No. _____

In The
Supreme Court of the United States

AMERICAN HUMANIST ASSOCIATION, et al.,

Petitioners,

v.

BIRDVILLE INDEPENDENT SCHOOL DISTRICT, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

It is firmly established that "public schools may not subject their students to readings of any prayer." *Lee v. Weisman*, 505 U.S. 577, 610 (1992). This is so even if the invocations are "student-led, student-initiated," and delivered at extracurricular events open to the general public. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301, 307-08 (2000).

Yet the Fifth Circuit upheld a Texas school district's longstanding practice of subjecting students to prayers at school board meetings where students are always present, sometimes mandatorily, and under the close supervision of school authorities who actively participate in the prayers themselves. The panel relied upon the *sui generis* legislative-prayer exception, despite this Court's cases holding that it does not apply to the "public school context." *Lee*, 505 U.S. at 596-97. Not only did the panel expand the legislative-prayer exception to prayers at school board meetings – directly contrary to the decisions of the Third and Sixth Circuits – but it also expanded it specifically to sustain: (1) "school-district-sanctioned invocations delivered by students" and (2) school officials' active participation in student prayers. The questions presented are as follows:

1. Is the Establishment Clause violated when a school district subjects its students to prayers at school board meetings?

QUESTIONS PRESENTED – Continued

2. Is the Establishment Clause violated when school authorities in their official capacities participate in prayers with elementary, middle, and high school students attending school board meetings in connection with curricular and extracurricular activities?

PARTIES TO THE PROCEEDINGS

Petitioners are the American Humanist Association and Isaiah Smith.

Respondents are Birdville Independent School District, Jack McCarty, Joe D. Tolbert, Brad Greene, Richard Davis, Ralph Kunkel, Cary Hancock, and Dolores Webb.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner American Humanist Association is a non-profit corporation, exempt from taxation under 26 U.S.C. § 501(c)(3). It has no parent or publicly held company owning ten percent or more of the corporation.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

OPINIONS BELOW

The Fifth Circuit's opinion, 851 F.3d 521, is included in the Petition Appendix ("App.") at 1. The United States District Court for the Northern District of Texas's unpublished opinion granting summary judgment is at App.18, and its unpublished opinion denying Respondents' motion to dismiss is at App.25.

JURISDICTION

The Fifth Circuit entered judgment on March 20, 2017 (App.1), and denied rehearing en banc on May 2, 2017. (App.27). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY 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. . . ."

INTRODUCTION[1]

As the Establishment Clause prohibits school districts from subjecting students to prayers at voluntary, extracurricular community events such as football games (*Santa Fe*), it necessarily should prohibit the very same prayers at formal school board meetings where students are (1) always present, (2) under the supervision of school officials, and (3) often required to attend for school credit or pursuant to some other educational or extracurricular opportunity.

The Fifth Circuit, however, upheld a school district's practice of subjecting captive students to prayers in a school-sponsored setting where school authorities maintain close supervision over the conduct of the students and actively participate in the prayers. While the panel properly deemed such prayers "school-district-sanctioned" rather than private speech, it held that prayers delivered by students under the authority of school officials qualify for the narrow legislative-prayer

[1] Citations to the Fifth Circuit Record (16-11220) are noted as ("R.[page]").

exception. (App.9-10). This extraordinary decision merits review for three reasons.

First, it directly conflicts with this Court's decisions holding that: (i) the legislative-prayer exception is inapplicable to the public-school context; (ii) the Establishment Clause is violated when public school students are subjected to prayer during school-sponsored activities; and (iii) the Establishment Clause is violated when school authorities participate in prayer with students. Allowing the decision to stand will yield two incongruous results grossly incompatible with this Court's Establishment Clause jurisprudence:

> 1. The decision authorizes a school district to subject an elementary student selected to lead the pledges at a school board meeting to a personally offensive prayer as she stands captive at the podium alongside the prayer-giver and her principal. But if that same prayer were delivered at an informal, purely voluntary varsity football game, it would be unconstitutional under *Lee* and *Santa Fe*.
>
> 2. The decision allows the superintendent, principal, and choir teacher to endorse and participate in a student-led prayer at a board meeting where the choir students are required to perform for their grade. But if the same teacher participated in the same prayer with the same students at an off-campus recital, such participation would be unconstitutional.

Because students participating in school board meetings, under the supervision of school officials, are no less susceptible to coercion than students merely attending football games, students attending such meetings should be entitled to the same constitutional protections as students attending any other school function.

Second, it directly conflicts with the decisions of the Third and Sixth Circuits, and the District Court for the Central District of California, decisively holding that prayers at school board meetings do not qualify for the legislative-prayer exception. *Doe v. Indian River Sch. Dist*., 653 F.3d 256, 275 (3d Cir. 2011); *Coles by Coles v. Cleveland Bd. of Educ*., 171 F.3d 369, 383 (6th Cir. 1999); *Freedom from Religion Found. v. Chino Valley Unified Sch. Dist. Bd. of Educ.*, 2016 U.S. Dist. LEXIS 19995, at *31-32 (C.D. Cal. Feb. 18, 2016).

Third, the issue presented has exceptional constitutional importance affecting millions of students throughout the country. The Court will not benefit from further percolation of this issue in the lower courts, as it has been debated and adjudicated for nearly a quarter century and courts are no closer to consensus.

STATEMENT OF THE CASE

A. Legal Framework

1. Establishment Clause Tests

At its core, the Establishment Clause prohibits the government from favoring "one religion over another, or religion over irreligion." *McCreary Cty. v. ACLU*, 545 U.S. 844, 875 (2005). The benchmark Establishment Clause test is *Lemon*, pursuant to which the challenged action must: (1) have a secular purpose; (2) not have the effect of advancing or endorsing religion; and (3) not foster excessive entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

In *Lee v. Weisman*, the Court formulated the separate "coercion test," which evaluates whether the government is coercing "anyone to support or participate in religion or its exercise." 505 U.S. 577, 587 (1992). Unconstitutional coercion exists when a school district forces "a student to choose between attending and participating in school functions and not attending only to avoid personally offensive religious rituals." *Skarin v. Woodbine Cmty. Sch. Dist.*, 204 F. Supp. 2d 1195, 1198 (S.D. Iowa 2002) (citing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 312 (2000); *Lee*, 505 U.S. at 593).

2. Heightened Protection to Students

This Court "has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools," *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987), where "there

are heightened concerns with protecting freedom of conscience from [even] subtle coercive pressure." *Lee*, 505 U.S. at 592. *Cf. Marsh v. Chambers*, 463 U.S. 783, 792 (1983) (distinguishing adults not susceptible to "religious indoctrination" and children subject to "peer pressure").

In its seminal school prayer case, *Engel v. Vitale*, this Court declared: "When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." 370 U.S. 421, 430-31 (1962). In *Wallace v. Jaffree*, the Court noted that this "comment has special force in the public-school context." 472 U.S. 38, 60 n.51 (1985) (citing *Engel*). Justice Kennedy, joined by Justice Scalia, agreed that the "inquiry with respect to coercion" must be "whether the government imposes pressure upon a student to participate in a religious activity. This inquiry, of course, must be undertaken with sensitivity to the *special circumstances that exist in a secondary school* where the line between voluntary and coerced participation may be difficult to draw." *Bd. of Educ. v. Mergens*, 496 U.S. 226, 261-62 (1990) (Kennedy, J., concurring in part) (emphasis added).

3. Legislative-Prayer Exception

Owing to its unique history dating back to the First Congress, *Marsh* carved out a narrow "'exception' to the Court's Establishment Clause jurisprudence"

solely for invocations to solemnize legislative sessions. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1818 (2014) (citation omitted) (upholding town council's practice under *Marsh*). Outside the *sui generis* legislative context, the Establishment Clause prohibits the government from endorsing prayers. *Engel*, 370 U.S. at 430. *See McCreary*, 545 U.S. at 860 n.10 (describing *Marsh* as a "special instance"). Accordingly, the lower courts have held that prayers in other government settings – including police departments,[2] courtrooms,[3] military,[4] public schools,[5] and city events[6] – fall outside the legislative-prayer exception.

B. Factual Background

For nearly three decades, Birdville Independent School District ("BISD") has been subjecting impressionable students in a captive audience to overtly religious prayers at school board meetings.[7] Furthermore, school authorities in their official capacities actively

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[2] *Marrero-Méndez v. Calixto-Rodríguez*, 830 F.3d 38, 48 (1st Cir. 2016).

[3] *N.C. Civil Liberties Union Legal Found. v. Constangy*, 947 F.2d 1145, 1147-49 (4th Cir. 1991).

[4] *Mellen v. Bunting*, 327 F.3d 355, 368-69 (4th Cir. 2003).

[5] *Jager v. Douglas Cnty. Sch. Dist.*, 862 F.2d 824, 828 (11th Cir. 1989).

[6] *Doe v. Village of Crestwood*, 917 F.2d 1476, 1479 (7th Cir. 1990).

[7] (App.4-5) (R.579, 606, 783-86, 1105-36, 1140, 1143, 1173-74).

endorse and participate in those prayers with students.[8]

The BISD Board of Trustees ("Board") oversees the district and meets monthly to address issues concerning its public schools.[9] The Board's responsibilities pertain exclusively to educating students and administering the school system.[10] Board meetings are integral to the public school system and have all the earmarks of other school events:

- They are held on district property.[11]
- They are conducted by school officials.[12]
- The Superintendent and at least one principal is always present.[13]
- Students are always participating, *infra.*

Numerous students participate in *every* Board meeting. Each meeting starts with participation by two student representatives, usually in elementary or middle school.[14] One leads the audience in the pledges

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[8] (App.16) (R.783-87, 922, 1016, 1043-44, 1175, 1182, 1189, 1196, 1203, 1211, 1217, 1261, 1264-66, 1316-17, 1840).

[9] (App.4) (R.551-52, 1491-95).

[10] (R.551-52, 579, 606, 1491-95, 1250); *e.g.*, (R.1497-2081) (agendas and minutes).

[11] (App.4) (R.35-42, 625, 628, 1143-45).

[12] (R.585, 1261-62, 1505-06, 1834-42, 2000-07).

[13] (R.783-87, 1143-45, 1261-62, 1834, 2000-07).

[14] (App.4) (R.551, 579, 606, 783-1096, 1133-36, 1143-46).

