Court of Appeal No. 25-7104

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Defendants-Appellants,

vs.

FREEDOM FROM RELIGION, *et al.*,

Plaintiffs-Appellees

Appeal from the Order of the United States District Court for the Central District of California,

Case No. EDCV 14-2336-JGB
The Honorable Jesus G. Bernal., District Judge

APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendants, Chino Valley Unified School District Board of Education, and Chino Valley Unified School Board of Education Board Members James Na, Sonja Shaw, Jonathan Monroe, Andrew Cruz, and John Cervantes, certify that they are not publicly held and have no corporate parents, subsidiaries, or affiliates that are publicly held which own 10% or more of its stock.

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I. INTRODUCTION

A permanent injunction is one of the most drastic and severe measures a civil court can impose. Unlike a damages award, a permanent injunction forbids certain conduct or requires certain conduct *in perpetuity.* When it comes to permanently enjoining constitutional conduct, such as free speech, the matter is all the more consequential. While finality in the law is generally a good thing, when it comes to permanently enjoining fundamental constitutional conduct *in perpetuity*, courts should be willing to reconsider the matter when appropriate. One such appropriate time is when the law upon which the permanent injunction was issued has been overturned by the U.S. Supreme Court. And this is the precise situation the Appellants find themselves in this case.

On February 28, 2016, the district court entered a permanent injunction forever barring the Chino Valley Unified School District Board members,[1] in their official capacities, from beginning its school board meetings with an invocation. Invocations are speech, and thus the injunction serves as a permanent prior restraint on speech. The permanent injunction is as broad in its scope as it is perpetual in its duration. The injunction prohibited the Board from "conducting, permitting or otherwise endorsing school-sponsored prayer in Board meetings." *See Freedom From Religion Foundation, Inc., v. Chino Valley Unified Sch. Dist.*, ("*Chino I*") (1-EOR-72). The district court came to this conclusion after applying the *Lemon* test. (1-EOR-69) (after holding that this case was controlled by *Lee* and other school prayer cases, the court then applied the *Lemon* test and concluded the prayer violated *Lemon*).

[1]Although the Chino Valley Unified School District Board of Education was dismissed under the 11th Amendment (1-EOR-72), the case proceeded against the Board members in their official capacities. For simplicity's sake, the individual Board members will collectively be referred to as the "Board" or "Appellants".

The Ninth Circuit upheld the permanent injunction after applying *Lemon*. *See Freedom From Religion Foundation, Inc., v. Chino Valley Unified Sch. Dist.*, 896 F.3d 1132, 1142 (9th Cir. 2018) ("*Chino II*") (1-EOR-25) ("Because prayer at the Chino Valley Board meeting falls outside the legislative-prayer tradition, we apply the three-pronged test first articulated in *Lemon v. Kurtzman* for determining whether a governmental policy or action is an impermissible establishment of religion.")

However, since the district court entered its permanent injunction in 2016, the Establishment Clause precedent relied upon by the courts has undergone metamorphic change. The Supreme Court has now overturned the *Lemon* test. In *Kennedy v. Bremerton School District*, the Supreme Court held that the question of whether a government practice violates the Establishment Clause turns on the history and tradition of such practices. 597 U.S. 507, 535 (2022).

Applying the history and traditions test, opening a school board meeting with an invocation does not violate the Establishment Clause. Invocations solemnize an occasion and unify government employees prior to a school board session. This tradition is rooted in our nation's history, and so relief from the permanent injunctive order is appropriate. Furthermore, opening a deliberative body's session with a prayer is not constitutionally coercive, even though students are present as was the case in *Town of Greece v. Galloway*, 572 U.S. 565 (2014).

The Board brought a Rule 60(b) motion ("Motion") to seek relief from the permanent injunction as the law applied in *Chino I* and *Chino II* was overturned. (2-EOR-75). The court below denied the Motion finding it was brought too late (three years after the *Kennedy* decision was rendered) and that the Board's practice of beginning school board meetings with an invocation otherwise violated the Establishment Clause. (1-EOR-4–6).

The lower court erred in concluding that a three-year period from the issuance of an opinion overturning precedent upon which an order was based and the filing of a Rule 60 motion barred the Board from seeking relief from a permanent injunction. The injunction is perpetual in nature and, without court intervention, continues forever in permanency. The three-year time lapse, however, is consistent with the time lapse allowed in other similar cases involving the overturning of constitutional precedent. Furthermore, there is no evidence that the Plaintiffs were prejudiced in any meaningful way by the three-year time-period. And most importantly, forever barring a party from seeking relief from a permanent injunction that enjoins constitutionally protected conduct under these facts is untenable and bad policy. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitute irreparable injury.")

II. JURISDICTIONAL STATEMENT

The district court had jurisdiction of this civil action arising under the United States Constitution pursuant to 28 U.S.C § 1331 & 1343(a)(3) because this case involves a First Amendment Establishment Clause challenge brought pursuant to 42 U.S.C. § 1983.

28 U.S.C. § 1291 provides jurisdiction on appeal from a final order of the district court. This is an appeal from an Order Denying Defendants' Motion for Relief from February 18, 2016, Order under Fed. Rule Civ. Proc. 60. Thus, this appeal is from a final order.

The district court entered judgment on its Order October 10, 2025. (1-EOR-2). Defendants timely appealed on November 10, 2025. (4-EOR-452).

III. ISSUES PRESENTED

On February 18, 2016, a permanent injunctive order was entered forever barring the Board from beginning school board meetings with an invocation. The legal doctrine upon which the order was issued (*Lemon* test) was overturned by the United States Supreme Court in *Kennedy v. Bremerton School District*, 597 U.S. 507 (2022), and was replaced by a historical test. Is the practice of opening a school board meeting with an invocation consistent with the history and traditions of the United States, and if so, should relief be given to the Board from a permanent injunctive order forever barring them from such practice?

IV. STATEMENT OF THE CASE

A. Factual History

The governing body of the Chino Valley Unified School District is the Board. (3-EOR-368); *see also Cal. Educ. Code* § 35160.) The Board has a myriad of responsibilities, which are generally listed in Board Bylaw 9000(a). (3-EOR-368–371).

1. The Board's Responsibilities

The Board's responsibilities include: approving budgets (3-EOR-368); creating policies to ensure proper accounting (3-EOR-369); Performing audits (3-EOR-369); authorizing expenditures of funds (3-EOR-369); approving courses of study and curricula (3-EOR-369); appointing all school district personnel (3-EOR-120, 130, 140, 145, 370); establishing salaries for district employees (3-EOR-370); adjudicating employee grievances/claims (3-EOR-116, 145, 153, 370); adjudicating student discipline issues (3-EOR-111, 120, 130, 140, 134); adjudicating employee discipline issues (3-EOR-111, 120, 130, 140, 149, 158); negotiating labor contracts (3-EOR-111, 120, 130, 140, 149, 158); appointing committee members (3-EOR-113, 143); revising Board bylaws and policies (3-EOR-114, 125, 135, 144); adopting

school calendars (3-EOR-115); negotiating and approving license agreements (3-EOR-115, 124); hiring contractors (3-EOR-115, 144, 153); approving sales of district property (3-EOR-116, 126, 146, 153, 162); settling litigated claims (3-EOR-116, 145, 153, 162); adopting administrative regulations (3-EOR-123); bringing/defending legal action and lawsuits (3-EOR-134, 144, 153); *Cal. Educ. Code* § 35162); and securing copyrights (*Cal. Educ. Code* § 35170), among many other responsibilities.

In the discharge of its duties and obligations, the Board meets twice per month.[2] (3-EOR-382).

As a deliberative, legislative body, the Board is subject to California's open meeting laws – also known as the "Brown Act". (3-EOR-382). Therefore, meetings of the Board are required to be held in public. (3-EOR-317). The Board is obliged to provide an opportunity for members of the public to address the Board on any item of interest to the public. (3-EOR-382); *see also*, *Cal Gov't Code* § 54954.3.

