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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

PLANS, Inc., Plaintiffs, v. SACRAMENTO CITY UNIFIED SCHOOL DISTRICT, TWIN RIDGES ELEMENTARY SCHOOL DISTRICT, DOES 1-100, Defendants.	Case No. CIV. S-98-0266 FCD PAN DEFENDANT TWIN RIDGES ELEMENTARY SCHOOL DISTRICT'S TRIAL BRIEF [Eastern District Local Rule 16-285] Date: September 12, 2005 Time: 1:30 p.m. Place: Courtroom 2

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I. INTRODUCTION.

Defendant Twin Ridges Elementary School District ("TRESD" or "School District") hereby files its Trial Brief as required by this Court's Third Amended Pretrial Conference Order ("Pretrial Order 3"), at 10, line 4. This Trial Brief conforms to Local Rule 16-285. The School District respectfully asserts that: (1) anthroposophy is not a religion for Establishment Clause purposes; and (2) even if anthroposophy is deemed a religion, these public schools do not teach anthroposophy, but do instruct California-approved curriculum utilizing entirely permissible *instructional methods* adapted for use in public schools.

Yuba River Charter School (hereafter "Yuba River"), a charter school chartered by Twin Ridges Elementary School District, educates approximately 240 students, and has 10 credentialed teachers, 20 classified staff, and 5 administrative staff. PLANS seeks to invoke the injunctive authority of this court to completely shut down Yuba River Charter School, as well as presumably any other similar school chartered by TRESD. Defendant respectfully asserts that Ninth Circuit case law, and the admissible evidence when applied to this court's specific pretrial order setting forth the matters subject to proof, will support a defense judgment that anthroposophy is a "philosophy," not a "religion." Admissible evidence and case law will also support a defense judgment regarding the *Lemon* "second prong." (Pretrial Order 3, at 7, ¶ 2-3.) Further, as a matter of law, there can be no "excessive entanglement" pursuant to the *Lemon* "third prong" in these factual circumstances, further supporting a defense judgment. (Pretrial Order 3, at 7-8, ¶ 4-11.) There is also no potential California State Constitution violation in this case. (Pretrial Order 3, at 9, ¶ 20-23.) Finally, PLANS is not entitled to the "shut-down" injunctive relief requested, in any event. (Pretrial Order 3, at 10, ¶ 24.)

II. BRIEF STATEMENT OF FACTS. [Local Rule 16-285(a)(1).]

The only undisputed facts are set forth at Pretrial Order 3, at 2, paragraphs a-I.

III. ADMISSIONS NOT RECITED IN PRETRIAL ORDER. [Local Rule 16-285(a)(2).]

PLANS admits that Yuba River is not affiliated with a traditional religious sect or denomination as set forth in PLANS Response to Defendant's Request for Admissions number Six, Set No. One dated January 15, 2004. (Exhibit E).

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IV. ADMISSIBILITY OF EVIDENCE DISPUTES. [Local Rule 16-285(a)(3).]

There are several motions in limine which remain pending before the Court or have been taken under submission. Additionally, TRESD will file objections to PLANS' exhibits as well.

V. POINTS OF LAW. [Local Rule 16-285(a)(3).]

A. PRETRIAL POINTS OF LAW.

1. Whether anthroposophy is a religion for Establishment Clause purposes under current United States Supreme Court and Ninth Circuit standards. [Pretrial Order 3 at 7, ¶ A.1.]

2. Whether anthroposophy is a religion. [Pretrial Order 3 at 3, ¶ 1.]

A. Whether anthroposophy is a system of belief and worship of a superhuman controlling power involving a code of ethics and philosophy requiring obedience thereto.

B. Whether anthroposophy addresses fundamental and ultimate questions having to do with "deep and imponderable matters."

C. Whether anthroposophy is "comprehensive in nature."

D. Whether anthroposophy can be recognized by formal and external signs such as formal services, ceremonial functions, the existence of clergy, structure and organization, efforts at propagation, observance of holidays and other similar manifestations associated with the traditional religions.

