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 8 DIEGO; AND MICHAEL RODDY

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UNITED STATES DISTRICT COURT  
 SOUTHERN DISTRICT OF CALIFORNIA

MINDY BARLOW and DALIA R. SMITH,

Plaintiffs,

v.

SUPERIOR COURT OF CALIFORNIA,  
 COUNTY OF SAN DIEGO; MICHAEL  
 RODDY, individually and in his official capacity  
 as the Executive Officer of the Superior Court of  
 California, County of San Diego; and DOES 1  
 through 20 inclusive,

Defendants.

Case No. 07-cv-1926-LAB(LSP)

**DEFENDANTS SUPERIOR  
 COURT OF CALIFORNIA,  
 COUNTY OF SAN DIEGO AND  
 MICHAEL RODDY'S  
 MEMORANDUM OF POINTS  
 AND AUTHORITIES IN  
 SUPPORT OF MOTION TO  
 DISMISS FIRST AMENDED  
 COMPLAINT**

Date: January 14, 2008  
 Time: 10:30 a.m.  
 Courtroom: 9  
 Judge: Larry Alan Burns

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1           **I.       INTRODUCTION**

2           This action is brought by two employees of the Superior Court of California, County of  
3 San Diego (“Superior Court”) against the Superior Court and its Executive Officer, Michael  
4 Roddy (collectively “Defendants”). Plaintiffs’ First Amended Complaint challenges Defendants’  
5 decision to deny their application for permission to use court facilities<sup>1</sup> for Bible study meetings.  
6 The employee Plaintiffs’ claims should be summarily dismissed as a matter of law.

7           The Superior Court, as a government employer, faces the “difficult task of charting a  
8 course between infringing on employees’ rights to the free exercise of their religions under the  
9 First Amendment and violating the Establishment Clause of the First Amendment by appearing to  
10 endorse [its] employees’ religious expressions.” *Berry v. Dept. of Social Servs.*, 447 F.3d 642,  
11 657 (9th Cir. 2006) (upholding government employer’s prohibition on religious displays and use  
12 of conference room for prayer meetings). In this case, the Superior Court lawfully charted that  
13 difficult course in accordance with federal and California constitutional principles. In denying  
14 Plaintiff employees’ request to conduct a Bible study on court premises, the Superior Court even-  
15 handedly applied its own multi-factored Administrative Policy regarding facilities use. In doing  
16 so, the Superior Court heeded the Supreme Court’s mandate to “guard against the civic  
17 divisiveness that follows when the Government weighs in on one side of religious debate.”  
18 *McCreary County v. ACLU*, 545 U.S. 844, 876 (2005) (holding that Ten Commandments display  
19 in county courthouse violated the Establishment Clause).

20           The crux of the First Amended Complaint is that the Superior Court violated two  
21 employee Plaintiffs’ rights to free expression and free exercise of religion. These claims are  
22 governed by a cornerstone principle of First Amendment law in the context of government  
23 employment: The government has wide latitude to regulate the speech of its employees in the  
24 workplace to ensure the effective and efficient administration of the government. *Pickering v.*  
25 *Bd. of Educ.*, 391 U.S. 563, 568 (1968). Accordingly, Plaintiffs cannot state a First Amendment  
26

27           <sup>1</sup> See First Amended Complaint (“FAC”) ¶¶ 10, 12-14, 23.

1 claim unless their interest in the speech at issue outweighs the government's need, as an  
2 employer, to regulate that speech.

3 The Superior Court's substantial interests here outweigh Plaintiffs' speech interests. In  
4 particular, the Superior Court has a significant, legitimate interest in avoiding potential violations  
5 of the Establishment Clause and related California constitutional provisions that likely would  
6 result if religious activities were allowed in court facilities. This interest is particularly  
7 substantial given the Superior Court's obligation to provide a neutral, impartial forum for all  
8 litigants, and outweighs Plaintiffs' interests in conducting a Bible study in court facilities.  
9 Plaintiffs' claims should therefore be dismissed.

## 10 II. STATEMENT OF FACTS

11 On November 13, 2006, the Superior Court adopted Administrative Policy ("AP" or the  
12 "Policy") 4.6, which governs "Use of Court Facilities." (First Amended Complaint ¶ 18 and Ex.  
13 A). The Policy provides that Superior Court employees may use court facilities for "celebrations  
14 of personal milestones commonly celebrated in the workplace" without seeking prior approval.  
15 (FAC Ex. A at II.B). Requests for all other uses by employees "must be submitted in writing."  
16 (*Id.* at II.C). Such requests must be submitted to the Assistant Executive Officer for the division,  
17 who "will evaluate the request using all" of six enumerated factors. (*Id.* at II.C.1.a-f). The  
18 factors that the Assistant Executive Officer must use to evaluate all requests are:

- 19 • Protection of the integrity of the judicial process, including  
20 public trust and confidence in the impartiality, lack of bias  
or discrimination, and fairness of the judicial system;
- 21 • Safety and security of the people and property within the  
22 courthouse and its perimeter;
- 23 • Whether the program or service advances the administration  
of justice and is useful to a significant number of litigants;
- 24 • Whether the program imposes any potential costs or liability  
25 on the court;
- 26 • Whether the program or service offered is conducted for  
27 profit; and
- 28

- Whether constitutional, statutory, or other legal requirements prohibit the court from granting use of its facilities.

(*Id.*).

Plaintiffs are two court reporters employed by the Superior Court. (FAC ¶¶ 5-6).

Sometime in 2006, Plaintiffs submitted a request under AP 4.6 to conduct a weekly Bible study in a jury room. (*Id.* ¶ 23). Assistant Executive Officer Stephen Cascioppo (“Cascioppo”) informed Plaintiffs that their request had been denied on grounds of the separation of church and state. (*Id.* ¶ 24). Plaintiff Mindy Barlow asked in writing that the denial be reconsidered. (*Id.* ¶ 26). In response, Cascioppo provided several reasons for prohibiting “religious use of court premises.” (*Id.* at ¶ 27 and Ex. D). He explained that his decision was based on the following factors enumerated in AP 4.6:

First, the premises are not public, and the court does not wish to open them up generally to public activities. This would be required in order to ensure public trust and confidence in the impartiality, lack of bias or discrimination and fairness of the judicial system. Second, the proposed use does not advance the administration of justice, and is not useful to a significant number of litigants. The premises are better preserved for the uses for which the property has been lawfully dedicated. Finally, the request may impose high potential costs or liability on the court.