In addition to the publicly elected board members, the Board also has one student member. (3-EOR-373). Although the student member is recognized as a full member of the Board, he or she is not required to attend any of the Board meetings and may not attend closed session meetings. (3-EOR-252, 288, 314, 323, 343, 373). In fact, student members are free to come and go as they please. (3-EOR-146, 275, 373).

The Board is restricted by its Bylaws and California State law from deliberating on agenda items outside of a normal or special meetings of the Board. (3-EOR-307); *Cal. Gov't Code* § 54952.2. Therefore, at the end of every meeting, Board members are given the opportunity to deliberate, debate, or otherwise

[2]In the months of July and August the Board is only obliged to meet once. (EOR 339).

comment on issues raised during the meeting. (3-EOR-117, 118, 125, 126, 125, 135, 145, 154, 163, 172, 180, 201, 211, 220, 230, 240, 284). During this portion of the public meeting, the board members express a wide variety of opinions and beliefs. *Id*. In all cases, the comments made by board members are directly related to agenda items, community news, issues of public concern, or communications to the Board in writing or orally during the meeting. *Id*.

2. The Invocation Policy

The Board had a practice of inviting members of all local clergy from all faiths to provide invocations at its meetings. (3-EOR-391). On October 17, 2013, the Board formalized this practice by adopting Resolution 2013/2014-11 (the "Policy"). (3 EOR-391–397). The Policy recognized the historical tradition of invocations to solemnize meetings of legislative bodies, as confirmed by Supreme Court precedent, including *Marsh v. Chambers* and *Town of Greece v. Galloway*. (3-EOR-391–392). Based on the historical tradition, Supreme Court precedent, and its own history of allowing invocations during its meetings, the Policy stated:

> 1. In order to solemnize proceedings of the Board of Education, it is the policy of the Board of Education to allow for an invocation or prayer to be offered at its meetings for the benefit of the Board of Education and the community.
>
> 2. The prayer shall not be listed or recognized as an agenda item for the meeting so that it may be clear the prayer is not considered a part of the public business.
>
> 3. No member of the Board of Education or District employee or any other person in attendance at the meeting shall be required to participate in any prayer that is offered.
>
> 4. The prayer shall be voluntarily delivered by an eligible member of the clergy or a religious leader in the boundaries of the Chino Valley Unified School District. To ensure that such person (the "invocational speaker") is selected from among a wide pool of the District's

clergy/religious leaders, on a rotating basis, the invocational speaker shall be selected according to the following procedure:

a. The Superintendent's designee shall compile and maintain a database (the "Congregations List") of the religious congregations with an established presence in the boundaries of the Chino Valley Unified School District.

b. The Congregations List shall be compiled by referencing the listing for "churches," "congregations," or other religious assemblies in the annual Yellow Pages telephone directory or directories published for the Chino Valley Unified School District, research from the Internet, and consultation with local chambers of commerce. All churches, congregations or other religious assemblies with an established presence in the boundaries of the Chino Valley Unified School District are eligible to be included in the Congregations List, and any such church, congregation or religious assembly can confirm its inclusion by specific written request to the Superintendent's designee.

. . . .

e. Within thirty (30) days of the effective date of this policy, and on or about December 1 of each calendar year thereafter, the Superintendent's designee shall mail an invitation addressed to the "religious leader" of each church, congregation or religious assembly listed on the Congregations List, as well as to the individual chaplains included on the Congregations List.

. . . .

g. Consistent with paragraph 7 hereof and, as the invitation letter indicates, the respondents to the invitation shall be scheduled on a first-come, first served, or other random basis to deliver the prayers.

. . . .

6. The Superintendent's designee shall make every reasonable effort to ensure that a variety of eligible invocational speakers are scheduled for the Board of Education meetings. In any event, no invocational speaker shall be selected to offer a prayer at consecutive meetings

> of the Board of Education or at more than three (3) Board of Education Meetings in any calendar year.
>
> 7. Neither the Board of Education nor the Superintendent's designee shall engage in any prior inquiry, review of, or involvement in, the content of any prayer to be offered by an invocational speaker.
>
> 8. The Board President shall introduce the invocational speaker and the person selected to recite the Pledge of Allegiance and invite only those persons who wish to participate.
>
> 9. This policy is not intended and shall not be implemented or construed in any way, to affiliate the Board of Education with, nor express the Board of Education's preference for, any faith or religious denomination. Rather, this policy is intended to acknowledge and express the Board of Education's respect for the diversity of religious denominations and faiths represented and practices among the citizens who reside in the Chino Valley Unified School District.

(3-EOR-393–395).

The Policy specified that the prayer not be listed or recognized as an agenda item "so that it may be clear that the prayer is not considered a part of the public business." (3-EOR-393). The Policy also exempted board members, district employees, and any member of the public from participating in any prayer offered. (3-EOR-393). The Policy was passed "to acknowledge and express the Board of Education's respect for the diversity of religious denominations and faiths represented and practices among the citizens who reside in the [District]." (3-EOR-395).

To achieve religiously diverse invocations, the Board invited all clergy or religious leaders with an established presence in the District's boundaries. (3-EOR-393). Indeed, the invocations during board meetings, although mostly Christian, had been diverse. (3-EOR-176, 279 (Hindu invocation); 342 (Muslim invocation)). The

invitation to clergy and religious leaders instructed them that "[t]his opportunity is voluntary, and you are free to offer the invocation according to the dictates of your own conscience. To maintain a spirit of respect and ecumenism, the Board of Education requests only that the prayer opportunity not be exploited as an effort to convert others to the particular faith of the invocational speaker, nor to disparage any faith or belief different from that of the invocational speaker." (3-EOR-394). Although the Policy referred invocations by members of clergy or religious leaders, non-clergy, private citizens had also offered invocations. (3-EOR-215, 223, 233). On rare occasions, such as during special meeting of the Board, board members delivered invocations when a member of the clergy or religious leader was not present. (3-EOR-128, 138, 205, 233, 323).

On November 3, 2016, the Board adopted Policy 9010.5 prohibiting board members from proselytizing. This policy states as follows:

> Bylaws of the Board BB 9010.5
>
> PUBLIC STATEMENTS REGARDING RELIGION OR NON-RELIGION
>
> As the elected legislative body of the Chino Valley Unified School District; the Board of Education recognizes that the First Amendment to the United States Constitution guarantees each person's individual right to free exercise of religion or non-religion and prevents the government and other public officials from establishing a religion or non-religion.
>
> 1. During the public portion of the Board meeting, Board members may discuss religion or religious perspectives to the extent that they are germane to agenda items or public comments.
>
> 2. When acting in their official capacities and when speaking on behalf of the District, Board members shall not proselytize and shall be neutral towards religion and/or non-religion.

(2-EOR-102).

V. PROCEDURAL HISTORY

A. Original Lawsuit

On December 15, 2014, the Freedom From Religion Foundation, together with several other Plaintiffs, filed a complaint against Chino Valley Unified School District Board of Education and its board members – James Na, Sylvia Orozco, Charles Dickie, Andrew Cruz, and Irene Hernandez-Blair. (4-EOR-398). The current Board members are James Na, Sonja Shaw, Jonathan Monroe, Andrew Cruz, John Cervantes, and thus are the current defendants pursuant to Fed. Rule 25(d). (2-EOF-73).

Plaintiffs allege that the Board violated the Establishment Clause by inviting and permitting invocations by religious leaders at the beginning of its school board meetings.[3] (4-EOR-400). Plaintiffs sought damages, declaratory relief, and an injunction preventing the Board and its members from permitting what Plaintiffs considered to be school-sponsored prayer. (4-EOR-422).

Both parties filed motions for summary judgment. (1-EOR-48). On February 18, 2016, the district court entered an order denying the Board's motion for summary judgment, and granting, in part, Plaintiffs' motion for summary judgment. (1-EOR-71–72). The district court's order dismissed Plaintiffs' state law claims against all Defendants. *Id.* In addition, the district court dismissed the Board as an entity with prejudice based on Eleventh Amendment Immunity. *Id.* But the district court ruled against the Board members in their official capacities on the Plaintiffs' federal Establishment Clause claim. (1-EOR-72).

