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18 IN THE UNITED STATES DISTRICT COURT  
19 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
20 SAN FRANCISCO DIVISION

21 FAITH CENTER CHURCH  
EVANGELISTIC MINISTRIES, et al.,

22 Plaintiffs,

23 v.

24 FEDERAL D. GLOVER, et al.,

25 Defendants.  
26  
27  
28

CASE NO. C-04-3111 JSW

**PLAINTIFFS' MOTION FOR  
PRELIMINARY INJUNCTION; NOTICE  
OF MOTION; POINTS AND  
AUTHORITIES**

**Hearing Date: January 28, 2005**

**Hearing Time: 9:00 a.m.**

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**NOTICE OF MOTION AND MOTION**

PLEASE TAKE NOTICE that Plaintiffs Faith Center Church Evangelistic Ministries and Hattie Mae Hopkins, by and through counsel, hereby move for a preliminary injunction in this action. The hearing is noted for 9:00 a.m., January 28, 2005. Plaintiffs respectfully request twenty minutes of oral argument on the law and do not anticipate relying upon oral testimony.

**STATEMENT OF RELIEF REQUESTED**

Plaintiffs seek to preliminarily enjoin the Defendants from enforcing the “Policy for Use of Meeting Rooms in Libraries” that expressly prohibits the use of Contra Costa County Library public meeting rooms for “religious services or activities”.

**ISSUE PRESENTED**

Whether the Defendants’ policy of denying access to public meeting rooms for religious services or activities is unconstitutional when Defendants, by policy, encourage educational, cultural, and community-related meetings, programs and activities in those meeting rooms.

**STATEMENT OF RELEVANT FACTS**

The Statement of Facts from the Amended Verified Complaint is hereby incorporated by reference as though set forth in full, *see* Amended Verified Complaint ¶¶ 21-81, and is properly considered by this Court as evidence in deciding this motion. *K-2 Ski Co. v. Head Ski Co.*, 467 F.2d 1087, 1088 (9th Cir. 1972). Additionally, counsel for both parties have stipulated that Resolution No. 93/525 is Defendants’ current policy. (*See* Stipulation, signed by Judge White, October 6, 2004.) Resolution No. 93/525 states, *inter alia*, that “[l]ibrary meeting rooms shall not be used for religious services or activities.” (Amended Verified Complaint, Ex. E.)

**SUMMARY OF ARGUMENT**

Plaintiffs – a religious organization and its leader – seek equal access to Defendants’ library facilities. After adopting a policy “to encourage the use of library meeting rooms for educational, cultural and community related meetings, programs, and activities,” Defendants then ban use of those rooms for “religious services or activities.” (*See* Amended Verified Complaint, Ex. E.) This is an outrageous denial of equal access.

Defendants' policy discriminates on the basis of Plaintiffs' viewpoint which is impermissible regardless of the nature of the forum. Defendants intentionally opened the facilities to a wide variety of community groups, thus creating a designated public forum. Within a designated forum, Defendants' may not discriminate against the content of Plaintiffs' speech absent a compelling state interest. Defendants have no such interest; in particular the Supreme Court has refused to recognize government avoidance of a presumed Establishment Clause violation as a "compelling" state interest. In fact, Defendants' policy goes to the extreme and actually violates the Establishment Clause by expressing hostility toward religion and creating excessive entanglement with religion. The Defendants also violate Equal Protection by treating Plaintiffs differently than other similarly-situated community groups, solely on the basis of Plaintiffs' religious expression.

It is far too late in the day to ban religious exercise from a rented facility solely because the landlord is the government. Unlike Rosa Parks, forced to sit in the back of a city bus because of the color of her skin, Faith Center is not even allowed "on board" because of the religious color of its speech. Such a blatantly unconstitutional policy must be enjoined.

**The following key cases will assist in the resolution of this matter:**

*Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226 (1990); *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Hopper v. City of Pasco*, 241 F.3d 1067 (9th Cir. 2001); *Concerned Women for America v. Lafayette County*, 883 F.2d 32 (5th Cir. 1989); *Tsosie v. Califano*, 630 F.2d 1328 (9th Cir. 1980).

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**MEMORANDUM OF POINTS AND AUTHORITIES**

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2 The standard for a preliminary injunction is satisfied when the movant shows either: (I) a  
3 likelihood of success on the merits and the possibility of irreparable harm; or (II) the existence of  
4 serious questions going to the merits and the balance tips in the movant's favor. *MAI Sys. Corp.*  
5 *v. Peak Computer, Inc.*, 991 F.2d 511, 516 (9th Cir. 1993). "These two alternatives represent  
6 'extremes of a single continuum,' rather than two separate tests . . . Thus, the greater the relative  
7 hardship to [the party seeking the preliminary injunction,] the less probability of success must be  
8 shown." *Clear Channel Outdoor Inc. v. City of Los Angeles*, 340 F.3d 810, 813 (9th Cir. 2003)  
9 (citing *Walczak v. EPL Prolong, Inc.*, 198 F.3d 725, 731 (9th Cir. 1999)). "Additionally, '[i]n  
10 cases where the public interest is involved, the district court must also examine whether the  
11 public interest favors the plaintiff.'" *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959  
12 (9th Cir. 2002) (citing *Fund for Animals v. Lujan*, 962 F.2d 1391, 1400 (9th Cir. 1992)). As  
13 shown below, the Plaintiffs meet this standard and the motion should be granted.