Whether anthroposophy qualifies as a religion for Establishment Clause purposes is the threshold issue in this case. The court has bifurcated the trial so that this issue may be dispositive. (Pretrial Order 3, at 14, line 9.) PLANS carries the evidentiary burden of proving anthroposophy is a religion. *Alvarado v. City of San Jose*, 94 F.3d 1223, 1226-1231(9th Cir. 1996). PLANS has no admissible testimony from experts or percipient witnesses, or documentary evidence to prove anthroposophy is a religion for purposes of the Establishment Clause pursuant to *Alvarado*, 94 F.3d, 1226-1231, and the factors set forth in Pretrial Order 3, at 3, paragraph 2 A-D as set forth above. (Pretrial Order 3, Attachment "A," Plaintiff's Amended Witness List; Pretrial Order 3, Attachment "C," Plaintiff's

Amended Exhibit List.) The School District plans to make a Rule 52(c) motion for judgment on partial findings, and judgment should be entered for Defendants.

Turning to points of law, the Ninth Circuit has not yet ruled upon, but has recognized, the proposition that religion for Establishment Clause purposes is to be construed more narrowly than for First Amendment Free Exercise Clause purposes. *Alvarado,* 94 F.3d at 1230 and cases cited therein; *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 520, n. 5 (9th Cir. 1994). Nevertheless, in *Peloza*, 37 F.3d at 521, the Ninth Circuit specifically rejected the claim that "evolutionism" or "secular humanism" are religion for Establishment Clause purposes. In doing so, the Ninth Circuit relied in part upon the following definition:

> According to Webster's, religion is the "belief in and reverence for a supernatural power accepted as the creator and governor of the universe." *Webster's II New Riverside University Dictionary* 993 (1988).

Peloza, 37 F.3d at 521, n. 4.

As stated in Laurence H. Tribe, *American Constitutional Law* (1978), and quoted in *United States v. Allen*, 760 F.2d 447, 450-451 (2d Cir. 1985), and *Peloza*, 37 F.3d at 521, n. 5:

> [W]hile "religion" should be broadly interpreted for Free Exercise Clause purposes, "anything 'arguably non-religious' should not be considered religious in applying the establishment clause."

In *Alvarado* itself, the Ninth Circuit rejected the broad claims of "New Age" religion argued by plaintiffs therein. *Alvarado*, 94 F.3d at 1229-1231.[1] TRESD respectfully asserts that since it is at the very least *arguably* not a religion, anthroposophy should be construed to be a philosophy for Establishment Clause purposes.[2]

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[1] *Alvarado* was referred to in one treatise as follows: "It has been held that so-called 'New Age' concepts do not implicate the Establishment Clause of the First Amendment, inasmuch as they do not demonstrate any shared or comprehensive doctrine or display any structural characteristics or formal signs associated with traditional religions, given the absence of any organization, membership, moral or behavioral obligations, comprehensive creed, particular texts, rituals, or guidelines, particular object or objects of worship, or any requirement that anyone give up religious beliefs he or she already holds." 16A Am. Jur. 2d *Constitutional Law* § 416 (2003), footnote citation to *Alvarado* omitted. PLANS has dropped any pretense of claiming anthroposophy is a "New Age" religion.

[2] Nor would anthroposophy meet the constitutional definition of "religion" set forth by commentators such as: Eli A. Echols, *Defining Religion for Constitutional Purposes: A New Approach Based on the Writings of Emanuel Swedenborg*, 13 B.U. Pub. Int. L.J. 117 (2003) [religion includes rules governing behavior, traceable to what is divine, that do not contradict the "golden rule," and it calls on its participants to conform to rules of the divine]; Anand Agneshwar, *Rediscovering God in the*

PLANS has heretofore relied upon *Malnak v. Yogi*, 592 F.2d 197 (3d Cir. 1979) ("*Malnak II*") which actually does not support PLANS' claims.[3] In *Malnak II*, 592 F.2d 197, the Third Circuit reviewed the situation where techniques of transcendental meditation were taught in public high schools through a textbook developed by a Hindu religious authority (Maharishi Mahesh Yogi), and the instruction involved Hindu-related religious practices inclusive of chanting a mantra with required attendance at a puja. *Malnak II*, 592 F.2d at 198-200. None of those factors, e.g., a formal religion with millions of worldwide adherents (Hinduism); religious exercise (chanting mantra), and religious ceremony (Hindu puja) are present in this case. Whatever the usefulness of Judge Adams' *Malnak II*'s concurrence[4] as relied so heavily upon by PLANS, the factors set forth by the Ninth Circuit in *Alvarado* control here. Moreover, Judge Adams' concurrence focused upon the theory that "[t]he rose cannot be had without the thorn" (*Malnak II*, 592 F.2d at 213) to support the truism that a religion cannot claim Free Exercise protection without Establishment Clause prohibitions. *Id*. But, in this case anthroposophy does not claim status as a religion, or Free Exercise Clause protection. In this case, there is no rose and thus no thorn.

