

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 IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

Whether a public school board, as a deliberative public body, may permit invocations or prayers during the ceremonial opening of its meetings under the *Marsh v. Chambers* and *Galloway v. Town of Greece* legislative prayer exception to the Establishment Clause.

Whether the elected public school board members may “participate,” by bowing their heads or standing, when a student gives an invocation or prayer when speaking at the ceremonial opening of the public school board meeting without violating the Establishment Clause.

**LIST OF PARTIES**

Petitioners are:

- (1) The American Humanist Association, and
- (2) Isaiah Smith.

Respondents are:

- (1) Birdville Independent School District;
- (2) Jack McCarty;
- (3) Joe D. Tolbert;
- (4) Brad Greene;
- (5) Richard Davis;
- (6) Ralph Kunkel;
- (7) Cary Hancock; and
- (8) Dolores Webb.

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## CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, First Amendment:

“Congress shall make no law respecting an establishment of religion.”

United States Constitution, Fourteenth Amendment:

“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .”



## STATEMENT OF THE CASE

In this case, Petitioners challenge the Birdville Independent School District’s (“District”) practice of permitting student speakers to offer remarks, which may include prayer, to open meetings of the District’s public school board, bringing the case pursuant to 42 U.S.C. §1983 and the U.S. Constitution Establishment Clause.<sup>1</sup>

### I. Procedural History

On May 18, 2015, Petitioners filed suit against the District and its school board members, Cary Hancock, Jack McCarty, Dolores Webb, Joe Tolbert, Brad Greene,

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<sup>1</sup> R.17-95.

Richard Davis, and Ralph Kunkel (“Respondents”), alleging that the District and the individual Respondents violated the Establishment Clause by permitting student speakers to pray during their remarks at the ceremonial opening of the school board meeting.<sup>2</sup> In their Amended Complaint, Petitioners alleged violations of their First Amendment rights under the Establishment Clause pursuant to §1983 against the District and each individual board member.<sup>3</sup>

Respondents moved to dismiss for failure to state a claim, in which they asserted qualified immunity on behalf of each of the board member defendants.<sup>4</sup> The district court denied the motion to dismiss and qualified immunity.<sup>5</sup> On October 26, 2015, the members of the District’s Board of Trustees filed their Notice of Appeal.<sup>6</sup>

The District also filed a Motion for Summary Judgment on Petitioner’s claims.<sup>7</sup> While the interlocutory appeal was pending, the trial court granted Respondent’s Motion for Summary Judgment, which found *Town of Greece, N.Y. v. Galloway*, 134 S.Ct. 1811 (2014) legislative exception applied.<sup>8</sup> Petitioners

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<sup>2</sup> R.17-95, R.142-55.

<sup>3</sup> R.153.

<sup>4</sup> R.174-203.

<sup>5</sup> R.256-57.

<sup>6</sup> R.282-83.

<sup>7</sup> R.541-641.

<sup>8</sup> R.2185-92; *see* Petitioners’ App. at 18-24.

appealed to the Fifth Circuit Court of Appeals, and the cases were consolidated.<sup>9</sup> The Fifth Circuit reversed the district court's denial of summary judgment based on qualified immunity and affirmed the trial court's granting summary judgment in favor of the Respondents.<sup>10</sup> The Court found that *Marsh v. Chambers*, 103 S.Ct. 3330 (1983) and *Town of Greece* legislative prayer exception applied to public school board meetings, and that the prayers offered by the students to ceremonially open the board meetings fell within those parameters.<sup>11</sup> Petitioners now petition this Court to reverse the Fifth Circuit's decision.

## II. Factual Background

Up until March 26, 2015, the District's Board of Trustees opened its meetings with two student speakers – one who led the Pledge of Allegiance and one who delivered an Invocation.<sup>12</sup> The published agendas for Board meetings up until February 26, 2015, entitled these presentations “Invocations and Pledges of Allegiance.”<sup>13</sup> Until March of 2015, the various campuses throughout Birdville Independent School District provided the two students for school board meetings on a

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<sup>9</sup> R.2193-95.

<sup>10</sup> Petitioners' App. at 1-17.

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

<sup>12</sup> R.579-82, R.600-24.

<sup>13</sup> R.581, R.583, R.623.

rotational basis.<sup>14</sup> Student speakers were selected by their campuses based upon a number of criteria: academics, leadership, citizenship, offices in student organizations, and other factors.<sup>15</sup> No trustee played any part in the selection of student speakers to do the Pledge of Allegiance or Invocation.<sup>16</sup> Neither did any trustee communicate with any student, parent, teacher, administrator, or other person to suggest or control the content of the student expression.<sup>17</sup>

Each invocation was delivered at the beginning of a meeting of the School District Board of Trustees, along with the Pledge of Allegiance.<sup>18</sup> The meetings are held for the purpose of permitting the Board of Trustees to take official action with respect to the governance of the School District, which routinely and consistently include public hearings and deliberation and action on topics including but not limited to: bond and construction projects, facility renovations, selection of vendors and professional service providers, approval of purchases, purchase and sale of real property, financial and investment reports, hiring and reassignment of personnel, adoption and amendments to the budget and tax rate, and the holding of joint elections with other political subdivisions.<sup>19</sup> The meetings are

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<sup>14</sup> R.579, R.600, R.603, R.606, R.609, R.612, R.615, R.618, R.621.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

open to the general public, with the exception of the executive session portions of such meetings which are held in closed session.<sup>20</sup> During the open session portions of those meetings, attendees are free to enter and leave the meetings as they see fit.<sup>21</sup> Attendees often come in after the meeting has started, leave before the meeting has ended, and step out of the room to take phone calls, use the restroom, or for any number of reasons.<sup>22</sup> Additionally, the attendees at such meetings are largely adults.<sup>23</sup>

The invocations delivered at the beginning of the school board meetings have the effect of solemnizing and opening the event, in conjunction with the saying of the Pledge of Allegiance.<sup>24</sup> Invocations have sometimes, but not always, taken the form of prayer.<sup>25</sup> Invocations frequently are focused on the Board, the individual Trustees, and their actions in leading the School District.<sup>26</sup>

In March of 2015, after discussions with a representative from the American Humanist Association, the District changed the designation of the second

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<sup>20</sup> *Id.*

<sup>21</sup> R.579-80, R.600-01, R.603-04, R.606-07, R.609-10, R.612-13, R.615-16, R.618-19, R.621-22.

