No. 17-178

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

REPLY BRIEF

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REPLY BRIEF FOR PETITIONERS

I. The question presented implicates a clear circuit split on an issue of exceptional constitutional importance to students and school districts nationwide.

A. The conflict over the question presented is genuine, widespread, entrenched, and important.

Respondent Birdville Independent School District (BISD) virtually concedes the certworthiness of this case. The importance of the issue presented is uncontested and the material facts are undisputed. Indeed, BISD highlights the certworthiness of this case by: (1) discussing at length the "split" of authority both before and after *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) (Opp.30-33, 35-38); and (2) relying on law review articles that confirm the need for Supreme Court review. (Opp.17, 27, 34-35, 39-40). Specifically, BISD relies on Paul Imperatore, *Solemn School Boards: Limiting* Marsh v. Chambers *to Make School Board Prayer Unconstitutional*, 101 GEO. L.J. 839, 841-42 (2013), which notes: "Many of the federal circuit courts have by now heard a school board prayer case, and the results have differed wildly." The other article, 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, 4 (Summer 2015) also recognizes that the "circuit courts have disagreed" over *Marsh*'s applicability "to school board situations." Although Wicks argues *Galloway* should extend to school boards,

she dedicated an entire section to: "Ensuring that Only Adults Deliver the Invocation." *Id.* at 40-41.

BISD devotes most of its Opposition to arguing the merits while offering nothing to counter the compelling grounds that warrant this Court's review. BISD confines its Opposition to two principal points: (1) that *Galloway* effectively abrogated *Doe v. Indian River Sch. Dist.*, 653 F.3d 256 (3d Cir. 2011) and *Coles by Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369 (6th Cir. 1999); and (2) that student prayers delivered at school board meetings, along with school officials' participation in those prayers, qualify for the legislative-prayer exception. Neither of these is correct, *infra*.

B. *Galloway* did not resolve the circuit split on school board prayers.

The lower courts fundamentally disagree on whether the legislative-prayer exception applies to school boards. (Opp.30-33, 35-38). BISD merely argues that *Galloway* resolved this decades-long dispute. (Opp.29, 33). But *Galloway* "was not a sea change across all lines of First Amendment jurisprudence." *Freedom from Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ.*, 2016 U.S. Dist. LEXIS 19995, at *53 (C.D. Cal. Feb. 18, 2016). *Galloway* "left the school prayer cases, upon which *Indian River*, *Coles*, and [*Chino Valley*] rely, undisturbed." *Id.* Although *Galloway* applied *Marsh v. Chambers*, 463 U.S. 783 (1983) "to local deliberative bodies" (Opp.29), it did not extend *Marsh* to *school boards*. Contrary to the

rationale employed by the Fifth Circuit, both the Third and Sixth Circuits thoroughly considered *Marsh*'s reference to "other deliberative public bodies" and still concluded that school board prayers do not qualify for the narrow legislative-prayer exception. (Pet.36, 38-39).

BISD, like the Fifth Circuit, relies on a "simple syllogism." *Coles*, 171 F.3d at 380. It "would hold that *Marsh*'s reference to 'other deliberative public bodies' means that all deliberative public bodies may open their meetings with the recitation of a prayer. [It] then states that because the school board is a deliberative public body, its practice is constitutional." *Id.* The Sixth Circuit rejected this reasoning. *Id.* (Pet.36). The Third Circuit agreed that "regardless" of a school board's superficial similarities to "deliberative or legislative" bodies, "*Marsh* is ill-suited to this context because the entire purpose and structure" of the school board "revolves around public school education." *Indian River*, 653 F.3d at 278-79. When *Indian River* was decided, *Marsh* already applied to local "deliberative bodies" in the circuit courts. *Id.* at 280 (citations omitted).

Accordingly, the court in *Chino Valley* rejected the argument that *Indian River* and *Coles* "no longer stand" after *Galloway*. 2016 U.S. Dist. LEXIS 19995, at *32. Nothing in *Galloway* "indicates an intent to disturb the long line of school prayer cases" 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. Notably, the "Court did not define a 'legislative' or 'deliberative'

body anywhere in *Marsh* or *Town of Greece*." *Id.* at *47-48 n.7.