(Texas and national) and another delivers an invocation, which is typically a prayer.[15] Both students are under the supervision of their principal, who stands over them at the podium.[16] Additionally, six "Student Ambassadors," who are selected by principals from each high school, participate in meetings as liaisons between the Board and student constituents for an entire semester.[17] Many other students frequently attend meetings, often mandatorily, in order to receive school credit, perform for the board, resolve disciplinary matters, or accept recognition for academic and extracurricular achievements.[18]

Each year, the Board creates a schedule for the "Student Participation Invocation and Pledge Leaders," directing principals to have students "chosen to

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[15] (App.4) (R.551-52, 606, 783-87, 1105-36, 1173-74); *e.g.*, (R.789-801, 806-12, 817-34, 839-41, 847-56, 860-67, 873-74, 879-89, 895-930, 936-47, 952-84, 993-1023, 1026-34, 1038-47, 1051-68, 1080-89, 1094-96).

[16] (R.800-01, 814, 1133-36).

[17] (R.1176, 1399, 2048, 2053, 2056, 2065).

[18] (App.4) (R.1176, 1491-95, 1499, 1501-02, 1506, 1510-14, 1518, 1523-25, 1535-36, 1538, 1543-45, 1551, 1556-57, 1559, 1562-63, 1566-67, 1569-71, 1575, 1577, 1580-84, 1589-90, 1595-97, 1599, 1603, 1608-09, 1611, 1615, 1620-21, 1623, 1627, 1632-33, 1638-39, 1644-46, 1652, 1657-58, 1664-65, 1667, 1670-72, 1674, 1677, 1681-83, 1689-90, 1692-93, 1695-96, 1699, 1701-05, 1708-09, 1711-13, 1716, 1719-21, 1725-26, 1729, 1733, 1737-41, 1743, 1749-54, 1756, 1760, 1764-68, 1773-74, 1780-83, 1788, 1793-97, 1804-05, 1807, 1809-14, 1818, 1822-25, 1827, 1830-31, 1833, 1835-38, 1840-46, 1848-50, 1852, 1857-58, 1869-71, 1875, 1881, 1889-96, 1904, 1915-21, 1930, 1941, 1951-53, 1963-66, 1976, 1986-88, 1997-99, 2003, 2009-11, 2014, 2018, 2023-29, 2035, 2037-38, 2041-43, 2051-57, 2060, 2065-67, 2071-72).

represent your campus during the Board meeting." (R.1143-45). The Board instructs principals to meet the students before the meeting to "go over the process and show [students] where they will be standing to address the Board." The students are told where to sit (with their principal in a reserved front row seat), where to stand (the podium, facing the Board), and what to say (the pledges, invocation, etc.). (R.1133-36).

After the gavel is pounded, the students join their principal at the podium.[19] The principal introduces the students and any family members present, and announces that the students are "representing" their campus. (R.1131-36). *E.g.*, (R.929) ("They are representing our entire campus, our students, and our faculty"); (R.1009) ("we have two wonderful fifth graders here representing us tonight for the invocation and the pledge.").[20] The principal then instructs the audience to stand.[21] *E.g.*, (R.885) ("[S.S.] will give the invocation tonight, so if everyone will please stand."). The prayer normally follows the pledges[22] and is often specifically Christian. (R.1173).[23]

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[19] (R.1133-36); *e.g.*, (R.797, 814-19).

[20] *See also* (R.783-87, 790-97, 847-56, 860-67, 871-91, 895-932, 937-47, 952-84, 994-99, 1004-23, 1027-34, 1039-47, 1051-68, 1080-89, 1095-96).

[21] (R.1131-33, 1174-75, 1262); *e.g.*, (R.783-87, 855-56, 905, 919-29, 937-56, 960-63, 970-83, 993-99, 1003-22, 1026-31, 1038-41, 1045-47, 1051-59, 1064-68, 1088-89, 1094-96, 1105-10).

[22] (R.1131, 1182, 1189, 1196).

[23] *E.g.*, (R.783-87, 795-801, 806-12, 819, 827-34, 847-53, 864-67, 881-90, 895-923, 936-42, 951-73, 978-84, 997-99, 1003-05,

School officials – including the superintendent (who attends every meeting), principals, and Board members – actively participate in the prayers by standing, bowing their heads, closing their eyes, and reciting "amen."[24] At the August 2014 meeting, for example, an elementary principal announced, "Our prayer will be led by [H.N.]," and proceeded to bow her head while standing over the student. (R.786, 1043-44, 1840).

Immediately after the invocation, the students receive a certificate and pose for a photograph with the Board (R.1133, 1138-41), and later receive a formal "thank you" letter. *E.g.*, (R.1140) (regarding a student's Christian prayer, "Thank you for the beautiful Invocation . . . I know your school is very proud of you.").

A student performance or awards ceremony often follows the prayer.[25] Approximately 75% of the meetings in 2014 and 2015 included a student performance or recognition. (R.1691-1716, 1832-58). After that, students, parents, and citizens have an opportunity to

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1008-20, 1026-34, 1042-44, 1051-62, 1080-89, 1094-96, 1265, 1323-24).

[24] (App.16) (R.783-87, 1175, 1182, 1189, 1196, 1203, 1211, 1217, 1261, 1264-66, 1316-17); *see also* (R.795, 831, 863, 867, 889, 900, 920-22, 938, 942, 953, 999, 1005, 1010, 1014, 1017, 1031, 1041-47, 1053-56, 1840).

[25] *E.g.*, (R.1725-26, 1729-30, 1743, 1766-68, 1781-82, 1796, 1805, 1857-58, 1894-95, 1914-15, 1921, 1949, 1951, 2071-72).

voice concerns about the school system during open forum.[26]

From 1997 through February 2015, students were invited to deliver an "Invocation,"[27] – the term used on the agendas and minutes[28] – and were handpicked by school officials without any governing criteria.[29]

Petitioner Isaiah Smith has had direct unwelcome contact with the prayers at several meetings, including on December 11, 2014, when he addressed the Board about bullying at his high school.[30] A principal asked the audience, including Smith, to stand for the pledges and prayer.[31] On December 15, Petitioner American Humanist Association ("AHA") sent BISD a letter warning that both the prayers and the participation by school officials are unconstitutional, and sought "written assurances that prayer will not be included in future School Board meetings." (R.1147-54).

BISD refused to discontinue the prayers, informing AHA on March 19, 2015, that it would merely

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[26] (R.1726, 1732, 1747, 1750-51, 1766-70, 1777, 1851, 1949-51, 2022, 2029).

[27] (R.579, 581, 600, 606, 1131, 1135).

[28] (R.1173, 1187-88, 1296-99); *see* (R.1497-1705, 1721-1845, 1861-2056) (agendas and minutes).

[29] (R.803, 944, 1165, 2123-25); *e.g.*, (R.925) ("these two kids jumped to the top of my mind"); (R.944) ("It is my extreme pleasure to introduce to you two of my favorite 8th grade girl students that I have this year and pretty much I've ever had to be honest.").

[30] (App.3-4) (R.1054-56, 1063-68, 1231, 1233, 1702, 1844).

[31] (R.786, 1055-56, 1233, 1382, 1702, 1844).

change the word "Invocation" to "Student Expression." (R.580-81, 1156-58). BISD insisted it would continue authorizing "prayer." (R.1158). Moreover, the "Student Expression" is limited to "one minute" and the "subject" 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, 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.[32]

While expressly declaring that prayers would still be approved, BISD adopted a written policy governing the selection process, which served to narrow the pool of speakers to elected student representatives. (R.1161). The new policy provides: "Principals will solicit volunteers during the first two weeks of school from the campus Student Council." (R.1133).

Substantively, the practice remains the same. Most "student expressions" remain prayers or religious poems.[33] School officials still actively participate in the

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[32] (App.4-6) (R.581, 1157, 1161-62).

[33] (R.780, 786-87, 1064-68, 1080-89, 1094-96, 1110, 1120-21, 1174, 1233).

prayers.[34] A principal still stands over the students at the podium, introduces the students as representatives, and asks the audience to participate.[35] Whenever a prayer is delivered, it is still to a captive audience that includes at least one other student (usually in elementary or middle school) standing at the podium with their principal, six student ambassadors, and often students present to receive awards or perform alongside classmates.[36] Lastly, the Board still retains control to "cut off" student remarks it deems "improper or offensive." (R.1161, 1312-13).

C. Procedural History

Petitioners filed their amended complaint on June 15, 2015, challenging BISD's "policy, practice, and custom of permitting, promoting, and endorsing prayers delivered by school-selected students" at Board meetings as violative of the Establishment Clause. (R.142-56). BISD moved to dismiss, alleging Petitioners failed to state a claim and that the Board members were entitled to qualified immunity. (R.174-76). BISD raised two contradictory defenses: (1) the prayers are private speech, and thus satisfy conventional Establishment Clause tests; or (2) the prayers are government speech but qualify for the legislative-prayer exception. (R.189-202, 2182). The court denied BISD's motion based

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[34] (R.786-87, 1081-83, 1095-96, 1182, 1189, 1196, 1203, 1211, 1217, 1264-66, 1316).

[35] (R.786-87, 1063-1101, 1131-36, 1378, 1847-59).

[36] (R.786-87, 1706-19, 1847-59, 2057-74).

on "applicable authorities." (App.25). The individual-capacity defendants appealed. (App.7).

BISD moved for summary judgment on June 23, 2016. (R.541). The court granted that motion, finding that the prayers, although not private speech, qualified for the legislative-prayer exception. (App.22). The court ignored Petitioners' separate claim that school officials participating in prayers with students violates the Establishment Clause independent from the prayers themselves.[37]

Petitioners appealed on August 8, 2016. (R.2193-95). The qualified-immunity and summary-judgment appeals were consolidated. (App.7). On March 20, 2017, the Fifth Circuit affirmed the summary judgment ruling and reversed the denial of qualified immunity. (App.3). In an opinion written by Judge Jerry E. Smith and joined by Judges Clement and Southwick, the panel upheld "school-district-sanctioned invocations delivered by students," and school officials' participation in them, under the legislative-prayer exception on the grounds that the "BISD board is a deliberative body." (App.9-10, 16). Rehearing en banc was denied on May 2, 2017. (App.27).

Throughout litigation, BISD has treated its legislative-prayer defense as a subsidiary, alternative argument, insisting that the prayers are private speech.[38]

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[37] (App.21-23) (R.214, 224, 237, 712, 761-63).

[38] (App.22) (R.189-92, 559-63, 2182).

Neither the district court nor the Fifth Circuit found that the prayers were anything but school-sponsored speech. (App.9, 21-22). Rather, the Fifth Circuit agreed with Petitioners that "this case is about school-district-sanctioned invocations delivered by students on district property." (App.9).

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit's decision conflicts with numerous Establishment Clause decisions of this Court.

