

No. 17-178

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IN THE  
**Supreme Court of the United States**

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AMERICAN HUMANIST ASSOCIATION ET AL.,  
*Petitioners,*

v.

BIRDVILLE INDEPENDENT SCHOOL DISTRICT ET AL.,  
*Respondents.*

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**On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Fifth Circuit**

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**BRIEF OF THE CENTER FOR INQUIRY,  
AMERICAN ATHEISTS, THE HINDU AMERICAN  
FOUNDATION, THE MILITARY ASSOCIATION  
OF ATHEISTS AND FREETHINKERS,  
THE SECULAR COALITION FOR AMERICA,  
AND THE SECULAR STUDENT ALLIANCE AS  
AMICI CURIAE IN SUPPORT OF PETITIONERS**

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## INTERESTS OF AMICI CURIAE

The Center for Inquiry (“CFI”), American Atheists, Inc., the Hindu American Foundation (“HAF”), the Military Association of Atheists and Freethinkers (“MAFF”), the Secular Coalition for America (“SCA”), and the Secular Student Alliance (“SSA”), submit this brief as amici curiae in support of the petition for a writ of certiorari filed by the American Humanist Association (“AHA”).<sup>1</sup>

CFI is a nonprofit educational organization dedicated to promoting and defending reason, science, freedom of inquiry, and humanist values. Through education, research, publishing, social services, and other activities, including litigation, CFI encourages evidence-based inquiry into science, pseudoscience, medicine and health, religion, and ethics. CFI believes that the separation of church and state is vital to the maintenance of a free society that allows for reasoned exchange of ideas about public policy.

American Atheists, Inc. is a national educational, nonpolitical, nonprofit corporation. American Atheists is a membership organization dedicated to advancing and promoting the complete and absolute separation of religion and government, and to preserving equal rights under the law for atheists. American Atheists encourages the development and public acceptance of

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<sup>1</sup> No counsel for a party authored this brief in whole or in part, and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *amici curiae*, their members, and their counsel, made a monetary contribution intended to fund its preparation or submission. Counsel of record for all parties has received timely notice of *amici curiae*’s intent to file this brief and have consented to filing this brief in letters on file with the Clerk’s office.

a humane, ethical system that stresses the mutual sympathy, understanding, and interdependence of all people and the corresponding responsibility of each individual in relation to society.

HAF is an advocacy organization for the Hindu American community. The Foundation educates the public about Hinduism, speaks out about issues affecting Hindus worldwide, and builds bridges with institutions and individuals whose work aligns with HAF's objectives. HAF focuses on human and civil rights, education, and community building through inter and intrafaith engagement. Through its advocacy efforts, HAF seeks to cultivate leaders and empower future generations of Hindu Americans. Since its inception, HAF has made legal advocacy one of its main areas of focus. From issues of religious accommodation and religious discrimination to defending the fundamental constitutional rights of free exercise and the separation of church and state, HAF has educated Americans at large and the courts about the impact of such issues on Hindu Americans as well as various aspects of Hindu belief and practice in the context of religious liberty.

MAFF represents active duty and former military personnel in all branches of service who protect a nation that does not discriminate on the basis of belief, and does not promote one type of belief to the exclusion of others.

SCA is a national nonprofit advocacy organization headquartered in Washington, D.C., dedicated to amplifying the diverse and growing voice of the non-theistic community in the United States. Representing eighteen voting member organizations and nearly three hundred local endorsing organizations, the mission of SCA is to increase the visibility of and respect for

nontheistic viewpoints in the United States, and to protect and strengthen the secular character of our government as the best guarantee of freedom for all. SCA's interests in the defense of a strong wall of separation between church and state are impacted by a policy which introduces religion and worship into school board meetings.

SSA is a national educational, nonpolitical, non-profit corporation. With approximately 250 chapters in high schools, colleges, and universities across the country, SSA empowers secular students to proudly express their identity, builds welcoming communities, promotes secular values, and sets a course for lifelong activism. SSA envisions a future in which thousands of secular students lead meaningful and fulfilling lives, thrive as valued members of society, and provide visionary leadership committed to humanistic ideals and critical inquiry.