**ARGUMENT****I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS****A. DEFENDANTS' POLICY AND PRACTICE UNCONSTITUTIONALLY DISCRIMINATE AGAINST THE PLAINTIFFS' VIEWPOINT.**

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18 Plaintiffs are likely to succeed on the merits because Defendants are censoring protected  
19 religious expression on the basis of the expression's viewpoint and content. The Supreme Court  
20 has established a three-prong test for determining a free speech violation: 1) determine if the  
21 speech in question is protected by the First Amendment; 2) identify the nature of the forum in  
22 which the speech would take place; and 3) assess whether the government's exclusion of the  
23 speech from the forum is justified by the requisite standard. *Cornelius v. NAACP Legal Defense*  
24 *& Educ. Fund*, 473 U.S. 788, 797 (1985). Here, without a compelling state interest, the  
25 Defendants refused Plaintiffs access to public property because of the Plaintiffs' viewpoint and  
26 the content of Plaintiffs' expression. The First Amendment does not tolerate such  
27 discrimination.

**1. Religious expression is fully protected by the First Amendment.**

28 Religious speech is indisputably protected by the First Amendment. *See Widmar v.*



1 *Vincent*, 454 U.S. 263, 269 (1981) (“religious worship and discussion . . . are forms of speech  
2 and association protected by the First Amendment”); *Bd. of Educ. of Westside Cmty. Sch. v.*  
3 *Mergens*, 496 U.S. 226, 248 (1990). As the Supreme Court has explained:

4 Our precedent establishes that private religious speech, far from being a First  
5 Amendment orphan, is as fully protected under the Free Speech Clause as secular  
6 private expression. . . . Indeed, in Anglo-American history, at least, government  
7 suppression of speech has so commonly been directed precisely at religious  
8 speech that a free-speech clause without religion would be Hamlet without the  
9 prince.

8 *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (emphasis in  
9 original) (citations omitted).

10 More specifically, speakers with a message of a religious nature are entitled to access  
11 public forums on the same terms as those whose message is secular or otherwise non-religious.  
12 *See Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993);  
13 *Mergens*, 496 U.S. at 248-49, *Widmar*, 454 U.S. at 267 n.5.

## 14 **2. Viewpoint discrimination is always impermissible.**

15 Importantly, viewpoint discrimination is forbidden regardless of the nature of the forum.  
16 *See, e.g., Lamb’s Chapel*, 508 U.S. at 394 (government may not discriminate based on a  
17 speaker’s viewpoint even in nonpublic forum). Put another way, the existence of viewpoint  
18 discrimination ends the *Cornelius* inquiry – the Court need not determine the nature of the  
19 Defendants’ forum in order to grant this motion.

20 The Defendants intentionally “encourage the use of library meeting rooms for  
21 educational, cultural and community related meetings, programs, and activities.” (*See* Amended  
22 Verified Complaint, Ex. E.) Plaintiffs sought access to a library meeting room to discuss  
23 “educational, cultural, and community” issues from a religious perspective; and engage in  
24 “activities” with a religious perspective. (*See* Amended Verified Complaint ¶ 26.) However, the  
25 Defendants explicitly denied Plaintiffs the right to access the facility solely because of the  
26 religious viewpoint of the Plaintiffs’ meetings. The Defendants have thus discriminated against  
27 Plaintiffs’ religious viewpoint on educational, cultural and community related issues and  
28 activities, which are permissible subjects in this forum.

1 The Supreme Court in *Lamb’s Chapel* held that “the government violates the First  
2 Amendment when it denies access to a speaker solely to suppress the point of view he espouses  
3 on an otherwise includible subject.” *Lamb’s Chapel*, 508 U.S. at 394 (quoting *Cornelius*, 473  
4 U.S. at 806). More recently, in *Good News Club*, the Supreme Court reaffirmed its holding that  
5 “speech discussing otherwise permissible subjects cannot be excluded . . . on the ground that the  
6 subject is discussed from a religious viewpoint.” 533 U.S. at 111-112 (2001) (assuming, without  
7 deciding, the existence of a nonpublic forum). The school’s “community use policy” in *Good*  
8 *News* prohibited use “by any individual or organization for religious purposes.” *Id.* at 103. As a  
9 result, the Milford Central School denied a request “to hold the Club’s weekly after-school  
10 meetings in the school cafeteria. . . . on the ground that the proposed use – to have ‘a fun time of  
11 singing songs, hearing a Bible lesson and memorizing scripture,’ . . . was ‘the equivalent of  
12 religious worship.” *Id.* The Court rejected this argument and concluded that the “Club’s  
13 activities do not constitute mere religious worship, divorced from any teaching of moral values.”  
14 *Id.* at 112 n.4. According to the Supreme Court, “Religion is the viewpoint from which ideas are  
15 conveyed. . . . [W]e see no reason to treat the Club’s use of religion as something other than a  
16 viewpoint merely because of any evangelical message it conveys.” *Id.*