This Court has held, without qualification, that "public schools may not subject their students to readings of any prayer," *Lee*, 505 U.S. at 610, even if the prayers are "student-initiated" and delivered at extracurricular events attended by adult community members. *Santa Fe*, 530 U.S. at 294, 301, 310-12. Any "[s]chool sponsorship of a religious message is impermissible." *Id.* at 309-10. *See also Engel*, 370 U.S. at 424 ("by using its public school system to encourage recitation of the Regents' prayer, the State of New York has adopted a practice wholly inconsistent with the Establishment Clause."). This Court recently reiterated that in the public-school setting where "school authorities maintain[ ] close supervision over the conduct of the students," an "invocation [i]s coercive." *Galloway*, 134 S. Ct. at 1827. As discussed below, the Fifth Circuit's dramatic step beyond this Court's precedents necessitates immediate review.

A. The Fifth Circuit's expansion of the legislative-prayer exception to the public-school context directly conflicts with Supreme Court precedents.

The panel's expansion of the legislative-prayer exception to "school-district-sanctioned invocations" (App.9) conflicts with this Court's cases expressly holding that it is inapplicable to the "public school context." *Lee*, 505 U.S. at 596-97. Even in *Marsh*, the Court distinguished adults not susceptible to "religious indoctrination" and children subject to "peer pressure." 463 U.S. at 792.

In *Edwards*, the Court refused to apply *Marsh* to the public-school context, warning that *Marsh*'s historical approach "is not useful in determining the proper roles of church and state in public schools, since free public education was virtually nonexistent at the time the Constitution was adopted." 482 U.S. at 581-83 & n.4.

In *Lee*, the Court again refused to extend *Marsh* to the public-school context, declaring: "Inherent differences between the public school system and a session of a state legislature distinguish this case from *Marsh*." 505 U.S. at 596. The Court found these differences "obvious." *Id.* at 597. Unlike in a legislative setting, "prayer exercises in public schools carry a particular risk of indirect coercion." *Id.* at 592. Although that concern exists outside the school context, "it is most pronounced there." *Id*. The Court explained: "What to most believers may seem nothing more than

a reasonable request that the nonbeliever respect their religious practices, *in a school context* may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy." *Id.* (emphasis added). Furthermore, at school events, "teachers and principals must and do retain a high degree of control over the . . . movements, the dress, and the decorum of the students." *Id*. at 597. *See* (R.1133-34).

In *Santa Fe*, the Court subsequently made clear that "student-led, student-initiated prayer" at school events open to the public do not qualify for the legislative-prayer exception either. 530 U.S. at 301-02. Instead, the Court ruled that *Lee*'s coercion test applies *regardless* of the "type of school function." *Id.* The Court then held that permitting students to deliver an "invocation and/or message" at football games for purposes of "solemnizing" the event failed the *Lemon* and coercion tests. *Id.* at 306, 309-12. Whereas a solemnizing invocation is permissible in the legislative setting, *Santa Fe* held that "the use of an invocation to foster such solemnity is impermissible when, in actuality, it constitutes prayer sponsored by the school." *Id.* at 309.

The panel below properly recognized that "like *Santa Fe*, this case is about school-district-sanctioned invocations delivered by students on district property." (App.9). Yet it paradoxically concluded that "student-led invocations," delivered under the authority of school officials, are governed by *Marsh* and *Galloway*. (App.10, 16).

1. *Galloway* reaffirmed the inapplicability of the legislative-prayer exception to the public-school context.

Contrary to the panel's opinion, *Galloway* fully supports the "notion that the legislative exception is limited to houses of governance in the world of mature adults." *Chino Valley*, 2016 U.S. Dist. LEXIS 19995, at *53. Nothing in *Galloway* "indicates an intent to disturb the long line of school prayer cases outlined above, or the 'heightened concern' they express for children forced to confront prayer in their public school, and there is every indication it preserves it." *Id.* at *55-56 (quoting *Lee*, 505 U.S. at 592).

In *Galloway*, this Court repeatedly emphasized that the audience impacted by its decision are adults: "Our tradition assumes that *adult* citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer[.] . . . *Adults* often encounter speech they find disagreeable." 134 S. Ct. at 1823, 1826 (emphasis added). The Court further observed:

> Should nonbelievers choose to exit the room during a prayer they find distasteful, their absence will not stand out as disrespectful or even noteworthy. And should they remain, their quiet acquiescence will not, in light of our traditions, be interpreted as an agreement with the words or ideas expressed. Neither choice represents an unconstitutional imposition as to *mature adults*, who "presumably" are "not readily susceptible to religious indoctrination or peer pressure."

Id. at 1827 (quoting *Marsh*, 463 U.S. at 792) (emphasis added).

Such a choice *does*, however, represent an unconstitutional imposition as to students. *Lee* held that school districts may not place "primary and secondary school children" in the "dilemma of participating" in a prayer, "with all that implies, or protesting." 505 U.S. at 593. Although attendance in *Santa Fe* was "purely voluntary," the Court declared that a school may not "force [the] difficult choice upon these students . . . between attending [the] games and avoiding personally offensive religious rituals." 530 U.S. at 311-12. Tellingly, *Galloway* specifically distinguished *Lee* and *Santa Fe*:

> This case can be distinguished from the conclusions and holding of *Lee* . . . [I]n the context of a graduation where school authorities maintained close supervision over the conduct of the students and the substance of the ceremony, a religious invocation was coercive as to an objecting student . . . *see also Santa Fe* [ ]

134 S. Ct. at 1827.

The circumstances that controlled *Lee* and *Santa Fe* were absent in *Galloway* but exist here. As in *Lee* and *Santa Fe*, "school authorities maintain[ ] close supervision over the conduct of the students and the substance of the [meeting]." *Id*.[39] Just as in *Santa Fe*, the prayers are recited over the district's sound system,

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[39] (R.1131, 1133-36, 1312-13, 2048, 2123-25); *e.g.*, (R.795, 883, 885).

"which remains subject to the control of school officials,"[40] and "delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function." 530 U.S. at 307. The coercive pressures are in fact significantly "higher here than at football games." *Chino Valley*, 2016 U.S. Dist. LEXIS 19995, at *51. Like graduations, the "Board's recognition of student achievement allows 'family and those closest to the student to celebrate success.'" *Indian River*, 653 F.3d at 276 (quoting *Lee*). *See id.* at 264 (presentation of awards at meetings are "an important part of student life"). For these students, the meetings are a culmination of their academic and extracurricular activities. *Id.* at 277.[41]

2. The panel overlooked five key distinctions between school boards and town councils.

In holding that "the presence of students at board meetings does not transform this into a school-prayer case" (App.12-13), the panel disregarded at least five key distinctions between school boards and town councils. This case is "'more than a factual wrinkle on *Town of Greece*.' [] 'It is a conceptual world apart.'" *Lund v. Rowan Cty., N.C.*, 2017 U.S. App. LEXIS 12623, at *19-20 (4th Cir. July 14, 2017) (en banc) (internal citations omitted).

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[40] (R.1126-29, 1134, 1312-13).

[41] *E.g.*, (R.1639, 1793-94, 1812, 1823-24, 1836-37, 2027, 2052).

First, the school district has "deliberately made its meetings meaningful to students." *Indian River*, 653 F.3d at 275-77. BISD starts every meeting with participation by two student representatives. Six principal-selected students are expected to participate as "ambassadors" for an entire semester, *supra.* Other students are invited throughout the year to receive individual or team awards including:

- Valedictorians, Salutatorians, and Merit Scholars (May)[42]
- Holiday Greeting Card Winner (November/December)[43]
- Special Olympics Student Athletes/State Finalist Athletes (June)[44]
- Cheerleading, JROTC, bowling, volleyball, art, etc.[45]

For many students, participation is compulsory. Every December, a school choir or band performs for the Board for school credit.[46] Richland High School's

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[42] (R.1499, 1513, 1523, 1535, 1544, 1556, 1569, 1581-82, 1595, 1608, 1620, 1632, 1644, 1657, 1670, 1682, 1685, 1726, 1739, 1753, 1766-67, 1780, 1794, 1811, 1824, 1837, 1869, 1892, 1915, 1941, 1964, 1986, 2009, 2025, 2041).

[43] (R.1494, 1638, 1677, 1690, 1702, 1716, 1773, 1818, 1831, 1844, 1857, 1951, 2018, 2035, 2052, 2071).

[44] *E.g.*, (R.1545, 1583, 1597, 1609, 1621, 1633, 1754, 1812, 2027).

[45] *E.g.*, (R.1491, 1494, 1511-12, 1545, 1577, 1599, 1622, 1639, 1743, 2053).

[46] (R.1502, 1518, 1530, 1540, 1551, 1563, 1589, 1603, 1615, 1627, 1639, 1652, 1665, 1677, 1690, 1702, 1716, 1732, 1760, 1774,

choir handbook states: "Students are required to attend the entire concert as part of a concert etiquette grade. No one is permitted to arrive late or leave early without prior permission of the director."[47] Haltom High School's choir handbook also specifies that attendance "is required and graded."[48]

While there "were children present at the town-board meetings in *Galloway*" (App.13), *Galloway* only referred to "occasional" presence of minors. 134 S. Ct. at 1832 (Alito, J., concurring). There is nothing remotely occasional here. BISD intentionally ensures that students are present and participating in *every* meeting. In general, there are at least six reasons a student would attend a Board meeting:

1) Deliver the invocation
2) Lead the pledges
3) Serve as a Student Ambassador
4) Perform in choir or band
5) Resolve disciplinary matters or grievances (FNG(LOCAL)-X)
6) Receive awards and honors

1805, 1818, 1831, 1844, 1858, 1881, 1904, 1930, 1953, 1976, 1999, 2018, 2035, 2052, 2072).

[47] http://richlandhschoir.weebly.com/uploads/2/4/2/1/24212542/beginning_of_year_rhs_handbook._2016-17.pdf (last visited April 1, 2017).

[48] http://www.birdvilleschools.net/site/handlers/filedownload.ashx?moduleinstanceid=42115&dataid=81538&FileName=VOH%20Handbook%201617.pdf (last visited April 1, 2017).

According to BISD: "Student participation in our Board meetings is very important to our Board members and our staff." (R.1141).

Second, unlike town councils, school boards exist for "educating the young for citizenship" and must be "faithful to the ideal of secular instruction." *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). As the superintendent conceded, "it is always a great thing to open a school board meeting with involvement from your students since that's why you exist." (R.1250). Allowing "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 381. Supreme Court jurisprudence and common sense dictate that "school board members should not be allowed to do at meetings what they could not mandate in the schools." *Doe v. Tangipahoa Parish Sch. Bd.*, 473 F.3d 188, 208 (5th Cir. 2006) (Stewart, J., concurring and dissenting in part), *vacated on standing grounds*, 494 F.3d 494 (5th Cir. 2007) (en banc).

