

**No. 25-7104**

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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FREEDOM FROM RELIGION FOUNDATION, INC., et al.,  
*Plaintiffs – Appellees,*

v.

CHINO VALLEY UNIFIED SCHOOL DISTRICT  
BOARD OF EDUCATION, et al.,  
*Defendants – Appellants.*

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On Appeal from the United States District Court  
for the Central District of California  
No. 5:14-CV-02336-JGB  
Honorable Jesus G. Bernal

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**ANSWERING BRIEF OF PLAINTIFFS-APPELLEES FREEDOM FROM  
RELIGION FOUNDATION, INC., ET AL.**

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Matthew J. Murray  
ALTSHULER BERZON LLP  
177 Post St., Suite 300  
San Francisco, CA 94108  
(415) 421-7151  
mmurray@altshulerberzon.com

Richard L. Bolton  
BOARDMAN & CLARK, LLP  
1 S. Pinckney St., Suite 410  
Madison, WI 53701  
(608) 283-1789  
rbolton@boardmanclark.com

Lisa C. Demidovich  
ALTSHULER BERZON LLP  
350 W. Colorado Blvd, Unit 420  
Pasadena, CA 91105  
(415) 421-7151  
ldemidovich@altshulerberzon.com

Patrick C. Elliott  
Samantha F. Lawrence  
FREEDOM FROM RELIGION  
FOUNDATION  
PO Box 750  
Madison, WI 53701  
(608) 256-8900  
patrick@ffrf.org; slawrence@ffrf.org

*Attorneys for Appellees Freedom From Religion Foundation, Inc., Michael  
Anderson, Larry Maldonado, & Does 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 16, 17, 18*

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## INTRODUCTION

In *Freedom From Religion Foundation, Inc. v. Chino Valley Unified School District Board of Education*, 896 F.3d 1132 (9th Cir. 2018) (“*FFRF*”), this Court affirmed a judgment against Defendant members of the Chino Valley Unified School District Board of Education (“Board”) holding that their policy and practice of government-sponsored prayer, Bible readings, and religious proselytizing at public school Board meetings attended by schoolchildren violated the Establishment Clause and enjoining the Board members “in their official capacities ... from conducting, permitting or otherwise endorsing school-sponsored prayer in Board meetings.” *Id.* at 1141.

Seven years later, on July 31, 2025, the Defendant-Appellant Board members (“Defendants”) moved for an order vacating the permanent injunction under Rule 60(b)(5), on the sole ground that the law on which the injunction was based was overturned three years before their motion, in *Kennedy v. Bremerton School District*, 597 U.S. 507 (2022). 2-ER-75, 84.

The district court properly denied that motion, on two independently sufficient grounds. First, the court held that Defendants failed to bring their motion within a “reasonable time” as required by Rule 60. The court made findings of fact, which Defendants do not contest on appeal, that Defendants waited more than three years after they knew of the *Kennedy* decision before filing their motion yet

failed to offer *any* justification for that delay, and that inexplicable delay caused prejudice to the Plaintiffs—parents, their children, and a nonprofit organization—whom Defendants dragged back into court, by forcing them to find new counsel and incur additional costs to defend the long-final judgment. 1-ER-4–5.

Second, the district court also correctly rejected Defendants’ arguments on the merits, holding that *Kennedy*, which addressed an individual teacher’s claim that he was discriminated against by being prohibited from privately engaging in a “brief, quiet, personal religious observance,” 597 U.S. at 543, did not change the law supporting the injunction here. 1-ER-5–8. *Kennedy* recognized that the Supreme Court had abandoned the “endorsement” test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and reaffirmed that “the Establishment Clause must be interpreted by ‘reference to historical practices and understandings.’” 597 U.S. at 535 (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014)). As the district court explained, both its original decision granting summary judgment and this Court’s opinion affirming that judgment are entirely consistent with *Kennedy*.

In its opinion affirming the judgment, this Court carefully considered the particular facts of this case and rejected the same historical argument that Defendants seek to relitigate here, concluding that the Board’s policy and practices were “not within the legislative-prayer tradition that allows certain types of prayer

to open legislative sessions.” *FFRF*, 896 F.3d at 1142 (citing *Town of Greece* and *Marsh v. Chambers*, 463 U.S. 783 (1983)). Unlike the “solemnizing and unifying prayer, directed at lawmakers themselves and conducted before an audience of mature adults free from coercive pressures to participate, that the legislative-prayer tradition contemplates,” the prayers at the school Board meetings here “typically take place before groups of schoolchildren whose attendance is not truly voluntary and whose relationship to school district officials, including the Board, is not one of full parity.” *Id.* at 1142. Given the “audience and timing of the prayers, as well as the religious preaching at the Board meetings,” this Court concluded that the Board members’ policy and practice was impermissibly coercive. *Id.* at 1145–46. In reaching that conclusion, the Court relied on a series of Supreme Court precedents requiring that children and adolescents be protected from potentially coercive government-sponsored prayers in a school setting, including, among others, *Lee v. Weisman*, 505 U.S. 577 (1992), and *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000). See *FFRF*, 896 F.3d at 1145–51.

In denying Defendants’ Rule 60(b)(5) motion, the district court correctly recognized that nothing in *Kennedy* overruled that long “line of school prayer cases banning ‘prayer involving public school students’ that is ‘problematically coercive’”—which is what is at issue here. 1-ER-7 (quoting *Kennedy*, 597 U.S. at 541–42).

The district court’s order denying Defendants’ Rule 60(b)(5) motion is subject to review for abuse of discretion. *Deocampo v. Potts*, 836 F.3d 1134, 1140 (9th Cir. 2016). Defendants do not overcome that deferential standard. They offered no reason at all in the district court to justify their three-year delay in bringing their motion, and they do not dispute the district court’s factual findings that their delay caused Plaintiffs prejudice. For the first time on appeal, Defendants contend that their delay was justified by a lack of “political will.” Appellants’ Opening Brief (“AOB”) at 47–48. They waived that argument by failing to raise it below. In any event, it is no argument at all—a party’s decision that it did not want to act sooner is not a justification for delay, especially where the delay undisputedly caused the opposing party tangible prejudice. The district court’s order should be affirmed on this ground alone.

The merits of Defendants’ argument fare no better. The district court correctly held that *Kennedy* did not overrule this Court’s prior decision or change the law in a way that now permits what this Court squarely held the Establishment Clause forbids. The Supreme Court and this Court have long recognized that coercive government-sponsored prayer imposed on schoolchildren violates the Establishment Clause. Nothing in *Kennedy* changed that basic principle—indeed, *Kennedy* cited favorably both *Lee* and *Santa Fe*, the primary cases on which this Court’s prior opinion relied. This Court has already considered and rejected

Defendants’ argument that their policy and practices are justified by the history and tradition of legislative prayers discussed in *Town of Greece* and *Marsh*. That decision remains controlling precedent. See *Kivett v. Flagstar Bank, FSB*, 154 F.4th 640, 645 (9th Cir. 2025). Defendants now simply seek to relitigate the same arguments that this Court already rejected. That is not a basis for the exceptional remedy provided by Rule 60(b)(5).

### STATEMENT OF JURISDICTION

Defendants’ statement of jurisdiction is correct.

### STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion in denying Defendants’ motion for relief from judgment under Rule 60(b)(5) for failure to bring the motion within a “reasonable time,” where Defendants delayed filing their motion for more than three years without any justification, causing Plaintiffs prejudice by forcing them to hire new counsel and incur additional expenses to defend the long-final judgment.

2. Whether the district court abused its discretion in declining to vacate the judgment under Rule 60(b)(5) based on Defendants’ sole argument that *Kennedy* changed the law supporting the injunction, when *Kennedy* did not abandon—and in fact cited with approval—the long line of Supreme Court cases on which the judgment and this Court’s prior opinion relied, which hold that

coercive school-sponsored prayer in the presence of schoolchildren in the public school context violates the Establishment Clause.

### STATEMENT OF THE CASE

#### **A. Before this lawsuit, Defendant Board members engaged in a policy and practice of government-sponsored prayer and proselytizing at public schoolboard meetings.**

The district court granted summary judgment to Plaintiffs in 2016 based on the undisputed facts. 1-ER-47, 50. Defendants do not contend that any of those facts have changed.

When Plaintiffs, including parents and their minor children, filed this lawsuit in 2014, the Chino Valley Unified School District Board of Education was engaging in a pattern and practice of opening public meetings with school-sponsored prayer, usually delivered by a clergy member, but also at times delivered by Board members themselves. 1-ER-47, 50, 53; *See FFRF*, 896 F.3d at 1138–40. On October 17, 2014, the Board adopted a formal policy codifying that practice. 1-ER-47, 50–53. That policy “prohibits the Board from ‘engag[ing] in any prior inquiry, review of, or involvement in, the content of any prayer to be offered by an invocational speaker,’” but, as this Court recognized, “these limitations on non-clergy were not always followed” in practice. *FFRF*, 896 F.3d at 1138 n.2 (discussing an example of the then-Board president directing the content of a prayer given by a “pre-selected community member”).

The invocations sponsored by the Board were overwhelmingly “overtly Christian.” 1-ER-47, 50–51, 55; SER-13 ¶4. As just one example, in response to the *Obergefell v. Hodges* decision legalizing same-sex marriage, Pastor Jeff Kerns of Calvary Chapel Chino Hills delivered an opening Board meeting prayer stating, “O Lord, we are in desperate need of you . . . Lord, our country is just making some big mistakes these days,” ending the prayer “In Jesus’s name.” SER-33–34 ¶¶101, 102. Board members James Na, Andrew Cruz, and Charles Dickie gave the opening prayers themselves at numerous meetings over the span of several years. SER-26–27 ¶¶38, 42, SER-31–33 ¶¶73, 84, 97.