(FAC Ex. D).

On October 2, 2007, Plaintiffs filed their initial Complaint alleging federal and state causes of action for violation of Free Speech, Free Exercise, Equal Protection, Due Process, and the Establishment Clause. (*See* Docket No. 1). On November 6, 2007, Plaintiffs filed the First Amended Complaint attaching the exhibits to the Complaint. (*See* Docket No. 11). For the reasons set forth below, Defendants move to dismiss the First Amended Complaint in its entirety.

### III. LEGAL GROUNDS FOR MOTION TO DISMISS

A motion to dismiss must be granted where the plaintiff fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). In order to survive a Rule 12(b)(6) motion to dismiss, a complaint must set forth “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Bell Atlantic Corp. v. Twombly*, \_\_\_ U.S. \_\_\_, 127 S. Ct. 1955, 1965 (2007) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). The plaintiff’s

1 factual allegations “must be enough to raise a right to relief above the speculative level.” *Id.*  
 2 (citing 5 C. Wright and A. Miller, Federal Practice and Procedure § 1216 at 235-36 (3d ed.  
 3 2004)). Exhibits attached to the complaint are considered for purposes of a motion to dismiss.  
 4 *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555 (9th Cir. 1989).  
 5 Here, Plaintiffs’ allegations fail to state a claim upon which relief can be granted for the reasons  
 6 set forth below.

7 **IV. PLAINTIFFS’ FIRST CLAIM FAILS TO STATE A CLAIM FOR**  
 8 **VIOLATION OF THE FIRST AMENDMENT’S FREE SPEECH CLAUSE**

9 Plaintiffs’ First Claim purports to state a claim for violation of the Free Speech Clause of  
 10 the First Amendment. (FAC ¶¶ 38-43). Plaintiffs allege that the Superior Court “single[d] out  
 11 religious speech for discriminatory treatment.” (*Id.* ¶ 41(a)). Two established legal principles  
 12 demonstrate that Plaintiffs’ cause of action is without merit. First, as a government employer, the  
 13 Superior Court is afforded wider latitude in regulating the speech of its employees than the speech  
 14 of the public at large. Second, because the Superior Court building is a nonpublic forum,  
 15 Defendants’ actions need only be reasonable and viewpoint neutral to pass Constitutional muster.  
 16 Even accepting the allegations of the Complaint as true, it is clear that Defendants’ Policy  
 17 governing use of court facilities satisfies both tests.

18 **A. Under the *Pickering* Balancing Test, the Superior Court’s Interests**  
 19 **Outweigh Plaintiffs’ Speech Interests**

20 A government employee’s First Amendment challenge to the conduct of a government  
 21 employer is evaluated under the “*Pickering* test.” *Waters v. Churchill*, 511 U.S. 661, 668 (1994)  
 22 (citing *Pickering*, 391 U.S. at 568). Under *Pickering*, courts apply a balancing test: The  
 23 “employee’s interest in expressing herself . . . must not be outweighed by any injury the speech  
 24 could cause to ‘the interest of the State, as an employer, in promoting the efficiency of the public  
 25 services it performs through its employees.’” *Id.* (quoting *Connick v. Myers*, 461 U.S. 138, 142  
 26 (1983)). In the government employee context, the *Pickering* balancing test supplants the  
 27  
 28

1 traditional “forum analysis” approach to free speech issues.<sup>2</sup> *See Good News Employee Ass’n v.*  
 2 *Hicks*, No. C03-3542 VRW, 2004 U.S. Dist. LEXIS 30371 \*44 (N.D. Cal. Mar. 16, 2004)  
 3 (refusing to apply forum analysis to public employee’s free speech claim).

4 The Supreme Court long ago recognized that the “State has interests as an employer in  
 5 regulating the speech of its employees that differ significantly from those it possesses in  
 6 connection with regulation of the speech of the citizenry in general.” *Pickering*, 391 U.S. at 568.  
 7 “The key to First Amendment analysis of government employment decisions, then, is this: *The*  
 8 *government’s interest in achieving its goals as effectively and efficiently as possible is elevated*  
 9 *from a relatively subordinate interest when it acts as sovereign to a significant one when it acts*  
 10 *as employer.*” *Waters*, 511 U.S. at 675 (emphasis added).

11 **1. The Superior Court’s Interest in Not Violating the**  
 12 **Establishment Clause Outweighs Plaintiffs’ Speech Interests**

13 The Superior Court’s denial of Plaintiffs’ application was based, in part, on its duty to  
 14 avoid violating the federal Establishment Clause. When Plaintiffs first requested permission to  
 15 use court space for their Bible study meetings, they were informed by Superior Court  
 16 administration that “Court policy [does] not allow Bible studies in courthouse facilities because of  
 17 a concern regarding the ‘separation of church and state.’” (FAC ¶ 12). The Superior Court’s  
 18 concern with violating the Establishment Clause is well-founded and outweighs Plaintiffs’  
 19 interest in conducting a Bible study on Superior Court premises.

20 The Ninth Circuit recently observed that “[t]he Supreme Court has reiterated that avoiding  
 21 an Establishment Clause violation may be a compelling state interest.” *Berry*, 447 F.3d at 650  
 22 (citations omitted). In *Berry*, plaintiff alleged that his employer, the Department of Social  
 23 Services, violated his rights by “prohibiting him from discussing religion with clients, displaying  
 24 religious items in his cubicle, and using a conference room for prayer meetings.” *Id.* at 645. The  
 25 Court held that the department’s policy prohibiting Berry from discussing religion with his clients

26 \_\_\_\_\_  
 27 <sup>2</sup> However, as discussed *infra*, section III.A.2, even under a traditional forum analysis,  
 28 Plaintiffs’ free speech claims lack merit.

1 was reasonable, and that “the Department’s need to avoid possible violations of the Establishment  
2 Clause of the First Amendment outweigh[ed] the restriction’s curtailment of Mr. Berry’s religious  
3 speech on the job.” *Id.* at 651. *See also Knight v. State of Conn. Dept. of Pub. Health*, 275 F.3d  
4 156, 164-65 (2d Cir. 2001) (allowing prohibition on religious speech by public health employees  
5 because state’s Establishment Clause concern outweighed plaintiffs’ speech interests).