[3]The First Amended Complaint asserted four grounds for relief; one of which was a violation of the Establishment Clause. Only the Establishment Clause claim for relief is discussed because that is the sole ground on which the order and judgment appealed from were based.

The court entered judgment declaring the Board's practice of delivering invocations before Board meetings violated the *Lemon* test and thus violated the Establishment Clause. (1-EOR-69–71). The court first determined that this case was outside of the legislative prayer context as it involved students. The court said, "Because this case is controlled by *Lee* and the school prayer cases, the Court must next decide whether the School Board's prayer policy violates the Establishment Clause." (1-EOR-69).

The court then proceeded to apply the *Lemon* test and found the invocations to violate *Lemon.* In determining the invocations lacked a secular purpose, the court said, "because solemnization of the meetings could have been achieved without resort to religious prayer, the Resolution fails to satisfy the purpose prong of the *Lemon* test." (1-EOR-70). Concerning the endorsement prong of the *Lemon* test, the court said, "[b]ecause the Board's policy and practice of prayer during its meetings ultimately conveys the message of government endorsement of Christianity in the public school system, it fails the *Lemon* test and therefore violates the Establishment Clause of the First Amendment." (1-EOR-71). The court then enjoined the Board from "conducting, permitting or otherwise endorsing school-sponsored prayer in Board meetings." (1-EOR-72).

On July 25, 2018, the Ninth Circuit affirmed the lower court's injunction against the Board. *Chino II*, 896 F.3d at 1132. Just like the lower court, the Ninth Circuit rejected the historical test and applied *Lemon* in upholding the injunction. *See id* at 1142 (1-EOR-25) ("Because prayer at the Chino Valley Board meeting falls outside the legislative-prayer tradition, we apply the three-pronged test first articulated in *Lemon v. Kurtzman* for determining whether a governmental policy or action is an impermissible establishment of religion.")

On December 26, 2018, the Ninth Circuit denied the Board's 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) ("*Chino III*"). Judge O'Scannlain dissented, and was joined by Judges Rawlinson, Bybee, Callahan, Bea, Ikuta, Bennett and Nelson. Judge O'Scannlain noted the history and tradition of prayers before public meetings and argued that rehearing should be given to apply the historical test.

> In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society." *Marsh v. Chambers*, 463 U.S. 783, 792, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983). So instructed the Supreme Court in upholding as constitutional the practice of the Nebraska Legislature of opening each legislative day with a prayer. "The Court has considered this symbolic expression to be a tolerable acknowledgement of beliefs widely held, rather than a first, treacherous step towards establishment of a state church." *Town of Greece v. Galloway*, 572 U.S. 565, 134 S.Ct. 1811, 1818, 188 L.Ed.2d 835 (2014) (internal quotation marks and citation omitted). And so reaffirmed the Supreme Court in upholding as constitutional the practice of a New York town board opening its monthly board meetings with a prayer.

Id. at 1298 (J. O'Scannlan dissenting).

The dissent noted that the presence of children at such meetings is consistent with history and should not preclude the application of a historical test.

> Such practice was constitutional despite the fact that the setting of a town board meeting may be "intimate," with "children or teenagers[ ] present to receive an award or fulfill a high school civics requirement." *Id*. at 1846 (Kagan, J., dissenting). Despite these features, the town board meeting "fit[ ] within the tradition long followed in

> Congress and the state legislatures." *Id*. at 1819 (Kennedy, J., opinion of the Court). Nowhere did the Court limit such tradition specifically to Congress, state legislatures, or town boards. *Id*. at 1818–19.

Id. at 1300.

The dissent noted that the purpose of finding a historical analogue is not to find a one-to-one exact match. Rather, applying a historical test illuminates what the founders viewed as an unconstitutional establishment of religion. Judge O'Scannlain said,

> [S]uch historical foundation illuminates what the drafters were understood to have meant and how the Establishment Clause applied to early practices…. [W]hat is required for a legislative prayer practice to be constitutional is not an unbroken historical pattern of the precise practice at issue…. All that is needed is simply for the practice to "fit[ ] within the tradition long followed."

Id. (citations omitted).

The dissent then noted there was ample historical analogs to show the founders would not have viewed prayers before school board meetings to be an unconstitutional establishment of religion.

> In fact, as circuit has observed in considering the applicability of the tradition, "dating from the early nineteenth century, at least eight states had some history of opening prayers at school-board meetings." And, until the mid-twentieth century, the use of public school facilities for religious education of students and the practice of prayer in public school classrooms were thought to be consistent with the Establishment Clause.

Id. at 1303 (citations omitted).

After en banc review was denied, certiorari review was not sought from the U.S. Supreme Court.

B. *Lemon* Overturned

Roughly four years after the Ninth Circuit issued its decision in *Chino II*, the Supreme Court abrogated the *Lemon* test in *Kennedy v. Bremerton School District*. 597 U.S. 507, 535 (2022). In *Kennedy*, the district court applied *Lemon* to hold that a high school football coach's prayer following games violated the Establishment Clause. *Id*. at 534. In reversing the district court, the Supreme Court noted that the *Lemon* test and its progeny were an "abstract" and "ahistorical" approach to the Establishment Clause that "invited chaos" to the lower courts. *Id*. The Court noted that the Establishment Clause does not compel the "government to purge from the public sphere anything an objective observer could reasonably infer endorses or partakes of the religious." *Id*. (citing *Van Orden v. Perry*, 545 U.S. 677, 699, (2005) (Breyer, J., concurring in judgment) (quotations omitted).

In place of the *Lemon* test, the Court instructed that "the Establishment Clause must be interpreted by reference to historical practices and understandings." *Id*. (citing *Town of Greece v. Galloway*, 572 U.S. 565 (2014) (internal quotes omitted)). This analysis must focus on the original meaning and history. *Id*. at 536. Because the Ninth Circuit had relied on a *Lemon* analysis of Coach Kennedy's actions, the Supreme Court reversed it. *Id*. at 544.

C. The Board's Rule 60 Motion

As the law on which the injunction was based was overturned by the Supreme Court, the Board sought relief from the permanent injunctive order. The Board, which consists of several new members, now desires to implement a policy allowing for invocations to start school board meetings that comply with the history and tradition of invocations prior to public meetings of deliberative bodies and, in particular, of school boards. Consequently, the Board brought this Motion seeking relief from the Feb 18, 2016, Order that permanently enjoined Board members from

"conducting, permitting or otherwise endorsing school-sponsored prayer in Board meetings" and to "permit the new Chino Valley Board to create a policy that permits an invocation to be done prior to board meetings in a manner that comports with current law." (2-EOR-93).

1. District Court's October 10, 2025, Order denying the Board's Rule 60 Motion

The lower court denied the Board's Motion. First, the lower court said the Motion was not filed within a "reasonable time" as there was a three-year lapse between when *Kennedy* was decided and when the Rule 60 Motion was filed. The court then noted that Plaintiffs were prejudiced as they had to find new counsel. (1-EOR-5). The Court then found denying relief was appropriate pursuant to the court's interest in the finality of judgments, again citing to the contention that Plaintiffs had to obtain new counsel. *Id.*

The court then found that *Kennedy's* overturning of *Lemon* did not represent a "significant change in the law." *Id.* The court said, "overturning *Lemon*, does not undermine the validity of either the Order or the Opinion." *Id.* The court then noted that *Kennedy* cited favorably to *Lee v. Weisman*, 505 U.S. 577 (1992) and *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000). (1-EOR-7). The court then held that the history and traditions analysis of *Town of Greece* did not apply to the current case.

> The Order next determined that the legislative exception allowing for prayer in legislative sessions did not apply to the Chino Valley School Board meetings "[b]ecause of the distinct risk of coercing students to participate in, or at least acquiesce to, religious exercises in the public-school context."