In all the meetings he attended or watched on TV, Plaintiff Anderson never saw “any meeting opened by a statement from a non-religious person as a secular invocation or secular solemnization of the meeting.” SER-13 ¶9. And on those rare occasions “where the meeting was opened with a non-Christian prayer,” Board members “James Na or Andrew Cruz would make religious comments particularly emphasizing Christian beliefs and often asking those in attendance to adopt such beliefs.” SER-13 ¶7.

This Court summarized the record as follows:

Historically—including after the adoption of the prayer policy, and during the pendency of the litigation now before us—Board members’ invocation of Christian beliefs, Bible readings, and further prayer were a regular feature of Board meetings. Board members stressed that they viewed such religious engagement as central to the mission and life of the school community. In a meeting in February

2014, following adoption of the prayer policy, Board member Andrew Cruz stated, “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.” At another meeting, then-Board president James Na “urged everyone who does not know Jesus Christ to go and find Him.” Na informed the assembled audience in May 2014, “God appointed us to be here—whether you to be teachers, or our staff members, or our principals, or our directors, assistant superintendents....” At another meeting, he instructed the teachers and the assembled audience: “anything you desire, depend on God.” Cruz publicly thanked a school principal “for placing God before herself and praying for every classroom on Saturday.”

During Board meetings from 2013 to 2015, Na and Cruz regularly endorsed prayer, read Bible verses, and reaffirmed their Christian beliefs. A third member of the five-member Board that approved the prayer policy, Charles Dickie, gave the invocation at the Board meetings at least three times and was identified by Na as a future “neighbor ... in heaven,” after Na discussed Dickie's missionary work in Africa at a Board meeting. No Board member sought to halt any of the religious comments.

The religious discussion at Board meetings included specific comments on the opening prayers given by outside clergy. At a June 2013 meeting, Cruz stated that the pastor who had given the opening invocation “was right, in his prayers, that I need [to] first look up to Jesus Christ for serving our students.” At another meeting following the adoption of the prayer policy, Na thanked the Christian pastor who gave an opening prayer “for your serving the Lord Jesus Christ and serving all of our students because we do need your prayers [on a] daily basis.”

Na and Cruz’s explicit linkages of the work of the Board, teachers, and the school community to Christianity, and their endorsement of prayer by the faculty, were frequent. Minutes from one meeting state that Cruz “praised personnel for putting God first.” On another occasion, Cruz described “one voice united in prayer at Chino,” and read Romans 15:6—“so that with one mind and one voice you may glorify the God and Father of our Lord Jesus Christ”—to the Board-meeting audience.

In the course of Board meetings, preaching to the district community and biblical readings by the Board members were also common. At one meeting, Na stated that he thought a deceased community member “wanted you, all the TV viewers and our friends to hear again,” and then read, John 3:16. Cruz, at another meeting, stated to the audience: “If we have confessed our sins and ask God's forgiveness, we simply need to keep a forward focus toward the goal of pleasing Christ.” At yet another meeting, Cruz told the audience: “Christ died for our sins, according to the scripture, and ... he was buried, and ... he was raised on the third day, according to the scripture. Now that is the gospel.” Another time, he instructed the audience “that the two greatest commandments are to [l]ove the Lord your God with all your heart, all your soul, all your strength, and all your mind” and to “[l]ove your neighbor as yourself.” During the comment period at one meeting, Na “thanked God for sending his son Jesus Christ so that our sins are forgiven and [we] may have eternal life in heaven.” He also described a news story about a murder in order to instruct the audience as to “how much we need God in today's society.” The record contains at least fourteen instances in which Cruz read Bible verses to the assembled district community during the period set aside for Board-member comment.

*FFRF*, 896 F.3d at 1140–41 (footnotes omitted).

The record contains even more examples of overt proselytizing by Board members during public Board meetings. *See, e.g.*, 1-ER-11, 47; SER-28 ¶49; SER-30 ¶65 (Na: “I would just like to thank God for sending his son Jesus Christ so our sins would be forgiven but have eternal hope, and we’ll stay together as we were on this earth but in eternal life in heaven.”); SER-31 ¶74 (“live every day as your last day and to have hope in Jesus Christ”); SER-27 ¶44 (Cruz: “But sin is one thing we should never need to look back on with feelings of failure. If we have confessed our sins and ask God’s forgiveness, we simply need to keep a forward

focus toward the goal of pleasing Christ.”); SER-25–33 ¶¶35, 37, 43, 48, 51, 55, 57, 60, 61, 67, 70, 76, 78, 81, 85, 89 (recounting numerous instances of Board members reading from the Bible during public Board meetings).

The Board’s policy and practices subjected District schoolchildren to these blatantly sectarian religious statements by the government officials who controlled their schools. 1-ER-47, 54–55. A student representative sits on the Board, is responsible for representing the student body, 1-ER-47, 54; SER-22 ¶20, and is “an active participant in the meetings.” *FFRF*, 896 F.3d at 1139. Students also regularly attend Board meetings to address issues with their schools. 1-ER-47, 54–55; SER-22 ¶19. Students present to the Board, 1-ER-47, 54; SER-23 ¶26, and student performance and “student recognition components of the meeting center on the accomplishments of students of all ages—from elementary school to high school—who are in attendance.” *FFRF*, 896 F.3d at 1139. Students have delivered the Pledge of Allegiance, 1-ER-47, 55; SER-23 ¶21, and presented the colors to the Board, 1-ER-47, 55; SER-35 ¶109. The Board also recognizes student achievements at board meetings. 1-ER-47, 54; SER-21 ¶18. Notably, before the district court granted summary judgment in 2016, student presentations occurred directly after the opening prayer. 1-ER-47, 54; SER-23 ¶26; *FFRF*, 896 F.3d at 1138.

**B. In 2016, the district court granted summary judgment to Plaintiffs.**

Plaintiffs Freedom From Religion Foundation, Inc., and several students and their parents filed suit on November 13, 2014, seeking declaratory and injunctive relief prohibiting the Board from conducting school-sponsored religious exercises and prayer at board meetings. 4-ER-473; *see* 4-ER-422. The district court granted Plaintiffs' motion for summary judgment in part on February 18, 2016, 1-ER-47–72, and permanently enjoined four Board members “in their official representative capacities ... from conducting, permitting or otherwise endorsing school-sponsored prayer in Board meetings.” 1-ER-46.

The district court reasoned that the case turned on “which line of Establishment Clause cases governs school board prayer,” either “the long line of cases restricting prayer in public schools,” or “the legislative prayer exception” cases of *Marsh* and *Town of Greece*. 1-ER-60. The court summarized “the history of the school prayer cases and the legislative exception,” 1-ER-60, giving particular attention to *Lee v. Weisman*, 505 U.S. 577 (1992), where the Supreme Court held that a public school policy of permitting principals to invite members of the clergy to give nonsectarian invocations and benedictions at middle school and high school graduations was unconstitutional, and *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), which struck down a school policy authorizing student-led invocations given before football games, 1-ER-61–63. The

district court noted that in these school prayer cases, the Supreme Court “emphasized that schools present a special, constitutionally significant context— ‘there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools,’” and “[p]rayers in the public schools ‘carry a particular risk of indirect coercion.’” 1-ER-62 (quoting *Lee*, 505 U.S. at 592).

The district court rejected Defendants’ argument that the historical legislative-prayer exception recognized in *Marsh* and *Town of Greece* encompassed the government-sponsored prayer at public school board meetings at issue here. 1-ER-64–69. The court reasoned that students at school Board meetings are not mere observers like adult members of the general public watching a legislative assembly from a public balcony. “They are participants—‘constituents’ of the Board drawn to the meetings to seek relief (in the case of disciplinary proceedings), ... acknowledgment of their curricular and extracurricular successes, ... or change to the policies that govern their daily lives .... They are also children, students of the District that rises before them and asks them to pray.” 1-ER-67.

The district court explained that “the risk that a student will feel coerced by the Board’s policy and practice of religious prayer is even higher here than at football games or graduations” at issue in *Lee* and *Santa Fe*. 1-ER-67. The school Board “possesses an inherently authoritarian position with respect to the students,”

“metes out discipline and awards,” “and sets school policies that directly and immediately affect the students’ lives.” 1-ER-67. In the “formal, manifestly school-sponsored setting” of the public Board meetings, “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.” 1-ER-67.

The district court carefully analyzed the legislative-prayer exception recognized in *Marsh* and *Town of Greece*, which allows the opening of a state legislative session with the recitation of a solemnizing, non-proselytizing prayer consistent with historical traditions. 1-ER-63–64, 67–69. The court explained that the Supreme Court in those decisions “repeatedly emphasized that the audience impacted” by those practices “are adults.” 1-ER-68. By contrast, “the school prayer cases stand firmly for the proposition that” forcing a student to the “choice” of leaving the room or remaining silent during a school-sponsored prayer “represents an unconstitutional imposition as to students who *are* readily susceptible to religious indoctrination and peer pressure.” 1-ER-68–69 (emphasis in original; citing *Lee*, 505 U.S. at 593). “The State may not place ‘primary and secondary school children’ in the ‘dilemma of participating’ in the prayer, ‘with all that implies, or protesting.’” 1-ER-69 (quoting *Lee*, 505 U.S. at 593). In sum, the

district court held that “nothing” in *Marsh* or *Town of Greece* “indicates an intent to disturb the long line of school prayer cases” the district court had summarized “or the ‘heightened concern’ they express for children forced to confront [government-sponsored] prayer in their public school.” 1-ER-69.