6 Here, Plaintiffs’ proposed Bible study in court facilities raises substantial Establishment  
7 Clause concerns. Conduct is consistent with the Establishment Clause if it “(1) has a secular  
8 purpose; (2) has a principal or primary effect that neither advances nor disapproves of religion;  
9 and (3) does not foster excessive governmental entanglement with religion.” *Vasquez v. Los*  
10 *Angeles County*, 487 F.3d 1246, 1255 (9th Cir. 2007) (citing *Lemon v. Kurtzmann*, 403 U.S. 602,  
11 612-13 (1971)). Here, permitting Plaintiffs’ Bible study would raise significant concern of  
12 possible violation of at least the third prong of the *Lemon* test by fostering excessive government  
13 entanglement with religion.

14 In *DiLoreto v. Bd. of Educ. of Downey Unified Sch. Dist.*, 74 Cal. App. 4th 267 (1999),  
15 the California Court of Appeal held that a school district would violate the Establishment Clause  
16 if it approved Plaintiffs’ proposed Ten Commandments advertisement for a baseball field fence.  
17 Because the school’s policy was to screen potential advertisements before approving them,  
18 allowing the sign to go up “would be viewed as a promulgation of certain religious views.” 74  
19 Cal. App. 4th at 277. Moreover, the court determined that permitting the advertisement would  
20 foster excessive entanglement with religion because the school “must deal with the possibility of  
21 protests, other religious factions seeking equal space, and the possibility of lawsuits.” *Id.*  
22 Accordingly, the court rejected Plaintiffs’ free speech challenge to the school district’s decision.

23 Here, as in *DiLoreto*, Defendants’ approval of Plaintiffs’ application, on its own, may well  
24 be viewed as promoting Plaintiffs’ religious beliefs, and may also create further government  
25 entanglement with religion due to “protests, other religious factions seeking equal space, and the  
26 possibility of lawsuits.” *Id.* at 277. Moreover, the Superior Court’s concern with a potential  
27 Establishment Clause violation is heightened in light of the specific activity at issue—a proposed  
28 Bible study in a court facility. (FAC ¶ 12). In *Berry*, in upholding the State’s prohibition on

1 religious items in the plaintiff's cubicle, the Ninth Circuit observed that "clients have access to  
 2 Mr. Berry's cubicle and might reasonably interpret the presence of visible religious items as  
 3 government endorsement of religion." *Berry*, 447 F.3d at 652. The risk that other court users  
 4 might observe court employees conducting Bible study in the facility substantiates Defendants'  
 5 concern regarding a potential Establishment Clause violation.

6 It should be noted that to prevail here, Defendants need not demonstrate conclusively that  
 7 allowing Plaintiffs' Bible study *would have* violated the Establishment Clause. Rather, "[w]hen  
 8 government endeavors to police itself and its employees in an effort to avoid transgressing  
 9 Establishment Clause limits, it must be afforded some leeway, even though the conduct it forbids  
 10 might not inevitably be determined to violate the Establishment Clause and the limitations it  
 11 imposes might restrict an individual's conduct that might well be protected by the Free Exercise  
 12 Clause if the individual were not acting as an agent of government." *Knight*, 275 F.3d at 165  
 13 (quoting *Marchi v. Bd. of Coop. Educ. Servs. of Albany*, 173 F.3d 469, 476 (2d Cir. 1999).

14 **2. The Superior Court's Interest in Not Violating the California**  
 15 **Constitution Outweighs Plaintiffs' Speech Interests**

16 Defendants' interest in avoiding a Constitutional violation is further amplified given the  
 17 stricter California constitutional provisions with which they must comply. The California  
 18 constitution's "No Aid" and "No Preference" Clauses reach further than the federal Establishment  
 19 Clause in prohibiting government involvement with, or support for, religious activities.

20 The "No Aid" clause provides that no government entity shall "grant *anything* to or in aid  
 21 of any religious sect, church, creed, or sectarian purpose." Cal. Const. Art. XVI § 5 (emphasis  
 22 added). The Ninth Circuit has held that "[g]iven the ordinary meaning of those words, the text of  
 23 the provision has enormous breadth." *Paulson v. City of San Diego*, 294 F.3d 1124, 1129 (9th  
 24 Cir. 2002). The provision has been "broadly" construed "to ban . . . the use of public property or  
 25 funds to support religious purposes" and to prohibit any official involvement that promotes  
 26 religion. *Hewitt v. Joyner*, 940 F.2d 1561, 1569 (9th Cir. 1991) (holding that park containing  
 27 religious statues violated California constitution). Government aid of numerous varieties has  
 28 been found to run afoul of the California No Aid Clause. *See Paulson*, 294 F.3d at 1129-1133

1 (preferential sale of land); *Frohliger v. Richardson*, 63 Cal. App. 209, 217 (1923) (funding for  
2 restoration of California missions); *County of Los Angeles v. Hollinger*, 221 Cal. App. 2d 154,  
3 162-63 (1963) (city contract for filming of Christian holiday parade); *California Teachers Ass'n*  
4 *v. Riles*, 29 Cal. 3d 794, 812-13 (1981) (state textbook loan program).

5 Likewise, the “No Preference” clause of the California constitution guarantees the “[f]ree  
6 exercise and enjoyment of religion without discrimination or preference.” Cal. Const. Art. I § 4.  
7 This provision is “broader or more comprehensive than the federal establishment clause.”  
8 *Woodland Hills Homeowners Org. v. Los Angeles Cnty. Coll. Dist.*, 218 Cal. App. 3d 79, 92  
9 (1990). The provision prohibits both actual and apparent preference for religion by the state: “not  
10 only may a governmental body not prefer one religion over another, it also may not *appear* to be  
11 acting preferentially.” *Hewitt*, 940 F.2d at 1567 (emphasis in original); *Ellis v. La Mesa*, 990  
12 F.2d 1518, 1524 (9th Cir. 1993).