Turning to the School District's potential evidence, Dr. Douglas Sloan, Professor Emeritus, Teachers College, Columbia University, a percipient and expert witness, may testify regarding anthroposophy. In the Establishment Clause context, the Fifth Circuit Court of Appeals has colorfully

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Constitution, 67 N.Y.U. L. Rev. 295 (1992) [religion is a system of beliefs, based on supernatural assumptions, that posits the existence of apparent evil, suffering, or ignorance in the world and announces a means of salvation or redemption from those conditions].

[3]Judge Adam's approach in *Malnak II* has been described by one commentator as the most consciously articulated example of the "analogical approach" to determining religion for constitutional purposes. Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 Cal. L. Rev. 753 (1984). The "analogical approach" compares the debated belief, activity, or organization with what is undeniably religious. *Id*. at 771-772. This is precisely what the School District is doing in this trial pursuant to the *Alvarado* factors—presenting objective evidence that anthroposophy is far more akin to philosophy than religion.

[4]In a Free Exercise majority opinion in *Africa v. Commonwealth of Pennsylvania*, 662 F.2d 1025 (3d Cir. 1981) Judge Adams subsequently concluded that the organization M.O.V.E. lacked the structural characteristics of religion, that its ideology was not religious, and thus did not meet the threshold test of religion. *Id*.

stated, "Absent feathers, webbed feet, a bill, and a quack, this bird just ain't a duck!" *Doe v. Santa Fe Independent Sch. Dist.*, 168 F.3d 806, 822 (5th Cir. 1999). Similarly, PLANS can repetitiously call anthroposophy a "religion," but that does not make it so in a court of law.

B. POINTS OF LAW CONTINUED. [Pretrial Order 3, at 7, ¶ A.3; Pretrial Order 3, at 8, ¶ 10-13.]

3. Whether Yuba River advances anthroposophy through the Waldorf inspired methodology in violation of Establishment Clause.

10. Whether an objective observer in the position of an elementary school student would perceive a message of endorsement of anthroposophy in the use of Waldorf education methods at any charter school sponsored by TRESD, including Yuba River.

11. This observer is not an expert on esoteric religions.

12. Whether mere consistency with, or resemblance to, a religious practice has the primary effect of endorsing religion.

13. Whether the Waldorf inspired charter schools sponsored by TRESD primarily advance the previously adjudicated secular purpose of educational innovation pursuant to the Charter Schools Act, California Education Code section 47600 et seq.

Pursuant to the second *Lemon* prong, the legal issue is "endorsement" or "advancement." (Pretrial Order 3-4, ¶ 2-3, 6-13.) Irrespective of whether anthroposophy is deemed philosophy or religion, the School District respectfully asserts the public charter schools' entire curriculum is secular and not inherently "religious". The schools at issue do not "advance" or "endorse" anthroposophy. PLANS proffers no admissible evidence why a "reasonable observer" would believe that either school "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring), as cited by Justice O'Connor in *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 17 (2004) ("*Newdow*"), setting forth again the "endorsement" analysis.

PLANS itself has admitted the schools are not affiliated with a traditional religious denomination or sect. (PLANS Response to Admission nos. 5-6; Defendant's proposed Exhibit E.) This admission obliterates PLANS' previous false analogy to publically funded Catholic or other undeniably religious schools. *PLANS, Inc. v. Sacramento City Unified Sch. Dist.*, 319 F.3d 504 (2003). Rather, quite unlike a religious school, administrator(s), teacher(s), and parent(s) will prove these schools teach California curriculum using in part certain pedagogical methods which originated in private Waldorf schools. Such methods are adaptable to public schools and congruent with multiple pedagogies. The schools do not teach or practice anthroposophy. Thus, even if anthroposophy is deemed a "religion," these public schools are quite unlike true religious schools.