(1-EOR-6).

The court then noted:

> To the extent that Defendants try and argue that an analysis of history should change the outcome, *Kennedy* already controls this Court's historical analysis. (Mot. at 13-20.) The Supreme Court noted that it "has long held that government may not, consistent with a historically sensitive understanding of the Establishment Clause, 'make a religious observance compulsory.'" *Kennedy*, 59 U.S. at 536-37.

(1-EOR-7).

The court noted that the previous Ninth Circuit opinion in this matter was similarly premised on the presence of school children:

> The Ninth Circuit Opinion affirmed this Court's Order on nearly identical grounds. The Ninth Circuit founds that Defendants' prayer policy and practice violate the Establishment clause because they "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.

Finally, the lower court distinguished what the Supreme Court did in *Agastini v. Felton* to the present case. The district court said,

> Although the Supreme Court reversed the judgement of the lower courts, it did not provide lowers courts permission to "conclude our more recent cases have, by implication, overruled an earlier precedent." *Id*. at 237. The Court lauded the trial court for recognizing that the Rule 60(b)(5) motion "had to be denied unless and until this Court reinterpreted the binding precedent.

(1-EOR-8).

The district court concluded its opinion by stating that the Supreme Court has not changed its Establishment Clause jurisprudence. "As described above, this Court is not persuaded that the Supreme Court has overturned its line of school prayer cases upon which this Court and the Ninth Circuit relied upon. Accordingly, the Court must deny the Rule 60(b)(5) motion." *Id.*

VI. SUMMARY OF THE ARGUMENT

The Board is entitled to relief from the permanent injunction entered on February 18, 2016, as the law upon which it was premised, *Lemon v. Kurtzman*, was overturned by the United States Supreme Court in *Kennedy v. Bremerton School District*, 597 U.S. at 507. The lower court and the Plaintiffs keep insisting that *Kennedy* had nothing to do with prayer involving schools and the line of cases on school prayer were left intact in *Kennedy*.

The lower court and the Plaintiffs conveniently omit two very important aspects of the *Kennedy* decision. First, *Kennedy* involved a high school coach praying at a high school football game where students witnessed it and some participated in it. *See id*. at 517. Simply put – the Supreme Court did not view the coach's actions as coercive to the students. Simply witnessing an invocation is not coercive. This is consistent with the volumes of history regarding prayers before public meetings, as seen in *Marsh v. Chambers* and *Town of Greece v. Galloway*.

Secondly, *Lee* and *Santa Fe* are not exceptions to the historical test, they are part of the historical test. And that is where the lower court erred. It rejected applying the historical test to the Board's invocation practice. Instead, it found that the historical test didn't apply and went straight to *Lemon* to prove that the prayers were coercive under the *Lemon* test. What the lower court should have done, post *Kennedy*, is apply the historical test to determine – in light of the history and traditions of the United States – would the invocation practice of the Board be viewed as an Establishment Clause violation? Part of that analysis could include any relevant facts of coercion. But there is no coercion here. The court only found coercion by applying the endorsement and purpose prongs of the *Lemon* test.

When the historical test is properly applied to these facts, it is clear that the Board's practice would not have been considered coercive historically and the permanent injunction should be lifted.

VII. STANDARD OF REVIEW

A ruling on a Rule 60(b) motion is reviewed under an abuse of discretion standard. *Casey v. Albertson's Inc.*, 362 F.3d 1254, 1257 (9th Cir. 2004). A district court abuses its discretion when it misapplies the law. *See Faile v. Upjohn Co.*, 988 F.2d 985, 986-87 (9th Cir. 1993). All questions of law underlying the court's decision to deny a Rule 60 motion are reviewed de novo. *Jeff D. v. Kempthorne,* 365 F.3d 844, 850–51 (9th Cir.2004).

VIII. ARGUMENT

A. The District Court Erred By Denying The Board's Rule 60 Motion Because The Board's Requested Relief Is Appropriate Considering The Legal Basis For The Permanent Injunction Has Been Overturned.

Federal Rule of Civil Procedure Rule 60(b) allows the Court to relieve a party from a final judgement, including an injunction, when it was based on a standard that has been reversed or where circumstances have changed such that it is no longer equitable. *See Anderson v. Central Point School Dist. No. 6*, 746 F.2d 505, 507 (9th Cir. 1984) (noting Rule 60 is a codification of the universally recognized principle that a court has continuing power to modify or vacate a final decree); *System Federation No. 91, Ry. Emp. Dept., AFL-CIO v. Wright*, 364 U.S. 642 (1961) (noting a district court has broad discretion to vacate or modify its prior orders or judgements); *see also Rufo, v. Inmates of Suffolk County Jail*, 502 U.S. 687, 760, (stating that Rule 60(b)(5)—which states that, "upon such terms as are just, the court may relieve a party ... from a final judgment ... [when] it is no longer equitable that the judgment should have prospective application"—authorizes relief from an

injunction if the moving party shows a significant change either in factual conditions or in law).

A court must never ignore significant changes in the law or the circumstances underlying an injunction lest the decree be turned into an "instrument of wrong." *U.S. v. Swift & Co.*, 286 U.S. 106, 114 (1932).

In fact, in a case very much analogous to the present case, a Rule 60 motion was the vehicle used to seek and obtain relief from a permanent injunctive order when the Supreme Court reversed a decision that served as the basis for the injunction. *See Agostini v. Felton*, 521 U.S. 203, 218, 237 (1997) (deciding that Establishment Clause law had significantly changed warranting petitioners' relief under Rule 60(b)(5)). In *Aguilar v. Felton*, 473 U.S. 402 (1985), the Supreme Court held that New York City's program that sent public school teachers into parochial schools to provide remedial education to disadvantaged children pursuant to Title I of the Elementary and Secondary Education Act of 1965 necessitated an excessive entanglement of church and state and violated the First Amendment's Establishment Clause. On remand, the District Court entered a permanent injunction reflecting that ruling.

Ten years later, the parties bound by the injunction filed a Rule 60 motion in the district court seeking relief from the injunction's operation under Federal Rule of Civil Procedure 60(b)(5). As grounds for relief, the parties argued that the injunction cannot be squared with this Court's intervening Establishment Clause jurisprudence and is no longer good law.

The Supreme Court agreed. *See Agostini v. Felton*, 521 U.S. at 203–04. In no uncertain terms, the Supreme Court held that "[a] court errs when it refuses to modify an injunction or consent decree in light of such changes." *Id.* at 215 (citing *System Federation No, 91, v. Wright*, 364 U.S. 642, 647 ("1961) ("[T]he court cannot be

required to disregard significant changes in law or facts if it is satisfied that what it has been doing has been turned through changed circumstances into an instrument of wrong" (internal quotation marks omitted)).

The dispositive issue in *Agostini* was whether the law had changed. *See Agostini*, 521 U.S. at 204 ("Thus, petitioners' ability to satisfy Rule 60(b)(5)'s prerequisites hinges on whether the Court's later Establishment Clause cases have so undermined *Aguilar* that it is no longer good law.") The Court then did an independent analysis of whether the challenged conduct violated the current understanding of the Establishment Clause and concluded it did not. *See id*. at 206 (finding that New York's Title I program did not run afoul of the Establishment Clause).

The Court said, "Moreover, in light of the Court's conclusion that *Aguilar* would be decided differently under current Establishment Clause law, adherence to that decision would undoubtedly work a 'manifest injustice,' such that the law of the case doctrine does not apply." *Id*. at 236.

In the same way, Rule 60 relief is warranted here as the basis for the injunctive order has been overturned and application of the new test would render the practice constitutional, thus adherence to that decision would "undoubtedly work a manifest injustice." *See id*.

The lower court cautioned that it was not the proper court to provide Rule 60 relief since it is based on a change of Supreme Court law. The lower court said, "Although the Supreme Court reversed the judgement of the lower courts, it did not provide lowers courts permission to 'conclude our more recent cases have, by implication, overruled an earlier precedent.'" *Id*. at 237. The Supreme Court then "lauded" the trial court for recognizing that the Rule 60(b)(5) motion "had to be denied unless and until this Court reinterpreted the binding precedent." *Id*. at 238.