13 Given the judicial responsibility of the public employer here, its interest in avoiding the  
14 appearance of partiality or bias (which would give rise to a “No Preference” violation) is  
15 particularly strong. In *Comfort v. MacLaughlin*, 473 F. Supp. 2d 1026 (C.D. Cal. 2006), plaintiff  
16 minister challenged the Los Angeles Superior Court’s General Order prohibiting him from  
17 proselytizing and preaching on Courthouse grounds. In denying the minister’s motion for a  
18 preliminary injunction, the court held:

19 [T]he General Order also reasonably serves another important  
20 governmental interest -- preservation of a forum that is free of  
21 actual or perceived partiality. As it applies to this case, the General  
22 Order ***reasonably ensures that members of the public will not***  
***perceive the courts as endorsing Plaintiffs faith above that of any***  
***other faith.***

23 *Id.* at 1029 (emphasis added). Like the General Order at issue in *Comfort*, one of the purposes  
24 behind AP 4.6 is avoiding “any appearance of impropriety.” (FAC Ex. A at I). Indeed, the Policy  
25 expressly requires the Assistant Executive Officer reviewing applications to consider  
26 “[p]rotection of the integrity of the judicial process, including public trust and confidence in the  
27 impartiality, lack of bias or discrimination, and fairness of the judicial system.” (FAC Ex. A at  
28

1 II.C.1.a). The Assistant Executive Officer expressly informed Plaintiffs he had relied on that  
2 important consideration in rejecting Plaintiffs' request. (FAC Ex. D).

3 Given that Defendants must avoid violating not only the Establishment Clause of the First  
4 Amendment, but also the broader California No Aid and No Preference Clauses, their decision to  
5 prohibit religious activity on Superior Court premises is reasonable and their interests outweigh  
6 Plaintiffs' speech interests.

7 **3. The Superior Court's Interests in Efficient Government**  
8 **Operations Outweigh Plaintiffs' Speech Interests**

9 In rejecting Plaintiffs' application under AP 4.6, the Superior Court also explained that the  
10 application was denied because "the proposed use does not advance the administration of justice"  
11 and "the request may impose high potential costs or liability on the court." (FAC Ex. D). Under  
12 the *Pickering* balancing test, these interests, which relate to promoting effective government  
13 operations, further tip the balance in Defendants' favor. *See Berry*, 447 F.3d at 653-54 (desire to  
14 maintain a conference room as nonpublic justified government employer's refusal to permit  
15 prayer meetings); *Piggee v. Carl Sandburg College*, 464 F.3d 667, 672-73 (7th Cir. 2006)  
16 (applying *Pickering* balancing and upholding school's decision to prohibit "discussions of  
17 religion and other matters" in the classroom "because they could impede the school's educational  
18 mission."); *Daniels v. City of Arlington*, 246 F.3d 500, 504 (5th Cir. 2001) (police department's  
19 interest in "conveying neutral authority" through its uniforms outweighed officer's interest in  
20 wearing a cross pin). These administrative interests, in addition to the need to avoid  
21 Constitutional violations, justified Defendants' decision and defeat Plaintiffs' claim.<sup>3</sup>

22  
23  
24  
25 <sup>3</sup> Indeed, Plaintiffs' expressly allege that their use of the Superior Court jury room was  
26 initially discontinued because a Deputy Sheriff informed Plaintiff Barlow that individuals without  
27 keycard access were not allowed entrance to the Superior Court's back hallways. *See* FAC ¶ 12.  
28 That is, Plaintiffs admit their use was initially discontinued by law enforcement personnel on  
purely administrative and security grounds having nothing to do with speech or religion.

1 **4. Plaintiffs' Allegations Regarding Other Groups' Use of Court**  
 2 **Facilities Do Not Change the *Pickering* Analysis**

3 Even if, as Plaintiffs allege, other groups have used Superior Court facilities, their usage  
 4 does not tip the *Pickering* balance in their favor. Plaintiffs allege, on information and belief, that  
 5 "Defendants have allowed Weight Watchers to meet weekly in court facilities" and that  
 6 "Defendants have allowed the Boy Scouts of America to meet occasionally in court facilities."  
 7 (FAC ¶¶ 31-32). These allegations do not save Plaintiffs' claim. The crux of the Complaint is a  
 8 challenge to AP 4.6, both as drafted and as applied to Plaintiffs. But Plaintiffs' allegation that the  
 9 Superior Court applied AP 4.6 unfairly or inconsistently fails because Plaintiffs can not allege  
 10 facts showing inconsistent application of the *Policy*. Plaintiffs do not assert that Weight Watchers  
 11 or Boy Scouts applied pursuant to AP 4.6 to use court facilities and that the Superior Court  
 12 granted their applications.<sup>4</sup>

13 Moreover, even assuming these other groups were permitted to meet in court facilities  
 14 pursuant to an application approved under AP 4.6, their use does not implicate the same  
 15 governmental interests as Plaintiffs' Bible study. Plaintiffs do not assert that either Weight  
 16 Watchers or the Boy Scouts of America's alleged uses were religious in nature. Rather, they only  
 17 allege that the two groups are "public organization[s]" which do not "advance the administration  
 18 of justice." (FAC ¶¶ 31-32). As discussed above, Plaintiffs' proposed religious use of court  
 19 facilities raises potential Federal and state constitutional violations, concerns not implicated by  
 20 allegations that these other groups have used Superior Court facilities. Under the *Pickering*  
 21 balancing test, exclusion of non-religious activity would not be necessary to "ensure[] that  
 22 members of the public will not perceive the courts as endorsing Plaintiffs faith above that of any  
 23 other faith." *Comfort*, 473 F. Supp. 2d at 1029. *See also Faith Center Church Evangelistic*

24 <sup>4</sup> Plaintiffs cannot, in fact, make such an allegation. Plaintiffs' FAC admits their Bible  
 25 study use was approved in 2000; AP 4.6 was adopted on November 13, 2006; Plaintiffs submitted  
 26 a request under AP 4.6; and the request was denied pursuant to AP 4.6. *See* FAC ¶¶ 10, 18, 23-  
 27 27. Plaintiffs fail to allege when any Weight Watchers or Boy Scouts meetings were allowed, or  
 28 that any such meetings were ever applied for or approved under or after AP 4.6. In fact, no  
 Weight Watchers or Boy Scouts meetings in court facilities have been applied for or approved  
 under AP 4.6.

1 *Ministries v. Glover*, 480 F.3d 891 (9th Cir. 2007) (upholding exclusion of religious worship  
2 services from library meeting room where other community groups were permitted to meet). In  
3 sum, Plaintiffs’ allegations regarding Weight Watchers and the Boy Scouts (which were made on  
4 information and belief) do not give their Free Speech claim merit.

### 5 **B. Plaintiffs’ Claim Also Fails Under a “Forum Analysis” Approach**

6 The *Pickering* balancing test replaces a traditional “forum analysis” to Free Speech claims  
7 in the government employee context. However, even if the forum analysis applied, Plaintiffs’  
8 Free Speech claim also fails under that rubric as a matter of law.