On its face, the curriculum of both schools is patently secular. In the expert opinion of Mr. Anderson, an educational expert formerly employed by the California State Department of Education (retired) specifically in the field of curriculum and a witness for TRESD, these schools and the curriculum are not religious.

PLANS seems to assert a theory that anthroposophy is the foundation of Waldorf private education; that private Waldorf education and the public Waldorf *method* schools at issue are identical; and the two (anthroposophy and public Waldorf *method* schools) are thus somehow inseparable. But, this construct remains only a theory without admissible evidence. Even at a theoretical level, this "inseparability" construct is insupportable.[5] Under this theory, even though the Greek Philosopher Plato unquestionably never founded a religion, because the dialectical method used in his dialogues pondered in part metaphysical issues, the Socratic *method* could never be constitutionally used to teach curriculum

[5]For example, the Greek philosopher Aristotle (c. 384-322 B.C.E.) significantly influenced Catholic theologian St. Thomas Aquinas (Ninian Smart, *World Philosophies* 200-206 (Routledge 1999)), but Aristotle is undoubtedly a philosopher, not a religious figure. (Ninian Smart, *World Philosophies* 124-157 (Routledge 1999) inclusive of Aristotle as philosopher; also id. at 138-141. The Greek philosopher Plato (c. 428-348 B.C.E.) as well has been described as having an "immense influence on Christianity" (Ninian Smart, *World Philosophies* 135-136 (Routledge 1999)), but without question was a philosopher. (Ninian Smart, *World Philosophies* 124-157 (Routledge 1999)). Further, both Plato and Aristotle founded long-lived academies of philosophical inquiry, not religions. (Ninian Smart, *World Philosophies* 135-136 (Routledge 1999)).

in public law schools.[6] Clearly as a pragmatic, practical matter, instructional *methods* can be separated from whatever source of origination.

C. POINTS OF LAW CONTINUED. [Pretrial Order 3, at 8-9, ¶¶ 17-19.]

17. Whether there is payment of TRESD public funds to a private religious institution. The court must determine the "character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority."

18. Whether there is excessive entanglement between TRESD and religion in general.

19. Whether supervision of public employees by public officials creates excessive entanglement between church and state.

Turning first to evidentiary issues, TRESD witnesses will establish that at Yuba River, teachers themselves decide where and how to spend a $500 professional development stipend. No other TRESD funds are potentially spent directly at Rudolf Steiner College (hereafter "Steiner College")[7].

With respect to legal points; first, it is not at all clear the *Lemon* "excessive entanglement" prong still stands alone, or standing alone is sufficient to find a constitutional violation. As stated in Justice O'Connor's recent concurrence in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002):

> In *Agostini v. Felton*, [citation omitted], we folded the entanglement inquiry into the primary effect inquiry. This made sense because both inquiries rely on the same evidence, see *ibid.,* and the degree of entanglement has implications for whether a statute advances or inhibits religion [citations omitted]. *Id*. at 668-669; *accord Columbia Union College v. Clarke*, 159 F.3d 151, 157 (4th Cir. 1998) [the "effects" and "entanglement" prong rightly comprise a single "effect" inquiry].

PLANS thus appears to rely on outmoded doctrine to assert an injunction may issue on "excessive entanglement" alone.

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[6]For example, in the *Republic* the dialogue ponders the nature of perception and reality [the famous "Allegory of the Cave"] (*The Collected Dialogues of Plato* 747-752 (Edith Hamilton & Huntington Cairns eds., Princeton University Press 1973) (1961)); posits underlying perfect forms or "ideas" made knowable by use of dialectic (*The Collected Dialogues of Plato*, at 744-747), "proves" reincarnation [the Myth of Er] (*The Collected Dialogues of Plato*, at 838-844), as well as discusses the best model for a State.

[7]Rudolf Steiner College is the local Waldolf teacher training institution.