The district court thus held that “this case is controlled by *Lee* and the school prayer cases.” 1-ER-69. The court then applied the then-controlling test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and concluded that the Board members’ policy and practice violated the Establishment Clause because the government lacked a secular purpose and the challenged practice had the effect of endorsing religion. 1-ER-69–71.<sup>1</sup>

**C. In 2018, this Court affirmed the judgment in a published opinion.**

This Court affirmed the district court’s judgment. *FFRF*, 896 F.3d 1132. The Court explained that the Establishment Clause “protects ‘the individual’s freedom to believe, to worship, and to express himself in accordance with the dictates of his own conscience.’” *FFRF*, 896 F.3d at 1137 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 49 (1985)). The Court then emphasized that “[b]ecause children and adolescents are just beginning to develop their own belief systems, and because they absorb the lessons of adults as to what beliefs are appropriate or right, we are

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<sup>1</sup> The district court dismissed the claims against the Board itself as barred by sovereign immunity, but granted a declaratory judgment and injunctive relief against the Board members in their official capacities. 1-ER-58–59.

especially attentive to Establishment Clause concerns raised by religious exercise in the public-school setting.” *Id.* That careful focus on the public-school context follows long-established guidance from the Supreme Court. *See, e.g., Lee*, 505 U.S. at 592 (“As we have observed before, there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.”) (citing cases); *Edwards v. Aguillard*, 482 U.S. 578, 583–84 (1987) (“The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools.”); *FFRF*, 896 F.3d at 1145.

This Court began by expressly considering and rejecting Defendants’ argument based on history and tradition, concluding that the Board’s prayer practice does not fall within the historical legislative-prayer tradition identified in *Marsh* and *Town of Greece*. *FFRF*, 896 F.3d at 1143. To evaluate whether the “historical tradition of legislative prayer” identified in those cases “does indeed encompass a particular prayer practice,” this Court followed the Supreme Court’s direction that it “must undertake a ‘fact-sensitive’ inquiry, in which we take into account ‘the setting in which the prayer arises and the audience to whom it is directed,’ the content of the prayer, and ‘the backdrop of historical practice.’” *Id.* at 1144 (quoting *Town of Greece*, 572 U.S. at 587). Focusing on the particular facts here, this Court held that the “audience and timing of the prayers, as well as the

religious preaching at the Board meetings, diverge from the legislative-prayer tradition.” *Id.* at 1144–45. “The invocations to start the open portions of Board meetings are not ... the sort of solemnizing and unifying prayer, directed at lawmakers themselves and conducted before an audience of mature adults free from coercive pressures to participate, that the legislative-prayer tradition contemplates.” *Id.* at 1142. “Instead, these prayers typically take place before groups of schoolchildren whose attendance is not truly voluntary and whose relationship to school district officials, including the Board, is not one of full parity.” *Id.*

In addition, after carefully analyzing the relevant history, this Court held that “prayer at school-board meetings cannot be understood as part of the historical tradition of legislative prayer identified in *Marsh* and *Town of Greece*,” because public schools did not exist at the time of the Framing. *Id.* at 1147–48.

Having rejected the Board members’ argument that their conduct was supported by history and tradition, this Court applied the Establishment Clause test articulated in *Lemon* and held that the Board members’ policy and practice was unconstitutional, relying in substantial part on—and repeatedly citing—the Supreme Court’s reasoning and holding in *Santa Fe*. *See FFRF*, 896 F.3d at 1148–51.

This Court rejected Defendants’ argument that the injunction impermissibly censored speech protected by the First Amendment, holding that the “judgment does not implicate protected speech” because “[t]he only speech that it requires the Board members to refrain from engaging in or permitting others to engage in is speech that would cause the district to violate the Establishment Clause,” i.e., “*school-sponsored prayer*.” *Id.* at 1151 (emphasis in original). The Court also rejected the Board’s request to vacate the judgment “as it pertains to the Board’s policy and practice of Bible reading, preaching, and prayer outside of the opening prayer because the Board ha[d] chosen not to argue the issue on appeal” and therefore waived it. *Id.* at 1152.<sup>2</sup>

The Court denied Defendants’ petition for rehearing en banc. *Freedom From Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ.*, 910 F.3d 1297 (9th Cir. 2018). Defendants did not seek certiorari review by the Supreme Court.

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<sup>2</sup> After the district court entered judgment on February 18, 2016, and while the case was on appeal, the Board in November 2016 had adopted a supplemental policy on “Public Statements Regarding Religion or Non-Religion” at Board meetings. 2-ER-102. That policy states, in part, that Board members “shall not proselytize” when “acting in their official capacities.” 2-ER-102. This Court granted Defendants’ motion for judicial notice of that supplemental policy, *FFRF*, 896 F.3d at 1152 n.21, but the policy’s existence did not affect the outcome of the case.

**D. Seven years later, the district court denied Defendants’ motion for relief from the judgment.**

The Supreme Court decided *Kennedy v. Bremerton School District*, 597 U.S. 507 (2022), on June 27, 2022, holding that a school district violated a coach’s Free Exercise and Free Speech rights by disciplining him for engaging in a “private” and “brief, quiet, personal” prayer without students present after a football game. *Id.* at 517, 543; *see id.* at 517 (“Mr. Kennedy emphasized that he sought only the opportunity to ‘wait until the game is over and the players have left the field and then walk to mid-field to say a short, private, personal prayer,’” and “he was even willing to say his ‘prayer while the players were walking to the locker room’ or ‘bus,’ and then catch up with his team.”) (brackets omitted); *id.* at 542 n.7 (emphasizing that the prayers “that formed the basis of his suspension” took place “without students”). The Court noted that it had previously “abandoned” *Lemon*’s “endorsement test,” and instructed “that the Establishment Clause must be interpreted by ‘reference to historical practices and understandings.’” *Id.* at 535 (quoting *Town of Greece*, 572 U.S. at 576).

Just two weeks later, on July 13, 2022, Plaintiff’s attorney sent a letter to Defendants’ attorney informing her that the final judgment and injunction in this case were not affected by the *Kennedy* decision. SER-4 ¶3; SER-6–7. That July 13, 2022, letter referenced statements by Board member Andrew Cruz which had openly questioned the validity of the injunction in light of *Kennedy*. SER-6.

Defendants' attorney at the time replied on July 21, 2022, stating that she had advised the Board members of their "ongoing obligations under the existing injunction." SER-4 ¶4; SER-9.

The Board members took no action for the next three years. Then, on July 31, 2025, Defendants filed a motion in the district court for relief from the judgment under Fed. R. Civ. P. 60(b)(5). 2-ER-75, 84. They did not argue that any facts had changed. Rather, the sole alleged ground for the motion was that the law on which the injunction was based was overturned in *Kennedy*. 2-ER-75, 84.

The district court denied Defendants' motion. 1-ER-2-8. Explaining that "Rule 60(b) provides for extraordinary relief and may be invoked only upon a showing of exceptional circumstances," the district court held that "Defendants have not articulated a sufficient basis for relief under Rule 60(b)(5)." 1-ER-3-4 (footnote omitted).

First, the district court held that Defendants failed to bring their motion within a "reasonable time," as required by Fed. R. Civ. P. 60(c). 1-ER-4. Defendants "waited over three years after *Kennedy* to file this Motion" and "provide no reason, let alone 'exceptional circumstances,' to justify this three-year delay." 1-ER-4. The district court found that Defendants "definitely knew of *Kennedy* just a few weeks" after it was issued, yet they "inexplicably waited three years prior to filing" the motion. 1-ER-4-5. The district court further found that

“this delay prejudiced Plaintiffs” by “forc[ing] Plaintiffs to find new counsel,” which “increased Plaintiffs’ costs as new counsel had to familiarize themselves with this long-running case.” 1-ER-5; *see* 4-ER-486–87 (appearances of new counsel); 4-ER-488–89 (withdrawals of former counsel). The court also held that Defendants failed to contest Plaintiffs’ “strong” abstract and reliance interests in the finality of the judgment, given the extensive length of the prior litigation to vindicate their constitutional rights and their decision to end retention of their former counsel after the judgment was affirmed many years ago. 1-ER-5. Defendants’ failure to bring their motion within a “reasonable time,” as required by Rule 60, was itself sufficient grounds to deny the motion. 1-ER-5.

Second, the district court held that even if the motion had been timely, *Kennedy* does not undermine the validity of either the injunction or this Court’s decision affirming the judgment. 1-ER-5. The district court acknowledged that *Kennedy* overruled the *Lemon* test and held that “courts should interpret the Establishment Clause by referencing ‘historical practices and understandings.’” 1-ER-6 (quoting *Kennedy*, 597 U.S. at 535). But the district court then explained that *Kennedy* also reaffirmed that the Establishment Clause prohibits government coercion and “distinguished Mr. Kennedy’s private prayers from [the Court’s] line of Establishment Clause cases finding ‘prayer involving public school students to be problematically coercive,’ because his prayers were not ‘publicly broadcast or

recited to a captive audience’ and because he did not require or expect students to participate.” 1-ER-6 (quoting *Kennedy*, 597 U.S. at 541–42).

The district court thus held that “Defendants’ argument that *Lemon*’s demise warrants relief from the injunction misses the forest for the trees.” 1-ER-6. The district court explained that its summary judgment order relied on Establishment Clause “cases related to school prayer,” including *Lee* and *Santa Fe*, “which the Supreme Court cited favorably in *Kennedy*.” 1-ER-6. The original summary judgment order also held that the historical legislative-prayer exception recognized in *Marsh* and *Town of Greece* did not apply to the school Board meetings here “because of the distinct risk of coercing students to participate in, or at least acquiesce to, religious exercises in the public school context.” 1-ER-6 (brackets omitted). The court explained that even though it had applied the *Lemon* test in its original decision, “it correctly focused on the coercive nature of Defendants’ prayer policy,” and nothing in *Kennedy* overruled the Supreme Court’s “line of school prayer cases banning ‘prayer involving public school students’ that is ‘problematically coercive.’” 1-ER-7 (quoting *Kennedy*, 597 U.S. at 541–42).