<sup>22</sup> R.580, R.601, R.604, R.607, R.610, R.613, R.616, R.619, R.622.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

speaker at Board Meetings to “Student Expression,” with a disclaimer that the student expressions do not reflect the District’s opinions.<sup>27</sup>

According to Board Policy, students who wish to speak are chosen by random drawing.<sup>28</sup> If a student whose name is drawn is not available, another name is drawn.<sup>29</sup> Since March of 2015, this is the exclusive mechanism utilized by the District for selecting students to speak at Board meetings.<sup>30</sup>

Students are instructed that the speech they will offer at the Board Meeting is their own.<sup>31</sup> They are free to choose the message and content within the time allotted for Student Expression.<sup>32</sup> As before, the Trustees of the District do not communicate with any student, parent, teacher, administrator, or other person to suggest or control the content of student expression or the selection of the student speaker.<sup>33</sup>

The District’s Policy FNA states:

The subject of the student introductions must be related to the purpose of the event and to the purpose of marking the opening of the event; honoring the occasion, the participants,

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<sup>27</sup> R.586.

<sup>28</sup> R.580, R.593.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*



and those in attendance; bringing the audience to order; and focusing the audience on the purpose of the event. A student must stay on the subject, and the student may not engage in obscene, vulgar, offensively lewd, or indecent speech. The District shall treat a student's voluntary expression of a religious viewpoint, if any, on an otherwise permissible subject in the same manner the District treats a student's voluntary expression of a secular or other viewpoint on an otherwise permissible subject and may not discriminate against the student based on a religious viewpoint expressed by the student on an otherwise permissible subject<sup>34</sup>

Trustees for Birdville Independent School District have never played any part in the selection of students who speak during the Pledge of Allegiance, Invocation, or Student Expression portions of the school board meetings.<sup>35</sup> In reviewing its practices, the District developed a set of Administrator Guidelines for Handling First Amendment Speech and Religion Issues.<sup>36</sup> Those guidelines are distributed to School District Administrators to clarify the responsibilities of School District personnel in dealing with issues arising under the

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<sup>34</sup> R.581, R.593-94.

<sup>35</sup> R.579-82, R.600-24.

<sup>36</sup> R.581, R.597-99, R.623.

First Amendment and to underscore that District officials are neither to encourage or discourage religion, a particular religion or anti-religion.<sup>37</sup>

Petitioners claim that “numerous students participate in *every* Board meeting,” but their record references do not support this assertion. *See* Petition for Writ of Certiorari at 8-9. The record shows that “students other than those who give the invocation or student expression are *sometimes* present for the meetings, including Student Ambassadors.”<sup>38</sup> Several Board meetings did not involve any form of student recognitions or awards.<sup>39</sup>



## REASONS FOR DENYING THE PETITION

### **I. The Fifth Circuit’s decision does not conflict with Establishment Clause cases concerning schools because a public school board meeting is not the same as a school or school-sponsored event.**

“[L]egislative prayer, while religious in nature, has long been understood as compatible with the Establishment Clause.” *Town of Greece, N.Y. v. Galloway*, 134 S.Ct. 1811, 1818 (2014). “As practiced by Congress since the framing of the Constitution, legislative

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<sup>37</sup> *Id.*

<sup>38</sup> R.1176. (Emphasis added).

<sup>39</sup> *See, e.g.*, R.1519-22, R.1526-34, R.1537, R.1539-43, R.1546-1501, R.1503-05, R.1507-09, R.1519-22, R.1526-34, R.1539-42.

prayer lends gravity to public business, reminds lawmakers to transcend petty differences in pursuit of a higher purpose, and expresses a common aspiration to a just and peaceful society.” *Id.* The Fifth Circuit opinion dutifully applied the *Marsh* “proposition that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted.” *Id.* at 1819. Prayers given to open the meeting of a deliberative body which are brief, solemn, and respectful in tone “strive for the idea that people of many faiths may be united in a community of tolerance and devotion” and do not offend the Constitution. *Id.* at 1823.

Like the town board in *Town of Greece*, the Fifth Circuit recognized that school boards are comprised of elected adult members who hold monthly public meetings, open to its citizens, for purposes including adopting a budget and tax rate, conducting elections, executing contracts, and other deliberative policy-making functions. (Petitioners’ App.10); TEX. EDUC. CODE §11.1511. In brief, a school board is more like a legislature or town board than a school classroom or graduation. (Petitioners’ App.10).

The Fifth Circuit correctly determined that the line of cases including *Santa Fe*, *Lee*, and *Engel*, concerning prayers during the school day and at student-centered extra-curricular events such as graduation and football games, do not apply to opening prayers at school board meetings. (Petitioners’ App.10). However, even the school prayer line of cases does not create a *per se* rule that no prayers may ever be allowed at

school related events. *See, e.g., Adler v. Duval County Sch. Bd.*, 250 F.3d 1330, 1342 (11th Cir.), *cert. denied*, 534 U.S. 1065 (2001) (upholding, *en banc* and post-*Santa Fe*, a school's policy that permitted seniors to elect to have unrestricted student-led messages at the beginning and end of graduation ceremonies); *Chandler v. Siegelman*, 230 F.3d 1313 (11th Cir. 2000) (finding student-led prayers at graduation constitutional and distinguishing *Santa Fe* based on its impermissible majoritarian election process for prayers), *cert. denied*, 533 U.S. 916 (2001); *Ingebretsen on Behalf of Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir.), *cert. denied*, 519 U.S. 965 (1996) (allowing a student "to choose to pray at high school graduation to solemnize that once-in-a-lifetime event").

The line of school prayer cases furthermore dealt with issues unique to school specific settings – morning prayer recitations in the classroom (*Engel v. Vitale*, 370 U.S. 421 (1962)); reading of Bible verses in the classroom at the start of each school day (*School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963)); praying at the start of the school day (*Wallace v. Jaffree*, 474 U.S. 38 (1985)); coach praying with athletes at games and practice (*Doe v. Duncanville Indep. Sch. Dist.*, 994 F.3d 160 (5th Cir. 1993)); having a rabbi deliver prayer at a high school graduation (*Lee v. Weisman*, 505 U.S. 577 (1992)); and electing students to deliver prayer over the loudspeaker at football games (*Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000)). These cases involved classroom, school, or extra-curricular school-sponsored events for students. They did not

involve the public business meetings of an elected governmental body. Indeed, the *Lee* Court found a graduation ceremony analogous in environment to a “classroom setting,” requiring heightened concerns over prayer practices in that setting. *Lee*, 505 U.S. at 597.

