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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
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13 FAITH CENTER CHURCH
EVANGELISTIC MINISTRIES, et al.,

14 Plaintiffs

15 v.

16 FEDERAL D. GLOVER, et al.,

17 Defendants.
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No. C 04-3111 JSW

DEFENDANTS' CROSS-MOTION FOR
SUMMARY JUDGMENT AND
PERMANENT INJUNCTION;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT AND IN
OPPOSITION TO PLAINTIFFS' MOTION

Date: November 7, 2008
Time: 9:00 a.m.
Courtroom 2, 17th Floor
Judge: Honorable Jeffrey S. White

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<i>Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah</i> , 508 U.S. 520 (1993).	14-16
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28	<i>Tilton v. Richardson</i> , 403 U.S. 672 (1971)	18
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9	18B Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure, Section 4478.5 (2d ed.	
10	2006).	7
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1 This motion is based upon this notice of motion and cross-motion, the memorandum of points
2 and authorities set forth below, the declarations, evidence, pleadings and papers on file in this action,
3 and such other and further evidence and authorities as the court may consider before deciding this
4 motion.

5 MEMORANDUM OF POINTS AND AUTHORITIES

6 INTRODUCTION

7 In *Faith Center*, the Ninth Circuit declined to convert the meeting room of the County's
8 Antioch library into a taxpayer-supported house of worship. The Ninth Circuit upheld the religious
9 use provision of the County's library meeting room use policy, which excludes religious worship
10 services from meeting rooms. The Supreme Court declined to review the Ninth Circuit's decision.
11 Under the law of the case doctrine, the Ninth Circuit's holding is binding on this Court, and requires
12 entry of judgment in favor of the County on Faith Center's free speech claim.

13 The Ninth Circuit's findings in *Faith Center* also conclusively determine the three remaining
14 Constitutional claims, and require entry of judgment in favor of the County on those claims. Any
15 ruling requiring the County to allow religious worship services in its library meeting room would force
16 the County to violate the Establishment Clause, which prohibits the government from financing
17 religious worship services.

18 ISSUES TO BE DECIDED

19 1. In *Faith Center*, the Ninth Circuit upheld the religious use provision of the County's
20 library meeting room use policy by holding that prohibiting Faith Center's religious worship services
21 from the Antioch library meeting room is a permissible exclusion of a category of speech that is meant
22 to preserve the purpose behind the limited public forum. Does the law of this case prohibit this Court
23 from revisiting Faith Center's free speech claim and require entry of judgment in favor of the County
24 on that claim?

25 2. Faith Center's free speech claim was brought in conjunction with its Establishment
26 Clause, Free Exercise Clause, and Equal Protection Clause claims. Should summary judgment be
27 entered in favor of the County on Faith Center's three remaining Constitutional claims?
28

3. In *Faith Center*, the Ninth Circuit directed this Court, after soliciting the views of the parties, to enter a permanent injunction that allows the County to exclude religious worship services from the Antioch library meeting room and allows Faith Center to conduct activities in the meeting room that express a religious viewpoint. What should the scope of the permanent injunction be?

STATEMENT OF FACTS

Contra Costa County Library Buildings and Policies

The Contra Costa Library has 25 community libraries, including a community library located in Antioch. All 25 community libraries have a main area where books are kept. Tables and chairs are located in these areas, which are set aside for reading, writing and quiet study. These areas allow people to acquire knowledge and information and improve literacy. Declaration of Anne Cain in Support of Cross-Motion for Summary Judgment and Entry of Permanent Injunction (“Cain Decl. II”), ¶ 3. Of the 25 community libraries, 12 community libraries do not have a meeting room. Cain Decl. II ¶ 4. The Antioch library has a meeting room situated directly in the library. Docket No. 30: Declaration of Anne Cain in Support of Defendants’ Opposition to Plaintiffs’ Motion for Preliminary Injunction (“Cain Decl. I), ¶ 5.

The Contra Costa County Library is funded by several revenue sources. The main source of library funding is property taxes. Approximately 80 percent of the library's budget is from property taxes. The remainder of the library's budget is from a combination of city and state funds, grants, fines, and fees. All of the revenue from these sources are placed into a library revenue account in the County budget. (Cain Decl. II, ¶ 7.) The maintenance of all library buildings owned by the County, including the Antioch library and its meeting room, is funded from the library revenue account of the County budget. Building maintenance that is funded from the library revenue account includes the cost of utilities, custodial services, painting, and the upkeep of each building's mechanical, electrical, and heating-ventilating-air conditioning systems. (Cain Decl. II, ¶ 8.)

The Antioch library is 11,000 square feet in size, including 900 square feet used as a meeting room. (Cain Decl. II, ¶ 5.) The entrance to the Antioch library meeting room is located off of the library's main entrance, and the meeting room shares a wall with the library staff break room. (Docket No. 30; Cain Decl. I, ¶ 5; Docket No. 101: Declaration of Timothy D. Chandler in Support of

1 Plaintiffs' Motion for Summary Judgment (Chandler Decl."), Exhibit B, deposition of Greta Galindo
2 ("Galindo Depo."), Exhibit 13.)

3 The use of meeting rooms in library buildings owned by the County, including the Antioch
4 library meeting room, is governed by Resolution No. 2004/655. (Docket No. 30: Cain Decl. I, Exhibit
5 A; Cain Decl. II, ¶ 9.) Under the library meeting room use policy, non-profit and civic organizations,
6 for-profit organizations, schools and governmental organizations may use the meeting room space for
7 "meetings, programs, or activities of educational, cultural or community interest." (Docket No. 30:
8 Cain Decl. I, Exhibit A.) Non-profit organizations may use the meeting room free of charge for
9 meetings that are open to the general public, for which no admission fee is charged, and at which no
10 soliciting or selling is done. (Docket No. 30: Cain Decl. I, Exhibit A). Non-profit and civic
11 organizations, for-profit organizations, schools and governmental organizations may use the meeting
12 room space for a fee for meetings that are closed to the general public, for which an admission fee is
13 charged, or at which soliciting or selling is done. (Docket No. 30: Cain Decl. I, Exhibit A.) Library
14 personnel are not authorized to grant exceptions to the meeting room use policy. (Docket No. 101:
15 Chandler Decl., Exhibit C, deposition of Laura O'Donoghue ("O'Donoghue Depo."), p. 8, line 25, p.
16 9, lines 1-2.)

17 The library meeting room use policy also prohibits library meeting rooms from being used for
18 "religious services." (Docket No. 30: Cain Decl. I, Exhibit A.) Resolution No. 2004/655 was adopted
19 by the County Board of Supervisors on December 14, 2004. (Docket No. 30: Cain Decl. I, Exhibit A).
20 Resolution No. 2004/655 replaced Resolution No. 93/525, which prohibited library meeting rooms
21 from being used for "religious services or activities." (Docket No. 30: Cain Decl. I, ¶ 9.)