The district court went on to reject Defendants’ historical arguments, explaining that *Kennedy* reaffirmed that the Supreme Court “has long held that government may not, consistent with a *historically sensitive understanding* of the Establishment Clause, ‘make a religious observance compulsory.’” 1-ER-7

(quoting *Kennedy*, 595 U.S. at 536–37; emphasis added by district court). The district court explained that “Mr. Kennedy’s quiet prayer alone differs dramatically from the” coercive school-sponsored prayers imposed on students at school Board meetings in this case. 1-ER-7. The court then explained that this Court had affirmed the judgment in this case on the same basic grounds, focusing on the coercive nature of Defendants’ policy and practice, and applying the “historical practices and understandings test” to distinguish the legislative prayer practice at issue in *Town of Greece*. 1-ER-7.

Defendants appealed the order denying their motion for relief from the judgment. 4-ER-452. Their sole argument on appeal, as below, is that the injunction must be vacated because *Kennedy* overturned *Lemon*.

### **SUMMARY OF ARGUMENT**

The district court did not abuse its discretion when it denied Defendants’ Rule 60(b)(5) motion, for two independently sufficient reasons.

First, the district court’s holding that Defendants failed to file their motion within a “reasonable time” as required by Rule 60 was well within its discretion. The court found that Defendants delayed for more than three years in bringing their motion without offering *any* justification, and that delay prejudiced Plaintiffs by forcing them to hire new counsel and incur additional expenses long after they had ended the retention of their prior counsel in reliance on the long-final judgment.

Defendants do not and cannot contest those factual findings on appeal. Their failure to offer any justification for their inexplicable and prejudicial delay is determinative.

Second, the district court correctly rejected Defendants’ argument that *Kennedy* overruled the legal basis for this Court’s prior decision affirming the underlying injunction here. In its original decision granting the injunction years ago, the district court properly examined history and tradition—including the historical understanding that the Establishment Clause prohibits government coercion in matters of religion. This Court too engaged in a historically sensitive analysis when it affirmed the judgment, relying on a long line of Supreme Court cases prohibiting school-sponsored prayers imposed on schoolchildren.

Nothing in *Kennedy* requires a different result—indeed, the Court in *Kennedy* favorably cited many of the school prayer cases on which this Court relied, including *Lee* and *Santa Fe*. Those cases, and this Court’s decision relying on them, remain controlling on this panel. Even if the panel were not bound by this Court’s previous decision, Defendants’ three cherry-picked “examples” of alleged historical public school board prayers are misleading at best and nothing close to the evidence that would be necessary to establish that public school boards imposing prayer on impressionable children is consistent with a historically sensitive understanding of the Establishment Clause. This Court already rejected

Defendants' historical argument. Rule 60(b)(5) does not give them license to relitigate that same issue.

## ARGUMENT

### **I. The District Court's Decision Is Subject to Review for Abuse of Discretion.**

This Court may reverse a district court's decision to deny a Rule 60(b) motion for relief from a final judgment only if the court abused its discretion. *Deocampo*, 836 F.3d at 1140.

Under Rule 60(b)(5), a district court may relieve a party from a final judgment or order only if “[1] the judgment has been satisfied, released, or discharged; [2] it is based on an earlier judgment that has been reversed or vacated; or [3] applying it prospectively is no longer equitable.” Fed. R. Civ. P. 60(b)(5).

Defendants have never specified the prong of Rule 60(b)(5) on which they rely, but none of them justify their requested relief. The first prong does not apply, because the judgment below has not “been satisfied, released, or discharged.” Defendants have never argued otherwise. The second prong does not apply, because it permits relief only when an earlier judgment *in the same case* “has been reversed or vacated.” This Court has long recognized “that a change in the applicable law after a judgment has become final in all respects is not a sufficient basis for vacating the judgment.” *Tomlin v. McDaniel*, 865 F.2d 209, 210 (9th Cir. 1989), *overruled on other grounds by Phelps v. Alamedia*, 569 F.3d 1120 (9th Cir.

2009)); *see also Wright & Miller*, 11 Federal Practice & Procedure § 2863 (3d ed. Sept. 2025) (prior judgment prong of Rule 60(b)(5) “does not apply merely because a case relied on as precedent by the court in rendering the present judgment has since been reversed”).

The only prong of Rule 60(b)(5) on which Defendants could possibly rely is the third, which permits relief from a judgment only if “applying it prospectively is no longer equitable.” Defendants bore the burden of establishing entitlement to relief. *Horne v. Flores*, 557 U.S. 433, 447 (2009). The district court had broad discretion to determine whether they met that burden. *Deocampo*, 836 F.3d at 1140.

The district court correctly held that Defendants failed to meet their burden for two independent reasons. First, Defendants failed to file their motion within a “reasonable time,” as expressly required by Rule 60, without any justification. That failure alone was sufficient to deny their motion. Second, Defendants’ sole argument—that *Kennedy* overruled the law on which the judgment was based—is meritless. Each of the district court’s grounds for denying the motion was well within the court’s discretion. This Court should affirm on both grounds, although either one is sufficient.

## II. The District Court Did Not Abuse Its Discretion in Denying Defendants' Rule 60(b)(5) Motion as Untimely.

A Rule 60(b)(5) motion “must be made within a reasonable time.” Fed. R. Civ. P. 60(c)(1). What constitutes a “reasonable time” depends on the facts of each case, taking into consideration: (1) the interest in finality; (2) the reason for delay; (3) the practical ability of the litigant to learn earlier of the grounds relied upon; and (4) prejudice to the other parties. *Lemoge v. United States*, 587 F.3d 1188, 1196 (9th Cir. 2009) (citing *Ashford v. Stewart*, 657 F.2d 1053, 1055 (9th Cir. 1981)). District courts have broad discretion in determining what constitutes a reasonable time. *See, e.g., Twentieth Century-Fox Film Corp. v. Dunnahoo*, 637 F.2d 1338, 1341 (9th Cir. 1981) (six-year delay unreasonable because defendant failed to establish extraordinary circumstances causing the delay); *Morse-Starrett Prods. Co. v. Steccone*, 205 F.2d 244, 249 (9th Cir. 1953) (twenty-two-month delay unreasonable because moving party gave “[n]o sufficient explanation” for delay); *Kellogg v. Strack*, 269 F.3d 100, 104 (2d Cir. 2001) (twenty-six month delay unreasonable despite movant’s incarceration); *Nucor Corp. v. Nebraska Pub. Power Dist.*, 999 F.2d 372, 375 (8th Cir. 1993) (three-and-a-half-year delay unreasonable where party had ample opportunity to bring motion sooner and simply failed to do so); *United States v. Boch Oldsmobile, Inc.*, 909 F.2d 657, 662 (1st Cir. 1990) (four-year delay unreasonable when motion was based on an appellate decision released more than one year before 60(b) motion was filed).

Defendants here “waited over three years after *Kennedy* to file” their 60(b)(5) motion. 1-ER-2, 4. As the district court found, “Defendants[] definitely knew of *Kennedy* just a few weeks” after the opinion was issued “when Plaintiffs’ counsel sent a letter to Defendants’ counsel on July 13, 2022 informing them that *Kennedy* did not [a]ffect the Order in this case.” 1-ER-4–5; SER-3–7. Defendants’ own counsel responded to that letter on July 21, 2022, and “informed Plaintiffs that Defendants were advised of their ‘ongoing obligations under the existing injunction.’” 1-ER-5; SER-4, 9. Yet Defendants did not bring their 60(b)(5) motion until more than three years later, on July 31, 2025.

Defendants offered *no* justification at all for their delay. 1-ER-2, 4. Nor can they dispute that their unjustified delay caused significant prejudice to Plaintiffs. 1-ER-4–5. Based on these facts, the district court acted well within its discretion in finding that all the relevant factors weigh in favor of denying Defendants’ motion as untimely.

**A. The interest in finality undisputedly weighs heavily against vacating the judgment.**

The district court found that both the abstract public policy interests in finality and Plaintiffs’ particular reliance interests in finality weigh heavily in Plaintiffs’ favor. *See* 1-ER-5; *Henson v. Fid. Nat’l Fin., Inc.*, 943 F.3d 434, 450 (9th Cir. 2019). A reliance interest accrues when “the final judgment being challenged has caused one or more of the parties to change his legal position in

reliance on that judgment.” *Henson*, 943 F.3d at 450 (quoting *Phelps*, 569 F.3d at 1138). Interest in finality is one of the most, if not *the* most, important factor in determining whether a Rule 60 motion is timely. “Relief from judgment pursuant to Rule 60(b) should be confined to situations in need of an extraordinary remedy, for the framers of Rule 60(b) set a higher value on the social interest in the finality of litigation.” *U.S. Care, Inc. v. Pioneer Life Ins. Co. of Ill.*, 244 F. Supp. 2d 1057, 1061 (C.D. Cal. 2002) (quoting *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 683 (7th Cir. 1983)) (citation modified).

The district court found, and Defendants have never disputed, that Plaintiffs have a strong abstract interest in finality due to the length of the prior litigation. 1-ER-5. From filing the complaint in 2014 to the final disposition of this case following appeal, Plaintiffs engaged in five years of contested litigation to vindicate their constitutional right to be free from proselytizing and coercive sectarian prayer by their school system, a right that most Americans enjoy without needing to litigate in the first place. Plaintiffs did not battle in court for five years for financial gain, but to protect the rights of themselves, the rights of their minor children, and the rights of other families similarly situated. After that extensive litigation, they have a strong interest in putting this case behind them.

The district court also found, and again Defendants have never disputed, that Plaintiffs also have a strong reliance interest in finality. 1-ER-5. Because of

the final closure of this case years ago, Plaintiffs ended their retention of their former counsel. Defendants' multi-year delay before bringing their motion forced Plaintiffs to find new counsel and incur additional costs to defend against Defendants' motion after Defendants forced them back into court to relitigate decided matters. 1-ER-4–5. The private and public interests in finality of judgments weigh heavily against Defendants.