### **SUMMARY OF ARGUMENT**

Amici include representatives of the fastest growing religious viewpoint demographic in the United States, the "nones" – those without religious belief or affiliation, encompassing atheists, agnostics, secular humanists, and many more – as well as representatives of the American Hindu community. Central to amici's mission is the belief that Thomas Jefferson's wall of separation between church and state benefits all in society; both non-believers and believers alike. Amici seek to defend the rights of all citizens to worship or not worship as they choose, but also to be free from state sponsored religious practices. By endorsing a particular religious viewpoint, the state places its *imprimatur* on that belief, to the detriment of those who hold other religious faiths, and those who hold no religious faith. This is particularly true in the area of

education, where this Court has long recognized that special care must be taken to avoid the coercive effect of even an appearance of state endorsement of religious belief or practice. In a country that is rapidly becoming more religiously diverse, societal health depends on government neutrality in the religious sphere; both between different religious faiths, and between religious faith and non-belief.

By ruling that Birdville Independent School District's ("BISD") policy of commencing school board meetings with a prayer was constitutional, the Fifth Circuit stands in stark contrast to the precedent set by other Circuit Courts of Appeal. Both the Third Circuit and the Sixth Circuit have analyzed similar policies put into place by school districts, and acknowledged that the special nature of education mandates that great care be taken to avoid the appearance of endorsement of religion. The Fifth Circuit, however, has chosen to push aside the long held precedent of this Court regarding prayer in educational settings, and, instead, has chosen to analyze the case under the decisions of this Court in *Marsh v. Chambers*, 463 U.S. 783 (1983) and *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014). By doing so, the court below erroneously ignored the essential educational nature of school board meetings and the regular attendance and participation of school children at such meetings, mistakenly viewing them instead as legislative bodies, akin to state legislatures and town councils.

Amici believe that the Fifth Circuit's analysis is erroneous, and that this Court's ruling in *Galloway*, *id.* at 1815, is restricted to truly legislative bodies, as opposed to those with educational purposes such as



school boards.<sup>2</sup> As the Third Circuit found in *Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 259 (3d Cir. 2011), and the Sixth Circuit found in *Coles by Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 371 (6th Cir. 1999), the critical educational mission and nature of the work of school boards, in particular in light of the role played by school children at such meetings, makes the difference. *Galloway*, however, addressed specifically legislative meetings. 134 S. Ct. at 1819-20. Any role for education and participation by school children was tangential to the core purpose of the meeting. This Court built on its precedent in *Marsh*, 463 U.S. at 791, to hold that the legislative prayer exception extended beyond state houses to some local legislative bodies. It did not, however, extend this exception to all government bodies where any policy decision is taken. Nor did it address the particular status of school boards.

By their very nature, school board meetings are inextricably tied to education. They serve as the primary source of interaction between pupils and parents and the officials making the decisions that will control every facet of public education. To a far greater degree than the meetings considered by this Court in *Marsh* and *Galloway*, school board meetings involve children both as active participants and as the *sine qua non* of the public school system. School boards are rightly seen by the public more as extensions of the school itself than as legislative bodies like the state

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<sup>2</sup> Amici maintain that both *Marsh* and *Galloway* were incorrectly decided, and that a practice of commencing legislative meetings with a prayer, whether sectarian or not, violates the separation of church and state as guaranteed by the Religion Clauses of the First Amendment. However, for the purposes of this brief, amici acknowledge that this Court has ruled that some prayers may be constitutional as regards legislative bodies.

house or the city council. Prayers at such meetings should not, therefore, be analyzed under the limited historical exception carved out in *Marsh* and *Galloway* but, instead, under the stricter standards of cases such as *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (finding prayer at a high school graduation ceremony to be unconstitutional) and *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301 (2000) (finding prayer at a high school football game violated the First Amendment), focusing on the long recognized constitutional problems that occur when public education and religion are intertwined.