This Court recently reiterated the coercive nature a religious invocation may have “in the context of a graduation where school authorities maintained close supervision over the conduct of the students and the substance of the ceremony. . . .” *Town of Greece*, 134 S.Ct. at 1827. However, *Town of Greece* held that the same religious invocation given during the ceremonial portion of a town board meeting where “board members and constituents are ‘free to enter and leave with little comment and for any number of reasons’” did not result in unconstitutional coercion. *Id.* In applying the *Marsh* legislative prayer exception to prayer at a school board meeting, the Fifth Circuit reached the logical conclusion that school board meetings are constitutionally indistinguishable from town board meetings, and may be opened with ceremonial prayer.

**A. The Fifth Circuit correctly applied the *Marsh* legislative prayer exception to school board meetings.**

The Fifth Circuit’s application of the legislative prayer exception to school board meetings is not controlled by the school prayer line of cases. Petitioners’ insistence that the application of the legislative prayer

exception to a school board meeting directly conflicts with this Court's precedents reflects a refusal to acknowledge the existence and continued vibrancy of the *Marsh* and *Town of Greece* principles and a determination to "confine religious speech to whispers or banish it to broom closets." *Chandler*, 230 F.3d at 1316.

"The opening of sessions of legislative *and other deliberative public bodies* with prayer is deeply embedded in the history and tradition of this country." *Marsh v. Chambers*, 103 S.Ct. 3330, 3336 (1983) (emphasis added). Moreover, and as in *Marsh*, "[h]ere, the individual claiming injury by the practice is an adult, presumably not readily susceptible to 'religious indoctrination,' . . . or peer pressure." 103 S.Ct. at 3336 (citing *Tilton v. Richardson*, 91 S.Ct. 2091, 2099 (1971)); (Petitioners' App.4) (finding that Petitioner Smith "is and has been an adult at all relevant times.")

In *Edwards v. Aguillard*, which dealt with a state requirement that classroom teachers instruct students in both evolution and "creation science," this Court declined to apply *Marsh*, in part because free public education was "virtually nonexistent at the time the Constitution was adopted." 107 S.Ct. 2573, n.4 (1987). However, *Town of Greece* recognized that the legislative prayer exception was not rooted in the town board's existence at the time of the Constitution's adoption; by contrast, it determined that *Marsh* "teaches instead that the Establishment Clause must be interpreted 'by reference to historical practices and understandings.'" 134 S.Ct. at 1819 (citing *County of*

*Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 109 S.Ct. 3086, 3142 (1989), *abrogated* by *Town of Greece, N.Y. v. Galloway*, 134 S.Ct. 1811 (2014) (Kennedy, J., concurring in part and dissenting in part)). A school board opening its monthly meeting with a brief, solemn, and respectful prayer is no more offensive to the Constitution than a town board in the same town following the same practice to open its monthly meeting.

Unlike the situation in *Lee*, which declined to extend *Marsh* to a high school graduation, school board meetings are not student-centered activities or otherwise analogous to a classroom setting or other school-sponsored activities like graduation, student assemblies, or extra-curricular and sporting events. The mere presence of students at meetings does not transform the deliberative governmental body into a school-sponsored setting. *Town of Greece*, 134 S.Ct. at 1827 (presence of high schoolers at town board meeting did not affect court's finding town board's invocation prayers were constitutional); *Galloway v. Town of Greece*, 681 F.3d 20, 22-23 (2d Cir. 2012), *rev'd*, 134 S.Ct. 1811 (2014) (noting children of residents, student groups, Boy Scouts, and other students attend school board meetings). The lack of student presence at a school board meeting would not affect the ability of the board to carry out its business. Student participation is, however, necessary for graduation, football games, and the school day. Furthermore, unlike school events such as the *Lee* graduation where teachers and principals retain a "high degree of control" over students, at a board meeting student attendance is entirely voluntary

(R.1133), and those in attendance typically come and go, like the citizens present at the town board meetings in *Town of Greece*. 134 S.Ct. at 1827. Petitioners' assertion that teachers and principals "retain a high degree of control over the . . . movements, the dress, and the decorum" of the students at board meetings is not supported by their referenced record evidence. (Petitioners' App.18, R.1133-34). Instead, the evidence shows that they are expected to meet their students in the lobby, go over the process, "show them where they will be standing to address the Board," and introduce the students and their parents at the appropriate time. (R.1133-34). There is no mention of control over movements, dress, or decorum, especially as the guidance contemplates that the volunteer students will be present and accompanied by their parents. (R.1133-34). Petitioners concede that "a solemnizing invocation is permissible in the legislative setting," and they have failed to show that a school board meeting is not properly characterized as a legislative or other deliberative body under *Marsh* and *Town of Greece*. (Petitioners' Wr.18).

**1. *Town of Greece* articulated that local government bodies may open their meetings with prayer pursuant to the historical and civic traditions of our country.**

In *Town of Greece*, this Court recognized that local elected boards may hold a prayer during the ceremonial portion to open their meeting, pursuant to the



history and civic traditions of our country. 134 S.Ct. 1819-20. Because school boards, as “other deliberative public bodies” under *Marsh*, are functionally indistinguishable from town boards, they may similarly open their meetings with remarks which solemnize and invite the elected leaders to reflect on common ends before commencing with their work of governance. *Marsh*, 463 U.S. at 786; *Town of Greece*, 134 S.Ct. at 1823. As in *Town of Greece*, a school board is comprised of a small number of adults elected from within the governmental unit’s residential boundaries. TEX. ELEC. CODE §§1.020, 11.002, 141.001(a); TEX. GOV’T CODE §601.009; TEX. EDUC. CODE §§11.052(g), 11.061(b). School boards, like town boards, are the business meetings of local public bodies, where elected adults deliberate and engage in policymaking functions. TEX. EDUC. CODE §§11.151(b)(d), 11.1511(b), 11.1513.