22 All groups requesting the use of a library meeting room must complete an application form for
23 each use. (Docket No. 30: Cain Decl. I, Exhibit A.) If an applicant wants to use a meeting room for a
24 religious service, the librarian reviewing the application will decide whether to allow the applicant to
25 use the room for that purpose based on what the applicant writes down on the application form.
26 (O'Donoghue Depo., 10:18-25; 11:1,) County library personnel do not monitor library meeting rooms
27 while they are being used by applicants who are authorized to use the rooms. (Cain Decl. II, ¶ 11;
28 Docket No. 101: Chandler Decl., Exhibit D, deposition of Lisa Loomis ("Loomis Depo."), 13:14;

1 Chandler Decl., Exhibit F, deposition of Jenna Biglow (“Biglow Depo.”) 27:11.)

2 Many groups or organizations that are considering using a library meeting room will telephone
3 that library to find out the requirements for using a meeting room before submitting a meeting room
4 use application. Many of these groups or organizations are non-profit or civic organizations, for-profit
5 organizations, schools, or governmental organizations that want to use a library meeting room for
6 meetings that are closed to the general public, for which an admission fee is charged, or at which
7 soliciting or selling is done. When informed that a fee is required, these groups and organizations
8 often will not submit a use application because they do not want to pay a fee. The County library does
9 not keep records of these telephone calls. (Cain Decl. II, ¶ 10.) A fee charged under the County’s
10 library meeting room use policy does not cover the entire cost of processing a use application, and a
11 fee charged under the County’s library meeting room use policy does not cover any of the cost of
12 maintaining library meeting rooms. (Cain Decl. II, ¶ 9.)

13 The County has allowed the Antioch library meeting room to be used numerous times by
14 religious and other groups for activities and events that express a religious viewpoint, including Bible
15 study. (Chandler Decl., ¶¶ 24-33.)

16 **Faith Center’s Meeting Room Use Applications and Religious Worship Service**

17 In May 2004, Faith Center submitted applications requesting to use the County's Antioch
18 Branch Library meeting room on May 29, 2004 and July 31, 2004. (Docket No. 18: Amended
19 Verified Complaint, Exhibits A and B.) Each application described the purpose of Faith Center’s
20 meetings as “Prayer, Praise and Worship Open to the Public, Purpose to Teach and Encourage
21 Salvation thru Jesus Christ and Build up Community.” (Docket No. 18: Amended Verified
22 Complaint, Exhibits A and B.) A reservation for the May 29, 2004 meeting was marked on the
23 Antioch branch library calendar. (Docket No. 30: Cain Decl. I, ¶ 10.)

24 Faith Center advertised its May 29, 2004 meeting with a flyer describing a “Women of
25 Excellence Conference” sponsored by Faith Center Evangelistic Ministries Outreach. The flyer
26 divided the day's activities into a “Wordshop” from 11:00 a.m. to 12:00 p.m., refreshments, and an
27 afternoon “Praise and Worship” service with a sermon by Pastor Hopkins from 1:00 p.m. to 3:00 p.m.
28 (Docket No. 31: Declaration of Danielle R. Merida in Support of Defendants’ Opposition to Plaintiffs’

1 Motion for Preliminary Injunction (“Merida Decl.”), Exhibit A.)

2 Faith Center used the Antioch library meeting room on May 29, 2004. Faith Center’s morning
3 session was a “Wordshop” that included a call to prayer, while its afternoon session was devoted
4 expressly to “praise and worship.” (Docket No. 100: Declaration of Dr. Hattie M. Hopkins in Support
5 of Plaintiffs’ Motion for Summary Judgment (“Hopkins Decl.”), ¶ 8.)

6 During the afternoon “praise and worship” service, two library employees overheard loud noise
7 coming from the meeting room. (Loomis Depo., 14:18-25, 15:1-5; Biglow Depo., 10:15-25.) The
8 religious service ended, then the employees told Pastor Hopkins that the service created a noise
9 problem. (Loomis Depo., 17:7-11; Biglow Depo., 17:11-17.)

10 On November 11, 2007, Faith Center applied to use the Antioch library meeting room for the
11 following purpose: “Prayer, Praise, Wordshop, Purpose to Teach Scripture and Encourage Salvation
12 thru Jesus to Build-Up this Community Overall.” (Cain Decl. II, Exhibit A.) Faith Center’s
13 application to use the room on December 15, 2007 was granted. Faith Center was informed that it
14 “may use the meeting room for any activity that does not violate the meeting room use policy,
15 including activities that express a religious viewpoint.” (Cain Decl. II, Exhibit B.)

16 PROCEDURAL BACKGROUND

17 On July 30, 2004, Faith Center sued to enjoin Defendants from excluding Faith Center’s
18 proposed religious meetings on the basis of the “religious use” provision of the County’s library
19 meeting room use policy. Faith Center alleged the use policy violated the Free Speech, Free Exercise,
20 and Establishment clauses of the First Amendment, and violated the Equal Protection Clause of the
21 Fourteenth Amendment.

22 This Court granted Faith Center’s motion for a preliminary injunction on May 23, 2005.
23 (Docket No. 53.) The County appealed the preliminary injunction on June 17, 2005. Docket No. 65.
24 The Ninth Circuit reversed in part and vacated in part this Court’s order granting Faith Center’s
25 motion for a preliminary injunction, and remanded with instructions that this Court enter an injunction
26 after soliciting the views of the parties. *Faith Center*, 480 F.3d at 918-19. Faith Center’s petition for
27 rehearing en banc was denied. *Id.* at 895. The United States Supreme Court denied Faith Center’s
28 petition for a writ of certiorari on October 1, 2007. 128 S.Ct. 143 (2007).

1 **ARGUMENT**

2 **I. UNDER THE LAW OF THIS CASE, THE COUNTY IS ENTITLED TO SUMMARY**
3 **JUDGMENT ON ALL CLAIMS AND TO A PERMANENT INJUNCTION**

4 **A. General Principles of the Law of the Case Doctrine**

5 To promote finality, the “law of the case” doctrine holds that “the decision of an appellate
6 court on a legal issue must be followed in all subsequent proceedings in the same case.” *United States*
7 *v. Cote*, 51 F.3d 178, 181 (9th Cir. 1995). The doctrine acts as a bar to issues that were “actually
8 considered and decided by the first court.” *Ibid*. The doctrine “applies to a court’s explicit decisions
9 as well as those issues decided by necessary implication.” *Ibid*. A fully considered appellate ruling on
10 an issue of law made on a preliminary injunction appeal is the law of the case for further proceedings
11 in the trial court on remand and in any subsequent appeal. *See* 18B Charles A. Wright & Arthur R.
12 Miller, Federal Practice and Procedure § 4478.5 (2d ed. 2006). A trial court may not reconsider a
13 question decided by an appellate court, whose rulings bind the lower court. *United States v. Houser*,
14 804 F.2d 565, 567 (9th Cir. 1986). Upon remand, an issue decided by an appellate court may not be
15 reconsidered. *Ibid*.