**B. The district court correctly found that Defendants' three-year delay caused prejudice to Plaintiffs.**

The district court also found as a matter of fact that Defendants' delay in bringing their motion "prejudiced Plaintiffs." 1-ER-5. Defendants' delay "forced Plaintiffs to find new counsel," and "increased Plaintiffs' costs as new counsel had to familiarize themselves with this long-running case." 1-ER-5. Defendants do not dispute these factual findings.

Ignoring the district court's findings, Defendants contend that "[a]n unfair judgement being set aside" and "[d]elay in resolving a case" do not count as prejudice under Rule 60. AOB at 46. Their cited cases are easily distinguishable, and in any event are beside the point, as none of them address circumstances like those here, where the district court found as a matter of fact that the moving party's delay caused tangible prejudice to the opposing party apart from the possibility that the underlying judgment might be set aside. *See TCI Group Life Ins. Plan v. Knoebber*, 244 F.3d 691, 701 (9th Cir. 2001), *overruled on other grounds by*

*Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141 (2001) (affirming order granting Rule 60(b)(1) motion to overturn a default judgment brought less than one month after the default judgment was entered, where the opposing party “point[ed] to no harm due to the short delay”); *Lowry Dev., L.L.C. v. Groves & Assocs. Ins., Inc.*, 690 F.3d 382, 389 (5th Cir. 2012) (only effect of motion was to set aside dismissal of claim that had been predicated on summary judgment order that was reversed on appeal); *Thompson v. Am. Home Assurance. Co.*, 95 F.3d 429, 433–34 (6th Cir. 1996) (“For the setting aside of a default judgment to be considered prejudicial, it must result in more than delay.”).<sup>3</sup>

This case does not involve a default judgment, and in any event, the district court found that Defendants’ completely unjustified delay caused real tangible harm to Plaintiffs—by forcing them to retain new counsel and incur substantial additional expense, because like most litigants they had ended their retention of their former counsel in reliance on the finality of the judgment, years before Defendants eventually decided to bring their motion. 1-ER-5. Defendants concede the district court’s factual finding of prejudice by failing to contest it.

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<sup>3</sup> Defendants incorrectly cite this Sixth Circuit case as having been decided by the Ninth Circuit. AOB at 47.

**C. Defendants failed to present *any* reason to justify their three-year delay.**

If a movant delays in filing a Rule 60(b) motion without *any* justification—let alone without establishing extraordinary circumstances justifying that delay—the motion must be denied. *See, e.g., Morton v. Twitter, Inc.*, No. 23-55732, 2024 WL 2843031, at \*1 (9th Cir. June 5, 2024) (where district court found that movant could have raised her arguments earlier and failed to provide any reason justifying her delay in bringing her motion, and movant did not challenge those factual findings as clearly erroneous on appeal, “Under our case law, these factual findings are sufficient to affirm the district court’s denial of her Rule 60(b) motion as untimely”); *S.E.C. v. Durante*, 641 F. App’x 73, 79 (2d Cir. 2016) (twenty-nine-month delay “without explanation” unreasonable); *Tyler v. Anderson*, 749 F.3d 499, 510 (6th Cir. 2014) (over-ten-year delay unreasonable because movant failed to “articulate a reasonable basis for delay”).

The district court acknowledged that in considering delay in bringing a Rule 60(b)(5) motion, “courts should apply ‘leniency when the challenged judgment is prospective.’” 1-ER-4 (quoting *United States v. Holtzman*, 762 F.2d 720, 725 (9th Cir. 1985)). But even applying that standard, the district court held that Defendants’ years-long delay was unjustified because Defendants failed to provide *any* justification at all for their failure to act any sooner. “Defendants provide no reason, let alone ‘exceptional circumstances,’ to justify this three-year delay.” 1-

ER-2, 4; *see* 2-ER-74, 81–93. Defendants’ failure to even attempt to justify their delay in the district court is dispositive.

On appeal, Defendants contend, for the first time, that they did not have the “political will” to file their motion sooner. AOB at 47–48. Defendants “forfeited this argument by failing to make it to the district court.” *Pritchard v. Blue Cross Blue Shield of Ill.*, 159 F.4th 646, 660 (9th Cir. 2025). “As a federal court of appeals,” the Ninth Circuit is “a court of review, not first review.” *Shirk v. U.S. ex rel. Dep’t of Interior*, 773 F.3d 999, 1007 (9th Cir. 2014) (quoting *Maronyan v. Toyota Motor Sales, U.S.A., Inc.*, 658 F.3d 1038, 1043 n. 4 (9th Cir. 2011)). This Court can affirm without going further.

Regardless, Defendants’ “political will” argument is little more than an assertion that Defendants simply chose not to act sooner, and that they need no justification for that decision to delay other than their own whims. This Court’s precedents foreclose that argument. *See Twentieth Century-Fox Film Corp.*, 637 F.2d at 1341 (six-year delay unreasonable where defendant “presented no reason” for failure to appeal original order); *Morse-Starrett Prods. Co.*, 205 F.2d at 249 (twenty-two-month delay unreasonable because moving party gave “[n]o sufficient explanation” for delay); *McKinney v. Boyle*, 447 F.2d 1091, 1093 (9th Cir. 1971) (four-and-a-half-year delay in bringing 60(b) motion unreasonable where delay was the fault of moving party’s own actions).

Defendants unpersuasively attempt to justify their delay by contending that “[t]here is no ‘outside limitation on the time’ which [sic] a Rule 60(b)(5) motion may be brought.” AOB at 41 (quoting *Corn v. Guam Coral Co.*, 318 F.2d 622, 632 (9th Cir. 1963)).<sup>4</sup> While Rule 60 does not impose a specific numerical time limit on when all Rule 60(b)(5) motions must be brought, the Rule unambiguously requires that such a motion “*must* be made within a reasonable time.” Fed. R. Civ. P. 60(c)(1) (emphasis added). The Supreme Court recently reaffirmed that “Rule 60(c)(1) requires parties to make Rule 60(b) motions within a ‘reasonable time.’” *Coney Island Auto Parts Unlimited, Inc. v. Burton Tr. for Vista-Pro Auto., LLC*, 146 S. Ct. 579, 582 (2026); *see id.* at 583 (“Rule 60 ... imposes a time limit for such motions.”).

Defendants’ other cited cases are similarly distinguishable. In *Agostini v. Felton*, 521 U.S. 203 (1997), the petitioners sought relief from the permanent injunction issued in *Aguilar v. Felton*, 473 U.S. 402 (1985). They filed their Rule 60(b)(5) motions in 1995, on the ground that five justices had called for the overruling of *Aguilar* in a decision issued just the prior year, in June 1994. *See Agostini*, 521 U.S. at 214 (citing *Bd. of Ed. of Kiryas Joel Vill. Sch. Dist. v.*

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<sup>4</sup> The Court in *Corn* did not address a motion under Rule 60(b)(5), but rather was discussing Guam’s Island Court Rule 60(b)(6), “which provides for relief for ‘any other reason justifying relief from the operation of the judgment,’” and a motion brought under that rule based on newly discovered evidence. 318 F.2d at 632.

*Grumet*, 512 U.S. 687 (1994)). They also relied on the even more recent decision in *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995), issued just a few months before they filed their motions. *See Agostini*, 521 U.S. at 216. Unlike here, there was no indication that the petitioners failed to justify the timing of their motions, and there was also no indication that any delay in bringing those motions caused prejudice to any party.<sup>5</sup>

In *Associated Builders & Contractors v. Michigan Department of Labor & Economic Growth*, 543 F.3d 275 (6th Cir. 2008), the Sixth Circuit emphasized that a district court’s decision whether a Rule 60(b)(5) was timely receives only “abuse-of-discretion review.” *Id.* at 278. The Court held that the district court in the unique circumstances at issue did not abuse its discretion in holding that a State’s 60(b)(5) motion was brought within a reasonable time where, among other things, the ERISA preemption law that the State argued had changed was “context-specific,” “short on bright-line guidance,” and lacked “clarity,” making it difficult to determine when (or if) a change in the law undermining the injunction at issue

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<sup>5</sup> Defendants also cite *Railway Employees v. Wright*, 364 U.S. 642 (1961), *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367 (1992), and *Pasadena City Bd. of Ed. v. Spangler*, 427 U.S. 424 (1976). AOB at 46. In none of those cases did the Court suggest—let alone review a factual finding like the district court’s here—that a Rule 60(b) movant had failed to provide any justification for a lengthy delay before filing their motion, or that delay had caused tangible prejudice to the opposing party.

may have occurred. *Id.* at 279. The Court also emphasized that the party opposing the motion had “not pointed to any prejudice” that any “alleged delay caused it to suffer,” and given all this, the district court did not abuse its discretion in considering the Rule 60(b)(5) motion. *Id.*

In *U.S. v. Holtzman*, 762 F.2d at 723, the defendant filed a motion to correct or clarify a permanent injunction against him just two months after the United States Attorney had informed him that the U.S. construed one paragraph of the injunction to prohibit him from importing certain vehicles that he had “always understood” the injunction permitted. After the district court denied that motion without giving reasons, the defendant filed a motion to vacate the disputed paragraphs of the injunction under Rule 60(b)(5) and (6). *Id.* In holding that the motions were brought within a reasonable time given the defendant’s understandable (albeit erroneous) construction of the meaning of the injunction, the Court emphasized that the “case presents an uncommon factual picture,” and moreover the moving party had “presented adequate reasons for failing” to bring the motions sooner, and “the government was not prejudiced” by any delay. *Id.* at 725. In contrast, Defendants here failed to present *any* reason for their three-year delay, and the district court found that Defendants’ delay did prejudice Plaintiffs.