Furthermore, “[i]n this case, as in *Marsh*, [and as in *Town of Greece*] board members and constituents are ‘free to enter and leave with little comment and for any number of reasons.’” *Town of Greece*, 134 S.Ct. at 1827 (quoting *Lee*, 112 S.Ct. 2660). Petitioners’ assertion that “school authorities maintain [] close supervision over the conduct of the students” (Petitioners’ Wr.20) misconstrues the record evidence, which anticipates and provides for the fact that the student volunteer speakers will be accompanied at the board meeting by their parents. (R.1131, 1133-36). Petitioners’ assertion that “school authorities maintain close supervision over the . . . substance of the [meeting]” (Petitioners’ Wr.20) is accurate, inasmuch as the school authorities

are school board members who set the agenda for their monthly board meetings, just as a town board or legislature does.

Petitioners' next assertion, that the students' speech is subject to the control of school officials, is not supported by their citation to the record evidence. (Petitioners' Wr.20-21). Instead, the cited evidence includes a list of the audio files of student speech over a period of time and a brief caption describing the type of speech they engaged in. (R.1126-29). The testimony cited establishes that the Assistant Superintendent had never witnessed a board meeting prayer being stopped by the district, while acknowledging that the board could cut off offensive speech, should it occur. (R.1312-13). The use of the public body's sound system, and the body's retention of the right to disallow offensive speech inappropriate to open and solemnize a meeting are inherent in the legislative prayer tradition. *Town of Greece* specifically emphasized that legislative prayer should be solemn and respectful in tone, and should not "denigrate, proselytize, or betray an impermissible government purpose." 134 S.Ct. at 1824.

Moreover, both this Court and the Second Circuit acknowledged the presence and participation of students at the town board meetings and did not find that their presence negated the applicability of the historical tradition of legislative prayer. *Town of Greece*, 134 S.Ct. at 1827; *Galloway v. Town of Greece*, 681 F.3d 20, 23 (2d Cir. 2012), *rev'd sub nom. Town of Greece, N.Y. v. Galloway*, 134 S.Ct. 1811 (2014). Unlike the high school graduation at issue in *Lee*, which is surely "one

of life's most significant occasions" for a student, a monthly public meeting of the school board is, by contrast, the quotidian business undertaken by the adult elected members, where student attendance is both voluntary and incidental to the board and the students. 505 U.S. at 595.

## **2. Distinctions between town boards and school boards are not constitutionally cognizable.**

Although school boards deliberate and adopt policies that govern their school district, board meetings are not student-centered activities like graduation and football games. See Paul Imperatore, *Solemn School Boards: Limiting Marsh v. Chambers to Make School Board Prayer Unconstitutional*, 101 GEO. L.J. 839, 847-48 (2013). While students may attend a board meeting, it is not central to their educational career. Prayer to open a school board meeting which is brief, solemn and respectful in tone, and which does not proselytize or denigrate other beliefs or non-beliefs fits within the historical tradition of legislative prayer. 134 S.Ct. at 1824.

As recognized by the district court in *Doe v. Indian River School District*, school board meetings are "at best incidental to a student's public school experience." *Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 267 (3d Cir. 2011) (quoting *Doe v. Indian River Sch. Dist.*, 685 F.Supp.2d 524, 539 (D. Del. 2010)). In contrast, a

student's attendance in a classroom or graduation ceremony is required, while extracurricular activities are student-centered and important to students as "part of a complete educational experience." *Id.*

Petitioners assert first that school board meetings must be constitutionally dissimilar from town board meetings because of the frequency of student participation. (Petitioners' Wr.22-24). However, *Town of Greece* specifically noted the presence and participation of students at town board meetings to lead the Pledge of Allegiance, receive awards, and fulfill "a state-mandated civics requirement necessary for graduation by going to Board meetings." 134 S.Ct. at 1827; *Galloway*, 681 F.3d at 23. Petitioners assert that a school choir or band performs for the Board each December, but their citations to the record do not establish that they do so for school credit, nor that they are required to do so. (Petitioners' Wr.22-23). Petitioners may not rely on purported evidence outside of the record. Fed. R. App. P. 10(a); *Bormuth v. County of Jackson*, \_\_\_ F.3d \_\_\_, No. 15-1869, 2017 WL 3881973 at \*2-3 (6th Cir. 2017) (refusing to review publicly available website as evidence cited by appellant and stating "we will not entertain on appeal factual recitations not presented to the district court"). Instead of a citation to the record evidence, Petitioners provide website links to two of the District's high school choir handbooks for the 2016-2017 school year. (Petitioners' Wr.23). The link for Richland High School's 2016-2017 handbook no longer functions, and the handbook for

Haltom High School's choir states only that attendance at "sectionals, rehearsals, and concerts scheduled outside of the regular school day is **required and graded.**" (Petitioners' Wr.23, n.48). There is no evidence that any performance Haltom High School's choir may have done for the board would be considered a "sectional, rehearsal, [or] concert." As to the students who volunteer to speak to open the meeting, lead the pledge, serve as a student ambassador, or receive an award, students were present at town board meetings in these same capacities in *Town of Greece*. 134 S.Ct. at 1827. Regarding parents who might bring grievances or disciplinary matters to the school board on behalf of their student child, *Town of Greece* also acknowledged that citizens often attended town board meetings for the same purpose. 134 S.Ct. at 1826.

Petitioners next assert that school boards are not deliberative bodies to which legislative prayer applies due to their relationship to the administration of public schools. While school boards set policy for their districts and occasionally adjudicate grievances or disciplinary proceedings brought by parents on behalf of students, the board's relationship with public schools does not change the limited impact of legislative prayer nor further the establishment of religion. The Nebraska Legislature in *Marsh* deliberated and set policy for all public schools in the state, yet this Court "conclude[d] that legislative prayer presents no more potential for establishment than the provision of school transportation . . . [or] beneficial grants for higher education." *Marsh*, 103 S.Ct. at 3335-36

(internal citations omitted). The statement cited by Petitioners that “school boards should not be allowed to do at meetings what they could not mandate in the schools,” does not account for the legislative prayer tradition. (Petitioners’ Wr.24). While both the Nebraska Legislature and *Greece* town board may open their deliberative sessions with prayer, they could not mandate a prayer practice in state departments or city offices. Just like members of town boards and commissions, school board members, “who often serve part-time and as volunteers, ceremonial prayer may also reflect the values they hold as private citizens,” which is “an opportunity for them to show who and what they are without denying the right to dissent by those who disagree.” 134 S.Ct. at 1826.