9 Forum analysis separates government property into three categories: public fora,  
10 designated public fora, and non-public fora. *Diloreto v. Downey Unified Sch. Dist. Bd. Of Educ.*,  
11 196 F.3d 958, 964 (9th Cir. 1999). A traditional public forum is a place such as a “public park or  
12 sidewalk” that “has traditionally been available for public expression.” *Id.* (quotation omitted).  
13 When the government opens for discourse property that has traditionally not been a public forum,  
14 it creates a “designated public forum.” *Id.* Other government properties are nonpublic fora. *Id.*  
15 at 965. Because courthouse facilities are nonpublic fora, the Superior Court’s policy and its  
16 rejection of Plaintiffs’ application need only be reasonable and viewpoint neutral. As discussed  
17 below, AP 4.6 easily meets these requirements.

#### 18 **1. The Court is a Nonpublic Forum**

19 The forum to which Plaintiffs seek access—the Superior Court—is a nonpublic forum.  
20 *See Comfort*, 473 F. Supp. 2d at 1028 n.1 (“the Court is aware of no instance in which another  
21 court has found that courthouse grounds constitute a public forum.”); *Huminski v. Corsones*, 386  
22 F.3d 116, 153 (2d Cir. 2004) (“Courts have ‘not been traditionally held open for the use of the  
23 public for expressive activities.’”) (quoting *United States v. Grace* 461 U.S. 171, 178 (1983));  
24 *Sefick v. Gardner*, 164 F.3d 370, 372 (7th Cir. 1998) (“The lobby of the [federal] courthouse is  
25 not a traditional public forum or a designated public forum, not a place open to the public for the  
26 presentation of views. No one can hold a political rally in the lobby of a federal courthouse. It is  
27 a nonpublic forum. . . .” (citation and internal quotation marks omitted)); *Berner v. Delahanty*,

1 129 F.3d 20, 26 (1st Cir. 1997) (“A courthouse – and, especially, a courtroom – is a nonpublic  
2 forum.”).<sup>5</sup>

3 AP 4.6 reinforces the nonpublic character of the forum by requiring potential users to  
4 obtain permission before using court facilities. (FAC Ex. A at II.C.1-3 [“All requests by  
5 employees for events . . . must be submitted in writing . . . Requestors will be notified in writing  
6 of the decision.”]). In *Arkansas Educ. Television Comm’n v. Forbes*, 523 U.S. 666 (1998), the  
7 Supreme Court explained the distinction between “general access,” which creates a public forum,  
8 and “limited access,” which does not. *Id.* at 679. The Court held that a congressional candidate  
9 debate on public television was a nonpublic forum because potential participants were required to  
10 apply and be approved before participating. *Id.* at 680. *See also Cornelius v. NAACP Legal*  
11 *Defense and Educ. Fund*, 473 U.S. 788, 804 (1985) (charity drive was a nonpublic forum because  
12 agencies were required to seek and “obtain permission” to participate); *Perry Educ. Ass’n v.*  
13 *Perry Local Educators Ass’n*, 460 U.S. 37, 47 (1983) (school mail system was nonpublic forum  
14 because policy required outside users to secure permission from school principal before using the  
15 mail system).

16 Superior Court facilities are not generally open to either the public at large, or even to  
17 Superior Court employees.<sup>6</sup> For all uses other than employee “birthday parties, baby or wedding  
18 showers, and retirement celebrations,” employees must submit a request in writing to the  
19 Assistant Executive Officer of the division pursuant to AP 4.6. (FAC Ex. A at II.B-C). The  
20 Assistant Executive Officer will then evaluate the request using all six factors set forth in the  
21 policy, and notify the applicant of the decision. (*Id.*, Ex. A at II.C). This requirement that users  
22 seek and obtain permission preserves the nonpublic character of the Superior Court’s facilities.

23 <sup>5</sup> The presence of other governmental facilities within the San Diego Superior Court and  
24 Hall of Justice buildings does not change the buildings’ status as a nonpublic forum. *See*  
25 *Sammartano v. First Judicial Dist. Ct.*, 303 F.3d 959 (9th Cir. 2002) (holding that mixed-use  
public building was not a public forum).

26 <sup>6</sup> The alleged uses by Weight Watchers and the Boy Scouts of America do not alter the  
27 nonpublic nature of the forum. (FAC ¶¶ 31-32). In fact, one purpose of the distinction between  
28 public and nonpublic forums is to encourage the government “to open its property to some  
expressive activity in cases where, if faced with an all or nothing choice, it might not open the  
property at all.” *Arkansas Educ. Television*, 523 U.S. at 680.



1 *See also Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 979 (9th Cir. 1998) (upholding  
2 exclusion of religious and political advertisements from public buses, and observing that the  
3 interest in “maintaining neutrality on political and religious issues [is] particularly strong.”).

#### 4 **C. The Policy is not Subject to Facial Invalidiation**

5 The Complaint appears to allege that the Superior Court’s Policy is facially invalid  
6 because it “fails to articulate sufficiently clear standards” and “restrains constitutionally-protected  
7 speech in advance of its expression, with virtually no guidelines or standards to guide the  
8 discretion of courthouse officials charged with enforcing [it].” (FAC ¶ 41(d)-(e)). That  
9 allegation, however, is wrong as a matter of law. The mere fact that a regulation may restrain  
10 protected expression does not render it facially invalid. *See Broadrick v. Oklahoma*, 413 U.S.  
11 601, 615 (1973). “[E]ven when a law implicates First Amendment rights, the constitution must  
12 tolerate a certain amount of vagueness.” *Cal. Teachers Ass’n v. State Bd. of Educ.*, 271 F.3d  
13 1141, 1151 (9th Cir. 2001). A regulation is susceptible to a facial challenge *only* if its deterrent  
14 effect on legitimate expression is “real and substantial” *and* the statute is not “readily susceptible  
15 to a narrowing construction” by the courts. *Id.* (quoting *Young v. Am. Mini Theatres, Inc.*,  
16 427 U.S. 50, 60 (1976)). “[U]ncertainty at a statute’s margins will not warrant facial invalidation  
17 if it is clear what the statute proscribes ‘in the vast majority of its intended applications.’” *Id.*  
18 (quoting *Hill v. Colorado*, 530 U.S. 703, 733 (2000)). The Supreme Court has recognized,  
19 moreover, that “[f]acial invalidation ‘is, manifestly, strong medicine’ that ‘has been employed by  
20 the Court sparingly and only as a last resort.’” *Nat’l Endowment for the Arts v. Finley*, 524 U.S.  
21 569, 580 (1998) (citation omitted)