Defendants contend that “[w]hen a party seeks relief from a prospective judgment, the reason for the delay is less important.” AOB at 47 (citing *Planned*

*Parenthood Monte Mar, Inc. v. Ford*, 349 F.R.D. 213, 219–20 (D. Nev. 2025)).

What the district court in the opinion they cite actually said, however, was “when relief is sought from a prospective judgment *and the delay caused no prejudice to the opposing party*, the length and reason for the delay are less important.”

*Planned Parenthood Monte Mar, Inc.*, 349 F.R.D. at 219–20 (emphasis added).

Defendants’ delay here did cause prejudice to Plaintiffs.

In sum, the district court acted well within its discretion when it found that Defendants failed to bring their Rule 60(b)(5) motion “within a reasonable time” as required by the Federal Rules. The order denying Defendants’ untimely motion can and should be affirmed on that ground alone.

### **III. The District Court Also Correctly Held That *Kennedy* Does Not Make Defendants’ Coercive and Proselytizing Prayers Acceptable Before Schoolchildren.**

Although this Court does not need to go any further, the order below should also independently be affirmed because the district court correctly held that *Kennedy* does not require that the underlying injunction be vacated.

As the moving party, Defendants bore the “burden of showing a significant change either in factual conditions or in the law” warranting that the permanent injunction be modified or vacated. *United States v. Asarco Inc.*, 430 F.3d 972, 979 (9th Cir. 2005) (citing *Rufo*, 502 U.S. at 384). They failed to do so. The Board members did not, and do not, contend that any “factual conditions” have changed.

They did not identify any specific practice they wish to engage in that the injunction prohibits, nor did they seek a modification of any terms of the injunction.

Rather, Defendants sought to vacate the injunction entirely, which would allow them to resume their prior policy and practices. Their argument rests solely on their contention that *Kennedy* is an intervening change in the law that requires vacating the injunction. They are wrong, for all the reasons the district court explained. 1-ER-5–8. The *Kennedy* decision did not alter the law so as to now permit the coercive practices forbidden by the injunction. Coercion of schoolchildren and proselytization in the public-school context remain forbidden by the Establishment Clause. *Kennedy* did not change that—to the contrary, *Kennedy* reinforced that principle.

Defendants argue that *Kennedy* replaced the *Lemon* test with an analysis that looks to history and tradition to evaluate an Establishment Clause claim, and under that analysis their policy and practice of school-sponsored prayer no longer violate the Constitution. This Court, however, has already rejected Defendants’ argument based on history and tradition and concluded that their policy and practice is impermissibly coercive to students. In reaching that result, this Court relied on principles set forth in a long line of school prayer cases involving coercive religious practices. *See FFRF*, 896 F.3d at 1142–51. *Kennedy* did not overrule

those cases nor adopt a new analysis for evaluating coercion.

*Kennedy* reaffirmed the core principle that government coercion violates the Establishment Clause and cited with approval several of the school prayer cases on which this Court's, and the district court's, original decisions relied, including *Lee* and *Santa Fe*. The only "new" argument Defendants make is by referencing three isolated alleged historical instances of school board prayer, which fall apart upon closer inspection. Those minimal and problematic "examples" cannot come close to overcoming the binding precedent from this Court's prior decision holding that history and tradition do *not* justify Defendants' school-sponsored prayers and proselytizing at public school board meetings where students are present.

**A. *Kennedy* reaffirmed that government coercion violates the Establishment Clause.**

While *Kennedy* held that the Court has "abandoned" the *Lemon* test and its "endorsement" test offshoot, it reaffirmed the central principle that has always controlled this case: "[G]overnment may not, consistent with a historically sensitive understanding of the Establishment Clause, 'make a religious observance compulsory.'" *Kennedy*, 597 U.S. at 536–37 (citing *Zorach v. Clauson*, 343 U.S. 306, 314 (1952)). Indeed, "[t]here is little doubt that, as a historical matter, coercion was at the core of religious establishment." Michael W. McConnell, *No More (Old) Symbol Cases*, 2018-2019 *Cato Sup. Ct. Rev.* 91, 115. The Court in *Kennedy* reiterated that coercion is one of many hallmarks of religious

establishment, affirming that the government cannot, for example, coerce anyone to attend church or force citizens to engage in religious exercise. *Kennedy*, 597 U.S. at 537 (quoting *Lee*, 505 U.S. at 589); *see also*, Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 158 (1992) (urging that in a historically sensitive Establishment Clause analysis, “it is vital to understand the concept of coercion broadly and realistically”).

As the district court below recognized, the *Kennedy* majority held that the plaintiff football coach’s practice of quietly and privately praying alone after football games did not violate students’ Establishment Clause rights because the record did not support the conclusion that students were coerced by the plaintiff’s private prayer practice. *Kennedy*, 597 U.S. at 525, 530, 536–37, 541 (case involved “no formal school program accommodating the religious activity at issue”). The Court specifically distinguished the coach’s prior meetings with students, a practice that the coach had discontinued and was not at issue in the case. *See id.* at 525–26, 538, 541, 543 (“The contested exercise before us does not involve leading prayers with the team or before any other captive audience .... Mr. Kennedy did not seek to direct any prayers to students....”); *id.* at 517 (“Mr. Kennedy emphasized that he sought only the opportunity to ‘wait until the game is over and the players have left the field and then walk to mid-field to say a short, private, personal prayer,’” and “he was even willing to say his ‘prayer while the players

were walking to the locker room’ or ‘bus,’ and then catch up with his team.”) (brackets omitted); *id.* at 542 n.7 (emphasizing that the prayers “that formed the basis of his suspension” took place “without students”).<sup>6</sup>

While the Supreme Court made clear that it had abandoned the *Lemon* test, it did not overrule any other case, let alone all post-*Lemon* cases. To the contrary, the Court has continued to favorably cite post-*Lemon* cases in subsequent opinions. *See, e.g., Catholic Charities Bureau, Inc. v. Wis. Lab. & Indus. Rev. Comm’n*, 605 U.S. 238, 247–48 (2025) (citing *Santa Fe* with approval); *see also Jusino v. Fed’n of Catholic Teachers, Inc.*, 54 F.4th 95, 102 (2d Cir. 2022) (holding that the Supreme Court’s ruling in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) “remains good law notwithstanding its reliance ... on *Lemon*” because *Kennedy* “indisputably did not ... overrule—or even mention—*Catholic Bishop*”).

Indeed, the Court in *Kennedy* itself cited both *Lee* and *Santa Fe* approvingly. *See Kennedy*, 597 U.S. at 537 (quoting *Zorach*, 343 U.S. at 314, and *Lee*, 505 U.S.

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<sup>6</sup> *Kennedy*’s emphasis on private speech further rebuts Defendants’ free speech argument. Formal prayers opening a government meeting given pursuant to a government policy, as in the present case, constitute government speech that is not protected by the Free Speech clause. *See Gundy v. City of Jacksonville Fla.*, 50 F.4th 60, 71 (11th Cir. 2022); *see also Santa Fe*, 530 U.S. at 302 (emphasizing distinction between government and private speech); *cf. Barke v. Banks*, 25 F.4th 714, 719 (9th Cir. 2022) (speech made pursuant to official government duties does not implicate private speech rights of local elected officials). Defendants do not dispute that the “school-sponsored” prayer and proselytizing at issue here is government speech, not private speech. *FFRF*, 896 F.3d at 1151.

at 589) (“Government ‘may not coerce anyone to attend church,’ ... nor may it force citizens to engage in ‘a formal religious exercise.’”); *id.* at 541–42 (citing *Santa Fe*, 530 U.S. at 294). *Kennedy* does not now make coercion and proselytization acceptable.

This Court’s reasoning in this case rested on the anti-coercion principles in the school prayer cases, including *Lee* and *Santa Fe*. *See FFRF*, 896 F.3d at 1149–51. This Court’s analysis repeatedly cited *Santa Fe* in analyzing and applying the anti-coercion principles that required affirmance of the judgment. *Id.* The same rationales—based on the same concern for avoiding coercion in public school settings—continue to apply. Defendants do not dispute that *Lee*, *Santa Fe*, and the Supreme Court’s other school-sponsored prayer cases remain good law. Indeed, they expressly agree that government coercion still violates the Establishment Clause. AOB at 38–39. That is dispositive given this Court’s prior holding that Defendants’ practices are coercive.

The Supreme Court has long recognized the unconstitutionally coercive effects that a state-sponsored religion has on the impressionable minds of schoolchildren. *See McCollum v. Bd. of Ed.*, 333 U.S. 203, 227 (1948); *Engel v. Vitale*, 370 U.S. 421, 441–42 (1962); *Lee*, 505 U.S. at 592 (“Our decisions . . . recognize, among other things, that prayer exercises in public schools carry a particular risk of indirect coercion.”); *see also Sch. Dist. of Abington Twp., Pa. v.*

*Schempp*, 374 U.S. 203, 307 (1963) (Goldberg, J., concurring); *Santa Fe*, 530 U.S. at 311–13.

*Lee* and *Santa Fe*—which undisputedly remain good law—in particular make clear that the coercive effect school-sponsored prayer has on students goes beyond the classroom and school hallways. *Lee* and *Santa Fe* involved school-sponsored prayer at graduation ceremonies and football games, respectively—school events where schoolchildren were present, even if they were not formally compelled to attend.<sup>7</sup> As this Court already held, the principles of *Lee* and *Santa Fe* apply to school board meeting prayer when the prayer is facilitated by the school. *FFRF*, 896 F.3d at 1142–51.