Petitioners’ third assertion – that a school board possesses an authoritarian position over students – cites the same unsupported fears over retaliation for dissent raised in *Town of Greece*. First, Petitioners cite no record evidence in support of their bald assertion that the school board decides disciplinary matters. (Petitioners’ Wr.24-25). Furthermore, this is the same argument “that the setting and conduct of the town board meetings create social pressures that force nonadherents to remain in the room or even feign participation in order to avoid offending the representatives who sponsor the prayer and will vote on matters citizens bring before the board” present in *Town of Greece*. 134 S.Ct. at 1820. There, “[c]itizens attend town meetings, on the other hand, to accept awards; speak on matters of local importance; and petition the board for action that may affect their economic interests, such as the

granting of permits, business licenses, and zoning variances.” *Id.* at 1825. This Court recognized that “offering a brief, solemn, and respectful prayer to open its monthly meetings,” did not compel or coerce citizens to engage in religious observance. *Id.* Petitioners’ suggestion that student constituents might feel pressure or coercion is not supported by evidence. There is no record evidence that school board members “allocated benefits and burdens based on participation in the prayer, or that citizens were received differently depending on whether they joined the invocation or quietly declined,” nor did members “signal disfavor toward nonparticipants or suggest that their stature in the community was in any way diminished.” *Id.* at 1826. Petitioners assert that Petitioner Smith “felt affronted by the prayer” given at a school board meeting. (Petitioners’ App.3-4). “Offense, however, does not equate to coercion. Adults often encounter speech they find disagreeable; and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum.” *Town of Greece*, 134 S.Ct. at 1826. Petitioners’ next assertion, that unlike a town board meeting, “school officials are always present” is an incomplete comparison. (Petitioners’ Wr.25). School officials are always present at a school board meeting, just as town officials are always present at town board meetings. Petitioners cite no record evidence for their proposition that students participating in board meetings are under the direct supervision of school officials. (Petitioners’ Wr.25). In contrast, the record evidence indicates that the district anticipates that the students who volunteer to participate in

meetings will be accompanied by their parents. (R.1133-34). This Court also addressed Petitioners' argument that participation by the officials in the board prayers constitutes unconstitutional pressure, determining that it was permissible for town officials to stand, bow their heads, or make the sign of the cross during the prayer. 134 S.Ct. at 1826. Finally, while students are a constituency of school boards, so are their adult parents, who can vote. Children are also a constituency of the towns in which they live, and the legislatures who set laws and education policy for their state.

**B. The Fifth Circuit's decision recognizes that the school board is the primary audience for prayer which opens a school board meeting.**

As recognized by this Court and the Fifth Circuit, the public is not the intended audience for prayers to open the meetings of deliberative bodies, but the lawmakers themselves, "who may find that a moment of prayer or quiet reflection sets the mind to a higher purpose and thereby eases the task of governing." *Town of Greece*, 134 S.Ct. at 1825. The school board members in this case are no different from the town board members in *Town of Greece* who may benefit from this ceremonial and traditional practice. "It is presumed that the reasonable observer is acquainted with this tradition and understands that its purposes are to lend gravity to public proceedings and to acknowledge the place religion holds in the lives of many private citizens. . . ." *Id.* The mere presence of students at board



meetings does not transform the deliberative governmental body into a school setting. 134 S.Ct. at 1827; *Galloway v. Town of Greece*, 681 F.3d 20, 22-23 (2d Cir. 2012), *rev'd*, 134 S.Ct. 1811 (2014).

The line of school prayer cases to which Petitioners cite (*Schempp*, *Lee*, and *Santa Fe*) dealt with issues unique to school specific and student-centered settings – classrooms, graduation, and football games. School board meetings are not student-centered activities or otherwise analogous to a classroom setting, as in the school prayer line of cases. A board meeting, in which board members deliberate and consider such varied topics as tax rates, eminent domain, school building construction projects, and the hiring and firing of personnel, is not in any way similar to a classroom setting or other school-sponsored activities like graduation, student assemblies, or extra-curricular and sporting events. Student attendance at a board meeting is voluntary, and those in attendance are free to enter and leave at any time. (Petitioners' App.4,6).

According to this Court, "legislative prayer has become part of our heritage and tradition, part of our expressive idiom, similar to the Pledge of Allegiance, inaugural prayer, or the recitation of 'God save the United States and this honorable Court.'" *Town of Greece*, 134 S.Ct. at 1825. While Petitioners argue that a student who volunteered to give the Pledge of Allegiance at a school board meeting would have "less constitutional protection" than a high school student at a football game (Petitioners' Wr.28), this position fails to take into account this Court's precedent

finding that a legislative prayer is functionally equivalent and just as constitutionally permissible as the recitation of the Pledge, which contains the words “under God.” 134 S.Ct. at 1825. The Fifth Circuit’s decision does not turn on any specific adult-to-student in attendance ratio; instead, it faithfully applied *Town of Greece* and determined that ceremonial prayer to open a school board meeting fits within the *Marsh* legislative prayer tradition.

**C. The Fifth Circuit’s ruling appropriately determined that elected officials may show respect for prayer which opens a meeting of a deliberative body.**

The Fifth Circuit’s opinion recognizes that officials of a deliberative body may show respect for legislative prayer without violating the Establishment Clause. *See Town of Greece*, 134 S.Ct. at 1825. Petitioners again rely on cases which dealt with school employee participation in prayers which took place during student-centered, curricular or extracurricular student events. (Petitioners’ Wr.29-32). *Lemon v. Kurtzman*, 91 S.Ct. 2105 (1971) was concerned with preventing “subsidized teachers from inculcating religion” via a statute providing a salary supplement to secular subject teachers in nonpublic schools. 91 S.Ct. 2105. All of the cases cited by Petitioners took place during school-controlled, curriculum or extracurricular activities centered around students and directing their teachers and coaches not to lead or participate in student-led prayer in those contexts. (Petitioners’

Wr.30-31). Moreover, Petitioners' statement that the district's own policies prohibit school officials from leading or participating in prayer with students (Petitioners' Wr.31), is not supported by the record evidence to which they cite. (R.2086-91). The Administrator Guidance to which Petitioners cite specifically states that it is not a policy adopted by the board and is "a guide for administrators when dealing with First Amendment issues that may arise on campus." (R.2086). School board meetings are not run by administrators, nor are they held on campus. (Petitioners' App.4). Petitioners' erroneous position that the Fifth Circuit, after determining that this case is properly analyzed as legislative prayer, must then distinguish every precedent involving religion in a public school setting reflects a dogmatic determination to refuse to acknowledge the valued place legislative prayer holds in our Nation's heritage. 134 S.Ct. at 1823.

