

1 Charles S. LiMandri SBN 110841  
cslimandri@limandri.com  
2 Paul M. Jonna SBN 265389  
pjonna@limandri.com  
3 Mark D. Myers SBN 235719  
mmyers@limandri.com  
4 Jeffrey M. Trissell SBN 292480  
jtrissell@limandri.com  
5 Robert E. Weisenburger SBN 305682  
rweisenburger@limandri.com  
6 LiMANDRI & JONNA LLP  
P.O. Box 9120  
7 Rancho Santa Fe, CA 92067  
Telephone: (858) 759-9930  
8 Facsimile: (858) 759-9938

9 Thomas Brejcha, *pro hac vice*\*  
tbrejcha@thomasmoresociety.org  
10 Peter Breen, *pro hac vice*\*  
pbreen@thomasmoresociety.org  
11 THOMAS MORE SOCIETY  
309 W. Washington St., Ste. 1250  
12 Chicago, IL 60606  
Tel: (312) 782-1680  
13 \*Application forthcoming

14 Attorneys for Plaintiffs

15 SUPERIOR COURT OF CALIFORNIA

16 COUNTY OF SAN DIEGO – CENTRAL DIVISION

17 CALIFORNIANS FOR EQUAL RIGHTS  
FOUNDATION, a California non-profit public  
18 benefit corporation; ERIC GONZALES, an  
19 individual; STEVE HOUBECK, an individual;  
JOSE VELAZQUEZ, an individual;

20 Plaintiffs,

21 v.

22 STATE OF CALIFORNIA, CALIFORNIA  
23 STATE BOARD OF EDUCATION,  
CALIFORNIA STATE DEPARTMENT OF  
24 EDUCATION, TONY THURMOND, in his  
25 official capacity as State Superintendent of Public  
Instruction, LINDA DARLING-HAMMOND, in  
26 her official capacity as President of the State Board  
of Education, and DOES 1-100,

27 Defendants.  
28

Case No.: 37-2021-00037896-CU-CR-CTL

**IMAGED FILE**

**EX PARTE APPLICATION FOR  
TEMPORARY RESTRAINING  
ORDER, AND FOR ORDER TO SHOW  
CAUSE RE: PRELIMINARY  
INJUNCTION**

Date: October 7, 2021

Time: 8:30 a.m.

Dept.: C-67

Judge: Hon. Eddie C. Sturgeon

Action Filed: September 3, 2021

1 Plaintiffs Californians for Equal Rights Foundation, Eric Gonzales, Steve Houbeck, and Jose  
2 Velazquez (collectively, “Plaintiffs”) hereby apply for issuance of a Temporary Restraining Order and an  
3 Order to Show Cause re: Preliminary Injunction against Defendants the State of California, the California  
4 State Board of Education, the California State Department of Education, Tony Thurmond in his official  
5 capacity as State Superintendent of Public Instruction, and Linda Darling-Hamilton in her official capacity  
6 as President of the State Board of Education. Plaintiffs seek an order enjoining and prohibiting Defendants  
7 from authorizing, promoting, or permitting the use of Aztec prayers and the “Ashe” chant in California’s  
8 public schools and also requiring Defendants to direct those under their authority not to use the Aztec prayer  
9 or “Ashe” chant in public schools.

10 This Application is made on the grounds that use of the prayers and chant violate the Establishment  
11 Clauses of both the U.S. and California Constitutions. (U.S. Const., amend. I; Cal. Const., art. I, § 4.) Further,  
12 immediate and irreparable harm will occur when the prayers and chant are used in California’s public  
13 schools.

14 Plaintiffs’ request is based on this application, the Attached Memorandum of Points and Authorities;  
15 the Declarations of Attorney Paul Jonna, Expert Alan R. Sandstrom and Plaintiffs Californians for Equal  
16 Rights Foundation, Eric Gonzales, Jose Velazquez, and Steve Houbeck; the Complaint on file herein; and  
17 such other and further evidence as may be presented to the Court at the time of hearing.

18 Counsel for Plaintiffs will be providing ex parte notice to Robert Bonta, Office of the Attorney  
19 General. As required by California Rule of Court 3.1202(a), Plaintiffs’ counsel will be notifying them no  
20 later than 10:00 a.m. on October 6, 2021 that Plaintiffs filed this Application, notifying them of the date,  
21 time, and place of the hearing and explaining the basis for the application and relief sought. (Declaration of  
22 Paul Jonna, ¶ 2.) Counsel for Plaintiffs have already provided informal notice by email to Assistant Attorney  
23 General Darin Wessel, Office of the Attorney General, 600 W. Broadway, Suite 1800, San Diego, CA 92101.