17 Similarly, in this case, Defendants prohibit use of library meeting rooms for “religious  
18 services or activities.” (See Amended Verified Complaint, Ex. E.) Plaintiffs’ proposed meetings  
19 differ from the speech that Defendants routinely welcome within the forum only in that  
20 Plaintiffs’ meetings espouse a religious viewpoint. Defendants discriminate unlawfully against  
21 religious viewpoints when they exclude Plaintiffs’ speech because of the perspectives contained  
22 therein. This viewpoint discrimination triggers strict scrutiny, which Defendants’ policy cannot  
23 survive. See *Cornelius*, 473 U.S. at 800 (strict scrutiny requires regulations to be narrowly  
24 drawn to serve a compelling state interest).

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1           **B.       DEFENDANTS’ POLICY AND PRACTICE UNCONSTITUTIONALLY DISCRIMINATE**  
2           **BASED ON THE CONTENT OF PLAINTIFFS’ SPEECH.**

3           **1.       Defendants opened a designated public forum for community groups.**

4           Even if we were to assume that Defendants’ discrimination does not discriminate based  
5 on viewpoint, the Court must nonetheless determine the nature of the forum at issue “because the  
6 extent to which the Government may limit access depends on whether the forum is public or  
7 nonpublic.” *See Hopper v. City of Pasco*, 241 F.3d 1067, 1074 (9th Cir. 2001) (quoting  
8 *Cornelius*, 473 U.S. at 797). There are three main categories of fora: traditional public fora,  
9 designated public fora, and nonpublic fora. *Id.* This Circuit also recognizes a fourth category –  
10 “limited public forum” – which “refers to a type of non-public forum that the government has  
11 intentionally opened to certain groups or to certain topics.” *Id.* at 1074-75.<sup>1</sup>

12           Traditional public fora are areas such as streets, sidewalks, and parks, where protected  
13 expression has historically occurred, and where the government’s power to limit speech is  
14 weakest. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).  
15 Designated public fora are areas created by the government for use by the public as places for  
16 expressive activity. “[A] public forum may be created by government designation of a place or  
17 channel of communication . . . for assembly and speech, for use by certain speakers, or for the  
18 discussion of certain subjects.” *Cornelius*, 473 U.S. at 802. Designated public fora are treated  
19 the same as traditional public fora for free speech purposes. *Hopper*, 241 F.3d at 1074.  
20 Nonpublic fora are areas not opened for public use by government, such as guarded military  
21 bases. *Perry*, 460 U.S. at 46. However, even within a nonpublic forum, restrictions must still be  
22 reasonable and viewpoint neutral. *Cornelius*, 473 U.S. at 788.

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23  
24 <sup>1</sup> Classifying the “limited” forum as a separate category is suspect in light of Supreme Court  
25 precedent. *See, e.g., Perry*, 460 U.S. at 46 n.7. If “a limited public forum is a sub-category of a  
26 designated public forum,” *Hopper*, 241 F.3d at 1074, then it cannot be non-public. A forum  
27 “opened to certain groups or to certain topics,” *id.*, is more properly termed as a “limited purpose  
28 public forum.” *See, e.g., Tucker v. Cal. Dep’t of Educ.*, 97 F.3d 1204, 1209 (9th Cir. 1996).  
Strict scrutiny applies in such a forum, just as in a designated public forum. *Widmar*, 454 U.S. at  
270; *Perry*, 460 U.S. at 46. Nonetheless, even under the four-category analysis, the Library in  
this case has opened a designated public forum subject to strict scrutiny.

1 In *Hopper*, the Ninth Circuit ruled that city government created a designated public  
2 forum (subject to strict scrutiny) when it opened an art gallery in a city hall for the limited  
3 purpose of “provid[ing] a venue for artists to display their work.” 241 F.3d at 1073. Moreover,  
4 the Fifth Circuit concluded that a library auditorium opened to outside groups is a designated  
5 public forum, in a case very similar to ours. *Concerned Women for America v. Lafayette County*,  
6 883 F.2d 32, 34-35 (5th Cir. 1989) (allowing diverse groups to use facilities created designated  
7 public forum). As the Fifth Circuit stated, the First Amendment requires that absent a  
8 compelling state interest, all “meetings, programs, or activities of educational, cultural or  
9 community interest” must be allowed regardless of the content of the expression at those events.

