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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

FREEDOM FROM RELIGION
FOUNDATION, INC.; DOE 1, a minor
by and through his/her guardian; DOE
2, and DOE 2 individually; DOE 3 and
DOE 4

Plaintiff(s)

v.

Defendant(s)

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

Defendant(s)

Case No.: EDCV 14-2336-JGB

Hon. Jesus G. Bernal

DEFENDANTS' REPLY IN SUPPORT
OF RULE 60 MOTION FOR RELIEF
FOLLOWING THE SUPREME
COURT'S OVERTURNING OF THE
LEMON TEST ON WHICH THE
COURT'S PRIOR ORDER RELIED

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TABLE OF CONTENTS

I. INTRODUCTION..... 4

II. THE HISTORY OF SCHOOL BOARD PRAYER IN AMERICA..... 6

 A. The History Of Prayer Before Public Meetings..... 6

 B. The Order Was Premised On The *Lemon* Test, Not A Historical Test .. 8

 C. Mere Exposure To Prayer Is Not An Establishment Clause Violation 10

III. SCHOOL BOARD’S ANTI-PROSELYTIZING POLICY WOULD PROHIBIT
THE PRAYER OPPORTUNITY FROM BEING EXPLOITED 12

IV. A RULE 60 MOTION IS THE PROPER RULE FOR THIS RELIEF 13

V. CONCLUSION..... 14

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page(s)

Cases

Agostini v. Felton,
521 U.S. 203 (1997)6, 8, 13

Anderson v. Central Point School Dist. No. 6,
746 F.2d 505 (9th Cir. 1984)..... 13

D.C. v. Heller,
554 U.S. 570 (2008)5, 9

Engel v. Vitale,
370 U.S. 421 (1962)4, 7

Freedom from Religion Found., Inc. v. Chino Valley Unified School Dist. Bd. of Educ., 896 F.3d 1132 (9th Cir. 2018)4, 5, 8

Freedom from Religion Found., Inc. v. Chino Valley Unified School Dist. Bd. of Educ., 910 F.3d 1297 (9th Cir. 2018)8

Kennedy v. Bremerton School District,
597 U.S. 507 (2022)5, 9, 13

Kyllo v. United States,
533 U.S. 27 (2001)5, 9

Lee v. Weisman,
505 U.S. 577 (1992)10, 11

Lynch v. Donnelly,
465 U.S. 668 (1984)4, 6

Marsh v. Chambers,
463 U.S. 783 (1983)4

New York State Rifle & Pistol Ass’n v. Bruen,
597 U.S. 1 (2022)5, 9, 10

1 *Reed v. Town of Gilbert*,
2 576 U.S. 155 (2015) 11

3 *Rosenberger v. Rector and Visitors of Univ. of Va.*,
4 515 U.S. 819 (1995) 11

5 *Santa Fe Independent School Dist. v. Doe*,
6 530 U.S., 290 (2000) 10, 12

7 *South Dakota v. Wayfair, Inc.*,
8 585 U.S. 162 (2018) 5, 9

9 *System Federation No. 91, Ry. Emp. Dept., AFL-CIO v. Wright*,
10 364 U.S. 642 (1961) 13

11 *Town of Greece v. Galloway*,
12 572 U.S. 565 (2014) 9, 10, 11

13 *Wallace v. Jaffree*,
14 472 U.S. 38 (1985) 4, 6, 7

15 Statutes

16 2 U.S.C. § 4901 11

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1 **I. INTRODUCTION**

2 *Almighty, as we deal with educating the future minds of America and the world, we*
3 *ask for your inspiration and guidance. Amen.”*

4 This prayer, while simple and to the point, is prohibited by the permanent
5 injunction issued in this case on February 18, 2016 (“Order” or “Injunction”). The
6 Order enjoined the Chino Valley Unified School Board members “in their official
7 representative capacities ... from conducting, permitting or otherwise endorsing
8 school-sponsored prayer in Board meetings.” *Freedom from Religion Found., Inc. v.*
9 *Chino Valley Unified School Dist. Bd. of Educ. (Chino I)*, 896 F.3d 1132, 1142-43,
10 1141 (9th Cir. 2018).