Third, a school board possesses an inherently authoritarian position over students. *See Coles*, 171 F.3d at 381-82; *Chino Valley*, 2016 U.S. Dist. LEXIS 19995, at *51. The Board "metes out discipline and awards at these meetings." *Id*. "The student who has come before the Board is unlikely to feel free to dissent from or walk out on the body that governs, disciplines, and

honors her." *Id.* The Board's *quasi-judicial* power to decide disciplinary matters regarding students who are compelled by law to attend school alone renders the "*legislative*" exception inapt.

Fourth, unlike at a town hall, school officials are always present, and students participating in the meetings are under their direct supervision. *Cf. Galloway*, 134 S. Ct. at 1827. In *Lee*, the Court observed that the "district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction." 505 U.S. at 593. This pressure "can be as real as any overt compulsion." *Id.*

Such coercive pressures are compounded here because school authorities also *participate* in the prayers. *Id.* at 590. This Court has recognized that the "State exerts great authority and coercive power . . . because of the students' emulation of [school officials] as role models." *Edwards*, 482 U.S. at 584. *See also Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 233 (1963); *Engel*, 370 U.S. at 422 (holding unconstitutional a "prayer to be said aloud by each class in the presence of a teacher"). When principals participate in prayer with students, the "law of imitation operates, and non-conformity is not an outstanding characteristic of children." *McCollum v. Bd. of Educ.*, 333 U.S. 203, 226-27 (1948) (Frankfurter, J., concurring). A school official's involvement in student prayers "no doubt 'will be

perceived by the students as inducing a participation they might otherwise reject.'" *Doe v. Duncanville Indep. Sch. Dist*., 994 F.2d 160, 165 (5th Cir. 1993) (quoting *Lee*, 505 U.S. at 590).

Fifth, the "fact that the function of the school board is uniquely directed toward school-related matters gives it a different type of 'constituency' than those of other legislative bodies – namely, students." *Coles*, 171 F.3d at 381-82. "Unlike ordinary constituencies, students cannot vote. They are thus unable to express their discomfort with state-sponsored religious practices through the democratic process." *Id*.

B. The panel's decision allowing a school district to subject captive student audiences to prayers conflicts with the holdings of *Schempp*, *Lee,* and *Santa Fe.*

The panel's decision conflicts with *Schempp*, *Lee*, and *Santa Fe* in a deeper sense. In *Schempp*, this Court held that the Establishment Clause is violated when prayer "exercises are prescribed as part of the curricular activities of students who are required by law to attend school." 374 U.S. at 223. Because choir and band students are required to perform at meetings as part of their curricular activities, *supra*, the Fifth Circuit's decision is squarely at odds with *Schempp.*

Furthermore, under *Santa Fe* and *Lee*, a school district cannot condition participation in *any* activity upon a student's willingness to be subjected to prayer, regardless of whether it is curricular. *Lee*, 505 U.S. at

594-96. *Santa Fe* held that the Establishment Clause "will not permit the District 'to exact religious conformity from a student as the price' of joining her classmates at a varsity football game." 530 U.S. at 311-12. BISD forces students to choose between attending Board meetings in order to receive awards or partake in a Student Council speaking opportunity, and not attending only to avoid personally offensive prayers. The Constitution decidedly prohibits BISD from forcing this "difficult choice upon these students." *Id.*

This is to say nothing of the students who ultimately participate in the meetings. In *Santa Fe*, the Court held that even "if we regard every high school student's decision to attend a home football game as purely voluntary, we are nevertheless persuaded that the delivery of a pregame prayer has the improper effect of coercing those present." 530 U.S. at 312.

The pledge leaders in particular have "no real alternative which would have allowed [them] to avoid the fact or appearance of participation" in the prayers. *Lee*, 505 U.S. at 588. "Finding no violation under these circumstances would place objectors in the dilemma of participating, with all that implies, or protesting." *Id.* at 593. *See Schempp*, 374 U.S. at 289-90 ("[E]ven devout children may well avoid claiming their right and simply continue to participate in exercises distasteful to them because of an understandable reluctance to be stigmatized as atheists"). Certainly they are not "'free to enter and leave with little comment and for any number of reasons'" as in *Galloway*, 134 S. Ct. at 1827 (quoting *Lee*). These students must sit with their

principal in the front row. (R.1131, 1133-36). As soon as the meeting starts, they are ushered to the podium to stand with their principal and the prayer giver.[49] They cannot leave to avoid a personally offensive prayer without everyone noticing, and in any event, must be present to receive their certificate immediately after the invocation.

Unless this Court intervenes, an elementary student randomly selected to lead the pledges at a formal school board meeting will be accorded *less* constitutional protection than a high school student selected to lead pledges at a football game. If, as *Santa Fe* holds, student prayers at extracurricular games are unconstitutionally coercive as to mature students voluntarily present, then such prayers at formal meetings where students as young as six regularly participate and are sometimes required to attend are *a fortiori* coercive. The "school-board setting is arguably more coercive to participating students than the graduation ceremony at issue in *Lee*." *Coles*, 171 F.3d at 383. And the "symbolism of a union between church and state is most likely to influence children of tender years." *Sch. Dist. v. Ball*, 473 U.S. 373, 390 (1985).

The panel acknowledged that students participate in every meeting and that most are "elementary- and middle-school students." (App.4). It further conceded that many other students "frequently attend

[49] (R.937-42, 1134); *e.g.*, (R.814) ("They're not really crazy about being right up here while I'm introducing them").

school-board meetings." (App.4). Yet it still believed *Galloway* applied on the grounds that "[m]ost attendees are adults." (App.4, 10). The heightened protection accorded to the public-school context, however, does not turn on any particular student-to-adult ratio. Otherwise, many school events such as football games and graduations would be subject to lesser scrutiny than classrooms simply because of the large presence of adults. This reasoning, of course, runs counter to *Santa Fe* and *Lee*.[50]

C. The panel's ruling allowing school officials to participate in prayers with students contravenes decisions of this Court and Circuit Courts.

The Fifth Circuit's decision allowing school authorities to participate in prayers with students flouts the letter and spirit of decades of Supreme Court precedent. In *Lemon*, this Court declared: "The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion." 403 U.S. at 619. In *Schempp*, this Court relied in part on the fact that the prayer exercises were conducted "under the supervision and with the participation of teachers employed in those schools." 374 U.S. at 223. In *Mergens*, moreover, this Court deemed the Equal Access Act provisions prohibiting school officials from "participating" in

[50] *See also Santa Fe*, 530 U.S. at 312 (the Constitution "will not permit the District 'to exact religious conformity from *a* student' ") (quoting *Lee*) (emphasis added).

prayer with students constitutionally necessary. 496 U.S. at 232-36, 249-53.

In *Lee*, this Court was concerned students would feel especially pressured to participate in prayer in the presence "of school officials." 505 U.S. at 590. In *Santa Fe*, the Court ruled that "student-initiated" invocations would be perceived as "delivered with the approval of the school administration" even without officials actually participating in the prayers. 530 U.S. at 301, 308 & n.11. Because BISD officials (1) actively participate in the prayers, (2) announce that the prayer-giver is in fact "representing" their school, (3) ask the audience to participate, and (4) occasionally edit the student remarks (R.2123-25), the "degree of school involvement here," even more than in *Santa Fe*, makes it clear that the prayers bear "the imprint of the State and thus put school-age children who objected in an untenable position." *Lee*, 505 U.S. at 590.

The panel's decision also conflicts with the decisions of other circuits. The Third Circuit in *Borden v. School District*, for instance, held that a coach's practice of silently taking a knee with his players during student-led prayer to "show respect" violated the Establishment Clause. 523 F.3d 153, 170 (3d Cir. 2008), *cert. denied*, 555 U.S. 1212 (2009). *See also Holloman v. Harland*, 370 F.3d 1252, 1286 (11th Cir. 2004) (teacher invoking moment of silence for prayer with students and sometimes concluding with "Amen" violated Establishment Clause).

The Department of Education even requires school districts to certify that practices comport with its "Guidance," which states: "school administrators, and other school employees are prohibited by the Establishment Clause from encouraging or discouraging prayer, and from actively participating in such activity with students."[51] BISD's *own* policies recognize that school officials "may not lead or participate in any prayer or religious activity with students." (R.2086-91).

The panel made no attempt to reconcile its decision with any of the foregoing authorities. Nor did it offer any cogent reason to depart from its own precedent. The Fifth Circuit has held that when school authorities "manifest approval and solidarity with student religious exercises, they cross the line between respect for religion and endorsement of religion." *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 405-06 & n.4 (5th Cir. 1995). The dissent agreed that there "is practically no doubt" that this Court's cases prohibit "teachers from actively joining in the student-led prayers." *Id.* at 409 (Jones, J., concurring and dissenting). In *Ingebretsen v. Jackson Public School District*, the Fifth Circuit subsequently held a statute unconstitutional because it permitted "school administrators [to] participate in prayers in their official capacity." 88 F.3d 274, 277 (5th Cir. 1996). The panel made no attempt to distinguish *Ingebretsen*. And beyond pointing to an

[51] U.S. Department of Education, Feb. 7, 2003, https://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html (last visited July 21, 2017). *See* 20 U.S.C. § 7904.

extraneous factual detail in *Duncanville*, the panel's only basis for distinguishing *Duncanville* was its circular position that: "This case, by way of stark contrast, concerns legislative prayers. It is distinguishable from *Duncanville* for that reason alone." (App.16). But the legislative-prayer exception has never allowed school officials to participate in prayer with students.

D. The panel's decision conflicts with *Galloway* and *Marsh*.

"*Marsh* and *Town of Greece* in no way sought to dictate the outcome of every subsequent case." *Lund*, 2017 U.S. App. LEXIS 12623, at *14-15. To pass muster, a legislative-prayer practice must be "'an internal act'" to "accommodate the spiritual needs of lawmakers." *Galloway*, 134 S. Ct. at 1825-26 (quoting *Marsh*). In *Marsh*, "'government officials invoke[d] spiritual inspiration *entirely for their own benefit*.'" *Id.* (citation omitted, emphasis added). A legislative-prayer practice is unconstitutional if it is "an effort to promote religious observance among the public." *Id*.