But what the Supreme Court was referring to was the overturning of precedent that served as the basis for the Rule 60 motion. Here, the Supreme Court has already reversed *Lemon*, so no implication is needed. In addition, while in *Agostini*, the original injunctive order was directed by the Supreme Court (and then entered by the lower court), here, the injunctive order was entered by the district court and then affirmed by the Ninth Circuit. The Supreme Court's direct order is not implicated in this case as it was in *Agostini*.

1. The Permanent Injunction Enjoining The Board Order Is Based On The Now Defunct *Lemon* Test.

Both the Ninth Circuit and the District Court, in issuing and upholding the permanent injunctive order, rejected application of the historical test to this matter and instead, applied the *Lemon* test. The District Court said, "Because this case is controlled by *Lee* and the school prayer cases, the Court must next decide whether the School Board's prayer policy violates the Establishment Clause" and then proceeded to apply *Lemon*. (1-EOR-69). The court made it clear what it was doing when it said, "If the challenged practice fails any part of the *Lemon* test, it violates the Establishment Clause." *Id*. This is a clear and unequivocal rejection of applying the history and traditions test in favor of *Lemon*. The court did not analyze whether the Board's actions and policies were consistent with the history of the United States from the time of ratification of the First and then Fourteenth Amendments. The court did not analyze whether the presence of students during such invocations were historically understood to be unconstitutionally coercive. There was no analysis of whether exposure to prayer in a deliberative body context was historically problematic, even in the presence of students. All the court did was cite to school prayer cases (*Lee* involving prayers at high school graduation ceremonies and *Santa*

Fe involving prayers at high school football games) to justify not applying the historical test and rather to apply *Lemon*.

Likewise, the Ninth Circuit refused to apply the historical test. *See Chino II*, 896 F.3d at 1142 (1-EOR-25). ("Because prayer at the Chino Valley Board meeting falls outside the legislative-prayer tradition, we apply the three-pronged test first articulated in *Lemon v. Kurtzman* for determining whether a governmental policy or action is an impermissible establishment of religion."). The Ninth Circuit Panel also expressly declined to conduct a historical analysis and stated that such an analysis would be impossible because school boards did not exist at the time of the founding. *Id*. at 1148.

The *Lemon* test consisted of three prongs to determine if the government violated the Establishment Clause. A court must consider: (1) whether the government practice has a secular legislative purpose; (2) its principal or primary effect must neither advance nor inhibit religion; and (3) it must not foster an "excessive entanglement with religion." *Lemon*, 403 U.S. at 612-13. Needless to say, the *Lemon* test does not consider the history or tradition of a policy.

2. In *Kennedy,* The Supreme Court Overturned *Lemon* And Replaced The *Lemon* Test With A History And Tradition Analysis.

Roughly four years after the Ninth Circuit issued its decision in *Chino II*, the Supreme Court abrogated the *Lemon* test in *Kennedy v. Bremerton School District*. 597 U.S. 507, 535 (2022). In *Kennedy*, the district court applied *Lemon* to hold that a high school football coach's prayer following games violated the Establishment Clause. *Id*. at 534. In reversing the district court, the Supreme Court noted that the *Lemon* test and its progeny were an "abstract" and "ahistorical" approach to the Establishment Clause that "invited chaos" to the lower courts. *Id*. The Court noted that the Establishment Clause does not compel the "government to purge from the

public sphere anything an objective observer could reasonably infer endorses or partakes of the religious." *Id*. (citing *Van Orden v. Perry*, 545 U.S. 677, 699, (2005) (Breyer, J., concurring in judgment) (quotations omitted).

In place of the *Lemon* test, the Court instructed that "the Establishment Clause must be interpreted by reference to historical practices and understandings." *Id*. (citing *Town of Greece v. Galloway*, 572 U.S. 565 (2014) (internal quotes omitted)). This analysis must focus on original meaning and history. *Id*. at 536. Because the Ninth Circuit had relied on a *Lemon* analysis of Coach Kennedy's actions, the Supreme Court reversed it. *Id*. at 544.

3. Prayer Before School Board Meetings Is Rooted In History And Tradition And Is Not Be Prohibited By The Establishment Clause.

The Court's decision in *Kennedy* constituted a significant change in the law that renders the continuing injunction in the present matter inequitable. Following *Kennedy*, to determine if a practice violates the Establishment Clause a court must now consider history to determine whether such practices fit within our countries' history and tradition, an application the previous courts absconded in favor of *Lemon*. *See* 597 U.S. at 534-355; *Chino II*, 896 F.3d at 1148. Because the law now requires such an analysis – and that analysis demonstrates that Chino Valley's practice does not violate the Establishment Clause–this Court should vacate the injunction.

Applying the history and traditions test shows that the founders would not have viewed opening a public meeting with an invocation as an unconstitutional establishment of religion. Since the time of the Founding, all three branches of government regularly conducted invocations during the course of official government business. Likewise, at the time of the ratification of the Fourteenth Amendment, these practices continued, and invocations were a common way for

school board meetings to begin. Accordingly, Chino Valley's policy of beginning school board meetings with an invocation comports with our countries history and tradition.

(a) Establishment Clause At The Founding Was Not Thought To Prohibit Government Invocations.

The First Congress's interpretation of the Establishment Clause in 1789 is especially significant, as it "was a Congress whose constitutional decisions have always been regarded, as they should be regarded, as of the greatest weight in the interpretation of that fundamental instrument." *Myers v. United States,* 272 U.S. 52, 174–175 (1926). The First Congress employed congressional Chaplains to offer daily prayers in the Congress. *Lynch*, 465 U.S. 674. Accordingly, the Founding Fathers saw no conflict between public prayer done before legislative session and the Establishment Clause. Through the 18th and 19th century, Congress regularly appropriated public money to religious organizations to provide education to Indian children. *Wallace v. Jaffree*, 472 U.S. 38, 103 (1985) (Rehnquist J., dissenting).

As to the executive branch, in 1789 President Washington issued a proclamation following a Joint Resolution from Congress that the President "recommend to the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God." *Jaffree*, 472 U.S. at 102 (Rehnquist J., dissenting) (citing 1 J. Richardson, Messages and Papers of the Presidents, 1789–1897, p. 64 (1897).) President Washington obliged, and his proclamation stated, in part, "[W]e may then unite in most humbly offering our prayers and supplications to the great Lord and Ruler of Nations and beseech Him to pardon our national and other transgressions." *Id*.

As to the Judicial Branch, since the time of John Marshall, the Supreme Court has begun each session by invoking the protection of God, with the traditional cry which ends, "God save the United States and this Honorable Court!" *Engel v. Vitale*, 370 U.S. 421, 446–450 (1962) (Stewart, J., dissenting); *see also* 1 C. Warren, *The Supreme Court in United States History* 469 (1922).

(b) The Establishment Clause After The Enactment Of The Fourteenth Amendment Likewise Does Not Prohibit Government Invocations.

The Fourteenth Amendment's ratification brought with it the application of the Establishment Clause against the states. Around this time public schools started to become commonplace thanks to reformers like Horace Mann, a Massachusetts legislator and the secretary on the state's Board of Education. Kaestle, C., *Pillars of the republic: Common schools and American society*, 1780-1860, p. 75; (1983), Hill and Wang.

History demonstrates that, since the inception of school boards, many began their meetings in prayer. In Pennsylvania, public school board meetings included clergy-led opening prayer from as early as 1820.[4] In 1857, school boards in Wisconsin opened in prayer.[5] Likewise, as early as 1859, school boards in Iowa began meetings with invocations.[6]

[4] Evan Lee, *School Board Prayer: Reconciling the Legislative Prayer Exception and School Prayer Jurisprudence*, 54 Akron L. Rev. 75, 99 (citing Second Annual Report Of The Controllers Of The Public Schools Of The First School District Of The State Of Pennsylvania 7 (1820)).

