High School student will unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval" because it occurred at a "regularly scheduled school-sponsored function conducted on school property."); *Lee v. Weisman*, 505 U.S. 577 (1992) (finding prayers at public high school graduations an impermissible establishment of religion); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (overturning law requiring daily "period of silence not to exceed one minute . . . for meditation or daily prayer"); *Abington Twp. Sch. Dist. v. Schempp*, 374 U.S. 203 (1963) (holding school-sponsored devotional Bible reading and recitation of the Lord's Prayer unconstitutional); *Engel v. Vitale*, 370 U.S. 421 (1962) (declaring school-sponsored prayers in public schools unconstitutional).

In each of these cases, the Supreme Court struck down school-sponsored prayer because it constitutes a government advancement and endorsement of religion, which violates the Establishment Clause of the First Amendment.

The board also passed a resolution "Recognizing the important of Easter in Orange County." This resolution stated that Easter is "a holiday of great significance to many American representing numerous cultures and nationalities." It proclaimed that Easter is "important for its religious meaning as well as a time for celebrating Spring, family, and community." It said "Christians and Christianity have contributed greatly to the development of Orange County from the time of Junipero Serra to today." It concluded by proclaiming that OCBE "acknowledges the

historical and present day importance of Easter and Christians to the culture of Orange County," expressing "its deepest respect to Christians through Orange County during this time as they commemorate and celebrate their belief in the resurrection of Jesus."

Easter is a religious holiday celebrated only by Christians. It is neither a federal or state holiday. This resolution is intended to endorse and promote a Christian holiday and the importance of Christians of Orange County. The OCBE has never passed a resolution honoring any other religious holiday, religious people, or nonreligious people. When this resolution is looked at in context with the National Day of Prayer proclamation and religious statements in other proclamations, it is apparent that the OCBE is promoting and endorsing Christianity above all other religions through its resolutions. This is impermissible.

Conclusion

Calling upon Board members, parents, students, and members of the public to pray and officially endorsing Christian messages is unconstitutional. We ask that you immediately refrain from scheduling prayers as part of future school board meetings to uphold the rights of conscience embodied in our First Amendment and recently re-affirmed by a California federal court. We also ask that future resolutions refrain from promoting or endorsing religion and that the words "IN GOD WE TRUST" be removed from the OCBE. Please inform us in writing at your earliest convenience of the steps you are taking to remedy these serious constitutional violations.

Sincerely,

Madeline Ziegler

Madeline Ziegler
Cornelius Vanderbroek Legal Fellow
Freedom From Religion Foundation

MEZ:cal

Enclosures

Photo 1

Board Meeting Invocations
Request for Letters of Interest

Persons interested in delivering an invocation at an Orange County Board of Education meeting should send a letter of interest in writing or email (ocbe@ocde.us). Please address written correspondence to: Orange County Board of Education, PO Box 9050, Costa Mesa, CA 92628-9050. Names will be chosen at random and those accepted will receive written confirmation by email from the Board Clerk. Confirmations will identify the date and time for the invocation.

Invocation Guidelines

Prayers or invocations shall not denigrate nonbelievers or religious minorities, proselytize, advance or disparage any religion or belief, promote harm to people, or threaten damnation or preach conversion. In all other respects, the board will not regulate the content of the prayers or invocations presented at board meetings.

Invocations shall not last more than three minutes and it is expected that the invocation focus on Orange County's children with a special emphasis on the children whom the Orange County Board of Education and the Orange County Superintendent of Schools serve. Presenters should be sensitive to the issues on the agenda for the particular meeting and the emotional concerns of those in attendance.

Photo 2

1Appeals No. 16-55425

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FREEDOM FROM RELIGION FOUNDATION, INC.,

Plaintiff – Appellee,

vs.

CHINO VALLEY UNIFIED SCHOOL DISTRICT BOARD OF EDUCATION; and CHINO VALLEY UNIFIED SCHOOL BOARD OF EDUCATION BOARD MEMBERS JAMES NA, SYLVIA OROZCO, CHARLES DICKIE, ANDREW CRUZ, IRENE HERNANDEZ-BLAIR, in their official representative capacities,

Defendants-Appellants,

DECLARATION OF ROBERT H. TYLER IN SUPPORT OF INTERVENOR'S, AS PARTY APPELLANT, MOTION FOR LEAVE TO INTERVENE-NINTH CIRCUIT COURT

On Appeal from the United States District Court
for the Central District of California
Honorable Jesus G. Bernal, Presiding
No. EDCV 14-2336-JGB (DTBx)

TYLER & BURSCH, LLP
Robert H. Tyler, CA Bar No. 179572
rtyler@tylerbursch.com
James A. Long, CA Bar No. 273735
jlong@tylerbursch.com
25026 Las Brisas Road
Murrieta, California 92562
Tel: (951) 600-2733
Fax: (951) 600-4996

Attorneys for Proposed Intervenor
ORANGE COUNTY BOARD OF EDUCTION

I, Robert H. Tyler, Esq., certify, and state under penalty of perjury under the laws of the State of California and the United States of America, as follows:

1. I am over the age of 18 years and have personal knowledge of the facts stated herein. My firm has been retained as counsel by the Orange County Board of Education to represent it in seeking intervention in the above-entitled case for the purpose of seeking review of the Ninth Circuit's decision in the United States Supreme Court.

2. I represent the board members of the Chino Valley Unified School District who were sued in their official capacity in this case. The board members, in their official capacity, appealed the district court's ruling to this Court. This Court denied the appeal.

3. I was present at the Chino Valley Unified School District board meeting on January 17, 2019. At that meeting, a majority of the Chino Valley Unified School District board members voted to not seek review of this Court's ruling. There are no other defendants or parties in this case that will seek review of this Court's ruling in the United State Supreme Court.

4. The Ninth Circuit's ruling is applicable to all primary and secondary school board meetings within the Ninth Circuit's jurisdiction. Meanwhile, no such prohibition on invocations exist within the Fifth

Circuit and other portions of the country. A serious constitutional question exists resulting in a conflict among the circuits.

5. Unless the Orange County Board of Education or another entity are granted the right to intervene forthwith, the United States Supreme Court will not have the opportunity consider accepting this case for review pursuant to a writ of certiorari and a conflict will remain amongst the circuits regarding a serious and important constitutional question.

Pursuant to *28 U.S.C.* § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on this 14th day of February 2019, at Murrieta, California.

s/Robert H. Tyler

CERTIFICATE OF SERVICE

I am employed in the county of Riverside, State of California. I am over the age of 18 and not a party to the within action. My business address is 25026 Las Brisas Road, Murrieta, California 92562.

☒ I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 9, 2017.

DECLARATION OF ROBERT H. TYLER IN SUPPORT OF INTERVENOR'S, AS PARTY APPELLANT, MOTION FOR LEAVE TO INTERVENE-NINTH CIRCUIT COURT

Executed on August 9, 2017, at Murrieta, California.

☒ (Federal) I declare that I am a member of the Bar of this Court at whose direction the service was made.

s/ Robert H. Tyler
Email: rtyler@tylerbursch.com