16 **B. The Law of This Case Was Established in *Faith Center***

17 In *Faith Center*, the Ninth Circuit upheld the religious use provision of the County’s library
18 meeting room use policy by holding that “prohibiting Faith Center’s religious worship services from
19 the Antioch meeting room is a permissible exclusion of a category of speech that is meant to preserve
20 the purpose behind the limited public forum.” *Faith Center*, 480 F.3d at 918. Under the law of the
21 case doctrine, the holding is binding on this Court, as are the findings made by the Ninth Circuit in
22 support of its holding.¹ The findings made by the Ninth Circuit also apply to Faith Center’s remaining
23 claims, and require entry of judgment in favor of the County on those claims.

24 The Ninth Circuit found that the Antioch library meeting room is a limited public forum. *Faith*
25 *Center*, 480 F.3d at 908. The Ninth Circuit also found that Faith Center made a distinction between
26

27 ¹ Faith Center misstates the Ninth Circuit’s holding at pages 7 and 9 of its summary judgment
28 motion. The Ninth Circuit did not hold that the County is entitled only to exclude “pure religious
worship” from the meeting room. The discussion of “pure religious worship” at page 915 of *Faith*
Center is not the holding of the case.

1 religious worship and virtually all other forms of religious speech when it separated its afternoon
2 religious worship service from its morning activities. *Id.* at 918. The Ninth Circuit further found that
3 the County’s enforcement of its policy “to exclude religious worship services from the meeting room
4 is reasonable in light of the forum’s purpose.” *Id.* at 908. The enforcement is reasonable for two
5 reasons: first, “so that the Antioch forum is not transformed into an occasional house of worship;” and
6 second, the County “reasonably could conclude that the controversy and distraction of religious
7 worship within the Antioch Library meeting room may alienate patrons and undermine the library’s
8 purpose of making itself available to the whole community.” *Id.* at 911.

9 In addition, the Ninth Circuit found that the County did not discriminate against Faith Center
10 on the basis of Faith Center’s religious viewpoint. *Faith Center*, 480 F.3d at 911, 914. Specifically,
11 the Ninth Circuit held “that the exclusion of Faith Center’s religious worship services from the
12 Antioch Library meeting room is a permissible limitation on the subject matter that may be discussed
13 in the meeting room, and . . . is not suppression of a prohibited perspective from an otherwise
14 permissible topic.” *Id.* at 911.

15 Finally, the Ninth Circuit found that the County’s enforcement of its policy did not and will not
16 foster an excessive government entanglement with religion. *Faith Center*, 480 F.3d at 917-18. The
17 court noted that “the government can distinguish and exclude proselytizing religious speech to
18 preserve the purpose for a limited forum,” *Id.* at 917, but in this case there was no excessive
19 entanglement because Faith Center itself distinguished between religious worship and other forms of
20 religious speech. *Id.* at 917-18. All of these findings are binding on remand.

21 **C. The Issues Raised by Faith Center Were Conclusively Determined by the Ninth Circuit**

22 Pages 8 through 21 of Faith Center’s summary judgment motion revisit issues that were
23 conclusively determined by the Ninth Circuit. The law of the case doctrine prohibits this Court on
24 remand from reconsidering whether the library meeting room is a limited public forum or a designated
25 public forum, whether there was any viewpoint discrimination, whether Faith Center’s event was a
26 religious worship service, or any other questions related to Faith Center’s free speech claim. *See*
27 *Houser*, 804 F.2d at 567. Moreover, the facts previously considered by this Court and the Ninth
28 Circuit are binding on remand, because evidence received upon an application for a preliminary

1 injunction becomes part of the record on trial. Fed.R.Civ.P. 65(a)(2). But even if this Court were
2 authorized to revisit the issues raised by Faith Center, all of the evidence cited in Faith Center's
3 motion supports the Ninth Circuit's findings that the Antioch library meeting room is a limited public
4 forum and that the afternoon session of Pastor Hopkins' event was a religious worship service.

5 **1. The Evidence Supports the Finding that the Antioch Library Meeting Room Is a**
6 **Limited Public Forum**

7 In *Faith Center*, the Ninth Circuit found that the purpose of the Antioch library meeting room,
8 as a limited public forum, is to serve as a "common meeting space, an alternative to the community
9 lecture hall, the corporate boardroom, or the local Starbucks." *Faith Center*, 480 F.3d at 910. The
10 evidence cited at pages 5 through 7 of Faith Center's summary judgment motion, in fact, establishes
11 that the Antioch meeting room is the type of forum the Ninth Circuit said it is – a limited public forum
12 serving as a common meeting space. Between January 2003 and March 2008, the meeting room was
13 used approximately 1,200 times by a variety of groups.² (Chandler Decl., ¶ 11.) This means the
14 meeting room is used an average of 18 times per month. If the meeting room is available for use an
15 average of 434 hours per month, *see* Plaintiffs' Summary Judgment Motion, p. 20, fn. 14, and
16 assuming each meeting lasts two hours, then the meeting room is used an average of 36 hours per
17 month. This means the meeting room is used about 8 percent of the time it is available for use, which
18 is hardly the amount of use that would make a meeting room a designated public forum rather than a
19 limited public forum.³ In finding that the meeting room is a limited public forum, the Ninth Circuit
20 distinguished between the meeting room and the rest of the library. *See Faith Center*, 480 F.3d at 910
21 (the "community at large has been invited to use the room," while the library itself is a place
22

23 ² Faith Center's references to the KKK and NAMBLA at pages 2, 23, and 25 of its motion is
24 rhetorically effective, but there is no evidence the County has ever allowed either group to use any of its
25 library meeting rooms for any purpose. The County objects to these references as irrelevant and
speculative.

26 ³ The Ninth Circuit's finding in *Faith Center* is consistent with other cases holding that
27 libraries are limited public forums. *See, e.g., Neinast v. Bd. of Trustees of Columbus Metropolitan*
28 *Library*, 346 F.3d 585, 591 (6th Cir. 2003), *Kreimer v. Bureau of Police of the Town of Morristown*,
958 F.2d 1242, 1259 (3d Cir. 1992); *see also, e.g., Good News Club v. Milford Cen. Sch.*, 522 U.S. 98,
111 (2001) (public school facilities are limited public forums), *Campbell v. St. Tammany Parish Sch.*
Bd., 231 F.3d 937, 940 (5th Cir. 2000) (same), *Bronx Household of Faith v. Board of Education of the*
City of New York, 331 F.3d 342, 351 (2d Cir. 2003) (same).

1 dedicated to quiet, to knowledge, and to beauty, where the worthy missions of facilitating learning and
2 cultural enrichment are fostered). None of Faith Center's evidence casts any doubt on the Ninth
3 Circuit's conclusion that the library portion of the Antioch library is a place dedicated to aid in the
4 acquisition of knowledge through reading, writing and quiet contemplation. *Ibid.*, citing cases.