[5] *Id*. (citing 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).)

[6] *Id*. (citing Journal Of The Board Of Education Of The State Of Iowa, At Its Second Session, December, A.D. 1859 5 (1860); *see also* Marie Wicks, *Prayer Is*

Furthermore, school boards at this time were often composed of clergy. 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." *Wicks*, at 31. Likewise, in Massachusetts, public schoolboards were noted to be comprised of clergy. *Id*; *see also Am. Humanist Ass'n*, 851 F.3d at 527 ("dating from the early nineteenth century, at least eight states had some history of opening prayers at school-board meetings.")

Simply put, there is nothing in the history and traditions of American life to suggest that opening up public meetings with an invocation was an unconstitutional establishment of religion.

4. The Court Erred In Placing The Burden On The Board To Prove The History Of The Practice.

As the historical and traditions test is now established as the appropriate test for Establishment Clause claims, the burden is on the Plaintiff to prove its case, not the defendants. In this matter, it is the Plaintiffs who brought the claim that the practice of opening up a deliberative body with a prayer violates the Establishment Clause. Thus the burden is on the Plaintiffs to prove that allowing invocations were not consistent with the history and traditions of the United States. In this regard, the Plaintiffs wholly failed. They offered no historical analysis. To the contrary, the Board and the Supreme Court have provided many examples of where invocations have been consistent with historical practices. *See Marsh v. Chambers*, 463 U.S. 783 (1983); *Town of Greece v. Galloway,* 572 U.S. 565, (2014)*; Chino III*, 910 F.3d at 1297 (J. O'Scannlain dissenting); *Am. Humanist Ass'n*, 851 F.3d at 527 ("dating from the early nineteenth century, at least eight states had some history of opening

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Prologue: the Impact of Town of Greece on the Constitutionality of Deliberative Body Prayer at the Start of School Board Meetings, 31 J.L. & Pol. 1, 30-31 (2015).

prayers at school-board meetings."). And this includes situations where students were present. *See Town of Greece,* 572 U.S. at 624 (Kagan, J., dissenting) (noting that setting of a town board meeting may be "intimate," with "children or teenagers[ ] present to receive an award or fulfill a high school civics requirement.")

5. The History And Traditions Test Does Not Require A One-To-One Match.

In the present matter, the Ninth Circuit stated that because free public education was virtually non-existent at the time of the founding that the "Framers consequently could not have viewed the Establishment Clause as relevant to local schools' and school boards' actions." *Chino II,* 896 F.3d at 1148. Given *Kennedy*'s requirements, this statement is misguided for two reasons.

First, the lack of an identical historical practice is not an adequate basis to forego historical analysis. *Kennedy*, 597 U.S. at 534-355. Rather, a historical analysis is only meant to illuminate what the Founder's understood the Establishment Clause to mean. *Town of Greece*, 572 U.S. at 565. This does not require a one-to-one comparison of identical practices. Rather, the court must consider analogous or similar practices that were around at the time of the founding to expound on what the Founder's intended the Establishment Clause to permit. *See Kyllo v. United States*, 533 U.S. 27 (2001). The goal is to get an understanding of whether the founders would have viewed the challenged conduct as unconstitutional.

> [S]uch historical foundation illuminates what the drafters were understood to have meant and how the Establishment Clause applied to early practices. *Id.*; *see also Marsh*, 463 U.S. at 791, 103 S.Ct. 3330 ("This unique history leads us to accept the interpretation of the First Amendment draftsmen who saw no real threat to the Establishment

> Clause arising from a practice of prayer similar to that now challenged.").

Chino III, at 1303 (J. O'Scannlain, dissent).

This concept is not new. The Court's ruling in *Kennedy* is simply its latest in a series of opinions requiring courts to look to history rather than applying rote tests. *See Kyllo*, 533 U.S. 27 (determining whether the use of a thermal-imaging device from the street constitutes a search under the Fourth Amendment despite no such technology at the time of the founding); *South Dakota v. Wayfair, Inc*, 585 U.S. 162 (2018) (determining how to tax internet commerce under the Commerce Clause); *D.C. v. Heller,* 554 U.S. 570 (2008) (determining whether a ban on handguns in the home for self-defense violated the Second Amendment.). In *New York State Rifle & Pistol Ass'n v. Bruen*, the Court held the "two-step" intermediate scrutiny test was "one step too many" for determining whether a gun licensing scheme violated the Second Amendment. 597 U.S. 1, 19 (2022). Rather, the proper test must consider if a law or regulation violated the text of the Constitution "as informed by history." *Id*. (emphasis added). The Court noted that the Founders created a constitution "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." Id. at 27-28 (*citing McCulloch v. Maryland*, 4 Wheat. 316, 415 (1819)). Accordingly, while technology and society change, "the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated." *Id*. Historical understanding must be extrapolated to determine how the clause is meant to apply to contemporaneous practices. *See Marsh v. Chambers*, 463 U.S. 783, 790, (1983). Thus, "[t]he existence from the beginning of the Nation's life of a practice, [while] not conclusive of its constitutionality ... [,] is a fact of considerable import in the interpretation" of the Establishment Clause. *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 681,

(1970) (Brennan, J., concurring); *see also Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (stating, "The Court's interpretation of the Establishment Clause has comported with what history reveals was the contemporaneous understanding of its guarantees"); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring) ("[T]he line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers").

Second, a proper historical analysis focuses on understanding of the scope of the right at the time of the founding in 1776 and around the time of the passage of the Fourteenth Amendment in 1868. As the Court noted in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 20 (2022), consideration of the history post-ratification is also relevant to how the text was understood immediately following its application to the states through the Fourteenth Amendment. *Id.* at 35 ("examination of a variety of legal and other sources to determine the public understanding of a legal text in the period after its enactment or ratification was 'a critical tool of constitutional interpretation"). Consideration of the ratification period is especially relevant in the present matter because school boards *did* exist at this time.

6. The Coercion Principles In *Lee* And *Santa Fe* Counsel In Favor Of Applying The History And Traditions Test, Not Abandoning It.

The lower court erred by misapplying the historical test to the principles of *Lee* and *Santa Fe*, both cited favorably by the Supreme Court in *Kennedy.* The district court said,

> Defendants' argument that *Lemon's* demise warrants relief from the injunction misses the forest for the trees. This Court's Order provided an extensive background on the Establishment Clause and, specifically, cases related to

> school prayer. (Order at 13-17.) These include cases like *Lee v. Weisman*, 505 U.S. 577 (1992) and *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), which the Supreme Court cited favorably in *Kennedy*. Compare Order at 15-16 with *Kennedy*, 597 U.S. at 541-42. (Order at 23.) In its analysis of the legislative exception, the Order reviewed *Town of Greece*, 572 U.S. 565 (2014), where the Supreme Court first developed its "historical practices and understandings test" in the context of the Establishment Clause. (Order at 22.) This Court held that "*Town of Greece* left the school prayer cases … undisturbed."

(1-EOR-6).

The court then applied the *Lemon* test to show that the prayer practice was "coercive."

> Finally, the Court turned to the Lemon test and, in doing so, focused on the coercive nature of the Defendants' prayer policy, finding that board members made "overtly religious, proselytizing statements" and that "the primary effect of the Board's Resolution and statements is to promote Christianity."

Id.

The district court erred; *Lee* and *Santa Fe* are not *exceptions* to the historical test. Rather, the Supreme Court viewed the coercion test as compatible with the historical test and viewed the conduct in *Lee* and *Santa Fe* to be coercive "because the school had 'in every practical sense compelled attendance and participation in' a 'religious exercise.'" *Kennedy*, 597 U.S. at 541. Yet, when applying that same historical test, the court found that opening public meetings with an invocation is not coercive to members in the audience, even if some of those members happen to be children. *See Town of Greece,* 572 U.S. at 624 (Kagan, J., dissenting). The district court assumed the Board's decision to open a forum for speech by allowing an invocation before its meetings meant coercion. It does not. The prayer opening the public, legislative meeting at issue in this case is no more coercive than the personal,

yet publicly viewable, prayer at the high school football game in *Kennedy*. Yet, the district court contorted the Supreme Court's holding in *Kennedy* beyond the recognizable to support its conclusion.