School-sponsored prayer “carr[ies] a particular risk of indirect coercion,” since “in a school context [prayer] may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.” *Lee*, 505 U.S. at 592. “[T]he school district’s supervision and control

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<sup>7</sup> Student attendance at Board meetings is “voluntary” only in the same way that attending any school event, including graduation or a football game, is voluntary. *See Lee*, 505 U.S. at 595. In each situation, not attending leads to a real loss. *See also, e.g., Karen B. v. Treen*, 653 F.2d 897, 902 (5th Cir. 1981), *aff’d*, 455 U.S. 913 (1982) (“State and school officials point out that student participation in the daily prayer session is allowed to be wholly voluntary. This fact is not relevant to the Establishment Clause inquiry.”); *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 and his or her participation in the supper prayer are ‘voluntary.’”).

of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction.” *Id.* at 593. Adolescents are susceptible to social pressures towards conformity, *id.*, and in conducting school-sponsored prayer, “the government may no more use social pressure to enforce orthodoxy than it may use more direct means.” *Id.* at 594.

As this Court has already held, the invocations and religious statements made by Defendants in their official capacities in this case are as coercive as the practices prohibited by *Lee* and *Santa Fe*. Adolescent students attend Board meetings and are subjected to the coercive effect of proselytizing statements made by government officials with significant power over them. Based on blatantly proselytizing statements by Board members—for example, urging “everyone who does not know Jesus Christ to go and find Him,” and saying the Board’s “one goal is under God, Jesus Christ,” *FFRF*, 896 F.3d at 1140—the Board’s religious preference and promotion was unmistakably clear for all students in attendance, including those of minority religious beliefs.<sup>8</sup>

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<sup>8</sup> Indeed, while non-proselytizing school-sponsored prayers would impermissibly coerce schoolchildren in the public-school context at issue here, Defendants’ policy and practice of invocations and religious statements that they seek to reinstate include overt proselytization, and are also objectionable precisely because they proselytize. In *Town of Greece*, the Supreme Court continued to recognize that, even in contexts where the historical legislative-prayer tradition applies, government prayer practices nevertheless do violate the Constitution if the

Defendants’ prayer policy and practices at public school Board meetings are unconstitutionally coercive and remain prohibited by well-established case law. *Kennedy* reaffirmed the point, emphasizing that “coercion... was among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment.” 597 U.S. at 537.

**B. Defendants’ policy and practice of school-sponsored prayer and proselytizing imposed upon schoolchildren at school Board meetings is not supported by history and tradition.**

**1. This Court already rejected Defendants’ argument that their policy and practices are justified by history and tradition.**

Defendants’ primary argument is that their prayers and proselytizing practices no longer violate the Establishment Clause because they fall within the historical legislative-prayer tradition recognized in *Marsh* and *Town of Greece*. But this Court has already squarely rejected that argument. 1-ER-9, 29. Defendants’ Rule 60(b) motion is in effect a request for a “do over.” That is not how Rule 60(b) works. Defendants’ disagreement with this Court’s rejection of their historical

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evidence “shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion,” because at that point, the invocation “fall[s] short of the desire to elevate the purpose of the occasion and to unite lawmakers in their common effort.” 572 U.S. at 583. As this Court and the district court previously concluded, the practices Defendants seek to revive in this case were exploited to include just this kind of express proselytization as part of a policy of discrimination and non-neutrality. *FFRF*, 896 F.3d at 1140–41.

argument in the prior opinion is no basis to vacate a final judgment to relitigate that same issue.

Defendants incorrectly contend that this Court “rejected” an analysis based on history and tradition. AOB at 19. To the contrary, after reciting the facts establishing the Board members’ overt proselytization and coercive promotion of Christianity, this Court expressly *applied* the historical analysis required by the then-recent decision of *Town of Greece*, and concluded that Defendants’ school-sponsored prayer practices are “not the sort of solemnizing and unifying prayer, directed at lawmakers themselves and conducted before an audience of mature adults free from coercive pressures to participate, that the legislative-prayer tradition contemplates.” *FFRF*, 896 F.3d at 1142 (distinguishing *Marsh* and *Town of Greece*).<sup>9</sup>

It is well-established that audience and context matter when considering whether there is a history and tradition of acceptable public prayer by the government. “The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools.” *Edwards*, 482 U.S. at 583–84. There are many religious practices that are allowed

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<sup>9</sup> In the original summary judgment order, the district court similarly rejected Defendants’ arguments after carefully analyzing the relevant history and tradition. 1-ER-47, 69–71.

elsewhere, but not in a school context. *Compare, e.g., Van Orden v. Perry*, 545 U.S. 677 (2005) (holding that a longstanding Ten Commandments display on courthouse grounds did not violate the Establishment Clause), *with Stone v. Graham*, 449 U.S. 39 (1980) (holding that a Kentucky statute requiring the Ten Commandments be posted in public school classrooms was unconstitutional).

This Court has already ruled that this is one such case. As this Court explained, Defendants’ prayers “typically take place before groups of schoolchildren whose attendance is not truly voluntary and whose relationship to school district officials, including the Board, is not one of full parity.” *FFRF*, 896 F.3d at 1142. In stark contrast, the audience for the prayers in *Marsh* and *Town of Greece* consisted of adults with the power to elect and vote legislators out of office. *FFRF*, 896 F.3d at 1143. Unlike in those cases, “many of the attendees at Chino Valley Board meetings are adolescents and children—some as young as second grade,” and their presence “is integral to the meeting.” *Id.* at 1146. This Court reiterated that students perform for the Board members, receive awards at the meetings, and seek redress from the Board for discipline, and a student sits as a member of the Board, participating in Board discussions. *Id.* “This audience, unlike the audience in the legislative-prayer cases, therefore implicates the concerns with mimicry and coercive pressure that have led us to ‘be particularly

vigilant in monitoring compliance with the Establishment Clause.” *Id.* (quoting *Edwards*, 482 U.S. at 583–84).

This Court looked to the Supreme Court’s long history of Establishment Clause cases, both before and after *Lemon*, that repeatedly recognize the special concern about coercion of children that arises in the school context. *See FFRF*, 896 F.3d at 1150 (citing *Lee* and *Santa Fe*, among other cases). The Court also expressly rejected Defendants’ argument that their policy and practices were supported by history and traditions at the time of the Framing, given that “[a]t the time of the Framing ... free public education was virtually nonexistent,” so the Framers “could not have viewed the Establishment Clause as relevant to local schools’ and school boards’ actions.” *Id.* at 1148. The Court thus soundly rejected the argument that the Board members’ prayers and proselytizing fit within a historically sensitive understanding of the Establishment Clause.

This Court’s prior opinion rejecting Defendants’ arguments from history and tradition is binding circuit precedent that cannot be overturned by a subsequent panel. *See Kivett*, 154 F.4th at 645. A “three-judge panel may not overrule a prior court decision” unless the prior holding is “clearly irreconcilable” with an intervening decision from the Supreme Court. *Id.* “It is not enough for there to be ‘some tension’ between the intervening higher authority and prior circuit precedent or for the intervening higher authority to ‘cast doubt’ on the prior circuit

precedent.” *Id.* (quoting *Lair v. Bullock*, 697 F.3d 1200, 1207 (9th Cir. 2012) (subsequent citations omitted)). “Even if a Supreme Court decision ‘contain[s] language that might persuade us to decide [the prior case] differently if presented to us today[,] ... the fact that we might decide a case differently than a prior panel is not sufficient grounds for deeming the case overruled. Nothing short of ‘clear irreconcilability’ will do.’” *Id.* (quoting *Close v. Sotheby’s, Inc.*, 894 F.3d 1061, 1073–74 (9th Cir. 2018); ellipses and brackets in *Kivett*).

This Court’s prior opinion—including its rejection of Defendants’ arguments from history—is not “clearly irreconcilable” with *Kennedy*. Instead of even attempting to argue to the contrary, Defendants ask the Court to ignore its prior decision and engage in a historical analysis from a blank slate. That approach would violate the established principle that prior decisions of this Court bind future panels.

The closest Defendants come to even confronting this Court’s prior analysis of the relevant history and traditions is to note that children sometimes attended the public town board meetings at issue in *Town of Greece*. AOB at 38–39. This Court has already explained, though, why the possibility that children might voluntarily choose to observe a town meeting or state legislative session is entirely different from the facts here, where the school-sponsored prayers “typically take place before groups of schoolchildren whose attendance is not truly voluntary and whose

relationship to school district officials, including the Board, is not one of full parity.” *FFRF*, 896 F.3d at 1142. This Court’s prior opinion holding that history and tradition do not support Defendants’ policy and practice remains controlling and dispositive.

**2. Defendants fail to demonstrate an accepted historical practice and understanding that school-sponsored prayer at public schoolboard meetings where schoolchildren are present is acceptable.**

The Court need go no further. But even were the Court to consider Defendants’ already-rejected argument from history, Defendants’ citations to three cherry-picked instances of alleged school board prayer, cited in a single student law review article, come nowhere close to meeting their burden to demonstrate a historical practice and tradition justifying their coercive policy and practices. *See* AOB at 33 (citing Evan Lee, *School Board Prayer: Reconciling the Legislative Prayer Exception and School Prayer Jurisprudence*, 54 *Akron L. Rev.* 75 (2020)). Defendants incorrectly contend that Plaintiffs must demonstrate that Defendants’ actions violate the Establishment Clause. AOB at 34–35. But Plaintiffs met that burden when the district court granted summary judgment in their favor and this Court affirmed. Instead, Defendants, who are now seeking relief by their Rule 60(b)(5) motion, have the burden to establish circumstances justifying such relief. *Horne*, 557 U.S. at 447. They have failed to do so.