5 The primary function of the Contra Costa County Library, including the Antioch library, is to
6 serve as a venue for reading, writing and study. Not all community libraries of the Contra Costa
7 County Library have meeting rooms, but all have a main area where books are kept, and tables and
8 chairs set aside for reading, writing and quiet study, which allow people to acquire knowledge and
9 information and improve literacy. (Cain Decl. II, ¶ 3.) Only 900 square feet of the Antioch library's
10 11,000 square feet is set aside as a meeting room. (Cain Decl. II, ¶ 4.) Setting aside 8 percent of a
11 library building for community meetings does not transform a library into a facility that is something
12 other than "a venue for reading, writing and quiet contemplation."

13 Moreover, contrary to Faith Center's assertions, the County has consistently enforced its
14 meeting room use policy. There is no evidence, for example, that the County has failed to enforce the
15 restriction prohibiting schools from using the meeting room as a regular part of the school's
16 curriculum. *See Faith Center*, 480 F.3d at 909. The meeting room has been used by educational-
17 related groups. (Chandler Decl., ¶¶ 34-50.) However, none of these groups used the room as a regular
18 part of a school curriculum. (*See, e.g.*, Cain Depo., 23:18-25, 24:1-6.)

19 **2. The Evidence Supports the Finding that Faith Center Held a Religious Worship** 20 **Service**

21 The evidence cited in Faith Center's motion also supports the Ninth Circuit's finding that the
22 afternoon session of Pastor Hopkins' event was a religious worship service. The Ninth Circuit's
23 finding was based on the distinction Faith Center drew in its flyer advertising its May 29, 2004 event.
24 Faith Center's morning session was a "Wordshop" that included a call to prayer, while its afternoon
25 session was devoted expressly to "praise and worship." *Faith Center*, 480 F.3d at 918. This
26 distinction between the morning "Wordshop" and the afternoon "Praise and Worship" time is
27 confirmed in Pastor Hopkins' declaration. (Docket No. 100: Declaration of Dr. Hattie M. Hopkins in
28 Support of Plaintiffs' Motion for Summary Judgment ("Hopkins Decl."), ¶ 8.) The "praise and

1 worship” consisted of an opening group prayer, two religious songs (“When I See Jesus” and
2 “Amazing Grace”), a sermon based on 2 Chronicles 20, and a closing group prayer. (Hopkins Decl.,
3 ¶¶ 10-17.) The opening prayer prepared attendees “mentally and spiritually to learn more from the
4 Bible,” the first song communicated to the attendees that they can derive hope, encouragement, and
5 strength through a strong relationship with Jesus, the second song communicated to the attendees that
6 God “will help us to overcome whatever problems we are facing” through God’s unconditional love
7 and acceptance, the sermon’s message to attendees was that they must be able to effectively
8 communicate with God “if we want to position ourselves for victory and overcome the problems in
9 our lives and in our communities,” and the closing prayer encouraged the attendees to continue
10 “effectively communicating with God.” (Hopkins Decl., ¶¶ 10-17.) Both prayers, both songs, and the
11 sermon each directly exhorted the attendees to a religious observance. *See Hills v. Scottsdale Unified*
12 *Sch. Dist.*, 329 F.3d 1044, 1053 (9th Cir. 2003) (government can exclude proselytizing religious speech
13 to preserve the purpose of a limited public forum). If Pastor Hopkins’ “praise and worship” time in
14 the afternoon was not a religious worship service, then nothing is, and the term “religious worship
15 service” is meaningless.⁴

16 Contrary to Faith Center’s assertion at page 11 of its motion, Pastor Hopkins’ afternoon service
17 event was different than the event in *Good News Club*. In *Good News Club*, the entire event was the
18 teaching of morals and character from a religious viewpoint. *Good News Club*, 522 U.S. at 110. By
19 contrast, the afternoon service was completely separate from the morning event, and the afternoon
20 service was devoted entirely – and only – to praise and worship. (See Hopkins Decl., ¶¶ 10-17.) Only
21 Faith Center’s separate morning event – which was devoted to “instruction on how to pray fervent,
22 effectual prayers that God hears and answers” – was like the event in *Good News Club*. (See Hopkins
23 Decl., ¶ 9).

24
25
26 ⁴ Appending impermissible activities to ones that are permissible within a forum does not
27 transform the impermissible activities into a permissible type of speech. *See, e.g., Bd. of Trustees of*
28 *State Univ. of N.Y. v. Fox*, 492 U.S. 469, 474 (1989) (inclusion of presentations on “how to be
financially responsible and how to run an efficient home” did not transform Tupperware party from
“commercial” to “educational” speech); *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 981
(9th Cir. 1998) (“the [Supreme] Court has continued to reject attempts to evade a regulation by
appending a message aimed at transforming the speech”).

1 **3. Activities That Express a Religious Viewpoint Have Been Held in the Antioch**
2 **Library Meeting Room**

3 Finally, there is no evidence the County has engaged in viewpoint discrimination or is violating
4 the Ninth Circuit’s ruling. For example, contrary to Faith Center’s assertion at pages 13 and 14 of its
5 motion, the County has *not* prohibited “a sermon on what the Bible says about how to manage your
6 money.”⁵ In fact, the County has allowed the Antioch library to be used numerous times by religious
7 and other groups for activities and events that express a religious viewpoint, including Bible study.
8 (Chandler Decl., ¶¶ 24-33.) These uses are entirely consistent with the Supreme Court’s holding in
9 *Good News Club*. Moreover, in 2007 Faith Center applied to use the Antioch library meeting room.
10 The application did not indicate that worship would occur, and did not indicate that it would have
11 separate sessions for “Wordshop” and “prayer and praise.” (Cain Decl. II, Exhibit B.) The County
12 Library granted Faith Center’s use application, and informed Faith Center that it “may use the meeting
13 room for any activity that does not violate the meeting room use policy, including activities that
14 express a religious viewpoint.” (Cain Decl. II, Exhibit C.)

15 **II. SUMMARY JUDGMENT SHOULD BE GRANTED TO DEFENDANTS BECAUSE**
16 **PLAINTIFFS’ REMAINING CONSTITUTIONAL CLAIMS FAIL AS A MATTER OF**
17 **LAW**

18 **A. General Rules for Summary Judgment Motions**

19 Summary judgment is proper when there is no genuine issue of material fact and the moving
20 party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56. The moving party bears the initial
21 burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477
22 U.S. 317, 323 (1986). Once the moving party has met this burden, the opposing party must show that
23 there is a genuine issue for trial. Fed.R.Civ.P. 56(e); *see also T.W. Elec. Serv., Inc. v. Pac. Elec.*
24 *Contractors Ass’n.*, 809 F.2d 626, 630 (9th Cir. 1987). The opposing party must present significant
25 and probative evidence to support its claim or defense. *Intel Corp. v. Hartford Accident & Indem. Co.*,
26 952 F.2d 1551, 1558 (9th Cir. 1991). Only disputes over facts that might affect the outcome of the

27
28

⁵ There is no evidence anyone has applied to use the meeting room for a money management presentation based on Bible teachings. (*See* Cain Depo., p. 43:16-23; Galindo Depo., 11:10-23.)