Second, Plaintiff miscomprehends the *Lemon* "excessive entanglement" prong by confusing public school teachers taking classes at Steiner College with the State spending taxpayer funds to directly aid Steiner College itself.

> It is well settled that the Establishment Clause is not violated every time money previously in the possession of a State is conveyed to a religious institution. For example, a State may issue a paycheck to one of its employees, who may then donate all or part of that paycheck to a religious institution, all without constitutional barrier; and the State may do so even knowing that the employee so intends to dispose of his salary. It is equally well-settled, on the other hand, that the State may not grant aid to a religious school, whether cash or inkind, where the effect of the aid is "that of a direct subsidy to the religious school" from the State [citations omitted]. *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481, 486-487 (1986).

Controlling Ninth Circuit case law is also clear that there is no entanglement issue when public officials supervise public employees performing public functions on public property. *Walker v. San Francisco Unified Sch. Dist.*, 46 F.3d 1449, 1461 (9th Cir. 1995). As the High Court has stated:

> Neither will there be any excessive entanglement arising from supervision of public employees to insure that they maintain a neutral stance. It can hardly be said that the supervision of public employees performing public functions on public property creates an excessive entanglement between church and state. *Wolman v. Walter*, 433 U.S. 229, 248 (1977).

Thus, there can be no "excessive entanglement" as a matter of law when teachers take classes on their own volition at Steiner College, or when school officials at TRESD supervise their own teachers' instruction of State curriculum to ensure "neutrality." *Wolman*, 433 U.S. at 248; *Walker,* 46 F.3d at 1461; Further, U.S. Supreme Court doctrine has evolved beyond *Lemon* as cited in the Summary Judgment Order at pages 22-24, to allow public employees to instruct even on private sectarian school grounds. The High Court has stated: "[T]he Establishment Clause lays down no absolute bar to the placing of a public employee in a sectarian school." *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) at 13; *Agostini v. Felton*, 521 U.S. 203, 230 (1997) [a public school teacher may even teach on parochial school grounds].

Third, even if this matter is treated as a State aid case, with respect to "excessive entanglement" with Steiner College, this court must then determine the precise nature of the institution (e.g., whether it is "pervasively sectarian" or "religiously affiliated") and whether State aid supports secular or sectarian purposes. *Roemer v. Bd. of Public Works of Maryland*, 426 U.S. 736, 759-762 (1976); *accord Columbia Union College*, 159 F.3d at 157-163. PLANS offers no evidence on these key points.

Fourth, PLANS ignores fundamental First Amendment free speech and association rights held by public school teachers. *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *Tinker v. Des Moines Indep. Community Sch. Dist.,* 393 U.S. 503 (1969). As stated by the High Court in *Tinker*: "First Amendment rights, applied in light of the special characteristics of the school environment, are available to *teachers* and students. It can hardly be argued that either students or *teachers* shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years." *Id*. at 506 (emphasis added). The Ninth Circuit has stated: "Neither this court nor the Supreme Court has definitively resolved whether and to what extent a teacher's instructional speech is protected by the First Amendment. [Citations omitted.]" *California Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1148 (9th Cir. 2001), see also footnote 6 and tests cited therein at 1149. Nevertheless, the Ninth Circuit in *California Teachers Ass'n*, 271 F.3d at 1148-1149 assumed *arguendo* instructional speech receives some First Amendment protection.

D. POINTS OF LAW CONTINUED. [Pretrial Order 3, at 9, ¶¶ 20-23.]

20. Whether the court should abstain from ruling upon the alleged California Constitution violations since this case is one of first impression and the California legal standards are not entirely clear, and could raise conflicts between federal and state constitutional rights.

TRESD respectfully asserts this federal District Court should abstain from ruling upon the alleged California Constitution violations raised in this matter pursuant to the doctrine set forth in *Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941) *("Pullman")*. The High Court held in *Pullman* that abstention is appropriate where (1) the state's constitution contains a provision unlike any in the federal constitution and (2) state court construction of an unclear provision might make a federal ruling unnecessary. *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1384 (9th Cir.1994) *("Woodland")* citing *Ellis v. City of La Mesa*, 990 F.2d 1518, 1522 (9th Cir.1993). For purposes of a *Pullman* abstention, "uncertainty" means that a federal court "cannot predict with any confidence how the state's highest court would decide an issue of state law." *Ellis*, 990 F.2d at 1522, citing *Pearl Inv. Co. v. City and County of San Francisco*, 774 F.2d 1460, 1465 (9th Cir. 1985).