This Court found no constitutional violation where "[m]embers of the audience and the Board have bowed their heads, stood, and participated in the prayers by saying 'Amen.' On a few occasions, some members of the Town Board have made the sign of the cross." *Town of Greece*, 681 F.3d 20, 24 (2d Cir. 2012). Despite such authority, rather than permitting a board member to bow his head in response to student expression involving prayer, Petitioners contend that school officials are constitutionally required to cut off such speech. The beauty of our constitutional guarantees under the First Amendment rests in the truth that no one should endure state-imposed religion, *and* no one's free exercise of religion or free speech should be prohibited or

abridged. Petitioners' claims do not respect this balance. In the same way Petitioners contend the District's practice is exclusively about the imposition of religion, they openly, and incorrectly, argue that the government must curtail any religious expression. This is not the law, and it only protects one side of the constitutional guarantees. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 313 (2000) (citing *Engel v. Vitale*, 370 U.S. 421, 430 (1962)). The two Religion Clauses are intended to work together as "[t]he common purpose of the Religion Clauses 'is to secure religious liberty.'" *Id.* (citing *Engel v. Vitale*, 370 U.S. 421, 430 (1962)).

**D. The Fifth Circuit's decision is a dutiful application of the legislative prayer exception enunciated in *Marsh* and the recognition of historical practice developed in *Town of Greece*.**

*Town of Greece* does not exclude public schools from its curtilage. While this Court did distinguish legislative prayer from *Lee*, it did so on the basis of the disparate and singular context inherent to a high school graduation. 134 S.Ct. at 1827. Nothing in *Town of Greece* indicates that school boards are excluded from the legislative prayer exception.

*Town of Greece* made clear that a specific and lengthy history of legislative prayer reaching back to the time of the First Congress is not a requisite for the application of the legislative prayer exception. 134

S.Ct. at 1819 (noting that even without precise historical information concerning the town’s prayer practice, “there can be no doubt that the practice of opening legislative sessions with a prayer has become part of the fabric of our society.”). As stated in *Marsh*, prayer offered at the opening of legislative and “*other deliberative public bodies*” is deeply embedded in the history and tradition of our country. *Marsh*, 463 U.S. at 786 (emphasis added). The Greece town board was simply emulating the practice long established by our national and state legislatures. *Town of Greece*, 134 S.Ct. at 1828 (Alito, J., concurring). Opening prayer at school board meetings also has a long history; at least eight states have demonstrable historical records of opening prayers at school board meetings dating back to the early 19th Century. See Marie Elizabeth Wicks, *Prayer is Prologue: The Impact of Town of Greece on the Constitutionality of Deliberative Public Body Prayer at the Start of School Board Meetings*, 31 J.L. & Pol. 1, 30-31 (Summer 2015). Moreover, “[t]he principal audience for these invocations is not, indeed, the public, but the lawmakers themselves, who may find that a moment of quiet reflection sets the mind to a higher purpose and thereby eases the task of governing.” 134 S.Ct. at 1825.

Petitioners cite to no record evidence showing that the board meeting prayer was used to promote religious observance among the public, nor that it was used to proselytize or denigrate the beliefs or non-beliefs of others. Instead, Petitioners assert that because the District has asserted that volunteer students have and retain their free speech rights when speaking at

board meetings, this is evidence of a plot to continue school-sanctioned prayer. (Pet.33). Petitioners put forth no evidence that the students are selected on the basis of their willingness to pray, nor that any official has instructed any student that they should pray.

Additionally, legislative prayer is not required to be non-sectarian:

Prayer that is solemn and respectful in tone, that invites lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing, serves that legitimate function. If the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion, many present may consider the prayer to fall short of the desire to elevate the purpose of the occasion and to unite lawmakers in their common effort.

*Town of Greece*, 134 S.Ct. at 1823. The practice at issue in this case easily comports with these constraints, and it is easily distinguished from *Lund v. Rowan County, North Carolina*, in which the board members themselves were the sole prayer-givers, they delivered sectarian prayers invoking only one religion and sometimes served to advance that faith. 863 F.3d 268, 281 (4th Cir. 2017). “In *Marsh*, the prayer-giver was paid by the state. In *Town of Greece*, the prayer-giver was invited by the state. But in Rowan County, the prayer-giver was the state itself.” *Id.* Unlike Rowan County, here the school board prayer-givers are invited

by the board, from a pool of volunteers. (Pet.App.5-6). There is also no evidence that the prayers given referenced one religion only, nor that they served to advance that faith, nor that a dissenter was ever subjected to reproach. *Cf. Lund*, 863 F.3d at 282-83.

“[T]he act of offering a brief, solemn, and respectful prayer to open [] monthly meetings” is a constitutionally recognized historical practice, part of the fabric and tradition of public bodies in our Nation. *Town of Greece*, 134 S.Ct. at 1825. A legislative prayer practice at school board meetings reflects an opportunity for recognition of historical tradition and respect for the beliefs of others.

**II. The Fifth Circuit’s decision does not conflict with other Circuit Courts concerning the post-*Town of Greece* legislative prayer exception for local deliberative bodies, as there have been no such cases concerning school boards post-*Town of Greece*.**

Petitioners contend that the underlying Fifth Circuit decision conflicts with other Circuit Courts. However, Petitioners do not take into account that the decisions they reference were decided *before* *Town of Greece* made clear that the *Marsh* legislative prayer exception applies to local deliberative bodies. Thus, the conflict Petitioners propose rings hollow. The only Circuit decision issued concerning prayer at school board meetings since *Town of Greece* is the underlying case. There is one other school board prayer case currently

pending before the Ninth Circuit in case number 16-55425, *Freedom From Religion Foundation, Inc. v. Chino Valley Unified Sch. Dist.* in which oral argument is set for November 8, 2017.