10 **2. Defendants have no compelling state interest to justify their content-**  
11 **based exclusion of Plaintiffs’ speech.**

12 In a designated public forum, content-based regulation of speech is subject to the same  
13 strict scrutiny analysis applied in the traditional public forum and, therefore, must be narrowly  
14 drawn to serve a compelling state interest. *See Cornelius*, 473 U.S. at 800; *Perry*, 460 U.S. at 45.  
15 As a result, content-based censorship is presumably unconstitutional:

16 [A]bove all else, the First Amendment means that government has no power to  
17 restrict expression because of its message, its ideas, its subject matter, or its  
18 content. . . . The essence of this forbidden censorship is content control. . . .  
Selective exclusions from a public forum may not be based on content alone, and  
may not be justified by reference to content alone.

19 *Police Dep’t of City of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972) (citations omitted and  
20 emphasis added). “[B]oth the Establishment and Free Speech Clauses prevent the government  
21 from treating religious speech less favorably.” *Kreisner v. City of San Diego*, 1 F.3d 775, 791  
22 (9th Cir. 1993) (concurring opinion).

23 Defendants’ policy selectively excludes uses for “religious services or activities” from a  
24 designated public forum based solely on the content of the message. *Cf. Mosley*, 408 U.S. at 96.  
25 Defendants can offer no compelling interest to support their policy – much less show how such a  
26 broad exclusion is narrowly drawn. Presumably, the Defendants based this policy on the usual  
27 misconceptions regarding the “separation of church and state” gloss on the Establishment  
28 Clause. However, the Supreme Court has long held that a policy of equal access does not violate

1 the Establishment Clause. The Court in *Widmar* explained that where a forum is available to a  
2 broad class of speakers, as is the case with Defendants' meeting room Policy, allowing religious  
3 speech "does not confer any imprimatur of state approval on religious sects or practices . . .  
4 [since] the forum is available to a broad class of nonreligious as well as religious speakers." 454  
5 U.S. at 274 (emphasis added). The *Pinette* Court reaffirmed this point:

6 We have twice previously addressed the combination of private religious  
7 expression, a forum available for public use, content-based regulation, and a  
8 State's interest in complying with the Establishment Clause. Both times, we have  
9 struck down the restriction on religious content. . . . And as a matter of  
Establishment Clause jurisprudence, we have consistently held that it is no  
violation for government to enact neutral policies that happen to benefit religion.

10 515 U.S. at 762, 763-64; *see also Mitchell v. Helms*, 530 U.S. 793 (2000); *Lamb's Chapel*, 508  
11 U.S. 384; *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Cuffley v. Mickes*, 208 F.3d  
12 702, 707 (8th Cir. 2000) (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)) (government  
13 "may not deny a benefit to a person on a basis that infringes his constitutionally protected  
14 interests especially his interest in the freedom of speech; . . . exercise of those freedoms would  
15 then be penalized or inhibited").

16 It is undisputed that our case involves not government speech, but the exclusion of  
17 private religious speech. The Supreme Court has said that "there is a crucial difference between  
18 government speech endorsing religion . . . and private speech endorsing religion, which the Free  
19 Speech and Free Exercise Clauses protect." *Mergens*, 496 U.S. at 250 (emphasis in original).  
20 Neither is there a "plausible fear" in this case that the speech in question would be attributed to  
21 the state [or] either endorsed or coerced by the state." *Tucker*, 97 F.3d at 1212 (quoting *Widmar*,  
22 454 U.S. at 269 and *Rosenberger v. Rectors & Visitors of the Univ. of Va.*, 515 U.S. at 819).  
23 Simply put, the Establishment Clause does not offer the Defendants anything close to the  
24 "compelling" interest necessary to justify such a blatantly discriminatory policy. Rather, the  
25 Defendants' policy actually violates the Establishment Clause because of the policy's express  
26 exclusion of "religious services or activities."  
27  
28

1           **C.       DEFENDANTS’ POLICY AND PRACTICE EXPRESS IMPERMISSIBLE HOSTILITY TO**  
 2           **RELIGION IN VIOLATION OF THE ESTABLISHMENT CLAUSE.**

3           The Establishment Clause of the First Amendment provides that “Congress shall make no  
 4 law respecting an establishment of religion.” U.S. Const. amend. I. The Clause “requires the  
 5 state to be neutral in its relations with groups of religious believers and non-believers.” *Everson*  
 6 *v. Bd. of Educ.*, 330 U.S. 1, 18 (1947). “[I]t is clear that ‘the First Amendment forbids an official  
 7 purpose to disapprove of a particular religion or of religion in general.’”<sup>2</sup> *Vernon v. City of Los*  
 8 *Angeles*, 27 F.3d 1385, 1396 (9th Cir. 1994) (citing *Church of Lukumi Babalu Aye, Inc. v. City of*  
 9 *Hialeah*, 508 U.S. 520 (1993)). “The government neutrality required under the Establishment  
 10 Clause is thus violated as much by government disapproval of religion as it is by government  
 11 approval of religion.” *Id.* There is no Establishment Clause violation where the government  
 12 conduct at issue (1) has a secular purpose, (2) does not have as its principal or primary effect  
 13 advancing or inhibiting religion, and (3) does not foster an excessive government entanglement  
 14 with religion. *Lemon*, 403 U.S. at 612-13; *see also Vernon*, 27 F.3d at 1396-97 (“the challenged  
 15 practice must survive all three prongs of the *Lemon* analysis in order to be held constitutional”).  
 16 As discussed above, Defendants cannot justify their policy by raising oft-rejected Establishment  
 17 Clause “concerns.” Instead, Defendants’ policy violates the Establishment Clause because it  
 18 fails the second and third prongs of the *Lemon* test, falling far outside the neutrality boundaries  
 19 set by the Supreme Court.