While actual coercion of religious activity is constitutionally problematic historically, the presence of children while invocations are taking place does not make the practice coercive. *See Town of Greece* at 1846 (Kagan, J., dissenting) (noting that invocations were done with "children or teenagers[ ] present to receive an award or fulfill a high school civics requirement."). Despite children being present, invocations at town board meeting "fit[ ] within the tradition long followed in Congress and the state legislatures." *Id*. at 1819 (Kennedy, J., opinion of the Court) The presence of children alone is not dispositive because history demonstrates that prayer was done in front of children, such as at presidential inaugural addresses, congressional meetings, and supreme court sittings.

While the Court compared the facts of the present matter with *Marsh* and *Greece*–both of which analyzed history–the lower court itself did not analyze history as required by *Kennedy*. The history, as discussed above, sheds greater light on *Marsh* and *Greece*. Simply reading these cases with no context only leaves one with half an understanding. More importantly, there is no historical evidence to suggest that prayer before school board meetings were unconstitutional or otherwise not permitted under the First or Fourteenth Amendments.

In *Marsh* and *Galloway*, the Supreme Court affirmed that deliberative bodies have a well-established tradition of opening with invocations. In *Marsh v. Chambers*, the Court upheld the practice of opening sessions of legislative "and other deliberative bodies" with prayer as it is "deeply embedded in the history and tradition of this country." 463 U.S. 783 (1983). The Court noted that the tradition began in the colonies and was linked to a State's established church. Based on this

and numerous other examples of legislative sessions beginning in prayer, the Court stated, "Clearly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress." *Id*. at 788.

In *Town of Greece v. Galloway*, the Court upheld the town beginning its board meetings with a prayer. The Court noted that a practice such as prayer before a meeting does not require an exact historical analogy to be constitutional. *Id.* at 576. Rather, constitutionality of a practice can be by reference to historical practices and understandings at the time. *Id*. The Court affirmed that *Marsh* "stands for the proposition that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted." *Id*. at 577. An invocation lends gravity to the occasion and reflects values long part of our nation's heritage. *Id*.

Given that the history of prayer in public schools and the Supreme Court's precedent, this Court should vacate the injunction in the present matter and permit the new Chino Valley Board to follow its policy that permits an invocation to be done prior to board meetings that is directed at board members and is meant to solemnify and unify the Board.

While this Court previously held that the legislative exception does not apply, the Court only did so by a one-to-two comparison with *Town of Greece* and *Marsh*. *Chino I*, 896 F.3d 1132. It did not conduct any historical analysis itself. It also noted that historical analysis could not be done because school boards did not exist at the time of the founding. As discussed above, after *Kennedy,* courts are now required to apply the historical practices and such an analysis demonstrates that the Establishment Clause does not prohibit invocations before a school board meeting.

B. The Lower Court Erred In Finding A Three-Year Time Lapse Precluded Relief From A Permanent Injunctive Order.

The lower court erred in holding the delay was unreasonable. A three-year lapse is consistent with the time lapse in other cases, including cases where the U.S. Supreme Court ultimately provided relief under Rule 60. In addition, a three-year lapse is reasonable in light of the fact the Board is a deliberative body, with many matters on the agenda and regularly changing board members. Finally, it is reasonable considering that a permanent injunction is permanent and never ending, and that Plaintiffs experienced no real prejudice.

1. A Three-Year Period Is Reasonable In Light Of Similar Cases.

There is no "outside limitation on the time" which a Rule 60(b)(5) motion may be brought, it simply must be brought within a "reasonable" time. *Corn v. Guam Coral Co.*, 318 F.2d 622, 632 (9th Cir. 1963); Fed. R. Civ. P. 60(c)(1). "What constitutes reasonable time depends on the facts of each case." *United States. v. Holtzman*, 762 F.2d 720, 725 (9th Cir. 1985). For instance, in *Agostini v. Felton*, the plaintiffs filed suit alleging that a Supreme Court case decided roughly three years prior "changed to make legal what the [injunction] was designed to prevent." *Id*., at 214. The total amount of time between the permanent injunction being entered and the motion for relief was twelve years. Rather than focus on the three-year lapse, the Court concluded that the ability to satisfy Rule 60(b)(5) hinged on whether in fact intervening law had rendered *Aguilar* no longer good law. *Id*. at 217–18. *See also Railway Employees v. Wright*, 364 U.S. 642, 652–653 (1961) (Rule 60 motion heard to challenge prospective ruling despite being based on law that was passed 6 years earlier); *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367 (1992) (hearing Rule 60 motion brought ten years after the Supreme Court decision that it claimed

modified and warranted a modification to the prospective relief); *Pasadena City Bd. of Ed. v. Spangler*, 427 U.S. 424, 437–438 (1976) (motion filed in 1974 led the Court to hold injunction should have been vacated due to 1971 Supreme Court holding in *Swann*); *U.S. v. Holtzman*, 762 F.2d 720, 725 (9th Cir. 1985) (allowing a motion to vacate a permanent injunction to proceed despite being filed six years after the final judgement); *Associated Builders & Contractors v. Mich. Dept. of Lab. and Econ. Growth*, 543 F.3d 275, 278–79 (6th Cir. 2008) (delay of two or more years was reasonable in seeking relief from permanent junction). These cases demonstrate, a delay of several years is not uncommon and is not ground to find unreasonable delay. This is especially true when a Rule 60 Motion seeks to overturn prospective relief. Courts have held that the reason for the delay

In *Rufo*, inmates sued the jail alleging the poor facilities constituted unconstitutional conditions. 502 U.S. 367 (1992). The Court agreed and entered a permanent injunction. Defendants did not appeal. *Id*., at 373.After defendants failed to remedy the situation, they, under threat, entered into a consent decree in 1979 to remedy the situation—one of the agreements being not to double bed prisoners in cells. In 1989, 10 years later, the sheriff moved to modify the decree under a Rule 60 Motion to allow for double bedding prisoners in cells. *Id*., at 376. The Sheriff argued that based on new law and facts, the modification was necessary. He alleged a decision in *Bell v. Wolfish*, which was issued ten years earlier in 1979, constituted a change in law warranting a modification of the consent decree as the case stated double bedding prisoners was not always unconstitutional. *Id*.[7] The lower court denied the request and the appellate court affirmed. *Id*. at 376-77.

[7] Like an injunction, consent decrees are subject to Rule 60 Motions. *Id*. at 378, 384.

Despite being brought ten years after the change in law, the Supreme Court vacated the lower courts' holdings. The Court stated "A consent decree must of course be modified if, as it later turns out, one or more of the obligations placed upon the parties has become impermissible under federal law." *Id*., at 388. The Court held that *Bell v. Wolfish* did not create new law but only clarified it. Regardless, it vacated the decision and remanded the case for the lower court to determine if the parties to the consent decree believed that double bedding prisoners was a constitutional violation—because such a misunderstanding could form an adequate basis for modification.

In the present matter, Defendant's argument is stronger because it is not based on a misunderstanding of the law, but rather on an actual change in the law. As the Court stated, a judgement "must of course be modified" when it turns out the obligations placed upon a party becomes impermissible under federal law. That is exactly what has happened in the present case, as the injunction now impinges on the Board's First Amendment Rights. For if the permanent injunction is not warranted under law, it serves as a prior restraint on speech. The Board also acted more quickly than the defendant in *Rufo*, who waited 10 years to file his Rule 60 motion.