BISD nonetheless insists that *Galloway* "does not exclude public schools from its curtilage" because, "[w]hile this Court did distinguish legislative prayer from *Lee*, it did so on the basis of the disparate and singular context inherent to a high school graduation." (Opp.26). This is not so. In the same paragraph, the Court also cited *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 312 (2000) as distinguishable authority, and *Santa Fe* involved purely voluntary, regularly scheduled, football games. 134 S. Ct. at 1827. The Court also repeatedly distinguished students from mature adults, *id.* at 1823, 1826-27 (Pet.19-20), and emphasized the narrowness and "fact-sensitive" nature of its decision. *Id.* at 1825. Justice Alito stressed: "All that the Court does today is to allow *a town* to follow a practice that we have previously held is permissible for Congress and state legislatures." *Id.* at 1834 (concurring opinion) (emphasis added).

BISD cites Wicks for the notion that "at least eight states have demonstrable historical records of opening prayers at school board meetings." (Opp.27). In *Galloway*, however, this Court cautioned that "*Marsh* must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation." *Id.* at 1819. And this Court already determined that *Marsh*'s historical approach is not useful in the public-school context. (Pet.17-18).

BISD's effort to reconcile the Fifth Circuit's decision with *Coles*, *Indian River*, and *Chino Valley* likewise fails. BISD only repeats the same erroneous distinctions made by the Fifth Circuit. (Opp.33-34) (App.13-14) (Pet.39-40).

II. BISD's Opposition failed to reconcile the conflict between this Court's school prayer cases and the Fifth Circuit's decision upholding school-sponsored prayers delivered to captive student audiences.

The Fifth Circuit's decision squarely conflicts with this Court's cases holding that "public schools may not subject their students to readings of any prayer," *Lee v. Weisman*, 505 U.S. 577, 610 (1992), and that the legislative-prayer exception is inapplicable to the public-school context. *Id.* at 592, 596-97. (Pet.16-21, 26-30). Legislative prayers "inhabit a pallid zone worlds apart from official prayers delivered to a captive audience of public school students and their families." *Id.* at 630 (Souter, J., concurring). In *Santa Fe*, the Court made clear that "student-led, student-initiated prayer" at voluntary school events open to the community do not qualify for the exception. 530 U.S. at 301-02, 309. (Pet.18).

The Fifth Circuit correctly found that "like *Santa Fe*, this case is about school-district-sanctioned invocations delivered by students on district property." (App.9). Yet it concluded that "student-led invocations," delivered under the authority of school officials to

captive student audiences, qualify for the legislative-prayer exception. (App.10, 16). As Petitioners illustrated, allowing this decision to stand will result in a paradoxical outcome foreclosed by this Court's cases. (Pet.3, 28).

This case, like *Lee*, "centers around an overt religious exercise in a secondary school environment" where "subtle coercive pressures exist" and where students have no real alternative allowing them "to avoid the fact or appearance of participation." 505 U.S. at 588. The Court's "jurisprudence in this area is of necessity one of line-drawing, of determining at what point a dissenter's rights of religious freedom are infringed by the State." *Id.* at 598. By any reading of the Court's cases, the conformity required of the students participating in board meetings is "too high an exaction." *Id.* (Pet.3-4, 28-29).

Absent from BISD's Opposition is any serious effort to distinguish students participating in school board meetings from students voluntarily attending other school functions. Although BISD states that the difference lies in the fact that legislative prayer is part of our nation's heritage (Opp.9-12, 25), BISD does not elucidate how that possibly makes its prayers any less coercive to an eight-year-old student leading the pledges at the podium alongside the prayer-giver and her principal. (Pet.27-28). Nor would the "legislative prayer" label make any difference to a Valedictorian or National Merit Scholar student receiving an honor at a meeting. (Pet.22). When she is asked by the principal to stand for a prayer she finds objectionable, then sees

her peers and school authorities participating, she is put in an "untenable" position exceeding that of the students in *Lee*, 505 U.S. at 590, and *Santa Fe*, 530 U.S. at 312. (Pet.26-30).

Lacking any meaningful basis to distinguish *Lee* and *Santa Fe*, BISD resorts to its simplistic syllogism that because a school board is a deliberative body, attending a school board meeting "clearly does not implicate the same concerns of coerciveness as does prayer at student-centered events." (Opp.35). Yet BISD, like the Fifth Circuit, fails to demonstrate how that is so. Instead, BISD avers that "[s]tudent attendance at a board meeting is voluntary, and those in attendance are free to enter and leave at any time." (Opp.23); *see also* (Opp.5, 11, 13, 15, 17). BISD misunderstands the lesson in *Lee* and *Santa Fe*. Giving a *student* the option to leave a prayer is not a cure for a constitutional violation. *Lee*, 505 U.S. at 596. School districts may not place "primary and secondary school children" in the "dilemma of participating" in the prayer, "with all that implies, or protesting." *Id.* at 593; *see also Santa Fe*, 530 U.S. at 311-12; *Indian River*, 653 F.3d at 278. In *Galloway*, the Court made this distinction between students and adults abundantly clear. 134 S. Ct. at 1823, 1826-27 (Pet.19-20).