BISD's practice is plainly an effort to bring "prayer and proselytization into public schools through the backdoor." *Chino Valley*, 2016 U.S. Dist. LEXIS 19995, at *60-61. It is hardly an "internal act" for lawmakers' "own benefit." BISD asserted that the practice is primarily an "opportunity for students" to "hone their public speaking skills" and engage in "private speech." (R.248, 553, 559, 1156). According to BISD, "it's always

about students having the opportunity to share their thoughts, express their first amendment rights." (R.1299). The legislative-prayer exception is not about students or anyone else exercising free speech rights. *E.g.*, *Turner v. City Council*, 534 F.3d 352, 355 (4th Cir. 2008) (Justice O'Connor) (noting there is not a "single case in which a legislative prayer was treated as individual or private speech.").

Of course, while the practice is unmistakably student-focused, BISD's "free speech" argument is nothing but a thinly veiled attempt to continue a longstanding practice of school-sanctioned prayer. *See Santa Fe*, 530 U.S. at 315. *E.g.*, (R.1300, 1478). From 1990 until the eve of litigation, students were selected to deliver an "Invocation," which continues to be a prayer or religious message most of the time. Giving select access to a "speaker representing the student body" to deliver a one-minute, content-limited remark traditionally called "Invocation," over the district's sound system, "under the supervision of school faculty," does not create a forum for "private speech" nor does it "'foster free expression.'" *Id.* at 303, 309-10. Both courts *a quo* understood as much. (App.9, 22).

Ignoring the practice's predominant student-targeted aims, the panel nonetheless upheld it under *Galloway* based solely on BISD's other litigation position "that the board members are the invocations' primary audience." (App.11). Even if this were true, it would not be enough. The practice must ultimately fit "within the [*Marsh*] tradition," *Galloway*, 134 S. Ct. at 1819, meaning it must be "consistent with the manner

in which the First Congress viewed its chaplains." *Marsh*, 463 U.S. at 793 n.16. *Marsh* "granted *certiorari* limited to the challenge to the practice of opening sessions with prayers by a state-employed clergyman," and relied on the fact that Nebraska's century-old *clergy* practice was "consistent with two centuries of national practice." *Id*. at 786, 790.

A school district's practice intended as an educational opportunity for students as young as six is in no way consistent with the way the First Congress viewed its chaplains. *See Edwards*, 482 U.S. at 581-83 & n.4; *Indian River*, 653 F.3d at 281. "The simple truth is that free public education was virtually nonexistent in the late 18th century . . . [so] it is unlikely that the persons who drafted the First Amendment, or the state legislators who ratified it, anticipated the problems of interaction of church and state in the public schools." *Wallace*, 472 U.S. at 80 (O'Connor, J., concurring) (internal citation omitted). Even the panel conceded: "Arguably, BISD's practice of student-led invocations undermines its claim that its practice is consistent with the historical practice." (App.12). The panel further agreed that "chaplains may be better at giving appropriately solemnizing invocations." And yet it still found that "BISD's practice of allowing students to deliver invocations fits within the legislative-prayer exception, notwithstanding its departure from the historical practice of chaplain-led invocations." (App.12).

The Fourth Circuit sitting en banc recently struck down a county's legislative-prayer practice, finding that "because the commissioners were the exclusive

prayer-givers, Rowan County's invocation practice falls *well outside* the more inclusive, minister-oriented practice of legislative prayer described in [*Galloway*]." *Lund*, 2017 U.S. App. LEXIS 12623 at *5 (emphasis added). *Marsh* and *Galloway* "did not concern lawmaker-led prayer," *id.* at *15-16, and they certainly did not concern student prayer or school officials participating in student prayers. That BISD confines the pool of speakers to Student Council pushes its practice even further outside *Galloway*'s perimeter. The Fourth Circuit deemed Rowan County's practice a "conceptual world apart" from *Galloway* because it created "a 'closed-universe' of prayer-givers" dependent "solely on election outcomes." *Id.* at *19-20, *32.

II. The Fifth Circuit's decision directly conflicts with the decisions of the other Circuit Courts holding that school board prayers do not qualify for the legislative-prayer exception.

A. The question presented has divided and perplexed the lower courts for over twenty years.

The pressing need for certiorari is hastened by the fact that the Fifth Circuit is just the most recent court to consider whether the legislative-prayer exception applies to prayers at school board meetings. *See Coles*, 171 F.3d at 374 (case filed in 1992). Declining to intervene will only lead to further confusion and inconsistent results in the lower courts, *infra*.

1. Sixth Circuit

The very first judge to decide the issue got it right. In *Coles v. Cleveland Board of Education*, the magistrate judge concluded that school board prayers involved the same type of "'state-sponsored and state-directed religious exercise'" invalidated in *Lee* and therefore did not quality for the legislative-prayer exception. 950 F. Supp. 1337, 1340-41, 1345 (N.D. Ohio 1996). The Sixth Circuit agreed. After a careful analysis, the court found the exception inapt, based on the differences between school boards and legislative bodies, the degree of student involvement, and the susceptibility of children to coercion. 171 F.3d at 371-72, 379. Unlike the Fifth Circuit (App.10), the Sixth Circuit understood that *Marsh* "does not support the proposition that government-sponsored prayer at all 'deliberative public bodies' is presumptively valid." *Id*. at 380. The court noted that "the fact that school board meetings are an integral component of the . . . school system serves to remove it from the logic in *Marsh*." *Id.* at 381.

2. Ninth Circuit

The Ninth Circuit in *Bacus v. Palo Verde Unified School District Board of Education*, subsequently reversed a decision upholding school board prayer under the legislative-prayer exception, finding that "*Marsh*, assuming without deciding that it is applicable, would not save the practice" because the prayers were "almost always 'in the Name of Jesus.'" 52 F. App'x 355, 356-57 (9th Cir. 2002).

3. Fifth Circuit (*Tangipahoa*)

Three years later, the court in *Doe v. Tangipahoa Parish School Board* held that school board prayers fall "outside the scope of *Marsh*" because the school board is an "integral part of the school system." 2005 U.S. Dist. LEXIS 3329, at *15, *27 (E.D. La. Feb. 23, 2005). The court enjoined the board from opening its meetings with invocations. *Id*. at *32. Two panel members affirmed in part, finding the prayers unconstitutional though for different reasons. 473 F.3d at 191. Judge Stewart contended that the exception was inapplicable based on "the language of *Marsh*, subsequent Supreme Court precedent, and other Circuits' applications of *Marsh*." *Id.* at 205-07 (concurring and dissenting in part). Judge Barksdale believed they could avoid "being placed 'between the proverbial rock and a hard place,' " by assuming *arguendo Marsh* applied, because the "Board defend[ed] its prayer practice *solely* under *Marsh*" and conceded it would "*not* survive the *Lemon* test." *Id.* at 197 (quoting *Coles*, 171 F.3d at 371). The majority concluded that the prayers unconstitutionally advanced Christianity. *Id.* at 203-04, & n.2. Judge Clement, who was on the panel below, dissented, believing that the prayers survived *Marsh*. *Id*. at 211-12.

4. Louisiana District Court

The court in *Doe v. Tangipahoa Parish School Board*, 631 F. Supp. 2d 823 (E.D. La. 2009) ("*Doe-II*") found that the legislative-prayer exception applied to the school board's policy modified after the remand.

Doe-II did not involve student prayers, but a rotating roster of community clergy, just like in *Galloway*. *Id.* at 826-27. Moreover, the prayer was offered "5 to 7 minutes *before* the Board meeting," which was "followed by a 3 to 4 minute break *before* the opening gavel." *Id.* at 829 (emphasis added). The court stressed: "if any student guest is present to lead the Pledge of Allegiance or sing a patriotic song, the guest is introduced at that point, post-gavel." *Id.*

5. Third Circuit

In 2011, the Third Circuit emphatically concluded that the legislative-prayer exception did not apply to a school board's practice of opening meetings with "prayer or moment of silence." *Indian River*, 653 F.3d at 261-62. After thoroughly considering "the role of students at school boards, the purpose of the school board, and the principles underlying this Court's school prayer case law," the court ruled that school board prayer belongs under school prayer cases. *Id.* at 281. The court reasoned that this Court's cases reveal "the need to protect students from government coercion in the form of endorsed or sponsored religion," and that "*Marsh* does not adequately capture these concerns." *Id.* at 275.

Like the Sixth Circuit before it, the Third Circuit agreed that "regardless of whether the Board is a 'deliberative or legislative body,'" the legislative-prayer exception "is ill-suited to this context." *Id.* at 278-79. The court emphasized that 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." *Id.*

6. Splintered Post-*Galloway* District Court Decisions

Two district courts considered this issue after *Galloway* and *Indian River*. The California district court held, after an exhaustive consideration of *Galloway*, that "the legislative exception does not apply to prayer at school board meetings," even when delivered by "clergyman from the community." *Chino Valley*, 2016 U.S. Dist. LEXIS 19995, at *42-43, *52. Six months later, the district court *a quo* summarily reached the opposite conclusion. (App.21-23). In so doing, it completely ignored *Edwards*, *Lee*, *Santa Fe*, *Lemon*, *Indian River*, *Coles*, and even *Chino Valley*. Instead, the court relied almost entirely on *Doe-II* (App.23), which predated *Indian River* and involved adult-led prayer delivered *before* meetings commenced, *supra.*

B. The Fifth Circuit's decision conflicts with the decisions of the Third and Sixth Circuits, and the California district court.

The panel's ruling is obviously irreconcilable with *Indian River*, *Coles*, and *Chino Valley*, all of which "soundly, and after detailed analysis, concluded that school board prayer does not qualify for the legislative

exception." *Id.* at *31-32 (citing *Indian River* and *Coles*). The Fifth Circuit acknowledged the conflict but presented no legitimate reason to part ways with these courts. It first suggested that *Indian River* and *Coles* are legally questionable merely because they predate *Galloway.* (App.14). But *Galloway* left "the school prayer cases, upon which *Indian River*, *Coles*, and [*Chino Valley*] rely, undisturbed." *Id.* at *53.

The panel's only other rationalization was that *Coles* "involved a school board that always had at least one student member," and in *Indian River* "student representatives attended board meetings 'in their formal role as student government representatives.'" (App.14). Neither case is distinguishable on such grounds, however, because at least two BISD students participate in *every* meeting as student government representatives (App.6) (R.1133), and six serve as Student Ambassadors, analogous to *Coles.* Indeed, whereas *Coles* only involved one student representative, 171 F.3d at 372, at least *eight* student representatives participate in BISD meetings. The student involvement is also more troubling here because the students frequently subjected to BISD prayers are elementary and middle schoolchildren.[52]

[52] Approximately 85% of the pledge leaders have been elementary and middle school students. (App.4).