22 Applying these standards, the Ninth Circuit affirmed dismissal of a complaint that alleged  
23 the broad language of an employment regulation rendered it facially overbroad. *See Kannisto v.*  
24 *City & County of San Francisco*, 541 F.2d 841 (9th Cir. 1976). The challenged regulation  
25 prohibited employees from doing anything that “tends to subvert the good order, efficiency or  
26 discipline of this [police] Department or which reflects discredit upon the Department or any  
27 member thereof . . . .” *Id.* at 844. The Ninth Circuit concluded that “even though the department  
28

1 might possibly apply the regulation to some conduct ultimately to be held protected,” the  
2 regulation was not unconstitutionally overbroad. *Id.*

3 The Superior Court’s Policy is no more susceptible to a facial challenge than the  
4 employment regulation upheld in *Kannisto*. Notably, Plaintiffs fail to allege which part of the  
5 Policy is overbroad or vague, much less allege that the alleged overbreadth or vagueness is “real,”  
6 “substantial,” and not subject to an appropriate limiting interpretation. The Policy at issue here  
7 (which Plaintiffs attach to the Complaint), like the policy in *Kannisto*, uses sufficiently clear  
8 language that “citizens who desire to obey [it] will have no difficulty understanding it.” *Id.* at 845  
9 (quoting *Colten v. Kentucky*, 407 U.S. 104, 110 (1972)) (citation omitted). The Policy clearly  
10 enumerates the six specific factors that “will” be applied by the Assistant Executive Officer in  
11 evaluating requests:

- 12 • Protection of the integrity of the judicial process, including  
13 public trust and confidence in the impartiality, lack of bias  
14 or discrimination, and fairness of the judicial system;
- 15 • Safety and security of the people and property within the  
16 courthouse and its perimeter;
- 17 • Whether the program or service advances the administration  
18 of justice and is useful to a significant number of litigants;
- 19 • Whether the program imposes any potential costs or liability  
20 on the court;
- 21 • Whether the program or service offered is conducted for  
22 profit; and
- 23 • Whether constitutional, statutory, or other legal  
24 requirements prohibit the court from granting use of its  
25 facilities.

26 (FAC Ex. A at II.C.1.a-f).

27 Thus, although the Policy provides that use of court facilities is “discretionary,” it does  
28 not empower the Assistant Executive Director with unbridled “discretion” in approving and  
not empowering the Assistant Executive Director with unbridled “discretion” in approving and  
rejecting applications for court use. The delineation of these six specific factors that the Assistant  
Executive Officer “will” consider defeats any assertion that the policy is unduly vague. *See*  
*Gilmore v. Gonzalez*, 435 F.3d 1125, 1135 (9th Cir. 2006) (policy did not give airline officials  
“unbridled discretion” to enforce identification policy, because it articulated “clear standards” for

1 implementation); *cf. Mardi Gras of San Luis Obispo v. City of San Luis Obispo*, 189 F. Supp. 2d  
 2 1018, 1033-34 (C.D. Cal. 2002) (striking down permitting regulation that granted “unguided  
 3 discretion” to officials with no “standards that must be followed” in the permitting process.) Far  
 4 less detailed policies have been upheld as not impermissibly vague. *See Cal. Teachers Ass’n*, 271  
 5 F.3d at 1152-54 (finding California Proposition 227 not unduly vague, despite requirements that  
 6 classroom instruction be “overwhelmingly” in English and that certain students receive “nearly  
 7 all” instruction in English). Accordingly, to the extent the Complaint challenges the Policy as  
 8 facially invalid, that challenge should be rejected as a matter of law.

9 **V. PLAINTIFFS’ SECOND CLAIM FAILS TO STATE A CLAIM FOR**  
 10 **VIOLATION OF THE FIRST AMENDMENT’S FREE EXERCISE**  
 11 **CLAUSE**

12 Plaintiffs’ Second Claim purports to state a claim for violation of the Free Exercise Clause  
 13 of the First Amendment. (FAC ¶¶ 44-48). Plaintiffs’ free exercise claim is subject to the  
 14 *Pickering* test discussed in Part A above, and must therefore be dismissed on the same grounds as  
 15 the free speech claim. *See Lumpkin v. Brown*, 109 F.3d 1498, 1501 (9th Cir. 1997) (*Pickering*  
 16 test applies to free exercise claim) (citing *Brown v. Polk County*, 61 F.3d 650, 658 (8th Cir.  
 17 1995)). *See also Berry*, 447 F.3d at 648-49 (rejecting argument that, because Free Exercise rights  
 18 were implicated, test stricter than *Pickering* balancing should be applied); *Knight*, 275 F.3d at  
 19 166-67 (applying *Pickering* balancing to public employee claim, and refusing to apply stricter  
 20 standard despite religious character of speech at issue).

21 **VI. PLAINTIFFS’ THIRD CLAIM FAILS TO STATE A CLAIM FOR**  
 22 **VIOLATION OF EQUAL PROTECTION**

23 Plaintiffs’ Third Claim for Equal Protection merely recasts their Free Speech claim under  
 24 the Fourteenth Amendment, rather than the First Amendment. Accordingly, the Equal Protection  
 25 claim fails for the same reasons as the Free Speech claim. *See Lee v. York County Sch. Div.*, 418  
 26 F. Supp. 2d 816, 834 (E.D. Va. 2006) (“If a plaintiff’s free speech claim fails, and an equal  
 27 protection claim is a mere rewording of a First Amendment claim, then the equal protection claim  
 28 also must fail.”) (citation and quotation omitted). In *Lee*, the court held that a public employee’s  
 Equal Protection claim failed, because it was reliant on his Free Speech claim. To allow an Equal

1 Protection claim would “eviscerate *Pickering-Connick*’s guarantee that a public employer may  
2 regulate its employee’s conduct to ensure the effective performance of its operations.” *Id.* Here,  
3 like in *Lee*, Plaintiffs’ Equal Protection claim should be dismissed along with their Free Speech  
4 claim in order to preserve the “interest of the State, as an employer, in promoting the efficiency of  
5 the public services it performs through its employees.” *Waters*, 511 U.S. at 668 (quoting  
6 *Connick*, 461 U.S. at 142).