11 Prayer is not categorically prohibited speech in America. To the contrary, there
12 is a rich history and tradition in America of public meetings being opened with prayer.
13 Prayers throughout our history have opened up congressional sessions, state
14 legislative sessions, municipal government meetings, court proceedings, school board
15 meetings, in addition to a myriad of other types of meetings.¹

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19 ¹ See *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Wallace v. Jaffree*, 472 U.S. 38, 103
20 (1985) (Rehnquist J., dissenting); *Engel v. Vitale*, 370 U.S. 421, 446–450 (1962)
21 (Stewart, J., dissenting); *Marsh v. Chambers*, 463 U.S. 783 (1983); 1 J. Richardson,
22 *Messages and Papers of the Presidents, 1789–1897*, p. 64 (1897); 1 C. Warren, *The*
23 *Supreme Court in United States History* 469 (1922); Evan Lee, *School Board Prayer:*
24 *Reconciling the Legislative Prayer Exception and School Prayer Jurisprudence*, 54
25 *Akron L. Rev.* 75, 99 (citing Second Annual Report Of The Controllers Of The Public
26 *Schools Of The First School District Of The State Of Pennsylvania* 7 (1820));
27 *Proceedings Of The Board Of Regents Of Normal Schools And The Regulations*
28 *Adopted At Their First Meeting Held At Madison, July 15, 1857* 6 (1857.); *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 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).

1 The Defendant School Board members² are asking this Court for relief from
2 the Order as the law upon which it was premised has changed. The Court, in issuing
3 the permanent injunction, applied the *Lemon* test. *See Chino I*, 896 F.3d at 1148
4 (“Instead of the legislative-prayer analysis, we apply the three-pronged Establishment
5 Clause test articulated in *Lemon v. Kurtzman*. The Chino Valley Board's prayer policy
6 and practice fails the *Lemon* test and is therefore unconstitutional.”)(citations
7 omitted).

8 Concerning a historical test, the Ninth Circuit said, “[*Marsh’s*] historical
9 approach is not useful in determining the proper roles of church and state in public
10 schools ... [and we] decline to apply the *Marsh-Greece* historical framework for
11 legislative prayer to an institution essentially unknown to the Framers—a public-
12 school board.” *Id.* at 1148.

13 But in *Kennedy v. Bremerton School District*, 597 U.S. 507, 535 (2022), the
14 Supreme Court made it crystal clear that the *Lemon* test was no longer good law, and
15 replaced it with a historical test. The historical test is not a limited test that only
16 inquires whether the challenged practice qualifies as a legislative prayer. To the
17 contrary, the historical test applies beyond the legislative prayer context and is meant
18 to guide the court in determining if the challenged practice is the type of activity that
19 the framers intended to prohibit when they ratified the constitution.³

20 Applying the historical test counsels in favor of giving the Defendants relief
21 from the Order. First, permitting school board prayer is consistent with the historical
22 practices in the United States when the First Amendment was ratified as well as the
23 Fourteenth Amendment. Second, the presence of children at School Board meetings
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26 ² The Chino Valley Unified School Board was dismissed as a defendant in this case.
27 ³ *See, e.g., Kyllo v. United States*, 533 U.S. 27 (2001); *South Dakota v. Wayfair, Inc.*,
28 585 U.S. 162 (2018); *D.C. v. Heller*, 554 U.S. 570 (2008); *New York State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1 (2022).

1 is irrelevant as the mere exposure to prayers is not an establishment clause violation,
2 as evidenced by the fact that children regularly attend congressional sessions and town
3 board meetings where prayers are given. And third, if the Court had any problem or
4 concern with the prayers offered over ten years ago in this matter, those concerns are
5 alleviated by the School Board’s non-proselytizing policy that has since been enacted
6 and the passage of over ten years.

7 Finally, Plaintiffs’ arguments that a Rule 60 motion is not the proper vehicle
8 for this type of relief is incorrect. In fact, it was this precise rule that was used in
9 *Agostini v. Felton*, where the petitioners obtained relief from an injunction based on
10 the Establishment Clause. *See* 521 U.S. 203, 218, 237 (1997) (deciding that
11 Establishment Clause law had significantly changed warranting petitioners’ relief
12 under Rule 60(b)(5)).