24 (*Id.*)

25 ///

26 ///

27 ///

28 ///



**TABLE OF CONTENTS**

I. FACTUAL AND PROCEDURAL BACKGROUND .....7

II. LEGAL STANDARDS .....9

III. LEGAL ARGUMENTS.....9

    A. Plaintiffs Have a Strong Likelihood of Success on the Merits .....9

    B. Balance of Hardships .....17

    C. Analysis .....17

IV. CONCLUSION.....18

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

**TABLE OF AUTHORITIES**

***U.S. Supreme Court Cases***

*American Legion v. American Humanist Ass’n* ..... 12  
(2019) 139 S.Ct. 2067

*Board of Educ. of Kiryas Joel Village School Dist. v. Grumet* ..... 15  
(1994) 512 U.S. 687

*Edwards v. Aguillard*..... 10  
(1987) 482 U.S. 578

*Elrod v. Burns* ..... 17  
(1976) 427 U.S. 347

*Engel v. Vitale* ..... 11  
(1962) 370 U.S. 421

*Lee v. Weisman*..... 10, 11, 15  
(1992) 505 U.S. 577

*Roman Catholic Diocese of Brooklyn v. Cuomo* ..... 17  
(2020) 141 S.Ct. 63

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

*School Dist. of Abington Tp., Pa. v. Schempp* ..... 11  
(1963) 374 U.S. 203

*Wallace v. Jaffree* ..... 13, 16  
(1985) 472 U.S. 38

***Federal Cases***

*Carpenter v. City and County of San Francisco*..... 10  
(9th Cir. 1996) 93 F.3d 627

*Chaplaincy of Full Gospel Churches v. England* ..... 17  
(D.C. Cir. 2006) 454 F.3d 290

***California Cases***

*Burfitt v. Newsom* ..... 10  
(Cal. Super. Ct., Jan. 5, 2021) No. BCV-20-102267, 2021 WL 2152961

*Butt v. State of California* ..... 9, 17, 18  
(1992) 4 Cal.4th 668

*Citizens for Parental Rights v. San Mateo County Bd. of Education*..... 10  
(1975) 51 Cal.App.3d 1

*Daly v. San Bernardino County Bd. of Supervisors* ..... 9  
(2021) 11 Cal.5th 1030

**TABLE OF AUTHORITIES, CONTINUED**

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

*Feminist Women’s Health Center, Inc. v. Philibosian* ..... 10  
 (1984) 157 Cal.App.3d 1076

*Fox v. City of Los Angeles*..... 16  
 (1978) 22 Cal.3d 792

*Ketchens v. Reiner* ..... 17  
 (1987) 194 Cal.App.3d 470

*Landmark Holding Group, Inc. v. Superior Court* ..... 9  
 (1987) 193 Cal.App.3d 525

*Mandel v. Hodges* ..... 10  
 (1976) 54 Cal.App.3d 596

*Robbins v. Superior Court*..... 9  
 (1985) 38 Cal.3d 199

*Sands v. Morongo Unified School Dist.* ..... 10, 11, 15  
 (1991) 53 Cal.3d 863

***Constitutional Provisions***

U.S. Const., amend. I ..... 2, 9

Cal. Const., art. I, § 4..... 2, 9, 10

***Statutes & Laws***

California Rule of Court 3.1202(a) ..... 1

Civ. Proc. Code § 526a..... 8, 16

***Other***

SCIENCE Magazine: Lizzie Wade, *Feeding the gods: Hundreds of skulls reveal massive scale of human sacrifice in Aztec capital* (June 21, 2018)..... 12  
<https://www.science.org/news/2018/06/feeding-gods-hundreds-skulls-reveal-massive-scale-human-sacrifice-aztec-capital>

SMITHSONIAN MAGAZINE: Livia Gershon, *The Aztecs Constructed This Tower Out of Hundreds of Human Skulls* (Dec. 14, 2020) ..... 12  
<https://www.smithsonianmag.com/smart-news/new-find-brings-skulls-discovered-aztec-tower-over-600-180976543/>

History Channel. (See, e.g., Dave Roos, *Human Sacrifice: Why the Aztecs Practiced This Gory Ritual*, Oct. 11, 2018)..... 12  
<https://www.history.com/news/aztec-human-sacrifice-religion>

1 **I. FACTUAL AND PROCEDURAL BACKGROUND.**

2 In 2016, California enacted a provision requiring the development and adoption of a model  
3 ethnic studies curriculum, to be used as a guide for local school districts. The State Board of Education  
4 appointed R. Tolteka Cuauhtin as the chair of the committee tasked with developing the curriculum.  
5 Cuauhtin’s scholarship in the field of ethnic studies reflects animus towards Christianity and  
6 Catholicism, which he blames for the demise of indigenous religious beliefs. He also advocates  
7 “regenerating” indigenous spiritual practices as a way of combating what he sees as the oppressiveness  
8 of Christianity.