1 suit under the governing law will properly preclude the entry of summary judgment. Factual disputes
2 that are irrelevant or unnecessary will not be counted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
3 248 (1986).

4 **B. The County’s Meeting Room Use Policy Does Not Violate the Free Exercise Clause**
5 **Because Faith Center Was, At Most, Only Inconvenienced**

6 **1. Free Exercise Clause Generally**

7 The Free Exercise Clause of the First Amendment provides that Congress shall make no law
8 prohibiting the free exercise of religion. U.S. Const. amend. I. “The free exercise of religion means,
9 first and foremost, the right to believe and profess whatever religious doctrine one desires.”
10 *Employment Div., Dep’t of Human Res. of Oregon v. Smith*, 494 U.S. 872, 877 (1990). The clause
11 prohibits the government from compelling affirmation of religious belief, punishing the expression of
12 religious doctrines it believes to be false, imposing special disabilities on the basis of religious views
13 or religious status, or lending its power to one or the other side in controversies over religious
14 authority or dogma. *Ibid.*

15 **2. The Use Policy Affects Only Faith Center’s Operations**

16 A law or regulation does not violate the Free Exercise Clause just because it affects a religious
17 organization’s operation. *EEOC v. Pacific Press Publishing Ass’n*, 676 F.2d 1272, 1279 (9th Cir.
18 1982). Courts will not find a Free Exercise Clause violation where compliance with the challenged
19 regulation makes the practice of one's religion more difficult or expensive, but the regulation is not
20 inherently inconsistent with the litigant's beliefs. *Christian Gospel Church, Inc. v. City and County of*
21 *San Francisco*, 896 F.2d 1221, 1224 (9th Cir. 1990) (denial of use permit imposes burden of
22 convenience and expense, but minimal burden on religious practice); *see also Lakewood, Ohio Cong.*
23 *of Jehovah's Witnesses, Inc. v. City of Lakewood, Ohio*, 699 F.2d 303, 306 (6th Cir), *cert. denied*, 464
24 U.S. 815 (1983) (holding that inconvenient economic burdens on religious freedom do not rise to a
25 constitutionally impermissible infringement of free exercise). At most, Faith Center was only
26 inconvenienced by the County’s enforcement of its library meeting room use policy. Faith Center is
27 free to hold religious services in places other than the Antioch library meeting room.
28

1 **3. The Use Policy’s Purposes Are to Prevent the Meeting Room from Becoming a**
2 **House of Worship and to Preserve Its Availability to the Entire Community**

3 Faith Center’s Free Exercise Clause claim was brought in conjunction with its free speech
4 claim, making its claim a “hybrid claim.” *See San Jose Christian Coll. v. City of Morgan Hill*, 360
5 F.3d 1024, 1031 (9th Cir. 2004). In a hybrid claim, a Free Exercise claim is analyzed under the rational
6 basis test after judgment is granted in favor of the defendant on the plaintiff’s companion claims. *Id.*
7 at 1032-33.

8 Under the rational basis test, a law is constitutional if it is rationally related to a legitimate
9 government interest. *Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999). In *Faith Center*, the Ninth
10 Circuit found there is a rational basis for excluding religious services from the library meeting room.
11 *Faith Center*, 480 F.3d at 908. The County’s enforcement of its policy is and was reasonable in order
12 to prevent the Antioch library meeting room from being transformed into an occasional house of
13 worship, and to preserve the library’s purpose of making itself available to the whole community. *Id.*
14 at 911.⁶

15 The meeting room use policy also survives strict scrutiny. *See Am. Family Ass’n, Inc. v. City*
16 *& County of San Francisco*, 277 F.3d 1114, 1123 (9th Cir. 2002). Because the policy affects only Faith
17 Center’s operations, it does not impose a substantial burden on a tenant or belief that is central to the
18 Christian faith. *See Vernon v. City of Los Angeles*, 27 F.3d 1385, 1393 (9th Cir. 1994); *Strout v.*
19 *Albanese*, 178 F.3d 57, 65 (1st Cir. 1999). As the Ninth Circuit held, the County has a compelling
20 governmental interest in preserving the library meeting room as a limited public forum. *Faith Center*,
21 480 F.3d at 918-19. Moreover, the County’s meeting room policy is narrowly tailored. The policy
22 only excludes religious services from the library meeting room. It does not exclude religious activities
23 from the meeting room. The public is free to use the meeting room to conduct activities in the
24 meeting room that express a religious viewpoint. *Faith Center*, 480 F.3d at 918-19. These activities
25 have occurred several times in the Antioch library meeting room.

26 The primary case cited by Faith Center at page 22 of its motion, *Church of the Lukumi Babalu*
27

28 ⁶ The Ninth Circuit also held the County had a compelling reason for excluding religious
services – to preserve the meeting room as a limited public forum. *Faith Center*, 480 F.3d at 918-19.

1 *Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), does not apply. There is no evidence of any
2 substantial animus on the County's part that motivated the law in question. *See Church of the Lukumi*
3 *Babalu Aye*, 508 U.S. at 543 (evidence of animus against Santeria worship); *KDM v. Reedsport Sch.*
4 *Dist.*, 196 F.3d 1046, 1051 (9th Cir. 1999); *Strout*, 178 F.3d at 65. The object of the County's policy is
5 to preserve the room as a limited public forum and to avoid an Establishment Clause violation, which
6 will certainly occur if the County is forced to provide a taxpayer-funded meeting room free of charge
7 to Faith Center for it to use as an occasional house of worship.

8 **C. The County's Meeting Room Use Policy Does Not Violate the Establishment Clause**
9 **Because It Allows Religious Activities To Occur in the Library Meeting Room and Is Not**
10 **Hostile to Religion**

11 **1. Establishment Clause Generally**

12 The Establishment Clause of the First Amendment provides that "Congress shall make now
13 law respecting the establishment of religion." U.S. Const., Amend. I. The U.S. Supreme Court has
14 articulated the boundaries of the Establishment Clause's coverage:

15 "Neither a state nor the Federal Government can set up a church. Neither can pass laws
16 which aid one religion, aid all religions, or prefer one religion over another. Neither
17 can force nor influence a person to go or to remain away from church against his will or
18 force him to profess a belief or disbelief in any religion. No person can be punished for
19 entertaining or professing religious beliefs or disbeliefs, for church attendance or non-
20 attendance. No tax in any amount, large or small, can be levied to support any religious
21 activities or institutions, whatever they may be called, or whatever form they may adopt
22 to teach or practice religion."