Amici assert that the Fifth Circuit was in error by extending the ruling of *Galloway* beyond the scope intended by this Court, and by doing so, creating a Circuit split with the Third and Sixth Circuits whose rulings correctly analyze school board prayer as occurring in a public educational environment. This split creates an ongoing problem which is being magnified by consistent and broad ranging demographic changes in the United States of America. Repeated studies indicate that the United States is rapidly becoming a more diverse nation with regard to religious faith and non-belief. Americans in significant numbers believe in a wider range of faiths than at any time in living memory. Further, many Americans, especially young Americans, are rejecting any religious affiliation whatsoever. The growth of the “nones” – those who affiliate with no religious group including those who express no religious or spiritual belief at all – has been well documented. The Pew Research Center estimated that in 2014, 23% of American adults, or 55.8 million individuals, had no religious affiliation. Among the

Millennial generation, those born between 1981 and 1996, this number rose to 35%.<sup>3</sup>

As Americans have become less religious, and those Americans who have remained affiliated with a particular faith have become more diverse in their affiliations, the chances of parents and children feeling excluded when a school board endorses a particular faith, or the general belief in a deity, have become greater. Parents and children of no faith, or of different faiths, should not feel they are required to avoid a meeting, as critical to education as that of the school board, simply to avoid being exposed to a religious exercise in which they do not share. They should not be made to feel as if they are outsiders by a school board's decision to publicly identify with a particular, or with any, faith community.

Amici defend the right of all Americans to pray and worship freely. Such a right, however, does not extend to co-opting public educational bodies for the endorsement of a particular belief, or the support of religious faith in general over an absence of religious belief. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (The Establishment Clause “mandates government neutrality between religion and religion, and between religion and nonreligion.”)

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<sup>3</sup> *America's Changing Religious Landscape*, Pew Research Center, available at <http://www.pewforum.org/2015/05/12/american-changes-changing-religious-landscape/> (May 12, 2015).

**ARGUMENT****I. THE FIFTH CIRCUIT ERRED BY MISAPPLYING AND EXTENDING THE PRECEDENT OF *MARSH V. CHAMBERS* AND *TOWN OF GREECE V. GALLOWAY* TO THIS CASE**

The court below, in *Am. Humanist Ass'n v. McCarty*, 851 F 3d 521, 523 (5th Cir. 2017) affirmed the grant of summary judgment to BISD by the United States District Court for the Northern District of Texas. This ruling represents a finding that BISD's policy of beginning its meetings with a prayer did not violate the Establishment Clause of the First Amendment. The Fifth Circuit based its rulings in large part on precedent established by this Court in *Marsh*, 463 U.S. at 791, and *Galloway*, 134 S. Ct. at 1815. In these cases, this Court established what has become known as the "legislative prayer exception," whereby state legislatures, under *Marsh*, 463 U.S. at 791, and then extended to include town boards, under *Galloway*, 134 S. Ct. at 1815, were permitted to begin their legislative deliberation sessions with a prayer, without a constitutional violation being found.

This Court has itself recognized that such prayers raise a question of establishment of religion, and that permitting them, absent the use of one of this Court's traditional tests to determine whether the Establishment Clause has been violated, represents a departure from the normal mode of analysis of government involvement in religious ceremony and practice. *Id.* at 1818 ("*Marsh* is sometimes described as 'carving out an exception' to the Court's Establishment Clause jurisprudence.") This Court's rationale for making such an exception was based on long historical practice,

looking to a historical tradition of such prayer at the start of legislative sessions dating back to the founding of the United States, including the appointment by Congress of a paid chaplain in the same week as the First Amendment was approved and submitted to the states. *Marsh*, 462 U.S. at 790-91. This Court therefore determined that “the Establishment Clause must be interpreted ‘by reference to historical practices and understandings.’” *Galloway*, 134 S. Ct. at 1819, citing *County of Allegheny v. ACLU*, 492 U.S. 573, 670 (1989). It ruled that the application of traditional tests to define the “precise boundary of the Establishment Clause” was unnecessary “where history shows that the specific practice is permitted.” *Galloway*, 134 S. Ct. at 1819.<sup>4</sup>

The Fifth Circuit placed its focus on the *Marsh-Galloway* line of cases, noting that *Galloway* stated “unequivocally that the legislative-prayer exception in [*Marsh*] extends to prayers delivered at town-board meetings.” *Am. Humanist Ass’n*, 851 F.3d at 526 (internal citations omitted). However, the Fifth Circuit moved beyond a simple application of the legislative prayer exception to legislative bodies and determined that the same exception applied to meetings of school boards. *Id.* (“In no respect is [the BISD board] less a deliberative legislative body than was the town board in *Galloway*.”)