III. This case presents a recurring question of exceptional constitutional importance, affecting millions of students nationwide, that is ripe for this Court's review.

Establishment Clause cases are of particular concern to this Court, given "'the fundamental place held by the Establishment Clause in our constitutional scheme,'" *Wallace*, 472 U.S. at 61 (citations omitted), and even more so when the freedom of conscience of schoolchildren is at stake. *Lee*, 505 U.S. at 592. This Court has "always treated with special sensitivity the Establishment Clause problems that result when religious observances are moved into the public schools." *Mergens*, 496 U.S. at 287 (Stevens, J., dissenting) (citing *Edwards*, 482 U.S. at 583-84).

The multi-state effects of the Fifth Circuit's decision furnish an independent reason for granting certiorari. The decision invites and countenances public schools to subject their students to prayers at school board meetings even when attendance is obligatory. Over 50 million students attend our nation's public elementary and secondary schools. Students residing in some states can freely participate in school board meetings without fear of being subjected to a personally offensive prayer, but the same cannot be said for

the nearly 6.5 million students residing in Texas, Louisiana, and Mississippi.[53]

The threatened multi-state effects are not illusory. Texas, Louisiana, and Mississippi joined an amicus brief declaring a vested interest in a Fifth Circuit decision giving the green light for school prayers.[54] They were joined by twelve other states situated within the Fourth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits. On the other side, at least sixteen religious groups and national civil rights organizations signed amicus briefs against BISD.[55]

Further percolation of this issue in the lower courts is wholly unnecessary. The question of the appropriate analysis for addressing prayer at school board meetings has been debated and decided in the federal courts for nearly a quarter century. In 2011, moreover, this Court was presented with an almost identical question: "Whether a school board's longstanding tradition of opening its monthly sessions with an invocation is consistent with the Establishment

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[53] *Enrollment in public elementary and secondary schools*, NATIONAL CENTER FOR EDUCATION STATISTICS, DIGEST OF EDUCATION STATISTICS, https://nces.ed.gov/programs/digest/d16/tables/dt16_203.20.asp (last visited July 21, 2017).

[54] Brief of the States of Texas, et al. as Amici Curiae Supporting Respondents, *Am. Humanist Ass'n v. McCarty*, 2016 WL 657492 (No. 16-11220).

[55] Brief of Ams. United for Separation of Church and State, et al. as Amici Curiae Supporting Petitioners, *Am. Humanist Ass'n v. McCarty* (No. 16-11220); Brief of Freedom from Religion Found., et al. as Amici Curiae Supporting Petitioners, *Am. Humanist Ass'n v. McCarty*, 2016 WL 6081534 (No. 16-11220).

Clause." Petition for Writ of Certiorari, *Indian River Sch. Dist. v. Doe*, No. 11-569 (Nov. 22, 2011). This Court denied the petition. 565 U.S. 1157 (2012). At that time, there was no circuit split for the Court to resolve.

Now the Fifth Circuit has issued a decision directly contrary to decisions of the Third and Sixth Circuits as well as numerous cases decided by this Court. Moreover, two district courts have since considered the issue and reached opposite conclusions. There is no prospect of the conflict being resolved without this Court's intervention.

CONCLUSION

For the foregoing reasons, the petition should be granted.

July 31, 2017

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 15-11067

AMERICAN HUMANIST ASSOCIATION; ISAIAH SMITH,

Plaintiffs-Appellees,

versus

JACK MCCARTY, in His Individual and Official Capacity;
JOE D. TOLBERT, in His Individual and Official Capacity;
BRAD GREENE, in His Individual and Official Capacity;
RICHARD DAVIS, in His Individual and Official Capacity;
RALPH KUNKEL, in His Individual and Official Capacity;
CARY HANCOCK, in His Individual and Official Capacity;
DOLORES WEBB, in Her Individual and Official Capacity,

Defendants-Appellants.

* * * * * * * * *

No. 16-11220

AMERICAN HUMANIST ASSOCIATION; ISAIAH SMITH,

Plaintiffs-Appellants,

versus

BIRDVILLE INDEPENDENT SCHOOL DISTRICT;
JACK MCCARTY, in His Individual and Official Capacity;
JOE D. TOLBERT, in His Individual and Official Capacity;
BRAD GREENE, in His Individual and Official Capacity;
RICHARD DAVIS, in His Individual and Official Capacity;
RALPH KUNKEL, in His Individual and Official Capacity;
CARY HANCOCK, in His Individual and Official Capacity;
DOLORES WEBB, in Her Individual and Official Capacity,

Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Texas

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(Filed Mar. 20, 2017)

Before SMITH, CLEMENT, and SOUTHWICK, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

The American Humanist Association ("AHA") and Isaiah Smith appeal a summary judgment for defendants, the Birdville Independent School District and its seven board members (collectively, "BISD"). AHA and Smith allege that BISD's policy of inviting students to deliver statements, which can include invocations, before school-board meetings violates the First Amendment's Establishment Clause. Because the practice falls more nearly within the recently reaffirmed legislative-prayer exception to the Supreme Court's Establishment Clause jurisprudence, we affirm the summary judgment in favor of the school district and, in the accompanying consolidated appeal, we reverse and render on the denial of qualified immunity to the school board members.

I.

BISD is a public school district. Smith is a 2014 graduate of Birdville High School and a member of AHA, an organization that "advocate[es] progressive values and equality for humanists, atheists, and freethinkers."[1] While a student at Birdville High School and as an alumnus, Smith attended BISD board meetings, some of which included student-led prayers. At a board meeting in December 2014, with a student-led invocation, Smith said that he felt affronted by the

[1] *See* American Humanist Association, https://americanhumanist.org (last visited Mar. 17, 2017).

prayer and that it meant that BISD was "favoring religion over nonreligion." Smith is and has been an adult at all relevant times.

BISD's board holds monthly meetings in the District Administration Building, which is not located within a school. The meetings include sessions open to the public. Attendees are free to enter and leave at any time. Most attendees are adults, though students frequently attend school-board meetings to receive awards or for other reasons, such as brief performances by school bands and choirs.

Since 1997, two students have opened each session – with one leading the Pledge of Allegiance and the Texas pledge and the other delivering some sort of statement, which can include an invocation. Those student presenters, typically either elementary- or middle-school students,[2] are given one minute. BISD officials do not direct them on what to say but tell them to make sure their statements are relevant to school-board meetings and not obscene or otherwise inappropriate. At a number of meetings, the student speakers have presented poems or read secular statements. But according to AHA and Smith, they are usually an invocation in the form of a prayer, with speakers frequently referencing "Jesus" or "Christ." AHA and Smith claim

[2] Of the 101 meetings from February 2008 to June 2016, elementary- and middle-school students delivered the presentations 84 times.

that sometimes the prayers are directed at the audience through the use of phrases such as "let us pray," "stand for the prayer," or "bow your heads."[3]

From 1997 through February 2015, the student-led presentations were called "invocations" and were delivered by students selected on merit.[4] In March 2015, in an apparent response to AHA's concerns about the invocations,[5] BISD began referring to them as "student expressions" and providing disclaimers that the students' statements do not reflect BISD's views.[6]

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[3] According to AHA and Smith, these requests typically come from the student speakers, though on occasion a board member or other school official has asked the audience to stand for the invocation. At the summary-judgment stage, "we must assume the facts as alleged by the [plaintiff]." *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 76 (1998).

[4] Each BISD campus selected students on a rotational basis (school-board members did not participate in the selection process). Campus officials took into account academic achievement, leadership, citizenship, extracurricular activities, and other factors.

[5] In late 2014, AHA sent BISD a letter complaining of the invocations and asking BISD to provide "written assurances that prayer will not be included in future School Board meetings." BISD's associate superintendent later testified that he recommended the policy changes so that the district "wouldn't be subject to litigation."

[6] The published policy, in its entirety, reads,

> 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, 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,

BISD began randomly selecting, from a list of volunteers, the students who would deliver the expressions.[7]

II.

AHA and Smith sued BISD under 42 U.S.C. § 1983 for monetary damages from the individual school-board members and declaratory and injunctive relief. In their amended complaint, AHA and Smith alleged that BISD has a "policy, practice, and custom of permitting, promoting, and endorsing prayers delivered by school-selected students" at board meetings, in violation of the Establishment Clause. BISD answered that the student-led invocations either qualify as private speech, satisfy the conventional Establishment Clause tests, or fit within the legislative-prayer exception to those tests.

BISD moved to dismiss, alleging that AHA and Smith had failed to state a claim and that the school-board members were entitled to qualified immunity.

> 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.

[7] Though student speakers are chosen randomly from a pool of volunteers, that pool may not be representative of the BISD student body: It consists only of members of the student leadership at the respective campuses.

The district court denied the motion. The individual-capacity defendants filed an interlocutory appeal challenging the denial of qualified immunity.

BISD moved for summary judgment. The district court granted that motion, finding that the legislative-prayer exception applies. AHA and Smith filed a separate appeal, bringing an issue of first impression to this court.[8]

III.

The Supreme Court generally applies at least one[9] of three tests under the Establishment Clause: the *Lemon* test,[10] the endorsement test,[11] and the coercion

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[8] The qualified-immunity and summary-judgment appeals have been consolidated. Because there is no constitutional violation, we do not address qualified immunity except summarily to reverse the denial of immunity.

[9] *See Lynch v. Donnelly*, 465 U.S. 668, 679 (1984) ("[W]e have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area.").

[10] Under the *Lemon* test, for a government practice to be constitutional, it must (1) have a secular purpose, (2) have a primary effect that neither advances nor inhibits religion, and (3) not foster excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

[11] Under the endorsement test, a "[g]overnment unconstitutionally endorses religion whenever it appears to take a position on questions of religious belief, or makes adherence to a religion relevant in any way to a person's standing in the political community." *Ingebretsen ex rel. Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996). "The government creates this appearance when it conveys a message that religion is favored, preferred, or promoted over other beliefs." *Id.*

test.[12] But in *Marsh v. Chambers*, 463 U.S. 783, 784-85 (1983), a member of the Nebraska Legislature sued state officials, claiming that the practice of opening each session with a chaplain's prayer violated the Establishment Clause. The Court upheld the practice without applying any of the conventional tests,[13] observing that "[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country." *Id.* at 786.

The Court revisited the issue in *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1827-28 (2014), stating unequivocally that the legislative-prayer exception in *Chambers* extends to prayers delivered at town-board meetings. Those prayers, however, must not "denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion." *Id.* at 1823. Moreover, "[t]he principal audience for these invocations is not . . . the public but lawmakers themselves, who may find that a moment of prayer or quiet reflection sets

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[12] Under the coercion test, unconstitutional coercion occurs where "(1) the government directs (2) a formal religious exercise (3) in such a way as to oblige the participation of objectors." *Doe ex rel. Doe v. Beaumont Indep. Sch. Dist.*, 173 F.3d 274, 285 (5th Cir. 1999) (quoting *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963, 970 (5th Cir. 1992), *abrogated on other grounds by Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806 (5th Cir. 1999)).