23 *Everson v. Board of Educ.*, 330 U.S. 1, 15-16 (1947), quoting *Reynolds v. United States*, 98 U.S. 145,
24 164 (1879). The Establishment Clause means that government may not promote or affiliate itself with
25 any religious doctrine or organization, may not discriminate among persons on the basis of their
26 religious beliefs and practices, may not delegate a governmental power to a religious institution, and
27 may not involve itself too deeply in such an institution's religious affairs. *County of Allegheny v.*
28 *ACLU*, 492 U.S. 573-590-91 (1989). The central issue in an Establishment Clause claim is whether a

1 governmental act impermissibly endorsed or disapproved of religion. *Vasquez v. Los Angeles County*,
2 487 F.3d 1246, 1254 (9th Cir. 2007).

3 **2. The Meeting Room Is a Limited Public Forum Where Religious Activities Are**
4 **Allowed**

5 Making a limited public forum available to religious groups, where they may speak about
6 topics from a religious viewpoint, does not violate the Establishment Clause. *Rosenberger v. Rector &*
7 *Visitors of the Univ. of Virginia*, 515 U.S. 819, 842-43 (1995). The County has allowed the Antioch
8 library meeting room to be used numerous times by religious and other groups for activities and events
9 that express a religious viewpoint, including Bible study. (Chandler Decl., ¶¶ 24-33.) The County
10 also allowed Faith Center to use the meeting room in late 2007 for “any activity that does not violate
11 the meeting room use policy, including activities that express a religious viewpoint.” (Cain Decl. II,
12 Exhibit C.)

13 **3. The Meeting Room Use Policy is Not Hostile Toward Religion**

14 The Establishment Clause applies not only to official condonement of a particular religion or
15 religious belief, but also to official disapproval or hostility towards religion. *Vernon*, 27 F.3d at 1396,
16 citing *Church of the Lukumi Babalu Aye*, 508 U.S. at 532. The government neutrality required under
17 the Establishment Clause is thus violated as much by government disapproval of religion as it is by
18 government approval of religion. *Vernon*, 27 F.3d at 1396.

19 In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Supreme Court established the three-part
20 “*Lemon* test” for analyzing government conduct under the Establishment Clause. See *Am. Family*
21 *Ass’n*, 277 F.3d at 1121. Under the *Lemon* test, a government act is consistent with the Establishment
22 Clause if it: (1) has a secular purpose; (2) has a principal or primary effect that neither advances nor
23 disapproves of religion; and (3) does not foster excessive governmental entanglement with religion.
24 *Vasquez*, 487 F.3d at 1255, citing *Lemon*, 403 U.S. at 612-613.⁷

27 ⁷ The Supreme Court refined the *Lemon* test in *Agostini v. Felton*, 521 U.S. 203, 222-23, 234
28 (1997), by folding the “excessive entanglement” inquiry into, and setting out revised criteria for, the
“effect” prong. See *Community House, Inc. v. City of Boise*, 490 F.3d 1041, 1055 (9th Cir. 2007). But
it does not appear the *Lemon-Agostini* test applies in a hostility case. See *Vasquez*, 487 F.3d at 1255
(applying the *Lemon* test).

1 **a. The County Has Compelling Secular Purposes for Excluding Religious**
2 **Services from Library Meeting Rooms**

3 The purpose prong of the *Lemon* test asks whether the government’s actual purpose is to
4 endorse or disapprove of religion. *Am. Family Ass’n*, 277 F.3d at 1121. A practice will stumble on
5 the purpose prong only if it is motivated only by a wholly impermissible purpose. *Ibid.* The analysis
6 under this prong focuses only on purpose; the reviewing court does not question the propriety of the
7 means to achieve that purpose or whether the defendants were correct or even reasonable in the
8 assumptions underlying their actions. *Ibid.* Moreover, the reviewing court must be reluctant to
9 attribute unconstitutional motives to government actors in the face of a plausible secular purpose.
10 *Ibid.*

11 The County has two compelling purposes for excluding religious services from its library
12 meeting rooms. First, as the Ninth Circuit held, the County has a compelling governmental interest in
13 preserving the meeting room as a limited public forum. *Faith Center*, 480 F.3d at 918-19.

14 The second compelling reason for excluding religious services from library meeting rooms is
15 to avoid an Establishment Clause violation. It is well established that governmental actions taken to
16 avoid potential Establishment Clause violations have a valid secular purpose. *Vasquez*, 487 F.3d at
17 1255. Without this rule, Establishment Clause jurisprudence would be unworkable. In *Vasquez*, the
18 County of Los Angeles removed the Christian cross from its county seal. According to the plaintiff,
19 the removal of the cross from the seal conveyed a message of hostility to the Christian religion, thus
20 violating the Establishment Clause. The Ninth Circuit disagreed, holding that the plaintiff’s
21 Establishment Clause claim was without merit. ““For this court ... to hold that the removal of ...
22 objects to cure an Establishment Clause violation would itself violate the Establishment Clause would
23 ... result in an inability to cure an Establishment Clause violation and thus totally eviscerate the
24 [E]stablishment [C]lause.”” *Id.* at 1256, n.8, quoting *McGinley v. Houston*, 282 F. Supp.2d 1304, 1307
25 (M.D.Ala. 2003), *aff’d* 361 F.3d 1328 (11th Cir. 2004) (ellipsis and alterations in original).

26 Here, allowing religious services – as distinguished from religious activities or speech from a
27 religious viewpoint – in the library meeting room would violate the Establishment Clause, because the
28 County would be providing a form of governmental financial support for religious services. The

1 provision of a meeting room involves governmental expenditure, if only in the form of electricity,
2 heating and cooling, and maintenance costs. *See Rosenberger*, 515 U.S. at 843. “[I]f the State pays a
3 church’s bills it is subsidizing it, and we must guard against this abuse.” *Id.* at 844; *see also Tilton v.*
4 *Richardson*, 403 U.S. 672, 683 (1971) (provision that federally subsidized building cannot be used for
5 sectarian or religious worship for 20 years is invalid because nothing prohibits building from being
6 converted into a chapel at the end of the 20-year period); *Roemer v. Bd. of Pub. Works*, 426 U.S. 736,
7 760-61 (1976) (upholding program of direct state financial aid to private colleges and universities,
8 including religious ones, because there was a statutory prohibition against use of funds for sectarian
9 purposes); *Hunt v. McNair*, 413 U.S. 734, 744-45 (1973) (upholding program of state aid to colleges
10 and universities, including religious ones, to finance construction because funds were not allowed to
11 be used for the construction of religious facilities).

12 In this case, requiring the County to allow religious services in its library meeting room would
13 itself be a violation of the Establishment Clause, because the County would be forced to provide
14 financial support for Faith Center’s religious services. The maintenance of the Antioch library and its
15 meeting room is funded primarily by property taxes. (Cain Decl. II, ¶¶ 8-9.) To hold that the
16 prohibition of religious services from the library meeting room would violate the Establishment
17 Clause would result in an conundrum that would “totally eviscerate” the Establishment Clause. *See*
18 *Vasquez*, 487 F.3d at 1256, n.8.