A. Student involvement is neither occasional nor incidental.

Rather than address the coercion faced by students participating in board meetings, BISD argues

that *Lee* and *Santa Fe* are distinguishable because they involved "school-sponsored events" (Opp.10), whereas "school board meetings are not student-centered activities." (Opp.13). "This perception, however, is not in accord with what actually takes place at meetings of the school board." *Coles*, 171 F.3d at 382. The ceremonial opening of the meeting – which BISD agrees is the relevant focus (Opp.i, 2-3, 11, 14) – is unquestionably student-centered. (Pet.11-12, 32-33). According to BISD, "[s]tudent participation in our Board meetings is very important[.]" (R.1141). The superintendent agreed, "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).

BISD asserts *Lee* is distinguishable because graduation is "'one of life's most significant occasions.'" (Opp.16-17). But just like graduation exercises, 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*, 505 U.S. at 595). For such students, the meetings are a culmination of their academic and extracurricular activities. *Id.* at 277. (Pet.21).

BISD's only attempt at distinguishing *Santa Fe* is a terse observation that it involved "extracurricular activities." (Opp.18, 24). However, student council speakers and principal-appointed ambassadors attend "meetings in their official capacity as representatives." *Id.* (Pet.9-10, 13). For them, attendance "is more formally part of their extracurricular activities." *Id.*

BISD still believes *Galloway* is indistinguishable because it "referenced the presence of students." (Opp.33); *see also* (Opp.16, 18, 19). But *Galloway* only involved incidental and "occasional" presence of minors. 134 S. Ct. at 1823, 1826-27, & 1832 (Alito, J., concurring). (Pet.19). There is nothing occasional or incidental about student participation in BISD meetings. (Pet.23-24).

BISD does not deny that it has "deliberately made its meetings meaningful to students." *Indian River*, 653 F.3d at 277. (Opp.3, 8). Rather, it restates the Fifth Circuit's conclusion, premised on its flawed syllogism, *supra*, that the "mere presence of students at meetings does not transform the deliberative governmental body into a school sponsored setting." (Opp.13, 22-23, 35) (App.12-13). But the " 'mere presence' of students at a legislative session is not what makes [BISD's] policy unconstitutional." *Id.* at 281. The conclusion is instead "premised on careful consideration of the role of students at school boards, the purpose of the school board, and the principles underlying the Supreme Court's school prayer case law." *Id*. In the "public school context, the need to protect students from coercion is of the utmost importance." *Id.*

Ignoring these considerations, BISD argues that the "lack of student presence" would "not affect the ability of the board to carry out its business." (Opp.13). The necessity of student presence, however, is not determinative of coercion, and even less so where the Board has created powerful incentives for students to attend. The "very fact that school board meetings focus

solely on school-related matters provides students with an incentive to attend the meetings that is lacking in other settings." *Coles*, 171 F.3d at 381-82.

Additionally, for many students, including choir performers and students appealing disciplinary actions, participation is at least as compulsory as *Lee*'s graduations. 505 U.S. at 586. BISD does not dispute that choir is a graded class held during instructional hours. Instead, apparently unconvinced by its own position, BISD asks this Court to disregard BISD's choir policies. (Opp.18-19). Of course, the Court can take judicial notice of BISD's policies available on its website. FED. R. EVID. 201. *See also Thornton v. United States*, 271 U.S. 414, 420 (1926); *Ali v. Stephens*, 822 F.3d 776, 782 n.5 (5th Cir. 2016); *Anchor Sav. Bank v. United States*, 121 Fed. Cl. 296, 317 n.23 (2015).[1] While BISD claims there is "no evidence" any performance would be considered a "concert" (Opp.19), the December 2006 minutes provide: "The Richland High School Rebellaires performed a holiday concert." (R.1733).

B. A school board possesses inherent authority over students.

A school board's quasi-judicial power over student discipline alone renders *Galloway* inapt. (Pet.25).

[1] Regarding the link to Richland High School's 2016-17 Handbook (Opp.18) (Pet.22-23), Petitioners found the same language in the 2017-18 Handbook. *See* http://richlandhschoir.weebly.com/uploads/2/4/2/1/24212542/beginning_of_year_rhs_handbook._2017-18.pdf (last viewed October 18, 2017); https://perma.cc/BT88-6VQU (permalink).