[13] *Chambers*, 463 U.S. at 796 (Brennan, J., dissenting) ("The Court makes no pretense of subjecting Nebraska's practice of legislative prayer to any of the formal 'tests' that have traditionally structured our inquiry under the Establishment Clause.").

the mind to a higher purpose and thereby eases the task of governing." *Id.* at 1825.

As distinguished from legislative-prayer cases, however, the Supreme Court, in school-prayer cases such as *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), *Lee v. Weisman*, 505 U.S. 577 (1992), and *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), has applied the conventional Establishment Clause tests. In *Weisman*, a graduation-prayer case, the Court, 505 U.S. at 592, explained that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools" and that "prayer exercises in public schools carry a particular risk" of unconstitutional coercion. The Court distinguished *Weisman* from *Chambers*, noting that the legislative-prayer exception does not apply in "the public school context." *Id.* at 597. In *ACLU*, the Court opined that "state-sponsored prayer in public schools" is "unconstitutional."[14]

The key question, then, is whether this case is essentially more a legislative-prayer case or a school-prayer matter. Like *Galloway*, this dispute is about the constitutionality of permitting religious invocations at the opening, ceremonial phase of a local deliberative body's public meetings. But like *Santa Fe*, this case is about school-district-sanctioned invocations delivered by students on district property.

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[14] *ACLU*, 492 U.S. at 590 n.40 (1989) (citing *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963)).

We agree with the district court that "a school board is more like a legislature than a school classroom or event." The BISD board is a deliberative body, charged with overseeing the district's public schools, adopting budgets, collecting taxes, conducting elections, issuing bonds, and other tasks that are undeniably legislative. *See* TEX. EDUC. CODE § 11.1511. In no respect is it less a deliberative legislative body than was the town board in *Galloway*.

The invocations are appropriately "solemn and respectful in tone." *Galloway*, 134 S. Ct. at 1823. Most attendees at school-board meetings, including Smith, are "mature adults," and the invocations are "delivered during the ceremonial portion of the [school board's] meeting." *Id.* at 1827. "Nothing in the record suggests that members of the public are dissuaded from leaving the meeting room during the prayer, arriving late, or even . . . making a later protest." *Id.* Occasionally, BISD board members and other school officials will ask the audience, including any students in the audience, to stand for the invocation. Those polite requests, however, do not coerce prayer.

AHA and Smith advance three colorable theories for why this should be understood as a school-prayer case. First, they claim that legislative prayers must be "internal acts" that are "entirely" for the benefit of lawmakers. As BISD acknowledges, its invocations are meant to benefit students and other attendees at school-board meetings, not just board members. But in *Galloway, id.* at 1825, the Court explained that lawmakers were merely the "principal audience" for the

invocations, suggesting that the audience may be made up of various groups, as well as unaffiliated individuals, so long as lawmakers are the main one. In its brief, BISD explains that the board members are the invocations' primary audience. AHA and Smith have not shown otherwise.

Second, AHA and Smith claim that BISD's invocation policy does not fit within the legislative-prayer exception because it lacks a "unique history." In *Galloway, id.* at 1819, the Court drew on historical evidence, describing its inquiry as "determin[ing] whether the prayer practice . . . fits within the tradition long followed in Congress and the state legislatures." In *Chambers*, 463 U.S. at 790, the Court emphasized the long history of legislative prayer, explaining that Nebraska's custom was "consistent with two centuries of national practice" and would not "be cast aside."

School-board prayer presumably does not date back to the Constitution's adoption, since "free public education was virtually nonexistent at the time." *Edwards v. Aguillard*, 482 U.S. 578, 583 n.4 (1987). Nonetheless, dating from the early nineteenth century, at least eight states had some history of opening prayers at school-board meetings.[15] And *Chambers* and *Galloway* show that there was a well-established practice of

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[15] *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).

opening meetings of deliberative bodies with invocations. *See Galloway*, 134 S. Ct. at 1819.[16] Such practices date from the First Congress, which suggests that "the Framers considered legislative prayer a benign acknowledgement of religion's role in society." *Id*.[17]

We do not overlook AHA and Smith's notion that the presence of students at BISD board meetings distinguishes this case from *Chambers* and *Galloway.* That is significant, because courts must consider "both the setting in which the prayer arises and the audience to whom it is directed." *Galloway*, 134 S. Ct. at 1825. Children are especially susceptible to peer pressure and other forms of coercion. *See, e.g.*, *Weisman*, 505 U.S. at 592. Nonetheless, the presence of students at board meetings does not transform this into a school-prayer

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[16] Arguably, BISD's practice of student-led invocations undermines its claim that its practice is consistent with the historical practice, given that, historically, legislative invocations were delivered by chaplains. *See Chambers*, 463 U.S. at 787-88. But the long history of chaplain-led invocations is relevant only insofar as it suggests that the Framers approved of them.

Although chaplains may be better at giving appropriately solemnizing invocations, the fact of their institutional religious affiliations risks the perception that the governmental body responsible for inviting them is affiliating itself with institutional religion. Allowing a student to give a Jewish prayer does not create the same perception of institutional entanglement that might result from a prayer from a rabbi. Thus, BISD's practice of allowing students to deliver invocations fits within the legislative-prayer exception, notwithstanding its departure from the historical practice of chaplain-led invocations.

[17] *See also id.* at 786 (stating that "[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country.").

case. There were children present at the town-board meetings in *Galloway*, as the dissenting[18] and lower court[19] opinions noted; the Court nonetheless applied the legislative-prayer exception.[20] Moreover, here, as in *Galloway,* "the prayer is delivered during the ceremonial portion of the . . . meeting." *Galloway*, 134 S. Ct. at 1827.

IV.

Although the Supreme Court has not addressed whether the legislative-prayer exception applies to school-board invocations, two circuits have. Both found that the legislative-prayer exception does not apply. In *Coles ex rel. Coles v. Cleveland Board of Education*, 171 F.3d 369, 383 (6th Cir. 1999), the court held that the legislative-prayer exception does not extend to invocations at school-board meetings. Although such meetings "might be of a 'different variety' than other school-related activities . . . they are part of the same 'class' as those other activities in that they take place on school property and are inextricably intertwined

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[18] *Galloway*, 134 S. Ct. at 1846, 1848 (Kagan, J., dissenting).

[19] *Galloway v. Town of Greece*, 681 F.3d 20, 23 (2d Cir. 2012) (stating that "members of Boy Scout troops and other student groups have led the Pledge of Allegiance, and high school students may fulfill a state-mandated civics requirement necessary for graduation by going to Board meetings.").

[20] *See Galloway*, 134 S. Ct. at 1831 (Alito, J., concurring) (rejecting the dissent's concern that "ordinary citizens (and even children!) are often present" at town-board meetings).

with the public school system." *Id.* at 377. Nevertheless, the court acknowledged that it is a tough question: "This case puts the court squarely between the proverbial rock and a hard place." *Id.* at 371.

The court in *Doe v. Indian River School District*, 653 F.3d 256 (3d Cir. 2011), reached a like conclusion. It described comparisons between the school board and municipal bodies as "ill-suited," because the board's "entire purpose and structure . . . revolves around public school education." *Id.* at 278-79.

Coles and *Indian River* predate *Galloway* and are factually, and therefore legally, distinguishable from the circumstance at BISD.[21] *Coles* involved a school board that always had at least one student member. *Coles*, 171 F.3d at 383. In *Indian River*, student representatives attended board meetings "in their formal role as student government representatives." *Indian River*, 653 F.3d at 264. In contrast, no students sit on the BISD board, BISD board members do not deliver the invocations, and the student representatives are not expected to attend board meetings.

At least two other circuit-court decisions – including one by this court – have touched on these issues.[22]

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[21] Establishment Clause cases often hinge on facts peculiar to each situation. *See Weisman*, 505 U.S. at 597 ("Our Establishment Clause jurisprudence remains a delicate and fact-sensitive one. . . .").

[22] Two district courts (in addition to the court *a quo)* have discussed the issue. In *Freedom from Religion Foundation v. Chino Valley Unified School District Board of Education*, 2016 U.S. Dist. LEXIS 19995, at *31-32 (C.D. Cal. Feb. 18, 2016), the

Both predate *Galloway* and turn on an argument the Court rejected there.

In *Bacus v. Palo Verde Unified School District Board of Education*, 52 F. App'x 355, 356-57 (9th Cir. 2002) (per curiam), the court assumed *arguendo* that the legislative-prayer exception applies to school-board invocations but held the district's policy unconstitutional because of the sectarian nature of the invocations. In *Doe v. Tangipahoa Parish School Board*, 473 F.3d 188 (5th Cir. 2006), *vacated on reh'g en banc*, 494 F.3d 494 (5th Cir. 2007), a split panel of this court struck down a school board's invocation policy.[23] One of the judges in the majority did so on account of the sectarian nature of the invocations. *Id.* at 202-04. But in *Galloway*, 134 S. Ct. at 1820-23, the Court said the Constitution does not require invocations to be non-sectarian.[24]

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court found that the legislative-prayer exception does not apply to a school board's practice of beginning its meetings with invocations. In *Doe v. Tangipahoa Parish School Board*, 631 F. Supp. 2d 823, 839 (E.D. La. 2009), the court found that the legislative-prayer exception did apply to a school board's practice of beginning school-board meetings with invocations.

[23] The en banc court vacated that decision for lack of standing.

[24] BISD's case is factually distinguishable from *Bormuth v. County of Jackson*, 849 F.3d 266 (6th Cir. 2017), *vacated for reh'g en banc*, 2017 U.S. App. LEXIS 3564 (6th Cir. Feb. 27, 2017), which also involved the legislative-prayer exception. *Bormuth* concerned a county board whose members personally delivered religious invocations and "affirmatively excluded non-Christian prayer givers." *Id.* at 287. The record suggests that board members "singled out [the plaintiff] for opprobrium" and may

V.