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In *Rentz v. Bozanich*, 397 U.S. 82 (1970), the High Court applied the *Pullman* doctrine and held that the district court should have abstained given that unique fishing provisions in the Alaska Constitution had not been interpreted by Alaska courts. To avoid any possible irritant in the federal-state relationship, the High Court concluded that the federal court should have stayed its hand while the parties repaired to state courts for resolution of state constitutional questions. *Rentz*, 397 U.S. at 86.

The *Pullman* doctrine is applicable here as PLANS' claims are not entirely clear under California legal standards. Particularly, California courts have not interpreted the meaning of California's Establishment Clause, Article I, section 4; the No Preference Clause, Article XVI, section 5; or, Article IX, section 8 of the California Constitution as applied to California's unique statutory law regarding the approval of charter schools in California. Specifically, as a statutory matter, Education Code section 47605, subdivision (d)(1) requires in pertinent part that: "a charter school shall be nonsectarian in its programs, admission policies, employment practices, and all other operations . . ."

TRESD recognizes that in *Woodland*, the Ninth Circuit held that the district court did not abuse its discretion when it did not abstain from a case dealing with curriculum in a public school district. *Woodland*, 27 F.3d at 1384. However, that case did not review California's unique charter school laws or Education Code section 47605, subdivision (d)(1) "nonsectarian" requirement. Accordingly, there is a degree of "uncertainty" because this court cannot predict with any confidence how the State's highest court would decide the issues raised by PLANS pursuant to State constitutional and statutory law regarding charter schools.

21. If the court does not abstain, then the court must determine whether Defendants violate Article I, section 4, Article XVI, section 5, or Article IX, section 8 of the California Constitution.

In *Woodland*, 27 F.2d at 1384-1385, the Ninth Circuit held that the school district's curriculum which included a series of books that contained sectarian and non-sectarian selections, among a wide variety of other cultural selections, did not violate Article I, section 4, Article XVI, section 5, or Article IX, section 8 of the California Constitution. Specifically, the Ninth Circuit concluded that the school district's use of the curriculum did not advance or give the appearance that the school district endorsed . . .

any sectarian belief. *Woodland,* 27 F.3d at 1384-1385. TRESD respectfully asserts *Woodland* compels finding no violation of the State Constitution in this matter as well.

22. The test for the California Constitution, Article I, section 4's "establishment clause" appears to be "endorsement." Article I, section 4's "no preference" clause appears to raise the issue whether government has granted a preferential benefit to a particular sect, religion, or religion in general, that is not granted to society at large.

California's No Preference Clause reads: "Free exercise and enjoyment of religion without discrimination or preference are guaranteed." Cal. Const. Art. I, § 4. The No Preference Clause has been interpreted by California courts "to require that the government neither prefer one religion over another nor appear to act preferentially." *Woodland,* 27 F.3d at 1384, citing *Sands v. Morongo Unified Sch. Dist.*, 53 Cal.3d 863 (1991), *cert. denied* , 505 U.S. 1218 (1992); *Tucker v. State of California Dep't of Educ.*, 97 F.3d 1204, 1214 (9th Cir. 1996); citing *Hewitt v. Joyner*, 940 F.2d 1561, 1567 (9th Cir.1991), *cert. denied*, 502 U.S. 1073 (1992).

California's Establishment Clause reads: "[t]he legislature shall make no law respecting an establishment of religion." Cal. Const. Art. I, §4. The State establishment clause has been interpreted by California courts as prohibiting "public schools from requiring their students to engage in religious ritual." *Woodland*, 27 F.3d at 1384, citing *Sands*, 53 Cal.3d at 870-871. Further, "the California Supreme Court has stated that federal cases interpreting the federal Establishment Clause provide guidance for interpreting the California Establishment Clause, but that the State courts must 'independently determine its scope.'" *Tucker,* 97 F.3d at 1214; citing *Sands*, 53 Cal.3d at 883. TRESD respectfully asserts its Waldorf methods charter school(s) do not violate any of the California Constitution provisions at issue, as interpreted by the Ninth Circuit in *Woodland*.