7 **VII. PLAINTIFFS’ FOURTH CLAIM FAILS TO STATE A CLAIM FOR**  
8 **VIOLATION OF DUE PROCESS**

9 Plaintiffs’ Fourth Claim purports to state a claim that the Superior Court’s Policy is void  
10 for vagueness under the Due Process Clause of the Fourteenth Amendment. (FAC ¶¶ 54-57).  
11 Specifically, Plaintiffs allege that the Policy lacks “sufficient objective standards” thereby  
12 allowing Defendants to “enforce the policy in an *ad hoc* and discriminatory manner. (FAC ¶ 55).  
13 This claim fails for two reasons.

14 First, as noted above, the FAC does not identify the language in the Policy that allegedly  
15 renders it void for vagueness. Because Plaintiffs fail to identify the portion of the Policy they  
16 find unconstitutionally vague, their claim must be dismissed. *See Good News Employee Ass’n*,  
17 2004 U.S. Dist. LEXIS 30371 at \*44 (“Because plaintiffs have not identified the language of the  
18 policy on which their vagueness challenge is based, the complaint fails to give defendants fair  
19 notice of the grounds for plaintiffs’ claim. Accordingly, the void for vagueness claim should be  
20 dismissed on this ground alone.”).

21 Moreover, even if the Court reviews the Policy, Plaintiffs cannot establish that it is void  
22 for vagueness under the standard applicable in the government employment context. As  
23 discussed in Part A above, the government has far greater latitude to regulate employees in its  
24 role as employer than it does in the context of regulating activities of private citizens. Thus, in  
25 addition to applying the general precepts that “a challenged statute enjoys a presumption of  
26 constitutionality” against a due process attack, *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964), and  
27 that courts have “greater tolerance of enactments with civil rather than criminal penalties,”  
28

1 *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982),  
2 courts evaluate employment regulations with greater leniency:

3           Although a government regulation is void for vagueness if people  
4           of common intelligence must necessarily guess at its meaning and  
5           differ as to its application, the *government acting in the role of*  
6           *employer enjoys much more latitude in crafting reasonable work*  
7           *regulations for its employees.* For example, a government  
8           employer “may, consistently with the First Amendment, prohibit its  
9           employees from being ‘rude to customers,’ a standard almost  
10           certainly too vague when applied to the public at large.”

11 *Greer v. Amesqua*, 212 F.3d 358, 369 (7th Cir. 2000) (quoting *Waters*, 511 U.S. at 673)  
12 (emphasis added) (citation omitted). As discussed above, the Policy sets forth six specific factors  
13 that will be considered in approving and denying applications for use of court facilities. It uses  
14 words of “common understanding” such that “in the vast majority of circumstances, it should be  
15 clear” what the policy prohibits. *Cal. Teachers Ass’n*, 271 F.3d at 1151-52. The Policy here is  
16 not unconstitutionally vague, particularly in the government employment context.

#### 17 **VIII. PLAINTIFFS’ FIFTH CLAIM FAILS TO STATE A CLAIM FOR** 18 **VIOLATION OF THE FIRST AMENDMENT’S ESTABLISHMENT** 19 **CLAUSE**

20           Plaintiffs’ Fifth Claim purports to state a cause of action for violation of the Establishment  
21 Clause of the First Amendment. (FAC ¶¶ 58-62). Plaintiffs base their claim on the allegation  
22 that Defendants’ rejection of their application was “hostile to religion” and “favor[ed] irreligion  
23 over religion.” (*Id.*, ¶ 59).

24           The Ninth Circuit’s decision this year in *Vasquez v. Los Angeles County*, 487 F.3d 1246  
25 (9th Cir. 2007), demonstrates that Plaintiffs cannot state an Establishment Clause claim. In  
26 *Vasquez*, the Court affirmed dismissal of the plaintiff’s Establishment Clause challenge to Los  
27 Angeles County’s decision to remove a cross from its official county seal. *Id.* at 1248. Plaintiff  
28 alleged that the decision “conveyed a state sponsored message of hostility toward Christians.” *Id.*  
The district court granted the defendants’ motion to dismiss, and the Ninth Circuit affirmed. The  
Court applied the three-part test for Establishment Clause violations set forth in *Lemon v.*  
*Kurtzman*, 403 U.S. 602 (1971). The Court held that because the County’s decision was made in  
order to avoid any potential Establishment Clause violation arising out of the presence of the

1 cross on the seal, the *Lemon* test was satisfied and plaintiff's Establishment Clause claim failed.  
2 487 F.3d at 1255-58.

3 Here, as in *Vasquez*, Defendants' conduct was motivated not by anti-religious motives, but  
4 by a desire to avoid an Establishment Clause violation, maintain the appearance of impartiality,  
5 and avoid costly litigation. (FAC ¶¶ 12, 27). Thus, Defendants' conduct does not support an  
6 Establishment Clause violation. *See also McGinley v. Houston*, 282 F. Supp. 2d 1304, 1307  
7 (M.D. Ala. 2003) ("to hold that the removal of . . . objects to cure an Establishment Clause  
8 violation would itself violate the Establishment Clause would . . . result in an inability to cure an  
9 Establishment Clause violation and thus totally eviscerate the [E]stablishment [C]ause.").

10 **IX. PLAINTIFFS' SIXTH, SEVENTH AND EIGHTH CLAIMS FAIL TO**  
11 **STATE CLAIMS FOR VIOLATION OF THE CALIFORNIA**  
12 **CONSTITUTION**

13 Plaintiffs' Sixth, Seventh, and Eighth Claims purport to allege causes of action for  
14 violation of the rights of Free Speech, Free Exercise, Due Process and Equal Protection under the  
15 California constitution. (FAC ¶¶ 63-75). As with the counterpart federal claims, Plaintiffs fail to  
16 state a claim upon which relief can be granted.