BISD board members often stand and bow their heads during the student-led invocations. AHA and Smith claim that violates the Establishment Clause regardless of whether the invocation policy itself is constitutional. They point to *Doe v. Duncanville Independent School District*, 70 F.3d 402, 406 (5th Cir. 1995), holding that a high-school basketball coach's participation in team prayers, on the basketball court at games, was an "unconstitutional endorsement of religion." AHA and Smith note that unlike that case, this one concerns high-level school district officials (such as principals and board members), some of whom publicize their religious affiliation on the district's website. Moreover, in *Duncanville* a member of the team was mocked and "required to stand by while the team prayed and was confronted by spectators who asked, "Aren't you a Christian" and by a teacher who, in class, called her a "little atheist." *Id.* at 404.

This case, by way of stark contrast, concerns legislative prayers. It is distinguishable from *Duncanville* for that reason alone. Legislative prayers are recited for the benefit of legislative officers. It would be nonsensical to permit legislative prayers but bar the legislative officers for whom they are being primarily recited from participating in the prayers in any way. Indeed, the Supreme Court did not take issue with the fact that Town of Greece board members bowed their

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have denied him a spot on a particular committee in retaliation for his criticisms of the board's invocation policy. *Id.* at 286.

heads during invocations. *Galloway*, 134 S. Ct. at 1826.[25]

VI.

"[L]egislative 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." *Galloway*, 134 S. Ct. at 1818 (citing *Donnelly*, 465 U.S. at 693). Although it is possible to imagine a school-board student-expression practice that offends the Establishment Clause, this one, under its specific facts, does not.[26] In No. 16-11220, the summary judgment is AFFIRMED. In No. 15-11067, the order denying summary judgment is REVERSED, and a judgment of dismissal is RENDERED.

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[25] We do not reach BISD's arguments that the student-led invocations are private speech and that the district's policy satisfies the conventional Establishment Clause tests.

[26] It is thus unnecessary for us to decide whether a contrary practice, which would prohibit student speakers from religious expression at school-board meetings, would offend the Free Exercise Clause. Nor do we opine on the assertion, by thirteen states and two state governors, appearing severally as *amici curiae*, that "what [AHA and Smith] are truly seeking is a ban on allowing students to express a religious message during their remarks."

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

AMERICAN HUMANIST ASSOCIATION, ET AL.,	§	
Plaintiffs,	§	
VS.	§	NO. 4:15-CV-377-A
BIRDVILLE INDEPENDENT SCHOOL DISTRICT, ET AL.,	§	
Defendants.	§	

ORDER

(Filed Aug. 1, 2016)

Came on for consideration the motion of defendants, Birdville Independent School District, Cary Hancock, Jack McCarty, Dolores Webb, Joe Tolbert, Brad Greene, Richard Davis, and Ralph Kunkel, for summary judgment. The court, having considered the motion, the response of plaintiffs, American Humanist Association and Isaiah Smith, the record, the summary judgment evidence, and applicable authorities, finds that the motion should be granted.

I.

Plaintiffs' Claims

Plaintiffs' operative pleading is their amended complaint filed June 15, 2015. In it, they allege that

defendants have a policy, practice, and custom of permitting, promoting, advancing, sponsoring, and endorsing prayers at school board meetings in violation of the Establishment Clause of the First Amendment to the United States Constitution. Plaintiffs seek a declaration to that effect and a permanent injunction enjoining defendants from allowing prayers to be delivered as part of any school-sponsored event, including school board meetings. They also seek damages, attorney's fees, and costs. Doc.[1] 14.

The individual defendants filed a motion to dismiss the claims against them based on their assertion of qualified immunity. The court denied the motion and the matter is currently before the United States Court of Appeals for the Fifth Circuit on interlocutory appeal. Doc. 26.

II.

Grounds of the Motion

Defendants assert two grounds in support of their motion. First, the Establishment Clause claim is moot. Second, and in the alternative, the Establishment Clause claim fails as a matter of law.

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[1] The "Doc." reference is to the number of the item on the docket in this action.

III.

Applicable Legal Principles

Rule 56(a) of the Federal Rules of Civil Procedure provides that the court shall grant summary judgment on a claim or defense if there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The movant bears the initial burden of pointing out to the court that there is no genuine dispute as to any material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 325 (1986). The movant can discharge this burden by pointing out the absence of evidence supporting one or more essential elements of the nonmoving party's claim, "since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* at 323. Once the movant has carried its burden under Rule 56(a), the nonmoving party must identify evidence in the record that creates a genuine dispute as to each of the challenged elements of its case. *Id.* at 324; *see also* Fed. R. Civ. P. 56(c) ("A party asserting that a fact . . . is genuinely disputed must support the assertion by . . . citing to particular parts of materials in the record. . . ."). If the evidence identified could not lead a rational trier of fact to find in favor of the nonmoving party as to each essential element of the nonmoving party's case, there is no genuine dispute for trial and summary judgment is appropriate. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 597 (1986). In

Mississippi Prot. & Advocacy Sys., Inc. v. Cotten, the Fifth Circuit explained:

> Where the record, including affidavits, interrogatories, admissions, and depositions could not, as a whole, lead a rational trier of fact to find for the nonmoving party, there is no issue for trial.

929 F.2d 1054, 1058 (5th Cir. 1991).

The standard for granting a motion for summary judgment is the same as the standard for rendering judgment as a matter of law.[2] *Celotex Corp.*, 477 U.S. at 323. If the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial. *Matsushita*, 475 U.S. at 597; *see also Mississippi Prot. & Advocacy Sys.*, 929 F.2d at 1058.

IV.

Analysis

Defendants first urge that the case is moot inasmuch as they have revised the policy regarding an opening invocation to call it "student expression." Students will be selected to speak based on a random drawing and their speeches will not be reviewed by defendants or any school district employee. Changing the

[2] In *Boeing Co. v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc), the Fifth Circuit explained the standard to be applied in determining whether the court should enter judgment on motions for directed verdict or for judgment notwithstanding the verdict.

policy, however, does not moot the question of whether an invocation before school board meetings meets constitutional muster. That is, there is no reason to believe that the practice of offering prayer before the meetings will not continue.

Defendants alternatively argue that the Establishment Clause claim fails as a matter of law. They make a number of arguments, but the determinative issue is whether school board meetings are more akin to legislative sessions, at which an invocation is allowed, *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014); *Marsh v. Chambers*, 463 U.S. 783 (1983), or to a high school graduation ceremony or other school event, at which an invocation would violate the Establishment Clause, *Lee v. Weisman*, 505 U.S. 577 (1992). The issue is not settled in the Fifth Circuit. *See Doe v. Tangipahoa Parish School Bd.*, 631 F. Supp. 2d 823 (E.D. La. 2009).

The court is persuaded, as in *Tangipahoa*, that a school board is more like a legislature than a school classroom or event. Thus, the mere fact that school board meetings may open with a prayer does not violate the Establishment Clause. However, use of such prayers to exploit or proselytize Christianity is improper. 631 F. Supp. 2d at 839-40.

Plaintiffs admit that it has been the policy, practice, and custom of the school district since at least 1997 to open meetings with a prayer. Doc. 80 at 2. Plaintiffs have not come forward with summary judgment evidence to raise a genuine fact issue as to the

motive of defendants in enacting the policy in question. Nor is there reason to genuinely question whether the opportunity to speak is used to proselytize or to disparage other faiths or beliefs. There is no evidence that citizens who attend meetings are coerced to support or participate or singled out if they do not participate. *Town of Greece*, 134 S. Ct. at 1825-26. Plaintiffs admit that Smith is an adult who should not be influenced by the opening proceedings. *See Marsh*, 463 U.S. at 792.

Finally, contrary to plaintiffs' argument, the most recent change to district policy regarding selection of speakers and their freedom to choose a topic does not confirm excessive entanglement of church and state, but rather shows that the district is going even further to distance itself from religious expressions. Students are chosen at random to participate and they alone select the topic of their presentation. That the student expressions may be Christian in nature does not prove discrimination against, or coercion of, others who do not embrace those beliefs.

V.

Order

The court ORDERS that defendants' motion for summary judgment be, and is hereby, granted; that plaintiffs take nothing on their claims against defendants; and that such claims be, and are hereby, dismissed.

SIGNED August 1, 2016.

/s/ John McBryde
JOHN McBRYDE
United States District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

AMERICAN HUMANIST ASSOCIATION, ET AL.,	§	
Plaintiffs,	§	
VS.	§	NO. 4:15-CV-377-A
BIRDVILLE INDEPENDENT SCHOOL DISTRICT, ET AL.,	§	
Defendants.	§	

ORDER

(Filed Sep. 24, 2015)

Came on for consideration the motion of defendants Birdville Independent School District, and Cary Hancock, Jack McCarty, Dolores Webb, Joe Tolbert, Brad Greene, Richard Davis, and Ralph Kunkel, individually and in their official capacities, to dismiss. The court, having considered the motion, the response of plaintiffs, American Humanist Association and Isaiah Smith, the reply, the record, and applicable authorities, finds that the motion should be denied.[1]

The court ORDERS that the motion to dismiss be, and is hereby, denied.

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[1] The court notes that both the motion and reply are signed by a law firm, in violation of the undersigned's judge-specific requirements. The court cautions that any further law firm filings may be stricken without an opportunity to replace them with corrected filings.

SIGNED September 24, 2015.

/s/ John McBryde
JOHN McBRYDE
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-11067

AMERICAN HUMANIST ASSOCIATION;
ISAIAH SMITH,

Plaintiffs-Appellees

v.

JACK MCCARTY, in his individual and official capacity; JOE D. TOLBERT, in his individual and official capacity; BRAD GREENE, in his individual and official capacity; RICHARD DAVIS, in his individual and official capacity; RALPH KUNKEL, in his individual and official capacity; CARY HANCOCK, in his individual and official capacity; DOLORES WEBB, in her individual and official capacity,

Defendants-Appellants

CONSOLIDATED with 16-11220

AMERICAN HUMANIST ASSOCIATION;
ISAIAH SMITH,

Plaintiffs-Appellants

v.

BIRDVILLE INDEPENDENT SCHOOL DISTRICT; JACK MCCARTY, in his individual and official capacity; JOE D. TOLBERT, in his individual and official capacity; BRAD GREENE, in his individual and official capacity; RICHARD DAVIS, in his individual and official capacity; RALPH KUNKEL, in

his individual and official capacity; CARY HANCOCK, in his individual and official capacity; DOLORES WEBB, in her individual and official capacity,

Defendants-Appellees

Appeals from the United States District Court for the Northern District of Texas, Fort Worth

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ON PETITION FOR REHEARING EN BANC

(Filed May 2, 2017)

(Opinion March 20, 2017, 5 Cir., ___, ___ F.3d ___)

Before SMITH, CLEMENT, and SOUTHWICK, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED R. APP. P. and 5TH CIR.

R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible] Smith
UNITED STATES
CIRCUIT JUDGE