9 On March 18, 2021, the Board of Education approved the Ethnic Studies Model Curriculum  
10 (“ESMC”), which is now available for use by California’s public schools. The approved curriculum is  
11 882 pages long, consisting of a preface and six chapters. The fifth chapter, Lesson Resources, includes  
12 activities for children. Among the activities are a group of “Affirmations, Chants, and Energizers,”  
13 which the text suggests using as “energizers to bring the class together, build unity around ethnic studies  
14 principles and values, and to reinvigorate the class following a lesson that may be emotionally taxing  
15 or even when student engagement may appear to be low.” (Declaration of Paul M. Jonna, Esq. Ex. G.)  
16 These activities are not tied to a specific lesson or group of lessons; and no text or explanation  
17 accompanies them. Instead, they are stand-alone activities that can be used at any time with any age  
18 group.

19 One of the activities is the “In Lak Ech Affirmation,” (the “Aztec Prayer”)<sup>1</sup> which invokes five  
20 spiritual beings worshiped by practitioners of the Aztec religion. (Jonna Decl., Ex. H.) A second activity  
21 is the “Ashe” chant or affirmation, in which students repeat the name “Ashe,” the divine force as  
22 recognized in the Yoruba religion. (*Id.*, Ex. I.) Children are directed to repeat this name, along with  
23 other words, in response to various questions, so as to form the phrase “Ashe, Ashe, Ashe, Still I rise,  
24 Ashe.”

25 Plaintiffs object to the state’s promotion of the Aztec Prayer and “Ashe” chant for use in public  
26

---

27 <sup>1</sup> Although the ESMC does not call it a prayer, this motion refers to the affirmation as such, because it  
28 invokes deities, praises and thanks them, and asks for their assistance. (See Declaration of Alan  
Sandstrom, ¶¶ 11, 13.)

1 schools as violating both the U.S. and California Constitutions’ Establishment Clauses. They filed this  
2 action seeking an injunction to prevent the use of the prayer and chant in public schools. Before filing  
3 this action, Plaintiffs’ counsel sent a demand letter to Defendants, outlining the basis for Plaintiffs’  
4 claims and requesting that the Aztec Prayer and “Ashe” chant not be used in California public schools.  
5 (Jonna Decl., Ex. J.) Defendants did not agree to this.

6 Plaintiffs have been injured and continue to be injured by Defendants’ adoption and promotion  
7 of the ESMC. Because teachers have discretion about when and with whom to use the Aztec Prayer  
8 and “Ashe” chant, students could be required at any time, without advance notice, to recite or chant  
9 them. Plaintiff Steve Houbeck, for example, has a child whom he is keeping out of public school to  
10 avoid this possibility. (See Declaration of Steve Houbeck.) Defendants’ action has thus chilled the  
11 exercise of his and his child’s right to public education. Plaintiff Eric Gonzales has a child receiving  
12 education through the San Diego Unified School District who at any time and without warning could  
13 be required to join in classroom prayer or religious exercises. (See Declaration of Eric Gonzales.)  
14 Plaintiffs also object to the expenditure of tax dollars to fund religious activity in public schools. (See  
15 Declaration of Jose Velazquez; Declaration of Wenyuan Wu.) All Plaintiffs enjoy taxpayer standing  
16 under Code Civ. Proc. § 526a, because the state has expended money to develop and promote ESMC,  
17 including the two challenged activities, and will continue expending money to use it in public school  
18 classes.

19 Plaintiffs are offering the declaration of Dr. Alan R. Sandstrom, Professor Emeritus of  
20 Anthropology at Purdue University Fort Wayne. Dr. Sandstrom is an expert in anthropology and  
21 particularly in Nahua (Aztec) religion and culture. He has studied and conducted research on the Nahua  
22 culture and published peer-reviewed scholarship on the subject. Dr. Sandstrom reviewed the Aztec  
23 Prayer, and determined that it is the kind of chant or payer that followers of neo-Aztec religion would  
24 use. (Declaration of Alan R. Sandstrom, Ph.D. ¶¶ 7, 13.) He identifies it as containing a series of prayers  
25 invoking five Mesoamerican spirit entities. (*Id.*, ¶¶ 11, 13.) He also objects to its lack of educational  
26 value, and sees it as undermining genuine understanding of and appreciation of Mesoamerican cultures.  
27 (*Id.*, ¶¶ 8, 9, 14–16.)

28 ///



1 **II. LEGAL STANDARDS.**

2 In deciding whether to grant a preliminary injunction, the Court “must weigh two interrelated  
3 factors: (1) the likelihood that the moving party will ultimately prevail on the merits and (2) the relative  
4 interim harm to the parties from issuance or nonissuance of the injunction.” (*Butt v. State of California*  
5 (1992) 4 Cal.4th 668, 677–678 [citations omitted].) Since the Court is “guided by a mix” of these  
6 factors, “the greater the plaintiff’s showing on one, the less must be shown on the other to support an  
7 injunction.” (*Id.* at 678.) When pushed to the extreme, there must be at least “potential merit” or “some  
8 possibility” of success on the merits for an injunction to issue. (*Id.*) But so long as there is that  
9 potentiality, “[i]f the denial of an injunction would result in great harm to the plaintiff, and the  
10 defendants would suffer little harm if it were granted, then it is an abuse of discretion to fail to grant  
11 the preliminary injunction.” (*Robbins v. Superior Court* (1985) 38 Cal.3d 199, 205.)