13 **II. THE HISTORY OF SCHOOL BOARD PRAYER IN AMERICA**

14 **A. The History Of Prayer Before Public Meetings**

15 The history surrounding the ratification of the First Amendment and the
16 Fourteenth Amendment shows that prayer before public meetings was not an
17 unconstitutional establishment of religion. The First Congress employed
18 congressional Chaplains to offer daily prayers in the Congress. *Lynch*, 465 U.S. 674.
19 Through the 18th and 19th century, Congress regularly appropriated public money to
20 religious organizations to provide education to Indian children. *Wallace v. Jaffree*,
21 472 U.S. 38, 103 (1985) (Rehnquist J., dissenting). In 1789 President Washington
22 issued a proclamation following a Joint Resolution from Congress that the President
23 “recommend to the people of the United States a day of public thanksgiving and
24 prayer, to be observed by acknowledging with grateful hearts the many and signal
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1 favors of Almighty God.” *Jaffree*, 472 U.S. at 102 (Rehnquist J., dissenting). Since
2 the time of John Marshall, the Supreme Court has begun each session by invoking the
3 protection of God, with the traditional cry which ends, “God save the United States
4 and this Honorable Court!” *Engel v. Vitale*, 370 U.S. 421, 446–450 (1962) (Stewart,
5 J., dissenting).
6

7
8 History demonstrates that, since the inception of school boards, many began
9 their meetings in prayer. In Pennsylvania, public school board meetings included
10 clergy-led opening prayer from as early as 1820.⁴ In 1857, school boards in Wisconsin
11 opened in prayer.⁵ Likewise, as early as 1859, school boards in Iowa began meetings
12 with invocations.⁶
13

14 Simply put, there is nothing in the history to suggest otherwise – that prayers
15 before school board meetings were viewed as an unconstitutional establishment of
16 religion. All available historical data points to the opposite conclusion – that prayers
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21 ⁴ Evan Lee, *School Board Prayer: Reconciling the Legislative Prayer Exception and*
22 *School Prayer Jurisprudence*, 54 Akron L. Rev. 75, 99 (citing Second Annual Report
23 Of The Controllers Of The Public Schools Of The First School District Of The State
Of Pennsylvania 7 (1820)).

24 ⁵ *Id.* (citing Proceedings Of The Board Of Regents Of Normal Schools And The
25 Regulations Adopted At Their First Meeting Held At Madison, July 15, 1857 6
(1857).)

26 ⁶ *Id.* (citing Journal Of The Board Of Education Of The State Of Iowa, At Its Second
27 Session, December, A.D. 1859 5 (1860); see also Marie Wicks, *Prayer Is Prologue:*
28 *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).

1 to open up public meetings were accepted as standard practice and not a constitutional
2 violation.

3
4 **B. The Order Was Premised On The *Lemon* Test, Not A Historical Test**

5 Most critically, this Court, and the Ninth Circuit, explicitly applied the *Lemon*
6 test in issuing the Order. *See Chino I*, 896 F.3d at 1142-43. The Ninth Circuit Court
7 upheld the Order because the “Chino Valley Board’s prayer policy lacks a secular
8 legislative purpose and therefore, under *Lemon*, violates the Establishment Clause.”
9
10 *Chino I*, 896 F.3d at 1149. The Ninth Circuit also expressly stated that a historical
11 analysis would be impossible because school boards did not exist at the time of the
12 founding. *Id.* at 1148.

13
14 The case was denied en banc review. However Senior Judge, Judge
15 O’Scannlain issued an order respecting the denial of rehearing, stating the panel had
16 “failed to faithfully apply *Town of Greece* and *Marsh*, and because such error has now
17 created a circuit split.” *Freedom from Religion Found., Inc. v. Chino Valley Unified*
18 *School Dist. Bd. of Educ. (Chino II)*, 910 F.3d 1297, 1304, 1306 (9th Cir. 2018)
19 (O’Scannlain, J., respecting the denial of rehearing en banc). Several judges further
20
21 dissented from the denial of rehearing stating that the panel wrongly applied the
22 *Lemon* test. *Id.* at 307 (Nelson, J., dissenting from denial of rehearing en banc and
23 stating that *Lemon* was “problematic” and “[b]ecause of its numerous shortcomings,
24 *Lemon* has been criticized by members of the Supreme Court and others.”)
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1 The Supreme Court now has officially abandoned the *Lemon* test. *See Kennedy*
2 *v. Bremerton School District*, 597 U.S. 507, 535 (2022). Instead, the proper test is a
3 historical test. A proper application of the historical test, however, does not require
4 for the challenged practice to have a direct analogue in history. Rather, the historical
5 test is meant to illuminate what the Founder’s understood the Establishment Clause
6 to mean. *Town of Greece*, 572 U.S. 565 (2014); *see also Kylo v. United States*, 533
7 U.S. 27 (2001).