23. Article XVI, section 5, has been held to prohibit official involvement, whatever its form, which has the direct, immediate, and substantial effect of promoting religious purposes. The test appears to be whether the government aid is direct, or indirect, and whether the nature of the aid is substantial or incidental. Article IX, section 8, precludes public funds appropriated for support of a sectarian or

denominational school; any school not being under exclusive control of the officers of the public schools; and the instruction of any sectarian or denominational doctrine in a common school. An "incidental" benefit to a private, sectarian school is permissible if the "direct" benefit is to the student.

"The highest court has interpreted Article XVI, section 5, to prohibit any official involvement that promotes religion." *Tucker,* 97 F.3d at 1214; citing *Sands*, 53 Cal.3d at 882-883. In this case, the alleged religion is anthroposophy. In determining whether governmental aid has violated Article XVI, section 5, this court must utilize a two-part test and "consider first whether the aid is direct or indirect, and second whether the nature of the aid is substantial or incidental." *Woodland*, 27 F.3d at 1384, citing *Sands*, 53 Cal.3d at 913. This is essentially the federal "entanglement" test. TRESD respectfully asserts its Waldorf methods charter school(s) do not violate any of the California Constitution provisions at issue, as interpreted by the Ninth Circuit in *Woodland*.

E. POINTS OF LAW CONTINUED. [Pretrial Order 3, at 10, ¶ 24.]

24. Whether the relief requested by Plaintiff is necessary and proper in the circumstances as presented at trial.

PLANS seeks the drastic "shut-down" injunctive relief of school closure. Pursuant to the Pretrial Order, VI, Relief Sought, paragraphs 1 through 3, TRESD contests the truly retroactive nature of injunctive relief arising from past events sought by PLANS, and whether it would be a proper exercise of federal injunctive power to completely close these Waldorf methods charter schools.

TRESD respectfully asserts injunctive relief is not available for past alleged misconduct. *Loya v. INS*, 583 F.2d 1110, 1114 (9th Cir. 1978.) Accordingly, claims for retroactive injunctive relief both in the Supreme Court and the Ninth Circuit have been barred. *Native Village of Noatak v. Blatchford,* 38 F.3d 1505, 1511-1512 (9th Cir. 1994), *citing Edelman v. Jordon*, 415 U.S. 651, 663 (1974). The High Court has held that injunctive relief "is necessarily limited to prospective injunctive relief." *Edelman v. Jordan*, 415 U.S. at 677. The purpose of injunctive relief is to deter or prevent future injury or harm, not to punish for past misconduct. *Swift & Co. v. United States*, 276 U.S. 311, 326 (1928);

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United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953); *Loya v. INS*, 583 F.2d 1110, 1114 (9th Cir. 1978); *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 564 (9th Cir. 1990); *Enrico's, Inc. v. Rice*, 730 F.2d 1250, 1253 (9th Cir. 1984); *United States v. Parkinson*, 135 F.Supp. 208, 213 (S.D. Cal.1955);.

The High Court has also held that if a federal district court finds that a public school district operates in a manner infringing upon the federal constitutional rights of students, for example, operating segregated schools, that court is empowered to prescribe a suitable remedy. *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 413 U.S. 189 (1973); *Wright v. Council of City of Emporia*, 407 U.S. 451 (1972); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). However, it has also been long established by the High Court that school officials must be given an opportunity to devise changes sufficient to bring the school district's operations within the constitutional standards. *Swann*, 402 U.S. at 16; *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294 (1955). Finally, if the school officials present a plan which corrects a found constitutional violation, and the plan does not infringe upon other rights in the process, the district court may approve that remedy. *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406 (1977); *Milliken v. Bradley*, 418 U.S. 717 (1974).