12 “At an ex parte hearing on a TRO, a lesser standard is used. The ex parte hearing concerning a  
13 TRO is no more than a review of the conflicting contentions to determine whether there is a sufficiency  
14 of evidence to support the issuance of an interlocutory order to keep the subject of litigation in status  
15 quo pending a full hearing to determine whether the applicant is entitled to a preliminary injunction.  
16 The issuance of a TRO is not a determination of the merits of the controversy. All that is determined is  
17 whether the TRO is necessary to maintain the status quo pending the noticed hearing on the application  
18 for preliminary injunction.” (*Landmark Holding Group, Inc. v. Superior Court* (1987) 193 Cal.App.3d  
19 525, 528 [citations omitted].)

20 Because Plaintiffs are seeking a prohibitory injunction intended to prevent future violations of  
21 the law, the measuring point in time is *status quo ante litem*, namely the last uncontested status  
22 preceding the controversy. (*Daly v. San Bernardino County Bd. of Supervisors* (2021) 11 Cal.5th 1030,  
23 282 Cal.Rptr.3d 282, 293–94 [explaining that the “last actual peaceable, uncontested status” standard  
24 applies to prohibitory injunctions intended to prevent further violations of the law].)

25 **III. LEGAL ARGUMENT.**

26 **A. Plaintiffs Have a Strong Likelihood of Success on the Merits.**

27 The First Amendment prohibits any “law respecting an establishment of religion.” (U.S. Const.,  
28 amend. I.) Similarly, the California Constitution provides that “[t]he Legislature shall make no law

1 respecting an establishment of religion.” (Cal. Const., art I, § 4.)

2 In looking at the California Establishment Clause, “[a]lthough federal cases may supply  
3 guidance for interpreting this provision, California courts must independently determine its scope.”  
4 (*Sands v. Morongo Unified School Dist.* (1991) 53 Cal.3d 863, 883 [school prayer unconstitutional  
5 under both federal and California establishment clauses].) “In general, the religion clauses of the  
6 California Constitution are read more broadly than their counterparts in the federal Constitution,”  
7 requiring even greater separation of church and state. (*Carpenter v. City and County of San Francisco*  
8 (9th Cir. 1996) 93 F.3d 627, 629.) Thus, “California courts alone determine the rights guaranteed by  
9 the California Constitution so long as those rights extend equal or greater protection to those guaranteed  
10 by the federal Constitution under totally similar provisions of the Bill of Rights.” (*Feminist Women’s*  
11 *Health Center, Inc. v. Philibosian* (1984) 157 Cal.App.3d 1076, 1086 [citing *Mandel v. Hodges* (1976)  
12 54 Cal.App.3d 596, 616]; see also *Burfitt v. Newsom* (Cal. Super. Ct., Jan. 5, 2021) No. BCV-20-  
13 102267, 2021 WL 2152961, at \*3 [“Article I, Section 4, of the California Constitution [] is at least as  
14 protective of religious liberties as the First Amendment”].)

15 The Supreme Court “has been particularly vigilant in monitoring compliance with the  
16 Establishment Clause in elementary and secondary schools” because “[f]amilies entrust public schools  
17 with the education of their children” and “[s]tudents in such institutions are impressionable and their  
18 attendance is involuntary.” (*Edwards v. Aguillard* (1987) 482 U.S. 578, 583–584.) “Children, as they  
19 become aware of the religious differences of our people, should be made to understand the true  
20 character of the public school’s religious neutrality . . . .” (*Citizens for Parental Rights v. San Mateo*  
21 *County Bd. of Education* (1975) 51 Cal.App.3d 1, fn. 26 [quoting 25 Cal. Ops. Att’y Gen. 325 (1955)].)  
22 Labeling prayer or religious exercises in public school as voluntary does not render them permissible.  
23 (See *Lee v. Weisman* (1992) 505 U.S. 577, 593–94 [holding that the state cannot put primary and  
24 secondary students to the choice between participating in prayer or protesting]; *Santa Fe Indep. School*  
25 *Dist. v. Doe* (2000) 530 U.S. 290, 311–12.) This is particularly true if the state is sponsoring the  
26 exercise. (*Id.* at 313 [“[T]he religious liberty protected by the Constitution is abridged when the State  
27 affirmatively sponsors the particular religious practice of prayer.”])

28 “Prayer is an address of entreaty, supplication, praise, or thanksgiving directed to some sacred

1 or divine spirit, being, or object. That it may contemplate some wholly secular objective cannot alter  
2 the inherently religious character of the exercise.” (*Sands, supra*, 53 Cal.3d at 873.) Both the U.S. and  
3 California Supreme Courts have made absolutely clear that prayer or other religious exercises in public  
4 schools are prohibited. (*School Dist. of Abington Tp., Pa. v. Schempp* (1963) 374 U.S. 203; *Sands,*  
5 *supra*, 53 Cal.3d 863.) Prayers drafted by public school officials are doubly prohibited. (*Lee, supra* 505  
6 U.S. at 588; *Sands, supra*, 53 Cal.3d at 882.) Prayers and religious exercises in public schools offend  
7 both the U.S. and California constitutions. (*Sands, supra*, 53 Cal.3d at 883.)