In making this assertion, the Fifth Circuit placed itself in direct opposition to the rationale expressed by the Third Circuit in *Indian River Sch. Dist.*, 653 F.3d at 279, and the Sixth Circuit in *Coles*, 171 F.3d at 383,

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<sup>4</sup> Amici respectfully disagree that any historical pattern would ever permit the endorsement of religion that accompanies legislative prayer.

which both held that school boards were sufficiently educational in nature so as to take them out of the scope of the legislative prayer exception and instead require analysis under this Court's series of tests for prayer in educational settings.<sup>5</sup>

The Fifth Circuit's analysis, moreover, misinterprets the rationale of this Court in the *Marsh-Galloway* line of cases, and ignores the evidence which it raises in its own opinion. It is indisputable that no line of history exists regarding public school district board meetings' being initiated with a prayer as it does with federal and state legislatures. This is due, among other factors, to the fact that public education, let alone public school districts, did not exist at the time of the drafting of the First Amendment. *Edwards v. Aguillard*, 482 U.S. 578, 583 n.4 (1987). By the very nature of public school boards, the historical practice argument is significantly weaker in this case than in *Galloway*. 134 S.Ct. at 1818-19.

Yet even where the legislative prayer exception is held to be applicable in a general sense, this Court has acknowledged that its application is fact specific. *Id.* at 1825 ("The inquiry remains a fact-sensitive one that considers both the setting in which the prayer arises and the audience to whom it is directed"); *id.* at 1838 ("As we all recognize, this is a 'fact-sensitive' case") (Breyer, J., dissenting); *id.* at 1851 ("The facts here matter to the constitutional issue") (Kagan, J., dissenting). While the Fifth Circuit acknowledged these factual differences existed, it dismissed them in favor of a *pro forma* application of the legislative prayer exception, dismissing the fundamental differences of a

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<sup>5</sup> See *infra* § II.

school board setting. *Am. Humanist Ass'n*, 851 F.3d at 526.

The Fifth Circuit admitted that this Court has been extremely wary regarding the interaction of education and religion. *Id.* (discussing *Lee v. Weisman*, 505 U.S. at 592, 597 and the “heightened concerns” of “unconstitutional coercion.”) It acknowledged that “the setting in which the prayer arises and the audience to whom it is directed,” *Galloway*, 134 S. Ct. at 1838, were markedly different than those in the Supreme Court legislative prayer cases. *Am. Humanist Ass'n*, 851 F.3d at 526. (“[T]his case is about *school-district-sanctioned* invocations *delivered by students on district property*”) (emphasis added). The court acknowledged that participation in the opening prayer was sometimes requested of attendees. *Id.* (“BISD *board members* and other *school officials* will ask the audience, *including any students* in the audience, to stand for the invocation”) (emphasis added). The court accepted that the school district had admitted that the target of the prayers was everyone in attendance. *Id.* at 527 (“As BISD acknowledges, its *invocations are meant to benefit students* and other attendees at school-board meetings.”) (emphasis added).<sup>6</sup> It went on to correctly draw the distinction between this case and those that made up the legislative prayer exception, stating that “[l]egislative prayers are recited for the benefit of legislative officers.” *Id.* at 529.

Yet, despite these plain findings of fact by the Fifth Circuit, it still determined that the BISD meetings

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<sup>6</sup> What further indication of a violation of the Establishment Clause could be needed than an admission by a school board that prayers, predominately Christian ones, are “meant to benefit” all students, including atheist, agnostic, humanist, Jewish, Islamic, Hindu, or ones of any other faith?

were sufficiently akin to meetings of federal, state, and town legislative bodies to warrant the application of the legislative prayer exception. The undeniable focus of school boards on education, and the regular and near-required presence of children at BISD meetings were insufficient to alter this determination. Instead, the Fifth Circuit analogized this to the incidental presence of children at legislative meetings. *Am. Humanist Ass'n*, 851 F. 3d at 527-28. (“We do not overlook AHA and Smith’s notion that the presence of students at BISD distinguishes this case from [*Marsh*] and *Galloway*. That is significant . . . Nonetheless, the presence of students at board meetings does not transform this into a school-prayer case. There were children present at the town-board meetings in *Galloway*, . . . the Court nonetheless applied the legislative-prayer exception.”) (internal citations omitted). Such disregard of the factual nature of school boards in this case<sup>7</sup> not only stands in opposition to the position taken by other circuits, but also disregards this Court’s mandate to make the facts of any legislative prayer case paramount. *Galloway*, 134 S. Ct. at 1825.