17 **A. Plaintiffs' California Free Speech Claim Fails**

18 The Sixth Claim for violation of the California right to freedom of speech is governed by  
19 the same federal free speech principles set forth above. First, California courts "apply the same  
20 analysis to public employee speech under the California constitution as the federal courts have  
21 applied under the First Amendment." *Mayfield v. City of Oakland*, No. C-07-0583 EMC, 2007  
22 U.S. Dist. LEXIS 59947, \*18 (N.D. Cal. Aug. 6, 2007). *See also Cal. Teachers Ass'n v.*  
23 *Governing Bd. of San Diego Unified Sch. Dist.*, 45 Cal. App. 4th 1383 (1996) (applying *Pickering*  
24 balancing to California free speech claim and finding that public employer could properly  
25 prohibit teachers from wearing controversial messages in classrooms). Likewise, even outside  
26 the public employment context, California courts uphold reasonable, viewpoint-neutral  
27 regulations in nonpublic fora. In *San Leandro Teachers Ass'n v. Governing Bd. of the San*  
28 *Leandro Unified Sch. Dist.*, 154 Cal. App. 4th 866 (2007), the court applied federal forum  
analysis law to a California free speech claim. In so doing, the court found that a school district

1 mailbox system was a nonpublic forum even though “selective access” had been granted to  
2 certain groups. *Id.* at 892. The court then held that a prohibition on all political speech from that  
3 system was reasonable and viewpoint neutral, and therefore constitutional. *Id.* at 893-94.  
4 Accordingly, given the lack of meaningful difference between the federal and state Free Speech  
5 rights, Plaintiffs’ California Free Speech claim should be dismissed under the federal analysis set  
6 forth above.

### 7 **B. Plaintiffs’ California Free Exercise Claim Fails**

8 Plaintiffs’ Seventh Claim for violation of Article 1, Section 4 of the California  
9 constitution, the California Free Exercise Clause, mirrors the federal Free Exercise claim  
10 discussed above, and should be dismissed under the same analysis. Indeed, “no California  
11 Supreme Court case has ever articulated a standard applicable to the free exercise clause of the  
12 California Constitution different from that applicable to the free exercise clause of the federal  
13 constitution.” *Brunson v. Dept. of Motor Vehicles*, 72 Cal. App. 4th 1251 (1999) (applying  
14 federal free exercise principles and deferring to California Supreme Court regarding any  
15 distinction between the two); *see also Catholic Charities of Sacramento, Inc. v. Superior Court of*  
16 *Sacramento County*, 32 Cal. 4th 527, 561-62 (2004) (“we may safely agree with the scholars who  
17 concluded . . . that section 4 has not so far played an independent role in free exercise claims.”)  
18 (quotation and citation omitted).

### 19 **C. Plaintiffs’ California Due Process and Equal Protection Claim Fails**

20 Finally, Plaintiffs’ Eighth Claim for violation of the California rights of Due Process and  
21 Equal Protection should be dismissed as well. In that claim, Plaintiffs allege Due Process and  
22 Equal Protection violations under Article 1, Section 7 of the California Constitution. (FAC ¶¶ 72-  
23 75). Like Plaintiffs’ parallel federal claims, the claim is based on Plaintiffs’ allegation that AP  
24 4.6 is “vague and lacks sufficient objective standards to cabin the discretion of City [sic] officials,  
25 which allows Defendants to enforce the policy in an *ad hoc* and discriminatory manner.” (*Id.* ¶  
26 73.) To the extent Plaintiffs allege a California Equal Protection claim, dismissal of the federal  
27 claim discussed above should likewise result in dismissal of the state claim. *See Sail’er Inn, Inc.*  
28 *v. Kirby*, 5 Cal. 3d 1, 15, fn. 13 (1971) (“[t]he California and federal tests for equal protection are

1 substantially the same.”); *In re Evans*, 49 Cal. App. 4th 1263, 1270 (1996) (“the scope and effect  
2 of the [federal and California equal protection clauses] is the same.”). Similarly, the federal due  
3 process analysis set forth above governs Plaintiffs’ California due process challenge. *See*  
4 *Evangelatos v. Superior Court*, 44 Cal. 3d 1188, 1200-1202 (1988) (analyzing and rejecting  
5 California and federal due process/vagueness claims concurrently); *In re Jorge G.*, 117 Cal. App.  
6 4th 931, 938-39 (2004) (same).

7 **X. LEAVE TO AMEND SHOULD BE DENIED.**

8 Plaintiffs’ and Defendants’ competing interests are set forth in the First Amended  
9 Complaint and the attached exhibits. The substantive applicable law—the *Pickering* test and the  
10 authority governing nonpublic fora—demonstrates that when those interests are analyzed,  
11 Plaintiffs’ causes of action fail. Because “allegations of other facts consistent with the challenged  
12 pleading could not possibly cure the defect” in the First Amended Complaint, leave to amend  
13 should be denied. *Schreiber Distrib. Co. v. Serv-Well Furniture Co., Inc.* 806 F.2d 1393, 1401  
14 (9th Cir. 1986).

15 **XI. CONCLUSION**

16 For the foregoing reasons, Defendants respectfully request that Plaintiffs’ First Amended  
17 Complaint be dismissed in its entirety without leave to amend.

18 Dated: November 20, 2007

MARK C. ZEBROWSKI  
M. ANDREW WOODMANSEE  
KATHERINE L. PARKER  
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21 By:           /s/ Mark C. Zebrowski            
22 Mark C. Zebrowski

23 Attorneys for Defendants  
24 SUPERIOR COURT OF  
25 CALIFORNIA, COUNTY OF SAN  
26 DIEGO; AND MICHAEL RODDY

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**CERTIFICATE OF SERVICE**

I, Mark C. Zebrowski, hereby certify that on November 20, 2007, I caused to be electronically filed a true and correct copy of the attached **Defendants Superior Court of California, County of San Diego and Michael Roddy’s Memorandum of Points and Authorities in Support of Motion to Dismiss First Amended Complaint** with the Clerk of the Court using CM/ECF, which will send notification that such filing is available for viewing and downloading to the following counsel of record for Plaintiffs:

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I, Mark C. Zebrowski, hereby further certify that on November 20, 2007, I caused to be served via United Parcel Service overnight delivery a true and correct copy of the attached **Defendants Superior Court of California, County of San Diego and Michael Roddy’s Memorandum of Points and Authorities in Support of Motion to Dismiss First Amended Complaint** to the following counsel of record for Plaintiffs:

Francis J. Manion  
American Center for Law & Justice  
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Geoffrey R. Surtees  
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Executed at San Diego, California, on this 20th day of November, 2007.

MORRISON & FOERSTER LLP

By: /s/ Mark C. Zebrowski  
Mark C. Zebrowski

Attorneys for Defendants  
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OF SAN DIEGO; AND MICHAEL RODDY