As Chief Justice Rehnquist recently noted: "When courts extend constitutional prohibitions beyond their previously recognized limit, they may restrict democratic choices made by public bodies." *Newdow*, 542 U.S. 1 (Rehnquist, C.J. concurring). If there is some identifiable problem with these TRESD charter schools, the elected school boards and public charter school administrators/teachers will fix it. Beyond the goal of keeping these charter schools open for those parents and pupils who favor this innovative educational approach, no single component of the program is sacrosanct. To take just one example, PLANS complains that *if* State funds are spent, no matter how indirectly, at Steiner College that alone somehow constitutes "excessive entanglement." Assuming *arguendo* this court eventually agrees, appropriately tailored injunctive relief would bar expending public funds from TRESD at Steiner College, rather than entirely shutting down these public charter schools.

F. OTHER POINTS OF LAW. [Pretrial Order 3, at 10, ¶ B.]

This Court previously dismissed this lawsuit for lack of standing, but the Ninth Circuit reversed on the basis of a PLANS' analogy comparing these schools to hypothetical publically funded Catholic charter schools. *PLANS, Inc.,* 319 F.3d 504. The Ninth Circuit found taxpayer "pocketbook" standing,

but only on the basis of PLANS' claimed constitutional violation, e.g., an objection that the *entire curriculum* of the schools is inherently religious. *PLANS, Inc.*, 319 F.3d at 506.

Under Ninth Circuit doctrine, this opinion by the Ninth Circuit becomes the law of the case. ["The law of the case doctrine is a judicial invention designed to aid in the efficient operation of court affairs." *Milgard Tempering, Inc. v. Selas Corp. of America*, 902 F.2d 703,715 (9th Cir. 1990). Under the law of the case doctrine, "a court is generally precluded from reconsidering an issue previously decided by the same court, or a higher court in the identical case." *United States v. Lummi Indian Tribe* 235 F.3d 443, 452 (9th Cir. 2000). Further, the law of the case doctrine is designed to ensure that generally a decision on a rule of law continues to govern the same issues in subsequent stages of the same case. *Rezzonico v. H & R Block, Inc.*, 182 F.3d 144, 148 (2d Cir. 1999).

PLANS' proposed witnesses/exhibits remaining in the case fall short of its standing claim before the Ninth Circuit that the *entire curriculum* of these public schools is inherently religious. PLANS is again relying upon limited instances of particular events, school activities, programs, or even non-school events to allege unconstitutionality. Most critically, despite full and repeated discovery rights, PLANS has *no curriculum evidence from TRESD* to prove the sweeping "inherently religious curriculum" claim propounded to the Ninth Circuit. (Pretrial Order 3, Attachment "C," Plaintiff's Amended Exhibit List.) Pursuant to the doctrine of the law of the case, PLANS cannot now deviate from the position it took before the Ninth Circuit. PLANS must challenge the TRESD "school curriculum as a whole," and not "a specific program or activity." *PLANS, Inc.,* 319 F.3d at 506, 508.

VI. CONCLUSION.

PLANS's litigation has been styled for the court of public opinion by relying upon rhetoric, assumptions, and hyperbole, but not for the federal district court. PLANS simply does not bring forward any admissible evidence regarding religion. The School District will, if necessary, bring forward admissible percipient and expert witness testimony regarding the threshold religion issue; the second

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Lemon "advancement" or "endorsement" prong; and finally "excessive entanglement," all of which support a defense judgment.

Respectfully submitted,

GIRARD & VINSON, LLP

By /s/ Christian M. Keiner
CHRISTIAN M. KEINER

Dated: August 29, 2005.

By /s/ Michelle L. Cannon
MICHELLE L. CANNON
Attorneys for Defendants

PROOF OF SERVICE

I am employed in the county of Sacramento, state of California. I am over the age of 18 and not a party to the within action; my business address is 1006 Fourth Street, Eighth Floor, Sacramento, California 95814-3326.

On August 29, 2005, I served the foregoing document described as DEFENDANT TWIN RIDGES ELEMENTARY SCHOOL DISTRICT'S TRIAL BRIEF [Eastern District Local Rule 16-285] on the following interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

FREDERICK J DENNEHY
WILENTZ GOLDMAN & SPITZER
90 WOODBRIDGE CENTER DRIVE
WOODBRIDGE NJ 07095

I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Sacramento, California.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

I declare under penalty of perjury under the laws of the state of California that the above is true and correct.

Executed on August 29, 2005, at Sacramento, California.

Sherri Lee Caplette, CCLS