19 **b. The Primary Effect of the Meeting Room Use Policy Cannot Be Construed**
20 **As Sending a Message of Disapproval of Religion**

21 The second prong of the *Lemon* test prohibits government action that has the principal or
22 primary effect of advancing or disapproving religion. *Am. Family Ass’n*, 277 F.3d at 1122. In a
23 hostility case, a court must analyze whether it is objectively reasonable for the government action to be
24 construed as sending primarily a message of disapproval of religion. *Vernon*, 27 F.3d at 1398. The
25 effect prong is analyzed from the point of view of a reasonable observer who is informed and familiar
26 with the history of the government practice at issue. *Vasquez*, 487 F.3d at 1256.

27 In this case, the primary message sent by the County is not disapproval of Faith Center’s
28 religious beliefs. A reasonable observer would not view the County’s prohibition of religious services

1 from the library meeting room as an act of hostility toward religion. Rather, a reasonable observer
2 who is familiar with the purpose of libraries generally and library meeting rooms in particular would
3 view the prohibition as the County's effort to preserve the meeting room as a limited public forum and
4 to preserve "the library's primary function as a venue for reading, writing and quiet contemplation."
5 *Faith Center*, 480 F.3d at 910.

6 A reasonable observer would also view the County's prohibition of religious services from the
7 library meeting room as an effort to ensure the County's compliance with the Establishment Clause,
8 not as an act hostile to religion. In *Vasquez*, the Ninth Circuit held that a reasonable observer would
9 not view the removal of the cross from the Los Angeles County seal as an act of hostility toward
10 religion. *Vasquez*, 487 F.3d at 1257. Rather, the court in *Vasquez* held that a reasonable observer
11 would view the cross removal as an effort to restore Los Angeles County's neutrality toward religion
12 and ensure its continued compliance with the Establishment Clause. *Ibid*.

13 **c. Enforcement of the Use Policy Does Not Foster Excessive Entanglement**
14 **with Religion**

15 Whether government action excessively entangles government with religion is the final prong
16 of the *Lemon* test. *Vernon*, 27 F.3d at 1389. Routine regulatory interaction that involves no inquiries
17 into religious doctrine, no detailed monitoring, and no close administrative contact between secular
18 and religious bodies does not violate the nonentanglement command. *KDM*, 196 F.3d at 1051.
19 Routine government oversight to ensure that public funding is not used for religious purposes is not
20 excessive entanglement. *Community House*, 490 F.3d at 1056. Entanglement must be excessive
21 before it runs afoul of the Establishment Clause. *Ibid*. Monitoring does not constitute excessive
22 entanglement. *Ibid*. Administrative entanglement typically involves comprehensive, discriminating,
23 and continuing state surveillance of religion. *Vernon*, 27 F.3d at 1389.

24 The County does not excessively entangle itself with religion. County library personnel do not
25 monitor library meeting rooms while they are being used by applicants who are authorized to use the
26 rooms. (Cain Decl. II, ¶ 11; Loomis Depo., 13:14; Biglow Depo., 27:11.) In this case, as the Ninth
27 Circuit found, the County's enforcement of its policy against Faith Center did not foster an excessive
28 government entanglement with religion because Faith Center itself distinguished between religious

1 worship and other forms of religious speech. *Faith Center*, 480 F.3d at 917-18.

2 In general, the instant case is not the type of case where the Supreme Court has found
3 government hostility toward religion. *See Locke v. Davey*, 540 U.S. 712, 720 (2004). This is not a
4 case where the government seeks to impose criminal or civil sanctions on Faith Center's religious
5 services or rites. *Ibid.* Nor is it a case where the government attempts to deny Faith Center officials
6 the right to participate in the political affairs of the community by, for example, prohibiting Faith
7 Center officials from running for office. *Ibid.* Nor is it a case where the government attempts to
8 require Faith Center members to choose between their religious beliefs and receiving a government
9 benefit, such as unemployment compensation. *Ibid.* Rather, as the Ninth Circuit held, the County
10 seeks to preserve the library meeting room as a limited public forum. *Faith Center*, 480 F.3d at 909.
11 Just as the County does not allow schools to use the meeting room for instructional purposes as a
12 regul, the County does not allow religious churches or organizations to use the meeting room for
13 church services. Faith Center is free to use the meeting room for expressive activity where topics are
14 discussed from a religious viewpoint. By allowing this expressive activity to occur, the County is not
15 hostile toward religion.

16 **4. The Use Policy Does Not Distinguish Between Religious Denominations**

17 The library meeting room use policy does not impermissibly distinguish between theistic and
18 non-theistic religions, contrary to Faith Center's assertion at page 25 of its motion. The policy is
19 denominationally neutral. *See Larson v. Valente*, 456 U.S. 228, 246 (1982). The use policy prohibits
20 meeting rooms from being used for "religious services."⁸ If a religious group, theistic or non-theistic,
21 wants to use a library meeting room for an activity that expresses a religious viewpoint, it can. If a
22 religious group, theistic or non-theistic, wants to use the meeting room for a religious worship service,
23 it cannot. Even Judge Bybee acknowledged that non-theistic religious groups conduct religious
24 services. *Faith Center*, 480 F.3d at 901 (Bybee, J., dissenting from denial of rehearing en banc).⁹

25
26 ⁸ As noted above, the Ninth Circuit did not hold that the County is entitled only to exclude
"pure religious worship" from the meeting room.

27 ⁹ Judge Bybee's assertion that a Buddhist group would not identify its activities as worship is
28 simply wrong. (*See* http://www.bbc.co.uk/religion/religions/buddhism/customs/worship_1.shtml (last
visited Sept. 23, 2008) ("There are as many forms of Buddhist worship as there are schools of
Buddhism - and there are many of those")

1 **D. The County’s Meeting Room Use Policy Does Not Violate the Equal Protection Clause**

2 The Equal Protection Clause of the Fourteenth Amendment provides that no State shall “deny
3 to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1.
4 The Equal Protection Clause is essentially a direction that all persons similarly situated should be
5 treated alike. *Green v. City of Tucson*, 340 F.3d 891, 896 (9th Cir. 2003).

6 The Free Exercise Clause provides the primary framework for assessing religious
7 discrimination claims. *Locke*, 540 U.S. at 720 n. 3. If a challenged program comports with the Free
8 Exercise Clause, that conclusion ends the religious discrimination analysis, and rational basis scrutiny
9 applies to any further equal protection inquiry. *Ibid.*; see also *Johnson v. Robison*, 415 U.S. 361, 375
10 n. 14 (1974) (once a law is found to be valid with respect to the free exercise right, there is “no
11 occasion to apply to the challenged classification a standard of scrutiny stricter than the traditional
12 rational-basis test” in addressing an equal protection claim). Under rational basis review, a statute will
13 be upheld if it is rationally related to a legitimate governmental purpose. *Romer v. Evans*, 517 U.S.
14 620, 631 (1996).