## II. THE THIRD CIRCUIT AND THE SIXTH CIRCUIT CORRECTLY ANALYZED SCHOOL BOARD MEETING PRAYERS

The Fifth Circuit’s opinion here stands in stark contrast to prior decisions on prayer at school board meetings by the Third and Sixth Circuits. In *Indian River*, 653 F.3d at 259, the Third Circuit ruled that a Delaware school board’s practice of opening meetings with prayer was not protected under the legislative prayer exception. While acknowledging that the school board did serve certain deliberative purposes, the court

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<sup>7</sup> See *infra* § III.



emphasized the educational aspect of the school board's mission. *Id.* at 279 (“To conclude that, merely because the Board has duties and powers similar to a legislative body *Marsh* applies, is to ignore the Board's role in Delaware's system of public school education.”) The Sixth Circuit, in *Coles*, 171 F.3d at 381, made the same determination, finding that the educational involvement of school boards trumped their legislative function, requiring an analysis under the school prayer line of cases such as *Lee*, 505 U.S. 507, rather than the legislative prayer exception established by *Marsh*. 463 U.S. at 791. The court held that “the fact that school board meetings are an integral component of the Cleveland public school system serves to remove it from the logic in *Marsh* and to place it squarely within the history and precedent concerning the school prayer line of cases.” *Coles*, 171 F.3d at 381.

Since these decisions, this Court has ruled in *Galloway* that prayers before town board meetings may avoid a First Amendment violation. 134 S. Ct. at 1815. Nothing in that opinion, however, alters the analysis undertaken by the Third and Sixth Circuits. *Galloway* extended existing precedent, finding that town board meetings were analogous to sessions of a state legislature, and therefore historical practice indicated that opening prayers were permissible. *Id.* at 1825. The presence of children, long recognized as particularly susceptible to unconstitutional religious coercion, *Lee*, 505 U.S. at 590, was tangential to the basic purpose of the meeting itself, which focused on adults. Indeed, this Court noted that leaving the town board meeting or merely remaining through the prayers in “quiet acquiescence” does not represent “an unconstitutional imposition *as to mature adults*.” *Galloway*, 134 S. Ct. at 1827 (emphasis added).

The Third and Sixth Circuits ruled that school board meetings, by their very nature, are sufficiently educational that the risk of coercing children cannot be so easily dismissed. *Indian River*, 653 F.3d at 278-79; *Coles*, 171 F.3d at 376-77. The Fifth Circuit treated BISD as a legislative body, where the presence and involvement of children was secondary to the overall purpose of the meeting, akin to the board of the Town of Greece. *Am. Humanist Ass'n*, 851 F.3d at 526. The nature of school boards and their central role in the nation's education system shows that the Fifth Circuit was in error in abandoning the mode of analysis employed by its sister Circuits.

### **III. SCHOOL BOARDS ARE EDUCATIONAL, NOT LEGISLATIVE BODIES**

Courts have recognized that the legislative prayer exception established by this Court is one of limited application. *Indian River*, 653 F.3d at 281 (“The Court has consistently emphasized the narrow, historical underpinnings of *Marsh* and has proven reluctant to extend *Marsh* outside of its narrow historical context.”) This has particularly been the case when the prayers in question touch on the sphere of education. While school boards do indeed undertake functions akin to those of legislative bodies, including raising funds and conducting elections, those functions are incidental to their core purpose – the management of a district's public schools. School boards exist to support and enable that purpose. *Id.* at 279 (“Every aspect of the Indian River School Board is intended to promote and support the public school system.”); *Coles*, 171 F.3d at 381 (“[T]he school board, unlike other public bodies, is an integral part of the public school system.”); *Freedom from Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ.*, 2016

U.S. Dist. LEXIS 19995 at \*48-\*51 (C.D. Cal. Feb. 18, 2016).