As a preliminary matter, Defendants' cited examples are from nearly a century before the Establishment Clause was incorporated against the States through the Fourteenth Amendment, so their relevance is limited at best. *See generally* *Everson v. Bd. of Educ. of Ewing Tp.*, 330 U.S. 1 (1947) (holding in 1947 that the Establishment Clause applies to the States). *Kennedy* directs courts to consider history and tradition consistent with the understanding of the Framers of the relevant constitutional rule. 597 U.S. at 535–36. Citing pre-*Everson* examples does nothing to show the constitutionality of prayers by school boards operated by the States, because the Establishment Clause was not incorporated against the States at the time. Moreover, Defendants cite only examples from the 1820s and 1850s, *before* the ratification of the Fourteenth Amendment. Local practices from before the time the First Amendment ever applied to those practices can say little, if anything, about what the Framers might have considered permissible or impermissible in this context. Defendants' failure to cite any example of a single permissible school board meeting prayer *after* the adoption of the Fourteenth Amendment, when the Establishment Clause even arguably could have first applied to the States, fundamentally undermines their historical argument.

Defendants' examples, moreover, do not establish the historical practice they urge. Defendants first assert that "In Pennsylvania, public school board meetings

included clergy-led opening prayer from as early as 1820.” AOB at 33 (citing Evan Lee, *School Board Prayer*, at 99). The student law review article on which Defendants rely cites a single line from a written report, the “1820 Second Annual Report of the Controllers of the Public Schools of the First School District of the State of Pennsylvania.” The line in question, which comes at the very end of the Second Annual Report, reads:

Desirous, notwithstanding, of being ever mindful that human exertions for advancing the welfare of mankind, can only prove availing through the interposition, and blessing, of the beneficent Ruler of all things, it is incumbent upon us to commend these humble efforts, and purposes, to the favour of Heaven.

Roberts Vaux, *Second Annual Report of the Controllers of the Public Schools of the First School District of the State of Pennsylvania* 7 (1820),

<https://goo.gl/9dLBH4>. A written report is not the same as a school board meeting with schoolchildren present. Additionally, the line cited, while making religious reference to a “Ruler of all things,” is arguably not even a prayer. And even if it were generously construed to be a “prayer,” it was not spoken out loud like the prayers at issue here. *See also*, Andrew Seidel, *Bad History, Bad Opinions: How ‘Law Office History’ Is Leading the Courts Astray on School Board Prayer and the First Amendment*, 12 *Northeastern Univ. L. Rev.* 248, 279–80 (2020). A single religious line concluding a single annual written report is hardly evidence of a

long, unbroken tradition of prayer at public school board meetings on a national scale. *See id.* at 280–82.

Next, Defendants state that “In 1857, school boards in Wisconsin opened in prayer.” AOB at 33 (citing Evan Lee, *School Board Prayer*, at 99). Again, the statement is not supported by the primary sources. The student article that Defendants rely on cites to “Proceedings of the Board of Regents of Normal Schools and the Regulations Adopted at their First Meeting Held at Madison, July 15, 1857 6 (1857).” *See* Evan Lee, *School Board Prayer*, at 99 n.201; *see also* D.Y. Kilgore, et al., *Report of Proceedings of the Board of Regents of Normal Schools*, within *Governor’s Message and Accompanying Documents*, at Document O (1857), <https://bit.ly/4tpcCTj>. The Board of Regents of Normal Schools was not a public school board overseeing primary or secondary education. Instead, this Board of Regents was a committee created by the Wisconsin legislature, and it dealt with higher education, primarily the post-high school education of future teachers. *See generally*, Albert Salisbury, *Historical Sketch of Normal Instruction in Wisconsin*, 14–15 (n.p., 1893), <https://books.google.com/books?id=n8qgAAAAMAAJ>; Seidel, *Law Office History*, at 298–99; Hicks, et al., *Study Committee on the Future of the University of Wisconsin System*, Wis. Leg. Council, 5 (July 3, 2024), <https://bit.ly/4tIN0GZ>.

The cited record of proceedings includes meeting minutes that indicate that during the Board of Regent’s first ever annual meeting, the second and third days of the three-day event opened with prayers delivered by board members. D.Y. Kilgore, et al., *Report of Proceedings of the Board of Regents of Normal Schools*, at Document O, <https://bit.ly/4tpcCTj>; see also Seidel, *Law Office History*, at 300. The reports from subsequent annual meetings do not show prayers at the Board of Regents of Normal Schools meetings. Seidel, *Law Office History*, at 301 (citing *University of Wisconsin Board of Regents Collection*, <https://bit.ly/4cjinf6>; *University of Wisconsin System Board of Regents Meeting Materials*, <https://bit.ly/4asWTd8>). To state the obvious, two discrete prayers given by members of a state legislative committee overseeing higher education at a single event in 1857 do not establish an accepted history of public school board members imposing prayer and proselytization on students.

Finally, Defendants assert that “as early as 1859, school boards in Iowa began meetings with invocations.” AOB at 33 (again citing Evan Lee, *School Board Prayer*, at 99). Again, the example is highly misleading at best. The article that Defendants rely on cites the Journal of the Board of Education of the State of Iowa at its second session in 1859. The records from that meeting indicate that the Board of Education of the State of Iowa had invited local clergy to open the session with prayer and list several other recorded instances of prayer at the

Board’s meetings. Seidel, *Law Office History*, at 297–98. However, like the Wisconsin Board of Regents of Normal Schools, the Board of Education of the State of Iowa was not a public school board overseeing kindergarten through twelfth grade. Instead, it was “a division of the state legislature, more akin to a committee. This body dealt with state-level matters” and held its meetings in the Senate Chamber of the Iowa capitol building, and “[t]here is no evidence that students or even citizens attended the meetings.” Seidel, *Law Office History*, at 297; *see also*, Iowa Const. of 1857, art. IX. The Board of Education of the State of Iowa “was abolished in 1864, having existed for less than a decade.” Seidel, *Law Office History*, at 298; 1864 Iowa Acts Ch. 52, <https://bit.ly/4rFWnQa>. The fact that this state legislative body opened some meetings with clergy-led prayer does not prove an unbroken history and tradition of local school board prayer before children.

Perhaps recognizing the dearth of relevant historical evidence supporting their position, Defendants claim that some school boards in North Carolina and Massachusetts had clergy members, and that “in North Carolina delegates chosen from school boards were chosen to attend a statewide delegation in 1859. Many of these delegates were noted to be ‘ministers of the gospel.’” AOB at 34.<sup>10</sup> But the

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<sup>10</sup> For these propositions, Defendants cite a second student law review article: Marie Wicks, *Prayer Is Prologue: the Impact of Town of Greece on the Constitutionality of Deliberative Public Body Prayer at the Start of School Board*

fact that some school board members in some places were also members of the clergy is unsurprising and says nothing about whether coercive school-sponsored prayers in the presence of schoolchildren at public school board meetings were ever thought to comply with the Establishment Clause.<sup>11</sup>

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*Meetings*, 31 J.L. & Pol. 1, 30–31 (2015). Interestingly, the primary article on which Defendants rely, by Evan Lee, also cites this article, and the Wicks article seems to be largely at the root of ahistorical and poorly researched claims regarding the non-existent history and tradition of school board prayer. *See* Seidel, *Law Office History*, at 258–69 (discussing numerous problems with the research and methodology employed by Wicks and lawyers who have subsequently relied on her article’s non-scholarly and incorrect historical analysis in briefing before various federal courts).

<sup>11</sup> Besides being irrelevant, Defendants’ assertions about these isolated examples of alleged school board members who were also clergy are also highly misleading and historically dubious. For example, the North Carolina “delegation” was a group of individuals chosen to attend a private (not governmental) educational association meeting, and 17 of the teachers chosen to attend also happened to be ministers. Seidel, *Law Office History*, at 274–75 (citing M. C. S. Noble, *A History of the Public Schools of North Carolina* 168, 175 (1930)). The presence of teachers who happened to also be religious leaders at a voluntary meeting for a private association of people with an interest in education says nothing about any relevant historical understanding regarding coercive prayer and proselytization at public school board meetings.

As support for the proposition that public school boards in Massachusetts “were noted to be comprised of clergy,” AOB at 34, Defendants cite a single student law review article that itself cites a to a single record from the Massachusetts Common School Journal for 1845 which, according to Wicks, states that public school boards in Massachusetts *could* have clergy people as members. Wicks, *Prayer Is Prologue*, at 30–31; *see also*, Seidel, *Law Office History*, at 288–89 (noting inconsistencies and problems with the source material upon which Wicks and subsequent authors have relied). A single report from 1845 stating that Massachusetts school boards were merely permitted to include clergy as members does not show a history of constitutionally permissible public school board prayer.

Defendants' reliance on three dubious examples of alleged school board prayer proves nothing, but reveals much: Defendants' motion is ultimately based on nothing more than their disagreement with this Court's binding decision rejecting their argument that their policy and practices fall within the accepted historical legislative-prayer tradition recognized in *Town of Greece*. That is not a cognizable basis for Rule 60(b)(5) relief.

### CONCLUSION

This Court should affirm the order denying Defendants' Rule 60(b)(5) motion.

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Respectfully submitted,

By: s/Matthew J. Murray

Matthew J. Murray  
ALTSHULER BERZON LLP  
177 Post St., Suite 300  
San Francisco, CA 94108  
(415) 421-7151  
mmurray@altshulerberzon.com

Lisa C. Demidovich  
ALTSHULER BERZON LLP  
350 W. Colorado Blvd, Unit 420  
Pasadena, CA 91105  
(415) 421-7151  
ldemidovich@altshulerberzon.com

Richard L. Bolton  
BOARDMAN & CLARK, LLP  
1 S. Pinckney St., Suite 410  
Madison, WI 53701

(608) 283-1789  
rbolton@boardmanclark.com

Patrick C. Elliott  
Samantha F. Lawrence  
FREEDOM FROM RELIGION  
FOUNDATION  
PO Box 750  
Madison, WI 53701  
(608) 256-8900  
patrick@ffrf.org  
slawrence@ffrf.org

*Attorneys for Plaintiffs-Appellees Freedom  
From Religion Foundation, Inc., Michael  
Anderson, Larry Maldonado, and Does 1, 2,  
3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 16, 17, and 18*

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FOR THE NINTH CIRCUIT

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