15 As noted above, the County’s decision to prohibit Faith Center from conducting religious
16 worship services in the library meeting room was reasonable, both to avoid transforming the meeting
17 room into an occasional house of worship and to avoid alienating patrons and undermining the
18 library’s purpose of making itself available to the whole community. *Faith Center*, 480 F.3d at 911.

19 **III. IF JUDGMENT IS NOT ENTERED FOR DEFENDANTS ON ALL CLAIMS, THEN**
20 **THE DEFENDANTS ARE ENTITLED TO ABSOLUTE OR QUALIFIED IMMUNITY**
21 **ON ANY REMAINING CLAIMS**

22 Absolute immunity applies to a government official’s actions in the course of fulfilling his or
23 her legislative, executive, or prosecutorial duties. *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982).
24 Absolute immunity does not require the official to have acted reasonably or in accordance with clearly
25 established law. *Ibid.* Here, defendants Glover, DeSaulnier, Gioia, Greenberg and Uilkema are all
26 entitled to absolute immunity. As members of the Board of Supervisors, they approved the library use
27 policy in their legislative capacity.¹⁰

28

¹⁰ Defendants DeSaulnier and Greenberg are no longer on the Board of Supervisors.

1 Qualified immunity generally protects government officials in the course of performing the
2 discretionary duties of their offices. *Harlow*, 457 U.S. at 818. Qualified immunity shields officials for
3 civil damages “insofar as their conduct does not violate clearly established statutory or constitutional
4 rights of which a reasonable person would have known. *Ibid*. The doctrine “gives ample room for
5 mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the
6 law.” *Malley v. Briggs*, 475 U.S. 335, 341 (1986). The doctrine is an immunity from suit rather than a
7 mere defense to liability. *Hunter v. Bryant*, 502 U.S. 224, 228 (1991).

8 In evaluating a qualified immunity claim, a court must first determine if, as a matter of law and
9 taken in the light most favorable to the party asserting the injury, the facts alleged show a violation of
10 a constitutional right. *Saucier v. Katz*, 533 U.S. 194, 201-02 (2001). If so, defendants are immune if
11 they can show that the right at issue was not “clearly established.” *Ibid*. The inquiry of whether a
12 right was clearly established “must be undertaken in light of the specific context of the case, not as a
13 broad general proposition.” *Id.* at 201. For the law to be clearly established, the “contours of the
14 right” must be sufficiently clear that a reasonable official would understand that his or her conduct
15 violates that right.” *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). “The relevant, dispositive
16 inquiry in determining whether a right is clearly established is whether it would be clear to a
17 reasonable [defendant] that his conduct was unlawful in the situation he confronted.” *Saucier*, 533
18 U.S. at 195-95. Officials are not presumed to have “the same kind of legal scholarship normally
19 associated with law professors and academicians.” *Walnut Properties, Inc. v. City of Whittier*, 861
20 F.2d 1102, 1113 (9th Cir. 1988).

21 Here, defendants Cain, Chan, O’Donoghue and Sweeten are entitled to qualified immunity.¹¹ It
22 is reasonable to assume that a librarian would believe that the Constitution says that the separation of
23 church and state requires excluding church services from a government meeting room. Moreover, as
24 the Ninth Circuit has acknowledged, Establishment Clause jurisprudence can be confusing.
25 *Community House, Inc.*, 490 F.3d at 1055 fn. 8.

¹¹ Sweeten is no longer County Administrator and is no longer employed by the County.

1 **IV. THE COUNTY IS ENTITLED TO A PERMANENT INJUNCTION PROHIBITING**
2 **PLAINTIFFS FROM USING THE LIBRARY MEETING ROOM FOR RELIGIOUS**
3 **SERVICES**

4 **A. Summary Judgment Can Be Used to Grant a Permanent Injunction**

5 Summary judgment may be used to grant a permanent injunction when the material facts are
6 undisputed. *DeNardo v. Murphy*, 781 F.2d 1345, 1347 (9th Cir. 1986); *see also Brotherhood of*
7 *Railroad Carmen v. Chicago & N.W. Ry. Co.*, 354 F.2d 786 (8th Cir. 1966), *Standard Oil Co. of Texas*
8 *v. Lopeno Gas Co.*, 240 F.2d 504 (5th Cir. 1957). No evidentiary hearing is required for the issuance
9 of a permanent injunction where there are no triable issues of material fact. *Charlton v. Estate of*
10 *Charlton*, 841 F.2d 988, 989 (9th Cir. 1988).

11 **B. Proposed Permanent Injunction**

12 The County proposes the following permanent injunction:

13 “Pursuant to the holding of the Ninth Circuit Court of Appeals in *Faith*
14 *Center Church Evangelistic Ministries, et al. v. Federal D. Glover, et al.*, 480
15 F.3d 891 (2007), Plaintiffs Faith Center Church Evangelistic Ministries and
16 Hattie Hopkins (“Plaintiffs”) are enjoined from using the meeting room in the
17 Antioch Branch of the Contra Costa County Library system for religious
18 worship services in violation of the “Religious Use” provision of the library
19 meeting room use policy adopted pursuant to Contra Costa County Resolution
20 No. 2004/655, entitled “In the Matter of Adopting a Policy for the Use of
21 Meeting Rooms in Libraries” (hereafter “Library Meeting Room Use Policy”).

22 Upon application to and authorization by the Contra Costa County
23 Library, Plaintiffs may use the meeting room in the Antioch Branch of the
24 Contra Costa County Library system for any use not prohibited by the Library
25 Meeting Room Use Policy, including but not limited to activities that express a
26 religious viewpoint. Defendants may require Plaintiffs to certify that the
27 activity or activities that will be conducted by Plaintiffs in the Antioch Branch
28 library meeting room will not constitute a religious worship service under the

1 tenets, beliefs, and practices of Plaintiffs' church, religious sect, religious
2 organization, or faith group.”

3 The permanent injunction proposed above complies with the Ninth Circuit's instructions on
4 remand. It allows the County to exclude religious worship services while also allowing Faith Center
5 to conduct activities in the meeting room that express a religious viewpoint. *Faith Center*, 480 F.3d at
6 918-19. The proposed injunction also avoids the problem of excessive entanglement by authorizing
7 the County to require Faith Center to self-certify that its activity will not constitute a religious worship
8 service. Although the Ninth Circuit expressed no opinion on self-certification by meeting room
9 applicants, *see* 480 F.3d at 919 n. 19, the court found that “[r]eligious worship services can be
10 distinguished from other forms of religious speech by the adherents themselves.” *Faith Center*, 480
11 F.3d at 918.

12 CONCLUSION

13 The County respectfully requests that this Court enter the permanent injunction proposed
14 above. The County also respectfully requests that this Court enter judgment in favor of the County on
15 all of Faith Center's claims.

16
17 DATED: September 26, 2008

SILVANO B. MARCHESI, County Counsel

18
19
20 By: /s/

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