**A. Pre-Town of Greece cases were split on whether the legislative prayer exception applied to local deliberative bodies such as schools.**

**1. Sixth Circuit**

Petitioners cite the Sixth Circuit case, *Coles v. Cleveland Board of Education*, 171 F.3d 369 (6th Cir. 1999), as supporting their proposition that school board prayers are the same type of “state-sponsored and state-directed religious exercise” prohibited by the *Lee* progeny of cases. See Petition for Writ of Certiorari at 36. In *Coles*, the school board president chose local clergy to give prayers at the opening of the school board meetings or the board president gave the prayers himself. *Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 372-74 (6th Cir. 1999). With few exceptions, the prayers were Christian in nature. *Id.* at 373-74. In addressing the constitutionality of prayers at school board meetings, the Court noted that the issue was not clear cut, stating that reasonable minds can differ on this very issue:

This case is “squarely between the proverbial rock and a hard place”. . . . Are the prayers in question more like “school prayers” prohibited by *Lee* or closer to “legislative prayers” permitted by *Marsh*? Reasonable minds can differ on



this issue, as indeed they have in this very case.

*Id.* at 371.

According to the Court, prayers at school board meetings do not fit neatly within the prohibited category of “school-sponsored prayer” because the prayers are not said in front of the student body as a whole. *Id.* at 376. Nevertheless, the Court found that school board meetings did not fall under the legislative or deliberative body exception established by *Marsh*. *Id.* at 383. According to the Court, a school board is not like a legislative body; instead, it is an integral part of the public school system – meetings occur on school property, and students often attend the meetings. *Id.* at 377, 383. Therefore, the Court found that prayer at a school board meeting violated the Establishment Clause. *Id.*

## 2. Ninth Circuit

Although the Ninth Circuit has also addressed prayer at school board meetings, it did not decide whether or not *Marsh* applied to school board prayers. *Bacus v. Palo Verde Unified Sch. Dist. Bd. of Educ.*, 52 Fed. Appx. 355, 2002 WL 31724273 (9th Cir. Dec. 3, 2002, unpublished opinion) (finding Establishment Clause violation due to the sectarian references in the board prayers). *Town of Greece* calls into question this holding due to this Court’s finding that the Constitution does not require legislative prayers to be non-sectarian and void of any references to specific deities. *See Town of Greece*, 134 S.Ct. at 1824.

### 3. Third Circuit

Petitioners cite to *Doe v. Indian River Sch. Bd.* as “emphatically” concluding that the legislative prayer exception did not apply to school board meetings. See Petition for Writ of Certiorari at 38-39. In that case, the Third Circuit concluded that the legislative prayer exception from *Marsh* was not applicable to school board meetings and instead applied the analytical framework articulated in *Lee v. Weisman*. *Doe v. Indian River School District*, 653 F.3d 256 (3d Cir. 2011), cert. denied, 132 S.Ct. 1097 (2012). In *Indian River*, the school board asked each board member to offer a prayer at the beginning of each meeting, on a rotating basis. *Id.* at 261-63.

The district court initially upheld the prayer policy under *Marsh*, finding a school board is a deliberative public body as it sets educational policies for schools, hires and fires employees, and approves curriculum and budgets. *Id.* at 259, 267-69. The Third Circuit, however, reversed after concluding that school board prayer is properly analyzed under the *Lee v. Weisman* framework rather than the *Marsh* legislative exception. *Id.* at 278-79. It found that *Marsh* did not adequately capture “the need to protect students from government coercion in the form of endorsed or sponsored religion at the heart of the school prayer cases.” *Id.* at 275. While the trial court had initially determined that board meetings were “incidental to a student’s public school experience,” akin to students viewing legislative sessions with opening prayers, the Third Circuit determined that student board meeting

attendance more analogous to attendance at graduation ceremonies or a high school football game. *Id.* at 267-68, 280. The Court focused on the fact that school board meetings take place on school property, the board retains control of the meeting and agenda, and the board's purpose is to promote and support the public school system. *Id.* at 278-79. Finding it irrelevant to determine whether a school board was a deliberative or legislative body, the Court held that the risk of coercion is heightened in the public school context, including school board meetings. *Id.* at 275. As a result, the Court found *Marsh* did not apply, and prayer at school board meetings was unconstitutional. *Id.* at 275, 290.

#### **4. The Third and Sixth Circuits' decisions are not applicable and do not create a conflict.**

The *Indian River* and *Coles* decisions pre-date *Town of Greece* and are of questionable precedential value. *Town of Greece* referenced the presence of students at town board meetings and still found the practice of legislative, opening prayer constitutional. *See Town of Greece*, 134 S.Ct. at 1827. Additionally, a history of prayer dating back to the enactment of the Constitution is not a prerequisite for legislative prayer to be applicable. *Id.* at 1819-20 (citing some city council prayers dated back to 1909 and that these traditions were based on state legislature's and Congress' practices). The ability of citizens to participate and address the board likewise does not remove the case from the

*Marsh* exception. *See id.* at 1825; *see also* Wicks, 31 J.L. & Pol. at 32-33.

*Coles* is also distinguishable from the present case in that the school board in *Coles* had a student representative who sat on the school board itself. *See Coles*, 171 F.3d at 372. Petitioners point out the Birdville school board had “student ambassadors,” but have failed to cite to anything in the record to show these students are in any way similar to the *Coles* student representative who actually sat on the school board. *See* Petition for Writ of Certiorari at 8-9. The Birdville student ambassadors to which Petitioners refer were intended to “enhance[] the Board’s understanding of campus needs.” *See* R.2048. Petitioners cite to nothing in the record to indicate that these ambassadors were present at each meeting nor anything to claim they were an essential part of the meeting or that their presence was mandatory.

In *Indian River*, the school board composed and recited the prayers; it controlled all aspects of the prayer. *See Indian River Sch. Dist.*, 653 F.3d at 261-63. These facts are not present in the case at bar. The *Indian River* court based its decision, in part, on its finding that educating students was the school board’s main purpose and that board meetings were meaningful to students. *Indian River Sch. Bd.*, 653 F.3d at 277-79. While technically true that a school board exists to administer the public school system and promote education of its students, that alone does not remove a school board from the *Marsh* and *Town of Greece* deliberative body exception. As discussed *supra*, school

boards, while integral to the public school system, are not public schools or classrooms themselves. See Paul Imperatore, *Solemn School Boards: Limiting Marsh v. Chambers to Make School Board Prayer Unconstitutional*, 101 GEO. L.J. 839, 847-48 (2013). A school board meeting is not a school-sponsored function, like a graduation, awards assembly, or sporting event; instead, it is a meeting of a governmental body, elected by adult citizens. See *id.* The ability to transform a school board prayer into an impermissible entanglement issue by the mere presence of students at some board meetings is akin to “transforming a school board meeting into a student council meeting.” *Id.* Attending a school board meeting of elected adult officials clearly does not implicate the same concerns of coerciveness as does prayer at student-centered events. See Wicks, 31 J.L. & Pol. at 27; see also *Indian River Sch. Dist.*, 685 F.Supp.2d at 539.