8 The Aztec prayer invokes by name five spiritual entities recognized by the Aztec religion, in  
9 order to request benefits such as blessed knowledge, creativity, healing, and power. (See Sandstrom  
10 Decl., ¶ 11.) It also gives them thanks and praises them. (See *id.*) Whether it is labeled as a prayer, or  
11 whether it uses traditional Western religious language is immaterial. (See *id.* ¶ 5 [recognizing that Aztec  
12 religious chants are identified by different terms].) It is therefore a prayer as contemplated by both  
13 federal and California law. (See *Engel v. Vitale* (1962) 370 U.S. 421, 424–25 [recognizing the  
14 invocation of divine blessings as a prayer]; *Sands, supra*, 53 Cal.3d at 873). Even if it is labeled an  
15 “affirmation” or “energizer,” it is still a spiritual exercise. (See Sandstrom Decl., ¶¶ 8, 11, 13, 14, 16.  
16 [identifying the affirmation as a religious activity].) Furthermore, in its context in the curriculum, it  
17 cannot reasonably be understood as having some kind of secular meaning. (*Id.*, ¶¶ 12, 14, 15.) It is not  
18 associated with any particular lesson, and serves no real didactic purpose. (See Sandstrom Decl., ¶¶ 8,  
19 15, 16.) Instead, it is a stand-alone activity unaccompanied by any instructions or information that might  
20 assist a teacher in putting it to some non-religious use. (See *id.* ¶ 15.)

21 In an apparent attempt to frame the affirmation as philosophical or political rather than religious,  
22 the introductory paragraph identifies the “In Lak Ech” affirmation as being based to some degree on  
23 teachings in Roberto Cintli Rodriguez’s *Our Sacred Maiz is Our Mother: Indigeneity and Belonging*  
24 *in the Americas*, but going deeper into the “Nahui Ollin (Four Movements)” as taught by Tupac Enrique  
25 Acosta and Curtis Acosta. No written sources for this understanding of Nahui Ollin are provided, and  
26 even the most diligent teacher would be hard pressed to find detailed and accurate information on it.  
27 (See Sandstrom Decl., ¶ 10.) Curtis Acosta’s chapter in *Rethinking Ethnic Studies* includes a cursory  
28 description of it, inaccurately describing the “Four Movements” understanding of Nahui Ollin as an

1 authentic Mesoamerican concept, rather than a modern invention. (Jonna Decl., Ex. E [*Rethinking*  
2 *Ethnic Studies* (2018) at 271–72] [describing Nahui Ollin and the “four movements” as lying at the  
3 center of the Mexicas’ sun stone, and the ideas as authentically Mesoamerican]; see also Sandstrom  
4 Decl., ¶ 9, 10 [debunking this].) Its religious meaning, however, is apparent, in that it invokes by name  
5 five spiritual entities whose names have no secular significance. (*Id.*, ¶¶ 11, 12.)

6 One of the relevant questions when determining whether the Establishment Clause is being  
7 violated is whether an “objective observer” acquainted with the relevant facts would perceive it as a  
8 state endorsement of prayer in public schools. (See *Santa Fe Indep. School Dist.*, *supra* 530 U.S. at  
9 308.) Here, a reasonable observer would be aware that the five spiritual entities have long been  
10 recognized as such, that they have been worshipped for centuries, and that they continue to be  
11 worshipped today. A reasonable observer would also recognize that the Aztec Prayer uses traditional  
12 identifiers for them, looks to them for blessings or benefits, and expresses thanks and praise to them.  
13 Even assuming a reasonable observer were aware of an additional symbolic meaning that had recently  
14 been assigned to these entities and taught in isolated instances, he or she would resolve the ambiguity  
15 in favor of the well-known and established usage. A reasonable observer would also be aware that the  
16 Aztec spirit entities were worshipped with human sacrifice.<sup>2</sup> Anyone with access to an encyclopedia  
17 would know of the long-established religious meaning assigned to the Mesoamerican deities, and this  
18 would be the dominant understanding among parents or other reasonable observers.