School boards establish curricula, conduct disciplinary hearings, determine how funds are allocated to schools, and purchase textbooks. Unlike legislative bodies, which serve the community as a whole, school boards have a much narrower constituency, the students of the district. *Coles*, 171 F.3d at 381. Residents in a particular school district are permitted and encouraged to attend school board meetings. Students attend and participate in such meetings on a regular basis, either as part of the deliberative process, or performing various ceremonial functions for the meeting. *Indian River*, 653 F.3d at 264-65 (listing six broad groups of reasons for student involvement in school board meetings). School boards therefore constitute a vital institution for parents, students, and communities. They permit parents and students to provide input as to how educational funds should be spent, whether more teachers should be hired, and what should comprise the curriculum. Students challenging discipline may plead their case to the school board. Students denied the right to establish a humanist school club may find themselves in front of the school board arguing their case. The delivery of a specifically Christian prayer at the start of the meeting would hardly fill them with confidence regarding the objectivity of the board that is ruling on their request.<sup>8</sup>

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<sup>8</sup> Denial of such requests is still a problem for secular students in American public schools. *E.g.* Kimberly Winston, *North Carolina High School Denies Secular Club, Human Rights Watchdog Steps In*, Huffington Post (Feb 14, 2014), [http://www.huffingtonpost.com/2014/02/14/north-carolina-school-secular-club\\_n\\_4784275.html](http://www.huffingtonpost.com/2014/02/14/north-carolina-school-secular-club_n_4784275.html).

Public education has been recognized as central to our democratic republic. As this Court has held, “Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government.” *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J. concurring). The public school system is “the primary vehicle for transmitting ‘the values on which our society rests.’” *Phylar v. Doe*, 457 U.S. 202, 221 (1982) (citing *Ambach v. Norwick*, 441 U.S. 68, 76 (1979)). The particular and specific role played by school boards has also been recognized by this Court. They are “uniquely local and democratic institutions . . . [they] have only one responsibility: the education of the youth of our country during their most formative and impressionable years.” *Bd. of Educ. v. Pico*, 457 U.S. 853, 894 (1982) (Powell, J., dissenting). School boards exist for “educating the young for citizenship.” *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943), and, as a result, “[a]llowing the board to act in a manner inconsistent with its fundamental function of running the school system only leads to its further erosion in the minds of those students who either attend or hear about such meetings.” *Coles*, 171 F. 3d at 382.

School boards exist for educational purposes, and school children regularly attend and participate in them. *Indian River*, 653 F.3d at 263-64. That the focus of the meetings is “solely on school-related matters provides students with an incentive to attend the meetings that is lacking in other settings.” *Coles*, 171 F.3d at 381-82. This attendance is often near-compulsory for those students, to at least the same degree that the voluntary nature of participation in a high school graduation ceremony was held by this Court to be insufficient to overcome the coercive nature of the prayers involved. *Indian River*, 653 F.3d

at 276, *citing Lee*, 505 U.S. at 595. (“Therefore, like commencement exercises, a student who decides not to attend the meeting will ‘forfeit . . . intangible benefits’ that have ‘motivated the student.’”) For other students, such as those performing or in the JROTC, “attendance at the Board meetings is more formally *part* of their extracurricular activities, and thus is closer to compulsory.” *Indian River*, 653 F.3d at 277 (emphasis in original). In order to be able to contribute to the planning of their school, or to fully receive rewards for their school achievements, students must and do attend school board meetings. *Id.* at 279. (“The First Amendment does not require students to give up their right to participate in their educational system or be rewarded for their school-related achievements as a price for dissenting from a state-sponsored religious practice.”)

At legislative meetings, such as sessions of the Nebraska Legislature, or of the board of Town of Greece, the presence of children was incidental to the central purpose of the meeting, and incidental to the historical rationale which was held to permit prayers. *Coles*, 171 F.3d at 382. Though school board meetings are not assemblies or high school football games, they “are inextricably intertwined with the public school system.” *Id.* at 377. It is not just the presence of children at school board meetings which makes those meetings part of the educational system as opposed to purely legislative bodies. Such a determination is compelled by a “careful consideration of the role of students at school boards, the purpose of the school board, and the principles underlying the Supreme Court’s school prayer case law.” *Indian River*, 653 F.3d at 281. Because of this determination, amici respectfully request this Court to analyze such prayers under the school prayer case law, rather than the legislative prayer line of cases.