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9
10 This concept is not new. The Court’s ruling in *Bremerton* is simply its latest in
11 a series of opinions requiring courts to look to history rather than applying rote tests.
12 *See Kylo v. United States*, 533 U.S. 27 (2001) (determining whether the use of a
13 thermal-imaging device from the street constitutes a search under the Fourth
14 Amendment despite no such technology at the time of the founding); *South Dakota v.*
15 *Wayfair, Inc*, 585 U.S. 162 (2018) (determining how to tax internet commerce under
16 the Commerce Clause); *D.C. v. Heller*, 554 U.S. 570 (2008) (determining whether a
17 ban on handguns in the home for self-defense violated the Second Amendment.); *New*
18 *York State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 19 (2022) (stating the proper test
19 must consider if a law or regulation violated the text of the Constitution “as informed
20 by history.”).

21 A proper historical analysis focuses on understanding the scope of the right at
22 the time of the founding in 1776 and around the time of the passage of the Fourteenth
23 Amendment in 1868. As the Court noted in *New York State Rifle & Pistol Ass’n, Inc.*
24

1 *v. Bruen*, 597 U.S. 1, 20 (2022), consideration of the history post-ratification is also
2 relevant to how the text was understood immediately following its application to the
3 states through the Fourteenth Amendment. *Id.* at 35 (“examination of a variety of legal
4 and other sources to determine the public understanding of a legal text in the period
5 after its enactment or ratification was ‘a critical tool of constitutional interpretation’”).
6 Consideration of the ratification period is especially relevant in the present matter
7 because school boards did exist at this time.
8
9

10 **C. Mere Exposure To Prayer Is Not An Establishment Clause Violation**

11 Plaintiffs’ arguments to the contrary are premised on the idea that mere
12 exposure to prayer is an Establishment Clause violation. This is not the law. In
13 *Galloway v. Greece*, the Supreme Court rejected this argument. *See* 572 U.S. 565,
14 590 (rejecting claim that exposure to offending prayer was coercive in and of itself).
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17 The Court said,

18 Ceremonial prayer is but a recognition that, since this Nation was
19 founded and until the present day, many Americans deem that their own
20 existence must be understood by precepts far beyond the authority of
21 government to alter or define and that willing participation in civic
22 affairs can be consistent with a brief acknowledgment of their belief in
23 a higher power, always with due respect for those who adhere to other
24 beliefs. The prayer in this case has a permissible ceremonial purpose. It
25 is not an unconstitutional establishment of religion.

26 *Id.* at 591.

27 Plaintiffs cite to *Lee v. Weisman*, 505 U.S. 577 (1992) and *Santa Fe*
28 *Independent School Dist. v. Doe*, 530 U.S., 290, 312 (2000) to argue that school board
prayers are different because students might be present. But children were present