19 By way of comparison, in *American Legion v. American Humanist Ass’n* (2019) 139 S.Ct. 2067,

---

21  
22 <sup>2</sup> This aspect of Aztec religion is well documented in respected publications such as SCIENCE and  
23 SMITHSONIAN. (See, e.g., Lizzie Wade, *Feeding the gods: Hundreds of skulls reveal massive scale of*  
24 *human sacrifice in Aztec capital* (June 21, 2018), SCIENCE magazine, available online at  
25 [https://www.science.org/news/2018/06/feeding-gods-hundreds-skulls-reveal-massive-scale-human-](https://www.science.org/news/2018/06/feeding-gods-hundreds-skulls-reveal-massive-scale-human-sacrifice-aztec-capital)  
26 [sacrifice-aztec-capital](https://www.science.org/news/2018/06/feeding-gods-hundreds-skulls-reveal-massive-scale-human-sacrifice-aztec-capital) [documenting large-scale human sacrifice to the Aztec deities Huitzilopochtli  
27 and Tlaloc, visited on Sept. 22, 2021]; Livia Gershon, *The Aztecs Constructed This Tower Out of*  
28 *Hundreds of Human Skulls* (Dec. 14, 2020) SMITHSONIAN MAGAZINE, available online at  
[https://www.smithsonianmag.com/smart-news/new-find-brings-skulls-discovered-aztec-tower-over-](https://www.smithsonianmag.com/smart-news/new-find-brings-skulls-discovered-aztec-tower-over-600-180976543/)  
[600-180976543/](https://www.smithsonianmag.com/smart-news/new-find-brings-skulls-discovered-aztec-tower-over-600-180976543/) [same].) It would also be familiar to a reasonable observer through popular media  
such as the History Channel. (See, e.g., Dave Roos, *Human Sacrifice: Why the Aztecs Practiced This*  
*Gory Ritual* (Oct. 11, 2018) HISTORY CHANNEL, available online at  
<https://www.history.com/news/aztec-human-sacrifice-religion> [explaining the Aztecs’ reasons for  
engaging in large-scale human sacrifice and ritual cannibalism].)

1 the Supreme Court grappled with the question of whether a cross could convey a non-religious  
2 meaning. The majority held that the meaning of religiously expressive practices could, “[w]ith  
3 sufficient time,” evolve into something else. (*Id.* at 2084.) The dissenters, limiting their analysis to the  
4 cross, thought it could never acquire a secondary meaning. (See *id.* at 2104 [Ginsburg, J., dissenting].)  
5 None, however, thought a religious symbol could quickly be transformed into a secular one quickly or  
6 without significant change in public opinion. By analogy, the long-standing historic meaning of  
7 Quetzalcoatl and the four other entities as religious figures has yet to evolve into anything secular. (See  
8 Sandstrom Decl., ¶ 12.)

9 Even supposing that schoolchildren and the general public were given the option to experience  
10 or interpret the Aztec prayer and “Ashe” chant either religiously or non-religiously, this would not  
11 render it Constitutional. Presenting schoolchildren with alternative ways to think about an exercise, one  
12 of which is religious, is still unconstitutional because one of the endorsed views is religious. (See  
13 *Wallace v. Jaffree* (1985) 472 U.S. 38, 60 [holding that setting aside one minute of silence for  
14 “meditation or voluntary prayer” demonstrated favoritism towards prayer and violated the  
15 government’s obligation to remain religiously neutral].)

16 Plaintiffs do not object to their children studying other cultures, including Aztec culture and  
17 history. They do object to their children being taught modern re-imagined ideas as if they were authentic  
18 and historically accurate. But most importantly for this lawsuit, they object to their children being  
19 required to invoke the five deities mentioned in the Aztec Prayer. (See generally Wu Decl., Velazquez  
20 Decl., Gonzales Decl., Houbeck Decl.) They particularly object, knowing that they were worshipped  
21 with human sacrifice; and that human hearts and other body parts were used in their worship. (See  
22 Velazquez Decl., ¶ 3; see also Wade, *supra*, fn.2 [documentation of use of skulls as masks or to build  
23 temple towers, illustration *infra*].) Any attempt to try to reframe the deities as symbols of humane  
24 benevolence would require forgetting history and erasing true Aztec culture.

25 ///

26 ///

27 ///

28 ///

1 ///



2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17 Similarly, the “Ashe” chant invokes a spiritual force recognized in the Yoruba religion, repeating  
18 the name “Ashe” and associating it with benefits such as a positive day. The chant appears to be written  
19 so that the teacher says the lines aloud, each line beginning with a question and ending with the  
20 instruction to say a particular word, and the students say or call out single-word responses. The response  
21 words do not answer the questions they follow. For example, the response to the question “Who will  
22 smile today?” is “Still.”<sup>3</sup> The logical answers to all the questions appear to be the students themselves  
23 (*i.e.*, the students are going to have a positive day, the students will respect their teachers today, etc.)  
24 The response words, however, are either “Ashe” or a single word in the phrase “Still I rise.” The effect  
25 is that students responding as directed will say the words “Ashe! Ashe! Ashe! Ashe! Still I rise, Ashe!”

26  
27  
28 <sup>3</sup> The only arguable exception is the word “I,” in response to the question “Who will laugh today?”  
However, “I” appears to be intended to be part of the phrase “Still I rise,” rather than an answer on its  
own.