BISD concedes school boards "adjudicate grievances" and "disciplinary proceedings" but argues *Galloway* is indistinguishable. (Opp.19-20). Yet nothing in *Galloway* indicated that the town possessed authority to discipline students. And while BISD contends Petitioners cited no evidence of this Board's disciplinary authority, Petitioner cited BISD policy FNG(LOCAL) (Pet.23),[2] and a meeting at which a "Level III Student Complaint Hearing" was conducted. (Pet.9) (citing R.1543). FNG(LEGAL) further provides: "If a student is denied credit or a final grade for a class by an attendance committee, the student may appeal the decision to the Board."[3] For such students, attendance "is not a matter of choice, but a matter of necessity." *Coles*, 171 F.3d at 382.

C. Students are under the supervision of school officials who participate in the prayers.

Galloway is also distinguishable because school officials at board meetings maintain authority over student participants. (Pet.25-26). BISD retorts: "[s]chool officials are always present at a school board meeting, just as town officials are always present at town board meetings." (Opp.21). This is a non sequitur. Town officials, unlike school officials who are central authority

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[2] http://pol.tasb.org/Policy/Download/1099?filename=FNG(LOCAL).pdf (last viewed October 18, 2017); https://perma.cc/C78Y-SDJL (permalink).

[3] http://pol.tasb.org/Policy/Download/1099?filename=FNG(LEGAL).pdf (last viewed October 18, 2017).

figures in students' lives, exercise no authority over students. *See generally Edwards v. Aguillard*, 482 U.S. 578, 581-84 & n.4 (1987); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 684 (1986) (recognizing the duty of "school authorities acting in *loco parentis*, to protect children – especially in a captive audience").

BISD denies that students are under the "direct supervision of school officials" (Opp.21) yet cites the record evidence confirming that student representatives are instructed to meet their principal beforehand, told where to sit, where to stand, what to say, and what not to say. (Opp.7, 22) (R.581, 593-94, 1133-36, 1143-45). Choir students performing for the Board every December are also indisputably under the authority of faculty. *E.g.* (R.1858) ("The Haltom High School 'Haltom Singers,' under the direction of Jeremy Crozier, performed several songs"); (R.1786, 1805, 1844). BISD similarly denies control over the speakers' "movements, dress, or decorum" and "speech" (Opp.14, 16), while admitting that "the board could cut off offensive speech" (Opp.16) and that the written policy mandates that "the student may not engage in obscene, vulgar, offensively lewd, or indecent speech." (Opp.6-7). *See Santa Fe*, 530 U.S. at 303, 313, 316. The Board's memo further instructs: "students have a choice – prayer, devotion, poem, etc." (R.1134). And BISD's dress code is "enforceable at all school-related functions."[4]

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[4] https://www.birdvilleschools.net/codeconduct (last viewed October 17, 2017).

BISD's only counterargument is that the "speakers will be accompanied at the board meeting by their parents." (Opp.15). *See also* (Opp.14, 22). But just like in *Lee*, 505 U.S. at 595, the presence of parents does not negate the district's shared authority over students.[5]

Finally, BISD attempts to defend the Fifth Circuit's decision upholding school officials' participation in student prayers (App.16) by asserting "it was permissible for town officials" in *Galloway* to participate in prayers. (Opp.22). But *Galloway* did not approve *school officials* participating in prayer with their students. (Pet.25-32).

In sum, BISD advances no valid reason for awaiting another case to resolve the circuit split on this recurring constitutional question of nationwide importance.

[5] It is also irrelevant that Petitioner Isaiah Smith was eighteen when the complaint was filed (Opp.12), as he has continued to have unwelcome contact with the prayers. (Pet.12). *See Bacus v. Palo Verde Unified Sch. Dist. Bd. of Educ.*, 52 F. App'x 355, 356 (9th Cir. 2002) (teachers had standing to challenge prayers as community members); *Jager v. Douglas Cnty. Sch. Dist.*, 862 F.2d 824, 826 n.1 (11th Cir. 1989) (graduated student had standing to challenge football prayers because he continued to attend games). Furthermore, Petitioner American Humanist Association represents all its members within the district, including families with children. (R.1346-47). *See generally Am. Humanist Ass'n v. Greenville Cty. Sch. Dist.*, 652 F. App'x 224, 230 (4th Cir. 2016). Moreover, the coercion test focuses on a hypothetical "reasonable dissenter," not the plaintiff. *Lee*, 505 U.S. at 593.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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