When the ability to exercise constitutional rights is at issue, even less weight should be given to the amount of time taken to bring a Rule 60 motion. For the purposes of argument, if Board is correct that it has a First Amendment right to solemnize school board meetings with prayer, the lower court's order prohibits the school from *ever* being able to exercise that right until the end of time. This runs contrary to the laws heightened protections for First Amendment Rights. *See e.g. Reed v. Town of Gilbert,* 576 U.S. 155 (2015) (holding strict scrutiny is the appropriate standard for content based laws); *303 Creative LLC v. Elenis*, 600 U.S.

570 (2023) (holding laws compelling speech subject to strict scrutiny); *Texas v. Johnson*, 491 U.S. 397 (1989) (holding expressive conduct requires the highest level of protection). It is not conceivable that failing to bring a suit within three years can cause an entity to forever lose its First Amendment rights. The injunction only makes sense if, in fact, the Board is substantively wrong and there is in fact no right to such speech.

The lower court also erred as a matter of law in its differentiation of *Agostini v. Felton*, 521 U.S. 203 (1997). The lower court discussed *Agostini* for the proposition that a lower court must deny a Rule 60 Motion if the Supreme Court has not overturned the line of case which were relied on to grant the injunction. (1-EOR-8). However, as stated above, the Ninth Circuit and the lower court explicitly relied on the *Lemon* test to grant the injunction. The *Lemon* test was struck down in *Kennedy*. The lower court misapplied the facts to the law by stating that it was not free to grant Defendant's Rule 60 Motion because the order did not rely on overturned law when, in fact, it had relied on *Lemon*.

2. The Plaintiff's Interest In Preserving The Finality Of A Permanent Injunction That Suppresses Constitutional Conduct Does Not Outweigh The Public's Interest.

When deciding a Rule 60 motion the court should balance the interest in finality against the desire to achieve justice. *Clark v. Burkle*, 570 F.2d 824, 830 (8th Cir. 1978) (citation omitted). Here, the Board's interests far outweigh the Plaintiffs'.

First, the interest of finality bears less weight when a party seeks relief from a prospective injunction. *U.S. v. Holtzman*, 762 F.2d 720, 725 (9th Cir. 1985). The interest of finality rests, in part, on the public's interest in there being an end to litigation. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 542 (1991). The

Board seeks relief from a prospective enforcement of an injunction against praying before school board meetings—as such the interest in finality is at its lowest.

Second, the lower court erred by not weighing the public's interest in modifying the injunction to allow invocations before Board meetings. When a party seeks to modify a prospective injunction that affects the public's interest, rather than purely personal aims, greater weight should be given to modifying the underlying order. *See Associated Builders & Contractors v. Mich. Dept. of Lab. and Econ. Growth*, 543 F.3d 275, 278–79 (6th Cir. 2008). In *Rufo*, the Court held that when it is no longer equitable for a judgement to have prospective application, Rule 60 permits a "less stringent, more flexible standard." 502 U.S. at 389-81. The Court went on to note that "public interest is a particularly significant reason for applying a flexible modification standard" because such judgements "reach beyond the parties" and impact the public. *Id*., at 381. The injunction prevents Defendant from instituting a policy that allows for local clergy from conducting solemnizing prayer before school board meetings. Solemnizing the occasion before a deliberative body meets and deliberates serves a valid secular purpose. *See Lynch v. Donnelly*, 465 U.S. 668, 688 (O'Connor, J., concurring) (discussing the "legitimate secular purposes of solemnizing public occasions"). By enjoining any future board from enacting an invocation policy, the lower court's order failed to weigh the considerable public interest.

Third, the lower court erred by not weighing the equity of continuing to enforce an injunction that prevents the expression of core First Amendment rights. Rule 60(b)(5) explicitly states that when an order is prospective, relief can be granted "when it is equitable." Fed. R. Civ. P. 60(B)(5) The Supreme Court has, on numerous occasions, granted Rule 60(b)(5) relief against prospective relief even when brought years later. *See Agostini v. Felton*, 521 U.S. 203 (1997) (waiting three years after

change in law and having motion granted); *Railway Employees v. Wright*, 364 U.S. 642, 652–653 (1961) (waiting six years to file suit following the passage of a statute that undermined a prior consent decree); *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367 (1992) (waiting 10 years after change in law and ultimately remanded to determine if the change was significant enough); *Pasadena City Bd. of Ed. v. Spangler*, 427 U.S. 424, 437–438 (1976); *U.S. v. Holtzman*, 762 F.2d 720, 725 (9th Cir. 1985) (successive school board bringing motion to absolve an injunction four years after its issuance, district's denial of the motion was vacated and matter remanded); *Associated Builders & Contractors v. Mich. Dept. of Lab. and Econ. Growth*, 543 F.3d 275, 278–79 (6th Cir. 2008).

3. Plaintiffs Have Not Been Prejudiced.

Plaintiffs have not been prejudiced by the timing of the Board's Motion. Any delay in bringing the Rule 60 Motion, accepting Plaintiffs' arguments as true, would benefit Plaintiffs' interests, allowing them further time with a favorable ruling. In *Associated Builders & Contractors v. Michigan Dept. of Labor*, 543 F.3d 275 (6th Cir. 2008), the court held there was no prejudice when a party was "stuck" with a beneficial ruling. Here, Plaintiffs have only benefitted from the time-lapse as the Board has continued to abide by the injunction and have not had any invocations before board meetings in the interim. An unfair judgement being set aside does not count as prejudice under Rule 60. *Lowry Development, L.L.C. v. Groves & Associates Ins., Inc*., 690 F.3d 382, 389 (5th Cir. 2003) ("Having a favorable judgment set aside is inherently prejudicial, so some extra measure of unfair prejudice must be present to overcome an otherwise worthy Rule 60(b) motion"). Delay in resolving a case is also insufficient to cause prejudice. *TCI Group Life Ins. Plan v. Knoebber*, 244 F.3d 691, 701 (9th Cir. 2001) (overruled on other grounds).

Prejudice is "tangible harm such as loss of evidence, increased difficulties of discovery, or greater opportunity for fraud or collusion." *See Thompson v. American Home Assur. Co.*, 95 F.3d 429, 433–34 (9th Cir.1992). In the present matter there are no such concerns. Because the Board only seeks to implement an invocation policy in accordance with the current Establishment Clause caselaw, there are no issues regarding loss of evidence, discovery, or possible misdeeds. The lower court's holding that Plaintiffs would be prejudice was clear error and should be overturned.

4. There Were Adequate Reasons For The Delay.

When a party seeks relief from a prospective judgment, the reason for the delay is less important. *Planned Parenthood Monte Mar, Inc. v. Ford*, 2025 WL 959500, at *6 (D. Nev. Mar. 31, 2025) (relying on *Holtzman* and *Associated Builders*).

In any case, the Board has justifiable reasons for delaying filing its motion. While the entity Chino Valley Unified School District Board of Education did not immediately seek to overturn the injunction, the Board did not delay once it had the board members and political will to challenge the ruling. Typically, unreasonable delay signals apathy, a lack of effort, and indifference towards a ruling that does not justify taking the significant step of overturning a final judgement. Because the Board is an institutional entity, its failure to bring the claim is not due to any of these traits.

As a school board, the Board is constituted of numerous individuals, who, by themselves, cannot authorize taking legal action. In many cases, more than just a choice is necessary, political will must be exerted to form a sufficient quorum to authorize taking legal action. The original Complaint in this matter demonstrates that, of the board members at the time the complaint was filed, only one remains. (2-EOR-74). Defendant presently is comprised of different board members, who have

acted diligently to try to vindicate their First Amendment rights to pray before school board meetings.

IX. CONCLUSION

For the reasons stated above, this Court should reverse the decision of the district court and remand the case to the lower court with instructions to issue an order vacating its permanent injunction and permitting the new Chino Valley Board to enact a policy that allows invocation prior to its board meetings in a manner that comports with current law.

Dated: January 21, 2026.

/s/ Joel Oster
Joel Oster

CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) and 9th Cir. Rule 27-1(d). This document is proportionally spaced and, not counting the items excluded from the length by Fed. R. App. P. 32(f), contains 11,778 words.

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/s/ Joel Oster
Joel Oster