1 Invoking and recognizing Ashe in this way also amounts to a prayer or similar religious exercise. As  
2 with the Aztec Prayer, no accompanying information or instructions connect the “Ashe” chant with the  
3 Yoruba culture, and teachers are given no instructions that would render its use in the classroom secular.

4 The fact that the Aztec Prayer and “Ashe” chant are associated with smaller, non-Western, and  
5 lesser-known religious traditions does not change the analysis. Just as the state cannot favor or disfavor  
6 religion in general or any religion or group of religions in particular, it cannot decide to help  
7 “regenerate” or assist a smaller indigenous religion or, more precisely, what it perceives to be an  
8 indigenous religion. (*Board of Educ. of Kiryas Joel Village School Dist. v. Grumet* (1994) 512 U.S.  
9 687, 705 “[A]iding this single, small religious group causes no less a constitutional problem than  
10 would follow from aiding a sect with more members or religion as a whole.”.) Nor would it matter if  
11 the prayer and chant were shown to derive from multiple religious traditions, such as traditional Aztec  
12 and modern Aztlan traditions or a blend of Yoruba and other traditions. (See *Sands, supra*, 53 Cal.3d  
13 at 873 [holding that the government cannot prefer one group of religions over another]; *Lee, supra*, 505  
14 U.S. at 588–89 [fact that school prayer was nonsectarian and drew on both Jewish and Christian  
15 traditions did not render it Constitutionally permissible].)

16 R. Tolteka Cuauhtin, the curriculum’s author, is also known as an editor of and contributor to  
17 the book *Rethinking Ethnic Studies*. In the sections of the book he authored, he identifies Christians as  
18 using “Theocide,” creedism, Islamophobia, and antisemitism to oppress marginalized groups, including  
19 “Indigenous spiritual traditions.” (Jonna Decl., Ex. B [*Rethinking Ethnic Studies* at 46]; see especially  
20 item 7 “Religion”.) The forms of resistance to Christian creedism and intolerance he mentions include  
21 “regenerating indigenous spiritual traditions.” (*Id.*) His “Ethnic Studies Framework” relies on a “double  
22 helix” of Humanity and Criticality. (*Id.*, Ex. C and D [*Rethinking Ethnic Studies* at 67, 74].) In  
23 illustrations, this double helix is pictured emblazoned with the “yin and yang” symbol of Taoism, the  
24 Hunab Ku symbol as pictured in the complaint, and a black-and-white depiction of a modern four-color  
25 Native American medicine wheel.<sup>4</sup> (*Id.*) In the illustration of his “Ethnic Studies Framework,” two  
26

27 \_\_\_\_\_  
28 <sup>4</sup> A fourth symbol is the African Adinka symbol “Ahoden,” associated with energy. Whether it is  
intended as spiritual or as symbolic of something else is unclear.

1 double helixes, each with all three religious symbols,<sup>5</sup> are shown attached to a chain whose lock is  
2 being shattered, associating these non-Western religious traditions with liberation. (*Id.*, Ex. C  
3 [*Rethinking Ethnic Studies* at 67].) A separate illustration shows spirituality, “concept of a higher  
4 power,” and cosmology as part of the “Deep Culture” he seeks to restore. (*Id.*, Ex. A [*Rethinking Ethnic*  
5 *Studies* at 26–27, arguing in favor of including “Deep Culture” in ethnic studies pedagogy and using  
6 tree roots as an illustration].) Cuauhtin’s views of ethnic studies include the desirability of promoting  
7 or revitalizing indigenous beliefs and the belief that Christianity is an oppressive movement that needs  
8 to be opposed.

9 To be sure, private individuals have every right to decide whether they agree with Cuauhtin that  
10 Christianity was and is oppressive and that indigenous religions should be revitalized. However, the  
11 state has no authority to weigh in on such matters, even subtly; it is supposed to be neutral. (*Wallace*,  
12 *supra*, 472 U.S. at 60 [relying on the “established principle that the government must pursue a course  
13 of complete neutrality toward religion” to condemn public school’s minute of silence for “meditation  
14 or voluntary prayer”]; *Fox v. City of Los Angeles* (1978) 22 Cal.3d 792, 798 [requiring government’s  
15 neutrality in matters of religion].) To the extent it tries to influence the debate, it acts ultra vires, and in  
16 violation of both the U.S. and California constitutions.

17 Because the curriculum has already been approved and recommended for use by all public  
18 schools in California and made available to teachers, the teachers may at any time use the Aztec Prayer  
19 or the “Ashe” chant in class without advance notice. Because of this, Plaintiff Eric Gonzales’ child is  
20 currently under threat of mandatory school prayer. To avoid the possibility that his child might be  
21 forced to say the required prayers, Plaintiff Steve Houbeck is presently forgoing his right to send his  
22 child to public school. In addition, Defendants have expended public funds to develop, adopt, and  
23 promote the curriculum and all Plaintiffs thus enjoy taxpayer standing under Code Civ. Proc. § 526a.  
24 No contingency needs to unfold before Plaintiffs’ claims are ripe. Furthermore, the violations will only  
25 mount each time the Aztec prayer and “Ashe” chant are used as intended in public school classrooms.