1 during congressional prayers upheld in *Marsh v. Chambers* and *Galloway v. Greece*.
2 *See Town of Greece v. Galloway*, 572 U.S. at 565 (Kagan, dissenting) (noting that
3 among the audience hearing the prayers were “A few may be children or teenagers,
4 present to receive an award or fulfill a high school civics requirement.”); *see also* 2
5 U.S.C. § 4901 *et seq.* (congressional page program) (this Court should take judicial
6 notice that students often appear as pages during sessions of the U.S. Congress).
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9 The mere presence of children does not negate the practice. Even if Plaintiffs
10 could imagine a doomsday scenario where an individual might abuse the prayer
11 opportunity, such a hypothetical would not justify a blanket permanent injunction
12 against religious speech solemnizing a public meeting. *See Reed v. Town of Gilbert*,
13 576 U.S. 155 (2015) (content-based speech restrictions must pass strict scrutiny and
14 be narrowly tailored); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S.
15 819 (1995) (viewpoint-based speech restrictions must be narrowly tailored).
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18 There is nothing inherent in school board meetings that makes religious speech
19 *carte blanche* impermissible. They are routinely done after the school day, meaning
20 if any young kids were in attendance, they would be there with their parents. School
21 board meetings are not “one in a lifetime” type of events like high school graduations.
22 And in any event, if a parent of a student or a student found such practice to be
23 offensive, they could ask for an accommodation. *See Galloway*, 572 U.S. at 590
24 (noting that the circumstances the Court confronted in *Lee* were not present in
25 *Galloway*. “Nothing in the record suggests that members of the public are dissuaded
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1 from leaving the meeting room during the prayer, arriving late, or even, as happened
2 here, making a later protest. In this case, as in *Marsh*, board members and constituents
3 are “free to enter and leave with little comment and for any number of reasons.”)

4
5 In addition, *Santa Fe* is distinguishable as that case involved a policy where
6 students gave the opening invocation before football games. The Court found in that
7 context; the prayers were coercive to student attendance and participation. *See Santa*
8 *Fe*, 530 U.S. at 310-11. But here, the prayers are not student initiated, or student led.

9
10 **III. SCHOOL BOARD’S ANTI-PROSELYTIZING POLICY WOULD**
11 **PROHIBIT THE PRAYER OPPORTUNITY FROM BEING**
12 **EXPLOITED.**

13
14 Plaintiffs cited some prayers by school board members as evidence that some
15 of the prayer opportunities were exploited. But this argument is inapposite to the
16 current situation as over ten years have passed since the facts giving rise to the
17 complaint occurred, and in the interim, the School Board adopted a new anti-
18 proselytizing policy. *See, e.g.*, Complaint, Dkt. No. 1 ¶ 107 (filed Nov. 13, 2014). The
19 Ninth Circuit took judicial notice that on November 3, 2016, the Board adopted Policy
20 9010.5 prohibiting board members from proselytizing. This policy states as follows:
21
22

23 Bylaws of the Board BB 9010.5

24 **PUBLIC STATEMENTS REGARDING RELIGION OR NON-RELIGION**

25 As the elected legislative body of the Chino Valley Unified School District; the
26 Board of Education recognizes that the First Amendment to the United States
27 Constitution guarantees each person’s individual right to free exercise of
28 religion or non-religion and prevents the government and other public officials
from establishing a religion or non-religion.

1 1. During the public portion of the Board meeting, Board members may discuss
2 religion or religious perspectives to the extent that they are germane to agenda
3 items or public comments.

4 2. When acting in their official capacities and when speaking on behalf of the
5 District, Board members shall not proselytize and shall be neutral towards
6 religion and/or non-religion.

(Exhibit 3 to Defendants' Motion)

7 So any prayers by School Board members that would abuse the prayer
8 opportunity by proselytizing would not be permitted.

9
10 **IV. A RULE 60 MOTION IS THE PROPER RULE FOR THIS RELIEF**

11 A Rule 60 motion is the proper vehicle to obtain relief in this matter. Federal
12 Rule of Civil Procedure Rule 60(b)(5) allows the Court to relieve a party from a final
13 injunction when it was based on a standard that has been reversed or where
14 circumstances have changed such that it is no longer equitable. *See also* Anderson v.
15 Central Point School Dist. No. 6, 746 F.2d 505, 507 (9th Cir. 1984); System
16 Federation No. 91, Ry. Emp. Dept., AFL-CIO v. Wright, 364 U.S. 642 (1961). If a
17 court's order relied on Establishment Clause precedent which has been eroded by
18 subsequent cases, relief under Rule 60 is appropriate. *Agostini v. Felton*, 521 U.S.
19 203, 218, 237 (1997) (deciding that Establishment Clause law had significantly
20 changed warranting petitioners' relief under Rule 60(b)(5).)

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24 Plaintiffs argue that relief under Rule 60 should not be granted as three years
25 elapsed between the time of the *Bremerton* decision and the filing of this motion. This
26 is a red herring. Plaintiffs were not unduly prejudiced by the time it took for the School
27 Board members to digest the opinion, seek legal counsel, determine what route they
28