20           **1.       Defendants’ policy has an appropriately secular purpose.**

21           Under the *Lemon* test, government conduct must be supported by a “secular legislative  
 22 purpose.” *Lemon*, 403 U.S. at 612. “A government practice or statute fails the purpose prong of  
 23 *Lemon* if its purpose is to endorse a religious custom or viewpoint.” *Kreisner v. City of San*  
 24 *Diego*, 1 F.3d 775, 782 (9th Cir. 1993). In this case, Defendants’ policy expressly states that its

25 \_\_\_\_\_  
 26 <sup>2</sup> Such a principle is perfectly consistent with the Founding Father’s view of religious liberty:  
 27 “The American population is entirely Christian, and with us Christianity and Religion are  
 28 identified. It would be strange indeed, if with such a people, our institutions did not presuppose  
 Christianity, and did not often refer to it, and exhibit relations with it.” John Marshall, Letter to  
 Jasper Adams, May 9, 1833, *quoted in* James McClellan, Joseph Story and the American  
 (Footnote continued on next page)

1 purpose is “to encourage the use of library meeting rooms for educational, cultural and  
2 community related meetings, programs, and activities.” (Amended Verified Complaint, Ex. E.)  
3 This is obviously a secular purpose and satisfies the first prong of the *Lemon* test.

4 **2. Defendants’ exclusion of religious organizations inhibits religion.**

5 The second prong of the *Lemon* test mandates that the “principal or primary effect” of  
6 government conduct must “neither advance[] nor inhibit[] religion.” *Lemon*, 403 U.S. at 612.  
7 “The test under this prong is whether ‘the challenged government action is sufficiently likely to  
8 be perceived by adherents of the controlling denominations as an endorsement, and by the  
9 nonadherents as a disapproval, of their individual religious choices.’” *Kreisner*, 1 F.3d at 782.  
10 The Ninth Circuit assumes that the “reasonable observer” is “familiar with the government  
11 practice at issue, as well as with the general contours of the Free Speech Clause and public forum  
12 doctrine.” *Kreisner*, 1 F.3d at 784. This objective standard “asks whether, irrespective of  
13 government’s actual purpose, the practice under review in fact conveys a message of  
14 endorsement or disapproval.” *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O’Connor, J.,  
15 concurring) (emphasis added).

16 Excluding “religious groups from a forum otherwise open to all would demonstrate  
17 government hostility to religion rather than neutrality contemplated by the Establishment  
18 Clause.” *Kreisner*, 1 F.3d at 785. In *Kreisner*, the Ninth Circuit held that the city’s decision to  
19 permit an organization to speak *via* a religious holiday display in an open forum did not  
20 constitute an endorsement of religion. *Id.* The court noted that the organization, “like other  
21 citizens of diverse views, has the right to express its views publicly in areas traditionally held  
22 open for all manner of speech.” *Id.*

23 The “key consideration in this second prong analysis [under *Lemon*] is whether the  
24 government action ‘primarily’ disapproves of religious beliefs.” *Vernon*, 27 F.3d at 1398. In  
25 *Vernon*, an assistant police chief brought an Establishment Clause challenge after the city  
26 conducted an “investigation of whether his religious views were having an impermissible effect

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Constitution 139 (Norman, OK: University of Oklahoma, 1971).

1 on his on-duty police department performance.” *Id.* at 1388. The Ninth Circuit relied on the  
2 “express language of the documents requesting and ordering the investigation” and the  
3 “prominent disclaimers contained therein” to find that the “primary purpose of the government  
4 action was the investigation of any possible impermissible or illegal on-duty conduct of Vernon.”  
5 *Id.* at 1399. The court concluded that “[n]either the pre-investigation statements nor the  
6 investigation itself could reasonably be construed to send as its primary message the disapproval  
7 of Vernon’s religious beliefs.” *Id.* (emphasis in original); *see also Concerned Women for*  
8 *America*, 883 F.2d at 35 (“In the absence of empirical evidence that religious groups will  
9 dominate use of the library’s auditorium, causing the advancement of religion to become the  
10 forum’s ‘primary effect,’ an equal access policy will not offend the Establishment Clause.”).