26 If Defendants thought the Aztec Prayer or “Ashe” chant was not likely to be used in California’s  
27

28 \_\_\_\_\_  
<sup>5</sup> The Ahoden symbol is also included on the helix. (See *supra* note 3.)



1 public schools, they could have responded to Plaintiffs’ counsel’s demand letter with reassurances. The  
2 fact that they did not do so, and have not withdrawn either the prayer or the chant implies that they  
3 intend the prayer and chant the prayer and chant to be used currently in California’s public schools.

4 Plaintiffs have therefore established a strong likelihood of success on the merits, on their  
5 Establishment Clause claims.

6 **B. Balance of Hardships.**

7 In the absence of preliminary injunctive relief, Plaintiffs will continue to suffer injuries as the  
8 result of the ongoing Establishment Clause violations. “The loss of First Amendment freedoms, for  
9 even minimal periods of time, unquestionably constitutes irreparable injury.” (*Roman Catholic Diocese*  
10 *of Brooklyn v. Cuomo* (2020) 141 S.Ct. 63, 67 [granting injunction pending appeal] [quoting *Elrod v.*  
11 *Burns* (1976) 427 U.S. 347, 373]; *Ketchens v. Reiner* (1987) 194 Cal.App.3d 470, 480 [holding that the  
12 balance of harms inquiry decidedly favored the plaintiff, whose loss of First Amendment freedoms was  
13 at issue] [quoting *Elrod, supra*, 427 U.S. at 373].) This includes Establishment Clause violations.  
14 (*Chaplaincy of Full Gospel Churches v. England* (D.C. Cir. 2006) 454 F.3d 290, 301–304 [applying  
15 *Elrod* to claim of government favoritism to one religious denomination over another].)

16 Furthermore, the burden that injunctive relief would impose on Defendants is light. The Aztec  
17 Prayer and “Ashe” chant are optional activities, and alternatives are available. Defendants would need  
18 to direct school districts and teachers not to use the Aztec Prayer and “Ashe” chant until further notice,  
19 but otherwise little needs to be done to comply with the injunction.

20 **C. Analysis.**

21 The analysis required here is not difficult. The Court is required to weigh (1) the likelihood that  
22 Plaintiffs will ultimately prevail on the merits and (2) the relative interim harm to the parties from  
23 issuance or nonissuance of the injunction. (*Butt, supra*, 4 Cal.4th at 677–678.) Given that the greater  
24 the plaintiff’s showing on one, the less must be shown on the other (*id.* at 678), the easier approach is  
25 to consider the second factor first.

26 Because Plaintiffs’ First Amendment rights are at stake, the question of which way the balance  
27 of hardships tips is not even close: it tips sharply in Plaintiffs’ favor. (See *Ketchens, supra*, 194  
28 Cal.App.3d at 480.) Furthermore, the burden on Defendants if the injunction is issued is quite light;

1 they can comply easily and inexpensively, with no disruption to classes or teaching. Because the  
2 balance here tips sharply in Plaintiffs’ favor, less of a likelihood of success on the merits needs to be  
3 shown. (*Butt, supra*, 4 Cal.4th at 678.)

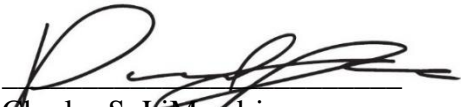
4 Here, however, Plaintiffs have a high likelihood of success on the merits. The Aztec Prayer and  
5 “Ashe” chant are religious exercises — specifically, prayers — and the law is clear that public schools  
6 may not sponsor prayers. Even in the early stages of this case, this motion is supported by evidence in  
7 the form of the declaration of an expert as well as citations to and discussion of the prayer and chant  
8 themselves. The evidence ultimately available is only likely to increase.

9 **IV. CONCLUSION.**

10 For the reasons set forth above, the balance of hardships tips sharply in Plaintiffs’ favor, and  
11 Plaintiffs are likely to succeed on the merits. Plaintiffs ask that the Court grant a temporary restraining  
12 order forbidding Defendants from permitting the Aztec Prayer (*i.e.*, the “In Lak Ech Affirmation) or  
13 “Ashe” chant (*i.e.*, the “Ashe Affirmation”) from being used in California public schools and requiring  
14 them to direct teachers not to use them until further notice. Plaintiffs also ask that the Court issue an  
15 order to show cause why a preliminary injunction should not issue.

16  
17 Respectfully submitted,  
18 LiMANDRI & JONNA LLP

19  
20 Dated: September 24, 2021

21 By:   
22 Charles S. LiMandri  
23 Paul M. Jonna  
24 Mark D. Myers  
25 Jeffrey M. Trissell  
26 Robert E. Weisenburger  
27 Attorneys for Plaintiffs  
28