#### **IV. DEMOGRAPHIC CHANGES HAVE MAGNIFIED THE NEED FOR SECULAR, INCLUSIVE SCHOOL BOARD MEETINGS**

As school boards have continued to serve a central, fundamental role in American democracy, the society which they serve has evolved rapidly. Demographic trends indicate that traditions and attitudes towards religion are changing apace, magnifying the deleterious impact that predominantly Christian prayers at school board meetings can have on society. America is becoming year by year a significantly more pluralistic society. Between 2007 and 2014, according to surveys performed by the Pew Research Center, the percentage of Americans identifying as Christian fell from 78.4% to 70.6%, while those of non-Christian faiths increased from 4.7% to 5.9%.<sup>9</sup> Within these numbers, the percentage identifying as Muslim more than doubled, and that of those identifying as Hindu rose by 75%.<sup>10</sup>

Over and above these developments, however, what has been most noticeable about the changes in the religious viewpoint landscape in the United States has been the explosive growth of the “nones,” those unaffiliated with any religious group. In 2007, this group constituted 16.1% of the U.S. population; in 2014 it was 22.8%, or approximately 56 million Americans.<sup>11</sup> Yet even this number underestimates the importance of this change regarding education and school boards. When only younger millennials, those born between 1990 and 1996, were considered, the percentage of “nones” grew even higher, to 36%, with

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<sup>9</sup> *America’s Changing Religious Landscape*, *supra* n. 3.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

only 56% identifying as Christian.<sup>12</sup> Americans, in particular younger Americans (those most directly impacted by the decisions of school boards) are becoming less religious at a rapid and accelerating rate. When compared to their predecessors, “young adults today are nearly four times as likely as young adults a generation ago to identify as religiously unaffiliated.”<sup>13</sup> In school boards across the country, then, more and more young students are being exposed to the coercive nature of prayers to gods they do not worship by the very boards established to manage their education.

Potentially coercive and unnecessary prayer practices, such as the one instituted by BISD, alienate and disenfranchise individual students and their families who are of minority religious and nonreligious backgrounds. Such prayers run the danger of telling these members of society that they are less valued by their school board, and are less likely to receive a fair hearing when it comes to their concerns about curricula, disciplinary matters, or extracurricular activities. Our Framers, all too aware of the historical dangers of how government sponsored religion led to societal strife and continent-wide warfare in Europe, established a wall of separation between church and state to protect both religion and secular society, and to ensure that the rights of members of minority faiths, or people of no faith, were not trampled by those who held majoritarian beliefs. *E.g.*, The Federalist No. 19 (James Madison) (“The controversies on the subject of religion, which in three instances have kindled violent and

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<sup>12</sup> *Id.*

<sup>13</sup> *Exodus: Why Young Americans are Leaving Religion – and Why They’re Unlikely to Come Back*, Public Religion Research Institute (Sept. 22, 2016), <https://www.prri.org/research/prri-rns-poll-nones-atheist-leaving-religion/>

bloody contests, may be said in fact to have severed the [Germanic] league.”) As a result, this Court has emphasized the critical importance of government neutrality on the issue of religion. *McCreary v. ACLU*, 545 U.S. 844, 876 (2005) (“The Framers . . . intended . . . to guard against the civic divisiveness that follows when the government weighs in on one side of religious debate; nothing does a better job of roiling society . . . .”)

In particular, this Court has recognized the importance of protecting the separation between government and religion when it considers the interaction between education and religion. *Lee*, 505 U.S. at 592. A determination that school boards are predominantly educational and not simply legislative bodies, and are therefore outside of the fact-specific, limited scope of *Marsh*, 463 U.S. 783 and *Galloway*, 134 S. Ct. 1811, would more accurately preserve the intent of the Religion Clauses of the First Amendment. It would not only protect students from exposure to unconstitutional religious coercion, but would also “not endanger the centuries-long practice of prayer at legislative sessions.” *Indian River*, 653 F.3d at 281.<sup>14</sup>

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<sup>14</sup> While amici once again assert that all legislative prayers violate the Constitution, this Court’s precedent permitting it does not compel the acceptance of prayer at school board meetings, and should not be extended to do so.



**CONCLUSION**

In light of the split between the analytical framework applied by the Third and Sixth Circuits, and that of the Fifth Circuit, as well as the broad and harmful impact of the Fifth Circuit's erroneous application of precedent, amici respectfully request that this Court grant certiorari.

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