11 This is very unlike Defendants’ express prohibition of religious speech where all other  
12 protected speech is apparently permitted. (Amended Verified Complaint, Ex. E.) The express  
13 language of Defendants’ policy sends as its “primary message the disapproval of [Plaintiffs’]  
14 religious beliefs.” *Vernon*, 27 F.3d at 1399 (emphasis omitted). Not only do Defendants fail the  
15 Establishment Clause’s requirement of “neutral[ity] in [the government’s] relations with groups  
16 of religious believers,” *Everson*, 330 U.S. at 18, but the Defendants’ exclusion of Plaintiffs from  
17 library meeting rooms “otherwise open to all . . . demonstrate[s] government hostility to  
18 religion.” *Kreisner*, 1 F.3d at 785. As the Ninth Circuit recognized in *Kreisner*, Plaintiffs have  
19 “the right to express [their] views publicly in areas . . . held open for all manner of speech.” *Id.*  
20 Therefore, Defendants’ restriction against use for “religious purposes” has the “primary effect”  
21 of inhibiting religion – failing *Lemon*’s second prong.

22 **3. Defendants’ prohibition of “religious services or activities” fosters an**  
23 **excessive government entanglement with religion.**

24 Under the third prong of the *Lemon* test, Defendants’ policy is unconstitutional because it  
25 fosters “an excessive government entanglement with religion.” *Lemon*, 403 U.S. at 613. “The  
26 entanglement prong seeks to minimize the interference of religious authorities with secular  
27 affairs and secular authorities in religious affairs.” *Cammack v. Waihee*, 932 F.2d 765, 780 (9th  
28 Cir. 1991). “In *Lemon*, the Supreme Court was concerned with administrative and political



1 entanglement” that “typically involves comprehensive, discriminating, and continuing state  
 2 surveillance of religion.” *Vernon*, 27 F.3d at 1399. To analyze “entanglement,” courts in this  
 3 circuit weigh the following factors: a) “the character and purpose of the religious institution  
 4 affected by the government action,” b) “the nature of the activity that the government mandates,”  
 5 and c) “the resulting relationship between the government and the religious institution.” *Id.*

6 **a) The character and purpose of Plaintiff Faith Center is religious  
 7 in nature.**

8 The first factor is “the character and purpose of the religious institution affected by the  
 9 government action.” *Id.* Plaintiff Faith Center is an evangelistic outreach ministry – for all  
 10 practical purposes, a church – and unequivocally religious in nature and purpose. (Amended  
 11 Verified Complaint at ¶¶ 10, 24, 26.)

12 **b) Defendants’ policy mandates unconstitutional governmental  
 13 scrutiny and ongoing monitoring of religious groups.**

14 Second, the court must weigh “the nature of the activity mandated by the government.”  
 15 *Vernon*, 27 F.3d at 1399. The Supreme Court has consistently stated that government scrutiny of  
 16 speech based on its religious content risks Establishment Clause violations due to hostility and  
 17 entanglement problems. *See Rosenberger*, 515 U.S. at 844-45 (University’s policy requiring  
 18 public officials to scan and interpret student publications based on its religious content “risk[s]  
 19 fostering a pervasive bias or hostility to religion”); *Mergens*, 496 U.S. at 253 (“[A] denial of  
 20 equal access to religious speech might well create greater entanglement problems in the form of  
 21 invasive monitoring to prevent religious speech at meetings at which such speech might occur.”);  
 22 *Widmar*, 454 U.S. at 272 n.11 (policy requiring scrutiny of religious speech risked  
 23 entanglement); *see also Vernon*, 27 F.3d at 1399 (discussing “administrative entanglement”).

24 The Ninth Circuit and other federal courts have also recognized entanglement problems  
 25 with policies that require speech to be scrutinized based on its religious content. *See Kreisner*, 1  
 26 F.3d at 789 (“In fact, the danger of entanglement would be considerably greater if the City  
 27 screened the religious motives of speakers before allowing them access to Balboa Park.”);  
 28 *Gentala v. City of Tucson*, 325 F. Supp. 2d 1012, 1020 (D. Ariz. 2003) (Policy requiring the city  
 to scrutinize applicants’ speech to decide whether an event directly supports a religious

1 organization and then exclude such an event “fosters, rather than avoids, entanglement.”).

2 In *Widmar*, the Supreme Court affirmed a Court of Appeals decision that struck down a  
3 policy that prohibited the use of University buildings or grounds “for purposes of religious  
4 worship or religious teaching.” 454 U.S. at 265, 267. The Supreme Court expressed disapproval  
5 that the policy required University officials to draw a distinction concerning religious speech. *Id.*  
6 at 272 n.11. The *Widmar* Court “agree[d] with the Court of Appeals that the University would  
7 risk greater ‘entanglement’ by attempting to enforce its exclusion of ‘religious worship’ and  
8 ‘religious speech.’” *Id.* (citation omitted). The Court predicted:

9 Initially, the University would need to determine which words and activities fall  
10 within “religious worship and religious teaching.” This alone could prove “an  
11 impossible task in an age where many and various beliefs meet the constitutional  
12 definition of religion.” There would also be a continuing need to monitor group  
13 meetings to ensure compliance with the rule.