### **5. Fifth Circuit (*Tangipahoa*)**

In *Doe v. Tangipahoa Parish School Board*, which also pre-dated *Town of Greece*, the Fifth Circuit issued a fractured opinion. *Doe v. Tangipahoa Parish Bd. Sch. Bd.*, 473 F.3d 188, 191-93 (5th Cir. 2006), *vacated on reh’g en banc*, 494 F.3d 494 (2007). In that case, the school board traditionally solemnized its meetings with opening prayer before each meeting. *Id.* Prayers were given by board members, students, teachers, or invited clergy. *Id.* at 192. At least three prayers ended with “in Jesus’ Name we pray” or invoked the name of Jesus. *Id.* at 191-93. All three appellate judges in *Doe*

were split as to whether the school board's prayers were constitutional. *Id.* at 205 (Barksdale, J.), 210 (Stewart, J., concurring in part and dissenting in part), 217 (Clement, J., concurring in part and dissenting in part).

Justice Stewart, in his separate written opinion, found that *Marsh* did not apply to school boards and therefore, prayers offered at school board meetings were unconstitutional. *Id.* at 211 (Stewart, J., concurring in part and dissenting in part). He wrote that "school board members should not be allowed to do at meetings what they could not mandate in the schools." *Id.* at 208.

In a separate opinion, Justice Barksdale did not find it necessary to decide whether a school board met the legislative prayer exception under *Marsh* since the prayers invoking "Jesus" were unconstitutionally sectarian in nature. *Id.* at 202-04. However, this reasoning is no longer sound based on *Town of Greece*.

On the other hand, Justice Clement dissented from her fellow panel members and found that a school board indeed did fit the *Marsh* legislative prayer exception. *Id.* at 211-17 (Clement, J., concurring in part and dissenting in part). The *Doe* case was eventually vacated when it was re-heard en banc, based on lack of standing. 494 F.3d 494 (5th Cir. 2007).

Although the Fifth Circuit *Doe* case ultimately was vacated, the taxpayer in the *Doe* case eventually re-filed his same lawsuit (hereinafter referred to as *Doe II*). *Doe v. Tangipahoa Parish Sch. Bd.*, 631

F.Supp.2d 823, 826 (E.D. La. 2009) (*Doe II*). Although pre-*Town of Greece*, the court determined that a school board is more like a legislative body than a classroom and thus “*Marsh* applies to this deliberative public body, and it strains reason to conclude otherwise.” *Id.* at 838-39. Petitioners distinguish *Doe II* noting that the school board used clergy for their prayers instead of students. See Petition for Writ at 37-38. However, this is a distinction without a difference. *Town of Greece* supports the findings of the district court because a school board is indeed a local deliberative public body, like the town board. Moreover, the *Doe II* school board indeed did have some students provide prayer in opening some of its meetings. See *Doe II*, 631 F.Supp.2d at 826. The fact that students may have provided some of the opening prayers does not transform the school board into a classroom type setting. The intended recipients of the remarks or prayers were the school board members themselves, and the students were free to choose their own remarks.

**B. Post-*Town of Greece* California Federal District Court (*Chino Valley*) and Texas Federal District Court (District Court *a quo*) Split on Whether *Marsh* Applies to school boards.**

In *Freedom from Religion Foundation v. Chino Valley Unified School District*, the school board allowed clergy to deliver invocations at its meetings on a rotating basis. *Freedom from Religion Found., Inc. v. Chino Valley Unified Sch. Dist.*, No. 5:14-cv-2336-JGB,

2016 U.S. Dist. LEXIS 19995 (C.D. Cal. Feb. 18, 2016). A student board member was “a part of the Board” and was “responsible for representing students’ interests.” *Id.* The court held that *Marsh* and *Town of Greece* did not apply to the school board concluding school board meetings were more akin to school events that take place on school property. *Id.*

Unlike *Chino Valley*, in the case at bar, no student is “part of the school board.” *Id.* The district court *a quo* found that a school board meeting is more akin to legislative body than to a school classroom or event, such that *Town of Greece* and *Marsh* permit legislative prayers to open the meetings. *See* Petitioners’ App.22.

**C. The Fifth Circuit’s decision does not create an irreconcilable conflict with the other Circuits, as those cases pre-date *Town of Greece*.**

Petitioners assert that the panel’s ruling is irreconcilable and conflicts with *Indian River* and *Coles*. *See* Petitioners’ Wr.39-40. As discussed *supra*, those cases are now called into question by the *Town of Greece*’s holding that the legislative prayer exception applies to local deliberative bodies. The fact that the school board is a local deliberate body – comprised only of adult elected unpaid citizens, akin to the town board in *Town of Greece* – makes this case fit squarely within that decision.



Petitioners argue the presence of students at any given board meeting make this case more troubling and outside the reach of *Town of Greece*. See Petitioners' Wr.39-40. However, the *Town of Greece* decision referenced the presence of students at town board meetings and still found the practice of legislative, opening prayer constitutional. See *Town of Greece*, 134 S.Ct. at 1827. This Court made clear that the principles from *Marsh* do not require a history of prayer dating back to the enactment of the Constitution. *Id.* at 1819-20. Also, the ability of citizens to participate and address the board does not remove the case from the *Marsh* exception. See *id.* at 1825; see also Wicks, 31 J.L. & Pol. at 32-33.

As noted *supra*, both *Coles* and *Indian River* are distinguishable from the present case in that the school board in *Coles* had a student representative who sat on the school board itself and the *Indian River* school board controlled all aspects of its prayer. See *Coles*, 171 F.3d at 372; *Indian River Sch. Dist.*, 653 F.3d at 261-63. These facts are not present in the case at bar.

Moreover, school board meetings, while integral to the public school system in general, are not public schools or classrooms themselves. See Paul Imperatore, *Solemn School Boards: Limiting Marsh v. Chambers to Make School Board Prayer Unconstitutional*, 101 GEO. L.J. 839, 847-48 (2013). A school board meeting clearly is not a school-sponsored student

function, like a graduation or sporting event, but a meeting of an elected governmental body. *See id.*



### **CONCLUSION**

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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