14 *Id.* (citations omitted).

15 In *Widmar*, the Supreme Court rejected the notion that there was a distinction with  
16 “intelligible content” between religious speech and speech acts constituting worship. *Id.* at 269.  
17 According to the Court, “There is no indication when ‘singing hymns, reading scripture, and  
18 teaching biblical principles,’ . . . cease to be ‘singing, teaching, and reading’ – all apparently  
19 forms of ‘speech,’ despite their religious subject matter – and become unprotected ‘worship.’”  
20 *Id.* at 270 n.6. Even if a distinction were made, the Supreme Court recognized that  
21 administration would be a fruitless effort:

22 Merely to draw the distinction would require the university--and ultimately the  
23 courts – to inquire into the significance of words and practices to different  
24 religious faiths, and in varying circumstances by the same faith. Such inquiries  
25 would tend inevitably to entangle the State with religion in a manner forbidden by  
26 our cases.

27 *Widmar*, 454 U.S. at 271 n.6 (emphasis added). Clearly, “official censorship [of religious  
28 speech] would be far more inconsistent with the Establishment Clause’s dictates than would  
29 governmental provision of secular . . . services on a religion-blind basis.” *Rosenberger*, 515 U.S.  
30 at 845.

31 Here, Defendants’ policy violates the excessive entanglement prong under Establishment

1 Clause analysis because it mandates unconstitutional governmental scrutiny and ongoing  
2 monitoring of religious groups. As the Supreme Court and the Ninth Circuit have recognized in  
3 similar circumstances, Defendants' policy creates unconstitutional entanglement problems  
4 because it requires scrutiny of speech based on its religious content. *Mergens*, 496 U.S. at 253;  
5 *Kreisner*, 1 F.3d at 789.

6 Defendants' policy mandates that officials draw a distinction that is impossible to  
7 administer. Plaintiffs' religious meetings and activities are "educational, cultural and community  
8 related," so their speech falls within the stated purpose of the forum. (*See Amended Verified*  
9 *Complaint, Ex. E.*) However, Defendants' policy distinguishes between Plaintiffs' speech and  
10 the speech of other non-profit organizations merely because Plaintiffs are conducting "religious  
11 services or activities." (*See Amended Verified Complaint, Ex. E.*) This distinction is  
12 unintelligible and unconstitutional. As the Supreme Court recognized in *Widmar*, the Library is  
13 implementing "greater 'entanglement' by attempting to enforce its exclusion" of Plaintiffs  
14 because they meet for "religious purposes." *Widmar*, 454 U.S. at 272 n.11.

15 For example, a secular group may meet unless it engaged in an isolated religious activity,  
16 such as a pre-meal or pre-program invocation, during the meeting. Under the clear terms of  
17 Defendants' policy, library officials must constantly watch for such "violations." This improper  
18 surveillance was evidenced at Plaintiff Faith Center's meeting on May 29, 2004 when two  
19 Library officials informed Ms. Hopkins and Ms. Ward near the end of the meeting that groups  
20 were not permitted to use Library meeting rooms for religious activities. (*See Amended Verified*  
21 *Complaint ¶ 52.*) According to Library employees, Plaintiff Faith Center only gained access to  
22 the Library meeting room because the Library volunteer who admitted the group was not fully  
23 familiar with Library policies. (*See id. ¶ 59.*) Clearly, Defendants' policy implements excessive  
24 entanglement with religion because it calls upon Library officials to scrutinize and monitor the  
25 private speech of outside groups to determine whether the speech constitutes "religious services  
26 or activities."

27 **c) As a complete bar to religious groups, the Defendants' policy**  
28 **goes too far by preventing even a neutral relationship.**

1 The third factor to weigh in determining whether there is excessive administrative  
2 entanglement is “the resulting relationship between the government and the religious institution.”  
3 *Vernon*, 27 F.3d at 1399. The Court could analyze this factor further if the Library appeared  
4 specifically to sponsor or fund Plaintiffs’ meetings, in order to determine if impermissible  
5 entanglement existed. However, no such illusion exists – the “resulting relationship” here is  
6 non-existent. The “entanglement” here results from the policy’s requirement that all groups and  
7 all activities be scrutinized to censor all religion. This activity is not required by the  
8 Establishment Clause, see *Concerned Women for America*, 883 F.2d at 35, and, in fact, reveals  
9 impermissible hostility that itself violates of the Establishment Clause. See Part I.C.2, *infra*.

10 Clearly, the relationship between Defendants and non-profit organizations like Faith  
11 Center fails the Ninth Circuit’s analysis under the third prong of the *Lemon* test because the  
12 policy results in comprehensive, discriminating, and ongoing entanglement with religion.

13 **D. DEFENDANTS’ POLICY AND PRACTICE VIOLATE PLAINTIFFS’ RIGHT TO EQUAL**  
14 **PROTECTION UNDER THE FOURTEENTH AMENDMENT.**

15 “The Equal Protection Clause of the Fourteenth Amendment commands that no State  
16 shall ‘deny to any person within its jurisdiction the equal protection of the laws,’ which is  
17 essentially a direction that all persons similarly situated should be treated alike.” *Serrano v.*  
18 *Francis*, 345 F.3d 1071, 1081 (9th Cir. 2003) (citing *City of Cleburne v. Cleburne Living Ctr.*,  
19 473 U.S. 432, 439 (1985)). “Equal protection analysis ‘requires strict scrutiny of a legislative  
20 classification only when the classification impermissibly interferes with the exercise of a  
21 fundamental right or operates to the peculiar disadvantage of a suspect class.’” *Tsosie v.*  
22 *Califano*, 630 F.2d 1328, 1337 (9th Cir. 1980) (quoting *Mass. Bd. of Retirement v. Murgia*, 427  
23 U.S. 307, 312 (1976)). As freedom of speech is a fundamental right, strict scrutiny is the proper  
24 level of scrutiny under these facts. See *Cal. Med. Ass’n v. Fed. Elec. Comm’n*, 641 F.2d 619,  
25 643 (9th Cir. 1980). In the constitutional context, strict scrutiny is an “exacting test.” *Turner*  
26 *Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 680 (1994). “It is not enough that the goals of the law  
27 be legitimate, or reasonable, or even praiseworthy. There must be some pressing public  
28

1 necessity, some essential value that has to be preserved; and even then the law must restrict as  
2 little speech as possible to serve that goal.” *Id.*

3 In this case, Faith Center, as a non-profit organization, is indisputably “similarly situated”  
4 with all the other non-profit groups freely allowed to use Library facilities for “educational,  
5 cultural and community related meetings, programs, and activities.” (See Amended Verified  
6 Complaint, Ex. E.) Defendants cannot proffer a legitimate (let alone “compelling”) interest for  
7 solely prohibiting Plaintiffs’ “religious services or activities” in Library meeting rooms. Yet, by  
8 policy and practice, Defendants treated Plaintiffs differently based on the content and viewpoint  
9 of Plaintiffs’ expression. Therefore, Defendants violated Plaintiffs’ right to equal protection of  
10 the laws as guaranteed by the Fourteenth Amendment to the United States Constitution.

## 11 **II. PLAINTIFFS HAVE SUFFERED IRREPARABLE HARM THROUGH A LOSS** 12 **OF CONSTITUTIONAL FREEDOM**

13 “It is undisputed that the loss of First Amendment freedoms, for even minimal periods of  
14 time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373-374  
15 (1976). Because Plaintiffs have suffered the loss of First Amendment freedoms, they are  
16 suffering “irreparable harm” as required by the preliminary injunction test. See *Memphis Cmty.*  
17 *Sch. Dist. v. Stachura*, 477 U.S. 299 (1986) (holding monetary recovery cannot compensate for  
18 injury to intangible rights guaranteed by the Constitution).

## 19 **III. SERIOUS LEGAL QUESTIONS EXIST AND THE BALANCE OF HARM** 20 **WEIGHS HEAVILY IN FAVOR OF THE PLAINTIFFS.**

21 With bedrock constitutional principles at stake, this case certainly presents “serious  
22 legal questions.” *MAI Sys. Corp.*, 991 F.2d at 516. Defendants will suffer no legally  
23 cognizable harm by being enjoined from continuing their unconstitutional deprivation. Rather,  
24 it is the Plaintiffs who are suffering irreparable harm from the Defendants’ unconstitutional  
25 Policy. *Elrod*, 427 U.S. at 373-374. Furthermore, the public interest would be well served by  
26 eliminating, rather than perpetuating, overt discrimination by government entities against non-  
27 profit groups like Faith Center. See *Lamb’s Chapel*, 508 U.S. at 394; *Cornelius*, 473 U.S. at  
28 806. No public interest is served by judicial countenance of an unconstitutional prohibition on  
speech. Clearly, Plaintiffs also satisfy the “public interest” portion of the Ninth Circuit’s

1 preliminary injunction standard. *Sammartano*, 303 F.3d at 965.

2 **CONCLUSION**

3 It is difficult to understand how, after over twenty years of Supreme Court “equal  
4 access” jurisprudence, a government policy so blatant in its religious discrimination could still  
5 exist, much less be applied to silence religious speech in a public community facility.  
6 Defendants’ Policy must be brought into compliance with the First Amendment. Plaintiffs are  
7 entitled to utilize Library facilities on the same terms as other non-profit organizations – and  
8 Defendants can point to nothing to countermand this constitutional right. Their egregiously  
9 discriminatory policy in regard to religious uses should therefore be enjoined by this Court.

10 Respectfully submitted this 26th day of October, 2004.

11 By: /s/ Joshua W. Carden  
12 Attorney for Plaintiffs